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THE ESSENTIAL FACILITIES DOCTRINE AND SECTION 36 OF THE COMMERCE ACT

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Contents

INTRODUCTION

The essential facilities doctrine has become topical recently. The doctrine requires that[1]

> where facilities cannot be practically duplicated by would-be competitors those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility. To be essential a facility need not be indispensable, it is sufficient if duplication of the facility would be economically infeasible and if denial of use inflicts a severe potential market entrants. Necessarily, this principle must be carefully delimited, the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendants ability to serve its customers adequately.

It involves an issue which has been described as "one of the most unsettled and vexations in the antitrust field under what circumstances does a monopolist have a duty to deal"[2]. It is difficult in that it involves telling a private individual or company who it must deal with. The right to deal with who you want to is central to freedom of contract; which has been a cornerstone of commercial law for over a century[3] though freedom of contract may be on the decline somewhat now[4]. It is worth noting that the freedom to deal was never quite an absolute one.

Atiyah notes that[5]

> [i]t was only in a very few cases indeed that a person was under a legal obligation to enter into a contract, virtually the only example was the person exercising a "common calling" such as the innkeeper and common carrier who were (subject to certain safeguards) legally bound to contract with any member of the public who required their services.

1 ARA v Mutual Renta Cars (1987) 2 NZLR 647, 687 applying Hecht v Pro-Football (1977) 570 F2d 982.
2 Byars by Bluff City News (1979) 609 F2d 843,846.
3 In Printing and Numerical Registering Co v Sampson (1875) CR 19 Eq at 465.
4 Sec An Introduction To The Law of Contract P.S. Atiyah Clarendon Press. Oxford 4th - ed 1989 p17.
5 Above n 4, P13.

> Sir George Jessel said "if there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be sacred and shall be enforced by Courts of Justice.

The aim of this paper is to examine the essential facilities doctrine and its possible application in New Zealand. This involves looking in some detail at the American case law and academic commentary to determine the status and the nature of the doctrine. Its position within the general law on monopolies' is central to this. Is the doctrine common law or an interpretation of the American competition legislation? There have been developments in Australia which are important because of the similiarity of New Zealands' and Australia's respective competition law statutes.

The position in New Zealand is of much more than academic interest. With the deregulation of many essential services and the Governments' privitisation and corporatisation programmes the application of competition law to what were formerly Government departments has become important. There have been reports by regulatory agencies suggesting what the options are for ensuring that corporations with control of a natural monopoly cannot foreclose competition using the market power which the facility gives them. The Governments preferred option - reliance on the Commerce Act - will then be examined. An important question there is how does the essential facilities doctrine relate to the Commerce Act. The answer to this question nessarily depends on the answer to the question ' what is the essential facility doctrine?'

The History of the Doctrine in America

The doctrine's origins are found in United States v Terminal Railroad Association of St. Louis.[6] There a consortium gained control of the only bridge across the Mississippi River at St Louis. Another bridge was built with the authorisation of Congress.[7] They also gained control of a ferry company which provided some competition when a railroad company which was not a member of the Terminal Association tried to get stock control of it to guarantee a route across the river. Twenty four railroads converged on St. Louis and to topographical considerations required them to use the terminal company's facilities. It was not feasible for non-members to duplicate the facilities.[8]

The members of the Terminal Association were found to have a power of veto over the use of the bridges and associated terminal facilities by non members. There was no allegation of any actual denials of access[9] nevertheless the Terminal Association was charged with being in restraint of trade contrary to section 1 of the Sherman Act and monopolising or attempting to monopolise interstate trade in breach of section 2 of the Sherman Act. The relevant parts of these sections are[10]

6 224 U S 383 (1912).
7 Above n1, p 396.
8 Above n1, p397.
9 Above n1, p400.
10 Taken from Union Shipping v Port Nelson unreported CP 101/89 14 February High Court Wellington.

S1: "Every contract, combination ... or conspiracy in restraint of trade or commerce is declared to be illegal."

S2: "Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any person or persons, to monopolise any part of the trade or commerce among the several states, or with foreign nations shall be guilty..."

The Association's argument that the use of the bridges and terminals was open to all at equal cost, that no dividend was paid on terminal shares and that [11]

> any new railroad built into St. Louis now has but to secure a way to a terminal track and it has at once the advantages of the entire terminal system."

Considerable reliance in the judgment is placed on Albert Perkins who was the railway expert of the Municipal Bridge and Terminal Board and the chief witness of the defendants[12]. He believed that the railway lines in any large city should be united as much as possible, that the terminal company should be the agent of all, and that it should be non-profit. "In short, that every railroad using the service should be a joint owner and equally interested in the control and management".[13] This was plainly not so in this case. The Court said[14]

> [t]hey are not under a common control and ownership. Nor can this be brought about unless the prohibition against the admission of other companies to such control is stricken out and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietory companies.

11 Above n1, p 388.
12 Above n1, p405.
13 Above n1, p406.
14 Above n1, p406.

The Court, explaining the remedy it was about to give, said [15]

> [p]lainly the combination which has occured would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the Terminal Company and the proprietory companies as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred will amply indicate the wise purpose of the statute, and will preserve to the public a system of great advantage.

The remedy allowed non-member railroads to pin the Terminal Association on non discriminating terms and these companies that did not want to pin the Association were to be allowed access on non discriminating terms[16].

There is some debate about whether Terminal Railroad is authority for an essential facility doctrine[17]. It lays down no general rule: the Supreme Court deals with a particular situation in an extremely pragmatic manner. Given the reliance on the absence of real joint control and ownership Areeda and Hovenkamp are probably right when they say Terminal Railroad is a combination in restraint of trade case[18].

15 Above n1, p410.

16 Membership and access were to be offered to non-members on just and reasonable terms and regulations as will, in respect of use character and cost of service, place every such company upon as nearly an equal plane as may be. Above n1 p411.

17 Ratner "Should there be an Essential Facility Doctrine" 21 UC Davis Law Rev (1989) 327.

18 Areeda and Hovenkamp Antitrust Law 736.1b (Supp 1988) Little Brown and Company Boston.

In terms of its facts it may or may not have been significant that it involved a regulated industry. Ratner states [19]

> [g]iven the pervasive regulation of the industry, the court may have simply chosen to parallel the existing regulatory scheme in tailoring a remedy. Similar treatment was not necessarily contemplated for nonregulated industries.

The Supreme Court in the decision really deal with ownership and control of the facility and not access to it, as noted earlier there was no allegation of access having been denied. As for the administrative deficiencies of the terminal system it appears that they were not consistent with freedom of competition [20] primarily because they were inefficient and outmoded and not because they discriminated against non proprietory companies.

The essential facility doctrine has its origin in this case. The reality is though it is perhaps of academic and esoteric interest, only that Terminal Railroad is very much a case on its facts and a general rule cannot really be drawn from it.

There are other Supreme Court cases which are consistent with the doctrine and have been used in support of it. Associated Press v United States [21] involved an antitrust charge against a news gathering service whose by-laws allowed a member to frustrate a non-member competitors attempts at gaining admission and, though no power of veto existed, place limitations on it when it gained

19 Above n14, p 337.
20 Above n1 p397.
21 326 US 1.

membership[22]. The news service, Associated Press, had no monopoly over the collection and distribution of news for publication but it did have a significant degree of market power[23].

The Court noted that[24]

> ... the fact an agreement to restrain trade does not inhibit competition in all objects of the Sherman Act. It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members, gives many newspapers a competitive advantage over their rivals.

The Court went on to reject the test proposed by the different of indispensability. This case, as Areeda and Hovenkomp again note really is a combination case[25]. The Court states[26]

> [i]t is further said that we reach our conclusion by application of the "public utility" concept to the newspaper business. This is not correct. We merely hold that arrangements or combinations designed to stifle competition cannot be immunised by adopting a membership device accomplishing that purpose.

The "public utility" concept mentioned is the duty to deal with is placed on suppliers of essential services in America[27]. The Court there is really contrasting what it is doing against a sort of essential facilities doctrine, not applying a form of the doctrine. Associated Press though often cited for the rule is not an authority for it[28]. That it is cited for the doctrine probably results from its remedy which required the removal of the offending by-laws allowing everyone equal access to Associated Press News.[29]

22 Above n21 p7.
23 Above n21, p13. For instance morning papers which had an AP service controlled 96% of the total circulation see p18.
24 Above n21, p17.
25 Above n21, para 736 1C.
26 Above n21, p19.
27 Troy "Unclogging the Bottleneck - A new Essential Facilities Doctrine 83 Col CR 1983 441,443.
28 See Aspon Highlands Skiing Corporation v Aspen Skiing Company 738 F 2d 1509,1519 (1984), Byars v Bluff City News Co Inc 609 F.2d 843,856 (1979).
29 Above A21, p21.

Otter Tail Power Co v United States [30] is the most important essential facilities Supreme Court case since Terminal Railroad, Otter Tail was an integrated electricity utility. It generated power at retail and at wholesale Municipalities could elect to set up their own retail system and purchase power of wholesale from Otter Trail or it could franchise Otter Tail to retail power. Otter Tail, not unnaturally, preferred the latter and when four municipalities elected to switch from the Otter Tail's to their own retail network it refused to supply power at wholesale. Two of the cities found alternatives, the other two found other sources of supply but needed Otter Tail to transmit (wheel) it. Otter Tail refused. This was litigated as a breach of section 2 of the Sherman Act.

Each town was a natural monopoly as Otter Tail had the only sub-transmission system capable of delivering electricity to all users. The Supreme Court found that [31]

> [t]he record makes abundantly clear that Otter Tail used its monopoly power in the cities in its service area to foreclose

30 410 US 369.
31 Above n30 p 377.

> competition or gain a competitive advantage, or destroy a competitor, all in violation of the antitrust laws.

Otter Tails singularly unsuccessful defense was that if they agrees to transmit the power more towns would opt for wholesale supply and public distribution and it would go downhill. The Court responded that the Sherman Act[32]

> ...assumes that an enterprise will protect itself against loss by operating with superior service, lower costs and improved efficiency. Otter Tails theory collides with the Sherman Act as it sought to substitute for competition anticompetitive uses of dominant economic power.

The Court affirmed the District court order which enjoined Otter Tail from continuing the violations found to exist[33]. The Supreme Court noted as a caveat on this that [34]

> [w]e do not suggest, however that the District Court, concluding that Otter Tail violated the antitrust laws, should be impervious to Otter Tails assertion that compulsory interconnection or wheeling will erode its integrated system and threaten its capacity to serve adequately the public.

Several elements of the essential facilities doctrine are present in Otter Tail. The facility, sub-transmission lines are unambiguously essential and induplicable economically for each town. The decision effectively required that in the absence of justification for refusing to deal they had to. A note in the Harvard Law Review observes that the case is largely consistent with the purpose test of monopolisation the decision could well rest on an essential facilities doctrine.[35]

32 Above n 30, P380.
33 331 Fed Supp 54,64.
34 Above n 30, P381.
35 "Refusal to Deal by Vertically Integrated Monopolists "87 HARV L REV (1974) 1720, 1724.

The note states[36]

> The Court held that there was sufficient evidence to support the District Courts finding that the refusals were aimed solely at maintenance of the defendants monopolies and had no other justification. Let the opinions discussion of the legal precedents did not mention purpose, although it alluded to two cases frequently thought to support the purpose test. Moreover, the bottleneck theory also permits examination of the defendants motivation, which may indicate the absence of significant redeeming features of the refusal. Furthermore Justice Douglas' description of the difficulties of entry into the sub-transmission in light of his Litation of concerted refusal cases, suggests reliance on the bottleneck theory since access to alternative facilities it not an element of the purpose test. Finally, the courts condemnation of Otter Tails reliance on "anticompetitive uses of its dominant economic power" demonstrates an interest in the bottlenecks theory's concern for competition on the merits of one's second level performance.

Nevertheless as the note goes on to state the basis of the decision is unclear.[37] Otter Tail does not lay down a rule about the responsibility of controls of essential facilities to provide access to those seeking access. The rule which can be drawn from it - that a monopolist cannot use its monopoly power to foreclose competition or destroy a competitor is of limited value because of the 'peculiarity' of its facts. As Areeda and Hovenkamp note[38]

> the defendant possessed a natural monopoly. This monopoly was partially regulated in ways that may have allowed it to operate to the detriment of consumers through vertical integration. Thirdly, there existed a nonjudicial agency accustomed to regulate both the prices and terms of dealing of the monopolists, the Court itself was not obliged to do so.

A fourth point may be added; that Otter Tail has shown itself to have a certain propensity towards antitrust infraction which was reflected in the remedy.

36 Above n 35.
37 Above n35, p1725.
38 Above n18, Para 736.1e.

The Court said "The proclivity of predutory practices has always been a consideration for the District Court in fashioning its antitrust decree".[39]

These factors again make Otter Tail something of a case of is facts; no broad essential facility doctrine can be drawn from it.

The most recent Supreme Court case to touch upon the essential facilities question was Aspen Skiing Co, V Aspen Highlands Skiing Corp.[40] At Circuit Court level[41] the decision was based upon the doctrine. The Supreme Court in a footnote said[42]

> Given our conclusion that the evidence amply supports the verdict under instruction as given by the trial court, we find it unnecessary to consider the possible relevance of the "essential facilities" doctrine...

Aspen Ski controlled three mountains in a four mountain skiing area and Aspen Highlands the other. Together they marketed a four mountain ticket, with Highlands receiving a proportion of revenue calculated from patronage. Ski grew increasingly dissatisfied with this arrangement and started trying to pin Highlands down to a fixed share. Eventually they made an offer that Highlands would find unacceptable.

39 above n 30, p381.
40 472 US 585 (1985).
41 Circuit Courts are multi state appellute Courts. There are eleven circuits and the tenth covers Wyoming, Utah Colarodo Kansas and New Mexico.
42 Above n 46, p611 footnote 44.

Thereafter Ski marketed a three mountain pass and effectively blocked all Highlands attempts to offer (or rather attempting to offer) a four area ticket and thereby improve the attractiveness or its mountain Highlands complained that Ski had monopolised the market for downhill skiing. The Court reaffirmed that the right of a business people to trade with whom they like, and the corresponding absence of an unqualified duty to cooperate, is not absolute.[43]

The jury instruction which was approved by the Supreme Court[44] required the jury to consider whether[45]

> Aspen Skiing Corporation wilfully acquired, maintained or used that power by anticompetition or exclusively means for anticompetition or exclusionary purposes.
> Though a monoplist is under no duty[46] ... to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor in some manner does not violate Section 2 it valid business reasons exist for that refusal...
> We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available - or in other ways - and instead has the effect of impairing competition ...
> To sum up, you must determine whether Aspen Skiing Corporation gained, maintained or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence if a superior product superior business sense, or historic element, were designed primarily to further any domination of the sub-market.

43 Above n 40, p601.
44 Above n 40, p611.
45 Above n40, p596.
46 Above n40, p597.

The court later sought to further elucidate this distinction between legitimate and illegitimate refusals to deal. The Court said that if a firm excludes a rival on any basis other that efficiency that exclusion is predatory. To determine it this is the case regard must be had to the effect of the challenged pattern of conduct on the monopolist, the excluded competitors and the consumers themselves.[47]

Aspen can catch virtually any act of a monopolist. A few points may be noted, firstly it concerns competition in the monopolists market - a monopolist is free to discriminate amongst customers.[48]

Thirdly the relationships involved in the case were a longstanding one which Aspen Ski sought to break off. It was a very efficient relationship and the length of the relationship makes it inequitable for one party to break it off - a sort of unstated estopped concept may have been at work. Forthly and most importantly there is the exculpation for refusals based on legitimate business reasons[49].

Through the Supreme Court decision in Aspen is not strictly an authority for an essential facilities doctrine it may prove to be of great value to plaintiffs denied access to induplicable facilities. If that can show as anticompetitive motive - such motive to be shown on facts or inferred from other evidence (effect on both business and consumers for instance) then access to the facility may be ordered.

47 Above n 40, p605.
48 See Areeda and Hovenkamp (above n18) para 736.1g.
49 Areeda and Hovenkamp (above n18) give what that see at the limitation on Aspen at para 736.1 g.

The details of what sort of access are not clear but in Aspen itself Aspen Ski was held to have a duty to market jointly with Aspen Highlands. This and the efficiency theme which runs through the judgement suggests probably the teams of access would be closer to the competitive level than the monopolistic[50].

There is no good Supreme Court authority for the essential facilities doctrine. There are a number of complex and difficult cases which are consistent with it; though they may be better explained by recourse to other more traditional forms of antitrust analysis.

The Court seems to have almost avoided ruling on it; perhaps directly in point before making a statement which will determine the law. The flipside of this enigmatic silence is that at circuit court level the doctrine will develop and gain a momentum which cannot be easily stopped.

It for years the Supreme Court refuses to hear cases where access has been ordered relying on essential facilities it becomes increasingly difficult for them to later deny the doctrines existence. All the while the doctrine 'develops'[51].

50 Areeda and Hovenkamp differ (above n18 para 736.1 saying there is no indication that the monopoly price could not be charged.

51 This may just reflect a different legal culture with the Supreme Court more of a constitutional Court and perhaps less concerned with giving overall legal direction.

Circuit Court Formulations

In the absence of direction from the Supreme Court the doctrine has been developed at Circuit Court level. It has reached a stage where a test can be given for it. In tracing the development of this test it is hoped that the nature of the doctrine will become apparent.

The case that gave the development of the doctrine impetus was Hecht Pro-football, Inc[52]. In this case a group of football promoters wanted to establish an American football League team in Washington DC. Washington already had one football team - the Washington Redskins - who where members of the rival and dominant National Football League. To establish the team the promoters needed to secure access to the Robert F Kennedy stadium which was effectively controlled by the Redskins. The Redskins would not seriously negotiate until a franchise for the league that the promoters were trying to get into was secured and the league would not negotiate for a franchise until access to the stadium was secured.

They sued the Redskins alleging violations of sections 1 and 2 of the Sherman Act. The Circuit Court, reversing the District Court upheld the promoters claim and agreed that they were entitled to a direction on the essential facilities doctrine[53].
In Hecht the question of monopolisation is treated as a seperate issue to the essential facilities aspects of the case.

52 570 F2d (1977).
53 Above n 52 p992.

The doctrine was explained in the following terms[54]

> The essential facility doctrine, also called he bottleneck principal, " states that "where facilities cannot be duplicated by would be competitors those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility". To be "essential" a facility need not be indispensable it is sufficient if duplication of the facility, would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. Necessarily, this principle must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhabit the defendants ability to serve it customers adequately.

The jury instructed that Hecht[55] states the principle has been regularly invoked in the lower level courts

> ... if the jury found (1) that the use of RFK stadium was essential to the operation of a professional football team in Washington (2) that such stadium facilities could not practically be duplicated by potential competitors (3) that another team could use the stadium in the Redskins' absence without interferring with the Redskins' use; and (4) that the restrictive covinant in the lease prevented equitable sharing of the stadium by potential competitors, then the jury must find the restrictive covenant to constitute or control in unreasonable restraint of trade.

54 The quotation used in it comes from A.D. Neale, The Antitrust Laws of the United States (2 ed:, 1970) id 66,69. The omitted part of the quotation deals with the doctrine origins and basis in precedent. It states "This principle of antitrust law derives from the Supreme Courts 1912 decision in United States v Terminal RR Assn, and was recently reaffirmed in Otter Tail Power Co v United States; the principle has been regularly invoked in the lower courts.

55 Above n52 p993.

The defendants argument was that if even a direction on the essential facilities doctrine was required, the jury could still, essential facilities nothwithstanding, have found the restrictive covinant on use of the stadium by other teams to be reasonable. This was given the short shrift.[56]

> This argument robs the essential facility doctrine of any signifiance and we regret it. The garden variety restrictive covenant does not violate unless it unreasonably restrains trade, when the restrictive covenant covers an essential facility however, all possible competition is by definition excluded and the restraint is unreasonable per se - provided, of course, that the facility can be shared practically. The requested instruction adequately accommodate this proviso

Troy [57] criticizes Hecht and in particular the above comment for purporting to treat the doctrine as a per se offence. Which is to say in the peculiar language of the American antitrust lawyer that it is a strict liability offence.

Troy notes that Otter Tail was not a per se case; and certainly cannot be relied upon for a per se essential facilities doctrine[58]. This error by the found is Hecht was compounded by calling its test 'per se' when it was really "rule of reason"[59].

56 Above n52, p993 - footnote 45.
57 Troy "Unclogging the Bottleneck: A New Essential Facility Doctrine" 83 Col L Rev [1983] 441,454.
58 Above 57 p451.
59 Above n 57 p456. "Rule of reason" means is like requiring intent.

> The Court specifically, held that the jury must be instructed to find the restraint unreasonable per se " provided that, of course, if facility can be shared partically and that such sharing would" not inhabit the defendants ability to serve its customers adequately. The Hecht court was in effect saying: it is a reasonable restraint.

Troy goes on to say note that later courts say that the doctrine is a per se offence - following Hecht but go on to apply "an analysis of considerably broader scope than can meaningfully be called per se"[60].

Hecht interestingly is a case decided under section 1 of the Sherman Act - the unreasonable restraint of trade section whereas most cases are decided under section 2 which concerns monopolisation. The court in Hecht notes in a footnote that the case could have been decided by use of the essential facilities doctrine to support monopolisation under section 2.

The plaintiff merely had not requested an instruction to that effect. The case for that reason was decided under section 1. The essential facility doctrine Hecht v Pro-football was not a common law doctrine. At the same time it appears to be something more that the

60 Above n 51 p 456.
61 Above n 52 P993 footnote 44.

application of the Sherman Act. It might be best characterized as a fact pattern leading to antitrust liability under a traditional head of antitrust law. The problem with characterizing it comes from the Wide terms of section 2 of the Sherman Act rather than the doctrine itself.

The next significant case of Circuit Court level is Bydrs v Bluff City News Co Inc[62]. There a subcontractor distributed periodicals to retailers for commission for a distribution. The job existed because the retailers Byars dealt with had turnovers of periodicals too small for the distribution was sold to Bluff City. After some months Bluff city terminated the relationship. Byors sued alleging that Bluff City was a monopolist and in refusing to deal with him it had abused its monopoly power.

The case is useful for its thorough analysis of the duty to deal of a monopolist, and consequently the essential facilities doctrine. Keith J separated refusals to deal by monopolists into "two conceptually similar lines of cases" [63]. One of the traditional intent based monopolisation test the other the essential facilities or as Keith J prefers to say "bottleneck theory of antitrust law".

The intent test began with United States v Colgate Co [64] where it was held that a business may deal with whom it pleases provided it

62 609 F 2d 843 (6 Cir 1980).
63 Above n62, p855.
64 250 US 300.

does not have a "purpose to create or maintain a monopoly. [65] This rule, according to Keith J has been applied three other times in the Supreme Court. In one of these a finding of illegal intent to monopolise was made where the only evidence was a desire to buy out its retail distributers and it was unable to give an independent business reason for its refusal to deal. This "comes perilously close to establishing an absolute duty to deal." [66]

The second and "related" line of cases is the essential facilities doctrine[67]. This approach is that "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." [68] The authority for it is the 'seminal' case of United States v Terminal railroads where "the Court noted that the terminal owners had to make the facility equally accessible to all users." [69] Keith J is less than convinced about the distinction he has mapped out. [70]

> In theory, the distinction between the "intent theory and the "bottleneck" theory is that the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors. In practice there exist many overlapping considerations.

65 Above n64, p307.
66 Above n62, p855 Referring to Eastman Kodak v Southern Photo Materials Co 293 US 359.
67 Above n30.
68 Above n62, p856.
69 Above n62, p856.

The Court gives as an example of these overlapping concerns Otter Tail. In Otter Tail "[i]ts overall conduct made it plain that it was seeking to destroy a potential competitor in the local retail market"[71]. Otter Tail advanced no benefit to the public from its conduct only self preservation. "Although the district court in Otter Tail relied separately on the "intent test" and the "bottleneck test" ... the Supreme Court's decision incorporated both in a brief overall analysis. [72] Which shows how interrelated the area is.

The Court examines various fact patterns stating that there is a 'discernible uniformity' in the decisions made in each pattern whichever theory is used. [73] There are, according to the Court in Byars, four fact patterns. [74]

> First, there are situations where a monopolist uses its monopoly power in one market to distort competition in another market by refusing to deal. This is forbidden, at least absent a valid business justification for the refusal to deal...
>
> Second, there is the context in which a monopolist refuses to deal with its rivals. This behaviour is inherently anti-competitive Lorain Journal, supra, makes it clear that this is illegal, either as monopolization or attempt to monopolize...

71 Above n62 p857.
72 Above n61, p857.
73 Above n62, p857.
74 Above n62, p857.

> Third, there is a context in which a group of competitors control an indispensable facility which cannot be easily duplicated. This is the classic case where the "bottleneck theory" applies. Absent valid business reasons, equal access is required for all...
>
> Fourth, there is the most conceptually difficult context of all - that in which a monopolist seeks to vertically integrate.

The Court felt that this case fell into this fourth category. The case was to be remitted back to the District Court for a finding on the question of monopolisation. The Sale question which the District Court would need guidance on if it were found that Bluff City had a monopoly was the level of intent which would be required before monopolisation was found. [75] Rather than focus on intent the Court preferred to look at the impact of the conduct. [76]

> As preservation of competition is at the heart of the Sherman and Clayton Acts, a practice should be deemed "unfair" or "predatory" only if it is unreasonably anticompetitive. In a 52 Case, only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful.

Byars shows the fundamental problem at the root of essential facilities is the same as in all refusal to deal situations - abuse of monopoly power.

Byars treatment of essential facilities is dated in that it refers to a "group of competitors [77] controlling an essential facility. This ignores Hecht where there was no question of a group of competitors but the doctrine was applied nonetheless[78]. In missing Hecht Byars usefully missed out on the tendency to view the doctrine as a strict liability rule. Byars notes that "valid business reasons" will serve to excuse a denial. [79]

75 Above n62, p859.
76 Above n62 p860.
78 Above n62, p992.
79 Above n62, p856.

Byars concentrates on the effect of the monopolists [80] refusal to determine whether, in the absence of business justification antitrust liability should to it. [81]

> It is for the district judge, as fact finder, to analyse the evidence and make a determination whether Bluff City's Cut-off of Byars was justifiable on efficiency grounds.
> This does not end the analysis, however a finding of antitrust liability in a case of refusal to deal should not be made without examing business reasons which might justify the refusal to deal. The rationale for this is that we tolerate the existence of some monopolists, we must give them some leeway in making business decisions.

Though the Court noted that

> a monopolists self serving ex post facto business justifications must be examined with care. [82]

The Court noted that a common justification for anticompetitive behaviour is that it was done for the purpose of self preservation. [83] This argument, was made in Otter Tail [84] and was less than successful there. One would think that it would be an argument which Courts would be unlikely to find persuassive.

The final, and critical factor, which the Court looked at was the feasibility of giving a judgement requiring a monopolist to deal. [85]

> An injunction ordering a monopolist to deal might emesh a Court in difficult problems of price regulation. In the 'bottleneck theory" cases, price regulation problems arose because a court could simply order the owners of a unique facility to trust all customs on equal terms. The same thing is generally true in any setting in which the monopolist deals with some businesses but refuses to deal with others.

80 Above n62, p860.
81 Above n62, p862.
82 Above n62, p863.
83 Above n62, p863 fn55.
84 Above n37.
85 Above n62, p863.

This is more than a little optimistic. In the two cases of "bottleneck theory" the Court is referring to Associated Press and Terminal Railroad the Court could order access on the same terms as it was supplied to others. Many cases will be more difficult as there will be only one firm seeking access. The Court noted the added difficulty of this situation which of course was precisely the problem in Byars. The Court said [86]

> in a case such as this, where there is only one cut-off firms, however, judiciant problems around ... In the ordinary case, however, the difficulty of setting a price at which the monopolist must deal might well justify withholding relief altogether. In this case, we have a history of previous dealings where they set a price...

The Court notes that the presence of the regulatory authority in Otter Tail 'obviated' the need for judicial price control. In Byars there was no regulatory authority but there was a history of dealings which would enable a proce to be fixed. No guidance is given to what should be done in there is no regulatory authority or history of dealings, other than that the problem may be so intractable that it is better to not give a remedy.

MCI v AT&T[87] communications is perhaps the most significant antitrust case of all times, at least in terms of effect. The essential facilities aspect of the case arose because AT&T refused to interconnect MCI's long distance telephone communication system into its local network. This prevented MCI from offering some services to the public. [88] The Court explained the doctrine in the following way[89]

86 Above n62, p864.
87 708 F.2d 1081 (7th Circuit).
88 Above n98, p1132.
89 Above n98, p1132.

> [a] monopolists refusal to deal under these situations is governed by the so called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a bottleneck") can extend monopoly power from one stage of production to another, and from one market to another. Thus the antitrust laws have imposed on firms controlling an essential facility the obligation available on non-discriminatory terms ....
>
> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine. (1) Control of the essential facility by a monopolist, (2) a competitors inability practically or reasonably to duplicate the essential facility (3) the denial of the use of the facility to a competitor and (4) the feasibility of providing the facility.

AT&T argued that the District Court insufficient explanation of what an essential facility is was inadequate. The Seventh Circuit Court of Appeals described that argument as merciless.[90] It is worth reproducing the reasons for rejecting the argument in full.[91]

> Judge Grady carefully instructed the jury on the elements of the essential facility doctrine (including the need for the jury to find that MCI could not reasonably duplicate the facility) and specifically stated that MCI contended the facilities of AT&T's local operating companies were "essential", since without them, MCI could not provide service to its customers. Moreover the district Court instructed the jury that the essential facilities doctrine is applicable where "a business holds a monopoly of some essential facility that other businesses need in order to compete ..." Since the word "essential" is a term of ordinary meaning, and since the instruction explained that the facilities involved must be those a firm needs in order to compile, the jury users given adequate guidance.

The four element test from MCI v AT&T has achieved since 1983 a certain degree of acceptance[92]. Sufficient to suggest that there is a definitive doctrine of the essential facilities doctrine which can be analysed.

90 Above n89, p1146.
91 Above n89, p1146 fn 98.
92 Ferguson v Greater Pocatello Chamber of Commerce 848 F2d 979,982 9th Cir) Flipside Productions Ltd v Jam Productions Ltd 843 F2d 1024,1032 (7th Cir) McKenzie v Mercy Hospital of Independence 854 F2d 365,369.

The Essential Facilities Test

Limits and Criticisms

There are a series of interrelated questions about the doctrine which can be examined in light of the list from MCI.

Aims of the Doctrine

The question is why have an essential facilities doctrine. The doctrine has a high interest in the end user welfare and in success on the merits of second level performance in the case of an integrated facility. [93]. This second concern translates into a disapproval of the high barriers to entry which a monopolised essential facility can create. [94] It has been argued that unless the capital markets are seriously flawed that a competent entrant should be able to raise finance. Though obviously the closer the market for the essential facility approximate and natural monopoly the more difficult successful entry and raising finance for such an entry will be. [95]

93 Above n35.
94 See above n35.
95 A natural monopoly is where becase of economics of scale on other physical reasons the only economic means of production is for one producer to satisfy the whole of the demand see Alcoa United States 148 F2d (2nd Cir 1945) 416,428.

One thing the doctrine clearly does do is limit the facility controllers right to choose with whom he or she will deal. This 'right' in its classic statement in United States v Colgate & Co [96] refers to a trader or manufacturer engaged in private business having no purpose to create or maintain a monopoly. It may be said that industries could in public interest are prevalent in essential facility cases and that the control of an essential facility is an enterprise that only loosely fits with the description 'trader'..

Most essential facility cases can be easily distinguished from ones where the Colgate freedoms exist unqualified.

The Doctrine Compared with the Purpose Test

The purpose test of monopolization also restricts traders freedom to deal. It is based around statements from Colgate and is often restated as it is often used as a defense. [97] A good statement of the purpose test comes from United States v Griffith [98] where it was said that "the use of monopoly power, however lawfully acquired, to foreclose competition on to gain a competitive is unlawful[99]. According to the Court in Byars v Bluff City News the difference in supposed to be that the purpose test concerns purpose and the doctrine is concerned with effect on competitors. This, as the Court in Byars noted, [100] is probably not correct. The doctrine

96 250 US (1919) 300,307.
97 Aspen Ski Co v Highlands Ski Co, above n40.
98 334 U.S. 100 (1948).
99 Above n 97, p107.
100 Above n 68.

is not a per se offence and only creates a duty to deal when it is practicable for the facility to be shared and there is no business justification for the denial of access. [101] Effectively it prohibits unreasonable refusals to deal by monopolists of essential facilities; such a refusal is either arbitrary and obstinate or an act intended to maintain monopoly power behind it. Furthermore the purpose test is not reflective of all cases under Section 2. Judge once said "we disregard any question of 'intent' ... for no monopolist monopolizes unconscious of what he is doing". [103] This may not reflect the American Law on monopolization but in 'non-purpose' cases the intent required is very general. [104] There is no sharp distinction in terms of intent between the doctrine and normal monopolization law.

This relationship between essential facilities and monopolisation is clearly expressed by Judge Rosner (of law and economics 'fame') in Olympia v Western Union [104] where speaking for the Seventh Circuit Court of Appeals he said [105]

> some cases hold that a firm which controls a facility essential to its competitors may be guilty of monopolization if it refuses to allow them access to the facility.
> We accept the authority of these cases absolutely

The Essential Facilities doctrine is part of monopolisation law and has a similar intent requirement. Though because the doctrine deals with inaction and not action it will sometimes be inferred rather obliquely.

101 Above n79.
102 In Town of Massena v Niagara Mohowk Power Corp 1980 - 2 Trade Cases (CCH) 1163,526 (NDNY) 1980 the Court said "if a monopolist's refusal to deal is founded on an unreasonable or arbitrary course of action and it thereby operates as an unreasonable restraint of trade, the refusal may constitute a violation of the Sherman Act" (It might be noted that this quote effectively treats denials of access as a one person group boycott, which is a somewhat confused concept.
103 United States v Alcoa 148 F2d 416(1945 2nd Cir).
104 "The Monopolists refusal to deal : an argument for a rule of reasons" 59 Tex L rev (1981) 1107,1108 J. Chapman.
105 Above n 18, p 656.

What is the Doctrine?

Areeda and Hovenkamp state [106]

> .... the primary use of the so-called essential facility doctrine has been in cases in which a monopolist - typically a <u>vertically interated firm</u> - refuses to deal

with his competitors either at all or on terms they consider reasonable. This recognition should make it clear that the "essential facility" is just an epiphet describing the monopolists situation. It is not on independant tool of analysis but only a label - a liable that bequits some comentators and courts into pronouncing a duty to deal without analysing the implications.

Ratner concurrs saying "the fact patterns of essential facility cases also suggest that the essential facility theory does not offer a unique theory of antitrust liability. [107] If essential facility is a label it is one which describes a particular type of case. There is something in the label perhaps. In <u>Otter Tail</u> [108] once the decision had been made that there was illegal monopolization there was a choice between "the unthinkably inefficient - vertical that had natural monopoly characteristics" or ordering access to be given.

It is situations such as that where the essential facility doctrine operates to require access to be given. It is the remedial aspect that indentifies and distinguishes the doctrine. The question becomes when is it appropriate to order access.

107 Ratner "Should then be an Essential Facility Doctrine" U.C. Davis Law Rev 21 (1988) 327,344.
108 Above n36.
109 Above n,107 p 341.

The Facility question

The doctrines name refers to facilities. Some commentators and courts have reduced this to an ''input' to allow it to cover products of the provision of a service. Facility has proved to be a remarkably fluid concept. It has been applied to electricity transmission systems, sports stations, a multi location ski pass[110] and the purchase of a flour mill.[111] A strong argument can be made for restricting the application of the doctrine to facilities strictly defined. Such a strict definition of facility is support by Hecht where it was said the doctrine should be delimited. Secondly a good is more likely to be capable of duplication or being sourced from elsewhere than a facility resulting from natural advantage or an economy of scale within a market which defined, to some extent, by geography.[112] A physical facility neccesary for entry into a market, such as the on electrical transmission system in South Dakota is a very different proposition from most goods. As noted earlier the Colgate freedoms are more applicable to manufacturers than facility controllers.

110 In Aspen, above n40.
111 Helix Milling Co. v Terminal Flour Mills Co s23 F2d 1317 (1975)
112 Troy "Unclogging The Bottleneck - A new essential facilities doctrine" 83 Col L Rev (1983) 441,454.

One commentator notes that[113] presumably, however, the use of the term facility was not accidental. Thus one may conclude that the essential facility doctrine applied only to a broadly defined 'structure'. Authority for this proposition is not strong, but does exist. All of the cases that delineate the doctrine involve structures provided that the term is defined broadly enough to encompass such things a local telephone exchanged.

The commentator notes that one district court doubt the applicability of the doctrine to anything but "tonight physical objects" and cases where the doctrine had not been applied.[114] The criticisms of the doctrine are nicely defused if the doctrine is delimited by use of facility in a strict sense.

Natural Monopoly/Monopoly

The next significant question is what sort of monopoly must the facility be. Rutner criticises the ennuniciation of the doctrine and suggests that the doctrine should not focus on the individual competitor can duplicate the facility but on whether any firm can enter.[115] He notes that a major reason to consider an input essential is that it "presents natural monopoly characteristics.[116] Though he notes that

> A facility may have no viable substitutes and not face entry, however, even though the market can accommodate several, efficiently sized firms. Risk capital market, more attractive

113 Werden "The Law and Economics of the Essential Facility Doctrine 32 St L ULR 433,452.
114 Above n 113, p452.
115 Above n 107, p346, footnote 105.
116 Above n 107, p346. footnote 106.

alternative investments, name recognition or other factors may all contribute to the conclusion that a facility is not practically duplicable.

Nevertheless the commentators has focused on natural monopolists as the sole agent where the essential facilities doctrine is most useful. [117] Troy states that [118]

> natural monopoly markets tend to create essential facilities more often than do monopolies resulting from competitive behavior because a facility is normally deemed essential if it is sometimes necessary for physical entry into a market geographic market. A facility for such entry is much more likely to result from a natural advantage - for example the single mountain pass - or from scale economics - the single newspaper - then from superior competitive behaviour superior usually creates a product necessary for entry into a product market, and products are more easily duplicated than are facilities resulting from natural advantage.

The case law does not require a natural monopoly but it is likely to be a factor. Troy goes on to note that [119]

> The most important natural monopolies - electricity production and distribution, water and gas distribution, telephones, and telegraphs are public utilities, which are subject to detailed economic regulation by public authorities. Public utilities are subject to a general duty to deal on reasonable and non discriminating terms.

Courts may well be drawing to some extent on the public utility concept as they have developed the essential facilities doctrine. Not every natural monopoly can be regulated and the doctrine allows the excesses of unregulated natural monopoly situations to be avoided.

117 Sec The "Essential Facilities" doctrine Kerrin Vautier A commerce commission occassional paper March 1990 p 66.
118 Above n 112, p443,
119 Above n 112, p445.

Though a natural monopoly is not a pre-requisite to the application of the doctrine. However since MCI v AT&T [120] test the closer a market approximates a natural monopoly the more likely it is that access will be ordered. The MCI test refers to a "competitors inability practically or reasonably to duplicate the essential facility". [121] The case of the adjectives "practically" and "reasonably" make this element of the test for more objective than Hecht [122] (which merely focused on the potential competitors ability to duplicate the facility. Therefore the inquiry will focus on whether the facility can be duplicated - though it is unlikely to be totally objective. Merely because a particular competitor seeking access cannot duplicate the facility does not mean that access will be ordered; it may be practical and reasonable to duplicate it notwithstanding the;at firms inability to do so. An inquiry into the practicality and reasonableness of duplication if an inquiry into the characteristics of the monopoly. Though merely because it is unreasonable and impractical to duplicate the facility does not mean that the facility is located in a natural monopoly.

Essentiality

Hecht required that the facility be essential in the sense that "denial of its use inflicts a source handicap on potential market entrants" [123] MCI tightened this requirement somewhat saying [124]

> since the word "essential" is a terms of ordinary meaning and since the instruction explained that the facilities involved must be those a firm needs in order to compete, the jury was given adequate guidance.

If a firm can compete without the facility it is not essential.

120 Above n 87.
121 Above n 89.
122 Above n 52.
123 Above n 55.
124 Above n 89.

Competitor/Non-Competitor

The MCI list refers specifically to competitors seeking access[125]. This is an area which is most unclear.
Official Airline Guides Inc v Federal Trade Commission [126] found that commuter airlines had no claim to be included in the airline guide as the guide in refusing the listing was not seekng to maintain its own monopoly.[127]

> We think that even a monopolist as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not at coercively, retains this right [to choose with whom it will deal].

Ratner argues that the rule should apply in a similiar manner to both competitors and non-competitors[128]. He notes that a rule which presented denials to competitors but not non-competitors provides a truly preverse incentive for an iintegrated facility to dis-integrate - so that it might deny access to alot are not non-competitors in order that it might re-integrate and monopolize both markets[129]. This is perhaps unlikely to actually happen but does show the possible illogical results nicely.

125 Above n 89.
126 630 F.2d 920 (2d Cir 1980).
127 Above n126 p927.
128 Above n 107 p362.
129 Above n 107 p362.

The Remedy

The remedy which the doctrine provides has been trenchently utilised. Rule for instance says [130]

> ... the courts through which the antitrust laws must be enforced are simply not equipped to regulate prices and specific terms of trade. It is practically impossible for a court to determine the reasonable price for the product or service controlled by a bottleneck monopolist, particularly since a federal courts jurisdication is limited to specific "cases and controversies" brought to it by injured parties ... Moreover, courts and enforcement agencies take the specialized resource such as a staff of enquiries and accountants, necessary for effective regulation. And courts are simply not set up for the enquity, evoloutionary decision-making that is necessary to regulate prices in an industry subject to constant changes in technology and consumer preferences.

The MCI test [131] referes to access on non-discriminatory terms which in this context is probably a synonyem for fair and reasonable. However the doctrine is likely to be in situations where there is no other customer

130 "Antitrust and Bottleneck Monopolies: The Lessons of the AT&T Decree" Remarks before the Brookings institute, Developments in Telecommunications Policy, 1988. Washington, Department of Justice, October 5 1988, p5.

131 Above n 89,

to compare it to. Nevertheless Ratner is more optimistic about courts ability to remedy a refusal to deal the states [132]

> unquestionably, determining the appropriate price for access at any given time ordinarily will be rather complex. Courts are not necessarily incapable of dealing with the problem, however. Many courts in antitrust cases have in fact undertaken "regulatory" remedial devices, so the idea is not particularly novel. Given an inclination by some courts to get involved extensively in any event, articulating that prices must approximate a competitive, level may simply service the purpose of helping to define a reasonable price.

He goes on to note that courts are often involved in difficult problems and that forming an order for the terms of access to an essential facility is n more difficult than some of the damages calculations which they are asked to make.

It may be that given willingness by the courts to become involved in what may amount to ongoing regulation the parties willingness to negotiate a price and thereby avoid the courts, and the costs associated with their fixing a price, may be increased somewhat. If a monopolist knows a duty to deal will be imposed the national monopolist may well negotiate access terms aware that the conditions of access imposed by the court may be less favourable.

132 Above n 107, p376.

The problems of granting a remedy are not insummountable. There will be costs associated with courts ordering access - the price is likely to be more favourable to one party than to the other compared with the competitive price. This cost will usually be negligable to the cost of denying access. Furthermore the existence of a remedy may, by prompting negotiation, avert the need for it in many situations.

An Effect Test?

The court in Byars reduced all monopolistic refusals to deal down to an effect test [133]. If the refusal was unreasonably anticompetitive then it should be illegal. Commentators have picked up on this. Chapman argues that [134]

> formal adoption of a rule of reason test similar to the one proposed by the Sixth Circuit in Byars would remedy the weakness of the current approach. Antitrust analysis of a monopolists refusal to deal should focus on the competitive effects of the refusal to deal, rather than on whether the monopolist is the owner of a unique reason or is motivated by an anticompetitive purpose, or whether its refusal is directed at a competitor or noncompetition.
> ... In contrast with current approaches, the proposed test ignores the monopolists motive for refusing the deal; instead the test focuses directly on the refusals impact on competition.

Areeda and Hovenkomp also stress competitive impact. They noted that[135] ... no one should be forced to deal unless doing so is likely substanially to improve competition in the marketplace.

133 Above n70.
134 Above n104, p1131.
135 Above n18, 676.

Their point is one which fits well within the MCI analysis. In the situation where a number of competitors have access to the facility and compete with the facility and one putative competitor is denied access it is unlikely an essential facilities claim would succeed. Competition probably would not be improved if access were ordered. Furthermore in a situation where a monopolist is willing to sell access to some but not others there may well be good business justifications behind the decision to deny access.

The typical essential facility situation involves only one competitor seeking access. Ordering access will, in the vast majority of situations improve competition. The MCI test works in this situation. In more complete situations it may not be as effective. To incorporate a competitive benefit-detriment test would result in a reasonably difficult balancing act involving much self serving expert economic evidence without improving the test in the more common cases. At the same time in complete cases competitive effects would seem to become an important policy factor; even within the MCI framework.

The American Doctrine - Summary and Conclusions

Some doctrinal clarity has emerged in American essential facilities law. It is aimed at situations where access to a facility is necessary to compete in another market. This facility should be under monopoly control and often will be a natural monopoly. That the doctrine refers to facilities is no accident; it probably is not appropriate in situations where a competitor or customer has been denied a product or good which is an essential input. It is a somewhat limited concept and there are difficulties with extending

lt beyond situations where access is sought to an essential facility located in a natural monopoly. The most difficult aspect of the doctrine is the basis in which the terms are fixed. The MCI test refers to non-discriminatory terms, however in many cases there will be nothing to compare the terms against. Nevertheless this problem is surmountable. Courts are capable of fixing prices and terms and willingness for them to do so will encourage the parties to negotiate.

The doctrines role is easier to explain than to classify. It may have no independent significance and be merely a label. In New Zealand and Australia the tendency has been to treat it as a common law doctrine. This is probably incorrect. The difficulties inherant in refusals to deal are compounded by Section 2 of the Sherman Act which it comes from. This has been described as the "wishing well" if antitrust law. As commentator noted ease of application has never been the hallmark of section 2. The Sherman Act covers drafted in wide terms with the goal of allowing courts to develop a common law of antitrust. The doctrine is one interpretation of a wide section. It may not have been specifically legislated for but is the kind of development the Sherman Act was designed to foster.

Areeda and Hovenkqmp regard it as merely being a part of the law of monopolisation [136] - a label without independent significance. In this they are probably correct. The doctrine stands alongside monopoly law as it applies to refusals to deal and covers those areas where divestiture would be 'unthinkably ineffectient'.

In terms if the intent required it is not as Hecht appeared to suggest a per se offense. Courts allow business justification to be raised against a duty to deal with a customer or competitor. Effectively this amounts to a denial of the monopolist of an essential facility to unreasonably refuse to deal. This at the end of the day is probably the same as the purpose tests intent to "maintain a monopoly".

136 Above n 106.

The Doctrine in Australia

New Zealand's Commerce Act 1986 draws considerably from the Australian Trade Practices Act 1974[137]. In particular section 36 of the Commerce Act owes much to section 46 of the Trade Practices Act. Section 46 reads

> Misuse of market power
> 46.(1) A corporation that has a substantial degree of market power in a market shall not take advantage of that power fir the purpose of -
> (a) eliminating or substantially damaging a competitor or a body corporation in that or in any other market
> (b) preventing the entry of a person into that or any other market
> (c) deterring or preventing a person from engaging in competitive conduct in that or in any other market

If the doctrine is to be introduced into Australian law it will be via section 46. The leading case is Queensland Wire Industries v Broken Hill Proprietory Co Ltd[138]. BHP and Queensland Wire (QWI) were the two leading competitors in the rural fencing industry. Both were successful though BHP were (and are) far larger. In respect of star-picket fencing BHP were vertically integrated from production to retail. This monopoly stemmed from their ownership of the only steel mill in Australia capable of producing Y-Bar steel which was the raw material from which star-picket was made. They had never supplied Y-Bar to anyone. QWI tried to get BHP to supply Y-Bar to them so that they could compete with BHP in the market for star picket. After refusing to supply at all BHP agreed to supply at a price which would ensure QWI was not competitive. Having failed to negotiate a supply QWI tried to litigate its way to one. It alleged an abuse of monopoly power under section 46.

137 Land "Monopolisation: The practical implications of section 30 of the Commerce Act 1988" 18 VUWLR (1988) 51,53.
138 1989 ATPR 40-925.

At the first instance this was rejected.[139] On appeal to the full federal court the doctrine was argued and emphatically rejected. The emphaticess of the rejection has thrown the doctrine into doubt in Australia. The court said[140]

> One mitigation or qualification of the requirement of intent by monopolists who refuse to deal may have in the development of the so called 'essential facilities doctrine', beginning with United States v Terminal Railroad Association of St Louis ... This was the view expressed by the Court of Appeals (Sixth Circuit) in Byars v Bluff City News Co. Inc (see also "Refusals to Deal by Vertically Integrated Monopolists")
> This is important for the present case because QWI relied on these authorities for the general proposition that as a general rule a monopolist may deal or refuse to deal with whom he pleases, this is not so where he controls an "essential facility". If he does control such a facility he is submitted, under a duty to give access to that facility to competitors and BHP's control of Y-Bar is to be likened to control of an essential facility.
> We do not accept this submission. First, it is not readily accommodated to the terms of sec 46 itself and it is those terms which govern this case. Secondly, as we have mentioned, the "essential facility" doctrine evolved as a gloss on the succint terms of the Sherman Act. Thirdly, we have some difficulty at least in a case where a monopoly of electric power, transport, communication or some other "essential service" is not involved in seeing the limits of the concept of "essential facility", in Fishman v Wirtz it was a sports stadium in Chicago. Fourthly, even if there be such a doctrine, there is a particular difficulty where the aid of the court is sought to oblige the respondent to accept the applicant as a customer. We were referred to Otter Tail Power Co v United States.
> A wholesale supplier of electricity had refused to supply electric power to an electric utility corporation which had no other source of supply. The supreme court held that the supplier had controvened sec.2 of the Sherman Act. But this is some force in BHP's submission to us that the existence of a federal regulatory authority may have made all the difference in that case working out the effects of the decision in the supreme court. In any event, the case has attracted forceful criticism in the United States... Fifthly, in applying the "essential facility" doctrine there would appear to be a need to consider the impact upon it of another doctrine, that of upholding :legitimate business purpose"

139 1987 ATPR 48-806.
140 1988 ATPR 49,065, p49-076.

> ... Finally there is also force in NHP's submission that the "essential facility" cases involved discriminatory refusals to deal rather than, as in the present case, a "vertically integrated" monopolist who had refused to deal at all in an intermediate product and committed it solely to its own manufacturing operations. In the United States this has been described as a largely unexplored topic...
> For these reasons whilst we have derived assistance from the United States authorities by way of comparison with and contrast for sec 46 we do not find them to be of any compelling guidance as to the construction of that provision.

The Federal Courts reasoning is, as Dr Warren Pengilley[141] has pointed out, somewhat flawed. The courts analysis of the doctrine and its possible application within the framework of section 46 is simplistic. The court observed that the doctrine cannot readily be accommodated within section 46. This issue should have been whether or not the doctrine was compatible with section 46 and not whether it is easily or readily accommodated. The reference to the doctrine as a gloss on the Sherman Act overlooks that one of the purposes of the Act was to allow American courts to develop a common law of antitrust[142]. The approach of this Australian legislation appear to have been similiar. While the Trade Practices Act was before Parliment Attorney General Senator Lionel Murphy said:[143]

> legislation of this kind is concerned with economic consideration. There is a limit to the extent to which such considerations can be treated in legislation as legal concepts capable of being expressed with absolute precision. Such an approach leads to provisions, particularly those describing the prohibited restrictive trade practices, which have been drafted along general lines using, where possible, will understand expressions. I am confident that this will be more satisfactory. The courts will be afforded an opportunity to apply the low in a realistic manner in the exercise of their traditional role.

141 "Is the "Essential Facilities" Doctrine of Trade Practices Law too Hard for the Federal Court of Australia or is there some hope still remaining. An analysis of Queensland Wire v BHP before the full Federal Court.
142 Above n104, p1134.
143 Australian Parlimentary Debutes (H of R) 25 Oct 1973 pp2734-5.

Which is of course the development of the law largely by analogy. The doctrine, even if seen as a gloss upon legislation - not an interpretation of it, would seem to fit into what Senator Murphy envisaged.

The third point appears to create a loophole for essential services. Certainly it appears that the federal court could accept the potential applicability of the doctrine to them. Nevertheless they are concerned at the fluidity of the concept, Fishman v Wirtz,[144] they say, illustrates the dangers.

Fishman v Wirtz[144] involved a somewhat similar situation to Hecht. Rivals were trying to buy the Chicago Bulls basketball team. The defendant through a monopoly of the only suitable stadium very effectively excluding rivals from bidding. There was more than then denial of access to the stadium the Seventh Circuit found that ..."the refusal to deal was not merely the uniliteral act of Arthur Wirtz but rather was a critical element in a common scheme to prevent IBI from arguing the Bulls"[145]. The case really is a good example of a situation where application of the doctrine was justified. It may seem odd that antitrust law should become involved in sport. The Federal Courts reaction to the case is more illustrative of cultural difference between Americans and Australians than anything else, it did, after all, involve millions of dollars.[146].

144 807 F2d 570 (1986).
145 Above n141,p9.
146 Above n141,p9.

The courts fourth point appears to be the difficulty of giving a remedy. The court refers to Otter Tail and after giving an incorrect summary of the facts points to the presence of a regulatory authority in that case which "may have made all the difference". As noticed earlier, the importance of regulatory authorities in some cases is hard to determine. Nevertheless it would seem odd to deny a remedy in a deserving case because in another the court had a regulatory authority to work it all out.

The fifth point - the need to examine the doctrine of "legitimate business purpose" ignores MCl v AT&T and the test formulated therein. The test includes the requirement that it is feasible to provide the facility and the competitors inability to practically or reasonably duplicate the facility. These along with the business justification from Hecht v Byars all equate to "legitimate business purpose". The test includes the very element which the federal court thought must be examined. Applying the essential facilities doctrine will involve looking at the business purposes behind the refusal to see if they are legitimate.

The final point amounts to a recognition that the real problem with the application of the doctrine in this case is the facts of the case. One might have thought that Queensland wire had conceded this from the start by arguing that this case was to be analogised to the essential facility type of case and not arguing that it was an essential facilities case. The federal courts decision nicely shows the problem in trying to decide cases in this area by analogy to previous cases.

Dr Pengilley regrets the generality with which the Federal Court expresses itself[147]. It virtually rejected the doctrine out of hand when it was quite clear that whatever the status of the doctrine in Australia it was inapplicable here.

The doctrine is about access to facilities and not the supply of the product.[148]

The high court of Australia reversed the Federal court largely on the ground that BHP is not dealing with QWI in Y-Bar had taken advantage of its market power for the purpose of preventing QWI's entry into the market[149].

The Court said

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

The High Court in Queensland Wire abandoned any vestiges of a moral wrongfulness element besides the purposes specified in para's (a) to (c).[150]

> The question is simply whether a firm with a substantial degree of market power has used that power for a purpose prescribed in the section, thereby undermining competition, and the addition of a hostile intent inquiry would be superfluous and confusing.

147 Above n141, p12.
148 Above n141, p13.
149 Above n138, p50,011.
150 Above n138 p,50,00.

The High Court was silent on the essential facilities doctrine. Though it is easy to read too much into silence it may well be that essential facilities are to be treated in the was as monopolies generally. The above quotation is certainly broad enough to cover essential facility situations and the high court in Queensland Wire ws willing to deal with a refusal to deal with injunctive relief to force dealing (though it used the appellate courts perogative of remitting it back to the Court of first instance for the details to be worked out).

Though the doctrine may not enjoy an independent existence in Australia the substantive question of access to essential facilities appears to have been answered. The High Court has gone somewhat further them the doctrine, carefully delimited, would by extending the duty to deal to manufacturers.

The position of the High Court is similar to that of the European Commission under article 86 of the Treaty of Rome [151].

151 Article 86 provides that:
Any above by one or more undertakings
of a dominant position within the common market or a substantial part of it shall be prohibited as incompatable with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices r other unfair trading conditions
(b) limiting production, markets or technical development to the prejudice of consumers
(c) applying dissimition conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage
(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligation which by their nature or according to commercial usage, have no connection with the subject of such contracts.

The article is the basis for the dominonce tests of section 46 of the Trade Practices Act 1974 and the Commerce Act 1986 so cases under it are likely to be useful in the interpretation of our law. In London European/Sabena where Belgium Airline refused a private Brittish airline access to its computerised reservation system[152] which was found to be in a dominant position in the market. The Commission found that the refusal was motivated by a desire to prevent the Brittish Airline competing certain routes. The Commission ordered access to be given. No reference to the doctrine was made standard monopoly law was applied to achieve this result. The approach is very similiar to that of the Australia High Court though it concerns access to a facility and not a product.

The status of the doctrine as an independent concern is in doubt in Australia, though the relevance of imposing duties to deal on the suppliers of essential services has been recognised. More importantly it appears that standard monopoly law to refusals to deal generally will cover any refusals to deal involving essential facilities.

152 London European/Sabena OJ 1988 LS17/47 European Commission CCH Common MArket Reporter at section 95,015.

Regulatory views of the Doctrine

The Australian Trade Practices Commission has recently endorsed the doctrine[153]. They note that it could be useful in cases "akin" to Queensland Wire. They have noted that it is particularly useful in situations where the facility enjoys a "degree of protection"[154]. The Trade Practices Commission did not that[155]

> ... to alleviate concerns about the possible effect on research and development, there may be a need to confine the term (essential facility) to firms controlling scarce resources or essential commodities, such as communication networks and airports.

This was written before the High Court decision in Queensland Wore. The decision removed that right to refuse to deal for the specified anticompetitive purpose from all firms with a substantial degree of market power.

In February 1990 the Trade Practices Commission returned to the doctrine. The definition of essential facilities given was[156].

153 "Misuse of Market Power" Submission by the Trade Practices Commission August 1988 to the inquiry into Merges Takeovers and Monopolics by the House of Representitives Standing Committee on Legal and Constitutional Affairs.

154 Above n154 - Quoted in "The Essential Facilities Doctrine" above n117, p28.

155 Mergers, Takeovers and Monopolics : Profiting from Competition? Report of House of Representitives Standing Committee on Legal and Constitutional Affairs, Canberra, 1989 (Griffiths Report), para 4.6.23.

156 Trade Practices Commission 1990, p40.

> an essential facility is created when a natural monopoly exists at a particular point in a chain or production or distribution and this cannot be bypassed.

The paper goes on to note that Queensland Wire will operate to force monopolists in charge of essential facilities to gave access unless there is a "compelling commercial reason" for the denial. The Trade Practices Commission felt that Queensland Wore condemned leveraging from one market to another and that the use of an essential facility to do this is under present law illegal.

The Griffiths Committee on Monopolics, Takeover and Mergers looked at the possibility of specifically legislating for the doctrine. It came out against the proposal[157]. They stated that Trade Practices Act already contained provisions capable of dealing with refusals to deal and there are problems with the definition and application of the doctrine. The problems of terms of access, of the incentives to compete and of enforcement of remedy exist whether the doctrine is specifically legislated for or access to essential facilities or whether normal monopoly law is relied upon.

The Griffiths Committee saw the fact that the doctrine had not been specifically legislated in the United States as a telling point against the doctrine[158]. As has been noted the Sherman Act was drafted to encourage judges to develop the law. The essential facility doctrine is one of the results of that.

157 Above n155 para 4.6.32.
158 Above n158.

To criticise the doctrine as not having been specifically legislated for it to utilise the drafters of the Sherman Act for not having perfect presciesence of the developments of the twentieth century - and the legal developments necessary to cope with them. Instead the drafters of the Sherman Act should be praised for not attempting to lock the law into 1890 but allowing room for it to develop. Furthermore the essential facilities doctrine should be dealt with on its merits not its legislative history.

The Griffiths Committee notes that there are, in fact, concerns that legislation recognition if the doctrine may cast to wide a net and deter corporate incentive.[159] Which is of course a fair point however it of course ignores the developments which soon followed in the Queensland Wire. At present in Australia all refusals to deal are dealth with under normal monopoly. Products are dealt with in the same way as, say, sub-transmission

One might think that the legislative refusal to deal with net was to wide now, without the doctrine. It may be that in the future by recourse to an essential facilities doctrine of some sorts and a recognition that different concerns apply with respect to facilities and products that the present "duty" to deal may be narrowed somewhat.

159 Above n117, p32

Conclusions in Australia

At present in Australia there is no essential facility doctrine, nor is there any need for one. All monopolics whether natural or not have the same applied to tem. It may be that in future Queensland Wire will become restricted to natural monopolics. At present, the Australian High Court has committed the whole refusals to deal area to be dealth with by a mechanical application of section 46 of the Trade Practices Act. This would appear to cast for too wide a net and it may be that in future recourse to some notion of "essential facilities" will narrow the "duty to deal". This in light of the American history of the doctrine seems a remarkable proposistion, nevertheless the current state of the law any force this role on the doctrine.

THE DOCTRINE IN NEW ZEALAND (5)

The background to the debate in New Zeland is provided by the State Owned Enterprises Act 1986 and the fourth Labour Government's subsequent privatisation programme. This has entailed deregulation of many essential services. This, especially in respect of telecommunications and the transmission of electricity, has created concern over access to these essential services. This concern has resulted in consideration of the application of the essential facilities doctrine in New Zealand.

At the same time the Commerce Act 1986 was enacted. This has substantially altered New Zealand's competition law. Central to this Act is section 36 which deals with misuse of market power. Section 36 was modelled on section 46 of the Australian Trade Practices Act [160]. Section 36 was not developed with the State Owned Enterprises in mind, however two of the most important of them, Electricorp and Telecom, have apparently accepted its applicability to them [161]. If the doctrine is good law in New Zealand or if there are alternative means of securing access to essential facilities it will be through section 36.

The Ministry of Commerce's 1989 discussion paper entitled "Guarantee of Access to Essential Facilities" [162] states [163]

160 Above n 137.
161 Review of the Commerce Act 1986: Discussion Document. Department of Trade And Industry 1988 (quoted in Essential Facilities Doctrine above n 117, p 59).
162 Guarantee of Access to Essential Facilities. Ministry of Commerce 1989.
163 Above n 162, p 27.

> [t]he Government has decided that section 36 of the Commerce Act should be relied upon as the basis for guaranteeing access to essential facilities in appropriate circumstances.

The paper does note the other options to guarantee access to such facilities. These are industry specific regulations and the introduction into the Commerce Act of provisions which will explicity compel controllers of essential facilities to grant access. These are last resort options to be used on the failure of general competition law [164]. The paper notes the costs associated with industry specific regulation and states [165].

> [e]vidence suggests that detailed intervention by way of industry specific rules does not produce more efficient outcomes than the market operating within the constraints of general competition law.

There are then disadvantages to industry specific rules without there being advantages. The paper also notes that the Government's willingness to use industry specific regulation as a last resort amounts to a significant threat [166]. The implication appears to be that those in control of essential facilities may be more inclined to 'play along' with competition law. certainly in terms of their business freedom it is a lesser evil that industry specific regulation.

The paper examines section 36 and then looks at ways to enhance its effectiveness. It gives three ways of doing this which it describes as: [167]

1 Information disclosure
2 Desgination
3 Reorganisation of Structure

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164 Above n 162, p 6.
165 Above n 162, p 7.
166 Above n 162, p 6.
167 Above n 162, p 22.

The first option involves requiring controllers of essential facilities to disclose information such as financial statements, pricing of access, disclosure of current terms and conditions and any planned changes. Information disclosure is designed to enhance section 36 by lowering the costs for potential entrants. They would have the relevant information above the facility and would not have to give up their own commercially sensitive information to get it [168]. However in practice if a monopolist had never given access to any one and denied that it was required to the information thus disclosed may not be of much assistance.

Designation involves changes to the Commerce Act being made to allow facilities to be designated "essential facilities" where certain criteria are met [169]. They would then be required to provide access on terms fixed by the commerce Commission. Such provisions would parallel section 36 and be used as a last resort. This method is certain in that it ensures access will be guaranteed: however it has quite high costs associated with it. The Commerce Commission would effectively replace competition and general competition law as the constraint upon the designated firms activities [170]. The final option -'reorganisation of structure' - involves the Government when selling assets that include intergrated essential facilities selling them separately.

168 Above n 162, p 22.
169 Above n 162, p 23.
170 Above n 162, p 24.
171 Above n 162, p 25.

(i.e. dis-intergrating them) and then relying on the merges and takeovers provisions of the Commerce Act to keep them separate [171]. This reduces the possibility of a controller of essential facilities using the market power of that facility to distort competition in an up or downstream market. This is the least preferred option. Separation is not always possible and where it is the costs associated with it are high. The separation of a once intergrated natural monopoly may make it less efficient than it previously was due to impaired information flows [172]. Futhermore unless the Commerce Commission is given the power to order divestiture [173] it will be a remedy of very limited application - only applying to ex-governmental agencies.

Reliance On An Unmodified Commerce Act

At present the main concern with relying on section 36 to provide for access to essential facilities appears to be the uncertainty associated with it. The Commerce Ministry's essential facility paper states [174].

> ...there is some uncertainty as to the scope of section 36 of the Commerce Act in relation to proving 'purpose'. There is also uncertainty in terms of the outcome of a Court decision, whether the Court will make a determination on what terms and conditions should apply and what that determination will be.

Given the Government's apparent determination to 'guarantee' access to essential facilities the question becomes whether section 36 is adequate to ensure access in appropriate situations. To determine this the cases under section 36 in this area must be examined.

171 Above n 162, p 25.
172 Above n 162, p 25.
173 This appears most unlikely; Above n 162, p 26.
174 Above n 162, p 20.

First it is interesting to note the framework of the Ministry of Commerces consideration of the problem. The Ministry paper states that [175]

> [n]atural monopolies and essential facilities, or as they are sometimes referred to bottleneck facilities, are very similar. An essential facility will always be a natural monopoly but a natural monopoly may always be an essential facility. This paper is concerned with the case where essential facilities and natural monopolies are one and the same. The distinction lies in the type of customers served. An essential facility serves other business customers and natural monopoly may well do so but could also be a firm whose product was sold direct to consumers.

The paper goes on to note that while business competition is the primary concern the underline policy goal is "consumer wellbeing" [176]. The Ministry of Commerce have thus explicity linked concerns about natural monopolies with using section 36 to force undertakings to provide others access to their facilities.

The relevant parts of section 36 state:

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

The issue of access to essential facilities has arisen directly or indirectly three times since the Commerce Act came into force.

Auckland Regional Authority v Mutual Rental Cars Limited [177].

This was the first New Zealand case to explicity deal with the essential facilities doctrine. The Auckland Regional Authority

175 Above n 162, p 1. The definition of natural monopoly used in the Ministrys paper is where "production is most efficiently done by a single firm or entity". (n 162, p 2.)
176 Above n 162, p 2.
177 [1987] 2 NZLR 647.

ran Auckland airport. To maximise the profits from rental car concessionnaires only two were granted - to Hertz and Avis. The contracts granting them contained a restrictive covenant which prevented the ARA from granting further concessionnaires. The ARA bought the proceedings to determine whether the restrictive covenants were in breach of the then recently enacted Commerce Act 1986. This was motivated by the ongoing dispute between Avis and Mutual rental cars (Budget). Barker J began his judgment by stating [178]

> [t]he coming into force of the Commerce Act 1986.... has opened up a new battle field in the protracted litigation war involving two rental car operators in New Zealand....

Barker J found that "as a matter of fact and commercial commonsense" [179] there was a market for the provision of rental car services at Auckland airport. He also found that the contracts substantially lessened competition and therefore breached section 27.

Budget had argued that in the market for the provision of rental cars at Auckland airport the concourse was an essential facility and that the ARA was in a dominant position in the market for the granting of concessionnaires. Dominant position is defined in subsection 3(8) and refers to "a person...in a position to exercise a dominant influence over the production, acquisition, supply or price of goods or services in a market ...". In light of that definition Barker J said it was "difficult to see how ARA is other than in a dominant position" [180] in both the market for rental car consessionnaires at Auckland airport and the

178 Above n 177, p 649.
179 Above n 177, p 677.
180 Above n 177, p 678.

market for hiring cars at Auckland airport.

Barker J immediately after considering whether preventing Budget from entering the market for hiring cars at Auckland airport was a substantial purpose says [181]

> Mr Gault quoted a number of helpful American cases on what is called the "bottleneck facility". This term describes a facility which is encapable of duplication and circumvention to which others must have accesss if they are to compete in a given market.
> The exclusion of others by means of the bottleneck facilities is anti-competitive; it should be eliminated by providing for for the admission of others ... if they met reasonable criteria.

He then quotes the Hecht enunciation of the doctrine [182] :

> "...'where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility'....To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. Necessarily, this principle must be carefully delimited; the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately".

He then states: [183]

> I adopt with respect that dictum which seem appropriate to the present situation.
> After consideration of the powerful United States authorities, I consider that Mr Gault is correct to submit that a gateway facility is likely to beget a separate and identifiable geographic market and that exclusion from that market by means of the gateway, prima facie indicates anti-competitive intention unless the exclusion can be explained by reference to reasonable contraints in the circumstances: an agreement to exclude others arbitrarily must be taken as having the purpose to monopolise. Although ARA's motive may have been to maximise rent, by accepting only two rental car operators, its means of achieving this object was the use of its dominant position to exclude competitors of the successful concessionn-aires. The collateral contracts therefore had the purpose of excluding other potential concessionnaires.
> I emphasise that ARA does not necessarily have to accept any applicant for a rental concession, including Budget. The availability of space, level of service proposed for the public and other consideration will operate as reasonable constraints
> I emphasise too that the collateral contracts were possible at

181 Above n 177, P 679
182 Above n 177, p 680
183 Above n 177, p 680

> the time they were entered into. It is the radical change in the law affected by the Act which has altered things.

It is clear from that that a common law essential factilities doctrine was not applied. It is an application of section 36 informed by the American essential facilities doctrine. The features of this application appear to be:

1. If a firm with a dominant position in a market controls a essential facility (being a facility which a competitor cannot duplicate and which denial of access to inflicts a severe handicap on the competitior seeking access);
2. The denial has as one of its purposes excluding competitors;
3. This purpose cannot be justified in the circumstances an arbitrary conclusion must be taken as having the purpose to monopolise.

In Fisher & Paykell v Simpson Appliances [184] Barker J (along with Gaire Blunt as lay assessor) returned to the question of American law and its correct usage in New Zealand. The court quoted from the decision in the Mobil arbitration to say that [185]

> [w]hile the language and structure of the Australian and New Zealand Acts are very similar, though certainly not identical there is a less close relationship between New Zealand and US law. Nevertheless we recognise that American anti-trust cases may suggest lines of analysis of the facts that well be pertinent in application of New Zealand provisions.

This is what Barker J appears to have done in ARA - used American case law to inform the application of the Commerce Act.

Kerrin Vautier, of the Commerce Commission has criticised ARA trenchently. She criticises the use of a market for rental car hire at Auckland airport as the relevant market. She states [186]

> [h]aving considered the relevant geographic market - for the provision of rental car services to the public - to be a national one, the judgment then resorted to the concept of a sub-market at Auckland airport, notwithstanding, the problems associated with the sub-market concept.

184 Unreported CL41/89 and 42/89 27.4.90 High Court Wellington. The Mobil arbitration was conducted at the International Centre for Resolution of Disputes at New York and concerned the Synfuel Plant.
185 Above n 184, p 67.
186 Above n 117, p 40.

While Barker J does look at the national market he prefaces this examination with the remark "I now endeavour to look at the way the rental car market operates" [187]. His'consideration' of the national market is to examine the dynamics of the rental car market in order to determine what the relevant market is. This is a very different thing from saying the relevant market in this case is the national market. Nevertheless the relevant market used by the Court in the case was geographically very small. This certainly increased the importance of the Auckland airport concourse with respect to the market. It should,however, be pointed out that the only expert economic evidence came from Dr A E Bollard for Budget"(who gave his evidence with authority and whose qualifications were impressive")[188] and was that there was a separate market for rental car hire at Auckland airport. [189]

Vautier has also criticised the finding that the concourse was essential [190]. She notes Barker J's comment that "[t]here is no acceptable substitute for the convenience of collecting a car and making the necessary arrangements at the terminal" [191], and points out that whether or not something has an acceptable substitute is a subjective enquiry [192]. She says [193]

> [t]he market [or the sub-market] definition adopted in this case clearly influenced the position adopted in relation to the essential facilities doctrine: the gateway facility was necessarily "essential" if the rental car market was confined to the facility itself. And yet the actual and potential ability to compete for rental passengers off-site, which perhaps was not an "acceptable" form of substition for some, casts doubt over the essentiality of the airport facility in that context.

187 Above n 117, p 41.
188 Above n 177, p666.
189 Above n 177, p655.
190 Above n 177, p664.
191 Above n 117, p 41.
192 Above n 117, p 41.
193 Above n 117, p 42 (original brackets)

The rather low essentiality requirement in ARA probably results from Barker J using the Hecht enunciation of the doctrine with its reference to denial inflicting a severe handicap on competitors [194]. If the MCI v AT&T test had been used then the question would have been could Budget compete in the market without access to the facility. This may have led to a different result. Pengilley notes that "[a] hallmark of "essential facilities" cases is that without the facility, it is simply not possible to be in business [195].

Chatham Islands Fishermans Co-operative Co. Ltd. v Chatham Islands Packing Co. Ltd.

The Defendants were holders of a Wharf Licence. The plaintiffs wished to use the wharf to land fish. The trial was an interim injunction hearing therefore the plaintiff's had to show that on the substantive point there was a serious issue to be tried and that the balance of convenience favoured the granting of the injunction (though this was not necessarily the sole factor in the exercise of the judges discretion).

Eichelbaum J found that the balance of convenience came down decisively against giving the injunction which would have granted access.[196] The judge agreed with the description of the settlement surrounding the wharf as a company town [197] and Eichelbum J noted the defendants deposition that to provide access might put them out of business in that settlement and that the settlement Kaingaroa might lose the essential services that the defendant provided [198].

The business justification and public policy arguments won.

194 Above n 54 and text accompanying
195 Above n 141, p 13.
196 Unreported CP 874/88 22.11.88 Eichelbaum J High Court Wellington
197 Above n 196, p 15.
198 Above n 196, p 14.

These arguments did not form part of the section 36 analysis (where a serious issue to be tried was found), rather they informed the exercise of the discretion to give a remedy after the more substantive first step of the test for interim injunctions had been satisfied.

In this case the essential facilities doctrine is not mentioned. The Court simply found that the refusal to grant access may amount to abuse of a dominant position under section 36.

Union Shipping v Port Nelson [199]

The deregulation of ports led to the newly created port companies rapidly adjusting to the new deregulated environment in which they fouond themselves. The port of Nelson (PNL) lost the monopoly of harbour work which the Nelson Harbour Board had had. PNL still had a fleet of fork lifts and drivers which it wished to fully utilise. PNL circulated a port user licence which largely embodied the pre-deregulation system. This would force shipping companies and stevedoring companies to use port company fork lifts and port company employees on Nelson's waterfront. The plaintiffs refused to sign the licence. PNL wrote to them informing them that unless they adhered to the status quo they could not use the port of Nelson wharves. A union shipping vessel went to Nelson, in part to test their resolve. After a series of incidents the stevedors wwere allowed to work the wharves pending the High Courts determination on the legality of the licence.

The competition law aspects of the case included a claim that the port of Nelson was an essential facility and that access to it

199 Above n 10,

was restricted by the licence or the ports alternative stipulation that a user levy be paid [200].

The expert economic witnesses for the respective sides disagreed. The redoubtable Dr Bollard for the plaintiff suggested that there were functional markets for port facilities, plant and labour supply, stevedoring and receipt and delivery markets. Dr Williams for the defants suggested one market for harbour facilities as well as all cargo operations at the wharf. The Court preferred the evidence of Dr Bollard saying it was simplier and reflected the situation there better [201]. The Court in relation to economic evidence generally said [202]

> "[t]he evidence of economists naturally has its use but in a controversial field is to be treated with the caution necessary in relation to all expert evidence."

In this case the Court was relieved from the decision as to whether PNL was dominant in a relevant market. The economic evidence of the parties agreed that PNL dominated the entirety of the markets however defined with which the Court agreed. The Court said [203]

> The port of Nelson, isolated as it is from other ports by lack of a rail connection, distance and difficult roads constitutes a natural monopoly which has made PNL dominant in all relevant markets.

By dominating the market for the provision of harbour facilities it was in a position to dominate all other markets.

The plaintiff had raised the essential facilities doctrine and the Court dealt with it. It said [204]

200 Though of course whether the levy amounts to a restriction or a deterrent to the plaintiff depends on its size and the reasons behind it.
201 Above n 10, p 78.
202 Above n 10, p 69.
203 Above n 10, p 78.
204 Above n 10, p 75.

[w]ith respect to the obviously considered utilisation of the doctrine by Barker J in ARA v Mutual Rental Cars supra, we hesitate to incorporate the entire doctrine "as is into New Zealand competition law at this point. There are five reasons.

(1.) The doctrine derives from a distinctively American social, commercial and constitutional setting. We need not expand on the social and business differences, both of type and scale, which are well enough known.....As with much American law careful adaptation may well be needed to translate it without causing distortions.

(2.) The doctrine is based upon sections 1 and/or 2. Of the Sherman Act....the American"essential facility' doctrine has started from a different statutory base. Care is necessary.

(3.) We are reluctant unreservedly to import [sic] a doctrine, both controversial and as yet untested before the United States Supreme Court, into development of New Zealand competition law at this early formative stage. A wrong turning at this point may prove painfully difficult to correct.

(4.) Some five months after delivery of judgment in ARA v Mutual Rental Cars (supra), the doctrine was criticised by a Full Court of the Federal Court in Australia on appeal in Queensland Wire v BHP ...those criticisms were not adverted to in the High Court of Australia on further appeal...The silence seems enigmatic. While we do not necessarily share all the criticisms made the desirability of alignment with Australia in this area there may be wisdom in awaiting further developments.

(5.) At risk of fatuity it is the task of this Court to interpret and apply the New Zealand Commerce Act 1986. It is not a matter of importing common law doctrine. It is a matter of obeying and applying New Zealand statute law. In that task, our preferred starting point is to look at s 36 requirements: market dominance and use for specified anticompetitive purpose. The American experience may give valuable insights, and assist assessment of potential s 36 solutions. While 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 Court under section 36 found that PNL were in a dominant position and had an anticompetitive purpose. The Court said that [205]

[t]he wider purpose of PNL was to preserve plant and manpower at optimum levels. There was, however, a substantial

205 Above n 10, p 87.

> subsidiary purpose at first to ban, and later to financially deter USSL [one of the plaintiffs] use of its own plant and drivers over common areas of activity. We find that there was a purpose of preventing or deterring competitive conduct by USSL in that respect in breach of s 36. Plaintiffs are intitled accordingly.

There was no need to order access to be given as access was already granted subject to a levy. It was the accounting method used to calculate the levy that was in dispute - there being some suggestion that the size of the levy was inflated by double counting [206]. The Court noted that it was not too late for PNL to conduct a proper cost accountancy analysis to eliminate double counting and establish a commercially appropriate level [207]. The Court was willing to order such an enquiry if necessary.

The Court noted that an analogy could be drawn between its analysis and the central facility doctrine. It said, however, that [208]

> [w]e do not rest this decision upon an essential facility analogy for all the reasons previously stated...We prefer to find that the wharf facilities in their geographic location in the Port of Nelson which is truly isolated from other ports, have created a natural monopoly which makes PNL dominant in all relevant markets. Thereby opening up statutory consequences. However, the outcome, accords with an outcome which might be expected under the principles discussed in the United States essential facility dicta and writings as in ARA v Mutual Rental Cars supra. That is not altogether surprising the Port is controlled by a natural monopoly in the sense that there can in a practical sense only ever be one body providing wharves in the area. Use of the wharves has been denied by PNL involving use of the monopolist's plant, or payment of a levy including a penal element, both damaging prospective users. It is feasible too provide the facility on fair terms, i.e. fair rental payment for shared use. So it is that while we think it unwise to rest this decision upon an "essential facilities" doctrine,the common outcome to common competition issues is on these facts perhaps to be expected.

206 The Court notes that p 59 that "[t]here is no particular concern over quantum in itself. Primary concern focuses on the possibility of double counting, through inclusion in the wharf user levy of items already charged in the wharfage.

207 Above n 10, p 97.

208 Above n 10, p 87.

The approaches of Barker J in ARA and McGechan J and Blunt Esq in Port Nelson are very similar. Both apply section 36 to a natural monopoly in way which requires access to be permitted on fair terms. Both recognise that the essential facility doctrine may be helpful. Barker J in ARA approaches the essential facilities doctrine much more positively an applies the provisions of the Commerce Act 1986 in accordance with it. There is some tension between the two cases because of Barker J's apparent use of the doctrine and the Port Nelson Courts rejection of it. The Port Nelson Court is surely correct when they say that when it says that the task of the Courts is to apply the Commerce Act 1986. They see applying the Act as being distinct from what they view as a common law rule. The key to reconciling the cases is that both apply section 36. Their differing views of the value of the American essential facilities doctrine perhaps only confused the matter, when the focus should be on how Courts are applying section 36 to the fact situations which come before them. In this regard ARA and Port Nelson are strikingly similar.

The Doctrine And The Commerce Act

Section 36 of the Commerce Act is designed to prevent use of a dominant position in a market for specified anticompetitive purposes. It seems from the cases that it does apply to refusals to deal on fair terms when that refusal is for one of the specified anticompetitive purposes. There is no need to have recourse to any common law doctrine to cope with refusals to deal.

In the United States the monopolisation provisions of the Sherman Act are in certain situations used in a way which has come to be known as the essential facilities doctrine. New Zealand

Courts have shown a willingness to draw from and refer to American anti-trust law. By examining section 36 and the way in which Courts have developed it and comparing it with the doctrine its possible to access whether section 36 is capable of providing access to essential facilities in a consistent manner.

The Commerce Act is designed to protect and enhance the competitive process in True Tone Ltd. v Festival Records [209] Richardson J in the Court of Appeal said that the Act [210]

> ...is based on the premisethat society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources.

The Court in Port Nelson said [211]

> [i]t is the permission of competition which the Court is directed to foster. Parliament, as a matter of policy, has decided benefits will flow from that course. Within that objective, the particular objectives of section 27 and 36 are clear....section 36, following in a tradition at least as old as the Sherman Act recognises that even in competitive markets dominant positions do arise which in the end can generate anti-competitive activity. Accordingly it is intended to prohibit the use of such dominant position within the market for serious anticompetitive purposes. Such provisions are directed at the protection of the concept of competition as such. They are not directed at the protection of individual competitors, except insofar as the latter may promote the former.

Section 36 has the elements of

1 Use of a dominant position in a market

2 For specified anticompetitive purposes in that or any other market.

Use

There has been some discussion as to whether a dominant firm necessarily uses its dominant position whenever it acts to injure its competitors [212]. The argument goes that when a dominant firm acts as it would in a truly competitive situation then

209 [1988] 2 NZLR 352.
210 Above n 209, p358.
211 Above n 10, p 65.
212 J Land "Monopolisation: The practical implications of Section 36 of the Commerce Act 1986" (1988) 18 VUWLR 52, 63.

those Acts are not uses of a dominant position. Thus if a dominant firm reduces its price to cost this would not be caught by section 36 whereas below cost pricing would be caught. This argument really amounts to distinguishing between ligitimate and illigimate methods of competition. In the a bove predatory pricing example the line which the dominant firm crosses over when it begins to use its market power is drawn purely arbitrarily. The point is also extremely high pothetical. It may be better to,as the Court in Port Nelson suggested, confine section 36 to serious anticompetitive uses of a dominant position.[213]

Dominant Position

Dominant position is defined in subsection 3(8) which states:

> For the purposes of section 36 and 36A of this Act a dominant position in a market is one in which a person as a supplier or acquirer of goods or services either alone or together with any interconnected body corporate is in a position to exercise a dominant influence over the production acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in a market regard shall be had to -
>
> (a) The state of the market, the technical knowledge, the access to material or capital of that person together with any interconnected body corporate:
>
> (b) The extent to which that person is contrained by the conduct of competitors or potential competitors in that market:
>
> (c) The extent to which that person is constrained by the conduct of suppliers or acquirers or goods or services by that market.

In Re Continental Can Co Inc.[214] the European Court explained the concept of dominance as follows[215]

213 Above n 10, p 65.
214 [1972] CMLR D11.
215 Above n 214, D27.

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

This explanation of dominance has been sighted with High Court approval [216]. TippingJ in Magic Millions and Elders Pastoral Ltd v Wrightson Bloodstock Ltd[217] emphasised the wide nature of the concept of dominance, saying: [218]

> [t]he very fact that there are three separate aspects which must be considered reinforces what has been apparent both in economics and law for many years, namely that market share is not the sole determinant of the presence of dominance or market power. The most that can be said is that dominance is frequently attended by a substantial degree of market power. For example a substantial market share without barriers to entry will seldom, if ever, be indicative of dominance.

Illustrative of the breadth of the concept of dominance within the Commerce Act is that in ARA Barker J found ARA dominant in the market for rental cars at Auckland airport even though they did not compete at all in that market. Nevertheless they were able to exercise a dominant influence over it by their control of the concourse [219]. An undertaking can clearly be in a dominant

216 Lion Corp v Commerce Commission [1987] 2 NZLR 682, 691: ARA Above n 177, p 679.
217 Unreported HC Christchurch 23 November 1989, CP 270/89 Tipping J
218 Above n 217, p 55.
219 Above n 177, p674.

position without being a monopolist. The essential facilities doctrine is a monopoly dependent test. There is some discontinuity between section 36 and the doctrine. Vautier notes that [220]

> [t]he first difficulty the full Federal Court of Australia had [in Queensland Wire] with the essential facilities doctrine was that "it is not readily accommodated to the terms of sec. 46 itself....". Given that the relevant competition threshold - namely, in Australia's Act, a substantial degree of market power - is part of the "terms of sec. 46 itself", then the Courts difficulty in readily accommodating within section 46 what is arguably a monopoly-dependent test, is understandable.

She then notes that with the higher threshold for market power in New Zealand the doctrine maybe "more readily accommodated to section 36 of the Commerce Act" [221]. Certainly the standard in the Commerce Act is closer to the standard required by the essential facilities doctrine than that of the Australian Trade Practices Act. However, in terms of accommodating the standard required by the doctrine as long as the standard of the other competition legislation was lower or equal to the doctrine then it should be able to accommodate this aspect of the doctrine.

A monopoly over as essential service will almost always translate into a dominant position in a market. Section 36 will also apply in situations where there is not a monopoly. If a denial of access is for a specified purpose it will be caught by the secrion as long as the refusal is by an undertakaing with a dominant position in a market.

Section 36 is also wider than the doctrine in that it applies to facilities, products and services. The doctrine however only applies to facilities. As noted above [222] different considerations

220 Above n 117, p 59.
221 Above n 117, p 59.
222 Above n 118, and text accompanying

apply to products and facilities; products are generally easier to find another source for and a dominant position in a product market is more likely to result from superior competitive behaviour than dominance resulting from control of a facility.

In dealing with the differences between the doctrine and section 36 as it applies to refusals to deal, the Courts willingness to allow American law to inform the application of New Zealand law may become important. It maybe that reference to the doctrine will operate to narrow rather than to broaden the application of the Commerce Act. This perhaps, as noted with the Australian situation [223], is an unexpected role for the doctrine. It is, however a potentially useful one because of the potentially wide reach of section 36.

Market

The question of market is a vexed one in competition law. In ARA Barker J relied on the notion of substitutability to find that there was a market for rental cars at Auckland airport [224]. The Commerce Amendment Act 1990[225] section 4 altered the definition of market to refer to substitutability. Section 3 of the Commerce Act now provides that

> ....reference...to the term 'market' is a reference to a market in New Zealand for goods and services as well as other goods and services that are substitutable for them as a matter of fact and commercial commonsense.

223 See text under heading'Conclusions in Australia'
224 Above n 193.
225 1990, n 41.

If there are no substitutes for a facility"as a matter of fact and commercial commonsense" then the relevant market will be restricted to the geographic market controlled by the facility. The use of narrow geographic markets is a feature of both ARA and Port Nelson [226]. If control of a facility is to give market dominance then the geographic market must necessarily be limited to the area in which there is no effective substitute for the facility.

Ratner, in the American context, suggests that the test of whether a facility is essential or not is a "lack of constraining substitutes".[227] This is very similar to the Commerce Acts substitutability requirement. Though the Commerce Act will apply to refusals to deal which the doctrine would not, in their application to essential facilities they both determine the market power threshold question by looking at the alternatives to the facility [228].

Purpose

To breach section 36 a dominant firm must act with the purpose of "eliminating, deterring or restricting" another trader. Some doubt exists over whether or not these purpose requirements are determined subjectively or objectively. Tipping J in Magic Millions said [229]

226 See text accompanying, n 187 and n 203

227 Above n 107, p 346.

228 In New Zealand the answer to this question is found through reference to 'market' and'dominant position' principles taken together, in this context, they equate with Ratner's exposition of the essentiality requirement in the doctrine.

229 Above n 217, p 67.

> Mr Brown submitted that essentially in evidence on the question of purpose on the Plaintiff's side came from Professor Wright. That is true to the extent that Professor Wright demonstrated in a manner, which to my view was convincing, that Wrightsons' conduct was hard to justify unless it had an anticompetitive purpose. When one is talking of purpose one is really talking of what one has in mind. It is clearly a subjective matter. Unless that party gives evidence, as Mr Floyd did, as to its purpose then the Court is left to infer with what purpose a person acts from all the available relevant materials.

This statement was discussed in Port Nelson where the Court said [230]

> [w]e must say that we are reluctant to adopt an entirely subjective approach. As the law of contract rather demonstrates, the commercial field is one in which objective ascertainment of states of mind has much to commend it. We would be sorry to see the objectives of s 36 inhibited by any undue subjectivity as to purpose, perhaps more natural to the criminal law. Howeverin light of Tipping J's firmly expressed view we will leave that question of principle open. In the end,a decision is not strictly necessary within the context of this present case. In any event, often the differences will be more apparent than real. Proof of purpose will often turn upon inferences drawn from actions and circumstances, with a sprinkling of internal memoranda and correspondence. Protestations of inner thoughts which do not reconcile with object of likelihoods are unlikely to carry much weight. In many cases, and this is ultimately one, both objective and subjective standards are met.

The Court is undoubtedly correct in saying that the difference between Tipping J's 'subjective' approach and their 'objective ' approach is minimal. Both rely on inferences drawn from the facts and credible testimony. Purpose is not "entirely subjective" - but no one was suggesting that it is. Tipping J's point appears to be that it is not enough that an act has an anticompetitive effect - the Court must find an anticompetitive purpose. This purpose to be drawn from the facts. Heydon explains the difference between effect and purpose as follows [231]

230 Above n 10, p 84
231 D Heydon, Trade Practices Law(1989) The Law Book Company Limited, Sydney, Para 4.120 p 2036

> [t]here is a difference between proving purpose and proving likely effect, even if one is using the likely effect to support an inference of purpose. The Court need only use objective criteria to establish a "likely effect"; but it must go further with purpose, which has a subjective element. All the usual evidentiary presumptions concerning purpose and intent will be available to assist in drawing the inference.

Competition is however, a ruthless business as the High Court of Australia in Queensland Wire noted: [232]

> [c]ompetition by its very nature is deliberate and ruthless. Competitiors jockey for sales, the more effective competitors injurying the less effective by taking sales away. Competitors almost always try to "injure" each other in this way.

Courts must tread a fine line between protecting the competitive process and penalising competition. This line is drawn by the purpose requirement. Heydon discussing proof of purpose says [233]

> [t]he problems of proof will have to be met by inferences from conduct, by admissions by officers, employees and agents of the corporation, and by the presumption that a legal person must be taken to intend the natural consequences of its acts. This presumption may not be applied full-bloodedly in interpreting the words "for the purpose of" which will to some extent be interpreted restrictively. Hence, knowledge that one of the list of consequences will occur may not be enough. What may be required is proof that the conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences.

Land gives an example of where a dominant firm would know that a firm will be eliminated but is not motivated by a desire to eliminate it [234]. It is where a dominant firm refuses to supply a retailer because of its uncredit worthiness. The dominant firms objective is to avoid incurring bad debts. But a necessary consequence of their action is the elimination of the retailer.

232 Above n 138, p 40-925 (per Mason C J and Wilson J)
233 Above n 231, para 5.400, p 2621
234 Above n 137, p 70.

The Court in Port Nelson notes Lands example and contrasts it with the situation in ARA where [235]

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

The Court goes on to observe that: [236]

> Refusal to supply maybe designed to eliminate, but it may be due to poor performance or credit rating. The activity covered will not be prohibited, despite forseen anticompetitive effects, if it arises for unrelated legitimate business reasons,without purposive pursuit of those anticompetitive outcomes in themselves. If, however, the anticompetitive effect is are within the defendants purpose, questions of morality and motive become irrelevant...

The Court then notes statements to similar effect in Queensland Wire in the Australian High Court.

This is similar to Barker J in ARA who there noted that while exclusion from a "gateway"prima facie indicated anticompetitive intent but an exclusion [237]

> Can be explained by reference to reasonable constraints in the circumstances: an agreement to exclude others arbitrarily must be taken as having the purpose to monopolise.

The requirement of an anticompetitive purpose differs from the apparent strict liability rule in Hecht. As noted this strict liability is not really strict[238]. The later cases make it clear that business justifications can excuse a denial of access.[239] this is remarkably similar to - but not exactly the same as - the anticompetitive purpose requirement in New Zealand under section 36. A situation where the two standards

235 Above n 10, p 80.
236 Above n 10, p 81.
237 Above n 177, p680.
238 Above n 59, and text accompanying
239 Above n 89, and text accompanying

would differ is not hard to envisage. The Court in Port Nelson said that any pursuit of the sections specified anticompetitive purposes are illegal - morality and motivation notwithstanding. A situation like Chatham Islands Fishermans Co-operative, where the defendant excluded the plaintiff from using wharfering facilities in order to ensure its economic survival in the settlement, would be caught by section 36 but not by the American essential facilities doctrine.

However, the contravention of section 36 by an undertaking does not inexorably lead to the Court ordering it to deal with the party denied access. Injunctive relief for breaches of section 36 is provided for in section 81 of the Act. It states:

> The Court may, on the application of the Commission or any other person, grant an injunction restraining a person from engaging in conduct that constitutes, or would constitute any of the following:
>
> (a) A contravention of any of the provisions of Part II of this Act:
>
> (b) Any attempt to contravene such a provision:....

The discretionary nature of this relief allows for business purposes which contravene section 36 to go unremedied if the business reasons for the intentional anticompetitive acts satisfy the Court that the acts do not amount to a "serious anticompetitive use of a dominant position". The exercise of this discretion may be informed by the American Law. This would result in the overall position regarding business justifications being the same under the Commerce Act and the doctrine.

Though the requirements of section 36 and the doctrine are not the same there is sufficient similarity to say that the doctrine

can be accommodated within section 36. More importantly section 36 is able to provide for access to the essential facilities without reference to any "Common Law" doctrine. Land is in no doubt [240]

> [i]n New Zealand a refusal to allow access to essential facilities can come within section 36 if the dominant firm concerned had the necessary predatory purpose.

Vautier doubts the efficacy of section 36 to guarantee access to essential facilities [241]. To the extent that this alludes to the distinction between'guarantee' and 'provide for access in appropriate cases' it is clearly correct. Her concern appears to go somewhat further than this however. She notes the linking of essential facility with natural monopoly which has taken place within Governmental discussions of the problem [242]. She asks [243]

> ...whether or not competition law makes, or needs to make a distinction between dominance and natural monopoly - that is, in determining the appropriate remedy for conduct proscribed by section 36 of the Commerce Act. Such distinction rests on the presumption that there exists a satisfactory analytical and objective basis to making it further, it rests on the presumption that, there exists a higher obligation in terms of the conduct of natural monopolies than in terms of the conduct of dominant firms in general.

Two points may be made. Firstly, whether a distinction between dominance and natural monopoly is necessary before access to an essential facility can be ordered. No distinction needs to be made between natural monopoly and dominant position. Access can be ordered in both situations. However, when a dominant firm is using the market power it has by virtue of control of an essential facility for anticompetitive purposes then ordering the dominant firm to grant access on fair terms

240 Above n 137, p 74.
241 Above n 117, p 74.
242 Above n 117, p 70.
243 Above n 117, p 71.

may be the most appropriate method for securing the objectives of the Act - competition. It is interesting that both in ARA and Port Nelson the Courts make reference to the natural monopoly characteristics of the market they are dealing with.

The second point is that ordering a firm to grant access to an essential facility it controls to others does not impose a higher obligation. The order is a remedy given because of past breaches of section 36. Section 36 operates to reduce the freedom of an undertaking once the threshold of dominance has been reached.[244] Injuctive relief such as ordering access is a discretionary remedy which the Courts will use in order to achieve the objectives of the Act. Its existence as a remedy does not penalise natural monopolies.

Vautier also states that [245]

> [t]he Government itself has conceded that the Commerce Act was not designed with State Owned Enterprises in mind. It is now confronted with policy options ranging from self-regulation [essentially a do-nothing policy] to reregulation [involving industry specific interventions]. If it relies on the Commerce Act, as its preferred option outcomes will necessary depend on the evolution of the case law from the Courts. As if to modify the risk of uncertainty and inconsistency associated with this route, the Government suggests that the application of the essential facilities doctrine in the context of section 36 will guarantee access. In other words, the Government, in effect, seems to be promulgating and informal guideline for the Courts - a guideline reflecting the Governments perception of the competition problem associated with natural monopoly, together with its preferred means of resolving that problem.

It may be that the last part of that statement goes a little too far. It is difficult to envisage the Courts abandoning the natural interpretation of a section in favour of the preference for its interpretation. She also says in the above

244 The freedom restricted is the freedom to act anticompetitively
245 Above 117, p 71.

quotation that relying on the Courts to ensure access to essential facilities is uncertain. It is axiomatic that there is always some uncertainty with the Courts. To achieve sensible results requires flexibility and not the rigid and possibly arbitrary rules which would be required for absolute certainty. The degree of uncertainty depends upon the framework within which the Courts are operating. Here the framework is provided by section 36 and the case law decided under it. Vautier does not consider this; nor how section 36 applies to refusals to deal. Clearly if section 36 covers refusals to deal then relying upon it to provide for access to essential facitilies is much less uncertain than if such access was secure by way of'common law' doctrine imported from the United States and untested before the Court of Appeal.

Her ultimate conclusion is that it is doubtful whether section 36 will guarantee access to essential facilities. She seems to assume that in order to provide access then some recourse is necessary to the essential facility doctrine. She states [246]

> [i]f the doctrine is to be given explicit recognition by the Government or the Courts, it would seem extremely important that agreement be sought as to the applicability of such factors [the principles comprised in the doctrine] in determining any access rights and access terms.

She concludes thus [247]

> [i]n conclusion, the underlying problem is that the central notion embodied in the essential facilities doctrine appears ot have lost [if indeed it ever had] any real sense of precision. Of itself, this has diminished the doctrine's value as a distinct contribution to competition law and economics. It would seem important to distinguish between intent theory - the focus of section 36 of the Commerce Act - and bottleneck theory. Any presumption that refusals to deal are necessarily driven by antcompetitive purpose should be

246 Above n 117, p 67. Original Brackets
247 Above n 117, p 72. Original Brackets

> tested. The possibility of efficiency motives for vertical relationships and related conduct needs to be considered in any assessment of potential liability. Fundamentality, the concerns of competition law should remain with competition, efficiency and consumer welfare, and not with notions of duty or obligations which may only serve the interests of particular competitors.
>
> Adoption of the essential facilities doctrine provides an "illusory reference point".

The question is not adoption of the essential facilities doctrine. It is whether section 36 can do the same job. The answer would appear to be that it can.

The essential facilities doctrine may yet prove to be useful to New Zealand competition law. The New Zealand Courts have shown their willingness to refer to United States law to inform the application of the Commerce Act. Section 36 applies to all firms in an dominant position which act anticompetitively. It is wider than the essential facilities doctrine as it applies to products and does not require the essential facility controller to be a monopoly. The injunctive relief available under section 81 for breaches of section 36 is discretionary. Reference to (but not application of) the doctrine may operate to restrict the situations in which the Courts order the dominant firm to grant access.

In both ARA and Port Nelson[248] reliance is placed upon the market being a natural monopoly to justify the remedies given. In Port Nelson this seems somewhat at odds with the Courts statement that no essential facility analogy was being drawn.[249] Certainly there was no need to find that PNL was a natural monopoly within the terms of section 36. Therefore any statements concerning natural monopoly are obiter. Nevertheless a finding that an undertaking was a

248 Above n 181 and n 208 and text accompanying
249 Above n 208 and text accompanying

natural monopoly makes ordered access much more defensible; with natural monopolies the only way of achieving competition in any markets controlled by them as by allowing others access to the facility.

Both ARA and Port Nelson refer to fair terms.[250] Again this is very similar, if not exactly the same, as the doctrine. Fair terms will however be difficult to work out in situations where a monopolist has never given access to anyone before. It may be that once Courts show they are willing to order access monopolists will have the incentives to negotiate raised somewhat. This was the case in Queensland Wire where after the High Court ruling that BHP had to supply Y-Bar a negotiated settlement was reached.[251]

Another difference between the doctrine and section 36 appears to be less significant. The doctrine refers only to competitors denied access. Section 36 with its reference'to restricting eliminating or deterring in that or any other market' explicity allows customer/ supplier relationships to be covered. In ARA the doctrine was applied in a customer/supplier relationship.

The Government's confidence that section 36 is capable of dealing with denials of access to essential facilities appears well justied. Section 36 may also provide for access in situations where it might not be so appropriate. However, the discretionary nature of the injunctive relief, the Courts' willingness to take a purposive approach to the Commerce Act and their willingness to draw from American law should ensure workable situations are found.

250 Above n 182 and n 208 and text accompanying
251 See CCH Trade Practices Reporter report 314

Section 36A Of The Commerce Act

The Commerce Amendment Act 1990 enacted section 36A by section 15 of that Act which reads:

> The principal Act is hereby amended by inserting after section 36 the following section
>
> 36A. (1) No person who has -
> "(a) A dominant position in a market; or
> "(b) A dominant position in a market in Australia; or
> "(c) A dominant position in a market in New Zealand and Australia-
> shall use that persons dominant position for the purpose of -
> "(d) Restricting the entry of any person into any market, not being a market exclusively for services; or
> "(e) Preventing or deterring any person from engaging in competitive in any market, not being a market exclusively for services, or
> "(f) Eliminating any person from any market, not being a market exclusively for services...

The section is one of the legislative results of the CER Agreement. In the drive to remove barriers to trade between the two countries anti-dumping laws have been removed between them and general competition law is going to be relied upon with the problem of dumping. Section 36A is designed to ensure the adequacy of competiton law to deal with this problem and more generally to ensure that there is fair competition in the new trans-Tasman market.

In terms of its application to essential facilities it may be said that the market which someone is'restricted, deterred or eliminated' from by anticompetitive use from the facility will generally fall within the"market exclusively for services" exception. The structures with which the doctrine is concerned - electrical transmission goods, ports, sports stadiums, telecommunication, interconnection networks and rail bridges et cetera, all allow for the provision of services.

The domestic competition law of each country appears to provide for access to essential facilities. With respect to the trans-Tasman market or the other countries market the legislation does not appear to so provide. This probably reflects the overall position of services within the CER Agreement rather than any legislative disapproval of the doctrine. Services were added to the Agreement in the 1988 general review of the relationship.[252] It may be that if the relationship continues to develop the section will be altered to apply services as well.

The doctrine has been raised as an area in which harmonisation of law between New Zealand and Australia is desirable[253]. If both misuse of market power sections apply to refusals to deal then these are not a problem. The issue would be the more general question concerning the threshold of market power - is substantial degree of influence in a market (section 46 Trade Practices Act) different to a dominant position in a market. This question, thankfully, is well outside the scope of this paper.

252 See agreed documents from the 1988 general review of the Austrlia New Zealand Closer Economic Relations Trade Agreement.

253 Above n 10, p 77.

Conclusion

The essential facilities doctrine is a part of the law relating to misuse of market power in the United States. It is not an independent tool of analysis. It is merely a useful label to describe a particular area of anti-trust law. It requires monopolists with control of an essential facility which a competitor is seeking access to, which cannot practically or reasonably be duplicated by the competitor, to provide access on terms which will enable the competitor to compete in the up or downstream market, unless there is a business justification for denying access. The doctrine is reasonably settled but also somewhat indeterminate. This flexibility is not a criticism of the doctrine. It is important that cases are dealt with on their facts and are no categorised according to arbitrary standards. The doctrine has been subjected to much criticism, however, if the market powerassociated with natural monopolies is a concern then the doctrine represents a good trade off between that problem and upholding the freedom to choose with whom to deal with.

The doctrine has been raised in Australia but the Australia High Court obviated any need to rely on a 'common law' notion of essential facilities by applying the Trade Practices Act to cover refuses to deal. While this application appears correct on the face of the Act it may raise concerns about the width of the Courts power to order dealing given that the market power threshold in section 46 is "a substantial of inference in a market".

In New Zealand the whole area of refusals to deal has been examined both judicially and by regulatory agencies. The Courts have shown themselves to be willing to apply section 36 in the refusal to deal context. This is unsurprising as all that is required is a normal application of section 36. This application of the Act is not restricted to refusal to allow access to facilities it will apply to products as well [254].

The Courts have been willing to refer to American law and ideas in developing New Zealand competition law. This in no way amounts to an application of the doctrine. Placing emphasis on the doctrine in the New Zealand context may distract attention from section 36 and its requirements.

Section 36 has been applied in a manner very similar to the doctrine. The purpose requirements of the section, as it has been interpreted are similar. In practice both regimes treat a refusal to deal by a monopolist in control of an essential facility as unlawful unless there is a business justification. The Commerce Act provides for injunctive relief which enables the Court to order access. The terms of such access have been described as fair in both countries. Courts may allow the doctrine to inform their application of section 36 and use their powers to order access in a restricted manner. The discretionary nature of injunctive relief under the Act means that access will not be ordered by a mechanical application of section 36. Chatham Islands Fishermans Co-operative is an example of a trader having a substantial purpose of restricting another but the Court refusing

254 In Bond & Bond Ltd v Fisher & Paykell Ltd (1986) 6NZAR 278 Barker J fouond there was a serious question as to whether Fisher & Paykell had contravened section 36 by refusing to supply white goods to Electric City shops.

to grant an injunction due to other business concerns.[255].

At present, with the developments in ARA and Port Nelson, it could be said that New Zealand was developing its own essential facilities doctrine under the rubric of section 36. While their may be an element of truth in that any reference to the doctrine is unhelpful in that it immediately creates an impression that something outside section 36 is being relied upon.

While section 36 does not'guarantee' it does provide for access to be ordered when its requirements are satisfied. While not being perfectly certain it is as certain as is consistent with the flexibility which is required in competition law cases. It may be that the mere presence of a remedy will encourage dominant undertakings to negotiate settlements and avoid the Courts altogether.

255 The injunction in that case was of course an interim injunction and not an injunction under section 81.

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