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**Draft Misuse of Market Power Guidelines**

1. Thank you for the opportunity to comment on the draft Misuse of Market Power Guidelines (**draft Guidelines**).
2. In summary, the draft Guidelines provide a helpful indication of the Commission's proposed approach to the new test under section 36. However, we consider that the draft Guidelines could be improved by providing more guidance as to how the Commission will distinguish legitimate and illegitimate conduct under the new test, and how the Commission will analyse conduct such as a refusal to supply where there is a legitimate business reason for the conduct. We also set out some other comments on specific aspects of the draft Guidelines below.

**Distinguishing legitimate and illegitimate conduct**

3. We anticipate that the primary use of the draft Guidelines will be by businesses and their advisers to assess whether certain conduct is likely to raise issues under section 36. Having clarity about how the Commission will distinguish between legitimate and illegitimate conduct is therefore fundamental. While the draft Guidelines have some general statements that innovation and conduct that improves efficiency or provides better products/lower prices is not likely to substantially lessen competition in a market (eg, paragraphs 19 and 118), we consider it would be useful if the draft Guidelines set out in more detail how the Commission will analyse such conduct under the new section 36.
4. One means of achieving this may be to provide some more examples of the types of conduct that the Commission considers are unlikely to substantially lessen competition. For example, including additional examples based on the examples included on pages 16-17 of the ACCC's Misuse of Market Power Guidelines, setting out the Commission's approach to the analysis, would be helpful. We would also find it beneficial if the Commission stepped out its analysis of the examples that we included in our submissions on the proposed changes to section 36 – namely:

- (a) The example of *New Zealand Private Hospitals Association & Auckland Branch Inc v Northern RHA* HC Auckland CP440/94, 7 December 1994, in which the Court ruled that no anti-competitive purpose was apparent but acknowledged that the effect of the behaviour may be to reduce competition.
- (b) A firm with a substantial degree of market power identifies a new way to produce a product or service that would substantially cut costs, and the likely effect of developing that product or service would be to put most of the firm's competitors out of business. For example, a firm with a substantial degree of power in the market for dairy processing identifies a way to process grass directly into milk, removing cows from the production chain, drastically reducing the cost of production. This would enable the firm to sell milk products at a fraction of the prevailing price. That new price could be below its competitors' cost of production. If the firm reduces its price to that level, that would likely drive its competitors out of business.

### **Clarity of examples**

- 5. In a number of the examples in the draft Guidelines, there is an underlying issue as to whether the relevant business would actually have a substantial degree of market power. While we consider it is useful to have a range of examples to show that the first issue that must be considered is whether the relevant person has a substantial degree of market power, it may also be useful to have some more simple/clear examples where the relevant entity more clearly has a substantial degree of market power.
- 6. There are also a couple of examples where the Commission indicates a lack of certainty about the appropriate market definition used in the example (stating "if that is an appropriate market"). While we acknowledge that market definition is a fact specific exercise and the Commission may wish to be cautious about providing a definitive view on the appropriate market definition in the context of the draft Guidelines, we consider that the clarity of the examples could be improved by the Commission being explicit about why it is not sure what the appropriate market definition is (or alternatively using examples where the relevant market is more clear/certain).

### **Refusal to supply input**

- 7. In relation to a refusal to supply an input (and linked to our general comments above about distinguishing between legitimate and illegitimate conduct), the draft Guidelines should include discussion about how the Commission would analyse a refusal to supply under the new section 36 where the refusal is for a legitimate business reason. For example, how would the Commission analyse a refusal to supply where the effect is the same as is set out in paragraph 88 and the example on page 17 of the draft Guidelines, but the reason for the refusal to supply is because the downstream rival/Company B is a credit risk or because the firm with market power does not have sufficient capacity?
- 8. Paragraph 85 of the draft Guidelines states that "*A firm with substantial market power may in some circumstances therefore be required to supply a wholesale input to a downstream competitor*". In general, we would expect a requirement to provide access to be a matter for regulation. We consider that it would be clearer for the paragraph to be reworded to state that a refusal to supply a

wholesale input to a downstream competitor may, in limited circumstances, amount to a breach of section 36. This is the approach taken in the ACCC's Misuse of Market Power Guidelines.

### **Loyalty rebates and conditional discounts**

9. Paragraph 104 of the draft Guidelines states "*There is also the potential for the use of rebates by a majority of suppliers in a market that has a small number of similar sized players to harm competition by facilitating accommodating behaviour*". It is not clear how is that paragraph is relevant to misuse of market power – for example, is the Commission suggesting that the players all have a substantial degree of market power and their conduct has the effect of substantially lessening competition? We recommend that the paragraph be deleted or alternatively that the Commission clarify how the paragraph relates to misuse of market power.

### **Indirect supply**

10. The Commission appears to be taking a broad interpretation of section 36(1)(b)(ii) (supplying or acquiring goods or services indirectly through one or more persons) in the discussion on pages 7-8 of the draft Guidelines. Given the draft Guidelines quote from the Explanatory Memorandum to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2017 (Australia) to provide a guide to the interpretation of the provision, we consider that the limits of the meaning of indirect supply that are set out in the Explanatory Memorandum should also be included in the draft Guidelines. That is, the Explanatory Memorandum also states that the indirect supply provisions "*are not intended to apply to situations where the corporation and the 'other person' are genuinely acting independently of one another and without any influence, pressure or collusion. In determining the nature of the relationship between the corporation and the other person, the focus should be on the substance of the relationship rather than the form*" (paragraph 1.45 of the Explanatory Memorandum/paragraph 1.34 of the Revised Explanatory Memorandum).

### **Minor comments**

11. We also have the following minor comments on the draft Guidelines:
  - (a) The reference to "NFL" in the price squeeze example on page 19 seems to be an error (we assume that it should be 'Company B').
  - (b) In the example on page 25, there is a typo ('Company B complaints to the Commission' should be 'Company B complains to the Commission').
  - (c) It is not clear in the Appendix whether the list of statutory exceptions is intended to be a comprehensive list of exceptions as at 11 October 2022. However, we note that there are some exceptions missing or that need to be updated, such as:
    - (i) Section 95(1)(o) of the Land Transport Management Act 2003 provides that the statutory exemption in section 43 of the Commerce Act applies to any activities delivered or managed in accordance with that provision (relating to the delivery of activities for ticketing systems and payments in relation to the land transport system).

- (ii) Section 159K of the Education (Tertiary Reform) Amendment Act 2002 (referred to in paragraph 150.7 of the draft Guidelines) is no longer in force. It has been replaced by section 418 of the Education and Training Act 2020. The Education and Training Act also provides for the Governor-General (by Order in Council) to specifically authorise acts by Education New Zealand.
- (iii) Section 53 of the New Zealand Public Health and Disability Act 2000 (referred to in paragraph 150.9.4 of the draft Guidelines) is no longer in force. It has been replaced by section 74 of the Pae Ora (Healthy Futures) Act 2022.

**Conclusion**

- 12. Please contact us if you have any questions about the above. We are happy to meet with you to discuss if that would be useful.

Yours sincerely

