

**House of Representatives**  
**Supplementary Order Paper**

**Wednesday, 11 December 2013**

**Commerce (Cartels and Other Matters)**  
**Amendment Bill**

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*Proposed amendment*

Hon Clayton Cosgrove, in Committee, to move the following amendment:

*New clause 7A*

After *clause 7* (after line 20 on page 10), insert:

**7A Section 36 replaced (Taking advantage of market power)**

Replace section 36 with:

**“36 Anti-competitive conduct**

- “(1) Nothing in this section applies to any practice or conduct to which this Part applies that has been authorised under Part 5.
- “(2) A person that has a substantial degree of power in a market must not engage in anti-competitive conduct.
- “(3) For the purposes of **subsection (2)**, a person engages in anti-competitive conduct if that person:
- “(a) takes advantage of a substantial degree of power in a market with the effect, or likely effect, of substantially lessening competition in that or any other market; or
  - “(b) takes advantage of a substantial degree of that power in a market for the purpose of—
    - “(i) restricting the entry of a person into that or any other market; or
    - “(ii) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
    - “(iii) eliminating a person from, or substantially damaging a person operating in, that or any other market.

- “(4) In determining whether a person has taken advantage of its substantial degree of power in a market, the court may have regard to any or all of the following:
- “(a) whether the conduct was materially facilitated by the person’s substantial degree of power in the market:
  - “(b) whether the person engaged in the conduct in reliance on its substantial degree of power in the market:
  - “(c) whether it is likely that the person would have engaged in the conduct if it did not have a substantial degree of power in the market:
  - “(d) whether the conduct is otherwise related to the person’s substantial degree of power in the market:
  - “(e) any other matter the court considers relevant.
- “(5) Without in any way limiting the manner in which the purpose of a person may be established for the purposes this section, a person may be taken to have taken advantage of its power for a purpose referred to in **subsection (3)(b)** notwithstanding that the existence of that purpose is ascertainable only by inference from the conduct of the person or of any other person or from other relevant circumstances.
- “(6) For the purposes of this section, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of section 45(2), in New Zealand.
- “(7) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected.”
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### Explanatory note

This Supplementary Order Paper proposes a new section 36 for the Commerce Act 1986.

Section 36 of the Commerce Act is intended to prevent firms with market power from interfering with workably effective competition. As currently drafted, section 36 targets firms with market power who take advantage of that market power for one or more of three prescribed anti-competitive purposes.

There are two significant gaps in this market power protection:

- There is an exclusive focus on purpose, rather than effect. A focus on purpose can make violations of section 36 difficult to prove in practice. Multiple purposes, some involving legitimate business rationales, can obscure an anti-competitive purpose. Further, actions that manifestly impact on competition in a market can remain unaddressed if the purpose element is not satisfied.

- There is no special recognition of the greater potential market impact from the actions of a monopolist. A firm with market power can impact on the effectiveness of competition in a market where firms with smaller market share cannot. When section 36 was drafted there was a concern that taking the monopolist's special position into account would protect inefficient competitors, but it is now widely recognised as a matter of competition law policy that the extra risk associated with monopoly power needs to be specifically addressed.

A focus on effects, rather than exclusively on purpose, addresses both these concerns. It allows the courts to examine the actual impact on a monopolist's conduct on the level and nature of competition in a market. Where a substantial lessening of competition can be attributed to the monopolist's conduct, section 36 will be breached. Accordingly, the proposed amendments add an effects-based test to the existing test of anti-competitive purpose (set out in *subsection (3)(a)*). This test is based on the substantial lessening of competition test, which is already familiar to the courts and businesses (see Commerce Act 1986, ss 27 and 47).

In addition, the application of the counterfactual test by the courts has limited the ambit of the market power protection under section 36. The counterfactual test offers a degree of certainty to a monopolist, but is widely viewed as an overly conservative test that returns too many false negatives. Because of a need to link causally an anti-competitive purpose or effect to the conduct of a monopolist, the courts are likely to continue to apply the counterfactual test in a conservative manner.

The proposed amendments address this issue but stating expressly a number of grounds that the court may rely on to assess 'taking advantage' of market power (*subsection (4)*). In particular, the 'materially facilitated' standard (*subsection (4)(a)*) has been used in Australia and is recognised as lowering the threshold of the standard counterfactual test for causation. Finally, *subsection (5)* clarifies that inferences drawn from market conduct can be used as proof of abuse of market power, which clarifies the nature of the new causation test in light of the new focus on market effects.