IAG SUBMISSION

MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT: CROSS SUBMISSION ON THE TARGETED REVIEW OF THE COMMERCE ACT 1986

20 July 2016

1. INTRODUCTION

1.1 This submission is a response by IAG New Zealand Group (IAG) to the request from the Ministry of Business, Innovation and Employment (MBIE) for cross-submissions on its review of the Commerce Act 1986 (the Act).

1.2 IAG is New Zealand's leading general insurer. We insure more than 1.5 million New Zealanders and protect over $450 billion of commercial and domestic assets across New Zealand. Our business is focussed on helping make the world a safer place, and we are committed to making sure that New Zealanders have the ability to protect themselves and their assets through easily accessible and affordable insurance.

1.3 We support the maintenance of effective and efficient competition law that reflects the specific nature of New Zealand's domestic markets and which provides long-term benefits to consumers.

1.4 Our submission reiterates the substantive points contained within our initial submission dated 9 February 2016 on MBIE's Issues Paper and also addresses some of the challenges raised by the New Zealand Commerce Commission (the Commission) within its letter to the Minister of Commerce and Consumer Affairs dated 2 June 2016.

1.5 We welcome the opportunity to discuss our views with MBIE officials and the Commission in the future and look forward to working with the Government as the review progresses.

1.6 IAG's contacts for matters relating to this submission are:

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2. PROPOSED REFORMS: OUR VIEWS

A causal connection is required

2.1 We believe reforming section 36 of the Act as proposed by MBIE is unnecessary.

2.2 The current policy requiring the establishment of a causal connection between the use of substantive market power and detriment to the competitive process is the most appropriate test to ensure that the prohibitions on exclusionary conduct are correctly applied. This ensures that our competition law protects competition within New Zealand markets rather than individual competitors.

A pure 'effects based' test creates confusion and uncertainty

2.3 A move away from the counterfactual analysis and it's 'taking advantage' limb to an 'effects based' test will undermine the commercial certainty currently offered by the legislation. In its current form the application of section 36 of the Act is comparatively straightforward for a business to apply to its conduct and this is supported by substantial case law which outlines how the counterfactual test is to be applied in practice.

2.4 A pure 'effects test' could potentially lead to a business with market power being unable to carry out legitimate business decisions and moving towards a more conservative decision-making process which will result in a deterioration of the business itself. Ultimately we see this leading to a reduction in competition in such a market and negative results for consumers.

2.5 We note an authorisation process has been identified as a means for businesses to obtain approval from the Commission for any activities that could potentially breach the 'effects test'. The Commission has indicated that a business would be free to carry out the activity subject to receiving such approval. We believe such a process would be detrimental to businesses given the potential to be held retroactively liable for any breach of the 'effects test'. Where a business has already commenced such activity it may not be able to unwind its actions.

2.6 The suggested authorisation process and uncertainty caused by an 'effects test' test could potentially see businesses submitting a significant number of potential decisions and/or activities for approval. This will impose not only significant delays, costs and complexity on businesses, but also place strain on the Commission's resources. The dynamic nature of today's marketplace means it is not feasible for businesses to apply for, and wait for, approval before undertaking actions, and the process will restrict a business' ability to implement changes or respond to competitors in an effective manner.

Alternative enforcement mechanisms

2.7 As noted in our initial submission, we are open to the consideration of alternative enforcement mechanisms under the Act and would be happy to work with officials and the Commission to develop alternative mechanisms that help in the application of the statutory framework.

Market studies

2.8 We do not see a strong case for the development of a market studies power for the Commission. Should such a power be deemed to be necessary, it would be more appropriate for it to rest with the Productivity Commission rather the Commission.

3. COMMERCE COMMISSION LETTER: OUR RESPONSE

3.1 We note the comments made by the Commission Chairman in his letter to Minister Goldsmith on 2 June 2016 referring to the uncertainty and chilling effects of adopting an effects based test. Dr Berry refers to *"(alleged) uncertainty*" and in relation to the chilling of competitive conduct states that "*there is simply no evidence to support that proposition*."[1]

3.2 We would firstly draw Dr Berry's and officials' attention to the many other submissions on the Issues Paper that echoed our concerns about the reform's potential to create uncertainty and chill competitive behaviour. We suggest this depth of concern from within the business industry is significant evidence in itself.

3.3 More specifically, the following hypothetical examples illustrate the uncertainties that businesses will face under a pure 'effects test'. This uncertainty would demand a level of analysis and caution that would slow or indeed stay action, and which would constitute a chilling effect on competitive behaviour.

3.4 A business which holds market power wishes to withdraw a product from a market for legitimate commercial reasons, and in such relevant market there is only one other competitor. Accordingly, though the business has not used its market power for the purpose of restricting competition, the decision by the business to remove the product would likely have the 'effect' of substantially lessening competition and so under an effects based approach, the business could be restricted from withdrawing the product.

3.5 A multinational company seeks to trial a new product in New Zealand and there is one other competitor in the market in New Zealand. Does the multinational need to consider the impact of an amended section 36 of the Act in the event that the trial is not deemed a success and it wishes to withdraw from the New Zealand market, therefore reducing the number of competitors from two to one?

3.6 A business with market power wants to go to tender in relation to the acquisition of certain goods. It is doing this to improve quality, and lower the cost, of those goods by filtering out suppliers that are uncompetitive, inefficient or fraudulent. A number of the unsuccessful suppliers are unable to find alternative customers and they exit the market or go out of business. As such the business could be potentially held liable under an "effects based" test because its actions in carrying out the tender process has had the effect of reducing the number of suppliers, even though it had not taken advantage of its market power to eliminate such suppliers from the market.

[1] Letter from Dr Mark Berry to Hon. Paul Goldsmith, 2 June 2016

3.7 As the above examples show, an “effects based” test could result in a business with market power being unable to carry out legitimate business decisions, which would ultimately have a negative effect on consumers (and the business itself).

4. CONCLUSION

4.1 Thank you for the opportunity to provide this cross-submission on the Targeted Review of the Act and respond to some of the challenges raised by the Commission in its recent letter to the Minister.

4.2 We would be happy to discuss any of the points raised within this submission, or our more substantive submission on the Issues Paper, with officials.