Submission on the Commerce Commission's consultation draft

Misuse of Market Power Guidelines

1. Thank you for the consultation opportunity to provide feedback on the draft *Misuse of Market Power Guidelines*. This submission is from Donal Curtin, Managing Director, Economics New Zealand Ltd, and none of it is confidential or needs redaction.

2. My overall comment is that the *Guidelines* as they stand look eminently reasonable and are well explained, and I have only a limited number of suggestions to contribute.

3. In the context of 'refusal to supply' (para 84-88), it is not clear from the *Guidelines* whether refusal to supply an essential input extends to refusal to supply patented intellectual property (IP). The rationale for patenting IP is to grant a legislated right to exclusive use of the IP, and it is not obvious whether the revised s36 overrides that right and that a patent holder with market power will now be required to supply it to a rival in the way they might be required to supply iron bars or chemicals. There is a passing reference at para 51.7, in the discussion on structural barriers to entry, to "The difficulties a firm would face in accessing required inputs (which could include access to intellectual property rights) or product distribution channels", which might at a stretch be interpreted as the *Guidelines* endorsing s36's priority over exclusive use patent rights, for incumbents with market power. But it would be helpful to have a clearer statement of what you think s36 means in this context. Many firms may well imagine that their patent rights continue as before and are not affected by the new s36: if, on your interpretation of s36, those rights are now subject to a requirement to supply for incumbents with market power, that view needs to be spelled out more clearly, as otherwise many owners of IP risk inadvertently breaching the Act.

4. At para 130 you note that the Commission has the power to grant interim authorisations "in appropriate circumstances". This is an unexceptionable position, but for a number of reasons it would be helpful to go further and give a clearer indication of your willingness to deploy this important and flexible new power. In particular, a particular feature of alleged abuse of market power cases, and which both overseas and domestically has complicated the legislative and judicial history of trying to police them, is that they often come as a bundle of consumer benefits and consumer detriments (which is self-evidently the rationale for authorisations passing a net benefits test). There will be occasions where a challenged

practice such as exclusive dealing does indeed pass a net benefits test, and consumers would benefit if the practice were to receive interim authorisation until the matter is finally settled. They would also have an interest in seeing those benefits banked sooner rather than later by way of timely interim authorisation, as the net public benefit behaviours facilitated during the COVID period showed. Would it be possible to expand the "in appropriate circumstances" to include something along the lines of: "The Commission is open to expediting interim authorisation where an applicant can demonstrate a reasonable likelihood that the behaviour could pass the net benefits test". An additional point is that the interim authorisation power was given to the Commission for good reason, and there is a risk of 'use it or lose it' if this helpful power is not readily exercised, and seen to be readily exercised, when there is a real chance that consumers would benefit.

5. Even allowing for the context of the *Guidelines* focussing on situations involving market power, the discussion at paras 100-105 on rebates and conditional discounts looks a little bit one-sided. There is none of the language in the draft building products market study, for example, which said (at 7.34) that "Rebates can have varying effects on competition, depending on the circumstances, including the structure of rebates offered" and (at 7.35) that "Rebates are a widely used business payment practice in many sectors that can benefit consumers". End consumers may well benefit from rebates paid by producers to merchants if the retailer market is workably competitive such that (some of) the rebates are passed on to end users. The arguments in 100-105 are fine, but they seemed to me to overcharacterise the potential for rebates to be detrimental.

6. In para 104 the draft *Guidelines* say "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 might be useful to explain this process more fully.

7. In para 67 I did not fully follow the logic of the sentence which reads, "Where goods are supplied at low margins but frequently, small increases in prices can lead to significant increased revenue to the supplier and significant consumer harm". Perhaps you meant that, if a shop makes a profit of 1 cent on a 3 dollar avocado, and the price is increased by 5 cents, the shop's profitability (not its sales revenue) does indeed increase significantly to six times its previous level. Perhaps you meant that if someone buys an avocado a day they will pay $18.25 more a year, but whether that is "significant consumer harm" is not obvious if they were paying $1095 before and $1113.25 now. And what is the relevance of frequent

purchase, since the impact on the consumer will be exactly the same as if they made a once-a-year purchase of $1095 before and a once-a-year purchase of $1113.25 now? But perhaps I'm missing something.

8. At 114.5 the suggestion that brand proliferation might breach s36 seems rather fanciful to me. There are, it is true, references in the competition textbooks to behaviour along those lines with say, breakfast cereal being marketed in every possible combination of flavours. Whether any real world incumbent would go to those extensive and expensive lengths to raise entry barriers looks unlikely to me, nor would I fancy trying to convince a court that there is some level of entry advertising that is 'too high', especially when any new entrant taking on an established incumbent (even one not 'brand proliferating') is likely to have to engage in a reasonably large level of brand advertising in any event. There is also the consideration that consumers may value the choice provided by 'proliferation'. The rest of the examples in 114.1 to 114.6 seemed to me to be very well chosen, but the *Guidelines* would lose little if 114.5 went overboard.