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DEALING WITH DOMINANT FIRMS: NEW ZEALAND, UNITED STATES, AND EUROPEAN COMMUNITY APPROACHES TO A FIRM'S USE OF A DOMINANT POSITION IN A MARKET

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ABSTRACT

Firms possessing a dominant position in a market create special problems in competition law. They may engage in competitive conduct, which benefits consumers, or anticompetitive conduct, which benefitdsno one but itself. Distinguishing between the two types of conduct is difficult, as one may look very much like the other. This paper explores the way in which the three jurisdictions distinguish between good and bad conduct by dominant firms. It looks, in particular, at a recent New Zealand case, and applies to its particular fact situation the laws of the United States and the European Community. The paper argues that New Zealand law has marked similarities with United States law. It further suggests that the New Zealand statutory provision which regulates the conduct of dominant firms, s 36 Commerce Act 1986, should be amended in line with the established streams of the United States jurisprudence. This, it is argued, will ensure that the provision is more in tune with purpose of the Act as a whole.

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1. INTRODUCTION

Firms possessing a dominant position in a market can act for good or for evil. They act for good when they engage in aggressive competitive conduct on the merits of their products, service, and price. This remains true even if their conduct harms competitors or eliminates rivals from the market place. If a dominant firm is more efficient, more industrious, or simply smarter than its smaller competitors it deserves the dominance it holds. Its behaviour in trading competitively can only benefit consumers. Conversely, dominant firms act for evil when they undertake exclusionary or predatory conduct.[1] This is not competition on the merits and is designed to drive competitors from the market or prevent their entry. In this case firms trade upon their market power not on their skill and industry. In doing so they risk eliminating more efficient or innovative firms from the market when ordinarily those firms would survive and flourish. This necessarily harms consumers. It is the task of competition laws to differentiate between the good and evil conduct of the monopolist. Unfortunately, this is a difficult endeavour, as conduct which is exclusionary or predatory may look very much like conduct which is aggressively competitive.[2] Further, enforcement, if undertaken in a wrong or misguided manner, will reward the inefficient at the expense of the efficient.

This paper examines the question of how should New Zealand law distinguish between a monopolist's competitive and anticompetitive conduct. It attempts to discover the best means of ensuring that conduct which is anticompetitive is met with appropriate censure while leaving competitive activity untouched. In other words, the laws controlling the

1 The term "exclusionary conduct" is commonly used to refer to conduct "which allow a firm to eliminate or injure rivals without regard to their efficiency." See John Andrew Maher, "Draining the *Alcoa* 'Wishing Well": The Section 2 Conduct Requirement After *Kodak* and *Calcomp*" (1979) 48 Fordham L Rev 291, at p 291 n 2. It is "strategic maneuvers that interfere with the normal competitive process and artificially deter entry or prevent existing rivals from increasing output." See Alon Y Kapan, "Duty to Cooperate Under Section 2 of the Sherman Act: *Aspen Skiing*'s Slippery Slope" (1987) 72 Cornell L Rev 1047, at p 1049. There are essentially two sorts of exclusionary conduct: predatory pricing and raising rival's costs in ways that the dominant firm does not face. See also Frank H Easterbrook, "On Identifying Exclusionary Conduct" (1986) 61 Notre Dame L Rev 972, 974.

2 Easterbrook, above, n 1, p 972

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activities of dominant firms should ensure not only that those firms which do not compete on the merits are caught, but also that the innocently competitive firm is left to continue in its business without the need to defend itself against allegations of anticompetitive conduct. The law should be sufficiently clear and certain that firms possessing market power can act with reasonable certainty. Further, it should also provide clear signals to regulators and potential private litigators of their prospects of success should they wish to challenge a dominant firm's activities. The current case law mostly meets these requirements. However, the general approach required by the case law has been challenged. This paper argues that in order to provide a clear and consistent test for anticompetitive conduct undertaken by dominant firms there is a need for amendment to s 36(1) of the Commerce Act 1986.[3]

This paper begins from the premise that the aim of competition law in New Zealand is the promotion of competition in New Zealand markets. While this concept is similar to and often overlaps with the goal of economic efficiency, the promotion of competition is best seen as the primary means of achieving an efficient economy. The promotion of competition, it is argued, means the preservation and promotion of competitive processes rather than the protection of actual and existing competition or competitors. The Commerce Act works best when it focuses on the process of competition rather than the effects of particular activity on individual firms. Further, it works best when it focuses on the behaviour of dominant firms which is objectively anticompetitive. It should, as is currently the situation in the case law, look more to conduct than to purpose. Indeed, it is argued that the Act will work better if the purpose element of s 36(1) is completely discarded and a clear, consistent test for "use" of a dominant position is added to the Act.

This argument is developed through a discussion of New Zealand's Commerce Act 1986 in comparison with the competition laws of the United States and the European Community. Accordingly, the essay falls into three major parts. Part 2 discusses the purpose of the Commerce Act 1986 and s 36(1) in particular. Part 3 narrows the focus of the paper by analysing a major decision under s 36, both in terms of

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3 1986 No 5, RS 31. Enacted 28 April 1986, in force from 1 May 1986.

the general approach taken by the Courts to the provision, and in terms of the particular conduct undertaken by the firm and the Courts' application of s 36 to this conduct. Part 4 then develops a comparison with the jurisprudence of the United States and the European Community. It discusses the general principles applied in each jurisdiction to the behaviour of monopoly firms and considers how the Courts in those jurisdictions have treated cases comparable to those analysed in the discussion of s 36.

The paper concludes that New Zealand's approach to the conduct of dominant firms is very similar to that adopted by the United States' Courts, and that this approach is consistent with the objects of the Commerce Act. However, it is suggested that s 36 be amended to clarify two particular points. First, that the section should be concerned only with objective conduct. It is not necessary to examine the motivation or purpose of the dominant firm. The current requirement to examine the firm's purpose is confusing and unnecessary, and detracts from the primary purpose of the section. Secondly, the section should clearly and explicitly state the test that the Courts are to apply when determining whether a dominant firm has used its market power.

2. SECTION 36 COMMERCE ACT 1986 — GENERAL

2.1. Historical Background

Modern New Zealand trade practices legislation in the field began with the Trade Practices Act 1958.[4] This legislation closely reflected the Restrictive Trade Practices Act 1956 (UK).[5] The Trade Practices Act concentrated mainly on collusive activity by competitors and prescribed 11 categories of agreement. Firms wishing to engage in these practices required the approval of the Commissioner of Trade Practices and Prices, who determined whether or not the particular practice was

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4 1958 No 110. Enacted on and in force from 3 October 1958.

5 See Yvonne van Roy, *Guidebook to New Zealand Competition Laws*, Auckland, CCH NZ Ltd, 1991, p 7; and Hunter M Donaldson, "The Development of New Zealand Competition Law" in Rex J Adhar (ed), *Competition Law and Policy in New Zealand*, Sydney, Law Book Co, 1991, p 16.

contrary to the public interest.[6] The Act did not deal comprehensively with the behaviour of monopolies or with issues of market structure.[7] Rather, the apparent policy of the Act in the broader commercial context was to regulate monopolies through a combination of price control and licensing.[8]

The Commerce Act 1975[9] replaced the Trade Practices Act 1958, but did not evidence any major change in New Zealand's competition policy. The new statute was enacted in a context of wide-ranging and detailed regulation of the economy. The 1970s saw a continuous process of price control by regulations made under the Economic Stabilisation Act 1948,[10] a situation in which the operation of competitive markets was of only secondary importance in keeping prices down.[11] The 1975 Act contained no specific provisions directed at attempts to monopolise. Rather, the Examiner of Trade Practices could investigate monopolies[12] and the Commerce Commission had the power to order the divestiture of monopolies where they were not in the public interest.[13] Enforcement of these provisions and all other provisions in the Act was undertaken by public bodies: there was no power for private actions under the Act.[14]

In 1982 a review of the 1975 Act was conducted by the Department of Trade and Industry, resulting in a draft Competition Bill.[15] The Bill, based on the requirement to harmonise New Zealand and Australian commercial law as a consequence of the closer economic relations agreement, was not introduced into Parliament.[16] Instead it underwent

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6 Trade Practices Act 1958, s 19. See van Roy, above, n 5, p 7; and Donaldson, above, n 5, p 17.

7 Although the Act did make "any complete or partial monopoly of the supply of goods in New Zealand, or any practice tending to bring about such complete or partial monopoly" an examinable trade practice. Trade Practices Act 1958, s 19(2)(j)

8 Donaldson, above, n 5, p 16.

9 1975 No 113. Enacted 10 October 1975, in force from 1 November 1975. See reg 2 Commerce Act Commencement Order 1975 (SR 1975/247).

10 1948 No 48. Enacted and in force from 19 November 1948.

11 Donaldson, above, n 5, pp 18-19.

12 Commerce Act 1975, s 61.

13 Ibid, s 65. There is no power to order divestiture in the Commerce Act 1986. The High Court's powers are limited to granting an injunction restraining a person from engaging in conduct which contravenes Part II of the Act (relating to restrictive trade practices): Commerce Act 1986, s 81.

14 Compare the Commerce Act 1986, which allows private actions for injunctions (s 81) and damages (s 82) but not for pecuniary penalties (s 80)

15 Donaldson, above, n 5, p 21.

16 Van Roy, above, n 5, p 6.

further study and refinement in the Department.[17] Some of the fruits of this review were included in the Commerce Amendment Act 1983.[18] Among other changes, the amendment Act lowered the threshold at which the Examiner of Trade Practices could being an investigation into a monopoly and allowed the Examiner to investigate the conduct of monopolies rather than their mere existence.[19]

2.2. Enacting the Commerce Act 1986

The Commerce Act 1986 completely changed the focus of New Zealand's competition policy. It was passed during a time of major economic liberalisation which saw the deregulation of much of the New Zealand economy accompanied by the corporatisation[20] and sometimes privatisation of the Government's trading activities.[21] This process required an effective competition law to complement the changes to the economy. This need was recognised by the then Minister of Trade and Industry, David Caygill, when he introduced the Commerce Bill in June 1985:[22]

> The Bill represents a key part of the Government's policy to improve the performance of the economy and to restore and maintain long-term growth. The Bill must be viewed against

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17 Donaldson, above, n 5, p 21.

18 1983 No 144. Enacted on 16 December 1983, in force from 1 April 1984. See Donaldson, above, n 5, p 22.

19 Ibid, s 22.

20 This process involves the reconfiguring of Government trading departments into State-owned enterprises with the mandate of operating as efficient and successful businesses. See State-owned Enterprises Act 1986 (1986 No 124, enacted 18 December 1986, in force 19 December 1986), especially ss 4 (duty of every State-owned enterprise to operate as a successful business, including a requirement to operate as profitably as comparable businesses not owned by the Crown).

21 For a critical view of this process, see Jane Kelsey, *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand*, Wellington, Bridget Williams Books, 1993. See also generally, Jonathan Boston and Martin Holland, *The Fourth Labour Government: Radical Politics in New Zealand*, Auckland, Oxford University Press, 1987; 2nd ed, Auckland, Oxford University Press, 1990 (now subtitled "Policy and Politics in New Zealand").

22 Hon David Caygill, (1985) 463 New Zealand Parliamentary Debates 4681 (11 June 1985). See also the Minister's speech during the second reading of the Bill ((1986) 506 New Zealand Parliamentary Debates (18 March 1986)):

> It will promote competition in the New Zealand marketplace. In tandem with other changes, the Bill increases efficiency in the New Zealand economy. In particular it will ensure that the benefits of a freer economy will not be obstructed by private restrictions in the market place.

> the background of the fundamental change that is occurring in the New Zealand economy because of the Government's initiatives. As its long title states, the purpose of the Bill is to promote competition in New Zealand markets.[23] By doing so, the Bill will ensure that, as New Zealand moves away from Government regulation of markets, that position will not be replaced by anticompetitive behaviour by individual companies or groups of traders. . . . It will ensure that the conditions for workable and effective competition exist and that the benefits of increased economic efficiency and growth are enjoyed by all members of the community, including consumers.

Seen in the context surrounding its enactment, the Commerce Act demonstrates a faith in the ability of markets and competition to further the public interest. This represents a fundamental change in the purpose of competition law in New Zealand. The aim of the Act, in the context of overall economic policy, is to foster a free and open economy with minimal central government regulation. This is accompanied by a vigilant, but not overly restrictive, oversight of firms' conduct which does not further the overall goal of promoting competition.[24] This purpose can be contrasted with the goal of maximising efficiency, which some have advocated should be the sole end of the Commerce Act.[25] While efficiency and the promotion of competition often coincide, there are occasions where they conflict.[26] In such cases the scheme of the Act suggests that the promotion of competition should prevail over the furtherance of efficiency.

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23 This purpose was carried through into the Act.

24 It is this purpose which the Courts are required to further when deciding litigation under the Act. See *Goodman Fielder Ltd v Commerce Commission* [1987] 2 NZLR 10. See also *Union Shipping NZ Ltd v Port Nelson Ltd* (1990) 3 NZBLC 101,618, 101, 639 (HC):

> It is the [promotion] of competition which the Court is directed to foster. Parliament, as a matter of policy, has decided benefits will flow from that course. Whether such is a correct economic or social analysis is not a matter for the court.

25 See, for example, W A Brock, "The Antitrust Debate in New Zealand: Commentary", paper prepared for the NZ Business Roundtable, August 1989, p 2; and S Jennings and K M Vautier, "Review Article, Competitive Trading in New Zealand: The Commerce Act of 1986" [1988] NZ Recent Law 95. In particular the those who counsel efficiency argue that:

> The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.

See Robert Bork, *The Antitrust Paradox: A Policy at War With Itself*, New York, Basic Books, 1978, p 149.

26 See Douglas F Greer, "Efficiency And/Or/Verus/Equals Competition", paper prepared for the NZ Institute of Economic Research, September 1988.

2.3. "An Act to promote competition in markets within New Zealand"

What is meant by the *promotion* of competition? The Act states that competition means "workable and effective competition".[27] The phrase promotion of competition connotes the protection of the competitive process rather than the protection of competitors or existing competition. It is significant that Parliament in stating the Act's purpose used the word "promote" rather than "protect", "preserve",[28] or "maintain".[29] Such terms would have suggested a different purpose for the Act. They would suggest that the aim was to ensure "workable and effective" competition exists at all times.[30] Such a purpose would look more to the protection of competitors, especially in a market where the level of competition, assessed in terms of market structure, could be regarded as dangerously low. The use of "promote", on the other hand, suggests that competition, in the sense of existing rivalry between firms, is to be encouraged and supported, but need not necessarily occur. Accordingly, anticompetitive conduct undertaken by a single firm which is not in a dominant position is not a violation of the Act.[31]

In this context it should be noted that the question of whether a particular firm is dominant in a market must be assessed having regard to, *inter alia*, the constraints imposed on the firm by potential competition.[32] Thus there may be competition in a market, even if the market at any one time consists of only one firm, if its actions are

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27 Commerce Act 1986, s 3(1).

28 The Australian Trade Practices Act 1965 was intituled "an Act to preserve competition in Australian trade and commerce to the extent required by the public interest". See J P Nieuwenhuysen, "The Theory of Competition Policy", in Alan Ransom and Warren Pengilley, eds, *Restrictive Trade Practices: Judgments, Materials, and Policy*, Sydney, Legal Books Pty Ltd, 1985, p 20.

29 Greer, above, n 26, treats the words "maintain" (meaning to cause to continue, to keep up, or preserve) and "promote" (meaning to help forward, encourage, or support actively) as synonymous, when clearly they are not. Ibid p 11. This, perhaps, causes him to over-emphasise the potential conflicts between the goals of furthering efficiency and promoting competition.

30 Commerce Act 1986, s 3(1).

31 However, see Barry Allen, "The Status of Collusion and Common Purpose Under Section 27, Commerce Act 1986", LLM Seminar Paper (Competition Law), 1996, which argues that the current interpretation of s 27 Commerce Act 1986 (prohibiting contracts, arrangements, or understandings substantially lessening competition) allows that provision to be invoked to censure conduct by an individual firm where it attempts to achieve a monopoly.

32 Commerce Act 1986, s 3(8)(b).

sufficiently constrained by the threat of competition. The Act, then, regards competition as a process occurring over time rather than a static concept. In *Re Queensland Co-operative Milling Assn Ltd*[33] the Australian Trade Practices Tribunal considered that "Competition is a process rather than a situation."[34] The competitive process, which can result in the elimination of competition, is the focus of the Act, not the protection of competitors.[35]

2.4. Section 36 Commerce Act 1986

The application of the Act's general purpose is illustrated by s 36(1) Commerce Act 1986. This provision prevents any person[36] possessing a dominant position[37] in a market[38] from using[39] that position for a

33 (1976) ATPR ¶40-012.

34 Ibid, p 17,246.

35 See also *Union Shipping NZ Ltd v Port Nelson* above, n 24, 101,652; *Fisher & Paykel Ltd v Commerce Commission* (1990) 3 NZBLC 101,655, 101,680; *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, 671; (1988) 2 NZBLC 103,041, 103,602.

36 A person includes "any association of persons whether incorporated or not". Commerce Act 1986, s 2.

37 A person is in a dominant position in a market if it acquires or supplies goods or services in a market either alone or with an interconnected body corporate and "is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market". Ibid, s 3(8). In deciding whether a particular person is dominant regard is to be had to three factors. Ibid, s 3(8)(a) to (c). See *Telecom Corp of NZ Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA); *Port Nelson Ltd v Commerce Commission* unreported, 3 July 1996, CA169/95; and Ross H Patterson, "The Rise and Fall of a Dominant Position in New Zealand Competition Law: From Economic Concept to Latin Derivation" (1993) 15 NZULR 265 (arguing that the Court of Appeal's decision in *Telecom v Commerce Commission* by moving from an economic approach concerning the question of market dominance to an approach based on dictionary definitions of the term "dominance" "turned the established jurisprudence on its head" (ibid, p 280) and "represents a major set-back to the development of New Zealand's competition law" (ibid, p 288)). This paper assumes for the question of argument the existence of market dominance. This paper also uses the terms "market power", "market dominance", "dominant position", and "monopoly power" interchangeably unless the context otherwise requires.

38 A reference to a "market" in the Act is a reference to a "market in New Zealand for goods and services that, as a matter of fact and commercial common sense, are substitutable for them." Commerce Act 1986, s 3(1A) (as substituted by s 3(1) Commerce Amendment Act 1990 (1990 No 41, RS 32. Enacted 29 June 1990, in force from 1 July 1990)). The question of market definition is one of considerable importance to any antitrust litigation. Defining the relevant market is "the first step towards the assessment of the current state of competition and the nature and extent of any inhibition of competition": *Tru Tone Ltd v Festival Retail Marketing Ltd* [1988] 2 NZLR 352, 358 (CA).

number of specified anticompetitive purposes.[40] This provision is not aimed at the policing the existence or acquisition of a monopoly.[41] This can be contrasted to earlier competition law in New Zealand which, until 1984, examined the existence or acquisition of monopolies rather than their conduct.[42] Instead the Commerce Act 1986 looks solely at the conduct and purpose of dominant firms. It is not the existence of dominant market power which is the concern of the Act but its exercise.[43] There must be some use of market dominance which sets the conduct aside from everyday competitive trading.[44] Accordingly, the Act as a whole and the section in particular seek to promote vigorous competition by individual firms; it does not seek to protect individual traders from the actions of dominant firms.[45] Predatory or exclusionary tactics, if undertaken by individual firms without market power, are legal because the Act assumes that such behaviour is ineffective without market dominance.[46] For example a firm in a competitive market which

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39 The appropriate test to be applied to determine whether a dominant firm has used its dominance is at the centre of this paper. This element of s 36 is generally referred to in this paper as the conduct element.

40 Commerce Act 1986, s 36(1)(a) to (c).

41 The Commerce Act contains provisions for the imposition of price controls where, for example, a dominant firm is extracting monopoly prices. The Governor-General on the recommendation of the Minister of Commerce may impose price controls on specified goods or services. The Minister may not make such a recommendation unless he or she is satisfied that competition in the market for the goods or services is limited or is likely to be lessened and it is necessary or desirable in the interests of users, consumers, or suppliers that prices be controlled. The Minister, before making a recommendation, may request the Commerce Commission to report on the desirability of imposing price controls. Ibid, ss 52-54.

42 See above, text accompanying notes 3 to 19.

43 See Mark Berry, et al, *Gault on Commercial Law*, Wellington, Brooker's, 1994, ¶CA36.Intro.01, p 3—144 (updated to 6/5/94).

44 If a dominant firm were prevented from engaging everyday trading then it is arguable that, in order to promote competition, divestiture provisions would logically be needed to supplement the existing enforcement provisions of the Act. In contrast to previous New Zealand legislation such provisions are notably absent from the Commerce Act 1986.

45 An agrument for the contrary interpretation of s 36 can be made. The ability to institute private actions in conjunction with the wording of the section, which speaks of eliminating a person from or detering a person's entry into a market, could lead to the inference that the provision is designed to protect individual traders rather than the competitive process itself. See John Land, "Monoplisation: The Practical Implications of Section 36 of the Commerce Act 1986" (1988) 18 VUWLR 51, 52; and van Roy, above, n 3, p 148.

46 Such an assumption is probably unwarranted. A firm possessing market power but which does not dominate the market may well be able to undertake predatory or exclusionary conduct successfully, in the sense of eliminating competition in a manner which is not competition on the merits. However, arguably other

refuses to deal in goods or services required by a firm in a second market will be undertaking a counter-productive strategy, as it will simply drive the potential purchaser to other suppliers.[47] Firms may generally undertake an entire range of action and are only prevented from doing so when they face no competition because they are dominant in a particular market. Conversely, when a firm possesses market dominance, the Act limits its freedom of action. While the dominant firm may act competitively,[48] even in an aggressively competitive fashion, it cannot engage in conduct which uses its dominance.[49]

Section 36, then, can be described as a consumer welfare provision, in the sense that phrase was used by Mason CJ and Wilson J in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*:[50]

> the object of s [36] is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.

3. THE APPLICATION OF SECTION 36 COMMERCE ACT 1986

Having examined the purpose of the Act, and of s 36 in particular, it is now time to examine the practical application of the provisions. The focus of this section is on the conduct element of s 36, which was first fully explored by the Australian High Court in *Queensland Wire*

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provisions of the Commerce Act 1986, especially s 27, provide scope for the Courts to prevent such attempted monopolisation. See Allan, above, n 31. Whether the use of s 27 in this way furthers the purpose of the Act is, it is submitted, a highly contentious point.

47 See *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d 263, 291 (2nd Cir, 1979) cert denied 444 US 1093 (1980).

48 See *Union Shipping*, above, n 24, at p 662; 101,618 ("If a person acts in a normal competitive fashion, as he would whether dominant or not, that person can hardly be said to be 'using dominance' ").

49 This paper contends that "use" is the engine-room of the provision. The question of the "purpose" of the dominant firm is, following recent case law, of minor and perhaps diversionary importance in the scheme of the section. Cf Janet M November, "The Meaning of 'Use' of a Dominant Position: from *Queensland Wire* to *Electricity Corp v Geotherm Energy*" (1993) 23 VUWLR 191, 206 ("a dominant firm acting in a 'normal competitive fashion' . . . may well be 'using dominance'; however it will not be breaching the section unless it also acts with one of the proscribed purposes".)

50 (1989) ATPR ¶40-925, 50,010. In that case the High Court of Australia considered s 46 Trade Practice Act 1976 (Cth), which is the Australian equivalent of s 36.

Industries Ltd v Broken Hill Pty Ltd.[51] The test elaborated by the case is examined and contrasted with another test proposed by an Australian Court. This section then discusses the recent New Zealand cases of *Telecom Corp of NZ Ltd v Clear Communications Ltd*[52] and *Commerce Commission v Port Nelson Ltd.*[53]

3.1. Australian Authorities

3.1.1. Queensland Wire Industries Ltd v Broken Hill Pty Ltd

This case concerned a refusal to deal by a firm with almost overwhelming market dominance. In the course of its decision, the High Court discussed the meaning of the words "take advantage of" in s 46 Trade Practices Act 1974 (Cth). Departing from earlier case law,[54] the Court held that the words meant nothing more than "use",[55] thus rendering the conduct element of s 46 identical to s 36 Commerce Act. The High Court then proceeded to elaborate on what was meant by "use".

Mason CJ and Wilson J delivered a joint judgment. The Justices emphasised the purpose of s 46 Trade Practices Act: the promotion of competition as the means of ensuring consumer welfare.[56] They noted that competition was a "deliberate and ruthless" process in which successful firms injured competitors, sometimes fatally.[57] From this platform Mason CJ and Wilson J turned to the actions of the defendant Broken Hill Proprietary Ltd (BHP), which was not constrained by

51 Ibid.

52 *Telecom Corp of NZ Ltd v Clear Communications Ltd* (1992) 5 TCLR 166 (HC); *Clear Communications Ltd v Telecom Corp of NZ Ltd* (1993) 5 TCLR 413 (CA); *Telecom Corp of NZ Ltd v Clear Communications Ltd* (1994) 6 TCLR 138 (PC).

53 *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 (HC); *Port Nelson Ltd v Commerce Commission* above, n 37 (CA).

54 Previous decisions had interpreted the words "take advantage of" as possessing pejorative overtones; they were held to require misuse rather than simply use of market power. See *Midland Milk Pty v Victorian Dairy Industry Authority* (1988) 82 ALR 279, 297. This was the approach adopted by the trial judge, Pincus J, in *Queensland Wire*, where he referred to an "abuse of position, to something unusual, predatory, forcful, or deceitful". See *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) ATPR ¶40-810, 48,818.

55 Above, n 50, p 50,010, per Mason CJ and Wilson J, p 50,012, per Deane J, p 50,016, per Dawson J, p 50,023, per Toohey J.

56 Ibid, p 50,010.

57 Ibid.

competitive pressures. They concluded that BHP was taking advantage of its substantial market power:[58]

> It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant. If BHP lacked that market power—in other words, if it were operating in a competitive market—it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.

Dawson J reached a similar conclusion. His Honour found that BHP used its market power "in a manner made possible only in the absence of competitive conditions."[59]

The effect of these passages has been summarised by one commentator as follows:[60]

> The common thread . . . is that in order to constitute a taking advantage of market power the conduct must be of a kind that a corporation can only 'get away with' because it has market power and because of the absence of competitive conditions.

3.1.2. Other Australian Decisions

Other Australian decisions have taken a different approach to the question of use. For example the Court in *Natwest Australia Bank Ltd v Boral Gerrad Strapping Systems Pty Ltd*[61] suggested that:[62]

> The conduct must either by necessary implication from its very nature or by reference to other pleaded facts and circumstances constitute a use of that power. . . There must be a causal connection between the conduct alleged and the market power pleaded such that it can be said that the conduct is a use of that power.

The authors of *Gault on Commercial Law*[63] believe that the "causation" is the best approach to the question of use in s 36.[64] It is submitted, however, that this test is not helpful in identifying conduct which

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58 Ibid.
59 Ibid, p 50,016.
60 S G Corones, *Restrictive Trade Practices Law*, Sydney, Law Book Company, 1994, p 183.
61 (1992) ATPR ¶41-196.
62 Ibid, p 40,644.
63 Above, n 43.
64 Ibid, ¶CA36.08.

violates s 36 Commerce Act 1986. In particular, suggesting that "use" should simply be regarded as providing a causal connection between the possession of dominance and the conduct complained of does not provide any answer at all to the central problem. First, this approach to causation is unusual. It appears to suggest that a dominant firm's use of its market power may be caused by that market power rather than by the firm itself. However, in law, causation normally refers to particular acts or omissions to act rather that the context in which the conduct occurs.[65] The idea of causation in normally implies some human action. Causation-as-context limits the role for human action and could be taken to suggest that a dominant firm in some circumstances cannot help but "use" its market power in an anticompetitive manner and thus violate the section. As such, the test is a mire of indeterminacy. There is no way to tell from the terms of the test itself which conduct will be a "use" of market power and which will not. Applying such a test would make it virtually impossible for dominant firms to monitor their own conduct, as despite their best efforts, a Court may still decide that their conduct was a use of their market power. This clearly runs contrary to the purpose of the Commerce Act.[66] If dominant firms are to compete vigorously then they require some degree of certainty in which to operate. A failure to abide by the requirements of the section can result in large sanctions.[67]

Secondly, it is arguable that the test adds nothing to that suggested by the High Court of Australia in *Queensland Wire*.[68] If the test can be rephrased in terms of the test for causation in torts it comes out as "would the conduct have occurred but for the firm's possession of dominance". This does not advance the test any further; however it is possible to again rephrase it. The test could be expressed as "would the dominant firm have undertaken the conduct if it did not possess market dominance". This, it is submitted, is functionally identical to the test in

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65 This is the sense in which the term is used in the law of torts. See Stephen Todd, *The Law of Torts in New Zealand*, Sydney, Law Book Co, 1992, ch 16. As competititon law is closely related to tort law, it is submitted that this comparison is apt.

66 See text accompanying notes 20 to 50 above.

67 A firm can be subject to pecuniary penalties of up to $5 million for violating s 36. See Commerce Act 1986, s 80.

68 Above, n 50.

Queensland Wire[69] as both, at least by implication, examine the likelihood that the conduct in question would have been undertaken by a firm not possessing dominance.

It is submitted, therefore, that stating that use is nothing more than a causative element between the possession of dominance and purpose is not a particularly satisfactory way of approaching the problem. Either the approach does not provide sufficient guidance for the dominant firm to monitor and correct its conduct or the test adds nothing to that proposed by the High Court of Australia in *Queensland Wire*.[70] If the former is correct the approach should be abandoned as it does not promote competition and is therefore contrary to the purpose of the Commerce Act 1986. If the latter is correct, the test only creates potential confusion and should be disregarded.

3.2. New Zealand Decisions

3.2.1. Telecom Corp of NZ Ltd v Clear Communications Ltd

The Privy Council's decision in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*[71] provides the authoritative New Zealand exposition of the correct test for "use" of a dominant position. That decision concerned Clear's attempts to connect to Telecom's Public Service Telecommunications Network. By interconnecting with this network, Clear proposed to offer a local telephone service for business customers in the central business districts of the major centres which would compete with the service already operated by Telecom. Clear would compete with Telecom by operating its own lines from its exchange—or switch—to its own customers. It would duplicate Telecom's existing network for the central business district. Clear, for reasons of expense, did not wish service to suburban or rural customers.[72]

Telecom and Clear competed in the same market, defined by the High Court as the national market for standard switched telecommunications

69 Ibid.
70 Ibid.
71 Above, n 52.
72 Ibid, (1992) 5 TCLR at p 170.

services.[73] This refers to fixed or hard-wired telephones rather than mobile cellular telephones.[74] Clear needed access to Telecom's network to enable its customers to call Telecom's customers and vice versa. In other words, Telecom's network was an essential facility, access to which was a prerequisite for a competitor to successfully enter the market.

However, the situation in this case can be distinguished from the archetypal essential facilities cases in at least two ways. First, Telecom did not refuse to deal. It always accepted that it must allow Clear to connect to its network. However, Telecom set a pricing strategy which Clear maintained was unreasonable, in that it could not make a sufficient return if it was required to pay the interconnection fee which Telecom demanded. Secondly, Telecom's conduct was not that of a firm possessing a natural monopoly refusing access to the facility in a vertically adjacent market, or at least refusing to do so on reasonable terms.[75] Telecom and Clear were competitors in the same market or markets.[76]

The central issue in the case at all stages of its life was the mechanism by which a price could be fixed for Clear's interconnection to Telecom's network.[77] In the High Court, the dispute essentially concerned how access to the networks should be characterised. Telecom's position was that Clear should be treated as a customer; Clear's position was that the two parties should be treated as equal network competitors with access to each other's network subject to a balancing payment representing disparities in traffic.[78]

In the High Court Telecom proposed the "Baumol/Willig rule", a rule formulated by two American economics professors, as the basis for any agreement on interconnection pricing structure. This remained its

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73 Ibid, p 199. Although Telecom did not agree with the assessment of the relevant market, it did conceed it was dominant in whatever market the Court found to be relevant. Ibid, p 198.

74 Ibid, p 198.

75 See Kenneth L Glazer and Abbott B Libsky, Jr, "Unilateral Refusals to Deal Under Section 2 of the Sherman Act" (1995) 63 Antitrust LJ 749, 775.

76 Above, n 52, (1992) 5 TCLR 198.

77 Ibid, (1994) 6 TCLR at p 141, 143.

78 Ibid, (1992) 5 TCLR at p 207.

position throughout the course of the litigation. The Privy Council described the effect of the rule as follows:[79]

> The consequence of applying this model to the present case is to say that Telecom is acting in a way which does not involve the use of its dominant market position if it allows Clear to interconnect to the Telecom network on payment of first, the average incremental cost to Telecom of providing the [network] *plus* the revenue Telecom would have received had it supplied the service to the Clear customers *less* the cost saved by Telecom by reason of Clear providing and handling and calls to or from a Clear customer over the sector from the interconnection with Telecom's network and the Clear customer, and vice versa.

It was accepted by Professor Baumol that the rule would allow Telecom to recoup monopoly rents both from any inefficiencies in its operation and from any profits in excess of a reasonable return on investment that it received from its operation. It was argued, however, that if Clear was more efficient than Telecom, it would be able to charge less than Telecom for calls which did not connect to the Telecom network and for that part of calls which did connect to the Telecom network but which were also carried part of the way by Clear. Competition caused by these lower charges would have the effect of eventually "competing out" any monopoly profits which Telecom may obtain from its network.[80]

While the Baumol/Willig rule was accepted by the High Court as not being a use of a monopoly position, this opinion was not shared by the Court of Appeal.[81] Cooke P (as he then was) held that the rule was "obviously anticompetitive" as it required a new entrant to the market to "indemnify the monopolist for loss of custom".[82] Gault J[83] highlighted the discrepancies between the model proposed by Professors Baumol and Willig and what would occur in a perfectly contestable market. That the model allowed monopoly profits for the incumbent when these would

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79 Ibid, (1994) 6 TCLR at p 146. Emphasis in original.

80 Ibid, at p 147. This conclusion was also accepted by the High Court, which accepted that while the Baumol/Willig rule was imperfect, it was more likely than other formula to improve competition in New Zealand telecommunications. The Court did accept the possiblility that Clear may not be able make a sufficient profit from its service. See ibid, (1992) 5 TCLR at p 217.

81 Ibid, (1993) 5 TCLR 413.

82 Ibid, p 416.

83 With whom Richardson J (as he then was) agreed in all respects (ibid, p 417), and with whom Cooke P (as he then was) agreed for the most part (ibid).

not be available in a perfectly contestable market "invites the conclusion that the model is imperfect."[84] Further, Gault J refused to accept the argument that Clear's lower costs and lower prices would eventually "compete out" Telecom's monopoly profits. His Honour pointed out that the inclusion of monopoly profits in the price charged to Clear might deter it from entering the market in the first place. Further, the process by which the access levy was to be calculated meant that Clear would be placed at a further disadvantage, especially if the reviews were not frequent enough.[85] Gault J concluded the Baumol/Willig rule was a use of a dominant position as "I cannot accept that the objects of the Commerce Act are served by a method of pricing that secures the profits of a firm in a dominant position."[86]

The question before the Privy Council was whether Telecom by insisting on the Baumol/Willig rule as the basis of its charging regime for access to its network was using its dominant position.[87] In approaching the question of "use", their Lordships emphasised the importance of commercial certainty. In particular the Board rejected a suggestion by Gault J that in approaching the question it may be helpful to look at whether the dominant firm has "acted reasonably or with justification".[88] Their Lordships held that such a test would place a dominant firm in "an impossible position".[89] It would face difficulty in defending its genuinely-held belief that its actions were reasonable and justified as a Court may well come to a different conclusion. This would expose the dominant firm to damages and quasi-criminal penalties. Their Lordships concluded that in their view, "s 36 must be construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful."[90]

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84 Ibid, p 433.

85 Ibid, pp 435-6.

86 Ibid, p 436.

87 Their Lordships had little time for Telecom's argument that it did not have an anticompetitive purpose. Their Lordships found that Telecom's task was "hopeless . . . not only because it would be most improbable that Telecom lacked the purpose to deter its bitter rival, Clear, but also because its past conduct and certain of its internal memoranda show that in fact it did have that purpose." Ibid, (1994) 6 TCLR at p 154.

88 Ibid, (1993) 5 TCLR 413 at p 430, per Gault J.

89 Ibid, (1994) 6 TCLR at p 155.

90 Ibid.

From this position, their Lordships then considered what, in their view, constituted the correct approach to the question of use. They noted that the "statutory words provide no explanation as to the distinction between conduct which does, and conduct which does not" constitute use of a dominant position.[91] They stated that it was both legitimate and necessary to approach to question from the position of a hypothetical seller in a competitive market.[92] That is, the action of the dominant firm must be compared to the actions of a hypothetical firm in a competitive market. In order for that comparison to be valid the hypothetical firm must be viewed as being in the same situation as the dominant firm in question. Their Lordships concluded:[93]

> it cannot be said that a person in a dominant position "uses" that position for the purposes of s 36 [if][94] he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.

Their Lordship's test, therefore, concentrates on those aspects of the dominant firm's behaviour that are likely to occur only if a firm possesses a dominant position. The idea of dominance necessarily suggests a lack of competitive restraint.[95] It is important to note the Privy Council used the word "would" in this test rather than "could". The test does not encompass all the potential acts a firm in a competitive market *could* do. Rather, it refers to the actions of a rational firm attempting to maximise its profit in a competitive market and necessarily constrained by the competitive conditions of that market.

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91 Ibid.

92 Ibid.

93 Ibid.

94 In their original judgment their Lordships used the word "unless" rather that "if". As the authors of *Gault on Commercial Law*, above, n 43, at para CA36.08, p 3—149 (updated to 14/3/96), state, the Privy Council could not have meant the statement to read as it did. The authors believe the best alternative is to replace "unless" with "if". This approach has been judicially sanctioned by McGechan J in *Port Nelson Ltd v Commerce Commission*, above, n 53, at p 445. This approach was adopted without comment by the Court of Appeal in *Port Nelson Ltd v Commerce Commission*, above, n 37, at p 41 of the unreported judgment. Note, however the alternate judicial construction favoured by Blanchard J in *NZ Private Hospitals Assn (Auckland Branch) v Northern Regional Health Authority* unreported, 7/12/94, Blanchard J, HC Auckland CP440/94, at p 27 of the unreported judgment.

95 Section 3(8)(b) Commerce Act 1986 states that in assessing whether a firm is dominant in a particular market one of the factors to be considered is "the extent to which that person is constrained by the conduct of competitors or potential competitors in that market." Section 46(3) of Australia's Trade Practices Act 1974 (Cth) contains a virtually identical provision.

Essentially, the test asks nothing more than whether there are commercial justifications for the dominant firm's actions that would hold true if the firm were subject to competition. The test focuses on those actions that a rational profit-maximising firm would undertake in the pursuit of increased profits and increased market share. The application of the test requires that the actions of the dominant firm are compared with what the same firm, acting according to conventional economic logic and on the basis of conventional economic assumptions, would do if it were in a fully competitive market. If a firm substantially in the same circumstances as the dominant firm but in a competitive market would not have acted as the dominant firm did in any particular case then the dominant firm has used its market dominance and thereby breached s 36.[96]

Several commentators have disagreed with the test propounded by the Privy Council in the *Telecom* case. The main criticism of the judgment is that it has limited the scope of s 36 to the extent that test does not meet the purpose of the section. Van Roy argues that the Privy Council's test, "if adhered to rigidly, is a giant step backwards. It has the potential to remove from the scope of s 36 a good deal of conduct already decided as contravening that section".[97] This particular criticism has little force to it, and is akin to saying that the Privy Council is bound by the decisions of the lower Courts. Van Roy's criticisms have more force when she argues that the Privy Council's test does not further the purpose of the Act. However, it appears that she misstates the test when she states that it excludes from s 36 "anything that a firm which is not dominant can do".[98] As noted above, the Privy Council's test does not refer to what a non-dominant firm could do, but what a non-dominant firm would do. This requires the application of conventional economic theory to discover whether a non-dominant firm in a competitive market would have acted in the same way as the dominant firm has done. It does not

96 Section 36 Commerce Act also requires that the dominant firm act with an anticompetitive purpose. However, as is argued below (see text accompanying notes 100 to 107) following the Privy Council judgment, the question of purpose has little force in any analysis of a dominant firm's anticompetitive conduct.

97 Yvonne van Roy, "The Privy Council decision in *Telecom v Clear*: Narrowing the application of s 3 of the Commerce Act 1986" [1995] NZLJ 54, at p 57. A similar criticism is made by the authors of *Gault on Commercial Law*, above, n 43, at para CA36.08, p 3—150 (updated to 14/3/96).

98 Ibid.

necessitate, as van Roy implies, an analysis of all the possible activities that a non-dominant firm could undertake and then require their automatic exclusion from the scope of s 36. Where a dominant firm undertakes activities that a non-dominant firm also could undertake, the Privy Council test looks at whether a non-dominant firm otherwise in the same circumstances as the dominant firm, seeking to maximise profit and constrained by the activities of competitors, would have undertaken those activities at all.

That said, it is still distinctly arguable that the Privy Council misapplied its own test to the conduct before it. If Telecom were not in a dominant position, that is, if it were constrained by actual or potential competition, there would by no element of monopoly profit in the charge levied under the Baumol/Willig rule. A firm in a competitive market could not insist on charging an access fee which included monopoly profits because by very definition they would not exist.[99] While the rule may provide a perfectly acceptable regime on which to base access levies in a competitive market it is not so in the case of one dominated by a single firm. There will generally always be the opportunity for it to reap monopoly profits.

The final significant aspect to consider in the Privy Council's decision is their Lordship's treatment of the purpose requirement of s 36. Earlier decisions of the Court of Appeal and High Court had noted the difficulty in distinguishing the two elements. In *Electricity Corp Ltd v Geotherm Energy Ltd*[100] the Court of Appeal discussed *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd.*[101] The Court of Appeal noted:[102]

> The actual conduct under scrutiny in that case was refusal to supply goods. That could have been done by a supplier with a single customer. It was not the conduct itself that amounted to a use of market power for the particular purpose but the conduct in the market for that particular anticompetitive purpose. This illustrates the difficulty in separating use of market dominance and purpose.

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99 This is essentially the reasoning of Gault J in the Court of Appeal. Above, n 52, (1993) 5 TCLR at p 433.

100 [1992] 2 NZLR 641.

101 Above, n 50.

102 Above, n 100, p 649.

This concern was echoed by McGechan J in *Commerce Commission v Port Nelson Ltd.*[103]

The Privy Council's approach to this question was to effectively subsume the issue of purpose into the major consideration of whether the firm had used its market dominance. It noted that:[104]

> If a person has used his dominant position it is hard to imagine a case in which he would have done otherwise that for the purpose of producing an anticompetitive effect; there will be no need to use the dominant position in the process of ordinary competition.

Their Lordships then noted that it was legitimate to infer anticompetitive purpose from use of a dominant position but possibly dangerous to infer use from purpose. This was because firms which are aggressively competitive have, in one sense, the purpose of eliminating their competitors from the market.[105] This suggests that the Privy Council believed that it may be very difficult if not impossible to distinguish between a competitive purpose to eliminate competitors and an anticompetitive purpose to do the same. Finally, the Privy Council noted that in the situation before it, "it would be most improbable that Telecom lacked the purpose to deter its bitter rival, Clear".[106]

Taken together, these dicta clearly limit the scope of any inquiry into purpose. In effect, purpose is demonstrated by proof that a dominant position has been used. This conclusion finds support in the Privy Council's test for use,[107] which is in essence also a test for objective purpose, in the sense that it looks to the nature and effect of the conduct in issue.

3.2.2. Commerce Commission v Port Nelson Ltd

So far there has been only one significant case discussing in any detail the requirements of s 36 in light of the decision in the *Telecom* case. In *Commerce Commission v Port Nelson Ltd*,[108] McGechan J was required to ascertain whether certain actions of Port Nelson Ltd (PNL) contravened

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103 Above, n 53, at p 557.
104 Above, n 52, (1994) 6 TCLR at p 154.
105 Ibid.
106 Ibid.
107 Discussesd above in text accompanying notes 87 to 99.
108 Above, n 53.

s 36. In that case PNL had dominance in the market for tug services, in the market for pilotage services, and in wharves in the Nelson Harbour. The question was whether it had used its dominant position in those three markets for the purpose of deterring or eliminating its competitor, Tasman Bay Marine Pilots Ltd. This question arose in relation to three specific activities carried out by PNL: a requirement that persons using its tugs must also use its pilots (the "tug tie"); offering a 5 percent discount across all port services if ships used PNL's tugs, lines, pilots, and stevedoring labour; and imposing a $100 minimum pilotage charge for all vessels below a certain size.

McGechan J approached the question of the tug tie using the test advanced by the Privy Council. The question was: would a firm which was not dominant in tugs, pilotage, and wharves but otherwise in the same circumstances as PNL require that those making use of its tugs make use of its pilots? McGechan J found that in the abstract the answer was probably that a firm subject to competition would not insist on a tug tie. It would not risk the fact that another firm seeking to make use of its tugs would baulk at the requirement that it must also hire pilots. "By seeking to have both operations, [a competitive firm] would risk losing both."[109] This was not a risk many firms would take. However, there could exist perfectly valid reasons in the surrounding commercial circumstances which would require a competitive firm to impose a tug tie. These could include questions over the quality of other pilots or potential labour problems. McGechan J believed this case was one where the surrounding commercial circumstances went both to the dominant firms' use of its position and to its anticompetitive purpose:[110]

> one must look at the commercial circumstances and steps taken at the time as pointing to the course which a non-dominant firm would have taken in relation to a tie and onward to actual purpose.

His Honour found that despite the number of explanations put forward, PNL's purpose in imposing the tug tie was to eliminate competition. In other words, the circumstances put forward to justify the tug tie did not exist. There was no possible honestly commercial or competitive justification for PNL's actions. The only possible reason was the desire

109 Ibid, at pp 556-7.
110 Ibid, at p 557.

to destroy a competitor. As there was no justification in the surrounding circumstances for the tug tie, a firm in a competitive situation would not have imposed it. Therefore, PNL used its dominant position. The absence of any circumstances which would justify the behaviour in a competitive market was partially demonstrated by the existence of PNL's purpose of killing competition. The lack of commercial justification in turn bolstered the Court's conclusion that PNL acted with an anticompetitive purpose.

Turning to the question of the discount PNL offered for its services, McGechan J again looked at the surrounding circumstances to conclude that the discount was not a use of the company's dominant position. His Honour held that:[111]

> Irrespective of questions of dominance, it could make good sense to stimulate through-put by discounting at rational levels, so promoting use of labour across all activities, hopefully achieving compensating economies of scale and scope. The figures would need to be calculated . . . but the non-dominant firm would be likely to do the same.

Even though PNL had acted with an anticompetitive purpose, it had acted in a way that a competitive firm, otherwise in the same circumstances, also would.

Finally, McGechan J turned to the question of the $100 minimum fee for the use of its tug services. His Honour concluded that a competitive firm was likely to exercise the same commercial judgment as had PNL. It would make its decision on the basis of "commercial intuition"[112] using the criteria of not wishing to impose a trivial charge while not deterring custom by imposing too high a charge. These criteria were the same for a non-dominant firm as for a dominant firm, and the price set by both firms would likely be the same or similar. Accordingly, PNL did not use its dominant position.

In summary, his Honour found that PNL had used its dominant position for an anticompetitive purpose when instituting the tug tie requirement. It had not used its dominant position, even though McGechan J found it may have had an anticompetitive purpose, when it gave a 5 percent "across the board" discount to customers who used a

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111 Ibid, at p 558.
112 Ibid, at p 559.

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range of its services, or when it imposed a $100 minimum fee for tug services. The case is an example of the practical application of the Privy Council's test from *Telecom*. His Honour made use of the same circumstances arm of their Lordship's test to discover whether a non-dominant firm would have acted in same manner as PNL did in this case. In particular, McGechan J made use of the circumstances in which PNL found itself in to gauge whether the explanations which that firm gave for its conduct were actual commercial reasons, or whether they were simply a cover for acts which amounted to use of its dominant position. Importantly, McGechan J also looked at the particular conduct which PNL undertook. His Honour carefully considered the precise circumstances of the individual practices to discern whether a firm in a competitive market but otherwise in the same situation would have acted in a similar way.

The application of the Privy Council test in *Commerce Commission v Port Nelson Ltd* is obviously correct in terms of the overall purpose of s 36. The section requires that firms, including dominant firms, be allowed to compete in a vigorous fashion. The only sensible test for whether such conduct has occurred must involve comparison with the likely conduct of an identical firm in a competitive market, but otherwise in the same circumstances. To a great extent this will depend on whether there are valid commercial justifications for the actions of the dominant firm. To do otherwise would have the potential to place and onerous burden on dominant firms and stifle their competitive energies. Unless the questioned particular activity is something that a firm facing competition would not do it cannot truly be said that the dominant firm has taken advantage of its position.[113]

However, this case also demonstrates the difficulty in applying the section caused by the requirement to show an anticompetitive purpose. In applying s 36. McGechan was forced to traverse the same ground

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113 The Court of Appeal has considered the judgment of the High Court in *Port Nelson Ltd v Commerce Commission* on appeal. See *Port Nelson Ltd v Commerce Commission*, above, n 37. In that case the Court did not address to any extent the question of "use" of a dominant position. However, it did foreshadow the possibility that shoud the issue of "use" come squarely before it in a future case it would not necessarily regard the Privy Council's approach favourably. Specifically, the Court said, "it is not easy to see why use of a dominant position should not be determined simply as a question of fact without the need to postulate artificial scenarios". Ibid, p 42 of the unreported judgment.

twice: once for "use" and once for "purpose". As the Act promotes competition, it is best to focus on conduct which is objectively contrary to the purpose of the Act. If a firm can act with an anticompetitive purpose and not violate the section, and if a finding of anticompetitive conduct will almost inevitably lead to a finding of anticompetitive purpose, then the existence of a separate purpose element in s 36 serves no useful function and ought to be removed. By including both conduct and objective purpose, the Privy Council's test for "use" effectively renders the purpose element of the section. As the test furthers the purpose of the Act and the section, it is submitted that legislative amendment is desirable to codify the Privy Council's approach.

New Zealand's competition law, then, when assessing the behaviour of dominant firms does so on an objective basis. This provides certainty for dominant firms. The law tells them that if they compete aggressively using techniques which a firm which was not in their dominant position would also use they have nothing to fear from s 36. As will be seen in the next section, a remarkably similar approach has been adopted by the United States Courts. In effect the United States Courts would reach the same results as New Zealand Courts using the same basic reasoning when confronted with similar problems. It is submitted that New Zealand can profitably take much from the United States experience. On the other hand the law of the European Community does not have the same crispness of approach which characterises New Zealand and United States law. Community law provides a less appropriate model for the New Zealand Courts to draw from.

4. UNITED STATES AND EUROPEAN COMMUNITY LAW

4.1. Sherman Act 1980

4.1.1. Legislative origins and purpose

The provision in United States federal law applicable to the actions of dominant forms is § 2 Sherman Act 1890.[114] This section states that:[115]

114 15 USCA § 2 (1982).

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony.

The purpose of the Sherman Act is difficult to ascertain from both the wording of the statute and the evidence that exists of the intention of its drafters. The words employed by the statute are vague and do not specify prohibited conduct. The legislative history—the speeches of the legislators in the debates accompanying its enactment—is similarly vague.

The Sherman Bill originally dealt only with combinations. However, § 2 was added by the Senate Judiciary Committee in order to improve the coverage of the legislation.[116] It seems clear that the legislators intended to promote competition.[117] However, beyond this most obvious of statements, it is difficult not to conclude that the legislative history is even more vague than the statutory words themselves and accordingly deserves little weight.[118] Perhaps the most that can be taken from the speeches of the legislators is that they wished to allow the Federal Courts to develop a common law of antitrust.[119]

4.1.2. Section 2 enforcement: statutory provisions

Numerous actions can be pursued under the aegis of § 2 Sherman Act. The provision is penal in nature, carrying with it the potential for a term of imprisonment. Such prosecutions must only be brought by the Government. Given the vague nature of the statute and the strict

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115 Ibid. This paper discusses only the monopolisation aspect of the provision. The prohibitions against attempts to monopolize and conspiracy to monopolize are outside the scope of this paper.

116 See the comments of Senator Edmunds: "[W]e thought we had done the right thing in providing . . . that if one person instead of two by a combination . . . did it, it was just as offensive and injurious to the public interest as if two had combined to do it." 21 Cong Rec 3151-3152 (1890), quoted in Phillip Areeda and Donald F Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Boston, Little, Brown and Co, 1978, vol 3, ¶617.

117 See the speech of Senator Edmunds: "I suppose, therefore . . . that a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business." 21 Cong Rec 3151-3152 (1890), quoted in ibid.

118 Ibid, vol 1, p 14

119 Ibid, vol 1, p 15, and ibid, vol 3, ¶310 ("the Courts have implicitly understood the Sherman Act as a mandate to develop a common law of antitrust").

requirements for finding criminal liability, prosecutions have normally only been commenced in "instances of outrageous conduct or undoubted illegality."[120] The Government can also bring actions to prevent illegal conduct by dominant firms and in some situations apply for divestiture of the dominant firm's assets.

Private individuals can bring actions for treble damages under § 2 Sherman Act. Section 4 Clayton Act[121] provides that any person "injured in his business or property by reason of anything forbidden in the antitrust laws[122] . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[123] This provision obviously enhances the incentives for individuals to enforce the antitrust laws. The provision encourages private actions as a supplement for public enforcement, which is likely to be episodic and focussed on the most obvious targets. This "increases the likelihood that a violator will be found out, greatly enlarges his penalties, and thereby helps discourage illegal conduct."[124] The requirements of a successful private action for treble damages are (1) an antitrust violation; (2) injury to the plaintiff's business or property; and (3) a reasonable basis for assessing damages resulting from the defendant's unlawful conduct.[125] However, while the policy behind the award of treble damages is easily appreciated, it is equally clear that, because of their punitive nature and the punishment they impose on a trader violating § 2, they should only be awarded in cases where liability is very clearly established.[126] The trebling of damages can lead to astronomical awards in some cases. For example, the District Court in *Telex Corp v IBM Corp*[127] awarded $260 million damages against IBM, demonstrating why § 2 litigation is "typically prolonged, expensive, and disruptive".[128]

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120 Ibid, vol 3, ¶309b

121 15 USCA § 15 (1972).

122 Defined in § 1 Clayton Act (15 USCA § 11 (1972)) as including the Sherman Act.

123 Ibid, § 15.

124 Areeda and Turner, above, n 116, vol 1, ¶311a.

125 See *Zenith Radio Corp v Hazeltine Research Inc* 395 US 100 (1969).

126 Areeda and Turner, above, n 116, vol 1, ¶311a, and vol 3, ¶630c.

127 367 F Supp 258 (ND Okla, 1973) rev'd 510 F 2d 894 (10th Cir); cert dismissed, 423 US 802 (1975). See also *West Virginia v Chas Pfizer & Co* 314 F Supp 710 (SDNY, 1970), aff'd 440 F 2d 1079 (2d Cir), cert denied 404 US 871 (1971) where a $100m settlement was reached.

128 Glazer and Lipsky, above, n 75, p 749. See, for example, the trial in *California Computer Products v IBM Corp* 613 F 2d 727 (9th Cir, 1979). The Court of

4.1.3. US Courts' approach to § 2 Sherman Act

Before the 1970s, the United States Courts were more likely to look at the existence of the monopoly and its purpose rather than at whether the conduct in question furthered efficiency. In *United States v Griffith*[129] the Supreme Court held that s 2 was breached if (1) a firm had the power to exclude competition, and (2) it had exercised that power or had the purpose of exercising it.[130] This was interpreted to mean that "it is a violation of Section 2 for one having effective control of the market to use, or plan to use, any exclusionary practice, even though it is not a technical restraint of trade."[131] A similar rule was stated in *United States v Grinnell Corp.*[132] Under the *Grinnell* rule monopolisation under § 2 Sherman Act required (1) monopoly power; and (2) "the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[133] The Court thus distinguished between the maintenance of dominance as a result of superior skill and that which was wilfully maintained or acquired.

After *Grinnell* the Supreme Court did not hear any § 2 monopolisation cases until *Aspen Skiing Co v Aspen Highlands Skiing Corp.*[134] In the intervening period of almost 20 years the lower Courts' approach to § 2 underwent a subtle yet important alteration. While the lower Courts still ostensibly applied the *Grinnell* test their approach to the questions of the monopolist's intent and the range of conduct which a monopolist could undertake began to show the influence of the Chicago School of law and economics.[135]

Appeals records that the trial itself took 54 days, heard over three months, and produced transcripts and records comprising 132 volumes.

129 334 US 100 (1948).

130 Ibid, p 107, per Douglas J

131 *United States v United Shoe Machinery Corp* 110 F Supp 295, 342 (D Mass, 1953) per Judge Wyzanski, affd 347 US 521 (1954).

132 384 US 563 (1966).

133 Ibid, pp 570-571.

134 472 US 585, 86 L Ed 2d 467, 105 S Ct 2847 (1985).

135 Many authors have documented this change. See, for example, S G Corones, "Identifying a Misuse of Market Power in Relation to s 46 of the Trade Practices Act", (1989) 17 ABLR 164, 164-5.

Three decisions of the Courts of Appeals signalled a departure from the *Grinnell* rule.[136] These decisions employed tests which focussed almost entirely on the conduct of the dominant firm, rather than investigating its subjective intent. These cases suggest that practices which reflect rational business decisions, even if they are undertaken with the purpose of entrenching existing dominance, will not violate § 2. They give the dominant firm "greater freedom to fight off its competitors with the same lawful weapons with which those competitors are assaulting its dominant position."[137]

The Tenth Circuit in *Telex Corp v IBM Corp*[138] reversed a judgment against IBM on the basis that the test applied by the District Court,[139] which closely followed the test in *Grinnell*,[140] was incorrect.[141] In particular the Tenth Circuit held that the trial Court had omitted to consider two factors: (1) "whether or not the acts are ordinary business

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136 *Telex Corp v IBM Corp* above, n 127; *California Computer Products Inc v IBM Corp* above, n 128; and *Berkey Photo Inc v Eastman Kodak Co* above, n 47.

137 Maher, above n 1, p 295.

138 Above, n 127. The defendant, IBM Corp, was an acknowledged monopolist in several markets for computer equipment. The plaintiffs, Telex Corp, complained of two specific types of conduct: price reductions and the leasing of computer equipment under fixed, long-term leases. Ibid, p 919. As to the leases, the trial Court found that adopted its policy to forestall a dramatic downturn in sales in computer equipment. The tactic of leasing equipment for long, fixed terms with penalties for early cancellation was common in the industry and IBM's standard term was less than that offered by its competitors. Ibid, p 920. The evidence of IBM's officers suggested that the leases were designed to improve the company's competitive. Ibid, p 921. Despite these findings, the trial Court found that IBM's monopoly position rendered its actions a violation of § 2 Sherman Act ("its action was not directed at competition in an appropriate sense but at competitors and their viability as such"). Ibid. IBM also introduced new models of equipment at lower prices. These prices were not necessarily lower than those of competitors and still enabled IBM to reap reasonable profits. Ibid, p 924. These price reductions were also found to breach § 2. Ibid, p 925.

139 *Telex Corp v IBM Corp* 367 F Supp 258 (ND Okla, 1975).

140 Above, n 132. The trial Court's view of the applicable law was stated in its conclusion 6, which stated in part:

> I believe the applicable rule to be that monopolization in terms of Section 2 of the Sherman Act involves two elements: (1) The possession of monopoly power in the relevant market or submarket and (2) the wilful acquisition or maintenance of that power with intent to monopolize, which intent need not be evidenced by predatory practices but which is not to be gathered merely from growth or development as a consequence of a superior product.

See *Telex Corp v IBM Corp*, above, n 127, p 925 (citations omitted).

141 The Court of Appeals noted that the "view of the authorities taken by the trial court [was] an extremely narrow one." Ibid.

practices typical of those used in a competitive market",[142] and (2) "whether the acts constitute the *use* of monopoly power".[143] The Court found that it was not the intent of § 2 "to prohibit the adoption of legal and ordinary marketing methods already used by others in the market, or to prohibit price changes which are within the 'reasonable' range, up or down."[144] The provision clearly required that a defendant must have "some room to move" in the face of competition.[145] If this were not so the competitors would be protected from "ordinary competition", and this would be "an incorrect application of applicable law".[146] The discussion in *Telex* was quite clearly obiter, as the appeal had been decided on market definition grounds.[147] It was also thought to have been overshadowed by *Greyhound Computer Corp v IBM Corp*,[148] a more conventional application of the *Grinnell* test. However, the case received more attention when it was relied upon in *California Computer Products Inc v IBM Corp*[149] and *Berkey Photo Inc v Eastman Kodak Co.*[150]

In the *California Computer Products* case, the Ninth Circuit affirmed the District Court's finding that the defendant, IBM's, price reductions and design changes on its computer equipment[151] did not amount to monopolisation prohibited by § 2 Sherman Act.[152] In particular the Court of Appeals stated:[153]

> The Sherman Act does not draw a distinction between competition on the basis of price and of performance: the two are inseparable parts of any competitive offering. Where the

142 Ibid, pp 925-926.
143 Ibid, p 926. Emphasis in original.
144 Ibid, p 927.
145 Ibid.
146 Ibid.
147 The Court of Appeals found that the trial Court had erroneously determined the correct market for the purposes of the antitrust claim. Ibid, pp 919, 933.
148 559 F 2d 488 (9th Cir, 1977) cert denied 434 US 1040 (1978). See Maher, above n 1, p 293 n 10.
149 Above, n 128.
150 Above, n 47.
151 The facts of this case have some similarity with the facts in *Telex Corp v IBM Corp*, above, n 127, discusses above in text accompanying notes 138 to 147.
152 "IBM's price cuts were a part of the very competitive process the Sherman Act was designed to promote. To accept CalComp's position would be to hold that IBM could not compete if competition would result in injury to its competitors, an ill-advised reversal of the Supreme Court's pronouncement that the Sherman Act is meant to protect the competitive process, not competitors." Ibid, p 742 citing *Brunswick Corp v Pueblo Bowl-O-Mat Inc* 429 US 477, 489, 97 S Ct 690, 50 L Ed 2d 701 (1977).
153 Ibid, p 742.

> opportunity exists to increase market share profitably by offering equivalent or superior performance at a lower price, even a virtual monopolist may do so.

As a monopolist, IBM had the right to redesign its product to make them more attractive to consumers either in terms of improved performance or lower costs. It was under no duty to ensure that its rivals survived or expanded and there was no need for it to constrain its product development programme to facilitate the sales of rival products.[154]

In *Berkey Photo Inc v Eastman Kodak Co*[155] the Second Circuit was confronted by a virtual monopolist in the film and film processing markets who had introduced a new film and camera format. The plaintiff, Berkey Photo, had contended Kodak was under a duty to predisclose to it and other competitors any innovations it planned to introduce. The trial Judge left this question open to the jury. The Court of Appeals found that this constituted an error of law, as there was no duty on firms, even monopolists, to predisclose information on product innovations to competitors. To do so would stifle innovation.[156] The Court stated, "Because ... a monopolist is permitted and indeed encouraged, by § 2 to compete aggressively on the merits, any success that it may achieve through 'the process of invention and innovation' is clearly tolerated by the antitrust laws."[157] Later in the course of its judgment, the Court addressed in greater depth the limits on its freedom of action a monopolist faces. The plaintiff alleged that Kodak had used its monopoly power in the film and camera markets to gain competitive advantage in the photofinishing market.[158] The Court found that Kodak did not attempt to monopolise the photofinishing market, and therefore would not be liable under § 2 "unless it gained a competitive advantage in [that market] by use of the monopoly power it possessed in other

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154 Ibid, p 745.

155 Above n 47.

156 Ibid, pp 279-281.

157 Ibid, p 281.

158 This refers to film processing and photo printing at specialist laboratories. Kodak had, until 1954, a virtual monopoly in the photofinishing market. However a consent decree drastically altered Kodak's business practices and opened the market to competition, with the result that its market share plummeted. Ibid, p 270-271.

segments of the industry."[159] The Court then further defined what it meant by the concept of "use":[160]

> "[A] use of a monopoly power is an action that a firm would have found substantially less effective, or even counterproductive, if it lacked market control. Thus, the classic example of such use is a refusal to deal in goods or services needed by a competitor in a second market, eg *Eastman Kodak Co v Southern Photo Materials Co* 273 US 359, 47 S Ct 406, 71 L ED 684 (1927). But a firm without control of the market that attempts this will simply drive the purchaser to take its patronage elsewhere."

The Court then elaborated a test: a dominant firm will use its market power if it does "anything that a smaller firm with integrated capabilities but no market control might not have done."[161] It justified the test on the basis of "a simple proposition: if an action that gains a firm a competitive advantage is effective because of the company's efficiency, prestige, and innovativeness, and not because of control over the market, the action is not a use of power."[162]

In 1985 the Supreme Court took the opportunity to consider again § 2 Sherman Act in *Aspen Skiing Co v Aspen Highlands Skiing Corp*.[163] This case is in many respects similar to *Telecom Corp of NZ Ltd v Clear Communications Ltd*.[164] The similarities between the cases are highlighted most clearly in the Court of Appeals' application of the essential facilities doctrine to the facts of *Aspen Skiing*. First those basic facts need to be set out.

Aspen Skiing Co (Skiing Co) owned 3 of the 4 ski resorts in Aspen, Colorado; Aspen Highlands Skiing Corp (Highlands) owned the other. Between 1962 and 1977 the ski resort operators in Aspen had offered an "all-Aspen" skiing package, which enabled skiers to ski at whichever resort they chose on any day during the 6-day currency of the ticket. These tickets accounted for nearly 35% of the total market. The returns to each resort had been based on the number of skiers on the package frequenting each resort.[165] However, for the 1977-1978 and 1978-1979

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159 Ibid, p 291.
160 Ibid.
161 Ibid.
162 Ibid, n 50.
163 Above, n 134.
164 Above, n 52.
165 Above, n 134, 475 US at pp 590-1, 86 L Ed 2d at p 473.

season, Skiing Co offered to continue with the package only if Highlands accepted a fixed return less than it had received in the past. Highlands agreed to this for the 1977-1978 season, but when Skiing Co offered an even lower rate of fixed return for the 1978-1978 season Highlands did not agree, and Skiing Co refused to consider any counter-proposals.[166] Further, when Highlands developed its own multi-area packages, Skiing Co refused to co-operate. This saw Highland's share of the market plummet by approximately 50% from 1976-1977 to 1980-1981. The jury in the District Court found for Highlands Corp[167] and the Court of Appeals affirmed in all respects.[168]

The Tenth Circuit applied an essential facilities analysis to the facts of the case.[169] It applied the four-stage test formulated by the Seventh Circuit of the Court of Appeals:[170]

(1) The monopolist controls an essential facility;
(2) Competitors cannot practicably duplicate the facility;
(3) Access to the facility is denied by the monopolist; and
(4) It is feasible to share the use of the facility.

The Tenth Circuit first considered that the offer of multi-day, multi-mountain tickets were an essential prerequisite to effective operation by the competitor in the market. By refusing to deal, Aspen Skiing could still offer a multi-mountain package while Highlands could not. The Tenth Circuit held that this was control of an essential facility.[171] This was the same predicament faced by Clear. It required access to Telecom's network to offer a comparable service to that Telecom could offer without co-operating with Clear.

Second, the Tenth Circuit found that the development of a new ski area was very difficult due to regulatory constraints, delays, and expense.[172] This corresponds with the difficulty and enormous expense that Clear

166 Ibid, 475 US at pp 591-3, 86 L Ed 2d at p 473-4.
167 Treble damages of $7.5m were awarded plus costs and attorney's fees. Ibid, 475 US at p 598, 86 L Ed 2d at 478.
168 738 F 2d 1509 (10th Cir, 1984).
169 Ibid, aff'd, 472 US 585 (1985). The Supreme Court did not deal with the issue of essential facilities in its judgment.
170 *MCI Communications v AT & T Corp* 708 F 2d 1081, 1132-33 (7th Cir) cert denied 464 US 891 (1983).
171 Above, n 168, p 1520.
172 Ibid.

would face duplicating Telecom's network, much of which was installed at public expense.

Third, the Tenth Circuit found a refusal to deal by Skiing Co.[173] However, it is difficult to ascertain whether this occurred when Skiing Co refused to deal with Highlands when it refused to provide the multi-area ticket with Highlands except on a basis that gave Highlands a lower proportion of the revenue from the tickets than if the revenue were apportioned according to the number of skiers that skied at each area. If a refusal to deal existed in that circumstance, then the case would be analogous to *Telecom v Clear*. Skiing Co would have received monopoly profits, that is greater profits without improving the benefit offered to the consumer. Further, Highlands would have effectively subsidised Skiing Co's monopoly profits by foregoing revenue. Unfortunately, the Courts regarded the conduct of Skiing Co as a whole, and Skiing Co's conduct consisted of both refusing to deal except at a low fixed proportion of the ticket revenue, and refusing to co-operate with Highland's attempts to formulate alternatives to the multi-area ticket. Accordingly, then, it is not entirely clear whether the Court would have regarded the initial refusal to deal except as a fixed percentage as a violation of § 2. However, it should be noted that the District Court, after awarding Highlands $7.5 million in treble damages also granted an injunction requiring Skiing Co to co-operate in offering with Highlands a multi-area ticket substantially similar to that which Skiing Co offered at another resort area.[174] It is difficult to imagine the Court would have granted an injunction that would have allowed Skiing Co to recoup monopoly profits.

Finally, in *Aspen* the Tenth Circuit decided that it was feasible for Skiing Co to grant access to the facility as it had been offered successfully for many seasons in the past and similar schemes operated at other resort areas.[175] Again, there was no question in the Telecom/Clear litigation that Telecom could offer Clear a connection to its network.

On appeal to the Supreme Court, Skiing Co argued that a monopoly has no duty to engage in joint marketing with its competitors. The Supreme

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173 Ibid, p 1521.
174 Above, n 134, 472 US 598, 86 L Ed 2d 478, n 23.
175 Above, n 168, p 1520.

Court agreed with this proposition,[176] but stated that the case did not rest on any such view. Rather, the Court held that a refusal to co-operate with competitors may in certain situations give rise to liability; the right of the trader to pick and choose with whom it trades is not unqualified.[177] The Supreme Court did not examine the essential facilities doctrine applied by the Court of Appeals.[178] Rather, it approached the case on the basis that Skiing Co had decided to end an arrangement which had developed in a competitive market, which had existed for many years, and which appeared to satisfy consumer demand. Its decision thus fundamentally changed the character of the market.[179] This can be contrasted with the *Telecom/Clear* litigation, where Telecom's conduct could be said to ensure that the market remained the same and was dominanted by Telecom.

The question for the Supreme Court was whether this conduct could be classified as exclusionary. The Court applied the test formulated by Robert Bork, namely that exclusionary or predatory conduct was characterised by "attempting to exclude rivals on some basis other than efficiency".[180] This was to be discovered through the effect of the conduct on consumers, Highlands Corp, and Skiing Co itself. Looking at the effect on consumers, the Supreme Court held the evidence justified a jury finding that Skiing Co's refusal to enter into the all-Aspen ticket did not accord with consumer demand and nor did it promote consumer satisfaction.[181] Further, and most importantly, Skiing Co's behaviour suggested that normal business purposes were absent from its considerations, in that it appeared willing to forgo short-run business to apparently reduce competition by harming Aspen Highlands. This behaviour was not supported by any justifications based on efficiency and none of justifications advanced by Skiing Co had any substance.[182]

A general similarity of approach can be discerned in the Supreme Court's decision in *Aspen Skiing* and the Privy Council's opinion in the

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176 Above, n 134, 472 US at p 600, 86 L Ed 2d at 479, citing *United States v Citizens & Southern National Bank* 422 US 86, 116, 45 L Ed 2d 41, 95 S Ct 2099 (1975).

177 Ibid, 472 US at p 601, 86 L Ed 2d at 479, citing *Lorain Journal Co v United States* 342 US 143, 96 L Ed 162, 72 S Ct 181 (1951).

178 Ibid, 472 US at p 611, 86 L Ed 2d at p 486, n 43.

179 Ibid, 472 US at p 603-4, 86 L Ed 2d at 481.

180 Ibid, 472 US at p 605, 86 L Ed 2d at 482, quoting Bork, above, n 25, p 138.

181 Ibid, 472 US at pp 605-7, 86 L Ed 2d at pp 482-4.

182 Ibid, 472 US at pp 608-11, 86 L Ed 2d at pp 484-5.

Telecom/Clear litigation. Both Courts applied objective criteria to the conduct before them. They did not extensively examine the defendants' intentions, purpose, or motive. Instead both Courts looked almost completely at conduct in assessing the allegedly anticompetitive acts before them. The examination of Skiing Co's business justifications for its action is also very similar to the approach adopted by McGechan J in the *Port Nelson* case.

The most recent Supreme Court decision to consider the conduct element of § 2 Sherman Act is *Eastman Kodak Co v Image Technical Services Inc.*[183] The defendant, Kodak, was a manufacturer of copiers. In the general product market it was not a dominant firm. However, the plaintiffs were organisations[184] that serviced Kodak equipment and claimed that there existed separate markets for parts and service for Kodak equipment.[185] They further claimed that Kodak had limited the availability of Kodak parts and had made it difficult for the ISOs to compete in the market for servicing Kodak equipment.[186] The Court, applying *Aspen Skiing*,[187] held that Kodak's liability under § 2 Sherman Act turned on whether it presented valid business reasons for its actions.[188] Kodak put forward three reasons for its behaviour, however, the Court after examining them believed that there were factual questions regarding the credibility of the justifications which made summary judgment inappropriate.[189]

Two further cases from the 7th Circuit of the US Court of Appeal are also worth noting. In *Ball Memorial Hospital Inc v Mutual Hospital Insurance Co*,[190] Easterbrook J discussed the purpose of the antitrust laws and the burden on the plaintiffs in § 2 Sherman Act litigation. He noted that the plaintiff faces a "stiff burden" as often exclusionary conduct

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183 504 US —, 119 L Ed 2d 265, 112 S Ct 2072

184 Known as independent service organisations (ISOs).

185 Knows as the derivative aftermarkets

186 Above, n 183, pp 276-7. The central issue for the Court was whether as a matter of law lack of dominance in the equipment market meant there could be no dominance in the derivative aftermarkets. Much of the decision was also taken up with the proper approach to a defendant's application for summary judgment, that is, an application that the evidence, even regarded in the most favourable light, does not disclose the alleged antitrust violation.

187 Above, n 134.

188 Above, n 183, 119 L Ed 2d at p 294.

189 Ibid.

190 784 F 2d 1325 (7th Cir, 1985).

which ultimately harms consumers is also completely consistent with the aggressive competition that the Sherman Act fosters.[191] In response to a submission by the plaintiffs that § 2 required anticompetitive intent and that the defendant displayed this in abundance,[192] Easterbrook J held that intent to harm rivals is not a useful test for antitrust law.[193] Competitors intend to harm their rivals in order to increase their sales: "To penalize this intent is to penalize competition".[194] Further, a monopolist cannot be penalised for intending to drive a hard bargain,[195] or for intending to compete aggressively in order to enlarge its current market share.[196] The only opening for an inquiry into intent is the question of whether the dominant firm wishes to exclude a rival on some basis other than efficiency.[197] Rather than focussing on intent, the true object of scrutiny under § 2 litigation is "the objective basis, not the mental state."[198]

In *Olympia Equipment Leasing Co v Western Union Telegraph Co*,[199] Posner J, delivering the judgment of the Court, traced the recent history of antitrust enforcement. He noted that in the 1940s a monopolist had to exercise "special restraint" but that the view of the Courts had shifted to the promotion of economic efficiency through competition to recognising that "the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors.[200] 'A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits' ".[201] There is, held Posner J, no general duty on monopolists to assist competitors.[202]

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191 Ibid, p 1388.

192 Ibid, p 1337, relying on *United States v Aluminum Co of America* 148 F 2d 416 (2nd Cir, 1945).

193 Ibid, pp 1338-39, citing *Barry Wright Corp v ITT Grinnell Corp* 724 F 2d 227 (1st Cir, 1983).

194 Ibid, p 1339.

195 Ibid, citing *MCI Communications Corp v AT&T* above, n 170..

196 Ibid, citing *Telex Corp v IBM Corp* above, n 127.

197 Ibid, citing *Aspen Skiing Co v Aspen Highlands Skiing Corp* above, n 134.

198 Ibid.

199 797 F 2d 370 (7th Cir, 1986).

200 This phrase was cited with approval by the Privy Council in *Telecom Corp of NZ Ltd v Clear Communications Ltd*, above, n 52.

201 Above, n 199, p 375, citing *Foremost Pro Color Inc v Eastman Kodak Co* 703 F 2d 534, 544 (9th Cir, 1983).

202 Ibid.

The major change in US jurisprudence has been a greater acceptance of efficiency arguments.[203] The emphasis now is on greater certainty and predicability rather than open-ended judicial discretion.[204] The Courts now look to give the monopolist that same freedom of action possessed by its smaller competitors. It may use the same lawful weapons to fight off their competition as they use to assault its dominance.[205]

In terms of basic approaches the United States Courts proceed on a remarkably similar basis to that adopted by the New Zealand Courts, especially the Privy Council. The focus of the United States Courts is on economic efficiency. They look at whether a monopolist's conduct can be justified in comparison with what a firm in a competitive market is likely to do. They encourage monopolists to compete aggressively on the merits and discourage them from trading on their dominance of the market. A further similarity with New Zealand decisions is the treatment of the monopolists intent or purpose. The United States approach is to minimise any inquiry into intent on the basis that a monopolist intending to compete aggressively will also intend to exclude competitors from the market—that particular attitude is at the root of the competitive ethos. The Privy Council in *Telecom Corp of NZ Ltd v Clear Communications Ltd*[206] expressed similar views. In the somewhat similar case of *Aspen Skiing* the Supreme Court confirmed the judgments of the trial Court and the Court of Appeal to find for the plaintiff. However, the process of reasoning adopted by the Supreme Court was similar to that employed by the Privy Council.

It remains now to consider the approach of European Community law.

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203 See Eleanor M Fox, "Monopolization and Dominance in the United States the European Community: Efficiency, Opportunity, and Fairness" (1986) 61 Notre Dame L Rev 981, 983 ("At a minimum, most courts would decline to apply the law in ways that impair efficiency").

204 See Flynn, "Antitrust Jurisprudence" (1977) 125 U Pa L Rev 1182, 1184 ("Perhaps in response to the open-ended and uncertain evolution of antitrust policy during the era of the Warren Court, there has been a renewed effort to bring greater certainty and predicability to antitrust analysis"). See also, Kauper, "The 'Warren Court' and the Antitrust Laws: Of Economics, Populism, and Cynicism" (1968) 67 Mich L Rev 325, 334-5.

205 Maher, above, n 1, p 295.

206 Above, n 52.

4.2. Article 86 Treaty of Rome (EC)

The European Community equivalent of s 36 Commerce Act and § 2 Sherman Act is art 86 Treaty of Rome. This provides:

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

Article 86 sits in the midst of a series of articles which constitute the basic competition law of the Community.[207] These provisions must be interpreted in the context of the Treaty as a whole. One relevant aim of the Treaty is the creation of a single internal market for goods and services.[208] Effective competition assists this purpose by ensuring that goods are priced the same throughout the Community. If there exist pockets of high prices, free competition will allow lower-priced goods to move in, thus equalising prices.[209] Another is contained in art 3(f), which states that one of the activities of the Community shall be "the institution of a system ensuring that competition in the common market is not distorted."[210]

The Commission of the European Community has the major role in implementing and enforcing the competition laws and halting infringements. It also has the primary role in formulating competition

207 See arts 84 to 95 EC Treaty.

208 Art 8A, inserted by the Single European Act 1987.

209 Christopher Bellamy and Graham D Child, *Common Market Law of Competition*, 3rd ed, London: Sweet and Maxwell, 1987, ¶1-027.

210 Art 3(f).

policy in the Community, which it does through its decisions and its annual Reports on Competition Policy.[211]

The highest judicial body in the European Community is the European Court of Justice. It has two broad appellate roles in the competition law sphere. The first is to hear appeals on point of law from the Court of First Instance.[212] The Court of First Instance is the first appellate Court from decisions of the Commission. Secondly, the Court of Justice can issue broad rulings of abstract basic principles of Community law to be applied by national Courts deciding national disputes.[213] The Court of Justice is assisted by the Advocate-General, who acts in a similar manner to an *amicus curiae*.[214] The Advocate-General summarises the positions of the parties and gives his own impartial ruling. The decisions of the Advocate-General possess a similar precedent value to those of the Court of Justice itself.[215]

The Commission possesses broad powers to implement and enforce the competition laws. It may require a firm to cease any conduct which infringes the Community rules and order the firm not to engage in the same or similar conduct in the future.[216] The Commission may also require firms to perform specific acts. For example in the *Commercial Solvents*[217] case the Commission ordered the firm in question to begin resupplying is downstream competitor again within 30 days. It also possesses the power to monitor and control prices, and may also have the power to order divestiture. The existence of the latter power is unclear as the Commission once ordered divestiture but its decision was overturned on appeal and the order was never given effect.[218] There is also power for the Commission to impose fines for negligent or

211 Bellamy and Child, above, n 209, ¶¶1-063, 1-066.

212 Art 173.

213 Art 177.

214 Bellamy and Child, above, n 209, ¶1-069

215 Ibid.

216 Ibid, ¶¶12-002, 12-004.

217 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp v Commission* [1974] ECR 223; [1974] 1 CMLR 309.

218 See *Continental Can* [1972] CMLR D11 (Commission); and *Europemballage and Continental Can v Commission* [1973] ECR 215 (ECJ).

intentional breaches of the competition laws[219] and to impose periodic penalties to force compliance with the Commission's decision.[220]

There is also significant interplay between Community competition law and that of the member States. Member states have an obligation to ensure that their domestic laws do not hinder the effective functioning of the Community laws.[221] National laws that require firms to conduct themselves contrary to arts 85 and 86 also breach art 5(2) of the Treaty. Articles 85 and 86 may also be enforced in national Courts. Parties injured by an abuse of a dominant position can bring actions for damages.[222]

The political context surrounding the enactment of art 86 of the Treaty of Rome shares similarities with the political climate in New Zealand at the time both the Trade Practices Act 1958 and the Commerce Act 1975 were passed.[223] European Community competition law had been described as evolving from a tradition favouring industrial concentration and trusting the power of Government regulation to limit abuses of market power.[224] There was less belief that the actions of individual firms could promote the public good and preferred to further that end through systematic government intervention. Competition law was also a response to the integration required by the European Economic Community rather than a desire to strengthen it or to benefit consumers. The thrust to greater integration of the European economy can also be seen in the absence of merger provisions in the Treaty of Rome. This omission was predicated on the belief that existing trade barriers had prevented firms from growing to their optimum size.[225]

One point about the wording of art 86 to note immediately is the use of the word "abuse". Both that word and the original French term used in art 86, "abusive exploitation" have pejorative connotations.[226] This

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219 Art 15(2)(a) of Reg 17. Reg 17 (made on 13 February 1962) brought into effect the Treaty competition rules.

220 Bellamy and Child, above, n 209, ¶¶12-012.

221 *INNO v ATAB* [1978] 1 CMLR 283.

222 *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130 (HL).

223 This is discussed above in the text accompanying notes 4 to 19.

224 Fox, above, n 203, p 982.

225 Ibid, p 983.

226 Valentine Korah, "Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position Within the Common Market" (1978) 53 Notre Dame L Rev 768, 771.

suggests that art 86 would be interpreted similarly to the Australian wording "take advantage of" was, until the decision in *Queensland Wire*.[227] However, the Commission of the European Union has taken a generous approach to the interpretation of "abuse", taking the view that firms can infringe art 86 even in the absence of fault.[228] The concept of abuse, as interpreted by the European Court of Justice, tends "to imply some causal link between the dominant position and the conduct complained of, even if only in the attenuated form that the conduct is harmful only because of the actor's dominance."[229]

One major difference between art 86 and the New Zealand and United States provisions is the inclusion of a series of specified acts which are deemed to violate the provision. Of particular importance for this essay is the specific power to determine whether a firm is engaged in unfair pricing,[230]

The unfair pricing provision was considered in *United Brands v Commission*.[231] There United Brands, a banana distributor was alleged to have charged widely-varying prices to its ripeners and wholesalers in the various countries of the Community. The European Court of Justice, reversing the decision of the European Commission, found that United Brands had not undertaken unfair pricing. However, the Court did confirm that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied [would be] . . . an abuse".[232] It then went on to propose a two-stage test: (1) is the difference between price and cost excessive; and (2) if so, "whether a price has been imposed which is either unfair in itself or when compared to competing products."[233]

This approach can be contrasted with that of the US situation, where there exists no residual power to prevent monopoly pricing.[234] Rather, the markets are relied on to prevent long run monopoly pricing as new firms move into the market attracted by the high prices and high profits.

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227 Above, n 50.
228 See, for example, *Re Gema* [1971] CMLR 261.
229 Korah, above, n 226, pp 797-98.
230 Art 86(a).
231 [1978] ECR 207; [1977-78] Common Mkt Rep ¶8429.
232 Ibid, p 301; p 7718.
233 Ibid, p 302; p 7718.
234 Except, perhaps, a resort to divestiture.

New Zealand, like the European Community, is not content to leave control of monopoly prices and profits to the market alone. As a remedy for market failure, the Commerce Act contains some price control provisions. In contrast to the Community, however, the New Zealand provisions operate administratively and politically rather than judicially. That the Act leaves the final decision to implement price controls in the hands of the Minister ensures that the decision is highly political. The issue of whether there was an unfair price was central to the Telecom/Clear litigation. It appears that the European Courts have both the ability and the willingness to act as a regulator, something which the New Zealand Court do not possess the power to do.

Other Community cases have looked at the duty of monopolists to supply to or deal with competitors. One of the first major refusal-to-deal case under art 86 was *Commercial Solvents*.[235] A dominant firm refused to supply a potential competitor with a particular raw material needed for the manufacture of a certain chemical when it decided to compete in the market for the chemical. The refusal-to-deal had the effect of eliminating the competitor as the dominant firm possessed a worldwide monopoly over the raw material. The European Court of Justice applied three general criteria in concluding that the dominant firm had abused its market dominance. These were (1) the possession of dominance; (2) refusal to supply; and (3) a risk of eliminating competition.[236] Interestingly, the Court did not discuss whether the dominant firm required the entire supply of the raw material for its own production of the chemical. If the dominant firm did not require the entire raw material supply then its refusal to deal was obviously anticompetitive and without business justification. If, on the other hand, it did require the entire supply, the Court's decision is difficult to support. A firm, even one which possesses absolute dominance should have the business freedom to vertically integrate, even if it is at the expense of potential competitors. They ought to be allowed to grow their business, so long as that growth is based on business efficiency, even if a result of that growth is the elimination of competitors. Rather, the Court's focus was on the elimination of the competitor and the preservation of the appearance of competition by ensuring the survival of individual firms.

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235 Above, n 217.
236 Ibid, [1974] ECR at 251; [1974] 1 CMLR at 341.

The Court adopted a similar approach in the *United Brands* case.[237] In that case United Brands Co, a firm dominant in the bulk banana market, refused to supply a particular distributor which had actively engaged in sales promotions for a rival brand. The Court noted that in general a dominant firm has a duty to continue with long-standing supply arrangements if the other party to the arrangement does not change its position.[238] However, the European Court of Justice also went further and considered the justification for United Brands' refusal to supply. It first noted that a dominant firm can protect its own interests, but that action can be protective only, and cannot be condoned it its actual purpose is the expansion of market dominance.[239] Although a dominant firm may launch a limited counter-attack to protect its commercial interests "that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other."[240] In this case, United Brands' approach was regarded by the Court's as excessive; it was more than "what might . . . reasonably be contemplated" as an appropriate sanction against the distributor.[241] The Court had regard to the deterrent effect United Brands' conduct would have on other distributors and which amounted to a "serious interference" with their freedom to trade and the fact that it "could not be unaware" of this effect.[242]

This final ground is perhaps the strongest of the reasoning put forward by the Court. It looks at the effect of United Brands' conduct in the context of its market power, and so far as it focuses on intent it looks only to the intent relevant to the particular conduct to be undertaken. If United Brands' aim was to make an example of the distributor its acts would only have force and effect if United Brands possessed a dominant position in the relevant market. Further, its conduct can arguably be

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237 *United Brands Co v Commission* [1978] ECR 207; [1978] 1 CMLR 429.

238 Ibid, [1978] ECR at 292; [1978] 1 CMLR at 496.

239 Ibid, [1978] ECR at 293; [1978] 1 CMLR at 496.

240 Ibid. See also BBI/Boosey & Hawkes, Commission Decision No 87/500/EEC OJ L286/36 (1987) where the Commission stated "A dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat." Ibid ¶41. It further noted "A course of conduct adopted by a dominant undertaking with a view to excluding a competitor from the market by means other than legitimate competition on the merits may constitute an infringement of Article 86." Ibid.

241 Ibid.

242 Ibid, [1978] ECR at 293; [1978] 1 CMLR at 497.

regarded as collusive. It created an understanding among the distributors that it would respond severely should they participate actively with competitors.[243] Accordingly, the deterrence aspect of the Court's reasoning was arguably sufficient for the Court to find abuse of a dominant position. However, the Court of Justice muddied matters by insisting on reasonable and proportionate conduct by a firm in a dominant position. As noted elsewhere formulations such as this make it very difficult for the monopolist to regulate its own conduct. What it considers reasonable may well be second-guessed by either the regulatory body that enforces the antitrust laws and by the Courts. Further, this formulation does not specifically target conduct which is anticompetitive and deleterious to consumer welfare. It promotes "cosy" competition rather than aggressive competition on the merits.

There is also a principle in European Community law that a vertically integrated firm dominant in both markets must supply competitors in the downstream market at a price that enables a reasonably efficient firm to stay in business.[244] The Commission considers that treating a subsidiary part of the business any differently than competitors is discriminatory and a violation of art 86.[245] In *B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd*[246] the Commission noted that a firm which controls an essential facility[247] can infringe art 86 if it refuses to provide access to the facility or provides access at terms inferior to those granted to its own subsidiaries unless there is objective justification for the action.[248] Similar statements are to be found in the related case of *Sea Containers Ltd v Sealink Harbours Ltd.*[249] One significant point about that decision is the active role played by the Commission in brokering a final settlement. It played an integral part in causing the parties to reach

243 See s 29 Commerce Act 1986.

244 See *National Carbonising Co Ltd v Commission* [1975] ECR 1193; [1975] 2 CMLR 457.

245 John Temple Lang, "Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities" (1994) 18 Fordham Intl L Rev 437, p 455.

246 [1992] 5 CMLR 255.

247 In that case a port. B&I Line plc occupied a berth near the harbour entrance. Each time a Sealink ferry went by B&I Line had to cease loading its own vessels. The complaint was brought when Sealink altered its schedules to improve its own timetables but with the additional effect of causing greater inconvenience to B&I Line by more frequently interrupting its loading. Ibid.

248 Temple Lang, Above, n 245, 460.

249 European Commission Decision No 94/19/EEC OJ L15/8 (1994).

a settlement by pressuring Sealink to agree to access and pricing conditions which the Commission believed were reasonable and non-discriminatory.[250] Indeed the Commission in its decision went so far as to criticise Sealink for its conduct in the negotiation process.[251]

The European Community approach to such matters as refusals to supply or refusals to deal differs in major ways from the New Zealand and United States approaches. The European institutions are more willing to substitute their own view for those of the firm over which they sit in judgment. Further, they possess a greater readiness to act as a regulator and to set broad policy guidelines.[252] These matters indicate a broad gulf between the New Zealand and European Community attitudes to competition law. This is further emphasised by the approach that the Community institutions take to the promotion of competition. Their approach is to look more to the effects of conduct on competitors rather than the competitive process. They are less likely to favour aggressive, competitive conduct by firms possessing market dominance. The European institutions are also more likely to take the purpose of the dominant firm into account. They are likely to regard a monopolist's desire to increase market share as an evil to be punished. The New Zealand and United States approach has been neutral to such expressions of purpose, as long as the methods the firm employs are not objectively anticompetitive. For these reasons, it is submitted that New Zealand law has less to learn from European law than from United States law.

5. CONCLUSION

To return, then, to the question of the approach New Zealand law should take to the question of how to distinguish between a dominant firm's competitive conduct and its exclusionary or predatory conduct. It is submitted that little should turn on the monopolist's intent or purpose, or on the harm inflicted to competitors. All firms look to eliminate their competitors from the market in order to increase their business. Further, aggressive competition will see some injury to competitors and possibly even their elimination from the market. Both

250 Temple Lang, above, n 245, p 461.

251 Ibid, p 498.

252 See, for example, "Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector" OJ C233/2 (1991).

intent to harm and actual harm will be found in all competitive situations. Accordingly, any test for anticompetitive behaviour should focus solely on the conduct of dominant firms which harms the competitive process. This will be found where the dominant firm trades on its market power rather than on the merits of its products, price, and service. For this reason, more than any other, s 36 Commerce Act 1986 should be amended to (1) remove the requirement that the dominant firm act with an anticompetitive purpose; and (2) add a test for use which closely follows that suggested by the Privy Council in *Telecom Corp of NZ Ltd v Clear Communications Ltd.* By these amendments the furtherance of both the purpose of the Act and the purpose of the section can be better assured.

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