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CROSSING THE STYX: THE CASE FOR THE PRIME NECESSITIES DOCTRINE IN NEW ZEALAND

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ABSTRACT

The Court of Appeal decision in *Vector v Transpower* effectively eliminates the doctrine of Prime Necessity in New Zealand. The decision depletes the range of mechanisms, through which monopoly-operated public utilities can be controlled. The prime necessities doctrine should be seen to have a role to play in the New Zealand framework. This paper concludes that the role of the doctrine is reconcilable with light-handed regulation. Furthermore, without the doctrine, the remaining safeguards in the Commerce Act 1986, and where relevant, the State-Owned Enterprises Act 1986, are ineffective to guard against abuses of monopoly power. The significance of utilities of prime necessity necessitates some control on monopoly power. In short this paper argues that the doctrine itself, is of prime necessity to the New Zealand context.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 13,966 words.

I. INTRODUCTION

In Greek mythology, the subterranean river, Styx, surrounded the Underworld. Charon, the official ferryman of the Underworld, was known to be difficult to deal with. The fare he charged to those who had died and wished to cross the Styx and enter the underworld was no more and no less than a gold sovereign. Unless the deceased presented this fare to Charon he would mercilessly leave them on the banks of the river, without refuge forever. The Greeks therefore always placed a sovereign in the mouths of their dead.[1]

Charon was in a position of great power. Had he wanted to abuse this position he could have charged arbitrary and excessive fares. His passengers would have had no alternative but to submit. Such behaviour is arguably unfair and unreasonable, yet in the absence of any control Charon was in a position to do just this.

This myth illustrates the position which arises today where services or utilities which are essential in nature are operated by a monopoly. Whereas there was nothing prohibiting Charon from exerting his power, today the doctrine of Prime Necessity may provide some relief from this situation.

The doctrine of prime necessity ensures supply of and access to utilities that are deemed to be fundamentally important. This is achieved by obliging a monopolist owner of a public facility to only charge fair and reasonable prices to users. In a recent decision of the Court of Appeal in *Vector Limited v Transpower New Zealand Limited*,[2] it was held that there is no room for the operation of the doctrine in New Zealand's current regime. The primary reason behind the decision was the inconsistency of the doctrine with the Commerce Act and to some

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[1] Felix Guirand *New Larousse Encyclopedia of Mythology: Introduction by Robert Graves* (Hamlyn Publishing, Middlesex, 1959) 165.

[2] (31 August 1999) unreported, Court of Appeal, CA 32/99 [*Vector v Transpower*].

extent the State-Owned Enterprise. The ruling signals the demise of a common law doctrine that has enjoyed a rich history in New Zealand and overseas.

In light of the decision in *Vector v Transpower*, this paper examines whether the doctrine ought to exist in New Zealand. Two aspects must be addressed.

First, the Court's determination that the doctrine is inconsistent with the current regime is questioned. This paper submits that the doctrine has a vital role to play in New Zealand's Light-Handed framework. Light-handed regulation is intended to avoid regulators, regulatory commissions and price control. Recourse in the courts however, is part of light-handed regulation. In the absence of any express or implied repeal the doctrine is consistent with New Zealand's competition law framework.

Secondly, the necessity of the doctrine in New Zealand's regulatory context must be emphasised. In New Zealand's regulatory context there is a serious gap, or as some call it, "a legal vacuum"[3] in the regulation of public utilities in New Zealand. The competition law framework in New Zealand provides no adequate guarantee of access to utilities of public importance. Such utilities are fundamental and warrant such a guarantee by the law.

The purpose of this paper is to show that in the absence of regulation of public utilities the doctrine provides some relief from what would otherwise be a legal void.

In view of this purpose the paper is presented as follows. Broadly the paper can be broken into four main sections. The first section establishes the doctrine. It looks at the origins, the steps taken towards

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[3] A R Galbraith "Deregulation, Privatisation and Corporatisation of Crown Activity: How will the law respond?" in *Conference Papers: The 1993 New Zealand Law Conference* (1993) vol 1, 236.

developing the doctrine of prime necessity, and the elements. Following this section, the decision of *Vector v Transpower* is discussed. The third section contemplates the consistency of the doctrine in New Zealand's statutory and policy framework. The final section looks at the regulation of public utilities in overseas jurisdictions. Both judicial and legislative techniques are examined to establish the need for the doctrine in New Zealand.

II. THE POTENTIAL HAZARD

The doctrine applies to suppliers of public utilities with monopoly-like characteristics. Monopoly suppliers of utilities which are considered essential services find themselves in a position of special advantage. This position creates a potential for abuse because of the fact that they are a monopoly supplier and that the resource in question is so essential. The supplier has the capacity to charge more than in a competitive market. In the types of utilities covered by the doctrine, barriers to entry are likely to be high, so that a firm's capacity to abuse a monopoly position is greater.[4]

The New Zealand environment is of particular concern. Many public utilities were previously owned by the state and then corporatised or privatised in the state reforms of the 1980's.

Consequently, many public utilities today lie in the hands of private companies. In addition, in comparison with other countries, New Zealand has a highly deregulated economy.

[4] This is because facilities of prime necessity often possess natural monopoly characteristics. For example, the National Grid or the Public Switched Telephone Network (PSTN).

III. ORIGINS OF THE DOCTRINE

A. Lord Hale's Treatise

In approximately 1670, Sir Mathew Hale, (then Chief Justice of the King's Bench of England), produced a manuscript. The manuscript was put away among his private papers. It was not until a century later, when the manuscript was presented to Francis Hargrave, that the essay resurfaced and was published by Hargrave in a collection of manuscripts.[5]

The essay consisted of a treatise divided into three parts. *"De Jure Maris"*, *"De Portibus Maris"* and *"Concerning the customs of goods imported and exported"*. *De Portibus Maris* is of special significance to the Prime Necessity doctrine, because the ideas and principles in the essay are found in the doctrine.

B. De Portibus Maris

De Portibus Maris is concerned with the regulation of ports. Lord Hale considered that there were three categories of rights: the rights and powers of the King, the rights of the person and the rights of things. Lord Hale distinguishes between rights of things that are *juris publici*, and *juris privati. Juris publici* related to things that are common to all the king's subjects. Examples, include common highways, bridges, rivers and ports. *Juris privati* , relates to things that are personal and real. Lord Hale did not determine all rivers and ports to be *juris publici.*

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[5] The essay has been published on several occasions. The first such occasion is Francis Hargrave "A Collection of Tracts relative to the Law of England from Manuscripts" Hargrave's Law Tracts (Dublin, 1787). See also BP McAllister "Lord

Small creeks that were not common passage for the king's subjects were private. In an often repeated passage Lord Hale enunciated the principle flowing from *juris publici*:[6]

> a man may for his own private advantage...set up a wharf or crane, and may take what rate he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz. makes the most of his own.
>
> If the king or subject have a publick wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are wharfs only licensed by the queen...or because there is no other wharf in that port,...there cannot be taken arbitrary and excessive duties...but the duties must be reasonable and moderate... For now the wharf and crane...are affected with a publick interest, and they cease to be *juris privati* only.

Lord Hale propounds therefore, that in the case of things *juris publici* tolls may not be excessive. The duty does not extend to services which are ordinarily *juris privati*. It is only where that wharf (or other service) is a "publick" wharf "unto which all persons that come to that port must come"[7] that it becomes *juris publici* and obligations follow.

Hale and Business Affected with a Public Interest" 43 Harv L Rev 759, which analyses Lord Hale's work.

[6] Hargrave, above n 5, 77-78.

[7] Hargrave, above n 5, 77.

IV. DEVELOPMENT AS A COMMON LAW DOCTRINE

A. A Creature of the Common Law

The first case to apply Lord Hale's principle was the English case of *Bolt v Stennett.*[8] The case involved an action in trespass to the plaintiff's crane on a public, open quay within the port of London. The defendant, Stennett claimed that the crane was essential to enable them to carry out their duty as the loader and unloader of goods in the Port, appointed by the City of London. Bolt responded by arguing that the public had no right to enter on all the quays in the port of London, nor to use the cranes situated there.

Referring to Lord Hale's passage above, the Court found a likeness between a public quay and Lord Hale's 'public street' and held that the defendants could claim a right to the use of the crane upon reasonable terms. On this basis, the court held that Bolt's crane although privately owned, was nonetheless affected with a public interest.

Soon after *Bolt v Stennett* the English Court applied the doctrine in the case of *Allnut v Inglis.*[9] The case involved the question of whether the London Dock Company, which enjoyed a statutory monopoly license to receive certain wines, could charge at their pleasure. Lord Ellenborough recognised the general principle that "every man may fix what prices he pleases", but held that this was not so where the public had a "right to resort to his premises...and he have a monopoly in them". For if "he will take the benefit of that monopoly, he must as an equivalent [to that benefit] perform the duty attached to it on reasonable terms". [10] Lord Ellenborough added that if the monopoly

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[8] (1800) 8 TR 606; 101 ER 1572 [*Bolt*].

[9] (1810) 12 East 527; 104 ER 206 [*Allnutt*].

[10] *Allnutt*, above n 9, 538.

position of the dock company ceased to exist (by the crown extending the license to other places) the obligation may not apply.

These two cases incorporate Lord Hale's principle into English case law. They show the extension of the principle to services beyond a public wharf. The cases illustrate the relationship between the public's right to have access to the crane or dock arising out of the monopoly position of the owner and the nature of the utility. The combination of the two results in a duty to provide reasonable access.

B. A Development of Common Callings

There are similarities between the Lord Hale's principle and the law of common callings. Under the law of common callings the courts imposed an obligation to charge only a reasonable price on those who exercised a common calling. Common callings encompassed those who held out their services to the public generally such as common carriers, innkeepers and millers.[11] The law originated well before Lord Hale's treatise during times of economic and social difficulty, such as the Black Death of 1348. The obligation was a means to counter the market power possessed by tradesmen who could otherwise charge any price they pleased. Craig links this body of law to the earlier cases of *Bolt* and *Allnutt* noting that the development of this body of law leaned towards monopolies such as railways and public utilities.[12]

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[11] P.P Craig *Administrative Law* (3ed, Sweet & Maxwell, London 1994) 224 [*Administrative Law*].

[12] *Administrative Law*, above n11, 224. The Court of Appeal in *Vector v Transpower* also noted the link: *Vector v Transpower* above n 2, 19.

C. *Munn v Illinois: The American Public Utility doctrine*

The principle lay unused in the English courts for some time. However, in the United States of America, the doctrine was seized by the Illinois Supreme Court, in the late nineteenth century. *Munn v Illinois*[13] marked the beginning of the corresponding American doctrine on public utilities. The development of this body of law in the United States is traced back to Lord Hale's treatise through the decision of *Munn*. However, the doctrine was applied into a rather unique constitutional context. In the United States, Lord Hale's principle was used as a means of defending the imposition of legislative price regulation against claims of unconstitutionality. The 5th and 14th Amendments of the US Constitution prohibit the taking of property without 'due-process' of law.[14] Legislative price regulation was argued to be taking "property" because it took away the right of citizens to use their property uninhibited.

Delivering the judgment of the majority, Chief Justice Waite declined to find the legislation regulating public warehouses repugnant to the US Constitution. Waite CJ asserted that from time immemorial in England, and since colonisation in the United States, it has been customary to regulate such services as ferries, common carriers and wharfingers.[15] Chief Justice Waite pointed to the common law as the source of this power to regulate prices. Re-affirming the notion that when private property is "affected with a public interest, it ceases to be *juris privati* only", Waite CJ described the principle as having been "an

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[13] (1876) 94 US 76 [*Munn*].

[14] The Fifth Amendment relates to the Federal Government and the Fourteenth to State Government.

[15] *Munn* above n 13, 125.

essential element in the law of property ever since".[16] Property, he confirmed does become: [17]

> clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interests in that use, and must submit to be controlled by the public and for the common good.

Waite CJ did not however find favour with all of the members of the bench. Justice Field delivered the dissenting judgment of the Court with Justice Strong concurring. Justice Field interpreted Lord Hale's principle as limited to "property dedicated by the owner to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred".[18]

The minority judgment takes a very narrow interpretation of Lord Hale's principle. Although the London Dock Company had a statutory monopoly, Hale's principle extends to things which are *juris privati* where they take on a public interest. This public interest is derived inherently from the type of service being offered, and the surrounding circumstances which make that service essential because that service is one "unto which all persons" must come.[19] A narrow interpretation of Hale's principle blurs the distinction between *juris privati* and *juris publici.* It makes redundant Lord Hale's references to wharves which cease to be *juris privati* because there is no other wharf.

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[16] *Munn*, above n 13, 126.

[17] *Munn*, above n 13, 126.

[18] *Munn*, above, n 13, 139. Justice Field has been joined in his opinion by other prominent jurists including Justice Thomas Cooley. See Professor Michael Taggart "Public Utilities and Public Law" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 214, 223 ["Public Utilities and Public Law"].

[19] Hargrave, above n 5, 77.

D. City of Levis – a Doctrine of Prime Necessity

In *Minister of Justice for the Dominion of Canada v City of Levis*[20] the Privy Council considered the obligation on the part of a municipal corporation, Levis Council, to supply water to buildings of the Dominion government. The government claimed immunity from local taxation, which the council accepted, but claimed reasonable remuneration for water supplied. Dismissing the appeal from the Superior Court of Quebec the Privy Council found for the Council. Lord Parmoor held that the Government cannot claim a supply of water unless it was prepared to pay a fair and reasonable price. While accepting that the Council did not have a monopoly, Lord Parmoor said:[21]

> It must be recognised, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred, by statute, a position of great and special advantage, … Their Lordships are therefore of [the] opinion that there is an implied obligation on the respondents to give a water supply to the government building provided that, and so long as, the Government of Canada is willing, in consideration of such supply, to make a fair and reasonable payment.

The judgment of *Levis* makes no reference to Lord Hale's works, nor the earlier cases relying on Hale. *Levis* has been criticised for this and

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[20] [1919] AC 505 (PC) [*Levis*].

[21] *Levis* above n 20, 513.

some suggest it cannot be regarded as a landmark case.[22] Nevertheless *Levis* introduces the phrase "Prime necessity" to the common law. Subsequent cases, have cited *Levis* widely with approval, including the Court of Appeal in *Vector v Transpower*,[23] and it can be regarded as responsible for the line of cases that have developed in Canada and New Zealand.

V. DEVELOPMENT AS A COMMON LAW DOCTRINE IN NEW ZEALAND

A. Initial Rejection

The New Zealand courts have applied the doctrine on numerous occasions. However the doctrine did have a questionable introduction to New Zealand law. Before the Privy Council decision in *Levis*, the New Zealand Court of Appeal in *Wellington Gas Company v Patten*[24] rejected the doctrine as expounded in *Allnutt*. Distinguishing *Allnutt*, Williams J limited Lord Hale's principle to cases where the public can point to some right (beyond the doctrine) to demand supply.[25] The Wellington Gas Company Act 1870, Williams J held, negatived an obligation to supply. The decision has not been followed in any subsequent New Zealand decisions and on the basis of the direction of

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[22] Even Professor Taggart notes its inherent shortcomings: "Public Utilities and Public Law", above n 18, 241 .

[23] *Vector v Transpower* above n 2, 20.

[24] [1881] NZLR 3 CA 205 [*Patten*]. Another decision before 1919 was the Court of Appeal decision in *Pollock v Saunders* (1897) 15 NZLR 581, in which the Court of Appeal cautioned against extensive use of the doctrine because of its "interference with and restriction of the rights of private property".

[25] *Patten* above n 24, 208.

later cases one commentator avidly suggests that it can no longer be considered to be good law.[26]

B. Acceptance of the Doctrine

The first New Zealand decision to follow the doctrine after *Levis* is the decision of the *Mayor of Auckland v The King*.[27] The case involved the payment of rubbish collection charges from the Post Office department. The Court held that rubbish collection was of prime necessity, and that the Crown should be liable to pay a fair and reasonable fee. Since *Mayor of Auckland* the doctrine has been accepted and applied widely.

The Court of Appeal in *State Advances Superintendent v Auckland City Corporation and the One Tree Hill Borough*[28] cited Levis as establishing a obligation outside the statute. The fact situation in *State Advances* involved a dispute between the City Corporation and the Borough over the terms of the supply of water to the Crown. Myers CJ began by summarising the principles established and enunciated by the authorities.[29] The judicial authorities, he said, establish that a body which has a practical monopoly in respect of a service of prime necessity, has "an obligation (implied where not expressed) to supply water to all those requiring it and who are prepared to pay a fair and reasonable charge".[30]

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[26] "Public Utilities and Public Law" above n 18, 242-243.

[27] [1924] GLR 415 [*Mayor of Auckland*].

[28] [1932] NZLR 1709 [*State Advances*].

[29] The Chief Justice cited *Levis*, *Sheffield Waterworks Co. v Wilkinson* 4 CPD 410, and *McLean v Municipal Council of Dubbo* 10 NSWSR 911.

[30] *State Advances* above n 28 , 1715.

In both *Wairoa Electric Power Board v Wairoa Borough*[31] and *South Taranaki Electric Power Board v Patea Borough*[32] contractual negotiations had broken down between the monopoly suppliers of electricity and the local borough. The court in both cases applied the doctrine to resolve the question of price for the continued supply of electricity.

Nearly, four decades later, the Court of Appeal in *Auckland Energy Power Board v Electricity Corporation of New Zealand*[33] referred to the judgment of Myers CJ in *State Advances*. Affirming Justice Barker's decision to strike out the claim on the prime necessity doctrine, the Court held that it was "common ground" that Electricorp as a monopoly supplier was obliged to supply electricity at fair and reasonable prices.[34] The Privy Council was however more cautious. Having recorded a concession by ECNZ of their obligations under the doctrine, their Lordships refrained from accepting or rejecting the Court of Appeal's views on the applicability of the doctrine to a State-owned enterprise.[35] This left the applicability of the doctrine in some doubt.

The doctrine has been cited, and in some instances applied, in other cases since 1986.[36] Justice McGechan called it an "arcane" doctrine in *New Zealand Rail Limited v Port of Marlborough*.[37] But in the later case of *New Zealand Private Hospitals Association – Auckland Branch Inc v*

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[31] [1937] NZLR 211 [*Wairoa*].

[32] [1955] NZLR 954 [*South Taranaki*].

[33] [1994] 1 NZLR 551 (CA) [*AEPB v ECNZ*].

[34] *AEPB v ECNZ* above n 33, 557.

[35] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) [*Mercury v ECNZ*].

[36] See also *Westgate, Transport Limited v Methanex New Zealand Limited* (8 June 1998) unreported, High Court, Auckland CP 93/98; *Airways Corporation of New Zealand Ltd v Geyserland Airways Ltd* [1996] 1 NZLR 116.

[37] (1 April 1993) unreported, High Court, Blenheim Registry, CP 8/91.

Northern Regional Health Authority, the doctrine was referred to as a "well established" principle.[38]

Until *Vector v Transpower* the doctrine was assumed to exist in New Zealand. Now the position has changed drastically. Before turning to that decision, the elements of the doctrine need to be examined.

VI. DEFINING OF THE DOCTRINE

For the doctrine to be applicable several elements must be satisfied. The leading case of *Levis* articulates the doctrine as having three main components: a service of prime necessity, supplied by body in a position of special advantage, implies an obligation to supply that service for a fair and reasonable price.[39]

A. Effect of the doctrine

If the doctrine is applicable some courts assert that where a contract has been entered into, that contract will not be effective to the extent that it is inconsistent with the doctrine.[40] This would mean that the notions of fairness implied by the doctrine would prevail over the common law freedom of contract. Prima facie this sounds undesirable. However the ideas behind Lord Hale's principle and the law of common callings were intended to counteract the market power of tradesmen who could

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[38] (7 December 1994) unreported, High Court, Auckland Registry, CP 400-94 Blanchard J.

[39] *Levis*, above n 20, 513.

[40] *Chastain v British Columbia Hydro and Power Authority* (1972) 32 DLR (3d) 443, 458 [*Chastain*].

"exact any price they pleased".[41] The obligation to provide service at reasonable rates was to address injustices whether contractual or not. Therefore to give the doctrine any effect it is desirable to allow it to prevail over contracts extracting unfair prices.

B. Elements of the Doctrine

1. Prime Necessity

The notion of prime necessity has been interpreted to require such services that are of "fundamental importance to the public".[42] The doctrine need not necessarily be publicly owned, it is the importance of the service to the public. The idea of 'prime necessity' echoes the sentiment of a business affected with a public interest. It is consistent with the principle as first postulated by Lord Hale when he spoke of a public wharf "unto which all persons that come to that port must come". It is the necessity of the service to the public that causes the utility to be of prime necessity. In New Zealand the services which the courts have considered to be of prime necessity are water,[43] electricity,[44] sewerage,[45] and ports.[46] [47]

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[41] Arteburn "The Origin and First Test of Public Callings" 75 Univ Penn Rev (1926-27) 411, 421.

[42] *Chastain*, above n 40, 454.

[43] *State Advances* above n 28. Note the decision of *Hutt Golf Course Estate v Hutt City Corporation* [1945] NZLR 56 where the majority held the doctrine only applied to the supply of water and not water connection charges.

[44] *Wairoa* above n 31; *South Taranaki* above n 32.

[45] *Auckland City v Auckland Metropolitan Fire Board* [1967] NZLR 615.

[46] *New Zealand Rail Limited v Port Marlborough* [1993] 2 NZLR 641 [*NZ Rail*].

[47] For a more extensive list of the different services to which the doctrine has been successfully and unsuccessfully argued see John Land "The Role of the Prime Necessities Doctrine in the control of central services" in New Zealand Institute for

In New Zealand the doctrine has not been extended to a wide variety of utilities. The Commerce Commission doubted that the doctrine would apply to NGC, since there were few firms for which gas was an essential commodity.[48] The application of the doctrine to telecommunications is a possibility, since it is very likely that a New Zealand court would hold that telecommunications are today regarded as a prime necessity.

The definition of a prime necessity is not static. It will change depending on the social conditions.[49]

2. *A Position of Special Advantage*

It is no surprise that businesses that are of prime necessity tend to be monopolistic since this is why the supply of their service is so necessary. But it is not sufficient that the business supply a service of a prime necessity. It must also occupy a position of "special advantage", as the Court in *Levis* expressed it, or a "practical monopoly", as expressed in *Wairoa* and *South Taranaki*.[50] In assessing whether a business occupies a position of special advantage the courts have looked at the feasibility and costs of alternative forms of supply. This was the case in *South Taranaki*, where the Supreme Court held that the Power Board had a practical monopoly.[51] It would seem that the standard required to satisfy the requirement of special advantage need not be exceptionally high.

International Research (ed) *Clarifying latest trends & future directions in Competition Law and Practice: 28 & 29 August, 1995, The James Cook Centre, Wellington* (New Zealand Institute for International Research, Wellington, 1995) 10 - 12.

[48] *Re Natural Gas Corporation of New Zealand Limited and Enerco New Zealand Limited* CC Decision No 270 (22/11/93).

[49] See also the Court of Appeals comments in *Vector v Transpower* above n 2, 22.

[50] Wairoa above n 31, 215; *South Taranaki* above n 32, 961-962.

[51] *South Taranaki* above n 32,962.

The doctrine is not contingent on statutory provisions governing the supply of the service. McIntyre J in *Chastain* made the point that the authorities do not proceed on the basis of a statutory obligation to supply. The statutes, he says are merely declaratory of the common law principles. This view is analogous to the approach in the United States, since what *Munn* effectively established was that the right of the legislature to impose price controls, derived from the common law principles. The legislative price restrictions, like statutes McIntyre J refers to are arguably equally declaratory of the common law.

3. *Application of the Doctrine to the Crown*

Intuitively, the Crown is the type of party that one would expect the doctrine apply to. However, there have been no cases where the doctrine has been applied to the Crown as a supplier. This should not restrict the application of the doctrine to the Crown (or instruments of the Crown). Common law doctrines are equally applicable to the Crown.[52] In the common law doctrine of prime necessity, the doctrine should be applied in the same way as any other supplier of that utility. The Crown is often in the position of monopoly supplier and it is expected that they would supply at fair and reasonable prices without the need for the doctrine. But if the doctrine were required, there is no reason in principle why the doctrine should not be applied. *Levis* is an illustration of the Crown receiving the benefit of the doctrine. The Court had no difficulty in requiring the Crown to pay a fair and reasonable price. There is therefore no reason why the Crown would not be required to supply under the same obligation. Similarly, the Post Office Department took the benefit of the doctrine in *Mayor of Auckland v The King*. The Court determined that the Post Office having received

[52] The common law of trespass is one example: *Entick v Carrington* (1765) 2 Wils 275; 95 ER 807.

the benefit of rubbish collection was under an obligation to pay a fair and reasonable price for the service.

4. *Fair and Reasonable Price*

Where a supplier of a prime necessity occupies a position of special advantage the obligation to supply the service to all who seek it for the payment of a fair and reasonable price follows. Reciprocity is a key feature of the doctrine, so that anyone receiving supply of the service is under a reciprocal duty to pay a fair and reasonable price. Some cases have also held that supply cannot be withheld if the former owner of premises has arrears.[53]

As yet the New Zealand courts have not had to undergo the task of determining a fair and reasonable price. If the parties agree, the court may refer the matter to arbitration.[54] The Court of Appeal in *State Advances* settled on the price being charged to other recipients plus the connection charges while the court in *South Taranaki* referred the issue to referees.[55]

John Land suggests that the formula the courts are likely to take is a cost plus reasonable return. He points to three cases with relevant pricing principles:[56]

First, *Union Shipping New Zealand Ltd v Port Nelson Ltd,*[57] where the court determined the phrase "commercially reasonable" in the Waterfront Industry Communication Act 1976 to be the cost of providing the service (including a contribution towards capital costs) plus a reasonable margin for profit.

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[53] *State Advances* above n 28.

[54] *Wairoa* above n 31.

[55] *South Taranaki* above n 32, 958.

[56] Land above n 47, 14-15.

[57] [1990] 2 NZLR 662.

Secondly, *Air New Zealand Limited v Wellington International Airport Limited*,[58] where a statutory obligation on the airport to act "as a commercial undertaking" meant it could recover costs (including sunk costs) and a reasonable return expected of any viable commercial enterprise.

Thirdly, the comments of Justice Gault in *Clear Communications v Telecom Corporation of New Zealand Ltd*,[59] where Gault J drew an analogy between reasonableness of a firms actions and assessment under the doctrine. Gault J determined that reasonable allowed additional charges to be added on to recover the incremental costs (including common costs) and a reasonable return.

5. *Reasonable Terms*

According to *Chastain*, the obligation to supply requires that the supply be without unreasonable discrimination between those similarly situated or who fall into one class of consumers.[60]. The Court held that requiring certain customers to provide security deposits but not others was unreasonable discrimination. This extends the doctrine further than merely reasonable price. In principle this extension is consistent with the obligation to supply at fair and reasonable prices because it ensures the obligation has force. The purpose of requiring a fair and reasonable price is to make the obligation to supply genuine. Requiring reasonable terms, precludes practical monopolies from ostensibly supplying at a fair and reasonable price, but in substance demanding such onerous terms as to negate the reasonableness of the

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[58] (15 October 1993) unreported, High Court, Wellington Registry, CP 829/92 McGechan J.

[59] (1993) 5 TCLR 413,430.

[60] *Chastain*, above n 40, 454.

price. Unreasonable pricing is a very tangible measure of whether supply is being withheld, but other means of subverting the doctrine should also not be tolerated. The Courts ought to err on the side of caution when determining reasonableness of terms. But as long as the courts are assessing whether supply is effectively being precluded by unreasonable terms, then it is within the objects and purposes of the doctrine to do so.

In the United States greater focus has been placed on the duty to provide adequate supply to all without discrimination. The common law duty of equal and adequate services is a United States development of the doctrine of prime necessity.[61] The American duties have taken on a greater human rights flavour, which explains why discriminatory behaviour is less likely to be tolerated in the United States. In New Zealand, such an emphasis has not emerged to the same extent. While the doctrine allows for the use of the doctrine as a human rights instrument such an application of the doctrine is yet to be seen in New Zealand.

VII. MERCURY V TRANSPOWER

In recent litigation between Vector and Transpower both the High Court and Court of Appeal struck out Vector's action under the doctrine. Vector alleged that Transpower New Zealand Ltd's pricing policies were unfair, unreasonable, and therefore unlawful.[62] In separate causes of action Vector alleged Transpower's pricing

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[61] A more detailed discussion follows in Part XIIIA(2) of this paper "Public Utilities Law".

[62] *Mercury Energy Ltd v TransPower NZ Ltd* (24 July 1998) unreported, High Court, Auckland Registry, CP 1/98 , 6 [*Mercury v Transpower*].

methodologies breached section 36 of the Commerce Act 1986 and its common law obligation to charge fair and reasonably under the prime necessity doctrine. Transpower's response was that section 36 does not apply to a firm such as itself which is a virtual monopoly. Vector is not an immediate competitor of Transpower. Transpower alleged that Vector failed to address the anti-competitive purpose element in their statement of claim and their claim is so poorly drafted that it is a "total write-off",[63] incapable of repair. Transpower argued that the doctrine had not been part of the law for over 100 years, or if it was it has been supplanted by the Commerce Act 1986 and the State-Owned Enterprises Act 1986 (SOE Act).

A. Decision of the High Court

In the High Court, Justice Williams and Dr Brunt declined to strike out the section 36 cause of action. In respect of the cause of action under the doctrine the court struck Mercury's claim.

The court undertook an extensive review of the New Zealand case law and leading Canadian, English, Australian cases. He found the weight of authority in the New Zealand High Court and Court of Appeal too compelling to conclude other than that the doctrine had been a part of New Zealand law at least until 1986.[64] The court however was not equally compelled by the case law in New Zealand since 1986. The movement towards privatisation and corporatisation and the general light-handed regulation policy of the government led it to believe that the courts' intervention through the doctrine was inconsistent with

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[63] *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316, 324 cited from *Mercury v Transpower* above n 62, 3.

[64] *Mercury v Transpower* above n 62 , 39.

such a regime. The Court held that the complexity of economic theory and pricing methodologies was not suitable for the courts. Direct intervention by the courts is a last resort, and protection for users, consumers and suppliers is provided by ministerial recommendation for price control under Part IV. SOEs are accountable through negotiations between the shareholding ministers and the SOEs in preparing the Statement of Corporate Intent. There is no indication in the parliamentary debates on the Commerce Act and the State-Owned Enterprises Act suggesting the doctrine was intended to survive and since there is no express preservation of the doctrine in the Commerce Act or the SOE Act the doctrine cannot have been intended to survive.[65]

The court's judgment rests on the broad proposition that the existence of the doctrine is inconsistent with the government's implementation of a light-handed regulatory system. Reliance on market forces, the Commerce Act and the SOE Act provisions for information disclosure and accountability mechanisms in a "light-handed way" mean that Parliament must have intended to exclude the doctrine.

B. Decision of the Court of Appeal

The Court of Appeal unanimously held that while the doctrine is a part of New Zealand's common law, the doctrine is eclipsed by the Commerce Act and SOEA.

Richardson P delivered the majority judgment, and Thomas J delivered a separate judgment with additional comments on the SOE Act. The Court determined that the doctrine had come to form part of the common law of New Zealand. It described the doctrine as a blunt,

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[65] *Mercury v Transpower* above n 62, 53-54.

"backstop common law remedy" to be applied only in the absence of other remedies or anything to the contrary.[66]

In the Court's opinion, the nature of the Commerce Act emphasises a deliberate move to a light-handed approach, which the doctrine is inconsistent with. Refusals to supply are caught by section 36 where there is an anti-competitive purpose. Noting the Privy Council's determination in *Telecom v Clear* that section 36 does not control monopoly rents,[67] the Court held that Part IV is the appropriate mechanism for price control. The Commerce Commission is the determiner of prices not the courts.

Turning to the particular facts of the case, the Court considered that Vectors statement of claim "smack[ed] of judicial review in another guise". The Court regarded Vector's complaint as primarily being that Transpower had not complied with its obligations under the Government's section 26 economic statement and the statements of corporate intent. Re-iterating the limited nature of judicial review of State-owned enterprises,[68] the Court was not prepared to allow judicial review through the back door.

Richardson P considered that neither the statement of corporate intents nor the scheme of the SOE Act would exclude the doctrine. However, the detail of the framework and accountability provisions and the specificity of pricing pointed strongly against finding a parallel accountability measure through the courts.

Justice Thomas re-inforced the point that the SOE Act did not in itself preclude the doctrine. Thomas J went further to hold that accountability in the SOE Act was not of the same character as that provided for by the doctrine. The SOE Act he held, does not provide a

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[66] *Vector v Transpower* above n 2, 23.

[67] *Telecom v Clear* [1995] 1 NZLR 385, 407 (PC).

[68] Judicial review of a State-owned enterprise is limited to situations of fraud, corruption or bad faith: *Mercury v ECNZ* above n 35, 390 .

pricing or price-fixing regime which would displace the doctrine. Thomas J emphasised the commercial and arms-length nature of an SOE, allowing scope for the doctrine to develop.

He cautioned that if the doctrine is to develop in today's climate it would require some adjustment. The original focus of the doctrine was an obligation to supply. The issue of price was included so supply could not be negated. The original focus must be returned to as the doctrine was never intended to be a "price fixing formula".

C. Effect of Vector v Transpower

The effect of the decision is that the doctrine cannot co-exist alongside the Commerce Act 1986 and to some extent the SOE Act. The Court viewed the statutory framework in the light-handed context as a rug over the common law floor. Should the Commerce Act be repealed the doctrine could revive. Presently however, it is inconsistent with the statutory framework. To assess this position it is necessary to examine New Zealand's framework in greater detail.

VIII. THE REGULATORY CLIMATE IN NEW ZEALAND

In 1984, the Labour Government returned to power following a lengthy National reign and the Muldoon era of strict regulation. The Labour government implemented an uncharacteristic regulatory regime. The regime was uncharacteristic because it did not reflect Labour's traditional welfare state approach. Until this time the New Zealand economy was closely monitored by price controls, tariff protections, and subsidies. The state had a large presence in the ownership and operation of public utilities. The inefficiencies associated with the

conflict between the State's roles as owner and as regulator of public services motivated a rapid restructuring of the New Zealand economy.[69] The reforms involved the restructuring of the state sector coupled with a liberalisation of the economy. The government removed itself from the ownership and operations of public utilities through corporatisation and in some instances privatisation. Similar restructuring has taken place in the United Kingdom and Australia. But whereas state-ownership was replaced with a regulatory interface in these countries, the New Zealand government opted for light-handed regulation. Light-handed regulation uses competition and market forces in place of heavy-handed government regulation. The approach is based on the presumption that it is "preferable to create incentives for market participants (both the regulated and its clients) to negotiate solutions, and, if necessary, resort to the legal system, than it is for the 'regulator' to directly intervene".[70] Two of the key elements of light-handed regulation in New Zealand are the provisions of the Commerce Act 1986 preventing anti-competitive behaviour and the threat of price control.[71]

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[69] These inefficiencies are outlined in Bollard and Pickford "New Zealand's 'Light-Handed' Approach to Utility Regulation" (1995) 2 Agenda 411, 417.

[70] John Belgrave "The Theory behind the existing environment of light handed regulation, with practical case studies" New Zealand Institute of Policy Studies Symposium Public Utilities: The New Environment Proceedings of a Symposium held at Wellington Park Royal 6 October 19993, 3.

[71] Belgrave above n 70, 3.

IX. THE COMMERCE ACT 1986

A. Section 36

The Commerce Act 1986 represents the "cornerstone of light-handed regulation"[72] and section 36 has been described as the "lynchpin"[73] of light-handed regulation. In the context of monopoly suppliers section 36 is the key focus. Section 36 provides:

36. Use of a dominant position in a market - (1) No person who has a dominant position in a market shall use that position for the purpose of -

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

(b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or

(c) Eliminating any person from that or any other market

Essentially section 36 prohibits a person in a dominant position, from using that position, for an anti-competitive purpose.

1. Dominance

There is a wealth of New Zealand and foreign case law discussing the threshold of dominance. Until the decision of the Court of Appeal in *Telecom Corporation NZ Ltd v Commerce Commission*[74] an economic definition of dominance had been followed. The Commerce

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[72] *Mercury v Transpower*, above n 62, 42.

[73] R Ahdar "The Privy Council and 'Light-Handed Regulation" (1995) 3 Law Quarterly Review 217, 219.

[74] [1992] 3 NZLR 429 [*Telecom AMPS-A*].

Commission in *Telecom AMPS-A* had relied on its earlier decision in *Proposal by Broadcast Communications Ltd* and defined dominance as:[75]

> economic strength such that it can behave to a large extent independently of that person's competitors. A person in a dominant position will be able to effect an appreciable change in the price and or other aspects of supply...for an appreciable length of time without suffering serious adverse impact on profitability.

Richardson J delivered the judgment of the Court of Appeal in *Telecom AMPS-A* and criticised the Commission's test as setting too low a standard. Dominance, he held ought to be given its ordinary meaning not a technical, economic meaning.[76] This meaning sets a rigorous threshold, requiring more than an advantageous or powerful influence. Resorting to the Latin meaning of the word 'dominus' meaning 'master', Richardson J determined that only one person can be dominant in one aspect of a market at one time.[77]

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[75] (1990) 8 NZAR 433, 438.

[76] The rejection of the economic meaning has been criticised as a "major setback to the development of New Zealand's competition law" because the view is that the Commerce Act should be interpreted consistent with the economic principles and concepts it promotes. Ross Patterson "The Rise and Fall of a Dominant Position in New Zealand Competition Law: From Economic Concept to Latin Derivation" (1993) 15 NZULR 265, 288.

[77] *Telecom Corporation NZ Ltd v Commerce Commission* [1992] 3 NZLR 429, 442. The standard set by the Court of Appeal has been criticised as raising the threshold above that which was intended: Patterson "The Rise and Fall of a Dominant Position in New Zealand's Competition Law: From Economic Concept to Latin Derivation" (1993) 15 NZULR 265, 267.

2. *Use*

Dominance alone is not an offence under the Act. The dominant person must misuse their position. In *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [78] Tipping J linked the element 'use' to the anti-competitive purposes. If a person in a dominant position has acted with an anti-competitive purpose then they are using their position. The Court of Appeal in *ECNZ v Geotherm Energy Ltd* considered use and purpose to be separate concepts.[79]

3. *Anti-competitive purpose*

A firm has an anti-competitive purpose if their substantial purpose was to restrict, deter, prevent, or eliminate competition.[80] For some time, the courts spent a great deal of time debating whether 'purpose' was to be determined objectively or subjectively. Finally, the Court of Appeal adopted both tests noting that the distinction between the two tests was not drastic because in the absence of actual evidence proving subjective purpose, objective evidence is usually referred to.[81] Purpose has a relatively high threshold. A person who intends to do an act which is known to have an anti-competitive effect will not satisfy the requirements of purpose. Purpose requires the anti-competitive conduct be the "object or aim" of the dominant person, not mere intention.[82]

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[78] [1990] 3 NZLR 247 (HC).

[79] [1992] 2 NZLR 641.

[80] Commerce Act 1986, s2(5), s 36(1)(a), (b), (c).

[81] *Commerce Commission v Port Nelson* (1995) 5 NZBLC 102-340, 102-358.

[82] *Union Shipping NZ Ltd v Port Nelson Ltd* (1990) 2 NZLR 662, 707.

B. *The Doctrine & Section 36 Compared*

1. *Different purposes*

The underlying tenet of section 36 is distinct from the doctrine. Consistent with the purpose of the Commerce Act "to promote competition in markets within NZ",[83] section 36 has a pro-competitive thrust. It is designed to produce competition, which in the long term will compete out monopoly rents.[84] The focus of section 36 is unilateral conduct detrimental to achieving workable competition in a market.[85] Achieving workable competition is the principal driving force behind the prohibition in section 36. The impact of such conduct on other parties is a secondary concern.

In contrast, the doctrine is concerned with ensuring reasonable access to public utilities. The reason behind this objective is the public importance certain services have. The prevention of anti-competitive conduct does not feature in the assessment. The origin of the doctrine illustrates that it is founded on a belief that certain property rights are affected by the public interest. This public interest creates a social obligation.

2. *No Anti-Competitive Purpose Required*

A supplier of a utility of prime necessity who refused to supply access (or constructively refused supply by charging excessively) may be caught by section 36 only if the supplier had an anti-competitive

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[83] Commerce Act 1986, Long Title.

[84] *Telecom v Clear* [1995] 1 NZLR 385, 407-408 (PC) [*Telecom v Clear (PC)*]. The Privy Council added that the short term solution was provided by Part IV.

purpose. It is possible that a supplier who charges competitors excessively with the aim of earning monopoly rents may not necessarily have an anti-competitive purpose. His purpose may be solely to earn excessive profits. As section 36 is currently drafted, it does not prohibit the earning of monopoly rents.[86] Although the Privy Council has said it is legitimate to infer purpose from use of a dominant position producing an anti-competitive effect, this is rebuttable by evidence showing a contrary subjective intent.[87] Accordingly, it is quite conceivable that an anti-competitive purpose may be lacking though an anti-competitive effect is present (or expected).

3. *An Amended Section 36*

The Commerce (Control of a Dominant Position) Amendment Bill proposes an amendment to section 36. The amendment repeals section 36(1) and inserts a new subsection as follows:[88]

(1) No person who has a dominant position in a market must use that position—

(a) For the purpose of--

(i) Restricting the entry of any person into any market, not being a market exclusively for services; or

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[85] Workable Competition (as opposed to perfect competition) is the level of desired competition, Commerce Act, s 3(5).

[86] *Telecom v Clear* (PC) above n 84, 407.

[87] *Telecom v Clear* (PC) above n 84, 402.

[88] Commerce (Control of a Dominant Position) Amendment Bill No. 265-1. Note the amended section 36 includes an inserted subsection (1A) which for the purposes of this paper is unnecessary to reproduce.

(ii) Preventing or deterring any person from engaging in competitive conduct in any market, not being a market exclusively for services; or

(iii) Eliminating any person from any market, not being a market exclusively for services;

(b) In a manner that has, or is likely to have the effect, of substantially lessening competition in a market.

The purpose of the amendment is to reduce the emphasis on requiring proof of an anti-competitive purpose with the objective of deterring anti-competitive behaviour. However, the drafting of the amendment is confusing. If paragraphs (a) and (b) are to be read conjunctively it seems that for a dominant firm to breach the amended section there must be an anti-competitive purpose and an effect on competition.[89] This appears to set the threshold of section 36 higher, because the amended section still requires proof of purpose as well as effect. The amended section 36 would still not prohibit the earning of monopoly profits. If the legislature's intention had been to prohibit such conduct it should have excluded paragraph (a). The result would be to introduce an "effects test".

A discussion paper published by the Ministry of Commerce this year discusses the possibility of introducing an "effects test" in section 36 in place of the "purpose test".[90] The test would catch conduct which would have the "effect, or likely effect, of restricting, deterring,

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[89] The section is ambiguous for another reason. Although it is not of any significance, the use of the words "must" in section 36(1) in place of the current wording "shall" is odd. The way the amendment reads appears to suggest that a dominant firm 'is not required to' have an anti-competitive purpose, which is of course obvious.

[90] "Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues: A discussion document" (Ministry of Commerce, Wellington, 1999) ["Thresholds Discussion Paper"].

preventing or limiting competition".[91] The Ministry notes some of the undesirable consequences of adopting such a test and concludes that an "effect test" would not assist in promoting competition in New Zealand markets.[92]

4 *The Implications of an Effects Test on the Doctrine*

If an effects test were adopted in New Zealand, the shortfall which currently exists under the section 36 purpose test would be reduced. The pro-competitive thrust of section 36 however would still be present. In comparison, the doctrine extends to conduct which is unreasonable although it has no effect on competition. The sort of situation envisaged arises in a situation like the one involving Transpower and Vector. First, Transpower as a natural monopoly do not necessarily act anti-competitively by charging lines companies higher prices. Transpower's monopoly position is not preserved by charging monopoly rents. It is preserved by the unique position it derives from being the owner of the National Electricity Grid. Charging high prices for access to the grid, could be analysed in some instances as more pro-competitive than undercharging. This is because assuming it was possible to replicate the National Grid, new-entrants are more likely to be deterred or forced out of the market by Transpower undercutting prices than over-charging. Secondly, it is arguable that in the case of public utilities operated by a monopoly, refusals to supply or constructive refusals to supply would not have the effect of restricting, deterring, preventing, or limiting competition, because there is no competition to begin with.

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[91] "Thresholds Discussion Paper", above n 90, 24.

[92] "Thresholds Discussion Paper", above n 90, 24.

C. *Part IV of the Commerce Act*

The Court of Appeal in *Vector v Transpower* determined that the existence of Part IV of the Commerce Act renders the doctrine unnecessary. If controls on prices are to imposed it should be through the mechanism provided by Part IV and not through the courts.

1. *Part IV*

Part IV of the Commerce Act provides a mechanism by which the Minister of Commerce can recommend that the Governor General imposes price controls on specified goods or services.[93] To make such a recommendation the Minister must be satisfied that competition in the relevant market is limited or likely to be lessened, and that it is necessary or desirable for prices to be controlled in the interests of users, consumer or suppliers.[94] The Minister also has the power to ask the Commission to investigate the necessity for price control, or the Commission of its own volition may recommend to the Minister that price controls be imposed on specified goods and services.[95] The threat of price control is to be invoked as a last resort and is intended to act as a deterrent against the abuse of market dominance.[96] In the area of natural monopolies the potential for abuses of power are high, making deterrents like this vital.

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[93] Commerce Act 1986, s53(1).

[94] Commerce Act 1986, s53(2).

[95] Commerce Act 1986, ss54(1), 54(3).

[96] "Guarantee of Access to Essential Facilities: A Discussion document" (Ministry of Commerce, Wellington, 1989) 4.

2. *Vector v Transpower*

Vector argued that Part IV cannot be intended to supplant the doctrine because it is of general application. Vector submitted that Part IV is a temporary measure, which does not provide a private cause of action. Part IV is not limited to monopolies. If it were there would be greater cause to think that it was intended to supplant the doctrine. Part IV is limited in time, because an Order in Council must specify a time at which control over prices expires. At best, Part IV suspends the position of price as long as the Order is valid.[97] The fact that Part IV is not limited to monopolies should not impede its ability to supplant the doctrine. Indeed, had it been limited to monopolies there would be a stronger argument that it eclipsed the doctrine, but just because Part IV is broad, it does not mean that it would not exclude the doctrine. Similarly the limitation in time of Part IV is to be expected to avoid the situation of price control remaining in force beyond what is needed. The strongest argument against finding the doctrine supplanted are possibly that Part IV as a public remedy is an ineffective and inadequate solution.

3. *A Problematic Provision*

Until recently, the likelihood of Part IV being invoked was regarded as remote. For the threat of price control to be credible it must be supported by a readiness to invoke it with the necessary procedures in place. Since Part IV has never been invoked it is questionable whether the threat of price control does act as a significant deterrent . Earlier this year the cobwebs gathering on Part IV were stirred. The

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[97] Written submissions for Vector Limited in the Court of Appeal CA 32/99 Russell McVeagh McKenzie Bartleet & Co. para 1.13 – 1.16 [*Vector's submissions*].

Commerce (Controlled Goods or Services) Amendment Bill 1999 ('the Bill') was introduced to impose price control on lines companies following criticisms in the wake of extensive reforms in the Electricity Sector.[98] The fact that the government chose not to use the price control provisions in place in Part IV of the Commerce Act 1986, but chose to actually amend the Commerce Act is important. Transpower contended that the imposition of price control under Part IV is a refined process requiring specific criteria to be met in comparison to the "open ended" criteria of the doctrine.[99] Part IV involves a specialist body, (the Commerce Commission), to set and monitor the implementation of prices, through an investigative rather than adversarial process. The basis of Transpower's submission is that Part IV addresses the same area as the doctrine but in a more sophisticated fashion. The Court of Appeal implied similar connotations by referring to the doctrine as a "blunt" instrument from a "bygone era".[100] Arguably Part IV is not quite as Transpower contends. The fact that the government avoided using Part IV itself in order to implement price control highlights defects in the present supposedly sophisticated tool.

4. *The Ineffectiveness of Public Remedies*

Part IV is a public remedy and affords no private remedies to individual consumers, users or supplier. For protection against excessive pricing individuals are reliant on the political processes of recommendation by the Minister or the Commerce Commission. The

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[98] The Electricity Industy Reform Act 1998 but did not have the desired effect on electricity prices, which rose.

[99] Written submissions for Transpower New Zealand Limited in the Court of Appeal CA 32/99 Simpson Grierson para 3.18 [*Transpower's submissions*].

[100] *Vector v Transpower* above n 2, 23.

deficiencies of this process is evidenced by the Bill. The Bill lacked sufficient support to be passed through Parliament and was abandoned. The failure to pass the Bill illustrates the ineffectiveness of public remedies, particularly in an MMP environment. Litigation is sometimes regarded as a slow and cumbersome process, but the passage of this Bill illustrates how ineffective and 'theoretical' a public remedy can be.

5. *An Inadequate Remedy*

Essentially Part IV leaves individuals with no private remedy and a potentially ineffective public remedy. The High Court and Court of Appeal in *Vector v Transpower* placed a great deal of reliance on the threat of and potential invocation of price control under Part IV. In theory Part IV provides a public remedy. However, this view ignores the practical reality. In reality there will always be reluctance in any New Zealand government to introduce price control, because it has the potential to undermine the entire light-handed regulatory regime. In an economy that has consciously renounced a heavy-handed approach any government would be anxious to avoid the political ramifications flowing from a failure to uphold the light-handed government policy. Consequently, the introduction of price control is not a decision the government would enter into lightly. Being an election year, it may be unfair to regard the National government's inability to pass the Bill as illustrative of the norm. For example, the opposition parties may have been more reluctant than usual to allow the National government a chance to rectify its embarrassment in the Electricity Reforms. But this is precisely the nature of price control. In New Zealand price control is politically controversial. It has the potential to be driven by political objectives. The Bill shows the government is, in extreme cases, prepared to introduce price control but its inability to effect such a

decision diminishes the power of the threat of price control and reduces the extent to which Part IV can be called a remedy at all. For these reasons, Part IV alone does not offer an adequate solution.

6. *The Doctrine in a Heavier Environment*

Although price control is unlikely to be implemented, it is important to consider what effect price control may have on the application of the doctrine. If price control were invoked the need for the doctrine substantially diminishes. Notwithstanding the invocation of price control there is a possibility that the doctrine could be relevant. Individual dealings between a supplier and user could be discriminatory or unreasonable in the particular circumstances even though controls on prices have been complied with. Price control is likely to be imposed on an industry-wide basis, or to a category of suppliers. The doctrine allows the courts to address individual cases of injustice notwithstanding that price control requirements have been met.

In the United States, the doctrine exists notwithstanding and independent of statutes regulating the conduct of businesses.[101] Therefore although the United States has regulatory bodies setting prices, the doctrine exists in the sense that a public utility has a duty to serve on reasonable terms to all who require the service.[102]

The doctrine has existed in heavier times in New Zealand too.

Prior to the Commerce Act 1986 there was no specific statutory control of monopolistic pricing.[103] Section 23(1) of the Commerce Act 1975

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[101] *Corpus Juris Secundum* , section 7, Volume 73B.

[102] Am Jur § 16 citing *United Fuel Gas Co v Railroad Com* 49 S Ct 150 [*United Fuel*].

[103] Section 19(2)(j) of the Trade Practices Act 1958 considered any "complete or partial monopoly of the supply of goods in NZ or any practice tending to about any such complete or partial monopoly" to be an examinable trade practice. See Yvonne Van

empowered the Commerce Commission to make an order prohibiting conduct, which it considered to be contrary to the public interest and fell within one of several categories.[104] One of these categories included an unjustified refusal by a wholesaler to sell or supply goods to a retailer.[105] A wholesaler was deemed to have refused to supply, if he refused to supply goods except at prices or terms which were so "disadvantageous as to be likely to deter the retailer from acquiring those goods" or to prevent the retailer from acquiring those goods at similar terms and conditions to other retailers.[106]

Section 21(1) deemed certain other trade practices to be contrary to the public interest. This included trade practices that would have the effect of limiting or preventing the supply of goods to consumers.[107]

Conduct prohibited by the doctrine may have fallen within the ambit of sections 23 or 21 of the Commerce Act 1975.[108] In fact, an 'unjustifiable refusal' (particularly with the inserted deeming provision) is very similar to the doctrine. The insertion in 1971 of conduct deemed to be a refusal to supply is consistent with the doctrine's obligation to supply and to do so reasonably. The provisions were however reliant on the Commission to hold an inquiry into the alleged conduct. Neither enactments created mechanisms for private redress in the Courts. Begrudged users were reliant on the respective Commissions to

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Roy *Guidebook to New Zealand Competition Laws* (2 ed CCH New Zealand Ltd, Auckland, 1991) 146.

[104] Section 19(1) of the Trade Practices Act 1958 (the predecessor to the 1975 Act) similarly empowered the Trade Practices and Prices Commission.

[105] Commerce Act 1975, s 23(1)(i). Trade Practices Act 1958; s 19(2)(i).

[106] Sections 23(5) and 23(6) of the Commerce Act 1975. Trade Practices Act 1958; s19(2)(i). Section 9 of the Trade Practices Amendment Act 1971 inserted a new s19(2)(i) which included the deeming provision in regard to refusals to supply.

[107] Commerce Act 1975, section 21(1)(g). Trade Practices Act 1958, section 20(1)(e).

[108] The provisions catch refusals to supply to retailers and consumers or refusals to supply to retailers which consequently limit the supply of goods to consumers. However, the provisions do not seem to cover a refusal to supply to a consumer, except at unreasonable prices or terms.

undertake an investigation. Notwithstanding these provisions the doctrine existed and was applied by the courts.

In *Wairoa* the Board's licence prescribed maximum charges for the supply of bulk electricity. The Council argued that the Board's charges despite being below the maximum prescribed levels were nevertheless unfair and unreasonable. The Court of Appeal accepted that if the Council could show the charges were unreasonable, the charges would be reduced to a reasonable amount.

If price control were invoked the doctrine could continue to be relevant in several ways. *Wairoa* indicates the readiness of the courts to apply the doctrine to unreasonable prices, despite price control having been complied with.

The continued application of the doctrine under the earlier legislation highlights the concurrent existence of public and private remedy. In the (unlikely) event of a supplier violating price control provisions and attempting to charge above the regulated price, users or consumers could seek damages under the doctrine.

Price control does not oblige a supplier of essential services to supply. The doctrine therefore could be invoked if a supplier refused to supply or a user failed to pay. The reciprocal nature of the doctrine, would allow a supplier to recover payment for services provided to a user, which price control does not.

D. Implied Repeal by the commerce act

The removal of common law rights requires express statutory wording or a necessary implication.[109] Since the Commerce Act does not provide an express repeal of the doctrine, the question is whether the Act as a whole implicitly repeals the doctrine.

1. No Express Preservation

The Commerce Act refers to two areas of the common law. Section 7 of the Commerce Act protects breach of confidence and restraint of trade. Transpower claimed that if Parliament went to the trouble to expressly preserve these aspects of the common law, they would have included the doctrine, had they intended it to survive. A distinction can be drawn however, between the types of law Parliament chose to expressly protect and the doctrine. Breach of confidence and restraint of trade are precisely the types of law that might otherwise inhibit competition, and may even be considered anti-competitive. These are common law doctrines substantially at odds with the pro-competitive force of the Commerce Act. Arguably, Parliament has legislated their protection to avoid the courts mistaking that they are implicitly repealed by the Act. Parliament has merely clarified the position in relation to those aspects of law. The doctrine is not an anti-competitive doctrine so there is less of a need to expressly preserve it.

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[109] *Australian Tramway Employee Association v Prahran & Malvern Tramway Trust* (1913) 17 CLR 680, 687. Compare *Falkner v Gisborne District Council* [1995] 3 NZLR 622 where the court held that it was a necessary implication of the Resource Management Act 1981 that a common law right of an owner to protect their lawn from erosion without a resource consent could no longer be asserted.

2. *Commerce Act is not a Code*

Transpower alleged that the doctrine is inconsistent with the Commerce Act because Parliament has chosen to deal with monopolies in three ways. Namely, by prohibiting them from using their position for an anti-competitive purpose, participating in restrictive trade practices, and through the threat of price control. Parliament deliberately omitted to permit private remedies for a party wishing to challenge a monopolist's price. This omission Transpower submitted, excludes the doctrine.[110]

The general tenor of Transpower's submission is open to criticism because it implies that the Commerce Act forms some sort of code. Courts do not typically regard code arguments with much weight.[111] Moreover, the Commerce Act is not a code. If section 36 does not deal with monopoly rents and does not deal with obligations to supply there can be no necessary implication that the legislation supplants the doctrine. Arguably, had Parliament wished to repeal a fundamental doctrine that has so evidently been part of the law regulating public utilities it would have done so clearly.

X. *STATE OWNED ENTERPRISES ACT 1986*

In *Vector v Transpower* the Court of Appeal considered the effect of the SOE Act on the doctrine. The State-Owned Enterprises Act 1986 is relevant where the monopoly supplier of the essential service is an

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[110] *Transpower Submissions* above n 99, 13.

[111] Michael Taggart "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] NZ Recent Law Review 343, 352 "SOEs Social Responsibility".

SOE. In New Zealand several facilities subject to the doctrine are supplied by SOEs.

A. Scope of the Act

The process of deregulation of the New Zealand economy resulted in the corporatisation (and in some cases privatisation) of public utilities. State-owned enterprises operate at arms-length to the government. The idea behind this structure was to remove government influences from these services. Removing the political element and introducing competition was intended to improve efficiency. The arms-length arrangement means the Minister is responsible for policy but does not direct the day-to-day operations. SOEs are however, accountable to their shareholding Ministers, who are in turn accountable to the House of Representatives. To facilitate accountability SOEs are subject to information disclosure requirements. SOEs are required to deliver a draft of their annual statement of corporate intent (SCI) to Ministers.[112] If the Minister makes any comments on the draft these must be considered by an SOE. The completed SCI is then delivered to the Minister. The SOE must also deliver annual reports and accounts to the shareholding Ministers.[113]

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[112] State-Owned Enterprises Act 1986, s 14 ["SOE Act"]. Note also that electricity companies are subject to additional disclosure requirements under the Electricity (Information Disclosure) Regulations 1999 pursuant to section 170 of the Electricity Act 1992.

[113] SOE Act, s15.

B. Applicability of the doctrine to SOEs

Consistent with the arguments advanced in relation to the applicability to the Crown, the doctrine is equally applicable to SOEs.[114] Any doubts about applying the doctrine to the Crown are substantially diminished when applying the doctrine to SOEs because they are entities at arms-length to the Crown. SOEs are intended to have a commercial focus. Their principal objective is to operate as a successful business.[115] The commercial focus of SOEs and the courts emphasis on putting them on a "level playing field" with private sector competitors aligns SOEs closely with private companies.[116] Yet SOEs possess distinctively public features. They are subject to the Ombudsmen Act 1973, the Official Information Act 1982, and oversight of the Auditor-General. These features of an SOE bring it within the notion of a business affected with a public interest to an even greater extent that an private company. The combination therefore of commerciality and public interest makes SOEs a prime candidate for the doctrine. While the principal objective of an SOE is to operate as a successful business, section 4(1)(c) of the SOE Act requires SOEs to exhibit a sense of social responsibility by having regard to the interests of the community and endeavouring to accommodate and encourage this where possible.[117] The courts have held that this provision is not couched in the language of a duty, and does not give rise to a cause of action by way of judicial review of civil action.[118] The provision does however, create an environment compatible with the principles inherent in the doctrine. Galbraith contends that section 4(1)(c) incorporates values such as

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[114] See above Part VI(B)(3) "Applicability of the Doctrine to the Crown".

[115] SOE Act, s 4(1).

[116] *AEPB v ECNZ* above n 33.

[117] SOE Act, s 4(1)(c).

legality, fairness and reasonableness.[119] Arguably therefore, the doctrine is consistent with the statutory requirements of an SOE.

C. *Displacement of the Doctrine by the SOE Act*

The issue is whether there is room for the doctrine in the current regime. Parliament has not expressly repealed the doctrine. Consequently the existence of the doctrine will depend upon whether the accountability regime imposed by the SOE Act is sufficiently comprehensive to exclude the doctrine. Justice Williams suggested that the accountability framework eliminates the need for the courts to intervene. Parliament, has deliberately decreed accountability, including pricing issues, to be "in the hands of the SOE's, their shareholding Ministers, Parliament and, ultimately the electorate.[120] Richardson P held that "it is clearly arguable"[121] that the commercial nature of SOEs did not give them immunity from the doctrine; that the SCIs did not prescribe prices to the extent of precluding the doctrine; and that the scheme of the Act did not grant Ministers the power to fix prices under sections 13 and 14. Richardson concluded however, that the framework as a whole pointed against the finding of "a parallel private law accountability" through the courts.

This view is open to criticism because it effectively disregards the place of common law doctrines in the legal system. The Courts do not require a statutory defined role to interpret and apply the common law. Similarly the existence of the common law does not depend on

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[118] *AEPB v ECNZ* above n 33, 555-557. Professor Taggart criticises the Court for not putting up any fight to protect the "constitutional right of access to the Court": "SOEs Social Responsibility", above n 111, 352.

[119] Galbraith, above n3, 233.

[120] *Mercury v Transpower*, above n 62, 49.

[121] *Vector v Transpower*, above n 2, 28.

statutory authorisation. The nature of the common law is that it ebbs and flows wherever Parliament has not legislated otherwise.

Unlike Richardson P, Thomas J was not equally convinced. Stressing first that accountability per se does not exclude the courts, he held that the SOE Act itself did not provide a pricing regime excluding the doctrine.[122]

Arguably this view appreciates the true nature of the relationship between SOEs and Ministers in respect of accountability and pricing issues. SOEs are accountable to Ministers but the intention of the reforms was for SOEs to create distance between Ministers and SOEs. SOEs are to operate as successful commercial businesses. The statements of corporate intent do not amount to a detailed pricing negotiation between the SOE and responsible Minister. SOEs are simply required to "consider" comments from the Minister.[123] Ultimately, SOEs' pricing decisions are commercial decisions made by the Board of the SOE, not the Minister and not the SOE Act.

XI. THE DOCTRINE WITHIN LIGHT-HANDED REGULATION

The inconsequentiality of the SOE Act, the inadequacy of Part IV and the incongruity of section 36 with the doctrine show that the doctrine is not easily eclipsed by the Commerce Act. Its consistency with light-handed regulation in general must be examined.

A. The Critical Role of the Courts

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[122] *Vector v Transpower*, above n 2, 29 -30.

[123] SOE Act 1986, s 14(4).

Light-handed regulation was never intended to mean no regulation whatsoever.[124] Arguably resort to the courts is an important and even necessary element of light-handed regulation. Dr Bollard, the former Commerce Commission Chairman has commented on the role of the courts and of private actions.[125] His paper specifically cites the prime necessity doctrine as playing a role in light-handed regulation. The Court of Appeal dismissed his comments as influenced by the recent court decision in *AEPB v ECNZ*.[126] His paper has no legal authority, yet it is a reasonably compelling comment. It shows perhaps that the Commerce Commission is content for the courts to assist the Commerce Commission in this manner.

B. Light-Handed Regulation frustrated

The doctrine plays a vital role in light-handed regulation by providing a control on the abuse of power by monopolies in the important area of essential services. As Galbraith points out, a utility which is allowed to earn monopoly rents will have no incentive to be efficient.[127] Galbraith argues that unless there are adequate restraints to ensure that a monopoly does achieve efficiency objectives, the overall policy of light-handed regulation is frustrated.[128] The courts' involvement could

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[124] Belgrave, above n 70, 2.

[125] Bollard and Pickford "New Zealand's 'Light-Handed' Approach to Utility Regulation" (1995) 2 Agenda 411, 417.

[126] The Court of Appeal said that ECNZ conceded the application of the doctrine in *AEPB v ECNZ* and before the Privy Council expressed caution about this concession: *Vector v Transpower* above n2, 25.

[127] AR Galbraith "Deregulation, Privatisation and Corportisation of Crown Activity: How will the law respond?" 1993 (New Zealand Law Conference The Law and Politics 2-5 March 1993, Wellington, New Zealand Conference Papers Volume 1) 226, 236.

[128] Galbraith above n 3, 236.

aid the process of light-handed regulation, because it provides an alternative mechanism for controlling monopolistic behaviour without the need to resort to price control. The doctrine offers a less overt control on the abuse of power by a monopoly than the price control provisions. Continued application of the doctrine will mitigate the need for Part IV to be invoked and consequently the risk of policy failure.

C. Courts as price fixers

The High Court was not inclined to deal with matters of complex economic theory. In the courts view the doctrine required the courts to assume the role of a price fixing body. This role was one which the court considered to be complex and ill-suited to the adversarial process.[129] The Court of Appeal emphasised that price control was not a role that had been granted to the courts, though they never cited economic complexity or the judicial capacity as the hindrance. Instead the Court seemed deterred by the bluntness of the doctrine. The Court is correct not to allow complexity to deter it. Courts engage in complex matters all the time. Predatory pricing matters, for example. The bluntness of the doctrine is apparent. But the doctrine has existed in the courts for nearly two centuries. Its bluntness comes from its simplicity and its simplicity gives it the flexibility to endure the test of time.

D. Adjustments to the Doctrine

[129] *Mercury v Transpower* above n 62, 54.

The criticism of the doctrine as a price control instrument is to some extent warranted. The doctrine was not borne out of modern economic ideas about pricing. The doctrine is a simple concept designed to ensure supply of and access to the most essential of public utilities. Decreasing the focus on pricing, as Justice Thomas advocates, is consistent with the original purpose of the doctrine. The means of adopting this change are problematic. To reduce the emphasis on pricing, there will be a tendency to be less specific in pricing issues. The courts must look at the situation and decide whether the defendant supplier is fulfilling his obligation to supply the prime necessity, or whether the defendant is 'constructively' refusing to supply. The doctrine could therefore be re-phrased as requiring:

> Where a public utility or service of prime necessity is owned or operated by a person in a position of special advantage, that person in under an obligation to grant **real and effective** supply of that utility or service to all who seek it without discrimination.

This takes the pricing terminology out of the doctrine's formula. The courts would have to be relied on to take the pricing focus out of the practical application of the doctrine. Taking the focus of the doctrine away from pricing would alleviate the task of the Courts. It would also eliminate any criticisms of a clash with Part IV.

XII. REVIEW OF THE NEW ZEALAND FRAMEWORK

The Commerce Act provides the strongest defence against abuses of monopoly powers by suppliers of essential services. But the Commerce is very limited in protections. Section 36 is the only control currently in force against monopolies. Section 36 however, does not

extend to obligations to supply, nor does it prohibit unreasonable pricing. Even in the decision of Court of Appeal dismissing the doctrine's applicability, Justice Thomas did not refrain from expressing his doubts about the deficiencies of a system without such protections.[130]

Part IV of the Commerce Act does not deal specifically with the subject matter of the doctrine. It does not recognise the reason why the doctrine imposes an obligation only on services of prime necessity. Part IV is triggered by an actual, or likely lessening of competition. As with section 36, Part IV serves a different purpose. Part IV is arguably a problematic and ineffective tool. It provides only a public remedy. Public remedies are in general reliant on democratic and political processes. As a public remedy, Part IV is even less adequate because of the political overtones of price control. The Court of Appeal it seems, were most influenced by the fact that the doctrine was too much of a price-fixing instrument. If it were given a different emphasis, as Thomas J suggested, the courts may feel more comfortable asserting its role. But the doctrine will always require some reliance on a fair and reasonable price. The courts must be prepared to give the doctrine its full application if necessary. Thomas J's suggestion may win support for the doctrine from those who currently see it as a heavy-handed tool. Whether the emphasis placed on the doctrine is in regard to an obligation to supply, or the requirement of a fair and reasonable price, the doctrine has an important role to play in light-handed regulation. The need for the doctrine can be seen when the New Zealand context is compared to the structures in overseas countries.

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[130] *Vector v Transpower* above n 2, 31.

XIII. USES OF THE DOCTRINE OVERSEAS

A. The United States experience

1. A Constitutional Setting

The use of the doctrine in the United States is quite unique. The implications of the *Munn* decision were that businesses "clothed with a public interest" submitted to having their compensation regulated by the legislature. Waite CJ justified legislative price control on the basis of a common law principle that some services are affected with a public interest and therefore fair and reasonable prices should be charged. The implementation of fair and reasonable prices by the legislature is merely enforcing a recognised common law obligation. Price control consequently, is unconstitutional except when applied to businesses affected with a public interest. There is no parallel in the New Zealand context since legislative price regulation (or Executive price control) is not required to pass a constitutionality test first.

Judicial acceptance of the Munn view lasted until 1934, with the decision of *Nebbia v New York.*[131] The Supreme Court rejected the restriction upon the legislature to regulate only the prices of businesses affected with a public interest, and extended the legislature's power to regulate in the public interest, as it saw fit.

2. Public Utilities Law

Notwithstanding the decision in *Nebbia*, Lord Hale's principles have been applied by the US judiciary to the extent that a body of law imposing duties on owners of public utilities has developed.

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[131] (1934) 291 US 502.

Generally the public utilities doctrine provides that a public utility has a general duty to serve those who desire its services, independent of the statutory context.[132] A public utility is a business or service, which supplies the public regularly with a commodity of public consequence.[133] That duty grants the consumer a common law right to reasonable rates.[134] In *Foltz v Indianapolis,*[135] the Supreme Court of Indiana explored the development of the doctrine. Judge Arteburn cited passages from both *Munn* and *Allnutt* and held that "upon the dedication of a business to a public use, it is established that such a business is under a common law duty to serve all who apply so long as facilities are available without discrimination".[136] Arteburn J stressed that "without discrimination" included discrimination as to price, since otherwise the principles could be "circumvented".

Professors Haar and Fessler devote an entire book to what they term the common law duty of equal and adequate services.[137] Haar and Fessler summarise the unifying themes in the United States judges reasoning as:[138]

1. The imposition of a common right to access drawn from the doctrine of services as a *public calling* essential to individual survival within the community

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[132] *United Fuel* above n 102 ; *Corpus Juris Secundum* section 7, vol 73B.

[133] 64 Am Jur 2d §1.

[134] *Corpus Juris Secundum* section 25, vol 73B.

[135] 130 NE 2d 650 (1955) [*Foltz*].

[136] *Foltz* above n135, 656.

[137] Charles Haar and Daniel Fessler *The Wrong Side of the Tracks* (Simon & Schuster, New York, 1986). Their argument is that equal access to basic services should not be pursued through federal courts and the Constitution, but through state courts and the common law, because of the increasing difficulty of pursuing constitutional theories in federal forums.

[138] Haar and Fessler, above n 137, 199-200.

2. The duty to serve all equally, inferred from and recognised as an essential part of *natural monopoly power*
3. The duty to serve all parties alike, as a consequence of the *grant of the privileged power of eminent domain* and finally
4. The duty to serve all equally, *flowing from consent*, expressed or (more frequently) implied.

The themes running through the common law duties are comparable to the prime necessity doctrine. The similarity of the American doctrine was noted at first instance by Justice Barker in *AEPB v ECNZ* where he said:[139]

> I do not find anything in the American authorities cited, such as *Foltz v City of Indianapolis* 130 NE 2d 650 (1955) basically different from the situation as articulated by the Privy Council in the *City of Levis* case and in the New Zealand cases cited.

Yet the United States law on public utilities has developed in a more expansive manner. The doctrine has been applied to a wider variety of services, an example of which is telecommunications. The American doctrine has been applied to telegraph and telephone companies.[140] There is also a greater emphasis on equality and the struggle against inequality and poverty. The notion that all citizens especially those living on the 'wrong side of the tracks' are treated equally is an important strand in the common law duties.

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[139] *AEPB v ECNZ* (HC) above n 33, 60.

[140] *State ex rel v Kinloch Telephone Co* (1902) 67 SW 684.

3. *Essential Facilities doctrine*

Alongside the public utilities body of law is the flourishing essential facilities doctrine. The essential facilities doctrine is quite different to the American equivalent of the prime necessity doctrine. A gloss on the Sherman Act, the essential facilities doctrine has developed as an interpretative aid to section 2 of the barren anti-trust instrument. Section 2 provides:

> Every person who shall monopolise, or attempt to monopolise, or combine to conspire with any other person or persons, to monopolise any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanour....

Section 2 of the Sherman Act is much broader in scope than section 36. In New Zealand it is not an offence to be a monopoly. But section 2 prohibits monopolisation itself.

The essential facilities doctrine makes liable controllers of essential facilities if they refuse access to their facility. The concern underlying the doctrine is that the control of an essential facility by a monopoly may be misused in an upstream or downstream market in which the monopoly also competes. Anti-trust law in the United State imposed the obligation to allow access to competitors on non-discriminatory terms. Generally the doctrine requires that "where facilities cannot practicably be duplicated by would be competitors those in possession of them must allow them to be shared on fair terms".[141]

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[141] *Hecht v Pro-Football* Inc 570 F 2d 982 (1977) 992-993 [*Hecht*] cited by Barker J in *ARA v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, 680.

4. Essential facilities and Prime Necessity doctrines compared

The essential facilities doctrine has a different thrust. It is focused on anti-competitive conduct regarding access to a 'bottleneck facility'. Actions under the essential facilities doctrine are dependent on actions under the Sherman Act. Although there is some debate as to whether the duty under the essential facilities doctrine is an action limited to competitors,[142] the doctrine seems to be aimed at competitors of the supplier. The *MCI Communications Corporation v AT&T*[143] test for liability is as follows:

1. Control of the essential facility by a monopolist
2. A competitor's inability to practically or reasonably duplicate the essential facility
3. The denial of the use of the facility to a competitor and
4. The feasibility of providing the facility

This framing of the essential facilities doctrine refers only to competitors, suggesting that the doctrine is limited to competitors of the supplier. This is consistent with the anti-trust origin of the doctrine. In comparison, the prime necessity doctrine is not a tool of anti-trust law. In fact, it could be said to share a closer relationship with public or constitutional law. For this reason the prime necessity doctrine is aimed at users of the utility and is less concerned with the effect on competitors and competition.

The essential facilities doctrine is also potentially much broader than the prime necessity doctrine, since its definition has not been restricted to utilities of a public necessity, a feature which is inherent in the prime

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[142] Herbert Hovenkamp *Federal Anti-Trust Policy: The Law of Competition and its practice* (West Publishing Company, Minnesota, 1994) 273 § 7.7.

[143] 104 S Ct 234 (1983).

necessity doctrine. In *Hecht v Pro Football Inc* the essential facilities doctrine was held to apply to a sports stadium.[144] The Australian case of *Queensland Wire Industries Pty Limited v The Broken Hill Proprietary Co Ltd & Anor* is a classic illustration of a situation that would not fulfil the criteria of being a prime necessity, because the essential facility was a 'Y-bar', a component of a fence post.[145] In neither New Zealand nor Australia has the essential facilities doctrine actually been applied. The court in *ARA v Mutual Rental Cars* "adopted" the dictum of the American court in *Hecht* but did not find it necessary to decide whether the essential facilities doctrine applied, because section 36 was satisfied.

B. Australia

1. Rejection of the Prime Necessities Doctrine

The Australian courts have declined to follow the *Levis* line of thought. The High Court of Australia in *Bennett & Fisher v The Electricity Trust of South Australia*[146] said that the American public utility law was not part of Australian law. The High Court's reasoning is not without its critics. Professor Taggart refers to the decision as a "wrong turning".[147] Among other things, Taggart criticised the narrow and literal interpretation given to the sections 15-16 of the South Australia Electric Light and Motive Power Company's Act 1897 (which is very much like a codification of the American public utility duty). The provisions, Taggart stated, should have been given a purposive interpretation to impose a statutory duty to supply. But the court was more concerned with the encroachment on the freedom of contract. One of the most condemning features of the case is that the leading case of the doctrine

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[144] [*Hecht*], see also *Fishman v Wirtz* 807 F2d 520 (1986).

[145] (1988) ATPR 40-841.

[146] 106 CLR 492 [*Bennett*].

[147] "Public Utilities and Public Law" above n18, 252.

of prime necessity was not referred to in the judgment. The court focuses its attention on the American authorities, which it contends, have "not yet been established in English law" and can have no application alongside the South Australia statutes.[148] The failure to refer to the Privy Council's decision is a critical oversight. The decision effectively ignores the leading common law authorities and focuses on American doctrine, which it can then dismiss as inappropriate.

C. Synopsis

This examination has shown that the courts in the United States have several layers of regulatory devices to draw on when seeking to control monopolistic behaviour. The broader nature of section 2 of the Sherman Act, the wide use of the essential facilities doctrine in the United States and development of the public utilities doctrine combine to create a system aware of the necessity of curbing abuses of monopoly power.

The Australian courts rejection of the doctrine lends weight to the argument that the doctrine is not necessary. However, the courts' actions in both Australia and the United States must be read in the context of the regulatory structures in place in these countries. In both countries the courts are only one player in the regulatory game.

To see the full picture, further examination of individual countries regulation of public utilities is required.

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[148] *Bennett* above n 146, 501.

XIV. REGULATION OFPUBLIC UTILITIES

In comparison to New Zealand's light-handed approach, regulation of public utilities overseas is more tightly monitored. Although the Court of Appeal in *Vector v Transpower* held that this light-handed approach made any other type of control, such as the doctrine, inconsistent. The problem is - what is the position without the doctrine. Arguably, reliance on Part IV and market forces is naive. Essentially this entails reliance on the good faith of monopolists to act in a fair and reasonable way. Patterson argues that economic theory predicts that a monopoly will act in its own self-interest.[149] Therefore a likely consequence of a light-handed regulation policy is misuse of monopoly power.

A. United Kingdom

In the United Kingdom, privatisation efforts began under the Thatcher government. With greater privatisation, heavy reliance is placed on industry-specific regulation to supervise and regulate activities in markets lacking competition. Specific legislation regulating conduct in industries is common. For example, the Telecommunications Act 1981, the Oil and Gas (Enterprise) Act 1982, and the Energy Act 1983.[150] This industry-specific regulation diminished the need for the courts' application of common law duties.

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[149] Ross Patterson "Light-Handed Regulation in New Zealand Ten Years on" (1998) CCLJ 134, 151.

[150] For a fuller list see "A Discussion Paper: Guarantee of Access to Essential Facilities" (Ministry of Commerce, Wellington, 1989) Annex I.

B. Australia

In Australia, additional controls exist too. Australia has a history of managing key sectors of its economy through state-owned public enterprises with competition not usually permitted.[151] In this way restrictions can be placed on the abuse of power by requiring them to set fair prices. Australia is a useful economy to examine because it places some reliance on general competition law.[152] However, Australia does not rely on competition alone. The Australian legislature has seen fit to address access issues to public utilities by implementing an access regime for essential facilities. The regime is driven by the Hilmer Report, which owes its name to the chairman of the Independent Committee of Inquiry into National Competition Policy. The rationale behind the regime is that "access to certain facilities with natural monopoly characteristics, such as electricity grids or gas pipelines, is needed to encourage competition in related markets".[153] The regime will apply to all nationally significant "essential facilities" whether privately owned or by federal or state governments. Several perceived reasons have been cited for the access regime, including the failure of the courts in establishing prices and terms of access.[154] The access regime is directed at essential facilities. This includes some utilities subject to the prime necessity doctrine. However the access regime is directed at dealing with anti-competitive behaviour.

While an access regime like the one established in Australia could be extremely beneficial in New Zealand, the undoubted expense of

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[151] For example, the mail service, telecommunications, water, electricity and many transport services have been provided by the public service.

[152] Such as the Australian Trade Practices Act 1974.

[153] Parliamentary Second Reading Speech to the June 1995 legislation, cited from Warren Pengilly "Access to essential facilities: a unique antitrust experiment in Australia" 1998 43 Antitrust Bulletin 519.

establishing and maintaining such a scheme may be a barrier. The Australian regime creates specific statutory bodies to administer the regime.[155] Because of this it is arguably not within the finances of the New Zealand government. It would also involve a major shift in governmental policy. In the absence of such a system, the prime necessities doctrine could provide similar protection in prime necessities industries. It is possible that the need for such a regime may be mitigated in New Zealand if the doctrine continues to be accepted and applied by the Courts.

C. United States

The United States has a highly developed system of anti-trust law of which some has been discussed in preceding sections. In addition to anti-trust law and the application of the essential facilities doctrine, there is a major difference between the way in which the United States addresses threats to competition. The United States relies heavily on industry-specific regulation in the form of Commission regulation. In the United States essential services have predominantly always been operated by private monopolies. Their regulation often comes by way of an independent agency. Many states have a Public Service Commission or a Public Commission and the Federal Government has designated public bodies.

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[154] Pengilly above n 153.

[155] The National Competition Council (NCO) makes an initial evaluation of the essentiality of the service and its national importance and makes a recommendation to the responsible minister as to whether or not to grant access.

D. Comparison with New Zealand

All three jurisdictions have alternatives to the doctrine. In comparison New Zealand has come from being one of the most regulated economies in the world, to one of the most deregulated.[156] One commentator suggests that in reality the system is best described as "hands-off" rather than "light-handed".[157] Another commentator has called it "non-regulation".[158] New Zealand has chosen to rely very heavily on market forces in all sectors of the market, even those where competition is difficult. New Zealand is a small economy, where a small number of suppliers in each industry is common.

The methods used overseas such as industry-specific regulation, regulatory bodies and access regimes show overseas countries recognise the significance of public utilities. New Zealand's strongest methods of controlling monopolies are the provisions in the Commerce Act, one of which does not apply to the abuses in question, and the other provides no satisfactory remedy. There are therefore few deterrents against monopolies abusing their power.

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[156] Ross Patterson "What Happened to the Brave Experiment of Light-Handed Regulation? Was the concept flawed or have the courts failed to deliver attainable benefits" in *Conference Papers: The 1993 New Zealand Law Conference* (1993) vol 1, 1.

[157] Ross Patterson "Light-Handed Regulation in New Zealand Ten Years on" (1998) CCLJ 134, 151.

[158] HS Dordick "New Zealand Testing the Limits on Non Regulation" in Noam Komatsu and Conn *Telecommunications in the Pacific Basin- an Evolutionary Approach* (Oxford University Press, Oxford, 1994) 438.

XV. CONCLUSION

In *Vector v Transpower* the Court of Appeal held that the prime necessities doctrine was incompatible with the regulatory principles underlying the statutory framework in New Zealand. The Court was content to regard the remedy provided by Part IV of the Commerce Act as sufficient. The conclusion that the doctrine has been impliedly repealed by the Commerce and SOE Acts can be regarded as unsatisfactory. While the price regulation of the doctrine may need to be softened for the context of the New Zealand regulatory framework this could be addressed by the courts moving the doctrine away from price fixing and back towards an obligation to supply. In the absence of the doctrine in some form the possibility of enforceable access to public utilities may be regarded as unpromising.

Experience suggests that Part IV of the Commerce Act does not provide a practical solution to the abuses of monopoly power. Given the current light-handed approach to the regulation of competition this is likely to continue. In contrast, in overseas regimes competition alone tends not to be relied on to regulate public utilities. Public utilities which are of prime necessity, are an area requiring specific attention. The doctrine captures only essential services operated in monopolistic environments. It is these markets that lack the competitive forces and incentives to be efficient. The historical manner in which these utilities have been removed from the control of the State in New Zealand has meant that there is an even greater need for supervision. The monopoly power inherited from the State creates a situation, which is open to abuse. Monopolies have the ability to operate to the detriment of the consumer because they can charge higher prices than would exist if there were a fully competitive market. Unlike other jurisdictions New Zealand has bravely left regulation of markets to competitive forces. Monopolies should not be allowed to abuse their

power in any market. But where the utility is of prime necessity, wider issues are at stake. Greater precautions are necessary. The prime necessity doctrine can be regarded as a satisfactory beginning and it allows the government to continue its light-handed regulatory policy. A change in focus may be necessary, but the force of the doctrine should not be sacrificed as a result. Consequently the doctrine should retain all of its elements.

If the ferryman Charon had decided to engage in rent-seeking behaviour less people would be able to use his services. As a result the number of condemned souls would be forced to wander the deserted shore. Excluding people from reaching the Underworld, would not have been in the public interest. Conferring a duty on Charon to provide his services as a reasonable price would have ensured that he could not adversely affect the public interest in such an essential service.