Bet a dozen Moas? Productivity Commission and s36

Speed read

A key provision in the Commerce Act – Section 36 - has been known to be a failure for 20 years. It's dealt with by the Productivity Commission in their recent draft report[1] on competition and ICT issues. They want it fixed. It should be, because it is costing NZ Inc considerable money. But I'm betting it won't be fixed as soon as it should be. So I'll take any one on for a box of Moa beer: I say the problem won't' be fixed in under three years. And yes, Moa will still be around then: they're just having speed wobbles.

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The draft report is a bodice ripper of a read, with plenty of well-considered ideas. We'll write several pieces on key topics, starting with s36. If these ideas are implemented, the impact on NZ businesses will be considerable. Yet businesses have hardly engaged in the Commission's processes (but they are being invited now to submit before this report goes final).

The report rightly says this Commerce Act provision dealing with abuse of market power by monopolies and similar companies is broken and those companies' actions are not sufficiently controlled.

Experienced commentators have known this is a big problem since 1994, when a controversial case brought about this situation, and it's been talked about endlessly. I can think of only two knowledgeable commentators who supported the status quo: one has changed his mind since, and one comes from a firm representing parties who benefit from Section 36 staying as it is. I might have missed the odd view or two, but then I am a dedicated Shades of Section 36 reader. Of course outliers can be right, but the strength of views to the contrary suggests this should be closely reviewed.

Drawing the line between abuse of market power by monopolies and the like (bad), and an innovative company rightly getting monopoly profits (good) is a tricky thing. Google has done wonderful and innovate things for their users, and dominates the world, making great money along the way. It's in our interests that companies like Google are encouraged. But at what point should competition law intervene to say that Google's market power and profits have gone too far, causing market problems?

The EU is grappling with that issue right now in relation to Google. But their law dividing the good and the bad seems way more sensible and usable than ours. Drawing the line is always going to be very difficult, but others do this better than us. One view of those wanting to retain the status quo is that the Googles of this world should not be deprived of their gains from innovation. That will not work. There must come a point.

I won't even try to explain how our law divides the good and the bad. It is largely incomprehensible and bears little relationship with business reality. And that's how lawyers would see it. Business people would be even more bemused that their businesses, and NZ Inc, are being judged by this sophistry. As the

Commerce Commission chair says of Section 36:

> *The application of monopoly rules based on hypothetical thought experiments, involving the creation of make-believe market structures and predictions of behaviour in make-believe worlds, is highly problematic. Section 36 is in urgent need of amendment.*

How did we get to this point? I reckon it's us lawyers. Sit in a conference room of competition lawyers debating this issue, as I have many times, or read one of the judgments dealing with such "*make-believe market structures*" and you'll lose the will to live. The focus seems more the detail of the words and how they are interpreted, instead of: "*What is it we are trying to achieve here and how do we best balance the tricky delineation between good stuff and bad stuff, in the interests of NZ Inc and consumers?*" Get that right and we'll have a chance of optimally encouraging competition and innovation, all the good things that economists say make us richer.

Has the time come to deal to us lawyers? As Dick said to Cade in Henry VI Pt II, when they were discussing Section 36: "*The first thing we do, let's kill all the lawyers [off the s36 debate]*". Probably not: there's some inevitably hard yet important law here. But somehow we've got to have this driven by those with broader vision. And the Commerce Commission made a great step last year by accelerating the debate and bringing to New Zealand more visionary thinkers (and lawyers at that) to talk about this. And now we've got a draft report by the Productivity Commission, leveraging off what the Commerce Commission has done, setting the problem within the broader context of the implications for New Zealanders. Additionally, the Productivity Commission rightly notes that we should pick up some ideas from the Australian's so-called roots and branches review of competition law, currently underway.

I particularly like the way the draft report deals to the pro-36'ers' idea that we are too small as a country to have fractionalised industries caused by s36 stopping large companies.

The Commission's view is largely to the contrary. This is part of the Commission' broader theme that one of the reasons we are falling behind countries such as Australia is our weaker regimes dealing with competition and with ICT. Of course there are other ways of dealing with exporting companies where a monopoly approach is needed, such as happened with Fonterra.

And finally, dealing with a key ground relied on to retain things as they are, it's said that the current test between the good and the bad should be retained as it gives certainty so that businesses can structure what they do, based on a bright line test.

To which it can be said:

- A bright line test based on, as the Commission describes it, a "*make-believe world*"? Alice in Wonderland.
- The cases show there is little that is certain about this test anyway.
- Why should monopolies be in a special position and get "*certainty*" when businesses including monopolies face all sorts of legal risk and compliance where there is no such bright line test? Privacy law for example – a key legal risk for all businesses to manage- would fail if the main obligations were set out in more detail than a few briefly and broadly stated principles.

The interests of consumers and NZ Inc, based on workable laws, are way more important than "*certainty*" for some suppliers. And anyway, we doubt that the NZ regime is any more "*certain*" than the better regimes in territories such as Australia and Europe.

Wigley & Company is a law firm acting for clients who like s36 as it stands and those who don't. In expressing our own views, we'll piss off the former.

1. http://www.productivity.govt.nz/inquiry-content/1624?stage=3

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