



REVIEW OF SECTION 36 OF THE COMMERCE ACT AND OTHER MATTERS



INTRODUCTION

Competitive markets are important for the benefit of consumers and businesses. Competition can lead to lower prices, higher quality goods and services, and more choice for consumers.

The Commerce Act sets the rules of the game to ensure that businesses can compete on their merits and do not face anti-competitive conduct that can ultimately harm consumers.

The government is consulting on whether section 36 of the Commerce Act (relating to the misuse of market power) should be amended.

We are also considering more minor issues relating to the Commerce Act's treatment of intellectual property and covenants. Submissions are due by 9am on 1 April 2019. You can email us your views via competition.policy@mbie.govt.nz

Please note that we intend to upload submissions to our website, and submissions will be subject to the Official Information Act 1982. If your submission contains information that is confidential or you otherwise do not want it to be published, please let us know.

SECTION 36

Section 36 prevents incumbent firms with market power from abusing that power to suppress competition. An effective prohibition against misuse of market power is particularly important in New Zealand as we have a high proportion of markets where there are only a few major players.

The courts' interpretation of section 36 requires a complex counterfactual test that means that firms may be able to get away with some forms of anti-competitive behaviour. Section 36 is also very difficult to enforce. This creates a risk of the playing field being tilted in favour of incumbent firms, and competition being distorted. This is not in the long term interests of consumers.

The proposed changes to section 36 are based on Australia's recent law changes in this area. The changes will bring New Zealand's law in line with other developed economies by introducing a legal test that examines the effects of a firm's conduct. The changes will level the playing field again by preventing powerful businesses from harming their competitors in ways that produce no benefit to consumers.

Question 1:

Do you agree with our proposal to strengthen section 36 by aligning it with Australia? Why/why not?

THE COMMERCE ACT AND INTELLECTUAL PROPERTY

Intellectual property refers to creations of the mind. These are protected under acts such as the Copyright Act and the Patents Act. The Commerce Act contains provisions that shield some intellectual property arrangements (such as licensing) from competition law, even if they harm competition.

The current intellectual property provisions in the Commerce Act are outdated, unclear and poorly understood. We propose repealing them so that intellectual property is treated the same under the Commerce Act as any other type of property.

Question 2:

Do you agree that the Commerce Act's provisions relating to intellectual property should be repealed? Why/why not?

COVENANTS

A covenant is essentially a commitment by someone to do, or refrain from doing, something. For example, a supermarket may place a covenant on the sale of secondary land to prevent that land from being used for a competing supermarket.

The Commerce Act prohibits covenants in relation to land that substantially lessen competition. However, there is a technical drafting issue with the treatment of covenants in the Act. Currently, the Commerce Act's cartel prohibitions do not apply to covenants. It is unlikely that covenants would create or implement a cartel, but we propose to close this unintentional loophole.

Question 3:

Do you agree that the cartel prohibitions should apply to covenants? Why/why not?

