TDB ADVISORY

Changes to the Commerce Act s36: Electricity Market Implications

A report prepared for Octopus Energy by TDB Advisory Ltd and Ben Hamlin, Barrister

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1 Introduction

The Commerce Amendment Act 2022 made a significant change to the test the Commerce Commission and the Courts will apply when assessing whether a market participant has abused their market power under the Commerce Act 1986 (the Act). Previously, conduct by a dominant market-participant was only prohibited if it could be established that the behaviour would not have been undertaken by a hypothetical non-dominant firm, and that the market participant's purpose was to exclude or restrict competitors.

The law has now been reformed to focus squarely on how the behaviour of dominant market participants impacts on competition. Under the amended section 36 (s36) of the Act, the Commission and Courts will consider the purpose and the effects of the behaviour of market participants who have substantial market power.

Importantly for electricity market participants, behaviour in one market (such as the wholesale electricity spot or derivatives markets) that has or is likely to have the effect of reducing competition in another market (such as the electricity retail market) may be in breach of the Act.

This report discusses the changes to s36 of the Commerce Act and what these changes in the "rules of the game" may mean for acceptable behaviour in electricity markets. The focus of this report is on the implications of the legislative changes for behaviour in wholesale electricity markets, including both the wholesale electricity spot and derivatives markets.

Following this introduction, Section 2 of this report outlines the changes to s36 of the Commerce Act and the rationale underlying the changes. The next section, Section 3, discusses a precondition for s36 of the Commerce Act to apply: ie, the extent to which generators have market power in the wholesale electricity spot or derivatives markets. Section 4 of the report then explores three possible behaviours that the generators might take which could have the effect of reducing competition in the retail market and which therefore could be deemed illegal under the amended Act. Finally, Section 5 provides our conclusions.

2 The changes to the Commerce Act

The Commerce Act sets out the ground rules that enable businesses to compete on their merits. One of these rules is a prohibition on firms with substantial market power misusing that market power to harm the competitive process – s36 of the Commerce Act.

The previous s36 of the Commerce Act was long regarded by many as ineffective at protecting or promoting competition.[1] Most criticism was directed at the Courts' interpretation of the Act, prohibiting only conduct that would not be undertaken by a hypothetical non-dominant firm. Crucially this ignored the fact that some conduct may be harmful when undertaken by dominant firms, but harmless or even

[1] Gavil, A. (2015). Imagining a Counterfactual S36: Rebalancing New Zealand's Competition Law Framework. 46 Victoria University of Wellington Law Review 1043; New Zealand Productivity Commission (2014). Boosting Productivity in the Services Sector; Scott, P. (2011) Taking a wrong turn? The Supreme Court and S36 of the Commerce Act. NZ Business Law Quarterly 17, 260–283; Ahdar, R. (2009). The unfulfilled promise of New Zealand's monopolisation law: sources, symptoms and solutions. Competition and Consumer Law Journal, 16, 291–313l Van Roy, Y (2005) Taking Advantage of Market Power: Should New Zealand Adopt the Approach of the High Court of Australia? 11 NZBLQ 319.

beneficial when undertaken by firms without market power. The analysis was also – intentionally – unrealistic.

As a consequence, a new s36 has been enacted, and from 5 April 2023, firms with substantial market power may not act in a way that substantially lessens competition. They also cannot substantially lessen competition by refusing to act – an important consideration for vertically integrated firms who may be asked to supply their downstream competitors.

A substantial lessening of competition can apply to any dimension of competition, but if measured in price terms it is generally accepted to involve a 4 to 5% shift in quality-adjusted prices.[2] In some markets, particularly those involving high volumes and low margins, smaller price increases may still indicate a substantial lessening of competition.[3] In electricity markets any analysis of competitive effects will likely focus on investment in efficiency-enhancing innovation as well as price effects.

Adopting an effects-based substantial lessening of competition test aligns New Zealand with Australia, and means that mergers, agreements and conduct by firms with substantial market power will all be assessed by the same test. The effect on competition will be assessed by comparing the constraints operating in the market with and without the conduct. If the competitive constraints on a firm would be substantially greater without the conduct, it is likely to be prohibited.

A stronger misuse-of-market-power prohibition is expected to improve competition in markets that are dominated by a small number of powerful firms. What the Government expects to see is businesses thriving when they are well run, have the most innovative practices and products, and act in the interests of consumers.[4] Electricity generation and wholesaling may accordingly be in for some change.

3 The market power of the generators

As noted above, for s36 of the Commerce Act to apply, a precondition is that the party whose behaviour is of concern must be assessed to have "a substantial degree of power in a market." This section of the report considers the extent to which participants are likely to have a substantial degree of market power in two markets: the wholesale electricity spot market and the wholesale electricity derivatives market.

It might be expected that wholesale electricity markets in New Zealand would be strongly competitive. There are five major generators, and a centralised market auction system is used to determine wholesale electricity prices. However, there are reasons why the wholesale electricity market may exhibit market power at times. These reasons may include the lack of storability of electricity and the lack of storage in New Zealand's hydro-dominated generation system; the short-run inelasticity of demand and supply for electricity, the scale of investment and time required to design, consent, build and commission new supply and the potential for the transmission grid to be congested at times, leading to variations in wholesale prices across the network.[5] Looking ahead, the country's increasing reliance on renewable generation with, amongst other things, climate change may provide some firms with increased market power.

[2] *Woolworths & Ors v Commerce Commission* HC Wellington CIV-2007-485-1255, 29 November 2007 at [145].

[3] Ibid at [148] - [156].

[4] Hon David Clark, Minister of Commerce and Consumer Affairs, 16 Mar 2021, First Reading of the Commerce Amendment Bill.

[5] See Commerce Commission, Electricity Investigation Report, May 2009, p59.

3.1 The wholesale electricity spot market

Five gentailers – Meridian, Contact, Genesis, Manawa and Mercury – dominate the wholesale electricity spot market.

The gentailers are largely vertically integrated, with retail as well as generation activities, although Manawa recently sold its residential retail book to Mercury and Contact's degree of integration has also decreased. The vertical integration matters because it means the generators can potentially influence the degree of competition in the retail market through their behaviour in the wholesale spot and derivatives markets.

Last year, the Electricity Authority (EA) reviewed the structure, conduct and performance of the wholesale electricity spot market.[6] In respect of the structure of the spot market the EA concluded:

> "We observed some evidence to suggest that generators have an increased incentive and ability to exercise market power and may have been doing so over the review period."[7, 8]

The EA found that one supplier (Meridian) had been "gross pivotal" (the market-price setter) 90 to 95 % of the time over the review period, an increase on the historical norm of around 77%, though the extent to which this matters is a matter of debate.

On the other hand, an often referred to measure of market concentration, the Herfindahl-Hirschman Index (HHI), is not particularly high for the wholesale electricity market and has not increased in recent years: it is around 2,000 as it has been since 2014.[9] This measure however has its limitations as it does not capture the degree of concentration in storage or the ability to respond in reserves markets.

The above discussion is at the national level. The degree of market power will inevitably be greater the more regionalised the market and can vary by time of day and time of the year.

There have been numerous claims of undesirable trading situations (UTS) occurring in the wholesale spot market. A notable example was in March 2011 when Genesis pushed prices on the market close to $20,000/MWh over several hours for Hamilton, and regions north of Hamilton, when Transpower closed part of the grid to upgrade its lines into Auckland. The EA found Genesis' conduct was not unlawful and did not constitute manipulative or attempted manipulative trading activity.

The EA found a UTS occurred between 3 and 27 December 2019. Meridian Energy was found to have pushed up power prices by unnecessarily spilling water from its South Island dams requiring the dispatch of more expensive thermal generation in the North Island.

Undesirable trading situations impact on competition beyond the short-term pricing effects. They introduce artificial volatility into the wholesale market that creates significant risks for other market participants who purchase from the wholesale spot market.

Finally, in relation to the competitiveness of the wholesale spot market, we note that barriers to competition in the sector can be high, especially because of the length of time and cost involved in obtaining consents for major projects. Technological change, most particularly with the emergence of the long-heralded distributed energy resources, is reducing some barriers to entry.

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[6] https://www.ea.govt.nz/assets/dms-assets/29/Monitoring-Review-of-structure-conduct-and-performance-in-the-wholesale-electricity-market-updated-paper.pdf

[7] Ibid, page ii.

[8] It should be noted that the EA was inconclusive on whether the generators used their market power in the period since the Pohokura outage in 2018. The EA noted "It is not possible to definitively conclude whether all of the increase in prices is due to underlying conditions, including uncertainty about future gas supply from existing fields, or if some of the increase is due to prices not being determined in a competitive environment. …." . page ii.

[9] An HHI measure between 1,500 and 2,500 generally indicates a moderate degree of concentration in the industry. A measure above 2,500 generally indicates a high degree of concentration.

3.2 The wholesale electricity derivatives markets

The wholesale electricity derivatives markets in NZ include trading on the centralised trading platform, the New Zealand Electricity Derivatives Market[10] (NZEDM), over-the counter (OTC) transactions and bilateral trades.[11] We consider each of these three markets in turn below.

The NZEDM is operated by the ASX. Products traded on the NZEDM include futures contracts, options and other mutually agreed risk-sharing arrangements.[12] Futures contracts are listed for trading on the New Zealand nodes of Otahuhu and Benmore. Products offered on the NZEDM include base-load monthly futures, base-load calendar quarter futures, peak-load quarter futures and base-load quarter average rate options. The futures contracts go up to three years ahead. The market is centrally cleared, with daily margin collection helping ensure participants meet their obligations.[13]

Participants on the ASX-run NZEDM include the major generators, many independent retailers, funds that trade alternative products and the trading banks. Like the stock exchange and other primary financial markets, a standardised product is traded and the trades are anonymous. The four largest participants (Meridian, Mercury, Genesis and Contact) provide market-making services that enhance liquidity in the market.

The OTC market is a broker-facilitated market where bilateral trades of futures contracts and options occur on a mutually agreed basis. The products are similar to the NZEDM but are more bespoke (eg, with different nodes) reflecting the particular requirements of market participants. The participants in the OTC market are similar to those in the NZEDM. Unlike the NZEDM, however, trades are between named participants and credit is available.

Trades of electricity futures and options can also occur outside the NZEDM and OTC markets on a bilaterally negotiated basis. Examples are the 'Tiwai contracts for differences' between Meridian Energy, Contact Energy and New Zealand Aluminium Smelters (NZAS).[14] Other examples are the Meridian-Genesis swaption (under which Meridian can draw up to 100MW at any time, and up to 150MW during the winter months, expiring 31 December 2022) and the Meridian-Nova contracts.[15]

For electricity retailers that are not vertically integrated, the ability to participate in the wholesale electricity derivates market on a competitive basis is critical. Prices on the wholesale electricity spot market are both highly volatile and asymmetric (ie, they are bounded on the downside but can rise to extremely high levels on the upside). Retail sales prices for electricity on the other hand are typically fixed or at least inflexible. As a result, a retailer that doesn't own generation is highly exposed to wholesale electricity spot prices and will typically want access to the derivatives market on competitive terms to hedge its spot price risk.

The EA released a report considering the competitiveness of the wholesale electricity derivatives markets last year.[16] While noting that there was nothing illegal in the arrangement, the EA highlighted its concern that "all consumers might be paying too much for their electricity, because Meridian,

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[10] https://www.asxenergy.com.au/products/new_zealand
[11] Other markets are the ancillary services (reserves and frequency support) markets run by and the market for financial transmission rights run by the ASX.
[12] Trading in quarterly futures contracts commenced in July 2009, while monthly contracts were introduced in 2015.
[13] The ASX futures and average rate options over New Zealand energy products are cash settled against the wholesale electricity market spot prices. No electricity derivatives involve the physical delivery of energy.
[14] The Tiwai smelter accounts for around 15% of New Zealand's electricity consumption.
[15] Meridian announced on 23 December 2021 that it and Nova have entered into swap transactions for 235GWh per annum with Nova being the fixed price payer, and a call option for up to 235GWh per annum with Meridian being the fixed price payer. The contracts are for a 5-year period commencing 1 January 2023.
[16] https://www.ea.govt.nz/assets/dms-assets/29/Inefficient-Price-Discrimination-in-the-Wholesale-Electricity-Market-Issues-and-Options-Discussion-Paper.pdf

supported by Contact, appears to have sold electricity to NZAS for significantly less than it costs to produce."[17]

It is difficult to assess the competitiveness of the market using publicly available information. Volumes traded have increased on the ASX around threefold over the last five years[18] indicating the market is likely to be more liquid than it was in the past. But no public information is available on who the trades are between and thus on the relative market shares of participants. The bespoke nature of the OTC and bilateral markets in particular means participants on either side of the market may have a degree of market power at certain times or nodes, but little information is available on the extent of the issue.

4 Some hypothetical case studies

This section of the report looks at three types of market behaviour that might have been permissible under the previous regime but which may well be found to be illegal under the new s36 of the Commerce Act. These three behaviours are a refusal to supply, price squeezes and actions that raise rivals' costs. The Annexes to this report discuss in more detail two case studies from Australia, one relating to behaviour in the ports sector (Annex One) and one relating to the purchase of fly ash (Annex Two).

While we discuss these separately, in practice they may be interrelated. An outright refusal to supply bilateral hedges might force a rival to use an inferior alternative, thus raising their costs. Similarly the offer of a high wholesale price that creates a price squeeze may amount to a constructive refusal to supply. While these may be helpful ways of thinking about the competition issue, the ultimate question for the Court will be whether the conduct substantially lessens competition.

4.1 Refusal to supply

A refusal to supply a product will tend to lessen competition where the product is required as an input to compete in the relevant market, and there are limited alternative sources of supply (including through entry). The more essential the product is, and the more limited the alternatives, the greater the tendency to lessen competition if supply is refused.

Even under the previous s36, decisions of the New Zealand and Australian Courts held that that a vertically integrated firm with substantial market power may be required to supply an essential wholesale input to a downstream competitor.[19] In passing the amended misuse of market power prohibition, Parliament made clear that a refusal to supply by a firm with substantial market power may contravene the amended s36, where that refusal has the purpose, effect, or likely effect of substantially lessening competition.[20]

The obligation to supply is not necessarily limited to products that are currently available in the market. For example, in *Queensland Wire v BHP*,[21] BHP was found to have misused its market power by constructively refusing to sell steel "Y-bar" to Queensland Wire who intended to compete in the downstream fencing market. Although BHP sold other wholesale steel products, Y-bar was not sold to

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[17] https://business.scoop.co.nz/2021/10/27/electricity-authoritys-review-of-competition-in-the-wholesale-electricity-market-raises-questions/

[18] https://www.emi.ea.govt.nz/Forward%20markets/Reports/DRERRQ?_rsdr=L5Y&DateFrom=20170101&DateTo=20211231&_si=v|3

[19] *Telecom Corp of NZ v Commerce Commission* [2012] NZCA 278 and *Commerce Commission v Bay of Plenty Electricity Ltd* CIV-2001-485-917, 13 December 2007. See also the discussion in Scott P, Unilateral Refusals to Supply and the Essential Facilities Doctrine Under New Zealand's Competition Law (2018) 49 VUWLR 371.

[20] Commerce Amendment Bill 2021 (9-1), Explanatory note, p1.

[21] *Queensland Wire Industries v BHP* (1989) 167 CLR 177 (HCA).

anyone. The Court found this was to prevent competition for fencing posts. Today, such conduct would likely be found to have substantially lessened competition for steel fence posts.

The same principles apply in the electricity industry. In *NT Power v PAWA (High Court of Australia)*,[22] a vertically integrated generator, transmitter, distributor and retailer (PAWA) refused to provide transmission and distribution services to NT Power. NT Power, a generator who intended to compete against PAWA in retail markets, successfully argued this was a misuse of market power, The fact PAWA did not currently provide those services did not mean it could refuse to do so. Today, such conduct would likely be found to have substantially lessened competition in the relevant retail electricity market.

4.2 Price squeeze

Another way a vertically integrated firm with substantial market power can harm its competitors is by a price or margin squeeze. A price squeeze occurs when a vertically integrated firm sells an input at one level (wholesale market) and also sells a product using the input at another (retail market). A high wholesale price compared to the retail price squeezes the available margin.

Where competitors in the downstream market require the input and have limited alternative sources of supply, a margin or price squeeze has the potential to prevent equally efficient competitors in the downstream market from competing with the firm on their merits. The smaller the available margin, and the fewer the alternatives, the greater the likelihood that competition will be lessened.

Price-squeeze cases have frequently arisen in telecommunications markets. In New Zealand, Telecom was found to have misused its market power through a price squeeze for access to its wholesale network in relation to high-speed data services.[23] The prices it charged rivals for last mile connections were close to, and in some cases above, its retail price for data services. The Court found that a dominant firm cannot charge an input price above the level at which an equally efficient rival can compete.

Wholesale and retail electricity price regulation has limited claims of price squeezes in many jurisdictions. Nevertheless, the potential for such claims in de-regulated markets has been noted.[24]

4.3 Raising a rival's costs

A third way that firms with substantial market power may lessen competition is by imposing costs on their rivals, which can raise market prices or cause rivals to exit. Conduct that imposes costs on rivals that are not faced by the firm with substantial market power can be a highly profitable way to lessen competition.

There are many ways that a firm can impose costs on its rivals, but of particular relevance are costs that can be imposed by a vertically integrated firm with substantial market power through the supply of products or services with limited alternatives.

A recent Australian case (discussed more in Annex One) provides a useful example.[25] TasPorts owns and operates a majority of the ports in Tasmania and provides pilotage and towage services. Engage Marine sought to compete with TasPorts to provide pilotage and towage services. TasPorts was found to have misused its market power by imposing a new charge on Engage that did not reflect costs faced

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[22] *NT Power Generation v Power and Water Authority* [2004] HCA 48; 219 CLR 90.

[23] *Telecom Corp of NZ v Commerce Commission* [2012] NZCA 278.

[24] For example, Goelzhauser, G (2004) Price Squeeze in a Deregulated Electric Power Industry, 32 Florida State University Law Review 225; Kwoka, Jr, J (1992). Price squeezes in electric power: The new Battle of Concord, The Electricity Journal. Volume 5, Issue 5 at 30.

[25] *Australian Competition and Consumer Commission v Tasmanian Ports Corporation Pty Ltd* [2021] FCA 482.

by TasPort. TasPort accepted in Court that imposing this cost on its rival would raise its rival’s costs and substantially lessen competition.

In some cases, a firm may raise both its own costs and its rival’s costs. For example, a vertically integrated firm that raises wholesale prices will raise costs for its rivals and itself but will be able to subsidise its own retail business through internal transfers. In such cases, the conduct may also result in a price squeeze.

5 Conclusions

The changes to s36 of the Commerce Act that come into force in April 2023 have significantly changed the rules of the game when it comes to the misuse of market power in the New Zealand economy. Behaviour such as refusing to supply, price squeezes and raising a rival’s costs - that may have been permissible under the previous regime - may no longer be legal under the new s36 of the Commerce Act.

Participants in the New Zealand wholesale electricity markets may have to be particularly alert to the changes in the regime. Firstly, a strong case can be made that participants in the wholesale spot electricity market have a degree of market power, at least at certain times and places. Secondly, the major suppliers in the wholesale market are largely vertically integrated and thus may have the ability, through their action in the wholesale markets, to influence the degree of competition in the retail market. This is precisely the type of behaviour that the new s36 is designed to address.

The experience from Australia and other regimes that have operated for many years under regimes similar to New Zealand’s new regime suggest that, while not many cases have come before the courts, the courts can and will act to penalise behaviour by participants that have market power in one market that reduces competition in another.

Annex One: Australia's experience with market power and competition legislation

The Australian equivalent to New Zealand's Commerce Act is the Competition and Consumer Act 2010 (CCA). The relevant provision in the CCA in relation to misuse of market power is s46.

In 2017, s46 of the CCA was replaced with a new misuse of market power prohibition which covers the effect of conduct as well as its purpose. The new provision prevents:

- a corporation with a substantial degree of power in a market...
- engaging in conduct with either the **purpose, effect** or **likely effect** of substantially lessening competition in:
    - the market in which the corporation has market power;
    - a market in which the corporation directly or indirectly supplies or is likely to supply goods or services; or
    - a market in which the corporation directly or indirectly acquires or is likely to acquire goods or services.

Determining 'substantial degree of market power'

The Australian Competition and Consumer Commission (ACCC) does not impose a market share threshold in determining whether a firm has a substantial degree of market power. The meaning of substantial depends on the context and in a relative sense. In case law, 'substantial' has been defined as large, weighty, big, real or of substance or not insubstantial.

A business's market power may be determined by a combination of factors, such as:

- how difficult it is for competitors to enter the market;
- the business's ability to behave with little regard to what its competitors, suppliers or customers do;
- the market share of the business;
- the financial strength of the business; and
- the ability of the business to consistently restrict competition.

ACCC v TasPorts

ACCC v TasPorts is the first finding of a contravention of s46 of the CCA since the Act was amended in 2017.

TasPorts owns and operates a majority of the ports in Tasmania and performs a range of port and marine operations at ports around Tasmania. Before Engage Marine entered the market, TasPorts was the sole supplier of pilotage and towage services at all major ports in Tasmania. Engage Marine is a marine services company providing primarily towage services in a number of Australian ports including Port Latta, Tasmania.

On 31 October 2017, following notice by Grange (a mining company that exports iron ore from Port Latta) that it would switch to another service provider, TasPorts advised Grange it would need to start paying TasPorts a "marine precinct tonnage charge" (MPTC), which TasPorts had never previously imposed.

The ACCC commenced proceedings against TasPorts on 6 December 2019, on the basis that:

- TasPorts imposed the MPTC after Grange notified TasPorts it would be switching its supplier of the relevant services;
- TasPorts did not have a legal right to require Grange to pay the charge without Grange's agreement;
- TasPorts sought to impose the MPTC without having conducted a full assessment of the costs of providing the services at Port Latta; and
- there was a real commercial likelihood that if Grange agreed to pay the MPTC, this would have the effect of raising Grange's future costs of acquiring services from TasPorts' competitors, compared to the counterfactual if no MPTC was imposed.

TasPorts admitted that it had a substantial degree of market power in managing and maintaining infrastructure in ports (other than Port Latta) in northern Tasmania. TasPorts also admitted it had contravened section 46 of the CCA by engaging in conduct, in response to the entry or attempted entry of a competitor, which had the **likely effect** of substantially lessening competition in the markets for towage and pilotage services in northern Tasmania, by maintaining to Grange that they were required to pay the MPTC.

The Federal Court made a declaration giving effect to TasPorts' admission. The ACCC opted not to pursue any penalties or injunctive relief but TasPorts provided a court enforceable undertaking in which TasPorts undertook to:

- only charge the MPTC:
  - with Grange's agreement;
  - where TasPorts would be entitled to do so pursuant to legislation; or
  - where the amount charged has been determined to be reasonable by an independent expert approved by the ACCC;
- offer berth space to a competitor on reasonable commercial terms;
- invest a minimum of $1,000,000 in wharf infrastructure at Inspection Head over five years; and
- enable port users to book towage services provided by a competitor using TasPorts' port communications system.

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Annex Two: The different legal standards in practice

The ACCC's prosecution of Cement Australia provides a useful contrast between the old approach to "taking advantage of market power" and the new approach that examines whether conduct "substantially lessens competition".[26]

The ACCC alleged that exclusive contracts between Cement Australia and four power stations to purchase to acquire fly ash:

- involved a misuse of market power contrary to s46 of the CCA; and
- had the purpose or effect of substantially lessening competition with the result that they were prohibited contracts that substantially lessen competition contrary to s45 of the CCA.

Fly ash is a by-product of the combustion of coal, and if of suitable quality it may be used as a partial substitute for cement in the making of concrete. Cement Australia and its related companies were the largest manufacturers and distributors of cement in Queensland, and one of Australia's major manufacturers of concrete.

The contracts related to fly ash from four power stations in Southeast Queensland. These stations would create an over-supply of fly ash, that would enable a competitor to enter. Without similar contracts a competitor would face substantially higher costs than Cement Australia.

The ACCC alleged that there was no commercial rationale for entering into and extending these contracts, and that they exceeded Cement Australia's actual and forecast demand for fly ash. Instead, Cement Australia intended to prevent firms from acquiring that fly ash to compete with Cement Australia.

The Court found that:

- Cement Australia had both commercial and anticompetitive purposes for acquiring the fly ash; and
- a non-dominant firm in Cement Australia's position could profitably enter the same fly ash contracts, and therefore its conduct was **not a misuse of market power** under s46; but
- Cement Australia's conduct had the purpose and effect of preventing competition which would otherwise have been possible if a rival had been able to obtain fly ash, and therefore its conduct **substantially lessened competition** and amounted to a contravention ofs45 of the Act.

The case provides a clear demonstration of the different outcomes that can arise when the same facts are considered under the two different legal standards.

The trial judge imposed penalties of A$17.1 million for this conduct.[27] On appeal, this was increased to a total of A$20.6 million.[28]

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[26] *ACCC v Cement Australia Pty Ltd* [2013] FCA 909.

[27] *ACCC v Cement Australia Pty Ltd* [2016] FCA 536.

[28] *ACCC v Cement Australia Pty Ltd* [2017] FCFCA 159.