Loyola University Chicago International Law Review

Volume 10
Issue 2 *Spring/Summer 2013*

Article 2

2013

New Zealand Antitrust: Some Reflections on the First Twenty-Five Years

Mark N. Berry Dr.
Chairman, New Zealand Commerce Commission

New Zealand Antitrust: Some Reflections on the First Twenty-Five Years

Dr. Mark N. Berry[†]

I. Introduction

New Zealand's antitrust law turned twenty-five in 2011. The Commerce Act,[1] enacted in 1986, provides New Zealand's first coherent antitrust regime. Earlier legislative attempts to regulate competition, dating back to 1908, had focused on a mix of goals and considerations. The imposition of price controls and prevention of profiteering were central themes through many of the decades up until the 1970s. From that point, up to 1986, a limited range of trade practices were as-

[†] Dr. Berry is the Chairman of the New Zealand Commerce Commission. This Article is based upon a guest lecture presented by Dr. Berry at the Loyola University Chicago School of Law on April 2, 2012. The views expressed in this Article are entirely those of the author.

[1] Commerce Act 1986 (N.Z.).

sessed against a mix of social, economic, competition and reasonableness factors.[2] Such rules had no particular antitrust pedigree.

The Commerce Act was essentially based upon the Australian Trade Practices Act of 1974 (renamed the Competition and Consumer Act in 2010),[3] which was influenced to a significant degree by the United States' Sherman and Clayton Acts. Therefore, there was some knowledge and experience of what we were about to adopt back in 1986, but the appropriateness of adopting such an antitrust law model for a small and remote economy such as New Zealand's was still largely unknown.

The Commerce Act contains a reasonably high level of prescription, running into some 118 sections. However, there are only a handful of key provisions under the Act governing restrictive practices and mergers. Most of these provisions, like the central provisions of the Sherman and Clayton Acts, contain briefly stated prohibitions of broad application.

The history of antitrust law in New Zealand reflects that, in application, there have been four key provisions under the Commerce Act over the first twenty-five years of its existence. These are section 27 (contracts, arrangements or understandings which substantially lessen competition), section 30 (price fixing), section 36 (monopolization), and section 47 (mergers).

This article begins with a brief overview of the policy challenges which have faced New Zealand in the framing of an antitrust regime. An understanding of New Zealand antitrust requires an appreciation of the small nature of its economy, and its remoteness from its major trading partners.[4]

The next part of the article discusses the application of the catch-all prohibition against contracts, arrangements or understandings which may substantially lessen competition under section 27. Regrettably, at least for the purposes of this review, the traffic of section 27 cases in the first twenty-five years has not been significant. Nonetheless, two case studies on exclusive dealing and long-term contracts in the energy sector serve to demonstrate the workings of section 27.[5]

A consideration of section 27 also involves the related issue of cartel conduct. Cartel conduct is deemed by section 30 to be unlawful per se under section 27. The application of this per se rule has resulted in the application of predictable case-law principles. However, there is currently some debate around the extent to which conduct by cartels outside New Zealand may escape liability—even though they affect markets in New Zealand—and this is the primary topic for discussion in Part III, D.[6]

The final key restrictive trade practices matter discussed is monopolization. There has been significant monopoly litigation over the first twenty-five years

2 *See* Hunter M. Donaldson, *The Development of New Zealand Competition Law*, in COMPETITION LAW AND POLICY IN NEW ZEALAND 11 (Rex J. Ahdar, ed., 1991) (discussing the historical development of New Zealand competition law).

3 *Competition and Consumer Act 2010* (Austl.).

4 *See infra* Part II.A.

5 *See infra* Part II.

6 *See infra* Part III.D.

under the Commerce Act. This article outlines the case-law developments to date, and highlights the serious problems now facing the application of the monopoly provision, section 36.[7]

Not surprisingly, a significant jurisprudence has emerged on the question of mergers. New Zealand has permitted levels of concentration which may be surprisingly high to some outside observers. For the most part, merger analysis under the Commerce Act has been conventional by international standards. However, there is one important qualification to this, and this relates to forward-looking counterfactual analysis. New Zealand stands apart in the adoption of multiple counterfactual analysis. This approach is potentially flawed. Given the novelty of this issue, Part V of the article pays particular attention to this subject.[8]

Part VI describes the workings of New Zealand's authorisation test, or efficiencies defense. A case study traces the methodology followed in a recent merger case. Regrettably, the redaction of confidential material makes it difficult to do justice to this case study. Nonetheless, this section is hopefully informative of the New Zealand approach to such cases.[9]

The final section provides some concluding observations.

II. Overview of the Commerce Act

A. Background

New Zealand is a case study of a small economy, which is remote from its major trading partners. New Zealand has a population of a little over four million. This means that many markets are highly concentrated and this, in significant part, sets the scene for the state of competition which may be expected in domestic markets. Coupled with this are the impacts which necessarily flow from New Zealand's remoteness. While low government trade barriers promote competition from imports, New Zealand's remoteness creates natural barriers to trade by increasing transportation costs. It also deters reliance upon imports where there may be concerns about the timeliness and reliability of supplies.[10]

This is not to suggest that import competition does not have a significant influence upon New Zealand markets. In many cases, the prices for goods in concentrated markets are constrained by actual or potential import competition. However, in some cases, domestic firms can look to earn rents by charging up to import-parity prices. Of course, this concern dissipates where import-parity pricing is not the key competitive constraint.

[7] *See infra* Part IV; *see also* Commerce Act 1986 §§ 29-37 (N.Z.) (prohibiting the resale of price maintenance and exclusionary provisions). Neither of these provisions has attracted sufficient attention to warrant further discussion in this Article.

[8] *See infra* Part V.

[9] *See infra* Part VI.

[10] *See Pact Group Pty. Ltd. & Viscount Plastics (N.Z.) Ltd.* [2012] 11 NZCC at paras 191, 254, *available at* http://www.comcom.govt.nz/assets/Uploads/Pact-Group-and-Viscount-Plastic-NZ-Ltd-2012-NZCC-11-Determination-public-Version-30-may-2012.pdf.

In her leading work on the subject of competition law in small market economies, Professor Michal Gal suggests that there are three main economic characteristics of small economies: high market-concentration levels, high entry barriers, and inefficient levels of production.[11] All of these characteristics are observable in New Zealand. New Zealand manufacturing markets are more concentrated than those of most other countries.[12] Smallness of an economy can also affect the height of barriers to new entry—although there are dangers that this concern may be overstated. Then, there is the issue of scale economies. In small economies a significant fraction of output may be manufactured in sub-optimal volumes by sub-optimal plants.[13] A recent study concluded that New Zealand industry, relative to four other countries in the relevant sample, had the lowest revenue to capital employed ratio and significant diseconomies of scale.[14] These market circumstances are not as a rule conducive to new entry. It has also been suggested that other entry barriers facing small economies include various factors of production, such as the availability of skilled labour and access to a diversified range of inputs for production.[15] It is, however, not altogether clear these should properly be regarded as entry barriers because they are factors of production experienced by all parties.[16] It should also be appreciated that, notwithstanding the smallness of markets in New Zealand, there are many instances of new entry (whether actual or potential).

These background economic circumstances set the scene and challenges for competition policy in New Zealand. Small, concentrated markets with significant barriers to entry are unlikely to exhibit the competitive dynamics of markets not reflecting these characteristics. The policy response to these circumstances is not, however, straightforward. There exists a basic tension between productive efficiency and competitive conditions. In many markets in New Zealand, demand means that only a few firms can operate at productively-efficient levels of manufacture. New entry may often create diseconomies of scale, unless domestic firms are also able to export their output.

---

[11] *See* MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 14 (Harvard University Press) (2003) (discussing high market concentration levels, high entry barriers and inefficient levels of production).

[12] Michal S. Gal, *The Effects of Smallness and Remoteness on Competition Law – The Case of New Zealand*, 14 COMPETITION & CONSUMER L.J. 292, 295 (2007).

[13] *Id.* at 295-96.

[14] *See* Terence Arnold, David Boles de Boer & Lewis T. Evans, *The Structure of New Zealand Industry: Its Implications for Competition Law*, *in* COMPETITION LAW AT THE TURN OF THE CENTURY: A NEW ZEALAND PERSPECTIVE 24, 30-40 (Mark N. Berry & Lewis T. Evans eds., 2003) (the other countries in the sample being the U.K., the U.S., Sweden and Australia).

[15] Gal, *supra* note 12, at 295.

[16] New Zealand courts have endorsed a Stiglerian approach to the definition of entry barriers. *See Commerce Commission v Southern Cross Medical Care Society* [2001] 10 TCLR 269 (CA) 75 (the Court of Appeal defined barriers to entry and expansion as "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."). Nonetheless, subsequent cases reflect that rather than determining whether an entry barrier exists according to some economic definition, a factual assessment is required whether new entry is likely, sufficient in extent and timely. *See New Zealand Bus. Ltd. v Commerce Comm'n* (2008) 12 TCLR 69, 252 (CA).

While recognisable benefits arise from having industry operating at productively efficient levels of output, having a small number of firms in a market can result in the creation and realisation of market power. This can also dampen dynamic efficiency, particularly where the threat of import competition is not real.

New Zealand's legislators faced these problems at the time the Commerce Act was enacted in 1986. There was no real debate about whether we should adopt an antitrust regime which conformed to international best practice—that was a given. The problem was assessing how competition laws should be fashioned for New Zealand's small market economy. There was a desire to develop an economy characterised by productively-efficient firms. But the pursuit of this goal also brought with it the prospect of markets characterised by a few large firms (by New Zealand standards), to which market power risks may attach. There were, therefore, competing challenges which needed to be addressed at the same time under the one law.

B. Goals

The first, and perhaps most problematic, issue in the context of this policy design was the question of the goals of competition laws. While it is generally acknowledged that competition laws strive to promote competition, questions remain about why the competitive process is valued. The history of competition laws, particularly in the U.S., reflects fluctuating views as to appropriate goals for antitrust.[17] The modern-day debate is whether the goal of economic efficiency should prevail, or whether greater weight should attach to concerns about wealth transfers resulting from the exercise of market power.

This debate is of particular relevance to small market economies. Indeed, the choice of goal in such markets is likely to impact market structure and performance. Policy tradeoffs need to be made. Granting economic efficiency primacy over other goals focuses upon ensuring that the mix of goods and services most preferred by consumers is produced at minimum cost. The pursuit of such a goal, if all goes well, should result in competition for the long-term benefit of consumers as firms strive to become more productively and dynamically efficient. Where the issue of scale economies is overcome, the pursuit of efficiency will also enhance the international competitiveness of domestic firms. This was an important part of the background fabric to the Commerce Act. It was feared that alternative goals in a small market economy which focused on short-term distributional goals or involved preserving inefficient firms would come at a cost.

When first enacted, the Commerce Act did not make the goal of the Act abundantly clear. The long title to the Act was: "An Act to promote competition in markets within New Zealand." Nonetheless, early judicial consideration of this long title tended towards adopting an efficiencies goal for the Act. In *Tru Tone Ltd. v. Festival Records Retail Marketing Ltd.*, the Court of Appeal stated that the Act was "based on the premise that society's resources are best allocated in a

[17] For a survey of the U.S. scene, *see* Mark N. Berry, *Efficiencies and Horizontal Mergers: In Search of a Defense*, 33 SAN DIEGO L. REV. 515, 528-32 (1996).

competitive market where rivalry between firms ensures maximum efficiency in the use of resources."[18] More recently, there has been legislative clarification of the issue through the introduction of the current purpose statement under the 2001 amendments to the Commerce Act.[19] Section 1A of the Act now provides that: "[T]he purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand."

While comments around this new purpose statement in the course of legislative deliberations were ambiguous, the reference to long-term benefits was seen to have a strong connection with efficiency goals. The Commerce Committee noted that: "An efficiency analysis considers the net present value impacts of any arrangement on productive, allocative and dynamic efficiency. This would be consistent with long-term consumer welfare."[20]

Combined with this purpose statement is an efficiencies defense under the Commerce Act which applies to both restrictive trade practices and merger authorisations in cases where there are market power findings leading to the identification of detriments.[21] In such cases, these practices and mergers can be authorised on the grounds that there are public benefits which outweigh such detriments. On this question, the legislation directs under section 3A that:

> Where the Commission is required under this Act to determine whether or not, or the extent to which, conduct will result or will be likely to result, in a benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result or will be likely to result from that conduct.[22]

Accordingly, a goal of economic efficiency prevails, and this has impacted on case law principles and their application, as will be apparent from the following discussion on how the Commerce Act has been applied in its first twenty-five years.

III. Contracts, Arrangements or Understandings Which Substantially Lessen Competition

A. Central Provisions and Basic Concepts

Because the documents being created by Working Group III are not treaties, but are The central provision of the restrictive trade practices part of the Act is section 27.[23] This section provides that no person may enter into or give effect to a provision of a contract, arrangement or understanding that has the purpose,

---

[18] *Tru Tone Ltd. v Festival Records Retail Mktg. Ltd.* [1988] 2 NZLR 352 (CA) 358.

[19] Section 1A of the Commerce Act 1986, as substituted by Section 4 of the Commerce Amendment Act 2001 (N.Z.).

[20] Commerce Committee (Report (296-2), 7 (2001).

[21] *See infra* Part VI (for further discussion of this defense).

[22] Commerce Act 1986 §3A (N.Z.).

[23] *Id.* pt. 2, § 27 (this, and other key sections in Part 2 of the Act, are reproduced in the Appendix to this Article).

effect or likely effect of substantially lessening competition in a market. This section of the article begins with an outline of general principles under section 27, followed by two case studies relating to exclusive dealing and long-term contracts.

The concepts of "market" and "competition" are defined in the Act. Section 3(1A) provides that the term "market is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common-sense, are substitutable for them."[24] Standard market definition principles have applied from the outset. A leading decision of the Australian Trade Practices Tribunal which predates the Commerce Act, _Queensland Co-operative Milling Assn. Ltd._,[25] served as a case providing first principles. It discussed the concept of market in the following terms:

> A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is, of course, a monopolistic market). Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.[26]

Notwithstanding the adoption of these standard principles, the legislative requirement that markets be in New Zealand means that in some cases geographic market boundaries will be artificially narrow from a proper economic perspective.[27] However, to the extent that this is a problem, it is normally overcome under entry barrier analysis.

The concept of "competition" is defined under section 3(1) to mean "workable or effective competition."[28] This legislative formulation of the concept of competition can be traced to U.S. antitrust law origins. Again, the first principles were enunciated here in the pre-Commerce Act case, _Queensland Co-operative Milling Assn. Ltd._, which stated:

---

[24] *Id.* §3A.

[25] *See generally Queensland Coop. Milling Ass'n Ltd.* (1976) 25 FLR 169 (Austl.) (discussing market definition principles).

[26] *Id.* at 190. This statement of principle has been routinely endorsed in New Zealand. *See, e.g.*, T.M. Gault & Barry Craig Allen, Gault On Commercial Law (2010); *see also* N.Z. Commerce Comm'n, Mergers and Acquisitions Guidelines § 3 at 14-20 (2003), *available at* http://www.comcom.govt.nz/mergers-and-acquisitions-guidelines/ (explaining how the Commission defines relevant markets in terms of five dimensions: product, geographical, functional, temporal, and customer).

[27] Some complexity has arisen in cases involving markets which have components both within and outside of New Zealand. *See Commerce Comm'n v Air New Zealand Ltd.* (unreported) High Court, Auckland, CIV 2008-404-008352, 24 August 2011, at paras 35-37, 241. This case involved price fixing in relation to inbound and outbound air cargo services to New Zealand. *Id.* It was argued that there was a clear geographic cut off between the relevant markets at the place of origin (where collusion had occurred) and New Zealand points of destination. *Id.* The Court concluded that a market does not have to be wholly in New Zealand for the Act to apply. *Id.* at 241; *see also infra* Part III.D (for further discussion).

[28] Commerce Act 1986 §3(1) (N.Z.).

As was said by the US Attorney-General's National Committee to Study the Antitrust Laws in its Report of 1955 (at p 320):

> 'The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sectors, whether existing competitors or new potential entrants into the field, would keep this power In check by offering or threatening to offer effective inducements. . .'

Or again, as is often said in US antitrust cases, the antitrust of competition is undue market power, in the sense of the power to raise price and exclude entry.[29]

Various principles of general application have emerged in relation to ascertaining whether competition has been substantially lessened under section 27. Three principles, in particular, are noteworthy.

First, the inquiry is centred upon counterfactual analysis. As Justice Smithers said in *Dandy Power Equipment Pty. Ltd. v. Mercury Marine Pty. Ltd.*, "[I]t is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening," and there is a need to "ask oneself how and to what extent there would have been competition therein but for the conduct."[30] In other words, a comparative assessment is required into the state of competition both with and without the practice in question.

Second, section 27 is concerned with a net effect on competition, with both pro-competitive and anti-competitive effects being taken into account.[31] Accordingly, it is open to the Court to give regard to any efficiencies which are pro-competitive.[32]

Third, it is clear from the New Zealand jurisprudence that section 27 is concerned with the level of rivalrous conduct, rather than the fate of individual competitors.[33]

---

[29] *Queensland* at 187-88 (Austl.). This statement of principle has also been routinely endorsed in New Zealand. *See, e.g., Fisher & Paykel Ltd. v Commerce Comm'n* [1990] 2 NZLR 731 (CA) 759 (where the court found the height of barriers to entry is the most important element of market structure); *see also Tru Tone Ltd* at 363 (CA) (which reiterated the most important element of market structure is the assessment of competition).

[30] *Dandy Power Equip. Ltd. v Mercury Marine Ltd.* (1982) 64 FLR 238, 259-60 (Austl.); *see also ANZCO Foods Waitara Ltd. v AFFCO N.Z. Ltd.* [2006] 3 NZLR 351 (CA) 404 (affirming that New Zealand has widely accepted the analytical approach taken in *Dandy Power*).

[31] *See Fisher & Paykel* [1990] 2 NZLR at 740 (the court stating it needed to consider both the pro and anti-competitive effects to determine the net-effect on a market); *see also ANZCO* [2006] 3 NZLR at 405 (discussing the net effect on competition).

[32] *Shell (Petroleum Mining) Co. Ltd. v Kapuni Gas Contracts Ltd.* (1997) 7 TCLR 463, 528-31.

[33] *Transpower N.Z. Ltd. v Todd Energy Ltd.* [2007] NZCA 302 at para 114.

B. Exclusive Dealing

Exclusive dealing is a practice which lends itself well to a case study under the substantial lessening of competition test. There has been one test case on this subject, *Fisher & Paykel*[34]—one of the first cases to be determined under the Commerce Act of 1986.

Fisher & Paykel had for many years been the leading manufacturer and wholesaler of whiteware (namely refrigerators, washing machines and the like). It was Fisher & Paykel's practice to enter into exclusive dealing arrangements with its retailers.[35] Such exclusive distribution arrangements were terminable by either party on ninety days' notice.[36]

Prior to 1987, Fisher & Paykel had enjoyed a position protected by import licensing and tariffs. However, beginning in 1987, these barriers to import competition were progressively removed through the repeal of import restrictions. Notwithstanding the emergence of import competition at the time of hearing in 1989, Fisher & Paykel still remained by far the largest player in the market. It held approximately an 80% market share and held exclusive dealership arrangements with around 450 of the total 800 to 850 outlets retailing whiteware in New Zealand.[37]

This case involved an appeal from a decision of the Commerce Commission (by a majority) that these exclusive dealing arrangements should not be authorised. The High Court reversed this finding and found that the Fisher & Paykel exclusive dealing arrangements did not contravene section 27. Regrettably, the High Court's analytical framework is not altogether clear, given that its analysis is confined solely to a range of concluding propositions.[38]

The Court first found that Fisher & Paykel had a significant degree of market power by virtue of factors, including its historic monopoly supply position and high market share.[39] However, this conclusion was internally inconsistent because the Court then observed, in its next breath, that Fisher & Paykel was nevertheless constrained by its competitors by the removal of artificial barriers to entry, particularly for Australian imports.[40]

Most significantly, the Court concluded that in the absence of artificial barriers to entry, exclusive dealing arrangements can have positive pro-competitive effects provided that a significant component—in this case access to retail space—had not been foreclosed.[41] On the facts presented, no significant foreclosure of retail space was found to exist as a result of the Fisher & Paykel exclusive dealing arrangements.

34 *Fisher & Paykel* [1990] 2 NZLR at 731.

35 *Id.* at 734.

36 *Id.*

37 *Id.* at 737.

38 *Id.* at 767.

39 *Id.* at 734.

40 *Id.*

41 *Id.*

Apart from this emphasis on foreclosure, the Court also attached some weight to the fact that the exclusive dealing arrangements could be terminated upon ninety days' notice.[42] It is not clear whether this point served to indicate that only short-term exclusive dealing arrangements should be regarded to be permissible. There was no elaboration on this point. A preferable view in analysing the significance of this point is that it was simply a further factor to be taken into account in justifying the conclusion that section 27 was not contravened in this case. Presumably, the ability of retailers to switch at relatively short notice supported the conclusion that the Fisher & Paykel exclusive dealing arrangements did not foreclose access to retail space for new entrant competitors who proposed to compete against Fisher & Paykel in this market. Clearly, it is arguable that the case did not turn on this point alone. So long as a new entrant was not foreclosed from access to adequate retail space, it appears that the view of the Court in *Fisher and Paykel* was that section 27 was not contravened.

Interestingly, the Court concluded by noting that it had derived substantial assistance from U.S. legal thinking in reaching its conclusions, and it commented in passing that if its views earned it "the appellation of 'Chicago School', then so be it."[43]

C. Long-term Contracting: A Case Study

The energy sector is one sector in which there has been some Commerce Act litigation in the first twenty-five years of the operation of the Act. The most significant of these cases is *Shell (Petroleum Mining) Co. Ltd. v. Kapuni Gas Contractors Ltd.*[44] This case related to the long term Kapuni gas contract which was entered into in 1967, some nineteen years prior to the commencement of the Commerce Act. Nonetheless, the legality of the contract under section 27 was open to assessment in the 1990s because section 2(3) of the Act provides that any provision of a contract may be rendered unenforceable if in contravention of section 27—even though at an earlier time the relevant anticompetitive effect may not have been present.[45] Further complicating the landscape was the impact of another provision of the Commerce Act, section 3(5), which provides that an assessment of section 27 liability takes into account not only the contract asserted to be unlawful, but also any other contractual arrangements in combination with the contract under dispute. A problem for the defendants was that their 1967 gas entitlements to Kapuni field gas were supplemented in 1973 by entitlements to gas from the Maui field.

New Zealand has few natural gas fields and, at the time of trial, Kapuni and Maui were the only two significant gas fields in production. Kapuni was owned by Shell and Todd, although they were required to sell all Kapuni gas to the Crown. The Crown's rights to Kapuni gas had been assigned to Kapuni Gas

42 *Id.* at 767.

43 *Id.*

44 *Shell (Petroleum Mining) Co. Ltd. v Kapuni Gas Contracts Ltd.* (1997) 7 TCLR 463.

45 Commerce Act 1986 §2(3) (N.Z.).

Contracts Ltd. ("K.G.C.L."), being a wholly owned subsidiary of Fletcher Challenge Ltd. (which in turn was a 33% shareholder of Natural Gas Corporation ("N.G.C.").[46] K.G.C.L. on-sold this gas to petrochemical companies and to N.G.C. Gas from the Maui field was committed to N.G.C., Methanex (a petrochemical company) and Contact (an electricity generator).

Shell and Todd, the owners of the Kapuni field, argued that section 27 rendered the long-term contract under which they had agreed to sell all Kapuni gas to the Crown unenforeceable.[47] Shell and Todd asserted that the combined effect of the Kapuni and Maui contracts was to commit all gas other than gas used for electricity generation and petrochemical production to N.G.C.[48] Plainly, as a result of these contractual arrangements, N.G.C. held substantial market power over the supply of gas to the wholesale and reticulated gas markets. One of the plaintiffs, Todd, provided evidence of potential customers it could supply in competition with N.G.C. if it was allowed access to Kapuni gas. These buyers included companies in other significant New Zealand sectors, such as the dairy sector.[49]

Market definition assumed some significance in this case, as the defendant argued that there was a single market in New Zealand for all gas. The Court concluded that the relevant markets in this case were those for the wholesale and retail sale of natural gas.[50] In so doing, the Court regarded the argument that other forms of gas (such as land-fill gas, coal-gas, porta-gas and liquefied natural gas) and other energy sources (such as light fuel oil, coal and electricity) were not sufficiently close substitutes because such alternative forms of energy were, in the medium-to-long run, either priced substantially above the price for natural gas or available only in small volumes.[51] This inevitably resulted in a finding of liability because it identified N.G.C. as being dominant in the wholesale market and as having a substantial degree of market power in the retail market.

The Court's analysis of the long-term contract here makes interesting reading because it involves a consideration of competing concerns regarding on the one hand foreclosure of competition under a contract which had run for twenty-nine years already, and could run for another twenty years (depending on the life of the Kapuni field) and, on the other hand, the efficiency and pro-competition effects that long-term contracts may have in incentivising high-risk and high-cost exploration and production of natural gas.[52]

On this issue, the Court first noted a tension which exists here under a statute which both prohibits provisions of contracts, arrangements or understandings

---

46 *Shell*, 7 TCLR at 531.

47 *Id.*

48 *Id.*

49 *Id.* at 516-17.

50 *Id.* at 527.

51 *Id.* at 531.

52 *Id.* at 528; *see also* A.I. Tonking, *Long-term Contracts: When are they Anti-competitive?* 6 COMPETITION & CONSUMER L.J. 13, 23-27 (1998) (discussing how a court may consider whether or not a long-term contract has social utility).

which substantially lessen competition and only permits such matters under an authorisation regime based upon efficiencies defense considerations. One view is that the efficiencies defense is available only to parties who have the foresight to seek prior authorisation and that the scheme of the Act otherwise prohibits defendants from raising such issues in defense of breaches of section 27 where no prior authorisation has been obtained. However, the Court stated here that efficiencies were also relevant to the assessment of section 27, absent authorisation. As the Court noted, "there is now a recognisable trend for efficiencies to be considered in terms of their pro-competition effect."[53]

The Court's ultimate analysis of this efficiency and section 27 liability question is something of a hybrid assessment. Authorisation-type analysis influences the way that the Court analyses the section 27 issue. The Court noted that had there been an authorisation application here, it would have been likely that this would have been granted for a fixed period long enough to allow recovery of the capital investment, a return on that investment and to maintain an acceptable level of exploration. On this basis, the Court suggested that the Kapuni gas contract may have been permitted to run until either 1991 or 1996. However, this litigation fell outside of this time dimension and the Court progressed to the inevitable conclusion that exploration and efficiency considerations were not sufficient to overcome the foreclosure of competition which arose from N.G.C.'s control over output from the two fields.[54]

In granting relief in this case, the Court endeavoured to find a solution which would be inducive of competition. It decided that the remaining reserves of the Kapuni gas field should be divided equally between the plaintiffs and defendants. The Court was able to impose this remedy because section 89(2)(a) of the Commerce Act entitles the Court to vary contracts, so long as such variation is consistent with the Act. The Court was persuaded that this outcome would provide a competitive outcome while still maintaining a reasonable balance between the parties' economic interests.[55]

D. Cartels

The prohibition against cartel conduct is, in essence, a subset of section 27. Section 30 provides that price fixing between competitors is a deemed contravention of section 27, with no requirement of proof of competitive harm.[56] Price fixing does not currently constitute a criminal offense under New Zealand law, however it appears likely that this position will soon change.[57]

---

[53] *Shell*, 7 TCLR at 531. This view was in part based upon a review of U.S. case-law trends. *Id.* at 528-29.

[54] *Id.* at 532.

[55] *Id.* at 536.

[56] Commerce Act 1986 §30 (N.Z.). There are provisions which exempt the application of this per se rule. These exemptions include joint venture pricing (Section 31), price recommendations to not less than 50 persons (Section 32) and joint buying and promotion arrangements (Section 33). *Id.* §§31-33.

[57] *See* Ministry of Econ. Dev., Cartel Criminalisation: Discussion Document (2010), *available at* www.med.govt.nz/business/competition-policy/cartel-criminalisation (exploring the issue of criminalizing cartels and who would be covered by such a law).

Section 30 of the Commerce Act has had significant application over the first twenty-five years of New Zealand antitrust. There have been some seventeen sets of completed judgments over a wide range of markets. The offense was somewhat trivialised in the earliest case, *Commerce Commission v. Otago and Southland Vegetable and Produce Growers Assn.*,[58] where only a $5 penalty was imposed. Nonetheless, penalty trends have been upwards in recent times. The current high-water mark case for penalties against an individual defendant is *Commerce Commission v. Qantas Airways Ltd.*,[59] where a penalty of $6.5 million was imposed.

The reason for the significant number of cartel cases in New Zealand is no doubt the per se nature of the offense. The plain wording of section 30 has led the New Zealand courts to conclude that the mere establishment of the elements of section 30 leads to an irrefutable presumption that the practice is deemed to have the purpose, effect or likely effect of substantially lessening competition.[60] As is always the case, such an approach to rulemaking is arbitrary, but as the Supreme Court observed in *U.S. v. Container Corp. of America*, such rules "are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result." [61]

The key elements of section 30, namely, whether there is a contract, arrangement or understanding which may substantially lower competition through the "fixing, controlling or maintaining" of prices has been largely and predictably subject to dictionary definition meanings. [62] Accordingly, most cases proceed on the basis of black letter law assessments as to whether there exists a requisite contractual, or other understanding or arrangement[63] which may have the purpose,[64] effect or likely effect of substantially lessening competition, through the fixing, controlling or maintaining of prices for goods or services.

To the extent that there is currently an issue regarding the interpretation of section 30, it pertains to the meaning of the requirement that the conspirators be "in competition with each other." This issue came to a head in the recent decision

58 (1990) 4 TCLR 14.

59 *Commerce Comm'n v Qantas Airways Ltd.* (unreported) High Court, Auckland, CIV 2008-404-8366, 2011, Allan J, at para 64 (N.Z.).

60 *See, e.g., Commerce Commission v Taylor Preston Ltd.* [1998] 3 NZLR 498, 509.

61 393 U.S. 333, 341 (1969).

62 *See, e.g., Radio 2UE Sydney Pty. Ltd. v Stereo FM Pty. Ltd.* [1982] ATPR 40-318, 43, 921 (Austl.); *Commerce Comm'n v Caltex N.Z. Ltd.* [1999] 9 TCLR 305, 311 (HC).

63 To establish a contract, arrangement or understanding, the question is whether an exchange between the parties involved in the putative arrangement or understanding has engendered an expectation that at least one person would act in the manner that the consensus envisaged. *See Giltrap City Ltd. v Commerce Comm'n* [2004] 1 NZLR 608, 14, 15-6.

64 The issue of whether the purpose test is objective has been a matter of some debate. The leading authority, by a majority, is to the effect that the purpose test is to be objectively applied, but subjective assessments may be legitimate in borderline cases where there is evidence of subjective anti-competitive effect, coupled with evidence as to equivocal anti-competitive effect. *See ANZCO Foods Waitara Ltd. v AFFCO N.Z. Ltd.* [2006] 3 NZLR 351 (CA) 404, paras 250–65.

of *Commerce Commission v. Air New Zealand Ltd.*[65] This case also involved an interrelated issue pertaining to the extra-territorial application of the Commerce Act under which section 4 states that the Act "extends to the engaging in conduct outside New Zealand by any person resident in or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand." This case is part of the litigation taken by a number of antitrust agencies concerning alleged cartel activities between airlines supplying air cargo services in relation to fuel and security surcharges. The conduct in question involved, in material part, arrangements entered into by the defendants outside of New Zealand.

Three main questions arose in determining the application of section 27—via section 30, in this case. First, was market definition a necessary requirement for the establishment of whether the airlines were "in competition with each other" for the purposes of section 30? Second, was it necessary to establish that such competition was in a market in New Zealand? Third, was it necessary under section 4 to establish that the conduct in question was prohibited under the Commerce Act?

Addressing the first question, the High Court endorsed the position that it is required to establish a "market" because section 30 is an extension of section 27, which plainly requires the establishment of an anti-competitive outcome in "a market."[66]

As to the second question, the High Court ruled that the requirement that there be a market actually located in New Zealand survives the effect of the section 30 deeming provision. An element of judicial pragmatism entered the analysis at this point. It would not be necessary, for example, for a plaintiff to plead and prove a market in every claim under section 27 via section 30 where there is no suggestion that the market is outside New Zealand. However, there would need to be an answer to any such claim where the market in question was wholly outside New Zealand.[67]

To some extent, there may appear to be some inconsistency as to the strictness of the market definition exercise in the context of the above discussion of the first and second questions. Ultimately, this matter is likely to be of no particular moment. If it is apparent on the facts that there is actual competition between the alleged conspirators in New Zealand, then an exhaustive inquiry into the precise boundaries of the market is not be necessary. Provided that there is an identification of some plausible market definition assessment that should suffice.

Turning to the final issue of extra-territorial application, the matter is somewhat more complicated. On its plain wording, section 4 states that the Commerce Act extends to conduct outside New Zealand where such conduct affects a mar-

[65] *See Commerce Comm'n v Air New Zealand Ltd.* (unreported) High Court, Auckland, CIV 2008-404-008352, 24 August 2011; *Re Queensland Co-operative Milling Ass'n v Defiance Holdings Ltd.*, 25 FLR 169 (1976).

[66] *Id.* at 92, 95-6.

[67] *Id.* at para 76.

ket in New Zealand.[68] Curiously, the High Court in *Air New Zealand* read this provision to hold that section 4 is only established where the conduct is both "prohibited by a substantive provision of the Act if it occurred in New Zealand, and 'affects a market in New Zealand' by affecting competition in the market in New Zealand in respect of which that substantive provision is alleged to have been breached."[69] This conclusion appears to misread section 4. On a plain reading of section 4, it is not apparent that its operation depends on the establishment of an offense. Rather, this provision serves simply to stipulate what evidence may be taken into account in assessing liability under the Act.

IV. The Monopoly Problem

A. Background

Apart from section 27, the other pivotal restrictive trade practices provision is section 36(2). This is the monopolization provision which prohibits firms with a substantial degree of market power from taking advantage of that power to pursue various prohibited purposes. These purposes include restricting new entry, preventing or deterring competitive conduct, and eliminating persons from any market. Section 36 applies to the achievement—or potential achievement—of these proscribed purposes in both the market in which power is held and any other market where the leverage effect of monopolization may be, or may become, apparent. This is a provision of real importance in the New Zealand setting, as will be apparent from the introductory remarks to this Article. There is a particular need for robust monopolization provisions in small market economies, where high levels of concentration exist.[70]

There is nothing unusual about the current legislative prohibition against monopolization. The simplicity of the provision mirrors in some respects section 2 of the Sherman Act. The judicial interpretation of the section can, however, only be described as problematic.

Section 36 is essentially based on the monopolization provision of the Australian antitrust law, namely section 46 of the Competition and Consumer Act 2010. This provision was substantially amended in 2007 and 2008,[71] but there is a

---

[68] The extra-territorial reach of the Commerce Act under section 4 is also subject to the requirement that the conduct in question is engaged in by a person resident or carrying on business in New Zealand. *See Poynter v Commerce Comm'n* [2010] 12 TCLR 399.

[69] *See Commerce Comm'n v Air New Zealand Ltd.* (unreported) High Court, Auckland, CIV 2008-404-008352, 24 August 2011, at para 261; *Re Queensland Co-operative Milling Ass'n v Defiance Holdings Ltd.*, 25 FLR 169 (1976).

[70] *See* Gal, *supra* note 12, at 311-12.

[71] For example, in 2008 section 46 (6A) was introduced to legislate tests for whether a corporation took advantage of market power. This provision directs that Courts may, without limitation, have regard to whether (a) the conduct was materially facilitated by the corporation's substantial degree of market power, and (b) whether the corporation acted in reliance on its substantial degree of market power, and (c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of market power. Another of the 2008 amendments provided that predatory pricing may contravene section 46, even if the corporation cannot, and might not even be able to, recoup losses incurred in supplying the goods. *See* Competition and Consumer Act 2010 (Cth) (formerly Trade Practices Act 1974 (Cth) 46 (1AAA) (Austl.)).

significant body of Australian case-law prior to such amendments, and reliance has been placed upon this by the New Zealand judiciary.

This part of the Article will first provide an overview of the Australian case-law under section 46 which remains of direct relevance to the New Zealand setting, followed by a review of the approach taken by the New Zealand courts to section 36. The focus of the discussion will be upon the problematic "taking advantage" limb of section 36.[72]

B. Australian Jurisprudence

Three different approaches to what constitutes the taking advantage of market power have emerged under the Australian case law, the counterfactual test, the "Justice Deane" approach and the "materially facilitated" test.

1. *Counterfactual Test*

A focal point of the Australian case-law has been upon the so-called "counterfactual test." The foundation case for this test is *Queensland Wire Industries Ltd v. The Broken Hill Pty. Co. Ltd.* ("*Q.W.I.*").[73] The Broken Hill Proprietary Company ("B.H.P.") produced around 97% of steel made in Australia. It also supplied around 85% of the steel and steel products consumed by Australia.[74] One of B.H.P.'s products was a "Y-bar"—a crucial part for the manufacture of rural star picket fences. Imports accounted for only around 1% of such fences.[75] B.H.P. only sold its Y-bar to a subsidiary company, Australian Wire Industries ("A.W.I.").[76] Queensland Wire Industries ("Q.W.I."), a competitor of B.H.P., attempted to secure an order of Y-bar from B.H.P. so that it could commence its own manufacture of star picket fences. B.H.P. first refused to supply, and then offered to supply at prices which were extraordinarily high—to the point of amounting to a constructive refusal to deal.[77]

Q.W.I. successfully brought an action against B.H.P. for monopolization. Four of the five High Court of Australia judges held that a firm does not improperly take advantage of its power if it acts in the same manner as it would have in a

[72] There are two other main limbs to section 36. First, there is the threshold question as to whether the defendant has a "substantial degree of market power." The case-law on this concept has centered upon identifying whether there is power that enables a corporation to behave independently of competition. *See Eastern Express Pty. Ltd. v General Newspapers Pty. Ltd.* [1992] 35 FCR 43, 62-63 (Austl.). Also it has centered on whether there is an absence of competitive constraint. *See Boral Besser Masonry Ltd. v Australian Competition and Consumer Commission* [2003] 215 CLR 374, 121, 136, 137-38 (Austl.). Assuming that a firm meets the market power threshold under section 36, and is found to have taken advantage of that power, there is a final inquiry as to whether it has the requisite anti-competitive purpose under section 36(2)(a) to (c). The test for purpose here is again "an objective one but evidence of subjective purpose can be addressed and taken into account in assessing objective purpose." *See ANZCO Foods Waitara Ltd. v AFFCO N.Z. Ltd.* [2006] 3 NZLR 351 (CA) 404, para 255.

[73] [1989] 167 CLR 177 (Austl.).

[74] *Id.* at 183-84.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 184.

competitive market.[78] There was no specific analysis on how this counterfactual test may properly address the policy concerns of monopolization. Rather, on the facts of that case, it was seen as a pragmatic way to assess the claim. However, the test went on to take on a life of its own.

In all subsequent cases, the counterfactual test has been a focal point, either in name or in application.[79] However, some limits have been placed on the application of the counterfactual test as the sole or dominant test. In *Melway Publishing Pty. Ltd. v. Robert Hicks Ltd.*, the High Court of Australia stated that the counterfactual test should be considered in all cases, but should only be undertaken where this can be done with sufficiency cogency.[80] *Melway* recognized that other tests should apply where counterfactual analysis could not be cogently undertaken.[81]

2. *The "Justice Deane" Approach*

In *Q.W.I.*, one of the judges used a different test to determine whether B.H.P. had taken advantage of its market power. Justice Deane stated:

> [B.H.P.'s] refusal to supply Y-bar to Q.W.I. otherwise than at an unrealistic price was for the purpose of preventing Q.W.I. from becoming a manufacturer or wholesaler of star pickets. That purpose could only be, and has only been, achieved by such a refusal to supply by virtue of B.H.P.'s substantial power in all sections of the Australian steel market as the dominant supplier of steel and steel products. In refusing to supply in order to achieve that purpose, B.H.P. has clearly taken advantage of that substantial power in that market.[82]

This test is based upon an assessment of purpose, and recognises that the concepts of taking advantage and purpose should not be evaluated in isolation of each other. This test has been referred to with approval in subsequent cases. In *Melway*, the High Court noted that "Justice Deane's approach was different" to the counterfactual test formulated in *Q.W.I.*.[83] Justice Deane's approach relies upon direct observation of purpose and conduct, and does not involve any comparative assessment of the kind envisaged under the counterfactual test.

[78] *Id.* at 192 (per Mason C.J. and Wilson J.), 202 (per Dawson J.), 216 (per Toohey J.).

[79] *See* Paul G. Scott, *Taking a Wrong Turn: The Supreme Court and Section 36 of the Commerce Act*, 17 N.Z. Bus. L.Q. 260, 264-71 (2011).

[80] [2001] HCA 13 (Austl.).

[81] *Id.* at paras 22, 24.

[82] *See Commerce Comm'n v Air New Zealand Ltd.*, (unreported) High Court, Auckland, CIV 2008-404-008352, 24 August 2011, at paras 197-98; *Re Queensland Co-operative Milling Ass'n v Defiance Holdings Ltd.*, 25 FLR 169 (1976).

[83] *Melway Publishing Pty. Ltd. v Robert Hicks Pty. Ltd.* [2001] HCA 13 at 22. *See also N.T. Power Generation Pty. Ltd. v Power and Water Authority* [2004] HCA 48 at paras 149-50 (Austl.) (noting that Deane J. had adopted an "alternate approach").

3. *The "Materially Facilitated" Test*

A third approach foreshadowed in *Melway,* the "materially facilitated" test, was discussed in the following terms:

> Dawson J's conclusion that B.H.P.'s refusal to supply Q.W.I. with Y-bar was made possible only by the absence of competitive conditions does not exclude the possibility that, in a given case, it may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the existence of the power, even though it may not have been absolutely impossible without the power. To that extent, one may accept the submission made on behalf of the ACCC, intervening in the present case, that s 46 would be contravened if the market power which a corporation had made it easier for the corporation to act for the proscribed purpose than otherwise would be the case.[84]

This test, like Justice Deane's test, is not framed in comparative terms. The material facilitation test has been recognised in subsequent Australian cases as another basis upon which to determine the taking advantage limb of section 46.[85] However, there is no further articulation of the test in these cases, and it has not to date provided a basis upon which any monopolization case has been decided in Australia.

C. New Zealand Jurisprudence

Until 2004, the Judicial Council of the Privy Council sat as New Zealand's highest appellate court. In July 2004, the Supreme Court of New Zealand was established and this assumed the appellate function previously performed by the Privy Council. The journey through the jurisprudence on section 36 begins with two decisions of the Privy Council and ends with a recent Supreme Court decision.

The first case in this saga was *Telecom Corp. of N.Z. Ltd. v. Clear Communications Ltd.* ("*Telecom/Clear*").[86] This case involved a dispute over the access price Clear had to pay Telecom to connect to its fixed copper Public Service Telecommunications Network. It centered upon the application of the Efficient Component Pricing Rule. Telecom argued that it would not be abusing its dominant market position if it demanded a price equal to the revenue it would have received had it provided the services itself. This premise relied upon the prevailing arguments in *Q.W.I.* That is, if Telecom's prices were no higher than those which a hypothetical firm would seek in a perfectly competitive market, Telecom was not abusing its dominant position.[87] This lead the Privy Council to fashion

[84] *Melway,* HCA 13 at 51.

[85] *See Australian Competition and Consumer Comm'n v Australian Safeway Stores Pty. Ltd.* [2003] FCAFC 149, 325-33 (discussing how to determine if a corporation has taken advantage of its market power through material facilitation).

[86] *Telecom Corp. of N.Z. Ltd. v Clear Comm. Ltd.* [1995] NZLR 385 (P.C.).

[87] *Id.* at para 403.

the following statement of principle on the taking advantage, or use, limb of section 36:[88]

> [I]t cannot be said that a person in a dominant market position "uses" that position for the purposes of s 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 solely counterfactual approach was affirmed by the Privy Council in a later case, *Carter Holt Harvey Building Products Group Ltd. v. Commerce Commission.*[89] In *Carter Holt Harvey* the Privy Council said that it was both legitimate and necessary to apply the counterfactual test to determine if a firm had abused its dominance.[90] Accordingly, the effect of *Telecom v. Clear* and *Carter Holt Harvey* was to impose on New Zealand a sole, counterfactual test. To be fair, the Privy Council simply relied on the counterfactual arguments before it,[91] and was not asked to consider whether either the Justice Deane or the material facilitation tests may apply.

This background sets the scene for the decision of the Supreme Court in *Commerce Commission v. Telecom Corp. of N.Z. Ltd.* ("*0867*").[92] Prior to this appeal, all New Zealand courts had been bound to follow the counterfactual test previously set down by the Privy Council. The *0867* appeal provided the Supreme Court with an opportunity to make a choice; would it continue to follow the sole counterfactual approach set down by the Privy Council, or would it prefer the wider approach adopted by the High Court of Australia?

Regrettably, the Supreme Court's misinterpretation of Australian case law squandered this opportunity. The Supreme Court convinced itself that, when appropriately analysed, all of the Australian tests could be regarded as involving a comparison between actual and hypothetical markets.[93] It also asserted that the predictability of outcome would be harmed by the application of a range of tests.[94] This reading of Australian case law is clearly problematic, given the clear expression that, within the jurisdiction, there are different and alternate tests apart from the counterfactual test, as noted above.

Against this background, the Supreme Court formulated the following comparative exercise test, which is in all but name, an endorsement of the sole counterfactual test:

---

88 *Id.* at para 402. *See, e.g., Commerce Comm'n v Bay of Plenty Elec. Ltd.* (unreported) High Court, Wellington, CIV 2001-485-917, 13 December 2007, at 311 (HC) (discussing how courts have held since this amendment that the concept of "use" and "take advantage" have parallel application under section 36).

89 *Carter Holt Harvey Bldg. Prod. Group Ltd. v Commerce Comm'n* [2006] NZLR 145 (P.C.).

90 *Id.* at para 60.

91 It should also be noted that the minority in *Carter Holt Harvey* did express concerns about the reliability of a test based on the identification of a hypothetical comparator. *Id.* at para 78.

92 *Commerce Comm'n v Telecom Corp. of N.Z. Ltd.* [2011] NZLR 577 (SC).

93 *Id.* at paras 17, 21.

94 *Id.* at para 30.

> A firm with a substantial degree of market power had the potential to use that power for a proscribed purpose. To breach s 36 it must actually use that power in seeking to achieve the proscribed purpose. Anyone asserting a breach of s36 must establish there has been the necessary actual use (taking advantage) of market power. To do so it must be shown, on the balance of probabilities, that the firm in question would not have acted as it did in a workably competitive market, that is, if it had not been dominant.[95]

In its statements, the Supreme Court provided some additional guidance on the application of this comparative test. The Court stressed that the question of what a firm with a substantial degree of market power would do in a hypothetically competitive market is a matter of practical business or commercial judgment, and is not necessarily a matter of economic analysis.[96] Further, in determining the hypothetical market, a court must strip away all aspects of the firm's dominance.[97]

In the limited time since the delivery of this decision, it has received strong criticism. The leading commentary to date concludes that:

> The Supreme Court has missed the point, misread Australian law and taken a wrong turn by confirming the counterfactual test as the sole determinant for "use" or "taking advantage of substantial market power". It has left no room for alternative tests.[98]

Such criticism has also been coupled with calls for legislative change to section 36.[99] For the time being, however, section 36 remains constrained to the world of a sole counterfactual (or comparative) test.

D. Critique

The judicial preference for a counterfactual test in Australasia is problematic. Nonetheless, it has prevailed—notwithstanding strong criticism from commenta-

---

[95] *Id.* at para 34. There is the possibility that the Supreme Court did attempt to expand the test to include material facilitation. For example, at one point it said: "market power gives some advantage if it makes easier – that is, materially facilitates – the conduct in issue." *Id.* at para 33. However, this passing reference is difficult to elevate to a new test having regard to the express endorsement throughout the decision of the sole counterfactual approach. *See, e.g.*, *id.* at para 31 stating,

> [T]he essential point is that if a dominant firm would, as a matter of commercial judgment, have acted in the same way in a hypothetically competitive market, it cannot logically be said that dominance has given it the advantage that is implied in the concepts of using or taking advantage of. . . a substantial degree of market power.

[96] *Id.* at para 30.

[97] *Id.*

[98] Scott, *supra* note 79, at 282. *See* Matt Sumpter, *Competition Law*, 2012 N.Z. L. Rev. 113, 123 (missing the fundamental point that the Australian case-law before the Supreme Court was that which pre-dated the 2007 and 2008 amendments to the Competition and Consumer Act).

[99] Scott, *supra* note 79, at 283; *see also* Oliver Meech, *"Taking Advantage" of Market Power*, 2010 N.Z. L.J. 389, 392.

tors over the years.[100] The continued application of this test is highly problematic for the following reasons:

First, the application of the test is plagued with uncertainty. The first step in performing the test is to construct the hypothetically competitive market comparator. The construct that a court may accept here is highly unpredictable.[101] Further, assuming the identification of such a hypothetically competitive market, there is an issue as to how reliably can it be predicted how the monopolist would act in it. Little guidance or comfort can be taken from the Supreme Court's "commercial judgment" test in *0867*.[102]

Second, from a policy perspective, relative market performance assessments are inappropriate. It is not difficult to identify instances where unilateral conduct may be of no concern, or even pro-competitive, when undertaken by a non-dominant firm in a competitive market, but may well be anticompetitive and cause consumer harm when engaged in by a dominant firm. These concerns are of potentially greater resonance in a small market economy such as New Zealand. Take, for example, the case study of exclusive dealing where a dominant firm's exclusive dealing arrangements exist in markets with high entry barriers and where the extent of these arrangements results in the foreclosure of either upstream or downstream competition. Under the sole counterfactual test we are required to construct a hypothetically competitive market comparator which will bear no resemblance to the real world problem. Would the now non-dominant monopolist have imposed the same exclusive dealing requirements in this artificial competitive market? The answer will probably be yes because exclusive dealing may be economically rational and may have pro-competitive effects in the hypothetically competitive market. On this analysis, the plaintiff in a monopoly case in New Zealand faces insurmountable problems in seeking relief in circumstances where it may well be warranted. This kind of analysis has the potential to play out in much the same way in other situations where section 36 applies.[103]

For the moment, New Zealand monopolization law sits in an unfortunate position. While the legislation itself presents no particular problems, the judicial analysis of the Act has seriously narrowed its application. Pragmatically, the only way forward is to adopt an amendment to section 36. Hopefully, any such legis-

[100] For references to this commentary, *see* Scott, *supra* note 79, at 282; *see also* Gal, *supra* note 12, 99-106.

[101] *See* Mark N. Berry, *The Uncertainty of Monopolistic Conduct: a Comparative Review of Three Jurisdictions*, 32 L. & POL'Y IN INT'L BUS. 263, 312 (2001) (discussing the construction of a hypothetical competitive market model utilizing monopolistic conduct). *See also Commerce Comm'n v Telecom Corp. of N.Z. Ltd.* (2009) 12 TCLR 457, 74 (discussing the resultant prolonged litigation that would stem from a suggested solution to the uncertainty found in the Court of Appeal decision in *0867*, which is that the Court should determine this matter as a preliminary question).

[102] *See* Jeffrey M. Cross, J. Douglas Richards, Maurice E. Stucke & Spencer Weber Waller, *Use of Dominance, Unlawful Conduct and Causation under Section 36 of New Zealand's Commerce Act 1986: A United States Perspective*, 18 N.Z. BUS. L.Q. 333 (2012) (for a discussion on the reluctance of the U.S. courts to engage in but-for analysis).

[103] There are also observations under U.S. law which reflect that the but-for analysis is too differential to the monopolist. *See U.S. v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (per curiam).

lative review will not be confined to the potential adoption of the revised monopolization provisions now contained in section 46 of the Competition and Consumer Act. As noted above, counterfactual analysis is unreliable and controversial in its application. Further, the content and application of the Justice Deane and material facilitation tests are unclear and uncertain.

A properly informed review of section 36 will require an international survey of the subject. There is no easy solution to the problem; indeed, the history of antitrust reflects a "continuing, and perhaps never ending, search for an appropriate [monopolization] rule."[104] In any such review, close consideration should be given to U.S. monopolization law which focuses upon the likely or actual competitive effects of the defendant's conduct.[105] At the least, such a test endeavours to address the real-world harm that may attach to monopolistic conduct and this is clearly preferable to hypothetical thought experiments.

V. Merger Analysis

Outside observers may, at first glance, be surprised at the levels of concentration which have been permitted under New Zealand merger approvals. The table below sets out a sample schedule of mergers which were approved in 2010 and 2011. This table has been constructed in random sequence, so as to preserve confidentiality of market share details. The market share for the merged entity is included, together with the three-firm concentration ratio.

MERGER APPROVALS 2010 - 2011

Mergers	Market Shares	3 Firm Concentration Ratio
A	19% and 42%	56% and 60%
B	98%	100%
C	82%	100%
D	72%, 38%, 28% and 58%	100%, 97%, 90%, 100 %
E	30% - 41%	78% - 93%
F	38% and 93%	87% and 100%
G	30% - 36%	83% - 88%
H	54%, 41% and 43%	91%,7 4% and 74%
I	7%, 19% and 46%	100%, 70% and 97%
J	56%, 71% and 89%	75%, 100% and 95%
K	68%	80%
L	31% and 41%	95% and 67%
M	93%	100%
N	42% and 38%	100%
O	97%	100%
P	100%	100%
Q	48%	92%
R	84%	100%

104 *See* Berry, *supra* note 101, at 264.

105 *See e.g.*, Cross et al., *supra* note 102 (for an outline of this test and its relevance to New Zealand).

There is, however, a need to observe these levels of concentration in the context of a small market economy. If mergers involving this level of concentration are not permitted, then this would significantly suppress merger activity and prohibition of such mergers would potentially deny the opportunity for the emergence of firms of sufficient size to achieve efficient levels of production.

As it happens, New Zealand has a conventional merger prohibition by international standards. Section 47(1) prohibits acquisitions of assets of a business or shares which would have, or would be likely to have, the effect of substantially lessening competition in a market.[106] There is a voluntary pre-merger notification regime which means that merger parties have three procedural options. First, if merger parties believe that their transaction does not contravene section 47 they can implement the merger without reference to the Commerce Commission.[107] Second, parties may apply to the Commission for clearance of their proposal before carrying out the merger. The Commission is required to give clearance under section 66 if it is satisfied that the merger will not contravene the section 47 test. Finally, in more problematic cases where mergers are likely to result in a substantial lessening of competition, applicants can seek authorisation on the basis that there are public benefits which outweigh the detriments flowing from the potential lessening of competition.

The substantive approach to the analysis of the section 47 substantial lessening of competition test follows international norms for the most part. Readers of the New Zealand Commerce Commission Mergers and Acquisitions Guidelines[108] will observe that its content bears a striking resemblance to the substance of earlier versions of the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.

There is, nonetheless, one crucial matter of difference. The view has been taken in this part of the world that the substantial lessening of competition test, by its very language, begs a comparative assessment. What will be the comparative competitive state of the markets both with and without the merger? This comparative question has become known under New Zealand antitrust law as yet another so-called "counterfactual" test. This test has become regarded as elementary to the analysis of section 47.[109]

[106] *See Commerce Comm'n v Port Nelson Ltd.* [1995] 6 TCLR 406, 441 (discussing the dominance test contained in this provision from 1986 to 2001; a test that was interpreted as one that required the establishment of more than high market power). *See also Telecom Corp. of N.Z. Ltd. v Commerce Comm'n* [1992] 3 NZLR 429 CA 442 (discussing further how the provision was considered to relate only to unilateral and not co-coordinated effects). For further background on this amendment, *see* Mark N. Berry & Morag Bond, *The Redirection of the Merger Threshold* in COMMERCIAL LAW ESSAYS: A NEW ZEALAND COLLECTION 119, 122-23 (David Rowe & Cynthia Hawes eds., 2003) (discussing how the introduction of the substantial lessening of the competition test under the Commerce Amendment Act 2001 was intended to lower the market power threshold under section 47, and require that merger analysis extend to take account of the potential for collusive or oligopolistic behaviour).

[107] *See Commerce Comm'n v New Zealand Bus Ltd.* (2006) 11 TCLR 679 (discussing how enforcement action may be taken by the Commission if it has competition concerns).

[108] Commerce Comm'n, *Mergers & Acquisitions Guidelines* (2003).

[109] *Commerce Comm'n v Woolworths Ltd.* [2008] NZCA 276 at para 4 (CA).

The courts have developed principles which govern the application of this counterfactual test. First, the counterfactual test "focuses upon a possible change along the spectrum of market power rather than whether or not a particular position on that spectrum, i.e. dominance has been attained."[110] In other words, it is necessary to plot the points of the merger (the factual) and the likely state of affairs without the merger (the counterfactual) along the market power continuum ranging from perfect competition at one end to monopoly at the other. It is this comparative market power assessment of the factual and counterfactual which forms the essential basis for determining whether there may be a substantial difference between the two identified levels of market power.

Another key interpretative matter, which flows from the above principle, is: what approach is taken in relation to the identification of the counterfactual? Inevitably, this forward-looking assessment will be highly problematic in many cases. In some cases it could be that more than one counterfactual may be likely. The test for likelihood requires only that the counterfactual be "more than possible" and that "it need not be more probable than not."[111] In *Woolworths Ltd. v. Commerce Commission*, the Court reflected on this possibility and enunciated the following principles for cases where more than one counterfactual may be possible:

> We consider that the correct approach is that we must assess what are the possibilities. We are to discard those possibilities that have only remote prospects of occurring. We are to consider each of the possibilities that are real and substantial possibilities. Each of these real and substantial possibilities become counterfactuals against which the factual is to be assessed. If in the factual as compared with any of the relevant counterfactuals competition is substantially lessened then the acquisition has a "likely" effect of substantially lessening competition in a market.[112]

An obvious related question which arises under this multiple counterfactual approach is whether any given merger decision should take into account the possibility that one of the identified counterfactuals may be most likely to occur. On this point, the Court considered that "where there is more than one real and substantial counterfactual it is not a case of choosing the one that we think has the greater prospect of succeeding."[113] Accordingly, merger analysis is now directed at identifying all likely counterfactuals and making the competition assessment in respect of the least favourable counterfactual, even if it may not be the most likely counterfactual.[114]

110 *Air New Zealand Ltd. v Commerce Comm'n (No. 6)* (2004) 11 TCLR 347 at para 42 (HC).

111 *Woolworths Ltd. v Commerce Comm'n* (2008) 8 NZBLC at para 112 (HC).

112 *Id.* at para 122.

113 *Id.* at para 118.

114 New Zealand merger jurisprudence largely follows Australian precedent. Section 50 of the Australian Act also contains a substantial lessening of competition threshold. However, while counterfactual analysis is also required in Australia, the multiple counterfactual approach outlined in *Woolworths* has not been expressly contemplated under Australian case-law. *See, e.g., Australian Competition & Consumer Comm'n v Metcash Trading Ltd.* [2011] FCAFC at paras 226-37 (Fed. C.).

Counterfactual analysis can be problematic because predictions as to the future structure and workings of markets are inherently uncertain. The alternative of taking the status quo as the point for comparison is not necessarily any more reliable. In small economies markets can foreseeably change, at times with some degree of speed. In a number of cases, there are only some three to four competitors in any given market. The investigation into such mergers can often reveal future market plans that reflect likely changes in the scale and scope of competition. In such cases, status quo counterfactuals would be inappropriate. Accordingly, the Australasian counterfactual approach is perhaps more fit for purpose than status quo assumptions in a small market economy. However, the multiple counterfactual approach formulated in *Woolworths* is problematic. The central objection to this approach is the risk of false negatives. Decision-makers are placed in an unfortunate position when they are required to decline a merger approval because one possible counterfactual does not pass the test, notwithstanding that there may be a more likely counterfactual under which approval would be given.[115]

Apart from this current framework problem, it is fair to say that the traffic of merger cases over the first twenty-five years of the Commerce Act have travelled well enough.

VI. A Window on the Efficiencies Defense

A final part of the Commerce Act which warrants comment is the authorisation (or efficiencies defense) process under the Act. As already mentioned, where parties propose to enter into, or give effect to any restrictive trade practice which may breach any section of the Act (other than the monopolization provision), they may seek prior authorisation of the practice from the Commerce Commission. Section 61(6) requires that the Commission must authorise any such application where it is likely that there is "a benefit to the public which would outweigh the lessening of competition" that would result or would be likely to result from the practice. A similar provision applies in respect of mergers which may not be cleared on substantial lessening of competition grounds. Such mergers can, nonetheless, be authorised under section 67(3) on the grounds that it will be likely to result "in such a benefit to the public that it should be permitted."[116] As already noted, the public benefit test centers upon efficiencies.[117]

[115] For wider discussion of the multiple counterfactual problem, *see* Mark N. Berry & Paul G. Scott, *Merger Analysis of Failing or Exiting Firms Under the Substantial Lessening of Competition Threshold*, 16 Canterbury L. Rev. 272, 287-88 (2010).

[116] The efficiencies defense has been applied in parallel manner under both sections 61(6) and 67(3), notwithstanding the different wording of the authorisation test. Commerce Act 1986 §5 (N.Z.); *Godfrey Hirst N.Z. Ltd. v Commerce Comm'n* (2011) 9 NZBLC at paras 82-90 (HC).

[117] The inquiry nonetheless extends beyond efficiency gains. *See Air New Zealand Ltd. v Commerce Comm'n (No. 6)* (2004) 11 TCLR 347 at para 319 (HC) (the high court noted "[b]enefits include efficiency gains § 3A of the Act and anything of value to the community generally."). Other points to note from *Air New Zealand, id.*, are that only net benefits are to be included. Any costs incurred in achieving efficiencies must be taken into account, and transfers of wealth which achieve no benefit to society as a whole should be disregarded. *Id.* Further, the claimed benefits must result from the acquisition. *Id.* Benefits which may be likely without the merger are not to be included. *Id.*

A recent case, *Godfrey Hirst N.Z. Ltd. v Commerce Commission*,[118] serves to illustrate the workings of the efficiencies defense in New Zealand in the merger law context. As earlier outlined, the authorisation process under section 67(3) requires the Commission to consider whether a merger should be permitted on grounds of countervailing public benefits, notwithstanding a finding of a likely substantial lessening of competition. The standard methodology for undertaking this assessment is first to assess detriments (or welfare losses) as quantified to the extent possible under three categories of efficiency losses, namely allocative, productive and dynamic.[119] These detriments must then be measured against public benefits. These benefits include efficiency benefits (or welfare gains), consistent with section 3A, and these must also be quantified to the extent possible. Such benefits are also assessed under parallel efficiency criteria namely, likely allocative, productive and dynamic efficiency gains. Other benefits may be advanced by the applicant—although in practice it is rare for any such benefits to carry much weight. The Commission is required to form a view on the range, magnitude and likelihood of all claimed benefits. Both a qualitative and quantitative judgment call is required. The outcome ultimately rests on where the balance lies between the detriments and the benefits.

A. Background

Godfrey Hirst is a case study of a two-to-one merger situation. The case concerned the proposed merger of New Zealand's two remaining wool scours, namely Cavalier and New Zealand Wool Services.

The relevant markets in this case were defined as being the North and South Island markets for the supply of wool scouring services.[120] Wool scouring is the process by which wool clipped from sheep is cleaned and prepared for use in other processes. Not all wool grown in New Zealand is scoured. Some wool is exported in greasy form. At present 78% of New Zealand's wool clip is exported (predominantly to China), and of these exports, 22% of the clip is greasy wool.[121]

Wool scouring is a high fixed cost, low variable cost business. Further, the industry is experiencing significant over-capacity in wool scouring facilities and this has driven the need for rationalisation. Between 1983 and the present day, New Zealand's sheep flock has declined 53% (from a peak of 70 million to 33 million sheep).[122] Cavalier had three wool scouring plants in the North Island and one in the South Island. New Zealand Wool Services had one plant in each Island. Cavalier proposed, post-merger, to close one plant in each Island and to work towards achieving related rationalisation benefits.

The two largest domestic customers of scoured wool in New Zealand are Cavalier and Godfrey Hirst, and they compete in the market for the manufacture of

118 *Godfrey Hirst*, 9 NZBLC at paras 82-90.

119 *Id.* at para 53.

120 *Id.* at para 54.

121 *Id.* at para 17.

122 *Id.* at para 16.

carpets. Godfrey Hirst owned a wool scour previously, but sold this to Cavalier in 2009. At the time of the sale Godfrey Hirst entered into a fixed-term contract with Cavalier for the provision of scouring services.[123] Godfrey Hirst opposed the Cavalier-New Zealand Wool Services merger because of the risk it saw in being beholden to wool scouring services from its major rival in the carpets market. While it was dependent on such services for the term of its contract with Cavalier, Godfrey Hirst still thought it important that the threat of switching to New Zealand Wool Services should remain.

B. The Detriments

On the question of allocative inefficiency losses, the Commission was required to assess likely price increases post-merger. Critical factors here in the assessment of market power included the prospect of new entry and the prospect of increased export of greasy wool to China. It was this threat of new entry and the threat of export of greasy wool to China that was seen as the ultimate price cap. The Commission modeled allocative inefficiency losses over a range of demand elasticities (-0.05, - 0.5 and -1.0) and over a range of price increase assumptions (5%, 10% and 15%). The Commission made a judgment call that a detriment value corresponding to a 10% price increase and a demand elasticity of -1.0 was the most likely allocative inefficiency loss. This equated to the likely allocative efficiency loss as being a net present value of $14.7 million over a five year period.[124] This finding was upheld on appeal.[125]

Turning to potential productive efficiency losses, the High Court again endorsed the Commission's findings on this highly speculative subject matter.[126] This matter addresses losses that may arise from reduced incentives to minimise costs and to avoid loss in the absence of competitive pressure. However, forward-looking assessments of potential organisational slack are notoriously difficult to make and depend substantially on surrounding market circumstances. Ongoing competitive threats in the form of new entry or the China export constraint, coupled with shareholder incentives to drive productive efficiencies, were material to the Commission's findings. The Commission considered that the productive efficiency loss may be in the range of 1% and 5% of pre-merger variable costs. It made a qualitative judgment at a mid-point range of 3%.

Dynamic efficiency losses, like productive efficiency losses, are notoriously difficult to quantify. While monopolists may lack the pressure to invest and innovate compared with a competitive market setting, there is no robust methodology for making the calculation. The Commission in this case focused on the long-term competitive threat of China's scouring industry and considered that this would spur innovation. Further, the key innovations in this market came from outside the market, in the form of equipment manufacturer innovations. These

[123] *Id.* at para 29.

[124] *Id.* at paras 127-29.

[125] *Id.* at para 190.

[126] *Id.* at paras 191-201.

factors suggested that any losses in dynamic efficiencies were likely to be limited.

Consistent with earlier authorisation decisions, the Commission attempted to quantify this detriment by multiplying total revenue by a factor. Given the perceived smallness of the detriment, the Commission used a range of losses of 0 to 1% and took a mid-point to reach its final decision.

The High Court took issue with the Commission using a start point of 0 on this range essentially because the removal of New Zealand Wool Services would be likely to remove at least some potential dynamic efficiency from the market.[127] Nonetheless, the Court accepted that the Commission's use of a mid-point (0.5% of industry revenue) was not wrong.[128] In so doing, the Court recognised the need for pragmatism in this assessment.

C. The Public Benefits

A range of countervailing benefits were claimed by the applicant, Cavalier. First, there were productive efficiency gains in the form of operating and administrative cost savings. The challenge for the applicant was to establish that these cost savings would be likely achieved, and that they would not otherwise occur in the counterfactual (without the merger). The applicant established to the Commission's satisfaction that cost savings in the order of 14% of pre-merger operating and administrative costs would be likely. Significant among these cost savings were energy costs, repairs and maintenance costs, and administration expenses (primarily salaries). Some claimed savings relating to fringe benefits for cars and council rates were rejected because these were viewed as "transfers" rather than public benefits.[129]

On appeal, the High Court rejected Godfrey Hirst's argument that these cost savings were functionless because they concerned fewer resources (electricity, gas, land, labour) being used to scour the same volume of wool.[130] Overall, the Court endorsed the Commission's findings on this category of public benefit.[131]

The next head of public benefit concerned the sale of surplus land and buildings. As mentioned earlier this merger, if implemented, would result in the closure of two existing wool scour plants. Throughout the Commission's deliberations, it was accepted that freeing-up surplus land and buildings was a public benefit as those resources could then be deployed to other productive uses. Godfrey Hirst used the appeal as an opportunity to test this proposition. The Court accepted that this was appropriately a head of public benefit because fewer land and building resources were needed for the scouring operations in the factual compared with the counterfactual, thereby releasing land for other produc-

[127] *Id.* at para 229.

[128] *Id.* at para 247.

[129] *Id.* at para 250.

[130] *Id.* at para 271.

[131] *Id.* at para 281.

tive uses.[132] Further, the Court endorsed the value of $8 million for this surplus land and buildings.[133]

It is noteworthy here to mention that the acceptance of the claimed benefits thus far was sufficient to outweigh the quantified detriments.[134] The public version of the decision does not, of course, reveal the precise numbers, because confidentiality attached to significant portions of the quantification before the Commission and the Court.

Finally, the Commission emphasised that the ultimate decision was not undertaken purely on a quantitative basis. This, it said, was supplemented by a qualitative assessment. The Court observed that this method involved some circularity, and that it was not clear what had gone into the qualitative assessment other than the quantitative assessment of most likely detriments and benefits.[135] While there is some validity to this view, it needs to be appreciated that there is a significant overlap between quantitative and qualitative methods. One does inform the other. It is not always possible to say that both methods of analysis involve discrete decision-making paths. However, the ability to stand back and make an overall qualitative assessment after the quantification has been done is desirable. This final check may provide appropriate push back in cases where instinctively the numbers in the final assessment may not look right.

VII. Some Concluding Thoughts

New Zealand competition policy and jurisprudence has come far in the first twenty-five years of the operation of the Commerce Act. Admittedly, there has been a good deal of free-riding on international experience throughout this journey.

The efficiency policy framework of the Act appears sound, although its application in a small economy always poses tensions. High concentration to enable productive efficiency has the potential to benefit consumers. But, at times, it might give rise to the prospect of the exercise of undue market power. This tension is almost always present.

---

132 *Id.* at para 296.

133 There were two other claimed heads of public benefit which were not ultimately determinative of this case. Cavalier had argued that the merger would enable it to create a wool superstore. *Id.* at para 321. This, it was argued, would lead to efficiencies (including freight savings) by eliminating duplication of resources in the storage and handling of wool (including wool sorting, cleansing and testing at one site, rather than at multiple sites). The Court concluded that this development may also be likely to occur in the counterfactual and indicated that if this matter had been crucial to the outcome it may have referred the matter back to the Commission for reconsideration. *Id.* The final benefit claim, quality improvements with brighter wool, also involved a difference of opinion between the Commission and the Court. Cavalier argued that with the merger there would be the likelihood that it could achieve improved quality, it being accepted that increase in brightness could increase wool value by 4 cents per kilogram. *Id.* The Commission reached the view that these benefits could be achieved in the counterfactual. In this case the Court thought that this may not be so and again indicated that if the case had turned on this point, it would have referred the matter back to the Commission for further consideration. *Id.*

134 *Id.*

135 *Id.* at para 323.

While there has been limited traffic under our catch-all section 27 provision relating to trade practices, the formulation of its tests and their application does not appear to pose any particular concerns. The analysis in cases such as *Fisher & Paykel* and *Kapuni* is likely to be regarded as internationally acceptable, depending on policy preferences. The problems surrounding the per se price fixing rule, section 30, are of no great magnitude. They are in the nature of bedding down. This provision will, of course, take on a new life with the likely introduction of criminalisation in the near future.

Merger analysis has also been robust in its approach and application. There are good reasons for the application of a forward-looking counterfactual approach to mergers in a small market economy, notwithstanding that in some cases this may involve some difficult future predictions. The one problem area under New Zealand merger law is the multiple counterfactual approach, as formulated by the High Court in *Woolworths*. This is a matter requiring further thought given the false negative risk that it inevitably introduces.

Finally, the current state of the jurisprudence on monopolization is the low point of New Zealand antitrust over the first twenty-five years. The decision of the Supreme Court in *0867* has serious implications for section 36. The application of monopoly rules based on hypothetical thought experiments, involving the creation of make-believe market structures and predictions of behaviour in make-believe worlds, is highly problematic. Section 36 is in urgent need of amendment.

Appendix

Key Provisions of the Commerce Act, 1986 (New Zealand)

Section 27(1): Contracts, arrangements, or understandings substantially lessening competition prohibited
No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

Section 27(2): No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

Section 30: Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition

> (1) Without limiting the generality of section 27, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are
> (a) supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or
> (b) resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.

Section 36: Taking advantage of market power

> (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 47: Certain acquisitions prohibited

> (1) A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.