New Zealand

A. Objectives of unilateral conduct laws
Statutory prohibitions relating to unilateral conduct

The principal prohibition under New Zealand competition law relating to anticompetitive unilateral conduct is section 36 of the Commerce Act 1986 (the Act). This section provides that:

(2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of –
   a. restricting the entry of a person into that or any other market; or
   b. preventing or deterring a person from engaging in competitive conduct in that or any other market; or
   c. eliminating a person from that or any other market.

The Act also defines the following terms in relation to this prohibition:

‘Person,’ includes a local authority, and any association of persons whether incorporated or not (section 2). Person includes the Crown, to the extent it engages in trade, and Crown corporations, if they engage in trade (sections 5 and 6). Section 36(4) provides that, for the purposes of section 36, “a reference to a person includes 2 or more persons that are interconnected.”

‘Market’ is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them (section 3(1B)).

‘Purpose’ is further defined by a deeming provision that provides that a person shall be deemed to have engaged in conduct for a particular purpose if that purpose was a substantial purpose, and the person acted for that particular purpose or for purposes that included that substantial purpose (section 2(5)). Section 36B provides that, for the purposes of section 36, the existence of any of the prohibited purposes, as the case may be, may be inferred from the conduct of any relevant person or from any other relevant circumstances.

Section 36A of the Act includes a further specific prohibition relating to persons with a substantial degree of power in specified markets that take advantage of that power to harm competition in New Zealand markets. This section provides that:

(2) A person must not, for any of the purposes specified in subsection (3), take advantage of the person’s substantial degree of power (if any) –
   a. in a market; or
   b. in a market in Australia; or
   c. in a market in New Zealand and Australia.

(3) The purposes are as follows:
a. restricting the entry of a person into a market that is not a market exclusively for services:
b. preventing or deterring a person from engaging in competitive conduct in a market that is not a market exclusively for services:
c. eliminating a person from a market that is not a market exclusively for services.

More generally, the courts have been willing to find unilateral conduct liable under the general prohibition in section 27 of the Act against anticompetitive agreements if those agreements enhance or sustain unilateral market power. This section provides that:

(1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

The response to this questionnaire focuses on sections 36 and 36A of the Act.

Q1. With regard to your jurisdiction’s unilateral conduct rules – e.g., rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (e.g., consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

   a. Constitution
   b. Statutes
   c. Regulations
   d. Agency enforcement policy (e.g. guidelines, speeches)
   e. Case law
   f. Other (please identify)

(i) Statute
The objective of section 36 is dictated by the purpose of the Commerce Act as specified in section 1A:
The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.
Competition in this case is defined as ‘workable or effective competition’ (section 3(1) of the Act).

There is no express statement of the objectives of the prohibitions in sections 36 and 36A. The sections do not prohibit the holding of market power per se, rather they focus on the exercise of market power for anticompetitive purposes.

(ii) Case law
The purpose statement in section 1A of the Act was considered by the Court of Appeal in
Giltrap City Ltd v Commerce Commission (2003) 10 TCLR 831:
In Tru Tone Limited v Festival Records Marketing Limited [1988] 2 NZLR 352, in a
judgment delivered by Richardson J, this Court referred to the long title of the Act
and observed that:

It is based on the premise that society’s resources are best allocated in a competitive
market where rivalry between firms ensures maximum efficiency in the
use of resources (p358).

Section 1A of the Act stipulates its purpose as being "to promote competition in markets
for the long-term benefit of consumers within New Zealand." While this provision
was inserted by the 2001 amendment, that was in substitution for the previous
long title which is not materially different.

Sections 36 and 36A were amended in 2001 and the courts have not tested the new
provisions. However, previous statements by the courts confirming that the prohibition in
section 36 exists to protect competition and consumers, not competitors, are likely to
continue to be relevant.

The Privy Council in Carter Holt Harvey cites a passage from the Australian case,
Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR 177,191:
Competition by its very nature is deliberate and ruthless. Competitors jockey for sales,
the more effective competitors injuring the less effective by taking sales away.
Competitors almost always try to ‘injure’ each other in this way. This competition
has never been a tort … and these injuries are the inevitable consequence of the
competition section 46 [of the Trade Practices Act] is designed to foster.

In the same decision, the Privy Council went on to state:
The law … does not disable a trader who is in a dominant position in a market from
competing with other traders in that or any other market. It is open to the trader to
compete on price as well as quality, so long as he does not use his dominant
position for the purpose of producing an effect which is anti-competitive.
Moreover, the trader is entitled, before he enters upon a line of conduct which is
designed to affect his competitors, to know with some certainty whether or not
what he proposes to do is lawful ... The question … is how, in this difficult area,
lawful conduct can be distinguished from unlawful conduct.

The importance of firms with market power having a right to compete in cases under
section 36 was further noted by the Privy Council in Telecom Corp of NZ Ltd v Clear
Communications Ltd [1995] 1 NZLR 385; (1994) 6 TCLR 138; 4 NZBLC 103,552, 402;
154; 103,565 (PC):

A monopolist is entitled, like everyone else, to compete with its competitors: if it is not
permitted to do so it ‘would be holding an umbrella over inefficient competitors’.
Consequently, the objective of sections 36 and 36A is to promote competition on the
merits.
(iii) Government policy
While not binding as to the interpretation of the unilateral conduct rules, the
government’s policy in relation to the new purpose statement in the Act provides a useful
indication of the intended objectives. In his speech to Parliament in relation to the new
purpose clause, the Minister of Commerce stated (Hansard, 27 February 2001):
The purpose statement makes clear that competition is not an end in itself, but a means to promote the welfare of New Zealanders. Consumers are given special mention as they are the ultimate beneficiaries of competition. However, the welfare of all New Zealanders will continue to be important. The focus on competition in the purpose statement also does not preclude wider public benefit issues being taken into account where appropriate. It simply clarifies that there should be a presumption in favour of competition, and competition must prevail unless the efficiencies of other public benefits are shown to exceed the detriments from the lessening of competition.

Consequently, the reference to ‘long term benefit of consumers’ does not imply a distributional welfare standard. Rather the phrase is seen as being consistent with an efficiency objective. In almost all cases, the promotion of competition is consistent with achieving efficiency. In the rare cases that it is not, the Act provides a procedure for authorisation of the practice on application to the New Zealand Commerce Commission (NZCC). The NZCC may authorise an acquisition or arrangement that might otherwise contravene the Act if the public interest in that acquisition/arrangement, taking into account efficiencies, outweighs the associated competition detriments. However, authorisation is not available for the conduct subject to sections 36 and 36A, and the courts will determine what account is taken of efficiency within the competition assessment.

(iv) International treaties

The specific objective of section 36A of the Act is outlined in A Protocol to the Australia New Zealand Closer Economic Relations – Trade Agreement on the Acceleration of Free Trade in Goods, signed on 18 August 1988. Section 36A (and its equivalent provision in section 46A of the Australian Trade Practices Act 1974) facilitates trade of goods between Australia and New Zealand by replacing trade related anti-dumping remedies with a generic competition law prohibition and remedies. Section 36A prohibits firms with power in a market in Australia (or in market in Australia and/or New Zealand) from taking advantage of that power for an anticompetitive purpose in markets in New Zealand. The prohibition relates to markets not exclusively for services.

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Q2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

The Act provides that the overriding goal is ‘the long term benefit of consumers within New Zealand’, which has been equated to an efficiency objective. Given the availability of the authorisation procedure, with its explicit focus on an efficiency standard, the restrictive trade practice prohibitions in the Act are primarily focused on the promotion of the competition. However, the courts have been willing to consider efficiency within the competition assessment and this is particularly relevant for the unilateral conduct prohibitions (where authorisation is not available). The High Court outlined in Clear Communications Ltd v Sky Network Television Ltd (1997):

In New Zealand and Australia (by contrast with the United States), the law deals explicitly with both authorisation and prohibition. It is true that the availability of
authorisation on the basis of efficiencies means that there is some tension in the partitioning of standards between the prohibitions contained in Parts 2 and 3 of the Act and the availability of authorisations. The emphasis in Australian and New Zealand jurisdictions when dealing with such concepts as “dominance”, “market power”, “lessening of competition” is upon discretionary power and barriers to entry, “the power to give less and charge more” Queensland Co-operative Milling Association Limited: Re Defiance Holdings Limited 1 ATPR 40-012, 17,247. Yet “competition is a process rather than a situation” that may well express itself in on-going efficiencies as well as other aspects of business performance.

In short, as the Queensland Co-operative Milling case (supra) emphasises, the test of competition is independent rivalry between market participants in all dimensions of the “price-product-service packages” (including those made possible by efficiencies), a rivalry that is not discretionary but is constrained by market forces. The test is not efficiency in itself but rather a thoroughgoing non-discretionary competitive process. Sections 36 and 36A do not seek to protect competitors, be they large or small, nor do they seek to promote industry policy. If other public policy objectives are considered important, Parliament may pass specific legislation to that effect, or alternatively, in certain circumstances where it is necessary to protect consumer welfare, there is provision for regulatory control to be imposed under Part 4 of the Act.

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**Q3. If there are multiple objectives, how are these balanced or reconciled?**

As outlined above, the Act provides for a balancing between the objectives of promoting competition and efficiency through enabling persons to apply to the NZCC for authorisation of arrangements if the public benefits of those arrangements exceed the competition detriments (section 58 of the Act). In assessing public benefits, the NZCC is required to have regard to efficiency (section 3A of the Act). However, authorisation is not available for conduct under sections 36 and 36A, and consequently, the extent to which efficiency is to be considered in relation to unilateral conduct is a matter for the courts. As outlined above, the courts have interpreted sections 36 and 36A as providing for competition on the merits. In addition, Parliament may legislate to achieve other public policy objectives, and if it does so, that legislation will prevail over the Commerce Act to the extent that the proscribed conduct is specifically authorised by that legislation (section 43 of the Act). The Privy Council in *NZ Apple and Pear Marketing Board v Apple Fields Ltd* developed a test for interpreting section 43 of the Act. The Privy Council outlined that an act will be ‘specifically authorised’ if:

(a) the statute authorises the very act in question; or

(b) the act is one of a class or kind of authorised acts and the whole or preponderant majority of the authorised class would, if not so authorised, contravene one of the trade practices prohibitions in the Act.
The Act also provides an interface between the unilateral conduct prohibitions and provisions relating to regulatory control, with regulatory control being another means to achieve the objective of ‘long term benefit to consumers’ in relation to firms with unilateral market power. Part 4 of the Act provides for the NZCC to recommend control be imposed over the supply or acquisition of goods or services by a firm(s) if it is satisfied that competition is limited and it is in the interests of customers or suppliers of those goods or services for control to be imposed. Consequently, this process enables a balancing between objectives of promoting competition through generic competition law and protecting consumer welfare through regulatory intervention.

Q4. How has your jurisdiction balanced the risks associated with over-deterrence (deterring efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

The objective of the unilateral conduct rules, being competition on the merits, is based on an assessment of what is efficient for New Zealand’s small economy and, by implication, this assessment would have included the risks associated with over or under deterrence. The prohibitions were introduced at a time of significant liberalisation of the economy and it is likely that policy-makers required that any regulatory intervention in markets promoted rather than impeded the competitive process. These risks were also taken into account in deciding how to specify the unilateral conduct rules (i.e., drawing the line between aggressive competitive conduct and anticompetitive conduct). The types of error considered where a type I error (false positive or over-deterrence), type II error (false negative or under-deterrence) and type III error (high transactions costs and uncertainty). Features of the prohibition that reflect these risks include:

(a) it only applies to persons that hold the requisite substantial degree of market power:
(b) it does not prohibit extortionary conduct, recognising that competition is consistent with short term monopolies based on cost or innovation advantages, and also that in a small economy, a monopoly or monopsony firm may be an efficient market structure: and
(c) liability attaches to purpose (which may be inferred from objective evidence) rather than any effects that may not have been foreseeable at the time that the conduct occurred. This reflects the principle that firms with market power should be able to determine *ex-ante* if any conduct would be lawful or unlawful.

In addition, harmonising the prohibition with the equivalent prohibition in the Australian Trade Practices Act enables New Zealand to benefit from Australian jurisprudence to clarify the application of the prohibitions. This reduces the uncertainty and costs to New Zealand businesses of arranging their affairs to comply with the provisions. Finally, the NZCC’s enforcement criteria relating to circumstances as to when it will intervene in the market are designed to take into account the risks of excessive versus under enforcement. The NZCC may take enforcement action following an assessment of:

(a) the extent of the detriment;
(b) the seriousness of the conduct; and
(c) the public interest in taking enforcement action in that case.

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**Q5.** With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

**Interface with regulated sectors or public bodies**

The interface between the unilateral conduct rules in the Act and regulated sectors or public bodies may take two forms:

(a) section 36 of the Act only applies to abuses of ‘market’ power, therefore power derived from statute or exercised other than by engaging in trade (e.g., through actions in accordance with exercising public policy functions) may be exempt from the prohibition: or

(b) sectors subject to industry-specific regulation may be exempt from section 36 of the Act either:

- by virtue of the otherwise impugned conduct being an action required by, or carried out in accordance with, that regulation; or
- that the regulation constrains the firm’s conduct in the market such that it does not meet the requisite market power.
In the first case, the public policy goals relating to the unilateral conduct may differ from general competition goals. Specific examples include:

(a) Pharmac, the Crown pharmaceutical purchasing body, is exempt in relation to its purchasing of pharmaceutical products and the setting of the pharmaceutical schedule (section 53 of the New Zealand Public Health and Disability Act 2000); and

(b) the Tertiary Education Commission, the Crown tertiary education oversight body, is exempt in relation to its statutory functions to negotiate charters and allocate public funding to tertiary education institutions (section 159K of the Education Act 1989).

However, any trade-offs between competition and other public policy goals can be taken into account by Parliament or the Executive when developing the statutes or public policies. Furthermore, unilateral conduct pursuant to statutory powers or otherwise than ‘in trade’ is either subject to oversight by the courts (through judicial review or appeal) or Parliament, as relevant. These alternative forums may provide redress for persons suffering harm.

In the second case, the goals of industry-specific regulation are usually consistent with the promotion of competition and/or efficiency. Specific examples include:

(a) the Telecommunications Act 2001 provides a regulated access regime for specified or designated telecommunications services. The purpose of that Part of the Act is ‘to promote competition in telecommunications markets for the long-term benefit of end users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers’ (section 18 of the TA);

(b) the Dairy Industry Restructuring Act 2001 provides an open entry and exit regime to the raw milk market and a regulated access regime for the wholesale supply of raw milk. The purpose of that Subpart of the Act is ‘to promote the efficient operation of dairy markets in New Zealand’ (section 70 of the DIRA); and

(c) the Shipping Act 1987, administered by the Ministry of Transport, prohibits unfair practices in relation to outward shipping services, including ‘the abuse of a dominant position by a carrier or an association of carriers’. Inward and outward shipping is exempt from the Commerce Act (section 44(2) of the Commerce Act).

Consequently, any balancing or reconciling generally relates to clarifying jurisdiction between the two approaches to achieve the objectives, rather than a conflict in the objectives per se. In the case of certain telecommunications services, electricity transmission and distribution services, and raw milk markets, the NZCC is both the competition and industry-specific regulator. This enables the NZCC to carry out this reconciliation process internally and consider the most effective means to achieve the objectives.
Intellectual property rights

Section 36(3) of the Act provides that:

For the purposes of this section, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of section 45(2), in New Zealand. Section 45(2) provides that ‘… a statutory intellectual property right means a right, privilege, or entitlement that is conferred, or acknowledged as valid, by or under –

(a) The Patents Act 1953 or
(b) The Designs Act 1953; or
(c) The Trade Marks Act 2002; or
(d) The Copyright Act 1994; or
(e) The Plant Variety Rights Act 1987; or

The NZCC considers that the holding of a statutory intellectual property right will generally not result in that person having market power due to the availability of substitutes. Furthermore, protection of intellectual property rights is generally consistent with the goals of competition in encouraging rivalry in innovation. However, this exemption clarifies that the mere enforcement of an intellectual property right does not contravene section 36.

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Q6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-liberalized), please explain.

The objective of the unilateral conduct prohibitions, being competition on the merits, is likely to be influenced by the nature of New Zealand’s economy. New Zealand’s economy is small and highly dependent on international trade. Consequently, its regulatory settings seek to balance the interests of consumers and producers. Also influential is:

(a) New Zealand’s geographic location and the business laws applying in the jurisdictions of the countries with which it has close economic relations. Consequently, sections 36 and 36A are closely based on the Australian equivalents in the Trade Practices Act 1974; and

(b) New Zealand engaged in an extensive process of corporatisation and/or privatisation of its state trading activities during the 1980s and 1990s, with little associated regulation. Rather reliance was placed upon the Commerce Act to manage anticompetitive conduct based on the principles of competitive neutrality. Consequently, the Act applies broadly to both state and private firms and any exemptions must be specifically identified following an explicit assessment of the relative public policy objectives.
Q7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

The insertion of the new purpose statement in the Commerce Act in 2001 was not intended to significantly change the objectives of competition law. Rather it was intended to confirm and make explicit the existing approach to interpreting the Act as outlined by the courts.

The prohibitions in section 36 and 36A were reviewed and the amendments also came into effect in 2001. Previously the prohibitions related to persons in a dominant position. The change lowered the competition threshold from dominance to a substantial degree of market power. The intention was to expand the number of firms and markets that would be subject to the prohibition.

A further benefit of this change was that it aligned New Zealand’s prohibition against unilateral conduct with Australia’s equivalent prohibition under the Trade Practices Act 1974. Harmonisation of competition law within the region is generally seen as desirable to facilitate trans-Tasman business activity through creating a seamless business environment.

The change in government in 1999 resulted in a moratorium on privatisation of public assets and a shift in regulatory approach in relation to monopolies. The previous ‘light-handed approach’ under the Commerce Act was supplemented by increased industry-specific regulation and the establishment of two industry-specific regulators, the Electricity Commission and the Telecommunications Commissioner. This change in regulatory approach reflected some perceived limitations in generic competition law and the court processes to effectively constrain monopoly abuses in relation to essential infrastructure services.

Q8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency’s ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

The NZCC is not impeded in achieving the objectives of unilateral conduct rules by any institutional features. However, an ongoing challenge to the NZCC is managing its limited enforcement resources and litigation funds to achieve its objectives. Litigation proceedings for contraventions of sections 36 and 36A are by their nature complex and inevitably costly and time consuming. In such proceedings, the NZCC could be described as being in an ‘arms race’ with private litigants to secure renowned Queen’s Counsel and international economic experts. The NZCC has a dedicated litigation fund maintained with a balance of $NZ1.5 million for this purpose.

A few features of New Zealand institutions that facilitate the NZCC in achieving its objectives include:

(a) Given the important role of economics in determining a contravention of the unilateral conduct rules, the High Court may be supplemented by the
appointment of lay members that are experts in economics, industry or commerce, to assist the Judge in adjudicating on restrictive trade practice prohibitions.

(b) Where it is desirable to act urgently in the interests in consumers or the public, the NZCC may apply to a specialist Cease and Desist Commissioner for cease and desist orders. This provision was used for the first time in 2006 in relation to an alleged contravention of section 36 of the Act.

A further recent institutional change is that the Privy Council is no longer the highest appeal court in New Zealand, as it is has been replaced by the establishment of New Zealand’s own Supreme Court. The Supreme Court is yet to consider an appeal relating to a contravention of section 36 of the Act, and it is not yet known if this change in judicial body will have an influence on the interpretation of the section.

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**Q9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?**

The NZCC has not experienced difficulties with the objectives for unilateral conduct rules. Rather any difficulties relate to how to differentiate between aggressively competitive conduct and anti-competitive conduct by a firm with a substantial degree of market power. In practice the distinction between permissible conduct and conduct that damages the competitive process is an extremely fine one not easily addressed by the statutory language of section 36. As noted by the Privy Council in *Telecom Corp v Clear*,

As to what constitutes ‘use of a dominant position’ ... the statutory words provide no explanation as to the distinction to be drawn between conduct which does, and conduct which does not, constitutes such use.

Recognising that the ‘anticompetitive’ purposes stated in section 36 of the Act may also be construed as natural, competitive motivations, the courts have tended to give models based solely on intention a wide berth, focusing instead on the connection between market power and the alleged anticompetitive behaviour – captured in section 36 by the terms 'use', or post 2001, ‘taking advantage of’.

This difficulty in defining ‘competition on the merits’ is not unique to New Zealand and we continue to monitor international developments with interest.
B. Assessment of Dominance/Substantial Market Power

Q1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction’s general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., “super dominance”).

Sections 36 and 36A refer to persons with a substantial degree of power in a market. For the purposes of section 36, the power must be held in a market in New Zealand. For the purposes of section 36A, the power may be held in a market in Australia, in Australia and New Zealand, or in New Zealand. The NZCC has also interpreted these sections to relate to ‘market power’ (relating to the actual or potential supply or acquisition of goods or services in a market) and not power derived from statute (relating to the exercise of regulatory functions), although the line between the two is a difficult one.

The phrase ‘substantial degree of power in a market’ is not defined in the Act. However, the explanatory note to the Commerce Amendment Bill stated the intention that the phrase should be interpreted in a similar manner to the equivalent Australian threshold in sections 46 and 46A of the Trade Practices Act 1974.

A leading Australian case on the meaning of this phrase is a decision of the High Court of Australia in *Boral Besesr Masonry Ltd v ACCC* (2003).

The essence of power is absence of constraint. Market power in a supplier is absence of constraint from the conduct of competitors or customers. This is reflected in the terms of s 46(3). Matters of degree are involved, but when a question of the degree of market power enjoyed by a supplier arises, the statute directs attention to the extent to which the conduct of the firm is constrained by the conduct of its competitors or its customers.

In *Queensland Wire*, Mason CJ and Wilson J defined market power as the ability of a firm to raise prices above supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product. … Pricing may not be the only aspect of market behaviour that manifests power. Other aspects may be the capacity to withhold supply; or to decide the terms and conditions, apart from price, upon which supply will take place. But pricing is ordinarily regarded as the critical test; and it is pricing behaviour that is the relevant conduct in the present case.

Power, that is, the capacity to act without constraint, may result from a variety of circumstances. A large market share may, or may not, give power. The presence or absence of barriers to entry into a market will ordinarily be vital. Vertical integration may be a factor.
Financial strength is not market power, although if a firm has market power, its financial resources might be part of the explanation of that power.

Section 36(4) provides that the market power of interconnected persons may be considered jointly in assessing market power. However, market power derived from coordinated conduct by other persons in the market is unlikely to be relevant. The issue of coordinated market power was considered in *Dowling v Dalgety* and Justice Lockhart stated:

In my opinion, s. 46 is not directed to aggregation of market power resulting from actions in concert by a number of corporations other than actions in concert by related corporations as detailed by s. 46(2) and defined by s. 4A(5)..

A corporation charged with contravention of s.46 must itself have a substantial degree of market power. It cannot be liable under the section on the basis of a shared position of substantial market power with another unrelated corporation. …

In my opinion, it is permissible, however, when considering the market power of a corporation, to have regard not only to its individual power but to additional power which it has through agreements, arrangements or understandings with others. While aggregation of the market power of a number of unrelated corporations is impermissible, it is important to recognise that a corporation can gain a position of substantial market power through its agreements, arrangements or understandings with others; and market power gained through acting in concert with others must add to the corporation's individual market power. Additional market power thus gained must enhance a corporation's individual market power. …

In short, a corporation may have power in a particular market gained through a variety of means and from a number of sources. Some of the power is held by the corporation through its own activities and some power is held because of its arrangements with others. Those arrangements must be taken into account when assessing the particular degree of power exercised by the individual corporation.

The NZCC does not categorise different levels of market power for the purposes of sections 36 and 36A of the Act.

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**Q2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?**

- If dominance/substantial market power is present **Yes** - Acquisition or creation of dominance/substantial market power **No** - Attempt to acquire or create dominance/substantial market power **No**
- Other (please identify)

**Why did your jurisdiction choose these stages?**
The requirement that a person hold a substantial degree of market power is specified by statute. This threshold is consistent with distinguishing between aggressive and anticompetitive conduct. Other prohibitions deal with anticompetitive behaviour arising from explicit collusion (section 27) or the creation of market structures that facilitate collusion (section 47). The threshold also provides some certainty as to when firms are on notice as to the need to comply with the section.

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Q3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”?

The Act does not contain a market share threshold for assessing a substantial degree of market power nor does the NZCC presume a threshold for this purpose. The NZCC considers that a firm may have a large market share without a substantial degree of market power, due to factors such as low barriers to entry. Alternatively, a firm may have a smaller market share with a substantial degree of market power, due to the fragmented position of other competitors in the market and high barriers to entry and expansion. Consequently, market share is only a starting point for the NZCC’s competition analysis.

The NZCC has set a safe harbour in relation to mergers and acquisitions that ‘substantially lessen competition’. The NZCC considers that a substantial lessening of competition is equivalent to the creation, enhancement or facilitation of the exercise of market power, and consequently, these thresholds could be inferred as safe harbours for assessing a ‘substantial degree of market power’. The merger safe harbour is:

If the three firm concentration ratio is below 70 percent, then the market share of the firm must be less than the order of 40 percent; otherwise the market share of the firm must be less than 20 percent.

If so, please respond as applicable:

- What is the market share level of the dominance presumption? Not applicable
- Is the dominance presumption rebuttable? Not applicable
- What is the market share level of the safe harbour?

The NZCC has not set a safe harbour for assessing ‘substantial degree of market power’, but it could be inferred from merger safe harbour as outlined above.

- Is the safe harbour absolute (i.e., dominance/substantial market power cannot be found below the specified percentage level)? No
- What is the legal basis of the presumption? Not applicable
- What is the legal basis for the safe harbor? statute/case law/guidelines
Q4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold?

No.

If so, please explain why and in which circumstances.

Q5. Does your jurisdiction’s analysis of dominance/substantial market power first require that a relevant product and geographic market be defined?

Yes. The Act specifies that a market is a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them (section 3(1B)). In defining a market, the NZCC has regard to product, geographic, and functional substitution possibilities, as well as the temporal and customer dimensions if relevant.

The NZCC applies the internationally accepted approach to market definition of assuming the relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test). The NZCC generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for a period of one year.

The NZCC is also aware of the additional difficulties of defining the relevant market in relation to firms with a substantial degree of market power. That is, the firm may already have raised price such that goods and services that might not otherwise have been close substitutes might be grouped together in that market (i.e., the cellophane trap). In such cases, the NZCC may attempt to estimate the level of prices that would apply in the absence of that market power, but the difficulties of making this estimate are also acknowledged.

Q6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?

- Market share of the firm and its competitors Yes
- Market position and market behavior of competitors Yes
- Durability of market power Yes
- Barriers to entry or expansion Yes
- Economies of scale and scope/network effects Yes
- Access to upstream markets/vertical integration Yes
- Buyer power Yes
- Access to essential facilities Yes
- Market maturity/vitality Yes
- Financial resources of the firm and its competitors Yes
- Profits of the firm Yes
- High prices (at absolute or comparative level) Yes

1 The answer “yes” should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer “no” should be provided if in practice you have not ever used that criterion.
Please specify any other criteria that you use to assess single-firm dominance/substantial market power.

A further indicator of a substantial degree of market power is the ability of the firm, having reduced prices to a point that a competitor might be deterred from competing or be eliminated from the market, to raise prices again to recoup some or all of the loss it incurred in pricing at such a low level. McHugh J in *Boral v ACCC* said that if a firm cannot successfully raise prices to supra-competitive levels after deterring or damaging competition by price-cutting, then the irresistible conclusion is that it did not have substantial market power at the time it engaged in the price-cutting.

Other factors that the NZCC may consider include the impact of regulation or the threat of regulation as a constraint on market power.

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**Q7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?**

Market power is dependent upon the extent of demand-side and supply-side substitutability. In assessing if market power exists, the NZCC considers the existence of constraints upon a firms’ conduct: such as the number of independent firms and patterns of substitution for their products; and the extent to which there are barriers to entry of new firms that would produce close substitute products.

The most important indirect evidence is an assessment of the extent of barriers to entry to the relevant market. The importance of barriers to entry in assessing the existence of market power was outlined by the Court in *Eastern Express Pty Limited v General Newspapers Pty Limited*:

> Market power is concerned with power which enables a corporation to behave independently of competition and of the competitive forces in a relevant market.

> The primary consideration in determining market power must be taken to be whether there are barriers to entry into the relevant market......To what extent is it rational or possible for new entrants to enter the market in this case? That is the primary question in considering whether each of the respondents has a substantial degree of market power.

In *Southern Cross*, the Court of Appeal defined an entry barrier as follows:

> “Anything is capable of being a barrier to entry or expansion if it amounts to a significant cost or limitation which a person has to face to enter a market or expand in the market and maintain that entry or expansion in the long run, being a cost or limitation that an established incumbent does not face. The height of the barrier is a function of the degree of the differential.”

The NZCC has incorporated this approach in its *Mergers and Acquisitions Guidelines*, where a barrier to entry is defined “as anything that amounts to a cost or disadvantage that a business has to face to enter a market that an established incumbent does not face.” The NZCC assesses the specific nature of the barriers in the defined market(s) based on the facts of each case. In evaluating the barriers to entry or expansion into a market, the NZCC generally adopts a two-stage approach. It first considers the broader ‘entry
conditions’ that apply—what it is that an aspiring entrant would have to do in order to enter, and to succeed in the conditions it might face when it does—and then evaluates which of those conditions constitute barriers to entry or expansion.

Other important criteria relevant to the assessment of market power include competition from existing competitors, countervailing power of buyers or the existence of regulatory constraints. Past conduct and performance in the market may also be indicative of the lack of market power.

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Q8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

The NZCC assesses each case on its facts applying a legal and economic analysis, and what makes commercial sense in the context. This analysis is usually qualitative rather than quantitative. The NZCC does not apply a strict weighted approach in considering all the relevant factors.

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Q9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

An intellectual property right confers upon the holder the right to exclude others from using a particular product or process. The NZCC considers intellectual property in assessing market power in the same way that it considers ownership of other factors of production. The holding of an intellectual property right does not necessarily grant the holder market power due to the availability of substitutes.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction?

No.

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Q10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

What constitutes substantial market power requires an assessment of what is appropriate in each jurisdiction. Dr Maureen Brunt, an economist influential in the development of New Zealand competition law, writes:

Rather, what constitutes ‘dominance’ and ‘substantial market power’ must depend, in each jurisdiction, upon what makes economic sense in light of the policy objective of the statute, the role played by the particular sections in the overall structure or logic of the Act and the detailed context (e.g. s 36 of the Commerce Act) in which the term is embedded. At the forefront must be the consideration that this is economic law designed to establish constraints upon business conduct
in a particular economy. Hence the standards should be drawn in a way that makes compliance feasible and gives rise to remedies of an economically relevant kind.

New Zealand is a small economy characterised by high levels of market concentration, and the NZCC takes this into account in assessing substantial market power. For example, the NZCC will consider competition for the market, not just competition within the market, as a possible constraint on market power. The availability of existing or potential substitutes supplied by persons not resident or not carrying on business in New Zealand (i.e. international trade) is also a required consideration under the Act (section 3(3) of the Act). Free trade agreements will be considered to the extent that those agreements lower barriers to imports into New Zealand and the availability of such products act as a constraint on market participants.

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Q11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

The unilateral conduct prohibitions seek to promote competition on the merits by defining the line between aggressively competitive conduct and anticompetitive conduct. This approach is seen as consistent with the objectives of the laws, being ‘the promotion of competition in markets for the long-term benefit of consumers within New Zealand’.

The NZCC also applies its enforcement criteria to the selection of cases for intervention under section 36 in order to advance the objectives of the Act.

2 Those undertakings that are 100% owned by the State.
3 The control belongs to the State, without taking into consideration the amount of the % of the State share.
4 E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.
5 Includes public/private undertakings that are granted exclusive rights within a certain region.

C. State-created Monopolies

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the telecoms, energy, water, and railways sectors.

I. State-created Monopolies

Q1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned, state-controlled, state-enabled or facilitated, recently privatized and/or liberalized, regional monopolies etc.
Given the definition of state-created monopolies, our response to this question is based on the following assumptions:

(a) It excludes state-created monopolies operating other than in a market. That is, we have assumed that core state activities such as policy advice, standard setting, and the provision of services such as police, justice, corrections, customs, national parks, defence and social welfare are provided other than in a market and are not covered by this question.

(b) It excludes existing or previously state-owned firms that are likely to hold a substantial degree of market power, but where that market power is unlikely to be created, maintained or enhanced by a state-imposed restraint on competition. For example, New Zealand Post is a state-owned enterprise and the primary provider of postal services in New Zealand. NZ Post is likely to hold a substantial degree of market power in the postal services market, but entry to this market is not subject to state-imposed restraints on competition. New entrants may participate in this market pursuant to a registration regime. Rather NZ Post’s market power is likely to be due to it having a first mover advantage and significant economies of scale. On this basis, we consider that it does not fall within the definition of a state-created monopoly.

(c) As outlined in footnote 6 below, the NZCC should not be required to carry out research or conduct a competition assessment of whether any firm has a substantial degree of market power for the purposes of completing this questionnaire. Consequently, this response focuses on those state-created monopolies that the NZCC considers are likely to hold a substantial degree of market power based on previous analysis.

Consequently, given the difficulties in responding to this question, we have selected specific examples that are likely to be state-created monopolies rather than provide a comprehensive response.

Sectors of the economy that include state-created monopolies are:

(a) Accident insurance – the Accident Compensation Corporation is state-owned and, by statute, the sole provider of accident insurance;

(b) Pharmaceuticals – Pharmac is state-owned and sets the pharmaceutical schedule, which determines the level of public subsidy for the sale of pharmaceuticals, and is the primary purchaser of pharmaceuticals on behalf of public hospitals and health providers; and

(c) Lotteries – the TAB and New Zealand Lotteries Commission are state-owned and may have market power, depending on the definition of the market.
(d) Kiwifruit export marketing – Zespri Group is a body corporate that has statutory privileges providing that it is the sole acquirer of kiwifruit for export.

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**Q2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.**

The NZCC is independent of the government and, consequently, does not have any particular insight into the government’s objectives for the creation or perpetuation of state-created monopolies.

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**Q3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:**

- **Legal restrictions/scopes of application:** Is there a "state action defense" (i.e., competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?

As outlined, the unilateral conduct prohibitions only apply to the firms holding a 'substantial degree of market power'. The NZCC considers that the prohibitions would not apply to firms that hold power sourced from statute. In addition, any conduct specifically authorised by a statute is exempt from the prohibition.

- **Practical restrictions/difficulties:** Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.

The NZCC does not face any practical restrictions or difficulties in enforcing the unilateral conduct prohibitions against state-created monopolies that are subject to the prohibitions.

Under the Act, the Crown is subject to almost all the same penalty provisions as Crown corporations and private trading enterprises, including third party damages actions and court orders. An exception is that the Crown is not liable for pecuniary penalties, as these would be payable to itself (section 5).

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**Q4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?**

As outlined, the Act only applies to firms holding a substantial degree of ‘market’ power.
In order to make this assessment, the NZCC will firstly determine if the power held by the firm is sourced from the statute, if the firm is engaging in trade, and if the impugned conduct is specifically authorized. In such cases, the firm may be exercising ‘statutory’ power rather than ‘market’ power and would not be subject to the unilateral conduct prohibitions in the Act.

Alternatively, the state-imposed restraint of competition may be assessed as a barrier to entry. In such cases, the NZCC will assess this restraint in the normal way, looking at the significance of the barrier to entry and its likely restraint on competition.

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II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

Q5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law)?

New Zealand engaged in an extensive and rapid process of liberalisation and privatisation in the mid-1980s. This process began following a change of government and was in response to severe economic problems resulting from the heavy interventionist policies of the previous government. Key features of this reform included:

(a) restructuring the public sector to separate contestable and non-contestable activities. This involved separation of policy advice, purchasing, and service provision into separate entities. Systems of contracting between the entities were introduced to facilitate transparency and accountability;

(b) contestable public trading activities were corporatised and, in many cases, privatised;

(c) previous barriers to trade, such as import and export licenses, quotas, etc, were removed to facilitate an open economy; and

(d) industry-specific regulation was replaced by generic regulation relating to competition and fair trading to create a level playing field.

Important examples of corporatised industries were air traffic control, national radio and TV services, secondary healthcare services, postal services and electricity generation and transmission. Examples of privatised enterprises included oil and gas production, steel, airports, electricity retailing, banking, air services, and telecommunications.

A particular feature of New Zealand’s corporatisation and privatisation programme was that it was not accompanied by significant regulation, other than by way of disclosure requirements. Rather, reliance was placed on the Commerce Act to ensure a competitive environment and manage potential monopoly abuses.

In 1999, once again following a change of government, the new Labour and Alliance Coalition Government announced a moratorium on the sale of public assets. The government also expanded its trading activities by acquiring an interest in the national airline, railway lines, and a bank. Previous corporatised trading activities were reassessed and, in some cases, made subject to a public charter which included social as well as
commercial objectives (eg. national radio and TV). The moratorium on sale of assets is still currently in place.

There is no specific legal framework for privatisation of public sector assets. However, corporatised state sector trading activities are subject to specific legislation. These laws are consistent with the principle of competitive neutrality.

In terms of liberalisation, New Zealand has continued to review its regulatory environment to ensure that it is consistent with a growing and innovative economy. The agricultural sector, in particular, has been significantly deregulated. Previous statutory single desk agricultural marketing boards have been corporatised and, in almost all cases, their statutory privileges have been removed.

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Q6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?

The New Zealand government has placed a moratorium on the sale of public assets. The NZCC is independent of the government and, consequently, does not have any particular insight into the government’s objectives for privatisation or liberalisation of state-created monopolies.

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Q7. Is competition law applicable to privatisation transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

The Commerce Act applies to the acquisition of shares and assets of a business. Consequently it does not distinguish between public sector and private transactions, and it would apply to any privatisation given effect through a market mechanism. An example of a privatisation in which the NZCC was involved was the sale of Contact Energy, an electricity generator and retailer.

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Q8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:

- What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency’s opinion on or approval of privatization and/or liberalization proposals?

- To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.

The NZCC has no advocacy role in relation to the privatisation or liberalisation of state-created monopolies.

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D. General

Q1. From among the following, how would you characterize your jurisdiction?

Developed.
Q2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction’s choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.