ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION SUBMISSION REGARDING THE NEW ZEALAND MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT DISCUSSION PAPER "REVIEW OF SECTION 36 OF THE COMMERCE ACT AND OTHER MATTERS"

1 Introduction and Purpose of Submission

1.1 Introduction

The International Bar Association's Unilateral Conduct and Behavioural Issues Working Group (the "Working Group") sets out below its submission on the New Zealand Ministry of Business, Innovation & Employment's ("NZMBIE") Discussion Paper entitled "Review of section 36 of the Commerce Act and other matters", dated January 2019 (the "Discussion Paper").

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 80,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative perspective. Further information on the IBA is available at **www.ibanet.org**.

1.2 Purpose of Submission

The Working Group is supportive of the NZMBIE's initiative to consider the important topics regarding New Zealand's existing provisions in terms of the section 36 prohibition against anti-competitive unilateral conduct; provisions of the Act relating to intellectual property; and the treatment of covenants under

Part 2 of the Act. The Working Group wishes to congratulate the NZMBIE on producing a thorough and extremely well-researched Discussion Paper.

The IBA's Antitrust Committee's Working Groups' central focus is to provide an international forum for thought leadership with respect to competition / antitrust law developments.

The Working Group sets out below its high-level submissions on the Targeted Review of the Commerce Act 1986 issued by the NZMBIE in January 2019. The issues in this review are also being considered by several antitrust authorities and government departments around the world. Accordingly, the Working Group welcomes the opportunity to comment on certain aspects of the review.

Given that the Working Group consists of a number of practitioners and experts in various jurisdictions, so that a clear consensus on each of the questions raised in the Discussion Paper is difficult to reach, it considers that an appropriate approach to its commentary is with regard to specific themes raised in the Discussion Paper. We hope that this high-level approach will nevertheless be helpful to the NZBIE as it further conducts its review.

The Working Group is conscious of the multitude of issues raised in the review and wishes to address only certain issues based on the Working Group's international and New Zealand experience in a manner that the NZMBIE will hopefully find constructive and helpful.

2 Structure of the proposals

2.1 The role of competition law with regard to anti-competitive unilateral conduct

Competition law has its primary objectives tied to the safeguarding of the competitive process, as a means to ensure efficient functioning markets, and the preservation of consumer and total welfare (and its indicative parameters including price, quality, choice and innovation etc.).

The Working Group agrees with the NZMBIE's observations in the Discussion Paper that a key goal of competition policy is to prohibit firms with substantial market power from unilaterally acting in an anti-competitive manner. It is generally accepted that such firms should not be able to undertake conduct that prevents or deters rivals (and potential rivals) from competing on their merit.

On the other hand, competition policy does not seek to prevent firms from developing market power, if they do so by developing better or cheaper products and becoming more efficient.

2.2 Misuse of Market Power

As currently drafted, s36 of the New Zealand Commerce Act prohibits persons with a substantial degree of market power from "taking advantage" of that market power for a proscribed anti-competitive purpose.

The Working Group considers that prohibitions on misuse of market power should focus on conduct with a material anti-competitive effect which does or likely would adversely affect competition and the competition process, rather than simply focusing on the purpose/aim or form of the conduct.

The Working Group notes the concern raised in the Discussion Paper that the counterfactual test adopted by the New Zealand courts has proved unsatisfactory in certain respects. The concerns are well articulated in the Discussion Paper; however, the Working Group also notes that some credence would need to be given to a counterfactual test in any effects-based analysis, in which the competitive outcome in the absence of the impugned conduct would need to be considered.

In regard to concerns raised about complexity, the Working Group notes that this is unavoidable in competition law enforcement and that any effects-based assessment does not admit of an easy, rules-based matrix of *ex ante* enforcement. As the Working Paper notes, some level of assistance may be provided by secondary legislation, such as guidelines or regulations.

2.3 Purpose Versus Effect

There are distinct merits to an approach that considers the effect of anticompetitive conduct rather than just its purpose:

- it targets conduct which is likely to have a detrimental effect on welfare;
- allows anticompetitive, competitively neutral and pro-competitive conduct to be distinguished on the basis of specific facts;
- avoids an overly subjective approach based on avowed and recorded intentions (e.g. in internal memoranda or strategy documents), which can be obfuscated on the one hand, or lack context on the other. A preoccupation with subjective intention can also misdirect more important inquiry into the actual impact on competition; and
- reduces the risk of chilling otherwise pro-competitive behavior.

However, there are potential downsides, particularly in that an effect-based approach can reduce certainty and increased costs for businesses as it generates a need for self-assessment of the relevant conduct. The Working Group considers this concern to be somewhat overblown: in many jurisdictions with competition law oversight firms of considerable size and which are likely to enjoy market power are rightly "on warning" that their conduct might have distortive effects. A measure of self-assessment should be treated as part of any responsible compliance regime and a form of corporate governance like any other.

In respect of retaining 'purpose', the Working Group considers that retaining purpose as an element while amending other elements of the provision (such as adding 'substantial lessening of competition') serves to conflate subjective intent with objective analysis and may result in committing enforcement resources to capture of conduct that is competitively neutral.

It is the Working Group's position that prohibitions on the misuse of market power should focus on conduct with material anticompetitive effect, which does or would adversely effect competition and the competitive process, rather than on the purpose/aim or form of such conduct (insofar as purpose may be viewed as synonymous with intent). It is not clear whether "purpose" might also be synonymous with "object". The Working Group notes that some jurisdictions (e.g. the EU) contemplate that certain types of conduct may be "anticompetitive by object" – i.e. conduct which by its nature is so egregious that it stands to be per se prohibited (per se prohibitions and those that are anti-competitive by object are generally considered to be one and the same concept). In the context of restrictive horizontal agreements, a dual test ("object or effect") makes sense – as some agreements must be per se prohibited (price fixing as a paragon example) while others may need to be analyzed as to effects (eg information exchange other than price). Abuse of dominance cases are less "open and shut" than price fixing agreements and treating them as anti-competitive "by object" has the risk of broadening the scope of the prohibition without substantial evidence that the conduct captured indeed lessens competition.

The Discussion Paper indicates that, as a matter of enforcement practice, purpose can be inferred from effects. This may not be entirely correct if "purpose" were conceptually equivalent with "by object" as used in the EU (where conduct that is anticompetitive "by object" supplants any effects analysis). However, the Working Group understands that the concept has been applied differently in New Zealand as being more a reference to subjective intent. If that is the context in which reference to purpose might be retained (eg to shift an onus on a defendant) then some codification of this practical approach is warranted, provided that effects are paramount over subjective intention.

2.4 The Take Advantage Limb

While removing the "take advantage" limb might appear to be effective in restricting behavior by firms that would be economically damaging to competition only if undertaken by an undertaking with market power, the Working Group considers that care should be taken to ensure that it is not replaced with a mechanism that introduces too high a cost to the overall competitive process possibly having a "chilling" effect on competition.

An assessment of whether the conduct in question is linked to the firm's market power is an essential part of considering whether or not there has been an abuse of dominance (or 'taking advantage of market power'). The current 'take advantage' limb could play an important filtering role to exclude otherwise pro-competitive conduct from the prohibition. If the limb were removed, with no 'filter' inserted to replace it, the amended section 36 could 'over-capture' conduct that is otherwise pro-competitive and could prohibit economically beneficial behaviour.

In the United States there is a requirement that the offence of unlawful monopolization requires something more than mere proof of monopoly power. General intent to harm a competitor or obtain a dominant position is not enough to satisfy the 'wilfulness' element absent predatory or anticompetitive conduct. This 'wilfuness' element provides the relevant connection or nexus between the firm's monopoly power and the relevant anticompetitive conduct in question.

In Europe, while there is no explicit 'take advantage' requirement in Article 102 of the TFEU (leaving aside the notion that this may be inherent in the concept of "abuse") in practice most types of abuse are only possible for a dominant company (i.e. in the absence of dominance, below cost pricing or refusal to supply will not normally make sense commercially; alternatively would not be anticompetitive) so in this sense companies abusing a dominant position are generally (ab)using their 'dominance' to do so. The position in Europe has been further clarified by case law which sees Article 102 imposing 'special responsibility' on dominant companies, so that, for example, exclusivity may be possible for both dominant and non-dominant firms, but dominant companies have to be more cautious in pursing such an objective as their conduct may have anticompetitive effects (e.g. foreclosure of other suppliers in the case of exclusive arrangements) that would not arise in relation to the same conduct on the part of a non-dominant company.

In other jurisdictions, such as Canada and Singapore, there are provisions that work in similar way to the 'take advantage' limb by outlining the relevant anticompetitive conduct and ensuring that there is a link between the market power and the conduct in question.

In South Africa, the courts adopt the notion of 'leverage', which is akin to a requirement that the dominant firm be found to be taking advantage of its dominance in order to protect or enhance its market power, whether in that primary market or some related (vertical or collateral) market. It is submitted that an approach that seeks to determine whether the conduct is likely to maintain or enhance market power is a useful screen.

2.5 Substantial degree of market power

Issues outlined above in relation to the removal of the "take advantage" limb are exacerbated by the lower market power test currently adopted in the New Zealand (and Australian) legislation (which refers to a 'substantial degree of market power') rather that the higher 'market dominance' standard under EU law or the possession of 'monopoly power' under US law. As the NZMBIE will be aware, section 36 used to contain a "dominance" threshold, which NZ courts interpreted using a "dictionary definition" test – the result being a very high threshold (eg firms with up to approximately 80% market share could arguably not be in a " dominant position"). Conversely, under the current substantial market power test ("SMP") firms with 45% market share could arguably not have SMP (especially if constrained by other significant player in the market.)

Although the Working Group does not advocate for its adoption, worth noting is that the South African legislation provides for a presumptive dominance based on prescribed market share thresholds: a firm with a market share of 35% or more is presumed dominant, unless the firm can demonstrate that it does not have market power (defined as recorded in the Discussion Paper). A firm with 45% or greater market share is irrebuttably presumed dominant. A firm with less than 35% market share is only subject to the abuse of dominance proscriptions if it is shown to have market power – defined as "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers". Germany has a similar presumption – at 40 % - although this "blunt instrument" is tempered by mandated administrative restraint: the authority can only rely on the presumption if it can show that a thorough market investigation (which it is obliged to carry out) results in a *non liquet*. Although the use of a presumptive dominance test allows for some clarity as to when rules aimed at policing unilateral exclusionary conduct might be applied, this approach should be treated with great circumspection as this undoubtedly increases the risk of false positives - if not in enforcement, where an effects based test can mitigate this risk, but at self-assessment level (which carries a greater risk of affecting ordinary commerce and efficient decision making). The ability of a regulator to rely on presumptions should be limited so as to ensure a balanced system

Amending the provision to refer to a corporation with 'market dominance' rather than a corporation with 'substantial market power' may warrant further consideration, provided that the terms were appropriately defined. Such an amendment would provide businesses with greater clarity regarding the applicability of the provisions and would ensure that only those businesses that have a very strong position in a particular market are subject to the prohibition. This reform would also bring New Zealand into line with other major antitrust jurisdictions such as the EU, US and UK.

One element of market power/dominance the Working Group notes at paragraph 101 of the Discussion Paper that the review proposes not to incorporate equivalents to the Australian section 46(4)-(7). In respect of (7) the Working Group considers that it may be useful for the drafting of the prohibition to make clear whether jointly held market power is intended to be covered – or rather, only substantial market power held by a single entity. In EU law it is established in principle that "collective dominance" is covered, but there is a dearth of case law and in practice it is very difficult to find an unequivocal finding of collective dominance. The Working Group considers that a regulator's resources might be better spent pursuing single firm abuse or cartel conduct, rather than a nebulous hybrid.

It appears that the Discussion Paper is also concerned with whether interconnected bodies corporate should be treated as one undertaking for the purposes of the SMP threshold. The Working Group notes that the Commerce Act does not contain an exception for intra-group agreements, except where such agreements constitute an abuse of market power – section 44(1A) reads:

Nothing in this Part (except sections 36 and 36A) applies to -

(a) The entering into of a contract or arrangement, or arriving at an understanding, or the giving or requiring the giving of a covenant, if the only parties, or (in the case of a covenant or proposed covenant) the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant, are, or would be, interconnected bodies corporate:

(b) Any act done to give effect to a provision of a contract, arrangement, or understanding, or to a covenant referred to in paragraph (a)

It is submitted that insofar as interconnected bodies cannot be accused of collusion, a consistent approach might be to have them considered together for the purposes of an initial pass at determining SMP. However, the specific facts and circumstances will also need to be brought to bear and the Working Group would caution against a rules-based approach here.

2.6 Subject of the Prohibition

The Working Group considers that this question might best be addressed by distinguishing between conduct between bodies corporate in a group of interconnected bodies and conduct by an interconnected group of bodies corporate. The former should generally be excluded from the prohibition, but the latter might not be – provided that there was evidence of a single controlling mind directing the conduct of the group that is sought to be impugned as anticompetitive.

2.7 Specific examples of proscribed conduct

The Working Group considers that including specific examples of proscribed conduct in the legislation itself has the potential to be useful as a guide to business and to aid in predictability, depending of course on how those examples are drafted and how the provision is intended to operate. Care should be taken to itemize only those forms of abuse that are most likely to lead to market distortion and a lessening of competition – a complete reliance on a rules-based approach at the expense of one primarily concerned with effects would be a step backwards.

South Africa, Canada and Singapore adopt this approach in their legislation in order to foreshadow the type pf anticompetitive conduct subject of the provision and to ensure that there is an adoptive filter. This is similar to the current role played by the 'take advantage' limb in Australia.

3 Comparitive Law

The Discussion Paper helpfully includes some reference to comparative law (apart from Australia) particularly in the EU, Canada and South Africa. If helpful, the Working Group can offer the following further clarifications based on feedback from members with experience in those jurisdictions:

Canada (clarifications expressed in the form of riders)

Section 3.1(iii) – Rider 6a

The Federal Court of Appeal has further stated that an anti-competitive act is one whose purpose is an intended effect [on a competitor] that is predatory, exclusionary or disciplinary.

Section 3.1(iii) – Rider 6b

In addition to considering whether conduct is anticompetitive, having regard to its purpose and any legitimate business justifications, section 79 of the Canadian Competition Act requires that the impugned conduct "has had, is having or is

likely to have the effect of preventing or lessening competition substantially in a market". The Canadian Competition Bureau's approach to determining whether an impugned practice has substantially lessened competition is by asking whether, but for the practice in question, there would likely be greater competition in the market in the past, present, or future.

Section 3.3 – Rider 7

This reform would also bring New Zealand into line with other major antitrust jurisdictions such as the EU, US, UK, and Canada.

Section 4.1 – Rider 11

(d) Canada

In Canada, the Commissioner of Competition may accept undertakings (referred to as a "consent agreement") under a procedure governed by the Canadian Competition Act.

If the Competition Bureau believes that a company has violated the law, the Competition Bureau may attempt to obtain compliance by entering into a consent agreement with the company. Similar to the regimes in the US, Australia and Europe, a consent agreement can be entered into without the company admitting liability, however it must agree to stop the particular practice identified.

EU (with reference to paragraphs of the Discussion Paper)

Para 4 makes explicit the choice not to apply s.36 to exploitative conduct. This has always been a problematic area of enforcement in the EU and arguably the situations that have been addressed in cases could have been dealt with by regulation, so this may seem a reasonable policy choice – which also accords with the US approach. However, there is an increasing sense that if consumer harm/welfare is the overall standard, Article 102 TFEU and its attendant clauses can (and should) be applied to go well beyond the notion of "protecting the competitive process" and to address more generally effects on consumers (exploitation as well as foreclosure of alternative sources of supply). A well-resourced and forward-thinking competition regulator may actually be best placed to address these concerns.

Para 151 mentions a block exemption. This is potentially misleading as there is no block exemption applicable to abuse of dominance. The Discussion Paper is not clear about which exemption is referred to, but in any case no block exemption is relevant to abuse of dominance as block exemptions (i) do not apply to unilateral conduct and (ii) apply only where the parties satisfy stated market share thresholds and these are set at levels which mean they do not apply to dominant companies.

Paras 224 and 228 set out the TTBER as the means by which EU law deals with the IP/antitrust interface, but in fact the TTBER simply provides presumed legality for certain licensing agreements. The interface more broadly is dealt with in the case law of the European Courts, including that on exhaustion of rights and on abusive refusal to supply/license, and in cases holding that antitrust law does not affect the "existence" of IP rights but may affect their "exercise".

Para 229 characterizes the EU approach as "exceptionality". The Working Group believes that the EU approach may by now be closer to "neutrality".

South Africa

The Discussion Paper (at paragraph 104, footnote 34) notes that the Competition Tribunal (in the *Media 24* case cited in the footnote) has adopted a purpose test in certain circumstances (in the cited case, in regard to predatory pricing). Importantly, the Competition Appeal Court has since clarified (in *Media 24 Ltd v Competition Commission, 146/CAC/Sep16*) that a firm's "predatory intent" has no place in an effects-based test. The current position is more correctly given at paragraph 119.

Also, at paragraph 119, in the context of exclusionary conduct, the Working Group considers that the South African enforcement regime is not necessarily preoccupied with the effect on another competitor, as the overarching test remains the effect on competition. A recent amendment (February 2019) changes this approach only in respect of certain conduct (unfair trading terms in the procurement market or price discrimination in the downstream market) by a dominant firm that affects small businesses or businesses owned by historically disadvantaged persons (in the Apartheid context); in such cases, effect on that designated class of business is considered without a requirement to consider the effect on competition overall.

4 Conclusion

The Working Group is grateful for the opportunity to share its views on NZMBIE's Discussion Paper and is supportive of the initiative to consider the important topic of whether New Zealand's existing protections against section 36 prohibition against anti-competitive unilateral conduct need to be strengthened.

The Working Group is grateful for the opportunity to provide its comment and trusts that the NZMBIE will find it useful.