

# Misuse of Market Power

*16 March 2023*

# Agenda

– *what we will cover*

- New Misuse of Market Power prohibition
- Broader application of the new prohibition: who it captures and when it “bites”
- Distinguishing between vigorous competitive “conduct” and anti-competitive exclusion
- Danger areas, eg (implied) refusals to supply, access pricing, enforcing IP rights, limit pricing/predation, bundling...
- How a reinvigorated ComCom will apply this new law & comparison with Australia

# New Misuse of Market Power prohibition

– *Commerce Act section 36*

## 36 Misuse of market power

(1) A person that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in—

(a) that market; or

(b) any other market in which the person, or an interconnected person,—

(i) supplies or acquires, or is likely to supply or acquire, goods or services; or

(ii) supplies or acquires, or is likely to supply or acquire, goods or services indirectly through 1 or more other persons.

(2) In this section, a person has a **substantial degree of power in a market** if—

(a) the person has a substantial degree of power in the market; or

(b) the person, together with 1 or more interconnected persons, has a substantial degree of power in the market; or

(c) 1 or more interconnected persons of the person have a substantial degree of power in the market; or

(d) 2 or more interconnected persons together have a substantial degree of power in the market.

# Broader application of the new prohibition

– *Who it captures and when it “bites”*

- Comes into force 5 April 2023
- No longer need a “taking advantage of” or prohibited purpose
- Still only applies to persons with **substantial market power (SMP)**
  - What is the relevant market?
  - Market power = lack of effective competitive constraint
  - More than 1 person in a market can have SMP
- Does not prohibit firms with SMP from ‘out-competing’ competitors





# Distinguishing between vigorous competitive conduct and anti-competitive exclusion

- SLC test compares state of competition with vs without conduct
  - To what extent are customers or inputs foreclosed by the conduct, and what alternatives do customers or competitors in the market have?
  - To what extent does the conduct impose costs on competitors or potential entrants that are not faced by the firm in question?
  - Does the conduct have the effect of harming incentives to innovate by other competitors in the market?
  - Does the conduct have the effect of causing competitors in the market to compete less vigorously?
  - Does the conduct make it harder for potential entrants to enter the market in question in response to profitable opportunities to do so?
  - Does the conduct enable the firm in question to exercise power over suppliers, customers or competitors?
  - How long are these effects likely to continue?

# Danger areas

– types of conduct that may SLC

- Refusals to supply, including implied refusals – access pricing test?
- Margin/price squeezing
- Exclusive dealing
- Loyalty rebates
- Tying/Bundling
- Limit pricing/predation
- Enforcing IP rights



# Misuse of Market Power Guidelines

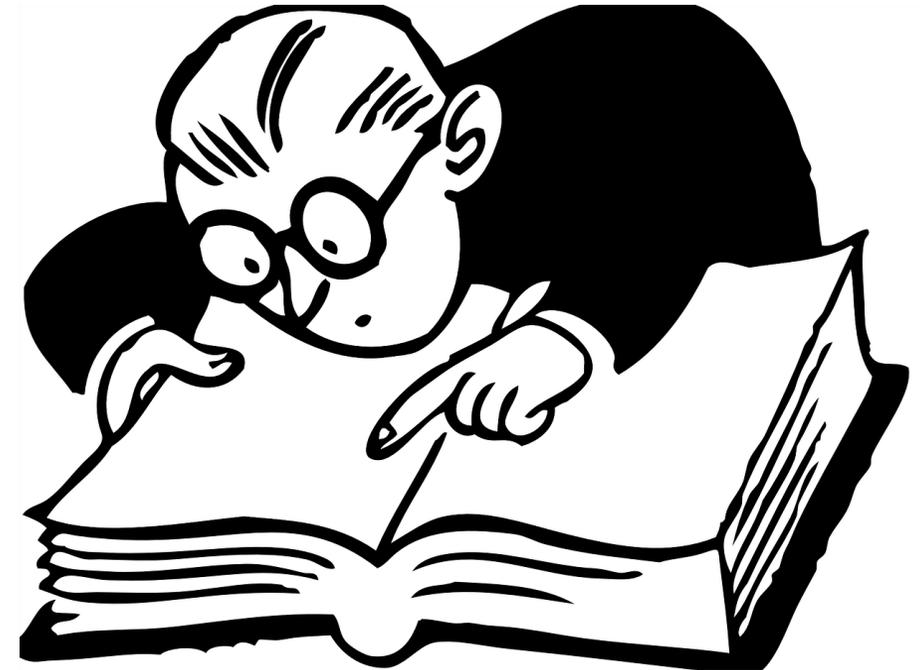
– *How a reinvigorated ComCom will apply this new law*

- ComCom guidelines:

<https://comcom.govt.nz/business/business-consultations/draft-misuse-of-market-power-guidelines>

- Also consulting on separate IP guidelines:

<https://comcom.govt.nz/business/business-consultations/draft-guidelines-on-the-application-of-competition-law-to-intellectual-property-rights>



# Australia s46 CCA

– comparison with Australia

- Section 46 Competition and Consumer Act also now has SLC test
- *Tasports* – first new s46 contravention – declaration by consent TasPorts breached s46 by imposing a new port access charge on one of its customers after the customer notified TasPorts it was going to switch to a new provider of towage and pilotage services
- ACCC has commenced proceedings against Mastercard
- Also have seen growth in private litigation eg *Epic v Apple*
- ACCC guidelines:  
<https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Misuse%20of%20Market%20Power.pdf>

# ACCC media release on TasPorts

– comparison with Australia

*“Businesses with substantial market power have a special responsibility when deciding how to respond to competitive threats. If they respond in a competitive way, for example by offering customers better products at better prices, they will not face the risk of enforcement action. However, when they hinder a competitor from competing on its merits, the ACCC will not hesitate to take enforcement action,”*

# Questions?



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