

Competition Law and Policy Institute New Zealand
Conference
19 August 2020

Misuse of Market Power A better NZ design?

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Perspectives

- ▶ Retain s 36 in present form:
 - serious flaws
 - devil one knows
- ▶ Proposed s 36 follows A s 46:
 - avoids old worst flaws
 - prone to overreach, underreach, uncertainty
- ▶ Infuse objective purpose standard (OPS):
 - Kemp, *Misuse of Market Power* (2018) (*MMP*)
 - cf MBIE Discussion Paper (2019) [120]
- ▶ Implications of OPS under proposed s 36?
 - exclusionary conduct
 - SLC purpose
 - SLC effect
 - SLC likely effect
 - ‘substantial’ lessening of competition
 - justification



Exclusionary conduct

- ▶ Exclusionary conduct - implications of OPS:
 - *MMP*, 183-186
 - no exclusionary rule in proposed s 36
 - critique
- ▶ Examples:
 - Dominant firm X decides to cease production in NZ in order to focus on more lucrative markets in US and EU. X is the largest and most effective competitor in NZ market.
 - A dominant supplier of a critical input to manufacturers in one downstream market unilaterally withdraws from that business to use the entire output of its own product as an input in the production of a more highly valued product in a separate downstream market.
- ▶ Solutions?
 - *MMP*, 235, 184
 - cf US (Areeda & Hovenkamp, III *Antitrust Law*, ¶651a)
 - note s 46 excluding the operation of Part 2 from acquisition of business assets or shares

SLC purpose

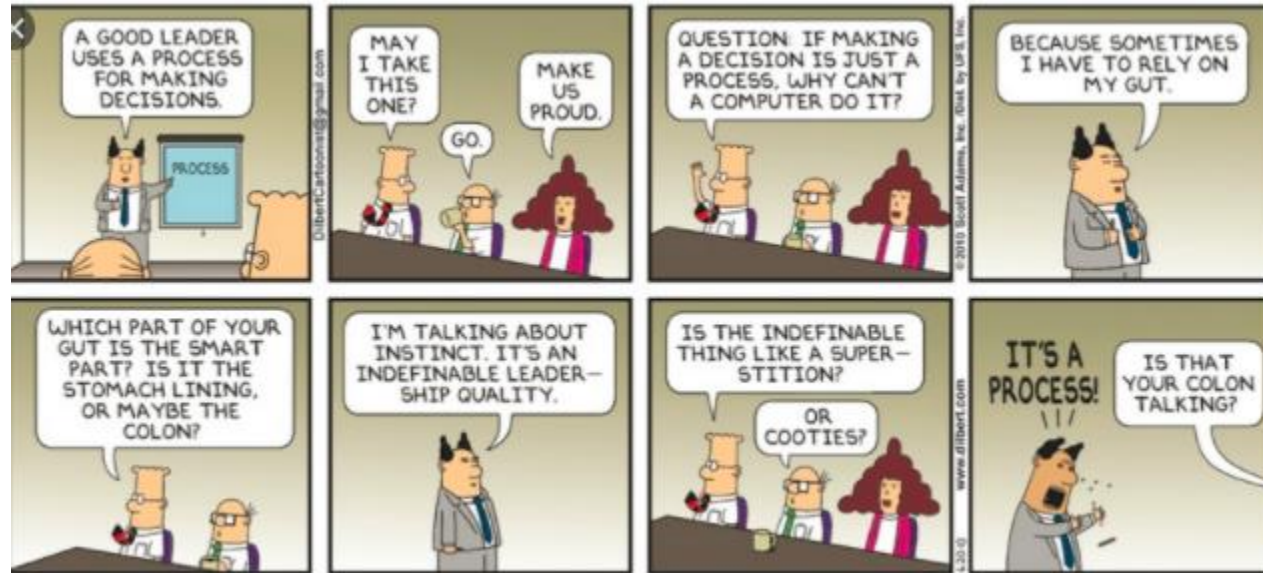
- ▶ SLC purpose - implications of OPS:
 - *MMP*, 213-220, 229-231
 - subjective purpose under s 46 unsatisfactory
 - objective purpose should be test
 - objective purpose not same as likely effect
- ▶ Examples:
 - GCO management act on the advice of a leading consulting firm that it can enter into a joint venture for the large scale manufacture of a vaccine without affecting competition significantly. This is a mistake of fact. In fact, the restrictions on sales outside the jv make the likely adverse effect on competition considerable.
 - *Universal Music Australia Pty Ltd v ACCC* [2003] FCAFC 193:
 - UMA liable on basis of intention in principle to act anti-competitively but no SLC on facts of UMA's intended course of conduct
- ▶ Solutions?
 - *MMP*, 217, 235-236
 - 'objective' element same as current NZ interpretation?
 - OPS also has important proportionality dimension
 - consider *MMP*, 239-240 - stymied by s 2(5)(b) Commerce Act?
 - Excise SLC purpose limb from proposed s 36?
 - Competition and Consumer Act 2016 (Samoa), s 33
 - PNG, *Consumer and Competition Framework Review* (2017) 81-83

- ▶ SLC effect – implications of OPS:
 - *MMP*, 190-199, 237-239
 - unexpected SLC effect
 - information reasonably available to D at time of conduct
 - error cost and disincentive
- ▶ Examples:
 - TCO changes the specification of its technology in order to improve the performance of its products. The change forces several competitors to withdraw from the market until they can resolve interoperability issues in product lines under development. TCO did not expect the interoperability issues to arise.
 - *MMP*, 238
- ▶ Solutions?
 - *MMP*, 238-239, 241
 - gap analysis
 - authorisation
 - defence of justification based on OPS?
 - class exemptions?
 - excise effect limb?

- ▶ SLC likely effect – implications of OPS
 - *MMP*, 182-183, 238
 - consistent with ex ante analysis of OPS
 - low threshold
- ▶ Example:
 - INZCO (Pink Batts) case (2004), Noonan 559:
 - The two-for-one arrangement was found not to have the likely effect of substantially lessening competition. Williams J observed that NWP's products remained on the market and even if NWP was eliminated, its technology would likely to have been used by other firms. During the relevant period a number of firms entered and exited the South Island market, including some wool-based insulation products. Arguably, the actions of INZCO would discourage other people licensing NWP's technology in the South Island or other markets.
- ▶ Solutions?
 - *MMP*, 182-183, 241
 - authorisation?
 - defence of justification based on OPS?
 - increase requisite degree of probability?
 - Heerey (2011) 39 ABLR 457
 - Cf Noonan, *Competition Law in New Zealand* (2017) 334-335

'Substantial' lessening of competition

- ▶ Implications of OPS:
 - MMP, 180-182
 - inconsistency
 - uncertainty
- ▶ Examples:
 - Coops (2014)
 - Leuner (2008)
 - Noonan (2017) 5.4(3)
- ▶ Solutions?
 - MMP, 240-242
 - authorisation?
 - defence of justification based on OPS?
 - class exemptions?
 - statutory clarification of s 2(1A) Commerce Act?



Justification

- ▶ Justification - implications of OPS:
 - *MMP*, 147, 176-220, 220-228, 239-240
 - proportionality test key element of OPS
 - includes least restrictive means test
- ▶ Example:
 - United Brands (Court of Justice, 1978)
 - Abusive for dominant supplier to terminate supplies to a distributor on the grounds that the distributor had participated in an advertising campaign for competitor of the supplier. A dominant firm can take 'reasonable steps' to protect its own commercial interests if they are attacked, but countermeasures must be proportionate to the threat 'taking into account the economic strength of the undertakings confronting each other.'
- ▶ Solutions?
 - *MMP*, 239-240
 - OPS-based defence?
 - stymied by s 2(5)(b) Commerce Act?
 - authorisation?
 - defence of justification?
 - defence of legitimate business interest?
 - defence of reasonable necessity and proportion?



Choices

- ▶ Retain s 36 in present form?
 - serious flaws preserved
 - defeatist
- ▶ Proposed s 36:
 - known weaknesses – significant?
 - undue SLC preoccupation?
 - comity/convergence spreads infection?
 - NZ innovation?
- ▶ Infuse OPS in proposed s 36?
 - luminosity of Kemp, *Misuse of Market Power* (2018)
 - query extent likely to be adopted by courts, regulators and other stakeholders unless backed by legislation
 - modest responsive legislative improvements?
 - exclusionary conduct
 - SLC purpose
 - SLC effect
 - SLC likely effect
 - ‘substantial’ lessening of competition
 - justification

