



Misuse of Market Power & RPM

+ bonus material (maybe, if time)

Monday 17 April 2023, 11.30 am – 12.30 pm

Matthews Law

COMPETITION · REGULATION · POLICY · STRATEGY

Agenda

– *what we will cover*

- New *Misuse of Market Power* prohibition – what’s changed & key consequences
- Broader application of the new prohibition: who it captures and when it “bites”
- Distinguishing vigorous competitive “conduct” & anti-competitive exclusion
- **Danger areas**
 - eg (implied) refusals to supply, access pricing, enforcing IP rights, limit pricing/predation, bundling...*[add self-preferencing?]*
- Resale Price Maintenance (RPM) reminder

New Misuse of Market Power prohibition

– *Commerce Act section 36*

OLD SECTION 36

1. A person with substantial market power (**SMP**)
2. Must not take advantage of that power
3. For the purpose of
 - restricting the entry of a person into a market
 - preventing or deterring a person from engaging in competitive conduct in a market, or
 - eliminating a person from a market

NEW SECTION 36

1. A person with substantial market power (**SMP**)
2. Must not engage in conduct
3. That has the purpose, effect, or likely effect, of substantially lessening competition (**SLC**) in
 - that market, or
 - any other market in which the person (or its interconnected bodies corporate) supplies or acquires, or is likely to supply or acquire, goods or services, whether directly, or indirectly through other persons.

Consequences of new test to be aware of

– Key consequences

- NZ law is again aligned with Australia's.
- The old “*safe harbour*” of normal business conduct to defend actions by dominant firms is gone.
- The new test recognises that single firm conduct by dominant firms can have anti-competitive effects which are unlikely when undertaken by small firms. “*Special duties*” may be an unpopular phrase but firms with SMP will have additional responsibilities.
- Despite being called an (economic) “effects test” due to the new focus on markets (rather than targeted competitors), a “purpose” component to the prohibition remains.
- The test is not unique – NZ has had the same test for contracts for decades, and for mergers since 2001. Many Australian experts say in practice the same change there has not been as great as expected. Although there has been an uptick in private litigation.

Predictions for the new test

– *Key consequences*

- Having a clear legitimate commercial rationale for “conduct” will remain important.
- Expect arguments on market definition to be a real feature of the new test.
- The test will remain hard to prove. Distinguishing vigorous competition (which benefits consumers on the long run) from exclusionary anti-competitive conduct is challenging.

Who does the prohibition apply to?

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

- Came into force 5 April 2023
- Still only applies to persons with **substantial market power (SMP)**
 - Depends on the relevant market
 - Market power = lack of effective competitive constraint
 - A firm with substantial *purchasing* market power might have the ability to worsen prices or terms of trade to sellers
 - 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
- Margin/price squeezing
- Exclusive dealing
- Loyalty rebates
- Tying/Bundling
- Limit pricing/predation
- Enforcing IP rights



Misuse of Market Power Guidelines

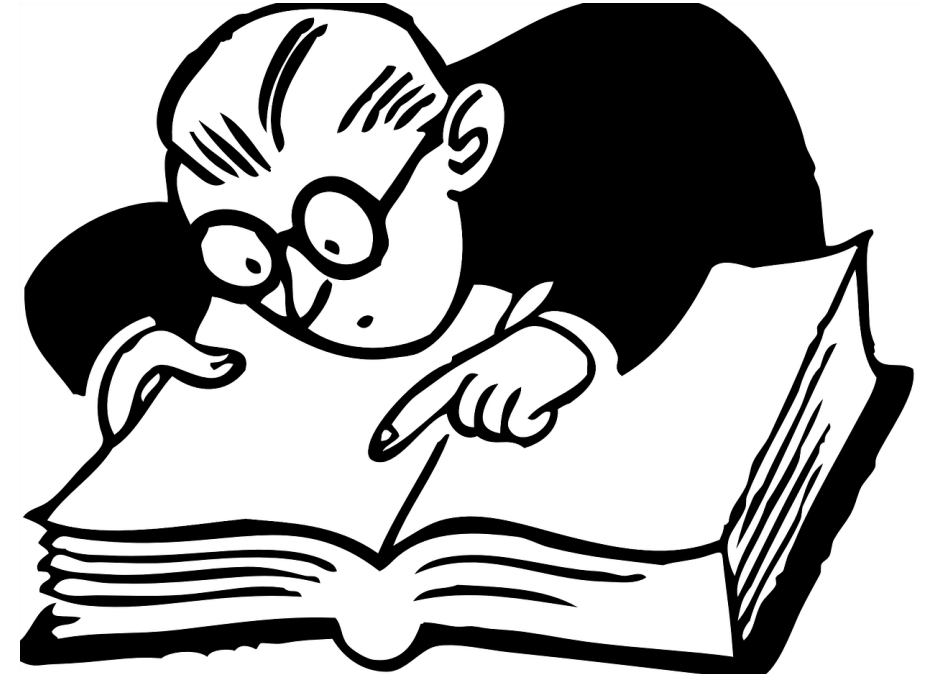
– *How a reinvigorated ComCom will apply this new law*

- ComCom guidelines:

<https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/misuse-of-market-power/ nocache>

- ComCom has separate IP guidelines:

https://comcom.govt.nz/_data/assets/pdf_file/0017/312308/Intellectual-property-guidelines.pdf



RPM risks: Comments in grocery market study report

p410: ***We intend to further investigate refusals to supply due to low retail pricing***

9.133 *...we are aware of examples of some suppliers refusing to supply retailers where they are concerned that the retail prices being offered are too low, or indicating that they are only willing to supply if a grocery retailer does not undercut the retail prices set by other grocery retailers of the supplier's products. This may be due to:*

9.133.1 ***direct pressure from grocery retailers;***

9.133.2 *unilateral actions by suppliers, due to concern about the possible response from major grocery retailers; or*

9.133.3 *unilateral action by suppliers for other reasons.*

9.134 *Refusal to supply due to low retail pricing could **potentially breach sections 37 and 38** of the Act, which prohibit the practice of resale price maintenance. It **could also breach section 36** ...to the extent that a refusal to supply reflects the influence of a major grocery retailer with substantial market power.*

9.135 *We have not enquired further ...at this stage. However, independent of this study, we intend to open an **investigation into compliance with the Act in respect of certain conduct that we have become aware of during the course of this study.***

RPM

– *Minimum resale price maintenance*

- RPM generally occurs when a supplier specifies a minimum price at which a retailer must on-sell goods
- Specifying a *maximum price* is usually fine
- A specified minimum price can be inferred eg if a RRP is actually a minimum price – however a genuine RRP is not RPM
- Be careful about language used eg in emails and how it could be interpreted by the CC
- Document legitimate rationale for any refusals to supply

RPM fact sheet

– *ComCom guidance*

- ComCom fact sheet https://comcom.govt.nz/_data/assets/pdf_file/0025/96181/Resale-price-maintenance-Fact-sheet-June-2022.pdf
- Has good practical tips:
 - ✓ Suppliers **can** suggest or recommend a retail / promotional price
 - ✓ Suppliers **can** set a maximum price for the resale of goods
 - ✓ Suppliers **can** agree promotional plans with resellers, if reseller maintains independence to set retail price
 - ✓ Suppliers **can** choose how they wish to distribute their goods

 - ✗ Suppliers **cannot** specify or mandate a minimum price for the on-sale of goods
 - ✗ Suppliers **cannot** enforce a recommended price
 - ✗ Suppliers **cannot** prevent or limit resellers from lowering their retail prices
 - ✗ Suppliers **cannot** withhold supply of goods because they were sold below a minimum price

Bonus: Cartel conduct

– *Hub and spoke cartels and other cartel risks*

- A cartel generally exists when competitors agree to reduce / remove competition that would otherwise exist between them. This can be “*price fixing*”, “*restricting output*”, “*market allocating*”
 - [ML 1-page guide: cartel provision prohibition & exceptions](#)
 - Direct / indirect “*CAU*” between parties “*in competition*” – assume it’s a CP?
 - “Nudge & wink”; removal of commercial freedom [ComCom “RED FLAGS”](#)
- Deeming provisions for associations in ss 2(8) & (9) CA: [ComCom Trade Associations Fact Sheet](#)
- There can be “hub and spoke” cartels where, say, a retailer is the means for suppliers agreeing prices or other CPs, or vice versa. Eg the [Cussons laundry detergent](#) case (AU), where Cussons successfully defended (full Federal Court) but Colgate & Woolworths admitted the conduct and agreed penalties of AU\$18M and AU\$9M respectively.

Bonus: Fair Trading Act rights

– *Fair Trading Act rights 1/2*

- Misleading or deceptive conduct - written & oral; disclaimers...
- Unsubstantiated representations - when rep'n is made
- False or misleading representations
- Unconscionable conduct
 - CC: *"...serious misconduct that is so far outside accepted standards of commercial conduct as to be against good conscience"*

Bonus: Unfair contract terms (UCT)

– Fair Trading Act rights 2/2

- \$250K annual value cap for B2B standard form contracts. Grocery Industry Competition Bill (**GICB**) proposes to increase this to \$1M for grocery standard form contracts.
- A court must declare the term is a UCT first. Currently only the CC can seek a declaration. Under GICB, firms can seek a declaration too.
- Unfair requires all three elements:
 - The term would **cause a significant imbalance** in the parties' rights and obligations arising under the contract
 - The term is **not reasonably necessary** in order to protect the supermarket's legitimate interests
 - The term would cause **detriment** (whether financial or otherwise) if it were applied, enforced, or relied on
- Does not apply to terms that
 - Define the main subject matter of the contract
 - Set the upfront price payable under the contract
 - Is a term required or expressly permitted by any enactment

Questions?



Andrew Matthews Principal

p +64 9 972 3754

m +64 222 333 666

e andrew.matthews@matthewslaw.co.nz