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COMPETITION LAW

Commerce Act: amendment gives new teeth to section 36 claims

The Commerce Commission and Productivity Commission each began raising s 36 as a policy problem after a 2012 court decision

Gary Hughes

For nearly a decade, provisions in the Commerce Act controlling abuse of market power – 'dominance' to many people, although that test was amended years ago – have been stunted, if not moribund.

But the passing into law this month of an important and controversial amendment to s 36 of the Act could infuse new breath into the law on conduct by large firms that may have a damaging effect on market competition.

What utility the Commerce Commission makes of this when the changes take effect in April 2023 will be critical to whether New Zealand competition law experiences something of a renaissance in this area.

The context

It can be helpful to think of competition law overall as broadly addressing four areas of possible harm:

- single firm conduct by a large player to increase its monopolistic power or damage competition by smaller rivals or new entrants;
- conduct by more than one firm in concert, through contractual or informal arrangements (which can be benign in intent but still affect competition or can be more pernicious such as deliberate collusion and cartels);
- transactions by merger or acquisition through which firms combine and grow to the size of a large player (increasing the risk of abusive large firm conduct in #1 above); and
- sector-specific price controls, typically for infrastructure monopoly providers, when market failure is evident or the other three competition law controls above are ineffective.

Put bluntly, our competition law jurisprudence has over the years ended up making proof of breach so difficult that area #1 became almost redundant in the New Zealand context.

History and near-death experiences

Like most competition law reforms, this has been on a long-term path. The Commerce Commission and Productivity Commission each began raising s 36 as a policy problem after a 2012 court decision.

In particular, problems arose from two interpretative matters embedded in the design of s 36: the focus upon only the 'purpose' of the large firm's action and not its effects (eg, when cutting pricing to borderline below cost in response to a cheaper new entrant); and the causation test applied by the courts, requiring proof of a taking advantage of the market power in support of an anti-competitive intent or purpose (eg, whether other firms without market power might also insist on exclusivity clauses).

Complicated causation tests were developed in the telco war cases – initially *Telecom v Clear Communications* in the Privy Council in1995 and later cemented by the Supreme Court in *CC v Telecom* [2010] NZSC 111.

Ironically, the commission actually won the last s 36 case it took, the 'data tails' litigation [2012] NZCA 344 and Telecom paid a $12 million penalty. But that was a long, hard-fought appellate battle with flocks of economists giving expert evidence. The commission seems to have since prioritised warnings and lobbying for law reform instead.

Both interpretative issues have now been adjusted, meaning s 36 issues may have more impact on your clients (large and small) in future.

Section 36 as amended

The reworded misuse of market power provision now reads:

> "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) that market; or
> (b) any other market in which the person, or an interconnected person,–
> (i) supplies or acquires, or is likely to supply or acquire, goods or services; or
> (ii) supplies or acquires, or is likely to supply or acquire, goods or services indirectly through one or more other persons."

This means a lower standard is in place with an 'effect or likely effect' test, as an alternative to demonstrating a bad 'purpose'. Many types of commercial conduct can arguably have different views of the purpose (even reasonably objective purpose), whereas effects can be more reliably measured or predicted.

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And the wretched counterfactual 'taking advantage of' test is gone – now simply 'engaging in' the conduct.

Other matters

A quick summary of other important things that are changing, besides s 36, includes:

- reliance on intellectual property rights (eg, patents) used to have an exemption, now removed;
- penalties increased to maximum $10m for mergers consummated without seeking clearance, if leading to substantially lessened competition;
- procedural changes to streamline commission authorisations applications – a path often so long and costly that few bother with it;
- covenants now expressly defined to be part of cartel provisions – a nod to restrictive land covenants in the supermarkets inquiry.

What happens next?

Large firms with significant power in their sector may need to reassess certain trade practices and established contracts they have in place, and whether this law change could now bite upon them.

Similarly, small firms that have experienced a hardball competition stance from an incumbent or dominant player might have new avenues to consider whether those tough tactics may cross a (now lowered) anti-competitive threshold.

Some amendments come into force sooner, but the important market power provision changes have a 12-month implementation time – 5 April 2023 is when the law will change.

We can expect the commission to issue detailed guidance in the coming months. How aggressively it moves next year will be important, as will the extent to which smaller players and their advisors are willing to take private action to test the new effects' threshold.

Auckland barrister Gary Hughes specialises in regulatory investigations and proceedings (eg, Commerce Commission, FMA, SFO, and AML-CFT supervisors) along with insurance or privacy aspects.
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