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OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW – DISCUSSION PAPER

1. We welcome the opportunity to submit on the Australian Government's *Options to Strengthen the Misuse of Market Power Law – Discussion Paper (December 2015)* (**Discussion Paper**).
2. Matthews Law is a specialist competition law firm in New Zealand. While we practice New Zealand law, we are involved in a number of trans-Tasman and multi-jurisdictional matters, and have followed the Australian "Harper Review" process with interest.
3. Australian case law forms an essential part of New Zealand's competition law and jurisprudence. The Australian process is important to New Zealand given the desire to maintain consistency of our business laws, particularly as it may influence the Ministry of Business, Innovation and Employment's (**MBIE**) similar consultation process.¹
4. We recently submitted to MBIE regarding the New Zealand review. The submission makes various references to the Discussion Paper, and we therefore thought that it may assist your consideration. A copy of the submission is **attached** and we refer you to the discussion in our responses to questions 4 & 5.
5. We also note:
 - a. As competition law evolves, there is an increased focus on economic analysis. This is illustrated, for example, by the European Commission's 2005 review of unilateral conduct (at the time art 82 EC, now art 102 TFEU) which resulted in guidance on the European Commission's enforcement priorities.²
 - b. This approach seems appropriate given the competition policy objectives of enhancing efficiency and innovation for the long-term benefit of consumers. (To us, this encompasses the long-term benefit of producers, which is also beneficial to consumers.) On that basis, it seems logical that the starting point would be a test focusing on materially adverse competitive effects, over an appropriate timeframe, rather than a firm's purpose.

¹ Following the Productivity Commission's 2014 inquiry report, *Boosting Productivity in the Services Sector*, the New Zealand Government initiated a review of the misuse of market power prohibition and related matters in the Commerce Act 1986 (**Commerce Act**). The Minister of Commerce and Consumer Affairs released an Issues Paper on 17 November 2015, with one of the key issues addressed being section 36 of the Commerce Act – New Zealand's equivalent to section 46 of the Competition and Consumer Act 2010 (**Competition and Consumer Act**). For more information about the targeted review, see <http://www.mbie.govt.nz/info-services/business/competition-policy/targeted-commerce-act-review>.

² Guidance implemented in 2008. See http://europa.eu/rapid/press-release_IP-08-1877_en.htm?locale=en.

- c. We appreciate that the existing Australian test, which we see as more nuanced than New Zealand's, may in practice achieve similar goals in many instances and may provide a level of certainty for larger firms. But we see some limitations in the test (at least as applied in New Zealand), notably the potential for the test to provide a "safe harbour" for conduct with enduring anti-competitive effects.
- d. We wonder if concerns about the adoption of an effects-based test may be overstated given the use of such a test in relation to contracts and mergers.
- e. However, we see real benefits in additional guidance for the courts, noting that:
 - i. There may be differing levels of economic expertise at the judicial level, and some judges may desire additional guidance on the relevant factors to take into account.
 - ii. In New Zealand, we saw the analysis of the former "dominance" test move from an economic test to the "dictionary definition" test,³ perhaps due to a lack of such guidance.
- f. Despite Parliament's clear intent that the 2001 amendments to section 36 of the Commerce Act would align New Zealand's law with that of Australia, they have diverged.⁴
- g. Given our respective Governments' commitment to the "Single Economic Market" agenda,⁵ one might see benefits in maintaining a degree of consistency between the main elements of the tests in section 46A of the Competition and Consumer Act (*Misuse of market power - corporation with substantial degree of power in trans-Tasman market*) and section 36A of the Commerce Act (*Taking advantage of market power in trans-Tasman markets*).
- h. A common issue which we deal with is refusals to licence intellectual property rights (IPR). Such a refusal might be seen as exclusionary, yet in most cases we deal with the IPR holder has invested considerably in those rights, at its risk, and may wish to fully exploit those rights and prevent "free-riding". We consider such a refusal may often be pro-competitive (ie not substantially lessening competition in an appropriately defined market) as it encourages innovation, both by the IPR holder and the third party who may be spurred to innovate.

Yours faithfully
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³ *Telecom Corporation of New Zealand v Commerce Commission* [1992] 3 NZLR 429 at p434 (CA).

⁴ Compare (1) the 2001 media statement by Hon. Paul Swain (Minister of Commerce) where he stated "*The Bill beefs up the Commerce Act...bringing New Zealand in line with its key trading partner Australia*" with (2) the Commerce Commission's Chair stating in 2012 that the Supreme Court "*has not delivered the alignment with Australian jurisprudence*" and this is of "*particular concern*". See (1) <https://www.beehive.govt.nz/release/commerce-amendment-bill-no-2-passed>; and (2) <http://www.comcom.govt.nz/the-commission/media-centre/speeches/keynote-speech-for-the-12th-annual-competition-law-and-regulatory-review-conference-an-update-from-the-commerce-commission/>.

⁵ In February 2015, New Zealand and Australian Ministers at the Closer Economic Relations Ministerial Meeting "*...reaffirmed both countries' strong commitment to further trans-Tasman integration, welcoming the continued progress towards the joint ambition of a Single Economic Market (SEM)*". See <https://www.beehive.govt.nz/release/2015-cer-ministerial-meeting-communique>.

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