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- the substitution between private label and branded rusks downstream; and
- the fact that producers of private label rusks and/or branded rusks and retailers in their upstream negotiations take into account the downstream competition between private label and branded rusks.

On appeal, the parties claimed that there were separate upstream markets private label rusks and branded rusks, particularly due to the different procurement procedures. But the District Court found that it had no reason to doubt the ACM's market delimitation, as outlined above. The parties had not substantiated their claim with an in-depth investigation. Additionally, the Commission decisions they had mentioned as precedents were too specious to apply to this case.

However, on further appeal, the Trade and Industry Appeals Tribunal agreed with the parties and considered the ACM had neglected to substantiate why there was one upstream market for private label and branded rusks. According to the Tribunal, the fact that upstream producers of private label and branded rusks themselves and the retailers in their relationship with these producers take account of the substitution between private label and branded rusk downstream, does not necessarily imply that the producers' market behaviour is disciplined in such way that there is one single product market.

Unilateral conduct and 'unfair contract terms'

NEW ZEALAND

Nicko Waymouth
Matthews Law, Auckland
nicko.waymouth@matthewslaw.co.nz

Gus Stewart
Matthews Law, Auckland
gus.stewart@matthewslaw.co.nz

Ministry published issues paper on unilateral conduct test

On 17 November 2015, the Ministry of Business, Innovation and Employment (MBIE) published its *Targeted Review of the Commerce Act 1986 – Issues Paper* ('Issues Paper'),[1] which focused on whether New Zealand's misuse of market power (monopolisation/unilateral conduct) test and alternative enforcement mechanisms work, and whether New Zealand needs formal powers specifically aimed at analysing competition across markets. This follows a similar and well-documented process in Australia (the 'Harper Review').

Submissions on the Issues Paper closed on 9 February 2016, and a total of 37 submissions have been published on MBIE's website. MBIE is considering submissions before reporting back to the Minister of Commerce and Consumer Affairs.

Many readers will be familiar with the well-documented failure of the Federal Trade Commission and Department of Justice in the US to agree an approach in respect of unilateral conduct, leading to the parties withdrawing their draft joint report on 'Single-Firm Conduct Under Section 2 Of the Sherman Act (2008)' in May 2009.[2] It will therefore come as no surprise that the misuse of market power test has 'dominated' the debate in New Zealand.

The Commerce Commission (the 'Commission') considers that the current test (section 36 of the Commerce Act 1986) is unworkable due to the court's confirmation that the test is solely based on a counterfactual analysis (described below), with the current Chair stating that:

- the Supreme Court 'has not delivered the alignment with Australian jurisprudence' and this is of 'particular concern';[3] and
- '[i]n light of the Supreme Court's decision… there is limited value that the Commission can currently provide by developing section 36 guidelines'.[4]

Misuse of market power test

The Issues Paper 'seeks to assess the functioning of section 36, as applied by the courts', and accordingly MBIE sought feedback on the following criteria:

- whether section 36 is assuring the long-term benefit of New Zealand consumers; and

- whether the application of section 36 is sufficiently simple.

New Zealand's misuse of market power test prohibits a party: (1) with substantial market power (SMP); (2) from taking advantage of ('use') that SMP; and (3) for an anti-competitive purpose, namely, restricting or preventing another party from competing or eliminating a party from a market.

In practice in New Zealand, a 'bright-line' counterfactual test is used to determine whether a firm has 'used' its SMP. This test was first applied in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd.*[5] That test essentially asks whether a firm without SMP, but otherwise in the same position as the defendant in a hypothetically competitive market, would undertake the same conduct. The New Zealand approach is viewed by many commentators to have diverged from the Australian test that it is modelled on. It also differs from the counterfactual test that is used for analysing effects on competition under section 27 (anti-competitive arrangements) and section 47 (mergers) of the Act.

Opponents of New Zealand's misuse of market power test consider that it incorrectly focuses on the dominant firm's 'purpose' when competition laws should be concerned with preventing harm to the competitive process. They also consider that the test is binary and that if a firm has a good commercial rationale for its conduct, this risks being seen as a complete defence ignoring potential harm to competition.

Proponents of the test consider that it provides a sufficient nexus between the dominant firm's market power and the relevant conduct so as not to capture otherwise competitive conduct. In other words, dominant firms should not be penalised for the same conduct as non-dominant firms. It is also considered that a 'purpose'-based test provides greater certainty for businesses by better allowing for self-assessment.

Perhaps unsurprisingly, submissions from larger businesses tended to favour the status quo while smaller businesses favoured a review of section 36 and the development of an 'Options Paper'.

Alternative enforcement mechanisms

The Issues Paper also notes the high cost and delay associated with standard competition law enforcement processes. The two key alternative enforcement mechanisms currently available to the Commission are administrative settlements and the 'cease and desist' regime (the latter having been used only once in 14 years). To assess New Zealand's alternative enforcement mechanisms regime MBIE sought feedback on the same criteria as it proposed for section 36.

We recall Commission staff at the time that the 'cease and desist' regime was introduced in 2001 expressing their (personal) views that they saw the cease and desist regime as offering little benefit over, while being more complex than, seeking an interim injunction.

Market studies

Finally, the Issues Paper noted that there has been a 'growing trend for the use of market studies by competition agencies'. Currently the Commission has no formal power specifically directed at analysing competition across any market. According to MBIE this has been identified by the OECD as a 'significant gap in New Zealand's competition framework'. The Issues Paper identifies various international approaches to market studies, and concludes that 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'.

Businesses that submitted generally did not support the introduction of a formal market studies power. Many businesses submitted that there was no clear evidence supporting the need for such a power and concerns were raised that it would increase the administrative burden on businesses.

Focus on unfair contract terms in the telecommunications sector

On 10 February 2016, the Commission released a report detailing its findings of its review of standard form consumer contracts in the telecomms sector. New legislation took effect in March 2015 prohibiting 'unfair contract terms' in standard form consumer contracts. Such contracts, generally presented on a 'take it or leave it' basis, are commonly used in the telecomms, car rental, gym and utility industries. The provisions are designed to protect consumers from terms that create a significant imbalance of rights or obligations between a business and the consumer.

Following the introduction of the new regime, the Commission launched a

project to review a range of standard form consumer contracts for unfair terms. A similar project was undertaken by the Australian Competition and Consumer Commission (ACCC) in 2013 following the introduction of similar legislation.[6] The ACCC concluded that it 'achieved important compliance outcomes by engaging with businesses on entire agreement clauses, except in the case of the vehicle rental industry.'

> In the Commission's case it found that: '[t]he majority of telco companies had made real efforts to comply with the provisions before they were introduced. However, we did identify 66 terms that we considered potentially unfair. Many of the terms were common across the contracts, particularly those that limited the liability of the company, allowed the company to unilaterally vary the contract or made the customer responsible for unauthorised charges.'

While the Commission identified a 'wide range of potentially unfair terms', it noted that there were a number of potentially unfair terms that were common across the industry, including terms that:

- 'limit or exclude the liability of the company [where there was no reciprocal limitation or exclusion for the customer]';
- 'allow the company to unilaterally vary the contract';
- 'make the customer responsible for unauthorised charges'; and
- 'allow the company to avoid liability for consequential loss.'

According to the Commission, some businesses were able to demonstrate that the term was necessary to protect the legitimate business interests of business, while in the remaining cases the businesses agreed to amend the relevant terms. However, the Commission issued all businesses with compliance letters and 'cautioned' businesses that their terms in their standard form contracts must comply with the law.

The Commission noted that it has also reviewed 'contracts in the electricity retail, credit and gym sectors and expects to report on these industries later this year.' We expect that the Commission will conduct reviews of other industries that use standard form contracts, particularly the vehicle rental industry.

Notes

1 See: www.mbie.govt.nz/info-services/business/competition-policy/targeted-review-of-the-commerce-act/targeted-commerce-act-review.
2 See: www.justice.gov/atr/dojs-single-firm-conduct-report-promoting-consumer-welfare-through-clearer-standards-section-2.
3 See: www.comcom.govt.nz/the-commission/media-centre/speeches/keynote-speech-for-the-12th-annual-competition-law-and-regulatory-review-conference-an-update-from-the-commerce-commission.
4 See www.comcom.govt.nz/business-competition/business-competition-media-releases/detail/2010/commission-ends-plans-to-draft-enforcement-guidelines-on-misuse-of-market-power.
5 *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).
6 Unfair contract terms, Industry review outcomes, March 2013.

Updates from Peru

PERU

Eduardo Quintana
Bullard Falla Ezcurra +, Lima
afalla@bullardabogados.pe

Agustín Valencia-Dongo
Bullard Falla Ezcurra +, Lima
avalencia-dongo@bullardabogados.pe

In Peru, the National Institute for the Defence of Competition and Intellectual Property (INDECOPI) is the administrative entity in charge of implementing competition law, consumer protection law and matters related to intellectual property, among other things. INDECOPI's Antitrust Commission is the administrative body in charge of implementing competition law and authorising acts of concentration in the electricity sector under Law No 26876. The Antitrust Commission's Technical Secretariat is the instructive body, in charge of conducting dawn raids and initiating ex-officio investigations, among other functions.

The organism in charge of supervising the private investment in telecoms (OSIPTEL) is the administrative entity in charge of implementing competition law in matters related to the telecoms sector.

In the last trimester of 2015, the Antitrust Commission's Technical Secretariat initiated a punitive administrative proceeding against two toilet paper distributors for price-fixing. Also, the judiciary confirmed the sanction imposed by INDECOPI to medicinal oxygen companies for market allocation agreements. Finally, the Antitrust Commission issued criteria to determine