

COMMERCE (CONTROL OF DOMINANT POSITION) AMENDMENT BILL

EXPLANATORY NOTE

The existence of a natural monopoly with the ability to earn monopoly profits has traditionally provided a rationale for State ownership or industry regulation.

However, New Zealand embarked on a process of State asset sales and deregulation over a decade ago, relying on industry to regulate itself through negotiated solutions and, if necessary, through the legal system. Direct regulatory intervention was rejected in favour of so-called “light-handed regulation.”

Underpinning light-handed regulation is the Commerce Act 1986, complemented by industry specific information disclosure regimes.

The provision in the Act relating to monopolies is section 36, which provides that no person who has a dominant position in a market shall use that position for the purpose of restricting the entry of any person into that or any other market; or preventing or deterring any person from engaging in competitive conduct in that or in any other market; or eliminating any person from that or any other market.

It is clear that this provision is not sufficient in its current form to eliminate monopoly profits and ensure effective competition. In the latest of several reports in relation to the telecommunications sector, *New Zealand Telecommunications: the state of competition*, two of the main findings were:

- The provision of local services generates monopoly profits, i.e. excess profits generated by virtue of a monopoly position not because of any competitive advantages such as better technology, superior performance or reward for successful risk taking.
- The performance of the sector could be improved significantly with effective competition. Competition is not effective in this sector at the moment because of Telecom’s ability to regulate the market through continued control of local access.

It is not only in the telecommunications industry that competition is not effective. The recent restructuring of the electricity industry has also highlighted the issue of dominant behaviour which lessens competition.

In short, the lessening of competition as a result of a dominant market position increases the overall economic cost of the service to the benefit only of the monopoly itself.

This bill strengthens section 36 by placing the emphasis on preventing anti-competitive conduct rather than requiring proof of an anti-competitive purpose. This measure is designed to deter major corporations from acting anti-competitively. Currently the risk of a major corporation being successfully prosecuted under the Commerce Act for anti-competitive behaviour is extremely low because of the need to prove that a company's purpose was to act anti-competitively.

This bill ensures that a test for anti-competitive behaviour by a dominant firm is whether that behaviour has the effect or likely effect of lessening competition.

Laila Harré

**COMMERCE (CONTROL OF DOMINANT POSITION)
AMENDMENT**

ANALYSIS

Title

1. Short Title
2. Use of dominant position in market

A BILL INTITULED

An Act to amend the Commerce Act 1986 to provide for more control on the use of a dominant position in a market

5 BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title—This Act may be cited as the Commerce (Control of Dominant Position) Amendment Act 1999, and is part of the Commerce Act 1986 (“the principal Act”).

10 **2. Use of dominant position in market**—Subsection (1) of section 36 of the principal Act is repealed, and the following new subsections substituted:

“(1) No person who has a dominant position in a market must use that position—

15 “(a) For the purpose of—

“(i) Restricting the entry of any person into that or any other market; or

“(ii) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or

20 “(iii) Eliminating any person from that or any other market:

“(b) In a manner that has, or is likely to have the effect, of substantially lessening competition in a market.

25 “(1A) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any

other provision of this Act, a corporation may be taken to have taken advantage of its position for a purpose referred to in **subsection (1) (a)** notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.” 5