Chapter 5

Competition Law and Policy: Can a Generalist Law be an Effective Regulator?

*Paul G Scott**

5.1 Introduction

A prevailing theme of this part of the New Zealand Law Foundation Regulatory Reform Project has been that competition law alone cannot be the sole form of regulation; and that competition law alone cannot police certain industries, in particular, network industries. New Zealand tried to do so, but the dominant view is that New Zealand's experiment in light-handed regulation failed.[1] A number of commentators blame New Zealand's monopolisation provision – section 36 of the Commerce Act 1986.[2] This chapter focuses mainly on that.

This chapter's thesis proposition is that this failure did not need to happen. The Commerce Act was up to the job. It was, and is, economically sophisticated

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

1 See, for example, Rex Ahdar "The New Zealand Electricity Industry and the Limits of Competition Law" (2010) 18(2) ULR 51.

2 At the time of enactment s 36(1) provided:

(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.

In 2001 Parliament amended s 36(2) to provide:

(2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—
  (a) restricting the entry of a person into that or any other market; or
  (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
  (c) eliminating a person from that or any other market.

Section 36 was amended in 2001 to bring it into line with the Australian provision shifting the threshold for market power from dominance in a market to a substantial degree of power in a market.

legislation. At the time of enactment worldwide competition law was propitious for the Commerce Act to suffice, but an unfortunate series of events occurred. There was an overreaction especially by commentators to the Privy Council's *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* decision.[3] New Zealand courts after the decision further set things back. Two other features of New Zealand's competition law jurisprudence did not help things: first, the courts' excessive reliance on literal interpretation; and second, their reluctance to refer to overseas case law and jurisprudence. New Zealand will never go back, but it was a lost opportunity.

To that end the first part of this chapter discusses the size of New Zealand's economy and whether it has had, and should have, an effect on New Zealand's competition law. It concludes it has not and should not. Rather, any failure of competition law has been due to the way the courts have approached competition cases. The failure has not been due to the size, scale or uniqueness of New Zealand. The second part discusses whether there was any problem with New Zealand's competition law. It discusses some of the issues raised in the Stage One chapter. Part 3 discusses what went wrong, in particular with section 36. Parts 4 and 5 then focus on two features of New Zealand's competition law that weakened the effectiveness of section 36. These are an excessive reliance on literal interpretation and a reluctance to rely on overseas' jurisprudence and scholarship. After a gloomy tour it concludes on a note of optimism. Part 6 briefly deals with whether delay has been a problem in competition law's effectiveness. Part 7 offers some conclusions.

5.2 Size of the New Zealand economy

When it comes to discussing competition law policy in small economies one must acknowledge Michal Gal's immense contribution to the topic. She wrote the definitive book on the subject.[4] She says small economies have three main characteristics. These are high market concentration levels, high entry barriers and inefficient levels of production.[5] All three exist in New Zealand. New Zealand's markets are characterised by either monopoly or oligopoly. As for inefficient production in small economies, Gal notes that a large fraction of output may be produced in sub-optimal volumes and in sub-optimal plants.[6] Firms may not be able to obtain minimum efficiency of scale, nor be able to take advantage of economies of scale. Further, New Zealand's size may mean

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

4 Michal S Gal *Competition Policy for Small Market Economies* (Harvard University Press, Cambridge (Mass), 2003).

5 See Michal S Gal *Competition Policy for Small Market Economies* (Harvard University Press, Cambridge (Mass), 2003) at ch 1.

6 Michal S Gal *Competition Policy for Small Market Economies* (Harvard University Press, Cambridge (Mass), 2003) at ch 1.

that demand is such that only a few firms, or one or no firms can operate at a productively efficient level.[7] Empirical studies certainly suggest this.[8]

As for entry barriers, Gal claims that for small economies these include not only economies of scale, but things such as the availability of labour and access to a diversified range of inputs for production.[9] Quite whether these are barriers to entry depends on whether one views entry barriers as costs which both the incumbent and entrant must face or not.[10] However, with New Zealand's geographic isolation and concomitant high transport costs, they do function as a reason for higher prices in New Zealand.

In any event, concentrated markets which are difficult to enter are unlikely to be as competitive as markets in larger countries which do not have these characteristics. As McLeod notes:[11]

> Competition authorities in small economies, therefore, are confronted by a conundrum. On the one hand, an overly aggressive approach to their role may prevent efficiency enhancing outcomes from taking place. On the other, an overly permissive approach may lead to the entrenchment of market power. Furthermore, they will often be faced by the requirement to make tradeoffs between market power and firm efficiency considerations.

This was the challenge New Zealand faced when it enacted the Commerce Act 1986. Parliament responded by largely adopting the then Australian Trade Practices Act 1974 (Cth) (now renamed the Competition and Consumer Act 2010 (Cth)). Along with that, New Zealand lowered many trade barriers. Many commentators have argued that this is even more important than competition law in ensuring good economic performance.[12]

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7 Mark N Berry "New Zealand Antitrust: Some Reflections on the First Twenty-Five Years" (paper presented at Loyola University, Chicago (IL), April 2012) at 5, available at www.luc.edu>.

8 Terrance Arnold, David Boles de Boer and Lewis Evans "The Structure of New Zealand Industry: Its Implications for Competition Law" in Mark Berry and Lewis Evans (eds) *Competition Law at the Turn of the Century: A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 24 at 30–40.

9 Michal S Gal "The Effects of Smallness and Remoteness on Competition Law – The Case of New Zealand" (2007) 14 CCLJ 292 at 295.

10 Mark N Berry "New Zealand Antitrust: Some Reflections on the First Twenty-Five Years" (paper presented at Loyola University, Chicago (IL), April 2012) at 5, available at www.luc.edu>.

11 Rory McLeod "Competition, Regulatory and Trade Policies in Small Economies: Issues Arising for New Zealand" in *APEC-OECD Co-operative Initiative on Regulatory Reform: Enhancing Market Openness Through Regulatory Reform* (Proceedings of the Sixth APEC-OECD Workshop on Regulatory Reform, Pucon, Chile, May 2004, published by OECD Publishing, 2008) 38 at 41 (footnotes omitted), available at www.oecd.org>.

12 Michael J Trebilcock "Competition Policy, Trade Policy and the Problem of Second Best" in RS Khemani and WT Stanbury (eds) *Canadian Competition Policy and Law at the Centenary* (Institute for the Research on Public Policy, Halifax, 1991); Rory McLeod "Competition, Regulatory and Trade Policies in Small Economies: Issues Arising for New Zealand" in *APEC-OECD Co-operative Initiative on Regulatory Reform: Enhancing Market Openness Through Regulatory Reform* (Proceedings of the Sixth APEC-OECD Workshop on Regulatory Reform, Pucon, Chile, May 2004, published by OECD Publishing, 2008) 38 at 42, available at www.oecd.org>.

How well has New Zealand's competition law done? In terms of the aim of competition law as is shown below the focus on efficiency is a plus. New Zealand's size does not permit a focus on the fate of individual competitors. If it did that would allow inefficient firms to prosper.

In terms of mergers and some restrictive trade practices, the Commerce Act allows authorisation of these when the public benefit outweighs any detriment.[13] The courts' focus has been on efficiency benefits, which again is good for the overall benefit of the economy. This is relatively unique to New Zealand as there is no authorisation process in the home of competition law – the United States.

Gal has argued that small economies cannot adopt measures of market power such as the Herfindahl-Hirschman Index (HHI) used in United States merger analysis.[14] New Zealand competition law, like others, has taken this advice.

Some commentators have argued that small economies should not make use of per se rules such as those against price fixing and boycotts.[15] They argue that agreements to fix prices can be welfare-enhancing as the prices fixed form ceilings rather than floors. The New Zealand Parliament and courts have ignored this advice. Price fixing has been and is per se illegal. Indeed Parliament, following most of the rest of the world, is criminalising naked cartels.[16] Given that naked cartels are unambiguously inefficient and damage consumers the call for elimination of per se rules will go unheeded. In any event if a price fixing agreement is efficient as claimed then the parties can seek authorisation.

While New Zealand is a small market economy, this has not impacted section 36. Gal claims small market economies with high levels of concentration need more robust monopolisation provisions.[17] I do not agree that there should be any difference in monopolisation laws between large and small economies. Anticompetitive monopolisation is bad wherever it occurs.[18] There might be more cases of monopolisation in small economies as there are more monopolists, but

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13 Commerce Act 1986, ss 58 and 61.

14 Michal S Gal "Size Does Matter: the Effects of Market Size on Optimal Competition Policy" (2001) 74 S Cal L Rev 1437 at 1466; Rory McLeod "Competition, Regulatory and Trade Policies in Small Economies: Issues Arising for New Zealand" in *APEC-OECD Co-operative Initiative on Regulatory Reform: Enhancing Market Openness Through Regulatory Reform* (Proceedings of the Sixth APEC-OECD Workshop on Regulatory Reform, Pucon, Chile, May 2004, published by OECD Publishing, 2008) 38 at 44, available at www.oecd.org>.

15 Charles River Associates (New Zealand) Ltd *The Competition Policy Dilemma in Small Economies: Some Lessons from the Economics Literature* (2002) at 58, cited in Rory McLeod "Competition, Regulatory and Trade Policies in Small Economies: Issues Arising for New Zealand" in *APEC-OECD Co-operative Initiative on Regulatory Reform: Enhancing Market Openness Through Regulatory Reform* (Proceedings of the Sixth APEC-OECD Workshop on Regulatory Reform, Pucon, Chile, May 2004, published by OECD Publishing, 2008) 38 at 44, available at www.oecd.org>.

16 Commerce (Cartels and Other Matters) Amendment Bill 2012 (341-1).

17 Michal S Gal "The Effects of Smallness and Remoteness on Competition Law – The Case of New Zealand" (2007) 14 CCLJ 292 at 311–313.

18 Mark N Berry "New Zealand Antitrust: Some Reflections on the First Twenty-Five Years" (paper presented at Loyola University, Chicago (IL), April 2012) at 40, available at www.luc.edu>.

that should be the only difference. The struggle to distinguish between efficient and anticompetitive behaviour applies equally to small and large economies.

It may be true that a firm with substantial market power in New Zealand may be small on a world scale. For example, Telecom (before its split) had substantial market power in New Zealand, however, a firm of its size may not have had such power in larger markets. But that does not matter. Substantial market power and monopolisation depends on the market – not size on a world scale. This is true the world over. Absolute size does not matter for monopolisation. Indeed, one of the leading United States cases on monopolisation is *Aspen Skiing Co v Aspen Highlands Skiing Corp*,[19] in which the defendant operated three of the four skiing mountains in Aspen, Colorado. It was held to have monopoly power in the market for downhill skiing at ski resorts in the Aspen area. There was no discussion of its relative size. Thus, the small relative size of New Zealand firms is no reason to jettison established monopolisation principles. Monopolisation is bad everywhere – no matter the size of the market or economy. All that matters is whether it is operating efficiently or monopolising.

5.3 Was there anything wrong with New Zealand's competition law?

If competition law regulation failed as the only form of regulation, what were the reasons? Was there anything wrong with New Zealand's competition law that resulted in it not being up to the task? The first possibility is that Parliament poorly drafted New Zealand's competition law, and that the Commerce Act 1986 did not cut the mustard. However, this does not seem valid. Trebilcock noted that "it is often claimed that Canada's Competition Act, 1986 is the most economically literate competition statue in force in any jurisdiction in the world".[20] I do not agree. At the time of drafting New Zealand's Act was at least as sophisticated, if not more so. For one thing Canada's Competition Act has a purpose clause which mentions four different and potentially conflicting goals. Section 1.1 provides:[21]

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and in order to provide consumers with competitive prices and products choices.

Breaking this down into four main parts one can see the following goals as being to:

(1) promote efficiency and adaptability of the Canadian economy;

(2) regulate foreign and domestic business inside and outside of Canada;

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

20 Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M Lacobucci *The Law and Economics of Canadian Competition Policy* (University of Toronto Press, Toronto, 2002) at 31.

21 Competition Act RSC 1985 c C-34, s 1.1 (Canada).

(3) protect small- and medium-sized businesses; and

(4) protect consumers.

These goals do not provide for consistency and clarity. Goals (1) and (3) at least can starkly conflict.

New Zealand has had two purpose statements, however, which while not free from controversy, are more helpful than Canada's.

The long title of the Commerce Act 1986 originally provided it was "[a]n Act to promote, competition in markets within New Zealand". The Court of Appeal in *Tru Tone Ltd v Festival Records Retail Marketing Ltd* related this to efficiency. Richardson J observed:[22]

> In terms of the long title the Commerce Act is an Act to promote competition in markets in New Zealand. It is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources.

In 2001, Parliament amended the Act and introduced a new purpose section via section 1A which provides:

> The purpose of this Act is to promote competition in markets for the long-term benefit of consumers in New Zealand.

Subsequent courts have interpreted this as continuing the efficiency focus of *Tru Tone*.[23] In any event the New Zealand purpose provision is clearer than Canada's.

The key sections in the Commerce Act are sections 27, 29, 30, 36 and 47.

Section 27 is the general prohibition section. It provides that no person may enter into or give effect to a provision of a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in a market.

Section 30 deems price fixing among rivals to be a breach of section 27. A plaintiff does not have to prove any competitive harm. Section 29 prohibits group boycotts. The Act terms these "exclusionary provisions". Section 37 prohibits resale price maintenance and makes it per se illegal – although it does not use this term and nor did sections 29 and 30. However, one can view those provisions as the Commerce Act's per se prohibitions. Section 36 is the Act's monopolisation provision.

Section 47 deals with mergers. Initially it prohibited mergers which resulted in acquiring or strengthening a dominant position. Parliament later changed this to prohibiting acquisitions which would be likely to have the effect of substantially lessening competition in a market.[24]

New Zealand based its Act on the Australian Trade Practices Act 1974 (Cth) (now renamed the Competition and Consumer Act 2010 (Cth)). However, New Zealand's

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22 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358.

23 *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA); *Air New Zealand Ltd v Commerce Commission (No 6)* (2004) 11 TCLR 347 (HC).

24 Commerce Amendment Act 2001, s 11(1).

Act was superior. New Zealand only had one general prohibition section (s 27), rather than individual sections which dealt with particular types of behaviour. The best example of the problems with the Australian legislation is the exclusive dealing provisions contained in section 47. Section 47 is not the finest model of the drafter's art. It has nearly 2,000 words in 14 subsections, 40 sub-subsections and 10 sub-subsections of subsections. In 1979, the High Court of Australia described it as "replete with double negatives and proliferating alternatives, [defying] accurate synopsis".[25]

In 2003, Kirby J called the provisions '"obscure" and "a significant challenge for interpretation" requiring the Court to deal with "too many cross references, qualifications and statutory interrelationships" which imposed "an unreasonable burden" on those with the responsibility of assigning meaning to, and applying its provisions.[26]

New Zealand has no equivalent section. Rather section 27 does the job all by itself and New Zealand has not suffered at all. Perhaps Pengilley put it best about section 47:[27]

> Australians are so garrulous that they need 2,000 words to describe that which does not need to be said.

Well what about Canada? Canada is supposedly the home of the most sophisticated piece of competition legislation of them all. It too suffered from prolixity. Initially the Competition Act RSC 1986 had its own sections expressly dealing with predatory pricing. Under the old section 50(1)(c) of the Competition Act, predatory pricing was a criminal offence. Again this was in contrast to New Zealand which simply relied on section 36. How did these provisions work in Canada? Parliament repealed them in 2009 and now Canada, like New Zealand, relies on its general monopolisation provisions. Further, New Zealand (and Australia) also allow for private suits for monopolisation. Under section 79 of the Competition Act, Canadian victims of monopolisation have to go to the Competition Bureau and convince it to apply to the Competition Tribunal for a remedial order. Only the Commissioner of Competition can file an application to the Tribunal. This is true of all the civil provisions of the Competition Act including agreements or arrangements that prevent or lessen competition under section 90 of the Competition Act.[28] Given that private litigation has contributed much to the Australasian competition jurisprudence, New Zealand's position was, and is, superior. In any event, it allowed private parties to use competition law to police markets.

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25 *Trade Practices Commission v Tooth & Co Ltd*, (1979) 142 CLR 397 (HCA) at 409, (1979) 26 ALR 185 at 194.

26 *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCA 59, (2003) 216 CLR 1, (2003) 201 ALR 414 at [69].

27 Warren Pengilley "A Pilgrim's Progress in Antitrust" (paper presented at New Zealand Competition Law and Policy Workshop, Christchurch, August 2005).

28 Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M Lacobucci *The Law and Economics of Canadian Competition Policy* (University of Toronto Press, Toronto, 2002). There is only private access to the Tribunal for reviewable conduct under s 75 (refusal to deal) and s 77 (exclusive dealings, tied selling and market restriction).

Another positive feature of New Zealand's competition law is that lay members appointed to the High Court must be qualified by virtue of their knowledge or experience in industry, commerce, economics, law or accountancy.[29] When hearing appeals from the Commerce Commission, section 77(9) makes it compulsory that the High Court consist of a judge and at least one lay member. With other Commerce Act matters under sections 27–29, 36, 36A or 47, a High Court judge may choose to sit with one or more lay members.[30] Most cases involving lay members have involved economists sitting. Also in most cases where lay members are not mandatory, the High Court has included them. This is hugely beneficial as one of the complaints from overseas is that generalist judges lack the economic knowledge to deal with competition matters.[31] The presence of lay members removes this criticism and allows the High Court to deal with sophisticated and complex matters confidently.

So, I am of the view that New Zealand's competition statute was, and is, in good shape. That is, not to say, all was and is perfect.

5.3.1 *Other provisions*

(a) Resale price maintenance

As mentioned above, New Zealand outlawed resale price maintenance (RPM). For some reason, RPM never became a hot issue in New Zealand (unlike Australia). Only one case ever went to trial and most of the cases involved agreed penalties. Parliament allowed for authorisation but there have been no such applications. Perhaps, like the United States, it will become subject to the rule of reason.[32] There appears to be no push for RPM to retain per se illegal status.

(b) Collective or group boycotts under section 29

The chapter on competition law in the first stage of this project indicated it would examine and discuss group boycotts under section 29. Its preliminary view was that Parliament should return to the original section 29 or group boycott law. It is worthwhile to recap briefly on New Zealand's history and the views in the first stage.

As for section 29, that has been legislated out of existence. Just after the birth of the Commerce Act, Pengilley gave a paper arguing that New Zealand's group boycott law (s 29) did not accurately reflect United States group boycott law.[33] He advocated that the target or victim of a boycott had to be in competition with one or more of the boycotters. His claims were highly arguable, if not downright

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29 Commerce Act 1986, s 77(2).

30 Commerce Act 1986, s 78(1).

31 Richard A Posner *The Federal Courts: Challenge and Reform* (Harvard University Press, Cambridge, 1996) at ch 8.

32 *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007).

33 Warren Pengilley "The Exclusionary Provisions of the New Zealand Commerce Act in Light of United States Decisions and Australian Experience" (1988) 3 Cant L Rev 357.

wrong.[34] Pengilley (and his epigoni)[35] claimed that a collective boycott (or collective refusal to deal) was only per se illegal when a group of competitors boycotted actual, or would be, competitors. Or, in other words, the victim of the boycott must be in competition with the boycotting parties. He cited *Smith v Pro Football Inc* where the DC Circuit Court of Appeals held this.[36] However, Pengilley ignored subsequent Supreme Court authority which held there was no such requirement. As the Supreme Court noted in *St Paul Fire & Marine Insurance Co v Barry*:[37]

> As the labor-boycott cases illustrate, the boycotters and the ultimate target need not be in a competitive relationship with each other. This Court also has held unlawful concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers.

Further, Pengilley claimed that the Supreme Court case *Fashion Originators' Guild of America v Federal Trade Commission*,[38] which established the per se rule against collective boycotts, was actually a price fixing case. He claimed "the arrangement was basically condemned because it was an illegal price fixing arrangement, the boycott only being the manner of enforcement of that arrangement".[39] Pengilley is quite wrong. The defendants argued that the government had shown neither a decrease in output nor price fixing. The Supreme Court said this did not matter as the antitrust laws were concerned with other harms as well as those the defendant listed.[40]

Despite his errors he was persuasive. Parliament enacted his suggested reforms in 1990 and removed much of the teeth from section 29. The reform befuddled courts, the Commerce Commission and practitioners. In *Tui Foods Ltd v New Zealand Milk Corp Ltd*, Gault J, with admirable candour, commented on the amended section 29 as follows:[41]

> I admit to difficulty in seeing just what the section is intended to target. In its terms, where traders who happen to compete are involved, it appears to extend to arrangements that may well enhance competition and involve reasonable competitive activity. I envisage for example graduated discounts for volume trading that clearly are intended to capture business from competitors (although falling short of predatory pricing).

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34 Lindsay Hampton "Exclusionary Provisions: A Critique of the New Zealand Reform" (1993) 1(4) TPLJ 198; see also Lindsay Hampton "Exclusionary Provisions" in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (3rd ed, LexisNexis, Wellington, 2010) 737 at 764.

35 IS Wylie "What is an exclusionary provision? Newspapers, rugby league, liquor and beyond" (2007) 35 ABLR 33.

36 *Smith v Pro Football Inc* 593 F2d 1173 (DC Cir 1978).

37 *St Paul Fire & Marine Insurance Co v Barry* 438 US 531 (1978) at 543.

38 *Fashion Originators' Guild of America v Federal Trade Commission* 312 US 457 (1941).

39 Warren Pengilley "The Exclusionary Provisions of the New Zealand Commerce Act in Light of United States Decisions and Australian Experience" (1988) 3 Cant L Rev 357 at 392.

40 *Fashion Originators' Guild* 312 US 457 (1941) at 468; Keith N Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press, Cambridge, 2003) at 170–172.

41 *Tui Foods Ltd v New Zealand Milk Corp Ltd* (1993) TCLR 406 (CA) at 411–412.

> The difficulty I have in distinguishing between what reasonable competitive activity that presumably is intended not to be prohibited and activities that are targeted by the section leaves me in some doubt as to the appropriate approach to the substantive issue that arises in this case.

The reform was so befuddling that, as Pengilley and Hampton noted,[42] it caused the Commerce Commission to fail to plead section 29 in the open and shut section 29 case of *Commerce Commission v Ophthalmological Society of New Zealand Inc.*[43]

As mentioned in the Stage One chapter, in the first part of this project, section 29 became a dead letter.[44] However, business groups were persuasive in leading Parliament to enact a defence to section 29. It is now a defence to an exclusionary provision if a defendant shows it does not have the purpose, effect or likely effect of substantially lessening competition.[45] This has the effect of turning section 29 cases into section 27 cases – albeit with the burden of proof reversed.

The argument for reform was that section 29 caught too many pro-competitive joint ventures.[46] Gault J's comments in *Tui Foods v New Zealand Milk Corp Ltd* supported this.[47] Although, as the Stage One chapter noted, there were only ever two cases under section 29 – an agreed penalty and an interlocutory application.[48] As for harming joint ventures, Australia has neither the Pengilley amendments, nor the defence and there is no evidence of a decrease of joint venture activity as a result.

Also, the claim was that section 29 caught too many cases of benign vertical integration. A firm may manufacture products and also distribute them through third party retailers using an exclusive dealing arrangement. The firm then establishes its own retailing outlet. Arguably this makes it a competitor of its own exclusive retailers and satisfies the section 29 requirements.[49]

As for the vertical integration point, the same argument would apply in Australia – but has not. It has not prevented benign vertical integration in Australia.

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42 Lindsay Hampton "Exclusionary Provisions: A Critique of the New Zealand Reform" (1993) 1TPLJ 198; Lindsay Hampton "Exclusionary Provisions" in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (3rd ed, LexisNexis, Wellington, 2010) 737 at 748–749; Warren Pengilley "Competition Policy and Arrangements Involving the Medical Profession in Australia and New Zealand: An Overview" (2005) 21(3) NZULR 409 at 450.

43 *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC).

44 See Paul G Scott "Competition Law and Policy" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 71.

45 See Commerce Act 1986, s 29(1A).

46 Commerce Amendment Bill 2001 (296-2) (select committee report) at 8–10.

47 See *Tui Foods Ltd v New Zealand Milk Corp Ltd* (1993) TCLR 406 (CA).

48 See Paul G Scott "Competition Law and Policy" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 71 at 79.

49 Lindsay Hampton "Exclusionary Provisions: A Critique of the New Zealand Reform" (1993) 1TPLJ198; see also Lindsay Hampton "Exclusionary Provisions" in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (3rd ed, LexisNexis, Wellington, 2010) 737 at 744–750.

The weakening of section 29 probably does not matter too much now as Australia primarily used section 4D to attack market division (this happens when competitors allocate customers, suppliers or geographical areas). New Zealand's proposed cartel amendment will now capture market division.[50] However, what will happen with cases like *Super League*,[51] which the Full Federal Court decided on the basis of section 4D alone? It is true that in other cases involving section 4D the courts have also found liability under the general prohibition section, such as in *Rural Press Ltd v Australian Competition and Consumer Commission.*[52] New Zealand courts could not rely on section 29 in group boycott cases, such as *United States v Visa USA Inc*[53] in the United States. Canada does not have any provisions against group boycotts so there is probably no real harm in not having such a per se provision anymore.[54]

However, it is ironic that the High Court of Australia, a court often criticised for being conservative, came out strongly in favour of the per se nature of exclusionary provisions in *Rural Press*.[55] There Gummow, Hayne and Heydon JJ favourably cited the following remarks of Kirby J:[56]

> 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 may 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.

Similarly Bork, hardly an antitrust enforcement zealot, heartily and enthusiastically endorsed the per se rule against concerted refusals to deal on boycotts in the context of *United States v Visa USA Inc*.[57]

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50 The Commerce (Cartels and Other Matters) Amendment Bill 2012 (341-1).

51 *News Ltd v Australian Rugby Football League Ltd* (1996) 135 ALR 33 (FCA).

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

53 *United States v Visa USA Inc* 344 F 3d 229 (2nd Cir 2003).

54 See Michael Trebilcock and others *The Law and Economics of Canadian Competition Policy* (University of Toronto Press, Toronto, 2002).

55 *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75, (2003) 216 CLR 53 at [82].

56 *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45, (2003) 215 CLR 563, (2003) 200 ALR 157 at [118].

57 Robert H Bork "Trust the TrustBusters: Why Conservatives are Wrong about Antitrust" in Robert H Bork (ed) *A Time to Speak: Selected Writings and Arguments* (ISI Books, Wilmington (Del), 2008) 473 at 475–476; see also *Chicago Professional Sports Ltd Partnership v National Basketball Assoc* 961 F 2d 667 (7th Cir 1992) which is a boycott decision of Judge Easterbrook.

Sumpter has called the current section 29 the Commerce Act's "most useless and enigmatic provision".[58] It undoubtedly is now. But it was not before Parliament unnecessarily amended it.

So, apart from the unnecessary changes to section 29, New Zealand's competition law was in good shape, in terms of its substantive provisions against restrictive trade practices. The presence of lay members meant the High Court would be economically literate and able to hear sophisticated and complex cases.

5.4 What went wrong?

So if New Zealand's Act was, and is, in good shape, what went wrong with competition law and network industries?

Why did competition law procedures fail with network industries? And fail it did as Parliament regulated both the telecommunications and electricity sector. A 2009 Commerce Commission report concluded that the four largest generators had exploited their substantial degree of market power.[59] This, the report claimed, resulted in average wholesale prices being 18 per cent higher than they would have been had effective competition prevailed.[60] However, the report held that this was not the result of breaches of the Commerce Act. Although not free from criticism,[61] the report shows how competition law came up short.

The first problem was with competition law itself. One of the great problems with concentrated industries is conscious parallelism, which arises when firms who are interdependent end up pricing similarly without entering into any agreement to do so.[62] It is a characteristic of oligopolies which, as McLeod notes, typifies many New Zealand industries.[63] This can result in prices above the competitive level, but throughout the world conscious parallelism is not a breach of competition law.[64] The

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58 Matt Sumpter "Competition Law" (2012) 1 NZ L Rev 113 at 140.

59 Commerce Commission "Investigation Report: Commerce Act 1986 s 27, s 30 and s 36 Electricity Investigation" (22 May 2009) at [272] and [686], available at www.comcom.govt.nz.

60 Commerce Commission "Investigation Report: Commerce Act 1986 s 27, s 30 and s 36 Electricity Investigation" (22 May 2009) at [272] and [686], available at www.comcom.govt.nz.

61 See L Evans, S Hogan and P Jackson "A Critique of Wolak's Evaluation of the NZ Electricity Market: Introduction and Overview" (2012) 46(1) New Zealand Economic Papers 1.

62 See Paul G Scott "Going it Alone: Arrangement and Understanding under the Commerce Act 1986" (2010) 16 NZBLQ 98; Rex Ahdar "The New Zealand Electricity Industry and the Limits of Competition Law" (2010) 18(2) Util LR 51; Gregory Werden "Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory" (2004) 71 Antitrust LJ 719 at 722; see also Keith N Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press, Cambridge, 2003).

63 Rory McLeod "Competition, Regulatory and Trade Policies in Small Economies: Issues Arising for New Zealand" in *APEC-OECD Co-operative Initiative on Regulatory Reform: Enhancing Market Openness Through Regulatory Reform* (Pucón Workshop, May 2004) 38 at 39–40, available at www.oecd.org.

64 See Paul G Scott "Going it Alone: Arrangement and Understanding under the Commerce Act 1986" (2010) 16 NZBLQ 98; Rex Ahdar "The New Zealand Electricity Industry and the Limits

reason is that it is unilateral action – albeit in situations of interdependence. It is not the result of an agreement, arrangement or understanding. However, the failure of competition law to deal with conscious parallelism was not the cause of industry specific regulation. Rather industry specific regulation was the result of perceived failure with section 36.

5.5 Was section 36 the problem?

At the time of enactment it was by no means inevitable that section 36 was going to fail. I argued in the Stage One chapter[65] that section 36 was an attempted statutory codification of United States monopolisation law in *United States v Grinnell Corp.*[66] At the time, United States law was in good shape for firms attempting to gain access to networks and the like. It was the apogee of the essential facilities doctrine.[67] Briefly, the doctrine flows from three United States Supreme Court cases[68] – although the Supreme Court never used the phrase "essential facilities". Indeed, Neale invented the phrase in his 1970 treatise.[69] He applied it in explaining the cases where the Supreme Court had dealt with refusals to deal by a vertically integrated firm with substantial market power. The DC Circuit Court of Appeals was the first court to use the doctrine in *Hecht v Pro-Football Inc*.[70] The Seventh Circuit Court of Appeals provided the classic formulation of the doctrine in *MCI Communications Corp v AT&T Co.*[71] It held liability results for failure to do business with a rival when:[72]

(1) the monopolist controls access to an essential facility;

(2) the rival cannot practically or reasonably duplicate the essential facility;

(3) the monopolist denies access to their rival; and

(4) it was feasible to grant access.

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of Competition Law" (2010) 18(2) Util LR 51; Gregory Werden "Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory" (2004) 71 Antitrust LJ 719 at 722; see also Keith N Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press, Cambridge, 2003).

65 See Paul G Scott "Competition Law and Policy" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 71 at 83.

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

67 See Spencer Weber Waller "Areeda, Epithets, and Essential Facilities" (2008) 2 Wis L Rev 359; Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul (Minn), 1999) at 305–311.

68 *United States v Terminal Railroad Assoc* 224 US 383 (1912); *Associated Press v United States* 326 US 1 (1945); *Otter Tail Power Co v United States* 410 US 366 (1973).

69 AD Neale *The Antitrust Laws of the United States of America: A study of Competition Enforced by Law* (2nd ed, Cambridge University Press, Cambridge, 1960).

70 *Hecht v Pro-Football Inc* 570 F 2d 982 (DC Cir 1977), cert denied 436 US 956 (1978).

71 *MCI Communications Corp v AT&T Co* 708 F 2d 1081 (7th Cir 1983), cert denied 464 US 891 (1983).

72 *MCI Communications Corp v AT&T Co* 708 F 2d 1081 (7th Cir 1983) at 1132.

Subsequent courts have added a further requirement: that the monopolist lacked a valid business justification for its refusal to deal[73] – although it was implicit in the *MCI* formulation.

Although the doctrine has received a bad name subsequently, mainly due to the efforts of Areeda[74] (plus the Supreme Court has overruled it in all but name),[75] it is worth remembering that very few plaintiffs ever actually won using the doctrine. One can poke fun at calling a football stadium an essential facility as in *Hecht*;[76] however, the DC Circuit Court of Appeals remanded the case for a new trial. The new jury found no liability and the plaintiffs never appealed.[77] As for *MCI*, the Seventh Circuit, while applying the doctrine, did order a new trial for damages. The parties settled, albeit at only five per cent of the original damages.[78] Although Areeda criticised the doctrine he never said MCI's case over denial of access was unjustified. Indeed, he agreed the case was "probably correct".[79]

The United States experience showed that a Federal Court could effectively use antitrust law in the telecommunications industry. This had occurred with the Antitrust Division of the United States Justice Department's antitrust case against American Telephone and Telegraph Company (AT&T).[80]

This company arose out of Alexander Graham Bell's invention of the telephone and more importantly his ownership of the first patent, for a recognisable telephone. Bell also patented improvements to his original telephone. The United States Supreme Court upheld these improvements.[81] Bell incorporated in 1886 and formed the famous Bell Telephone company. AT&T was at the core of the Bell Company.

At the expiry of Bell's patents there was a flurry of competition with new independent companies forming; but the competition did not last. A wave of mergers led to reconsolidation. Congress eventually passed a Communications Act of 1934.[82] By this time everyone regarded telephone services as a natural monopoly. The only way to protect consumers was by regulation. For local services

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73 *Morris Communications Corp v PGA Tour Inc* 364 F 3d 1288 (11th Cir 2004); *United Asset Coverage Inc v Avaya Inc* 409 F Supp 2d 1008 (ND Ill 2006).

74 Phillip Areeda "Essential Facilities: An Epithet in Need of Limiting Principles" (1989) 58 Antitrust LJ 841.

75 See *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004).

76 *Hecht v Pro-Football Inc* 570 F 2d (DC Cir 1977), cert denied 436 US 956 (1978).

77 See Spencer Weber Waller "Areeda, Epithets, and Essential Facilities" (2008) 2 Wis L Rev 359; Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul (Minn), 1999) at 374.

78 See Spencer Weber Waller "Areeda, Epithets, and Essential Facilities" (2008) 2 Wis L Rev 359; Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul (Minn), 1999) at 305-311.

79 Phillip Areeda "Essential Facilities: An Epithet in Need of Limiting Principles" (1989) 58 Antitrust LJ 841 at 845.

80 *United States v AT&T* 179 US App DC 198, 551 F 2d 384 (1976); see also *Goldwasser v Ameritech Corp* 222 F 3d 390 (7th Cir 2000); George P Oslin *The Story of Telecommunications* (Mercer University Press, Georgia, 1992).

81 *United States v American Bell Telephone Co* 167 US 224 (1897).

82 Communications Act of 1934 Ch 652 48 Stat 1064 (1934).

there was state regulation. The Federal Communications Commission regulated interstate telephone companies and services.

One can see the dominance in 1934 of the Bell companies by it having operating companies, long distance services, equipment manufacturing and research laboratories. AT&T owned 80 per cent of local telephone lines and services and had a complete monopoly on long distance service. This continued until the 1970s.

Then in 1974 the Antitrust Division sued AT&T seeking dissolution. It alleged (inter alia) various acts of monopolisation. In particular, the Division attacked AT&T's joining of its long-distance business with its regulated local natural monopolies. AT&T's long-distance business was capable of being competitive and the joining allowed AT&T to cross-subsidise resulting in a distortion of resource allocation.[83]

The case came under the control of Judge Harold Greene.[84] The parties settled the case by entering into a consent decree which severed AT&T's long-distance business from its local telephone service monopolies. From the time of approving the consent decree until Congress passed the Telecommunications Act 1996 Judge Greene supervised the process of opening up telecommunications markets to competition.[85] Thus, it appeared a court could grant access to network industries – of which telecommunications is undoubtedly one.

At the time of the Commerce Act's enactment in New Zealand, all appeared sunny for some local variant of the essential facilities doctrine. The doctrine received a further fillip when Barker J favourably referred to it in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd.*[86] Although the High Court backtracked in *Union Shipping NZ Ltd v Port Nelson Ltd.*[87]

The High Court of Australia gave the biggest support to access seekers in *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd*.[88] This was the first case in which a court ordered a firm to supply a product which it had previously used all for itself. Thus, the background to and early history of section 36 suggested it would be an effective tool in granting access.

All this changed in *Telecom Corp of New Zealand Ltd v Clear Communications Ltd*,[89] however, which concerned the access price to Telecom's network. The High Court held Telecom did not breach section 36 by charging an access price based on the Baumol-Willig rule or Efficient Component Pricing Rule (ECPR). The potential problem was that the ECPR allowed Telecom to charge its opportunity cost in connecting a rival. The benchmark price could be at such a level to permit an

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83 Robert H Bork *The Antitrust Paradox: A Policy at War with Itself* (The Free Press, New York, 1993) at 431.

84 *United States v American Tel & Tel Co* 552 F Supp 131 (1982), aff'd sub nom *Maryland v United States* 460 US 1001 (1983).

85 *United States v American Tel & Tel Co* 552 F Supp 131 (1982), aff'd sub nom *Maryland v United States* 460 US 1001 (1983).

86 *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC).

87 *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC).

88 *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177, (1989) 83 ALR 577 (HCA).

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

integrated monopolist to maintain its monopoly profits in the output market.[90] This could enable Telecom to receive any monopoly rents that were contained in Telecom's charges.

A numerical example will show how the ECPR works.[91] A vertically integrated monopolist sells a retail product. The monopoly or output price of the retail product is $100. It also manufactures a vital input to the retail product at a price of $10 per unit. It has other incremental costs of $30 per unit of output sold. Thus, the costs per unit are $40. The monopolist earns a price-cost margin of $60 per unit.

Under the ECPR, a monopolist will charge $70 to an equally efficient competitor who seeks access to the vital input. The new entrant as it is equally as efficient will have incremental costs of $30. Thus, when charged $70 it will have a price-cost margin of zero if the monopolist continues to charge the pre-entry price of $100 for the retail product (costs include a competitive rate of return). The retail product price will stay at $100 and the monopolist retains its profit of $60 per unit. This is so whether the final product is sold by the retailer or new entrant.

Thus, the $70 price for the input represents the opportunity cost for the monopolist; that is, $10 cost of manufacturing the input and the foregone price-cost margin of $60.

The Court of Appeal reversed the High Court. The Privy Council allowed Telecom's appeal. The Privy Council was not concerned with any monopoly rents as Part IV of the Commerce Act (the price control provisions) could deal with those. Section 36 was not to be construed so as to produce a "quasi-regulatory system".[92] The Privy Council laid down a test for use of a dominant position, stating:[93]

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

This became known as the counterfactual test, derived from *Queensland Wire*. Whatever one thinks of the ECPR and the Privy Council's decision, it was the end of section 36 being used as the primary means of regulating industries. The government declared light-handed regulation a failure and re-regulated telecommunications in 2001.[94]

Also the Privy Council's decision received extremely bad press. Numerous articles attacked the test for use as being too lenient on monopolists.[95] They even

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90 See Nicholas Economides and Lawrence J White "Access and Interconnection Pricing: How Efficient is the 'Efficient Component Pricing Rule'?" (1995) 40 Antitrust Bull 557.

91 I take this from Steven C Salop "Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist" (2009) 76 Antitrust LJ 709 at 722–723.

92 *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 388.

93 *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 403.

94 See Rex Ahdar "The New Zealand Electricity Industry and the Limits of Competition Law" (2010) 18(2) Util LR 51.

95 See, for example, Yvonne van Roy "The Privy Council Decision in *Telecom v Clear*: Narrowing the Application of s 36 of the Commerce Act 1986" [1995] NZLJ 54; Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at [CA36.10(3)]; Rex Ahdar "Battles in New Zealand's Deregulated Telecommunications Industry" (1995) 23 ABLR 77.

accused the courts as having surrendered to the Chicago School.[96] Supposedly this was a damning criticism.

New Zealand courts did not help things. In *Port Nelson Ltd v Commerce Commission*,[97] the High Court found a breach of section 36 for tying – but not for bundled discounting or predatory pricing. These practices fell under section 27, despite being unilateral conduct. Gault J did not advance things, apart from grumbling about the counterfactual test saying:[98]

> While it is not easy to see why use … should not be determined simply as a question of fact without the need to postulate artificial scenarios, we are content in this case to adopt that approach….

He essentially said the defendant had not shown the High Court was wrong in its analysis. He said much the same thing in *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* in upholding liability under section 36 for predatory pricing.[99]

He also repeated van Roy's criticism that the Privy Council test captured very little anticompetitive conduct.[100] This was more a plea for reform than an attempt to grapple with the law.

One can contrast this with the performance of Heerey J in Australia. Operating under the constraints of *Queensland Wire*[101] (the ultimate source of the counterfactual test) in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[102] and *Australian Corp and Consumer Commission v Boral*[103] Heerey J introduced legitimate business rationale into the jurisprudence of section 46 and showed how it was consistent with *Queensland Wire*. He also introduced recoupment for predatory pricing in *Boral,*[104] relying heavily on United States jurisprudence. The High Court agreed.[105] So too did the Privy Council in *Carter Holt.*[106] One can contrast Heerey J's reasoning with Gault J's performance in that Gault J never mentioned legitimate rationale and unconvincingly dismissed recoupment in a desultory couple of paragraphs in *Port Nelson.*[107]

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96 See Ross Patterson "How the Chicago School Hijacked New Zealand Competition Law and Policy" (1996) 17 NZULR 160.

97 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA).

98 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 577.

99 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2001) 10 TCLR 247 (CA).

100 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2001) 10 TCLR 247 (CA) at [72].

101 *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177, (1989) 83 ALR 577 (HCA).

102 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [1999] FCA 664, (1999) 90 FCR 128, (1999) 169 ALR 554.

103 *Australian Corp and Consumer Commission v Boral* [1999] FCA 1318, (1999) 166 ALR 410.

104 *Australian Corp and Consumer Commission v Boral* [1999] FCA 1318, (1999) 166 ALR 410 at [169].

105 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374.

106 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 (PC).

107 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 571.

In comparison to the Australian courts, the New Zealand courts gave up on developing section 36 – as did private plaintiffs as the number of private cases dropped precipitously. Perhaps they should not have. The High Court of Australia held a refusal of access was a breach of section 46 in *Northern Territories Power Generation Pty Ltd v Power and Water Authority.*[108] There, too, in the Full Federal Court, Finkelstein J used another part of *Queensland Wire*, namely Deane J's approach, to find liability.[109] New Zealand courts had never referred to Deane J's reasoning after the Privy Council's *Telecom* decision.

As Berry has noted, one can best explain *Northern Territories* using the essential facilities doctrine.[110] As for the ECPR, it made a comeback in *Commerce Commission v Telecom Corp of New Zealand Ltd* (*Data Tails*) in the High Court decision.[111] In a lovely irony, Salop, one of the leading Post-Chicago School economists, has wholeheartedly endorsed the ECPR in refusals to deal and price-squeeze cases.[112]

So, in my view, one of the reasons for section 36 not being as effective as it should have been is the failure of New Zealand courts to engage in analysing and adapting section 36. They appeared to eschew economic reasoning. No New Zealand court showed the imagination and legal and economic reasoning of Heerey J.

I do not accept Ahdar's claim that the high failure rate of plaintiffs in section 36 cases following *Telecom v Clear* was a cause for concern.[113] Many of the cases were no-goers from the start. Further, monopolisation cases, as the Stage One chapter stated, are difficult and give rise to many disagreements.[114] The problem is that pro and anticompetitive behaviour look alike. Distinguishing competitive and anticompetitive conduct is often difficult and reasonable people can wildly disagree. This is perhaps best seen in the United States Supreme Court price-squeeze case of *Pacific Bell Telephone Co v linkLine Communications Inc,*[115] in which the Department of Justice filed a brief arguing that the Court should not recognise price-squeeze cases.[116] It argued that price squeezes do not "necessarily, or even ordinarily, entail anticompetitive conduct within the meaning of the antitrust

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108 *Northern Territories Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48, (2004) 219 CLR 90, (2004) 210 ALR 312.

109 *Northern Territories Power Generation Pty Ltd v Power and Water Authority* [2002] FCAFC 302, (2003) 122 FCR 399 at 452–453.

110 See Mark Berry "Competition Law" [2006] New Zealand Law Rev 599.

111 *Commerce Commission v Telecom Corp of NZ Ltd* HC Auckland CIV-2004-404-1333, 9 October 2009.

112 See Steven C Salop "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard" (2005) 73 Antitrust LJ 311; Steven C Salop "Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist" (2009) 76 Antitrust LJ 709.

113 Rex Ahdar "The New Zealand Electricity Industry and the Limits of Competition Law" (2010) 18(2) Util LR 51 at 57–58; Rex Ahdar "Escaping New Zealand's Monopolisation Quagmire" (2006) 34 ABLR 260.

114 See Paul Scott "Competition Law and Policy" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 71 at 87–89.

115 *Pacific Bell Telephone Co v linkLine Communications Inc* 555 US 438 (2009).

116 United States Department of Justice "Pacific Bell Telephone Company … Brief for the United States as Amicus Curiae" (May 2008), available at www.justice.gov>.

laws".[117] Conversely, the Federal Trade Commission issued a press release strongly disagreeing with the Department of Justice[118] arguing that price squeezes can cause great competitive harm.

Also behaviour which one court says is anticompetitive can be viewed as procompetitive by another. An example is the *Commerce Commission v Bay of Plenty Electricity Ltd* case where the Commerce Commission alleged the defendant breached section 36 by refusing to lease its meters to new entrants.[119] Rather, it offered only to sell its meters. Ironically there are famous United States cases holding that a firm can be liable for monopolisation by only leasing its equipment to rivals rather than selling it to them.[120]

This makes it difficult to claim that the courts have erred in deciding a monopolisation case. There are few certain cases and often the same conduct can simultaneously generate efficiencies and exclude rivals.[121] Perhaps this makes monopolisation cases a breach of the rule of law, but it is the nature of monopolisation law that everything is very much fact specific.[122] Thus, a low success rate for plaintiffs does not necessarily mean section 36 is ineffective.

One of the concerns the Privy Council and the United States Supreme Court has had with refusals to deal and essential facilities cases is that they essentially force the courts to become regulators.[123] The courts eschew doing so. Arguably the courts' reluctance to do so may have had the effect of reducing the effectiveness of section 36. The High Court in *Bay of Plenty Electricity* referred to this problem.[124] However, perhaps the concern is overblown.

The objections to courts overseeing access are familiar. They do not like to do so. Cooke P noted in *Telecom v Clear*: "We are not a price-fixing authority".[125] As Judge Easterbrook has observed,[126] courts should not function as "little versions of the Office of Price Administration and assess the 'cost justification' for prices charged". Courts lack the expertise to do so because it requires an in-depth examination of all

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117 United States Department of Justice "Pacific Bell Telephone Company … Brief for the United States as Amicus Curiae" (May 2008) at 12, available at www.justice.gov>.

118 United States Federal Trade Commission "Petition for a Writ of Certiorari in *Pacific Tel. Co. d/b/a AT&T California v linkLine Comms. Inc.* (No. 07-512)" (Press Release, 2008).

119 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007.

120 *United States v United Shoe Machinery Corp* 110 F Supp 295 (D Mass 1953); *Hanover Shoe Inc v United Shoe Machinery Corp* 392 US 481 (1968).

121 United States Department of Justice "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" (September 2008) (withdrawn May 2009) at 13, which also cites Douglas Melamed "Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice and Refusals to Deal" (2005) 20 Berkeley Tech LJ 1247 at 1249.

122 Rebecca Prebble and John Prebble "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study" (2010) 55 St Louis ULJ 21 at 28.

123 See *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC); see also *Verizon Communications Inc v Law Offices of Curtis v Trinko LLP* 540 US 398 (2004)

124 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 at [377].

125 *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1993) 5 TCLR 413 at 417.

126 *Ball Memorial Hospital Inc v Mutual Hospital Insurance Inc* 784 F 2d 1325 (7th Cir 1986) at 1340.

the costs of both incumbent and access seeker. It is hard for generalist courts to develop a price where there has been no previous dealing and so the courts would have to review access prices regularly.[127]

As for New Zealand, the presence of lay members on the High Court removes the objection based on lack of expertise. Ironically, access based on the ECPR alleviates concerns as well.[128] It only requires the monopolists' costs to establish profit and input cost. Courts need similar information to evaluate predatory pricing claims.[129] No one claims this is too difficult.

In the United States, courts have to calculate damages which means they are de facto acting as a regulator. Most essential facilities cases involve claims for damages – not access,[130] and even Areeda agreed that certain injunctions granting access were not problematic.[131]

To be fair, the most famous counter-example is the *AT&T* consent decree which Judge Harold Greene administered.[132] He did become the regulatory tsar for telecommunications in the United States until the passing of the Telecommunications Act 1996. As Waller notes, he muddled his way through[133] – although whether it was effective regulation is an open question. However, AT&T did agree to his involvement.

5.6 Features of New Zealand's competition law

This chapter has spoken briefly on how New Zealand courts have dealt with section 36. I now turn to deal with the distinctive aspects of New Zealand competition law. These aspects have impacted the effectiveness of section 36. Perhaps the most distinctive aspect is how New Zealand (and, to a somewhat lesser extent, Australian) courts place extreme importance on statutory language. As Berry notes,

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127 See Warren Pengilley "Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management" (2000) 8 TPLJ 56; Warren Pengilley "The Privy Council Speaks on Essential Facilities Access in New Zealand: What are the Australasian Lessons?" (1995) 3 CCLJ 26; Brenda Marshall and Rachael Mulheron "Access to Essential Facilities under Section 36 of the Commerce Act 1986: Lessons From Australian Competition Law" (2003) 9 Cant L Rev 248; Michael O'Bryan "Access Pricing Law Before Economics" (1996) 4 CCLJ 85.

128 See Steven C Salop "Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist" (2009) 76 Antitrust LJ 709.

129 Steven C Salop "Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist" (2009) 76 Antitrust LJ 709 at 717.

130 See Spencer Weber Waller "Areeda, Epithets, and Essential Facilities" (2008) 2 Wis L Rev 359; Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul (Minn), 1999) at 305–311.

131 Phillip Areeda "Essential Facilities: An Epithet in Need of Limiting Principles" (1989) 58 Antitrust LJ 841 at 844, 852–853.

132 See Spencer Weber Waller "Areeda, Epithets, and Essential Facilities" (2008) 2 Wis L Rev 359 at 380; Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul (Minn), 1999) at 374.

133 See Spencer Weber Waller "Areeda, Epithets, and Essential Facilities" (2008) 2 Wis L Rev 359 at 380; Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul (Minn), 1999) at 374.

the development of principles has centred on statutory interpretation.[134] This is in contrast to the United States where Congress gave the courts the task of developing a common law of antitrust. Most United States cases do not bother citing the relevant statutes. New Zealand's approach, however, is in Hay's words excessively "lexicographical".[135] Both jurisdictions use the words "substantial lessening of competition", and both deal with a "substantial degree of market power".

A look at Australasian cases shows that there will inevitably be a passage on what "substantial" means; for example, "large", "weighty", "big" and "not ephemeral".[136] As Hay notes, it is as if the answer to what constitutes a substantial degree of market power, or a substantial lessening of competition, "could really be found in the dictionary".[137] In contrast, an examination of United States cases on a "substantial lessening of competition" reveals no reference to the dictionary.[138]

The *AMPS-A* decision, where the Court of Appeal resorted to the dictionary to define "dominance" and "dominant position", is another example of excessive literal interpretation.[139] This was despite Parliament not intending that courts apply "dominance" in its ordinary meaning.[140] The background paper to the Commerce Act made it clear that courts should follow European law which had the same phrase.[141] As Patterson notes, "[t]he background paper and parliamentary debate make it quite clear that dominant influence was introduced into the Act as an economic concept, and should be interpreted in the manner."[142]

AMPS-A represents the nadir of competition analysis and excessive reliance on wooden statutory analysis. Section 3(8) then provided:

> For the purposes of sections 36, 66 and 67 of this Act, a dominant position in a market is one in which a person as a supplier or an 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.

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134 Mark N Berry "New Zealand Antitrust: Some Reflections on the First Twenty-Five Years" (paper presented at Loyola University, Chicago (IL), April 2012) at 2, available at www.luc.edu>.

135 George A Hay "Book Review" (2005) 50 Antitrust Bull 299 at 306.

136 See authorities cited in Lindsay Hampton "The General Prohibition Section" in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (3rd ed, LexisNexis, Wellington, 2010) 709 at 724–725.

137 George A Hay "Book Review" (2005) 50 Antitrust Bull 299 at 306.

138 See Clayton Antitrust Act of 1914 Pub L No 63-212 § 7, 38 Stat 730 (1914); George A Hay "Book Review" (2005) 50 Antitrust Bull 299 at 304.

139 *Telecom Corp of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) at 442.

140 Ross H Patterson "The Rise and Fall of a Dominant Position in New Zealand Competition Law: From Economic Concept to the Latin Derivation" (1993) 15 NZULR 265 at 288.

141 Ross H Patterson "The Rise and Fall of a Dominant Position in New Zealand Competition Law: From Economic Concept to the Latin Derivation" (1993) 15 NZULR 265 at 288.

142 Ross H Patterson "The Rise and Fall of a Dominant Position in New Zealand Competition Law: From Economic Concept to the Latin Derivation" (1993) 15 NZULR 265 at 288.

Cooke P commented:[143]

> Clearly there could be no more than one dominant influence over each of the aspects of a market specified in the Act – "the production, acquisition, supply or price of goods or services" – but it may be theoretically conceivable, for instance, that one person could be in a position to exercise a dominant influence over supply, while another was in a position to exercise a dominant influence over price.

As a matter of strictly logical statutory interpretation Cooke P's comments pass muster. However, as a matter of economic analysis they are nonsensical. They deny the workings of a demand curve. As Farmer notes they led to charges that our Court of Appeal was "economically illiterate".[144]

The *AMP-A* judgment forgot the purposive approach to statutory interpretation in favour of a dictionary approach. In short they forgot the words of Judge Learned Hand in *Cabell v Markham* where he observed:[145]

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Port Nelson[146] is another case where the courts literally interpreted section 27 to hold that unilateral purpose meant that predatory pricing was a breach of section 27. Literally, this means that customers are liable under section 27. The decision has no friends.[147]

This approach, particularly in respect to monopolisation, has been subject to severe criticism by Kirby J judicially and McMahon academically.[148] In Australasia, courts break down section 36/section 46 into three elements: (1) substantial market power; (2) take advantage; and (3) purpose.[149] Courts ask if all three elements are satisfied. Kirby J says this literal approach was attacking section 46 "with scissors".[150] He says dissecting the section like this offended "the orthodox

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143 *Telecom Corp of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) at 434.

144 James Farmer "The New Zealand Court of Appeal: Maintaining Quality After the Privy Council" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 237 at 241.

145 *Cabell v Markham* 148 F 2d 737 (2nd Cir 1945) at 739.

146 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA).

147 Dennis Carlton and David Goddard "Contracts that Lessen Competition: What is Section 27 for, and How Has It Been Used?" in Mark N Berry and Lewis T Evans (eds) *Competition Law at the Turn of the Century: A New Zealand Perspective* (Victoria University Press, Wellington, 2003) at 137; "Port Nelson Ltd v Commerce Commission: Has the Court of Appeal Read the Need for Concerted Action out of Section 27 of the Commerce Act?" (paper presented at New Zealand Law and Policy Workshop, Christchurch, 3–4 August 1996).

148 See Kathryn McMahon "Competition Law, Adjudication and the High Court" (2006) 30 MULR 782.

149 Lindsay Hampton "Taking Advantage of Market Power" in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (3rd ed, LexisNexis, Wellington, 2010) 795 at 795–845.

150 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [382].

approach to the interpretation of legislation".[151] Rather, the better approach was an integrated approach to the analysis of predatory conduct. The Australasian approach allows a firm to act with proscribed purpose without taking advantage of market power. It also allows a firm to take advantage without proscribed purpose; McMahon claims this does not make sense.[152] If a firm did not engage in anticompetitive conduct it should be impossible to find a prohibited purpose. She claims it makes it difficult to distinguish pro and anticompetitive conduct.[153]

In contrast, a United States court would ask whether the conduct was in fact anticompetitive.[154] This is economically more reliable as it enables a court to determine more easily whether the conduct was efficient or reduced output and increased price. Dissection does not easily show this.[155] One can certainly justify the Australian approach on statutory interpretation grounds, but less so on economic reliability. It obscures the essential question of whether the conduct harms consumer welfare by reducing output. The *Queensland Wine* counterfactual approach of asking whether a firm would act in the same way without market power shows this.[156] As Katz and Salinger have noted:[157]

> It is plainly not sufficient to say, "Well, gee, if we observe a practice being common in competitive markets, then it's okay when practiced by a monopolist." The value of looking more carefully at a practice under competitive circumstances is that it might provide some insight into why it occurs and what the efficiency benefits are. … But because there is that efficiency benefit, that doesn't necessarily mean that you would never condemn the behavior when practiced by a firm with market power.

Whether a firm would or did act in the same way as a firm without market power did or did not act, tells us nothing about whether at the present time the conduct harms consumer welfare. Literal statutory interpretation only takes us so far in that the conduct initially may have had an efficiency enhancing reason for it.

However, Kirby J's and McMahon's concerns are overblown. The High Court of Australia does look at the competitive effect of conduct. In *Melway*, the majority noted the restraints were intrabrand and discussed how they can be precompetitive.[158] In *Boral*, McHugh J in particular, examined the economics of predatory pricing.[159] These were not cases involving literal interpretation. Rather than rely on literal interpretation the courts should fashion rules for monopolisation.[160] An example of the proper approach comes from intellectual

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151 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [382].

152 Kathryn McMahon "Competition Adjudication and the High Court" [2006] 30 MULR 782 at 799.

153 Kathryn McMahon "Competition Adjudication and the High Court" [2006] 30 MULR 782 at 780.

154 George A Hay "Book Review" (2005) Antitrust Bull 299 at 305.

155 Kathryn McMahon "Competition Adjudication and the High Court" [2006] 30 MULR 782 at 780.

156 *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177, (1989) 83 ALR 577 (HCA).

157 Michael Katz and Michael Salinger "The Current State of Economics Underlying Section 2" (The Antitrust Source, December 2006) at 14, available at www.americanbar.org>.

158 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1 at 14.

159 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [274]–[292].

160 See Paul Scott "Competition Law and Policy" in Susy Frankel (ed) *Learning from the Past,*

property law. Copyright infringement requires copying of a substantial part.[161] No copyright court refers to the dictionary for the meaning of "substantial". Rather they refer to the rules in previous cases to find that what is substantial is a matter of quality and degree. Another example comes from patent law and the meaning of obvious. When considering whether an invention is obvious the courts employ a four-step analysis:[162]

> The first [step] is to identify the inventive concept embodied in the patent in suit. Thereafter, the court has to assume the mantle of the normally skilled but unimaginative addressee in the art at the priority date to impute to him what was, at that date, common general knowledge in the art in question. The third step is to identify what, if any, differences exist between the matter cited as being "known or used" and the alleged invention. Finally, the court has to ask itself whether, viewed without any knowledge of the alleged invention, those differences constitute steps which would have been obvious to the skilled man or whether they require any degree of invention.

This is not the result of literal interpretation. Rather it is the courts fashioning a test to determine whether an invention is obvious. The word "obvious" does not mandate such a test, rather the courts fashioned it due to experience. This is what courts should be doing with monopolisation sections. Arguably they are beginning to do so with predatory pricing. Following *Boral* and *Carter Holt* in the Privy Council there is now a separate test for predatory pricing which requires recoupment.[163] Recoupment came about from economic analysis – not strict or literal statutory interpretation.

McHugh J's judgment in *Boral* also shows an eschewal of strict statutory interpretation and use of the dictionary. When discussing the then Trade Practices Act he observed:[164]

> The terms of the Act have economic content and their application to the facts of a case combines legal and economic analysis. Their effect can only be understood if economic theory and writings are considered.

Later, in his *Boral* judgment, McHugh J discussed market power. He said, "[m]arket power is an economic concept and should be given its ordinary meaning."[165] Rather than resort to various ordinary dictionaries he cited a law review article by Krattenmaker, Lande and Salop explaining what economics meant by "market

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Adapting for the Future: Regulatory Reform in New Zealand (LexisNexis, Wellington, 2011) 71 at 89–90.

161 Copyright Act 1994, s 29; see Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 261–282.

162 *Windsurfing International Inc v Tabur Marine (GB) Ltd* [1985] RPC 59 (EWCA) at 73–74.

163 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374; *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 (PC).

164 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [247].

165 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [287].

power" and "monopoly power".[166] The contrast between this and *AMPS-A* is marked.

5.7 The influence of overseas law and scholarship

Another distinctive and related feature of New Zealand's competition law is how remarkably uninfluenced by overseas law New Zealand courts are. This poses a problem as New Zealand still has a small body of indigenous case law. Not relying on overseas case law leaves market participants very little to draw upon when dealing with possible competition law liability. One can contrast this with intellectual property law where New Zealand courts regularly cite English and European authority.[167]

Most surprisingly New Zealand competition courts sometimes do not cite Australian authority on identically worded sections. *Giltrap City Ltd v Commerce Commission* dealt with the meaning of arrangement under section 27.[168] The majority of the Court of Appeal based its decision on the old English case of *British Basic Slag.*[169] It did not discuss Australian authority, despite McGrath J referring to it. The result was that the majority fashioned a test which Pengilley notes does not accord with Australian law.[170]

A further, and more extreme example, is *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd.*[171] Two issues in the case involved whether purpose is objective or subjective in section 27 and whether persons could be liable under section 27's purpose limb for behaviour that could never have the effect or likely effect of substantially lessening competition. Glazebrook J for the majority said that purpose was primarily objective, with subjective sometimes relevant, and that persons could not be liable under the purpose limb if an apparently anticompetitive purpose could not be achieved.[172] While there are strong arguments for these findings, what was surprising was that the Court did not refer to the High Court of Australia authority, which held purpose was subjective and that it could never be both objective and subjective.[173] As for "impossible effect" the Court did not discuss the Full Federal Court of Australia authorities, for example, *Universal Music Australia Pty Ltd v*

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166 T Krattenmaker, R Lande and S Salop "Monopoly Power and Market Power in Antitrust Law (1987) 76 Geo LJ 241 at 245, cited in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [287].

167 See, for example, *Lucas v Peterson Portable Sawing Systems Ltd* [2006] NZSC 20, [2006] 3 NZLR 721.

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

169 *Re British Basic Slag Ltd's Agreement* [1963] 2 All ER 807 (EWCA).

170 See Warren Pengilley "What is Required to Prove a Contract, Arrangement or Understanding?" (2006) 13 CCLJ 241.

171 *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* [2006] 3 NZLR 351 (CA); see Paul G Scott "The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law" (2011) 19 Waikato L Rev 168 at 169.

172 *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* [2006] 3 NZLR 351 (CA) at [252] and [256].

173 *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45, (2003) 215 CLR 563.

ACCC, which said one could be liable.[174] Even more surprisingly, the *ANZCO* Court cited *Universal Music* on another point.[175] While this may have been due to counsel failing to cite the relevant Australian authority, one would expect a Court with clerks to do their own research. They do so in cases involving human rights and immigration.[176] Why not competition law?

With section 36, however, our courts do refer and attempt to follow Australian law. Whether the New Zealand Supreme Court did so correctly is a matter of controversy.[177] The Commerce Commission appears to disagree with the Supreme Court and is no friend of the *0867* decision.[178]

While it is easy to take shots at the courts, sometimes it is not their fault. Counsel may not have made good arguments. *Bay of Plenty Electricity* is an example.[179] The case involved the Commerce Commission alleging Bay of Plenty Electricity had breached (inter alia) section 36. The defendant's behaviour involved the old section 36 with its threshold of "dominance" and the amended section 36 with its lesser threshold of "substantial degree of market power".

The Commerce Commission did not argue that there was any material difference between the two thresholds.[180] The High Court said:[181]

> Therefore, taken overall, and whilst it may in our view be possible to conclude that substantial degree of market power was originally intended to set a slightly lower threshold than dominance, in general the question of degree is so slight as to prevent clear enunciation. In this case, and as accepted by both parties, we will therefore proceed on the basis that there is no material difference between the two tests and will analyse the factual situation accordingly. We refer variously to dominance and a substantial degree of market power similarly.

This is quite wrong. As the High Court noted, its conclusion is contrary to the parliamentary material.[182] It ignored the Australian legislative amendments and

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174 *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 193, (2003) 131 FCR 529 at [288].

175 *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* [2006] 3 NZLR 351 (CA) at [247].

176 See *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [547].

177 See Paul G Scott "Taking a Wrong Turn? The Supreme Court and Section 36 of the Commerce Act" (2011) 17 NZBLQ 260 (no the Supreme Court did not); and John Land and Sam Hiebendaal "Misuse of Market Power – Section 36: How the Telecom 0867 Case has Clarified the Law" (paper at Bright Star, 14 February 2011) (yes the Supreme Court did); Oliver Meech "Taking Advantage of Market Power" [2010] NZLJ 389 (more ambivalent); Ian Eagles and Louise Longdin *Refusals to Licence Intellectual Property: Testing the Limits of Law and Economics* (Hart Publishing, Oxford, 2011) at 195 (no it did not); Cento Veljanovski "Mergers, Counterfactuals and Proof after Metcash" (2012) 40 ABLR 263 (no it did not).

178 Mark N Berry "New Zealand Antitrust: Some Reflections on the First Twenty-Five Years" (paper presented at Loyola University, Chicago (IL), April 2012) at 25–29, available at www.luc.edu>.

179 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007.

180 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 at [287].

181 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 at [298].

182 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 at [298].

materials. It relied on a Court of Appeal merger case under the dominance threshold, *Commerce Commission v Southern Cross Medical Care Society*.[183] Yet it failed to take account of the fact that Parliament had also lowered the threshold for mergers to one of substantially lessening competition in a market. This, as Hampton notes, led to the High Court failing "to appreciate" the significant difference between the thresholds.[184] However, one cannot fully blame the Court because, as mentioned above, the Commission accepted there was no material difference between the thresholds.

To complete the picture, sometimes New Zealand courts do not take account of New Zealand courts' decisions. An example is *Southern Cross*[185] – a merger decision.

There, the Court of Appeal, in a decision of Tipping J, discussed barriers to entry. Tipping J held:[186]

> Anything is capable of being a barrier to entry or expansion if it amounts to a significant cost or limitation which a person has to face to enter a market or expand in the market and maintain that entry or expansion in the long run, being a cost or limitation that an established incumbent does not face.

This is a Stiglerian definition of a barrier entry.[187] Stigler defined a barrier to entry as costs that a potential entrant must face at or after entry, which those already in the market did not have to face when they entered.[188] Bain, however, defined it as some factor in a market that allows firms already in the market to earn monopoly profits, while deterring new entrants from entering.[189] As Hovenkamp notes, the difference between the two definitions can be quite substantial.[190]

In *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Company Ltd*[191] the Supreme Court dealt with regulations under the Dairy Industry Restructuring Act 2001. The Supreme Court held:[192]

> To require a new entrant to possess or borrow the capital necessary to establish its own facility would establish a significant barrier to entry …

The *Fonterra* comment on a barrier to entry is inconsistent with the *Southern Cross* definition.[193] Such capital is not a barrier to entry as the incumbent has faced this cost. The author of *Fonterra*: Tipping J.

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183 *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA).

184 Lindsay Hampton "Taking Advantage of Market Power" in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (3rd ed, LexisNexis NZ, Wellington, 2010) 795 at 807.

185 *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA).

186 *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [73].

187 George J Stigler *The Organization of Industry* (RD Irwin, Homewood (Ill), 1968) at 67–70.

188 George J Stigler *The Organization of Industry* (RD Irwin, Homewood (Ill), 1968) at 67–70.

189 Joe S Bain *Industrial Organization* (Wiley, New York, 1968) at 252.

190 Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul (Minn), 1999) at 39–40.

191 *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Company Ltd* [2012] NZSC 15, [2012] 2 NZLR 184.

192 *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Company Ltd* [2012] NZSC 15, [2012] 2 NZLR 184 at [18].

193 *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [73].

As for United States law, New Zealand courts appear to almost deliberately eschew it. This approach is often to the detriment of New Zealand's competition law. Perhaps the best example is recoupment in predatory pricing. Both the *Port Nelson* and *Carter Holt* Courts said recoupment was not part of New Zealand law as it was a United States doctrine under a differently worded statute.[194] However, Heerey J at trial in *Boral*, and particularly McHugh J in the High Court, made it a crucial element for finding liability for predatory pricing under section 46.[195] In so doing, United States academic work and case law was crucial to their reasoning.[196] In *Carter Holt* the Privy Council adopted the Australian courts' reasoning.[197] It is now part of New Zealand's law, but left to New Zealand courts it would not be. In so doing, the Privy Council aligned New Zealand's law with most western countries' views of predatory pricing. For example, the Canadian guidelines on predatory pricing provide:[198]

> The Bureau considers predatory pricing to be a firm deliberately setting prices to incur losses for a sufficiently long period of time to eliminate, discipline, or deter entry by a competitor, in the expectation that the firm will subsequently be able to recoup its losses by charging prices above the level that would have prevailed in the absence of the impugned conduct, with the effect that competition would be substantially lessened or prevented.

Australian law shows the influence of United States law, particularly in monopolisation cases. One can trace legitimate business rationale in *Melway* and perhaps *Queensland Wire* to the United States Supreme Court's case *Aspen Skiing Co v Aspen Highlands Skiing Corp*.[199] The *Melway* High Court made use of United States authorities.[200]

Conversely, there is a dearth of United States authorities in at least recent New Zealand High Court cases. The *Data Tails* litigation is a good example.[201] This involved an allegation of a price squeeze.

Before discussing the High Court's treatment of United States law it is useful to examine how overseas courts dealt with predatory pricing. One can then compare it with how the High Court in *Data Tails* dealt with a price squeeze.

With predatory pricing, United States and Australian courts noted the problems with finding liability. Finding liability too easily could cause a chilling of beneficial

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194 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 571; *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2001) 10 TCLR 247 (CA).

195 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [292].

196 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [274]–[278].

197 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 (PC).

198 Canada Competition Bureau "Predatory Pricing Enforcement Guidelines" (July 2008) at ii, available at www.competitionbureau.gc.ca>.

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

200 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1.

201 *Commerce Commission v Telecom Corp of NZ Ltd* HC Auckland CIV-2004-404-1333, 9 October 2009.

price-cutting. They noted the academic commentary that predatory pricing is rarely tried and even more rarely successful.[202]

Accordingly, following academic suggestions courts imposed recoupment as a filter for predatory pricing cases bringing the approach in line with economic reasoning. Only if a predator can recoup by raising prices after eliminating or chastening a victim can there be any harm to victims. Recoupment is now part of section 36, but that, as mentioned previously, is due to the Privy Council – not New Zealand courts.

Data Tails did not go through any similar exercise. Its discussion of how price squeezes can be anticompetitive was cursory. The High Court noted that United States price squeeze and refusal to deal cases, notably the Supreme Court *Verizon* case[203] and the Ninth Circuit *linkLine* case,[204] only provided "valuable insights".[205] The Court did not tell us what those insights were.

Only the Ninth Circuit Court of Appeal's *linkLine* decision was available at the time of hearing. However, the Supreme Court's decision came out well before judgment.[206] It is inconceivable that Australian courts would ignore a Supreme Court antitrust decision on the very matter before them. The United States decisions were relevant. Following United States Supreme Court authority, should there be a cause of action for refusal to supply when the market is subject to regulation and access seekers have a regulatory remedy?[207]

Another issue was whether there is a difference between a constructive refusal to supply as in *Queensland Wire* and a price squeeze? The reason this is important is that commentators, particularly Easterbrook, have argued one can best understand *Queensland Wire* as a price squeeze.[208]

Also at issue was whether a defendant could be liable for high prices in the upstream level when there was no duty to deal. Or in other words, are high prices at the upstream level worthy of competition law concern when "[t]he opportunity to charge monopoly prices … is what attracts 'business acumen' in the first place"?[209]

The *Data Tails* High Court appeared to accept that, following *Queensland Wire*, there was a duty on a vertically integrated incumbent to supply an essential

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202 See *Matsushita Electric Industrial Co v Zenith Radio Corp* 475 US 574 (1986) at 589.

203 *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004).

204 *linkLine Communications Inc v SBC California Inc* 530 F 3d 876 (9th Cir 2007).

205 *Commerce Commission v Telecom Corp of NZ Ltd* HC Auckland CIV-2004-404-1333, 9 October 2009 at [127].

206 *Data Tails* came out on 9 October 2009 (*Commerce Commission v Telecom Corp of NZ Ltd* HC Auckland CIV-2004-404-1333, 9 October 2009) whereas *linkLine* came out on 25 February 2009 (*Pacific Bell Telephone Co v linkLine Communications Inc* 555 US 438 (2009)).

207 *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004).

208 Frank H Easterbrook "The Inevitability of Law and Economics" (1989) 1 Legal Education Rev 3 at 17. See also Kathryn McMahon "Refusals to Supply by Corporations with Substantial Market Power" (1994) 22 ABLR 7.

209 *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) at 407.

wholesale input to a competitor in a downstream market.[210] It held Telecom would so supply.[211] This issue deserved more analysis than the High Court gave it.

First, it is highly arguable that the *Queensland Wire* Court's finding of a duty to supply in the circumstances has not survived the subsequent decision in *Melway*.[212] There the High Court noted that *Queensland Wire* had not addressed what the hypothetical competitive market comparator would look like, in the sense of how competitive it would be, and what the structure of that market would be.[213] It cited[214] Mason CJ and Wilson J's statement from *Queensland Wire*:[215]

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

The *Melway* Court noted the evidentiary basis for that conclusion was not clear.[216] It said that neither the trial court nor the Full Federal Court had found this, adding that "[n]ot everyone would agree that, as a proposition of fact, it is self-evidently-correct."[217]

In essence the Court is saying that in a real *competitive* market there would be no mandatory supply.

The Melway majority's reasoning on this issue caused Kirby J, in dissent, to comment:[218]

> The judges [in the Federal and Full Federal Courts] who reached that view correctly applied the principles established by this Court in *Queensland Wire.* Now, without overruling the approach to s 46 of the Act mandated by that decision, but with dark hints of factual errors in it and seemingly grudging acceptance of its holding, a result is reached that effectively, but not explicitly, in my opinion, overturns *Queensland Wire.*

The *Data Tails* judgment does not even discuss this possibility. Also, although it mentions *Trinko*, the *Data Tails* High Court judgment does not discuss United States Supreme Court authority,[219] which makes it explicit that there is no duty by a

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210 *Commerce Commission v Telecom Corp of New Zealand* HC Auckland CIV-2004-404-1333, 9 October 2009 at [127].

211 *Commerce Commission v Telecom Corp of New Zealand* HC Auckland CIV-2004-404-1333, 9 October 2009 at [128]–[129].

212 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1.

213 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1 at [50].

214 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1 at [46].

215 *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 192, (1989) 83 ALR 577 (HCA) at 585–586.

216 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1 at [47].

217 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1 at [47].

218 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1 at [89].

219 *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004); *Pacific Bell Telephone Co v linkLine Communications Inc* 555 US 438 (2009).

vertically integrated incumbent to supply. Given that this was a key holding, and subject of much analysis in *Trinko*, it is difficult to see what "valuable insights" *Trinko* provided.[220]

Also, price squeezes are arguably problematic. A squeeze involves the claim that upstream prices are too high and downstream prices are too low. What is the remedy? Make defendants increase downstream prices? As with predatory pricing, this potentially risks chilling legitimate price cutting. If downstream prices are too low, why cannot a predatory pricing claim suffice? The *linkLine* Supreme Court discussed all of this, but the *Data Tails* High Court did not.[221]

If the cause of action is worth persevering with, why did the High Court not discuss Breyer J's concurrence in *linkLine*, or more particularly, his masterful exposition of the law and economics of price squeezes in unregulated industries in *Town of Concord v Boston Edison Co*?[222] Why not refer to *United States v Aluminium Co of America*? – the great case that began the price-squeeze cause of action.[223] The High Court could have considered what the appropriate test is – the ECPR or Learned Hand J's pricing test which asks if the defendant's downstream division could make a profit if it had to pay its upstream division's price?

As for previous New Zealand courts' reluctance to be a price-regulating body, allowing a price-squeeze case results in the courts becoming a regulating body (the same is true of predatory pricing cases).[224]

The High Court in the *Data Tails* case had to deal (inter alia) with what costs to include in the ECPR, the effect of sunk or fixed costs and how to deal with bundled services. These are the tasks of a price regulator and show how New Zealand courts could have handled network industry disputes. In short, competition law was up to the job.

While the High Court showed it could act as a de facto regulator, it did not discuss previous authority that courts could not, and should not, act as regulators. Nor did it mention academic writing. A plethora of academic writing exists on price squeezes.[225] The High Court did not refer to it. This directly contrasts with the above mentioned treatment of recoupment and predatory pricing.

If United States law was not relevant, why did the Court not cite European law which commonly holds firms liable from price squeezes as an act of monopolisation?[226] This is so even if there is an applicable regulatory framework. This

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220 *Commerce Commission v Telecom Corp of New Zealand* HC Auckland CIV-2004-404-1333, 9 October 2009 at [127].

221 *Pacific Bell Telephone Co v linkLine Communications Inc* 555 US 438 (2009).

222 *Town of Concord v Boston Edison Co* 915 F 2d 17 (1st Cir 1990).

223 *United States v Aluminium Co of America* 148 F 2d 416 (2nd Cir 1945).

224 Steven C Salop "Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist" (2009) 76 Antitrust LJ 709.

225 See, for example, Steven C Salop "Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist" (2009) 76 Antitrust LJ 709; Greg Goelzhauser "Price Squeeze in a Deregulated Electric Power Industry" (2004) 32 Fla St U L Rev 225; Erik Hovenkamp and Herbert Hovenkamp "The Viability of Antitrust Price Squeeze Claims" (2008) 50 Ariz L Rev 967.

226 See Case COMP/38.784 *Wanadoo España Telefónica* (4 July 2007); Case COMP/C-1/37.451

European situation of overlapping control, that is, competition law and direct regulation has been subject to much criticism.[227]

Whatever one's view of the decision, a lot more was involved than simply asking whether Telecom offended against section 36 by breaching the ECPR for its inputs. Similarly, a lot more is involved in predatory pricing cases than did the defendant breach section 36 by charging below cost. By relying on statutory interpretation and eschewing overseas case law and literature, the High Court did not properly become involved. This reluctance to refer to overseas case law and literature does harm to New Zealand's competition law. It leaves us, in Heydon J's words, as a lonely island lost in the middle of a foggy sea.[228]

I had completed a previous draft of this chapter before the Court of Appeal had issued its decision on *Data Tails.*[229] I concluded that the discussion of the High Court's *Data Tails* decision with the above note of Teutonic gloom. I expected the Court of Appeal's decision would not include any discussion of overseas case law and would lack reference to academic writings on price squeezes. In short, the Court of Appeal would continue in the same way. Boy, was I wrong! In a masterful judgment Glazebrook J fully discusses United States and European case law. Not only that, it also refers to the most up-to-date literature on price squeezes and displays an in-depth understanding of the economics on the topic. It is a tour de force. It suffers from none of the problems identified earlier in this chapter.

Competition law is essentially applied industrial organisation economics.[230] The same issues arise in all western capitalist economies. To ignore learning and case law from overseas deprives us from a fruitful source of knowledge. While New Zealand is small, it does not stop parties using overseas expert economists (despite occasional pleas to use New Zealanders from the High Court). If so, why not use overseas case law?

So it is possible to end this part of the chapter on an optimistic note. Based on the most recent *Data Tails* case things are looking up. Further, it is not to say all is bad with our jurisprudence. To the contrary, the way our courts have interpreted the purpose limb of section 36 and have emphasised efficiency, is beneficial. Concern for the fate of individual competitors is not relevant. The European idea that courts can and should use competition law to protect smaller firms from aggressive competition from larger rivals even when there is little likelihood of long-term harm to consumers, has never taken root in New

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Deutsche Telekom AG OJ L 263/9; Case C-52/09 *Konkurrensverketk v Teliasonera Sverige AB* [2011] 4 CMLR 18.

227 Damien Geradin and Robert O'Donoghue "The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector" (2005) 1(2) J Competition Law & Econ 355; Hendrik Auf'mkolk "From Regulatory Tool to Competition Law Rule: The Case of Margin Squeeze under EU Competition Law" (2012) 3(2) JECL & Pract 149; Robbie Downing and Alison Jones "Margin Squeezes in Telecommunications Markets" in Steven Anderman and Ariel Ezrachi (eds) *Intellectual Property and Competition Law: New Frontiers* (Oxford University Press, Oxford, 2011).

228 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1; (2011) 280 ALR 221 at [389].

229 *Telecom Corp of New Zealand Ltd v Commerce Commission* [2012] NZCA 278.

230 Frank H Easterbrook "Comparative Advantage and Antitrust Law" (1987) 75 Cal Law Rev 983 at 983.

Zealand.[231] Thankfully, the Privy Council virtually eliminated the need to refer to European monopolisation cases in *Carter Holt*.[232] Also, unlike some Australian Federal Court judges in monopolisation cases, New Zealand courts have not written books masquerading as judgments.[233]

Further, at least in Australia, the monopolisation jurisprudence has reached such a state that parties are admitting liability without going to trial.[234] This suggests some certainty is entering the area which is to the good.

One possible concern about section 36's on-going effectiveness was delay.

5.8 Another possible limitation on effectiveness — delay

The Stage One chapter[235] noted that three cases – *0867, Bay of Plenty Electricity* and *Data Tails* – had taken several years to get to court. It resisted the cliché of comparing them to *Jarndyce v Jarndyce* in *Bleak House*.

However, it wondered whether delay was endemic and caused a reluctance to invoke section 36. This appears not as the Commerce Commission, as plaintiff, was a "Rip van Winkle" as it allowed the cases to drift without doing anything. Other cases such as *ANZCO* with private plaintiffs did not suffer delays.

Data Tails shows the dilatory nature of the then Commission. An interlocutory application hearing[236] shows the Commission started investigating in May 1999. By the end of 2000 it had completed its investigation and decided to seek external economic and legal advice on whether to file proceedings. It sought advice in December 2000. According to the then Commission General Manager "[o]btaining external input took some time".[237]

He noted that when all external advice had been received, he recommended that proceedings be filed. The Commission resolved in November 2003. It filed a statement of claim in March 2004.[238]

This is disgraceful. It should not take a year to investigate action in an industry like telecommunications. Nearly three years for expert advice is

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231 *British Airways v Commission* [2007] ECR I-233 (ECT); *France Télécom SA v Commission of the European Communities* [2009] ECR-I-02369 (ECJ); *Deutsche Telekom AG v European Commission* 2003/707/EC.

232 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 (PC) at [61]–[65].

233 See, for example, *Seven Network Ltd v News Ltd* [2007] FCA 1062 (3404 paragraphs); *Pacific National (ACT) Ltd v Queensland Rail* [2006] FCA 91 (1197 paragraphs).

234 See *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489.

235 See Paul G Scott "Competition Law and Policy" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 71.

236 *Commerce Commission v Telecom Corp of New Zealand* HC Auckland CIV-2004- 404-1333, 3 October 2006.

237 *Commerce Commission v Telecom Corp of New Zealand* HC Auckland CIV-2004-404-1333, 3 October 2006 at [39].

238 *Commerce Commission v Telecom Corp of New Zealand* HC Auckland CIV-2004-404-1333, 3 October 2006 at [39].

laughable. That is how long students take to complete a doctorate. A further five months to file a statement of claim is not moving with celerity. Thus, any delay was the fault of the then Commission. One cannot blame the court system. Delay does not appear to be endemic and limiting section 36's effectiveness.

5.9 Conclusion

New Zealand's competition law will not be the sole form of regulation for our economy. Notwithstanding that, it is in good shape. *Data Tails* in the Court of Appeal is a fine harbinger for the future. No more, hopefully, will our courts rely on strict interpretation principles. The signs are that our courts are more receptive to overseas jurisprudence and case law. This is all to the good.