

## MARKET STUDY INTO RESIDENTIAL BUILDING SUPPLIES – MITRE 10 NZ'S SUBMISSION ON DRAFT REPORT

- 1 Mitre 10 (New Zealand) Limited (**Mitre 10 NZ**) appreciates the opportunity to submit on the Commerce Commission's (**Commission**) *Residential building supplies market study - draft report* (**Draft Report**) published on 4 August 2022.
- 2 As one of the five national merchants of building supplies in New Zealand, we were pleased to see the Commission confirm its view that "competition between merchants appears to be working relatively well at the national level". This confirms the robust level of competition that Mitre 10 stores see.
- 3 Mitre 10 NZ has identified two areas where we can provide additional input to assist the Commission in continuing its study: the regulatory system and rebates. In this submission, Mitre 10 NZ does not discuss all issues covered in the Draft Report, or repeat all of the points in our response to the preliminary issues paper.<sup>1</sup>
- 4 Information that is confidential to Mitre 10 NZ and not to be shared with the public is marked by [ ].

### **Proposed changes to the regulatory and standards systems**

- 5 Mitre 10 NZ agrees with the Commission's assessment that the regulatory system is making it difficult for competing key building supplies to enter and become established in the New Zealand market and for competing suppliers of key building supplies to enter and expand their business.<sup>2</sup>
- 6 In particular, there are considerable costs associated with regulatory compliance in New Zealand, relative to the size of the market, which limits suppliers' returns on investment. This issue disproportionately affects emerging brands and, as such, operates as a barrier to new products. Examples of new brands that Mitre 10 NZ considers have been constrained by regulatory barriers include USG Boral, which exited the market in 2021, and Cemintel, which has struggled to successfully establish itself as an alternative to James Hardie's fibre cement products.
- 7 In Mitre 10 NZ's view this is a key issue affecting building supplies, further detail on which is provided in our response to the preliminary issues paper.
- 8 As a result, Mitre 10 NZ agrees with the Commission's draft recommendations to enhance the regulatory system. In particular, draft recommendations 3 to 5 will be critical in reducing barriers to entry for new building products and suppliers, a key issue identified in Mitre 10 NZ's response to the preliminary issues paper. We look forward to working with the Commission, Government and other stakeholders as these recommendations progress.

### **Rebates**

#### **Mitre 10 generally agrees with the Commission's approach to rebates, and its analysis of merchant rebates**

- 9 Mitre 10 NZ provides additional information below to support the Commission in finalising its analysis of rebates. However in doing so, we wish to make clear that in our view the impact of rebates on competition is not material, particularly when

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<sup>1</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0031/277591/Mitre-10-Submission-on-residential-building-supplies-preliminary-issues-paper-4-February-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0031/277591/Mitre-10-Submission-on-residential-building-supplies-preliminary-issues-paper-4-February-2022.pdf)

<sup>2</sup> *Draft Report* at Chapter 4 and [9.19].

compared with the impact of the regulatory issues described above, and a number of the other issues the Commission canvasses in the Draft Report.

- 10 Mitre 10 NZ agrees that rebates can have both pro- and anti-competitive effects which must be weighed.<sup>3</sup> While rebates paid to customers are not a material part of Mitre 10's business model, we support the Commission's preliminary analysis regarding rebates from merchants to their customers, and its conclusions that they are unlikely to adversely affect competition between merchants.

***Mitre 10 provides additional information regarding supplier rebates***

- 11 In relation to supplier rebates, the Commission's weighing exercise results in a draft finding that there is potential for supplier-merchant rebates to harm competition between suppliers.<sup>4</sup> The Commission's draft findings suggest a particular concern with tiered retroactive rebates.
- 12 In Mitre 10 NZ's view, the available evidence supports a conclusion that the circumstances in which tiered retroactive rebates harm competition are likely to be few, and addressable under the Commerce Act.<sup>5</sup> In our view, regulatory intervention on rebates, over and above Commerce Act enforcement, is unlikely to be warranted.<sup>6</sup>
- 13 As with other types of rebates, tiered retroactive rebates can have pro-competitive effects. For example, the impact of economies of scale will be greater as the merchant orders greater quantities, and so such rebates can correspondingly enhance efficiency.
- 14 In addition, rebates (including tiered retroactive rebates), can offer benefits for administrative convenience, a benefit the Commission recognises in the context of rebates offered by merchants to customers.<sup>7</sup> Specifically, Mitre 10 NZ [

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<sup>3</sup> See, for example, *Draft Report*, at [7.57].

<sup>4</sup> *Draft Report*, chapter 7.

<sup>5</sup> This appears to be consistent with the view the Commission has formed at [7.62]. Further, while the Commission has not yet issued its guidance regarding the amended section 36, Mitre 10 has no reason to expect the new provision to be deficient in its application to rebates.

<sup>6</sup> Put another way, Mitre 10 NZ agrees with the Commission's preliminary view that recommending legislative change to prohibit the use of such rebate structures across the building supplies industry is unlikely to be justified (*Draft Report* at [9.89]).

<sup>7</sup> *Draft Report* at [7.88].

***Rebates do not typically affect Mitre 10's conduct***

- 15 While rebates, including tiered retroactive rebates, can in theory, and potentially in practice in some circumstances, "create strong incentives for merchants to sell the products to which the arrangements relate":

15.1 in practice, rebates tend not to be key to Mitre 10's purchasing decisions, that is:

(a) [

],

(b) [

], and

15.2 the effect of rebates on how Mitre 10 NZ and its Members compete downstream is not typically material. As the Commission is aware, Mitre 10 NZ makes significant and ongoing efforts to improve supplier competition by introducing new products to market and investing heavily in their take-up. Mitre 10 NZ and its Members have sought to do this regardless of the presence or otherwise of the rebates they earn on sales of incumbent products. They operate in competitive markets and their overriding incentives are to innovate and improve the Mitre 10 customer proposition (on both price and non-price dimensions).

***The effect of rebates needs to be distinguished from other issues***

- 16 Mitre 10 NZ does not consider that the failure of new products to enter and expand is typically materially attributable to merchants' loyalty to incumbent brands as driven by supplier rebates of any type. In fact, the evidence suggests, at least in the case of Mitre 10 NZ, significant efforts to introduce new brands and products, and compete vigorously, regardless of the presence or otherwise of rebates.

- 17 One example the Commission gives is plasterboard, where the Commission suggests tiered retroactive rebates impact merchant decision making and make it harder for alternative suppliers to reach scale.<sup>8</sup>

- 18 In Mitre 10 NZ's experience, it is not clear that rebates have played a material role in the concentration that now exists in the plasterboard market, or the ongoing competitive dynamics. Instead, in Mitre 10's view, reputable international suppliers have been discouraged from entering the New Zealand market by:

18.1 New Zealand's bespoke regulatory regime and the costs of establishing operations in this country, and

18.2 familiarity bias on the part of many builders and architects, which has also manifested itself in certain Council consenting processes (including sometimes challenging variation processes where specified products / brands are unavailable).

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<sup>8</sup> *Draft Report* at [7.56].