Commissions gang up against counterfactual test

The Productivity Commission has weighed in behind the Commerce Commission’s campaign to unseat the counterfactual test for determining misuse of market power under section 36 of the Commerce Act.

Describing it as an “idiosyncratic approach”, the Productivity Commission is proposing that the section be reviewed in tandem with the “root and branch” review of Australia’s competition laws announced by the Abbott Government before Christmas.

The proposal is contained in the Commission’s second interim report on Boosting Productivity in the Services Sector. Submissions are due by 7 March 2014.

The Commission hopes to have its final recommendations with the Government by 30 April.

Progress for the Commerce Commission?
The Commerce Commission has been campaigning actively and loudly against the limitations of the counterfactual test for months (see Chapman Tripp’s commentary of November last year). So it will be pleased that it is now getting traction behind the need for change.

We expect that a review in parallel with the Australian review will proceed, and understand that the Ministry of Business, Innovation and Employment is already working on this.

Draft report’s recommendations for “improving competition law”
It is interesting that the Productivity Commission has tackled the section 36 issue as a side bar to an extensive report on the services sector. Devising an appropriate monopolisation rule is devilishly complex.

The debate is notoriously difficult to pin down and a preference for any particular approach inevitably requires a leap of faith.
Nonetheless, the Productivity Commission is sufficiently confident to suggest that section 36 should be amended to either:

- ensure that the courts do not rely solely on the counterfactual test for abuse of monopoly power, or
- establish more of an “effects” approach.

Chapman Tripp comments

The draft recommendations substantially reflect the Commerce Commission’s position. The Productivity Commission has catalogued “the two sides” (if it were only that simple!) and concluded that it finds the Commerce Commission’s arguments “persuasive” and the other arguments “not convincing”.

Unfortunately, all of the arguments are rather abstract. If and when a review commences, it will be critical that we take a hard-hearted look at why we believe something different will be better. Ideally, there would be change only when there is a solid foundation for the belief that New Zealand will be a stronger economy with section 36 reform.

We might establish that foundation by answering questions such as these:

- What are the known examples of genuine innovation emerging in the New Zealand economy and how often is such innovation stifled by the latitude afforded by section 36 in its current form? No-one with market power stopped Xero. But who out there was not so fortunate?
- Would the additional flexibility featuring in the Australian legislation have saved any of the innovators stifled in New Zealand? On a related point, how have the changes to the Australian law impacted on the propensity of firms with market power to engage in “anti-competitive” conduct?
- How is it that loading a “special responsibility” on firms with market power (as they do in Europe) is a bad idea and yet applying an “effects test” (which seems to engineer a similar requirement) is not?
- What is our view of the cost of having firms with market power not necessarily able to operate as others would in competitive markets? The Productivity Commission notes that the New Zealand economy is small and so more susceptible to the negative effects of anti-competitive conduct. The flipside is that it is disproportionately important that firms in New Zealand with market power are operating at full throttle.

Footnotes