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PART I: INTRODUCTION

The concept of market dominance is central to competition law in New Zealand, Australia, the United States and the EEC. Although different terminology is used in the different jurisdictions, the general idea is to address the potential for competitive harm. The law relating to market dominance generally works in tandem with the law of mergers and takeovers, the aim of which is to prevent firms from acquiring market dominance to the extent that this results in a lack of effective competition in a market. For firms already dominant in a market, the law of market dominance operates to place a special burden on them, which is intended to provide the antidote to consumer exploitation normally provided by competition.

The premise underlying the law of market dominance is that where there is dominance there is exploitative potential, and competition is apt to be thwarted. Competition, the antithesis of market dominance, is inherently a good thing. This is so regardless of possible beneficial effects of market dominance, for instance economies of scale. The firms most likely to be caught are those with entrenched market power which have operated in regulated sectors in the past without the need to worry about new or potential entrants. This is consistent with a move towards a more deregulated economy in which competition is encouraged. This paper focusses on section 36 of the New Zealand *Commerce Act* 1986 and the issues that arise out of the cases which have been decided since the inception of the Act. Section 36 reads:[1]

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1 Section 36(2) and (3) have been omitted since they are not relevant to the discussion in this paper.

36(1) [Dominant position] 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 any other market; or
(c) Eliminating any person from that or any other market.

In general section 36 is an ex ante, not an ex post, test, which assumes there is a precise way of telling in advance whether practices will be anti-competitive. It has twin objectives, to ensure that there are disincentives for firms to pursue particular forms of conduct, and to ensure that legitimate competitive conduct is not stifled. This distinction between legitimate and illegitimate competitive conduct is critical for the short- and long-term business decisions of the many New Zealand firms with market power.

Section 36 encapsulates an economic concept in a statutory provision. Although the interdependence of the two disciplines of law and economics is recognised, an essentially legal approach is taken in the courts. Some problems arise from this, for instance that lawyers concentrate on words, their order and the meaning of each, not necessarily in its context. As a result the interpretation of the section has become a matter of applying a number of separate threshold tests, each of which must be crossed before the section will apply. To some degree the economic concept has been obscured in the process, and the results do not always reflect a principled approach. The judgments to which lay assessors contributed are different both in layout and methodology from those where lay assessors were

absent.[2] The cases reflect the different points of view.

Different points of view are also found in the differing versions of the tests in section 36. Section 36 must be interpreted to allow a wide range of activities and proscribe only a small range, otherwise the market risks being unreasonably curtailed. The courts have been inconsistent in their approach, resulting in confusion as to whether all activities of a dominant firm fall within the section, with the purpose test as the limiting factor, or whether the scope of the section is confined to activities that constitute use of the dominant position. If the latter were the case, comparatively few of a dominant firm's activities would be subject to a purpose enquiry. A possible result would be that activities that were found not to be use of the dominant position could be taken by firms for anti-competitive purposes, yet attract no further action.

A further area of inconsistency relates to the approach to the definition of market. Although this has generally been considered the first issue to be decided, a recent case suggests this approach is wrong and that the concepts of market and dominance cannot be analysed separately.

Another issue arises in the application and effectiveness of the purpose tests. There is no agreement on whether the test is subjective or objective. This affects the ease of proof of a proscribed purpose. Another problem is that taken literally, the words of the purpose tests focus on

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2 Compare the judgments in *Magic Millions* and the *Chathams Island* case on the one hand with *Port Nelson* on the other for an example of different methodology and layout.

the competitor to the degree that one might conclude that protection of the competitor was the aim of the section. Courts have consistently stated that the aim of the Act is to promote competition, which is assumed to be in the best interest of consumers, rather than protect competitors. There may be some conflict between the words of the section and the aim of the Act. Since protection of competition may to some extent depend on protection of the competitor the test of purpose must balance two apparently conflicting objectives. The cases illustrate how this conflict is worked out in practice.

The concept of market power is critical to competition law since it is the antithesis of competition. The next section of the paper discusses the New Zealand perspective of market power, or "dominance" as it is referred to in New Zealand, and relates it to similar concepts in other jurisdictions. Then the facts of the New Zealand cases are described to set the stage for more detailed consideration of the issues raised above in the context of the cases in which they arise. Some general problems with section 36 are then discussed followed by concluding remarks.

PART II: THE CONCEPT OF MARKET POWER

In competition law an understanding of the concept of market power is critical, since a determination of the degree of market power is often a prerequisite to other enquiries. The rationale is that it is most unlikely that anti-competitive activities of a firm without market power will have appreciable

detrimental effects on competition in a market. Thus the legislation is concerned to eliminate these from further enquiry at the earliest stage. Section 1 of the United States *Sherman Act* 1890, for instance, prohibits agreements in restraint of trade. The test is applied as a two step process, first an assessment of the degree of market power, then if market power is found, an assessment of the degree of restraint of trade. A purpose enquiry under section 46 of the Australian *Trade Practices Act* 1974 is only made if the threshold for market power is crossed. Section 36 operates in the same way. The section 36 test of "dominant position in a market" is based on Article 86 of the EEC Treaty, which provides that:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The definition of market dominance in the *Commerce Act* 1986 for the purposes of section 36 is found in section 3(8):

Section 3(8) [Dominant position] 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 acquirer of goods or services either alone or interconnected with any 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.

The concept in section 3(8) has been encapsulated in a number of formulations including that of Maureen Brunt:[3]

> Market power is essentially the power of a firm to "administer" its production and selling policies (for example its prices, its service, its capacity, its techniques) somewhat independently of market pressures: it is the extent to which a firm can "give less and charge more" without its market being undermined by rivals' incursions. Yet the firm may not *choose* to give less and charge more. Rather, it has the *discretion* to do so. And so we say the essence of market power is "discretionary power".

The definition of market power in the United States introduces another dimension to that accepted in other jurisdictions. The most commonly used definition is found in the 1984 Department of Justice Merger Guidelines which state that market power is "the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time". The Guidelines stress the word "profitably" because in a competitive market a firm raising prices above the competitive level would gradually be forced out of business, whereas an absence of competition may be inferred if profitability can be sustained over time.

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3 M Brunt "'Market definition' issues in Australian and New Zealand trade practices litigation" (April 1990) ABLR 86, 93.

The emphasis on profitability in the US formulation is not found in the definition of the European Court in *Continental Can*4, which is the definition most commonly quoted in New Zealand:[5]

> Undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position when, because of their share of the market or their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question. This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate all will on the part of their economic partners, but it is enough that they be strong enough as a whole to ensure to those undertakings an overall independence of behaviour, even if there are differences in intensity in their influence on the different partial markets.

A problem with the European Court's definition is that very few firms would be in a position such as they describe. For most there would be some elasticity of demand that would eventually erode profitability. The definition is somewhat one-dimensional. The US definition adds the concept of time so that dominance is defined as a position of power over time. It is not the power a firm has in the short term since most firms, regardless of dominance, have this kind of discretion, but power in the long term. The time period would be that length of time within which one would expect competition to materialise if there were no hindrances in the form of actions of the firm or the nature of the market.

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4 *Re Continental Can Co Inc* [1972] CMLR D11.
5 Above n4, D27.

The nature of the market is closely related to the concept of dominance, since it dictates the circumstances in which dominance may or may not be found. A wide definition of market lessens the chances of dominance being found, and conversely a narrow definition enhances the risk for an influential firm. The nature of the market is established by looking at a number of factors including the existence of large market shares, large investment requirements, surplus capacity, profitability, production of a range of products, efficiency as a result of economies of scale and vertical integration. Additional barriers to entry may be created by law, such as patent rights or exclusive contracts. The definition of market will be further discussed below in Part IV.

Of the nine decisions made in New Zealand courts since the Act was introduced, four[6] never proceeded beyond an application for an interim injunction and are therefore limited in the extent of their consideration of the issues raised under section 36, and five[7] were decided in the High Court with two of

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6 *Chatham Islands Fishermans Co-Operative Company Limited* v *Chatham Islands Packing Company Limited @ Others* Unreported, 22 November 1988, High Court Wellington Registry cp 874/88; *Telecom Corporation of New Zealand Limited* v *Sanda Communications (NZ) Limited* Unreported, 20 September 1989, High Court Wellington Registry, cp 592/89; *Bond @ Bond Limited @ Anor* v *Fisher @ Paykel Ltd @ Anor* (1986) 6 NZAR 278; (1987) 1 NZBLC 102,622; *Glaxo New Zealand Ltd* v *The Attorney General* Unreported, 9 March 1990, High Court Auckland Registry cl 6/90; Unreported, 12 June 1990, Court of Appeal 81/89.

7 *Auckland Regional Authority* v *Mutual Rental Cars (Auckland Airport) Limited @ Others* [1987] 2 NZLR 647; (1988) 2 NZBLC 103,041; *The New Zealand Apple and Pear Marketing Board @ Anor* v *Apple Fields Limited @ Anor* [1989] 3 NZLR 158; (1989) 2 NZBLC 103,564 (HCT); (1989) 2 NZBLC 103,741 (CA); *New Zealand Magic Millions Ltd @ Anor* v *Wrightson Bloodstock Ltd* (1990) 3 NZBLC 101,501; *Tru Tone Ltd* v *Festival Records Retail Marketing Ltd* (1988) 2 NZBLC 99,113 (HCT); (1988) 2 NZBLC 103,286 (CA);

these going on to the Court of Appeal. All cases were initiated by private parties rather than the Commerce Commission. Part III of the paper describes the facts of the nine cases in the order in which they were decided. Some of the cases are included for completeness and to illustrate the types of situations in which section 36 was invoked. They do not all provoke further discussion. Others, however, raise issues that are fully discussed in Parts IV, V, VI and VII of the paper.

PART III: THE NEW ZEALAND CASES

Fisher and Paykel[8]

Fisher and Paykel was NZ's only manufacturer of white goods which it distributed to retailers under exclusive dealership arrangements. It had about 85% of the market. The plaintiff, a retailer, opened an electrical goods supermarket in Auckland which it wished to stock with a wide range of goods, including white goods of other brands. Fisher and Paykel refused to deal under these conditions and the plaintiff sought an interim injunction. The plaintiff alleged among other things that Fisher and Paykel was in breach of section 36 by using its dominant position for one of the proscribed purposes. The Court found there was a serious issue to be tried, since it was a reasonable inference that a purpose of the defendant's conduct was to use its dominance to deter competitive conduct in the market.

Union Shipping New Zealand Ltd v *Port Nelson Ltd* (1990) 3 NZBLC 101,618.

8 Above n6.

The Court, however, rejected the application on the balance of convenience.

ARA[9]

The Auckland Regional Authority (ARA) had statutory authority to administer and operate the Auckland International Airport. Two rental car companies, Avis and Hertz, had contracted with the ARA to provide and operate rental vehicle services at the airport with the proviso that no more licences with other rental car agencies would be given by ARA. Budget, a rental car company in competition with Avis and Hertz, claimed that by virtue of sections 27, 29 and 36 of the *Commerce Act* 1986 ARA was not bound by the proviso and was free to negotiate with Budget. The proceedings were brought by ARA which sought a declaration of the Court as to whether it was bound by its contracts or whether it was bound by the *Commerce Act* 1986 to negotiate. Barker J found no breach of section 29, but a breach of both sections 27 and 36.

The *Chatham Islands* case[10]

The defendants owned and controlled the only wharf facilities in the small community of Kaingaroa on the Chatham Islands. Until the plaintiffs, who had started their own fish processing cooperative in the Chathams, opened a rival plant at Kaingaroa, the defendants were operating the only local fish

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9 Above n7.
10 Above n6.

processing plant. The defendants' plant was located at the landward end of the wharf and access to the wharf was obtained through the plant premises. The local fishers habitually discharged their catch onto the defendants' wharf for processing at the defendants' plant, however the plaintiffs' co-operative had grown since its inception in 1988 to account for about 70% of the fish caught from the Chathams, and its members in Kaingaroa wished to patronise the plaintiffs' local facility. The defendants issued circulars stating that suppliers of the plaintiffs would not be permitted to use a number of facilities such as bait sales, access to credit, and use of the wharf. Fishers unable to use the wharf were forced to use dinghies to transport their catch and equipment. The defendants pointed out that when a major storm destroyed the wharf all fishers used dinghies till the defendants rebuilt the wharf, thus proving that it was a viable alternative. In an application for an interlocutory injunction, the plaintiffs alleged among other causes of action a breach of section 36. In an oral judgment Eichelbaum J found that the defendants were indeed in breach.

The *Sanda* case[11]

Sanda Communications was a small telecommunications company set up in Auckland in competition with Telecom, after deregulation of the telecommunications market. It leased from Telecom two megabits of space on the Auckland to Wellington link for which it had not paid. Telecom threatened to cut off the link. Sanda accused Telecom of a variety of discriminatory actions including non-performance of contract, statements by its officers prejudicial to Sanda's

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11 Above n6.

reputation with its clients, and breach of section 36. Due to the investment of time and effort required to answer the allegations, Telecom conceded that there was an arguable case and defended it on the basis of the balance of convenience. The Court made orders restraining Telecom from cutting the link but subject to Sanda paying current rental rates.

The Court found that Telecom was indisputably dominant in the telecommunications market. The fact that the Court made orders against Telecom suggests that the Court thought the pending substantive hearing might find Telecom in breach of section 36, though this is by no means clear. The Court observed that the orders made "should impress upon Telecom that its obligation is to trade fairly, even scrupulously, until the substantive issues are decided".[12] It is not possible to read into this statement that Telecom was in breach. However, it suggests that there is a special burden on dominant firms where small competitors exist, and the fact that the orders made meant Telecom could not exercise its contractual right to terminate service for unpaid debts suggests that the burden on dominant firms goes beyond normal commercial considerations, perhaps as far as special concessions. As mentioned above, it is not certain that this conclusion is based on the judge's perception of section 36 obligations. It is more likely that the foundation for the orders was Telecom's concession, and therefore the case has little to say about section 36.

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12 Above n6, 11.

Apple Fields[13]

In 1988 proceedings were brought in the High Court by Apple Fields Ltd against the New Zealand Apple and Pear Marketing Board and the New Zealand Fruit Growers' Federation. Apple Fields claimed the Board and the Federation had acted in concert to impose practices in breach of the freedom of competition provisions of the *Commerce Act* 1986. The Board and the Federation had acted pursuant to sections 31 and 32B of the *Apple and Pear Marketing Act* 1971 which the Board considered enabled it to impose unequal levies on different classes of growers.

Since 1948 growers had been paying levies to the Board, which used the funds to acquire capital assets such as storage sheds and sorting facilities required for the marketing process. Recently production had increased dramatically with new entrants to the industry plus existing growers who were expanding their output. Since the Board is a statutory monopsony, the additional production meant there was considerable pressure on existing facilities and a requirement for additional facilities which had to be funded from levies. The Board and the Federation thought the new growers and the existing growers who were expanding should carry the major funding burden. Consequently the "new crop levy" was imposed, which differentiated between new and longer established growers, and between those maintaining and those expanding production. Considerable discussion was held by the Board and Federation indicating their concern that recent and prospective entrants to the industry would suffer hardship, and allowances were made for this.

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13 Above n7.

In the High Court Apple Fields claimed among other things that the agreement between the Board and the Federation to impose differential levies was a trade practice that breached sections 27, 29 and 36 of the *Commerce Act* 1986. In relation to section 36, Holland J found without discussion that the Board with its monopsony had a dominant position in the market and had acted with a proscribed purpose.

The Board and the Federation appealed the case to the Court of Appeal[14] on the basis that the judge was wrong to find that the arrangement was "likely to have the effect, of substantially lessening competition in a market" within section 27. They also sought to raise section 43. Cooke P, appearing to wish to clarify the meaning of "purpose" in sections 27, 29 and 36, found that not only did the arrangement have the effect of lessening competition, but that this was an instance when purpose and effect could not be separated, and the arrangement was not only in conflict with section 27, but also with sections 29 and 36. There was very little discussion of section 36. Cooke P merely indicated that:[15]

> ...the arrangement of the levy between the Board and the Federation, however, well motivated, has had a substantial purpose of deterring entry into the apple-growing industry or increases of production.

The result was that there was a breach of both sections 27 and 36, but the Board was protected by the section 43 exemption.

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14 Above n7.
15 Above n7, 103,745.

Magic Millions[16]

In *Magic Millions* the case concerned the actions of Wrightson Bloodstock in causing the date of its yearling thoroughbred auction near Auckland to coincide with that of Magic Millions, who had organised competing sales to take place at Trentham during the Wellington Spring Carnival. Wrightsons, who before the advent of Magic Millions had been the only player in the market, had conducted sales for 60 years at Trentham on this weekend. It had, however, recently moved its sales location nearer Auckland, vacating the Trentham site. Before Magic Millions came on the scene Wrightsons had deferred to the wishes of the Wellington Racing Club and organised its sales around Auckland Anniversary Weekend so as not to conflict with the Wellington Spring Carnival, but when Magic Millions emerged in 1989 Wrightsons, stating in evidence a need to maintain "a competitive position", changed its sales dates to clash with those of Magic Millions, making it impossible for buyers and sellers to attend both auctions. Wrightsons not only changed its sale dates, but it allocated the sale dates between what became known as the K1 sale for premiere yearlings, and K2 which covered less valuable horses, tying buyers and sellers in the K1 and K2 submarkets together.

The judge found Magic Millions' sale dates to be inflexible, in part due to the requirements of its sponsor. For 1989, negotiations ended with Wrightson changing its dates so as not to coincide with the Wellington Spring Carnival. However for 1990 Wrightson again set its dates to clash with Magic Millions, insisting that the Commonwealth Games made it necessary. Negotiations failed and Magic Millions

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16 Above n7.

took Wrightsons to court alleging breach of section 36. Tipping J found that there was a breach, and ordered Wrightsons to set its dates so as not to clash, for a period of three additional years.

Festival Records[17]

The plaintiffs (Tru Tone) were retailers and the defendants (Festival) distributors of albums, that is, records, tapes and discs. Festival did business with the retailers on an agency, commission, sale or return basis, which means that the retailer takes none of the risks associated with the decision to promote a particular album. Festival retained ownership of the albums which could be returned free of obligation by the retailer if the promotion did not achieve the desired result. Festival's philosophy of sales was to cater to a price-sensitive public by keeping the retail price down. This strategy was expected to generate maximum profits by maintaining high sales volume. Accordingly it charged retailers prices that were about 10% lower than those of other distributors. The retailers did not, however, respond with lower retail prices. During the period of the *Commerce Act* 1975 Festival did not insist on a maximum retail price due to the risk that it would conflict with the Act. After the *Commerce Act* 1986 was passed Festival introduced its maximum retail price, and when retailers failed to abide by it Festival cut off supply. The retailers brought the case to court pleading breach of sections 27 and 36.

In the High Court, Smellie J and lay member Lang Esq found no breach of the Act. The retailers appealed

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17 Above n7.

to the Court of Appeal, which endorsed the decision of the High Court. The judgment of the Court was delivered by Richardson J, who drew attention to the fact that there was a lay member sitting on the High Court. This meant, he said, that additional weight was to be given to the Court's decision due to the expertise in economics and commerce. This expertise assisted the Court in assessing the conflicting evidence of the economic experts who appeared as witnesses for each side. Richardson J emphasised that the case fell for decision essentially on its own facts and was not to be considered as laying down any general principles of interpretation of the Act.

The Court noted that the definitions of both of the crucial concepts found in the long title of the Act, "competition" and "market", indicate that a practical approach is to be taken in assessing the state of competition in a particular case. The description of "market" as a matter of fact and commercial common sense means that no particular criterion, for instance substitutability, is to be given undue prominence. "Market" is a multi-dimensional concept with dimensions of product, functional level, space and time.

The High Court had concluded that the single album definition of market submitted by the plaintiffs lacked commercial reality. The Court of Appeal agreed, for the reasons that a narrow definition is like a snapshot rather than a more realistic moving picture of continuing commercial activity. Distributors acquire rights from artists on the basis of all albums they produce rather than for each individual album. New albums substitute for existing albums in a continuous process of displacement, and there is strong emphasis on differentiation to avoid the possibility of a whole range of substitutes. The

Court emphasised that the definition of market in this case would not necessarily be of help in another case, since "[t]he special factual basis of each decision renders pointless attempted comparisons between the present case and such cases".[18]

In its assessment of dominance the Court focussed on market share as the single most important consideration. Due to the size of the market as it was defined by the Court the resulting market share was not sufficient to create dominance. Festival had a modest share of the overall market for albums (6 per cent) and there was abundant evidence of competitive activity on the part of its rival distributors. The Court said:[19]

> The plaintiffs accordingly failed at the first hurdle under s 36 and it was not and is not necessary to go on to consider whether in insisting on maximum retail pricing RML used its dominant position in that market for the purpose of preventing or deterring any retailer from engaging in competitive conduct in that or any other market within s 36(1)(b), or of eliminating any retailer from that or any other market within s 36(1)(c).

It is not possible from this passage to determine whether the Court, if dominance had been found, would have gone on to assess use of the position, or whether it would have focussed on purpose.

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18 Above n7, 103,293.
19 Above n7, 103,294.

Port Nelson[20]

Port Nelson was a case involving a constructive refusal to supply and predatory pricing. Port Nelson Ltd had, as part of the Government's move to deregulate the country's ports, inherited the ownership of wharf facilities in Nelson from its predecessor the Nelson Harbour Board. It had amalgamated previously separate charges for services into a single charge for using wharf facilities. Under the reforms, it acquired the power to contract with third parties who used the ports. Using this power, it required Union Shipping New Zealand Ltd (USNZ) and Union Stevedoring Services Ltd (USS) to use and pay for port company forklifts and drivers plus pay a wharf usage levy. USNZ and USS wished to arrange their own forklifts and drivers. To cement its position, Port Nelson demanded USNZ obtain a port users' licence, and included as a condition a contract restricting use of forklifts and drivers other than those of Port Nelson. One of the many causes of action asserted breach of section 36 alleging that Port Nelson was using its dominant position to restrict entry into the various wharf activities such as stevedoring.

The Court found that Port Nelson was a natural monopoly, isolated as it is from other competing facilities. This made it dominant in all the relevant markets. In mandating use of its own equipment it was not acting as it would in a normal competitive environment but was using its dominant position to eliminate the use of plant belonging to others. This was a contravention of section 36 in that it prevented or deterred the competitive activity of the plaintiffs.

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20 Above n7.

The *Glaxo* case[21]

The applicant manufacturer of the drug Ceporex brought an action against the Minister of Health for her failure to respond positively to the application of the company to have Ceporex given a full listing on the Drugs Tariff. The effect of a full listing is to qualify Ceporex for public subsidies when generally prescribed. At the time of application Ceporex qualified for public subsidy only when prescribed through a hospital pharmacy. The company alleged that since the Minister had the power to determine subsidies, she was in a dominant position in the market for general prescription antibiotics, and her action was for a proscribed purpose. The judge found that the Minister did not engage in trade, and was therefore exempted from section 36 by section 5 of the Act. In addition the Minister's actions were specifically authorised by statute and consequently exempt under section 43. The judge chose not to consider the dominant position point under section 36.

The cases cover a wide range of different fact situations. Common to all is an accusation by a less powerful organisation that a powerful concern is acting in such a way as to adversely affect the introduction or ongoing development of competition in a market. The long title of the Act is:

An Act to promote competition in markets within New Zealand and to repeal the Commerce Act 1975.

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21 Above n6.

"Competition" is therefore a crucial concept. It is defined in section 3 as "workable or effective competition", indicating that a practical approach is to be taken in assessing the state of competition in a particular case. The two interrelated elements of competition are dominance and delineation of market. In most cases the courts have taken the view that "market" is be defined before the issue of dominance is considered, and the same approach is to be taken in this paper.

PART IV: MARKET[22]

The factual definition of market is critical to a section 36 analysis in that the existence or otherwise of dominance is dependent on the definition of market boundaries. At one extreme each firm is a monopolist of its own product; at the other all products of firms compete in the market for the consumer's dollar. Naturally a wide definition is in the interests of the defendant, and accordingly in *Magic Millions* Wrightson submitted the relevant market was the provision of services for the sale of thoroughbred horses by whatever means. Magic Millions argued the relevant market was either sales of thoroughbred horses by auction, or more narrowly, sales of thoroughbred yearlings by auction. In *Festival Records* the viewpoints of the opposing parties were for the defendant the New Zealand album market as a whole, versus for the plaintiff a separate and unique market for each album which gets

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22 There are extensive issues surrounding the concept of "market" which are outside the scope of this paper. Therefore its treatment here will be more in the nature of a summary.

on to the charts. This pattern, whereby the defendant argues for a wide definition and the plaintiff for a narrow one, is a common theme running through the cases, with the arguments of each side often supported by experts in economic theory.

Section 3(1) of the Act, now amended by the *Commerce Amendment Act* 1990, contained the following definition of "market":

"Market", means a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense.

The accepted criteria for market definition are based on the three dimensions of the market, the product dimension, the functional level and the geographic dimension. Factors to be considered include those in section 3(8), which indicate regard is to be had to factors affecting both the structure of the market (section 3(8)(a)) and the behaviour of those engaged in the market (section 3 (8)(b) and (c)). The Commerce Commission in *News Ltd*[23] provided an expanded list of factors:[24]

> (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 sale 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

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23 *Re Proposal by News Ltd* (1986) 6 NZAR 47.
24 Above n23, 51.

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.

The *Commerce Amendment Act* 1990 amends section 3(1) to read:[25]

(1A) 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 and services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

The two significant changes are that the word "within" replaces "in" and that the definition now specifically incorporates the concept of substitutability. Several cases have emphasised that the Australian Act incorporated substitutability but the New Zealand Act did not, therefore a different approach was required in New Zealand. In *Festival Records* Richardson J said:[26]

> In focussing in the definition in s3(1) on distinguishability as a matter of fact and commercial commonsense the legislation has

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25 *Commerce Amendment Act* 1990 s3(1).
26 Above n7, 103,292.

> carefully avoided giving prominence to any particular criterion. In particular, the test is not substitutability as such, although that will ordinarily be an important consideration; and, as is recognised in the passage cited, "market" is ordinarily regarded as a multi-dimensional concept with dimensions of product, functional level, space and time.

In *Magic Millions* Tipping J emphasised the differences between the two Acts and said:[27]

> Our definition emphasises the idea of a market being distinguished as a matter of fact and commercial commonsense. ... While I acknowledge that questions of substitutability are certainly relevant in delineating a market in New Zealand, they are by no means the be all and the end all of the exercise and care must be taken not to give too much weight to that or any other aspect. It is a matter of weighing all the relevant considerations and then, against our statutory definition, distinguishing the relevant market as a matter of fact and commercial commonsense. Matters pertaining to economics and economic theory are relevant but must be kept in perspective in the light of the direction to the courts inherent in the definition.

The amendment has brought the New Zealand definition more in line with that of Australia. Although there was some focus on substitutability in the cases the amendment is likely to change the approach to market definition quite substantially by indicating that Parliament intends a viewpoint more in line with that of economists to be taken. The overall constraint of "fact and commercial common sense" will remain.

The second issue raised by the amendment relates to the question of how much influence competition from other countries has on market dominance in New Zealand. In *Magic Millions* Wrightsons argued that it

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27 Above n7, 101,514.

was not dominant in the New Zealand market since New Zealand breeders were free to sell in auctions held in Australia. The relevant market should, they argued, include New Zealand and the east coast of Australia. Tipping J used section 3(1) which confines market to one "within New Zealand" to restrict section 3(3) which has a potentially wider application. He concluded that "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".[28] His Honour stated that not only does this interpretation harmonise sections 3(1) and (3) but it is also in accord with section 4.

However, Hill points out that:[29]

> [t]here is no economic reason for limiting the influence of situations and firms outside New Zealand because economically and commercially there are no national boundaries to competitive influences, if there is actual or potential trade between national jurisdictions.

Hill's opinion is that not only is Tipping J's interpretation wrong from an economic and commercial point of view but also from a legal point of view since statutory jurisdictions are incompatible with market definition. Residency requirements are only relevant to the determination of liability and should have nothing to do with market definition. The change of wording in the amendment from "within New Zealand" to "in New Zealand" may have been intended to deal with this problem, but its effectiveness is doubtful given the weight of precedent.

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28 Above n7, 101,526.
29 B M Hill "A review of developments under section 36 of the Commerce Act 1986" Paper presented to the August 1990 Workshop of the Competition Law and Policy Institute of New Zealand, 36-37.

The above discussion relates to how the market is defined and the recent changes that have been made. Till the *Port Nelson* case, the generally accepted approach was to define the market, then determine if dominance existed. In *Port Nelson*, however, the approach to market definition and dominance is not as straightforward, with the Court concluding that because actual dominance in the relevant market is not necessary, the issue of market definition is less acute.

The generally accepted approach is that of Tipping J in *Magic Millions* where, following the Court of Appeal in *Festival Records*, he said:[30]

> ... although questions of dominance and delineation of the market are closely related, it has been found helpful in the past, for ease of analysis, to define the market before turning to the question as to whether or not the party concerned has a dominant position in that market.

Tipping J identified the market as "that comprising the facilitation of the sale of thoroughbred yearlings by auction".[31] He then went on to ask:[32]

> ... whether the Plaintiffs have proved on the balance of probabilities that Wrightsons was in March 1989 in a position to exercise a dominant influence over the supply of auction services in New Zealand for the sale of thoroughbred yearlings.

He found that they were. The process he followed was to identify the market, then establish whether Wrightsons was dominant in that market.

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30 Above n7, 101,515.
31 Above n7, 101,521.
32 Above n7, 101,525.

A different approach was taken in *Port Nelson*. McGechan J and lay member Mr G Blunt referred to *Festival Records*, *Magic Millions* and *Queensland Wire*[33] and said, referring to the judgment in *Queensland Wire*:[34]

> Identification of boundaries of the relevant market and identification of market power (ie dominance) are part of one process (582 per Mason CJ and Wilson J). Indeed, the learned Chief Justice and Wilson J applied that thought in a vertical integration context to reach a view that relevant market will be at the level which is the source of market power (582). In like but more emphatic manner, it was said by Deane J (587), with whom Dawson J (590) agreed, that "there will ordinarily be little point in attempting to define relevant markets without first identifying precisely what it is that is said to have been done in contravention of the section". Indeed, for s36 purposes, definition of a market is an avoidable problem where the defendant has such power that dominance will exist however widely the boundaries are drawn: Deane J 589; Dawson J 592. Deane J resisted attempts at precise definition. After reference to the Australian s4E, His Honour observed (588) "the Act does not otherwise seek to define what is meant by the word 'market'. That is not surprising since the word is not susceptible of precise comprehensive definition when used as abstract noun in an economic context. The most that can be said is that 'market' should, in the context of the act, be understood in the sense of an area of potentially close competition in particular goods and or services and other substitutes ...". Dawson J (590) took a comparably general approach, specifically warning against rigid approaches as leading to unrealistic results.

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33 *Queensland Wire Industries* (1988) ATPR 40-925.
34 Above n7, 101,641.

The Court concluded that the correct approach is to:[35]

> ... apply fact and commercial commonsense in each case, with the comfort of knowing exact delineation may well not be necessary if the extent of dominance or contravening activity is sufficiently wide.

To the extent that the Court did define the market, it preferred the plaintiff's argument that stevedoring was the relevant market because as it said, the demarcation between different activity fields, although perhaps disintegrating, in fact still existed. The defendant had argued a unified market for all wharf activities arising from economies of scale, an argument which had its attractions, but perhaps did not actually exist at that time. The Court said, however, that:[36]

> ... in the present s36 context, the choice may not be necessary. A use of dominance in a market may take place in relation to a significant section of that market. There is no doubt that stevedoring services comprise a significant segment of Dr Williams expanded market. We will proceed on the basis of a Nelson "stevedoring services" market, or at least on a significant section so identified of a wider overall market.

The Court referred to the customary approach of defining the market first then evaluating dominance, but rejected this as unreal separation of issues. It said:[37]

> Actual dominance is not necessary. Under s3(8) it is sufficient if a firm is "in a position to exercise a dominant influence over the production, acquisition, supply or price of goods or services in that market", with regard paid to specified criteria for

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35 Above n7, 101,641.
36 Above n7, 101,642.
37 Above n7, 101,643.

> the purposes of determining whether a person is "in a position". ... A firm with dominance in one market may, as a result, be "in a position" to be dominant in another. That possibility is recognised by the legislation in its reference in s36(1)(a)(b) and (c) to "any other market".

The Court concluded that it preferred the definition of market as the stevedoring market in the Port Nelson area, but that there was no need for choice among the options because:[38]

> ... ownership and control of the wharf facilities, on a monopoly basis, is a key which permits control of activities dependant upon the wharf.

ARA provides another example of a situation in which dominance was found in a market in which the defendant could not have been dominant. Budget argued that two markets were at issue. ARA was in a dominant position in the market of concessions for rental car operators at Auckland Airport and that they were using their dominant position for the purpose of restricting the entry of Budget into that market, or any other market. "Any other market" Budget argued was a reference to the market for hiring of rental cars at Auckland Airport. Barker J referred to the section 3(8) definition of dominance in a market and found it "difficult to see how ARA is other than in a dominant position in both markets".[39] ARA held a monopoly, for which no substitutes were available. Thus ARA was found dominant in both the market for providing concessions and the market for hiring of rental cars. However, ARA could not have been dominant in the market for hiring rental cars, and the test from section 3(8) would not have permitted liability to be found. In the context of that particular case, though, ARA was clearly

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38 Above n7, 101,645.
39 Above n7, 678.

dominant in the market for the supply of concessions, so whether it could or should have been found dominant in the other market was not, in the end, significant. Having been found dominant in the market for concessions it was then using its influence in another market for proscribed purposes, within the terms of section 36.

By contrast in *Festival Records* and *Magic Millions* the first step was to delineate the market, then apply the tests for dominance and purpose to that particular market. The advantages of this approach according to Maureen Brunt[40] are that the market concept serves to define what is relevant and why. It is an aid to clear thinking about economic relationships and causality. It is also very helpful to a legal analysis which must apply rules to the facts of a case. The danger of the approach in *Port Nelson* is that the court did not clearly define the market and then apply the section 3(8) factors to determine whether dominance existed. Dominance was established but not in the relevant market, yet a breach of section 36 was found.[41]

The approach of the Court in *Port Nelson* might reflect the emphasis it placed on the statutory object of the Act at the outset of its analysis. It stated that the emphasis was to permit competition and that the particular objectives of sections 27 and 36 were to be seen within this overall objective. Port Nelson's actions were inhibiting competitive activity in the provision of stevedoring services on the wharves, and clearly they held a dominant position. This raises the question whether the general objectives of the Act are at risk of not being met in the application of the particular

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40 Above n3, 113.
41 Further discussion of the result in *Port Nelson* is included under Part V: Dominance.

sections of it. The Court could, however, have accepted the argument that the market consisted of the wider provision of port facilities. It could then have found dominance in this market, used to influence the stevedoring market. It is not clear why the Court chose to take the path it did.

It is interesting to compare the method described in the US Department of Justice Guidelines for defining the market. The definition is used to enable an inference to be made as to the existence of market power, as it is in New Zealand. Market definition relies heavily on market share on the basis that an organisation with sufficient market share is free to act uncompetitively where its competitors are too small to take advantage of the opportunity.

The process is in two steps. First the firm is assumed to be the only producer in the area. Then the effect of a hypothetical moderate price rise (5-10%) is examined to establish whether the resulting profitability would be sustainable. Four relevant factors to be considered are demand side substitution, supply side substitution, geographic substitution, and new entry. The information that is collected may indicate that consumers will substitute quite dissimilar products, or suppliers of dissimilar goods will re-tool to compete. These alternative or additional products are to be included in the market, reducing market share and thus the possibility of finding market power. Similarly ease of substitution by consumers of goods from other geographical locations may indicate the area as drawn is too narrow. Finally, if other suppliers would be induced to enter the market within a reasonable time they are also included. With the addition by amendment of substitutability as a key consideration for a section 36 analysis, the process of market definition in New

Zealand is brought more into line with that in the US.

The value of this approach according to Hay[42] is that it addresses the problem of defining a market according to a retrospective assessment of market share by introducing a dynamic forward-looking perspective much more in line with reality. In addition this is a valuable way of organising the data and enabling a practically oriented approach by investigative staff for whom a highly relevant question is "what if...". The views of business-persons take on added significance and may often be the most useful data. This aspect of the analysis is compatible with the New Zealand emphasis on fact and commercial common sense.

A result of this type of analysis is the counter-intuitive possibility that a firm which is the only supplier of a product may not be found to have market power. An example of this might be where a port company puts up its port handling charges, thereby increasing the price of all commodities brought in through that port. If consumers of those goods are thereby induced to buy from other sources, the price rise will not be sustainable over the long term and the port does not have real market power. Similarly a manufacturer which is a monopolist of follow-up servicing of its product may, by charging high servicing costs, cause buyers to turn to other cheaper products. Although it may have a monopoly of the market for servicing its own product, it does not have the market power necessary to allow it to raise prices. The point is relevant in New Zealand since there may be a tendency to assume that where there is

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42 G Hay "Market Dominance" Paper presented to the August 1990 Workshop of the Competition Law and Policy Institute of New Zealand.

a monopoly there is automatic market power, when in fact, further analysis would indicate there is not.

In *Port Nelson* the Court said that the separation of "market" from "dominance" is unreal, and that the two concepts were mutually interdependent and had to be dealt with together. It is true that from an economic perspective the concept of market dominance is a total concept. The problem is that where liability rests on a finding of misuse of market dominance, it must be clear from a practical point of view what the meaning of the term is so that firms may act accordingly. Hence the value of the step by step approach that is taken in most of the cases, and in this paper. Thus, once the market has been defined, the next step is to evaluate dominance.

PART V: DOMINANCE

The statutory approach to the determination of dominance is to apply the factors in section 3(8). If the circumstances of the firm do not conform to the tests in section 3(8) then dominance for the purposes of the Act does not exist. The *Chatham Islands* case provides a simple example.

Eichelbaum J commenced by defining the market as the services required by fishers for purposes of their trade, including access to wharf facilities, in the geographical area of Kaingaroa. His Honour then applied section 3(8) to establish whether there was dominance. Under section 3(8)(a) the share of the market of the defendants, their technical knowledge, and access to materials and capital overshadowed

everything else available. The share of the wharf was total. Under (b), the defendants were not constrained in any way by competitors, nor under (c) did the actions of suppliers affect them. The defendants argued the plaintiff could get supplies elsewhere on the island and could use dinghies to circumvent the wharf. Eichelbaum J found these alternatives not to be real constraints of the defendants and that the defendants were "... in a position to exercise a dominant influence over the ... supply ... of ... goods or services"[43] in the market.

A similar approach is taken in *Magic Millions* where, having defined the market as that comprising the facilitation of the sale of thoroughbred yearlings by auction, Tipping J considered the question of dominance in that market. He endorsed the approach of Davison CJ in the *Lion Corp*[44] case. In that case Lion had sought judicial review of the Commerce Commission's decision to permit Magnum to merge with Dominion Breweries, on the basis that the Commission, in interpreting section 3(8), gave inadequate weight to section 3(8)(a) structural factors while overemphasising sections 3(8)(b) and (c), the behavioural factors. Lion had argued that the Brierley group acquired market shares that were very high in many markets and that to downplay these "... not only ignores the explicit provisions of s3(8)(a) but also ignores the universal recognition of the vital significance of high market shares as an indicator of dominance".[45]

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43 Section 3(8).
44 *Lion Corporation Ltd* v *Commerce Commission* [1987] 2 NZLR 682.
45 Above n44, 687.

The Chief Justice however rejected Lion's argument pointing out that the Commission had to give meaning to the word "dominant". It:[46]

> ... adopted the so-called "independence of behaviour test" as equating to "dominance" so that where throughout its decision it referred to "independence of behaviour" it was in fact referring to "dominance". It also included the para (a) requirements as is apparent from that part of the decision just referred to when it spoke of a person in a "dominant position" having sufficient market power [economic strength]. Market power and economic strength are matters referred to in para (a) which speaks of the share of the market, technical knowledge, access to materials or capital.

The Chief Justice endorsed this approach of the Commerce Commission, and the same approach was taken by Tipping J in *Magic Millions*. Market share, ie factor (a), is not the sole determinant of dominance but dominance is frequently found in conjunction with a high market share. This must be accompanied by a consideration of the other relevant factors in section 3(8).

Within the market identified by Tipping J of sales by auction of thoroughbred yearlings, comprising sub-markets K1 and K2, it was not immediately clear to the Court whether Wrightsons had a dominant position, since Magic Millions was in fact in the market. It was clear that Wrightsons was dominant in the K1 sub-market. His Honour said "[t]here cannot I think on the evidence be any doubt about that proposition".[47] On his analysis, however, he had to establish Wrightsons' dominance in the K2 sub-market as well, in order to establish dominance in the total market. This was possible because of Wrightsons' ability to

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46 Above n44, 690.
47 Above n7, 101,522.

tie the two sub-markets together. To test this proposition he applied the three factors in 3(8).

Under 3(a) he found Wrightsons' market share highly concentrated by percentage of numbers and value, technical knowledge and access to materials and capital. Any share that might devolve upon Magic Millions was entirely dependent on Wrightsons' sale dates not coinciding with those of Magic Millions.

Under 3(8)(b) the fact that Wrightsons was able to move its sales dates at will and without consultation indicated lack of any constraint arising from the presence of Magic Millions. Likewise Wrightsons' concern to ensure the K1 and K2 sales were tied together overrode any consideration of the preferences of the Breeders' Association.

As far as potential competitors were concerned Tipping J found that "without barriers to entry dominance will seldom if ever be found"[48] and that their height was critical. Potential competition is one of the most important factors to be defined in assessing dominance. Thus a consideration of barriers to entry is critical since it is the ease with which firms can enter the market that determines the level of potential competition. A barrier to entry is any factor which raises the costs to a potential entrant above those of incumbent firms, or which otherwise restricts or discourages new firms from entering the market. For instance, existing firms may have cost advantages arising from patented technology or trained staff, or they may have advantages of large scale production and financial resources. Other factors include customer loyalty, and government policies such as tariffs and import licences which act to raise the prices of competing

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48 Above n7, 101,524.

imported goods. Labour laws can act as barriers to entry if for instance there will be redundancy costs on exiting a market. In *Re Queensland Co-operative Milling Association Ltd*[49] the Australian Trade Practices Tribunal said, after describing the elements of market structure:[50]

> Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.

Tipping J's approach to barriers to entry is patently legalistic rather than economic. He found Wrightsons had considerable sunk costs in expertise, facilities and client base. A potential competitor would know from Wrightsons' conduct in 1988 that a battle was likely to ensue. Wrightsons pointed out that Magic Millions' relatively small investment indicated barriers were low but the judge found that questions of barriers to entry should be determined by reference to the market as a whole, rather than a particular party.

Under 3(8)(c) Wrightsons argued it was severely constrained by the actions of breeders who were able to send horses to Australia if they wished. The evidence, however, suggested the breeders were not troubled by the manipulation of dates.

Tipping J concluded that on the factors in section 3(8), Wrightsons was in a dominant position in the market. The important factors were:[51]

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49 (1976) 8 ALR 481.
50 Above n49, 516.
51 Above n7, 101,525-101,526.

> [fi]rst, Wrightsons' firmly established position in the market, effectively for 60 years; second, its undoubted stranglehold on the A sector of the market; third, its ability to act in a manner largely unconstrained when setting dates; fourth, its ability to link K1 and K2 to suit its purposes in the face of an emerging competitor; fifth, Magic Millions' very fragile position aside, the absence of any workable or effective competition for Wrightsons within the market; and sixth, the problems provided by the limit in the number of available time slots. This in my view is a relevant and significant barrier to entry into the market. It is also, I agree, an aspect of product differentiation but not to the extent of justifying Wrightsons' conduct.

By contrast with the approach taken in *Magic Millions*, *Festival Records*, and the other cases, in *Port Nelson* section 3(8) is read to mean that "actual dominance is not necessary"[52], and that it is sufficient that a firm is "in a position to exercise a dominant influence ... in that market".[53] The section 3(8) factors have little prominence. Having already determined that Port Nelson held a monopoly of port activities and had overall dominance, and that the relevant market was for stevedoring services, it was axiomatic that Port Nelson was dominant in the stevedoring market.

The *Port Nelson* approach, therefore, is that a firm had only to be in a position to exercise a dominant influence, rather than actually be dominant in the market. The question that is raised is how one can find a breach of section 36 if dominance in the market is not found. If the relevant market was for stevedoring services, then Port Nelson was not dominant, yet the Court found a breach of section 36. The Court cited both sections 36 and 3(8) in support of its view, however section 36 states that dominance

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52 Above n7, 101,643.
53 Section 3(8).

in a market must be established, and section 3(8) provides the criteria for establishing whether that dominance exists. Where section 3(8) refers to a firm being "in a position to exercise a dominant influence ... in a market", this indicates that such a firm is included in the definition of a dominant firm for purposes of section 36. Once dominance has been found, then in accordance with section 36, the acts of the firm in either that or some other market come under scrutiny.

Once the questions of relevant market and dominance have been established, the next question that is raised is whether there is a "use" test or whether one goes straight to a consideration of purpose. The issue is a critical one, since if there is a use test the ambit of the section will include fewer acts of dominant firms, whereas if the next step to be considered is purpose, all acts of dominant firms will be subject, and consequently the likelihood of more being found in breach is high.

PART VI: USE

A major issue in the interpretation of section 36 is whether it includes a "use" test as an issue standing separately from a consideration of purpose. The cases are ambivalent on this point. Most do not provide any real guidance. Others like *Port Nelson* and *ARA* assume there is an issue of use and state that the defendants did in fact use their dominance. The facts of the two cases facilitate this argument, possibly because in each case the organisation's monopoly power enabled the action. In *Magic Millions*

Tipping J considered Wrightsons' argument that it did not use its position and rejected the possibility, but without extensive analysis.

The argument for a use test is founded on the idea of discretion. The essence of market power is that a firm has the power to exercise discretion. In other words a dominant firm can choose whether to exercise its market power. For instance, Port Nelson did not have to impose a requirement that only equipment belonging to it could be used on the wharfs. It made a choice which, in the absence of dominance, would have been unavailable to it, in the sense that if there had been competing port facilities users could have gone elsewhere. Similarly, ARA held by statute a dominant position in the market for rental car concessions at Auckland Airport, and it had discretionary power as to whether to allow another entrant.

If having discretion means a firm can choose whether or not to take some action that, but for the dominant position, would have been unavailable to it, this suggests that there are many acts of dominant firms which do not involve use of the dominant position. Wrightsons argued that normal competitive activity did not involve use of dominance. It follows that if some actions constitute use and others not, a dominant firm's actions may be classified as non-use, use, and misuse. Non-use involves competitive acts which do not depend on the dominant position. These are not caught by section 36 and a purpose enquiry is therefore not relevant. Use constitutes competitive acts which depend on the firm's dominance in the relevant market. These are caught by section 36 and a purpose test is then applied. Misuse includes those acts which depend on the firm being dominant in

the relevant market and which are found to have one of the proscribed purposes.

The point that is being made is that if use of dominance is found, this falls into the words of the section, and whether it constitutes misuse is then determined under the purpose test. However non-use does not fall into the section and is eliminated from consideration on this basis. In *Magic Millions* Tipping J referred to the judgment of Mason CJ and Wilson J in *Queensland Wire*[54] where they pointed out that the purpose provisions defined use and misuse, and he used that as a basis for his rejection of the argument on use. However, the above analysis argues that use as opposed to misuse is still determined by the purpose enquiry and therefore meets His Honour's concerns as well as those of the judges in *Queensland Wire*. The issue to be considered in the use test is the boundary between use and non-use. The two cases in which the point is most clearly made are Fisher and Paykel and Port Nelson.

In *Fisher and Paykel* Barker J did not, having established dominance, go straight into a consideration of purpose. He found it necessary to establish the means by which the goal was reached, which was by limiting the number of rental car concessionaires. He said:[55]

> Although ARA's motive may have been to maximise rent, by accepting only two rental car operators, its means of achieving this object was the use of its dominant position to exclude competitors of the successful concessionaires. The collateral contract therefore had the purpose of excluding other potential concessionaires.

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54 Above n33.
55 Above n6, 680.

Barker J's analysis suggests that even if ARA had had an anticompetitive motive, it was crucial for section 36 that ARA should be found to have used its dominant position as the means of achieving its purpose. If there was no use of the dominant position, by implication section 36 would not apply irrespective of purpose.

In *Port Nelson* the Court said:[56]

> Section 36 provides that no person, who has a dominant position in a market "shall use that position" for proscribed purposes. There must be "use" of dominant position for infringement. The section does not say that no person who has a dominant position in a market shall "act" for proscribed purposes. The evidence of Dr Williams and the submissions for PNL took the stance that there is no "use" of dominant position where a person is simply doing something that would be done in a competitive situation in any event. Put so baldly, and as a theoretical proposition, few would disagree. If a person simply acts in a normal competitive fashion, as he would whether dominant or not, that person hardly can be said to be "using dominance".

The question, the Court said, is one of fact.[57] Port Nelson was not in fact acting as it would in a competitive situation but:[58]

> [i]ts present demands are possible only because of its dominant position. Its demands, at times stark, are a use of that dominance.

Magic Millions represents the only considered statement of the argument against a use test. Others have either ignored the issue, or left the reader to infer what the position is. For instance, Eichelbaum J, in the *Chatham Islands* case, went from

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56 Above n7, 101,645.
57 Above n7, 101,645.
58 Above n7, 101,646.

establishing dominance directly into a purpose test, but he said:[59]

> ... the plaintiff alleges that as the holders of a dominant position in the market, the defendants have used their position for the purpose of restricting the entry of any person into another market, namely the market for the obtaining and processing of the catch of fish landed at Kaingaroa. Having regard to the terms of S 2(5) it is unnecessary for the purpose to be the sole purpose.

It is not clear from the reasoning whether Eichelbaum J would have thought the issue of "use" was a separate question or not. The defendant could not have acted as they did if they had not owned the facilities, and therefore use was established without further consideration.

Another case in which only hints were made is *Apple Fields*. Holland J, after agreeing that the Board had a dominant position in the apple wholesale market, went on to say:[60]

> It is significant that it is the use of the position for the *purpose* which must be considered.

As in the *Chatham Islands* case, it is hard to determine whether the fact that dominance was hardly an issue meant use of the position was not an issue either. It is easier to argue that the close connection with purpose suggests a *Magic Millions* approach in which the purpose test is the final determinant of liability if a firm is found dominant.

In *Magic Millions*, representing the other side of the argument, Wrightsons argued that if it were found dominant, its conduct in changing dates did not constitute use of its position but was consistent

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59 Above n6, 12.
60 Above n7, 103,581.

with normal competitive behaviour. Tipping J observed that he:[61]

> ... would have thought that if a person having a dominant position acts in a particular way with a prohibited purpose in mind it is almost axiomatic that such a person has used his (sic) dominant position for a prohibited purpose ...

Tipping J remarked further that:[62]

> [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 ... if someone with a dominant position takes some action for a purpose proscribed by section 36 then clearly they are using their dominant position in a manner which section 36 prohibits.

This indicates that Tipping J thinks all acts of dominant firms must be subject to a section 36 analysis, and all are at risk of being found to have a proscribed purpose.

Might the outcome of the case have been different if Tipping J had analysed Wrightsons' actions in terms of a use test? The question to ask, from *Port Nelson*, would be whether Wrightsons' actions depended on its dominant position. In a competitive environment one might expect to find several competing auctions run by firms with varying market shares. It is reasonable to suppose that in such a situation Wrightsons might have been constrained by its fear that clients would choose the rival auction of a powerful competitor if they were forced to make a choice. Wrightsons' perception of the risk of loss of clientele would be likely to lead it to avoid clashes with potent rivals. Possibly the same would

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61 Above n7, 101,528.
62 Above n7, 101,528.

not hold true for its smaller rivals. An ordinary sales strategy of firms in competition is to try to attract away a rival's clientele by providing consumers with a choice. Large organisations like supermarkets should not have to be concerned about opening during the same hours as the corner store, although the purpose of the longer hours is to woo the customers of the corner store. Even if one can argue that *Magic Millions* is different, in that Wrightsons' persistence in changing the dates to maintain a situation of clashing dates was reprehensible, does the Act forbid reprehensible competitive activity?

Wrightsons' acts indicated its focus was its competitor and its purpose was to knock that competitor out of the market. If one considers that liability under the section relates to purpose, Wrightsons is liable. But if one supports a use test, it is arguable that Wrightsons may not have been liable, and the purpose of the actions would never have been in issue. Subjectively speaking, it is hard to permit acts that seem reprehensible to escape, but as in criminal law, the tests are objective although one may not like the results.

In the above analysis the test for use was whether the firm could have acted as it did in the absence of dominance. In his article[63], Hill states that the relevant question to be asked is:[64]

> Is the conduct and the response to it consistent with normal single firm competitive behaviour?

It should be noted that there is some danger in justifying acts by likening them to those of non-

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63 Above n29.
64 Above n29, 19.

dominant firms. Firms not in a dominant position are free to act in ways that dominant firms cannot. It is the dominant firm that is in a position to inhibit competition. Although the acts might be exactly the same, a non-dominant firm cannot perform "anti-competitive activity" the way it is understood in the context of competition law. The acts of a non-dominant firm are aggressive, not anti-competitive. The issues are clarified if one concentrates on whether the actions could have occurred in the absence of dominance. In *Magic Millions* the answer is yes, whereas in *Port Nelson* and *ARA* the answer is clearly no.

The effect of a use test would be to alter the focus of the section away from the purpose test and onto the use test. Whether this is likely, not to mention feasible or desirable, depends on how the purpose test operates in practice. It is now proposed to examine the purpose test, then go on to look at how the two tests might interact.

PART VII: PURPOSE

To contravene section 36, a dominant firm must have the purpose of restricting another trader from entering a market, whether it be the market in which dominance was found or another market, or preventing or deterring competitive conduct in either market, or eliminating any person from either market. The intention is to disallow these anti-competitive acts by dominant firms, but to allow normal competitive activity. The tests do not look at the effect of the

activity, but focus on the motive of the dominant firm.

Section 2(5)(b) provides that:

(b) A person shall be deemed to have engaged, or to engage, in conduct for a particular purpose or a particular reason if -
(i) That person engaged or engages in that conduct for that purpose or reason or for purposes or reasons that included or include that purpose or reason; and
(ii) That purpose or reason was or is a substantial purpose or reason.

Under section 2(5), therefore, "purpose" is not confined to "sole purpose". Multi-purpose conduct which includes the anti-competitive purpose is sufficient if the anti-competitive purpose is a "substantial" purpose. In section 2(1A) "substantial" is defined as meaning "real or of substance".

There are three issues that create difficulty for the operation of the purpose test. One is the controversy caused by the lack of indication in the section whether the test is to be subjective or objective. The cases have made conflicting statements. The second is whether purpose can be inferred from the evidence. The position most commonly held is that it can. The third issue is the intention of the test. The way the words read suggest that the purpose is to protect competitors from the rigours of competition. There is general judicial agreement that this should not be so, and that the test is directed towards the protection of competition, regardless of the hardships that that may cause to a small competitor struggling to compete. How the test is applied in practice, however, indicates that whatever the professed judicial position, the words of the section can inhibit the intended outcome. The following

discussion describes how the courts have treated the test and the issues arising out of it.

With respect to the objective/subjective debate, in *ARA* the statement of facts recorded that the purpose of ARA in granting concessions to Hertz and Avis was to maximise profit. The means of achieving the goal was the use of the dominant position to exclude competitors. Barker J deduced that a purpose of the collateral contracts was, therefore, to exclude competitors, and that this was a purpose along with the purpose of maximising income. This is clearly an objective analysis.

In *Festival Records* the question was only raised in connection with section 27. Both objective and subjective tests were found to be satisfied.

In the High Court judgment of *Apple Fields*, Holland J referred to Barker J's judgment in *ARA* but weighed it against the decision of Toohey J in the *Western Australian Cricket* case[65] in which the subjective test was preferred. He pointed out that in *Festival Records* the Court of Appeal found:[66]

> ... it is not necessary to discuss the interpretation of the purpose alternative beyond noting that its meaning calls for careful analysis of the statutory scheme and setting.

Holland J went on to state, referring to section 36, that "at least in this provision the appropriate test of 'purpose' is a subjective one".[67] The purpose of the Apple and Pear Marketing Board was to recover from new entrants or those increasing production a fair proportion of the capital costs associated with

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65 *Hughes* v *Western Australian Cricket Association (Inc) @ Ors* (1986) ATPR 40-736.
66 Above n7, 103,578.
67 Above n7, 103,581.

handling the increased volume of fruit. The Board did not have the purpose of restricting entry or deterring competition. In the Court of Appeal Cooke P, referring to the proscribed purposes and the purpose of recovery of capital costs accepted by Holland J, said:[68]

> The difficulty, as I see it, is that those two ways of analysing the Board's purpose are not really different. They are not in contrast but alternative ways of saying the same thing. The Board has set out to ensure that newcomers would not be attracted to the industry partly by the prospect of establishment costs seen by the Board as unrealistically low. Similarly the Board thought that established growers would be less likely to make new plantings if faced with a levy. By achieving some degree of fairness the levy at the same time inevitably carries out a policy or purpose of restricting new production. Intrinsically it is a policy restraining competition seen by the Board and the Federation as unfair ... I cannot avoid the conclusion that the arrangement for the levy between the Board and the Federation, however well motivated, has had a substantial purpose of deterring entry into the apple-growing industry or increases in production.

Cooke P is not saying that there is an additional purpose of deterring entry, but that the purpose of recovery of capital costs is another way of stating the same purpose. Since this was a avowed purpose of the Board, Cooke P might be seen to be advocating a subjective test, although he did not go on to discuss the subjective or objective nature of the test. This analysis of Cooke P's view is disagreed with by the Court in *Port Nelson* which thought Cooke P was taking an objective approach.[69]

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68 Above n7, 103,743.
69 Above n7, 101,647.

In *Magic Millions*, Tipping J held that:[70]

> ... when one is talking of purpose one is really talking about what a party has in mind. It is clearly a subjective matter.

Tipping J did not mention either *ARA* or *Apple Fields*. Shortly after the *Magic Millions* decision the Court in *Port Nelson* analysed the New Zealand decisions, the Australian decisions and text book authorities and said:[71]

> We must say we are reluctant to adopt an entirely subjective approach. As the development of the law of contract rather demonstrates, the commercial field is one in which objective ascertainment of states of mind has much to commend it. We would be sorry to see the objectives of s36 inhibited by any undue subjectivity as to purpose, perhaps more natural to criminal law. However, in the light of Tipping J's firmly expressed view, we will leave the question of principle open. In the end, a decision is not strictly necessary within the context of this present case. In any event, often the difference will be more apparent than real. Proof of purpose, in the nature of these cases often will turn upon inferences drawn from actions and circumstances, with a sprinkling of internal memoranda and correspondence. Protestations of inner thoughts which do not reconcile with objective likelihoods are unlikely to carry much weight. In many cases, and this ultimately is one, both objective and subjective standards are met.

The Court found that the wider purpose of Port Nelson was to ensure that its own plant was fully utilised, but it was also found that a subsidiary purpose was to inhibit USS from using its own plant in competition with Port Nelson. The wharf user levy had a deterrent purpose so far as it exceeded the commercially reasonable. These purposes were objectively ascertainable but there was existing

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70 Above n7, 101,529.
71 Above n7, 101,648.

subjective evidence if required in the form of memoranda between executives of Port Nelson.

Whether the test is ultimately decided to be subjective or objective has implications for the ambit of the section. It is harder to produce evidence of subjective than objective purpose. Since the existence of evidence of subjective purpose seems somewhat arbitrary, it is arguably a reason why the test should not be subjective. But on the other hand objective purpose may be too low a hurdle, especially if section 36 liability for dominant firms depends on the purpose test.

Although the question whether the test is subjective or objective has not been answered, the ability of the court to infer purpose is less controversial. In the absence of evidence from the party concerned, Tipping J in *Magic Millions* made it clear that the court may infer purpose from available materials. His Honour said:[72]

> Unless that party gives evidence, as Mr Floyd did, as to its purpose then the Court is left to infer with what purpose a person acts from all the available and relevant materials.

This statement suggests that in the absence of a legitimate purpose for particular conduct the Court will infer an anti-competitive purpose. The statement follows statements of Barker J in *Fisher and Paykel*, who was prepared to consider the question of purpose based on inferred evidence. Barker J said:[73]

> It is a reasonable inference, giving rise to a serious question to be tried, that a substantial reason - not necessarily the

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72 Above n7, 101,529.
73 Above n6, 102,626.

> only reason - for the defendant's conduct is to enforce its dominant position for one of the purposes named in the statute.

Similarly in *ARA* Barker J said:[74]

> ... an agreement to exclude others arbitrarily must be taken as having the purpose to monopolise.

In *Port Nelson* the Court inferred from the evidence concerning the wharf user levy that it did not only have the purpose of obtaining a return on surface areas provided, but also had the purpose of deterring USS from using its own plant. The reason was that the wharf user levy was higher than commercially reasonable.

The general agreement in New Zealand suggests that there is no need to amend the Act as happened in Australia. In Australia conflicting statements by courts led to amendment of their Act in 1986. Section 46(7) now makes it clear that an inference as to purpose can be drawn from conduct or other circumstances.

The third issue raised by the purpose test is whether in practice it tends towards the protection of competitors rather than competition, regardless of the statements of the court. In *Port Nelson* the Court, referring to sections 27 and 36, stated unequivocally that:[75]

> [s]uch provisions are directed at protection of the concept of competition as such. They are not directed at the protection of individual competitors, except insofar as the latter may promote the former.

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74 Above n7, 680.
75 Above n7, 101,640.

However, the proscribed purposes emphasise the actual or potential competitor, rather than harm to the competitive process as such. Although prohibition of the specified purposes will tend to be consistent with the promotion of competition, it is probably not wise to assume that this is true all the time. As the section is presently worded, and since actions may be brought by private individuals or firms, there is at least some danger that the section could be used by small competitors as a non-market weapon in the battle against their larger rivals. The statement in the long title to the Act indicates that such use of section 36 is against the intention of the Act, but the possibility is admitted by the words of section 36.

Whether the legislature intended section 36 liability to depend on a use test and/or a purpose test is not clear from the words of the section. Although the words of the section as interpreted in court are determinative in the final analysis, there is some value in speculating on what the consequences are for one interpretation or the other.

If, for instance, the purpose test does in fact allow dominant firms to engage in normal competitive activity, the concern about a use test is a less compelling problem to be solved. But the risk with a purpose test is that it is possible to argue that all competitive activity has one of the proscribed purposes long-term. For example, lowering one's prices to increase one's market share automatically reduces the opportunities of a rival who may be unable to compete for a variety of reasons, including such things as size, available short-term capital and ability to diversify. The rival may even face the prospect of going out of business. Under the purpose test dominant firms engaging in this type of activity

are at risk. In the absence of a use test one must consider all the uncertainties surrounding the purpose test, not only the risk of catching competitive activity. Another uncertainty is the objective or subjective nature of the test, which will affect the extent and type of activities caught by it.

If the court eventually decides there is a use test, the purpose test will be much less significant in the overall context of section 36 liability. It is submitted that a use test is more likely to eliminate normal competitive activity than a purpose test. Where use of market power is found, as opposed to non-use, these activities only will be subject to the purpose tests, and presumably not all will be caught. The threshold of liability for a dominant firm will be shifted more to the use test and away from the purpose test. The probable result of this is that the ambit of the section is narrower, and fewer acts of dominant firms will be caught.

So far the cases have provided little analysis of a use test, which would give some guidance as to how such a test might work. As for the purpose test, it has been argued here that *Magic Millions* is an example of the purpose test operating to catch normal competitive activity that would not have been caught by a use test.

Beyond the uncertainties as to what the tests are in section 36 which have been described in the previous parts of this paper, there are more general problems with section 36 that relate to the situations it is expected to control and regulate.

PART VIII: GENERAL ISSUES RAISED BY S36

Section 36 is expected to operate in a wide variety of roles. It is expected to control the development of competition in newly deregulated industries and industries which have been subject till recently to direct state ownership. Access to essential facilities is expected to be guaranteed by section 36. It is also supposed to be effective in controlling dumping on New Zealand markets by Australian firms. Concerns have been expressed about its effectiveness in achieving these aims.

For instance, with regard to essential facilities, it may be that section 36 is not sufficiently explicit to require that access be provided to an essential facility, and that the burden of proving a purpose behind denial of access is to restrict entry into a market is too difficult. In *ARA*, Barker J adopted the dictum of the United States Court of Appeals in *Hecht*[76] which stated that foreclosing access to essential facilities was an illegal restraint of trade unless access was impractical or would inhibit the defendant's ability to serve its customers. In *Port Nelson* the Court was more circumspect, listing the reasons why the doctrine should not be adopted by New Zealand as is. Essential facilities are potentially a major problem in New Zealand given our large number of natural monopolies. Industry specific regulation may be required if section 36 does not prove effective.

As part of the CER review in 1988 the anti-dumping laws governing trans-Tasman trade have been removed.

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76 *Hecht* v *Pro-Football Inc* 570 F 2d 982 (1977), 992-993.

As a result, New Zealand is potentially exposed to the predatory use of a dominant position in a trans-Tasman market which the prior dumping laws were intended to handle. The definition of market in the *Commerce Act* 1986 has been widened to include a tran-Tasman market, but there is fear that the thresholds in section 36 may not be adequate to protect New Zealand firms against large Australian concerns with a much wider resource base. In a trans-Tasman context, there are also problems with how section 36 will interact with section 46 of the *Trade Practices Act* 1974, given the slightly different wording of the two sections.

Other more general difficulties with section 36 are that certain actions of firms are omitted from its ambit. For instance, section 36 cannot be used to control monopoly pricing if the purpose is not anti-competitive. Another omission is that under the price control provisions of the Act one of the matters to be observed is the promotion of efficiency in the production and supply or acquisition of the controlled goods or services, however this is not a consideration under section 36, whereas perhaps it should be.

Finally, section 36 focusses on intent to cause certain situations. In determining intent there is opportunity for much subjective and therefore discretionary judgment. This creates uncertainty and results in high compliance costs. A danger is that if there are many successful actions, firms may be discouraged from becoming the leading firm in a market.

CONCLUSION

The courts have not yet provided a landmark decision on section 36 containing statements that define and integrate the thresholds that it contains. This means that the critical distinction between legitimate and illegitimate business activity is not yet clear. A major difficulty for the courts is that the task requires a reconciliation of economic concepts with a legal analytical process. There is also disagreement between judges as to what the thresholds are that must be crossed in order for firms to be in breach of the section. For instance, is there a use test, or does the purpose test form the limiting factor? If there is a use test, how is it defined, and is it more effective in distinguishing between competitive and anti-competitive activity than a purpose test? If there is no use test and liability depends on a purpose test, how, given the words of the section, can one be sure the Act will be used to promote competition, rather by competitors as a weapon in the war against larger rivals? What is the desirable ambit of the section, and how is this affected by the issues just raised? In the absence of further government intervention, will the section adequately perform its expected role of controlling the development of competition in newly deregulated sectors?

In summary, the arguments in this paper are that the approach to market definition taken in *Port Nelson*, although it may be more in line with the underlying economic concept of market power, is not either in line with the Act or practically applicable in a legal analysis. The Court's statement that actual dominance is not necessary is argued to be incorrect

on the basis that the legislation does not support it, and therefore the outcome of the case, if the relevant market is defined as the stevedoring market, could be challenged. The approach taken in *Magic Millions* is preferred as being more in line with the practical approach indicated in the Act.

Dominance must be found in the relevant market. Once this threshold is crossed, section 36 catches acts performed in other markets than that in which dominance was found, if there was a use of dominance for a proscribed purpose. It is argued here that the words of the section intend a use test, and that a use test is more likely than a purpose test to distinguish competitive from anti-competitive activities. The purpose test is flawed by disagreement about the subjective or objective nature of the test, and the risk that it may be used by competitors in a way not intended by the Act. In the context of a use versus a purpose test, it is argued that the result in *Magic Millions* supports the existence of the use and purpose test combination over the purpose test standing alone.

The purpose of this paper has been to define and discuss the issues that arise in the application of section 36. Due to the significance of the law of market dominance, and the comparatively large proportion of the New Zealand business community that has a dominant position in a market, the way these issues are resolved will have profound consequences for the way business is conducted in this country.

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