Chapter 3

Competition Law and Policy

Paul G Scott[*]

3.1 Introduction

In the context of a project on regulatory reform it has been fashionable to cite the father of the concept of the invisible hand – Adam Smith.

Sometimes it has been while lamenting the free market. A notable example is Baragwanath J. In one of the "leaky homes" decisions, his Honour, when referring to the Building Act, observed:[1]

> The argument based on "economic" arguments is demolished by the 1991 Act's lamentable lesson of what happens if the market is left untrammelled by law. The underlying neo-liberal theory has been influenced by one part of Adam Smith's economic theories without regard to the important social and moral context on which *The Wealth Nations* of 1776 was premised. It is set out in his 1759 essay *The Theory of Moral Sentiments.* His keen concern for the disadvantaged is a leitmotiv which includes:
>
> … as we sympathise with the sorrow of our fellow-creature whenever we see his distress, so we likewise enter into his abhorrence and aversion of whatever has given occasion to it. Our heart, as it adapts and beats time to his grief, so is it likewise animated with the spirit by which he endeavours to drive away or destroy the cause of it.

This perhaps suggests that Smith was not the patron saint of neo-liberal theory. That rather than rely on the market, sometimes regulation was the better option. If Baragwanath J thought so, he was wrong. Just as the Devil

* Senior Lecturer, Faculty of Law, Victoria University of Wellington.

1 *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486 [*Sunset Terraces*] at [63] citations omitted.

can quote scripture, so can the neo-liberal quote Smith. This is what Smith said about regulation:[2]

> To be merely useless is perhaps the highest eulogy which can ever justly be bestowed upon a regulated company.

Indeed, Smith can be regarded as one of the fathers of competition law. Here is what he said about meetings of competitors:[3]

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

Interestingly, lawyers are not allowed to read this out to juries in price-fixing cases in the United States.[4]

3.2 Purpose of competition law

The purpose of competition law is to promote and protect a market-based economy that increases economic growth and maximises the wealth and prosperity of society. Competition law is based on the premise that free markets result in the efficient allocation of resources, productive efficiency and increases in innovation. It is a commitment to preserve free markets to ensure they are unfettered by unreasonable restraints or blocks on trade. The United States Supreme Court has said:[5]

> The Sherman Act[6] was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress ...

Competition is the process by which more efficient firms win and society's limited resources are allocated as efficiently as possible. It leads to cheaper prices for consumers.[7] Competition sharpens firms' incentives to cut costs,

---

2 Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (2 vols), Roy H Campbell and Andrew S Skinner (eds) (Oxford, 1976) at 793; see also P J O'Rourke *On The Wealth of Nations* (Allen & Unwin, Australia, 2007) at 198.

3 Roy H Campbell and Andrew S Skinner (eds) *An Inquiry into the Nature and Causes of the Wealth of Nations* (2 vols) from the *Glasgow Edition of the Works and Correspondence of Adam Smith* (Oxford University Press, Oxford, 1976) at 764.

4 *US v Taubman* 297 F 3d 161 (2d Cir 2002).

5 *Northern Pacific Railway Co. Ltd v United States* 356 US 1 (1958) at 1.

6 Sherman Antitrust Act 1890.

7 See Alec Mladenovic "Network Industries Case Study: Electricity and Telecommunications" in this volume (ch 13).

improve productivity, stimulate production and process innovation. So competition spurs firms to decrease cost, improve the quality of their products and services, invest in new products and services, educate consumers[8] and engage in a range of other activities that benefit consumer welfare.[9] These are presumptively good things.[10] In New Zealand the focus is on economic efficiency.[11]

The Commerce Act 1986 ("the Act"), New Zealand's competition law statute, helps ensure this in a number of ways. Two are via the proscribing of restrictive trade practices in Part 2 of the Act and mergers that substantially lessen competition in Part 3 of the Act. This part of the Regulatory Reform Project aims to examine the efficacy of Parts 2 and 3 of this Act.

This chapter outlines three areas of empirical research on competition law and its regulation. In essence it asks how well the regulatory regime and authority are working. One key feature of a regulatory regime is whether it provides sufficient certainty to participants. In short, do they know whether their conduct breaches the law?[12] The chapter examines aspects of New Zealand's competition law and the way case law has developed to assess that law.

Linked with certainty is the concept of the effectiveness of the law. Does it capture anticompetitive conduct which should be outlawed? Conversely does competition law proscribe behaviour which should be permissible? Or in other words, under the current law are there too many false positives and false negatives? This chapter examines these issues.

The project will examine the efficacy of New Zealand's competition law regulator – the Commerce Commission. If it takes action it should act with celerity. Anticompetitive conduct can have an enduring effect on the market. Thus, the regulator needs to act promptly.

Much of New Zealand's competition law derives from Australia's, which in turn derives from the United States. New Zealand's merger threshold of substantially lessening competition comes from s 7 of the United States' Clayton Act 1914. Section 7 is also the source of the threshold in s 27 of the Commerce Act 1986. The United States Supreme Court case *US v Socony-*

---

8 As to the particular importance of education in respect of consumer finance see Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in this volume (ch 11).

9 See also Kate Tokeley "Consumer Law and Paternalism: A Framework for Policy Decision-Making" in this volume (ch 10).

10 United States Department of Justice "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act" (2008) at 6-7 (withdrawn May 2009).

11 *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA).

12 See John Prebble and Rebecca Prebble "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study" in this volume (ch 4).

Vacuum Oil Co[13] is the source of s 30's per se rule against price fixing. One can also trace s 36's monopolisation rule to the United States Supreme Court case of *US v Grinnell Corp* (*Grinnell*).[14]

The issue arises whether this law, developed in the world's largest market economy, applies to a small market economy such as New Zealand. Is it appropriate to transfer such jurisprudence and tests to New Zealand? Or should we be developing our own indigenous bespoke competition law?[15] This chapter will examine and discuss this issue.

The specific topics through which the above issues are explored are:

- Substantial lessening of competition (s 27);
- Merger analysis under the substantial lessening of competition threshold (s 47);
- Counterfactual analysis;
- Section 36 and monopolisation;
- Delays.

3.3 Substantial lessening of competition (SLC)

The SLC test is the key to much of New Zealand's competition law, which aims to protect consumers. Section 27 of the Act proscribes contracts, arrangements and understandings that have the purpose, effect or likely effect of SLC. SLC is also the threshold for assessing whether a merger is anticompetitive under s 47 of the Act.

With s 27 (and indeed authorisations of restrictive trade practices under s 58) the black letter law on what constitutes SLC is clear. See, for example, *ANZCO Foods Ltd v AFFCO NZ Ltd.*[16] This law sets out the methodology for assessing whether a provision of a contract arrangement or understanding has the proscribed purpose, effect, or likely effect of SLC.

While the methodology is clear, the issue arises whether the SLC test is appropriate. Does the SLC test protect consumers and provide adequate guidance for market participants? Some commentators have suggested that such a test provides for lengthy analysis, long trials and "endless economic inquiry resulting in a defence verdict".[17] Arguably s 27 does not provide sufficient certainty for market participants. It is difficult for them to predict

---

13 *United States v Socony-Vacuum Oil Co* 310 US 150 (1940).

14 *United States v Grinnell Corp* 384 US 563 (1996).

15 A similar issue is discussed in Susy Frankel and Megan Richardson "Trans-Tasman Intellectual Property Coordination" in this volume (ch 18).

16 *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA).

17 Maxwell Blecher "The *Schwinn Case* – An Example of a Genuine Commitment to Antirust Law" (1975) 44 Antitrust LJ 550 at 553.

whether their conduct breaches the section. In part this is due to s 27's SLC test being a standard, rather than a rule.[18] Section 27 deals with agreements. The reason for competition law to be concerned with agreements is that they increase the risk of anticompetitive action, expand market power, create an anticompetitive restraint not otherwise possible and surrender important decision-making autonomy on matters of competitive significance.[19]

Bork has identified the two ways in which agreements can harm competition:[20]

(a) agreements by which consenting parties remove some or all competition existing or likely to exist between themselves; and

(b) practices by which two or more parties injure competitors and thereby injure the competitive process itself.

3.3.1 *How well is s 27 working?*

In this project, one of the areas of research which is already completed has been the examination of success rates for plaintiffs alleging breaches of s 27 of the Act, and its Australian equivalent, s 45 of the Trade Practices Act 1974 (Cth) (now called the Competition and Consumer Act 2010 (Cth)). Results indicate that the figure is just under 10 per cent of cases. While not high, it is higher than plaintiffs alleging a breach of the monopolisation provisions, namely, s 36 of the Commerce Act[21] and s 46 of the Trade Practices Act 1974 (Cth). Commentators have suggested s 36 is not an adequate deterrent, yet it appears s 27 is not much more of a deterrent. It may be that it is too hard to establish a breach of s 27.

One cannot, however, make too much of these statistics. A large number of cases were no-goers from the start. Most involve strike out applications where the plaintiff has not defined a market, nor indicated how the so-called agreement allegedly substantially lessened competition. In some cases the plaintiff has not even alleged or identified the impugned contract, arrangement or understanding. This indicates that raw data on the success or failure of s 27 cases provides no insight into the efficacy of the section.

This analysis of ss 27 and 45 has excluded deemed breaches via s 30 (for price fixing) and previously s 29 (for exclusionary provisions). It has also excluded success under the equivalent Australian provisions (ss 45A and 4D, Trade Practices Act 1974).

---

18 See also John Prebble and Rebecca Prebble "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study" in this volume (ch 4). For a discussion of the difference between rules and standards see Ward Farnsworth *The Legal Analyst* (The University of Chicago Press, Chicago, 2007) at 163-171.

19 Phillip Areeda 6 *Antitrust Law* (Little Brown and Co, Boston, 1986) at [1402(a)].

20 Robert H Bork "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division: Part 1" (1965) 71 Yale L J 775 at 775.

21 Rex Ahdar "Escaping New Zealand's Monopolisation Quagmire" (2006) 3 4 ABLR 260.

3.3.2 *Assessing whether there has been an SLC – a case study*

The project also examines the utility of the SLC test under s 27. A tribunal may determine that a contract does not create an SLC. It accordingly leaves the contract in place. Subsequent events should provide a case study of whether that determination was correct, that is, whether there eventually was an SLC. This raises the issue of how to measure whether there has been an SLC. Or is it all too difficult? If so, does this mean the SLC test is of little utility? Such studies are common in the United States.[22] They are, however, as yet rare in New Zealand.

The project will conduct a case study of whether a contract which was alleged to have the effect or likely effect of an SLC actually did so. This will aid in assessing whether s 27 provides certainty. Most s 27 cases, and indeed all authorisations ,are ex ante (in the sense they involve a tribunal assessing the future). How well the tribunal did in an actual case provides some evidence of the efficacy of s 27's analytical framework. The case to be examined is *Fisher and Paykel v Commerce Commission* ("*Fisher and Paykel*").[23] This case concerned Fisher and Paykel's exclusive dealing contract (EDC) for whiteware with its dealers. Fisher and Paykel in the late 1980s possessed 80 per cent of New Zealand's whiteware market. It had an EDC with its dealers which it had used for 40 years. The EDC required dealers not to stock or sell other manufacturers' whiteware. The EDC was terminable by either party on 90 days' notice. In 1987 Fisher and Paykel applied to the Commerce Commission for an authorisation which involved determining whether the EDC breached s 27. It did so as the EDC was now potentially subject to s 27. Prior to the passing of the Commerce Act it was free of any liability. In 1989, the Commission by a majority held the EDC did breach s 27. On appeal the High Court held the EDC did not.

This High Court decision proved controversial. Two noted competition law experts wrote articles extremely critical of the decision.[24] They said the EDC

22 See, for example John McGee "Predatory Price Cutting: The Standard Oil (NJ) Case" (1958) 1 J L & Econ 137; Peter Carstensen "The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the 'Rule of Reason' in 'Restraint of Trade Analysis'" (1992) 15 Res in Law & Econ 1; John E Lopatka and Andrew N Kleit "Mystery of Lorain Journal and the Quest for Foreclosure in Antitrust" (1995) 73 Tex L Rev 1255; John E Lopatka and Paul E Godek "Another Look at ALCOA: Raising Rivals' Cost Does not Improve the View" (1992) 35 J L & Econ 311; Franklin M Fisher, John J McGowan and John E Greenwood *Folded, Spindled and Mutilated Economic Analysis and US v IBM* (The MIT Press, Cambridge, Massachusetts, 1983).

23 *Fisher and Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC).

24 Rex Ahdar "Exclusive Dealing and the Fisher and Paykel Saga" (1992) 15 NZULR 1; Warren Pengilley "Product Exclusivity in New Zealand: The Fisher and Paykel Decision – Enlightened Reasoning or Competition Naivety?" paper presented at the second annual workshop of the Competition Law and Policy Institute of New Zealand, 8 November 1991.

resulted in a clear SLC. One lesser-known commentator praised the High Court's decision.[25] He said the EDC did not result in an SLC.

The aim of the research project in the next stage will be to assess (and establish if it is even possible to assess) whether the EDC did in fact substantially lessen competition in this case. The theory is that an EDC can impair the ability of rivals to grow into effective competitors by limiting their access to distributors for their products. If they are unable to distribute their products widely, rivals will be unable to obtain the necessary scale to achieve economic efficiencies (even though if there was no exclusive dealing more than one firm would be large enough to obtain economies of scale). EDCs can also lead to increased collusions, de facto resale price maintenance, decreased consumer choice and price increases for consumers.[26]

The study in stage two of this project will necessarily involve regression analysis. While this analysis will attempt to determine whether the EDC resulted in an SLC, it likely will not satisfy everyone. It may determine that as at 2011 there has been no SLC. Critics of the original decision will not find anything to counter their initial view, as their response will be that without the EDC the market would have been competitive a lot quicker. It may be that the study will not be able to counter any such criticism.

An interesting wrinkle arises. One of the precompetitive or efficiency-enhancing justifications for exclusive dealing is the prevention of free riding. Suppliers may provide distributors with special services that make the distributors more effective in selling their products. These include: advertising, technical and sales training, product design and after-sales services. If a distributor sells other products for the supplier's rivals this can create a problem. Rivals may not provide these services. The supplier may take advantage of these services and then persuade consumers to buy the rival's products. Rivals can take a free ride on the services as Posner J has noted:[27]

> Exclusive dealing may also enable a manufacturer to prevent dealers from taking a free ride on his efforts (for example, efforts in the form of national advertising) to promote his brand. The dealer who carried competing brands as well might switch customers to a lower-priced substitute on which he got a higher margin, thus defeating the manufacturer's effort to recover the costs of his promotional expenditures by charging the dealer a higher price.

Certainly the *Fisher and Paykel* High Court accepted this.[28] Fisher and Paykel has now removed its EDC. It will be interesting to see if the research can establish why; particularly as the company now faces more competitors and one would imagine, therefore, that the risk of free riding has increased.

---

25 Paul G Scott "Raising Rivals Costs and Exclusive Dealing" (1996) 6 Cant L Rev 291.

26 Paul G Scott "Raising Rivals Costs and Exclusive Dealing" (1996) 6 Cant L Rev 291.

27 *Roland Machinery Co v Dresser Industries Inc* 749 F 2 d 380 (7th Cir 1984) at 395.

28 *Fisher and Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC) at 765–767.

3.4 Exclusionary provisions

Interestingly, the analysis has shown that the most litigated provision in Australia is s 4D, Competition and Consumer Act 2010 (Cth).[29] Also plaintiffs succeed most under this provision than any other. As a result of two separate amendments, s 29 of the Commerce Act now differs from s 4D. One result has been to render it a dead letter. Plaintiffs, since the amendments, have virtually never pleaded it. One of the outputs of this project will be the author arguing Parliament went wrong in amending and consequently weakening s 29. As it stands, New Zealand differs from both Australia and the United States. These countries continue to treat exclusionary provisions (termed "boycotts" in the United States) as per se illegal. The question is why does New Zealand differ? All three countries are Western capitalist countries which rely on the market mechanism. Why are exclusionary provisions (or boycotts) per se illegal in two countries yet not in New Zealand? Is there something different about the New Zealand economy? Or does New Zealand suffer from a gap in its competition law coverage? Part of the reason for saying that New Zealand erred is that Australian cases which resulted in liability under s 4D would not be caught under ss 27 and 29. Yet the conduct was anticompetitive. This is likely to be controversial.

Generally the purpose of exclusionary provision sections, such as ss 29 and 4D, is to prohibit concerted refusals to deal or group boycotts. Section 29

---

29 Section 4D, Competition and Consumer Act 2010 (Cth) provides:

(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and

(b) the provision has the purpose of preventing, restricting or limiting:

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

(2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first-mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.

lumps them under the term "exclusionary provisions". As mentioned above, originally they were per se illegal. Kirby J has concisely summarised why this was so:[30]

> There were strongly arguable economic and social reasons to support the Swanson Committee's conclusion that the law in Australia should take a firm stand against "collective economic bullying". From an economic point of view, such exclusionary provisions diminish the potential of unilateral decisions by market players; impose on others the aggregation of power which individual players lack; and tend to be introduced by powerful market entities exerting what is the antithesis of competition. Such activities are frequently engaged in to prevent innovative market entry and to permit powerful players to divide the market like the Popes of old divided the world, for their own convenience and advantage. In such circumstances, it was unsurprising that the Act should be amended to prohibit exclusionary provisions in contracts, arrangements and understandings subject to the Act. This Court should give full effect to those provisions. It should not whittle them down.

Yet New Zealand has not kept them per se illegal. First, in 1990 Parliament added s 29(1)(c). This meant that the particular person or class of persons to whom supply or acquisition is restricted must be competition to one or more of the parties to the arrangement containing the exclusionary provision. The reasons for this reform to s 29 will be discussed in the next stage of the project. It is noted that from the first reform to the second in 2001 there were only two court decisions – one involving an agreed penalty and the other a strike out.

Despite this dearth of cases, Parliament further amended s 29. It did so by adding s 29(1A). This provides a defence whereby a defendant can escape liability if it can prove the alleged exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition in a market. This has removed the per se nature of s 29. Any plaintiff is going to face a full-blown SLC trial if the defendants invoke the defence. Thus, there seems no reason to rely on s 29 anymore. As mentioned above, the issue arises as to whether this constitutes a gap in New Zealand's competition law coverage.

The question is why Parliament made this change. The Select Committee Report states that s 29 could capture many precompetitive arrangements involving vertically integrated firms that also have exclusive dealing arrangements with other downstream firms.[31] While this may be true, it is interesting to note that Australia has resisted any such amendments. Yet the

---

30 *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45, (2003) 215 CLR 563 at [118] (footnotes omitted). In *Rural Press Ltd v ACCC* [2003] HCA 75, (2003) 216 CLR 53 at [82], Gummow, Hayne and Heydon JJ approvingly cited Kirby J's rationale for proscribing exclusionary provisions per se.

31 Commerce Select Committee (Report 296-2) 01 February 2001 at 8-10.

sky has not fallen. Also given that over an 11-year period there were only two cases, one wonders how valid the concerns with s 29 were.

In the next stage of this project, Australian cases such as the *Super League* litigation will be analysed.[32] Stage two will also give consideration to whether the contracts at issue were manifestly anticompetitive and were worthy of per se prohibition under s 4D. It is highly doubtful such a result (that is, liability under the per se exclusionary provisions section) could occur now in New Zealand. In the *Super League* case, the full Federal Court decided the issue only under s 4D; it did not discuss whether the agreements involved an SLC. In New Zealand, if the s 29 defence was invoked, this could not happen. *Rural Press* is another example that will be considered.[33]

The further research will also consider the use of s 4D against market division. Market division can be a hard-core cartel conduct worthy of condemnation.[34] Yet in New Zealand the Commerce Commission has to rely on s 30 to capture market division. This depends on the practice amounting to a "control" of price.[35] As yet the only cases have been agreed penalty cases and these establish no law.[36] It is not yet certain that market division is per se illegal in New Zealand. Under an unamended s 29, presuming New Zealand courts would follow High Court of Australia authority on s 4D,[37] the issue would be beyond doubt.

At this stage, but subject to further research and analysis, it is the author's preliminary view to call for a return to the original s 29.

3.5 Merger analysis

In 2001, Parliament changed New Zealand's merger threshold from one of dominance to the SLC test.

Competition law regulates mergers primarily because they have the potential to decrease competition and thus increase or facilitate the exercise of market power. If a firm can exercise market power by itself, it has unilateral

---

32 *News Ltd v Australian Rugby Football League Ltd* (1996) 135 ALR 33 (FFC).

33 *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75, (2003) 216 CLR 53.

34 Paul G Scott "Unresolved Issues in Price Fixing" (2006) 12 Cant L Rev 197.

35 Paul G Scott "Unresolved Issues in Price Fixing" (2006) 12 Cant L Rev 197.

36 *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75, (2003) 216 CLR 53 at [62].

37 Although this is not a foregone conclusion; see Paul G Scott "The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law" forthcoming (2011) Waikato Law Review which discusses *ANZCO Foods Waitara Ltd v AFFCO New Zealand* [2006] 3 NZLR 351 (CA) where the New Zealand Court of Appeal ignored the High Court of Australia's decision in *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45, (2003) 215 CLR 563.

market power. If a group of firms acting jointly can exercise market power that is called "coordinated market power" or "coordinated effects".

The purpose of lowering the threshold was to move away from capturing only unilateral market power and to also capture coordinated effects. Given the small size of New Zealand's economy, is this appropriate or is it unduly restrictive? The next stage of this project will involve examination of New Zealand's merger decisions since the 2001 amendment to assess what role coordinated effects have played in merger analysis. This will aid in assessing the efficacy of the new merger threshold.

The SLC test for mergers derives from s 7 of the United States Clayton Act.[38] The research will compare merger analysis under the Clayton Act with New Zealand. It will ask whether the United States approach is applicable. Bork, for example, has argued the Clayton Act should allow mergers from five firms to four, provided that no one firm had more than 50 per cent market share.[39] Anything which resulted in less than that was illegal. Current United States law is not so permissive.[40] Yet such a rule in New Zealand would essentially mean virtually no merger activity, due to the small size of New Zealand's economy. Furthermore, the most recent United States guidelines suggest that unilateral market power issues arise when a merger results in a market going from five such firms to four. With most New Zealand mergers not involving this many players, one cannot simply transfer United States merger practice to New Zealand. What then is the correct presumptive rule for New Zealand? Is relying on thresholds developed in the world's largest market economy of any use at all in a small market economy like New Zealand?

3.6 Counterfactual analysis

In assessing whether a merger results in an SLC, New Zealand tribunals engage in counterfactual analysis. They compare the likely state of competition in a market if the merger proceeds (the factual) with the likely state of competition if the merger does not proceed (the counterfactual).

New Zealand law differs from most countries that use an SLC test, in that it uses something other than the status quo as the counterfactual. Also, following the High Court's decision in *Woolworths v Commerce Commission* ("*Woolworths*"),[41] it has instigated the unique practice of allowing multiple counterfactuals to be considered. It may be that this multiple counterfactual

---

38 Clayton Antitrust Act 1914.

39 Robert H Bork *The Antitrust Paradox: A Policy at War with Itself* (2nd ed, The Free Press, New York, 1993) at ch 10.

40 Herbert Hovenkamp *Federal Antitrust Policy, The Law of Competition and Its Practice* (2nd ed, West, St Paul, 1999) at ch 12.

41 *Woolworths v Commerce Commission* (2008) 8 NZBLC 102,128 (HC).

analysis is an appropriate New Zealand-specific approach, given the small size of our market. Alternatively, it may be a divergence by the High Court which has led to uncertainty.

The project will research merger decisions to see how often the Commission was correct in assessing counterfactuals. Sometimes it has failed to clear mergers because it said the counterfactual was that another firm would take over the target. How often was the Commission correct? If the Commission was incorrect a number of times, then this calls into question the efficacy of using something different than the status quo as a counterfactual.

In respect of multiple counterfactuals the research will examine whether this has led to a decrease in clearances. The American Bar Association has warned of counterfactuals other than the status quo as it will lead to self-serving statements by rivals. The research will assess whether this is correct. Multiple counterfactuals also prima facie lead to uncertainty as parties try to determine which counterfactual a tribunal will choose? This may impact on whether market participants will seek clearance or simply decide not to progress. Does this lead to a decrease in beneficial efficiency-enhancing mergers?

The *Woolworths* counterfactual scenario represented a great change from previous law, as was indicated by the High Court. The High Court did not indicate how great the change was. Interestingly, in 2011 the Federal Court of Australia rejected the concept of multiple counterfactuals.[42] That was not to say the change was not arguable as a matter of statutory interpretation, but the fact that the law changes often without discussion or even acknowledgment leads to questions about whether our courts are giving good guidance to the Commerce Commission. In the United States, guidance comes from the enforcement agencies rather than the courts. Indeed, the United States Supreme Court has not heard a merger case since 1974. This raises the issue of which way is better? Should generalist courts be providing the lead or specialist regulatory bodies? This is the subject of discussion in stage two of the project.

3.7 Section 36

One of competition law's primary concerns is prohibiting firms with market power from using that power to eliminate rivals or protect themselves from competition. Such firms do not vanquish their rivals through superior performance. Rather they aim to decrease the competitive viability of actual or potential rivals.

---

42 *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 967 at [145]–[146].

Courts and commentators have coined various terms to describe such use of market power. They include predation, abuse of market power, foreclosure and monopolisation. This chapter uses the term "monopolisation". Competition law contains anti-monopolisation provisions. Their raison d'être is to prohibit unilateral conduct that results in the deterring of rivals' competitive behaviour by taking advantage of, using or exercising that market power. In so doing, the anti-monopolisation provisions preserve a competitive environment that gives firms incentives to spur economic growth. Thus, anti-monopolisation provisions are essential if there is to be an effective competition law.

The United States Sherman Act begat modern competition law, including the anti-monopolisation provisions. It is, therefore, worthwhile to examine that law.

3.7.1 *United States law and the origins of ss 36 and 46*

Section 2 of the Sherman Act 1890 is the United States anti-monopolisation provision. It provides:[43]

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

Section 2 does not define "monopolise". Thus, it was left to the courts to give guidance as to what s 2 meant and prohibited, as the Supreme Court noted in *Standard Oil Co of New Jersey v United States* ("*Standard Oil*").[44] Congress gave the courts "a new jurisdiction to apply a common law against monopolising".[45]

The *Standard Oil* Court noted that the Sherman Act did not prohibit monopoly by itself.[46] There had to be unlawful conduct as well. It said that without unlawful conduct "size, aggregated capital, power and volume of business are not monopolising in a legal sense".[47] The Supreme Court affirmed

---

[43] 15 USC §2.

[44] *Standard Oil Co of New Jersey v United States* 221 US 1 (1911). See MN Berry "The Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions" (2001) 32 *Law and Policy in International Business* 263; Herbert Hovenkamp *Federal Antitrust Policy The Law of Competition and Its Practice* (2nd ed, West Group, St Paul, 1999) at 267–335; KN Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press, Cambridge, 2003), at 186–202; Einer Elhauge "Defining Better Monopolisation Standards" (2003) 56 Stanford: Rev 253; JG Fogarty "Property and Contract Influences on Competition Law Thresholds" (2001) 9 TPLJ 149.

[45] *Standard Oil Co of New Jersey v United States* 221 US 1 (1911) at 62.

[46] *Standard Oil Co of New Jersey v United States* 221 US 1 (1911) at 62.

[47] *Standard Oil Co of New Jersey v United States* 221 US 1 (1911) at 10.

this in *United States v United States Steel Corp*[48] where McKenna J said, "the law does not make mere size an offence, or the existence of unexerted power an offence".[49] The Supreme Court provided little guidance as to what constituted monopolistic conduct.

The first real guidance came from *United States v Aluminium Co of America ("Alcoa")*.[50] There Learned Hand J noted that mere possession of monopoly did not violate s 2. Thus, the fact that Alcoa possessed a monopoly in aluminium ingot did not necessarily mean it had monopolised that market. Rather, the origin of its monopoly determined liability. Alcoa "may not have achieved monopoly; monopoly may have been thrust upon it."[51] Furthermore, monopoly can result from lawful means. These included "by force of accident" or when a market can only profitably accommodate one firm.[52] Similarly, where a "single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry",[53] then s 2 did not apply. Learned Hand J noted, "the successful competitor having been urged to compete, must not be turned upon when he wins".[54]

Alcoa proved to be influential. The Supreme Court endorsed *Alcoa's* principles in *American Tobacco Co v United States.*[55] In *United States v Griffith* (*Griffith*),[56] the Supreme Court held that "the existence of power to exclude competition when it is desired to do so is itself a violation of s 2, provided it is coupled with the purpose or intent to exercise that power."[57] The Court further held that "use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful".[58] In *United States v United Shoe Machinery Co*[59] Judge Wyzanski attempted to rationalise the cases. In discussing *Griffith* Judge Wyzanski held that a firm breaches s 2 or monopolises "if it (a) has the power to exclude competition, and (b) has exercised it, or has the purpose to exercise it."[60] Building on *Alcoa*, the Supreme Court in *Grinnell*[61] laid down the classic test for monopolisation. Douglas J stated:[62]

---

48 *United States v United States Steel Corp* 251 US 417 (1920).

49. *United States v United States Steel Corp* 251 US 417 (1920) at 451.

50 *United States v Aluminium Co of America ("Alcoa")* 148 F 2d 416 (2d Cir 1945).

51 *United States v Aluminium Co of America ("Alcoa")* 148 F 2d 416 (2d Cir 1945) at 429.

52 *United States v Aluminium Co of America ("Alcoa")* 148 F 2d 416 (2d Cir 1945) at 429–430.

53 *United States v Aluminium Co of America ("Alcoa")* 148 F 2d 416 (2d Cir 1945) at 430.

54 *United States v Aluminium Co of America ("Alcoa")* 148 F 2d 416 (2d Cir 1945) at 430.

55 *American Tobacco Co v United States* 328 US 781 (1946) at 811–814.

56 *United States v Griffith* 334 US 100 (1948).

57 *United States v Griffith* 334 US 100 (1948) at 107.

58 *United States v Griffith* 334 US 100 (1948) at 107.

59 *United States v United Shoe Machinery Co* 110 F Supp 295 (D Mass 1953).

60 *United States v United Shoe Machinery Co* 110 F Supp 295 (D Mass 1953) at 342.

61 *United States v Grinnell Corp* 384 US 563 (1966).

62 *United States v Grinnell Corp* 384 US 563 (1966) at 570–571.

> The offense of monopoly … has two elements: (1) the possession of monopoly in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

Thus, to be liable under s 2 a firm must have monopoly power in the relevant market. Courts have held this means a firm must have substantial market power.[63] Second, using Judge Wyzanski's language, it must have exercised that substantial power. Or wilfully acquired or maintained that power by using exclusionary practices in contradistinction to growth or development from superior performance or historic accident. Thus, a monopoly or substantial market power alone does not breach s 2. The defendant must also engage in an anti-competitive act. As mentioned above, courts have termed this anti-competitive act as exclusionary or predatory conduct or monopolisation. This covers both conduct to acquire a monopoly and conduct to maintain a monopoly.

Section 2's requirements closely resemble both ss 36 and 46. These require substantial market power (or the United States equivalent, a monopoly). The Australasian sections' requirement of take advantage/use is remarkably similar to exercising substantial market power. Section 2's wilful prerequisite is equivalent to ss 36 and 46's purpose limbs. The only difference is that ss 36 and 46 do not proscribe acquiring substantial market power. Rather, s 2's monopoly maintenance is the functional equivalent of ss 36 and 46. Thus, one can see that, monopoly acquisition aside, the Australasian monopolisation provisions are a statutory encapsulation of the United States Supreme Court's *Grinnell* test for monopolisation.

Given this similarity, one can list a number of principles that should govern the interpretation and development of monopolisation law in both the United States and Australasia.[64]

3.8 Monopolisation principles

First, the monopolisation provisions only apply to firms that have substantial market power. This is the core requirement of all monopolisation provisions.[65]

---

63 Phillip E Areeda and Herbert Hovenkamp *3 Antitrust Law* (2nd ed, Little, Brown and Co, Boston, 2002) at [801].

64 This list is based on the principles contained in United States Department of Justice "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act" (2008) (withdrawn May 2009) at 8-9.

65 United States Department of Justice "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act" (2008) (withdrawn May 2009) at 8; Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010) at 255.

Second, simply having substantial market power is not enough to breach the monopolisation provisions. A firm must do something more. In the United States it must wilfully exercise that substantial market power. In Australasia it must take advantage of/use that substantial market power for a proscribed purpose.

Third, a firm with substantial market power only commits monopolisation if it harms the competitive process. Such conduct harms consumers. Consequently, the law proscribes it. As the United States Supreme Court noted in *Spectrum Sports Inc v McQuillan*[66] "the law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[67] Similarly, the New Zealand Supreme Court in *Commerce Commission v Telecom (*known as the *0867* case*)*, when discussing the High Court of Australia's decision *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*[68] concerning predatory pricing, stated:[69]

> In their joint judgment Gaudron, Gummow and Hayne JJ said more than once that s 46 was designed to prevent damage to the competitive process rather than to individual competitors. It is therefore erroneous to reason backwards from damage to a competitor to find a breach of the section. Only uses of market power that damage competition rather than competitors per se are caught by the section. Vigorous legitimate competition by a firm with dominance may damage competitors but, ex hypothesi, does not damage competition and is therefore not a breach of the section.

Thus, to be liable a firm must act with the purpose of preserving its substantial market power through practices that exclude or hinder rivals but do not benefit consumers.

Fourth, flowing on from the previous point, monopolisation provisions (indeed competition law as a whole) protects competition,[70] not competitors. Mere damage to a competitor alone does not breach the monopolisation provisions. The reason is that normal vigorous competition injures rivals. As one United States court has noted, "[a]ll lawful competition aims to defeat and drive out competitors".[71] The United States Supreme Court has said "the purpose of the [Sherman] Act is not to protect businesses from the workings

---

66 *Spectrum Sports Inc v McQuillan* 506 US 447 (1993).

67 *Spectrum Sports Inc v McQuillan* 506 US 447 (1993) at 458.

68 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374.

69 *Commerce Commission v Telecom* [2010] NZSC 111, [2011] 1 NZLR 577 at [25] [*0867*].

70 See Graeme Austin "The Regulation of Consumer Credit Products: An Examination of Baseline Assumptions" and Kate Tokeley "Consumer Law and Paternalism: A Framework for Policy Decision-making" in this volume (ch 11 and ch 10, respectively).

71 *Great Escape Inc v Union City Body Co* 791 F 2d 532 (7th Cir 1986) at 541.

of the market; it is to protect the public from the failure of the market."[72] Bork has noted:[73]

> The essential mechanism of competition and its prime virtue [is] that more efficient firms take business away from the less efficient. Some businesses will shrink and some will disappear. Competition is an evolutionary process. Evolution requires the extinction of some species as well as the survival of others. The business equivalent of the dodos, the dinosaurs, and the great ground sloths are in for a bad time – and they should be.

The New Zealand Supreme Court in *0867* held the same thing.[74] The Privy Council in *Carter Holt Harvey v Commerce Commission* ("*Carter Holt Harvey*") noted:[75]

> But it has to be borne in mind, as the Board also pointed out ... that a monopolist is entitled like everyone else to compete with his competitors. He is not required to stand idly by as he sees his market share being eaten into by others who are not dominant. That would be stifling competition – the very thing the section is designed to promote.

This is remarkably similar to the United States Seventh Circuit Court of Appeals which observed that s 2 does not require a monopolist to "lie down and play dead".[76]

From this, one can see that the whole purpose of the monopolisation provisions requiring an anti-competitive act is to distinguish between competitive conduct or competition on the merits which should be praised, and anti-competitive conduct which should be condemned.

Fifth, it is often a very difficult task to distinguish the two as they look alike. Easterbrook J has noted:[77]

> Aggressive, competitive conduct by a monopolist is highly beneficial to consumers. Courts should prize and encourage it under the antitrust laws. Aggressive, exclusionary conduct by a monopolist is deleterious to consumers. Courts should condemn it under the antitrust laws. There is only one problem: Competitive and exclusionary conduct look alike.

As Areeda and Turner pointed out, the problem becomes acute in situations where conduct by a firm without substantial market power can be efficiency-enhancing. Yet, the same conduct is anti-competitive when a firm with

---

72 *Spectrum Sports Inc v McQuillan* 506 US 447 (1993) at 458.

73 Robert H Bork, Ward S Bowman, Harlan M Blake and William K Jones "The Goals of Anti-trust: A Dialogue on Policy" (1965) 65 Colum L Rev 363 at 375.

74 *Commerce Commission v Telecom* [2010] NZSC 111, [2011] NZLR 577 at [25].

75 *Carter Holt Harvey v Commerce Commission* [2004] UKPC 37, [2006] 1 NZLR 145.

76 *Goldwasser v Ameritech Corp* 222 F 3d 390 (7th Cir 2000) at 397.

77 Frank H Easterbrook "On Identifying Conduct" (1986) 61 Notre Dame L Rev 972 at 972.

substantial market power carries it out.[78] Areeda and Turner gave the examples of lease-only practices, predatory pricing, tying and exclusive dealing.[79] Scalia J cited Areeda and Turner in the tying case of *Eastman Kodak*. He said:[80]

> Where a defendant maintains substantial market power, his activities are examined through a special lens: Behaviour that might otherwise not be of concern to the antitrust laws − or that might even be viewed as pro-competitive − can take on exclusionary connotations when practised by a monopolist.

Another scenario where the problem of distinguishing becomes acute is where the same conduct is both anti-competitive and pro-competitive. It has both aspects. The paradigm example is exclusive dealing.[81] Exclusive dealing occurs when one or more distributors agree to buy from only one supplier and not to carry other suppliers' products for the agreement duration. The pro-competitive effects include stimulating distributors to sell more of the supplier's products by focusing all their efforts on selling one product. It can prevent free riding, reduce costs and business uncertainty, protect a products quality and reputation and improve monitoring effectiveness.

Exclusive dealing can also be anti-competitive. If an agreement covers enough of the market, it can allow one supplier to dominate the market and foreclose access of a supplier's rivals and potential rivals to distributors. It can prevent rivals from obtaining economies of scale. This harm only occurs when the firm imposing exclusive dealing has significant market power and a significant market share such as to foreclose rivals' access.

Sixth, as a result of these problems in distinguishing, and the sparse statutory language of the monopolisation provisions, it is up to the courts to fashion rules.[82] As shown above, s 2 does not tell courts how to distinguish between competition on the merits and anti-competitive conduct. Rather, Congress left that task to the courts. As the United States Supreme Court noted,[83] Congress "expected the courts to give shape to the statute's mandate by drawing on the common law tradition" to further the statutory goals.

---

78 Phillip E Areeda and Donald Turner *3 Antitrust Law* (Little, Brown and Co, Boston, 1978) at [806e].

79 Phillip E Areeda and Donald Turner *3 Antitrust Law* (Little, Brown and Co, Boston 1978) at [806e].

80 *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 (1992) at 488.

81 United States Department of Justice "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act" (2008) at 6-7 (withdrawn May 2009) at 131.

82 A similar problem arises in the context of general tax avoidance rules. See John Prebble and Rebecca Prebble "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study" in this volume (ch 4).

83 *National Society of Professional Engineers v United States* 435 US 679 (1978) at 688.

Similarly the New Zealand Supreme Court in *0867* cited the Privy Council in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*[84] (“*Telecom v Clear”)*:[85]

> In *Telecom v Clear* the Privy Council observed that the words of s 36 provided no explanation as to the distinction between conduct which does, and conduct which does not, constitute use of a dominant position.

United States courts, given s 2’s sparse words, have not limited themselves to one formulation of a rule against monopolisation. *Grinnell* is not the sole test. The Supreme Court in *Aspen Skiing Co v Aspen Highlands Skiing Corp* (“*Aspen*”)[86] established another test. Citing Bork, it held that improper exclusion was “exclusion not the result of superior efficiency.”[87] It called conduct which attempted to exclude rivals on some basis, other than efficiency, “predatory” conduct. It further adopted Areeda and Turner’s definition of predation.[88] This states:[89]

> Thus “exclusionary” comprehends at the most behaviour that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

The Supreme Court in *Aspen* also held that it was relevant whether there was a legitimate business justification for the conduct.[90] In *Eastman Kodak v Image Technical Services* (*Eastman Kodak*) the Supreme Court held that “liability [for monopolisation] turns on whether valid business reasons can explain [the defendant’s] actions”.[91] Lack of valid business reasons means liability for the monopolist.

An influential lower court decision is the DC Circuit Court of Appeals’ decision in *United States v Microsoft Corp.*[92] After a plaintiff has established a prima facie case, the monopolist may proffer a pro-competitive justification for its conduct. The plaintiff then has the burden of rebutting it.

Thus, under United States law, the black letter law is not merely *Grinnell*. These tests apply as a general rule for monopolisation. It is important to have a

---

84 *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

85 *Commerce Commission v Telecom* [2010] NZSC 111, [2011] 1 NZLR 577 at [12].

86 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985).

87 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985) at 603.

88 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985) at 605.

89 Phillip E Areeda and Donald Turner *3 Antitrust Law* (Little, Brown and Co, Boston 1978) at 78.

90 *Aspen Skiing Co Corp v Aspen Highlands Skiing* 472 US 585 (1985) at 608.

91 *Eastman Kodak v Image Technical Services Inc* 504 US 451 (1992) at 483.

92 *United States v Microsoft Corp* 253 F 3d 34 (DC Cir 2001).

general rule. As the DC Circuit Court of Appeals noted,[93] "[a]nti-competitive conduct can come in too many forms, and is too dependent upon context for any Court or commentator ever to have enumerated all the varieties".

Along with general rules, United States courts have developed specific rules which apply to particular types of monopolistic conduct. The classic example is predatory pricing. In *Brooke Group Limited v Brown and Williamson Tobacco Corp*,[94] the Supreme Court held that a successful claim for predatory pricing requires, "first, proof that the prices complained of are below an appropriate level of cost and, second, a demonstration that the competitor had a reasonable prospect … or a dangerous probability of recouping its investment in below – cost prices".[95] This specific rule applies to predatory pricing rather than the general rules the Supreme Court established in *Grinnell, Aspen* and *Eastman Kodak.*

Seventh, given that the consequences of a finding of monopolisation are severe, the rules for monopolisation should be clear and certain.[96] As the Privy Council noted in *Telecom v Clear,* s 36 should be "construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful".[97]

The High Court of Australia in *Melway Publishing v Robert Hicks* agreed.[98] The Privy Council in *Carter Holt Harvey* said "the law would be failing in its duty if it did not make clear to [the monopolist] what he can and cannot do …".[99]

The writer has elsewhere argued that the New Zealand Supreme Court's departure from Australian law has failed to uphold these principles and impacted on the certainly and effectiveness of the law.[100] Of course, this may be a feature of all monopolisation litigation, as the fifth monopolisation principle mentioned above shows it is often difficult to distinguish between aggressive competition and monopolisation.

---

93 *Caribbean Broadcasting Systems Ltd v Cable & Wireless PLC* 148 F 3d 1080 (DC Cir 1998) at 1087; the same thing can be said about tax avoidance. See John Prebble and Rebecca Prebble "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study" in this volume (ch 4).

94 *Brooke Group Limited v Brown and Williamson Tobacco Corp* 509 US 209 (1993).

95 *Brooke Group Limited v Brown and Williamson Tobacco Corp* 509 US 209 (1993) at 223–224.

96 A general discussion of the importance of certain and accessible legislation can be found in John Prebble and Rebecca Prebble "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study" in this volume (ch 4).

97 *Telecom Corporation Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 403; Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010) at 257–258.

98 *Melway Publishing v Robert Hicks* [2001] HCA 13, (2001) 205 CLR 1 at [8].

99 *Carter Holt Harvey v Commerce Commission* [2004] UKPC 37, [2006] 1 NZLR 145 at [23].

100 Paul G Scott "Taking a Wrong Turn? The Supreme Court and Section 36 of the Commerce Act" (2011) 17 NZBLQ 260.

3.9 Delay

A striking feature of *0867* has been the substantial delay in getting to Court.[101] This was similar for *Commerce Commission v Bay of Plenty Electricity Ltd* (*BOPE*)[102] and *Commerce Commission v Telecom Corporation of New Zealand Ltd* (*Data Tails*).[103]

Nearly a decade waiting to get to Court is disgraceful. It also weakens the efficacy of s 36. What private plaintiff will wait so long? In all three cases the plaintiff was the Commerce Commission. Statements from its former chair place the blame on the court system. This project will examine whether this criticism is warranted.

Delay is also a factor in merger and restrictive trade practices applications. The project will examine whether this delay has led to reluctance to go to the Commission. It will also examine what may be the cause of such endemic delays. Is it only the capacity of the Commerce Commission and courts? Or are there further capacity issues in relation to the legal and economic consulting profession? Such capacity constraints, if they exist, can potentially impact on the quality and timeliness of outcomes and cost. Another issue is the dearth of fully argued cases under Part 2 of the Act. It may be that competition law litigation in New Zealand is just too expensive. Delays can contribute to this expense. The next stage of the project will examine these issues.

3.10 Conclusion

Competition law should provide an alternative to regulation of markets, such as that found in Part 4 of the Commerce Act 1986.[104] But whether it does depends on it being an effective alternative in practice. This requires it to be certain, relatively easily accessible, and suited to New Zealand's market conditions. As discussed above, it is arguable that New Zealand's competition law is none of these things, or, at least, not living up to expectations. The focus of the next stage of this project, therefore, will be analysis of whether current competition law, particularly the SLC test, is the best fit for an economy like New Zealand's, and consideration of how it might be improved.

---

[101] Over eight years.

[102] *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV–2001-485-917, 13 November 2007.

[103] *Commerce Commission v Telecom Corporation of New Zealand Ltd* HC Auckland CIV-2004-404-1333, 9 October 2009.

[104] See Alec Mladenovic "Networked Industry Case Studies: Electricity and Telecommunications" in this volume (ch 13).