FIONA JOY HEIFORD

RETHINKING UNILATERAL CONDUCT: A HOLISTIC APPROACH TO SECTION 36 OF THE COMMERCE ACT 1986

LLB (HONS) RESEARCH PAPER
ADVANCED COMPETITION LAW (LAWS 546)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1996

CONTENTS

ABSTRACT

This paper examines the interpretation and application of section 36(1) of the Commerce Act 1986. The main focus is on how the scope of conduct prohibited under the section has been severely curtailed by recent judicial pronouncements on the provision. As a consequence the underlying purpose for this particular section, preventing monopolies or dominant firms from exploiting their power, is no longer being achieved. This is primarily due to the artificial separation of the component elements of the section. Individual tests have been created for each element without considering the effect this has on the section as a whole. The paper identifies the three elements comprised in the section and explains and analyses the judicial tests for each element. The paper then illustrates the difficulty with applying a fragmented regime of tests to show compliance with the requirements of the section by applying the tests to a specific practice that was previously prohibited. As the section is no longer achieving its purpose or the intentions of Parliament it is suggested that a reassessment of this area of law is required.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 18,000 words.

I INTRODUCTION

The long title of the Commerce Act 1986 (the Act) states that it is "[a]n Act to promote competition in markets within New Zealand and to repeal the Commerce Act 1975". The Act fulfils various functions from establishing and regulating the Commerce Commission,[1] to prohibiting restrictive trade practices,[2] to outlining authorisation and clearance procedures for mergers and takeovers.[3] Most of the practices that the Act targets relate to agreements between two or more parties that have the potential to directly or indirectly affect the market. The conduct aimed at is bilateral. One of the only provisions to deal with unilateral conduct is s 36 - use of a dominant position in a market.

Section 36 is included in the restrictive trade practices part of the Act and can be seen as a means to "remedy or ameliorate the effects of market failure due to the existence of monopoly power".[4] The section is not aimed solely at monopolies, any firm that comes within the definition of 'dominant position in a market' is potentially liable under the section.[5] Section 36 provides that a firm in a dominant position must not use that position to restrict entry into, prevent or deter competitive conduct in, or eliminate someone from, the market.

The Commerce Act has been in force for ten years[6] and the key to understanding it lies in the judicial interpretations of it. Although initially there were very few decisions on s 36,[7] over the last five years there have been a number of decisions that have had a

---

1 Part I of the Act.

2 Part II of the Act.

3 Part V of the Act. Part III relates to business acquisitions, part IV relates to price controls and miscellaneous provisions are contained in Part VII.

4 LL Stevens and DK Round "The Commerce Act 1986 - A Legal and Economic Commentary Upon Some Fundamental Concepts" (1987) 12 NZULR 231, 233.

5 'Dominant position in a market' is defined in s 3(8) of the Act.

6 Section 1(2) of the Act provides that "[t]his Act shall come into force on the 1st day of May 1986."

7 There were approximately 10 decisions that referred to s 36, however, most of those decisions only briefly analysed s 36 because either they were applications for an interim injunction or the main argument related to s 27. Four decisions discussed s 36 at length: *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647; *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352; *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731; and *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662.

significant impact on the interpretation and application of the section.[8] The normal judicial approach to analysing the section is to split it into three elements.[9] This is also the general approach of academic authors to the topic.[10] The three elements are 'dominant position in a market', 'use of a dominant position' and 'purpose'.[11] The result is that although there is quite a lot of writing on s 36 it is usually aimed at a specific element or case and there is a dearth of recent writing addressing the section as a whole.[12] This paper addresses the section as a whole.

A similar approach to that used by the judiciary is followed in this paper. Section 36 is divided into its constituent elements and each element is analysed individually. The section has changed quite dramatically since it was first enacted in 1986. This is not so much through statutory amendment as judicial interpretation. Therefore each element is considered on several different levels. Not only is each element discussed in reference to how the section is applied in 1996 but also in relation to how the element (and consequently s 36) has been developed over the last ten years. The current interpretation and application of each element is compared to the interpretation and application of the element when the section was first enacted. This will show that there has been such development in this area that what may have been the intended proscribed conduct in 1986 may no longer be proscribed in 1996. In other words, the developments in the case law mean that the original intentions of Parliament are no longer being fulfilled.

---

8 There have been at least 11 cases since 1990. Six of those have involved Telecom with one decision from the Privy Council *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385. These cases are discussed further in Part III - Interpretation and Application of Section 36.

9 *Gault on Commercial Law* splits the section into 6 constituent pieces. 'Dominant position in a market' is split into two separate elements - dominant position and market. *Gault* also adds a consideration of s 36(2) and considers the nature of the business of the dominant firm. See M Berry, T Housden and TM Gault (eds) *Gault on Commercial Law* (Brooker's Ltd, Wellington, 1994) 3-146.

10 For example Y van Roy *Guidebook to New Zealand Competition Laws* (2 ed, CCH New Zealand Ltd, Auckland, 1991) 157.

11 There are other requirements such as the dominant firm being a person who supplies or acquires goods and services. These additional requirements are discussed further in Part III B - Other Prerequisites to Breaching Section 36.

12 Two texts that do address the section as a whole are *Gault,* above n 9, and van Roy, above n 10.

There are various explanations for this undermining of s 36. The most basic reason is that by dividing the section into separate elements and developing different tests for each element, the judiciary has lost sight of the overall purpose of the section and conduct which should be proscribed is continuing. This is because the threshold tests for each element are getting progressively harder to satisfy, thereby giving dominant firms more and more scope for avoiding the section. This paper will show that although it is necessary to consider the elements of the section separately it is also necessary to keep sight of the 'big picture' in order to maintain any real power in the section.

In order to develop these propositions the paper analyses the interpretation and application of the section and then applies this analysis to a specific practice that, given the policy of the Act, should be prohibited by it. It is therefore necessary to discuss the underlying policy and economics of the Act and s 36. Part II of the paper addresses these topics by discussing briefly the purpose of promoting competition in the market place and the problems associated with monopoly power in the market place.[13]

Part III of the paper analyses s 36 itself. The basic framework of separating the section into its constituent elements has been maintained for ease of analysis. The first element is 'dominant position in a market' which is discussed below in Part III C. 'Use that position' is the second element and is discussed in Part III D. The final element is 'purpose' which is discussed in Part III E. There is also a brief discussion of the other more general requirements of the section.

The specific practice addressed in Part IV of the paper is sham litigation. The purpose of this part of the paper is to show that certain practices that have all the hallmarks of being use of a dominant position are no longer prohibited by s36. The conclusion in Part V summarises the problems with s 36 and suggests some reforms that would

---

[13] Due to constraints of length this discussion is necessarily brief. For more information on policy see RJ Adhar (ed) *Competition Law and Policy in New Zealand* (The Law Book Co Ltd, Sydney, 1991). For more information on economics see A Bollard (ed) *The Economics of the Commerce Act* (New Zealand Institute of Economic Research Inc, Wellington, 1989); also see D Hay and J Vickers (eds) *The Economics of Market Dominance* (Basil Blackwell Ltd, Oxford, 1987).

allow the section to achieve its original purpose: the prevention and punishment of unilateral conduct that adversely affects competition.

II ECONOMICS AND POLICY

A The Commerce Act 1986

1 *General policy*

New Zealand society is becoming more and more deregulated as time passes. As a consequence the market system is mixed. This means that the allocation of resources is mainly determined by the price system, productive resources are mainly privately owned and there is limited Government influence and ownership.[14] The difficulty facing the New Zealand system is that the elimination of regulation from markets may permit conduct that distorts the advantages of the market. If markets do not work properly[15] it can lead to situations where there is inefficiency, lack of choice for consumers, restricted supplies of goods and services, lower quality goods and services and unnecessarily high prices. Paradoxically it is necessary to regulate to try to prevent these problems from occurring. The Commerce Act intervenes in the market by prohibiting particular business practices which would otherwise be lawful. Various other statutes in New Zealand also try to regulate the economy in a 'light-handed way', for example the Consumer Guarantees Act 1993, which is also aimed at specific behaviour of participants in the market.[16]

The intervention in any market requires the "interplay of political, social and economic factors ...".[17] The interplay of these particular factors has meant that the Commerce Act could not intervene in the market system through an ad hoc approach to prohibiting particular business practices. It was necessary to use a tool that would help achieve the long term objectives of consumer welfare and efficiency and the tool

---

14 J Horsman *Graphic Economics* (Longman Paul Ltd, Auckland 1979) 6.

15 Whether a market works properly or not will depend almost entirely on exactly which economic model is being used. Common models used are perfect competition and perfectly contestable markets.

16 Other examples are the Fair Trading Act 1986 and the Credit Contracts Act 1981.

17 Above n 4, 231.

chosen is competition.[18] Competition "tends to be diffusive of economic and political power, to result in greater consumer choice, to stimulate productive and allocative efficiency, and to lower prices."[19]

Parliament could have enacted legislation with the specific objectives of economic efficiency and consumer welfare but these objectives may have necessitated more intervention than the Government was willing to tolerate at the time. It was felt that the same objectives could be achieved through the use of competition and the market system. It is clearly accepted that competition is a means of achieving the desired consequences rather than the desired consequence itself.[20] It is "best regarded as a mechanism or process for achieving efficiency and economic growth."[21] This is supported by the Court of Appeal which stated that the Act "is based on the premise that society's resources are best located in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources."[22]

2 *Economics*

Economics underlie many of the core components of the Act such as market, competition and dominant position. Therefore economic concepts, models and theories are inexorably linked with the Act. The judiciary have come under some criticism because judges "reveal a lack of comfortable understanding of, or familiarity with, economic learning about markets or, indeed, competition matters generally."[23] However, this is not necessarily all the fault of the judiciary. Economics is neither a straightforward nor an exact science for the judiciary to understand. This is implicitly acknowledged by the allowance for lay members to sit in certain situations.[24] Economists may also add to this confusion by misleading "the judiciary with "extremely unrealistic" models which are inappropriate for application to competition

---

18 RH Patterson "The Rise and Fall of a Dominant Position in New Zealand Competition Law: From Economic Concept to Latin Derivation" (1993) 15 NZULR 265, 265.

19 PH Clarke *Recent Developments in the Australian Law of Monopolization* (Commerce Act Workshop, Wellington, 1988) 16.

20 Above n 18, 290.

21 Above n 4, 237.

22 See *Tru Tone Ltd* above n 7, 358.

23 Above n 19, 7.

24 Sections 77 and 78 of the Act.

law."[25] To confuse matters more, there is enough divergence in economic theory to enable participants in litigation to 'buy' an economist.

An important distinction that needs to be drawn in relation to the Commerce Act is the difference between protecting and promoting competition and protecting competitors. Although in addressing the problems associated with competition it may necessarily be a requisite to look at a specific competitor, this is not the main aim of the Act. The general competition tests contained in the bilateral prohibition sections such as substantially lessening competition are less likely to cause this type of problem than the unilateral conduct provision of s 36.[26]

When attempting to use a statute to promote competition in the market it is necessary to address the possible occurrence of a monopoly in the market because:[27]

> [m]arket economies recognize, however, that competition itself requires protection because it is possible for businesses to amass such considerable economic strength that they become immune from the competitive process and the disciplines which that process imposes. Competition legislation in general terms is designed to protect the competitive process by preventing the acquisition and abuse of undue economic power.

The specific approach of the Act to situations of dominance or monopoly in the market is addressed below.

B Section 36 of the Commerce Act 1986

1 *General policy*

The general objective of the Commerce Act is to promote competition. Section 36 is aimed at specific practices that could undermine this objective. It is based on Article 86 of the Treaty of Rome and is aimed at the unilateral conduct of dominant firms. It

---

25 B Jew "Competition Law and Policy in New Zealand by RJ Adhar - A Review" (1992) 7 AULR 237, 237.

26 This is discussed further in Part II B 1 - General Policy.

27 Above n 18, 266.

prohibits a firm in a dominant position from using that position for certain proscribed purposes. Section 36:[28]

> seeks to improve market performance and the use of society's scarce resources by limiting, or controlling, the discretionary power which some firms possess to advance their own causes, unconstrained by market processes, at the expense of the welfare of society in general.

Originally it was thought that the phrases used in the section were too vague and there would be definitional problems.[29] However, these fears were allayed because of the interconnection with Article 86 which has had various cases decided under it which would help with definitional problems. The Commerce Act is also loosely based on the Trade Practices Act 1974 (Cth) so Australian case law is particularly relevant to New Zealand cases.

The mere existence of a monopoly or dominant firm does not contravene the section. It is the behaviour of firms that is at issue not their relationship to the market. In an economy the size of New Zealand it is sometimes necessary to have extremely large firms in order to achieve the economies of scale necessary to make the business viable. This is normally referred to as productive or technical efficiency. The problem is the potential exploitation of the position in the market that could lead to allocative, productive and technical inefficiency.[30] Therefore the conduct of the monopoly or dominant firm is at issue. It is necessary to get a balance between the need to have these large firms and the need for consumer welfare and economic efficiency. As Utton states "in a very real sense, the possible conflict between technical and allocative efficiency lies at the heart of many antitrust questions."[31]

Any provision aimed at preventing monopolies or dominant firms from exploiting their power needs to:[32]

---

28 Above n 4, 233.
29 (1985) 468 NZPD 8591.
30 This is explained further in Part II B 2 - Economics.
31 MA Utton *Market Dominance and Antitrust Policy* (Edward Elgar Publishing Ltd, England, 1995) 14.
32 Above n 19, 16.

> be able to distinguish between what may be termed "pro-competitive conduct", that is, conduct which, even when engaged in with the object of *ultimately* achieving a monopoly, involves increased rivalry between firms through such means as product improvement or price reductions, and "anti-competitive conduct", that is, conduct whose immediate aim is to reduce rivalry. Then, it needs to be able to prohibit the latter without impeding the former.

Theoretically this is what s 36 is trying to achieve. The best analogy is that of a race.[33] Section 36 is aiming for a fair start. Natural ranking will occur simply because some runners are better than others, but as long as there is a equal chance at the beginning that is all that matters. The real question is whether this is what is actually achieved by the provision.

The nature of the proscribed purposes as outlined in s 36(1)(a)-(c) can easily lead to the belief that the section is protecting competitors not competition. However, one has to read this section in light of the whole Act. It has been suggested that if an abuse of dominant position provision allows a firm to eliminate its less efficient competitors from the market through "efficiency-based non-exclusionary behaviour ... [it] is a competition-oriented law ...".[34] It is submitted that this conduct is theoretically not proscribed by s 36 and if the section is interpreted correctly is what it achieves. Unfortunately, as discussed below, this is not necessarily how the section is being interpreted and applied in practice.

2 *Economics*

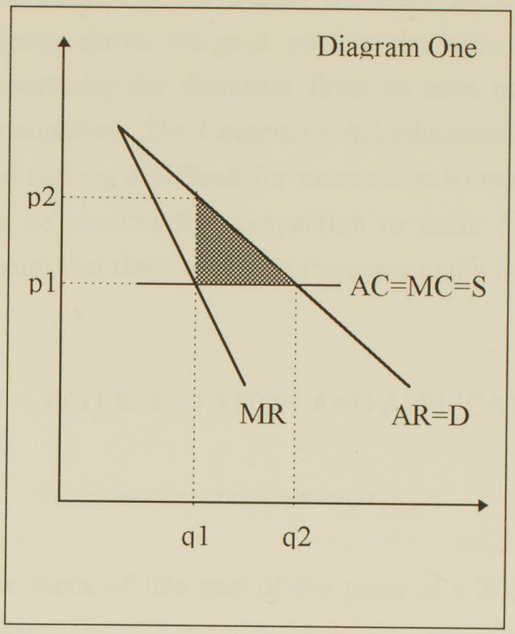
This part of the paper explains exactly why it is believed that if monopolies and other firms in dominant positions are left unregulated it can lead to a loss of consumer welfare and general economic inefficiency. The analysis is based on a situation where there is a monopolistic market. Diagram one is a simple supply and demand curve. The demand curve is equivalent to the average revenue of the monopoly. The supply

---

33 Above n 31, 15.

34 LF Hampton "Section 36(1) of the Commerce Act 1986: An Analysis of its Constituent Elements" in RJ Adhar (ed) *Competition Law and Policy in New Zealand* (The Law Book Co Ltd, Sydney, 1991) 179, 214.

curve is horizontal because it is assumed that the monopoly's long-run average cost is constant and consequently will be the same (in the long-run) as marginal cost.



If this was a perfectly competitive market, equilibrium would be where the demand curve intersected with supply, point q2p1 in the diagram. However, because this is a monopolistic market the profit maximisation point for the monopoly is where marginal cost is equal to marginal revenue, point q1p2. The difference between the demand price and marginal cost is the monopoly profits. The difference in price indicates that the consumers would be prepared to pay a sum equal to the shaded area to increase production to q2. The increase to that quantity of production would generate a consumer benefit. Logically, because the production is restricted to q1, there is a loss to consumers equal to the shaded triangle. As Utton describes the situation:[35]

> [t]he fact that the monopolist would restrict output below [q2] implies that resources are being misallocated: too few resources are devoted to monopoly production in order that price can be maintained above marginal cost. The monopolist's pricing behaviour therefore leads to allocative inefficiency. At the heart of economists' case against monopoly is this price-cost divergence and the resource misallocation that results.

Although a monopoly is not necessarily productively inefficient there are few incentives to maintain efficiency of production as the monopoly profits are not being threatened by competitive forces. This means that a monopoly market could be both allocatively and productively inefficient. There is also some support for the idea that

---

35 Above n 31, 5.

monopolies are less innovative than competitive firms,[36] however, the counter argument is that if the monopoly wishes to retain that status it has to be innovative.

The analysis is not exactly the same for dominant firms but the general theory of pricing above marginal cost is the same, with a consequence that there is an opportunity for dominant firms to earn monopoly profits in the same manner as monopolies. The Commerce Act addresses these issues by intervening in the market and making it difficult for monopolies to maintain the market for themselves. It may not be possible for competition to occur in every market, but the Act attempts to ensure that there is at least the opportunity for competition.

III INTERPRETATION AND APPLICATION OF SECTION 36

A Introduction and Approach

The focus of this part of the paper is s 36(1) of the Commerce Act. This section reads:

> **36. Use of a dominant position in a market-**
>
> (1) No person who has a dominant position in a market shall use that position for the purpose of-
>
> (a) Restricting the entry of any person into that or any other market; or
>
> (b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
>
> (c) Eliminating any person from that or any other market.

Section 36(2) provides for protection in certain circumstances of statutory intellectual property rights and s 36(3) prevents s 36(1) from applying when the conduct in question has been authorised under Part V of the Act.[37] It is not important for present purposes how these two subsections are interpreted or applied.

---

[36] Above n 31, 7-8.

[37] For more information on intellectual property rights and s 36 see AI van Melle "Refusals to License Intellectual Property Rights: The Impact of *RTE & ITP v European Commission ('Magill')* on Australian and New Zealand Competition Law" (Forthcoming, December 1996/January 1997 ABLR).

The normal approach to understanding the section is to split it into three elements and this is the approach taken by this paper.[38] The specific approach of this paper is to outline the statutory definitions and tests relating to each element, discuss and analyse the cases decided that relate to the element, outline any residual problems with those judicial interpretations and if necessary outline possible reforms to rectify those problems.

B Other Prerequisites to Breaching Section 36

There are other factors to consider when deciding whether particular conduct has breached s 36. The elements outlined below are the most difficult and controversial parts of the section. However, certain other requirements must be fulfilled otherwise there is no cause of action under the section.

The first requirement is that the dominant firm is a person. Person is defined in s 2 of the Act as "a local authority, and any association of persons whether incorporated or not." This definition includes most entities including trade associations, partnerships, companies and compound structures such as parent and subsidiary companies. The entity affected by the conduct must also come within this definition. It is a person who is restricted or prevented from entering the market or eliminated from the market.

The most likely reason that there would be no breach is because the person who has a dominant position is not a supplier or acquirer of goods or services. On first reading of the section it does not appear that this is a requirement but the definition of 'dominant position in a market' in s 3(8) of the Act includes this requirement.[39] Most entities would still fall within this definition although it is questionable whether trade associations would. A trade association is a person but does not supply goods or services in a market. The standard interpretation is that because the association does not supply anything other than services to its members it probably does not fall within the definition of 'dominant position in a market'.[40] However, in the right circumstances a trade association may actually be supplying services in a market, for example, if it only supplies its members and there are other potential users of those

---

38 See above n 9.

39 Section 3(8) is discussed at length in Part III C 3 - Dominant Position.

40 See above n 9, 3-146.

services. If the association uses any dominance in providing those services to trade members to affect another market, there is a potential breach of s 36.

Other requirements that need to be satisfied apply generally to the Act rather than specifically to s 36. For example the restrictions on application of the section to the Crown and Crown Corporations in ss 5 and 6. These requirements will usually only be important in specific fact situations and the purpose of this paper is to address the typical situation rather than a situation involving strange or unusual circumstances.

C Dominant Position in a Market

1 *Overview*

There is some debate over exactly whether the determination of the relevant market should be done separately to the analysis of the dominant position in that relevant market or as part of the same process. There is case law to suggest that identification of the relevant market is necessary before considering the dominance of the firm in question.[41] However, there is also case law to suggest that defining the relevant market and deciding on dominance need to be done together.[42] *Gault on Commercial Law* considers that "it is necessary, therefore, to keep the concept of "dominance" in mind when defining the relevant market, for each concept has meaning only in relation to the other."[43] This does not necessarily mean that you cannot separate out the analysis for each part. The important thing to remember is that you cannot ignore the conduct at issue when defining the relevant market.

The Court of Appeal applies the two step approach as evidenced by its decision in *Port Nelson Ltd v Commerce Commission*.[44] The Court addressed the issue of relevant market first before moving on to the conduct at issue. However, it was obvious from the judgment that the market definition was not done completely in isolation of the conduct at issue.[45] Therefore although these are interrelated concepts

---

41 See *Tru Tone Ltd* above n 7, 358.

42 For example *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd* (1989) ATPR 40-925, 50,008.

43 Above n 9, 3-146.

44 Unreported, 3 July 1996, Court of Appeal, CA 169/95, 5-10.

45 Above n 44, 9.

this paper proceeds on the basis of defining the relevant market, keeping in mind the conduct at issue, and then addressing the issue of dominance.

2 *Market*[46]

(a) Statutory definitions

The starting point for any consideration of the relevant market has to be the definition of market. Competition law prior to the enactment of the 1986 Act had no definition of market although it was an important concept when examining trade practices. In the Commerce Act 1986 market is defined in s 3(1A). It provides that:

> Every reference in this Act, except the reference in section 36A(1)(b) and (c) of this Act, to the term "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.

This is different to the original enactment where the market was defined as meaning "a market for goods and services within New Zealand that may be distinguished as a matter of fact and commercial common sense."[47] This differed from the Australian definition which included the idea of substitutability.[48] It is unclear whether the change occurred due to several decisions of New Zealand courts which indicated that substitutability was not the test for market and that Australian decisions were not necessarily relevant due to the difference in definition,[49] or whether it was merely due to change in the philosophy of the Government of the day towards a more economic approach to markets.[50] However, the Courts have accepted the new definition as meaning that substitutability is a consideration but is not the deciding factor for

---

46 For a general discussion of the market principles see M Brunt "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation" (1990) 18 ABLR 86.

47 The definition was changed by s 3(1) of the Commerce Amendment Act 1990.

48 Section 4E Australian Trade Practices Act 1974 (Cth).

49 For example *Tru Tone Ltd* above n 7, 359; *ARA* above n 7, 669; and *Apple Fields Ltd v The New Zealand Apple and Pear Marketing Board* (1989) 2 NZBLC 103,564, 103,577.

50 Trade Practices Commission *Review of the Commerce Act 1986: Comment by the Australian Trade Practices Commission on Department of Trade and Industry Discussion Paper* (Australia, 1988) 4; also see Business Competition and Corporate Affairs Division, Department of Trade and Industry *Review of the Commerce Act 1986: A Discussion Paper* (Wellington, 1988) 12.

defining the market.[51] In *Telecom Corporation of New Zealand Ltd v Commerce Commission* the High Court stated that:[52]

> [t]he practical effect of the revised wording appears to be no more than to make the relevance of economic substitutability explicit. ... We see no source of conflict or tension in the juxtaposition of the two elements, substitutability and commercial common sense, in this formulation.

(b) Case law

There is a plethora of case law which expands on the statutory definition of market.[53] Two of the foundation cases on market definition are *Re Edmonds Foods Ltd*[54] and *Re Queensland Co-operative Milling Assn Ltd.*[55] Both these cases predate the 1986 Act but are still being used today.[56] In these cases phrases such as "the field of rivalry between [firms]" have been used to define market.[57] *Edmonds Foods* provided New Zealand's most cited judicial definition of market when it defined market as "a field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given sufficient price incentive".[58]

The demarcation of the relevant market is a question of fact. Therefore the case law on the definition of market is mainly useful in identifying the approach to be taken when interpreting the facts. The definition of the relevant market is not an easy issue to determine, however, there is an accepted general approach to the issue. The decision in *Telecom v Commerce Commission* (HC) clearly illustrates this approach.[59]

The High Court outlined three basic steps to be undertaken when assessing the relevant market. The first step is to "seek to identify the constraints upon the price

---

51 Above n 44, 7.

52 (1991) 4 TCLR 473, 499. This case is subsequently referred to as *Telecom v Commerce Commission* (HC).

53 Almost all of the cases relating to s 36 have discussed market at some length. The most recent in-depth discussion is the decision in *Telecom v Commerce Commission* (HC) above n 52.

54 21 June 1984, Commerce Commission Decision No 84.

55 (1976) ATPR 40-012.

56 Above n 44, 6; and above n 42, 50,015.

57 Above n 55, 17,247.

58 Above n 54, 4-5.

59 Above 52, 501-504.

and production policies of firms or divisions of firms whose conduct is of relevance for the matters litigated."[60] The next step is to address substitutability issues, both for supply and demand. This can be done by using cross elasticities of both supply and demand as this will show the "extent to which the supply of or demand for a product responds to a change in the price of another product."[61] Utton argues that this tool of analysis is impractical because the information required to calculate the elasticities is almost impossible to obtain.[62] This impracticality is probably borne out by the fact that quite often the court seems to merely play lip service to the concepts of elasticity of demand or supply and then simply looks at substitutability.[63] The techniques used in assessing the constraints and any substitutability will also be important to the consideration of dominant position. This is discussed further below.[64]

The last step the court will take is to examine the different dimensions of the market.[65] The four dimensions are: product; functional; geographic; and time.[66] All three factors are not entirely separate from each other and this is particularly obvious when you consider the four dimensions of market.

The product dimension is usually assessed by looking at the effect a change in price will have on supply and demand. In other words substitutability. If a large change in price does not affect demand or supply, there is low elasticity and substitutability. The appropriate functional divisions in any market will depend on "whatever will best expose the play of market forces, actual and potential, upon buyers and sellers."[67]

The functional dimension is the classic division into the horizontal levels of manufacturing, wholesale and retail. This does not mean that vertical combinations of firms are ignored. The definition of person ensures that 'associations of persons' are considered as one person so compound structures will still be caught by the Act. Splitting the market into horizontal levels is merely a tool of analysis and is not always

---

60 Above n 52, 501.
61 Above n 42, 50,014.
62 Above n 31, 11.
63 Above n 52, 504.
64 See below Part III C 3 - Dominant Position.
65 Above n 52, 502.
66 *Telecom v Commerce Commission* (HC) focused on the dimensions of function and time. Above n 52, 502.
67 Above n 52, 502.

followed, for example in *Tru Tone* it was necessary to consider the wholesale and retail market at the same time due to the unusual factual circumstances.[68]

The third dimension to be considered is geographical. The definition of market in s 3(1A) of the Act contemplates a 'market in New Zealand' and no wider. Quite often the market will be New Zealand wide as for example in *Telecom v Commerce Commission* (HC).[69] However, it may sometimes be necessary to define the market as something less than New Zealand wide as evidenced by *Port Nelson*[70] and *Auckland Regional Authority*.[71] The geographic dimension of the market is not determined by the place of business of the companies involved. Considerations are the pattern of demand, the area of buying and selling, convenience, cost and of course transport. Under s 3(3) imports may be considered when adding up the competition in that market.[72] Therefore there is the potential to extend the geographical boundaries of the market beyond New Zealand in some circumstances. However, according to Tipping J, "services supplied outside New Zealand by persons not resident or not carrying on business in New Zealand are irrelevant when defining the market within New Zealand or assessing dominance within it."[73]

The last dimension, time, is a fairly new addition to the analysis.[74] It is closely related to supply substitutability as it considers potential competitors in the market. Originally it was thought that only existing competitors and technology had relevance to the market, however, under this dimension the courts will look at potential competitors as well. This will include "those sources of supply that come about from redeploying existing production and distribution capacity but stop short of including supplies arising from entirely new entry."[75] An infinite time frame is impractical so

---

68 See *Tru Tone Ltd* above n 7, 360. For more discussion on this point see above n 10, 63.

69 Above n 52.

70 Above n 44, 9.

71 Above n 7, 672.

72 Section 3(3) provides:
For the purposes of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market including competition from goods or services supplied or likely to be supplied by persons not resident or not carrying on business in New Zealand.

73 See *New Zealand Magic Millions* above n 7, 759.

74 *Gault on Commercial Law* addresses all four dimensions, above n 9, 3-28; whereas van Roy only addresses the first three, above n 10, 61-65.

75 Above n 52, 503.

considerations will be how long it would take for those potential competitors to actually compete, how long it will take for the technology to be redeployed and how serious those potential competitors are about competing.[76] This is indirectly confirmed by the Court of Appeal in *Port Nelson*[77] when Gault J cited a passage from *Queensland Wire*. In that case Deane J stated that:[78]

> [t]he outer limits (including geographic confines) of a particular market are likely to be blurred: their definition will commonly involve assessment of the relative weight to be given to competing considerations in relation to questions such as the extent of product substitutability and the significance of competition between traders at different stages of distribution. While actual competition must exist and be assessed in the context of a market, a market can exist if there be the potential for close competition even though none in fact exists.

(c) Other problems and issues

The most fundamental problem facing any court trying to decide the relevant market is how widely to define the market. Counsel alleging the breach of s 36 will try to have market defined as narrowly as possible. Conversely, counsel defending the breach will try to have the market defined as widely as possible. The court has to make sense of the completely contrasting arguments. This is made even more difficult by the number of expert economic witnesses that are normally used in a Commerce Act case.[79] Ultimately the relevant market is a question of fact and is in the court's discretion.

An interesting aspect of s 36 is that most conduct that potentially breaches the section will involve two markets, the market that the firm is dominant in and the market that is being affected by that firm's conduct. They do not have to be the same market. This is because the section specifically says 'in that or any other market' when defining the proscribed purposes.[80] Occasionally a court has stated that the firm is dominant in

---

76 Above n 52, 503.

77 Above n 44, 8.

78 Above n 42, 50,013.

79 Several expert witnesses were called to discuss the Baumol-Willig rule in *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1992) 5 TCLR 166. Referred to in the text as *Clear v Telecom* (HC).

80 Section 36(1)(a)-(c).

both markets. An example is *Auckland Regional Authority* where Barker J thought the Authority was dominant in the supplying of rental booths and in the renting of cars,[81] an obvious error.

While keeping in mind the conduct at issue, as discussed above,[82] the court has to make sure that the conduct at issue does not automatically define the relevant market. It is arguable that this is what happened in the *Auckland Regional Authority* case.[83] The conduct at issue was the Authority restricting the number of rental booths at Auckland Airport. The relevant market was "a market for rental car services at Auckland airport ...".[84] A closely related problem is how to define a market when one of the parties concedes that they are dominant. Should the court simply accept whatever definition of the market that the conceding party gives? As should be evident this is extremely problematic as what the relevant market is has an enormous impact on the other elements of s 36.

Finally, although market definition is an important part of any analysis under most of the restrictive trade practices provisions, it is particularly relevant to the concept of dominant position. This is because dominance will depend entirely on how the market is defined. The two overlap considerably as the "choice of market definition relates specifically to the case or matter under consideration."[85] Dominant position is discussed in the next part of the paper.

3 *Dominant position*

(a) The statutory test for 'dominant position in a market'

'Dominant position in a market' is defined in s 3(8) of the Act. The definition is based on Article 86 of the Treaty of Rome.[86] Section 3(8) provides:

---

81 See *ARA* above n 7, 678; another example is *Union Shipping* above n 7, 706.
82 See discussion in Part III C 1 - Overview.
83 See *ARA* above n 7.
84 See *ARA* above n 7, 677.
85 J Feil and K Smith *Structure and Conduct: The Assessment of dominance Under the Commerce Act 1986* (New Zealand Trade Practices Workshop, Auckland, 1987) 6.
86 Above n 10, 75; also above n 44, 35.

3. Certain terms defined in relation to competition -

(8) For the purposes of sections 36 and 36A of this Act, a dominant position in a market is one in which a person as a supplier or an acquirer of goods or services either alone or together with any interconnected body corporate is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in a market regard shall be had to-

(a) The share of the market, the technical knowledge, the access to materials or capital of that person or that person together with any interconnected body corporate:

(b) The extent to which that person is constrained by the conduct of competitors or potential competitors in that market:

(c) The extent to which that person is constrained by the conduct of suppliers or acquirers of goods or services in that market.

Originally s 3(8) defined 'dominant position in a market' for both the purposes of the restrictive trade practice provisions and the merger and takeover provisions contained in s 66 and 67 of the Act. The section was amended in 1990 by restricting the application of s 3(8) to ss 36 and 36A and by adding a new s 3(9) to apply to business acquisitions.[87]

Although s 36 is similar to s 46 of the Trade Practices Act 1974 (Cth) there are some substantial differences.[88] The most important difference is the threshold requirement. The Australian provision requires that the corporation has 'a substantial degree of power in a market' whereas New Zealand's legislation uses 'dominant position'. This means that the threshold requirement in Australia is lower than in New Zealand. Indications of what to consider in determining the degree of power the corporation has are given in s 46(3) of the Trade Practices Act 1974 (Cth),[89] however, this section differs markedly from s 3(8) of the Commerce Act.

---

87 Sections 3(2) and 3(3) of the Commerce Amendment Act 1990.

88 Relevant portions of s 46 of the Trade Practices Act 1974 (Cth) are included in Appendix A.

89 Section 46(3) is included in Appendix A.

The test in s 3(8) is encapsulated by the phrase "a dominant position in a market is one in which a person ... is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market". Three factors to take into consideration when deciding this issue are outlined in (a), (b) and (c). Feil and Smith explain these factors further by stating that:[90]

> [p]aragraph (a) is concerned principally with the attributes of the particular firm and implicitly with its position in the market as a whole. The investigation under this paragraph would include a basic description of the market structure. However it is by no means determinative of whether a firm has a dominant position. It is then necessary in terms of paragraph (b) to look at the operation of competitive forces in the market and the ability of those to limit the actions of the firm. Paragraph (c) completes the analysis by considering the level of any countervailing market power in the hands of those supplying the firm or purchasing its output.

It is important to note that the three factors are not a test in themselves and are not an exhaustive list. In fact the Commerce Commission expanded on these factors in the *Re Proposal by News Ltd* decision.[91] Examples of extra considerations are: the degree of market concentration, financial stability of the merged concern and the extent of vertical integration.[92] It is debatable whether this expanded list of factors actually adds to the original three or merely explains them further. However, the High Court approved of this expansion in *Lion Corporation Ltd v Commerce Commission.*[93] Although not cited specifically in most of the judgments relating to s 36, the passage from *News Ltd* is implicitly referred to in most s36 cases.[94]

(b) How much influence is enough?

The main problem with the definition given in s 3(8) is that it is circular. A person in a dominant position is defined as someone having a dominant influence. The question that arises from this is still what is meant by dominant? How much influence must the

---

90 Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1988) vol 1, p 6.

91 (1986) 6 NZAR 47, 51. The full expansion is quoted in Appendix B.

92 Above n 91, 52.

93 *Lion Corporation Ltd v Commerce Commission* [1987] 2 NZLR 682, 691.

94 See *New Zealand Magic Millions* above n 7, 747.

firm have before it is considered dominant? The courts will analyse various factors to decide this issue, as discussed below, but there is still a need to decide the threshold requirement for dominance.

The cases decided on this issue can be divided into two types: those that use a specialised economic definition of dominance; and those that look at the ordinary or dictionary meaning of dominance. The former span the late 1980s up until the 1992 Court of Appeal decision in *Telecom Corporation of New Zealand v Commerce Commission*.[95]

A pure economic definition of dominance is:[96]

> the ability of a firm or group of firms persistently to hold price above long-run average costs without thereby losing so many sales that the price level is unsustainable.

The decisions relating to s 3(8) regarding the economic definition of dominant position are not this technical. The general proposition is that a dominant position occurs when the firm has the "ability to act independently of the constraints that a competitive market would normally provide."[97] Various catch phrases were used in the decisions such as "economic strength", "ability to act independently", "discretionary behaviour" and "lack of restraint".[98] Perhaps one of the best renditions of the pre-*Telecom v Commerce Commission* (CA) threshold definition is from *Proposal by Broadcast Communications Ltd* where the Commerce Commission stated that:[99]

> [d]ominance exists when a person is in a position of economic strength such that it can behave to a large extent independently of that person's competitors. A person in a dominant position will be able to effect an appreciable change in the price and or other

---

95 [1992] 3 NZLR 429. From this point onwards this case is referred to as *Telecom v Commerce Commission* (CA). The High Court decision, above n 52, is referred to as *Telecom v Commerce Commission* (HC).

96 Above n 31, 10.

97 Above n 18, 271.

98 *Re Magnum Corporation Ltd and Dominion Breweries Ltd* (1986) 2 TCLR 177, 195; *Lion Corporation Ltd* above n 93, 690; *Union Shipping* above n 7, 703; *New Zealand Magic Millions* above n 7, 758; and *ARA* above n 7, 679.

99 [1990] NZAR 433, 448.

> aspects of supply of his goods and services and to maintain this change for an appreciable length of time without suffering a serious adverse impact on profitability.

This definition was criticised by the High Court in *Telecom v Commerce Commission* because "'appreciable' can mean perceptible, discernible, noticeable; and it can also mean considerable, large, or fairly large, and, perhaps a different shade of meaning, material."[100] The Court sympathised with the Commission's desire to delineate a more precise standard but though that "in the abstract, the test can [not] be pushed very far."[101] Instead the High Court focused on the phrase 'high market power' which was described as where "there is a large discretion to depart from competitive behaviour e.g. a large pricing discretion or a large discretion to choose the pace of technological change."[102]

Several European Community cases also support an economic definition of dominance,[103] for example *Re Continental Can Inc.*[104] The High Court of Australia also uses an economic definition of market power describing it as:[105]

> the ability of a firm to raise prices above the 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 ...

There are a number of cases that could be discussed with regard to the economic definition, with each having a slight variation of an economic definition, however, it is more relevant to discuss the present approach to 'dominant position'. This is outlined by the Court of Appeal's interpretation of dominance in *Telecom v Commerce Commission* and the subsequent cases.[106]

---

100 Above n 52, 510.

101 Above n 52, 510.

102 Above n 52, 513.

103 For more information on European Community cases see above n 10, 74-80; above n 18, 267-271; also see A Riley *The EEC Approach to "Dominant" and "Market"* (Conference Paper).

104 [1972] 2 CMLR D11.

105 Above n 42, 50,008.

106 Two cases have been decided since *Telecom v Commerce Commission* (CA) that have dealt specifically with this issue. They are the decisions of the High Court and the Court of Appeal in *Port Nelson Ltd v Commerce Commission*. See above n 44.

The main judgment in *Telecom v Commerce Commission* (CA) was given by Richardson J. The most important statement Richardson J makes is:[107]

> [c]learly the dominance test sets a rigorous threshold. It is not sufficient that the influence be advantageous or powerful. It must be dominant. The word comes from the Latin dominus meaning master. Only one person can be dominant in a particular aspect of a market at any one time. Not surprisingly standard dictionaries give meanings such as "ruling", "governing", "commanding", "reigning", "ascendant", "prevailing" and "paramount".

He then goes on to criticise the dominance test given in *Broadcast Communications* (cited above).[108] The concern was that words such as 'high', 'great', 'large' and 'appreciable' set too low a threshold as they could easily mean something much less than dominance. Instead s 3(8) "requires that the influence which the person concerned is in a position to exercise is so high or great or large as to be characterised as "a dominant influence"."[109] Dominance must be given its ordinary meaning and this is more than high, large or appreciable market power.[110]

The question this raises is whether the ordinary meaning test is significantly different from an economic meaning test. It is arguable that the Court of Appeal simply wanted to draw a distinction between 'dominant position' and 'substantial degree of market power' in order to illustrate the differences between the New Zealand threshold and the Australian threshold. This is implicit from statements such as anything less than a "prevailing, commanding, ascendant, governing, primary, principal or leading influence" sets too low a standard.[111] However, this does not necessarily mean that there is a practical difference when applying the new test. Three of the Court of Appeal judges decided that Telecom was in a position to exert a dominant influence in the relevant market thereby agreeing with the High Court. On the other hand Richardson J and Hardie Boys J thought Telecom did not exert a dominant influence in the relevant market.

---

107 Above n 95, 442.
108 See text at n 99.
109 Above n 95, 442.
110 Above n 95, Cooke P at 434, Casey J at 447 and McKay J at 449.
111 Above n 95, 434.

If the economic meaning of dominant position creates a threshold that is lower than intended by Parliament, as indicated by the Court of Appeal, the problem area will be firms that meet the lower threshold but fall short of the higher threshold. The difficulty in New Zealand is that most cases decided relating to s 3(8) involve factual circumstances where it is either conceded that the firm is dominant or they easily meet the higher threshold test. If there is a difference of opinion, as there was in *Telecom v Commerce Commission* (CA), it is normally due to the application of the facts rather than a difference in the threshold tests.

Certain academics are unquestionably of the opinion that there is a significant difference between the two tests. Patterson is one of the most vocal. He states that:[112]

> the Court of Appeal, in rejecting the contention that dominance had a recognized economic meaning, and relying instead on dictionary meanings of the word, placed the market power threshold far higher than had been intended by the framers of the legislation, and as a result has prejudiced the objective of promoting competition in New Zealand markets.

Van Roy is also of the opinion that the threshold is now too high. She states that the case "imposed a very high threshold for 'dominant position in a market' - more than mere ability to behave largely independently of competitors, but rather requiring a high degree of market control."[113]

The first case decided after *Telecom v Commerce Commission* (CA) that addressed the issue of the threshold requirement was *Commerce Commission v Port Nelson Ltd.*[114] In that case McGechan J said:[115]

> 'Dominance' includes a qualitative assessment of market power. It involves more than "high" market power; more than mere ability to behave "largely" independently of

---

112 Above n 18, 267.
113 Y van Roy "'Abuse of a Dominant Position' in New Zealand Competition Legislation" (1995) 7 ECLR 428, 428.
114 (1994) 6 TCLR 406.
115 Above n 114, 441-442.

> competitors; and more than power to effect "appreciable" changes in terms of trading. It involves a high degree of market *control*.
>
> How high? Clearly, not absolute control. There need not be monopoly. There need not be ability to act totally without regard to competitors, suppliers, or customers. Expression of the required degree of control in terms of mastery - eg as "commanding", "ruling" or "governing" - is perhaps to that extent misaligned, and needs to be read down. ... However, in the light of the Court of Appeal's rejection of "to a large extent independently" as a standard, dominance sets a very high standard of independence. To be dominant, the firm must be able to act, within the limits of commercial reality, without significant competitive or consumer constraints. ... Not only must a firm be able to raise prices without fear of competitive constraint (competitors indeed may follow with pleasure), but must be able to reduce prices or accept more adverse conditions with confidence significant competitors, to survive, must follow. To be dominant, the firm must be able through market conditions to impose adverse conditions of trading upon competitors.
>
> Greater precision is not possible.

McGechan J obviously also thought that the new dominance test set a very high threshold and he considered that "legislative action may be warranted."[116] He also said that when applying the test it is necessary to recognise that it is in an "economic context" and "some degree of background commercial realism" is required.[117] What is unclear is when he was applying the test to the facts of *Port Nelson* whether he was using the high threshold test or a 'read down' version of the test as on either one Port Nelson would have been dominant.

Port Nelson went to the Court of Appeal and the Court in deciding the case again addressed the issue of the dominance test. Gault J recognised that *Telecom v Commerce Commission* (CA) had been criticised for setting too high a threshold test and went on to explain why the test did not "shift the concept of dominant position away from that from which it had been derived - Article 86 of the Treaty of Rome."[118]

---

116 Above n 114, 442.
117 Above n 114, 441.
118 Above n 44, 35.

It is not clear whether the judgment is reasserting the test, merely clarifying it or slightly retracting from it. The key to understanding why the Court of Appeal altered the test is probably also explained by its recognition that there is a "distinction between the concept (dominant position in a market) and the test for its existence (market share, vertical and horizontal constraints - which economists assess as elements of market power)."[119]

Gault J also stated that:[120]

> [t]he *Telecom* case really decided no more than that "dominant" means dominant; that in testing for dominant position s 3(8) prescribes certain non-exhaustive matters to be considered; that potential competition may impose constraints and that the evidence of economists (so long as it is empirically based) will be helpful. A reading of the judgments as a whole discloses that although there was concern that the use of synonyms and the economists' expression "high market power" risks substituting a lower standard than the term dominant requires, all members of the Court were focusing on a market reality capable of practical assessment having regard to the market structure and the actual and potential process of workable and effective competition. There is no indication in the judgments that a dominant position is one of absolute control or monopoly. The very tests in s 3(8)(a), (b) and (c) contemplate less than that.

Richardson J in *Telecom v Commerce Commission* (CA) was not rejecting terms such as 'large' and 'appreciable' but rather criticising them as being unhelpful because they could convey a meaning that is:[121]

> inappropriate to reflect dominant position. It is not a rejection of the view that dominance reflects the ability to act to a large extent independently across every possible interpretation of "to a large extent".

Whether the Court of Appeal originally meant to import an extremely high threshold into the test for dominant position in the *Telecom v Commerce Commission* decision is

---

119 Above n 44, 35.
120 Above n 44, 35-36.
121 Above n 44, 37.

irrelevant. It is clear from the *Port Nelson* decision that the Court of Appeal has slightly relaxed that test. The consequence is that the economic test concepts such as 'independence of behaviour' may still be used. However, the courts need to be wary of lowering the threshold through the use of words such as 'high', 'large' and 'appreciable' when considering such concepts. There has to be a substantial amount of independence, or whatever other concept is being used, in other words the firm has to fit within the far end of any scale to be considered dominant. Perhaps the best way of addressing this issue is to apply any threshold criteria, concept or test and then step back and consider whether the firm could really be considered 'dominant'.

The fact that the phrase chosen differs significantly from the Australian provision indicates that Parliament did indeed want the threshold to be higher than the Australian threshold. Whether it was meant to be as high as it is currently perceived is something that needs to be addressed at the legislative and policy levels rather than by the judiciary. If this means that the number of firms that are currently considered to be within the definition of a 'dominant firm' is less than Parliament originally intended, then it is up to the Legislature to change the provision.

(c) Important factors in deciding 'dominant position in a market'

A court will consider various factors when deciding whether a person is in a dominant position or not. The starting point, as discussed above, is s 3(8)(a)-(c) with the expanded list or explanation from the *News Ltd* decision also being important.[122] An analysis of each individual factor is not possible in this paper. Instead specific factors that are either controversial or problematic are discussed in the following paragraphs.

The first issue relates to s 3(8)(a) of the test for dominance.[123] This is commonly referred to as the structure test for dominance. There has been some support for promoting this factor above the rest. In other words if a firm has a majority of the market share it is presumed to be dominant. There are problems associated with defining what is meant by market share, however, the European Court of Justice has

---

122 Above n 91, 51. This decision is discussed above in Part III C 3 (a) - The Statutory Test for Dominant Position in a Market.

123 See text a n 85 for the full quotation of the section. The provision states that "... regard shall be had to- (a) The share of the market, the technical knowledge, the access to materials or capital of that person or that person together with any interconnected body corporate."

simply applied this kind of test to Article 86 cases.[124] The difficulty with this presumption is that it moves the s 36 contravention away from behaviour towards structure. The other elements of the section still have to be fulfilled, but it does imply a policy change. The attitude of the New Zealand courts is that, although market share is an important factor in determining dominance and the more share the firm has the more *likely* it is to be dominant, this is not the determinative test.[125] This is especially important when it is shown that market share does not necessarily equate with power.[126] Korah states that "[e]ven a sole supplier may be constrained by fear of entry and charge only competitive prices where barriers to entry are not high; in which case, the market is already operating competitively."[127]

The previous quote introduces the next issue - barriers to entry. This issue is inversely related to the issue of potential competition. The fewer barriers to entry that there are the more likely it is that there is potential competition. Some examples of barriers to entry are; government protection, start up costs, control of the raw materials and vertical integration. It has sometimes been argued that considering barriers to entry is of paramount importance.[128] It is apparent from the decisions regarding s 3(8) and s 36 that the courts do not focus on one factor as being the determinative test. A variety of factors are considered and this is evidenced by the in-depth analysis given in *Telecom v Commerce Commission* (CA).[129] Richardson J also addressed the time frame requirement when considering potential competition. He considered that it is necessary to:[130]

> focus on market performance over a sufficient run of time in order to comprehend whether and to what extent it is workably competitive. On that approach the Court was firmly of the view that a prospective development should not be disregarded merely because it entailed looking two years into the future.

---

124 See *The EEC Approach to "Dominance" and "Market"* above n 103, 9-11; also see V Korah "Concept of a Dominant Position Within the Meaning of Article 86" (1980) 17 CML Rev 395, 399.

125 Above n 95, 444.

126 For more information on this aspect of market power see above n 19.

127 Above n 124, 396.

128 J Land "Monopolisation: The Practical Implications of Section 36 of the Commerce Act 1986" (1988) 18 VUWLR 51, 59.

129 Above n 95, Cooke P at 434-435, Richardson J at 443-445.

130 Above n 95, 443.

Another issue that has been discussed reasonably often is whether it is necessary that there is an absence of competition before dominance can occur. Section 3(8) recognises that there is the possibility of competition in the market as indicated by paragraph (b) which uses the phrase 'constrained by the conduct of competitors or potential competitors in that market'. The issue arose because of certain statements which seemed to indicate that an absence of competition is a necessary condition.[131] The Court of Appeal addressed this issue in *Port Nelson* and stated that:[132]

> [c]learly there were matters indicating that PNL was not totally unconstrained but that is not a necessary requirement for dominant influence. ... The very focus of s 36 is a person in a dominant position acting to deter or eliminate a competitor. The section contemplates a dominant position in which there still is a perceived need to act aggressively. A dominant position is not one that is so controlling that it is impenetrable.

It is clear that no single factor assumes more importance than the others when considering dominant position. All three of the factors under 3(8) must be taken into consideration and are of equal value, depending on the factual circumstances. It is necessary, however, to realise that this analysis has to been done within a dynamic and economic environment. The Court of Appeal states that:[133]

> [a]s is plain from s 3(8) in which the legislature appears to have distilled the essential elements of market power, a dynamic analysis is required of the market, its structure, the concentration of participants, their behaviour and that expected of potential entrants, the nature of the activities encompassed and general circumstances of supply to, and by, the market.

(d) Can more than one person be in a dominant position?

An interesting issue is whether two or more firms could collude in such a way that together they hold a dominant position. Utton believes that this can occur in practice

---

131 See *New Zealand Magic Millions* above n 7.
132 Above n 44, 40.
133 Above n 44, 38.

as firms can secretly collude to act together or tacitly agree to apply similar prices.[134] Hampton also thinks that this is possible because:[135]

> two or more unrelated firms, each of whom is individually not in a position to dominate a market but who together control a dominant portion of the market, [could] act to protect that position by restraining competition.

The problem may also occur where there are two extremely large firms in a market which are not restrained from anticompetitive conduct by each other.[136]

Hampton concludes that the Act does not provide for the control of this type of situation as if "the legislature had intended s. 36 to apply to joint dominance it could simply have used the words 'one or more persons' instead of 'a person'.[137] This approach is also supported by case law. In *Telecom v Commerce Commission* (CA) Richardson J specifically states that "[o]nly one person can be dominant in a particular aspect of a market at any one time."[138] Cooke P also alludes to the impossibility of more than one person being dominant in a market at a time. He states that:[139]

> [c]learly there could be no more than one dominant influence over each of the aspects of a market specified in the Act - "the production, acquisition, supply or price of goods or services" - but it may be theoretically conceivable, for instance, that one person could be in a position to exercise a dominant influence over supply, while another was in a position to exercise a dominant influence over price. Yet probably that would be an uncommon situation.

There was no question of more than one person being dominant in *Telecom v Commerce Commission* (CA), so it is difficult to conclude that these comments are absolutely decisive on the point. If the right facts came before the Court of Appeal it

---

134 Above n 31, 1; also see above n 10, 80.

135 Above n 34, 183.

136 This was the situation in *Magnum*. If clearance was given the market would have two strong competitors; Magnum and Lion. Although this is an oligopoly situation and collusive behaviour may occur, the Commission did not "accept that collusion, will necessarily follow." *Re Magnum Corporation* above n 98, 196.

137 Above n 34, 183.

138 Above n 95, 442.

139 Above n 95, 434.

is still conceivable that it could decide that more than one person can be dominant in the same market. This would necessitate using a more liberal interpretation of 'association of persons' in the definition of person, but it is possible. However, if collusion is proven between the two or more firms involved it may be far more straightforward to take a claim under the general anti-competitive provision - s 27.

The difficulty is that the firms would not be dominant in the market as a single entity (unless they somehow come within the definition of person) but rather are dominant in their collusive behaviour. It is the combined behaviour of the firms that gives the dominance and it is a contradiction to call each firm dominant, especially with respect to the Court of Appeal articulation of the test. It would be far more arguable under the Australian Act as all that is required is a 'substantial degree of market power' and it is conceivable that this could be held by more than one firm.

D Use of a Dominant Position

1 *The statute*

The requirement that the person with a dominant position in a market 'has used that position' for one of the proscribed purposes is the equivalent of the s 46 Trade Practices Act 1974 (Cth) requirement that the person 'take advantage of' his, her or its substantial degree of power in a market for one of the proscribed purposes.[140] This means that Australian case law on 'take advantage of' has great relevance for the New Zealand position.

Much controversy surrounds this particular element of s 36. It is arguable that there is no need to address use as a separate element let alone analyse it to the extent it has been. It is conceivable from reading the statute that use is a completely neutral term that does not require further analysis and it could be replaced by a phrase such as 'shall not act for the purpose of'. It simply serves as a causal connector.

The whole problem arose subsequent to the *Queensland Wire* case where it was decided that 'take advantage of' did not have a pejorative meaning.[141] The only

---

140 Section 46(1) of the Trade Practices Act 1974 (Cth) is quoted in full in Appendix A.

141 Above n 42, 50,010.

reason that this was an issue is because prior to the decision it was believed that 'take advantage of' required an extra element of malicious intention. It is possible that the New Zealand Courts may never have focused on the meaning of use but for the discussion of this issue and the High Court decision that 'take advantage of' was the same as 'use'.

This may have lead to other problems because if use was merely a neutral term to represent a causal connection between the conduct of the firm and its dominance it could mean that the purpose requirement was too wide in scope and too much conduct that is actually competitive may be caught by s 36. On the other hand, a focus on use may mean that the scope of the section is too narrow and not enough conduct is caught by s 36. Gault J assesses this dilemma and stated that "it is perhaps timely to caution against substituting a test helpful in applying the statutory rule for the rule itself."[142]

2 *The* Queensland Wire *decision and the* Geotherm *decision*

As mentioned above, prior to the *Queensland Wire* decision it was unusual for New Zealand courts to even consider 'use' as a requirement. The High Court in *Auckland Regional Authority*[143] did not address the issue at all and the *New Zealand Magic Millions*[144] case focused on the requirement of purpose.[145] However, the issues of use and purpose were separated to some extent in *Union Shipping*.[146] By 1992 it was recognised by the Court of Appeal that "[t]here will be circumstances in which the use of the market position and the purpose are not easily separated but the two requirements must be kept in mind."[147] The question that arises from this statement is: what exactly is required under the use element?

---

142 Above n 95, 430.

143 Above n 7.

144 Above n 7, 761-764.

145 Tipping J stated that "[i]t seems to me that the key question is not so much whether a dominant party has used its dominant position but rather whether or not its conduct is proved to have been for one or more of the proscribed purposes." See *New Zealand Magic Millions* above n 7, 761.

146 See *Union Shipping New Zealand Ltd* above n 7, 706-710.

147 *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641, 646.

Various formulations of a test for use have been suggested by writers in the area or outlined in case law.[148] One of the most commonly cited is from *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd*.[149] The Court stated that:[150]

> [t]here must be a causal connection between the conduct alleged and the market power pleaded such that it can be shown that the conduct is a use of that power. In many cases the connection may be demonstrated by showing reliance by the contravenor upon its market power to insulate it from the sanctions that competition would ordinarily visit upon its conduct.

Van Roy agrees with this analysis of use and states that:[151]

> [i]t should be sufficient to recognise that the word 'use' merely provides the causal connection between the conduct of the firm and its market power/dominance, and leave it up to the courts to decide what best provides this causal connection in any particular case.

There is a difference between what the test should be and what it is currently. The decision in *Queensland Wire* has added to the controversy in this area because it has been interpreted by other courts and writers as giving a test where the inquiry is: whether the conduct was only possible because of the market power or dominance that the firm has.[152] Some writers believe that this is too narrow a test and that it was not at all what was intended by the High Court.[153] Rather, the High Court addressed use in the market context and was still regarding it as a causal connection. They did not simply look at the conduct in question but also the effect of the conduct.

Even if the narrow interpretation of the *Queensland Wire* test is correct it may only be illustrative. Van Melle states that:[154]

---

148 See above n 9, 3-148 - 3-151.
149 (1992) ATPR 41-196.
150 Above n 149, 40,644.
151 Above n 113, 434.
152 Above n 37, 36; also above n 10, 152.
153 JM November "The Meaning of 'Use' of a Dominant Position: From *Queensland Wire* to *Electricity Corporation v Geotherm Energy*" (1993) 23 VUWLR 191, 197; also see above n 9, 3-148(a) and above n 10, 152.
154 Above n 37, 36.

> [t]he *Queensland Wire* test (arguably correctly) states that market power *must* have been "used" if a firm without such power could not have acted in the same way, but this does *not* in itself preclude a finding that market power could also have been "used" even if the same conduct was possible by a firm lacking market power.

A quite different situation arose in *Geotherm* and as a consequence a different test was articulated. Instead of looking to the conduct only being possible because of dominance the Court of Appeal said that use occurred if "it is the dominant position that gives the statements the force amounting to deterrence."[155] The case involved conduct outside of the market and so did not require the same kind of analysis as conduct directly affecting the market.[156] This is similar to the approach of the European Court of Justice in *Radio Telefis Eireann and Independent Television Publications Ltd v European Commission*.[157]

Therefore prior to the Privy Council decision in *Telecom v Clear* there was more than one test used to help define what is required for the 'use' element of the section. The *Queensland Wire* test and the *Geotherm* test are simply two examples of these types of tests and help to illustrate that the courts were willing to adapt their thinking according to the type of situation that they were facing. It could be argued that this meant there was very little certainty for firms with regard to 'use' of a dominant position, however, the courts were maintaining flexibility in this regard. It is difficult to foresee every type of conduct that a dominant firm could undertake and it is probable that the courts did not want to sacrifice flexibility for the sake of certainty. Also, provided any dominant firm did not have the requisite purpose, regardless of whether it satisfied the use test or not, it would not be contravening the section.

3 *The Privy Council test*

The highest authority on the test for use is the Privy Council decision in *Telecom Corporation of New Zealand v Clear Communications Ltd*.[158] The focus changed

---

155 Above n 147, 650.

156 This is discussed further in Part IV - Sham Litigation.

157 [1995] All ER (EC) 416. For an in-depth discussion of this case see above n 37.

158 Above n 8, hereafter referred to as *Telecom v Clear* (PC). The Court of Appeal decision is referred to as *Clear v Telecom* (CA) and the High Court decision as *Clear v Telecom* (HC).

completely after this decision with huge implications. The test as stated by Lord Browne-Wilkinson is:[159]

> it cannot be said that a person in a dominant market position "uses" that position for the purposes of s 36 [if] he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.

This test has been severely criticised both in terms of its impact on unilateral anti-competitive conduct and the way it undermines the Government's regime of 'light-hearted regulation'.[160] Van Roy has expressed dissatisfaction with the Privy Council test in at least two articles.[161] She believes that the test "imposed a very restrictive interpretation on the meaning of 'use' of a dominant position by excluding from its ambit all behaviour which a non-dominant firm in the same circumstances would have engaged in."[162] Further:[163]

> The court did not consider the full implications which such a high threshold could have on cases under section 36. Taken literally, if the test for 'use' excludes all conduct that a non-dominant firm would do, there must be very little conduct that would not be excluded. For there is little which can be done by a firm with the commanding influence required by 'dominance' that cannot also be done by a firm which meets the lower Australian threshold (large degree of market power) or the former New Zealand threshold (can act to a large extent independently). It is to be hoped that the New Zealand courts continue to avoid this complication, for to take account of it would surely mean the complete demise of section 36.

As discussed in Part III C above, the threshold requirement for dominant position is quite high. When this high threshold is combined with the Privy Council test for use there is an extreme effect. Firms that have potentially high market power that do not

---

159 Above n 8, 403. The if is substituted for the original 'unless' because the test as originally articulated in the case this did not make sense. It is supported by McGechan J in *Port Nelson*, above n 114, 445.

160 For more information on light hearted regulation see R Adhar "The Privy Council and 'Light-Handed Regulation'" (1995) 111 LQR 217.

161 See above n 113; also see Y van Roy "The Privy Council Decision in *Telecom v Clear*: Narrowing the Application of s36 of the Commerce Act 1986" [1995] NZLJ 54.

162 Above n 113, 429.

163 Above n 113, 437.

meet this high threshold are considered to be non-dominant. When this point is added to the fact that the Privy Council test minimises the amount or scope of conduct that contravenes s 36, the overall effect is that little unilateral conduct will be proscribed by the section.

Unlike the *Queensland Wire* test, which arguably relies on purpose requirements and is only illustrative, the Privy Council test is theoretically exhaustive.[164] It implies that if the conduct undertaken by the dominant firm is conduct which a non dominant firm could undertake then there is no use of the dominant position. The test obviously does not allow for situations where the conduct may be undertaken by any firm, but *because* it is undertaken by a dominant firm has anti-competitive effects. The conduct that breached the Australian provision in *Queensland Wire* was refusal to supply, clearly conduct that any firm could have undertaken. The conduct of Electricorp in *Geotherm* is also of this type. Predatory pricing, although more difficult to prove, also falls into this category of conduct.

There is the possibility that the Privy Council in articulating the test for 'use' deliberately used the word 'would' in order to differentiate between conduct that any firm *could* undertake from conduct that only a dominant firm *would* undertake. For example, only a dominant firm would risk refusing to supply a potential competitor because in a more competitive market the competitor would simply go elsewhere. So although a non-dominant firm *could* refuse to supply, it *would* not. However, there is again a counter argument, the non-dominant firm *would* refuse to supply if it did not have excess capacity to fill the competitor's order. So the argument becomes less forceful because the conduct at issue is something that any firm might undertake. In *Port Nelson* (CA) Gault J quoted the Privy Council test as outlined above, and then proceeded to use 'could' when assessing the conduct at issue.[165] As the two words were used interchangeably it indicates that any distinction is based solely on semantics.

4 *Intentions of Parliament*

Given that the combination of the dominant position test and the use test means that the amount of unilateral conduct that contravenes s 36 is severely restricted, one has

---

164 Above n 37, 38; also see above n 161, 57.
165 Above n 44, 41-42.

to ask whether this is what Parliament intended. Hill and Jones believe that the central concern of s 36 is purpose and use is quite neutral.[166] The Commerce Act was enacted well after the Trade Practices Act 1974 (Cth) and although the Act is based on the Australian Act it is significant that Parliament did not use 'take advantage of' in s 36. The difficulty is interpreting the significance as this could merely have been to avoid any pejorative connotations.

The focus of the Privy Council test is the nature of the conduct itself rather than the purpose or effect of the conduct. It is conceded that if the action is something that only a dominant firm could undertake, for example charging above cost to achieve monopoly profits, that this will be a use of dominant position.[167] However, it is still necessary to address the issue of purpose. There is nothing wrong, according to s 36, with charging below cost unless it involves one of the proscribed purposes.[168] In most cases it is the purpose that distinguishes between legitimate competition and conduct that contravenes the Act. With respect, it appears that the Privy Council has forgotten the objective of the purpose element. Instead 'use' is taken to be the defining element of the section and this leads to such a narrow interpretation of use that the section is rendered almost meaningless. The explanation for this unusual interpretation of 'use' may be that the Privy Council were in no doubt that Telecom had the requisite purpose and yet did not want to find against them.[169] This left a finding of no 'use' as the only possible option for preventing fulfilment of the requirements of the section.

A simple conduct oriented test is too sterile. It neglects other important aspects such as the market context and the purpose of the conduct. By taking into account these aspects a true use of market power analysis can be undertaken and s 36 will retain the power to prevent unilateral conduct of dominant firms that has the required proscribed purpose. The difficulty is how to get around the Privy Council test and this is discussed further below.

---

166 BM Hill and MR Jones *Competitive Trading in New Zealand: The Commerce Act 1986* (Butterworths, Wellington, 1986) 77.

167 This was the issue in all three of the *Clear v Telecom* decisions as the argument centred around whether the Baumol-Willig rule allowed for the charging of monopoly rents within the costing regime imposed on Clear.

168 An example of this type of conduct is shown by the facts in *Eastern Express Pty Limited v General Newspapers Pty Limited* (1991) ATPR 41-128. Predatory pricing was argued and discussed in the case but Wilcox J held that the facts did not prove this claim.

169 Above n 8, 403.

5 *Reinterpreting the Privy Council test for use*

Privy Council decisions from the New Zealand jurisdiction are binding on our courts. Therefore there are very few ways to avoid applying the Privy Council test for use. McGechan J had a difficult time when applying the test to conduct amounting to pricing lower than cost in *Port Nelson*.[170] Ultimately it was decided that this was a contravention of s 27 rather than the perhaps more natural option - s 36. The reason was that according to the Privy Council test a non-dominant firm may also have undertaken the conduct that allegedly breached s 36 and therefore there was no 'use'.

The conduct that McGechan did consider to be a breach of s 36 may also have not been a real use as outlined by the Privy Council test. It appears that McGechan J took into consideration the context and also implicitly the purpose of the conduct. It is debatable whether this is possible under the test although the words 'otherwise in the same circumstances' may provide this opportunity. Van Roy does not agree with this proposition as:[171]

> had that been the intention of the Privy Council, it could not have decided that the imposition of a pricing rule which could be used by competitive firms in normal competition, but would only be used for anti-competitive purposes by firms with real market power, was not a 'use' of a dominant position.

The counter argument is that the Privy Council may not have even considered the argument and perhaps did not actually intend to narrow the rule to the extent that it is narrowed.

Another way to remove the adverse consequences of the Privy Council test is to try to restrict the ratio of the case to the facts. The narrowing could be to cases where there is a pricing issue - as this is the issue in the three *Telecom v Clear* cases. There was no question of access to facilities or predatory pricing or any of the commonly considered 'abuses' of dominant position. The decision could be narrowed even more to situations where the issue is monopoly pricing of access to facilities where the supplier of the facility is also a competitor. However, this may be too artificial.

---

170 Above n 114, 553-559.

171 Above n 113, 434; also see above n 161, 60.

Another possibility is to consider the nature of the industry - telecommunications and access to networks in view of recent deregulations of a state monopoly. Again this may go too far and as a consequence look artificial.

The Court of Appeal implies that there is room to manoeuvre around the test. It briefly considered the Privy Council test in *Port Nelson* and stated that:[172]

> [w]hile it is not easy to see why use of a dominant position should not be determined simply as a question of fact without the need to postulate artificial scenarios, we are content in this case to adopt that approach, as did the High Court.

This is simply a different way of expressing Gault J's point that "it is perhaps timely to caution against substituting a test helpful in applying the statutory rule for the rule itself."[173] Given that the Court of Appeal simply accepted McGechan J's analysis of the test and his decision in *Port Nelson* it is difficult to predict exactly how the Court of Appeal will apply the Privy Council test in future. A possibility is that the Court will use the would/could distinction discussed above.[174]

The most straightforward but perhaps not the easiest way to deal with the test is through legislative changes. Parliament would be able to determine exactly what kind of conduct is meant to be proscribed by s 36. This would require deciding whether a test for use should be enacted. The difficulty is that it is unlikely that one all encompassing test would resolve all issues. This was the beauty of the pre *Telecom v Clear* case law, it allowed for different tests or considerations in different situations. A possibility would be to include some form of two tier test that would take into account conduct that only dominant firms could undertake but also other conduct when dominance would strengthen or achieve the proscribed purpose. Two examples of this kind of test are given in Appendix C. 'Use' could also be defined in the Act as merely a causal link as shown by *Natwest Australia Bank Ltd*.[175] If combined with some form of statement that purpose is the important element when considering s 36

---

172 Above n 44, 42.
173 Above n 95, 430.
174 This is discussed in Part III D 3 - The Privy Council Test, at text accompanying footnote 165.
175 Above n 149, 40,644.

this may resolve any residual difficulties.[176] In fact the whole issue of dominant position could be addressed at the same time.

E Purpose

1 *The statute*

The last constituent element of s 36 is purpose. The proscribed purposes are specifically outlined in s 36(1)(a)-(c). The requisite purposes are:[177]

> (a) Restricting the entry of any person into that or any other market; or
>
> (b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
>
> (c) Eliminating any person from that or any other market.

The ultimate effect of the conduct is irrelevant under s 36 as long as the requisite purpose is shown. Under s 2(5)(b) a person is deemed to have the purpose if it is one of the purposes or reasons that person engaged in the conduct and it was a substantial purpose or reason. Therefore it does not have to be the sole purpose of the dominant firm. Section 2(1A) defines substantial as meaning "real or of substance". A hostile intention is not required, provided the "anti-competitive effects are within the defendant's purpose, questions of morality and motive become irrelevant."[178]

More then mere intention is required to satisfy this element, the purpose has to be the object or aim of the perpetrator.[179] However, there is dicta which supports the proposition that if the conduct undertaken has the inevitable consequence equivalent to satisfying one of the purposes, it is sufficient to show the perpetrator had that intended purpose.[180] The Court of Appeal in *Clear v Telecom* stated that where a competitor will not be able to enter the market without access to facilities the dominant firm holds "the anticompetitive purpose is to be inferred from the inevitability of the consequences of refusing to deal except on terms that lead to

---

176 Above n 161, 60.
177 The full text of s 36 is included above in Part III A - Introduction and Approach.
178 Above n 10, 84.
179 Above n 10, 83.
180 *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158, 162.

competitive disadvantage."[181] Land disagrees with this dicta, stating that "[t]he intention to do an act which it is known will have the consequence of eliminating a trader from the market is not enough."[182] However, a distinction may be drawn between an inevitable consequence that occurs due to another plausible purpose, for example because the competitor is a bad credit risk, and an inevitable consequence when there is no other plausible explanation.[183]

Sections 36(1)(a)-(c) are written in such away as to give as wide a coverage of unilateral purposes as is possible. The section does not include a competition test and therefore "it is possible for a firm to achieve a prohibited purpose without actually lessening competition."[184] There is impact on competition in a much wider sense than is contemplated by the other restrictive trade practices provisions.

The three paragraphs give three different types of prohibited purpose, although unilateral conduct undertaken by a dominant firm will usually fit within more than one of the types. Paragraphs (a) and (c) are slightly narrower in that they simply address stopping someone from entering the market or removing someone from the market. The scope of the conduct envisaged by para (b) is much wider as it addresses the actual conduct of the parties within the market. Van Roy states that para (b) would:[185]

> cover conduct which has the purpose of forcing others to act in a way in which they would not freely choose to act. For example, a dominant manufacturer might demand that its distributors stock only its brand of products (ie, exclusive dealing).

Quite often the courts will decide whether a dominant firm has the requisite purpose by analysing whether there is any other legitimate commercial reason for undertaking the conduct in question.[186] This is because although sometimes it may appear that a dominant firm has an anti-competitive purpose, there may be a legitimate reason for

---

181 *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1992) 5 TCLR 413, 437. Referred to in the text as *Clear v Telecom* (CA).

182 Above n 128, 70. Also see JD Heydon and BG Donald *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* (The Law Book Co Ltd, Sydney, 1989) para 5400, p 2621.

183 This is also supported by the decision in *Union Shipping* above n 7, 707.

184 Above n 19, 16.

185 Above n 10, 158.

186 Above n 114, 556.

the conduct undertaken, for example a refusal to supply may be due to the competitor being a bad credit risk.

2 *An objective or subjective test for purpose?*

A subsidiary issue is whether an objective or subjective test is to be used when determining purpose.[187] There is some argument that whereas ss 27 and 29 require an objective standard for purpose because contracts arrangements and understandings are involved, s 36 requires a subjective standard because it is the actual firm's purpose that is being questioned. There are various cases that address the objective subjective dichotomy,[188] with the balance of favour being with a subjective purpose for s 36.[189] However, the Court of Appeal in *Port Nelson* stated that:[190]

> [m]uch has been written on this distinction which generally is unimportant in practice. There will be very little difference in most cases between ascertaining subjective purpose by inference from what was said and done and ascribing objectively a purpose from evidence of what was said and done. ... So far as concerns s 36, in the absence of further argument we incline to the conclusion McGechan J reached after reviewing the authorities that purpose may be established or negatived on either a subjective or an objective analysis.

Clearly no decision will be made unless there is a case where it will make a difference whether a objective or subjective purpose is required.

---

187 See A Boutel "Purpose in the Commerce Act" in Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1993) vol 5, p 109; also see JM November *The Meaning of "Use" of a Dominant Position in a Market for a Proscribed "Purpose": The Jurisprudence of Section 36(1) of the Commerce Act 1986* (LLM Research Paper, Victoria University of Wellington, 1992).

188 Some examples are *ARA* above n 7, 664; *New Zealand Magic Millions* above n 7, 762; *Union Shipping* above n 7, 708; and *Apple Fields* above n 7, 103,581.

189 *New Zealand Magic Millions* above n 7, 762.

190 Above n 44, 15.

3 *Inferring purpose*

Prior to the Privy Council decision in *Telecom v Clear* it was reasonable to infer that if there was an anti-competitive purpose then there was use. The High Court of Australia, in *Queensland Wire*, stated that:[191]

> it is significant that sec. 46(1) already contains an anti-competitive purpose element. It stipulates that an infringement may be found only where the market power is taken advantage of for a purpose proscribed in para. (a), (b) or (c). It is these purpose provisions which define what uses of market power constitute misuses.

The Court of Appeal also indicated that this approach is correct.[192] In *Geotherm* Gault J stated that "[t]he distinction between vigorous legitimate competition by a corporation with substantial market power and conduct that contravenes the section is the purpose of the conduct."[193] However, the Privy Council takes a different point of view. According to their Lordships:[194]

> [a]lthough it is legitimate to infer "purpose" from use of a dominant position producing an anticompetitive effect, it may be dangerous to argue the converse ie, that because the anticompetitive purpose was present, therefore there was use of a dominant position.

To infer purpose from use leads to the situation where a dominant firm could have an anti-competitive purpose but would not breach s 36 because it acted in a way that a non-dominant firm would or could have acted. Therefore if dominant firms are careful in how they achieve any anti-competitive purposes they will not contravene s 36. It is also unlikely that they will contravene any other section because s 36 is the only section aimed at unilateral conduct.

The Trade Practices Act 1974(Cth) has a specific section that provides that purpose may be ascertained simply by inference from the conduct undertaken or other circumstances.[195] There is no equivalent provision in the Commerce Act probably

---

191 Above n 42, 50,010.
192 Above n 181, 437.
193 Above n 147, 649.
194 Above n 8, 402.
195 Section 46(7) is quoted in full in Appendix A.

because "it is clear that in the absence of such a provision the courts have accepted as evidence of purpose inferences taken from the conduct of the dominant firm in question."[196] In light of the comments by the Privy Council discussed above it may be necessary to include such a provision in future.

4 *Purpose and the* Telecom v Clear *trilogy*

The three cases involving Telecom and Clear that related to the use of the Baumol-Willig rule for pricing access to Telecom's network are an interesting illustration of the application of the use and purpose tests.[197] There was no question of whether Telecom was in a dominant position or not as counsel conceded that point.[198] Therefore the issues were whether Telecom had used its dominant position and if so, was it for one of the proscribed purposes. The High Court decision indicated that there was 'use' but no 'purpose',[199] the Court of Appeal found both 'use' and 'purpose',[200] however, the Privy Council found 'purpose' but no 'use'.[201] Indeed, stated like this, it is hard to believe that all three decisions were based on the same facts.

The primary issue was whether the application of the rule included an element of monopoly profits being charged to the competitor and if so whether that was sufficient to contravene s 36. It is clear that s 36 is "not aimed at mere monopoly charging or terms of dealing",[202] it is only when that type of monopoly pricing affects a competitor that the section can be used. Both the High Court and the Privy Council decided that although monopoly profits may be included, they accepted the evidence of some of the economic experts that those profits could be competed out of the pricing by an efficient competitor.[203]

---

196 See *Review of the Commerce Act 1986: A Discussion Paper* above n 49, 33.

197 The Baumol-Willig rule is one of the many issues in this line of cases, however, it is the focus of this part of the paper.

198 Above n 79, 194.

199 Above n 79, 217.

200 Above n 181, Cooke P at 416, Gault J at 437.

201 Above n 8, 402-403.

202 It is clear that s 36 is "not aimed at mere monopoly charging or terms of dealing ..." Above n 79, 197. It is only when that type of monopoly pricing affects a competitor that the section can be used.

203 Above n 8, 406; also above n 198, 214.

The Privy Council started from a different point to the other decisions because it decided initially that Telecom clearly had one of the proscribed purposes. The Privy Council stated that it was a hopeless task to argue that Telecom did not have an anti-competitive purpose because: [204]

> it would be most improbable that Telecom lacked the purpose to deter its bitter rival, Clear, but also because its past conduct and certain of its internal memoranda show that in fact it did have that purpose.

This seems to focus on the general attitude of Telecom to Clear rather than the specific conduct in question. The Privy Council then considered whether there was 'use' of a dominant position.[205] As a "hypothetical supplier in a perfectly contestable market" would use the Baumol-Willig rule, there was no 'use' of a dominant position.[206] This decision was probably influenced by three factors. The first is that the Privy Council had already decided that there was 'purpose'. The second factor is that charging of monopoly prices is not generally proscribed by the section.[207] Thirdly, if it is desirable to eliminate the charging of monopoly profits, s 36 does not have to be mis-interpreted to achieve this as the price control provisions of the Act specifically allow for it.[208]

The High Court's decision is quite different although it achieves exactly the same result. The possibility of including monopoly profits was again the major issue the court had to address. The difference in this decision is that the court linked the ability to compete out the monopoly profits and therefore enhance competition to the purpose requirement. It stated that:[209]

> [i]f the defendant's conduct is more likely than not, in light of available alternatives, to improve competition, the defendant cannot be said to be in breach of the purpose requirements of s 36. There is an improvement in competition when there is an

---

204 Above n 8, 402.
205 See discussion above in Part III D - Use of a Dominant Position.
206 Above n 8, 406.
207 Section 36 will only apply to monopoly pricing if it involves some form of vertically integrated firm that is competing with the person it is supplying.
208 Above n 8, 407.
209 Above n 79, 217.

> enhancement of an efficient competitive process. Effect does not necessarily imply purpose. But Telecom's intent can be inferred from an analysis of the true character of the charging regime it proposes.

5 *Combining use and purpose*

Most of the difficulties associated with the tests for purpose and use are due to the artificial separation of the elements. The consequence of addressing each element individually is that the courts are loath to use a test that may include conduct that is not within the general purpose of the provision. Therefore great care is taken to ensure that the test for the specific element is not so wide as to include behaviour that the section as a whole would not include. This can lead to an extremely narrow test and ignores the fact that the provision needs to be read as a whole.[210] This is particularly evident when analysing 'purpose' and 'use' as the two elements are interdependent. This is clearly indicated by the Privy Council when it stated that:[211]

> [t]he use of a dominant position otherwise than for one of those purposes does not constitute a breach. Contrawise, the fact that a person has acted in order to achieve one of the purposes (a), (b) or (c) does not constitute a breach unless he has used his dominant position to achieve those purposes.

They may have to be considered separately to ensure that both requirements are met, but the overall emphasis must be on their joint contribution. The Court of Appeal supported this proposition in stating that:[212]

> [i]t is the purpose of the conduct which distinguishes what is proscribed from what is legitimate. If the conduct in question does not involve use of a dominant position in the market, purpose alone will not contravene. In most circumstances the use and the purpose will not be easily separated and need not be.

---

210 For example the test for 'use' discussed above in Part III D 3 - The Privy Council Test.
211 Above n 8, 402.
212 Above n 181, 429.

This is also supported by the approach of Gault J in *Port Nelson*.[213] He stated that whether a dominant firm has used its position should be a question of fact rather than being decided by the use of "artificial scenarios".[214] However, the rest of the judgment addresses the two elements together.

F Summary

The current judicial approach determining whether s 36 has been breached is to split the provision into three elements and decide if each element has been satisfied. The three elements that need to be shown are:[215]

(i) a person who has a dominant position in a market;

(ii) who has used that dominant position

(iii) for the purpose of the matters referred to in subpara (a), (b) and (c) of subs (1).

The relevant market is determined by reference to; the constraints on the dominant firm, substitutability of demand and supply, and the four dimensions of the market.[216] Ultimately it is a question of fact. Section 3(8) defines dominant position and the relevant judicial test is as outlined in *Telecom v Commerce Commission* (CA) as refined by the Court of Appeal in *Port Nelson*. It is a high threshold test that requires more than 'high market power' or the ability to behave independently of competitors.

Use is determined by reference to the Privy Council test in *Telecom v Clear*. This requires that the conduct undertaken by the dominant firm be something that a non dominant firm in the same circumstances would not have done. It is an exhaustive test that has the effect of severely restricting the conduct that might possibly satisfy the use element. Finally, the purpose element requires that the purpose of the dominant firm be a substantial purpose but not necessarily the only purpose. It is also irrelevant whether purpose is found by objective or subjective means.

---

213 Above n 44.

214 Above n 44, 42.

215 Above n 8, 402.

216 The four dimensions are: product; function; geographic; and time. This is discussed fully above in Part III C 2 - Market.

All three elements have to be satisfied before a breach of s 36 will be found. The next part of the paper addresses the issue of whether a particular practice, which was originally a possible breach of s 36, is still arguably a breach under the current interpretation and application of the section.

IV SHAM LITIGATION

A Introduction and Definition of Sham Litigation

Normal market activity relates directly to the production, acquisition, supply or pricing of goods and services. There are many practices that a dominant firm can undertake that do not fall within the normal categories of market activity and consequently will only indirectly affect the market, competition and competitors. The issue that is addressed in this part of the paper is whether these practices contravene s 36. Examples of these types of practices are; statements of policy,[217] denial of access to advice,[218] delay in contract negotiations,[219] and overuse of litigation. The focus is on the use of litigation by dominant firms for anti-competitive reasons. This will be referred to as sham litigation.[220]

There are various reasons why a dominant firm would wish to undertake sham litigation. The most obvious is that it will raise the costs of the other party. It is not necessarily used to eliminate the other party completely from the market. It may only be used to slow their production down, or to increase their prices, or to delay their entry into the market. If a dominant firm is reaping monopoly profits then it may well be worth their while to undertake this sham litigation even if it is costly:[221]

> [u]sually, it would be commercial commonsense in a competitive marketplace to not risk the costs of anti-competitive litigation where even a positive result would be

---

217 Above n 147, 650.

218 Above n 147, 652.

219 Above n 181, 415.

220 An alternative definition of sham litigation is where "a defendant has used legitimate rights for anticompetitive purposes". See AK Laurenson *Sham Litigation and its Relevance to Section 36 of the Commerce Act 1986* (LLB (Hons) Legal Writing, Victoria University of Wellington, 1992) 3.

221 SJ Welsman "Commercial Power and Competitor Litigation" (1996) 24 ABLR 85, 87.

unlikely to change the dynamics of the market. However, as the balance of power in a market shifts towards larger entities, desirable competition techniques, such as reducing prices and improving products and services, may become more costly to a dominant business than aggressive anti-competitive use of court or administrative processes. At times, an instigator might only be able to justify and sustain litigation in a commercial sense *because of* its market power.

B Early Recognition of Sham Litigation in the Courts

Instances of sham litigation have been recognised in Australia,[222] Canada[223] and the United States of America.[224] The Australian case law initially focused on enforcement of intellectual property rights and use of contractual rights. The line of cases pre *Queensland Wire* tended towards the view that "to exercise in good faith an extraneous legal right, though the effect may be to lessen, or even eliminate, competition is to take advantage of that right, not of market power."[225] However, the more modern approach is that taking legal proceedings may be use of a dominant position in some circumstances.[226] This reflects the view that "the exercise of contractual rights cannot sensibly be looked at in isolation from the circumstances in which they were brought into being or the circumstances in which they were exercised."[227]

The US has a specific and reasonably well developed doctrine that deals with sham litigation. The New Zealand courts are reluctant to import US doctrines as evidenced by the discussion of the essential facilities doctrine in *Union Shipping*[228] and also the discussion of the sham litigation doctrine in both *Geotherm*[229] and *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd.*[230] Therefore this

---

222 For example *Queensland Wire* above n 42; *Dowling v Dalgety Australia Ltd* (1992) ATPR 41-165; and *Australasian Performing Right Association Limited v Ceridale Pty Ltd* (1991) ATPR 41-074.

223 An example is *Director of Investigation and Research v Laidlaw Waste Systems Ltd* (1992) 40 CPR (3d) 289.

224 For more information on American cases see above n 220 and above n 221.

225 *Warman International v Envirotech Australia Pty Ltd* (1986) ATPR 40-714, ?? 502.

226 Above n 222.

227 Above n 128, 69.

228 Above n 7, 101,644.

229 Above n 147, 652.

230 [1992] 3 NZLR 247, 251.

paper proceeds on the basis of first principles rather than by simply importing a foreign doctrine.[231]

There are two cases in New Zealand that specifically deal with sham litigation.[232] They are the *Geotherm* decision[233] and the *Telecom v Clear* decision.[234] The first obstacle to overcome was whether it was possible that non-normal market activity could even be considered under s 36. The Court of Appeal had no problem with this issue. It stated that:[235]

> [w]e do not consider that s 36 when read with s 3(8) is intended to be confined to market activity *in* the production, acquisition, supply or pricing of goods or services. Clearly it extends to conduct capable of "influencing" those market elements. There must, however, be a clear and direct link between the influence and the dominant position.

The Court considered that this was further supported by the enactment of s 36(2) which prevents the enforcement of intellectual property rights from being considered a 'use of dominant position in a market'.[236] This would only be necessary if it was considered possible that the courts would categorise this as a contravention of s 36.[237]

After canvassing the relevant Australian authority the Court decided that: [238]

> the exercise of statutory rights will not necessarily be beyond the scope of the New Zealand s 36. As s 3(8) indicates, technical knowledge and access to materials and capital are factors in the capacity to influence production and supply and going to market dominance. If in a particular case they are an element of a dominant position

---

231 For discussion of the applicability of the US doctrine see above n 220 and above n 221.

232 Earlier cases also dealt peripherally with arguments relating to sham litigation but are unimportant for present purposes. For example, *Bond and Bond Ltd v Fisher & Paykel Ltd* (1986) 6 NZAR 278; and *ARA* above n 7, 680.

233 Above n 147.

234 Above n 230.

235 Above n 147, 649.

236 Above n 147, 652.

237 Above n 128, 68.

238 Above n 147, 651.

> and are used in the course of the exercise of statutory rights for a proscribed purposes s 36 might be breached.

Therefore although the courts recognise that in certain situations taking legal proceedings may be a 'use of dominant position' they also recognise that it is not clear what is required to successfully prove this.[239] Some guidance is given by the final paragraph in *Geotherm* which states:[240]

> [a]s already mentioned, it is difficult to suppose that a contravention of the Act will be established by the mere reasonable exercise of rights of objection. It is as well to expand on this. Even a monopoly must be entitled to make a case to the appropriate licensing or other authority for the preservation of its monopoly. This submission of reasonable arguments to that end and the taking of reasonable steps to prepare the case could not in themselves amount to a use of a dominant position in the market. Something more would have to be shown to bring [the] conduct within s 36.

The issue becomes what is "something more"?[241] In *Telecom v Clear* Smellie J stated that a sham litigation argument "is infinitely more difficult to sustain than where a more obvious anti-competitive procedure such as price-fixing or refusal to supply raw materials, is alleged."[242] In assessing the facts he decided that Telecom's refusal to refer the dispute to the Commerce Commission did not amount to unreasonable behaviour and implied that a complaint that is trivial in nature but which will establish a cause of action which could require a Court remedy would fall short of "something more".

In summary, prior to the decisions of the Privy Council in *Telecom v Clear*, and the Court of Appeal in *Telecom v Commerce Commission*, the courts were open to the possibility that in the right circumstances sham litigation would contravene s 36. The paper moves on to consider whether sham litigation may still be considered 'use of a dominant position' under the new application and interpretation of s 36. In doing this

---

239 Above n 230, 252.
240 Above n 147, 655.
241 Above n 230, 254.
242 Above n 230, 251.

it will be necessary to identify more clearly the necessary circumstances for a sham litigation argument and this is discussed in Part IV D - Applying the Theory.

C Application of Section 36 to Sham Litigation Situations

To prove a breach of s 36 due to sham litigation requires a person in a dominant position in a market who uses that position and has the requisite purpose or purposes. These factors are discussed in detail below.

1 *Dominant position in the market place*

The two elements of this requirement do not directly impact on the issue of whether sham litigation can be 'use of a dominant position'. The question of market is factual in nature and so will depend on the circumstances of the case. There are two possible markets to argue about, the market that the person is dominant in and the market that is affected by the dominant firm's conduct (if different). As noted above the conduct does not necessarily have to be 'in' the market as long as it influences market elements and presumably this means in either market.[243]

Whether a firm is in a dominant position or not is a very important consideration under s 36. However, it will only indirectly affect the issue of sham litigation. The difficulty is that currently the threshold for deciding dominant position is extremely high and this may mean that firms that are potentially sham litigants only have a 'high' degree of market power and so do not contravene the section.[244] A related but somewhat different issue is whether it is fair that only firms in a dominant position get sanctioned for participating in sham litigation. The answer is that non-dominant firms may also succeed with other unilateral conduct, but normally undertaking such conduct is not worth the costs associated with it. If firms have enough power to make sham litigation a viable strategy but do not pass the high threshold of dominance, one could argue that it is the threshold that is at fault rather than the possibility of sham litigation being a breach of s 36.

---

243 Above n 147, 649.

244 See the discussion in Part III C 3 - Dominant Position.

2 *Use of a dominant position*

Given that the Privy Council test for 'use' of a dominant position is the current exposition of the required conduct it will be quite difficult to argue that sham litigation is a 'use' of a dominant position. As *Gault on Commercial Law* states:[245]

> [a] rigid adherence to the Privy Council test would exclude all cases of abuse of legal rights from action under s 36, unless a very liberal view of the words "but otherwise in the same circumstances" is taken. However it is clear that such conduct was contemplated as a possible contravention of s 36 because s 36(2) expressly states that a person does not use a dominant position in a market for any of the purposes in s 36(1)(a) to (c) by reason only that they seek to enforce a statutory intellectual property right. There would have been no need for this exemption if such conduct could not have been argued to be a contravention of s 36.

Any firm can take court action to enforce contractual or other rights and as such sham litigation is possibly conduct that "a person not in a dominant position but otherwise in the same circumstances would have acted."[246] To circumvent this it would be necessary to somehow distinguish normal litigation from sham litigation. The difficulty with doing this is that the usual way to distinguish would be to look at the purpose of the litigant. This undermines the whole need to look at 'use' as more than a mere causal connector and therefore makes the argument somewhat circular.

Another potential way to circumvent the strict application of this test is to analyse the litigation itself to decide if it is reasonable or not. Scott argues that:[247]

> [a] non-dominant firm can make reasonable arguments and take reasonable steps in preparing a case. "Reasonable arguments" suggest that the firm making them wants to or, at least, has a chance to win. A firm that makes unreasonable arguments cannot win. A firm in a competitive market could not afford to waste money on a case it could not win. Similarly, it would not be able to afford to object regardless of the merits or

---

245 See above n 9, 3-150.

246 Above n 8, 403; also see generally the discussion in Part III D - Use of a Dominant Position.

247 PG Scott "Abuse of Judicial and Administrative Processes - An Antitrust Violation?" (1993) 21 ABLR 389, 395.

> afford to assist other objectors. A dominant firm that has made monopoly profits could afford to do so. It has "deep pockets". In this way a dominant firm uses its position. The above factors are also relevant to purpose. A firm which brings a case it cannot win must have a purpose other than winning. This must be to harm the other party.

One would have to categorise the conduct as unreasonable litigation rather than simply litigation. Patterns of sham litigation behaviour may also enable some form of differentiation between dominant and non-dominant firms.[248] Of course the counter is again that a non-dominant firm can undertake unreasonable litigation or a pattern of litigation - especially considering the range of firms that now fall below the dominance threshold. However, it is possible that the Court of Appeal would be willing to accept this type of analysis if it deemed it necessary to avoid the "artificial scenario" postulated by the Privy Council.[249] There are also relitigation problems associated with this type of approach. It is not a straightforward issue - one cannot say with certainty that if sham litigation is proven that it would be considered a use of dominant position. It is enough at this point to say that any window of opportunity opened by the *Geotherm* and *Telecom v Clear* cases has potentially been closed due to the Privy Council test for 'use'.

3 *Purpose*

The definition of sham litigation given above is dependent on the purpose of the litigant. Purpose is central to the whole issue of sham litigation being use of dominant position. It is not disputed that people have a right to undertake court proceedings for various reasons. The difficulty is when proceedings are undertaken for anti-competitive reasons such as deterring, eliminating or preventing someone from competing. The United States *Grip-Pak Inc v Illinois Tool Works Inc* succinctly states the difference as being "when the plaintiff's purpose is not to win a favourable judgment against a competitor but to harass him and deter others by the process itself, regardless of the outcome of litigating."[250]

---

248 Above n 247, 401.
249 Above n 44, 42.
250 *Grip-Pak Inc v Illinois Tool Works Inc* 694 F.2d 466 (1982), 472.

Most of the discussion on sham litigation and the United States sham litigation doctrine relates to when exactly the requisite purpose will be shown. Particular problems are associated with taking a single case as opposed to patterns of litigation.[251] Is there an anti-competitive purpose if the dominant firm actually wins? Can a good faith case ever be considered sham litigation and if not what standard is required? Does the cause of action have to be frivolous, lacking in merit, baseless, unreasonable, unwinable, part of a scheme or policy of harassing the plaintiff or must the costs simply outweigh the benefits?[252] In almost all the situations listed it is easy to say 'but what if ...'. Laying down a specific rule to identify situations where the anti-competitive purpose will be assumed, presumed or proven is not the answer. This does not mean that the courts have to use an ad hoc approach to these situations, rather it requires common sense and a logical approach rather than a set of detailed rules.

A substantial purpose is all that is required by the legislation.[253] This simplifies the issue for New Zealand courts. For example, in situations where the sham litigant actually wins, as long as one of the substantial purpose in undertaking the proceeding comes within the proscribed purposes listed in s 36(1)(a)-(c), then theoretically (provided the other elements are fulfilled) there is a breach of s 36. On the other hand, is it good policy to punish someone for taking action when the anti-competitive purpose is only one of their purposes? A closely related issue is whether it is subjective or objective purpose that is relevant. Sham litigation is a situation when there is potential for there to be a difference depending on which test is used. This is complicated by the fact that quite often legal opinions and therefore legal privilege will be a factor in determining the purpose of the litigant.[254]

Prior to the Privy Council decision in *Telecom v Clear*, in most cases it was enough to prove an anti-competitive purpose and then infer the 'use' element. Now, according

---

251 A single, well-timed and carefully-pleaded case with appeals can cost a competitor a large amount of money and time even if it is frivolous. A pattern of claims should not be a prerequisite but, rather, persuasive evidence of a sham. Academic authority strongly supports this. See above n 247, 406.

252 Posner J articulated a test in *Grip-Pak*, above n 250, which relied on a cost-benefit analysis. Unless the law suit was cost-justified it is a sham. For more discussion of this point see above n 209, 403.

253 See the discussion in Part III E - Purpose.

254 Above n 221; also see above n 247.

to the Privy Council, one can infer purpose from use but not use from purpose.[255] If this is accurate, even if there is a situation where there is clearly an anti-competitive purpose in undertaking litigation, given the extreme problems associated with the Privy Council test for 'use' it is unlikely that sham litigation will ever contravene s 36.

D Applying the Theory

An application of the theory discussed above to a practical situation will illustrate the difficulties with the new judicial interpretations of and tests for s 36. The example chosen is the *Geotherm* case because it clearly shows that prior to these new judicial tests sham litigation was arguable as a cause of action under s 36.

1 *The facts of* Geotherm

The case of *Electricity Corporation Ltd v Geotherm Energy Ltd* involved three parties and various allegations of use of a dominant position.[256] For simplicity this discussion will just use the two main parties. The first party, Electricity Corporation Ltd (Electricorp), produces and supplies wholesale electricity. The second party, Geotherm Energy Ltd (Geotherm), intends to produce electricity through an electrical generating plant employing part of the Wairakei geothermal resource and as such will be in direct competition with Electricorp.

It is alleged that Electricorp used its dominant position in undertaking various kinds of conduct. The alleged conduct included: giving public statements of policy, objecting unnecessarily to statutory applications, inducing agencies to give the corporation access to land adjacent to Geotherm, monopolising and foreclosing potential energy resources and preventing access to advice. As the focus of this part of the paper is on the use of litigation by dominant firms for anti-competitive reasons this discussion focuses on the allegation regarding the statutory approvals.

In relation to the statutory applications Geotherm argued that "Electricorp resisted at every stage on all possible grounds, many of them baseless, the statutory applications

---

255 See the discussion in Part III E 3 - Inferring Purpose.

256 The three parties are Electricity Corporation Ltd, Trans Power Ltd and Geotherm Energy Ltd.

required to be made by the respondents."[257] The manner in which the objections were undertaken is of particular relevance as it included "alleged perjury, overreaching grounds of opposition and assisting other objectors."[258] The discussion below addresses whether Geotherm would still have an arguable case under the current interpretation and application of s 36.

2 *Analysis*

To show a breach of s 36, Geotherm will need to prove that Electricorp is in a dominant position, that it has used that dominant position and that it had one or more of the proscribed purposes.

It is difficult to argue that Electricorp is dominant without information about the factual background of the electricity industry and Electricorp's part in that industry. However, it is likely that Electricorp will meet the high threshold test for dominant position and so it will be assumed (as it was in the original case)[259] that Electricorp is in a dominant position. The relevant market is either the production of electricity, the wholesale supply of electricity or possibly the production and wholesale supply of electricity. Given the nature of the industry it is likely that the geographical limits of the relevant market will be either the North Island or the central North Island.[260]

Due to the new test for 'use' it is difficult to argue that Electricorp has 'used' its dominant position. Unless it is conduct that a person not in a dominant position but otherwise in the same circumstances would have undertaken, it does not fit within the Privy Council test.[261] Generally any firm can object to statutory applications and it is not because such a firm is dominant that this conduct is possible. To be successful Geotherm will need to get around the Privy Council test. Relying on the effect the

---

257 Above n 147, 650. The statement of claim in respect of this particular allegation also provided that the "broad allegation is particularised by reference to certain specific conduct by Electricorp relating to Geotherm's planning application to the Taupo County Council, its application to the Minister of Energy for geothermal licences and its water rights applications under the Water and Soil Conservation Act 1967." Above n 147, 644.

258 Above n 147, 650.

259 Above n 147, 647.

260 The smaller the market is geographically the more likely it is that Electricorp is dominant.

261 Above n 8, 403.

conduct has because the firm is dominant will not be sufficient.[262] Geotherm's best argument, if the evidence supports it, is that Electricorp had a policy to exclude competitors which incorporates this and other conduct and that there was a pattern of behaviour supporting or indicating this policy. It would be useful to look at the behaviour of Electricorp as a whole rather than separating out the policy of the firm (ie purpose) from the actions of the firm (ie use). This might be enough to move the conduct from the 'any firm could undertake it' category into the 'only a dominant firm could undertake it' category, especially considering the Court of Appeal's attitude towards the Privy Council test for use.[263] However, it is still at best a tenuous argument.

Geotherm will also have to prove that one of Electricorp's substantial purposes when utilising its statutory right of objection is one of the proscribed purposes outlined in s 36(1)(a)-(c). It is unlikely that Geotherm will be able to find any evidence of a policy of excluding competitors which is implemented through this behaviour and so it will have to rely on proving that an anti-competitive purpose is the only logical reason for the conduct undertaken. The difficulty is that there could be many legitimate reasons why Electricorp was objecting to Geotherm's statutory application. However, as discussed above, it does not have to be the sole purpose, merely a substantial purpose. If Electricorp did indeed help other applicants for no apparent reason, overreach the grounds of opposition and orchestrate its personnel perjuring themselves it will certainly be indicative of an anti-competitive purpose as there are very few other reasons for acting this way. Purpose may also be inferred if there is evidence of continual objections on previously decided grounds, or continual objections on new and frivolous grounds. Such actions may be considered unreasonable and therefore contravene the 'reasonableness' threshold that *Geotherm* requires.[264] Ultimately the specific facts of the case will help to determine this issue and as *Geotherm* was an application for an interim injunction, there are not enough facts to be certain of this point.

---

262 See discussion above in Part III D 3 - The Privy Council Test, especially the text following n 164.

263 Above n 44, 42.

264 Above n 147, 655. The same requirement is referred to in *Telecom v Clear* see above n 230, 254.

3 *Conclusion*

There is a small possibility that Geotherm could prove a breach of s 36 because Electricorp used its dominant position for the purpose of preventing or deterring Geotherm from competing in the relevant market. As the analysis shows, however, it is much more difficult if not impossible to prove this under the new interpretation of s 36 than it was to prove it when the case was first argued in 1991. Even if Geotherm can prove all the factual requirements, ultimately it will still be a "matter of fact in each case whether the exercise of the rights of objection and the manner of their exercise in all the circumstances may be said to constitute use of a dominant market position."[265]

In a sham litigation situation the basic intention of the dominant party is to raise its rivals costs to deter or eliminate potential rivals from competing. It is a classic example of exploiting a dominant position. The current fragmented approach of the courts to s 36 cases does not prevent the dominant party from undertaking this course of conduct. However, an approach that treats the section as a whole, instead of a series of unrelated individual tests, would probably mean that the courts would identify this conduct as an exploitation of a dominant position and would act accordingly.

V CONCLUSION

Section 36 has been separated into at least three different elements. Each element is assessed separately and usually has its own test or tests that are used to indicate when the element has been fulfilled. In setting or defining these tests there is a tendency to address each element as if it is the sole component of the section. Consequently the tests for the element are usually set too high as it is perceived that otherwise the scope of the conduct caught would be too wide. The section as a whole is not given enough attention and it is the section as a whole that Parliament enacted not separate, individual tests. The overall effect is that s 36 has lost most of its power and conduct that is theoretically 'use of a dominant position' is being legitimately undertaken as the current interpretation and application of the section no longer proscribes that conduct.

---

[265] Above n 147, 652.

The previous discussion illustrates the difficulty with the section as it is currently interpreted and applied. The threshold for dominance is so high that many companies with potentially high market power are not caught. The 'use' test is so narrow that very little conduct is considered to fulfil it. When combined with the almost impotent purpose element the overall effect is a weak and ineffectual constraint on unilateral conduct. The specific example discussed, sham litigation, also graphically illustrates how weak and ineffectual the section has become as a practice that was previously considered 'use of a dominant position' is now barely arguable under the section.

If the section was originally enacted to prevent monopolies or dominant firms from exploiting their power and this is no longer being achieved then it is time to reassess the law. If Parliament's attitude towards unilateral conduct has changed in the last 10 years then the section will need to be completely revised and rewritten in line with any new requirements. However, if Parliament's attitude toward unilateral conduct is the same or similar as when s 36 was first enacted then clarification is required. The minimum that needs to be done is for Parliament to clarify what is required from the 'use' element of the section. More importantly there needs to be some indication that the 'use' and 'purpose' element are interconnected and that the section needs to be read as a whole, not as a collection of separate tests. Parliament needs to realise that how the section was originally interpreted and applied has radically changed from how it is interpreted and applied today and if this is cause for concern then immediate legislative action is required.

VI APPENDICES

Appendix A Extracts from Section 46 of the Trade Practices Act 1974 (Cth)

Section 46(1)

A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Section 46(3)

In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of -

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

Section 46(7)

Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in sub-section (1) notwithstanding that after all the evidence has been considered the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

Appendix B *Extracts from* Re Proposal by News Ltd *(1986) 6 NZAR 47, 51.*

Paragraph 10

Bearing these matters in mind, it may assist for the future if the Commission provides an expanded and explanatory list of some of the factors (including those set out in s 3(8)) which may be relevant to the issue:

(i) The structure of the market, which requires a consideration of:
   (a) The share of the market of the merged new concern.
   (b) The degree of market concentration.
   (c) The size distribution of all concerns in the market.
   (d) The extent to which the products in question are characterised by product differentiation and sales promotion, ie whether there are reasonably close substitutes.
   (e) Access to technical knowledge, materials and capital.
   (f) The financial stability of the merged concern in relation to other operators in the market.
   (g) The nature of any formal, stable and fundamental contracts, arrangements or understandings between concerns in the market.
   (h) The extent of corporate integration (eg interlocking shareholdings and cross-directorships) among concerns in the market.
   (i) The extent of vertical integration.

(ii) The extent of restraints imposed by the conduct of competitors or potential competitors or by others affected, which requires a consideration of:
   (a) The extent to which competition exists or has existed and is likely to continue.
   (b) The extent to which the concern is constrained by the conduct of competitors.

(c) The capacity of the concern to determine prices in or to exclude entry to the market without being inhibited in that determination or action by suppliers and acquirers.

(d) The height of barriers to entry in that market and the ability of potential competitors to enter the market and to sustain a position in the market.

This list is not necessary exhaustive of the matters which need to be considered. Nor may all of these factors be relevant in any particular case. Further, there is no absolute measure by which a dominant position can be determined - only a mix of factors upon which a judgment is to be based. The importance of any particular factor will depend upon the particular proposal under consideration. The end result of the assessment required by s 66(7) is to test whether in the relevant markets, having regard to all of these factors, the degree of dominance of the new concern, as created or strengthened by the proposal, allows or would be likely to allow workable or effective competition in the relevant market.

Appendix C Alternative Legislative Tests for 'Use' and 'Purpose'

The first alternative is from Y van Roy "The Privy Council Decision in *Telecom v Clear*: Narrowing the Application of s36 of the Commerce Act 1986" [1995] NZLJ 54, 60.

A helpful way to proceed would be to specify in the Act that "use" of a dominant position should be determined as a causal link between the conduct at issue and the dominance, and then to outline the ways in which "use" might be determined. These should include:

(i) Conduct which would only be done by a firm with market power, or which would not be done by a firm in a competitive market situation; and

(ii) Conduct which only has an anti-competitive effect when carried out by a firm with market power; and

(iii) Any other method that the Court thinks best describes the causal connection between use and dominance in the particular case, taking into account the market context of the conduct.

An overriding statement that it is the purpose of the conduct which determines which uses contravene the Act would also be helpful. This would ensure the importance of the determination of "purpose", and consistency with cases in Australia. The above guidelines would spell out what a Court is endeavouring to do in determining "use" (ie determining the causal connection), and would leave it to the good sense of the courts to understand which method to choose.

The second alternative is from LF Hampton "Section 36(1) of the Commerce Act 1986: An Analysis of its Constituent Elements" in RJ Adhar (ed) *Competition Law and Policy in New Zealand* (The Law Book Co Ltd, Sydney, 1991) 179, 199.

The following classification attempts to specify the conditions under which conduct is likely to constitute a use of a dominant position under s. 36 (assuming proof of the requisite purpose):

(a) where the conduct could only be performed by a person in a dominant position (market dominance is a sufficient condition for the occurrence of the offence); or

(b) where the conduct could be performed by both dominant and non-dominant firms:

  (i) where no harmful effect would have resulted if there had not been a dominant position (market dominance is a necessary condition for the effect to result); or

  (ii) where the harmful effect would have occurred irrespective of the market power of the respondent firm, but where the harmful effect was strengthened by the circumstance that the respondent was indeed dominant (market dominance is neither necessary nor sufficient for the effect to result).

Category (b)(ii) is troublesome since it could encompass ordinary business practices typical of those used in a competitive market.

VII BIBLIOGRAPHY

A Table of Cases

Apple Fields Ltd v The New Zealand Apple and Pear Marketing Board (1989) 2 NZBLC 103,564.

Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd [1987] 2 NZLR 647.

Australasian Performing Right Association Limited v Ceridale Pty Ltd (1991) ATPR 41-074.

Bond & Bond Ltd v Fisher & Paykel Ltd (1986) 6 NZAR 278.

Broadcast Communications Ltd v Commerce Commission (1991) 4 TCLR 537.

Clear Communications Ltd v Telecom Corporation of New Zealand Ltd (1992) 5 TCLR 166.

Clear Communications Ltd v Telecom Corporation of New Zealand Ltd (1992) 5 TCLR 413.

Commerce Commission v Port Nelson Ltd (1994) 6 TCLR 406.

Director of Investigation and Research v Laidlaw Waste Systems Ltd (1992) 40 CPR (3d) 289.

Dowling v Dalgety Australia Ltd (1992) ATPR 41-165.

Eastern Express Pty Limited v General Newspapers Pty Limited (1991) ATPR 41-128.

Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641.

Grip-Pak Inc v Illinois Tool Works Inc 694 F.2d 466 (1982).

Lion Corporation Ltd v Commerce Commission [1987] 2 NZLR 682.

Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd (1992) ATPR 41-196.

New Zealand Apple and Pear Marketing Board v Apple Fields Ltd [1989] 3 NZLR 158.

New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd [1990] 1 NZLR 731.

Port Nelson Ltd v Commerce Commission Unreported, 3 July 1996, Court of Appeal, CA 169/95.

Proposal by Broadcast Communications Ltd [1990] NZAR 433.

Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd (1989) ATPR 40-925.

Radio Telefis Eireann and Independent Television Publications Ltd v European Commission [1995] All ER (EC) 416.

Re Continental Can Co Inc [1972] 2 CMLR D11.

Re Edmonds Food Ltd 21 June 1984, Commerce Commission Decision No 84.

Re Magnum Corporation Ltd and Dominion Breweries Ltd (1986) 2 TCLR 177.

Re Proposal by News Ltd (1986) 6 NZAR 47.

Re Queensland Co-operative Milling Assn Ltd (1976) ATPR 40-012.

Stevedoring Services (Nelson) Ltd v Port Nelson Ltd [1992] NZAR 5.

Telecom Corporation of New Zealand Ltd v Clear Communications Ltd [1992] 3 NZLR 247.

Telecom Corporation of New Zealand Ltd v Clear Communications Ltd [1995] 1 NZLR 385.

Telecom Corporation of New Zealand Ltd v Commerce Commission (1991) 4 TCLR 473.

Telecom Corporation of New Zealand Ltd v Commerce Commission [1992] 3 NZLR 429.

Tru Tone Ltd v Festival Records Retail Marketing Ltd [1988] 2 NZLR 352.

Union Shipping NZ Ltd v Port Nelson Ltd [1990] 2 NZLR 662.

Warman International v Envirotech Australia Pty Ltd (1986) ATPR 40-714.

B Texts

Adhar RJ (ed) *Competition Law and Policy in New Zealand* (The Law Book Co Ltd, Sydney, 1991).

Berry M, Housden T and Gault TM (eds) *Gault on Commercial Law* (Brooker's Ltd, Wellington, 1994).

Bollard A (ed) *The Economics of the Commerce Act* (New Zealand Institute of Economic Research Inc, Wellington, 1989).

Corones SG *Competition Law and Policy in Australia* (The Law Book Co Ltd, Sydney, 1990).

Corones SG *Restrictive Trade Practices Law* (The Law Book Co Ltd, Sydney, 1994).

Hay D and Vickers J (eds) *The Economics of Market Dominance* (Basil Blackwell Ltd, Oxford, 1987).

Heydon JD and Donald BG *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct and Consumer Protection* (The Law Book Co Ltd, Sydney, 1989).

Hill BM and Jones MR *Competitive Trading in New Zealand: The Commerce Act 1986* (Butterworths, Wellington, 1986).

Horsman J *Graphic Economics* (Longman Paul Ltd, Auckland, 1979).

Miller RV *Annotated Trade Practices Act* (13 ed, The Law Book Co Ltd, Sydney, 1992).

Taperell GQ, Vermeesch RB and Harland DJ *Trade Practices and Consumer Protection* (3 ed, Butterworths, Sydney, 1983).

Utton MA *Market Dominance and Antitrust Policy* (Edward Elgar Publishing Ltd, England, 1995).

van Roy Y *Guidebook to New Zealand Competition Laws* (2 ed, CCH New Zealand Ltd, Auckland, 1991).

Watson S and van Roy Y *The Law of Business Organisations* (Palatine Press Ltd, Auckland, 1995).

C Articles, Essays and Research Papers

Adhar RJ "Battles in New Zealand's Deregulated Telecommunications Industry" (1995) 23 ABLR 77.

Adhar RJ "The Privy Council and 'Light-Handed Regulation'" (1995) 111 LQR 217.

Arnold T "Competition Law" [1995] NZ Law Review 370.

Arnold T "The Courts and the Pricing of Access to Essential Facilities" (1995) 3 NZBLQ 123.

Berry M "Market Dominance Principles in New Zealand" (1987) 3 Aust & NZ Trade Practices Advertising and Marketing Law Bulletin (No 6) 85.

Bollard A and White D "The Interface Between Law and Economics in the Context of the Commerce Act 1986" in RJ Adhar (ed) *Competition Law and Policy in New Zealand* (The Law Book Co Ltd, Sydney, 1991) 44.

Boutel A "Purpose in the Commerce Act" in Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1993) vol 5, p 109.

Brunt M "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation" (1990) 18 ABLR 86.

Clarke PH "Monopolisation Without a Misuse of Market Power - The Debate Continues" (1988) 16 ABLR 78.

Corones SG "Are Corporations with a Substantial Degree of Market Power Free to Choose their Distributors and Customers?" (1989) 4 QUTLJ 21.

Eisenberg J "Predatory Pricing in the Context of Australian and New Zealand Competition Law" in Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1991) vol 4, p 1.

Farmer JA "Competition Law" [1990] NZ Recent Law Review 203.

Guscott S *Section 36 of the Commerce Act 1986* (LLB (Hons) Research Paper, Victoria University of Wellington, 1990).

Hampton LF "Section 36(1) of the Commerce Act 1986: An Analysis of its Constituent Elements" in Adhar RJ (ed) *Competition Law and Policy in New Zealand* (The Law Book Co Ltd, Sydney, 1991) 179.

Hay GA "The Economics of Predatory Pricing" (1982) 51 Antitrust LQ 361.

Hay GA v McMahon K "The "Duty to Deal" Under Section 46: Panacea or Pandora's Box?" (1994) 17 UNSWLJ 54.

Hinton PB and Moorman DG "Competition Policy After the Porter Report" [1992] NZLJ 71.

Jew B "Competition Law and Policy in New Zealand by RJ Adhar - A Review" (1992) 7 AULR 237.

Korah K "Concept of a Dominant Position Within the Meaning of Article 86" (1980) 17 CML Rev 395.

Land J "Monopolisation: The Practical Implications of Section 36 of the Commerce Act 1986" (1988) 18 VUWLR 51.

Laurenson AK *Sham Litigation and its Relevance to Section 36 of the Commerce Act 1986* (LLB (Hons) Legal Writing, Victoria University of Wellington, 1992).

Meikle SN *The Prime Necessity Doctrine and Section 36 of the Commerce Act 1986* (LLM Research Paper, Victoria University of Wellington, 1995).

November JM "The Meaning of 'Use' of a Dominant Position: From *Queensland Wire* to *Electricity Corporation v Geotherm Energy*" (1993) 23 VUWLR 191.

November JM *The Meaning of "Use" of a Dominant Position in a Market for a Proscribed "Purpose": The Jurisprudence of Section 36(1) of the Commerce Act 1986* (LLM Research Paper, Victoria University of Wellington, 1992).

O'Donnell PTH *Competition or Efficiency: Section 3(8) and Section 3(9) of the Commerce Act 1986* (LLB (Hons) Legal Writing, Victoria University of Wellington, 1991).

Orsborn J "Commerce Amendment Act 1990" (1991) 6 AULR 597.

Patterson RH "The Rise and Fall of a Dominant Position in New Zealand Competition Law: From Economic Concept to Latin Derivation" (1993) 15 NZULR 265.

Pengilley W "Lowering the Monopoly Power Threshold: An Evaluation of the Australian Monopolization amendments and their Likely Results" (1987) 11 Sydney LR 196.

Pengilley W "The 'Essential Facilities" Doctrine and the Federal Court" (1988) 4 Aust & NZ Trade Practices Advertising and Marketing Law Bulletin (No 4) 57.

Scott PG "Abuse of Judicial and Administrative Processes - An Antitrust Violation?" (1993) 21 ABLR 389.

Steinwall R "Review Article: Competition Law and Policy in Australia by SG Corones" (1992) 15 UNSWLJ 561.

Shirtcliffe JGM "Access to essential Facilities in Electricity Supply" in Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1993) vol 5, p 23.

Stevens LL and Round DK "The Commerce Act 1986 - A Legal and Economic Commentary Upon Some Fundamental Concepts" (1987) 12 NZULR 231.

van Melle AI "Competition Law and Refusals to License Intellectual Property: *Radio Telefis Eireann and another v European Commission ('Magill')* [1995] All ER (EC) 416" [1995] NZLJ 318.

van Melle AI "Refusals to License Intellectual Property Rights: The Impact of *RTE & ITP v European Commission ('Magill')* on Australian and New Zealand Competition Law" (Forthcoming, December 1996/January 1997 ABLR).

van Roy Y "'Abuse of a Dominant Position' in New Zealand Competition Legislation" (1995) 7 ECLR 428.

van Roy Y "The Privy Council Decision in *Telecom v Clear*: Narrowing the Application of s36 of the Commerce Act 1986" [1995] NZLJ 54.

Welsman SJ "Commercial Power and Competitor Litigation" (1996) 24 ABLR 85.

D Commission and Departmental Papers

Business Competition and Corporate Affairs Division, Department of Trade and Industry *Review of the Commerce Act 1986: A Discussion Paper* (Wellington, 1988).

Commerce Commission *Abusing a Dominant Position: Section 36 of the Commerce Act* (Wellington, 1996).

Commerce Commission *Anti-Competitive Behaviour: What the Commerce Act Prohibits* (Wellington, 1995).

Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1988) vol 1.

Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1989) vol 2.

Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1990) vol 3.

Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1991) vol 4.

Commerce Commission *Current Issues in New Zealand Competition and Consumer Law* (Wellington, 1993) vol 5.

Competition Policy and Business Law Division, Ministry of Commerce *Reports and Decisions: Review of the Commerce Act 1986* (Wellington, 1989).

James K (ed) *Commerce Commission 1975-1996: The Coming of Age of Competition Law in New Zealand* (Commerce Commission, Wellington, 1996).

Trade Practices Commission *Misuse of Market Power: Section 46 of the Trade Practices Act 1974* (Trade Practices Commission, Canberra, 1990).

Trade Practices Commission *Review of the Commerce Act 1986: Comment by the Australian Trade Practices Commission on Department of Trade and Industry Discussion Paper* (Australia, 1988).

Vautier KM *The "Essential Facilities Doctrine"* (Commerce Commission, Occasional Paper No 4, Wellington, 1990).

E Workshop, Conference and Seminar Papers

Berry MN *Market Dominance Principles* (Commerce Act Workshop, Wellington, 1988).

Calhoun DC and Brown BWF *The Interface Between Amended Section 36 of the Commerce Act 1986 and Intellectual Property Law* (Competition Law and Policy Institute of New Zealand Inc Workshop, Wellington, 1990).

Clarke PH *Recent Developments in the Australian Law of Monopolization* (Commerce Act Workshop, Wellington, 1988).

Feil J and Smith K *Structure and Conduct: The Assessment of Dominance Under the Commerce Act 1986* (New Zealand Trade Practices Workshop, Auckland, 1987).

Hay GA *Market Dominance* (Conference Paper, 1990).

Hay GA Predatory Pricing (First Annual Workshop of the Competition Law and Policy Institute of New Zealand Inc, Christchurch, 1990).

Hill B *A Review of Developments Under Section 36 of the Commerce Act 1986* (First Annual Workshop of the Competition Law and Policy Institute of New Zealand Inc, Christchurch, 1990).

W *Is the "Essential Facilities" Doctrine of Trade Practice Law Simply Too Hard for the Federal Court of Australia or is There Some Hope Still Remaining? An Analysis of* Queensland Wire v BHP *Before the Full Federal Court* (Seminar Paper).

Riley A *The EEC Approach to "Dominance" and "Market"* (Conference Paper).

Round DK *Interpretation of Competition Tests* (Conference Paper).

van Roy Y *Predatory Pricing and Sections 36 and 36A of the Commerce Act 1986* (First Annual Workshop of the Competition Law and Policy Institute of New Zealand Inc, Christchurch, 1990).

r Heiford, Fiona Joy
Folder Rethinking
He unilateral conduct