



Memo

To: Tim Bennetts

File ref: 562426

From: Andrew Schollum

Date: 18 Dec 2008

Re: **TRADE COMPETITION – COMMERCE ACT 1986**

Tim;

As requested, I have discussed options for addressing trade competition with officials from Treasury and the Ministry of Economic Development. One option considered was that of introducing linkages between the Resource Management Act 1991 and the Commerce Act 1986.

Officials are not aware of any specific Commerce Act cases relating to the RMA. There have, however, been cases taken under section 36 (misuse of market power) of the Commerce Act relating to arguments that a party was abusing its legal rights/administrative processes for anti-competitive purposes. A brief summary of potentially relevant cases is appended to the bottom of this memorandum.

In order for section 36 of the Commerce Act to apply, there needs to be proof of party with a substantial degree of market power (interpreted as being 'dominant position' in a market), was 'taking advantage' of this market power (or 'using' it), for an anti-competitive purpose. In the cases summarized below, the judgments made it clear that it is important to distinguish between the legitimate use of legal rights, which all firms should be able to do regardless of their market power, and an abuse of those legal rights for anticompetitive purposes. The courts did not rule out the use of section 36 for such cases but made it clear that it will be a matter of fact in each case whether the exercise of the rights of objection and the manner of their exercise in all the circumstances may be said to constitute use of a dominant market position.

The clear conclusion of these discussions and subsequent analysis is therefore:

The purpose of the Commerce Act 1986 is to promote competition in markets, but linking Commerce Act provisions to the RMA will not resolve the trade competition problem in resource management decision-making. The Commerce Act prohibits collusion, price fixing, the abuse of market power, and the purchase of a business's shares or assets if that purchase will lead to a substantial lessening of competition in the market. Given that any citizen has the right to make an objection under the RMA, such objections (even if motivated by trade competition reasons) cannot be considered an example of collusion or abuse of market power, and therefore cannot be prohibited under the Commerce Act.

***Telecom Corp of NZ Ltd v Clear Communications Ltd* [1992] 3 NZLR 247; (1992) 4 TCLR 568**

In *Telecom Corp of NZ Ltd v Clear Communications Ltd* [1992] 3 NZLR 247; (1992) 4 TCLR 568, it was argued that, in bringing six actions and threatening others (the actions included breach of compromise, contraventions of the Fair Trading Act 1986, copyright infringement, and passing off), Telecom had contravened s 36 by subjecting Clear to increased costs as a result of this litigation. It was argued that this conduct was unreasonable because Telecom had been unwilling to have its complaints referred to the Commerce Commission and instead forced Clear into expensive litigation, and that Telecom's complaints were vexatious and accompanied by threats of legal action with the intention of subjecting Clear to increased costs. Smellie J did not consider unreasonable a refusal to use the commission as a dispute resolution facility and the preference for the use of the Courts. Nor did his Honour consider Telecom's complaints to be vexatious or unreasonable (p 255; p 577).

***Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641 (CA) and**

In *Geotherm*, the Court of Appeal had to consider seven different allegations of conduct by Electricorp which were argued to contravene s 36. One of these was that Electricorp objected to Geotherm's statutory applications at every opportunity and on all possible grounds. Geotherm argued that many of these objections were baseless and that Electricorp had led perjured evidence and had assisted other objectors. The Court at p 649 considered that as long as the conduct of a dominant firm is capable of "influencing" the market (in which it is dominant) with respect to the production, acquisition, supply, or pricing of goods or services, the dominant firm (after the Commerce Amendment Act 2001 a firm with substantial power in a market) may be "using" its position of dominance by means of its conduct. It is not necessary that the conduct be market activity in the production, acquisition, supply, or pricing of goods or services: "There must, however, be a clear and direct link between the influence and the dominant position."

However, the Court decided that something more than the mere reasonable exercise of rights of objection was required for a contravention of s 36. It stated at p 655: "Even a monopoly must be entitled to make a case to the appropriate licensing or other authority for the preservation of its monopoly. The submission of reasonable arguments to that end and the taking of reasonable steps to prepare the case could not in themselves amount to a use of a dominant position in a market. Something more would have to be shown ..."

The Court refused to strike out this cause of action because it could not at that stage exclude the possibility that Geotherm would be able to establish "something more". What would be regarded as "something more" appears to be behaviour which a Court would consider to be unreasonable; perhaps the fact that the dominant firm knew its legal actions to be baseless, or a finding of perjury on the part of the dominant firm or a finding that the legal action was part of an overall anticompetitive scheme. Note that, if a subjective view of "purpose" were taken, this would focus on the dominant firm's view as to the viability of its legal actions or objections, and not whether a Court ultimately found them to be so. However, in practice the firm's view may have to be determined by objective evidence (such as the legal advice it is given). It would seem unfair to penalise a firm which took legal action in good faith believing it had a good case, just because the legal action in actual fact turned out to be baseless.