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ESSENTIAL FACILITIES IN A NEW ZEALAND CONTEXT AFTER THE HILMER REPORT

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CONTENTS

Abstract

This paper considers the "essential facilities doctrine" and the role it should have in New Zealand's law today. In order to determine the best way for any such doctrine to be imported into New Zealand law, the work of the Hilmer Committee which lead to the recent enactment of the Competition Policy Reform Act 1995 (Australia) is considered. The Australian regime lies outside of the bounds of the Australian Trade Practices Act 1974 and as such is a novel method for the imposition of a competition law doctrine. This paper concludes that there is merit in New Zealand adopting a regime similar to that enacted in Australia. However, after a careful analysis of the Australian regime, the conclusion is reached that some modifications would be required before New Zealand could truly maximize the benefits to be obtained from such an enactment.

I INTRODUCTION

The "essential facilities" doctrine is not a per se doctrine[1] or an independent tool of analysis, rather, it is a useful label to describe a particular area of antitrust.[2] The doctrine may be basically encapsulated by the following words found in *Hecht* [3] "where facilities cannot practicably be duplicated by would-be competitors those in possession of them must allow them to be shared on fair terms." The basic concern of the doctrine has been simply stated by Robertson as the situation where a monopolist possesses a resource or "facility" that may be denied to certain persons for whom it is "essential."

While Areeda has noted that granting access to others has a certain intuitive appeal, this paper attempts to analyse the value of such a principal at a deeper level. The doctrine will be examined in detail and areas of contention concerning its elements will be considered. Particular attention will be given to the potential remedies that the courts are able to grant in light of the doctrine's breach and administrative concerns relating to the doctrine's enforcement.

This paper will outline New Zealand's current approach to the essential facilities doctrine. The paper will note propositions established in relation to essential facilities by New Zealand case-law. The potential role of section 36 of the Commerce Act 1986 and the Commerce Commission's Business Acquisition Guidelines in enforcing the doctrine in New Zealand will also be examined.

The paper's principal focus however is on the recent enactment of the Competition Policy Reform Act 1995 (Australia)[4] which establishes an essential facilities access regime independent of competition law regulation in Australia. This Act is novel in that it specifically provides for an access regime rather than allowing general competition law principles or competition law legislation to enforce the doctrine.

Having considered the issues involved with the doctrine and the Act, the paper will attempt to draw conclusions as to whether New Zealand should adopt the essential facilities doctrine and if so whether an independent access regime would have merit for us in this country.

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[1] Areeda & Turner *Antitrust Law* (Little Brown, Boston, 1978; 1995 Update) 736.2f

[2] Hinton P "Competition Policy after the Porter Report" NZLJ 1992,71.

[3] *Hecht* v *Pro Football League* 570 F 2d 982 (1977).

[4] Hereinafter CPRA

II THE ESSENTIAL FACILITIES DOCTRINE - OVERVIEW

A The Jurisprudential Basis For The Doctrine

As has been noted, the idea that a near monopoly holder should have to give access to another has a certain intuitive appeal. However a deeper analysis is required before such a doctrine can be justified[5].

The Chicago School of Economic analysis[6] would argue that efficiency considerations militate against requiring an essential facilities holder being required to give access to a competitor. That school regards the firm as being in the best position to judge whether it is cost-effective to provide a competitor with rights to an essential facility.[7]

In *Aspen*[8] the American Supreme Court asked whether an essential facilities holder's behaviour could fairly be categorized as predatory if it was excluding its rival from using the facility. The rationale being that an essential facilities holder is likely to be excluding access based on efficiency concerns and thus may not in fact be engaging in predatory behaviour. Writers such as Robertson have taken the view that there is no justification for any type of an essential facilities doctrine, adopting the view that "there is some price at which almost any firm will share access to a scarce resource within its possession" and therefore that "it is reasonable to infer that all essential facilities plaintiffs are merely disappointed suitors, asking the court to grant access cheaply when the market would not."[9] Indeed Tye has stated that "[i]f the two firms are not competitors in an upstream or downstream market what besides efficiency considerations would motivate the denial of access?"[10]. Further the Chicago School holds that the essential facilities doctrine should not be regarded as invoking a general duty to deal. Such a limitless doctrine would "discourage joint investment in a facility that no single investor could afford."[11]

However as against the view that the essential facilities doctrine is unmeritorious lies the opinion that market competition

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[5] Above note 1.

[6] A large body of thinkers come within this group, Areeda & Hovenkamp *Antitrust Law* (Little Brown,Boston , 1996); Posner *An Economic Analysis of Law* (Little Brown , Boston, 1982).

[7] Areeda & Turner, above note 1.

[8] *Aspen Skiing Co* v *Aspen Highlands Skiing Corp* 472 US 585 (1985).

[9] D B Robertson "Government Business Enterprises and Access to Essential Facilities" 2 (Nov 1994) Comp & Consumer Law Jnl 948.

[10] Tye "Toward Achieving Workable Competition in Industries" (summer 88) Yale Jnl on Regn

[11] Troy "Unclogging the Bottleneck : A New Essential Facility Doctrine" 83 Colum L J 462.

would be significantly improved if the doctrine is invoked. Douglas Williamson has taken the view that it is because competition law regulators such as the Australian Consumer and Competition Commission[12] have not cured all the structural defects in the market that the essential facilities doctrine is required to remedy the inefficiencies left in the market.

The essential facilities doctrine is primarily concerned with harm to a competitor while Vautier has stated that "such harm need not coincide with harm to competition"[13] Areeda and Turner note that "a particular plaintiff's plight is relevant only as it bears on market effects."[14] Areeda's position seems to be supported throughout the American case-law as was held in *MCI*[15] the purpose of the doctrine is to promote competition. It is submitted, however, that even if the goal of the doctrine is viewed as being preventing harm to competition in markets generally, the consideration of the impact on an individual competitor will weigh heavily in a courts assessment.[16] The jurisprudential basis for the essential facilities doctrine in its home, America, seems to have been well analysed by Troy "a tightrope is being walked between the free trade values (in light of the defence to the invocation of the doctrine that there is a legitimate business reason for the denial of access to the facility) and the purpose of antitrust laws - to promote and protect competition."[17]

B The Essential Requirements of the Doctrine

Firstly the limits of the doctrine (as it has been enunciated in America) should be considered. The doctrine was dismissed as existing in Australia in the case of *Queensland Wire.*[18] Although on closer analysis this case may not meet the criteria of being a true essential facilities case, and the comments made by the Full Federal Court can technically be regarded as obiter, the case is nonetheless indicative of the likely approach to the essential facilities doctrine in Australia. The Australian court treated the doctrine as being a mere gloss on the American Sherman Act 1890 (USA) which was

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[12] Hereinafter the ACCC.

[13] K M Vautier "The Essential Facilities Doctrine" Occasional Paper No 4 (Commerce Commission, Wellington, March 1990)1,7.

[14] Above note 1, 639.

[15] *MCI Communication* v *American Telephone and Telegraph Co* 708 F 2d 1081 Seventh Circuit [1983]

[16] Shirtcliffe "Access to Essential facilities in Electricity Supply"cited in Commerce Commission 5 *Current Issues in New Zealand Competition and Consumer Law* (May 1993),35; Vautier above note 32,7 ; Troy above note 11,453.

[17] Troy above note 11,462.

[18] *Queensland Wire* v *BHP Industries Ltd* (1988) ATPR 40-84.

regarded as a specific statute. Thus the doctrine was regarded as inapplicable to any action instigated by a plaintiff under section 46 of the Australian Trade Practices Act 1974. As the doctrine originates from sections 1 and 2 of the Sherman Act 1890 it is the American analysis of the elements of the doctrine which will be considered as outlining the doctrine's prima facie scope.

It is important that the essential facilities doctrine only found an action against an essential facilities holder when various requirements are met. This is in light of the fact that prima facie a monopolist is free to compete as is any firm, thus, it is only to be in certain clearly defined restrictive circumstances that its power to deal should be limited. As was noted in the American case *Olympia*[19] a monopolist is to be encouraged to compete aggressively on the merits . If this does not occur the antitrust laws would effectively be holding an umbrella over inefficient competitors. In light of this Areeda has noted as the first principle in his essential facility analysis that liability for denying access should be exceptional.[20]

Thus the courts have (particularly in America from where the doctrine originated) imposed restrictive conditions before a plaintiff can successfully assert the essential facilities doctrine. This requires that the plaintiff prove :

* the facility meets the concept of "essential";
* a grant of access made to him will improve competition in the market place;
* the plaintiff is indeed a competitor of the defendant;
* if the defendant raises a legitimate business reason for denying access, that this is not so.
* the defendant intended to exclude its rivals by denying access to them;
* any remedy the court gives will be administrable. (The court needs to be satisfied that any order they make can be enforced without the court becoming a price control agency).

Each of these requirements will now be examined. However, firstly, it should be noted that as regards already regulated industries the court should take into account such factors as whether the challenged conduct is the result of unilateral/concerted activity; the level of regulation within the challenged industry and the feasibility of applying the remedy of compulsory dealing to the situation.[21] This allows for the fact that in industries where the government has already imposed market regulation there is little need to invoke competition law as a means of ensuring that

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19 *Olympia Equipment Leasing Western Union Tel Co* 797 F 2d 370; 480 US 934 (1987)

20 Above note 1.

21 Edgar F "The Essential Facilities Doctrine" 29 Idaho Law Rev (1992) 283,303.

adequate competition occurs, as, presumably, the government has already determined what level of competition is desirable and has factored this into its analysis of what level of regulation is necessary for the industry.

It should also be noted, before the above requirements are analyzed further, that they provide a broad framework only and that none have ben defined in concrete terms. The exact extent and scope of each of the factors has been the subject of case-law and argument. This has caused Troy to assert that "(t)here are no clear rules govern(ing) when the essential facility doctrine should be invoked. Nor is there a consensus as to what the doctrine requires once invoked."[22] While there is some truth in this claim, the requirements above do encode at least the essential limits of the doctrine, albeit in a somewhat open way.

1 Essentiality

The courts have imposed the "essentiality" requirement as the initial hurdle which must be surmounted before the doctrine can found a remedy. Areeda notes that an essential facility is typically a resource possessed by the defendant over which he has a clear cost advantage.

The case which spawned the essential facilities doctrine was *Terminal Railroad*[23] . There the American Supreme Court had little difficulty in viewing a railroad company's monopoly position over terms of access to a bridge as involving something essential relative to other operators. This case lead to many others which fleshed out the essentiality requirement. The case of *MCI* [24] established that before the essential facilities doctrine could be invoked control of the essential facility must be held by a monopolist and the competitor must be incapable of duplicating the facility. The cases culminated in *Alaska Airline Inc*[25]which established that a facility could be regarded as essential only when the facility owner had the power to eliminate competition by the denial of access to it and this power was relatively permanent. *Corsearch*[26] further specified that before a facility can be regarded as "essential" its "duplication must be economically infeasible" denial of access must cause at least a "severe handicap" to the competitor.

Thus the "essentiality" criterion is likely to place a significant block on the indiscriminate use of the doctrine by rivals to gain access to essential facilities.

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22 Above note 11, 441.

23 *Terminal Railroad Assn of Saint Louis* 224 US 383; 32 S Ct 597; 56L Ed 810 (1912).

24 Above note 15.

25 *Alaska Airlines Inc* v*United Airlines Inc* [1991] 2 Trade Cases 69,624.

26 *Corsearch* v *Thomson and Thomson* [1992] Trade Cases 69,819.

In *Queensland Wire* the Australian Federal Court stated that there was difficulty "in seeing the limit of the concept of "essential facility" noting that the doctrine had enabled access to be granted to a sports stadium in *Fishman.*[27] However, it is submitted that an American sports stadium could amount to an essential facility . This is not in itself unreasonable and does not mean that the "essentiality" test is too wide.

It is important to note concerning the idea of "essentiality" that the competitor whose conduct is in question must be a monopolist not only of the "essential" facility itself, but also of the market to which the "essential" facility actually impacts on. Without an impact on this secondary market no ultimate anti-competitive effect can result from the denial of access. Thus competition law would have no jurisprudential grounds for interfering in the conduct as competition would not ultimately be harmed. In the essential facilities context it should be remembered that the court will place substantial weight on the impact felt by a particular competitor. This too is likely to be less where the monopolist does not hold a monopoly over the essential facility.

2 *Granting access may improve competition*

For an essential facilities doctrine to accord with competition law policy in general (policies reflected in the Sherman Act 1890, the Australian Trade Practices Act 1976 and the New Zealand Commerce Act 1986) its application must result in the enhancement of a competitive market. Thus, the court must be satisfied that a grant of access would prevent a reduction of competitiveness in a market. The doctrine seeks to ameliorate the mischief caused when a monopolist is extending its monopoly power from a monopoly power in a secondary market. The cases of *MCI* [28] *City of Anaheim*[29] and *Continental Trend Resources Inc*[30] firmly establish that the plaintiff must prove to the court's satisfaction that competition policy will be enhanced by a grant of access. However it should be noted that in proving this the court is likely to take much guidance from the harm felt by the individual competitor which cntrasts with the policy approach taken to many competition law principles.

3 *The plaintiff must be a competitor of the defendant*

Relief under the traditional essential facilities doctrine is only available to a competitor of the monopolist. This accords with the

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[27] *Fishman* v *Wirtz* *807 F 2d 520 (1986)

[28] Above note 15.

[29] *City of Anaheim* v *Southern Californian Edison Co* [1992] 1 Trade Cases 69,716

[30] *Continental Trend Resources Inc* [1991] 2 Trade Cases 69,510

purpose of the doctrine and the focus on the impact to individual competitors in light of a denial of access. This was the traditional American exposition in the case of *Grand Catillou* [31]. In that case even arbitrary refusals by a monopolist to deal were alleged to have breached the essential facilities doctrine. The court responded to the contention by holding that they did not have the jurisdiction to prevent the defendant's conduct, given the arbitrary nature of the refusal to deal. *Official Airlines*[32] further affirmed this proposition. *MCI* further affirms this proposition in an explicit statement that "the denial of access to an essential facility must be a denial to a competitor of a monopolist."[33]

There can perhaps be questions raised as to the merit of the requirement that the plaintiff be a competitor. It can be submitted that the injury a consumer suffers could be equated to that of a competitor, thus the consumer should also have an action available to him. However the difference may be that granting access to a consumer will not increase competition in a market if this is measured in terms of the number of market entrants able to compete or pure market efficiency. However, if competition law is to be regarded as being responsible for providing a variety of products to consumers at a reasonable price perhaps essential facility claims should be open to consumers. If this is so, the use of the essential facilities doctrine as one which stems from competition law should be able to accomodate such claims.

However, the traditional position is that the essential facilities doctrine can not be asserted by other than competitiors. As the Australian Federal Court noted in purportedly rejecting the existence of the essential facilities doctrine in Australia, "where the aid of the court is sought to oblige the respondent to accept the applicant as a customer"[34] to an essential facility no remedy can be provided by the doctrine.

It should perhaps be noted that in the Australian context most essential facilities actions are likely to be based on section 46 of the Australian Trade Practices Act 1974. If a claim is made on this basis the use of the words "any market" in the section would make it difficult for those who are not competitors to bring an essential facilities action. This is clearly specified by the ACCC in its Guidelines concerning the use of section 46 of the Australian Trade Practices Act 1974. This statutory limitation would accord with the traditional common law restriction on the use of the doctrine.

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[31] *Grand Catillou* 65 FTC 799; also cited as *la Peye* v *FTC* 366 F 2d 117

[32] *Official Airlines Guides* v *FTC* 630 F 2d 920; 450 US 917 (1981).

[33] Above note 15.

[34] Above note 18, 40-841.

4 No legitimate business reason exists to justify any denial of access

It is a well founded principle of the essential facilities doctrine that there is no general duty to deal. Thus the liability of the monopolist must be exceptional. Such a principle ties into the idea that where a monopolist has a legitimate reason for the denial of access to a competitor, no liability should be imposed. This requirement links to the purpose of the doctrine that the mischief which is to be attacked is the maintenance or enhancement of monopoly power by the essential facility holder[35]. As was noted in *Olympia*[36] "the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors." This approach is also partially reflective of the general approach of the courts that it is not their place to interfere in business decision-making practices.[37] As Areeda notes, no matter how essential a monopolist's facilities he is never obliged to sacrifice legitimate business objectives in allowing access to his facility to a competitor. This accords with the idea that if a reasonable fee is set by a monopolist there can be no breach of the essential facilities doctrine in requiring his competitor to pay. The proposition was expressly stated in the *City of Anaheim*[38] case that if the facility holder's service or product will be diminished by the imposition of an access order, such an order can not be made. This further ties to the historic "free-trader" concept that a major purpose of free market activity is unhindered free choice.[39]

The importance of recognising an access holder's right to undertake legitimate business conduct despite the retention of the essential facility to the acceptance of the essential facilities doctrine can be seen by studying *Queensland Wire* .[40] There the Australian Federal Court adopted the view that an essential facilities doctrine liberally applied could potentially prevent a facility holder from operating legitimately. Thus the doctrine's application in Australia was rejected. However it is respectfully submitted that the Australian Federal Court in considering the doctrine's potential application failed to understand its true limits. The doctrines need not be incompatible with allowing legitimate commercial activity,

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35 *City of Anaheim* v *Southern California Edison Co* above note 28.

36 Above note 18.

37 Such attitudes are also reflected in laws such as the business judgement rule by which in America the courts regard themselves as being without jurisdiction to question the business wisdom of director's decisions.

38 *City of Anaheim* v *Southern California Edison Co* above note 28.

39 Troy above note 11.

40 Above note 18.

rather, it must be used to prevent monopolisation and ensure that any business activity is indeed legitimate.

5 The facility holder's intention to monopolize

The traditional espousal of the essential facilities doctrine requires that the facility holder intend to exclude his rivals in the denial of access to the facility. The intention must be to exclude the plaintiff by improper means this being a question of objective rather than subjective intent. The focus of an intent inquiry is on the monopoly power's intention to monopolize, which as the American Supreme Court stated in *Byars* v *Bluff City News* requires a specific intention to do so. There the court held that "although a general intent to monopolize is all that is ordinarily required to find a section 2 violation (of the Sherman Act from which the doctrine originates), cases discussing a monopolist's duty to deal have effectively required a finding of specififc intent to monopolize."[41]

Some have argued that a doctrine concerned with the granting of access to facilities should not be concerned with intention and that the monopolist's behaviour should be sufficient to allow an action. These critics argue that essential facilities analysis should be concerned with concepts of ownership rather than purpose.[42] As Areeda and Turner note a defendant's intention is seldom helpful as "denial of access to a competitor is always motivated (at least in part), by the desire to exclude him and keep as much of the market as he can for himself."[43]

6 The remedy is administrable

One of the primary concerns of those who doubt the value of the doctrine is that it will cause uncertainty within the law and will involve an abuse of the justice system in that the court will be forced to use its time as a price control regulator rather than as a settlor of disputes. If the court is to use its time enforcing price control and access orders the separation of powers doctrine will be breached. Such a regulatory function should be left to administrative agencies rather than falling into the hands of the court which does not have the capabilities or skills to undertake such action. "Judges are in many cases simply not equipped to deal with decisions on access prices and conditions. The courts should

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[41] *Byars* v*Bluff City News* 273 U S 375,400 ; 683 F 2d 981 6th Cir (1982) affirming *Eastman Kodak Co v Southern Photos Materials Co.*

[42] W Pengilley "Hilmer and Essential Facilities" UNSWL Jnl 1994,1.

[43] Areeda and Turner *Antitrust Law* (little Brown, Boston, 1978) vol III.

not under the guise of competition law become business price regulators."[44]

Setting a reasonable access price raises difficulties as the price cannot simply be set at the level the monopolist could charge. As has been noted, for the doctrine to be of any benefit some measure needs to be taken to ensure that any access price charged is indeed below what the monopolist is capable of charging. If the antitrust laws allow a monopolist to trade access to his facility at any price that the traffic will bear "society will not be much benefitted by forcing access in the first place."[45] The monopoly rent will simply be perpetuated and no efficiency enhancement will be achieved.

However the monopoly holder should arguably be somewhat reimbursed for the risks he engaged in in the development of the essential facility. It is here that the traditional concern of regulating prices arises in that by arbitrarily setting a price the court has the potential to upset traditional market control mechanisms which will stultify capital investment and prevent new entrants from competing.[46] Also there lies the traditional policy of the courts that where a situation requires continual supervision they will abstain from granting injunctions or making orders for specific performance.

However such concerns can not devalue the doctrine in itself. Rather, the appropriate approach would be to allow the courts to make orders only if another agency can readily enforce them. Areeda suggests that a court would in general be capable of enforcing orders such as those that a competitor be allowed access to a consortium controlling a facility generally; that a a price be paid to the facility holder where agencies already exist to supervise the exact terms of access and the amount at which this price should be set; or, simple orders that the competitor can not be discriminated against[47]. In the past the cases arising in America tended to stem from a "context of extensive regulatory experience and/or previous dealings between the parties."[48] As was noted in *Byars* [49] a history of dealing "greatly facilitates the structuring of a decree" as there is guidance for the courts as to what the terms of access should be. *Consolidated Gas*[50] was a decision where the court ordered that access be granted but refused to make any

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44 Above note 42,3.

45 Wright R "Injunctive Relief in cases of Refusal to Supply" 19 ABLR (1991) 65.

46 Above note 42.

47 Above note 1. In New Zealand an order against discrimination could be made under sections 27, 29 or 36 of the Commerce Act 1986.

48 J G M Shirtcliffe above note 16,44.

49 *Byars* v *Bluff City News* above note 41.

50 *Consolidated Gas Co of Florida* v *City Gas Co of Florida* 665 F Supp 1493 (S Fla 1987) 880 F 2d 297 (11th Cir) 1545.

determination as to the exact price at which such access should be compensated stating instead that Florida had a regulatory agency whom could deal with such issue.

C The Essential Facilities Doctrine and the Prime Necessities Doctrines Compared.

The prime necessities doctrine harks back to a private essay of Lord Hale written in the seventeenth century. Lord Hale outlined the situation where as a consequence of an Act of Parliament or other external factors, a previously private activity took on a public function[51]. Such activities once within the public realm had to be available for access to the public in return for a reasonable fee. The doctrine is accepted as having three core elements. The necessity in question must be a prime necessity, the supplier of the necessity must be in a position of great and special advantage and the payment sought must be fair and reasonable. These requirements were ennunciated in the Privy Council decision of *Levis.*[52]

The prime necessities doctrine has the potential to overlap somewhat with the essential facilities doctrine in that both concern the granting of access to commodities for reasonable fees. However the prime necessities doctrine is broader in that it is open to anyone to instigate it against the supplier whereas in traditional essential facilities analysis only competitors may invoke the doctrine. However the ambit of the prime necessities doctrine is narrowed when it is considered that supply can only be required in the narrow situation where such supply is of "fundamental importance to the public."[53] In the essential facilities context the facility must be essential for the competitor in that without access he must be unable to compete in the market, however, there is no overarching requirement that the facility concerned must be of fundamental importance to the public in general. Thus, in the past the prime necessities doctrine has been confined to electricity supply[54], water supply[55], wharf access[56] and rubbish collection[57] whereas the essential facilities doctrine has applied to enable access to sports stadiums[58], railway bridges[59] and buildings in which local

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51 Cited in B P McAllister "Lord Hale and Business Affected with a Public Interest" (1929-1930) 43 Harv L Rev 759.

52 *Minister of Justice for the Dominion of Canada* v *City of Levis* [1919] AC 505

53 *Chastain* v *British Columbia Hydro & Power Authority* (1972) 32 DLR (3d) 443,454.

54 *South Taranaki Electric Power Board* v *Patea Borough* [1955] NZLR 954.

55 Above note 52.

56 *De Portibus Maris* cited in B P McAllister above note 51.

57 *Mayor,etc, of Auckland* v *The King (Mayor of Auckland)* [1932] NZLR 1709.

58 *Fishman* v *Wirtz* above note 27.

fruit trade occured[60] to name but a few. Further it seems that in order for a service to be regarded as a prime necessity there needs to be empowering legislation which places such service within the public domain. This appears to be an inherent characteristic throughout the prime necessities cases. This differs from the essential facilities doctrine where the issue regarding the facility is whether it is essential to the competitor seeking access.

III THE NEW ZEALAND ESSENTIAL FACILITIES POSITION

A Section 36 of the Commerce Act 1986

1 The section

There is the potential (and indeed it has been the practice to date) for essential facilities type cases to be brought under the auspices of the Commerce Act. The major way to date that such actions have been brought has been through section 36 of the Act. Section 36 is concerned with outlawing the "abuse" of a dominant position in a market. Section 36 provides that:

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

The section thus effectively provides that merely being in a dominant position results in no infringement of the Act, rather the crucial issue is whether such dominance has been used. Commentators have argued that the best way to interpret the section lies in reading "use" and the purposes in section 36)1)a)-c) together. Thus conduct that is not anti-competitive if engaged in by non-dominant firms, becomes so if it is conducted by dominant firms.[61] In determining the party's purpose the Court will make an inference based on all the materials available to it.

2 Section 36 and the essential facilities doctrine compared

Section 36 does however differ from the essential facilities doctrine in several ways. The essential facilities doctrine unlike the Commerce Act focuses on the "effect rather than purpose."[62] That is the doctrine does not require an investigation into the monopolist's

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59 *Terminal Railroad* above note 23.

60 *Gamco* v *Providence Fruit and Produce Building Inc et al* 194 F 2d 484, First Circuit.

61 Van Roy *Guidebook to New Zealand Competition Laws* (CCH, Auckland,1991) 153.

62 Above note 16.

state of mind, the doctrine is concerned with more objective issues. Further, so long as a facility holder's purpose in denying the access to the customer is due to a legitimate business reason the doctrine cannot be raised. This could potentially differ from a Commerce Act action in that the Act provides in section 2(5)b) that where an anticompetitive purpose is a "substantial" purpose a finding of anticompetitive intent can be easily made. Thus in the situation where a facility holder has a legitimate business reason for withholding access but has a substantial intent to act anticompetitively the Act will be breached, however the doctrine will not.

Another distinction between the doctrine and section 36 is that the former bases actions from firms holding an "essential" facility which is a higher test than that of mere dominance. Section 36 is also broader in that it does not prevent non-competitors using it as a basis of an action. This differs from the essential facilities doctrine in that the doctrine requires that the plaintiff be a competitor of the defendant before the doctrine be invoked. The underlying mischief which section 36 seeks to attack may be contrasted with one of interpretation of the doctrine. The doctrine has been argued to be primarily concerned with the situation where there is harm to a competitor. Vautier takes the view that this differs from section 36 which "as it stands appears to focus more on potential harm to an individual person, that on harm to overall competitive conduct as such."[63] However as was argued above, while the doctrine does take strong cognisance of the harm which is being caused to a competitor, to be consistent with antitrust policy this cannot be regarded as the overall mischief which it seeks to attack. The doctrine should aim to prevent the reduction of competition in the market as a whole and not to protect inefficient competitors where such protection is not warranted. Thus this latter distinction may in fact be less apparent than it first appears.

3 Case law

The New Zealand courts have been faced with essential facilities type cases in the context of actions bought under section 36 of the Commerce Act 1986. This section prohibits the use of a dominant position for the purpose of restricting or preventing competition in a market. The Ministry of Commerce has noted that most cases concerning essential facilities would come within this section of the Commerce Act.[64]

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[63] Above note 13,7.

[64] Ministry of Commerce "Guarantee of Access to Essential Facilities" Wellington, December 1989,13.

The first case to consider essential facilities in New Zealand was *Auckland Regional Authority* v *Mutual Rental Cars* .[65] While the case found that competition law had been breached it was on the basis of statutory competition law as enshrined in section 36 rather than the American espousal of the essential facilities doctrine per se. However this was an application of section 36 "informed by the American essential facilities doctrine"[66] in that Barker held that "exclusion from the market by means of gateway, prima facie indicates anti-competitive intention unless the exclusion can be explained with reference to reasonable constraints."[67]

The next major consideration of the essential facilities doctrine in New Zealand can be found in the case of *Union Shipping.*[68] There the High Court expressly hesitated to incorporate the American essential facilities doctrine into New Zealand law. It expressly laid out five reasons for such reluctance. It stated that careful adaption of American law was needed in order that distortion could be avoided also that New Zealand has a different statutory base for its competition law to the American Sherman Act from which the essential facilities doctrine is founded. Further given the lack of an American Supreme Court ruling on the doctrine the court was reluctant to apply it into New Zealand law. Also in light of the Australian approach in *Queensland Wire* [69] the court considered its reluctance to incorporate the doctrine to be further supported. The final justification for failing to import the common law doctrine into New Zealand law was that the court already had section 36 of the Commerce Act and this was sufficient to cover essential facility type situations, it not being the role of the court to import a common law doctrine, but rather to apply the Commerce Act. The court did not reject the value of the essential facilities doctrine out of hand however. It noted that "(w)hile we do not adopt and apply the doctrine as such, nor do we ignore help which it may offer in achieving some sensible resolution ... the American experience may give valuable insights, and assist assessment of potential section 36 solutions."[70]

In 1990 at this point in New Zealand's essential facilities jurisprudence commentators were adopting the view that "it could

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65 *Auckland Regional Authority* v *Mutual Rental Cars* [1987] 2 NZLR 647.

66 Mason "The Essential Facilities Doctrine and Section 36 of the Commerce Act" (LLM, Victoria Universitry of Wellington, 1990).

67 Above note 65, 680.

68 *Union Shipping New Zealand Ltd & Another* v *Port Nelson Ltd* CP 101/89

69 Above note 18.

70 Above note 68,101,645.

be said that New Zealand was developing its own essential facilities doctrine under the rubric of section 36 of the Commerce Act."[71]

The most recent case discussing essential facilities in New Zealand is *Telecom Communications.*[72] This case "is a world first in that it is a a court system which is attempting to grapple with details of telecommunications access terms and conditions... as, in all other countries there is a specific telecommunications regulator whose task it is to determine interconnection terms and conditions."[73] The case centred around Clear's objection to paying the price that Telecom was seeking to charge it for access to its hard-wired telephone network. The action was bought as an alleged breach of section 36 of the Commerce Act. The High Court made no reference to the essential facilities doctrine in determining that it was unnecessary for Telecom to charge any of its customers an access fee. The Court of Appeal applied the Commerce Act to hold that Telecom was entitled to charge Clear a reasonable fee for the use of its service (this would accord with a traditional essential facilities analysis). However the court neatly avoided the traditional difficulty in the essential facilities cases of determining the quantum of this figure by stating that that was a matter for the parties to resolve between themselves. On appeal to the Privy Council the Law Lords did not discuss the essential facilities doctrine but rather simply stated that while Telecom was entitled to charge a fee for access to its facility this was not to include super normal rent. The Privy Council took the view that the Commerce Act would prevent this from occuring in that Part IV of the Act contained provisions enabling the removal of monopoly amounts. The omission by the Privy Council or indeed any of the other lower courts is likely to reflect the judicial attitude that in New Zealand the essential facilities doctrine does not exist at common law but rather is to be used as a tool of analysis in the interpretation of section 36 of the Commerce Act.

B Section 47

1 The section

Section 47 of the Act is designed to prohibit the occurence of certain business acquisitions where the acquisition will result in dominance in the market. Section 47 provides:

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71 Above note 66,87.

72 *Telecom Communications of New Zealand Ltd* v *Clear Comunications Ltd* (1992) TCLR 166; (1994) 5 TCLR 412 (CA); [1995] 1 NZLR 385 (PC); (1994) 6 TCLR 138 (PC).

73 Pengilley "The Privy Council Speaks on Essential Facilities in New Zealand : What are the Australasian Lessons ?" 26(3) Comp & Consumer Law Jnl.

> No person shall acquire the assets of a business or shares if, as a result of the acquisition,-
>
> (a) That person or another person would be, or would be likely to be, in a dominant position in a market; or
>
> (b) That person's or another person's dominant position in a market would be, or would be likely to be, strengthened.

The Commerce Commission's Guidelines relating to the application of the business acquisition prohibition state that "(a) business acquisition is unlikely to result in any person acquiring or strengthening a dominant position in a market if behaviour in that market continues to be subject to significant constraints from the threat of market entry."[74]

In determining what these potential barriers could be the Commission lists "differences in access to raw materials, technology or capital and differences in access to distribution or "essential facilities."[75] Thus as any essential facilities holder will not be subject to any barrier to entry into a market as they will already have a monopoly over the essential facility there is a possibility that should they attempt to undertake a merger their conduct could be prevented by the application of section 47. The Guidelines go on to further affirm that an essential facilities holder is likely to be regarded as being in a dominant position in a market (which any acquisition could potentially strengthen) by stating that "(a) person is in a dominant position in a market when it is in a position to exercise a high degree of market control. A person in a dominant position will be able to set prices or conditions without significant constraint by competitor or customer reaction."[76]

2 Case law

It is interesting to note that no essential facility type cases have been brought under this section to date. This may be a indication that essential facilities holders typically have such a monopoly position that they are not in the business of seeking to strengthen their position. This in itself may provide an argument as to the need for a common law essential facilities doctrine being enacted in some way into New Zealand law as arguably section 47 does little to capture the behaviour of those holding essential facilities.

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[74] Commerce Commission "Business Acquisition Guidelines - Exposure Draft 1995." 17

[75] Above note 74,18.

[76] Above note 74,19.

IV THE HILMER COMMITTEE REPORT

A *The Traditional Position in Australia Concerning Essential Facilities*

1 *Section 46 of the Trade Practices Act 1974*

To date in Australia any case which could have fallen within an essential facilities framework has been brought as an action under section 46 of the Trade Practices Act 1974 which focuses on the "purpose" of the conduct. However there does not exist any ability for a plaintiff to bring an action asserting a simple breach of the "essential facilities doctrine" in Australia. The cases arising under section 46 seem somewhat inconsistent as to whether "purpose" is to be assessed on an objective or subjective basis. In *Pont Data*[77] the court held that "purpose was to be ascertained 'subjectively' rather than 'objectively'" whereas in *General Newspapers*[78] it was held that "the ultimate test is an objective test." However the focus of the Court's enquiry nonetheless centred around the purpose which the alleged anti competitive conduct was taken. Thus until the time of the Hilmer report it was the "purpose" (whether this is measured objectively or subjectively) which proved the most substantial stumbling block faced by plaintiffs in essential facility type scenarios.

2 *Case law*

As has been discussed above the essential facilities doctrine does not exist in Australia. The doctrine was purportedly rejected by the Australian Federal Court in *Queensland Wire.*[79] This case held that there were several major reasons as to why the essential facilities doctrine could not be applied to the case.

Firstly, the doctrine was not readily accommodated as being within the terms of section 46 itself. Section 46 of the Trade Practices Act 1974 is analogous to New Zealand's section 36. The criticism of the court that its section outlawing the abuse of a dominant position and the essential facilities doctrine are directed at different mischiefs is open to question. Pengilley suggests that both are designed to ensure "that a party can obtain market entry (and thus) compete."[80]

The court further stated that as the doctrine formed a gloss on the Sherman Act it could not be imported into Australian law

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77 *ASXOperations* v *Pont Data* (1991) 13 ATPR 41-069

78 *General Newspapers* (1992) 14 ATPR 41-165.

79 Above note 18.

80 Pengilley W "The Essential Facilities Doctrine and the Federal Court" Trade Practices Advertising and Marketing Law Bulletin 4 (May 1988) 57,59.

which did not have this specififc statute. This is arguably not a sufficiently substantial reason to reject the doctrine per se.

One of the most overwhelming reasons for the court's rejection of the doctrine was that they could not see its limits. The court seemed to take this concern seriously implying that should the essential facility doctrine be accepted as valid it would be applicable to a case such as *Queensland Wire.* Many commentators have argued that this view is somewhat misguided. If the essential facilities doctrine were to be imported *Queensland Wire* would never have been a case where its application would have been warranted.

The court also noted that if there was such a doctrine there was difficulty where the applicant was a customer in asserting the proposition. Commentators have in fact agreed with the court on this point which is a correct analysis of the scope of the doctrine(as can be seen from an examination of the elements of the doctrine above in section IIB. Commentators have asserted that this is yet another reason why the essential facilities doctrine should not have been applied in the case.

The court further objected to the imposition of the doctrine stating that there would need to be further consideration of the "legitimate business purpose" doctrine. As discussed above in section IIB the court here fails to recognize that the two doctrines have traditionally been considered together and that all law is about the reconciliation of conflicting principles. In the essential facilities case these principles are reconciled such that the legitimate business purpose doctrine acts as a defence to the notion of essential facilities.

B Overview of the Hilmer Committee Recommendations

Pursuant to an agreement by the heads of Australian State Governments on the need for a comprehensive statement as to the basis and scope of Australian competition law policies and principles the Hilmer Committee was created. The Committee's report addressed competition law in general but made particular reference to the "essential facilities doctrine."

The Committee expressed concerns it had about the ability of the courts to enforce specific performance orders and to set a reasonable price and other terms of access to essential facilities. In regard to this latter concern it noted that the repercussions of setting an incorrect access price could be substantial. The Committee held that "...failure to provide appropriate protection to the owners of (essential) facilities has the potential to undermine

incentives for investment."[81] Investors will not be willing to invest in risky enterprises where there is a likelihood that the extra profit that their investment should potentially recoup in light of the heightened risk will be eliminated from them as access is granted to new players in the market.

However the Committee noted the merits involved in having a type of essential facilities doctrine for certain industries. The industries they gave examples of included telecommunications networks, electricity transmission grids, rail tracks and airports. The view was adopted that as regards these industries competition would not be introduced in such markets absent a facilities doctrine. "In some markets the introduction of effective competition requires competitors to have access to facilities which exhibit natural monopoly characteristics and hence cannot be duplicated economically."[82]

As regards the industries that were considered"essential" in nature the view was adopted that a single access regime rather than specific industry regulation was the most efficient way of enforcing access. The Committee's approach was to advocate the establishment of an entirely new access regime outside of the scope of competition law.

The Hilmer Committee recommended that one "economy-wide" body should undertake the enforcement of the regime. Any decision concerning access was regarded as a decision that should be made by Government and thus it was the role of a Commonwealth Minister to determine circumstances in which an access order ought to be made. The Committee held that there were important public access issues at stake and thus it should be the role of a democratically elected decision-making authority to determine when access orders were to be made. In awarding such a decision-making power "(t)he Hilmer Committee was crystal clear in its determination to keep this particular area of dispute away from the courts."[83]

To enable the Minister to make an adequately informed decision a national body known as the National Competition Council was to deliver an opinion to the Minister as to whether a service should be declared and thus fall within the Act. Before making such a recommendation the body was to ensure that the facility met various criteria These criteria were that :

* access to the facility was to be essential for competition,

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81 Independent Committee of Inquiry *National Competition Policy* (Australian Government Printer, canberra, August 1993),248.

82 Above note 81, 239.

83 S Corones "The Hilmer Report and its Potential Implementation" 21 ABLR 451.

* the making of an access order was to be in the public interest (In making a determination as to whether a matter could truly be regarded as within the public interest the Committee was to give due regard to:
  - the significance of the industry in the national economy; and
  - the expected impact that effective competition in that industry would have on the national economy.)

and * that an access fee was decided giving due regard to the protection of a facility holder's legitimate interests.

Once these criteria were met the Minister was to make a Ministerial declaration requiring a grant of access to the facility. However the Minister was to have the jurisdiction to elect to ignore their recommendation if he so wished.

The Committee hoped that normally the facility holder and access seeker would be capable of agreeing on the terms of access and in particular a figure which allowed for reasonable compensation between themselves. It adopted the idea that in the absence of such an agreement, recourse could be made to the ACCC's arbitration skills to aid in the attainment by the parties of a consensus. It was then envisaged that such contract would be registered by the ACCC. However if one of the parties elected to appeal an appeal could be made to the Australian Competition Tribunal within 28 days was provided for and further appeal to the Federal Court. was provided for however this had to be on a question of law

C The Competition Policy Reform Act 1995

1 Overview

On 20 July 1995 the Competition Policy Reform Act 1995 was enacted in Australia. The CPRA "results from the acceptance in principle but with modifications"[84] of the Hilmer Committee recommendations. It is in part IIIA of the CPRA that the Committee's conclusions concerning essential facilities are addressed. By accepting the establishment of the regime as a separate national access regime the Coalition of Australian Governments effectively accepted the Hilmer report's conclusion concerning essential facilities. The CPRA implicitly provides that as regards these facilities competition can only be promoted through

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84 ACCC *Trade Practices Reporter* (CCH, Continually Updated) 10-000, 6,021

preventing facility holders charging full market rental for access or preventing the denial of access.[85]

The ACCC notes that the introduction of a statutory regime of general application is fairly novel.[86] The CPRA's provisions concerning essential facilities seek to create some consistency and rationalization in relation to the operation of state, Commonwealth and private contractual arrangements concerning access according ot the ACCC. This is due to the fact that if a State or Territory regime is regarded as an effective regime access to the facility is to be determined in accordance with that state or territorial basis.[87]

The ACCC notes that section 46 and the other sections of the Australian Trade Practices Act 1974 are not diminished by the CPRA. Rather the Trade Practices Act continues to exist and run alongside the new Act. Thus Part IIIA of the CPRA in no way establishes a code.[88]

Part IIIA of the CPRA is divided into eight core divisions. Division one discusses preliminary issues. Declared services are discussed in division two and provision is made for access to them in division three. In division four a framework is established through which the Commission may decide whether or not to register a contract for a declared service. The implications of hindering a declared service are outlined in division five. Division six relates to non-declared services, for these services the service provider may undertake to provide access despite the fact that the service remains undeclared. Enforcement and remedy provisions are outlined in division seven and the last division concerns miscellaneous matters.

2 *The application of the CPRA - declaration of a service*

The CPRA applies only to services. Services are defined as :

> " (a) the use of an infrastructure generally;
> (b) the handling or transporting of things such as goods/people;
> (c) a communications service or similar service."

The CPRA however excludes from the definition of service:

> "(d) the supply of goods; or
> (e) the use of intellectual property;or
> (f) the use of a production process.
> except to the extent that these are an integral but subsidary part of the service."

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85 See clause 6(1) of the Inter-Governmental Competition Policy Agreement, ACCC *Trade Practies Reporter* above note 84, 140,211.

86 Above note 84.

87 For a diagramatical reflection of this see Appendix I. This diagram is taken from the ACCC above note 84.

88 Above note 84, 6,021.

Thus, excluded services are outside the scope of the access regime, unless they are required by a declared service but only in an incidental fashion.

The CPRA remains consistent with the recommendations of the Hilmer Committee in that it is the Minister whom has the role of declaring a service on recommendation of the National Competition Council[89]. Criteria for the recommendations of the NCC are established in sections 44F and 44G. These same criteria apply to the Minister's decision as to whether or not he will accept their views (section 44H). The criteria listed in these sections are essentially those outlined by the Committee, however the requirement that the service be of national importance has been dropped.[90] Whether or not a service is declared is the central biggest issue under the CPRA in light of the fact that it is only to these declared services that access will be granted under the CPRA. The CPRA has no application to services which are not declared. Before a service may indeed be declared the Minister must be satisfied as to all of the factors specified. The Minister must believe that:

* a grant of access will cause the promotion of competition,
* that as regards the facility its duplication would be uneconomical,
* other parties' contractual rights will be protected,
* the access seeker is not going to become an owner of the facility without the consent of the access provider

and * that costs in providing the said access will indeed be met by the access seeker.

These criteria do not present alternatives, they must all be met.

Any person may apply for a service to be declared and the Minister is also at liberty to instigate an opinion from the NCC. Once the Minister has decided whether or not a service should be declared his decision may be appealed to the Australian Competition Tribunal. In the event of such an appeal the situation is reconsidered rather than the Minister's decision being reviewed.

The Act does not however prevent the advancement of a judicial review proceeding the right to which exists at common law. As noted by Taylor "judicial review is the product of the common law reflecting not the direct will of Parliament on who should do what, but the separate assessment by the Courts of what is needed for the good of society to (variously expressed) "control",

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89 Hereinafter the"NCC"

90 See above 84, 6,082.

"supervise", "keep within Parliament's instructions" the activities of government-related authorities."[91] Thus as the Court's jurisdiction depends on it maintaining the confidence of the people, such an inquiry is necessarily limited to whether the decision maker has made the decision within the ambit of his/her power. The Court cannot substitute its own decision regarding the matter at hand. Lord Diplock has stated the tradittional grounds on which an action can be based as "illegality, irrationality, and procedural impropriety."[92] This allows the Court a relatively small ambit within which to assess an executive decision.

3 Gaining access to a declared service

Obtaining access will result either when the facility holder and plaintiff agree, or, after an arbitration process supervised by the Commission occurs. Thus adopts the Committee's recommendation is adopted. If the parties agree, they may register a contract with the Commission at its discretion. On registration of such a document it has the same legal weight as a declaration of the Commission.

A facility holder may avoid these provisions by making undertakings with which the Commission concurs, however, this relates only to services that have not yet been declared. In determining whether to accept any proposed undertaking the Commission must take account of the same factors as it is required to when arbitrating an access issue.[93]

The traditional problem in essential facilities cases of setting a reasonable price for access to the facility only arises under the CPRA where the parties disagree. In this event the CPRA provides for the matter to be resolved by arbitration.

If the parties elect to have their dispute arbitrated privately at the conclusion of the arbitration they will enter into a contract in accordance with the private commercial arbitrator's findings . This will subsequently be registered with the Commission at which point the contract will becomes as binding legally as if it were a determination by the Commission. To ensure that the result of the private arbitration agreement accords with competition law policy in general and is fair to the parties the Commission is granted the authority to refuse to register the contract if it does not meet certain requirements. These requirements are that the contract be in the public interest and be fair to the interests of the parties.

Alternatively, the parties may elect for the Commission to arbitrate their dispute. In the event of this occuring the Commission

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91 Taylor GDS *Judicial Review in New Zealand* (Wellington, Butterworths, 1991) 3.

92 *Council of Civil Service* v *Minister for the Civil Service* [1985] AC 374 (HL) 410-411.

93 These factors are outlined below.

is required to take account of various factors. These factors include:

* the legitimate business interests and investment of the owner/operator;
* the direct costs of providing access;
* requirements concerning the safe operation of the facility;
* the interests of those who have rights to use the service

and * the public interest in general.

The determination has a broad ambit and may concern any matter relating to the access.

D Analysis of the CPRA

1 Application of the CPRA

The CPRA is novel in that it sets out a separate framework detailing how decisions regarding its application should be made and decisions as to how terms on which access should be granted should be determined. The CPRA has sought to overcome the difficulty that :

> regulation attempts to emulate the pricing and output effects that would occur if the industry were structurally capable of functioning competitively. In contrast..., antitrust provides a general, background regulation for the vast majority of the economy's industries where competition is possible. Antitrust seeks not to replace or emulate market forces, but to remove private, unnatural obstacles to the operation of market forces.[94]

While not seeking to regulate per se, the CPRA principally envokes a regulatory framework to enforce antitrust principles. The CPRA effectively provides that the courts (the traditional enforcers of antitrust) are to be a place of last resort and that prima facie a determination as to whether the CPRA should apply to a facility is to be made by a Minister with terms of access being determined in the event of a dispute by the Commission. In this way the courts only have a role if either of the above party's decisions are being appealed. Thus the courts can only become involved where the decision making processes of a Minister do not accord with principles of justice under a judicial review action, or, where a question of law is raised in regard to the terms of access.

Thus the CPRA adopts the approach that while antitrust ideas are important they are best enforced by a regulatory body. Nonetheless industry regulation as a principle is not applied under

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94 Rule C "Antitrust and Bottleneck Monopolies ; The Lessons of the AT &T Decree" Remarks before the Brookings Institution, Washington DC, October 1988, 3.

the CPRA. The CPRA is not seeking to simulate the way the market would operate should it be capable of functioning efficiently. Rather, it is merely seeking to eradicate behaviour which has a detrimental impact on the competitive functioning of markets inherently capable of functioning competitively.

(a) Should regulators rather than Ministers decide when the CPRA should apply ?

Dispute has surrounded how exactly the executive arm of Government should decide whom is to come within the ambit of the CPRA. This dispute has centred around whether Ministers or regulatory bodies (such as the ACCC) are best capable of making decisions as to when a service should be declared.

(i) Advantages of a Ministerial Assessment

The Committee adopted the view that as access to essential facilities was a matter of national economic concern the decision as to whether a service was to fall within the access framework was to be made independently by an elected Minister. Such an approach was seen to accord with democratic principles.

A further advantage in Ministerial decisions on the issue is the ability for Ministers to allow for nationwide consistency as to what facilities are to be treated as essential and which are not. Arguably Ministers develop skill and knowledge based on their previous decisions when making such assessments. Further Ministerial decisions can be made speedily and thus changes in market conditions can be readily accounted for.

(ii) Disadvantages of a Ministerial Assessment

The view that Ministers are the best decision makers in terms of service declaration has been questioned by Pengilley who adopts the approach that if so, there is no reason for other competition law decisions not to be made the government. Pengilley, thus argues that the new law, involves some inconsistency in that the ACCC are empowered to decide various issues of a competition law nature which arguably also involve issues of national significance. Thus Pengilley argues that the fact that a competition law issue is of national significance does not per se require it to be determined by a governmental body.

The initial rationale for Ministers to make service declarations was that this was seen to accord with democracy in that matters of national significance were at stake. However, the requirement on the Minister to consider public interest issues

recommended by the Committee does not seem to have been accepted into the legislation. The criteria to which the Minister must give regard when deciding on service declarations does not include the requirement that services be of national significance.

The change apparent in the Act takes account of comments made that "an 'essential facility' does not have to be significant to the national economy for a denial of access to amount to a misuse of market power."[95] In the traditional American exposition of the doctrine so long as a facility was essential to a market any denial of access to that facility amounted to a breach of the doctrine. There was, however, no additional requirement that the market be of significance to the national economy. The absence of this secondary requirement made it possible for cases such as *Fishman*[96] to fall within the essential facilities doctrine as although access to an American sports stadium was not a matter of national significance the access facility holder nonetheless was in the position of preventing access to a facility which was limiting competition and reducing efficiency. It seems that given the purpose of the doctrine such a decision should be commended as it allows for the mischief at which the doctrine is aimed to be punished.

While there may exist merit in dropping the requirement that Ministers take account of the national significance of the industry concerned when determining whether a service declaration be made, the case for Ministers making the initial service declaration due to the national significance of the issues at stake is somewhat weakened.

Pengilley further argues that Ministers are not more likely to be neutral arbiters of disputes than courts or regulatory bodies. Ministers have the potential to make decisions based on the political pressures they face. This relates to public choice theory[97] that politicians are essentially motivated by political concerns and will engage in rent seeking behaviour. As has been noted in New Zealand but which is arguably a universal comment "Ministers are likely to face considerable pressure to declare an essential facility to advance private interests. These situations do not necessarily coincide with the promotion of the competitive process or the overall public interest."[98] Also, this may have an adverse impact on investor confidence in the market as different political ideologies are arguably reflected. Thus investors wishing to make long range investment decisions may have difficulty in knowing whether the

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95 Above note 79, 39.

96 Above note 27.

97 C K Rowley *Public Choice* (Elgat, Aldershot, 1993).

98 NZ Ministry of Commerce *Review of the Commerce Act,1986 : Reports and Decisions* (August 1989) 8.

company they wish to invest in will or will not have access to a facility in the long term.

A potential problem also lies in that mere lobbying strength may become the true determinant of whether a service is regarded as being one to which the CPRA should apply regardless of the underlying intent of the decision maker. This lobbying could occur at various distinct stages.

Under the initial Committee recommendations there was the potential for lobbying to be the trigger that the NCC responded to in instigating an inquiry and providing a Minister with advice as to whether a service should be declared. However, as the CPRA makes express provision for any person to initiate a request that a service be declared this lobbying may not have the same effect as initially feared. There is some merit in this concern however in that the declaration process normally begins with the government initiating an inquiry through the NCC. Further although the CPRA in this way does not raise issues of standing which an interested party must circumvent prior to seeking an access declaration, the parties relative resources may causes inequities in their ability to assert their legal rights. The concern may have some substance in that the relative difference between parties resources could be substantial in the essential facilities context.

There may however be stronger potential for lobbying requests made to the NCC as to whether the access regime should apply to determine the outcome of their inquiry. Further lobbying made to the Minister to either accept or reject the NCC's advice may have some impact. These latter stages of lobbying are of particular concern in the essential facilities context as those whom hold access to informational and economic resources regarding the value of the facility are likely to be the facility holders. These players will be in a position of significant bargaining strength relative to the access seekers. Thus concerns of governmental capture may become particularly apposite as the imbalance of resources may ensure that information concerning one side's position is more readily available and therefore receives more weight in the evaluation process. As the Ministry of Commerce has noted in its consideration of the appropriate role of essential facilities in the New Zealand context, if a designation was required to be made by a Minister as to whether a facility is essential this "could occur through pressures from private interests which do not necessarily coincide with the promotion of the competitive process or the overall public interest."[99]

A further criticism of allowing Ministers rather than regulatory authorities to decide who should come within the ambit

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[99] Ministry of Commerce above note 64.

of the Act is that Ministerial decisions may be more difficult to appeal. A regulator has been argued to be a better decision making body than a Minister of the Crown in light of the fact that a regulatory body tends to be made up of more than one person while Ministers tend to act as individuals. While not a universal truth decisions made by groups are likely to be more carefully considered and to accord with principles of natural justice.[100] Decisions made by Ministers can only be reviewed at common law if principles of natural justice are not adherred to when the decision is made.[101] The substance of a Minister's decision however is a matter for his discretion and cannot be questioned by the courts if the only basis for objection is a disagreement with the Minister's view. Such a position does not provide a sufficient basis to ground a judicial review action. The constitiutional doctrine of the separation of powers requires that the judiciary is not empowered to second guess a Minster's decision.

In this regard it is interesting to note that the CPRA makes provision for the facility holder or plaintiff to seek a review of a Ministerial decision through the forum of the Australian Competition Tribunal. This is not a part of the judicial system but is also part of the executory arm of the government. Thus the CPRA does impose some check on the executive's power but this comes internally from the executive itself. As such the value of this check may again be arguably somewhat limited as the executive arm which may be inclined not to criticize Ministerial decisions as it will not be in its rational self interest to do so. Whereas judicial tenure is not tied to political concerns funding for agencies like the ACCC comes from the government, that is Ministers decide the issue. Thus even this small check on administrative power may in reality be somewhat limited.

(b) Should the Judiciary rather than Ministers make declaration decisions ?

There has been some debate as to whether it should be the executive who determines what services should be considered to be declared services within the CPRA. As was discussed above the CPRA provides a clear definition of what a "service" is but leaves it to the Minister to determine what is to be regarded as a declared service in light of certain factors. Some have argued that this latter decision should best be made by the judiciary. The Hilmer Committee noted that judicial procedures in enforcing the CPRA are

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100 Taylor GDS above note 91; Crane Peter *An Introduction to Administrative Law* (New York, Clarendon Press, 1992).

101 Above note 91.

more accessible, speedier and have more precedential authority than determinations made by Ministers. However despite this, the election was made that Ministers should be responsible for deciding the circumstances in which the CPRA should apply in light of the national significance that issues of service declaration were seen to have.

The problem may be that governmental policy may not be reflected by judicial decisions in certain circumstances. Providing the same list of factors for the judiciary to consider rather than the government Minister does not guarantee that governmental policy may be adherred to. Although factors could be enacted in more detail there would remain scope for judicial interpretation.

Further, Rule argues that in the context of determining requisite access conditions a constitutional cost is incurred in allowing courts to establish access conditions, as such a determination is best made by the executive, which is a separate arm of the government. It is argued that it is inefficient for the courts to undertake this function because there are informational costs in transmuting information from government to the judiciary as our constitutional system is such that the courts are well insulated from the government. However arguably in the context of simply determining to which services the regime should apply the judiciary could be well used. There is arguably not the same level of information required in determining whether or not a service is essential as there is in determining what the content of access conditions. Also, it may be possible for the legislature to ensure that the judiciary correctly interpreted the legislation by specifically legislating in the case where the judiciary did not enable legislative intentions to be performed. Further the courts throughout all areas of law are required to interpret Parliament's intent. Competition law is in some senses no different to other law and does not have peculiar policy considerations requiring it to be determined by the executive. Indeed in the traditional essential facilities cases the courts were required to interpret which facilities were essential without any guidance as to which factors should be considered. Competition law has well established overarching policies such as the promotion of efficiency which do not change frequently. Whether a service should be declared (that is, considered essential) may not change frequently, thus, there may be less need for the executive to be involved than where the terms of access to the facility are being determined. Thus a strong case can be made for the judiciary, who are less likely to be captured by interest groups to make service declarations. The policy considerations militating against the judiciary determining access conditions are not so relevant to the initial issue of service declaration.

2 *Enforcement - determining the terms of access*

(a) The benefits of regulatory enforcement

The delegation of regulatory detail to a regulatory authority has advantages both over a totally court based system and a system whereby certain monopolists find themselves subjected to price control from time to time.

It would seem accurate to suggest that a single regulator policing an access regime allows that regulator to develop specialized skills as relates to its function. This is a particular concern in the essential facilities area where the skills required to enforce the doctrine to enhance efficiency are great. There is a need for a regulator to understand what terms are fair and how access can best be granted (assuming that, as in the CPRA, it is the function of the regulator to aid the parties in their determination of what access terms are required).

Further, a regulatory authority may develop economies of scale as that body is able to develop economies of scale and employ those with skills specialized to dealing with access issues. This is an advantage over having specific price control in specialized industries where the knowledge necessary to determine access which applies to all industries is paid for again and again by a multitude of regulatory authorities. Such a system would use society's and taxpayer's resources inefficiently.

Another advantage of having one central regulatory body established is that given requisite resources it will be capable of instigating its own enquiries from time to time. This could be particularly valuable in an essential facilities context where there is the potential for the facility holder's monopoly power to be so great that a potential access seeker can not develop sufficient economic resources to enable it to fund an action seeking access. Should a regulatory body have the legal ability to investigate the practices of essential facilities holders the costs of any action undertaken by an essential facilities access seeker would be lessened as much of its research work would be complete in that it would have an informational monopoly over the operation of the facility. The Act does not make specific provision for the NCC to carry out such an inquiry at present.

(b) Court Administration

(i) Difficulties

Most criticism that surrounds the essential facilities doctrine centers around the difficulties faced by the court in determining

access conditions.[102] Several commentators have outlined crucial difficulties with the court determining access prices and conditions. The Committee seems to have taken heed of many of these criticisms in electing to prevent the courts in interfering with issues of access terms. Rather, the commission elected to allow parties to prima facie determine the terms of access to an essential facility between themselves, or, in the alternative appeal to the arbitration skills of the Commission.

Pricing

Rule adopts the view that it is "practically impossible" for the court to determine a reasonable price of access. Duncan's view that a facility holder holds an informational monopoly over the costs of the facility further supports the view that a court assessment is difficult.[103] This informational imbalance creates further difficulties in that courts do not have access to resources allowing them to correctly estimate the marginal cost of production or to determine the correct spreading of fixed costs.

In the *Pont Data*[104] case the Federal Court was asked to determine what an appropriate supply price would be for the supply of information from the Australian Stock Exchange to Pont Data. The action was raised under section 46 it being alleged that there was no cost justification for ASXO charging Pont Data a price different to that which it was charging its subsidary.[105] The Federal Court sought to determine a price "designed to obtain broad and substantial justice between the parties."[106] Given the circumstances the court considered that this should be the supply price that had been negotiated between the parties prior to their dispute. The problem raised by the case is that there is nothing in the negotiations to show that this did not incorporate monopoly profits and that it was indeed an efficient price. Further the Court's approach does not allow us to determine how profits could be assessed where negotiations between the parties had not occurred.

Court Resources

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102 Rule C above note 94.

103 A Duncan "Natural Monopolies and the Commerce Act" NZIER Working Paper 89/10 (1989).

104 *ASX Operations* v *Pont Data* above note 77.

105 As recognised by the Commission where a price difference is due to savings in the cost of manufacture, distribution, sale or bulk order deliveries no action under section 46 may stand. *Australian Trade Practices Binder* , above note 84 3,834.

106 Above note 77, 52,068

The view adopted here is that the courts lack specialized resources to enable effective regulation. That courts are arguably not equipped to deal with ongoing, evolutionary decision-making necessary to regulate prices in an industry subject to constant changes in consumer preferences. It is argued that making trade-offs inherent in regulation is a political task and thus there are constitutional costs in breaching the doctrine of the separation of powers. These costs arise because there is inefficiency created in the governmental system by the courts having to obtain information from Ministers concerning the intentions of government and changing governmental policies. The argument lies that as regulatory bodies are part of the executive these costs are reduced when regulatory agencies seek to determine governmental information concerning access terms as there are fewer barriers to the transferral of information.

Court Orders

The enforcement of a regulatory type order that is made in an essential facilities case is arguably difficult for a court to enforce. Such orders differ significantly from traditional court awards of damages and specific performance. Access condition orders differ in that they need to be flexible and take into account changing market conditions (Shirtcliffe includes inflation and consumer preferences within these changing conditions.[107]) The view here is that it is inefficient to require interested parties to bring lengthy court proceedings rather than allowing a regulatory authority the power to simply change the terms of access to fit with altering market conditions.

(ii) Benefits of court enforcement

The judicial determination of access terms may be viewed as advantageous in that the judiciary is less likely to be the subject of interest group capture that a regulatory body. As noted by Shirtcliffe, Ratner has argued that courts are less likely to succumb to capture than regulatory bodies[108]. The basis on which capture theory rests is that given certain parties greater access to economic resources and information they have a greater ability to subvert justice in that they stand assured that their views will be heard

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107 Above note 16,44.

108 Ratner J "Should There Be An Essential Facility Doctrine ?" (1988) 21 Univ Calif Davis L Rev,327

while the smaller players face a potentially greater loss in attempting to gather information to state their case.[109]

Such concerns are particularly relevant to essential facilities type cases as there is likely to be a substantial imbalance in the facility holder's favour of such resources, this gives them the potential to further maintain their monopoly.

Interest groups may attempt to dominate the legislature and ensure that their wishes are enshrined in legislation by rewarding the legislature with the promise of their votes in any on-coming election. A judiciary whose tenure is not tied to such considerations is in this way above falling prey to the wishes of interest groups as was discussed above. However independent judges do have additional value to interest groups because of their ability to enforce a statute based on its initial policy regardless of the current legislative view. Judges effectively act as a check to ensure that any legislative concession which an interest group managed to initially attain from a legislature remains enforceable whether or not that legislature remains in power. This provides an additional incentive to interest groups to lobby while a bill is being considered before the house.

As Posner notes having an independent judiciary has economic benefits in that the rule of law is maintained. This is advantageous as if the judicial interpretation of a statute can be tied to the whims of the legislature there is the potential for a judiciary to effectively nullify a statute which is inefficient . Any lack of consistency in the law may occur which may cause a lack of certainty for business in the context of a statute regulating competition law.[110] This is one of the reasons why the Rule of Law has economic value.

In the context of the CPRA it may thus be assumed that should a judiciary be faced with the issue as to what access conditions should be granted to the facility, it will be capable of making an independent assessment of the situation regardless of interest group pressure. Such analysis is also applicable to whether a service should initially be declared for the purposes of the CPRA.

V ESSENTIAL FACILITIES IN THE NEW ZEALAND CONTEXT

A *Does New Zealand Need An Essential Facilities Doctrine?*

As discussed above New Zealand does not have an essential facilities doctrine at present, however it does have a prime necessities doctrine.

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109 Olson M *The Logic of Collective Action* (Schcken, New York,1971).

110 Posner R above note 6 , 53.

The major reasons for rejecting an essential facilities doctrine to date has been that there was a lack of clear precedent as to the true scope of the doctrine. This remains somewhat true today. However in the *ARA*[111] decision Barker J seems to have placed additional reliance on the rejection made of the doctrine in *Queensland Wire*[112]. As discussed above that case arguably does not cover a true essential facilities scenario.

If an essential facilities doctrine were to be adopted into New Zealand's common law added protections would be available to competitors of monopolistic entities. Given the recent deregulation and privatisation of many of New Zealand's State Owned Enterprises perhaps the importation of such a doctrine would prevent those facility holders which already hold substantial bottleneck monopolies from exploiting these to the detriment of efficiency and competition in markets. Such privatisation is well recognised as creating "acute problems in the context of natural monopolies"[113] Thus further protection may be needed to ensure that anti-competitive access prevention does not hinder the operation of a fully competitive market and cause the associated detriments.

Arguably however most anti-competitive access prevention by an essential facilities holder would come within section 36 of the Commerce Act. However the essential facilities doctrine would capture the situation that the CPRA would not , where the facility holder does not have the "purpose" of restricting a competitor's entry into the market but nevertheless this is the effect. This is due to the fact that "purpose" is one of the major hurdles which any competitor must overcome in proving that section 36 has been breached. This however is likely to be a fairly limited circumstance.

The traditional concern regarding the adoption of the doctrine, that it is difficult for the courts to determine the terms of access inherent in an essential facilities case, remains true. A recent illustration of the difficulty which the New Zealand courts have encountered in setting an appropriate price for access can be seen in the renowned case of Telecom and Clear.

In that case the Privy Council has recently invoked the Baumol-Willig rule as the best means of determining a supply price. This case however was brought under Section 36, this is relevant to the issue of pricing in that their Lordships noted that it was not appropriate to deal with a proceeding brought under section 36 into a way of regulating monopoly rents. The prima facie concern of section 36 is that exclusionary conduct is outlawed rather than that monopolistic pricing is prohibited. The Privy Council, however, did

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111 Above note 65.

112 Above note 17.

113 D B Robertson above note 9,100.

determine that the correct way for Telecom to charge Clear for access to its facility was to invoke the Baumol-Willig rule. This was despite the High Court's previous finding that "The court is not a regulatory agency. We cannot pursue investigations into...(w)hether Telecom's operations are conducted in an inefficient manner."[114] The Baumol-Willig rule allowed the facility holder (Telecom)[115] to charge a price that allowed it to recoup monopoly rents from inefficiencies in its operation and from profits in excess of a reasonable return on its investment.[116]

There are two major criticisms of this rule. The first is that the price may contain monopoly rents. If Telecom had initially had monopoly profits in its line rental these would still be recoverable after the imposition of the rule. Secondly the criticism lies that even if the price did not contain monopoly rents it would have been set in a monopoly market and in that sense would have been a monopoly price.[117] Arnold notes that these concerns have merit in that "the existence of monopoly rents is of course an inefficiency which competition is intended to cure, not perpetuate."[118] However Arnold takes the view that the Baumol- Willig rule may be the best that the court can do in the circumstances. He notes that "the difficulty is that there is no mechanism for identifying the "competitive price", because there is no basis for identifying the appropriate "competitive" mark up.[119] Further Arnold notes that the "Courts are not equipped to consider whether particular costs are efficient or inefficient costs."[120] This has been a strong reason for courts to traditionally shy away from the importation of the essential facilities doctrine into the law. Alternatively in the past, particularly in America the courts have invoked the doctrine only to refuse to make a determination as to what the price of access

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114 *Telecom Communications of New Zealand Ltd* v *Clear Communicationss Ltd* (1992) 2 TCLR 166

115 This assumes that the facility was the Public Service Telecommunications Network over which Telecom held a monopoly position.

116 The rule enabled Telecom to charge "the average incremental cost of 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." *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (1994) 6 TCLR 138,146.

117 Arnold "The Courts and the Pricig of Access to Essential Facilities - The 'Old" Law and Economics at Work ?" (1995) 1 NZBLQ 123,133.

118 Above note 117,135.

119 Above note 117,136.

120 Above note 117,140. As an illustration of this point Arnold cites Pengilley "Misuse of Market Power: Present Difficulties - Future Problems" (1994) 2 Trade Pract LJ 27,42 and in particular the decision of *ASX Operations Pty Ltd Pont Data v Australia Pty Ltd* (1990)97 ALR 513; (1991)100 ALR 125 (Fed CA).

should be.[121] such a decision can be of little practical benefit to the parties.

Thus it may be that New Zealand should maintain the current stance that an essential facilities doctrine not be imported into the common law.

B Should New Zealand Enact an Essential Facilities Provision into the Commerce Act ?

In view of the judicial reluctance to adopt a common law essential facilities doctrine there nonetheless remains the potential for a specific provision prohibiting the denial of access by an essential facility holder. This could be done either through the amendment of section 36 or through adding an additional provision to the Commerce Act.

1 A Section 36 Amendment ?

In August 1989 the Ministry of Commerce stated that it believed that section 36 of the Commerce Act would be "relied upon as the basis for guaranteeing access to essential facilities in appropriate circumstances."[122] In a further paper of December 1989 the view was further propounded by the Ministry that there was no need to amend section 36 and that it was the best means of ensuring that denial of access to essential facilities was covered.

As has been noted above however[123], there do exist differences between the essential facilities doctrine and section 36. In particular that the former covers the situation where the facility holder did not have the purpose of denying access to his facility but nonetheless this was the effect of his actions.

It is interesting to note that Dr Bollard adopted the view in the August 1989 review document's commentary that administrative listing as to whether a facility was indeed essential would be difficult as this was likely to fluctuate in view of the constantly changing market conditions. Thus the best way of determining whether a facility was indeed essential is to allow the courts to make such a determination on a case by case basis.[124] Any section enacted within the Commerce Act would no doubt adopt the same approach.

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121 *Consolidated Gas Co of Florida* above note 49.

122 Ministry of Commerce above note 98.

123 See above analysis **III THE NEW ZEALAND ESSENTIAL FACILITIES POSITION - A** *Section 36 of the Commerce Act 1986*

124 This may be well contrasted with the Australian Act where it is Ministerial discretion that has been deemed to be the best tool in determining which facilities are to be regarded as essential. This brings its own problems as previously discussed.

It is important to note that if section 36 is simply to be amended it will be the Courts whom have the role of determining what the reasonable terms of access are to be. The Commission has no power under section 36 to grant authorisations and thus cannot become involved in determining access conditions. Requiring the court to determine what the conditions of access should be has been a traditional concern of the doctrine as has been discussed in depth above[125]. In view of this if an amendment is to be made to the Commerce Act it may be better for this to be encoded in a separate section.

2 *An Alternative Amendment within the Commerce Act ?*

The Commerce Act 1986 which states its purpose as being "the promotion of competition within markets." While the Act provides for certain circumstances in which public benefit considerations may outweigh this concern (as is seen in light of the authorisation procedures taken under the Act) these are nevertheless the exception to the general policy stated. The Act thus, implicitly makes the aim of competition law in New Zealand the promotion of economic efficiency.[126] This adopts the premise that "society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources."[127] The Ministry of Commerce has observed that "competition causes efficient firms to prosper at the expense of inefficient ones. Increasing the number of firms in the industry permits owners to identify substandard performance and reward performance on the basis of inter-firm comparisons. [I]ncreasing the number of firms enhances the variety of experimental innovations that firms undertake and increases the opportunities for firms to learn from one another."[128] Thus the Ministry adopts the view that any time competition is reduced disbenefits are viewed as resulting. This is why our Commerce Act imposes some restrictions on the behaviour of monopolists viewed as decreasing competition.

In light of the view adopted in this paper that the goal of the essential facilities doctrine is to protect competitors rather than protecting competition necessarily[129] there seems to exist an

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125 See the analysis above **II THE ESSENTIAL FACILITIES DOCTRINE** *B The Essential Requirements of the Doctrine - 6 The remedy is administrable*

126 Arnold T above note 117.

127 *Tru Tone Ltd* v *Festival Records* [1988] 2 NZLR 352,358.

128 New Zealand Ministry of Commerce and the Treasury *Regulation of Access to Vertically Integrated Natural Monopolies - A Discussion Paper* (Wellington, August 1995) 17.

129 Above analysis - **II THE ESSENTIAL FACILITIES DOCTRINE** - *A The Jurisprudential Basis of the Doctrine*

inherent inconsistency with enacting an essential facilities section into the Commerce Act.

Further if such a section were enacted the existence of section 26 of the Act and the potential for regulatory capture enters the debate to swing the argument towards favouring the establishment of a separate access regime. This is because section 26 provides for the Commerce Commission to take into consideration any governmental policies transmitted to them in writing by the Minister. This section does not require that the Commission become mere Ministerial puppets in that the governmental policies are not to override their decision making powers. "The Commission is required only to have regard to such statements in reaching its decisions."[130] However there will nevertheless remain a greater potential than where no section exists for the Commission to wish to fall in line with Ministerial interest, which in itself may be determined by Ministerial vote seeking behaviour. This is a concern as ministers are more likely to receive greater benefits from facility holders and thus competitors interests and the interests of competition generally may not be promoted due to the capture process that has occured.

C Does New Zealand Require a Separate Access Regime?

It may be concluded that, on balance, the problems inherent in the courts determining the terms of access militate towards the rejection of a common law essential facilities doctrine becoming enshrined in New Zealand law of its own accord. Further it has been determined that there is in aggregate a greater disbenefit in enacting an essential facilities provision into the Commerce Act than warrants such action. The question however remains whether New Zealand should nonetheless, invoke a separate access regime falling outside the scope of our Commerce Act, as Australia has done.

1 In light of the analysis of the Australian Act how could an access regime best be formulated ?

In determining how an essential facilities access regime could best be established the Australian approach leads to valuable insights.

In analysing the CPRA this paper has determined that as regards the issue of whom the appropriate body is to determine whether a facility should fall within the regime a Ministerial decision is not necessarily best. This conclusion is reached in light of

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130 *Re : New Zealand Kiwifruit Exporters Association (inc) new Zealand Kiwifruit Coolstores Association Limited* (1989) 2 NZBLC (Com) 104,485 D No 221 15 September 1988 104,494.

the fact that democracy does not truly require that an elected person decide access issues. The mischief of anticompetitive conduct may be present whether or not the industry concerned is of importance to the national economy. Further Ministers have the potential to take political concerns into account rather than truly focussing on the issue they have been asked to resolve. Thus an access regime in which it was the role of the judiciary to determine whether any industry should fall within the scope of the Act would be meritorious. This would also increase the level of certainty necessary for investor confidence in the market as previously discussed. Investor confidence may be of particular concern in a market like New Zealand as it is relatively small and relies on overseas investors whom do not have the same level of information concerning the New Zealand economy and government operation as New Zealanders do feeling confident enough to invest.

Thus a regime whereby the permission of the judiciary to bring a facility within the scope of the Act would be beneficial[131]. This could be done by either enacting a broad provision that a court order that the regime was to apply would have that effect, or by requiring the court to fit a facility within the definition of a "facility" as proscribed in the regime.

The next step in the regime would be to require a regulatory body to enforce the terms of access whenever an access order had been granted. As has been learnt from the Australian analysis above, regulatory bodies are better able than courts to make such determinations in that they have more appropriate skills to do so. Further, economies of scale are likely to occur where one national body seeks to regulate access, rather than a multitude of independent industry specific bodies attempting to do so. The constant change in market conditions makes a regulatory authority the appropriate body to determine access conditions rather than a court whose processes are more time consuming and thus whose ability to respond quickly to a change in market conditions is limited. The regulatory body should always be designated the role of determining access terms and conditions as this ensures that consistency is maintained throughout access determinations. Such consistency encourages certainty within the market place which is of particular concern in a small market like New Zealand.[132] In the

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131 Pengilley supports such a view. See above note 42,49.

132 It should be noted that in his alternative proposal to the Committee's recommendations Pengilley , above note 41 advocates a system whereby it is only in the absence o f the court's ability to establish prices and access conditions that the regulatory body is to be deemed with the task of determining such conditions of access. This however, it is argued, potentially allows a decision making body with little economic skills to define terms of access of which it may know very little. The better approach seems to be to universally designate the determination of access conditions to a regulatory authority.

New Zealand context it may well be that such a regulatory body should be the Commerce Commission. This Commission has experience in competition law issues in general and well understands the issues involved in essential facility regulation. The cost of establishing an independent body like the NCC seems to be of little value in New Zealand in light of the size of the market and the limited pool of experts able to staff such a venture.

Appeals concerning the approach taken by the regulatory body should be available in the courts. This should take the form of a provision for judicial review. Although the body may be somewhat subject to regulatory capture such capture is not likely to be as great as that capable of occuring in Ministerial decision-making as previously discussed. Allowing any greater right of review in the courts would only prolong unnecessarily any claim made to essential facilities. As facilities holders are likely to be well endowed with resources to engage in appeals, any further right of appeal may only serve to further imbalance the practical ability of parties to obtain equal access to justice .

The proposed regime would thus require essential facilities holders to grant potential market entrants access to their facility in circumstances where the inadequacies of the market required this. Intervention in the market's operation would be justified when this enhanced competition and therefore efficiency. This would mean that the regime had the same overarching goal as the Commerce Act. Which would ensure consistency throughout the application of competition law.

2 *The benefits of an access regime*

Firstly, the concerns of the recent increase in essential facility type holders existing in the market as a whole in view of recent governmental deregulation are addressed if a separate access regime is established. This is because the proposed regime would have a wider ambit than that currently existing under section 36.

While a court order would still be required to determine whether a facility should fall within the scope of the Act such litigation would be relatively brief in nature. Thus parties would benefit from the existence of a regime in that there would no longer be the need for them to bring lengthy section 36 action. The length of such an action in an essential facilities type case is generally due to the need for the court to determine what the terms of any order to supply at a reasonable price are.[133] As under the proposed regime a regulatory body would be charged with such a function the court action would be speedier. There would be no need for the

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133 See for example the *Telecom Communications of New Zealand Ltd* v *Clear Communications* litigation above note 72.

court to even attempt to determine the access conditions and make an assessment as to whether it was indeed capable of deciding on reasonable access conditions.

Further long term investor confidence in New Zealand would increase as there would be certainty that once a judicial order that the regime was to apply to a facility had been made, this would stand. This would ensure greater certainty than is available in the Australian regime where Ministerial decisions are more subject to change as there are not the same constitutional barriers to amending a Ministerial decision as there are in altering a judicial decision which must be appealed. Although the proposed regime would be less flexible than the Australian approach in that there is not the flexibility for a Ministerial decision to immediately provide for a facility to be covered by the regime, this is outweighed in a market the size of New Zealand in the gains made to investor certainty.

A separate regime is also beneficial to the rule of law. As the philosophy of the essential facilities doctrine focuses largely on the harm caused to independent competitors it could potentially be difficult to reconcile this with the policy of the Commerce Act of preventing harm to competition generally. A separate regime allows these two policies to co-exist side by side without difficult inconsistencies resulting.

V I CONCLUSION

The essential facilities doctrine is renowned for the inherent difficulties that exist in defining its elements and the enforcement of any order it requires as to access.

This paper has considered the essential elements of the doctrine. We have then moved to consider the interesting and novel approach which has been taken to these inherent difficulties in Australia. The adoption of the Hilmer Committee report recommendations in the Competition Policy Reform Act 1995 have much merit.

However our analysis, particularly in light of capture theory concerns and the specialized skills which the enforcement of the doctrine requires, has lead to the conclusion that an access regime could be better formulated. The principal weakness in the CPRA is that Ministerial discretion is used to determine when a service should be declared. As has been acknowledged above this leads to difficulties in that there is significant potential for a Ministers decision to simply reflect the view of facility holders rather than the views of all interested parties.

In light of this Australian analysis the paper has considered whether a separate access regime similar to that existing in

Australia is desirable or whether the essential facilities doctrine should be incorporated in a different manner.

The paper has concluded that there may be some merit in the import of the essential facilities doctrine into New Zealand law in light of recent deregulation of many of New Zealand's essential type facilities.

However,difficulties in the court's administration of the essential facilities doctrine warrants its rejection from its incorporation into New Zealand's common law. The fact that the court would have to administer the terms of access if the doctrine was enacted as an amendment to section 36 warrants the rejection of this approach. The difference in philosophy of the Commerce Act and the doctrine further prevents an additional section being incorporated into the Commerce Act.

Thus the best solution of importing the essential facilities doctrine into New Zealand law lies in the establishment of a separate regime for such facilities, operating outside of the scope of the Commerce Act. Given the analysis concerning the Australian regime this paper adopts the stance that such a regime should provide for legislative definition as to what an essential facility should be. This definition should grant the legislature a reasonable amount of latitude so that they can determine this issue on a case by case basis. The enforcement of an access order should be left to the Commerce Commission given their expertise and skill.

The enactment of such a regime would provide further protections to competitors and encourage the participation of new entrants in the market.

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