

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF  
ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON NEW ZEALAND'S  
TARGETED REVIEW OF THE COMMERCE ACT 1986**

*The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.*

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments to the New Zealand Ministry of Business Innovation and Employment (“the Ministry”). The Sections appreciate the opportunity to present their views with respect to the subjects raised in the Ministry’s Targeted Review of the Commerce Act 1986: Issues Paper (“Issues Paper”). The Sections’ comments reflect the expertise and experience of their members with competition law in the United States as well as in numerous other jurisdictions worldwide.

These comments provide input on two subjects discussed in the Issues Paper, specifically (I) the functioning and scope of Section 36 of the New Zealand Commerce Act of 1986 (“NZCA”); and (II) the introduction of the ability to institute market studies.

**I. Section 36 of the New Zealand Commerce Act**

The Issues Paper seeks comments on the functioning, and options for possible revision, of Section 36 of the NZCA. Section 36 prohibits firms with a “substantial degree of market power” from “taking advantage” of that market power with the purpose of excluding competitors from the market. The Sections’ comments regarding Section 36 provide an overview of U.S. antitrust law as applied to unilateral conduct (Section 2 of the Sherman Act) and address whether Section 36 and its application are consistent with U.S. and mainstream international approaches to antitrust limitations on unilateral conduct.

Section 2 Overview

The U.S. experience regarding unilateral conduct holds particular relevance for New Zealand’s policymakers. Section 2 of the Sherman Act contains broad language prohibiting monopolization, attempted monopolization and conspiracies to monopolize. Congress drafted the Act broadly, relying on the courts to “give shape to the statute’s broad mandate by drawing on the common-law tradition.”<sup>1</sup>

U.S. courts have required proof of two elements to establish unlawful monopolization: “(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or

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<sup>1</sup> National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978).

maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>2</sup> The U.S. Supreme Court has defined monopoly power as the power to control prices or exclude competition. Monopoly power is generally treated by U.S. courts as equivalent to “substantial market power.”<sup>3</sup> This approach is broadly consistent with the definition of dominance or monopoly power in other jurisdictions.<sup>4</sup>

Defining the second element of monopolization has proven to be among the most vexing questions in U.S. competition law. Over time, however, U.S. courts have successfully developed workable standards to identify certain types of exclusionary conduct, using the *effect* of conduct, as opposed to its *purpose*, as the main touchstone for analysis.<sup>5</sup> This focus on competitive effect derives from several important policy objectives that have become increasingly emphasized in U.S. antitrust law as it is applied to single-firm conduct. The Sections submit that these same policy objectives deserve recognition in any revision to standards under Section 36 NZCA.

First, U.S. law recognizes that individual firms – including those with significant market positions – should be free to innovate and to compete aggressively. Uncertainty or ambiguity in the definition of anticompetitive conduct can chill desirable competitive behavior by raising the specter of severe legal consequences and thus thwart the fundamental economic objective of competition law. Therefore, U.S. courts have increasingly refined the standards for proof of anticompetitive conduct under Section 2, identifying specific elements that must be proven in order to condemn certain categories of conduct, and requiring that claims under Section 2 meet certain threshold requirements at various stages of litigation. Second, U.S. courts have increasingly recognized that it is inconsistent with fundamental antitrust objectives to protect competitors from legitimate competition, even when that competition arises from firms with substantial market power.

The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to

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<sup>2</sup> United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

<sup>3</sup> See, e.g., Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894 (10th Cir. 1991) (defining monopoly power as “substantial” market power). A firm’s market power is usually proven with circumstantial evidence and may be based on analysis of market structure, for example, the firm’s possession of a dominant share in a defined relevant market protected by substantial entry barriers. See PepsiCo Inc. v. Coca Cola Co., 315 F.3d 101, 107–08 (2d Cir. 2002).

<sup>4</sup> For example, the European Commission’s enforcement of Article 82 of the EC Treaty begins with an assessment of market power (See European Commission *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (Feb. 2009) at [19]-[22]). Canadian and UK enforcement follows a similar approach.

<sup>5</sup> Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (4th ed., 2015) Vol. 3b ¶651a.

destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.<sup>6</sup>

U.S. courts have, over time, developed a reasonably clear set of rules to assess the legality of certain pricing practices, for example, providing increased predictability for businesses. The Supreme Court's decision in *Brooke Group*<sup>7</sup> defined predatory pricing as below-cost pricing that is reasonably likely to lead to future price increases made possible by driving out or by disciplining competitors. Thus, it is the *effect* of the pricing (as opposed to its *intent* or *purpose* in any subjective sense) that determines the legality of low pricing by a firm with substantial market power.<sup>8</sup> The courts have developed similar refinements in the definition of other categories of monopolizing conduct, such as tying.<sup>9</sup>

For other business conduct that may not fall within one of these specific categories, judicial analysis focuses on the competitive effects of the conduct at issue, requiring that plaintiff demonstrate the adverse competitive effects<sup>10</sup> of a particular practice in light of the relevant market conditions and circumstances, including the defendant's proffered business justifications for its practice.<sup>11</sup> As a result, Section 2 has proven flexible enough to apply to numerous forms of business conduct and has remained a useful legal instrument despite profound changes in the U.S. economy over the past century.

The requirement to prove intent in a Section 2 monopolization case has not been a particular obstacle in U.S. enforcement in an otherwise sound case of exclusionary anticompetitive conduct causing clear consumer harm.<sup>12</sup> Modern U.S. decisions hold that it is not subjective intent but actual or likely competitive effects that are most relevant in assessing the conduct of a single firm with substantial market power, and "[e]vidence of the intent behind the conduct of a monopolist is

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<sup>6</sup> *Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993).

<sup>7</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Similarly, the Supreme Court has established a limiting test for "predatory bidding" that mirrors *Brooke Group*. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312 (2008).

<sup>8</sup> The Sections note that in relation to predatory pricing, the New Zealand Supreme Court appears to have adopted an effects-based approach based on Australian and U.S. precedent. *See Carter Holt Harvey Building Products Group Ltd v. Commerce Commission* [2006] 1 NZLR 145 (PC), finding that a violation of Section 36 for price-cutting would require proof of both pricing below some measure of cost and evidence of a probable later ability to recoup any losses incurred.

<sup>9</sup> *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

<sup>10</sup> *United States v. Microsoft*, 253 F.3d 34, 58-59 (D.C. Cir. 1995) ("[T]he plaintiff . . . must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect.").

<sup>11</sup> *United States v. Dentsply Int'l*, 399 F.3d 181, 196 (3d Cir. 2005) ("[E]ven if a company exerts monopoly power, it may defend its practices by establishing a business justification.").

<sup>12</sup> Specific intent to build a monopoly remains an element of attempted monopolization. *See Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993).

relevant only to the extent it helps [a court] understand the likely effect of the monopolist's conduct."<sup>13</sup> Thus, the focus of the U.S. courts today is on evidence of monopoly power and proof of exclusionary conduct.<sup>14</sup>

Given the importance of single-firm innovation which lies at the heart of vigorous competition, judicial construction of Section 2 takes considerable care to ensure that harm to competitors is not confused with harm to competition as the basis for imposing legal consequences on unilateral conduct. Wrongly diagnosing aggressive but efficiency-producing conduct not only reduces consumer welfare in the immediate case, it threatens to chill aggressive but welfare-enhancing conduct by other successful firms. As the leading American antitrust treatise explains, "we do not want to hamper the monopolist's ability to innovate, even if the result is exclusion of competitors. . . . [M]any practices have robust efficiency explanations and we do not want to condemn conduct that benefits consumers simply because it deprives rivals of sufficient output to attain scale economies."<sup>15</sup> Thus, preserving the rough-and-tumble of the marketplace ultimately "promotes the consumer interests that the Sherman Act aims to foster."<sup>16</sup>

### Section 36 should align with international approaches

The Sections commend the Ministry's recognition of recent developments in international jurisprudence regarding exclusionary conduct, particularly with respect to the report of Australia's Competition Policy Review ("Harper Review").<sup>17</sup>

The Sections previously submitted comments to the Harper Review addressing, inter alia, Section 46 of the Australian Competition and Consumer Act, which is drafted in terms somewhat similar to Section 36 of the Commerce Act. The Sections ultimately suggested that an amendment to Section 46 explicitly adopting an effects test was unnecessary in light of the substantial jurisprudence in Australia which, as in the U.S., appeared to have developed an objective standard for assessing exclusionary conduct considering the nature of the conduct and its likely competitive effects. The Harper Review's final report endorsed the adoption of a test that more clearly examines the conduct's "purpose or effect or likely effect" of substantially lessening competition in a market, bringing Section 46 into alignment with other provisions of Australian competition legislation and

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<sup>13</sup> United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001).

<sup>14</sup> "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 879 (2004) (emphasis in original).

<sup>15</sup> Herbert Hovenkamp, FEDERAL ANTITRUST POLICY 301 (4th ed., 2011) (footnote reference omitted).

<sup>16</sup> Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984).

<sup>17</sup> Ministry of Business Innovation & Employment, Targeted Review of the Commerce Act 1986, 13 (November 2015) available at <http://www.mbie.govt.nz/info-services/business/competition-policy/targeted-commerce-act-review/issues-paper.pdf>.

eliminating previously complex concepts of “taking advantage” and any possible inquiry into subjective purpose.<sup>18</sup> The Australian Government is currently considering the Harper Report’s findings and in particular whether changes to Section 46 are appropriate.

The Sections understand that New Zealand jurisprudence on the interpretation of the “taking advantage” element of Section 36 has not aligned precisely with Australian Section 46 jurisprudence and instead follows a “counterfactual” approach. The “counterfactual” test examines whether the challenged conduct would rationally be undertaken by a firm *without* market power, finding no violation when a non-dominant firm in the same market would have acted in the challenged manner.<sup>19</sup> This test has been criticized for ignoring the true competitive effects of the challenged conduct when undertaken by the firm with market power, as well as for relying on unsupported inferences and leading to an abundance of “false negatives” (as well as potentially “false positives”) in enforcement.<sup>20</sup>

The Sections understand these concerns. Although it is clearly the case that in most instances that conduct undertaken by a non-dominant firm will be efficient and procompetitive, and thus in the vast majority of cases also will be efficient and procompetitive if undertaken by a dominant firm, there are cases where an entity has substantial market power and “behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.”<sup>21</sup> Focusing on the rationality of the conduct for a differently situated market actor will not necessarily protect against the effects of the conduct, and may fall short of the policy objectives of maintaining competitive markets.

Consistent with the position long advocated by the Sections with regard to the competition laws of other jurisdictions, the revision of New Zealand law and practice to focus Section 36 on the

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<sup>18</sup> The Final Report, Competition Policy Review, available at [http://competitionpolicyreview.gov.au/files/2015/03/Part4\\_final-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Part4_final-report_online.pdf)

<sup>19</sup> “[I]t cannot be said that a person in a dominant market position ‘uses’ that position for the purposes of section 36 [if] he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.” *Commerce Commission v. Telecom Corp. of New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577.

<sup>20</sup> Andrew I. Gavil, “Imagining a Counterfactual Section 36: Rebalancing New Zealand’s Competition Law Framework” (2015) 46 VUWLR 1043.

<sup>21</sup> *United States v. Dentsply*, 399 F. 3d at 187. A leading U.S. antitrust treatise makes a similar point: “To find that a monopolist’s act may improperly impair rivals’ opportunities and threaten consumer welfare does not say how substantial a contribution that act has made or may make to achieving or maintaining the monopoly. The effect may in fact be marginal or even inconsequential. That act may be incapable of making a significant contribution, abandoned before it could have had any such effect, or seem on balance not to have been significant when compared to scale economies or superior skill as sources of the particular defendant’s power.” Phillip E. Areeda and Herbert Hovenkamp, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (4th ed., 2015), Vol. 3b ¶651g.

effects of challenged conduct undertaken by a dominant firm would be a desirable change, and would align New Zealand's law more closely with the best international practice.

## **II. Market Studies**

As discussed in the Issues Paper, market studies are increasingly used by competition agencies as a means to develop information on markets, particularly for industry-wide studies. The Sections agree with the OECD's identification of the New Zealand Commerce Commission's lack of clear market study authority as a gap. The power to conduct market studies can be useful for identifying key competition issues, including the importance of regulatory or other barriers to competition, and potentially separately developing evidence suggesting an objective basis for specific enforcement action. Market studies are a flexible tool which, as employed in other jurisdictions, can lead to a range of actions or recommendations by the agency, including reporting of key findings and perspectives without recommendations for direct action; recommendations for action by others (e.g., legislation or regulatory reform); or enforcement action by the agency pursuant to existing legal authority.

The Issues Paper takes the preliminary view (on page 57) that there is limited net benefit to extending market studies power to the Commerce Commission, due to countervailing potential costs, conflicts of interest, and the importance of maintaining clear separation between enforcement authority and the authority to conduct market studies.

The Sections suggest that these concerns, while legitimate, may be overstated. Competition agencies in many jurisdictions possess and exercise these powers, including the United States Federal Trade Commission ("FTC"), the UK Competition and Markets Authority, and the European Commission. Section 6 of the FTC Act expressly grants the FTC the authority to conduct market studies and the power to use compulsory process as part of that authority. This has been particularly helpful in industries undergoing disruptive change to inform the agency in conducting its enforcement activities, as well as for competition advocacy.<sup>22</sup> Subject to appropriate safeguards to minimize the costs, avoid potential conflicts of interest and/or maintain a clear distinction between study authority and enforcement authority, market study powers could enhance the Commerce Commission's ability to fulfill its mandate to safeguard competition in New Zealand.

The Sections therefore propose that in New Zealand the Commerce Commission be the primary body empowered to conduct market studies and that the Commerce Commission should be able to launch such studies of its own initiative. A key benefit of granting such authority would be to free the Commerce Commission from dependence on the presentation of evidence or complaints by private parties. Government departments, consumer bodies and industry participants could also be

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<sup>22</sup> "The Federal Trade Commission's ("FTC" or "the Commission") authority extends beyond antitrust law enforcement to include unique tools for industry study and competition advocacy that allow it to construct a broader competition policy program. These non-enforcement tools are especially important during times of change, when technology and other developments can trigger significant disruptions in the business environment." See Andrew I. Gavil, "The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead" 83 GEO. WASH. L. REV. 1902.

permitted to propose areas for investigation. If the Commerce Commission were granted the discretion to accept or decline such proposals, this would ensure that any market studies carried forward were justified from the broader public perspective, rather than compelled by parties that may not have the public interest in vigorous competition as their primary objective.

The Sections consider that mandatory information-gathering powers should apply where critical to the process, but should be used sparingly and following careful consideration of participants' ability to respond and the cost implications of doing so.<sup>23</sup> The Commerce Commission should ultimately have the power to compel a response and to impose proportional sanctions for failure to do so; otherwise it may become impossible to carry out market studies effectively. Guidelines should also be established concerning the use of any such data to ensure the protection of confidential information divulged to the Commerce Commission, whether or not such information is provided through legal compulsion.

The Sections strongly recommend that a strict separation be maintained between powers of study and powers of enforcement (i.e., the initiation of a proceeding to order changes in business conduct or to apply remedies to any specific party or parties). The Commerce Commission has well-defined powers and processes to investigate whether specific parties have engaged in any infringement of the NZCA, and the addition to those powers of a market study power should not be used to undermine the legal framework and various safeguards that assure the integrity of the enforcement process. Nor should the addition of a market study power to the authority of the Commerce Commission be proposed or implemented in a way that undermines the perception – by the business community, the competition bar, or the broader public – that such safeguards are being altered or reduced thereby. In this connection the sharp controversy in the UK regarding the use of a market study to advance proposals for specific remedies (in particular in relation to the *BAA Airports* case<sup>24</sup>) may be instructive.

In relation to such broad market study powers and enforcement actions, the Sections strongly recommend consideration of approaches that define limits on the scope of the powers, ensure that there are clear procedural safeguards, and provide an appeals process that is both searching and reasonably prompt.

As to whether the government should be required to respond to a market study consultation, an element of compulsion seems unnecessary; if the proposal could lead to legislative recommendations, the Sections respectfully suggest that the government would be incentivized to respond. The Sections also suggest that if the government's views are required to be taken into

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<sup>23</sup> Section 6 of the FTC Act provides specific criteria for the authority to use compulsory process to obtain relevant data and information in the context of market studies. See, Gavil op. cit. at 1903 and William E. Kovacic, "The Federal Trade Commission at 100: Into Our 2<sup>nd</sup> Century," 92–93 (2009). Available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf).

<sup>24</sup> [2010] EWCA Civ 1097.

account by the Commerce Commission, the Commission should be able to set a reasonable deadline for receipt of government input.