MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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Targeted Review of the Commerce Act 1986

Issues Paper

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Comments should be submitted in writing, no later than 5pm on 9 February 2016, as follows:

Email (preferred)
commerceact@mbie.govt.nz

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Competition and Consumer Policy
Ministry of Business, Innovation and Employment
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Executive summary

Introduction

In May 2014, the Productivity Commission set out a number of recommendations in a report entitled Boosting Services Sector Productivity. In response, the 2015 Business Growth Agenda progress report announced that the Government would "review the misuse of market power prohibition and related matters" in the Commerce Act 1986. Those related matters include the cease and desist regime, and the issue of market studies.

Anti-competitive exclusionary conduct

New Zealand's rule against anti-competitive exclusionary conduct is set out in section 36 of the Commerce Act. The persons subject to the rule are those with a substantial degree of market power. The way the rule is framed is to prohibit the "taking advantage" of market power with the purpose of excluding competitors from the market. There is no defence to a case under section 36 other than to disprove one of the elements of the claim, and the authorisation regime is not available in respect of conduct that will or is likely to breach section 36.

This Issues Paper seeks to assess the functioning of section 36, as applied by the courts. In this regard, it seeks feedback on what the appropriate criteria for assessment are. Those that it has chosen on a preliminary basis are:

- whether section 36 is assuring the long-term benefit of consumers;
- whether the application of section 36 is sufficiently simple;
- other potential criteria:
    - alignment with other prohibitions in the Commerce Act, and equivalent prohibitions in overseas jurisdictions; and
    - the small size and remoteness of the New Zealand economy.

Using these criteria, the Ministry's preliminary view is that the operation of section 36 has not been satisfactory. This is because section 36 appears:

- to be failing to maximise the long-term benefit of consumers, by failing to punish anti-competitive conduct by powerful firms;
- to be too complex to allow for cost-effective and timely application; and
- to be misaligned with other prohibitions in the Commerce Act (sections 27 and 47 both include an 'effects test' while section 36 relies on a 'purpose test') and with equivalent provisions in a number of foreign jurisdictions (the US, the EU and Canada do not require that a powerful firm 'take advantage' of its market power).

Alternative enforcement mechanisms

A problem facing jurisdictions around the world is the high cost and delay associated with standard competition law enforcement processes. In this context, competition regimes throughout the world have developed alternative enforcement mechanisms that are designed to resolve competition issues in an efficient manner – essentially, by avoiding a full substantive process. The two main alternative enforcement mechanisms in New Zealand are administrative settlements and the cease and desist regime.

The Issues Paper has adopted, and seeks feedback on, the following criteria for assessing New Zealand's alternative enforcement mechanisms regime:

- whether these mechanisms are assuring the long-term benefit of consumers;
- whether these mechanisms are sufficiently simple;
- respect for natural justice;
- the current need for alternative enforcement mechanisms; and
- potentially, alignment with, but not duplication of, other relevant enforcement mechanisms.

Applying these criteria, the Ministry's preliminary view is that the alternative enforcement mechanisms, taken as a whole, are not operating satisfactorily. This is because:

- the settlements regime:
  - is weak because it is based on contractual arrangements, for example:
    - financial penalties for the alleged breach of the Commerce Act can only be included with the approval of the High Court;
    - the parties may fail to make all provisions public; and
    - if the settlement terms were breached, the Commerce Commission would have to take a civil claim in the High Court (a long and costly process), and before the court could order that the firm perform its obligations under the settlement, it would have to be convinced that monetary damages were an insufficient remedy.
  - is misaligned with recent changes to the Fair Trading Act 1986 and the Telecommunications Act 2001, where enforceable undertaking regimes were introduced, and

- the cease and desist regime:
  - is less needed following changes to the High Court's Commercial List, the introduction of ex ante regulatory regimes in certain sectors, and the fact that the Commerce Commission no longer needs to make an undertaking as to damages when seeking an interim injunction;
  - has proven ineffective in assuring the long-term benefits of consumers, because it has been used only once in 14 years;
  - if it were used, would be unlikely to be cost-effective and timely, due to its cumbersome procedural requirements; and
  - is misaligned with other relevant legislation (none of the other Acts that the Commerce Commission enforces have a cease and desist regime) and may unduly duplicate the (interim) injunction process.

Market studies

Recent international developments have shown a growing trend for the use of market studies by competition agencies. While only a handful of states had market studies powers 20 years ago, a 2009 study by the International Competition Network found that at least 40 competition agencies now have the ability to conduct market studies. Different public bodies in New Zealand — such as the Commerce Commission, the Productivity Commission and the Electricity Authority — have varying powers to undertake research that may be described as market studies. However, unlike comparable jurisdictions, there is no formal power specifically directed at analysing competition across any market, for the purpose of improving market performance. This has been identified by the OECD as a significant gap in New Zealand's competition framework.

This Issues Paper canvasses various aspects of the market studies power as it is exists in different jurisdictions. Three interconnected approaches to market studies, as seen in the international experience, are identified:

- diagnosing market problems;
- removing regulatory barriers to competition; and
- building an evidence base as a precursor to enforcement.

The Ministry considers that the question of whether New Zealand needs a formal market studies power is dependent on whether there is a definable gap in its competition framework that aligns with one or more of these approaches.

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Market studies

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Glossary and list of acronyms

ACCC	Australian Competition and Consumer Commission
Ad hoc adjudicative process	A process established outside the standard court system to rule on disputes concerning alleged anti-competitive conduct. It is often designed to be faster and cheaper than adjudication by the courts.
Alternative enforcement mechanism	A means of enforcing competition law other than through court action. The two main categories of alternative enforcement mechanism are negotiated settlements and ad hoc adjudicative processes.
Business Growth Agenda	A detailed programme of initiatives and reforms the Government is taking to build a more productive and competitive economy. It has six inter-connected work-streams: Export Markets, Innovation, Safe and Skilled Workplaces, Infrastructure, Natural Resources and Investment.
Harper Review	The common term for a competition policy review initiated by the Australian government in December 2013, which issued a Final Report in March 2015.
Negotiated settlement	A consensual agreement between a competition authority and a firm, setting out how certain competition concerns will be addressed. A negotiated settlement can take the form of a contractual arrangement or (in some jurisdictions) an enforceable undertaking.
Productivity Commission	The New Zealand Productivity Commission, an independent Crown entity, that provides advice to the Government on improving productivity
TFEU	Treaty on the Functioning of the European Union. Formerly known as the EC Treaty, the Treaty of Rome or the Treaty establishing the European Community, it sets out the organisational and functional details of the European Union (including its competition law rules).

1 Introduction

1.1 Background to the Issues Paper

The Commerce Act came into force on 1 May 1986. Its objective is to promote competition in markets in New Zealand for the long-term benefit of consumers. To this end, the Act seeks to prevent the establishment or operation of business arrangements which substantially lessen competition; to prevent firms possessing substantial market power from abusing that power; and to provide for scrutiny of the competitive effects of mergers or takeovers in order to prevent undesirable aggregation of market power. In addition the Act provides for the implementation of price control where competition is insufficient to protect the interests of consumers.

The passage of the Commerce Act during 1985 was controversial. At the time, concerns were expressed by various business interests that the Act would limit legitimate business activities. Today, some have concerns that the Commerce Act does not go far enough.

In this regard, in May 2014, the Productivity Commission set out a number of recommendations in a report entitled Boosting Productivity in the Services Sector. In response, the 2015 Business Growth Agenda progress report announced that the Government would "review the misuse of market power prohibition and related matters". Those related matters include the cease and desist regime, and the issue of market studies.

1.2 Scope of the Issues Paper

The Issues Paper focuses on three main legal matters:

- the prohibition against misuse of market power in section 36 (chapter 2);
- alternative enforcement mechanisms, including the cease and desist regime (Chapter 3); and
- the possibility of a new 'market studies' function for an appropriate agency (chapter 4).

Other matters are not explored at this time. They are:

- the prohibition against resale price maintenance;
- the intellectual property exemption;
- the case for a generic access regime; and
- the possible introduction of a prohibition against concerted practices ('tacit collusion').

These latter matters do not appear to raise concern at this time or, as in the case of intellectual property, are better dealt with in the context of their own legislative review.

Nevertheless, the Ministry remains open to submissions on the scope of the Issues Paper. Should evidence emerge of potentially material problems with respect to these additional matters, the Ministry may decide to include one or more of them in any Options Paper that may later be produced.

1.3 Purpose of the Issues Paper

The Issues Paper is designed to test whether further investigation – in the form of an Options Paper – is appropriate, in respect of any of the matters within scope.

In this regard, the Issues Paper sets out the Ministry's current understanding of:

- how the relevant provisions of the Commerce Act have operated in practice;
- the factors the Ministry should use in determining whether this operation has or has not been satisfactory; and

- if an Options Paper is prepared, what options might be considered.

The Issues Paper then invites respondents' views on the Ministry's approach, together with supporting arguments and information.

1.4 Relevant reports

1.4.1 The Productivity Commission report

The Productivity Commission report of May 2014 recommended, in respect of section 36 of the Commerce Act, that the Government consider whether approaches other than the current one "offer greater accuracy in identifying situations where firms have taken advantage of market power and damaged dynamic efficiency with consequent detriments to competition, innovation and/or productivity".[1]

In this regard, the report proposed that the Government consider:

- a more flexible approach where courts do not rely on a single counterfactual test for an abuse of monopoly power;
- more of an 'effect' approach to gauge whether conduct has harmed dynamic efficiency; and
- providing for an efficiency defence in cases where the conduct of a firm with substantial market power fails a primary test that it is harming competition.

The Government is considering the Commission's report and recommendations. No timeframe has been set for the overall response. The Business Growth Agenda has however signalled a review of section 36 of Commerce Act and related provisions.

1.4.2 The Harper Review

In December 2013, the then Australian Prime Minister and Minister for Small Business announced a review of their country's competition policy. The review was led by Professor Ian Harper and released its final report in March 2015. The final report made 56 recommendations for reform, including in respect of some of the matters within scope of this Issues Paper.

Because of the similarities that exist between New Zealand and Australian competition policy, the Ministry considers it appropriate, in framing this Issues Paper, to consider the submissions to, and recommendations of, the Harper Review.

While the Australian government has since consulted on the Harper Review recommendations, it was reported in September 2015 that the government will "take its time" in considering its official response.[2] If the response is released during the consultation period for this Issues Paper, then we will consider it along with submissions.

[1] 'Boosting productivity in the services sector', New Zealand Productivity Commission, May 2014 at p.135
[2] 'Scott Morrison to take charge of competition reform', Australian Financial Review, 24 September 2015

2 Anti-competitive exclusionary conduct

2.1 Matters at issue

2.1.1 Competition

Professor Maureen Brunt has described competition as follows:

> "Competition is a process rather than a situation. Dynamic processes of substitution are at work. Technological change in products and processes, whether small or large, is ongoing and there are changing tastes and shifting demographic and locational factors to which business firms respond. Profits and losses move the system: it is the hope of supernormal profits and some respite from the 'perennial gale' that motivates firms' endeavours to discover and supply the kinds of goods and services their customers want and to strive for cost efficiency. Such a vision tells us that effective competition is fully compatible with the existence of strictly 'limited monopolies' resting upon some short run advantage or upon distinctive characteristics of product (including location). Where there is effective competition, it is the ongoing substitution process that ensures that any achievement of market power will be transitory."[3]

Competition is usually desirable,[4] because it can promote allocative, productive and dynamic efficiency – in other words, economic efficiency. The Competition and Markets Authority in the United Kingdom has recently published a report highlighting the ways that competition generates such benefits:

> "First, within firms, competition acts as a disciplining device, placing pressure on the managers of firms to become more efficient. This decreases 'x-inefficiency' – that is, the difference between the most efficient behaviour that the firm is capable of and its observed behaviour in practice. This is sometimes called the 'within-firm' effect.
>
> "Secondly, competition ensures that higher productivity firms increase their market share at the expense of the less productive. These low productivity firms may then exit the market, to be replaced by higher productivity firms. This is sometimes called the 'across-firm' or 'market-sorting' effect.
>
> "Thirdly, and perhaps most importantly, competition drives firms to innovate. Innovation increases dynamic efficiency through technological improvements of production processes, or the creation of new products and services." [5]

2.1.2 Anti-competitive exclusionary conduct

Exclusionary conduct describes behaviour where a firm seeks to exclude one or more competitors from a market or to render them less competitively effective. Exclusionary conduct can be harmful to competition, or not harmful to competition.[6] Governments worldwide seek to prohibit harmful (i.e. anti-competitive) exclusionary conduct.

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[3] Brunt, M., 'Market definition Issues in Australian and New Zealand Trade Practices Litigation', in Ahdar (ed), 'Competition Law and Policy in New Zealand', 1991, p.115

[4] There may, however, be some markets (such as natural monopolies) where competition can constitute wasteful duplication or may discourage socially beneficial collaboration and cooperation.

[5] 'Productivity and Competition: a summary of the evidence', 9 July 2015, at para 3.17

[6] For example, an exclusive dealing arrangement is, by definition, exclusionary, but it may be necessary in order for an investment in the production or distribution of a product to take place. As such, the exclusive deal may result in a net increase in competition.

The two prevailing categories of anti-competitive exclusionary conduct are:

- predation: for example, where a powerful business lowers its prices for a sustained period of time to drive a competitor or competitors out of the market. This may be anticompetitive if these prices are below an appropriate measure of cost and the business has the ability to recoup its losses by increasing its prices later, without likely entry into the market by others; and
- raising rivals' costs, such as:
    - exclusive dealing – where a business has contracts with retailers or distributors that allow them only to sell its products. This may be anticompetitive if the arrangement denied a competitor access to an important distribution channel.
    - refusal to deal – where a vertically-integrated business refuses to supply a competitor with an input or to give the competitor access to infrastructure, which the competitor needs to be able to compete in downstream markets.
    - high access pricing (or margin squeeze) – the supply of a bottleneck input or infrastructure to a competitor at a high price may also be anticompetitive. A high price may be assessed relative to the selling price of the downstream product or service and, in general, a business must leave a sufficient margin for an efficient competitor to compete.
    - tying – where a business only sells a product if the customer purchases it together with another product. For example, if a firm dominant in respect of one product market sells that product together with another product (in respect of which the firm is not dominant), competition for the latter product could be impeded if the combined price of the tied products is significantly less than the prices of the products when sold separately.

Prohibiting anti-competitive exclusionary conduct of these kinds is designed to protect competition, not individual competitors. In this regard, the Ministry notes that a large proportion of submissions to the Harper Review suggested that problems with the current prohibition in Australia are due to it not protecting small business. In the Ministry's view, however, this is not the prohibition's purpose. Imbalance of bargaining power is better dealt with by other means – e.g. industry codes of conduct, fair trading rules, etc. In this regard, the Ministry notes that the Harper Review Final Report did not accept the submissions suggesting that section 46 should protect competitors.

In addition, striving to acquire market power is what encourages innovation, and firms should not be punished when they achieve it. Nor, having acquired market power, should they be prevented from innovating further. Consumers benefit from increased productivity and innovation.

1. Has the Ministry accurately described the type of conduct that countries typically seek to prohibit?

2.2 Benchmark of approaches to anti-competitive exclusionary conduct

Rules against anti-competitive exclusionary conduct exist in most jurisdictions around the world. They can be analysed according to two key elements:

- first, who is subject to the rule (in New Zealand this is persons with a substantial degree of market power);
- second, how the rule is framed (in New Zealand it is that the persons concerned "take advantage" of their substantial degree of market power with the purpose of excluding competitors from the market).

In addition, there sometimes exist defences to these rules, and (in a limited number of jurisdictions) authorisation regimes allowing exemptions from these rules.

2.2.1 The persons who are subject to the rule

The definition of who is subject to prohibitions on anti-competitive exclusionary conduct is similar across many jurisdictions, with the most common terms referring to firms with "market power" or a "dominant position" in a market. Although the US uses the term "monopoly" power, it does not carry the modern economic meaning of monopoly and so, for example, "US courts use the term 'monopoly power' to include large firms that do have some smaller rivals".[7] The essence of all these terms appears to be the absence of significant, market-related constraints on a firm from the conduct of its competitors and customers.

Note that, unlike in many jurisdictions, in the US the market power need not exist at the time of the anti-competitive conduct (but in such a case it must subsequently exist as a result of the anti-competitive conduct). Thus, in the US, a person with a dangerous probability of achieving monopoly power will also be captured by the prohibition.[8]

The "dominance / market power" threshold is a reflection of the fact that more powerful firms are likely to have greater impacts (positive or negative) on the competitive process. As Williams has written: "the requirement of substantial market power is a useful sorting mechanism".[9]

In most jurisdictions, the competition authorities tend, in assessing whether the threshold has been met, to rely on matters such as (trends in) market shares and the risk or imminence of market entry (including the presence or absence of barriers to entry). These factors are however merely tools for answering the broader question of whether the firm in question does or does not face material competitive constraints.

Table 1: Persons who are subject to the rule

	NZ	Australia	Australia (Harper)	EU	USA		Canada
Persons who are subject to the rule	Persons with a **substantial degree of market power**	Corporations with a **substantial degree of market power**	Corporations with a **substantial degree of market power**	Undertakings with a **dominant position**	Persons with **monopoly power**	Persons with a **dangerous probability of achieving monopoly power**	One or more persons with **substantial or complete control** of a class of business[10]

2.2.2 How the rule is framed

Assuming a firm is one that is subject to a jurisdiction's rule against anti-competitive exclusionary conduct, there is no breach of the law unless the action they have taken is in some way exclusionary and anti-competitive, taking the form for example of price squeezes, predatory pricing, refusal to deal, etc.[11] What, though, amounts to 'anti-competitive exclusionary conduct'?

[7] Elhauge and Geradin (eds), 'Global Competition Law and Economics', 2nd edition, 2011, at p.271
[8] *Spectrum Sports Inc v McQuillan* 506 US 447 at 456 (1993).
[9] Williams, P. of Frontier Economics, 'Should an effects test be added to s46', May 2014, at p.2
[10] According to the 2012 Enforcement Guidelines for sections 78 and 79 of Canada's Competition Act, "the assessment of market power under paragraph 79(1)(a) accounts not only for a firm's pre-existing market power, but also for market power derived from the alleged anti-competitive conduct": see p.1 of the Enforcement Guidelines.
[11] The EU also targets "exploitative" conduct, such as charging excessive prices.

Purpose versus effect

One main divide here is between jurisdictions that focus on conduct whose *purpose* is exclusionary (New Zealand, Australia) and jurisdictions that focus on conduct whose *effect* is exclusionary (EU, USA).

In the former jurisdictions, the competition agency asks whether the purpose of the conduct (in other words, the intent of the powerful firm) was to exclude competitors, such as by creating a price squeeze, setting predatory prices, refusing to deal, etc. By contrast, in the latter jurisdictions, the test concerns not the purpose of the conduct (the intent of the powerful firm) but the real-world impact of the powerful firm's actions (although the finding of an anti-competitive intent may facilitate the establishing of an abuse).

The Harper Review has proposed that Australia adopt a test of 'purpose or effect or likely effect' of substantially lessening competition in a market.

Causal connection

A further divide concerns whether there is a requirement for a "causal connection" between the market power of the firm and the exclusionary conduct alleged.

New Zealand and Australia, for example, require that the firm in question, when taking exclusionary action in the market, be relying on ("taking advantage of") its market power to do so. If, in the absence of the market power, the conduct would still have occurred, then the causal connection is not established, and the case fails.

The US, for its part, requires that the firm in question be doing something that contributes to the maintenance (or acquisition) of its monopoly power (its dominance).[12] If the conduct does not contribute to the maintenance (or acquisition) of the monopoly power, then the causal connection is not established, and the case fails.

The European Union is sometimes portrayed as setting no requirement for any form of causal connection. As noted by Rousseva, "the *Continental Can* and *Hoffman La-Roche* cases are normally cited as authorities in this respect".[13] However, while the court rejected suggestions that a causal connection was (in those particular cases) necessary between the market power and the abusive conduct (as is the case, in different ways, in New Zealand/Australia and the US), it did not reject the notion that a causal connection was necessary between the market power and the 'harm to competition' also required under Article 102 of the TFEU. Rousseva notes that the requirement for such a connection "follows from the reasoning of the Court".[14]

[12] To be precise, US law requires "the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident". See *US v Grinnell Corp 384* US 563 at 570-571 (1996). It should also be noted that section 2 of the US Sherman Act concerns not only monopolisation but also "attempted" monopolisation. However, for the purposes of this Issues Paper, we have focused on the US monopolisation provisions only i.e. successful acquisition (or maintenance) of monopoly power.

[13] Rousseva, E., 'Rethinking Exclusionary Abuses in EU Competition Law', Hart Publishing, 2010, at section 5.1

[14] Ibid. Note, in addition, the view of O'Donoghue, R and Padilla, A, that "[w]hile there are undoubtedly some statements by the EU courts which suggest that causation is not a central issue in abuse cases, many more clearly suggest that it is": see 'The Law and Economics of Article 102 of the TFEU', 2nd ed, Hart Publishing, 2013 at para 5.4.1

Table 2: Conduct that breaches the rule

	NZ	Australia	Australia (Harper)	EU	USA		Canada
Purpose versus effect	The **purpose** of their conduct is to exclude competitors from the market	The **purpose** of their conduct is to exclude competitors from the market	The **purpose**, **effect** or **likely effect** of their conduct is to substantially lessen competition	The **effect** of their conduct is to hinder the maintenance or development of the level of competition in the market[15]	The **effect** of their conduct is to impair the opportunities of rivals[16]		They undertake an 'anti-competitive act',[17] and the **effect** of their conduct is to prevent or substantially lessen competition[18]
Causal connection	They **take advantage** of their market power	They **take advantage** of their market power	n/a	Not settled	The conduct **contributes to the maintenance** or enhancement of the monopoly power	The conduct **contributes to the acquisition** of the monopoly power	n/a

2.2.3 Defences and authorisations

Defences

Some jurisdictions allow for positive defences against anti-competitive exclusionary conduct. In other words, even where the elements of the rule have been met, these jurisdictions allow the defendant to avoid liability by proving some additional, exculpatory matter – a justification.

> To establish an efficiency defence, a powerful firm typically has to demonstrate that the negative effects of its conduct on competition are outweighed by efficiencies that the conduct brings about. Efficiencies might include (but are not limited to) things like improved product quality, or reductions in the cost of producing or distributing a product.

Express provision for an efficiency defence is much less common for anti-competitive exclusionary conduct than for, say, mergers and concerted practices, but it does exist in a few jurisdictions.[19] In addition, the European Union's courts have recognised the availability of an efficiency defence, even in the absence of words to that effect in Article 102 of the Treaty on the Functioning of the European Union (TFEU). In this regard, the European Commission has stated:

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[15] See Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, at para 91. Article 102 of the TFEU applies not only to conduct excluding competitors from the market but also to conduct that exploits consumers (for example, through excessive prices or other unfair terms and conditions).

[16] See *Aspen Skiing Co. v Aspen Highlands Skiing Corp*, 472 US at 595-596. The Court in *Aspen* added the additional requirement that the conduct must not "further competition on the merits" or must do so only "in an unnecessarily restrictive way".

[17] See section 79(1)(b) of the Canadian Competition Act. Section 78 of the same Act lists a number of examples of 'anti-competitive act'. Most but not all of these involve a "purpose-like" element. To this extent, it could be argued that Canada has a hybrid approach, which requires proving both (i) under s 79(1)(b), an exclusionary, predatory or disciplinary *purpose* and (ii) under s 79(1)(c), an *effect* of substantial lessening or prevention of competition

[18] See section 79(1)(c) of the Canadian Competition Act

[19] See, for example, Article L.420-4 of France's *Code de commerce*; and section 8 of South Africa's Competition Act 1998.

"The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise."[20]

In Australia, the Harper Review Draft Report proposed that a defence be available under the (proposed revised) section 46, "to minimise the risk of inadvertently capturing pro-competitive conduct".[21] Under the draft report proposal, "the primary prohibition would not apply if [the defendant could prove that] the conduct in question:

- would be a rational business decision by a corporation that did not have a substantial degree of power in the market; and
- would be likely to have the effect of advancing the long-term interests of consumers."[22]

This defence was criticised in submissions on the Draft Report partly on the ground of impracticability and was rejected in the Harper Review Final Report.

Authorisations

Rather than relying on a defence once proceedings have begun, a powerful firm may wish instead to seek authorisation ahead of time.

An 'authorisation' is permission to undertake conduct even though that conduct will be, or is likely to be, anti-competitive. This differs from a 'clearance', which is confirmation that a proposed course of action can proceed because it will not in fact be anti-competitive.

Provisions allowing a firm to apply for an authorisation exist in a number of jurisdictions in respect of many anti-competitive practices (mergers, agreements…), with the notable exceptions of the US and the European Union.[23] However, authorisations are very rare in respect of anti-competitive exclusionary conduct.

One jurisdiction that does have such a provision is Barbados, where "any person who proposes to enter into or carry out an agreement or to engage in a business practice which, in that person's opinion, is an agreement or practice affected or prohibited by this Act, may apply to the Commission for an authorisation to do so".[24] This includes business practices that fall within section 16 of the relevant Act as 'abuse of a dominant position'.

Canada does not have an authorisation regime in respect of anti-competitive exclusionary conduct, but does have a "written opinions" regime. Under section 124.1 of Canada's Competition Act, "the Commissioner has the discretion, on request from any person, to provide a binding written opinion on the applicability of one or more provisions of the Act or regulations to a proposed practice or conduct",[25] including in respect of section 79 of the Competition Act.

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[20] 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 24 February 2009, at para 30. Recently the European Court of Justice confirmed this approach in C-209/10 - *Post Danmark*, para 42.

[21] Harper Review draft report at p.210

[22] Ibid.

[23] The European Commission can authorise a merger based on efficiencies but, rather than being a distinct authorisation process, efficiencies are considered to be covered by the legal test of "significant impediment to effective competition" (SIEC), i.e. if a merger produces efficiency gains (fulfilling the criteria of being verifiable, merger-specific and likely to be passed on to consumers) outweighing the anti-competitive effects, the merger is considered not to result in a SIEC.

[24] See section 29(1) of Barbados' Fair Competition Act, Cap. 326C

[25] See Canadian Competition Bureau, 'Competition Bureau Fee and Service Standards Handbook for Written Opinions', July 2014, at p.3

In addition, the Harper Review has proposed that authorisation should be available in respect of potential breaches of section 46 of Australia's Competition and Consumer Act 2010.[26]

2. Has the Ministry accurately described the different approaches countries take in their rules against anti-competitive exclusionary conduct?

2.3 The New Zealand regime

The New Zealand rule against anti-competitive exclusionary conduct is set out in Section 36 of the Commerce Act. 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 (c) eliminating a person from that or any other market."[27]

As noted in the previous section, this rule can be analysed according to two key elements:

- who is caught by the rule (persons with a substantial degree of market power);
- how the rule is framed (when they "take advantage" of their substantial degree of market power with the purpose of excluding competitors from the market).

There have been over 50 court cases relating to section 36 of the Act. A list of proceedings taken by the Commerce Commission and by private parties is contained in Appendix A.

It is important to note that the Commerce Act provides that its overriding goal is 'the long term benefit of consumers within New Zealand', which has been equated to an efficiency objective.[28] Given the availability of the authorisation procedure, with its explicit focus on an efficiency standard, the restrictive trade practice prohibitions in the Act, including section 36, are primarily focused on the promotion of competition. However, the New Zealand courts have been willing to consider efficiency within the competition assessment and this is particularly relevant for the unilateral conduct prohibitions (where authorisation is not available).

Section 36 also contains an exclusion of enforcement of statutory intellectual property rights (set out in section 36(3)). That exclusion falls outside the scope of this Issues Paper.

2.3.1 Substantial degree of power

The holding of substantial market power in New Zealand is usually associated with an ability to raise prices above the efficient costs of supply without existing or potential competitors taking away customers in due time. However, market power may also manifest itself through other conduct such as refusing to supply or dictating non-price terms of supply.

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[26] Harper Review Final Report, at pp.345 and 348

[27] In its original formulation (i.e. until 2001), section 36 of the Act applied to those in "a dominant position" in a market. The circumstances which triggered the prohibition were where the firm in question was "using" its dominant position. The courts have found that, despite Parliament's intention, the original and current formulations of section 36 are effectively identical in effect.

[28] See, for example, *Giltrap City Ltd v Commerce Commission* (2003) 10 TCLR 831 at 852 (para 76) citing *Tru Tone Limited v Festival Records Marketing Limited* [1988] 2 NZLR 352 at 358, where the Court of Appeal stated that the Commerce Act's purpose statement "is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources". See also the comments of the Minister of Commerce quoted in section 2.4.1 of this Issues Paper.

Substantial market power is often equated with holding high market share, but high market share may or may not confer substantial market power. The presence of barriers to entry into the market is necessary for market power to exist. Also, while not tested in the New Zealand courts, it may be possible for more than one person to have substantial market power in a market.

Unlike in, for example, the US, this element of the New Zealand rule against anti-competitive exclusionary conduct will exclude persons who acquire substantial market power through successful exclusionary conduct, but who did not hold substantial market power at the time the conduct occurred.

Practical example

The Australian case of *Boral Besser*[29] is an interesting illustration of the requirement for a substantial degree of market power.

In the context of a proceeding concerning section 46 of the Australian Competition and Consumer Act 2010, the Australian Competition and Consumer Commission (ACCC) alleged that Boral Besser Masonry (BBM) had priced below cost in order to drive a competitor out of the market for concrete masonry products in metropolitan Melbourne.

Despite the narrow market definition, the ACCC failed to establish that BBM had a substantial degree of market power, notably because of strong counter-vailing buyer powers by customers (itself a result of over-capacity). The High Court, reversing the decision of the Full Court, held:

"The unchallenged finding that customers were 'able to force' the price of masonry products 'down and down' is of major importance in considering whether BBM, or any other supplier, had, and took advantage of, a substantial degree of power in the market; yet it appears to have played no part in the reasoning of the Full Court. The finding reflects the antithesis of market power on the part of an individual supplier."[30]

"…BBM did not have a substantial degree of power in the relevant market – the sale of concrete masonry products – because it was not able to raise prices to supra-competitive levels without its rivals taking away customers. … Accordingly, irrespective of the purpose of its pricing, it did not have a substantial degree of market power of which it could take advantage…"[31]

2.3.2 Taking advantage of market power for an exclusionary purpose

2.3.2.1 Taking advantage of market power

Section 36 will only apply to a firm when it takes advantage of its substantial degree of market power. The New Zealand courts have interpreted this to mean that, if a business without substantial market power but otherwise in the same circumstances would have acted the same way, then it has not 'taken advantage of its market power'. As the High Court put it in the 0867 case:

> "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".[32]

The Supreme Court in the 0867 case added:

[29] *Boral Besser Masonry Limited v Australian Competition and Consumer Commission*, [2003] HCA 5; 215 CLR 374; 195 ALR 609; 77 ALJR 623 (7 February 2003)
[30] *Boral Besser*, at para 32 per Gleeson CJ and Callinan J
[31] *Boral Besser*, at para 199 per McHugh J
[32] *Commerce Commission v Telecom* (2008) 12 TCLR 168 at para 55

> "Anyone asserting a breach of s36 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 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."[33]

This court-derived rule is referred to as a counterfactual test or comparative exercise. It introduces a 'but for' test, looking at the difference in likely conduct between the actual market and a hypothetical market where the business does not hold substantial market power.

This rule is likely intended to exclude from liability any welfare-enhancing or welfare-neutral conduct by persons with substantial market power. Success based on superior skill, products or business acumen does not depend on the exploitation of market power. The rule allows successful parties to engage in vigorous competition using all legitimate tactics available to other parties even if the result of that vigorous competition is to harm competitors. However if a person has 'taken advantage of their market power', the implication is that they have done so other than on their own merits or other than for a legitimate rationale.

The elements of this counterfactual test or comparative exercise have been discussed in various cases since it was first applied in Australia by the High Court in 1989 and, in the case of New Zealand, the Privy Council in 1994.[34] In 2010 the New Zealand Supreme Court indicated how the comparative exercise of comparing the actual and hypothetical market should be conducted.[35] It confirmed that the hypothetical markets should be workably competitive and the defendant should be denied all aspects of its market power.[36] The assessment of what the non-dominant defendant 'would do' in the hypothetically competitive market should be assessed by way of commercial judgement and not necessarily involve economic analysis.

The courts have explained that their adoption of this rule is to provide businesses with certainty *ex ante* as to whether their conduct is lawful and to minimise the risk of a chilling effect on large businesses competing.[37]

Practical example

The Carter Holt Harvey case concerned conduct that took place when section 36 referred to 'dominance' rather than 'market power', and 'use' rather than 'take advantage'. Case law has however determined that these terms have the same legal meaning.

In the case, INZCO (as Carter Holt Harvey was known at the relevant time) supplied to merchants in the Nelson and Marlborough region a product known as Wool Line on a "2-for-1" basis, whereby for every bale purchased a second bale would be provided free by INZCO. This was done in response to the introduction into the market by a Nelson-based firm called New Wool Products Ltd ("NWP') of a woollen insulation product known as Wool Bloc which had significantly reduced the sales of INZCO's principal product in that area.

[33] *Commerce Commission v Telecom* (2010) 12 TCLR 843 at para 34 per Blanchard and Tipping JJ

[34] *Queensland Wire Industries Ltd v Broker Hill Pty Co Ltd* [1989] High Court of Australia and *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* (1994) 6 TCLR 138 (PC) respectively. In the latter case, Gault J also referred to a counterfactual test in the Court of Appeal: see *Clear Communications v Telecom Corp of New Zealand Ltd* (1993) 5 ICLR 413 at 429

[35] *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2010] 12 TCLR 843

[36] *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2010] 12 TCLR 843 at 856 (para 36)

[37] See, for example, *Carter Holt Harvey v Commerce Commission* 2004 11 TCLR 200 at para 8

The High Court found, and before the Privy Council the parties accepted, that INZCO was dominant in the South Island market for building insulation materials, and that its purpose in behaving as it did was to prevent or deter NWP from engaging in competitive conduct in that market or eliminating it from that market.

However, the Privy Council held that INZCO had not 'used' ('taken advantage of') its dominance. The majority was "not persuaded that … INZCO's conduct, in the face of strong competition from NWP and in response to the demands of its distributors, was any different from that which a non-dominant firm of equivalent financial strength would have resorted to in the same circumstances … Moreover, there was no evidence that the '2-for-1' pricing of [INZCO's product] Wool Line was resorted to by INZCO with a view to charging supra-competitive prices at a later date on that or any other of its products. It was a response to competition in an area of a market which it dominated but where it had nevertheless been shown to be vulnerable. The price level had been set by NWP, and no-one could sell a product comparable to [NWP's product] Wool Bloc at a higher price and be competitive. Without the offer of a comparable product to that of its distributors INZCO was at risk of losing its market share, and in the Nelson/Marlborough area it was already doing so." [38]

2.3.2.2 Exclusionary purpose

Purpose

With the passage of the Commerce Act in 1986, New Zealand adopted a purpose-based approach to its prohibition on anti-competitive exclusionary conduct. It is likely that it did so to align section 36 with the equivalent Australian provisions on misuse of market power under the then Trade Practices Act 1974.

A purpose in the context of section 36 is a firm's goal or objective – what it is seeking to achieve.[39] Sometimes, there may be direct evidence of what that purpose was (for example, statements in correspondence at the time of the conduct). More often, purpose will need to be deduced from indirect (circumstantial) evidence. Indeed, section 36B provides that purpose "may be inferred from the conduct of the relevant person or from any other relevant circumstances", such as the effect of the conduct.[40] In this regard, the difference between a purpose test and an effects-test should not be overemphasised.

Exclusionary purpose

To fall foul of section 36, a firm's purpose must be (a) to restrict the entry of a person into a market; or (b) to prevent or deter a person from engaging in competitive conduct in a market; or (c) to eliminate a person from a market. In framing the requirement this way, section 36 does not seek to protect competitors, but the competitive process itself. Such exclusionary conduct often reduces the total output in the market, usually to the detriment of consumers.[41]

The courts have stated that "it will frequently be legitimate for a Court to infer from the defendant's use of his dominant position that his purpose was to produce the [anti-competitive] effect in fact

[38] *Carter Holt Harvey v Commerce Commission* 2004 11 TCLR 200 at para 68
[39] See *Commerce Commission v Telecom* (2008) 12 TCLR 168 at paras 99-100
[40] See *Commerce Commission v Telecom* (2008) 12 TCLR 168 at para 92
[41] The exclusionary conduct might increase the total output in the market, if the exclusion is the result of efficiency-enhancing behaviour.

produced" since "if a person has used his dominant position it is hard to imagine a case in which he would have done so otherwise than for the purpose of producing an anti-competitive effect".[42]

The anti-competitive outcome need not be the firm's sole purpose – it is sufficient if it is "a real or substantial" part of the firm's purpose.[43] Nor need the anti-competitive outcome be achieved. It is enough for a firm, relying on its substantial degree of market power, to take action with the objective of achieving the anti-competitive outcome.

Practical example

The private enforcement proceedings case of *Turners & Growers*[44] is a useful illustration of the requirement for an exclusionary purpose.

Picked kiwifruit is graded into three standards based on shape, appearance and damage: Class 1; Class 2; and Class 3. Class 1 is the premium export fruit, almost all of which is exported to countries other than Australia. Class 2 is also an export grade, exported primarily to Australia. Class 3 is sold domestically or dumped.

The defendant, Zespri, was (and is) the sole legal purchaser of kiwifruit for export destinations other than Australia. Turners & Growers Ltd is, amongst other things, a kiwifruit grower. A significant surplus of kiwifruit was expected for the 2009/2010 season. To avoid a consequent flooding of the Australia market with Class 2 kiwifruit (which would mean reduced returns), Zespri concluded agreements with suppliers under which they would, in return for financial compensation, pack Class 1 kiwifruit for Australia rather than Class 2 kiwifruit.

Turners & Growers pleaded (amongst other things) that, by entering into these agreements, Zespri had taken advantage of its substantial degree of power, in the grower/exporter (non-Australia) kiwifruit market, for the purposes of preventing or deterring exporters or potential exporters of kiwifruit from engaging in competitive conduct in the market for the acquisition and supply of kiwifruit for export to Australia.

There was no dispute that Zespri has a substantial degree of market power in the grower/exporter (non-Australia) market. However, the High Court found that:

> "Zespri's real and substantial purpose in entering into the service level agreements was the same as the real and substantial purpose of the provisions of the service level agreements, namely to provide a commercial solution in the best interests of the industry in response to the anticipated surplus of Class 1 kiwifruit in the 2009 season. Zespri's purpose was not to hinder competition for the acquisition of Class 1 kiwifruit once it made this product available for export to Australia. Even assuming that Zespri had taken advantage of its power in the current grower/exporter (non-Australia) market, there was no evidence that it had done so for the purpose of gaining market share at the expense of other exporters in the market for the acquisition of kiwifruit for export to Australia".[45]

2.3.3 Defences and authorisations

No defence is available to negate liability under section 36, where the elements of liability discussed above are established against a defendant.

[42] *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* (1994) 6 TCLR 138 at 154
[43] Ibid. at paras 92 and 96
[44] *Turners & Growers Ltd v Zespri Group* (2011) 13 TCLR 286 at para 363 et seq.
[45] At para 293

However, pursuant to section 36(1), the prohibition in section 36(2) does not apply to any practice or conduct that has been authorised. Under section 58, authorisations are possible in respect of conduct that might breach a number of provisions in the Commerce Act (such as section 27), but they are not available in respect of section 36(2). The rationale behind section 36(1) has, in this context, been explained as follows:

> "As the Commission will not authorise any practice or conduct (with respect to ss 27-29, 37 or 38) if it considers the practice or conduct will also contravene s 36, the provision in s 36(1) exists to provide a protection from court action by other persons who may have a different view from that of the Commission with respect to the likely contravention of s 36."[46]

3. Has the Ministry accurately described the main elements of New Zealand's rule against anti-competitive exclusionary conduct?

4. In your opinion, what justifications can there be for requiring that a firm with a substantial degree of market power "take advantage" of that power?

5. What justifications can there be for a purpose-based (rather than effects-based) approach? Why do you think Australia adopted such an approach with its Trade Practices Act 1974?

6. Does section 36(1) make sense, given that authorisations do not apply to section 36(2)?

2.4 Framework for assessment

One of the objectives of the Issues Paper is to determine the criteria or factors the Ministry should use in assessing whether the operation of section 36 has been satisfactory, or could be improved.

The Ministry has listed below the criteria it proposes to use. They should not be considered to be a check-list of factors that would be considered in isolation, the one after the other. For example, there may be trade-offs to be made – allowing some disadvantages under one criterion, due to advantages that outweigh them under another. In this context, in assessing the New Zealand regime, the Ministry will consider the criteria as a whole.

2.4.1 Long-term benefit of consumers

The purpose statement in section 1A of the Commerce Act refers to the promotion of competition for the long-term benefit of consumers within New Zealand. This could suggest that competition is the only way in which the Act looks to assure the long-term benefit of consumers, but that is not the case. The existence of an authorisation regime – which can allow conduct that is harmful to competition[47] – demonstrates that the Commerce Act allows different ways of maximising the long-term benefit of consumers. The critical point is to assure the long-term benefit of consumers, and this means maximising economic efficiencies. As the Minister of Commerce stated:

> "The focus on competition in the purpose statement … does not preclude wider public benefit issues being taken into account where appropriate. It simply clarifies that there should be a presumption in favour of competition, and competition must prevail unless the efficiencies or other public benefits are shown to exceed the detriments from the lessening of competition."[48]

[46] See Gault on Commercial Law, 2010 (online version), CA36.02 at (3)
[47] Although not in respect of conduct that breaches section 36 of the Commerce Act
[48] Speech to Parliament in relation to the new purpose clause, by the then Minister of Commerce, Hansard, 27 February 2001

In this context, the courts have concluded that "the object of s 36, like its counterpart in Australia, is to protect the interests of consumers".[49]

The question here is therefore whether section 36 is effective at assuring the long-term benefit of consumers. For example, we would ask whether section 36 and the courts have:

- deterred or punished conduct that was to the long-term benefit of consumers; or
- failed to deter or punish conduct that harmful to the long-term benefit of consumers.

Instances of deterring or punishing too much are known in decision theory as 'false positives' or 'type 1 errors'. Instances of deterring or punishing too little are sometimes known as 'false negatives' or 'type 2 errors'. The Productivity Commission has emphasised that such outcomes pose a risk to "productivity performance":

> "False negative errors [harm productivity] … because they allow large firms suppress competition and innovation from new, smaller firms. False positive errors harm productivity by undermining the potential contribution of large firms to dynamic efficiency through innovation and using scale to lower costs."[50]

2.4.2 Simplicity

A system that perfectly assured the long-term benefit of consumers – even if possible – would likely be highly complex, bringing with it:

- undesirable expense and delays; and
- difficulty for firms to know in advance whether their proposed course of action is likely to be punishable.[51]

In this context, the complexity (and with it, potentially, the effectiveness) of the system we design may need to be reduced in order to allow the system to be cost-efficient, timely, and predictable.

2.4.3 Other potential criteria

2.4.3.1 Alignment with other provisions

It may be desirable that section 36 align with other competition law provisions – both other prohibitions in the Commerce Act, and prohibitions equivalent to section 36 in overseas jurisdictions.

In both cases, alignment reduces the costs of compliance and enforcement by allowing New Zealand courts and firms to draw on a larger body of knowledge and skills to interpret the law. In particular, New Zealand produces few court decisions under section 36. Even if the law were amended as a result of the current review process, it might still not produce nearly as many decisions as do larger jurisdictions such as Australia, the European Union and the US. If New Zealand court decisions on, say, sections 27 and 47 of the Commerce Act, and foreign court decisions on anti-competitive exclusionary conduct, became more directly relevant, the additional case-law could assist in reaching decisions more quickly, and enhance the predictability of the system for the firms affected.

Alignment with the laws of major trading partners (US, Australia, China…) would also be desirable to facilitate cross-border trade and investment (both investment in New Zealand by foreign firms and

[49] *Carter Holt Harvey v Commerce Commission* 2004 11 TCLR 200 at para 51

[50] Productivity Commission final report at p.132

[51] In Telecom v Clear, the Privy Council stated: "In their Lordships' view, s 36 must be construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful": Telecom v Clear 1994 6 TCLR 138 at 154

investment in foreign countries by New Zealand firms). This is particularly the case for alignment with Australia, if third party investors (e.g. China, US…) feel reassured that they face few extra competition law risks if they scale up Australian operations to encompass New Zealand.

On the other hand, alignment can be costly, if it means changing legislative provisions on a regular basis in response to other countries' decisions. The law in other jurisdictions may also be unsatisfactory or difficult to replicate in the New Zealand legal system.

2.4.3.2 Consideration of New Zealand's small and remote economy

New Zealand has a relatively small economy. According to IMF figures, our annual GDP ranks us 53rd, between Romania and Vietnam, or 69th on a PPP basis, between Sudan and Slovakia.[52] New Zealand's economy is also geographically remote. This may make it expensive for New Zealand firms to source foreign inputs, and for foreign firms to enter and compete in the New Zealand market.

In this context, our (competitive) commercial sectors tend to attract fewer strong market entrants than equivalent sectors abroad, since there is less money to be made. This means that, in such sectors, an operator is (through no fault of its own) more likely to find itself having significant market power in New Zealand than in countries with larger economies, and there are likely to be fewer cases of markets with evenly-matched 'medium-sized' firms.

What this means in terms of framing an appropriate prohibition on anti-competitive exclusionary conduct can be debated.

On the one hand, it could be argued that powerful firms should be allowed some leeway to act as they might if the market were more competitive, to enable them to act the same way as similarly sized competitors abroad (who, being in larger economies, might not have a substantial degree of market power). This is the 'national champion' argument.

On the other hand, it might be argued that powerful firms should be subject to stricter rules than abroad, due to "a weaker tendency of markets to self-correct because of higher entry barriers, and consumers having fewer choices".[53]

The Ministry welcomes submissions on what the correct implication of our small and remote economy is, in terms of framing and applying our prohibition on anti-competitive exclusionary conduct.

7. Has the Ministry identified the right criteria for assessing the adequacy of section 36 of the Commerce Act? Should any criteria identified be excluded, or should criteria not mentioned be added?

8. Should the criteria used be given equal weight?

2.5 Assessment of the New Zealand regime

2.5.1 Long-term benefit of consumers

Does section 36, as applied by the courts, effectively assure the long-term benefit of consumers? In our preliminary opinion, there is a risk that it will not. This risk is linked to the court-derived counterfactual test (discussed above in section 2.3.2), which requires the court to ask whether the

[52] Australia is 12th and 19th respectively; the United Kingdom 5th and 10th.
[53] Productivity Commission report, at p.132. See also Gal, M., 'The Effects of Smallness and Remoteness on Competition Law – The Case of New Zealand (2007) 14 CCLJ 292

firm would have acted the same way if it had lacked market power. The counterfactual test excludes liability if the alleged conduct would also be undertaken by a non-dominant business in a competitive market.

This "safe harbour" counterfactual test effectively introduces a type of efficiency justification for what might be anti-competitive conduct. This is because a firm without market power would be likely to take action if it was efficiency-enhancing. One of the problems with this approach is that the courts have not considered whether the efficiencies the defendant is seeking to achieve through its conduct could be achieved in a way that had fewer or less harmful anti-competitive effects. In other words, the counterfactual test is a blunt, "binary" test.

In addition, some cases involving competitively neutral or pro-competitive conduct could result in liability for the firm in question (i.e. there could be 'type 1' errors). For example, under the counterfactual test, a concern may arise if the efficiencies that a business with substantial market power could achieve from the challenged conduct are greater than those that are achievable in a hypothetical scenario by a business without substantial market power. Where this is the case, the business in the hypothetical counterfactual may not act in the same way as the actual business has, and the conduct would be found to be unlawful (if other elements of the prohibition are made out).

More often, some cases before the courts involving conduct with anti-competitive effects could, in our opinion, result in no liability for the firm responsible (i.e. there could be 'type 2' errors). Exclusive dealing, for instance, frequently occurs in competitive markets as businesses seek to control the distribution of their products. However, the same conduct when carried out by a business with substantial market power can result in significant competition detriments, at worst eliminating all competitors from the market.

This risk of 'type 2' errors is what the ACCC argues has occurred under section 46 of the Competition and Consumer Protection Act 2010.[54] In this regard, the Chairman of the ACCC, Rod Sims, has been quoted as follows:

> "The ACCC had done investigations into 'serious exclusionary behaviour' but been unable to take court action because of the current wording and interpretation of the Competition and Consumer Act, Mr Sims said. That was allowing companies to buy up all available land, restrict the supply of essential inputs, price in a predatory fashion, as well as offer anti-competitive product bundles or loyalty rebates. Each of these was 'recognised worldwide as potentially exclusionary'."[55]

On the other hand, liability might in such situations still be established under section 27 of the Commerce Act or section 45 of the Australian Competition and Consumer Act 2010.[56]

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[54] In its submission on the Harper Review's Issues Paper, the ACCC stated: "The ACCC considers that Rural Press Limited v ACCC and Cement Australia best exemplify the narrow interpretation of 'take advantage' that has been taken by the courts: in both cases the conduct of a firm with substantial market power, despite being found by the Court to have been engaged in for a substantial anti-competitive purpose and having the effect of substantially lessening competition, was not found to constitute a 'taking advantage' of the firms' market power. Accordingly, no contravention of section 46 was made out in either case." See ACCC, 'Submission to the Competition Policy Review', 25 June 2014, at p.79

[55] Rolfe, J., 'ACCC boss Rod Sims: Companies locking rivals in change rooms', 12 September 2014, on news.com.au

[56] This was the case in the *Rural Press* case. The defendants escaped liability under section 46 of the then Trade Practices Act 1974, but were held liable under sections 4D and 46. See *Rural Press Limited v ACCC* (2003) 216 CLR 53 (FCA)

Overall, in our view, section 36 risks failing to appropriately assure the long-term benefit of consumers.

9. Do you agree that section 36 may not effectively assure the long-term benefit of consumers? If you agree, are there any sectors of the economy where you consider this to be well illustrated? If you disagree, please explain why.

2.5.2 Simplicity

Is the New Zealand approach to anti-competitive exclusionary conduct, as embodied in section 36 and its interpretation by the courts, simple enough to be cost-efficient and timely, as well as predictable for powerful firms considering market conduct?

The elements of section 36 liability have been set out in earlier sections. The element of substantial degree of market power has proven relatively simple to apply. Purpose, too, seems to be well understood.[57] However, the requirement of "taking advantage" of market power has led to complex and lengthy argument, particularly as a result of the court-originated counterfactual test.

The problem here is not so much one of predictability for powerful firms – businesses will generally know if they are acting in a way that they would not in a competitive market. The problem seems instead to be the cost and delay involved in making a case under the counterfactual test. The evidential burden for the plaintiff of proving a hypothetical counterfactual is simply too heavy in many cases. 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. Such an evidential burden for the plaintiff has increased the complexity of the section 36 process. The prohibition has ultimately become defendant-friendly.

In this context, the Ministry considers that the simplicity of section 36, as that section is applied by the courts, could be improved.

10. Is it fair to say that businesses will generally know if they are acting in a way that they would not in a competitive market – i.e. that the current test is sufficiently predictable?

11. Do you agree that section 36 – as applied by the courts – is too complex to ensure that it is cost-effective and timely?

2.5.3 Other potential criteria

2.5.3.1 Alignment with other provisions

Section 27(1) of the Commerce Act provides:

> "No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market."

Section 47 of the Commerce Act provides:

[57] We note, however, the words of Easterbrook J in *AA Poultry Farms Inc v Rose Acre Farms Inc* 881 F.2d 1396 at 1402 (7th Cir, 1989) per Easterbrook J: "Intent … complicates litigation. Lawyers rummage through business records seeking to discover titbits that will sound impressive (or aggressive) when read to a jury. Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions".

> "A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market."

These provisions are framed differently from section 36. Both provisions use the concept of a "significant lessening of competition", which is absent from section 36. Each also includes, or solely comprises, an effects test, again absent from section 36.

In addition, in their interpretation by the courts, while these provisions have – like section 36 – given rise to hypothetical counterfactual analysis to determine liability,[58] there are important differences too. In sections 27 and 47, the counterfactual looks at how the market would evolve without the conduct, while in section 36, it asks whether the conduct would be the same in a hypothetical market. The reliance on unrealistic assumptions required for the counterfactual under section 36 raises unique challenges.

Finally, some have queried the coherence of the competition regime where unilateral conduct that does not contravene the prohibition in section 36, if carried out by two or more parties in concert, would contravene the anticompetitive arrangements prohibition in section 27 of the Act. They query if the same standard for anticompetitive conduct should apply to unilateral conduct as for multiple party conduct. The substantial lessening of competition test is applied by businesses and their advisers in relation to mergers and arrangements, so some query why this is different in the case of unilateral exclusionary conduct. On the other hand, of course, most competition law regimes treat multilateral conduct more harshly than unilateral conduct – having different results under different provisions is thus not unusual worldwide.[59]

In terms of alignment with provisions outside New Zealand, as can be seen in Tables 1 and 2 above, section 36 is broadly similar to section 46 of Australia's Competition and Consumer Act 2010. However, there has been a divergence in the way the provisions have been interpreted by the courts in each country. In Australia, the courts are willing to consider 'taking advantage of market power for exclusionary purposes' in a more flexible way. The Australian courts can consider evidence of conduct in similar competitive markets and the existence of legitimate business purposes. The counterfactual test is used to assist the court in analysing the conduct, but it is not necessarily the only test applied.

Tables 1 and 2 (in section 2.2 above) also show that section 36 is significantly different from equivalent provisions in the US, the European Union and Canada. None of these jurisdictions requires, for example, that the powerful firm 'take advantage' of its dominant position (in the specific sense that 'take advantage' has in the New Zealand and Australian courts). None, for that matter, seeks to impose liability merely on the basis of a powerful firm's exclusionary intent – all are concerned with the effects of the powerful firm's conduct.[60] [61]

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[58] In particular, it is necessary to determine a counterfactual in order to compare the factual when assessing if any transaction substantially lessens competition under sections 27 and 47 of the Commerce Act

[59] See in the US, for example, *Copperweld Corp v Independence Tube Corp* 467 US 752 at 768-769, where the court states: "Concerted activity subject to § 1 [of the Sherman Act] is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price-fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se,* without inquiry into the harm it has actually caused."

[60] However, see O'Donoghue, R and Padilla, A, 'The Law and Economics of Article 102 of the TFEU', 2nd ed, Hart Publishing, 2013 at para 5.4.4, where the authors argue, in respect of article 102 of the European Union's TFEU, that "it is clear that weight can be attached to evidence of exclusionary intent…". For example, in CaseC-549/10 *P Tomra*, the Court of Justice made a general statement that intent, while not a requirement, can in principle be helpful in finding abuses. In practical terms, this means that if the European Commission finds evidence of intent, it can use it to strengthen its case for a breach of Article 102 of the TFEU. Note also

12. Do you agree that section 36 – as applied by the courts – is not well aligned with other relevant provisions?

2.5.3.2 Consideration of New Zealand's small and remote economy

Because the Ministry has not come to a conclusion on the correct implication, for our prohibition on anti-competitive exclusionary conduct, of our small and remote economy, it is difficult to set out at this stage our assessment of section 36 by this criterion.

13. Given your view on the correct implication of having a small and remote economy, do you consider that section 36 appropriately reflects that implication?

2.6 Conclusion

Subject to learning more from respondents about the implications of our small and remote economy, the Ministry's preliminary conclusion is that the operation of section 36 has not been satisfactory. This is because section 36 appears:

- to be failing to maximise the long-term benefit of consumers, by failing to punish anti-competitive conduct by powerful firms;
- to be too complex to allow for cost-effective and timely application; and
- to be misaligned with other prohibitions in the Commerce Act (sections 27 and 47 both include an 'effects test' while section 36 relies on a 'purpose test') and with equivalent provisions in a number of foreign jurisdictions (the US, the EU and Canada do not require that a powerful firm 'take advantage' of its market power).

This does not necessarily imply that any other approach is superior or, if it is, that it should be adopted. That is a separate matter, for potential consideration in a later options paper.

14. For each of the criteria it has adopted, has the Ministry's assessment been well-reasoned?

15. If you are submitting that the criteria for assessment should be different from those used by the Ministry, how might the assessment be different using your preferred criteria?

16. Do you agree with the Ministry's conclusion? Please explain why.

17. Do you have any other comments you wish to make about the Ministry's approach to assessing the current law on anti-competitive exclusionary conduct?

2.7 Potential options for reform

It is not the place or purpose of this Issues Paper to consider the advantages and disadvantages of options for reform of section 36. However, it would be remiss of the Ministry not to give signals of

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that, for predatory pricing, proof of intent has been particularly important in the European Union. Indeed, proving anti-competitive intent has been a requirement for proving the abuse where the pricing is below average total cost but above average variable cost. When the pricing is below average variable cost, the anti-competitive intent is presumed. See, for example, Case 62/86 *AKZO Chemie BV v Commission*, paragraphs 71-72; Case T-83/91 *Tetra Pak v Commission*, paragraph 151; Case T-340/03, *France Télécom SA*, paragraph 192

[61] In Canada, in order for a firm to be held liable, the Competition Bureau must prove, amongst other things, that a firm engaged in an anti-competitive act, which typically requires proving that the purpose of the act is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. However, this is not sufficient to prove a breach of s 79 of the Competition Act: proof must also be brought concerning the effect of the act on competition.

what options it might consider, should it be decided (in response to submissions) that an Options Paper is appropriate. This will give respondents the chance to shape any such options.

The first option would of course be to retain the status quo. In such a case, change may emerge over time, but it would be through judicial interpretation of section 36, rather than legislative change. A variation of this approach would be to insert 'guidance' into the Commerce Act to direct the courts to interpret section 36 in a different way, as has been done in Australia with section 46(6A) of the Competition and Consumer Act 2010.

A second option would be to remove the taking advantage requirement from the current section 36 test. This would mean that a firm with a substantial degree of market power would be in breach of the prohibition so long as it undertook conduct with the necessary purpose. Conduct would not be excluded simply because, in undertaking it, the powerful firm did not rely on its market power.

A third option would be to replace the purpose requirement in the current section 36 test with an 'effects' test, or an 'effects or purpose' test.[62] An 'effects' test would reflect the approach taken in Part XIB of the Australian Competition and Consumer Act 2010, and more specifically sections 151AJ and AK.[63] [64] An 'effects or purpose' test would reflect the approach recommended in the Harper Review Final Report.

A fourth option would be a combination of the first and second reform options: removing the 'take advantage' requirement and replacing the purpose test with an 'effects' test (or an 'effects or purpose' test).

Table 3: Summary of potential options

Option	1		2	3		4	
Description	Status quo		Remove taking advantage requirement	Add an effects test		Remove taking advantage requirement and add effects test	
Variants	Current test 'as is'	Current test with added guidance	Powerful firm will be liable whenever it acts with exclusionary purpose	Powerful firm will be liable if it takes advantage of market power to act in a way that harms competition	Powerful firm will be liable if it takes advantage of market power (i) to act in a way that harms competition and/or (ii) with an anti-competitive purpose	Powerful firm will be liable if it acts in a way that harms competition	Powerful firm will be liable if it acts (i) in a way that harms competition and/or (ii) with an anti-competitive purpose

[62] Such an option would require a decision on what effects should be prohibited: effects on competitors; or effects on competition. Given that the purpose of the Commerce Act is to promote competition, it would seem appropriate to favour a prohibition on effects on competition (and more specifically, a substantial lessening of competition).

[63] Part XIB has been in effect since 1 July 1997. The Australian Government has announced a review of Part XIB "in the second half of 2015": see 'Telecommunications Structural and Regulatory Review', December 2014, at section 2.5. A useful discussion of Part XIB, and its differences from section 46, is set out in the Australian Productivity Commission's Telecommunications Competition Regulation report of September 2001.

[64] In its submission on the Harper Review's Issues Paper, the ACCC stated in respect of Part XIB: "The ACCC considers that the concerns articulated by the [2003] Dawson Report that [an effects test] would discourage legitimate competitive practices and therefore have a 'chilling' effect upon efficient, pro-competitive conduct are unfounded and have not been demonstrated in the telecommunications sector." See ACCC, 'Submission to the Competition Policy Review', 25 June 2014, at p.80

Further options might need to be considered in respect of defences and authorisations. For example, an affirmative 'efficiency defence' could be considered,[65] or it might be preferred to better incorporate consideration of efficiencies within the elements of the section 36 prohibition itself.[66]

Alternatively, a specific authorisation regime relating to section 36 could be developed to enable the exemption of conduct with anti-competitive effects where the conduct brings net efficiency benefits,[67] or the power of authorisation under section 58 could simply be extended to the prohibition on misuse of market power under section 36.[68]

Still other, more "out of the box" options might include:

- if the current section 36 formulation is retained, reversing the burden of proof for some of the elements of the prohibition. For instance, a defendant that held a substantial degree of market power and had acted with an anti-competitive purpose, could be required to prove that it did not take advantage of its market power in doing so.[69]
- if an effects test is adopted, limiting liability to reasonably foreseeable anti-competitive effects. This might be seen as aligning the section 36 test with the well-understood tort of negligence.

18. Which of the potential options identified would you like to see discussed if the Ministry publishes an options paper next year? Please explain why these options would be worthy of consideration.

19. Which of the potential options identified are not worthy of discussion if the Ministry publishes an options paper next year? Please explain why these options would not be worthy of consideration.

20. Are there any other potential options that the Ministry should consider?

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[65] The standard of proof would be on the balance of probabilities. In its submission on the Harper Review Issues Paper, the Commerce Commission understood "that there may be a rational business justification for conduct that is not pro-competitive or efficiency driven (such as complying with other legislation) and that the Panel may wish to include a defence which captures such a rationale for anti-competitive conduct": see Commerce Commission, Letter from Dr Mark Berry (undated) to the Australian Competition Policy Review Secretariat, at para 17.

[66] The Commerce Commission supported this "net effects" approach in its submission on the Harper Review Issues Paper: see Commerce Commission, Letter from Dr Mark Berry (undated) to the Australian Competition Policy Review Secretariat, at paras 12-13. Recommendation 30 of the Harper Review Final Report, at p.62, was that the court, when applying a (recommended) substantial lessening of competition test, consider *inter alia* "the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness".

[67] The Commerce Act has already been amended to introduce an authorisation regime. The Commerce Amendment Act 1990 amended what was previously an absolute prohibition on resale price maintenance to allow authorisations in circumstances where it could be shown to yield benefits to the public which outweigh its anti-competitive effects. The authorisation is now provided for in section 58(7) of the Commerce Act.

[68] A similar recommendation regarding the equivalent Australian sections was made in the Harper Review Final Report, at p.70, in Recommendation 38.

[69] Williams has suggested such a change: "One way [the requirement of taking advantage] could be made clearer would be if it were to state explicitly that take advantage is a defence rather than part of the substantive problem". See Williams, P. of Frontier Economics, 'Should an effects test be added to s46', May 2014, at p.5. By contrast, Baker & McKenzie have suggested that such an approach fails to address the complexity of the take advantage element: "Having determined that this concept is too difficult to establish, it is then removed from the primary prohibition to re-emerge as 'someone else's problem', namely the firm with market power." See Baker & McKenzie, 'Submission on Draft Report released by the Competition Policy Review Panel', 2014, at para 4.7.

21. In the event that an options paper is issued, what criteria should the Ministry use to assess the options the paper includes? In principle, should they be the same as whatever criteria are finally used to assess the adequacy of the New Zealand regime?

3 Alternative enforcement mechanisms

3.1 Matters at issue

There may be reason to suspect that a breach of a Commerce Act provision is taking place, will soon take place, or has already taken place. This may be conduct that breaches, for example, the section 27 prohibition on arrangements substantially lessening competition, or the section 36 prohibition on taking advantage of market power. In this situation, there may be a need to take enforcement action.

A problem facing jurisdictions around the world is the high cost and delay associated with standard enforcement processes – be it litigation before the first-instance court (as in New Zealand, Australia and the US) or adjudication by the competition authority (as in the European Union). In this context, competition regimes throughout the world have developed mechanisms that are designed to resolve competition issues in an efficient manner – essentially, by avoiding a full substantive process.

We will call these mechanisms 'alternative enforcement mechanisms', inasmuch as they are alternatives to the standard enforcement approach (litigation or adjudication).

22. Do you agree that standard enforcement of the Commerce Act (litigation by the Commerce Commission in the courts) faces high costs and long delays? Please give reasons for your view.

3.2 Benchmark of approaches to alternative enforcement mechanisms

Alternative enforcement mechanisms are of two main types: out-of-court negotiated settlements (which are consensual); and ad hoc adjudicative processes (which are not).

3.2.1 Out-of-court negotiated settlements

3.2.1.1 Standard negotiated settlements

Regulators in some jurisdictions have implied authority to negotiate a settlement with the party they allege will contravene, is contravening or has contravened competition law provisions. For example, in New Zealand, the Commerce Commission has negotiated settlements under, amongst other legislation, the Commerce Act, the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003.

Standard negotiated settlements (at least in New Zealand) are contractual arrangements. Out-of-court negotiated settlements occur either during a competition authority investigation or, if it is completed, before court proceedings have been issued. Terms of such settlements might include "agreement to cease the conduct, admissions of likely breach of the law, compensation payments, costs paid to us, publicity and other terms".[70]

3.2.1.2 Enforceable undertakings

In some countries, competition legislation provides for a special type of negotiated settlement, which is often known as an enforceable undertaking. Its main advantage over a standard negotiated settlement is that it is immediately enforceable as if it were a court decision.

In Australia, section 87B of the Competition and Consumer Act 2010 gives the Australian Competition and Consumer Commission (ACCC) the ability to use enforceable undertakings as a means to quickly resolve competition concerns. The ACCC has issued guidelines on when such an

[70] Commerce Commission, Enforcement Response Guidelines, October 2013 at para 66

administrative solution will be preferred to litigation. The guidelines note that one of the advantages of an undertaking is that it can be used to resolve the competition issues without costly and lengthy court processes. Undertakings also allow for efficient and innovative outcomes.[71]

In the US, the Federal Trade Commission can accept undertakings (called 'consent orders') in a procedure governed by the Federal Trade Commission Regulations, and the Department of Justice can accept undertakings (called 'consent decrees') under a procedure governed by the Tunney Act.

The European Union has a similar regime where a company investigated under Article 101 (cartels) or Article 102 (abuse of a dominant position) of the TFEU may offer forward-looking voluntary "commitments" (either behavioural or structural) in order to address the concerns of the European Commission. Following public consultation on the terms of the undertaking, if it is considered adequate, the European Commission issues a decision making the commitments binding upon the company.[72]

Some commentators have noted that European Commission commitment decisions were expected to be unusual and rare and there is some concern that it is instead becoming the enforcement tool of choice, especially where an investigation raises novel legal questions or rests upon less established theories of harm.[73] Potential issues associated with the procedure include:

- that commitments might go beyond what is strictly necessary to remedy the competition concern;[74]
- the effect that commitment decisions have (or do not have) on the body of European Union jurisprudence and that of member countries; and
- the effect that the commitment decision has on the rights of private parties given that they do not contain any finding of infringement.

This has resulted in calls for additional safeguards to minimise the risk of abuses and ensure that commitments are only used where the benefit, in terms of early termination of the infringement and saving of cost of longer proceedings, outweighs the benefit of other contributions to enforcement which infringement decisions could make.[75]

Outside of competition law, New Zealand has enforceable undertakings regimes under at least six Acts:

- two Acts enforced by the Commerce Commission (the Fair Trading Act 1986 and the Telecommunications Act 2001);
- one Act enforced by MBIE (the Employment Relations Act 2000);and

[71] ACCC, "Section 87B of the Trade Practices Act: Guidelines on the use of enforceable undertakings", September 2009

[72] The European Union's commitment regime is set out in Article 9 of Regulation 1/2003 dated 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

[73] Botteman, Y, Patsa, A, *Towards a more sustainable use of commitment decisions in Article 102 TFEU cases,* Journal of Antitrust Enforcement, August 2013, p.348

[74] In C-441/07 P - *Commission v Alrosa*, the European Court of Justice clarified that the application of the European 'proportionality' principle in the context of a commitment decision is confined to verifying (i) that the commitments address the Commission's concerns and (ii) that the parties have not offered less onerous commitments that also address those concerns adequately. The Court underlined that parties which offer commitments consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a prohibition decision, and that the Commission is not required to itself seek out less onerous solutions than the commitments offered to it.

[75] Botteman, Y, Patsa, A, ibid, p.367

- three Acts enforced by other agencies (the Financial Markets Authority Act 2011, the Unsolicited Electronic Messages Act 2007, and the Takeovers Act 1993).

3.2.2 Ad hoc adjudicative processes

Some countries create a new layer of the court system, by establishing an adjudicative procedure, the decisions of which can be appealed to the normal courts. Unlike negotiated settlements, the aim is not to avoid an adversarial approach to resolving the dispute but to create a more streamlined (and so faster and less costly) version of the courts' adversarial approach.

The US Federal Trade Commission has set up an adjudicative procedure in its Rules of Practice,[76] which is essentially a policy tool that allows for the Commission to seek and issue the opinion of an administrative law judge on a novel matter, rather than sending it to the Federal Courts. Following an investigation, if the Commission has reason to believe there is a competition problem, officers of the Commission may pursue the matter before a specially appointed administrative law judge. That judge's judgment (known as an 'initial decision') can be appealed to the full Federal Trade Commission and, if necessary, to the Federal Court and ultimately the Supreme Court.

Generally the adjudicative procedure is thought to be appropriate where the facts present an issue that is novel and the process allows for Federal Trade Commission input and expertise in a way that advances the issue. The process is more flexible than the process used in the Federal Court. Although this results in faster resolution of the issues than full litigation, to ensure due process it still takes some time.

In New Zealand, the cease-and-desist regime under Part 6 of the Commerce Act could be considered to be a type of ad hoc adjudicative process. However, in some ways it is a more limited tool than the US process. For example, it is only available in cases of urgency.

In a different sector, New Zealand's Financial Markets Conduct Act 2013 provides for the Financial Markets Authority to make interim and permanent "stop orders". A stop order can prohibit offers, issues, sales, or transfers of financial products, prohibit the supply of market services, prohibit the acceptance of contributions or deposits, or prohibit the distribution of product disclosure statements or certain communications (for example, advertisements). A stop order can be made if, for example, a product disclosure statement is not worded and presented in a clear, concise, and effective manner.

23. Has the Ministry accurately identified the main types of alternative enforcement mechanism that a given country can adopt?

3.3 The New Zealand regime

Currently the Commerce Commission has a range of enforcement responses that it uses to encourage compliance with Commerce Act provisions, outside of taking proceedings in court. The decision on which tool to use is a matter of practice rather than law but depends largely on the extent of detriment being caused, the seriousness of the conduct causing it, and more broadly the public interest.

The different possible responses are outlined in the Commerce Commission's Enforcement Response Guidelines of October 2013, and include advocacy and outreach as well as official warnings. The threat of action by private parties also assists in driving a culture of compliance.

[76] See the US Code of Federal Regulations, Title 16, Chapter I, Subchapter A, Part 3, entitled "Rules of Practice for Adjudicative Proceedings'

In terms of the more substantial mechanisms outlined in the previous section (negotiated settlements and ad hoc adjudicative processes), the following table illustrates the tools at the Commerce Commission's disposal.

Mechanism		Commerce Commission tool	Legal basis
Negotiated settlements	**Standard contractual settlements**	Administrative settlements	Implied authority
	Enforceable undertakings	n/a	n/a
Ad hoc adjudicative processes		Cease and desist regime	Sections 74AA-74D of Commerce Act

3.3.1 Negotiated settlements in New Zealand

The New Zealand courts recognise that the Commerce Commission has an implied authority to negotiate standard administrative settlements.[77] However, New Zealand has no enforceable undertakings regime under the Commerce Act.[78]

The Ministry has previously reviewed the role of enforceable undertakings in relation to clearances and decided to allow only structural enforceable undertakings.[79] The main points made at the time were:

- structural problems (such as mergers) should be addressed by structural solutions, not behavioural solutions;
- requiring the Commerce Commission to consider offers of behavioural undertakings as part of merger reviews would increase complexity, cost and potential for error; and
- enforceable undertakings are effectively company-specific regulation requiring resources to monitor, enforce and review to ensure that they are effective and do not distort the market over time.

3.3.2 Ad hoc adjudicative processes in New Zealand

The cease and desist regime is New Zealand's choice of ad hoc adjudicative process. It was introduced in 2001. The Minister of Commerce at the time cited the need for "more timely and effective enforcement of the Commerce Act".[80] In this regard, he described applications for cease and desist orders as "an alternative to the Commission seeking interim injunctions from the High Court", although a key difference is that cease and desist orders can be long-term or even permanent.

Cease and desist orders are made by one of two specially appointed cease and desist Commissioners. The following people have filled or currently fill these positions:

[77] In the case of New Zealand, see for example *Commerce Commission v Telecom* (1994) 5 TCLR 482 at 490 per Cooke P

[78] As noted earlier, an enforceable undertaking is a form of alternative enforcement mechanism. It is a consensual agreement between a competition authority and a firm to address certain competition concerns, which is immediately enforceable as if it were a court decision.

[79] See, for example, the Ministry of Economic Development discussion document 'Review of the Clearance and Authorisation Provisions under the Commerce Act 1986", May 2007

[80] Media statement by Hon Paul Swain, 'Cease and Desist Commissioners Appointments', 28 March 2002

Term	Cease and Desist Commissioners	
2002-2007	Fiona Bolwell	Terence Stapleton
2007-2012	Sir Ian Barker QC	Helen Ann Cull QC
2013-2018	Sir Bruce Robertson	Michael Behrens QC

Before granting an order, the Act requires that a cease and desist Commissioner be satisfied that:

- there is a prima facie case that a person has breached either Parts 2 or 3 of the Commerce Act; and
- it is necessary to act urgently:
  - to prevent a particular person or consumers from suffering serious loss or damage; and
  - in the interests of the public.

The effect of a cease and desist order is "to restrain conduct for any period and on any terms that are specified in the order".[81] In this sense, it is akin to an injunction – interim or permanent. Cease and desist orders can alternatively be 'cease and do' orders (akin to mandatory injunctions) when cessation of conduct would not remedy an anti-competitive situation.[82]

Importantly, applications for a cease and desist order can only be made by an employee of the Commerce Commission – they are not open to private parties, such as firms concerned about the conduct of another market participant.[83]

Where a cease and desist order has been issued, the Commerce Commission can take suspected breaches to the courts, which can impose a penalty not exceeding $500,000.[84]

24. Has the Ministry accurately described the main elements of New Zealand's alternative enforcement mechanisms? If not, please explain why.

3.4 Framework for assessment

The question is whether the New Zealand approach to alternative enforcement is fit for purpose. This means considering whether our country's choice of settlements regime (administrative settlements) functions well, whether our country's choice of ad hoc adjudicative process (the cease and desist regime) functions well, and more generally whether we have the right balance between settlements, on the one hand, and ad hoc adjudicative processes, on the other.

However, before attempting to answer this question, we need to set out clearly the measures or criteria by which we will assess the New Zealand approach. This means listing the factors that make an alternative enforcement regime fit for purpose.

3.4.1 Long-term benefit of consumers

Alternative enforcement mechanisms (such as administrative settlements and the cease and desist regime) will assure the long-term benefit of consumers when they are effective at bringing early resolution to cases of conduct that threaten the long-term benefit of consumers.

[81] See section 74A(2) of the Commerce Act

[82] See section 74A(3)(a) of the Commerce Act, which provides that an order "may require a person to do something only if the Commissioner is satisfied that restraining the person from engaging in the conduct will not restore competition, or the potential for competition, in a market".

[83] See section 74B of the Commerce Act

[84] See section 74D of the Commerce Act

In this regard, alternative enforcement mechanisms should minimise the number of such cases which need to be dealt with by standard enforcement measures such as court proceedings. At the same time, they should avoid as much as possible any 'false positive' (type 1) outcomes that check, interrupt or reverse conduct that is not actually a risk to the long-term benefit of consumers (i.e. 'innocent' parties should not feel pressured to settle).

3.4.2 Simplicity

While assuring the long-term benefit of consumers is important, the alternative enforcement mechanisms adopted by New Zealand should be simple – not as an end in itself, but as a means to ensuring cost-effectiveness, timeliness, and predictability (e.g. in terms of which mechanism the Commerce Commission is likely to use and when).

3.4.3 Respectful of natural justice

Administrative authorities – including the Commerce Commission and the cease and desist Commissioners – "are bound by procedural requirements known as the rules of natural justice".[85] Those rules are of two main kinds: adequate opportunity to be heard (audi alteram partem); and an unbiased decision-maker (nemo judex in causa sua).

In this context, the Ministry considers that, in its assessment of the current alternative enforcement mechanisms, it should consider the extent to which those mechanisms protect parties' natural justice interests.

3.4.4 The current need for alternative enforcement mechanisms

Whether New Zealand's approach to alternative enforcement mechanisms is appropriately set will depend to some extent on how much of a need there is, today and in the future, for such mechanisms.

One of the main drivers of such need is the cost and delay associated with standard enforcement mechanisms i.e. court proceedings (including for injunctions). In this regard, it is important to consider whether the cost and timeliness of standard enforcement proceedings under the Commerce Act continue to be the concern they were when the current alternative mechanisms were last reviewed in 2001.

3.4.5 Other potential criteria

Alignment of New Zealand's alternative enforcement mechanisms with those of overseas jurisdictions is much less important than alignment of its prohibition on anti-competitive exclusionary conduct with its foreign equivalents. For one thing, alternative enforcement mechanisms are less likely to be front-of-mind for foreign investors, and they do not generate 'case law' that can help with interpretation matters. What is more, enforcement mechanisms of any kind (alternative or not) should in the first instance be tailored to the related substantive provisions in force in New Zealand.

However, it could be argued that alignment of alternative enforcement mechanisms under the Commerce Act, on the one hand, with alternative enforcement mechanisms under other New Zealand legislation, on the other, is useful. This might be the case, for example, where the Commerce Commission is also responsible for enforcing the other legislation. Harmonised alternative enforcement mechanisms in such cases would mean fewer differing procedures for the Commission to develop and master.

[85] Joseph, P., 'Constitutional and Administrative Law in New Zealand', at para 24.1

On a related matter, while alignment of enforcement mechanisms may be beneficial, duplication by one enforcement mechanism of another is inefficient. By duplication, we mean providing for a process which in all material respects is identical to another process available to the parties. In this context, the Ministry believes it may be appropriate to consider to what extent either of the main alternative enforcement mechanisms that now exist duplicates the other, or duplicates some other (standard) enforcement mechanism.

25. Has the Ministry identified the right criteria for assessing the adequacy of alternative enforcement mechanisms under the Commerce Act? Should any criteria identified be excluded, or should criteria not mentioned be added?

26. For the criteria that the Ministry has included, have they been accurately described? If not, please explain why.

3.5 Assessment of the New Zealand regime

3.5.1 Long-term benefit of consumers

3.5.1.1 Settlements

The Commerce Commission has reached a number of 'out-of-court' settlements under the Commerce Act. For example:

- in 2010, ERS NZ admitted a breach of section 27 and agreed to pay a significant sum to the Commission towards the costs of its investigation, and agreed to ensure its directors and senior executives undertake competition law compliance training;
- in 2009, the Commerce Commission signed agreements with Visa and Mastercard settling the Commission's section 27 claims against the companies in relation to credit card interchange fees. The agreements required Visa and MasterCard to alter the way their scheme rules would apply in New Zealand; and
- in 2007, the Commerce Commission settled with Aoraki Mount Cook Alpine Village Ltd, with the company admitting to breaching section 36 by tying the purchase of hotel accommodation with dinners through a compulsory "Dinner, Bed and Breakfast" rate.

The fact that these settlements appear to be quite regular suggests that the settlement regime we have is working well to minimise the number of cases that need to be dealt with by standard enforcement measures such as court proceedings.

However, the current settlement regime has a number of weaknesses, all born of the fact that settlements are contractual:

- financial penalties for the alleged breach of the Act cannot be included without the approval of the High Court;[86]
- liquidated damages clauses for breach of the settlement agreement can only seek to compensate for loss due to the breach, meaning useful mechanisms such as daily financial penalties for non-compliance are not available;
- in the event of a breach of the settlement agreement, the Commerce Commission would have to take a civil claim in the High Court (a long and costly process), and before the court

[86] The Commerce Act has no equivalent to section 46A of the Financial Markets Authority Act 2013. Section 46A expressly provides that an undertaking made to the Financial Markets Authority (FMA) may include "an undertaking to pay to the FMA an amount in lieu of a pecuniary penalty".

could order that the firm perform its obligations under the settlement, it would have to be convinced that monetary damages were an insufficient remedy; and
- certain portions of settlement agreements may not be made public.

Furthermore, settlements fail to generate case-law, and do not benefit third parties (such as firms affected by the powerful firms' conduct) inasmuch as they do not contain any finding of infringement.

27. Do you agree that the current settlements regime has a number of weaknesses? Please give reasons for your answer.

3.5.1.2 Cease and desist regime

In its most recent letter to those appointed as cease and desist Commissioners, the Minister of Commerce stated that "the original assumptions were that … 15 orders would be made in a year."

In fact, the Commerce Commission has only once applied for an order under the cease and desist process, and applications for such orders are not available as an enforcement mechanism for third parties such as firms affected by anti-competitive conduct.

In the instance where the cease and desist process was used, the Commerce Commission sought an order against Northport Limited, the owner of the port at Marsden Point in Whangarei. The order was made in relation to a complaint by a stevedoring company that the Port 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. Then Commerce Commission Chair, Paula Rebstock, said that Northport had attempted to use its monopoly power as the owner of the port to prevent competition in the general cargo marshalling services market. Northport consented to a cease and desist order. In other words, in the only application made by the Commerce Commission, the matter did not progress fully through the cease and desist process.

Even if the Commerce Commission were to make more regular applications for cease and desist orders:

- the delays involved would likely mirror those of the courts, since the process includes procedural safeguards akin to those in court (indeed, the requirement that the cease and desist Commissioners establish a prima facie case before they can issue a cease and desist order is more stringent than the requirements for a court to issue an interim injunction) and the fact that cease and desist Commissioners might be busy with their other responsibilities means that a hearing may not be able to be scheduled immediately; and
- the requirement that it be necessary to act urgently restricts the circumstances in which the power can be used effectively. Generally it will be difficult to satisfy this element because urgency must be balanced against the nature of the alleged conduct, the strength of the evidence and the impact of the proposed intervention on the parties.

With all this in mind, the Ministry considers that the cease and desist regime has proven ineffective as an alternative enforcement mechanism for resolving cases of conduct harmful to the long-term benefit of consumers.

28. Do you agree that the cease and desist regime has proven ineffective? Please give reasons for your answer.

29. Should the Commerce Commission make more use of the cease and desist process? Please explain why / why not.

3.5.2 Simplicity

The settlement regime used by the Commerce Commission appears to have proven simple enough to be cost-effective and timely, as well as predictable. The Commerce Commission has, for example, clearly set out the considerations guiding its choices in entering settlement arrangements, in its Enforcement Guidelines.

By contrast, the cease and desist regime seems to be open to criticism under this criterion. The failure of the cease and desist regime in this respect has recently been highlighted by the successful use of a "stop order" by the Financial Markets Authority. Land has written that "the relative lack of use of cease and desist orders may be the result of the relatively cumbersome procedure required for such an order to be issued."[87]

It is difficult to be more precise given the lack of examples of cease and desist orders being sought.

30. Do you agree that the settlements regime has proven simple enough to be cost-effective and timely, and that it is adequately predictable? Please explain why / why not.

31. Do you agree that the cease and desist regime, if it were used, would be unlikely to be cost-effective, timely and predictable? Please explain why / why not.

3.5.3 Respectful of natural justice

The settlements process followed by the Commerce Commission, as outlined in the Commission's 2013 Enforcement Guidelines, appears to protect firms' right to natural justice. They are consensual arrangements which the firms concerned are free not to sign. We are not aware of firms being placed under undue pressure to sign them.

Cease and desist orders, for their part, have a substantial impact on the entity that is subject to them as the effect of the order is akin to an injunction. Given the extent of the power and the nature of the intervention, a number of procedural protections are provided for in the legislation. These include:

- cease and desist Commissioners must be lawyers;
- there must be an investigation into the alleged contravention, with a report submitted to the Commerce Commission recommending that a cease and desist order be sought;
- the Commission must agree with the recommendation and direct an employee to make an application for a cease and desist order;
- the person against whom an order is sought is then served, must be notified of:
    - the nature of the alleged contravention;
    - the terms of the proposed order; and
    - the reasons for the order;
- the person then has an opportunity to review the Commerce Commission's information and respond;
- the cease and desist Commissioner must give written reasons for the decision; and
- in the event of an order being made, there is the right to appeal the decision to the High Court.

The fact that the cease and desist order can be permanent (there is no time limit set in the Act) does raise some concerns – it might accord better with natural justice if orders stood only for as long as was reasonably necessary to allow proper consideration on the merits of the Commerce

[87] "FMA makes first stop order", Land, J., New Zealand Law Society, 13 August 2015

Commission's case. However, overall, the Ministry considers that the safeguards established for the cease and desist process ensure that firms' right to natural justice is protected.

32. Do you agree that the settlement regime and the cease and desist regime both adequately protect the rights of firms? Please explain why / why not.

3.5.4 The current need for alternative enforcement mechanisms

Full substantive court proceedings can still be a slow and expensive process in 2015. In this context, there seems little doubt that there is a continued need for the Commerce Commission to have the ability to settle matters out of court. However, is there a continued need for the cease and desist regime?

Part of the reason for the introduction of the cease and desist regime was a belief that another manner of obtaining urgent relief – the interim injunction application – was too slow and costly. These concerns were particularly acute in respect of network-based industries where there was a perception that incumbents stood to benefit substantially from anti-competitive conduct, such as denying or delaying access to essential facilities.

Since the cease and desist regime was introduced by the Commerce (Amendment) Act 2001, these concerns have been partly addressed by the following reforms:

- At the time that the cease and desist regime was created, there was no Commercial List for the High Court in Wellington – only in Auckland. However, that is no longer the case;
- Ex ante access regimes have been established in a number of network-based industries. For example, the Telecommunications Act 2001 has been passed and a Postal Network Access Committee established;
- The cease and desist regime was accompanied by an amendment to the Commerce Act prohibiting the court from requiring an undertaking as to damages in cases where the Commerce Commission applied for an interim injunction.[88] This removed an impediment on the Commission's ability or willingness to seek interim injunctions.

In this context, it may be the case that there is less need for any type of ad hoc adjudicative process (such as our cease and desist regime) than there was in 2001.

33. Do you agree that there is a continued need for a settlement process, but a reduced need for an ad hoc adjudicative process such as the cease and desist regime, compared to the position in 2001? Please explain why / why not.

3.5.4 Other potential criteria

3.5.4.1 Alignment

The Commerce Commission is responsible for enforcing five main pieces of legislation:

- the Commerce Act;
- the Fair Trading Act 1986;
- the Credit Contracts and Consumer Finance Act 2003;
- the Telecommunications Act 2001; and
- the Dairy Industry Restructuring Act 2001.

[88] See section 88A of the Commerce Act

The settlements process under the Commerce Act appears to be the same as the settlements process under the Credit Contracts and Consumer Finance Act 2003[89] and, presumably, under the Dairy Industry Restructuring Act.[90]

However, it is misaligned with the settlements processes under the Fair Trading Act 1986 and the Telecommunications Act 2001:

- Enforceable undertakings were introduced to the Fair Trading Act in 2013 and allow the Commission to apply to the court to enforce an agreement if a trader is not abiding by the conditions of that undertaking. The first use of this power was in October 2014 in a settlement with Broadlands Finance Limited.
- Enforceable undertakings were introduced to the Telecommunications Act in 2006. Firms can conclude a "registered undertaking" under Schedule 3A of the Telecommunications Act 2001, to avoid the imposition of *ex ante* obligations.

The cease and desist regime, for its part, appears to be misaligned with other relevant legislation.

In respect of legislation which the Commerce Commission is responsible for enforcing, there is no equivalent to the cease and desist regime in the Fair Trading Act 1986, the Credit Contracts and Consumer Finance Act 2003, the Telecommunications Act 2001 or the Dairy Industry Restructuring Act 2001.The former Ministry of Consumer Affairs at one stage considered that "that there is merit in proposing that the Fair Trading Act be amended so that the Commerce Commission can make cease and desist orders",[91] but this proposal was never adopted by the government.

In respect of legislation enforced by other New Zealand agencies, some Acts (such as the Financial Markets Conduct Act 2013 and the Land Transport Act 1998) allow agencies to issue stop orders, but none of these has a process attached that is as cumbersome as the cease and desist regime.

34. Do you agree with the way that the Ministry has described the alignment and misalignment of the settlement process under the Commerce Act, on the one hand, with settlement processes under other legislation enforced by the Commerce Commission, on the other? Please explain why / why not.

35. Do you agree that the cease and desist regime is misaligned with other relevant legislation?

3.5.4.2 Duplication

While the settlements process does not seem to duplicate other enforcement mechanisms, cease and desist orders have been criticised for being "injunctions by another name".[92] Indeed, the level of protection for firms' right to natural justice is so high that it is difficult to see how – in terms of cost

[89] The Commerce Commission's 2013 Enforcement Guidelines expressly refer to both the Commerce Act and the Credit Contracts and Consumer Finance Act 2003, and the Commerce Commission entered into a settlement with Marac Finance Limited in February 2013, in relation to allegations that the company had breached the Credit Contracts and Consumer Finance Act 2003. The Guidelines also refer to the Fair Trading Act, but the Fair Trading Act's enforcement tools have been updated since the Guidelines were published, by the introduction of enforceable undertakings.

[90] The Commerce Commission's 2013 Enforcement Guidelines state that they do not apply to the Dairy Industry Restructuring Act 2001. However, it is difficult to see how the administrative settlement process for that Act would differ materially.

[91] 'Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper', May 2006

[92] Submission of New Zealand Law Society, 17 September 1999, on Supplementary Order Paper No 203 on the Commerce Amendment Bill, at p.4

and timeframes – the cease and desist regime adds much at all to the ability of the Commerce Commission to seek interim and permanent injunctions from the courts.

In this regard, in Australia, the Dawson Review final report was released in April 2003. It concluded that "there is little, if anything, to suggest that the New Zealand procedure for obtaining a cease and desist order would be an improvement upon the procedure for obtaining an interim injunction".[93]

Nevertheless, a brief comparison between cease and desist orders and other key enforcement responses currently available to the Commission, as set out in Table 3 below, suggests that there are ways in which cease and desist orders differ from both court injunctions and negotiated settlements.

Table 4: Comparison of Key Enforcement Responses

]	Final court injunction	Interim court injunction	Cease and desist orders	Administrative settlement
Prerequisite	Either: 1. an admission of guilt by the Party; or 2. a finding of a contravention.	Filed substantive proceeding. Finding of: 1. serious issue to be tried; 2. balance of convenience favours granting the order; and 3. injunction is in the interests of justice.	Finding either by: 1. Commissioner; or 2. with consent of the Party, that: 1. there is a prima facie case; 2. it is necessary to act urgently; and 3. it is in the public interest.	Consent by the Party to the terms and conditions of the settlement. Admission of guilt not necessary.
Sanctions	✓	×	× Only a court may impose sanctions.	× Only a court may impose sanctions.
Stop impugned conduct	✓	✓	✓	✓
Positive remedies	✓	Generally no, unless stopping impugned conduct restores requirement to deal.	Only if Commissioner is satisfied that ceasing the conduct will not restore competition.	✓
Compensation	1. For parties to the proceeding. 2. Enhanced ability for third parties to bring a follow on action for damages	×	×	×
Precedent value	High	Low	Medium Commissioner must provide written reasons	Low

[93] Australian Committee Report, 2003, at p.108. Cease and desist regimes were also rejected in Australia in the earlier Hilmer (National Competition Policy) Report of 1993

36. Do you think that the cease and desist regime unduly duplicates the (interim) injunction process?

3.6 Conclusion

The Ministry's preliminary conclusion is that the alternative enforcement mechanism regime under the Commerce Act is not operating satisfactorily. This is because:

- the settlements regime:
  - is weak because it is based on contractual arrangements, for example:
    - financial penalties for the alleged breach of the Commerce Act can only be included with the approval of the High Court;
    - the parties may fail to make all provisions public; and
    - if the settlement terms were breached, the Commerce Commission would have to take a civil claim in the High Court (a long and costly process), and before the court could order that the firm perform its obligations under the settlement, it would have to be convinced that monetary damages were an insufficient remedy.
  - is misaligned with recent changes to the Fair Trading Act 1986 and the Telecommunications Act 2001, where enforceable undertaking regimes were introduced, and

- the cease and desist regime:
  - is less needed following changes to the High Court's Commercial List, the introduction of ex ante regulatory regimes in certain sectors, and the fact that the Commerce Commission no longer needs to make an undertaking as to damages when seeking an interim injunction;
  - has proven ineffective in assuring the long-term benefits of consumers, because it has been used only once in 14 years;
  - if it were used, would be unlikely to be cost-effective and timely, due to its cumbersome procedural requirements; and
  - is misaligned with other relevant legislation (none of the other Acts that the Commerce Commission enforces have a cease and desist regime) and may unduly duplicate the (interim) injunction process.

37. Given the criteria for assessment it has used, is the Ministry's assessment of the current New Zealand approach to alternative enforcement mechanisms well-reasoned?

38. If you are submitting that the criteria for assessment should be different from those used by the Ministry, how might the assessment be different using your preferred criteria?

39. Do you agree with the Ministry's conclusion? Please explain why.

40. Do you have any other comments you wish to make about the Ministry's approach to assessing the current approach to alternative enforcement mechanisms under the Commerce Act?

3.7 Potential options for reform

In the event that an Options Paper is later prepared, the Ministry is keen to hear respondents' views on what options should be included. This section sets out at a high level the options that the Ministry currently envisages might possibly be considered (beyond the status quo).

Our starting point is a recognition, based on the assessment above, that the main problem with the current system of alternative enforcement mechanisms is the cease and desist regime.

In this context, one option would be to modify the cease and desist regime to resemble more successful ad hoc adjudicative procedures, such as the stop order regime now in place under the Financial Markets Conduct Act 2013.[94] A variation of this option would be instead to extend the cease and desist regime to private prosecutions, allowing firms that allege anti-competitive conduct (and not just the Commerce Commission) to seek cease and desist orders. The high threshold for obtaining an order could also be lowered, for example, by removing the urgency element.

Another option would be to repeal the cease and desist regime, and rely on the settlements regime as the main alternative enforcement mechanism (which would reflect the de facto situation today).

A further option would be to repeal the cease and desist regime, but modify the settlement regime, for example by changing it to an enforceable undertakings system, with or without a provision equivalent to section 46A of the Financial Markets Authority Act 2013 allowing the inclusion of "penalty-like" financial payments. One issue here would be whether an enforceable undertaking could be accepted in cases where the Commerce Commission's case against the firm or firms in question was criminal, rather than civil.[95]

We do not consider changes to the injunction provisions of the Commerce Act to be within scope, should an Options Paper be prepared.

Table 5: Summary of potential options

Option	1	2			3	4
Description	Status quo	Modify the cease and desist regime			Repeal the cease and desist regime	Repeal cease and desist regime + modify the settlements regime
Variants	Retain the administrative settlements regime and the cease and desist regime	Adopt an FMA 'stop order' approach	Allow private parties to apply for cease and desist orders	Reduce threshold for obtaining an order	Administrative settlements become the only major alternative enforcement mechanism	Enforceable undertakings become the only major alternative enforcement mechanism

41. Which of the potential options identified would you like to see discussed if the Ministry publishes an options paper next year? Please explain why these options would be worthy of consideration.

42. Which of the potential options identified would you NOT like to see discussed if the Ministry publishes an options paper next year? Please explain why these options would not be worthy of consideration.

43. Are there any other potential options that the Ministry should consider? For example, could better use be made of arbitration proceedings under the Arbitration Act 1996?

[94] Land has written: "Unlike the position with Commerce Act cease and desist orders, the Financial Market Conducts Act does not provide for a separate Commissioner to make such stop orders. An affected party does have the right to be heard (except potentially in the case of an interim stop order) but the time limits involved are short and there is no express right to call or cross-examine witnesses." See "FMA makes first stop order", Land, J., New Zealand Law Society, 13 August 2015

[95] The Commerce Commission is empowered to bring criminal prosecutions under specific sections of the Commerce Act, as well as under the Fair Trading Act 1986 and Consumer Credit and Consumer Finance Act 2003

44. In the event that an options paper is issued, what criteria should the Ministry use to assess the options set out in the Issues Paper? In principle, should they be the same as whatever criteria are finally used to assess the adequacy of the New Zealand regime?

4 Market studies

4.1 Matters at issue

The term "market study" refers to detailed research by an institution into a particular market, or markets, where there are concerns that the market could be functioning sub-optimally. Market studies tend to be undertaken by a state's competition agency, and are used as a tool for promoting competition.

International developments in recent years have shown a growing trend for the use of market studies by competition agencies. Market studies are not new; the United States, for example, has been undertaking such studies since the early 20th Century. But while only a handful of states had market studies powers 20 years ago, a 2009 study by the International Competition Network (ICN) found that at least 40 competition agencies now have the ability to undertake conduct market studies.[96]

As the uptake of the market studies function has increased, so too has the promotion of market studies by international organisations. The ICN has identified that market studies can help to enhance agencies' capacity and reputation and promote better market outcomes.[97] The OECD also recognises the ability to undertake market studies as an important tool — one that it has recommended that the Commerce Commission should have. In its 2011 economic survey of New Zealand, the OECD suggested that a market studies power would help strengthen the competition culture among policymakers and the public, as well as reduce inconsistencies in New Zealand's policy approach to competition.[98]

While it would not be correct to say that market studies cannot be conducted in New Zealand, the absence of a formal power for specifically analysing competition across any market could be a gap in our institutional settings for promoting competition.

4.2 Defining "market study"

Markets that do not function properly result in poor outcomes for consumers, businesses and the economy. Businesses may be deterred from innovating or entering the market, consumers may be faced with high prices and a lack of choice and information, and productivity and economic growth may be undermined.

Often, the existence of one or more "triggers" may be indicative that the operation of a market may require some scrutiny. Some examples include:[99]

(i) firm behaviour;
(ii) lack of product or service diversity;
(iii) market structure;
(iv) information asymmetries;
(v) abusive use of intellectual property rights;
(vi) consumer conduct;

[96] International Competition Network Advocacy Working Group 'Market Studies Project Report', June 2009, at p.3
[97] International Competition Network Advocacy Working Group 'Market Studies Good Practice Handbook', April 2012, at p.2
[98] OECD, *OECD Economic Surveys: New Zealand*, 2011, at pp.119-120.
[99] International Competition Network Advocacy Working Group 'Market Studies Project Report', at p.28; Paul Geroski 'The UK Market Inquiry Regime' in Barry E. Hawk (ed) *Fordham Corporate Law Institute: International Antitrust Law & Policy,* 2005, at pp.5-6.

(vii) public sector intervention in markets; or
(viii) other factors which may give rise to consumer detriment.

The market studies function provides a means of identifying what is going on in a market and why. Unlike a traditional investigation, it is not the actions of a specific company that are the focus of a market study, but the structure and behaviour of the market itself. The objective in a market study is to identify whether there are factors that are preventing, restricting or distorting competition, efficiency and/or consumer welfare in that market.

The findings of a market study may be published in a report. The report may dispel views that a market is restricted or distorted, giving the market a "clean bill of health". Or it may confirm market problems, and suggest solutions. As the ICN states in its definition of "market study":[100]

"Where problems are found, the market study report can include:
(i) recommendations for action by others, such as legislatures, government departments or agencies, regulators, and business or consumer bodies; and/or
(ii) commitments by the competition (or competition and consumer) agency itself to take advocacy and/or enforcement action."

4.3 Characteristics of market studies powers

Internationally, there is no standardised form for market studies. Known variously as market inquiries, market investigations, sector inquiries, fact-finding surveys, market monitors and more, market studies encompass a diverse range of methodologies and institutional settings. Some of the different ways in which market studies powers vary are outlined in this section.

The market studies body

Overseas, market studies tend to be the responsibility of competition agencies. It is generally seen as uncontroversial that competition agencies may both enforce competition law and undertake market studies — which may lead to competition advocacy. As discussed in further detail below, many agencies make policy recommendations as a result of their market studies findings.

However, recent national competition policy reviews have suggested the establishment of a separate institution to the competition enforcement agency dedicated solely to competition advocacy, including market studies.[101] There is a view that empowering a competition agency to undertake market studies with a possible recommendatory power may compromise the agency's appearance as an impartial enforcer of competition law.

Initiating market studies

Generally, market studies can be carried out either at a competition agency's initiative and/or at the request of the legislature or government ministers. Competition agencies usually prefer to choose market study topics. This is commonly done by assessing potential markets for study against a set of criteria. In the UK, the Competition and Markets Authority considers proposals against its prioritisation principles, encompassing considerations such as impacts, strategic significance and risks, to ensure its resources are used to produce the greatest benefits for consumers.[102]

[100] International Competition Network Advocacy Working Group 'Market Studies Project Report', at p.28.
[101] See Harper Review Final Report, Recommendation 44, p.77; and Competition Policy Review Panel (Canada), 'Compete to Win: Final Report', July 2011, at p.60.
[102] Office of Fair Trading, 'Market Studies: Guidance on the OFT approach', 2010, p.7.

In the ICN's 2009 survey, one agency reported that it conducted market studies at the request of the relevant government Ministers only.[103] Allowing a government or minister to initiate a market study generally ensures policy relevance to the government of the day. On the other hand, it could be interpreted as a criticism that the competition agency is not doing its job, or an indication that its independence is being overridden.

Information-gathering powers

The majority of competition agencies have formal powers to compel the supply of information for market studies purposes.[104] The extent of these powers varies. For example, the European Commission has used search and seizure powers as part of its sector inquiry process, whereas other agencies — such as the South African Competition Commission — may only have the powers to summon individuals to appear for interrogation, or provide documents.

A common theme in the literature is that while mandatory information-gathering powers are desirable, they should be used sparingly if possible.[105] There is a preference among agencies to build and maintain collaborative relationships with market participants, and voluntary participation tends to aid these processes.

Information use

There are differences among jurisdictions as to whether and how information gathered as part of market studies can be used for other follow-on purposes — namely, enforcement. Most of the competition agencies involved in the ICN survey reported that they use information gathered as part of market studies to help their enforcement activities. But there are commonly procedural safeguards on the use of this information. For example, where market studies involve the same subject matter as an ongoing investigation, antitrust agencies in the US have maintained a strict division between staff conducting the study and those working on enforcement matters.[106]

Market study outputs

As noted in the definition above, market studies generally result in the production of a report containing findings. If appropriate, agencies will make recommendations that will improve market performance — and at the extreme end of the scale, they may be able to enforce remedies. The UK Competition and Markets Authority has a duty to implement remedies when it finds an adverse effect on competition, and it has a broad range of remedy powers — including the ability to implement structural remedies, such as divestment.

Government response

Only 25% of competition agencies in the ICN survey reported that their government is required to respond to their market studies recommendations. One agency reported that its government is required to act on its recommendations.[107]

4.4 Market studies in New Zealand

As noted above, it would be inaccurate to say that market studies cannot be conducted in New Zealand. Though there is no express market studies function in New Zealand, several public bodies may undertake research that fits within the definition of market studies outlined above.

[103] International Competition Network Advocacy Working Group 'Market Studies Project Report', at p.30.
[104] Ibid., at p.38.
[105] OECD, 'Promoting Competition Market Studies in Latin America', 2015, at p.94.
[106] OECD, *Policy Roundtables: Market Studies*, 2008, at p.147.
[107] International Competition Network Advocacy Working Group 'Market Studies Project Report', at p.74.

4.4.1 The Commerce Commission

The Commerce Commission has several circumscribed and/or implied powers to conduct and publish market-level research.

Commerce Act powers

Part 4 of the Commerce Act deals with the use of economic regulation to promote outcomes that are consistent with outcomes produced in competitive markets. Under this Part, the Commerce Commission is permitted to investigate markets in which there is little or no competition, with a view to assessing whether regulation should be applied. The Commerce Commission is able to initiate such inquiries itself or at the request of the Minister. As a result of its findings, it makes a recommendation to the Minister as to whether regulation is warranted, and if so, how that regulation should be imposed.

Part 4 investigations do not fit the conventional mould for market studies. However, they involve gaining a deep understanding of a relevant market for the purpose of improving its performance (albeit through economic regulation, if that is recommended), which is the essence of the market studies function.

The Commerce Act also provides a limited ability to undertake research into markets for the purposes of providing targeted guidance to market participants. Section 25 gives the Commission the capacity to disseminate information on its functions and powers, and the purposes and provisions of the Act. This allows the Commission to undertake advocacy and outreach functions to encourage compliance and greater awareness of the benefits of competition; a renewed focus of the Commission's work in recent years. One strategy the Commission has employed to encourage compliance has been to identify high-risk industry sectors for targeted education programmes or communication.[108] In order to gauge the levels of competition law awareness in the relevant sector and customise an outreach approach to its needs, the Commerce Commission may undertake research to gain a better understanding of the sector participants.

For example, in 2010, the Commission commissioned research into building contractors' views and experiences of anti-competitive, cartel and collusive behaviours. The findings, which indicated areas of low competition awareness in the construction sector, have informed the Commission's advocacy approach in dealing with the construction sector. Actions have included the launch of a website to help industry members increase their understanding of competition and consumer laws.

Other market studies functions

Beyond Part 4 and section 25, the Commerce Act provides no other means for the Commerce Commission to conduct market studies. Internationally, it is not uncommon for competition agencies to undertake market studies as a means of initiating change in a market pursuant to their general legislative functions. However, as the Commission's general functions and purposes are not described under the Commerce Act or any other legislation, the Commission is unable to take this approach.

This was confirmed by the 1994 judicial review of the Commission's 1991-1992 telecommunications industry inquiry. The Court of Appeal held that the Commission had acted outside of its powers in conducting and publishing an inquiry into the development of competition in the telecommunications industry in New Zealand.[109]

[108] Commerce Commission, 'Submission to OECD Competition Committee on Promoting Compliance with Competition Law' in OECD, *Policy Roundtables: Promoting Compliance with Competition Law*, 2011, at 138.
[109] Commerce Commission v Telecom Corporation of New Zealand [1994] 2 NZLR 421.

Further powers for the Commerce Commission exist, however, in other legislation. In 2006, Parliament extended the Commission's ability to consider competition issues in the telecommunications sector. Under section 9A of Telecommunications Act 2001, the Commerce Commission is required to monitor competition in, and the performance and development of, telecommunications markets and may conduct inquiries, reviews and studies into any matter relating to the telecommunications industry or the long-term benefit of end-users of telecommunications services within in New Zealand.

The Commerce Commission released its most recent of two studies under section 9A in June 2012, the purpose of which was "to raise awareness of issues which may affect the uptake of high speed broadband services in New Zealand".[110] The Commission has interpreted section 9A conservatively and does not consider that the provision includes the power to make policy recommendations as a result of any section 9A study.[111]

Lastly, the Commerce Commission also has a limited market studies function under the Fair Trading Act 1986. Under section 6 of that Act, it has been able to undertake studies and publish reports and information regarding matters affecting the interests of consumers. The Commerce Commission recently released a report on its Mobile Trader 2014/2015 project, detailing its findings about the operation of the truck shop industry.

4.4.2 Other market studies functions

Electricity Authority

The Electricity Authority is an independent Crown entity, whose objective is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers. Under the Electricity Industry Act 2010, the Electricity Authority is given the function of carrying out and making publicly available reviews, studies and inquiries into any matter relating to the electricity industry.

Productivity Commission

The Productivity Commission was established in 2010 to provide advice to the government on improving productivity in New Zealand. It may hold inquiries and report on productivity-related matters, on referral by Ministers. While Productivity Commission inquiries have not focused exclusively on competition issues to date, some have included market study components – for example, the Housing Affordability, and International Freight Services inquiries.

Other government agencies

While not formally empowered to do so, government agencies may undertake reviews and studies that have core elements of a market study. The Ministry of Business, Innovation and Employment administers and provides policy advice on the Commerce Act. As part of the government's wider response to the Productivity Commission's aforementioned Housing Affordability study, the Ministry conducted a study of the residential construction sector. The study focused on competition within the sector and its productivity.

Inquiries Act 2013

Market studies could be conducted under the Inquiries Act 2013, which provides for public or ministerial inquiries for the purpose of investigating and reporting on any matter of public

[110] Commerce Commission, 'High speed broadband services demand side study: final report", 29 June 2012, at para 3.
[111] Ibid., para 7.

importance. The Act would allow for ad hoc taskforces to be set up to look into market competition and related issues. It also provides mandatory information-gathering powers.

4.5 Is there a gap?

Although there are forms of market studies that may be undertaken in New Zealand, there is no single, broad power to investigate any market from a competition perspective and make recommendations on how improvements can be made, as is found in comparable jurisdictions.

Market studies are generally undertaken for the overarching purpose of improving market performance. However, the international experience shows that there are different but related approaches to achieving this. The question of whether further institution of market studies powers is necessary in New Zealand may be dependent on whether there is a definable gap in its competition law framework that aligns with one or more of those approaches. Some possible grounds for introducing a new power, and considerations around how that hypothetical power might be conferred, are outlined below.

4.5.1 Diagnosing market problems

Sometimes, the traditional advocacy and enforcement tools of a competitive agency will be an inappropriate or inadequate means of addressing an apparently failing market. The signs that a market is not working well may not be synonymous with illegal anti-competitive behaviour. For example, a competition agency may notice an ascertainable decline in new products entering a market. In the absence of further evidence, low product differentiation alone may not suggest anything more sinister than stifled innovation. However, a lack of innovation may be indicative that there are barriers to competition in the market.

A market study in this context is directed at gaining a thorough understanding of the market to confirm or refute perceptions of market malfunction and, if the former applies, make recommendations and/or commitments to improve market performance. Successful market studies undertaken for this purpose often involve a flexible approach to the use of information-gathering powers, and agencies will foster transparency about the study's processes and findings, demonstrate openness to consider all views, and seek buy-in to the study's recommendations.[112]

The Ministry of Business, Innovation and Employment can already conduct studies of this kind, as exemplified by the residential construction sector market study. But there may be a need to confer the power to initiate market studies for purposes of diagnosing market problems on another public body.

A broader market function studies may be seen to fit comfortably between the Commerce Commission's existing enforcement and advocacy functions. A new market studies power for Commerce Commission would allow it to take a more holistic, forward-looking approach to market performance. On the other hand, there may be concerns about conflicts of interest. A possible outcome of a market study is a recommendation for regulatory change. Depending on the nature of any recommendation, this could impact perceptions of the Commerce Commission's impartiality in performing its enforcement role. However, the ability to make policy recommendations would not necessarily need to be a feature of the power under this approach.

[112] Competition Agency (Ireland), 'Submission to OECD Competition Committee on Market Studies' in Organisation for Economic Co-operation and Economic Development, *Policy Roundtables: Market Studies*, 2008, at p.77; Office of Fair Trading, 'Submission to OECD Competition Committee on Market Studies' in Organisation for Economic Co-operation and Economic Development, *Policy Roundtables: Market Studies*, 2008, at p.126.

4.5.2 Removing regulatory barriers to competition

In some jurisdictions, removing regulatory barriers to competition is an explicit purpose of the market study function. The 2009 ICN survey showed a high level of consensus among competition agencies that "preparation for intervention in legislative processes" was the most important purpose of market studies.[113] While market improvement is still a goal, the focus of the work is on identifying how regulation may be impacting the market and dismantling any identifiable barriers.

The use of market studies for this purpose can manifest itself in different ways. For example, the Canadian Competition Bureau undertakes market studies to gather information to form the basis for its interventions before government tribunals and other regulatory decision-makers to "advocate in favour of market forces".[114] Japan's Fair Trading Commission undertakes studies to clarify the effects of regulations on competition in regulated fields. It may recommend that existing regulations that are having adverse effects on competition are abolished, or propose new regulations to better promote competition.[115]

Although the Commerce Commission has a broad competition advocacy role currently, if the conflict of interest concerns raised above are of concern, another body such as the Productivity Commission could take on the role of advocating for pro-competition regulatory change through market studies. However, it is unclear whether there is a need for greater evidence-based competition advocacy by another public body.

A relevant consideration may be the Government's recent commitment to removing public barriers to competition and being more inclusive of the competition perspective as part of regulatory processes. One of the Government's priority areas in its Building Innovation work in the 2015 Business Growth Agenda is to review market regulation to ensure it supports the development of new and innovative products and services. Removing regulatory and institutional barriers to competition that sit outside the core competition regulatory system forms a key part of this work stream.

The initial phase of this work includes refreshing the Government's high level approach to occupational regulation, and giving greater prominence to competition analysis in regulatory impact analysis guidance. The Ministry of Business, Innovation and Employment will also be working with Ministers and other agencies to systematically review whether other barriers to competition in the New Zealand economy provide net public benefits that justify their ongoing existence.

4.5.3 Building an evidence base as a precursor to enforcement

A market may be exhibiting characteristics that might give a competition agency, in its enforcement capacity, cause for concern. A study of the market in this context may allow the agency to verify suspicions about whether market participants are engaging in anti-competitive behaviour.

For example, the European Commission views its sector inquiry function as being helpful to uncover evidence that is indicative of where its enforcement cases should be opened.[116] The European

[113] International Competition Network Advocacy Working Group 'Market Studies Project Report', at p.32.
[114] Competition Bureau (Canada), 'Submission to OECD Competition Committee on Market Studies' in Organisation for Economic Co-operation and Economic Development, *Policy Roundtables: Market Studies*, 2008, at p.15.
[115] Fair Trading Commission (Japan), 'Submission to OECD Competition Committee on Market Studies' in Organisation for Economic Co-operation and Economic Development, *Policy Roundtables: Market Studies*, 2008, at p.66.
[116] European Commission, 'Submission to OECD Competition Committee on Market Studies' in Organisation for Economic Co-operation and Economic Development, *Policy Roundtables: Market Studies*, 2008, at p.154.

Commission has used its mandatory information-gathering powers, including undertaking dawn raids, for this purpose. The European Commission has received some criticism for its use of dawn raids as a means of collecting information for sector inquiries.[117] There is disagreement as to whether — if there is no specific evidence of wrongdoing — surprise inspections are warranted in the market study context.[118]

If this area is identified as a gap and then implemented in New Zealand, it would presumably exist in the Commerce Commission's toolkit. In this regard, a formal market studies function that included a power to compulsorily gather information in the hope that it might lead to enforcement action would be a significant extension of the Commerce Commission's powers. Currently, there must be a reasonable basis for the Commerce Commission to believe that there may be undiscovered facts that could give rise to a contravention; the Commission cannot proceed on the basis that the use of its power may be retrospectively justified by the information it discovers.[119]

In the Ministry's preliminary view, this kind of extension to the Commerce Commission's powers is unlikely to be helpful. Though most of the competition agencies involved in the ICN survey reported that they use information gathered as part of market studies to help their enforcement activities, a clear separation between market studies and enforcement processes is recommended. Any utility gained by instituting a market studies power that is explicitly a precursor to enforcement would likely be outweighed by such a power's disadvantages. These would include possible rights concerns, possible difficulties in the Commerce Commission's relationships with stakeholders, and both perceived and actual burdens to businesses, in terms of both expense and reputational impact.

45. Do the approaches to market studies described in the Issues Paper align with a gap in New Zealand's institutional settings for promoting competition?

46. If there is a gap, what procedural settings for a market studies power would best fit the identified gap, in terms of:
    a. The appropriate body to conduct market studies;
    b. Who may initiate a market study;
    c. Whether mandatory information-gathering powers should apply;
    d. The nature of recommendations the market studies body could make; and
    e. Whether the government should be required to respond.

[117] See Helene Andersson and Elisabeth Legnerfalt 'Dawn Raids in Sector Inquiries — Fishing Expeditions in Disguise?' European Competition Law Review, Issue 8, 2008.
[118] In the case of the European Commission's use of dawn raids, there are of course procedural guarantees for the parties' rights of defence and for preventing the use of information gathered in sector inquiries from being used in enforcement proceedings (although the Commission can always request information again using its enforcement powers).
[119] See *AstroZeneca v Commerce Commission* [2010] 1 NZLR 297.

Appendix A: Proceedings taken under section 36 of the Commerce Act

Commerce Commission Cases Under Section 36

	Defendant	Alleged conduct	Markets	Court	Outcome
1	Telecom Corp of New Zealand Ltd (Data tails)	High access pricing over the period 2001 - 2004	Telecommunications – data transmission services	High Court (2009) Court of Appeal (2012)	Contravention. Pecuniary penalty of $12 million.
2	Telecom Corp of New Zealand Ltd (0867)	Unilateral change of interconnection contract, pre-2001	Telecommunications – wholesale and retail supply	High Court (2008) Court of Appeal (2009) Supreme Court (2010)	No contravention. Telecom dominant, but did not 'use' its dominance.
3	Bay of Plenty Electricity Ltd (BoPE)	Refusal to supply and raising rivals costs over 1999 to 2000	Supply of electricity metering and retail electricity services	High Court (2007)	No contravention. Did not establish BoPE dominant. Also no substantial lessening of competition.
4	Northport Ltd	Refusal to supply	Supply of cargo marshalling services	Cease and Desist Commissioner (2006)	Order granted, based on consensual application.
5	Carter Holt Harvey Ltd (CHH)	Predatory pricing in 1994	Supply of building insulation products	High Court (2000) Court of Appeal (2001) Privy Council (2004)	No contravention. CHH dominant, but did not 'use' its dominance.
6	Fullers Cruises Northland Ltd	Refusal to supply	Supply of ramps and ferry services in Opua	High Court (2000)	Dismissed. Issues related to statutory licensing, not Commerce Act.
7	Southpower	Cross-subsidisation and bundling	Supply of electricity distribution services	High Court (1997)	Interlocutory – question to be tried.
8	Port Nelson Ltd	Tying	Supply of tug and pilotage services	High Court (1995) Court of Appeal (1996)	Contravention. Injunction. Pecuniary penalty of $300,000. Also substantial lessening of competition.
9	Telecom Corp of New Zealand Ltd	High access pricing	Telecommunications	High Court (1992)	Interlocutory – further discovery.

Source: Briefcase, Thomson Reuters

Private Enforcement Proceedings Relating to Section 36

	Parties	Alleged conduct	Markets	Court	Outcome
1	Integrated Education Software Ltd v Attorney General	Refusal to accredit supply 2005	Supply of education software services	Damages claim -High Court (2012)	Dismissed. Not engaged in trade. No exclusionary purpose. Out of time.
2	Loktronic Industries Ltd v Stephen Driver, et al	Unilateral termination of contract	Distribution of electronic drop locks	Injunctive relief - High Court (2011)	Dismissed. No serious question to be tried.
3	Turners & Growers Ltd v Zespri Group	Exclusive loyalty discounts. Raising rivals costs over 2004 – 2009.	Acquiring kiwifruit for export and licensing kiwifruit cultivars	Damages and injunctive relief claim - High Court (2011)	No contravention. No deregulated kiwifruit market established. Zespri took advantage of market power for cultivar licensing, but no exclusionary purpose.
4	Clee v Attorney General for Legal Services Authority	Imposing mandatory rotation policy in 2010	Supply of legal services for criminal cases	Interim relief - High Court (2010)	Dismissed. Claims as to markets and 'engaging in trade' not sufficiently pleaded.
5	Open Country Cheese Co. v Fonterra Cooperative Group	Refusal to supply at regulated access price	Wholesale supply of raw milk	Interim injunction - High Court (2008)	Relief granted. Fonterra dominant. A serious question to be tried.
6	Todd Energy Ltd v Transpower Ltd, PowerCo Ltd	Refusal to supply. Tying / bundling over 2003 – 2004.	Wholesale electricity transmission services. Retail delivered electricity.	High Court (2005) Court of Appeal (2007)	Struck out. Claims as to markets not sufficiently pleaded.
7	CallPlus, et al v Telecom Corp of New Zealand Ltd (0867)	Unilateral change of interconnection agreement	Wholesale and retail telecommunications services	Injunction - High Court (2000)	Injunction granted. Serious question to be tried. Joining of Commerce Commission proceedings allowed.
8	Vector Ltd (formerly Mercury Energy) v Transpower Ltd	Monopoly pricing	Supply of electricity transmission services	Interlocutory - High Court (1999)	Dismissed. Claims not sufficiently pleaded.
9	Telstra New Zealand Ltd v Telecom Corp of New Zealand Ltd	Refusal to process carrier rebilling	Telecommunications	Interlocutory - High Court (1999)	Dismissed. Claims not sufficiently pleaded.
10	Researched Medicines Industry Association v Pharmac	Exercise of buyer power	Setting pharmaceutical schedule	Interlocutory - High Court (1997) Court of Appeal (1998)	Dismissed. Pharmac exempt from Part II of Commerce Act.

	Parties	Alleged conduct	Markets	Court	Outcome
11	New Zealand Insurance Life v Patterson	Refusal to supply	Supply of life insurance products in Queenstown	Interlocutory - High Court (1997)	Dismissed. Claims not sufficiently pleaded.
12	Russell Livestock Ltd v Wrightsons Ltd	Refusal to supply	Supply of livestock and sale yard services	Interim injunction - High Court (1997)	Injunction granted, with conditions. Question to be tried.
13	Purebred Jersey Breed Soc. (NZ) Inc v Jersey Breeders	Refusal to supply	Registration of pedigree jersey cattle	Interlocutory - High Court (1997)	Dismissed. Claims as to 'use' and 'purpose' not sufficiently pleaded.
14	Clear Communications Ltd v Sky Network Television Ltd and Telecom Ltd	Acquisition with potential to enable merged entity to bundle and cross-subsidise	Supply of Pay TV services	Interlocutory - High Court (1997)	Dismissed. No 'use' established.
15	McKay Refined Sugars Ltd v New Zealand Sugar Company	Predatory pricing (pricing below import parity)	Supply of sugar	Interlocutory – High Court (1997)	Stay of proceedings until Australian proceedings determined.
16	Shell (Petroleum Mining) Co. Ltd v Kapuni Gas Contract	Exclusionary conduct	Wholesale and retail supply of gas	Damages - High Court (1997)	No contravention. NGC dominant, but 'use' and 'purpose' not established.
17	Telecom Corp. of New Zealand v Clear Communications Ltd	High access pricing	Telecommunications	Damages - Privy Council (1994)	No contravention. Telecom dominant, but 'use' and 'purpose' not established.
18	TV3 Network Ltd v Television NZ Ltd	Exclusive dealing with sporting bodies and advertisers	Television market	Interlocutory – High Court (1994)	Further discovery allowed
19	New Zealand Private Hospitals Assoc – Auckland Branch v Northern Regional Health Authority	Refusal to acquire	Supply of health services	Interlocutory – High Court (1994)	Dismissed. No exclusionary purpose.
20	Marine Resources Ltd v Natural Gas Corporation	Exclusive dealing	Wholesale, transmission and retail gas markets	Interlocutory - High Court (1994)	Plaintiff to amend statement of claim.
21	Hooker Bros Holding Ltd v New Zealand Rail	Forced termination of contract for services	Bridging contract for transporting containers	Injunction – High Court (1993)	Dismissed. Claim unsound.
22	Tui Foods Ltd v O'Hagan	Unilateral termination of contract	Supply of town milk in advance of deregulation	Counterclaim - High Court (1993)	Dismissed.

	Parties	Alleged conduct	Markets	Court	Outcome
23	Merivale Service Station v Mobil Oil NZ Ltd	Unilateral termination of contract	Wholesale supply of petrol	Injunction – High Court (1993)	Dismissed. No 'use' or 'purpose' established.
24	Hyde v Topmilk Ltd	Unilateral termination of contract	Home delivery of milk	Interlocutory - High Court (1993)	Dismissed. No exclusionary purpose.
25	Rodden v Southern Fresh Milk Co. Ltd	Unilateral termination of contract	Home delivery of milk	Injunction – High Court (1993)	Injunction granted. Question to be tried.
26	McDonald v NZ Milk Corporation Ltd	Unilateral termination of contract	Home delivery of milk	Injunction - Court of Appeal (1993)	Injunction granted. Question to be tried.
27	Howick Parklands Building Co Ltd v Howick Parklands Ltd	Refusal to supply	Real estate	Interlocutory – High Court (1993)	Dismissed.
28	Byers v Northland Dairy Products	Unilateral termination of contract	Home delivery of milk	Injunction - High Court (1992)	Dismissed. No exclusionary purpose.
29	Irwin v Fletcher Industries Ltd	Predatory pricing	Supply of steel reinforcing bar	Interlocutory – High Court (1992)	No strike out. Claim allowed to proceed.
30	Wellington Provincial Milk Vendors Association v Capital Dairy Products	Unilateral termination of contract	Home delivery of milk	Interim relief – High Court (1992)	Injunction granted. Serious question to be tried.
31	Petrocorp Exploration Ltd v The New Zealand Refining Company Ltd	Refusal to supply oil refining services	Wholesale supply of oil products	Interlocutory – High Court (1992)	Claim not sufficiently pleaded and directed to be amended.
32	Clear Communications Ltd v Telecom Ltd	Unilateral termination of connection of 0800 and 0230 services	Telecommunications	Interim relief – High Court (1992)	Declined
33	McDonalds Motors v Christchurch International Airport	Refusal to provide access. Exclusive dealing	Advertising rental car services at airport	Interim injunction – High Court (1991)	Declined
34	Stevedoring Services (Nelson) Ltd v Port Nelson Ltd	Refusal to supply	Supply of tug services and pilotage	Interlocutory – High Court (1992)	Declined
35	Geotherm Energy Ltd v Electricity Corporation Ltd	Strategic legal challenges and exclusive dealing	Generation and wholesale supply of electricity	High Court (1991) Court of Appeal (1992)	Strike out applications denied.
36	Budget Backpacker Hostels Ltd v McCarthy	Raising rivals costs	Supply of accommodation guides	Interim relief – High Court (1991)	Dismissed. Claims as to markets insufficient.
37	Glaxo New Zealand Ltd v Attorney-General	Exercising buyer power	Setting pharmaceutical schedule	Interlocutory – High Court (1990) Court of Appeal	Dismissed. Not 'engaged in trade'.

	Parties	Alleged conduct	Markets	Court	Outcome
				(1991)	
38	Telecom Corp of New Zealand Ltd v Sanda Communications (NZ) Ltd		Telecommunications	Interim relief – High Court (1990)	Interim injunction granted
39	New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd	Raising rivals costs	Horse breeding	Interim relief – High Court (1990)	Injunction granted (for 3 years).
40	Apple Fields Ltd v New Zealand Apple and Pear Marketing Board	Price discrimination	Levies for export marketing	Interlocutory – High Court (1989) Court of Appeal (1989) Privy Council (1991)	Finding that New Zealand Apple and Pear Marketing Board not exempt from Part II and potential liability under section 36.
41	Chatham Islands Fisherman's Co-op Ltd v Chatham Island Packing Co Ltd	Refusal to supply	Supply of wharf services	Interim relief – High Court (1988)	Interim injunction granted
42	Tru Tone Ltd v Festival Records Retail Marketing Ltd	Refusal to supply	Supply of music albums	Interlocutory – High Court (1988) Court of Appeal (1988)	Dismissed. Market definition not sufficiently pleaded. No dominance.
43	Henderson Rental Cars Ltd v Auckland Regional Authority	Refusal to supply	Rental car services at airport	Interim relief – High Court 1987)	Declined.
44	Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd	Refusal to supply	Rental car services at airport	Declaratory judgment – High Court (1987)	Declaration of contravention. Auckland Airport to consider Budget's request to operate services
45	Bond & Bond Ltd v Fisher & Paykel Ltd	Exclusive dealing	Supply of whiteware products	Interlocutory – High Court (1986)	Serious question to be tried.