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Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
WELLINGTON

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by email

SUBMISSION ON TARGETED REVIEW OF THE COMMERCE ACT 1986

Introduction

1 This submission comes from the Motion Picture Association of America, Inc. (**MPAA**).

2 The MPAA is not-for-profit trade association that has served as the voice and advocate of the major American motion picture studios since 1922. The MPAA represents not only the theatrical film industry, but also serves as a leader and advocate for the principal producers and distributors of entertainment programming for television, pay TV, online streaming services like Hulu and Netflix, and DVDs. Its members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

3 We welcome the opportunity to comment on MBIE's targeted review of the Commerce Act 1986 (the **Act**) in its November 2015 issues paper (the **Issues Paper**).

Our submission in context

4 The MPAA understands that New Zealand has a well-developed antitrust regime. We are also aware that the New Zealand Commerce Commission is an efficient and effective competition agency, praised by the likes of Professor William Kovacic – former Chairman of the United States Federal Trade Commission.[1]

5 Our local counsel has shown us press clippings which suggest that, despite its general successfulness, the Commerce Commission is unhappy with New Zealand's monopolisation provision: s36 of the Act. We see, too, that New Zealand's Productivity Commission has suggested that s36 – which involves a purpose test – be replaced, or supplemented by, an "effects test" for whether or not a dominant firm has abused its market power.[2]

6 The MPAA and its members are well versed in the competition laws of many countries around the world. We are intimately familiar with United States antitrust law and practice and have witnessed its evolution over the last century. In the circumstances, the MPAA feels it is well placed to offer an international perspective on matters in the Issues Paper.

SUMMARY OF OUR SUBMISSION

Support for effects test

7 The MPAA believes New Zealand should introduce an "effects test" for anti-competitive exclusionary conduct.[3] An effects test would:

7.1 align New Zealand competition law with other comparable jurisdictions, including the United States, the European Union (including the UK), and Canada, enabling the country to draw on a substantial body of international precedent, commentary and agency guidance; and

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1 New Zealand Commerce Commission press release, *Chairman Dr Mark Berry and Professor William Kovacic present at the Roundtable on Agency Effectiveness hosted by the Commerce Commission*: http://www.comcom.govt.nz/the-commission/media-centre/features/measuring-our-impact/ (16 August 2012); Professor William Kovacic's remarks at New Zealand Commerce Commission *Competition Matters Conference* 2015 (Wellington, 23/24 July 2015).

2 New Zealand Productivity *Commission Boosting Productivity in the Services Sector* (May 2014), Chapter 7 ("Improving Competition Law") at page 130 – 131.

3 Although we do note that s27 of the Act already contains an effects test which can be deployed against a firm abusing its dominance in any New Zealand market.

7.2 better align with the goal of maximizing consumer welfare by focusing on actual marketplace effects instead of intent, where it can be difficult to distinguish between the intent to vigorously compete and predatory intent to exclude.

Need for certainty at the intellectual property / competition law interface

8 If New Zealand does amend the Act's monopolisation rule, we think it desirable to retain an exception for intellectual property rights (**IPRs**) like the ones currently in sections 36(3) and 45.

9 The MPAA says that because it is important and useful for the law to be clear that IPR "monopolies" are not (necessarily) co-extensive with "monopoly" or "market power" in the competition law sense.

10 Removing these exceptions could complicate IPR enforcement in New Zealand and thus undermine the value of IP assets and the development of IP markets in this country. Without clear guidance like s36(3) of the Act, infringers might be able to ward off summary judgment, for instance, through a make-weight counterclaim that copyright owner is a monopolist abusing its market power.

11 After many years of falsely presuming market power from the mere presence of a patent or copyright, the United States Supreme Court properly reversed course in 2006. The Court noted that there is "virtual consensus" among economists and U.S. antitrust enforcers that such IPR does not necessarily confer market power in the antitrust sense.[4] In other words, the Court held that the exclusive rights granted to an IP holder under the law do not translate into a monopoly position in a relevant market in the competition law sense. We have no doubt that the New Zealand courts would arrive at the same point over time. But with that position presently encoded into the Commerce Act, it seems a backward step to replace the current certainty with uncertainty on the point.

ADDITIONAL COMMENT OF EFFECTS TEST ANALYSIS

12 MPAA agrees that, as presently drafted, s36's focus on the purpose of exclusionary conduct, rather than its effects, may well have produced a regime which:

[4] *Illinois Tool Works, Inc. v Independent Ink, Inc.* 547 U.S. 28 at 45 (2006).

12.1 is uncertain and unpredictable, particularly in the Courts' application of the so-called "counterfactual" test;

12.2 is out of line with other major jurisdictions; and

12.3 as a result, may not best safeguard the long term interests of New Zealand consumers.

13 It is possible that these features of New Zealand's competition jurisprudence may be chilling New Zealand marketplace behaviour.

- **US experience with "effects test" analysis**

14 The MPAA's experience is that some antitrust regimes, particularly that of the United States, regulate exclusionary conduct in a more workable and predictable way than purpose-based monopolisation offences like those currently in force in Australia and New Zealand.

15 Section 2 of the Sherman Act establishes the offence of monopoly in the U.S. That offence has two elements:[5]

15.1 the possession of **monopoly power** by a market player; and

15.2 the **wilful** acquisition or maintenance of that power, as distinguished from growth or development as a consequence of superior product, business acumen or historic accident.

16 The Sherman Act monopoly regime is best understood as conduct-focussed, rather than as a simple "effects" test. The American courts have emphasised that the mere *potential* for anticompetitive effects alone may not justify antitrust intervention, absent methods for reliably identifying conduct with anticompetitive effects. As the U.S. Supreme Court stated in *Verizon v Trinko*:[6]

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[5] *United States v Grinnell Corp.* 384 U.S. 563. A claim for attempted monopolization under Section 2 has three elements: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize the relevant market and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *see also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 317 (3d Cir. 2007); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1432-33 (9th Cir. 1995)

[6] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 414 (2004).

> "Against the … benefits of antitrust intervention …, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.' *United States v. Microsoft Corp.*, 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (CADC 2001) (en banc) (per curiam). Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The cost of false positives counsels against an undue expansion of § 2 liability."

17 The American courts, and indeed the United States' principal enforcement agency, the Department of Justice's antitrust division, have consistently emphasised that the monopoly rule is only intended to capture conduct which harms competition itself: aggressive, competitive conduct by any one firm, even with market power, benefits consumers.[7] The American courts have likewise underlined the risk of false positives chilling welfare-enhancing behaviour by large and small players alike:[8]

> The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization**. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.** (emphasis added).

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7 "An unlawful monopoly exists when only one firm controls the market for a product or service, and it has obtained that market power, not because its product or service is superior to others, but by suppressing competition with anticompetitive conduct. The Act is not violated simply when one firm's vigorous competition and lower prices take sales from its less efficient competitors—that is competition working properly." United States Department of Justice, *Antitrust Enforcement and the Consumer* (September 26, 2005), *available at* http://www.justice.gov/atr/file/800691/download.

8 *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 762, 767-68 (1984) (footnotes omitted).

18 It is to guard against these dangers that anticompetitive intent, standing alone, does not violate Section 2 of the Sherman Act. Even proof that a defendant's sole motivation is anticompetitive will not suffice unless the conduct under challenge is objectively anticompetitive. As the U.S. First Circuit Court of Appeals has put it:[9] "As long as [defendant's] course of conduct was itself legitimate, the fact that some of its executives hoped to see [plaintiff] disappear is irrelevant. Under these circumstances, [defendant] is no more guilty of an antitrust violation than a boxer who delivers a perfectly legal punch -- hoping that it will kill his opponent -- is guilty of attempted murder." Numerous other courts and antitrust experts have likewise warned against improperly focussing on a defendant's anti-competitive purpose when assessing Section 2 liability:

18.1 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 241 (1993): despite evidence from defendant's "corporate planning documents" of intent to attain anticompetitive result of restricting output, "no objective evidence of its conduct permits a reasonable inference that it had any real prospect of doing so through anticompetitive means";

18.2 *Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 268 (8th Cir. 1984): "an inference of anti-competitive intent on the part of [defendant] . . . is not enough to transform [defendant's] otherwise legitimate business activities into anti-competitive, monopolistic conduct"[10] (citing *Cal. Computer Prods. v. IBM Corp.*, 613 F.2d 727, 745 n.32 (9th Cir. 1979);

18.3 *Byars v. Bluff City News Co.*, 609 F.2d 843, 860, 862 n.53 (6th Cir. 1979): "we think it clear that what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices. As preservation of competition is at the heart of the Sherman and Clayton Acts, a practice should be deemed 'unfair' or 'predatory' only if it is unreasonably anti-competitive";

18.4 *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986: "We add, what has become an antitrust commonplace, that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant"; and

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[9] *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989).

[10] Citing *Cal. Computer Prods. v. IBM Corp.*, 613 F.2d 727, 745 n.32 (9th Cir. 1979).

18.5 3 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 626g at 83: "The behavioral component [of § 2] is not defined by 'purpose,' 'intent,' or similar language. It can be rationally defined only in terms of conduct".

19 While an anti-competitive intent alone will not violate Section 2 of the Sherman Act, the acquisition or maintenance of monopoly power is, generally speaking, unlawful if coupled with a general purpose to do the acts found to be unlawful.[11] In some cases, evidence of intent may be relevant to establishing anticompetitive conduct, *as long as* the intent explains the specific conduct. *Taylor Publ'g Co. v. Jostens Inc.*, 216 F.3d 465, 476 n.2 (5th Cir. 2000) (plaintiff's intent evidence did not sufficiently explain why defendant engaged in below-cost pricing, it merely identified a general intent to become the dominant market participant). By way of notable example, the Supreme Court in *Aspen Skiing* (an exclusionary conduct case) declared that:[12]

> the question of intent is relevant to the offence of monopolisation in determining whether the challenged conduct is fairly characterised as "exclusionary", "anticompetitive", or "predatory".

20 MPAA submits that MBIE should consider adopting a similar approach into the New Zealand legislation, which permits (but does not require) reference to intent in appropriate cases. We also see merit in an express efficiency defence: see our remarks at paras **25** to **28** below.

- **Effects evidence enables clear assessment of conduct's impact, including any efficiency gains**

21 In the MPAA's submission, the US Courts' approach to the monopoly prohibition underlines the value of effects evidence when assessing whether a firm has acted unlawfully. Ultimately it is the economic impact of a firm's conduct which should be the concern of s36 (or any other anti-monopolisation rule). The nature and magnitude of this impact is the best barometer of the corresponding impact on consumer welfare, the protection of which is the main goal of competition law generally.

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[11] *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431-32 (2d Cir. 1945) (specific intent not required "for no monopolist monopolizes unconscious of what he is doing"). For an attempted monopolization or conspiracy to monopolize claim, however, the defendant's specific intent to achieve a monopoly must be demonstrated. *See, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 257 (3d Cir. 2010)* ("Specific intent is an essential element of a conspiracy to monopolize claim."); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 782 (6th Cir. 2002) ("[I]n order for a 'completed' monopolization claim to succeed, the plaintiff must prove a general intent on the part of the monopolist to exclude; while by contrast, to prevail on a 'mere' attempt claim, the plaintiff must prove a specific intent to 'destroy competition or build a monopoly.'" [citation omitted]).

[12] *Aspen Skiing Co. v Aspen Highlands Skiing Corp.* 472 US 585, at 586 (1985).

22 MPAA sees an "effects test" as likely to enable an assessment of the conduct in the round, rather than a requiring a narrower focus on the firm's subjective purpose or intent. For example, in the *Aspen Skiing* matter, the trial Court benefitted from substantial and detailed evidence about:

22.1 the effect of Aspen Skiing Co's impugned behaviour on its rival's "Highlands" facility, including market share data, pecuniary losses, and oral evidence from Highlands executives about the perceived effects of Aspen Skiing's conduct on their operations;[13]

22.2 the marketplace results of Aspen Skiing's conduct, including through consumer preference surveys, expert marketing evidence, and anecdotal testimony about the effects of Aspen Skiing's ticketing practices;[14] and

22.3 potential efficiency justifications (or the lack thereof) for Aspen Skiing's behaviour, including whether Aspen Skiing's conduct had a "normal business purpose" (including the likely costs and benefits to Aspen in behaving as it did).[15]

23 In MPAA's view, a Court receiving such fine-grained effects evidence is well placed to robustly assess whether the defendant's conduct is wrongly anti-competitive, or simply part and parcel of ordinary marketplace rivalry.

Potential areas for s36 refinement

24 MPAA respectfully suggests that, even if an effects test is incorporated into s36, officials consider further steps to ensure the test remains workable and certain. Any new rule must not inadvertently chill legitimate business conduct and thereby discourage competition and innovation in New Zealand markets. In this regard, we observe that:

24.1 "monopoly" is a high threshold in the United States – and because of the concerns with the chilling effect of over-inclusion, MPAA's experience is that American Courts have consistently required a dominant (or at least high) market share before inferring monopoly power.[16] This consideration requires inquiry into barriers to

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13 Ibid, at 607-608 (with the Supreme Court referring to instances of that evidence in the trial transcript).

14 *Ibid*, at 605-606 (and again see references to the trial transcript).

15 *Ibid*, at 608-610.

16 Although US Courts certainly do not adopt a "mechanistic approach" based solely on market share. Evidence of a predominant market share does not support a circumstantial case of monopoly power

entry and other pertinent market features. We would invite MBIE to consider whether legislative guidance on "substantial degree of market power" is warranted, given the potentially broader shadow cast by an effects test; and

24.2 evidence of marketplace effects and the business justifications for the conduct will be required to enable a clear-eyed assessment of the competitive harm and economic efficiencies from the impugned conduct. (Again, we elaborate below on the merits of including an express efficiency defence). MPAA therefore invites MBIE to consider clarifying in the statute that a Court may hear evidence about:

(a) the market effect of anticompetitive conduct, and

(b) the defendant firm's objective business justifications for its conduct.

- **Further remarks on proposed efficiency defence**

25 MPAA sees a real risk of consumer welfare loss from over-deterrence in this area. For that reason, our members submit that MBIE should consider incorporating an express efficiency defence into s36. Such a defence would allow a Court to take into account, among other things, the business justifications and efficiency-enhancing outcomes from the conduct.

26 An evaluation of whether a firm has infringed the Sherman Act's "wilfulness" requirement requires objective assessment of any justifications for the conduct.[17] Valid business justifications for challenged actions serve to negate claims of exclusionary

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(or dangerous probability) when control of such a share of the market does not translate into an ability to restrict market output and charge supracompetitive prices. A defendant's high market share must be shown to give it sufficient leverage over "a dominant share of the market's productive assets" so as to allow it "to restrict marketwide output and, hence, increase marketwide prices." *Rebel Oil*, 51 F.3d at 1434, 1437. High market share figures "do not always indicate power over sales and prices tomorrow." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *see also Sterling Merch., Inc. v. Nestlé, S.A.*, 656 F.3d 112, 125 (1st Cir. 2011) (70% market share insufficient when defendant's market share was decreasing, plaintiff's market share was increasing, and consumer prices had not increased).

[17] Sometimes the business justification doctrine is referred to as the business justification "defense." The doctrine, however, generally concerns a burden that may ultimately be borne by the plaintiff, not the defendant. "If the monopolist asserts a procompetitive justification—a non-pretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim." *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001); *see also Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004) ("Once the defendant has met its burden to show its valid business justification, the burden shifts to the plaintiff to show that the proffered business justification is pretextual."). "A plaintiff may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual." *Image Tech. Servs., Inc. v. Eastman Kodak Co.,* 125 F.3d 1195, 1212 (9th Cir. 1997).

conduct. In general, a business justification is valid under U.S. law "if it relates directly or indirectly to the enhancement of consumer welfare."[18] Legitimate business justifications require "proof of countervailing benefits" to the competitive process,[19] and can include:

26.1 the pursuit of efficiency,

26.2 quality control,

26.3 cost reduction,

26.4 prevention of "free-riding" by competitors,

26.5 the enhancement of revenues, or

26.6 similar considerations.

27 Business justification review has, in the MPAA's view, provided the U.S. Courts with a further tool to sort anti-competitive monopolisation from the pro-competitive innovation: see, by way of further example, the judicial observations in:

27.1 *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof. Pubs., Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995): "A defendant may avoid liability [under Section 2] by showing a legitimate business justification for the conduct [at issue]";

27.2 *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993): "Exclusionary conduct is conduct that tends to exclude or restrict competition and is not supported by a valid business reason."

27.3 *Great W. Directories, Inc. v. Southwestern Bell Tel. Co.*, 63 F.3d 1378, 1385-86 (5th Cir. 1995), on reh'g, 74 F.3d 613 (1996): "An attempt to exclude or actual exclusion is conduct based on something other than efficiency, that is, without a valid business purpose"; and

27.4 *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999): "If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported".

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[18] *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994).
[19] *Data Gen.*, 36 F.3d at 1183.

28 MPAA sees merit in expressly empowering New Zealand courts to review these types of matter by way of an express efficiency defence to s36.

29 Finally, MPAA wholly endorses the comments of the American Bar Association Antitrust Section on the s36 review.[20] MPAA commends the Section for its insightful remarks on the U.S. experience with section 2 of the Sherman Act requirements, and invites MBIE to further consider to the Section's remarks on U.S. experience with an effects test.

Further comment and contact

30 The MPAA is happy to comment further. In the first instance, please contact:

[20] American Bar Association (Section of Antitrust Law and Section of International Law) *Joint Comments on New Zealand's Targeted Review of the Commerce Act 1986* dated 17 February 2016 (available online here).

Appendix: MPAA responses to selected questions

#	Question	MPAA remarks
2.2 Benchmark of approaches to anticompetitive exclusionary conduct	Has the Ministry accurately described the different approaches countries take in their rules against anti-competitive exclusionary conduct?	For the most part, yes. The MPAA respectfully suggests, however, that the US Courts' approach to the anti-monopolisation rule in the Sherman Act is better characterised as conduct-based, rather than solely as an effects test. See our remarks at para 15-16, 20 of the submission on the Sherman Act's "wilfulness" requirement for more details.
2.3 The New Zealand Regime	In your opinion, what justifications can there be for requiring that a firm with a substantial degree of market power "take advantage" of that power?	All firms, including those with market power, will continue to strive for competitive success and "reap the benefits" of their market position that success brings. Provided such conduct does not harm the competitive process (ie is not exclusionary or improperly predatory), it is *prima facie* efficiency-enhancing and will further consumer welfare.
	Does section 36(1) make sense, given that authorisations do not apply to section 36(2)?	No, s36(1) doesn't make sense at present. MPAA suggests it be deleted.
2.4 Framework for assessment	Has the Ministry identified the right criteria for assessing the adequacy of section 36 of the Commerce Act? Should any criteria identified be excluded, or should criteria not mentioned be added?	MPAA considers that MBIE's criteria are the correct starting point for any s36 evaluation. We suggest, however, that officials also expressly consider the risks that s36 may be presently chilling entrepreneurship in some quarters. See our remarks at para **12** and **13** of the submission for more details.

	Should the criteria used be given equal weight?	MPAA would see simplicity, predictability, and alignment with the antirust regimes of New Zealand's major trading partners as paramount considerations.
2.5 Assessment of the New Zealand regime	Is it fair to say that businesses will generally know if they are acting in a way that they would not in a competitive market – i.e. that the current test is sufficiently predictable?	While MPAA understands New Zealand's current antitrust regime is, for the most part, functioning well, we suggest that an effects test would be desirable because it would: • be **more predictable**, insofar as New Zealand jurists will be able to draw on international precedents in other "effects test" jurisdictions; and • reduce the risk **of false positives**, by focussing a Court's analysis on both the marketplace effects of, and business justifications for, the relevant conduct See our remarks at paras **7** and **16 to 19** of the submission for more details.
	Do you agree that section 36 – as applied by the courts – is too complex to ensure that it is cost-effective and timely?	
	Do you agree that section 36 – as applied by the courts – is not well aligned with other relevant provisions?	MPAA would see an "effects test" as better aligned with other key provisions of the Commerce Act, particularly sections 27 and 47 (both of which we understand require an assessment of the competitive *effects* of conduct, rather than of firms' *motives*).
2.6 Conclusion	Do you have any other comments you wish to make about the Ministry's approach to assessing the current law on anti-competitive exclusionary conduct?	MPAA invites MBIE officials to also consider, in any review of s36, whether there is merit in: • whether legislative guidance on "substantial degree of market power" is warranted, given the potentially broader shadow cast

		by an effects test; and • clarifying in the statute that a Court may hear evidence about both the market effects of anticompetitive conduct, and the defendant's business justifications. See our remarks at paras **22, 23** and **27 to 29** of the submission for more details on these topics.