CASE STUDY

The Commerce Act
Predatory pricing or competitive price matching?

This case study looks at the Commerce Commission’s Pink Batts case under section 36 of the Commerce Act.

INZCO, a subsidiary of the Carter Holt Harvey Group, manufactured the very successful Pink Batts product, used in building insulation. A Nelson firm called New Wool Products Limited (NWP) started to manufacture an alternative wool product called Wool Bloc. NWP successfully marketed Wool Bloc in the Nelson/Marlborough region, and this was proving a threat to INZCO’s market share.

In response to this new product, INZCO developed and marketed a wool/polyester product called Wool Line. It introduced Wool Line onto the market at a relatively high price and sales were low. INZCO then introduced a strategy where it gave builders' merchants two bales of Wool Line for the price of one.

INZCO pursued this strategy for seven months in Nelson and Marlborough, extending it to Queenstown where Wool Bloc was also selling well. NWP’s sales of Wool Bloc reduced sharply during this time.

NWP complained to the Commerce Commission. After an investigation, we prosecuted INZCO under section 36 of the Commerce Act. We alleged that by introducing and maintaining the 2-for-1 strategy over a sustained period, INZCO had used its market power for an anti-competitive purpose.

What was the market?
The market was defined as the South Island market for the supply of all types of building insulation materials.

Did INZCO have a substantial degree of power in this market?
At the time, the test for market power under section 36 was whether a business had used a dominant position in a market for an anti-competitive purpose. This changed in 2001 to whether a business has taken advantage of a substantial degree of market power for anti-competitive purpose.

In 2000, the High Court determined that INZCO held a dominant position in the South Island market for the supply of insulation. This is because INZCO had a very high market share, its margins on Pink Batts were high and it had better access to resources and technology than its competitors, along with a strong distribution structure.
Had INZCO taken advantage of its substantial degree of market power for an anti-competitive purpose?

The High Court found that INZCO had used its dominant position to deter NWP from engaging in competitive conduct, by pricing its product below the cost of production. The Court found this conduct was in breach of section 36 and imposed a penalty of $525,000.

What did the Court ultimately decide?

INZCO appealed the High Court’s decision, but this appeal was dismissed by the Court of Appeal. INZCO then appealed to the Privy Council. In 2004, the Privy Council decided that INZCO had not used its dominance in the market for an anti-competitive purpose, overturning the decisions of the High Court and Court of Appeal.

While it was clear that INZCO had cut the pricing of its wool product to less than the cost of production, the Privy Council found no evidence that it had done so to force a competitor out of the market. The Privy Council found that in reducing its prices, INZCO was simply meeting strong competition from NWP’s product and pricing. In other words, INZCO’s price cutting was a legitimate commercial response, rather than a use of its market power.

The Privy Council also set out a specific rule for predatory pricing. This rule is that to show that the price-cutting business is using its market power to drive a competitor out of the market, it also has to be shown that the business will later be in a position to charge high prices on that (or any other product) it is selling, once it has driven the competitor out of the market. The Privy Council noted that there was no evidence that INZCO was intending to charge above competitive prices later on its wool product or any other product.

This case study should be read alongside our fact sheet Taking advantage of market power at www.comcom.govt.nz