MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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Discussion paper

Review of Section 36 of the Commerce Act and other matters

January 2019

BRM 4452

New Zealand Government

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ISBN (online) 978-1-98-853581-4

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Executive Summary

1. This review considers three issues relating to the Commerce Act 1986 (“**the Act**”):
   - the section 36 prohibition against anti-competitive unilateral conduct;
   - the provisions in the Act relating to intellectual property; and
   - the treatment of covenants under Part 2 of the Act.
2. The purpose of any change proposals is the same as the purpose statement of the Act: “to promote competition in markets for the long-term benefit of consumers within New Zealand.”

Section 36

3. 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 firms should not be able to undertake certain types of anti-competitive conduct that prevents or deters rivals (and potential rivals) from competing on their merits. These prohibitions aim to protect competition itself, rather than individual competitors.
4. On the other hand, competition policy does not seek to prevent firms from developing market power, if they do so by developing better products and becoming more efficient. Similarly, unilateral conduct laws do not seek to prohibit firms with substantial market power from charging higher prices and thus earning “monopoly rents”. While monopoly pricing reduces consumer welfare, it generally does not harm the competitive process (if anything, it can attract competitors). In situations where competition is unlikely to develop (such as electricity lines or fixed line telecommunications), monopoly pricing can be addressed through sector-specific regulation.
5. New Zealand’s prohibition against unilateral anti-competitive conduct is contained in section 36 of the Act. The prohibition has three elements. In order for conduct to be prohibited:
   a. a firm must have substantial market power;
   b. it must take advantage of that market power; and
   c. it must have a proscribed purpose.
6. The main issue with section 36 is with the interpretation of the second element: taking advantage of market power. The Privy Council and Supreme Court have interpreted this to require the construction of a hypothetical market in which the firm is without market power, and demonstrate that the firm would not have undertaken the conduct at issue in that hypothetical market. This detailed inquiry is known as the ‘counterfactual test’ or the ‘comparative exercise’.
7. In 2015, the Ministry of Business, Innovation and Employment (MBIE) released the *Targeted Review of the Commerce Act Issues Paper*, which focused primarily on section 36.[1] Based on submissions to that review and subsequent analysis, MBIE has concluded that the current formulation and interpretation of section 36 leads to three main problems:

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[1] The Issues Paper, submissions and cross-submissions are all available at **https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/targeted-review-of-the-commerce-act-2015/**

a. There are whole categories of conduct that are harmless if a firm has no market power, but harmful if the firm has market power. This means that the current test in section 36 produces the wrong answer in these types of cases and fails to condemn all anti-competitive conduct.

b. It is difficult to construct the hypothetical market, as it requires a number of assumptions which can be quite unrealistic. Small changes to these assumptions lead to very different answers. It is impossible to know beforehand which assumptions a court will choose in constructing the hypothetical market. This leads to costly, complex enforcement that reduces the incentive for businesses to comply with the law.

c. The difficulties of constructing the hypothetical market also cause some unpredictability for day-to-day business decision-making, reducing the incentive for businesses to vigorously compete.

8. MBIE considers that section 36 in its current form does not fully meet the Act's purpose to promote competition in markets for the long-term benefit of consumers within New Zealand.

9. Australia's equivalent law was substantially similar to New Zealand's. After a rigorous and independent process, the Australian Government has adopted an 'effects test'. This change has brought Australia into line with other developed countries, of which the vast majority focus their prohibitions on the effects of the conduct.

10. Our preferred option is to adopt and adapt the Australian law as follows:

A person that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

11. This is our preferred version because:

a. It addresses the under-reach of the current law and removes the need to construct a hypothetical market.

b. It would fit most closely with the general scheme of the Act, which is based on the Australian legislation.

c. New Zealand courts are likely to pay close attention to and often follow the Australian case law. This enhances the body of case law available to New Zealand market participants and helps to improve certainty.

d. Businesses may operate with a substantial degree of market power in both Australia and New Zealand.

12. The Commerce Commission ("**the Commission**") has the power to grant authorisations for practices that would or might breach certain sections of the Act, if the Commission is satisfied that the practice would result in public benefits that outweigh the potential harm to competition. We are proposing that this power be extended to section 36.

13. The initial impact analysis suggests that the proposed change to section 36 is substantially better than the status quo. The costs of change are very low: around $2.7 million. The benefits are hard to quantify but would result from the improved competitiveness of markets.

14. The paper also seeks views on section 36A of the Act. In 1988, the Australian and New Zealand governments agreed to remove protections against dumping (the situation where a business sells its goods at a cheaper price in a foreign country than its home country) for goods traded across the Tasman. Instead, reliance was placed on generic competition law to protect against conduct such as predatory pricing (which could be a factor in dumping). To enable this measure, section 36A was inserted into the Act to allow consideration of market power in

Australia or a Trans-Tasman market. The Australian legislation was amended with a reciprocal provision: their section 46A. As the Australians have amended their underlying provision and we are proposing changes to section 36, the paper also seeks views on section 36A.

Intellectual property provisions

15. The Act contains three provisions that restrict the application of the Act from applying to certain conduct relating to intellectual property ("**IP**") (such as copyright or patents). The scope of the provisions is unclear and they have not been tested in the courts. They potentially mean that a firm is not prohibited from acting anti-competitively in relation to its IP (such as by imposing particular conditions on the use of its IP or refusing to licence its IP at all).

16. The main IP exemption, section 45, dates from an era when competition law and IP rights were seen as being incompatible with each other. This is because IP rights in effect grant a limited monopoly to the rights holder. As the thinking went, there was little point in granting IP rights if these would regularly and immediately fall foul of competition law. Partial exemptions from competition law for IP were consequently introduced in some jurisdictions as a way to address this conflict. Over time, this view has changed and it is generally accepted that:

    a. IP is essentially comparable to any other form of property;

    b. IP is not presumed to create market power in the competition law context; and

    c. IP licensing is generally pro-competitive.

17. For these reasons, many jurisdictions have moved to a neutral approach that treats IP rights as no different from any other commercial right. This sometimes means forbidding IP owners from exercising some of their rights, if the exercise would be anti-competitive.

18. Australia's competition law has a similar provision to New Zealand's section 45. The provision has been subject to seven separate reviews since 1999 that have recommended its repeal or significant narrowing. The Australian Government has recently introduced legislation to repeal the provision.

19. We propose repealing the IP-related provisions. There is a strong presumption that there should not be any exemptions from the Act unless there is a compelling reason for the exception.

Covenants

20. The Act defines covenants as relating to land. A covenant on land generally restricts the way in which that land can be used. For example, a supermarket may place a covenant on the sale of its surplus land to prevent that land from being used for a competing supermarket. Depending on the context, such as the availability of other suitable land for use as a supermarket, this covenant may impede competition.

21. Section 28 of the Act prohibits covenants that substantially lessen competition. The pre-2017 version of the Act also prohibited covenants that fix prices, without reference to their effects on competition. In 2017, when the Commerce (Cartels and Other Matters) Amendment Act repealed the Act's price fixing prohibitions and replaced them with new cartel prohibitions, covenants were inadvertently excluded from the new provisions. This was an oversight, rather than any change in the policy position. The likelihood of covenants being used to create or implement a cartel is low, but it is important to close this possible loophole.

22. The covenants chapter presents two options for addressing the issue identified above:

    a. reinstating a separate prohibition for covenants involving cartel provisions; or

    b. redefining contracts to include covenants (preferred).

1 Introduction

1. This review considers three issues relating to the Commerce Act 1986 ("**the Act**"):
   - the section 36 prohibition against anti-competitive unilateral conduct;
   - the provisions in the Act relating to intellectual property (sections 45, 36(3), and 7); and
   - the treatment of covenants under Part 2.
2. The bulk of the paper is concerned with section 36. The purpose of the discussion of section 36 is to enable the design of high quality legislative amendments to regulate anti-competitive unilateral conduct. The goal is to design amendments that deter abuses of market power, while not deterring efficiency-enhancing activity. The paper also seeks views on section 36A.
3. Intellectual property ("**IP"**) exemptions to competition law are either being eliminated or reduced in comparable jurisdictions. The purpose of the discussion document is to elicit views on the importance of New Zealand's IP-related provisions and understand the nature of the impacts if these provisions were removed.
4. Finally, from a policy perspective, covenants should not be treated differently from other kinds of agreements but there are separate provisions regarding their treatment in the Act. The current cartel provisions do not apply to covenants, but this is an unintentional oversight. This discussion document seeks views on the best drafting approach to the treatment of covenants.
5. This discussion document sets out common objectives and criteria for assessing any proposed changes to the Act. Each of the three topics is then treated sequentially with:
   - a brief history of any prior policy development;
   - a description of the status quo;
   - a problem definition;
   - a description of options to address the problem;
   - an assessment of the options against the objectives and criteria; and
   - a high-level cost-benefit assessment.
6. Most importantly, the discussion document seeks your input on the questions raised.
7. All submissions on this discussion document will be taken into account in formulating policy advice to the Minister of Commerce and Consumer Affairs, and ultimately Cabinet. Depending on the nature of the policy proposals, we may or may not recommend a Draft Exposure Bill process to refine legislative proposals before they are introduced to the House.

Acknowledgements

8. While many people have contributed to this document, MBIE would like to acknowledge the peer review provided by Katharine Kemp, Paul Scott, Louise Longdin and Ian Eagles. Any errors or omissions are MBIE's responsibility and the document does not necessarily reflect the views of the peer reviewers.

2 Decision-making criteria

Primary objective and decision-making criteria

9. The purpose statement of the Act is "to promote competition in markets for the long-term benefit of consumers within New Zealand." This is the primary objective for any reform of Part 2 of the Act. The criteria below should all be read in the light of furthering this objective.

10. We propose four main criteria to assess any proposed changes to Part 2 and their likely contribution to the objective:

    i. minimise the risk of wrong answers that stop pro-competitive behaviour (Type I errors – false positives);

    ii. minimise the risk of wrong answers that allow anti-competitive behaviour (Type II errors – false negatives);

    iii. provide businesses with predictability for pro-competitive decision making and reasonable compliance costs; and

    iv. minimise the cost and complexity of enforcing cases in order to penalise and deter anti-competitive behaviour.

11. These criteria are based upon the 'error cost' analysis framework commonly used in competition law and policy.[2]

1	Do you agree with the primary objective and the criteria?

Previous decision-making criteria

12. The proposed criteria outlined above differ from those set out in the *Targeted Review of the Commerce Act Issues Paper*. The Issues Paper sets out the following proposed criteria for assessing the effectiveness of section 36:

    i. whether section 36 is assuring the long-term benefit of consumers (the purpose of the Commerce Act);

    ii. whether the application of section 36 is sufficiently simple; and

    iii. other potential criteria:

        a. alignment with other prohibitions in the Commerce Act, and with equivalent prohibitions in overseas jurisdictions; and

        b. the small size and remoteness of the New Zealand economy.

13. In light of responses to the Issues Paper, MBIE refined the criteria to those outlined above. In particular, we made the following judgements:

    a. First, a number of respondents to the Issues Paper pointed to the issue of implementation costs, should any option for change be adopted. While a relevant consideration, this was not given full weight as a criterion, as it would unfairly favour the status quo.

[2] For a discussion of error cost analysis see Katharine Kemp, *'The Big Chill? A Comparative Analysis of Effects-Based Tests for Misuse of Market Power* (2017) 40(2) University of New South Wales Law Journal.

b. Second, the Ministry of Foreign Affairs and Trade supported consideration of alignment of section 36 with misuse of market power provisions in other jurisdictions. We agree that this is important, particularly with regard to our trans-Tasman commitments.[3] However, ultimately the issue is what would be best practice for New Zealand. We also note that some of the benefit of alignment (access to a greater amount of relevant case-law and academic analysis) will be taken into consideration under the 'predictability' criterion, as more relevant case-law makes it easier for firms to predict how the courts will assess their conduct. As a result, we have not given alignment full weight as a stand-alone criterion.

c. Third, alignment of section 36 with other provisions of the Act (such as sections 27 and 47) was not retained as a stand-alone criterion. There are definitely synergies in having alignment between the key provisions of the Act. Case law generated through one section is applicable to the others, to the extent that they share the same wording. This amplification of the sometimes sparse case law helps increase certainty and reduces costs and complexity. In our view, this criterion has been subsumed into the 'predictability' and 'enforcement' criteria.

d. Finally, the small size and remoteness of the New Zealand economy was not retained as a criterion for assessment. Submitters held divided views on this issue: some considered that it meant section 36 should be harsher on dominant firms, while others thought it meant section 36 should be more forgiving. In the end, our assessment is that the only certain conclusion is that the proportion of markets in New Zealand with a dominant player would be higher than in many larger, more connected economies. As a result, the costs and benefits of any particular option are magnified, relative to many foreign jurisdictions. Rather than leading us to weight any one criterion higher than others, the likelihood that the impact of this provision is amplified in New Zealand merely suggests that it is an important one to get right.

[3] In 2010, the New Zealand and Australian governments signed a Memorandum of Understanding ("MoU") which sets out a number of principles to guide efforts to coordinate business law, with these principles subsequently being adopted in the Trans-Tasman Outcomes Framework. Under clause 8, the two Governments identified a number of principles to guide coordination efforts, including the principle that "measures should deliver substantively the same regulatory outcomes in both countries in the most efficient manner". Under clause 13, each Government committed to "keep the other Government informed of proposed reforms in the area of business law and … give the other the opportunity to be involved in the other's reform process at an early stage."

3 Section 36: Background and Context

What is anti-competitive unilateral conduct?

14. A key goal of competition policy is to prohibit firms with substantial market power from unilaterally acting in an anti-competitive manner.[4] Generally, competition law seeks to prohibit firms from undertaking certain types of exclusionary conduct (i.e. anti-competitive conduct) that prevents, hinders or deters rivals and potential rivals from competing on their merits. These prohibitions do this in order to protect competition itself, rather than individual competitors. Unlike up-front sector-specific rules (such as Part 4 of the Act), which impose positive obligations on firms (what firms must do), unilateral conduct prohibitions impose negative obligations (what firms must not do).

15. Anti-competitive unilateral conduct generally aims to deter new entry into a market, raise rivals' costs, discipline and/or deter rivals, and/or force a rival to exit a market. Some of the strategies include:

    a. **Predatory pricing** – a powerful business lowers its prices for a sustained period of time to drive a competitor or competitors out of the market. This is harmful if these prices are below an appropriate measure of cost and the business has the ability to recoup its losses by sustaining higher prices later, without likely entry into the market by others.

    b. **Exclusive dealing** – where a powerful business has contracts with retailers, distributors, or suppliers that require or induce them to only to sell that business' products or only supply that business. This may be harmful if the arrangement denies a competitor access to an important supply or distribution channel.

    c. **Refusal to deal** – where a vertically-integrated business refuses to supply a competitor with an input or give the competitor access to infrastructure, which the competitor needs to be able to compete in downstream markets. For instance, the Cease and Desist Order against Northport Limited in 2006 was because "Northport had granted an exclusive licence to its own joint venture port services company, Northport Services Limited, and was making it uneconomic for other companies to marshal cargo at the port."[5]

    d. **High access pricing (or margin squeeze)** – the supply of a bottleneck input or infrastructure to a competitor at a high price may also be prohibited. A 'high' price may be assessed relative to the selling price of the downstream product. In general, a business must leave a sufficient margin for an efficient competitor to compete, to avoid being found to have engaged in high access pricing.

    e. **Tying** – where a business only sells a product if the customer purchases it together with another product. For example, if a firm with market power in one product market sells that

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[4] The other broad goals are preventing firms from collaborating to substantially lessen competition in a market, and to prevent mergers and acquisitions that lead to substantial market power.

[5] Commerce Commission. (2006). *First ever Cease and Desist Order issued against Northport.* Retrieved from **https://comcom.govt.nz/news-and-media/media-releases/archive/first-ever-cease-and-desist-order-issued-against-northport**

product together with a second product (for which the firm has no market power), competition for the latter product could be reduced if the combined price of the tied products is significantly less than the prices of the products when sold separately. For example, the Commission's report into the tying of accommodation and dinners at the Hermitage hotel found that "The Hermitage would have introduced, and persisted with, a tying policy that reduced its profits, so that… the intended 'payoff' could only stem from the elimination or deterrence of the competitor."[6]

f. **Buying up scarce intermediate goods or resources required by a competitor**.

16. Practices such as low pricing and exclusive dealing are not necessarily harmful to competition (and can have many benefits), and practices such as price cutting and vertical relationships can be part of normal business strategies. The challenge is in judging if the conduct is anti-competitive.

17. Firms are entitled to succeed through competition, by developing better products and becoming more efficient, even if this leads to them achieving market power. Competition laws generally only seek to prevent firms with substantial market power from engaging in behaviour that damages competition.

18. Similarly, unilateral conduct laws do not seek to prohibit firms with substantial market power from charging higher prices and thus earning "monopoly rents". While monopoly pricing reduces consumer welfare, it does not harm the competitive process (if anything, it can attract competitors). Monopoly pricing in some sectors is addressed under Part 4 of the Act. We are not seeking views on the issue of monopoly pricing or the operation of Part 4.

New Zealand's legislative provisions

19. The Act came into force on 1 May 1986. It seeks to protect competition in markets in New Zealand for the long-term benefit of consumers. One of the ways it attempts to achieve this is through prohibiting the misuse of market power by powerful firms.

20. New Zealand's rule against anti-competitive unilateral conduct is set out in section 36 of the Act, which is enforced by the Commerce Commission (**"the Commission"**) or through private action. The rule is one of New Zealand's main prohibitions against anti-competitive unilateral conduct (the other being resale price maintenance). The Act also covers anti-competitive multilateral arrangements (such as price fixing), and anti-competitive mergers and acquisitions. The Act and section 36 were closely modelled on the Australian legislation in force at the time.

21. The persons subject to section 36 are those with a substantial degree of market power. The way the rule is framed is to prohibit those persons from "taking advantage" of their market power with the purpose of excluding competitors from the market.

22. More precisely, section 36(2) provides:

> *"A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of*
>
> > *(a) restricting the entry of a person into that or any other market; or*
> >
> > *(b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or*

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[6] Commerce Commission. (2007). *Final Investigation Report into the tying of accommodation and dinners at the Hermitage.*

(c) eliminating a person from that or any other market."

23. The prohibition has three elements. In order for conduct to be prohibited:

    a. a firm must have substantial market power;

    b. it must take advantage of that market power; and

    c. it must have one of the purposes outlined above.

24. The first element of the prohibition, that a firm must have substantial market power, recognises that unilateral conduct by a firm is generally unlikely to be harmful if a firm does not have substantial market power. The provision provides a 'safe harbour' for firms that do not have market power.

25. The third element of the prohibition, the reference to a firm's purpose, distinguishes between a straight exercise of market power (such as monopoly pricing) and the exercise of market power to impede competition. While the third element is framed in terms of 'purpose', section 37B enables 'purpose' to be inferred from conduct. Case law has meant that in some situations, purpose can also be deduced through evidence of the effects of a firm's conduct.[7]

26. There is no defence to section 36. The Commission's authorisation regime (under which, conduct that prima facie breaches the Act can be allowed if the benefits of the conduct are likely to exceed the costs) is not available in respect of conduct that will or is likely to breach section 36.

Judicial interpretation of the 'taking advantage' requirement

27. The second element of section 36 is a requirement that a firm with substantial market power take advantage of that market power. This has been interpreted by the courts as a requirement for a 'causal connection' or 'causal nexus' between the market power and the conduct at issue (e.g. pricing in a predatory manner).

28. In 1994, the Privy Council interpreted the requirement for 'use' of market power to require the plaintiff to construct a hypothetical market in which the defendant firm is without market power, and demonstrate that the defendant would not have undertaken the conduct at issue in that hypothetical market.[8] This detailed inquiry is known as the 'counterfactual test' or the 'comparative exercise'.

29. In 2008, the High Court stated that, based on the Privy Council's judgement:

    "A dominant firm does not use its dominance … if it acts as a non-dominant firm otherwise in the same position would have acted in a competitive market."[9]

30. Despite the unusual step of an intervention by the Attorney-General seeking a different approach, in 2010 the Supreme Court cemented the requirement for section 36 cases to use the counterfactual test when it stated:

    "Anyone asserting a breach of section 36 must establish there has been the necessary actual use (taking advantage) of market power. To do so, it must be shown, on the balance of

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[7] *NZ Private Hospitals Assn + Auckland Branch (Inc) v Northern RHA* 7/12/94, Blanchard J, HC Auckland CP440/94. at p 24.

[8] Before 2001, section 36 had "use" instead of "take advantage of". The Supreme Court concluded that the expressions "use" and "take advantage of" involve the same inquiry. *Commerce Commission v Telecom Corp of New Zealand Ltd* [2010] NZSC 111 at [1].

[9] *Commerce Commission v Telecom* (2008) 12 TCLR 168 at [55].

probabilities, that the firm in question would not have acted as it did in a workably competitive market, that is, if it had not been dominant."[10]

31. These judicial interpretations of the 'taking advantage' requirement are summarised in the following table:

Judicial question	Answer	Legal consequence
What would the firm have done if it did not have substantial market power?	The firm would still have undertaken the conduct at issue	The firm has not taken advantage of its market power
	The firm would not have undertaken the conduct at issue	The firm has taken advantage of its market power

Previous policy development and consultation

32. In May 2014, the Productivity Commission set out a number of recommendations in a report entitled *Boosting Productivity in the Services Sector*. On the topic of section 36, the Commission summarised its views as follows:

"Monopolisation provisions (as they are termed) are tricky to get right and contentious in many countries. In New Zealand, those in favour of retaining the status quo suggest that changes to s 36 could create uncertainty for large firms and discourage them from innovation and other desirable competitive activities. However, other commentators consider that the counterfactual test is complicated to apply, suffers from conceptual problems, and can lead to wrong conclusions about whether firms are abusing their market power.

The [Productivity] Commission considers that s 36 should be reviewed, through a thorough legal and economic analysis that assesses reform options against the objectives of economic efficiency (particularly dynamic efficiency) and the long-term interests of consumers. The review should take into account the impact of small domestic markets, which may not be large enough to support firms that are big enough to exploit economies of scale, at the same time as maintaining sufficient competition and challenge to the market power of those firms."

The review process to date

33. MBIE undertakes regular reviews of aspects of competition law. On 17 November 2015, MBIE released an Issues Paper seeking views on a number of Act issues, including whether New Zealand's current section 36 was functioning adequately. In total, 39 submissions were received.[11] On 2 June 2016, the Commission Chair sent the Minister of Commerce and Consumer Affairs a supplementary submission, which critiqued a number of points made by other submitters. Given the issues raised, it was considered appropriate to launch a cross-submission process. In total, 26 cross-submissions were received.

34. Around two-thirds of submitters on the Issues Paper – mostly large firms and the law firms that represent them – supported retaining the current test contained in section 36 of the Act, on the basis that there was little practical evidence of a problem with the current test at present, and even if there were a problem, the costs of change would outweigh the benefits. They argued that there would be significant uncertainty until new case law emerged and that

[10] *Commerce Commission v Telecom* (2010) 12 TCLR 843 at [34] per Blanchard and Tipping JJ.
[11] The Issues Paper, submissions and cross-submissions are all available at **https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/targeted-review-of-the-commerce-act-2015/**

this would discourage larger firms from taking aggressive, consumer welfare-enhancing competitive actions.

35. However, a number of submitters, including the Commission, supported a change to section 36, on the basis that:

   a. the courts have interpreted the ‘take advantage’ requirement contained in section 36 into a counterfactual test that is too difficult for a plaintiff to prove – that is, regardless of a case’s merits, it is extremely difficult to win a section 36 case at present;

   b. the current ‘purpose’ requirement is misaligned with the rationale for having competition laws, which is to protect against harmful *effects* on the competitive process; and

   c. concerns about the practical difficulties that an amendment would create are overblown.

36. The previous Government considered the review in June 2017 and invited the Minister of Commerce and Consumer Affairs to report back to Cabinet by end of June 2018, on whether it is appropriate to proceed to a section 36 options paper.

37. Following the change in Government, the current Minister of Commerce and Consumer Affairs has publicly committed to reviewing section 36 of the Commerce Act.

Corresponding review in Australia

38. In December 2013, the Australian government announced a competition policy review to be undertaken by a panel led by Professor Ian Harper (“**the Harper Panel**”). The Harper Panel’s final report covered a wide range of competition law and policy matters, including a chapter on Australia’s prohibition on misuse of market power (section 46 of Australia’s Competition and Consumer Act 2010).

39. On 11 December 2015, the Australian government issued a consultation document, soliciting views on the Harper Panel’s recommendation to amend section 46.

40. Eighty-six submissions were received and these have been considered by MBIE. Of the submissions that were made public, those from economists and lawyers appeared to be roughly split on whether an effects test (which focuses on whether the conduct in question is likely to substantially lessen competition) should replace the formulation of section 46 (which focuses on whether the conduct in question was in some way enabled by the firm’s substantial market power). Large businesses overwhelmingly supported the status quo, while small businesses strongly supported the move to an effects test.

41. Although the submissions on Australia’s review of misuse of market power were not solicited by MBIE, MBIE has considered them due to the fact that the current Australian prohibition is similar to the current New Zealand prohibition.

42. In March 2016, the Australian Government announced it would adopt an effects test for section 46. In August 2017, the Competition and Consumer Act 2010 was amended, giving effect to those policy decisions.

The provision in the context of New Zealand’s small and remote economy

43. As New Zealand is a small and remote economy, in any given market there are likely to be fewer players and therefore more markets dominated by a single firm, than in an equivalent market abroad. However, the implications for prohibitions on anti-competitive unilateral conduct have not been well studied.

44. As New Zealand is likely to have a greater number of dominant players, it is particularly important to get the prohibition on misuse of market power provision right because:

a. a provision that favours false negatives (i.e. allows anti-competitive behaviour to go ahead) is likely to lead to greater harm for consumers in New Zealand than in larger markets; and

b. a provision that favours false positives (i.e. stops pro-competitive behaviour) is likely to affect a greater number of businesses' confidence to engage in pro-competitive behaviour than in larger markets.

45. Now that Australia has changed its law, to our knowledge New Zealand is the only country requiring a strict causal connection between market power and the conduct in question. New Zealand is also the only jurisdiction without any consideration of the effects of the conduct. Given New Zealand's size and remoteness, any variation from the global standard of an effects-based test should require a very high level of proof of superior outcomes.

4 Section 36: Problem definition

46. MBIE considers that the current section 36 is unsatisfactory. This section articulates the state of the evidence on the problems with section 36.

47. The current formulation and interpretation of section 36 leads to three main problems:

    a. The potential for wrong answers that could harm competition, and the failure to deter or penalise some types of conduct that may undermine the long-term benefit of consumers (i.e. 'false negatives').

    b. It involves costly and complex enforcement that reduces the incentive for businesses to comply with the law.

    c. It creates some unpredictability for day-to-day business decision making, reducing the incentive for businesses to vigorously compete.

48. MBIE considers that section 36 in its current form does not fully meet the Act's purpose (i.e. it does not succeed in promoting competition in New Zealand markets for the long-term benefit of consumers), in large part due to the counterfactual test required to assess whether a firm has taken advantage of its substantial market power.

49. Evidence for the three main problems with section 36 is provided below.

The potential for wrong answers that could harm competition

50. Section 36 relies on the 'take advantage' test to distinguish harmful conduct from harmless conduct. The test requires a causal connection between the firm's market power and its conduct (i.e. the market power somehow enables the conduct). As explained above, the courts have interpreted this to require a complex counterfactual test.

51. The counterfactual test is particularly unsuited to differentiating competitive conduct from anti-competitive unilateral conduct. Conduct undertaken by a firm with substantial market power may have exclusionary effects, even though the same conduct would be neutral or even pro-competitive when undertaken by a firm with little market power. [12] The stripping away of market power in the counterfactual assumes away the very issue in question. As one commentator has put it: "[Use of the counterfactual] is akin to saying that because a person

[12] *Eastman Kodak Co. v. Image Tech. Svcs., Inc.*, 504 U.S. 451, 488 (1992)(Scalia, J., dissenting). "Behaviour that might otherwise not be of concern to the antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist." In support of this proposition, Justice Scalia cited the then current edition of the authoritative Areeda and Turner treatise on antitrust law. The equivalent point is made in Areeda, P., & Hovenkamp, H. (2008). *Antitrust Law* ¶802(d)(3d ed.): "The definition of 'exclusionary conduct' [in this treatise] … was predicated on the existence of substantial market power. Those definitions cannot be automatically carried over to firms without such power. A given act might be significantly anticompetitive only when the actor possesses substantial power." Similarly, the treatise authors note that "conduct that would have significant anticompetitive effects when coupled with substantial market power may well have negligible or no effect when power is slight or non-existent. In that event, the conduct would not be harmful and would not contribute significantly to any market power that the actor might have or eventually obtain."

can walk into a room with a lighted match without setting off an explosion, doing so in a room where there is a suspected gas leak did not 'cause' the explosion."[13]

52. The current test fails to deter some types of conduct that may undermine the long-term benefits of consumers. This includes forms of exclusive dealing where the firm's misuse of market power is profitable in the short run (as opposed to involving profit sacrifice in the short run).

53. Exclusive dealing frequently occurs in competitive markets as businesses seek to control the distribution of their products; it is therefore unlikely to be penalised under the counterfactual test. When carried out by a business with substantial market power, exclusive dealing can foreclose a large portion of the market and result in significant competitive detriment. At worst, it could eliminate all competitors from the market. In such a scenario, there would be a false negative under section 36.[14]

54. The Australian Competition and Consumer Commission's ("**ACCC**") submission to the Australian Treasury in February 2016 during the review of their equivalent submission cited the following example of a false negative: [15]

> *"ACCC v Cement Australia [2013] FCA 909: a firm with substantial market power in the South East Queensland cement market contracted all the available supply of a cement ingredient with the purpose of excluding and/or increasing costs of rivals. The Court held that the firm with substantial market power had not 'taken advantage' of market power because a small firm could have done the same. [However]…the Court found the contracts… had the purpose and effect of substantially lessening competition."*

55. The ACCC's submission to the Australian Treasury also contained a number of hypothetical scenarios where the previous Australian provision and its judicial interpretation (which was very similar to the New Zealand one) were unlikely to apply. One example was land banking by a firm with substantial market power to prevent new entrants entering a market. The ACCC considered that despite such conduct being designed to protect market power, it was unlikely to constitute a breach of section 46 because the land could also be purchased by firms without substantial market power.

56. One submitter to the Issues Paper also set out "several examples of conduct that have … resulted in findings of liability [abroad], but [where] the results might have been different had the conduct been judged under New Zealand's version of the counterfactual test."[16] This included Microsoft bundling its Internet browser and/or its media player into its operating system, Windows (i.e. by excluding that product from the add/remove option).

57. False negatives, to the extent that they occur, can have a significant negative impact on competition. The amount of damage is highly case-dependent. As one academic notes, "[False negatives] can amplify incentives to undertake harmful conduct for both the defendant and

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[13] Veljanovski, C. (2017). *The Flawed Market Power Counterfactual* NZLJ August 2017 247-252.

[14] The plaintiff might nevertheless in some such cases be able to take a case based not on section 36 but on section 27 of the Commerce Act.

[15] Australian Competition and Consumer Commission. (2016). *Options to strengthen the misuse of market power law, Submission to the Treasury*.

[16] Gavil, A. (2016). Submission on Issues Paper, at p.40.

others, harming competition and consumers."[17] The International Competition Network has expressed this in the following economic terms: [18]

> *"The cost of under-enforcement is the risk of exclusion and the resulting reduction in competitive pressure faced by the dominant firm. Under-enforcement may also lead to a loss of dynamic efficiency flowing from competitors' lessened incentives to innovate and enter the market. It may furthermore result in redistribution of resources from consumers to producers, potentially inflated costs by dominant firms, and the inefficient devotion of resources to rent-seeking by firms that seek to obtain or maintain dominance… under-enforcement will tend to reduce the pressure on an incumbent monopolist to innovate, improve, or expand and reduce the possibilities for innovative competitors to enter and expand."*

58. The Commission has not been able to indicate whether it has foregone investigations where it considered there was a substantial lessening of competition but it believed the conduct would not constitute taking advantage of market power (a 'false negative'). However, the Commission rightly argues that this would be difficult to do, given that its analysis of past cases has been undertaken within the current legal framework for section 36.

59. As a result, it is difficult to determine the extent to which section 36 is leading to false negatives. There have almost certainly been false negatives in the past: cases that were not taken to the courts by either the Commission or private litigants because the complainant was convinced that the current test would produce a false negative. Despite the logical argument that the current test does not capture all anti-competitive unilateral conduct, it has nevertheless proved difficult to find evidence of actual harm occurring. However, absence of evidence is not evidence of absence. There is clear evidence in Australia, which had substantially similar legislative provisions, of cases such as *Cement Australia* that produced false negatives.[19]

Cost and complexity of enforcement

60. A section 36 case is costly and complex.[20] While this is true of cases taken under other provisions of the Act, the counterfactual test adds an extra degree of complication to section 36 cases.

61. In particular, a mandatory requirement to construct a hypothetical competitive market of at least two participants requires difficult assumptions to be made. These difficulties are compounded by the courts' observation that the analysis need not depend on realistic or practical assumptions, so that unrealistic scenarios are permitted.[21] It is difficult for the Commission or private litigants to know which assumptions the courts will choose, and hence which scenario will be chosen as the counterfactual.

62. This makes section 36 cases unnecessarily complicated and resource intensive, with outcomes potentially determined on the counterfactual analysis rather than the conduct at issue. As such, the Commission has to carefully consider when it is appropriate to take such cases. The

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[17] Gavil, A. (2015). *Imagining a Counterfactual Section 36: Rebalancing New Zealand's Competition Law Framework.* 46 VUWLR at p. 1060.

[18] International Competition Network. (2012). *The Objectives and Principles of Unilateral Conduct Laws.* Unilateral Conduct Workbook, Chapter 1, at [45]-[46].

[19] See discussion above at paragraph 54.

[20] Part of the cost is due to the time it might take a case to work its way through the court system: that is more a function of the courts generally than of anything particular to our prohibition on misuse of market power.

[21] *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 12 August 2011 at [345].

Commission has limited resources and has to weigh these issues up against other enforcement priorities.

63. Some submitters (including Air New Zealand and Bell Gully) claimed that the complexity is justifiable on the basis that such cases are "often factually complex". However, factual complexity should not be compounded by unnecessary analytical complexity.

64. The Australian cases demonstrate some of these difficulties. *Melway*[22], *Boral*[23] and *Rural Press*[24] all had the trial and appellate courts taking opposite views on the outcome of the "taking advantage" question. This suggests that the "take advantage" limb is not sufficiently clear and predictable in interpretation and application, and thus increases the cost and complexity of enforcement. This uncertainty also reduces the deterrence effect of any enforcement action.

65. Costly and complex enforcement can deter plaintiffs from taking their case to court. This is concerning as it may incentivise large firms to risk conduct that is likely to breach section 36. It is concerning that after more than 30 years of experience with section 36; the expert regulator regards a central plank of the Act as difficult to enforce.

66. Cost and complexity can also drain the resources of defendants away from competing actively in the market.

Predictability for pro-competitive decision making

67. Businesses require some degree of predictability when planning their conduct, so that they can aggressively compete with rivals without being deterred by concerns that their conduct will breach section 36 (or other parts of the Act). Submitters were divided on whether the status quo provides sufficient predictability.

68. Some submitters argued that the status quo has the advantage of a relatively simple thought experiment for businesses ('would we do this if we didn't have market power?') which, in the time-pressured environment of daily business decisions, offers a higher level of predictability to firms with substantial market power considering market conduct.

69. For example, in their response to the Issues Paper, Orion stated that the counterfactual test "delivers a known compliance standard that can be readily applied by firms with market power to assess commercial conduct", and Air New Zealand claimed that it "has found that the current section 36, and in particular the 'taking advantage' limb, relatively simple to apply to its own conduct and the conduct of its competitors."

70. Other stakeholders, however, differed in their view of the predictability of the test. The Commission argued that the hypothetical nature of the competitive market a court must construct means there is an inherent uncertainty in the counterfactual test. A firm cannot know for certain in advance what the hypothetical market the court will adopt will look like.

71. As the Commission noted in its supplementary submission on the Issues Paper, "business is… exposed to significant risks around how the Commission and the courts will undertake the hypothetical analysis required by the taking advantage test… The Commission's conclusion on this hypothetical analysis [in the Origin Pacific investigation] turned on a single adjustment to

[22] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13
[23] *Boral Besser Masonry Ltd v ACCC* [2003] 215 CLR 374
[24] *Rural Press Limited v ACCC* [2003] HCA 75

an assumption about seating capacity in this hypothetical scenario. [25] This change was made late in the investigation. That this change was made so late and was so significant to the outcome tends to belie the purported certainty of the counterfactual test." [26]

72. In addition, in its cross-submission on the Issues Paper, Tompkins Wake considered that, even if the counterfactual test itself is predictable, there can be uncertainty in what approach an individual judge would take to the test (a blunt 'but for' approach or a more nuanced economic test). [27]

73. Predictability is not solely the concern of the incumbent firm. New entrants intent on challenging the incumbents also require a degree of certainty that they will be able to compete on their merits and not be subject to anti-competitive responses by the incumbent. [28] There were no submissions from challengers and new entrants but this form of certainty merits consideration.

74. Any single principle-based test is likely to involve an element of unpredictability for businesses. The current formulation of section 36 is, however, more unpredictable than most: the use by the courts of the counterfactual test, which requires very difficult and unrealistic assumptions to be made, can make it difficult for firms to accurately predict the outcome of any potential challenge or court case.

75. At present, there may be greater predictability in knowing that the Commission or other plaintiff may find it difficult to take any enforcement action if there is a breach of section 36. This is not a desirable form of predictability.

76. In summary, MBIE is of the view that the status quo makes it difficult for businesses to predict whether their conduct is likely to breach section 36. However, MBIE does not consider this to be as significant an issue as some of the other problems with section 36, given that a number of the firms which this most affects believe that the status quo provides sufficient predictability.

Conclusion

77. MBIE concludes that there are the following issues with the status quo:

    a. Certain types of undesirable conduct are unlikely to be captured by the current test.

    b. The counterfactual test adopted by the courts increases the cost and complexity of enforcement, raising questions around the regulator's ability to enforce the law, thus reducing the incentive on businesses to comply with the law.

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[25] The Commerce Commission investigated whether Air New Zealand has used its substantial market power to deter Origin Pacific from introducing a direct Hamilton-Christchurch route in 2003. In a media statement dated 31 March 2006, the Commerce Commission announced that it had found that Air New Zealand had not taken advantage of its market power.

[26] Letter from Dr Mark Berry to Minister Goldsmith dated 2 June 2016 (supplementary submission on the Issues Paper concerning the Targeted Review of the Commerce Act), at [23].

[27] For example, in the Supreme Court in the *0867* case, the court declined to rely on a nuanced economic approach. It stated (at [23]): "While we agree that economic analysis is likely to be helpful in identifying the relevant features of the hypothetically competitive market, deciding what the firm in question would or would not have done in that market will often be best approached simply as a matter of practical business or commercial judgment." In contrast, the lead Court of Appeal judgment in the Data Tails case makes a serious and sustained effort to grapple with the economic (that is, market) impacts of the impugned behaviour. Tompkins Wake suggests that these two approaches are materially different and that it is impossible for a firm to know in advance which approach a court will adopt.

[28] Gavil fn 17 at p1047.

c. There is some evidence that the current test lacks predictability.

78. However, the magnitude of these issues is not clear and they are difficult to quantify.

79. MBIE officials are conscious that it can be difficult to quantify the benefits of a law change in a complex area of competition law like this. We have no data on the prevalence of anti-competitive unilateral conduct and even in individual cases, assessments of the magnitude of harm is difficult when competition has been foreclosed. The benefits of change would come from improved static and dynamic efficiency across the economy, and this is all but impossible to isolate and measure.

80. It is also useful to consider to what extent there is a bias towards the status quo. As we understand it, New Zealand is the only country (with a modern competition law) without any consideration of the effects of unilateral conduct. In theory, given New Zealand's size and remoteness, any variation from the global standard of an effects-based test should require a very high level of proof of superior outcomes from an alternative approach. If the status quo were an effects-based test, it would be impossible to show any benefit from changing to a test that relied on a strict causal connection between market power and conduct. It would likely never be considered as a plausible alternative to an effects-based test as it has so many obvious theoretical difficulties.

81. Although there is a lack of empirical evidence about the scale of the problem, it is our judgement that maintaining the status quo does not promote the long term benefit of consumers. As such, it is no longer appropriate to wait for certainty about the costs and benefits of reform before recommending change.

2	Can you offer any new evidence on the costs and benefits of section 36, as currently worded? If you have previously submitted on this issue, do you have anything new or different to add to your views on the effectiveness of section 36? If you have not previously submitted on this issue, what are your views on the effectiveness of section 36? Previous submissions are available at: **https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/targeted-review-of-the-commerce-act-2015/**

5 Section 36: Designing a unilateral conduct prohibition

82. This chapter considers how an alternative prohibition against anti-competitive unilateral conduct could be designed.

How should anti-competitive unilateral conduct prohibitions be designed?

83. Competition law is ultimately concerned with market power. Almost all jurisdictions use an effects-based approach to examine single-firm conduct. The evidence and analysis of market power, effects, conduct and purpose tend to be interrelated. However, the general approach is to first assess the market power of the firm and then examine the effects of its conduct. This 'power + effects' formula is common across many jurisdictions. Effects are generally proven based on evidence of actual effects, or inferences drawn from some combination of evidence of power, purpose and conduct.[29]

84. While much is made of the differences between the US and European approaches to unilateral conduct, they still share significant conceptual similarities. The differences arise more from the European courts' approaches to interpretation of the law, rather than significant differences in the intellectual underpinning of the law.

85. An idealised competition-based effects analysis of unilateral conduct would work through the following steps:[30]

    i. Establish if the firm in question has a significant level of market power.

    ii. If so, examine whether the conduct in question has any anti-competitive effects.

    iii. If so, examine whether the conduct in question has any pro-competitive effects.

    iv. If so, can any of the benefits identified in the third step be achieved in a way that is less harmful to competition?

    v. Do the pro-competitive effects outweigh the anti-competitive effects?

86. Only conduct where the anti-competitive effects outweigh the pro-competitive effects would be prohibited.

87. This idealised analysis provides the right answer but at a high cost and involves significant complexity. There are a range of 'analytical shortcuts' that can be taken to simplify the analysis, improve certainty, and reduce cost. Some analytical shortcuts can improve the decision quality while others make wrong answers more likely. The analytical shortcuts include:

    a. truncating the analysis by eliminating some steps (such as iv); and

[29] Based on Gavil fn 17 at page 1065 with some modifications.

[30] Adapted from Herbert Hovenkamp *The Antitrust Enterprise: Principle and Execution,* Harvard University Press, 2005, pp106-7.

b. supplementing a generic prohibition with specific rules for different types of conduct (e.g. a below-cost test for predatory pricing).

88. While the nature of the any prohibition is important, there are other factors in the regulatory scheme that have an impact on a firm's decision-making and behaviour, and ultimately determine the actual effects of any regulation. These other factors include:

a. defences and burdens of proof;

b. exceptions, exemptions and safe harbours;

c. case law; and

d. competition authority guidelines.

89. The rest of this chapter sets out the design of a generic prohibition. The following chapter covers off options for specific rules for specific conduct and other ways of enhancing certainty.

A generic effects-based test for anti-competitive unilateral conduct

90. Chapter 4 outlined the problems and difficulties with the current formulation of section 36. The previous section set out the broad parameters of an idealised prohibition against anti-competitive unilateral conduct. To make an informed choice between the status quo and an effects-based prohibition, the rest of this chapter sets out the detailed choices that need to be made in designing an effects-based prohibition.

91. There are three possible approaches to designing a generic effects-based prohibition:

a. base the prohibition on the Australian law;

b. base the prohibition on the law in another jurisdiction; or

c. design a prohibition from first principles.

92. In the discussion that follows, we have considered the Australian law and approaches in other English speaking jurisdictions. The Australian legislation and examples from other jurisdictions are set out in the Annex to this paper.

93. We briefly considered designing a prohibition from first principles but rejected this option as it would not fit well with the overall scheme of the Act. [31] It would also lead to greater uncertainty as there would not be any case law to draw on from other Commerce Act cases, or other jurisdictions.

94. The discussion below draws on the existing case law to elucidate how a new prohibition is likely to be interpreted by the courts. It focusses on the boundaries of the substantial lessening of competition (SLC) test where there is the least certainty. The discussion somewhat overemphasises the difficulties with the SLC test in the interests of fully testing its application to unilateral conduct.

95. Each possible element of the prohibition is discussed below and feedback is invited on the choices. The discussion that follows is technical and dense. We have attempted to write it as

[31] This would have been based on the Areeda and Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* definition of monopolistic conduct as "acts that (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harm disproportionate to any resulting benefit." at ¶651a.

simply and clearly as possible, but it is aimed at a legal audience. There is a circularity in some of the discussions, which reflects the underlying circularity in the logic of some of the legislative drafting in other jurisdictions. Elements of prohibitions that appear conceptually distinct often overlap in practice and the same evidence can be used to establish different elements of the prohibition. This reflects the underlying difficulties in translating economic concepts into law.

Who would the provision apply to?

The subject of the prohibition

96. There are no significant choices to be made in terms of who the prohibition applies to.

97. At present, section 36 applies to "a person". In our view, any new provision should also apply to "a person". Section 36(4) enables a reference to a person to "include[s] 2 or more persons that are interconnected". Section 46(3) of Australia's Competition and Consumer Act is equivalent to section 36(4) of the Act. These provisions enable the conduct of interconnected bodies corporate to be considered in the same way as a single body corporate. They are an 'anti-avoidance' measure that prevents companies from structuring their corporate affairs in such a way as to avoid the application of the prohibition. In our view, this position is widely accepted and non-controversial. Any redefined test would require an equivalent measure.

3	Do you agree that interconnected bodies corporate should be treated the same as a single firm?

The threshold for the prohibition

98. The prohibition should only apply to firms with market power above a certain threshold. Firms without much market power cannot have any significant effects on competition when they act alone. A threshold also sets a line so that firms without much market power know they are not subject to the prohibition. The question is where to set the threshold.

99. The current section 36 applies to a person with "a substantial degree of power in a market". The new Australian provision maintains the same threshold with the same wording. This formulation of section 36 was introduced in 2001 to replace the previous threshold of "dominance". This threshold seems both sensible and non-controversial. We propose maintaining it for a new effects-based prohibition.

4	Do you agree that "a substantial degree of power in a market" is an appropriate threshold for the prohibition?

100. Section 46 of the Australian legislation includes a number of extra sub-sections that expand on the concept of market power. We deal with these briefly below but do not propose adopting any of them. The relevant parts of section 46 state:

> *(4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate have in a market:*
>
> > *(a) regard must be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:*
> >
> > > *(i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or*

(ii) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market; and

(b) regard may be had to the power the body corporate or bodies corporate have in that market that results from:

(i) any contracts, arrangements or understandings that the body corporate or bodies corporate have with another party or other parties; or

(ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.

(5) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:

(a) the body corporate does not substantially control that market; or

(b) the body corporate does not have absolute freedom from constraint by the conduct of:

(i) competitors, or potential competitors, of the body corporate in that market; or

(ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

(7) To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.

101. In our view, these sections merely re-state some of the factors required for an assessment of market power. These are the factors that a court would be expected to consider as part of its assessment. They do not add anything to the threshold test.

5	Do you agree that a new prohibition does not require any equivalents to the Australian section 46(4)-(7)?

What should be prohibited?

Conduct

102. The prohibitions are generally framed as a prohibition on conduct with a certain effect. The design choices are to leave the conduct undefined, or to specifically prohibit exclusionary conduct. Prohibiting exclusionary conduct requires either a definition of the conduct in question, or a list (exhaustive or non-exhaustive) of the types of conduct in question. Defining or listing exclusionary conduct can lead to overlap with other elements of the prohibition.

103. The Australian prohibition simply prohibits a firm from "engaging in conduct" that has an anti-competitive purpose or effect. As such, the legislation provides no definition or guidance on the forms of conduct that are subject to the prohibition. One critique of this approach is that it doesn't specify that the prohibited conduct is *exclusionary conduct* with the purpose or effect

of a substantial lessening of competition in a market.[32] In theory, it could prohibit conduct that leads to a substantial lessening of competition but has no exclusionary motive, such as a dominant firm choosing to exit the market. We do not think this is likely to be an issue in practice.

104. There are a few approaches to defining exclusionary conduct. The South African Competition Act 1998 defines an "exclusionary act" as an act that impedes or prevents a firm from entering into, [participating in,] or expanding within, a market.[33] One part of the legislation lists specific exclusionary acts and another is a catch-all that requires the exclusionary nature of the act to be proven. The Competition Tribunal of South Africa has not imposed a single test of what constitutes an exclusionary act and is prepared to consider multiple tests, depending on the type of conduct. Some of these tests consider purpose (either objective or subjective purpose), as well as the "no business sense" test. Sometimes the tests can also consider effects.[34]

105. The Canadian Competition Act 1985 defines an "anti-competitive act" by enumerating that:

without restricting the generality of the term, includes any of the following acts:

a. *squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;*
b. *acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;*
c. *freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;*
d. *use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;*
e. *pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;*
f. *buying up of products to prevent the erosion of existing price levels;*
g. *adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;*
h. *requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and*
i. *selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.*

106. As the list is non-exhaustive, case law has expanded it to encompass any act carried out by a dominant firm for an anti-competitive purpose. In establishing the requisite anti-competitive

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[32] Fisse, B. (2015). *The Australian Competition Policy Review Final Report 2015: Sirens' Call or Lyre of Orpheus?* Paper presented at the New Zealand Competition Law & Policy Institute, 26th Annual Workshop, Auckland, New Zealand, 16 October 2015), p. 11.

[33] Square bracketed text is from a proposed amendment bill.

[34] *Competition Commission of South Africa v Media 24 Ltd* (CT Case No 013938/CR154Oct11, 8 September 2015) from page 55 onwards.

purpose, evidence of subjective intent is not required, but is probative. The intended purpose can also be inferred based on the reasonably foreseeable consequences of the act. A valid business justification can also provide an alternative explanation for the acts.[35]

107. However, if the conduct in question is on the list, the inquiry into purpose is only slightly truncated. The Canadian Competition Tribunal has stated that each of the types of conduct listed in section 78(1) incorporates an element of purpose (e.g. by reference to the "purpose", "object" or "design" of the conduct) and that this is an element that must be proved in respect of each of the listed types of conduct[36].

108. Listing specific types of conduct has the advantage of giving clearer guidance on the types of conduct that are prohibited, but it leads to a 'laundry list' which is not a very elegant form of legislative drafting. There are a very large number of ways in which a monopolist can engage in exclusionary conduct and it is almost impossible to come up with a complete list.

109. Defining the conduct also seems to leads almost inevitably to an inquiry into purpose (for many of the listed forms of conduct and any new forms of conduct in Canada) or effects (the EU[37] and South Africa). This can create overlap between the different elements of the prohibition. Purpose and effects are covered further in the next section.

6	Should a new prohibition define the types of proscribed conduct? Should a new prohibition describe or list the types of proscribed conduct?

The purpose and/or effects of the conduct

110. The prohibitions that we have examined can require both purpose and effect, or only one of these two elements.

111. The Australian prohibition prevents a firm with a substantial degree of market power from engaging in conduct that has the **purpose, effect or likely effect**, of substantially lessening competition. The exact formulation of this wording about purpose and effects is the same as section 27 of New Zealand's Act. This section provides a brief overview of purpose, effect and likely effect as well as critiques of this approach. Only one element of the three needs to be proven.

Purpose

112. "Purpose" is not the same as "intention". Intention to do something known to have anti-competitive consequences is not enough. "Purpose" implies an object or aim to lessen competition.[38] The courts have also found a person to have an anti-competitive purpose when an anti-competitive consequence is inseparable from the object or aim of the conduct.[39] Purpose can be assessed objectively or subjectively. The courts seem to have seen the distinctions between objective and subjective assessments as "unimportant in practice".[40] Arguably, the courts are moving towards an objective purpose in refusing to condemn

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[35] Musgrove, J (ed). (2015). *Fundamentals of Canadian Competition Law.* Carswell: Canada.
[36] See *Commissioner of Competition v Air Canada* 2003 Comp Trib 13 (22 July 2003) [54]; Competition Bureau, Canada, 'Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act' (20 September 2012) 10–11.
[37] European Commission *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking* OJ C 45, 24.2.2009, p. 7–20 at [19-22]
[38] *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC) at 707
[39] See *NZ Apple & Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158 (CA) and *ARA v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647
[40] *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 104

agreements that may have an anti-competitive purpose but cannot plausibly have an anti-competitive effect.[41] However in Australia, purpose is assessed subjectively.

113. In New Zealand, "[p]roof of purpose … will often turn upon inferences drawn from actions and circumstances, with a sprinkling of internal memoranda and correspondence."[42] Section 36B (introduced in 2001) explicitly allows purpose to be inferred from conduct and other relevant circumstances, though this is largely a codification of the case law.

114. This approach to purpose is very similar to the Canadian method of defining anti-competitive acts, described above.

Box 1: Section 36 and purpose

Section 36 has proscribed purposes. These are:

- restricting someone from entering into a market;
- preventing someone from competing in a market; and
- eliminating someone from a market.

These purposes are anachronistic in modern competition law because they are focussed on *competitors*, rather than the *competitive process* itself. They also seem inconsistent with the overall purpose and scheme of the Act and its focus on the long-term benefit of consumers. The current purpose element is over-inclusive as almost all firms in competitive markets would have had these proscribed purposes at many times. Proving this element of a section 36 claim is generally straight-forward and it is not useful for distinguishing between anti- and pro-competitive behaviour.

If the current purpose element of section 36 were amended to focus on the effects on competition (rather than competitors), it would become a type of effects test. This would create a prohibition with both the counterfactual use test and an effects test. This would increase enforcement costs without addressing the criticisms of the overall scheme. We have not analysed this option any further.

Effects

115. An effect refers to what has actually happened and a likely effect refers to future effects. The Court of Appeal stated that the level of probability for likely is "above mere possibility but not so high as more likely than not and is best expressed as a real and substantial risk that the stated consequence will happen".[43]

116. Effects and likely effects also connote the passage of time. An analysis of "effects" generally occurs after the fact, because the effects aren't known until they have occurred. "Likely effects" is generally an up-front analysis because it is a consideration of what could occur in the future. Including likely effects in the prohibition can protect against future harm.

'And/Or'

117. The Australian law requires proof of either purpose or effects.

118. Both the Canadian and South African prohibitions require three elements:

    a. a firm with a dominant position;

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[41] *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 at [257]
[42] *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC) at 707
[43] *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 562-3

b. engaging in anti-competitive conduct;

c. that has the effect of lessening competition in the market.

119. The second element of engaging in anti-competitive conduct is an inquiry in to the purpose (Canada) or effect on another competitor (South Africa) of the conduct. The Canadian approach requires purpose and effect. The South African prohibition requires proof of effects, without necessarily requiring consideration of purpose.

Discussion and critique

120. A number of commentators on the Australian law reform have discussed the potential over-reach of subjectively assessed purpose. [44] Minter Ellison proposed removing "purpose" and focussing the test solely on effects, as subjective purpose leads to far too much effort being expended on attempting to control internal communications. Katherine Kemp has argued instead for an assessment of objective anti-competitive purpose. [45] In our view this is less of an issue in New Zealand given the different approach to purpose in our case law.

121. Another critique is that conduct under the Australian law will be judged after the fact, but the business in question has to make up-front decisions based on limited information. It is suggested by some that this could have a small chilling effect on business conduct as businesses would be concerned about the risk of liability, even if the conduct wouldn't ultimately be captured by an SLC test.

122. There are a number of ways to address the potential for uncertainty outlined above, including:

a. specifying or narrowing the definition of the conduct (see discussion above under "conduct");

b. providing specific tests for specific categories of conduct (discussed in the next chapter); and

c. authorisations or other exemption mechanisms (discussed in the next chapter).

7	Should the prohibition focus on purpose OR effects, purpose AND effects, solely purpose, or solely effects? Please provide reasoning.
8	Should purpose be defined as per the existing case law or should it explicitly be an objective purpose? Should section 36B and/or an equivalent provision be retained?

The Substantial Lessening of Competition test

123. All effects-based prohibitions obviously require some effect on competition for conduct to be prohibited. This section considers the threshold for that effect and the nature of that effect.

124. "Substantially lessening competition" is a term already used in the Act. Section 2(1A) defines "substantial" as meaning "real, or of substance". Subsequent case law has clarified that "substantial" does not mean "objectively 'big', but merely something more 'than 'insubstantial' or 'nominal'…The merely ephemeral and minimal will not suffice. Inevitably,

[44] See for example submissions on Australian Treasury discussion paper *Options to strengthen the misuse of market power law* at **https://treasury.gov.au/consultation/options-to-strengthen-the-misuse-of-market-power-law/**

[45] Kemp, K. (2016). *A Third Way: Objective Anticompetitive Purpose*. Submission in response to on Australian Treasury discussion paper *Options to strengthen the misuse of market power* law. Retrieved from **https://static.treasury.gov.au/uploads/sites/1/2017/06/C2015-061_Kemp_Katharine.pdf**

that will involve some attention to relativity; and in the end be a question of judgement on a matter of degree."[46]

125. Section 3(2) provides that references to "the lessening of competition include references to the hindering or preventing of competition."

126. Section 3(1) defines "competition'" as "workable or effective competition".

127. To assess whether or not conduct has the effect of substantially lessening competition, one must compare the (likely) state of the market after the conduct in question with the (likely) state of the market in the absence of the conduct. This is a counterfactual test, but it should not be in any way confused with the counterfactual test used to assess "taking advantage" under section 36. This counterfactual is sometimes referred to as the "with and without test".[47]

128. The Commission formulated a helpful list of questions in *Re Weddel Crown Corp Ltd*. [48] These questions assist in evaluating whether competition is substantially lessened:

    a. What is the extent to which competition is foreclosed by the [conduct], and what alternatives do others in the market have?

    b. Does the [conduct] have the effect of threatening independent initiatives of operators in the market?

    c. Does the [conduct] have the effect of causing operators in the market to compete less vigorously?

    d. Does the [conduct] enable the [dominant firm] to exercise power over other, for example, over persons contracting with the [dominant firm] or their competitors?

    e. Does the [conduct] affect the ability or desire of potential entrants to enter the market in question?

129. An SLC is not the same as substantially lessening the effectiveness of a particular competitor. For there to be an SLC, the effect must be more than short term and must have an impact on the competitive process in the market. Competition is harmed if there is an increase in market power or existing market power is protected.

130. The SLC test is concerned with the net effect on competition. The High Court has taken into account pro-competitive efficiency gains when considering whether or not there has been an SLC.[49] The Court has, however, limited the analysis to effects in the same market.

131. In the context of the Australian reforms, some commentators have criticised the "substantial" elements of the SLC test as a vague standard that is interpreted inconsistently and with very vague and uncertain thresholds. [50] These concerns may be tempered by the different New Zealand case law and the greater judicial guidance on matters such as price increases and duration of effects.

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[46] McGechan J in *CC v Port Nelson Ltd* (1995) 6 TCLR 406; (1995) 5 NZBLC 103,762

[47] Noonan, C. (2017). *Competition Law in New Zealand.* Thomson Reuters.

[48] *Re Weddel Crown Corp Ltd* (1987) 1 NZBLC (Com) 104,200 at 104,212

[49] *See Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd* (1997) 7 TCLR 463, 528-531 *and Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC) at 740 and 741. This approach was also endorsed in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 at 349. This approach is different to Australia, where efficiencies are not taken in to account in the SLC analysis.

[50] See Fisse fn 32 and Kemp, K. (2017). *'The Big Chill? A Comparative Analysis of Effects-Based Tests for Misuse of Market Power* 40(2) University of New South Wales Law Journal.

9	Is a "substantial lessening of competition" the appropriate standard for the prohibition? If not, do you have any alternative suggestions? Does the SLC standard provide enough certainty to assess conduct before it is undertaken?

Market definition

132. The prohibition has to relate the effects on a market or markets. Market definition is already reasonably well understood in the context of the Act and this section sets out that understanding as well as setting out choices to be made when effects are found in more than one market.

133. Section 3(1A) of the Act says that the term "market" is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them. The classical exposition on market definition principles comes from *Re Queensland Co-op Milling Association Ltd*: [51]

> *"A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another.*
>
> *As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.*
>
> *It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities would we expect a relatively high demand or supply response to price change, ie, a relatively high cross-elasticity of demand or cross-elasticity of supply?"*

134. The principles of market definition are reasonably well agreed. In the context of unilateral conduct, market definition would come in to play at two points:

    a. in the assessment of the threshold test for market power; and

    b. in assessing the effects of the conduct.

135. There are two issues about market definition that are different in the context of a unilateral conduct claim.

136. The first is that market definition is an instrumental exercise. It is a tool to assist the broader inquiry. "[T]he boundaries [of the market] should be drawn by reference to the conduct at

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[51] (1976) 25 FLR 169

issue, the terms of the relevant section or sections, and the policy of the statute."[52] This can lead to different market definitions for different causes of action. The appropriate market definition for the merger of a national rental car companies may be a national market but a single airport market may be more appropriate to analyse the competition issues arising from the exclusion of a rental car company from an individual airport.[53]

137. The second issue is that a firm may have market power in one market but create an SLC in a different market. The Australian legislation expressly provides for the SLC to occur in other markets. As an example, tying relies on leveraging market power in one market to gain an advantage in another market. The question is whether with these types of practices, the anti-competitive effects occur in a different market from the pro-competitive effects. As discussed above, the courts have limited themselves to only balancing pro-competitive and anti-competitive effects in the same market when assessing an SLC. In the current scheme of the Act, balancing different effects in different markets is only possible through the authorisation process. This issue is discussed further in the section below on authorisation.

10	Can you provide any examples of exclusionary conduct where the anti-competitive effects and the pro-competitive effects occur in different markets? Should the prohibition enable a balancing of pro- and anti-competitive effects that occur in different markets?

Our preferred option is based on the Australian law

138. Based on the discussion above, our preferred option would be to adopt and adapt the Australian law. This is because:

   a. This would fit most closely with the general scheme of the Act, which is based on the Australian legislation.

   b. New Zealand courts are likely to pay close attention to and often follow the Australian case law. This enhances the body of case law available to New Zealand market participants and helps to improve certainty.

   c. Businesses may operate with a substantial degree of market power in both Australia and New Zealand.

   d. The same unilateral conduct may have effects in markets in both New Zealand and Australia (e.g. freight and transportation services across the Tasman originate in one market and terminate in the other).[54]

139. Our simplified version of the Australian prohibition is as follows:

   A person that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.[55]

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[52] *Telecom Corp of New Zealand Ltd v Commerce Commission* (1991) 3 NZBLC 102,340 (HC) at 102,360

[53] Compare *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport)* Ltd [1987] 2 NZLR 647 (HC) at 677 with *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305 (FCA) as discussed in both Noonan and Gault

[54] We are not implying that there are any particular issues with unilateral conduct in freight and transportation services across the Tasman. More generally, the air cargo cartels have raised issues for competition enforcement for conduct that spans different national markets.

140. MBIE notes that Australian legislation is drafted in a different style to New Zealand's, with a higher level of specification. In the Australian Competition and Consumer Act 2010, case law is sometimes codified in to the legislation through amendments. We are not proposing the adoption of a similar drafting style, even if we adopt the substance of their prohibition.

141. While an effects-based prohibition on unilateral conduct would be novel in the Act, many of the terms and concepts employed are already defined and used in other parts of the Act. At the heart of the effects-based prohibition is a test for a substantial lessening of competition (SLC). SLC tests are used for assessing agreements under section 27 and mergers under section 47. It is a well understood concept in New Zealand and Australian law, and there would already be a body of case law to draw on in helping to understand the new prohibition.

Overall assessment of the generic prohibition

142. Based on the discussion above, an effect-based prohibition would come very close to following the idealised analysis outlined earlier in this chapter. There are only two areas where this is not the case:

   a. The first issue is that based on current case law, the courts would not be able to balance pro- and anti-competitive effects that occur in different markets. This issue is outlined in greater detail in the section above on markets.

   b. The other issue is that in weighing up pro- and anti-competitive effects, the courts have not considered if the conduct is the least anti-competitive means of achieving the pro-competitive effects. This test is sometimes referred to as a "less restrictive alternative" in the US jurisprudence. Explicitly introducing a less restrictive alternative test would assist in reducing harm to competition. On the other hand, it may over-complicate the analysis, given that it is already possible to balance pro- and anti-competitive effects in the same market.

143. The generic effects-based prohibition is likely to reduce the risk of both false negatives and false positives, compared to the status quo. This comes at the expense of some certainty for businesses, and the potential for some compliance costs. The next chapter considers ways of remedying this.

11	Should a "less restrictive alternative" test form part of the analysis when assessing conduct with both pro- and anti-competitive effects?

[55] All that has been done to the Australian provision is replace "corporation" with "person" and summarise 46(1)(b)-(d) as "a market". While this looks very much like the possible drafting of a legislative provision, we are not tied to this exact wording.

6 Section 36: Providing certainty

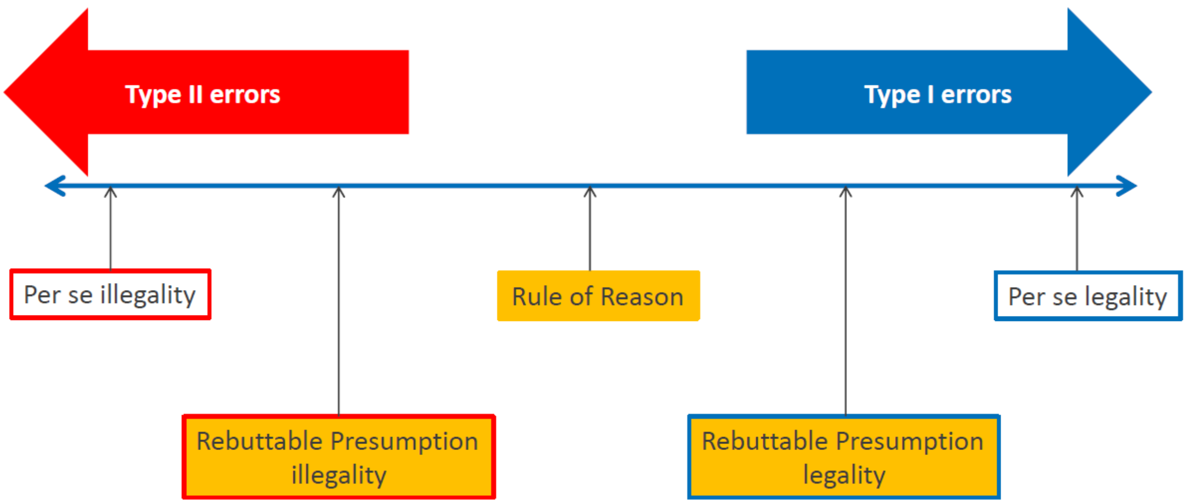
144. The previous chapter outlined the formulation of a generic prohibition against anti-competitive unilateral conduct. A major criticism of the generic prohibition is that it does not provide a high degree of certainty about how the regulator, or courts, will interpret the provision and apply it to specific conduct. This chapter considers a range of tools for providing greater certainty on specific forms of anti-competitive unilateral conduct. It covers prohibitions on specific forms of conduct, and legislative and non-legislative means of achieving greater certainty.

Specific prohibitions

145. Specific prohibitions help give greater certainty to businesses about how certain types of conduct will be assessed without having to go through a full effects analysis. Specific prohibitions may either prohibit conduct outright (a per se prohibition) or make it subject to a different test or standard than a full blown effects analysis (e.g. a predatory pricing prohibition on dominant firms selling at prices below long run average incremental cost).

146. Prohibiting specific forms of conduct is a complement to a generic prohibition, rather than a substitute for one. Specific prohibitions can only cover the most well-known and common forms of abuse. The types and varieties of abuse have increased over time as dominant firms have come up with new ways to leverage their market power. As an example, an emerging area of abuse in the US and Europe is companies making misleading representations to patent offices and standards bodies to maintain or enhance their market power. A generic prohibition is important for assessing novel behaviours that do not necessarily fall neatly in to existing definitions.

147. We have found Jorgé Padilla's schematic on legal standards useful for thinking about the different types of rules and the risk of related errors: [56]



[56] Padilla, J. (2016). *Using Competition Law to Control Unilateral Market Power: An Economist's Perspective.* Presentation to the Competition Law and Policy Institute of New Zealand annual conference 26 August 2016.

148. Specific prohibitions are not always found in primary legislation. Prohibitions and guidance on specific forms of conduct are found in the entire infrastructure of the competition system: primary and secondary legislation, case law, competition authority guidelines (binding and non-binding) and competition authority practice. This discussion document is chiefly concerned with changes to primary legislation. The questions that follow focus on possible changes to the Act and consider any necessary changes to enable greater certainty to arise from secondary legislation or guidelines.

Specific prohibitions in other jurisdictions

149. Australia's legislation has no specific prohibitions against unilateral conduct. However there are two prohibitions against vertical conduct that also apply to firms with market power. These are the prohibitions against exclusive dealing and resale price maintenance. It is a defence to exclusive dealing to argue that the arrangement does not substantially lessen competition. This means exclusive dealing is treated under a rebuttable presumption of illegality, in the Padilla schematic.

150. The United States has a very minimal statutory prohibition. All the rules for assessing unilateral conduct come from case law, which is extensive and has evolved over time. There are quite detailed rules in the case law on how to analyse specific forms of conduct. The US enforcement agencies do not currently have any public guidelines or guidance on how they approach enforcement.

151. The European Union Treaty has a non-exhaustive list of conduct that is subject to the prohibition on abuses of a dominant position. There is also a "block exemption" exempting companies below a certain market share threshold from the law. The European Union also has an extensive body of case law. The European Commission has also published guidance on how it approaches enforcement of abuses of dominance.

152. Canada's law also has a non-exhaustive list of conduct that is subject to an effects-based test. In addition, the Canadian Act also regulates some specific forms of vertical conduct that are relevant to firms with market power. In refusal to deal cases, the courts can order the supplier to supply. In resale price maintenance cases, the courts can stop the practice. In exclusive dealing, market restriction, or tying cases with an SLC, the courts can impose remedies that stop the practice. The Canadian legislation is supplemented with case law and enforcement guidelines from the Canadian Competition Bureau.

153. The South African law is interesting for being a newer competition law that is explicitly based on overseas experience and designed with a view to maximising business certainty. In addition to a generic prohibition, the legislation deems:

a. exclusive dealing;

b. refusals to deal;

c. tying;

d. below-cost predatory pricing; and

e. buying up scarce resources,

to be exclusionary acts. However the complainant still has to prove their anti-competitive effects. The South African law is supported by some case law.

Per se condemnation

154. Over time competition law has evolved to be more informed by economic analysis. Over this period, a number of vertical practices and forms of unilateral conduct in North America and

Europe have shifted from the category of outright, per se condemnation in to some form of inquiry about their effects or rule of reason analysis. In the US, tying is the last form of unilateral conducts where there are vestiges of per se condemnation, though its position is somewhat ambiguous.

Other specific prohibitions in primary legislation

155. A number of jurisdictions (EU, Canada, and South Africa) list specific prohibited forms of conduct. However, these specific forms of prohibited conduct generally still require proof of their anti-competitive effects and/or purpose. Standards and tests for particular forms of conduct evolve and change over time and there is a risk that if included in statute, the prohibition risks becoming outdated or out of step with the economic theory. For example, the South African government is currently proposing additions and amendments to their predatory pricing tests.

156. Our preliminary view is that there should not be any specific prohibitions on anti-competitive unilateral conduct in the Act.

12	Are there any forms of anti-competitive unilateral conduct that should be specifically prohibited in the Commerce Act?

Providing certainty through other means

157. As discussed above, prohibitions and guidance on specific forms of conduct can be set out in secondary legislation, case law, and competition authority guidelines.

Secondary legislation

158. The term 'secondary legislation' is the term used in the Legislation Bill to cover any law-making function under a Parliamentary Act.[57] It encompasses a range of forms including regulations, proclamations, Orders in Council, bylaws, rules, and codes. Secondary legislation can be made by different bodies, or officers within or outside the executive.

159. The Legislative Design and Advisory Committee Legislation Guidelines set out a series of competing considerations to balance in determining what is appropriate for Parliament to delegate[58]:

    a. **The legitimacy of the law** – important policy content should be a matter for Parliament to determine in the Act through an open democratic process. Too much delegation undermines the transparency and legitimacy of the law.

    b. **The durability and flexibility of the law** – Delegation can be important to how a law performs over time in terms of responding to changing or unforeseen circumstances.

    c. **The certainty and predictability of the law** – If too much policy content is delegated or delegations are given to different decision makers without clearly scoped mandates, clarity about what is required by the law can be undermined.

[57] Legislation Bill, Government Bill 275 – 1 http://www.legislation.govt.nz/bill/government/2017/0275/latest/d56e2.html Note that the Bill will remove the distinction between secondary and tertiary legislation.

[58] Legislative Design and Advisory Committee. (2018). *Legislation Guidelines: 2018 Edition.* Retrieved from http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/

d. **The transparency of the law** – Layers of secondary legislation can create complexity and fragmentation in a regime, making it difficult for readers to find and understand the law. However, too much technical detail in an Act might make it difficult to navigate.

160. Secondary legislation should not cover matters that are more appropriate for primary legislation. The following are some of the examples of subject areas that may be appropriate for secondary legislation:

a. Technically complex matters.

b. Subject matter that requires flexibility or updating in light of technological developments in an area.

c. Material that requires input from experts or key stakeholders.

161. At least one commentator has suggested that transparent secondary legislation may preferable to case law in dealing with unilateral conduct.[59] Secondary legislation could be well suited to setting detailed rules for the analysis of practices such as predatory pricing. Secondary legislation could also be useful for creating exemptions and safe harbours such as specifying a market share threshold below which there can be no presumption of substantial market power.

162. Who holds the power to make secondary legislation is a key design question. If secondary legislation were to be made regarding unilateral market conduct, it could be made by either the Governor-General in Council or the Commission. The Guidelines state that the more technical the exercise of the power, the more likely it is to be appropriate for delegation to another agency. The Commission is the obvious organisation with the requisite technical expertise. The Commission does not currently have any secondary legislation-making powers. However, the input methodologies under Part 4 of the Act are not dissimilar to secondary legislation.

163. Having the Commission both develop the rules and enforce them could be problematic, even if the rules were subject to some form of review. The input methodologies under Part 4 can also be distinguished in a number of ways:

a. Price-quality paths (the outcome sought under part 4) cannot be established without the input methodologies.

b. Before they are created, it is known exactly who the input methodologies will apply to. This ensures that affected parties have a strong incentive to seek merits review if they believe the Commission could have developed a better approach.

c. The subject matter of input methodologies is relatively constrained: they are required for the inputs or building blocks to developing a price path.

d. It would be inappropriate and inefficient for input methodologies to be developed through either guidelines or case law.

164. Our current view is that we do not support secondary legislation as a means of providing greater certainty for anti-competitive unilateral conduct.

13	Should the Act provide for secondary legislation to provide greater certainty for anti-competitive unilateral conduct? If so, who should hold the power to make secondary legislation?

[59] Hodder, J. (2016). *Reform of Misuse of Market Power Law: One Lawyer's Reflections (Or Reform? Reform! Aren't things bad enough already?)* Paper at CLPINZ 27th Annual Workshop, Wellington, 26 August 2016.

Commerce Commission guidelines

165. The Commission has produced guidelines in a number of areas including on competitor collaborations, and mergers and acquisitions. These guidelines are only morally binding on the Commission and have no effect on private parties that may wish to take action. The Courts may also have regard to the guidelines but are under no obligation to do so.

166. Despite their non-binding nature, guidelines are useful for increasing business certainty and the Commission is very likely to produce guidelines on anti-competitive unilateral conduct if there is a law change.

Case law

167. While new, the generic prohibition is likely to be able to draw on existing case law. This case law will be very useful for the analysis of a substantial lessening of competition. However, case law may not be particularly helpful in predicting how the courts will approach the analysis of specific types of conduct, if courts choose to develop specific rules for specific conduct. For example, an SLC analysis may well lead to the conclusion that below cost predatory pricing with some prospect of recoupment is an appropriate standard for analysing predatory pricing. However, the current case law gives no guidance on which particular cost measures the courts are likely to endorse for the analysis. The closer our legislative wording is to the Australian wording, the more we can draw on their case law. However, their provisions are new so it will be a while before there is a useful body of case law.

168. Overall, moving to an effects-based test makes it easier to draw on case law from other overseas jurisdictions as they have a similar approach in their legislative framework.

Authorisations

169. The Commission has the power to grant authorisations for practices that would or might breach certain sections of the Act, if the Commission is satisfied that the practice would result in public benefits that outweigh the harm to competition.

170. Authorisation has never been available for section 36 and was only introduced in Australia for unilateral conduct with the shift to an effects test. There does not appear to be any compelling reason why authorisation should not be available for unilateral conduct in the same way that it is for mergers or agreements.

171. Authorisation can be a useful mechanism to provide greater up-front certainty to businesses. In general, the authorisation process helps mitigate the effects of any 'false positives' created by the primary prohibition. Authorisation is also probably the most useful mechanism for dealing with situations in which pro-competitive effects occur in one market and anti-competitive effects occur in another market.

172. On the other hand, the authorisation process is seen by stakeholders as expensive and time-consuming, and therefore unlikely to be suitable for providing certainty around the types of day-to-day business decisions that are made. Nevertheless, in our view, authorisation should be available for unilateral conduct.

14	Should authorisation be available for unilateral conduct?

7 Section 36A: Misuse of Trans-Tasman Market Power

173. As part of the Closer Economic Relations review in 1988, the Australian and New Zealand governments agreed to remove protections against dumping (the situation where a business sells its goods at a cheaper price in a foreign country than its home country) for goods traded across the Tasman. Instead, reliance was placed on generic competition law to protect against conduct such as predatory pricing (which can be a factor in dumping). To enable this, section 36A was inserted in to the Act to enable consideration of market power in Australia or a Trans-Tasman market. The theory is that firms with market power in Australia could leverage that power in New Zealand and vice versa. The Australian legislation was amended with a reciprocal provision: their section 46A.

174. Section 46A was considered by the Harper Panel. The next three paragraphs quote the Harper Panel findings, with square bracketed adjustments for New Zealand readers:

175. *"Insofar as a [person] takes advantage of market power in a [New Zealand] market or a market that spans both Australia and New Zealand, section [36A] overlaps with section [36] in the [Commerce Act] and is redundant. The principal circumstance in which the section has potential additional operation is if a firm with substantial market power in an [Australian] market (but not a [New Zealand] market) takes advantage of that power to harm a competitor in a [New Zealand] market involving the supply of goods.*

176. *"The Panel questions the continued utility of the section because:*

    - *First, since its enactment in 1990, the Panel is aware of only one case in which it has been invoked — an application for an interlocutory injunction, which was unsuccessful: Berlaz Pty Ltd v Fine Leather Care Products Ltd (1991) ATPR 41-118.*
    - *Second, it is doubtful that the section is able to achieve its original aim — to prohibit predatory pricing in a [New Zealand] goods market by a firm with market power in [Australia]. This is because predatory pricing in those circumstances would typically require the predatory firm to possess market power in the [New Zealand] market, not an [Australian] market, since the predation could not be successful without market power in the [New Zealand] market.*

177. *"Nevertheless, since section 46A was enacted as part of a package of reforms agreed between Australia and New Zealand relating to the trade in goods between the countries, its reconsideration should occur through consultations between both jurisdictions. Factors that might be considered during such consultations include:*

    - *whether the reciprocal prohibitions in the [Australian Competition and Consumer Act 2010] and New Zealand's Commerce Act have any significant operative effect;*
    - *if section 46 of the [Australian Competition and Consumer Act 2010] is reformed in line with the Panel's recommendation, whether the reciprocal prohibitions in both Acts ought to be reformed in like manner; and*

- *if the reciprocal provisions are retained, whether they should be extended to markets involving the supply of services.*" [60]

178. It is appropriate to revisit section 36A, given that the Australian government amended section 46 of Australian Competition and Consumer Act 2010 and we are considering similar changes to section 36 of the Act. We are seeking views on the operation of this section to inform consultations with the Australian government.

15	In your view, does section 36A have any practical effect? Should section 36A be retained or repealed? If section 36 is changed, should section 36A be changed to mirror the new section 36?

[60] Harper, I. et al. (2015). *Competition Policy Review* Final Report March 2015. Retrieved from **http://competitionpolicyreview.gov.au/**

8 Section 36: Options Identification and Impact Analysis

179. The previous two chapters outlined a range of potential design options for a redeveloped prohibition against anti-competitive unilateral conduct. This chapter presents what we consider to be the most feasible design proposition for a revised section 36, as well as other possible options for change, and then assesses and compares the impact of different options.

Initial proposition

180. Our initial proposition is to adopt a version of Section 46(1) of the Australian Competition and Consumer Act (with appropriate drafting modifications and adaptations):

A person that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

181. In addition, authorisations would be available for section 36 to address concerns about a lack of certainty in this model.

16	Do you support our initial proposition? If not, why not?

Other options considered

182. We have briefly considered a few options for change other than an effects-based test but rejected them as unfeasible.

Reliance on Section 27

183. Some submitters argued that section 27 is an appropriate backstop for the under-inclusive nature of section 36. Section 27 has already been used in some unilateral conduct cases, generally in conjunction with section 36. Much of the discussion above on designing a new prohibition has drawn on the section 27 case law.

184. This discussion ignores the crucial distinction between sections 27 and 36. Section 27 is aimed at agreements between parties whereas section 36 is aimed at the conduct of a single party. Sometimes unilateral conduct will manifest in agreements between parties but sometimes there is no agreement or proving an agreement is inappropriate. In refusals to deal, the whole point of the infringement is that there is a refusal to enter in to an agreement.

185. For conduct such as predatory pricing, the only agreement would be the sale by the predatory firm to consumers. While these sales manifest as agreements, individual sales in a spot market or on very short term contracts have no effect on competition. What matters is the firm's pricing policy, not previous pricing behaviour of short duration.

186. Additionally, all parties to an "agreement" with an SLC have breached the Act and are subject to liability. It seems unreasonable that innocent customers who could not even reasonably discover the breach would be subject to condemnation by the Act.[61]

187. We do not consider section 27 to be a reliable backstop for the current section 36 or an alternative to it.

Minor modification of the current section 36

188. The greatest difficulties with section 36 lie in the strict hypothetical counterfactual test required to assess whether a firm has "taken advantage of" its market power. This is an issue that has been around for a long time and various solutions have been tried. The reforms to the Act in 2001 were intended to overturn previous Privy Council decisions along these lines by changing "use" to "take advantage of". The intervention by the Attorney-General in the 0867 case was also directed towards a move away from a strict hypothetical counterfactual test. [62]

189. In Australia, there was older case law (e.g. *Queensland Wire*) which permitted more flexible approaches to the assessment of use/taking advantage. [63] Despite this, in recent times the Australian courts have moved towards the strict hypothetical counterfactual approach.[64] The Australian government tried tweaking their equivalent provisions by incorporating older case law in to a new provision – the then section 46(6A) outlining other ways in which "taking advantage" could be established. However, it is unclear that the Australian "false negative" cases would have been decided any differently under that approach.

190. In our view, we have already tried legislative approaches and judicial guidance to alter the hypothetical counterfactual test. It seems that the very idea of a "use" test seems to inevitably lead the courts to a hypothetical counterfactual test. Retaining a use-type test would also keep New Zealand out of line with the mainstream of international practice and with little prospect of new case law. As such, we have not analysed this option any further as a feasible option.

191. As noted in Chapter 5, we also do not consider amending the current purpose element of section 36 to focus on the effects on competition (rather than competitors) to be a viable option.

192. In our view, no legislative tweaking could remedy the difficulties with the current version of section 36. We consider that the costs and benefits, and assessment against the criteria, for minor modification of section 36 are not significantly different from the analysis of the status quo.

17	Do you agree with the rejection of these options as unfeasible? Are there any other options that should be considered?

[61] Carlton and Goddard. (2003). "Contracts that Lessen Competition – what is section 27 for, and how has it been used?" in M Berry & L Evans (eds), *Competition Law at the Turn of the Century: a New Zealand Perspective.* Victoria University Press.
[62] *Commerce Commission v Telecom* (2010) 12 TCLR 843.
[63] *Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1989) 167 CLR 177; 83 ALR 577; ATPR 40-925 (HCA).
[64] *ACCC v Cement Australia Pty Ltd* [2013] FCA 909

Impact analysis

193. This section assesses an effects-based test against the status quo, using the criteria set out in chapter 2.

Criterion 1: Minimise the risk of wrong answers that stop pro-competitive behaviour (false positives)

194. One possible critique of the Australian law is that conduct will be judged after the fact, but the business in question has to make up-front decisions based on limited information.[65] This could lead to a small increase in risk aversion among businesses, as they could be concerned about the risk of liability, even if the conduct wouldn't ultimately be captured by an SLC test. In our view, this effect is minor. Firms regularly have to assess agreements against the SLC standards.

195. We consider that there is unlikely to be any substantial difference between an effects-based test and the status quo when measured against this criterion.

Criterion 2: Minimise the risk of wrong answers that allow anti-competitive behaviour (false negatives)

196. A major criticism of the status quo is that under a number of plausible scenarios, anti-competitive behaviour will not be captured by the current test. On the other hand, the effects-based test is highly unlikely to produce false negatives. This is why we consider that the effects-based test is much better than the status quo on this criterion.

Criterion 3: Provide businesses with predictability for pro-competitive decision making and reasonable compliance costs

197. Any single principle-based test is likely to involve an element of unpredictability for businesses.

198. The description of the status quo has a discussion of the question of predictability. Many large businesses consider that the current formulation is easy to apply to their conduct. The Commission and other commentators view the current formulation as very difficult to apply and very sensitive to the assumptions that are made. We are of the view that the status quo makes it difficult for businesses to predict whether their conduct is likely to breach section 36. Some of the claimed certainty of the current test is likely to come from its under-inclusive nature (the false negatives) and the low likelihood of action by the Commission. This is not predictability for pro-competitive decision making.

199. For the effect-based test, businesses are used to the SLC test in other contexts and they and their advisors understand how to apply it. We think it is likely to produce more predictability for pro-competitive decision making than the status quo and is unlikely to differ significantly from the status quo in its compliance costs. The addition of conduct-specific guidelines will assist business decision-making. In our view, the shift to a known standard – the SLC test – makes the effects-based test option better than the status quo in respect of this criterion.

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[65] Kemp, K. (2016). *A Third Way: Objective Anticompetitive Purpose*. Submission in response to on Australian Treasury discussion paper *Options to strengthen the misuse of market power* law. Retrieved from **https://static.treasury.gov.au/uploads/sites/1/2017/06/C2015-061_Kemp_Katharine.pdf**

Criterion 4: Minimise the cost and complexity of enforcing cases in order to penalise and deter anti-competitive behaviour

200. The counterfactual test adds significant additional cost, complexity and uncertainty to a section 36 case for both parties. This is because of its requirement to construct a hypothetical market in which no player has substantial market power. This cost, complexity, and uncertainty reduce the risk of enforcement action and, accordingly, reduces the incentive on businesses to comply with the law.

201. By comparison, an effect-based test will be less complex and more certain for the Commission (and possible private sector plaintiffs) to enforce. Greater enforcement will deter more anti-competitive behaviour.

18	Do you agree with our assessment of this option against the criteria? If not, why not? Please provide evidence to support your answers.

Costs and benefits of an effects-based test

202. The table below summarises the expected costs and benefits of the effects-based test. The table only outlines the marginal costs and benefits of the option, i.e. costs or benefits additional to what would happen if no action were taken. Due to the lack of hard data on broader effects from improved competition, we have only quantified the costs and benefits where we can make reasonable assumptions.

Affected parties	Comment	Impact *$m*	Evidence certainty
Additional costs of effects-based test, compared to taking no action			
Businesses with a substantial degree of market power	One-off transition costs as businesses become acquainted with new law and may have greater uncertainty about the law in the initial stages.	\$0.6m[66] one off	Medium
All other businesses	None of significance	None	High
Commerce Commission	One-off transition costs as Commission is required to produce rules and guidelines. Ongoing costs from authorisation applications.	\$0.17m[67] per annum for authorisation – NPV \$1.95m[68] \$0.15m[69] one off transition costs	Medium
Wider government	None of significance	None	High
Other parties	None of significance	None	High

[66] Assume 30 businesses spending \$20,000 each on external legal advice. This is solely to reassess conduct where the business had previously sought legal advice under the old section 36 test.
[67] Assume 1 complex application (around \$500,000) every 3 years
[68] 6% discount rate for costs continuing over 20 years
[69] Based on preparation costs for criminalisation

Wider economy	None of significance	None	High
Total Monetised costs	Addition of one-off costs to NPV of ongoing costs.	$2.7m total	Medium
Non-monetised costs	None of significance	None	High

Additional benefits of effects-based test, compared to taking no action			
Businesses with a substantial degree of market power	Over time likely to benefit from greater certainty of rules around specific types of conduct.	Low	Low
All other businesses	Some could benefit from greater likelihood of success of private legal actions.	Low	Low
Commerce Commission	Less complex enforcement produces cost savings for the Commission. Greater certainty of outcomes enables Commission to be a more effective regulator.	Low	Low
Wider government	None of significance	None	High
Other parties	Potential new entrants more likely to enter markets and develop new businesses.	Low-Medium	Low
Wider economy	Gains to broader economy from improved static and dynamic gains from improved competition.[70] Attractiveness of New Zealand as an investment destination enhanced by more readily understood protections against anti-competitive unilateral conduct.	Low-Medium	Low
Non-monetised benefits		Low-Medium	Low

203. The potential costs of this change are reasonably straight-forward to estimate but these are relatively low: $2.7 million. The potential benefits are difficult to monetise, but only need to be greater than $2.7 million to make the changes worthwhile. With a number this low, even if the uncertainty is high, the overall assessment does not change substantially.

19	Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer.

[70] We examined the judgements in the *Data Tails* litigation in an attempt to estimate the losses caused by anti-competitive unilateral conduct. Despite extensive expert testimony from economists about a specific factual situation, the losses could only be described but not quantified. See: *Commerce Commission v Telecom Corp of New Zealand* HC Auckland CIV-2004-404-1333, 19 April 2011 at [29]-[43] and *Telecom v Commerce Commission* [2012] NZCA 344 at [43].

9 Treatment of Intellectual Property in the Commerce Act

Introduction

204. This section considers the interface between intellectual property (IP) rights and competition law. In New Zealand, the interface between IP rights and competition law is defined by three provisions in the Act. These sections either exempt certain forms of conduct relating to IP from being subject to competition law, or guide how such conduct is treated under the Act.

205. We consider that a review of this interface is desirable due to:

    a. changes in thinking on the interaction between IP rights and competition law;

    b. changes in technology and market practices; and

    c. the review of other sections of the Act providing a possible legislative vehicle for reform.

Background

206. At a high level, IP rights are the protections assigned to creations of the mind. Intellectual property can be protected by statutory intellectual property rights. New Zealand's intellectual property rights legislation includes:

    a. The Copyright Act 1994, which protects artistic works (such as photographs), graphic works (such as paintings) literary works (such as books), musical works, sound recordings, performances, films, dramatic works (such as a film script), and communications works (such as TV broadcasts).

    b. The Patents Act 2013, which protects new inventions.

    c. The Trade Marks Act 2002, which protects signs that distinguish the goods or services of one person from those of another.

207. IP can also be protected via the common law. For example, the tort of 'passing off' can protect unregistered trade marks, while an action for breach of confidence can protect trade secrets or 'know-how'.

208. Statutory IP rights give creators and innovators the exclusive right, for a limited time, to control what others may do with their work. This exclusive right is based on the idea that IP rights give people an opportunity to make a return on their investment in creativity or innovation. It also provides an incentive for creative or innovative activity that might not take place otherwise. The benefits that result from this additional creativity and innovation are generally considered to outweigh the costs imposed on society by IP rights (such as reduced choice for consumers and higher prices for products protected by IP rights).

209. As we understand it, in the early-to-mid 20th century, IP and competition law were seen as being incompatible with each other. This is because IP rights in effect grant a limited monopoly to the rights holder. This was seen as being inconsistent with the aims of competition law. As the thinking went, there was little point in granting IP rights if these would regularly and immediately fall foul of competition law. Partial exemptions from competition law for IP rights were consequently introduced in some jurisdictions as a way to address this conflict.

210. However, IP and competition laws are now generally seen as being complementary. IP rights incentivise creativity and innovation. Similarly, competition encourages innovation in new processes, designs and products. While IP rights may confer exclusivity, it is now generally accepted that the monopolies granted by IP rights are much narrower than the markets considered under competition law to assess effects on competition. As such, the availability of substitutes and competitive pressures generally ensures that IP rights holders do not have enduring market power.

211. For example, in the market for painkillers, a drug company may be given a patent for a specific form of painkiller. However, nothing prevents a second drug company from developing and selling another drug that achieves similar outcomes. The first company is therefore unlikely to have a monopoly in the market for painkillers in the competition law sense.

212. This has also been reflected in the way that courts have examined competition issues in relation to IP rights. For example, in the case of *Tru Tone Ltd v Festival Records*, the Court of Appeal held that each music album was not a separate market in itself; rather the relevant market was the New Zealand album market.[71]

Status quo

New Zealand

213. In New Zealand, the interface between IP rights and competition law is defined by three provisions in the Act. These provisions either exempt certain forms of conduct relating to IP from being subject to competition law, or guide how such conduct is treated under the Act. These sections are:

a. section 45;

b. section 36(3); and

c. section 7(2) and 7(3).

Section 45

214. Section 45 of the Act exempts contracts, arrangements or understandings – in so far as they contain a provision authorising any act that would otherwise be prohibited by reason of the existence of a statutory IP right – from the prohibitions in the Act relating to cartels (under section 30) and agreements (under section 27).

215. Statutory IP rights are defined in subsection 45(2) to be a right, privilege, or entitlement that is conferred, or acknowledged as valid, by or under:

a. the Patents Act 2013;

b. the Designs Act 1953;

c. the Trade Marks Act 2002;

d. the Copyright Act 1994;

e. the Plant Variety Rights Act 1987; or

f. the Layout Designs Act 1994.

216. The exemption does not cover provisions which contravene the prohibitions against unilateral exclusionary conduct (sections 36 and 36A) or resale price maintenance.

[71] *Tru Tone Ltd v Festival Records Retail Marketing Ltd [1988] 2 NZLR 352 (CA)*

217. Section 45 appears to have its origins in Germany's 1958 competition legislation. However, the provision in its current form only dates back to 1990. There is no case law on the exemption. As such, its exact scope is unclear. However, at a high level, the exemption means that granting a license to use and exploit intellectual property is not, in itself, a breach of the cartels or agreements provisions of the Act.

218. In addition, it appears that a licensing arrangement is exempt only if it would have been prohibited by IP rights, had the licensing arrangement not existed. For example, a contract that gives a licensee rights to distribute a patented product within a particular market would likely fall within the scope of the exemption, because it enables something that would otherwise be restricted by the IP right. However, a condition of that licence that required licensees to purchase other products from the licensor may fall outside of the exemption, because it restricts the licensee beyond the restriction imposed by the IP right itself.

219. While there is no case law on the scope of section 45, the Commission has investigated cases involving IP in the past. For example, in 2010 the Commission investigated royalty agreements between owners of music copyright and Phonographic Performance NZ Ltd in respect of a potential breach of section 27.[72] Similarly, the Commission's investigation report into a patent dispute regarding metal roof flashing stated that a breach of the Act was likely to have occurred.[73] This indicates that the Commission does not see itself as limited by the section 45 exemption in all instances.

Section 36(3)

220. Section 36(3) states that a person does not take advantage of a substantial degree of power in a market (as prohibited by section 36) by reason only that the person seeks to enforce a statutory IP right (as defined above).

221. As with section 45, the extent of the provision is unclear. The only case law on the provision to date involved the High Court ruling that section 36(3) allowed a holder of IP rights to file proceedings seeking to enforce its rights.[74] However, it is unclear whether a firm's refusal to license its IP counts as enforcement of its rights under section 36(3), or whether it does not and is therefore subject to the prohibition against the misuse of market power.

Section 7

222. Section 7(2) provides that the Act does not limit or affect any rule of law relating to breaches of confidence, and section 7(3) provides that no rule of law relating to breaches of confidence affects the interpretation of any of the provisions of the Act. A breach of confidence could include, for example, the disclosure of a trade secret.

223. Again, there is no case law on these provisions. A narrow interpretation of the provisions, advanced by Gault, is that issues of breaches of confidence and breaches of the Act must be examined separately, but that conduct which is a breach of confidence may still be subject to the Act.[75] On the other hand, a broader interpretation is that conduct which is a breach of confidence would not be subject to the Act.

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[72] Commerce Commission. (2010). *Commerce Commission closes investigation into music copyright holders*. Retrieved from **https://comcom.govt.nz/news-and-media/media-releases/archive/commerce-commission-closes-investigation-into-music-copyright-holders**

[73] Commerce Commission. (2015). *Metal Roof Flashing: Investigation Report.* Retrieved from **https://comcom.govt.nz/__data/assets/pdf_file/0024/94371/Investigation-report-Metal-roof-flashing-5-October-2015.PDF**

[74] *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1992] 3 NZLR 247 (HC).

[75] Gault on Commercial Law, CA7.02

International approaches

224. Internationally, a range of approaches have been adopted over time and between jurisdictions for defining the interface between IP rights and competition law:[76]

a. The ‘indirect causation’ approach – to allow holders of IP rights freedom from competition scrutiny as long as their actions are linked (however indirectly) to their status as rights holders.

b. The ‘formalist’ or ‘scope of grant’ approach – to allow owners of IP rights to exercise any power granted to them by or under the IP statute but to allow competition scrutiny of any acts or attempts to extend or enhance those powers. New Zealand’s section 45 arguably falls within this category.

c. The ‘hostile’ or ‘reverse scope of grant’ approach – to presume all acts or attempts to extend or enhance rights outside what the IP statute allows to be anti-competitive.

d. The ‘neutrality’ approach – to treat IP rights no differently from other legal rights or privileges, even if this means forbidding holders of IP rights from exercising some of their rights under the relevant IP statute if it would be anti-competitive.

e. The ‘exceptionality’ approach – to accept that there may be occasions to scrutinise some rights granted by the IP statutes, but to treat those cases as a rare or exceptional departure from the scope of grant approach.

225. In each of these approaches, the IP statutes themselves may incorporate competition principles, such as in setting the thresholds to be met for registering IP rights, or providing for the compulsory licensing of IP rights under certain circumstances.[77]

United States

226. The United States follows the ‘neutrality’ approach outlined above. Guidelines issued by the United States Department of Justice and the Federal Trade Commission outline three general principles for analysing IP rights in the context of competition law:[78]

a. IP is essentially comparable to any other form of property;

b. IP is not presumed to create market power in the competition law context; and

c. IP licensing is generally pro-competitive.

Canada

227. Canada’s Competition Act 1985 contains a provision which broadly provides that the exercise of any legislative IP right is not a misuse of market power in itself. However, it also provides additional restrictions on those IP rights in the form of special remedies in the case of abuse of IP rights. If the use of IP rights leads to certain outcomes (such as an unreasonable increase in the price of a product), the Federal Court may declare an IP agreement or licence void, or

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[76] Eagles, I. (2007). Regulating the Interface Between Competition Law and Intellectual Property in New Zealand. *New Zealand Business Law Quarterly (13).*

[77] In New Zealand, the Patents Act 2013, the Plant Variety Rights Act 1987, and the Designs Act 1953 all provide for compulsory licensing in certain circumstances.

[78] U.S. Department of Justice and Federal Trade Commission. (2017). *Antitrust Guidelines for the Licensing of Intellectual Property.* Retrieved from **https://www.justice.gov/atr/IPguidelines/download**

direct the grant of a licence to any persons the Court considers appropriate. However, a case has never been brought to trial under this provision or its equivalent predecessors.[79]

European Union

228. In the European Union (EU), the Technology Transfer Block Exemption Regulation (TTBER) exempts some IP licensing and enforcement from the EU's competition laws. This exemption was revised and narrowed in a number of respects in 2014. As it stands, the TTBER exemption only applies to agreements concerning 'technology rights', including software copyright, design rights, patents and know-how. Other forms of IP rights, such as trademarks and non-software copyright, are not covered. In addition, the exemption only applies to:

- agreements between two parties;
- licences for the purpose of the production of goods or services exploiting the IP rights in question; and
- agreements between parties below a given combined market share.[80]

229. In recent decades, EU courts have adopted the exceptionality approach outlined above.[81]

Australia

230. Australia's Competition and Consumer Act 2010 contains a similar exemption to New Zealand's section 45. However, it uses different language that could potentially be read more broadly than section 45. As such, Australia's exemption could be seen to fall within the 'indirect causation' approach outlined above.

231. Like New Zealand's exemption, Australia's has remained relatively untested in the courts. As the Australian Productivity Commission has noted, the provision has been subject to seven separate reviews since 1999 that have recommended its repeal or significant narrowing.[82] Some of these reviews are outlined in Box 2 below. The Australian Government has recently introduced legislation to repeal the provision.

Box 2: Summary of Australian reviews into the treatment of IP in competition law

Hilmer Review (1993)

The Committee noted that it "was not presented with any persuasive arguments as to why intellectual property rights should receive protection beyond that available under the authorisation process" and that "it is not clear that different treatment as to the application of the competitive conduct rules is warranted [for IP]". However it did not consider itself to be in a position to make expert recommendations on the matter.[83]

National Competition Council (1999)

The National Competition Council considered that the Australian exemption's likely objective of

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[79] Eagles, I., & Longdin, L. (2011). Refusals to License Intellectual Property: Testing *the Limits of Law and Economics.* Oregon: Hart Publishing.
[80] Pinsent Masons. (2014). *The Technology Transfer Block Exemption.* Retrieved from **https://www.out-law.com/page-7091**
[81] Sumpter. M. (2010). *New Zealand Competition Law and Policy.* Auckland: CCH.
[82] Australian Productivity Commission. (2016). *Intellectual Property Arrangements.* Retrieved from **http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf**
[83] Australian Government. (1993). *National Competition Policy (the Hilmer Review).* Retrieved from **http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf**

avoiding a perceived conflict between IP laws and competition laws was no longer relevant “because it is clear that these two fields of law are compatible and consistent with each other.” It recommended retaining the exemption on the basis that it provided some businesses certainty, but advised that protections for price and quantity restrictions and horizontal agreements should be removed.[84]

Australian Law Reform Commission (2013)

The Australian Law Reform Commission, in its report on Copyright and the Digital Economy, argued that “licensing arrangements for copyright licensing should be assessed against the same general competition law framework that applies to other transactions across the Australian economy.” It argued that repeal of Australia’s exemption should be considered as an integral aspect of equipping copyright law for the digital economy.[85]

Harper Panel (2015)

The Harper Panel recommended removing Australia’s IP exemption (along with a generic exemption from the cartel provisions for vertical supply agreements, and allowing the ACCC to issue block exemptions). It considered it appropriate that commercial transactions involving IP rights be subject to competition laws, in the same manner as transactions involving other property and assets. It noted that “most comparable jurisdictions have no equivalent to subsection 51(3)[…] In those jurisdictions, IP assignments and licences and their conditions are assessed under competition laws in the same manner as all other commercial transactions. The courts in those jurisdictions distinguish between competitively benign and harmful IP transactions, taking account of all relevant circumstances of the transaction and the conditions imposed. There is no evidence that this has diminished the value of IP rights in those countries.”[86]

Productivity Commission (2016)

The Australian Productivity Commission recommended repeal of the IP exemption. It noted that fears about the consequences of removing the exemption appear to be grounded in misunderstanding and that guidelines could be introduced to minimise uncertainty associated with the removal of the exemption.[87]

Decision-making criteria

232. We have applied the decision-making criteria outlined in chapter 2 of this discussion document to the Commerce Act IP-related provisions. These are repeated here:

i. minimise the risk of wrong answers that stop pro-competitive behaviour (Type I errors – false positives);

ii. minimise the risk of wrong answers that allow anti-competitive behaviour (Type II errors – false negatives);

iii. provide businesses with predictability for pro-competitive decision making and reasonable compliance costs; and

iv. minimise the cost and complexity of enforcing cases in order to penalise and deter anti-competitive behaviour.

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[84] Australian National Competition Council. (1999). Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974, Final Report. Retrieved from **http://ncp.ncc.gov.au/docs/LESe-001.pdf**

[85] Australian Law Reform Commission. *Copyright and the Digital Economy.* Retrieved from ***https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf***

[86] Harper, I. et al. (2015). Fn 60.

[87] Australian Productivity Commission. (2016). *Intellectual Property Arrangements.* Retrieved from **https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf**

233. In applying these criteria to the IP provisions, our thinking is underpinned by two principles:

a. Firstly, as noted in the background section of this chapter, we see the objectives that underpin government policy in respect of IP and competition law as complementary. The creativity and innovation that are facilitated by IP rights are an important part of the competitive process. Therefore, the first criterion of minimising false positives also extends to ensuring that any options considered do not unduly undermine innovation and creativity.

b. Secondly, given the criterion of minimising false negatives, our working presumption is that statutory exemptions from the Act should not exist, unless there is a good reason for them to do so.

Problem definition

High-level issues

234. As noted above, IP-related conduct is unlikely to be anti-competitive in most instances. However, there are cases where the use, licensing, or refusal to license of IP rights could lead to a lessening of competition. At present, the provisions identified above raise the risk that such anti-competitive conduct could go undeterred. As such, the current situation presents the potential for 'false negatives'.

235. There are a range of examples of where conduct in relation to IP could, in some contexts, lead to competition concerns. For example:

a. Tying or bundling IP with another product (which might also be protected IP), so as to extend a firm's market power in one market to another.

b. Firms agreeing not to challenge the validity of each other's IP.

c. 'Pay for delay', where, upon expiry of a patent, a firm pays a potential competitor to not introduce a generic version of a product.

d. 'Patent pooling', in which a group of patent owners with collective market power form a patent pool where they agree to license their patents to everyone else in the pool, but not to outsiders.

e. Grant-back obligations, in which licensees are required to license any improvements made to the technology back to the licensor, can reduce a licensee's incentives to engage in research and development.

f. 'Hold-up', where patent holders license a patented technology to a licensee, then increase the license fees to the licensee after they have made up-front investments that rely on the patented technology. Potential licensees may anticipate this tactic, discouraging them from making the initial investment in the first place (and thus holding up the adoption of new inventions).

236. Many of these examples may fall outside of the three IP-related provisions in the Act (although as noted above the boundaries of the provisions are unclear) and therefore could be challenged as unlawful at present. Conduct which may fall within the section 45 exemption at present includes:[88]

a. granting exclusive licences;

[88] Noonan, C. (2017). *Competition Law in New Zealand.* Wellington: Thompson Reuters, p. 698.

b. limiting licensees to particular territories or for a specified period of time;

c. imposing production quotas (i.e. restricting output);

d. refusals to license (although this may be caught by section 36); and

e. placing bans on resale to unauthorised distributors.

237. To the extent that IP-related conduct falls *outside* of the Act's IP provisions, it can be assessed on a case-by-case basis. Under section 27, an IP-related agreements is only prohibited if it is anti-competitive. Under section 30, following the cartels amendments, IP-related conduct may fall within the generic exemptions for collaborative activities, vertical supply contracts, or joint buying and promotion agreements.[89] These reflect the understanding that many forms of conduct (including in relation to IP rights) can be pro-competitive.

238. However, our key concern is that that some anti-competitive IP-related conduct may be exempt from the Act and will therefore not be subject to the same competition analysis as any other form of conduct. This means that anti-competitive conduct may go undeterred, with corresponding negative implications for consumers and New Zealand's economic performance.

239. It is worth reiterating our view that the vast majority of IP-related conduct is unlikely to be anti-competitive. For example, as noted by the Harper Panel, granting an exclusive licence would be unlikely to lead to a lessening of competition. Without an exclusive licence, a licensee would have been unable to commercialise the IP right.[90] Therefore, a licence does not generally restrict the level of competition that would have existed but for the licence.

240. Nevertheless, in cases where IP-related conduct does lead to a substantial lessening of competition, our initial view is that it should be prohibited. Put another way, in reviewing the IP provisions, it is not clear that a strong rationale exists for treating IP differently under competition law to any other form of property.

241. As Eagles notes, the end result of New Zealand's current IP-related provisions is: [91]

> *"An intellectual property/competition law interface that privileges some forms of economic activity over others by treating them as economics free zones in which black letter formalism reigns supreme. Admission to the privileged zones depends on arbitrary categorisations that make little economic sense and which encourage market participants to game the competition regime".*

242. The scale of the problem that results from the IP provisions could grow over time. For example, the Australian Competition and Consumer Commission has noted that: [92]

> *"The digital environment [provides] new ways of creating, using and distributing copyright materials with commensurate opportunities to improve efficiency and welfare. However, copyright materials are increasingly used as intermediate inputs, which increases the potential for copyright to have anti-competitive effects. Solutions that are capable of addressing new market failures in digital environments (including potentially new forms of collective licensing or copyright exchanges) may also raise competition concerns."*

[89] Commerce (Cartels and Other Matters) Amendment Act 2017
[90] Harper, I. et al. (2015). Fn 60.
[91] Eagles, I. (2007).
[92] Australian Competition and Consumer Commission. (2012). *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*. Retrieved from **http://www.alrc.gov.au/sites/default/files/subs/165._org_accc.pdf**

We are not aware of specific New Zealand examples of the IP provisions in the Act enabling anti-competitive conduct to go undeterred. However, this may be due, in part, to cases not being taken by private litigants, or complaints not being made to the Commission, because the complainants considered that the current provisions meant that their complaint was unlikely to succeed. Potential complainants may also be deterred from complaining because it could damage their relationship with rights holders and restrict their access to material protected by IP rights.

20	Can you identify any examples of potentially anti-competitive IP-related conduct that is likely to fall within the scope of the Commerce Act's IP-related provisions at present?
21	Do you agree with our initial assessment that there is not a strong rationale for treating IP-related conduct differently to other forms of conduct? If not, why not?

Specific issues with the IP provisions

243. A number of more specific issues have been raised with the IP provisions.[93] In addition to the uncertainty associated with what is actually exempt from the Act, it has been argued that the provisions lack a coherent underpinning policy rationale. For example, in relation to section 45:

    a. It focuses on form rather substance, meaning that licensors and licenses may be able to structure their dealings relatively easily to fall within the scope of the exemption. For example, an agreement in which two firms agree to exclusively cross-license their IP rights to each other might fall *outside* the exemption (because it restricts the licensee beyond the restriction imposed by the IP right itself). However, two separate agreements in which each firm licenses their IP rights to the other may fall *inside* the exemption (because it enables something that would otherwise be restricted by the IP right). This is the case despite both approaches having the same effect.

    b. It applies solely to statutory IP rights, thus treating them differently to rights created in common law (such as the tort of passing off).

    c. By defining statutory IP rights to include any 'entitlement that is conferred or acknowledged as valid, by or under' one of the intellectual property statutes, the exemption may extend to a range of secret information and expertise that has only a loose connection to the statutory IP right. Under a broad interpretation of the wording, restrictions on the use and transfer of such information could potentially be included as part of licenses of IP rights. This could impede the ability of firms to undertake innovations that 'piggy-back' or build upon previous ones.

244. Issues have also been raised about sections 36(3). In particular:

    a. It is unclear whether it:

        i. is simply seeking to clarify that enforcing an intellectual property right should not automatically be assumed to be a misuse of market power (i.e. an evidentiary provision); or

        ii. whether it provides a full-carve out from the Act for enforcement of IP rights (i.e. a substantive exemption).

    b. As noted above, it is unclear whether a refusal to license IP is captured within the scope of the provision. If the provision does exempt enforcement of an IP right but not refusal to

[93] In particular, see Eagles, I. (2007).

license, the economic justification for doing so is unclear. Taking action to prevent unauthorised use of IP can essentially have the same effect as not licensing the IP in the first place.

245. In addition, the rationale behind section 7(2) is unclear. The provisions appear to have been lifted from Australia's Trade Practices Act 1974, which also contained consumer protection provisions. It has been suggested that the provision may have had more relevance in the context of that Act's consumer protection provisions.

22	Do you agree with the specific issues with the IP provisions that we have identified? If not, why not? Are there other specific issues with the provisions that we have not identified?

Options identification

246. We have considered two options in relation to the Act's IP-related provisions:

Option 1: Retain the status quo

247. Under this option, each of the three existing IP-related provisions would be retained in the Act in their current form.

Option 2: Repeal each of the IP-related provisions

248. Under this option, each of the Act's IP-related provisions would be repealed. As part of this, we would encourage the Commission to produce guidelines about its approach to enforcing the Act in respect of IP-related conduct.

249. Alternatively, only one or two of the IP-related provisions could be repealed, if a compelling case were made for retaining particular provisions.

Other options

250. We have not seriously considered amendments to the IP-related provisions to clarify or reduce their scope as we consider that there would be significant difficulty in defining new provisions that made economic and legal sense. In addition, we think that any benefits that might result from the redefined provisions could be outweighed by the costs faced by firms in interpreting the new provisions. However, we are open to submissions which suggest amendments to one or more of the provisions.

23	Are there other options that we should consider? For example, are there modifications that could be made to one or more of the provisions to clarify or reduce their scope?

Impact analysis

251. We have analysed the repeal of the IP-related provisions against the status quo, using the criteria set out earlier in the discussion document.

Criterion 1: Minimise the risk of wrong answers that stop pro-competitive behaviour (false positives)

252. We consider that both the status quo and option two are unlikely to result in false positives.

253. Under the status quo, IP-related conduct that falls within the scope of the Act's IP-related provisions cannot be subject to false positives.

254. If the IP provisions are repealed, conduct that was previously exempt will now be subject to provisions of the Act that relate to cartels and agreements. In addition, section 36 of the Act would likely apply to a wider range of IP-related conduct (such as enforcement of IP rights). The exact effects of repealing the provisions relating to breaches of confidence are unclear.

255. Contracts, arrangements, understandings, and misuse of market power (under the reforms proposed in this discussion document) are only prohibited to the extent that they result in a substantial lessening of competition. As such, it seems unlikely that there is any risk of false positives in this respect.

256. Cartel arrangements are per se prohibited on the basis that they are highly likely to be anti-competitive. However, the recent cartels amendments, and their generic exceptions for collaborative activities, vertical supply contracts, and joint buying and promotion agreements, should ensure that pro-competitive IP arrangements are not inadvertently captured. These will be supported by the collaborative activities clearance regime. Overall, we consider that the cartels amendments have reduced the (already low) risk of false positives occurring, should the Commerce Act's IP provisions be repealed.

257. In addition, the Act's authorisation regime would be available for any IP-related conduct where the benefit to the public is likely to outweigh any reduction in competition that could result.

258. Taking all of this into account, we view it as highly unlikely that the goals of IP policy – to promote creativity and innovation – would be undermined by repeal of the IP provisions.

Criterion 2: Minimise the risk of wrong answers that allow anti-competitive behaviour (false negatives)

259. As outlined in the problem definition section, we think that there is a risk that the status quo may lead to false negatives. While the number of false negatives at present is likely relatively low, the current IP-related provisions mean that a range of IP-related conduct is nevertheless not subject to a competition test in the way that most other business conduct is.

260. Repealing the provisions should remove any potential for Act under-reach in respect of IP-related conduct.

Criterion 3: Provide businesses with predictability for pro-competitive decision making and reasonable compliance costs

261. While the existing IP provisions may provide businesses with an element of predictability under the status quo, given the unclear wording of the exemptions and the lack of case law, we do not consider that this level of predictability is particularly high.

262. Removing the IP provisions may lead to a reduction in predictability in relation to IP-related conduct that is clearly exempt at present. However, for IP-related conduct where it is unclear whether or not the current provisions apply, removal of the provisions could arguably actually lead to an increase in predictability. At present, an assessment is first required about whether the provisions are likely to apply, and then, if not, the likely competition impact of conduct. Removing the provisions will simplify the analysis to focus on the latter.

263. The vast majority of IP-related conduct (like the majority of other forms of business conduct) is likely to be pro-competitive, with competition concerns able to be dismissed relatively easily. We consider that removing the provisions is likely to have relatively similar outcomes to the status quo in terms of predictability.

264. Predictability could be further promoted if the Commission produced guidelines about its approach to enforcement of the Act for IP-related conduct.

Criterion 4: Minimise the cost and complexity of enforcing cases in order to penalise and deter anti-competitive behaviour

265. Currently, if the Commission or a private plaintiff were to take enforcement action, an assessment would first be required about whether the IP provisions are likely to apply, and if not, the likely competitive impacts of the conduct. Similarly, a defendant would likely need to argue both that the conduct was exempt from the Act at present, and that if it were not exempt, that it is not anti-competitive.

266. Removing the IP provisions will allow the Commission, other plaintiffs, and potential defendants to focus solely on the question of whether the conduct is anti-competitive. While enforcement action under the status quo appears has been limited, where action is taken, the cost of such action is likely to be less if the IP provisions are repealed.

24	Do you agree with our assessment of this option against the criteria? If not, why not?

Initial preferred option

267. Our initial preferred option is to repeal each of the IP-related provisions. We consider that this will reduce the risk of false negatives, and lead to easier enforcement and greater deterrence of anti-competitive conduct. We do not consider that it will have any meaningful impact on the likelihood of false positives, or on predictability and compliance costs for businesses. It will also not have any meaningful negative impact on the outcomes sought by IP policy in respect of innovation and creativity.

25	Do you support our initial preferred option? If not, why not?

Costs and benefits of repeal of the IP provisions

268. The table below summarises the expected costs and benefits of repealing IP-related provisions.

Affected parties	Comment	Impact	Evidence certainty
Additional costs of repeal of IP-related provisions, compared to taking no action			
Businesses with rights to significant or critical IP	One-off transition costs as businesses become acquainted with the impact of the removal of the provisions and face some uncertainty about the impact in the early stages. Reduced profits for rights-holders to the extent that they are engaging in anti-competitive practices that would become unlawful.	Low	Medium
All other businesses	None of significance	None	High
Commerce	Additional enforcement costs for	Low	Medium

Commission	conduct that is currently exempt from the Act.		
Wider government	None of significance	None	High
Other parties	None of significance	None	High
Wider economy	None of significance	None	High
Total costs		Low	Medium

Additional benefits of repeal of IP-related provisions, compared to taking no action			
Businesses with rights to significant or critical IP	None of significance	None	Medium
All other businesses	Easier for businesses to access, utilise, and build upon existing IP. Some could benefit from greater likelihood of success of private legal actions.	Low	Low
Commerce Commission	Less complex enforcement produces cost savings for the Commission. Greater certainty of outcomes enables Commission to be a more effective regulator.	Low	Medium
Wider government	None of significance	None	High
Other parties	None of significance	None	High
Wider economy	Gains to broader economy from improved static and dynamic gains from improved competition.	Low	Low
Total benefits		Low	Low

269. The costs and benefits of removing the IP-related provisions are difficult to monetise (particularly given the large, but difficult to estimate, number of firms with rights to significant IP). However, our assessment is that both the benefits and the costs of the change are likely to be relatively modest.

270. Despite this, over time, we consider that the benefits of removing the provisions are likely to exceed the costs. Many of the costs are likely to be limited to transition costs for businesses in understanding the implications of removing the provisions, rather than ongoing costs. In contrast, the potential for prohibiting anti-competitive IP-related conduct will persist over time.

271. The only other costs are for rights holders who are currently engaging in anti-competitive conduct that is within the scope of the IP exemptions, may face a reduction in profits as this conduct becomes unlawful. However, we do not assign a high weighting to costs that arise for firms as a result of being required to cease anti-competitive conduct.

26	Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer.

10 Covenants

Introduction

272. This section considers the treatment of covenants within Part 2 of the Act. In particular, it considers potential minor, technical changes to the treatment of covenants in response to the passage of the Commerce (Cartels and Other Matters) Amendment Act 2017 and developments in Australia.

Background

273. A covenant is essentially a commitment by a party to do, or refrain from doing, some action. Covenants are commonly made in relation to land use and can be 'attached' to land. A party is bound by a covenant not because they have signed a contract, but because they are making use of land to which a covenant is attached. The person who gives a covenant (the covenantor) is normally the person whose activities are being restricted. The covenantee is the person who is entitled to the benefit of the covenant.[94]

274. Within the limits of district planning rules and legislation, parties that own or have an interest in land are generally free to determine how that land should be used or whether the land is suitable for use for a particular purpose. However, in some cases, constraints or requirements on the use of land may restrict competition.

275. An example of a covenant is a restriction on the use of a block of land ('the secondary land') that benefits a neighbouring owner of land ('the primary land'). The covenant may prevent the secondary land from being used for certain purposes (regardless of what is permitted under district planning rules) that could have a detrimental impact on the use and employment of the primary land. For example:

    a. A theatre owner may place a covenant on the sale of secondary land that it owns to prevent noisy activities being carried out that would interfere with performances at the theatre. Ordinarily this type of covenant would not impede competition.

    b. A supermarket may place a covenant on the sale of secondary land to prevent that land from being used for a competing supermarket. This covenant might impede competition, if the availability of suitable land is a binding constraint on potential competitors.

    c. A developer may place covenants on a subdivision that it has created which prevents further subdivision of the land. It may also prevent secondary dwellings such as 'granny flats' from being placed on the land. These types of covenants can impede housing supply, and potentially competition.

Status quo

New Zealand

276. The Act defines covenants as relating to land. Section 2(1) of the Act defines a covenant as "a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land)".

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[94] Gault on Commercial Law, CA28.04.

277. At present, section 28 of the Act sets out prohibitions relating to anti-competitive covenants. This section largely duplicates the prohibition in section 27 relating to anti-competitive contracts, arrangements or understandings (which includes leases and licences relating to land or buildings). In particular, section 28 prohibits giving or requiring a covenant with the purpose, effect or likely effect of substantially lessening competition in a market.

278. Prior to the cartels amendments, section 34 of the Act deemed a covenant to have breached section 28 if it involved price fixing, mirroring section 30 (which related to contracts, arrangements or understandings).

279. These duplications reflect certain technical differences, in a legal sense, between covenants, and contracts, arrangements or understanding.[95] However, the policy intent was that covenants should be treated the same as a provision of a contract.

280. The Commerce (Cartels and Other Matters) Amendment Act 2017 reformed the law relating to contracts containing a cartel provision. In particular, section 30 was made a standalone prohibition relating to three classes of cartel conduct (price fixing, restricting output and allocating markets), rather than deeming contracts involving price fixing to have breached section 27. New or enhanced exceptions to this prohibition were also enacted (i.e. collaborative activities, vertical supply contracts, and joint buying and promotion agreements).

281. In the case of covenants, however, the cartel amendments repealed the equivalent provision relating to covenants involving price fixing in section 34. Section 28 was unaffected. This repeal was designed when the previous Bill still contained criminal liability for cartels.[96] It sought to clarify the boundary between criminal and civil liability by establishing that criminal liability would arise for covenants that involved a cartel provision.

282. Outside of the Act, no statutory mechanism exists for regulating the general use of covenants. However, covenants can be removed or overridden in certain circumstances under the Property Law Act 2007, Residential Tenancies Act 1986, Public Works Act 1981, Resource Management Act 1991, and Human Rights Act 1993. These circumstances are generally not related to competition, and therefore not considered further here.

Australia

283. Until recently, Australia's competition law treated covenants in a similar manner to New Zealand prior to the cartels amendments:

   a. Section 45B of the Competition and Consumer Act 2010 prohibited covenants with the effect or likely effect of substantially lessening competition.

   b. Section 45C deemed covenants that involve price fixing to have breached section 45B.

284. New Zealand's provisions relating to covenants were modelled off Australia's, which in themselves were a response to a restrictive interpretation of Australia's provisions relating to contracts, arrangements or understandings.[97]

285. Australia's Harper Panel considered that the separate provisions for covenants were unnecessary. It included a recommendation that the Competition and Consumer Act be simplified by repealing the prohibitions relating to covenants and inserting a definition

[95] For example, unlike a contract, a covenant may be enforceable against third parties who were not a party when it was entered into.

[96] The Commerce (Cartels and Other Matters) Amendment Bill as introduced included a criminal offence for cartel conduct. This was removed from the Bill at Committee of the Whole House stage.

[97] Noonan, C. (2017), p. 352.

clarifying that a contract includes a covenant.[98] The Australian Competition and Consumer Amendment (Competition Policy Review) Act 2017 implemented this recommendation.

286. Given the minor and technical nature of the subject matter, we have not examined the approaches taken by other jurisdictions in relation to covenants.

Decision-making criteria

287. We have applied the decision-making criteria outlined in chapter 2 of this discussion document to the treatment of covenants in the Act. These are repeated here:

i. minimise the risk of wrong answers that stop pro-competitive behaviour (Type I errors – false positives);

ii. minimise the risk of wrong answers that allow anti-competitive behaviour (Type II errors – false negatives);

iii. provide businesses with predictability for pro-competitive decision making and reasonable compliance costs; and

iv. minimise the cost and complexity of enforcing cases in order to penalise and deter anti-competitive behaviour.

Problem definition

288. Following the removal of the criminal sanctions from the cartels amendments, some concerns have been raised that the repeal of section 34 has had the effect of making covenants that fix prices only subject to a prohibition if the covenant:

a. is in the form of a contract (and subject to section 30); or

b. has the purpose, effect or likely effect of substantially lessening competition (section 28).

289. As such, there is now no specific prohibition against covenants that involve a cartel provision.

290. In our view, the technical differences between a contract and a covenant do not justify different consequences for similar conduct. We consider that, wherever possible, similar arrangements should have similar treatment under competition law. Generally parties should not be allowed to fix prices, limit output or allocate markets for goods or services that are bought or sold in competition (or likely competition) with each other, regardless of the way in which this achieved.

291. Given this, we consider that the current situation is undesirable. The size of the problem is unclear, as there have been few Commerce Act cases involving anti-competitive covenants, but it is likely to be relatively small. Firstly, the extent to which covenants can involve price fixing or other cartel provisions may be limited. However, the Office of Fair Trading offers an example in which parties to a land agreement who are competitors impose restrictions regarding the use of land, with the aim of sharing or carving-up markets.[99] To the extent that covenants do involve cartel provisions, the prohibition in section 28 should capture most anti-competitive covenants that previously would have fallen within section 34's per se prohibition.

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[98] Harper, I. et al. (2015). Fn 60, p. 308.

[99] The Office of Fair Trading was a predecessor to the UK Competition and Markets Authority. Office of Fair Trading (2011). *Land Agreements: the application of competition law following the revocation of the Land Agreements Exclusion Order.* Retrieved from **https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284406/land-agreements-guideline.pdf**

292. Nevertheless, the status quo creates some uncertainty as to the application of the Act and, at worst, may lead to some weakening of deterrents against anti-competitive covenants relating to land. The status quo could make enforcement action in respect of anti-competitive covenants more difficult. This is because the Commission (or a private litigant) would need to demonstrate that a covenant containing a cartel provision was anti-competitive, unlike an equivalent contract containing a cartel provision.

293. In addition, the problem associated with the status quo could increase if the Commerce (Criminalisation of Cartels) Amendment Bill is enacted. This Bill re-introduces the criminal offence for cartel provisions that was originally contained in (and later removed from) the cartels amendments. If enacted, the Bill will mean that entering into a contract, arrangement or understanding that contains a cartel provision will be an offence, but a covenant containing a cartel provision will not be. There is no apparent rationale for treating one as an offence and not the other. There is a small risk that it could – at the margin – incentivise parties to use covenants rather than contracts so as to avoid criminal liability.

27	Do you agree that covenants and provisions of contracts should be treated the same in the Commerce Act? If not, why not?

Options identification

294. We have identified three options in relation to the treatment of covenants in the Act.

Option 1: Retain the status quo

295. Under this option, we would retain section 28's prohibition against covenants with the purpose, effect or likely effect of substantially lessening competition in a market. There would be no separate prohibition against covenants containing cartel provisions.

296. This would result in different treatment under the Act for a covenant involving a cartel provision, depending on whether it formed part of a contract, arrangement or understanding or not.

Option 2: Reinstate a separate prohibition for covenants involving cartel provisions

297. Under this option, a separate prohibition for covenants involving cartel provisions would be reinstated. However, it would be extended to mirror the cartel prohibitions as redefined in the cartels amendments – that is, in addition to price fixing, it would also include prohibitions for covenants that involve output restrictions and market allocation.

298. This would enable consistent treatment between covenants and provisions of contracts, while making explicit the technical legal differences between the two arrangements. However, to achieve consistent treatment it may be necessary to duplicate many of the additional provisions relating to cartels, including the applicability of the exceptions such as for collaborative activities.

299. This change would have the effect of making covenants subject to the criminal sanctions contained in the Commerce (Criminalisation of Cartels) Amendment Bill in the same way as cartel provisions contained in contracts.

Option 3: Redefine contracts to include covenants

300. This option would simplify the Act by repealing the particular provisions relating to covenants in the Act (particularly section 28) and amalgamating their treatment with those provisions dealing with contracts. This mirrors the approach taken in the Australian Competition and Consumer Amendment (Competition Policy Review) Act 2017.

301. This would likely involve:

   a. Redefining a contract to include a covenant. Section 2(6) of the Act already provides that references to a 'contract' include leases and licences in respect of any land or building, so such an amendment to include covenants relating to land is consistent with the current scheme of the Act.

   b. Introducing a new definition of party to a contract to include a person bound by, or entitled to the benefit of, a covenant.

302. As with Option 2, this change would have the effect of making covenants subject to the criminal sanctions contained in the Commerce (Criminalisation of Cartels) Amendment Bill in the same way as cartel provisions contained in contracts.

28	Are there other options that we should consider?

Impact analysis

303. We have analysed Options 2 and 3 against the status quo, using the criteria set out earlier in the discussion document.

Criterion 1: Minimise the risk of wrong answers that stop pro-competitive behaviour (false positives)

304. We consider that the risk of false positives is low under all options. Reintroducing a per se prohibition against covenants that involve cartel provisions (as per Options 2 and 3) does technically increase the risk of false positives. However, we consider that cartel conduct – be it in a contract or a covenant – is presumptively anti-competitive and should be prohibited without the need to demonstrate a substantial lessening of competition.

305. Where false positives might otherwise be likely, the exemption from the cartel prohibitions for collaborative activities and the associated clearance regime should ensure that pro-competitive covenants are not inadvertently captured by the cartel prohibitions. In addition, the Act's authorisation regime would be available for any covenant where the benefit to the public is likely to outweigh any reduction in competition that could result.

Criterion 2: Minimise the risk of wrong answers that allow anti-competitive behaviour (false negatives)

306. As noted above, we think that the status quo presents a small risk of false negatives in relation to covenants that contain cartel provisions. Both Options 2 and 3 are likely to address this risk, by ensuring that similar arrangements have similar treatment under competition law.

Criterion 3: Provide businesses with predictability for pro-competitive decision making and reasonable compliance costs

307. We consider that Options 2 and 3 are unlikely to have a significant impact on predictability or compliance costs for businesses. Both options could, arguably, improve predictability and

reduce compliance cost by treating covenants in the same way as contracts in all instances; however this impact is likely to be minor.

Criterion 4: Minimise the cost and complexity of enforcing cases in order to penalise and deter anti-competitive behaviour

308. Options 2 and 3 have the potential to reduce the cost and complexity of enforcing cases relating to covenants containing cartel provisions. This is because both options would result in covenants containing cartel provisions being deemed per se illegal, meaning that the Commission (or private plaintiffs) would not need to prove a substantial lessening of competition.

29	Do you agree with our assessment of these options against the criteria? If not, why not?

Initial preferred option

309. As outlined in the table above, we consider that Options 2 and 3 will have similar outcomes. Both will reduce the risk of false negatives relative to the status quo, and reduce the cost of enforcement. The impact of both is likely to be small, but nevertheless positive.

310. The difference between Options 2 and 3 is largely in their legislative design. As noted above, Option 2 would likely require the duplication of a number of the cartel provisions. Duplication can undermine the simplicity of legislation. In contrast, Option 3 would simplify the legislation relative to the status quo by ensuring that parties entering into covenants and contracts (including leases and licences) relating to land need only comply with one set of provisions. As such, Option 3 is our initial preferred option.

30	Do you support our initial preferred option? If not, why not?

Costs and benefits of redefining contracts to include covenants

311. The table below summarises the expected costs and benefits of redefining contracts to include covenants.

Affected parties	Comment	Impact	Evidence certainty
Additional costs of redefining contracts to include covenants, compared to taking no action			
Parties that give or require covenants	Very minor transition costs (e.g. legal advice) as most covenants are unlikely to be affected by the proposal.	Low	Medium
All other businesses	None of significance	None	High
Commerce Commission	None of significance	None	High
Wider government	None of significance	None	High

Other parties	None of significance	None	High
Wider economy	None of significance	None	High
Total costs		Low	Medium

Additional benefits of redefining contracts to include covenants, compared to taking no action			
Parties that give or require covenants	Parties that are required to give covenants containing a cartel prohibition may benefit from no longer needing to do so. They may also benefit from greater likelihood of success of private legal action.	Low	Medium
All other businesses	None of significance	None	High
Commerce Commission	Less complex enforcement produces cost savings for the Commission. Greater certainty of outcomes enables Commission to be a more effective regulator.	Low	Medium
Wider government	None of significance	None	High
Other parties	None of significance	None	High
Wider economy	Gains to broader economy from improved static and dynamic gains from improved competition.	Low	Low
Total benefits		Low	Low

312. As outlined in the table, the costs and benefits of redefining contracts to include covenants are difficult to estimate. Our assessment is that while the costs and benefits are both modest, the benefits are likely to exceed the costs. The costs are likely low because, as discussed above, most anti-competitive covenants are already prohibited. As such, transition costs (such as legal advice) are likely to be limited to the few parties who give or require covenants containing a cartel provision.

313. The benefits, while also modest, are likely to be greater, as they will persist over time. These benefits potentially include a reduction in anti-competitive conduct (with benefits to affected businesses and the wider economy) and easier enforcement for the Commission and private plaintiffs.

31	Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer.

11 Recap of questions

Objectives

1	Do you agree with the primary objective and the criteria?

Section 36: Problem Definition

2	Can you offer any new evidence on the costs and benefits of section 36, as currently worded? If you have previously submitted on this issue, do you have anything new or different to add to your views on the effectiveness of section 36? If you have not previously submitted on this issue, what are your views on the effectiveness of section 36?

Section 36: Designing a Unilateral Conduct Prohibition

3	Do you agree that interconnected bodies corporate should be treated the same as a single firm?
4	Do you agree that "a substantial degree of power in a market" is an appropriate threshold for the prohibition?
5	Do you agree that a new prohibition does not require any equivalents to the Australian section 46(4)-(7)?
6	Should a new prohibition define the types of proscribed conduct? Should a new prohibition describe or list the types of proscribed conduct?
7	Should the prohibition focus on purpose OR effects, purpose AND effects, solely purpose, or solely effects? Please provide reasoning.
8	Should purpose be defined as per the existing case law or should it explicitly be an objective purpose? Should section 36B and/or an equivalent provision be retained?
9	Is a "substantial lessening of competition" the appropriate standard for the prohibition? If not, do you have any alternative suggestions? Does the SLC standard provide enough certainty to assess conduct before it is undertaken?
10	Can you provide any examples of exclusionary conduct where the anti-competitive effects and the pro-competitive effects occur in different markets? Should the prohibition enable a balancing of pro- and anti-competitive effects that occur in different markets?
11	Should a "less restrictive alternative" test form part of the analysis when assessing conduct with both pro- and anti-competitive effects?

Section 36: Providing certainty

12	Are there any forms of anti-competitive unilateral conduct that should be specifically prohibited in the Commerce Act?
13	Should the Act provide for secondary legislation to provide greater certainty for anti-competitive unilateral conduct? If so, who should hold the power to make secondary legislation?
14	Should authorisation be available for unilateral conduct?

Section 36A: Misuse of Trans-Tasman Market Power

15	In your view, does section 36A have any practical effect? Should section 36A be retained or repealed? If section 36 is changed, should section 36A be changed to mirror the new section 36?

Section 36: Options Identification and Impact Analysis

16	Do you support our initial proposition? If not, why not?
17	Do you agree with the rejection of these options as unfeasible? Are there any other options that should be considered?
18	Do you agree with our assessment of this option against the criteria? If not, why not? Please provide evidence to support your answers.
19	Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer.

Treatment of Intellectual Property in the Commerce Act

20	Can you identify any examples of potentially anti-competitive IP-related conduct that is likely to fall within the scope of the Commerce Act's IP-related provisions at present?
21	Do you agree with our initial assessment that there is not a strong rationale for treating IP-related conduct differently to other forms of conduct? If not, why not?
22	Do you agree with the specific issues with the IP provisions that we have identified? If not, why not? Are there other specific issues with the provisions that we have not identified?
23	Are there other options that we should consider? For example, are there modifications that could be made to one or more of the provisions to clarify or reduce their scope?
24	Do you agree with our assessment of this option against the criteria? If not, why not?
25	Do you support our initial preferred option? If not, why not?
26	Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer.

Covenants

27	Do you agree that covenants and provisions of contracts should be treated the same in the Commerce Act? If not, why not?
28	Are there other options that we should consider?
29	Do you agree with our assessment of these options against the criteria? If not, why not?
30	Do you support our initial preferred option? If not, why not?
31	Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer.

Annex 1: Legislative Examples of Unilateral Conduct Provisions

Australia – Competition and Consumer Act 2010

46 Misuse of market power

(1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:

a. that market; or

b. any other market in which that corporation, or a body corporate that is related to that corporation:

   i. supplies goods or services, or is likely to supply goods or services; or

   ii. supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or

c. any other market in which that corporation, or a body corporate that is related to that corporation:

   i. acquires goods or services, or is likely to acquire goods or services; or

   ii. acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.

(3) A corporation is taken for the purposes of this section to have a substantial degree of power in a market if:

a. a body corporate that is related to that corporation has, or 2 or more bodies corporate each of which is related to that corporation together have, a substantial degree of power in that market; or

b. that corporation and a body corporate that is, or that corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in that market.

(4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate have in a market:

a. regard must be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

   i. competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

   ii. persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market; and

b. regard may be had to the power the body corporate or bodies corporate have in that market that results from:

   i. any contracts, arrangements or understandings that the body corporate or bodies corporate have with another party or other parties; or

ii. any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.

(5) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:

a. the body corporate does not substantially control that market; or
b. the body corporate does not have absolute freedom from constraint by the conduct of:
    i. competitors, or potential competitors, of the body corporate in that market; or
    ii. persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

(7) To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.

(8) In this section:

a. a reference to power is a reference to market power; and
b. a reference to a market is a reference to a market for goods or services; and
c. a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

Canada – Competition Act 1985

Abuse of Dominant Position

Definition of anti-competitive act

78 (1) For the purposes of section 79, anti-competitive act, without restricting the generality of the term, includes any of the following acts:

a. squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
b. acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
c. freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
d. use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
e. pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
f. buying up of products to prevent the erosion of existing price levels;

g. adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

h. requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

i. selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Prohibition where abuse of dominant position

79 (1) Where, on application by the Commissioner, the Tribunal finds that

a. one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

b. that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

c. the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

a. the effect on competition in the relevant market;

b. the gross revenue from sales affected by the practice;

c. any actual or anticipated profits affected by the practice;

d. the financial position of the person against whom the order is made;

e. the history of compliance with this Act by the person against whom the order is made; and

f. any other relevant factor.

Purpose of order

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

European Union – Treaty on the Functioning of the European Union

Article 102

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

a. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b. limiting production, markets or technical development to the prejudice of consumers;

c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

South Africa – Competition Act 1998

Abuse of dominance prohibited

8. It is prohibited for a dominant *firm* to –

a. charge an excessive price to the detriment of consumers;

b. refuse to give a competitor access to an essential facility when it is economically feasible to do so;

c. engage in an exclusionary act, other than an act listed in paragraph (d),if the anti-competitive effect of that act outweighs its technological, efficiency, or other pro-competitive gain; or

d. engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:

    i. requiring or inducing a supplier or customer to not deal with a competitor;

    ii. refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

    iii. selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

    iv. selling *goods or services* below their marginal or average variable cost; or

    v. buying-up a scarce supply of intermediate goods or resources required by a competitor.

'*Exclusionary act*' means an act that impedes or prevents a firm from entering into, or expanding within, a market.

United Kingdom – Competition Act 1998

18 Abuse of dominant position.

(1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

(2) Conduct may, in particular, constitute such an abuse if it consists in—

a. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b. limiting production, markets or technical development to the prejudice of consumers;

c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

United States of America – Sherman Act

Section 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.