THE IMPACT OF US ANTITRUST ON ASPECTS OF NEW ZEALAND
COMPETITION LAW

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My project’s purpose is to examine the influence United States antitrust law has had and should have on New Zealand’s competition law. Both countries’ law is statutory. New Zealand’s is the Commerce Act 1986. Prima facie it seems obvious that there should be some influence or impact. Both countries are western capitalist economies and US antitrust law begat Australia’s Trade Practices Act 1974 (the TPA). The TPA begat the Commerce Act as many provisions are identical. One can see the influence of US antitrust law in many of Australasia’s statutory provisions. Section 27 of the Commerce Act proscribes contracts, arrangements or understandings that have the purpose or effect or likely effect of substantially lessening competition in a market (SLC). Section 47 proscribes mergers that have the effect or likely effect of SLC. The SLC test derives from s7 of the Clayton Act. “Contract, arrangement or understanding” are similar to and derive from the “contract, combination or conspiracy” language of s1 of the Sherman Act. Section 30 of the Commerce Act deems contracts arrangements or understandings that contain provisions that have the purpose or effect or likely effect of “fixing, controlling or maintaining” prices to be a SLC. One can trace the phrase “fix, control or maintain” to the wording in Socony Vacuum.1

Despite this lineage Australasian courts have not been consistent in following US antitrust authorities. At times they have enthusiastically endorsed it. At others they eschew it. John Roberts, apparently following Judge Leventhal, famously claimed that one of the problems of using international law in interpreting the constitution is that one can pick out one’s friends. Whatever the truth of that in constitutional law it is true in Australasian competition law when it comes to following US authorities. For example:

The majority of the High Court of Australia in Boral2 endorsed recoupment being an essential feature of liability for predatory pricing under s46 of the TPA. (Australia’s monopolization section) It cited Brooke Group3, AA Poultry4 and US academics. Kirby J dissented saying US monopolization authorities did not apply in Australia. The New Zealand Court of appeal curtly dismissed recoupment being a requirement for predatory pricing in Port Nelson5 and Carter Holt Harvey.6

In Melway7 the majority of the High Court of Australia cited Burdett Sound Inc v Altec Corporation8 in saying a manufacturer was free to terminate a distributor. It also cited Sylvania9

1 United States v Socony-Vacuum Oil Co 310 US 150 (1940).
4 AA Poultry Farms Inc v Rose Acre Farms Inc 881 F2d 1396 (7th Cir 1989).
8 515 F2d 1245 (5th Cir 1975).
on how vertical restraints can be efficiency enhancing. Kirby J again dissented saying the US authorities were irrelevant to Australia.

The High Court also endorsed legitimate business justification as being vital to monopolization cases. This derives from the US Supreme Court in *Aspen*\(^{10}\) and *Eastman Kodak*\(^{11}\). Despite the High Court approvingly citing US s2 authorities in the above cases the situation changed in *NT Power*,\(^{12}\) a refusal to supply case. There the majority of the High Court refused to apply *Trinko*.\(^{13}\) It rejected *Trinko* as an aid to interpreting s46 as a whole and on refusals to supply. The reason was that the statutes differed; s2 was a criminal statute backed by sanction of imprisonment and that competition law still applied to Australia’s electricity industry. It held that a refusal to supply in the circumstances was an act of monopolization. Kirby J again dissented but held *Trinko* offered valuable insights and was relevant. Kirby J was perhaps the most schizophrenic judge when it came to US antitrust authorities. Such authorities were irrelevant to monopolization cases except those involving refusals to supply. Yet for collective boycotts in *Visy*\(^{14}\) Kirby J argued Australia should follow US law on the topic and in particular the distinction between vertical and horizontal agreements. This was another dissent. To be fair the majority who favoured US law in *Melway* and *Boral* rejected US law in *Visy* and in *NT Power*.

Essential facilities is another example of inconsistency. Initially the High Court of New Zealand enthusiastically adopted the doctrine under s36\(^{15}\). A different High Court then was reluctant to endorse, let alone adopt it, saying a wrong step could be deleterious and difficult to reverse.\(^{16}\) The Full Federal Court in a decision of Gummow J roundly rejected the doctrine for Australia.\(^{17}\) Yet as I argue in *NT Power* the majority of the High Court of Australia (including Gummow J) adopted and applied the doctrine de facto. It is the best explanation of the decision. Back in New Zealand the Court of Appeal noted that in *Bay of Plenty Electricity*\(^{18}\) the High Court appeared to endorse the essential facilities doctrine for New Zealand. The Court of Appeal did not have to decide the issue.

**Why have the Courts been reluctant to follow US law**

Thus the Australia jurisprudence is not consistent in applying and on the relevance of US antitrust. There a number of potential reasons why Australasian courts have been reluctant to follow US law.

The primary reason courts give for not following is the difference in statutory wording. Section 2 of the Sherman act does not resemble ss36/46. This appears valid but in reality is not so. Courts should be comparing the rules the US courts have developed for various types of conduct with the Australasian statutes rather that ss1 and 2 of the Sherman Act. The US courts treated the

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\(^{13}\) *Verizon Communications Inc v Law Offices of Curtis v Trinko LLP* 540 US 398 (2004)


\(^{15}\) *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC).

\(^{16}\) *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC).

\(^{17}\) (1987) 17 FCR 211.

\(^{18}\) *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV–2001-485-917, 13 November 2007
Sherman Act as an invitation to develop a common law of antitrust. It is these court developed rules that Australasian courts should be using as a basis for comparison.

The second reason Australasian courts may be reluctant to follow US law is that they do not have that wide ranging role when it comes to interpreting statutes. Rather that develop a common law of a statute Australasian courts interpret statutory words using traditional techniques of interpretation. One of the first Australian cases shows this. Originally s45 of the Australian Act was virtually identical to s 1 of the Sherman Act. It prohibited contracts arrangements and understandings that amounted to a “restraint of trade”. In Quadramain the High Court of Australia had to interpret the section and in particular “restraint of trade”. It had to decide whether that phrase should have the meaning the House of Lords had given it in Esso Petroleum in 1968. Using traditional reasoning the High Court followed the House of Lords as to the common law meaning. Thus the court shut down the path of following a very similar US antitrust provision. As a result Parliament abandoned the phrase “restraint of trade” and substituted the SLC test.

This view of the role of judges in interpretation leads to another reason why US law has not been as influential as it perhaps should have been. That characteristic is how the words of the statute, no matter the type of statute, are paramount. Developments in New Zealand, especially the development of principles has centered on statutory interpretation. New Zealand’s approach has been in George Hay’s words excessively lexicographical. Both the US and New Zealand use the phrase SLC and both deal with a “substantial degree of market power”.

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

A case shows this. In AMPS-A the New Zealand Court of Appeal had to define “dominance” and “dominant position”. It resorted to the dictionary despite Parliament not intending that courts apply “dominance” in its ordinary meaning. The background paper to the Commerce Act made it clear that courts should follow European law which had the same phrase. As a commentator notes “the background paper and parliamentary debate make it quite clear that dominant influence was introduced into the Act as an economic concept and should be interpreted in that

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20 Quadramain Pty Ltd v Sevastapol Investments Pty Ltd (1976) 133 CLR 390.
21 Esso Petroleum Co Ltd v Harpers Garage (Stourport) Ltd (1968) AC 269.
26 Telecom Corp of New Zealand Ltd v Commerce Commission [1992] 3 NZLR 429 (CA) at 442.
manner." As the dictionary referred to dominant as "sole" and "single" influence the Court of Appeal decided that only one firm could be dominant in a market. Thus the European concept of joint dominance never took hold. AMPS-A perhaps is the nadir of competition analysis and excessive reliance on wooden statutory interpretation. Section 3(8) of the Commerce Act then provided:

For the purposes of sections 36, 66 and 67 of this Act, a dominant position in a market is one in which a person as a supplier or an acquirer of goods or services either alone or together with any interconnected body corporate is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market.

One of the judges commented:

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

As a matter of strictly logical statutory interpretation these comments pass muster. However as a matter of economic analysis they are nonsensical. They deny the workings of a demand curve. They are economically illiterate. While this comment may be harsh it also illustrates another reason why Australasian courts have not been overly receptive to US jurisprudence.

In the US antitrust heavily involves economic analysis. Indeed Judge Easterbrook has referred to antitrust as a branch of industrial organization economics.31 Australasian courts have not been so keen on economic analysis. A New Zealand Supreme Court cases shows this. In *Commerce Commission v Telecom32* the Supreme Court accepted that in determining whether a firm has breached s36 one asks whether a firm would have acted the same way in a competitive market. This involves asking whether the impugned conduct has a business rationale and whether it would have acted in the same way as a matter of commercial judgment. The Court said this was essentially a question of commercial judgment. Thus, economic analysis may be helpful but is by no means essential. It concluded by saying that the question of whether a firm has used its dominant position (ie engaged in monopolization) is a practical one.

In another case the High Court of New Zealand referred to econometrics as arcane and of no utility33. This deprecating of economic evidence and analysis would simply not happen in the US. This reluctance to embrace economics may be due to Commonwealth Courts eschewal of top down reasoning or grand theories of law.34 As Posner notes law and economics analysis in

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30 Telecom Corp of New Zealand Ltd v Commerce Commission [1992] 3 NZLR 429 (CA) at 434
34 Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516.
antitrust (or the favouring of economic efficiency as a goal of antitrust) is top down reasoning at its finest.\textsuperscript{35}

One commentator has suggested the way the US appoints its Supreme Court and Federal Court judges has meant that New Zealand courts are unwilling to look to US Federal Court decisions.\textsuperscript{36} There may be a feeling US judicial appointments are simply political, not merit based and that US judges are not “sound.” Hence New Zealand courts should not follow them.

Also the vast difference in size between the two countries may be a reason. The argument is that while both countries may be capitalist New Zealand is only the population of a small city. Thus any economic pronouncements on how the US competition laws apply to US markets is of limited relevance.

**The Project**

Whatever the reason and each suggested reason may have some element of truth and be correct in some cases US antitrust jurisprudence and scholarship provides a rich mother lode of material for New Zealand courts to draw insights from at the very least. My project will attempt to provide a framework for determining when Courts do and when they should take advantage of US law and scholarship. It will focus mainly on monopolization. The reason is that it is the type of behavior which most readily transfers from one jurisdiction to the other. The size differences between countries and economies means that other types of behavior do not readily transfer. Merger analysis is the prime example. Both the US and New Zealand (and Australia) proscribe mergers that have the effect or likely effect of SLC. However the small size of New Zealand means that the thresholds for permissible mergers is far lower in New Zealand. So New Zealand courts and the competition authority (the Commerce Commission) have blessed mergers from 4 to 3, 3 to 2, and even 2 to 1 (New Zealand allows authorization of mergers where the efficiency gains outweigh any competitive detriments from the merger.) Such mergers would not even be considered, let alone permitted in the US.

Thus, my project focuses on monopolization. Another reason for so doing is that I disagree with Michal Gal. Gal has claimed small market economies with high levels of concentration (such as New Zealand) need more robust monopolization provisions.\textsuperscript{37} I do not agree that there should be any difference in monopolization laws between large and small economies. Anticompetitive monopolization is bad wherever it occurs. There might be more cases of monopolization in small economies as there are more monopolists, but that should be the only difference. The struggle to distinguish between efficient and anticompetitive behavior applies equally to small and large economies. I wish to investigate this issue further.

Before outlining the areas of monopolization I want to examine it is worthwhile to set out the background to the monopolization provisions in the US and Australasia.

\textsuperscript{35} “Legal Reason From the Top Down and From the Bottom Up; The Question of Unenumerated Constitutional Rights” (1992) 59 University of Chicago Law Rev 433.


\textsuperscript{37} Michal S Gal “The Effects of Smallness and Remoteness on Competition Law – The Case of New Zealand” (2007) 14 CCLJ 292 at 311–313.
Monopolisation

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

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

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

United States law and the origins of ss 36 and 46

Section 2 of the Sherman Act 1890 is the United States anti-monopolisation provision. It provides:38

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

Section 2 does not define “monopolise”. Thus, it was left to the courts to give guidance as to what s 2 meant and prohibited, as the Supreme Court noted in Standard Oil Co of New Jersey v United States (“Standard Oil”).39 Congress gave the courts “a new jurisdiction to apply a common law against monopolising”.40

The Standard Oil Court noted that the Sherman Act did not prohibit monopoly by itself:41 There had to be unlawful conduct as well. It said that without unlawful conduct “size, aggregated capital, power and volume of business are not monopolising in a legal sense”.42 The Supreme Court affirmed this in United States v United States Steel Corp43 where McKenna J said, “the law does not make mere size an offence, or the existence of unexerted power an offence”.44 The Supreme Court provided little guidance as to what constituted monopolistic conduct.

38 15 USC §2.
40 Standard Oil Co of New Jersey v United States 221 US 1 (1911) at 62.
41 Standard Oil Co of New Jersey v United States 221 US 1 (1911) at 62.
42 Standard Oil Co of New Jersey v United States 221 US 1 (1911) at 10.
43 United States v United States Steel Corp 251 US 417 (1920).
44 United States v United States Steel Corp 251 US 417 (1920) at 451.
The first real guidance came from *United States v Aluminium Co of America* (“Alcoa”). There Learned Hand J noted that mere possession of monopoly did not violate s 2. Thus, the fact that Alcoa possessed a monopoly in aluminium ingot did not necessarily mean it had monopolised that market. Rather, the origin of its monopoly determined liability. Alcoa “may not have achieved monopoly; monopoly may have been thrust upon it.” Furthermore, monopoly can result from lawful means. These included “by force of accident” or when a market can only profitably accommodate one firm. Similarly, where a “single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry” then s 2 did not apply. Learned Hand J noted, “the successful competitor having been urged to compete, must not be turned upon when he wins”.

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

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

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

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45 *United States v Aluminium Co of America* (“Alcoa”) 148 F 2d 416 (2d Cir 1945).
46 *United States v Aluminium Co of America* (“Alcoa”) 148 F 2d 416 (2d Cir 1945) at 429.
47 *United States v Aluminium Co of America* (“Alcoa”) 148 F 2d 416 (2d Cir 1945) at 429–430.
48 *United States v Aluminium Co of America* (“Alcoa”) 148 F 2d 416 (2d Cir 1945) at 430.
49 *United States v Aluminium Co of America* (“Alcoa”) 148 F 2d 416 (2d Cir 1945) at 430.
51 *United States v Griffith* 334 US 100 (1948).
52 *United States v Griffith* 334 US 100 (1948) at 107.
53 *United States v Griffith* 334 US 100 (1948) at 107.
55 *United States v United Shoe Machinery Co* 110 F Supp 295 (D Mass 1953) at 342.
Section 2’s requirements closely resemble both ss 36 and 46. These require substantial market power (or the United States equivalent, a monopoly). The Australasian sections’ requirement of take advantage/use is remarkably similar to exercising substantial market power. Section 2’s wilful prerequisite is equivalent to ss 36 and 46’s purpose limbs. The only difference is that ss 36 and 46 do not proscribe acquiring substantial market power. Rather, s 2’s monopoly maintenance is the functional equivalent of ss 36 and 46. Thus, one can see that, monopoly acquisition aside, the Australasian monopolisation provisions are a statutory encapsulation of the United States Supreme Court’s *Grinnell* test for monopolisation

Despite my earlier claim that ss36/46 are statutory encapsulations of the *Grinnell* black letter law rule the law is not identical. In some ways Australasia forged its own path.

### The Australasian Story

#### Queensland Wire

The story begins in Queensland. The first High Court of Australia case on s46 was *QWI v The Broken Hill Pty Co Ltd*. BHP produced around 97 percent of steel made in Australia. It also supplied about 85 percent of Australia’s requirements for steel and steel products. One of BHP’s products was Y-Bar. It used Y-bar to make star picket fences. These fences were the most popular in Australia. Imports accounted for only one percent of such fences. Y-Bar was the only product BHP produced which it did not sell to the general public. BHP only sold Y-bar to its subsidiary AWI and only exported to companies in which it had an interest. QWI was a retailer of rural fence posts and competed with BHP. QWI asked BHP to supply it with Y-Bar. QWI wanted to make its own star picket fences and compete more effectively with BHP. BHP first refused to supply. It then offered to supply but only at excessively high prices. Thus, there was a constructive refusal to supply. QWI sued alleging a breach of s46.

The High Court held BHP had breached s46. It rejected Pincus J’s view in the Federal Court that taking advantage required a defendant do something reprehensible. It did not require an inquiry into hostile intent. Four of the High Court judges, in determining whether BHP had taken advantage of its substantial market power, considered that a firm will not have taken advantage of its power if it would have acted in the same way in a competitive market.

Deane J used a different test. He inferred a taking advantage from BHP’s substantial market power and its anticompetitive purpose. He observed:

> BHP’s refusal to supply Y-bar to QWI otherwise than at an unrealistic price was for the purpose of preventing QWI from becoming a manufacturer or wholesaler of star pickets. That purpose should only be, and has only been, achieved by such a refusal of supply by

\[59\] *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* *(1989)* 167 CLR 177, *(1989)* 83 ALR 577 *(HCA).*

\[60\] *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* *(1989)* 167 CLR 177, *(1989)* 83 ALR 577 *(HCA).* at 183-184.


\[62\] *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* *(1989)* 167 CLR 177, *(1989)* 83 ALR 577 *(HCA)* at 192,202 and 216.

\[63\] *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* *(1989)* 167 CLR 177, *(1989)* 83 ALR 577 *(HCA)* at 197-198.
virtue of BHP’s substantial power in all sections of the Australian steel market as the dominant supplier of steel and steel products. In refusing supply in order to achieve that purpose, BHP has clearly taken advantage of that substantial power in that market.

**Telecom v Clear**

The next Australasian development was the Privy Council’s decision in *Telecom v Clear*\(^6^4\) concerning the access price Clear had to pay Telecom to connect to its fixed copper Public Service Telecommunications Network. Clear wanted access not as a customer but as a potential competitor so it could sell telecommunications services to its own business customers in three central business districts in New Zealand. Telecom had offered connection on the basis of the Efficient Component Pricing Rule especially devised for Telecom by US economists Baumol and Willig. Thus, in a contestable market they suggested if Telecom sold to a competitor the facilities necessary to produce a service that Telecom could otherwise provide, Telecom would not be abusing its dominant position if it demanded a price equal to the revenue it would have received had it provided those facilities itself. Thus, the rule enabled Telecom to charge Clear its opportunity costs and these could contain monopoly profits. The rule contemplated that monopoly profits could either be competed away over time as Telecom lowered its business rental rates to compete with Clear or be regulated away. The Privy Council noted that both the High Court and Court of Appeal had proceeded on the basis where they agreed that if the terms Telecom were to extract were no higher than those which a hypothetical firm would seek in a perfectly contestable market Telecom was not using its dominant position.\(^6^5\) This approach derives from *QWI.* The Privy Council said in determining use of a dominant position it was legitimate and necessary to consider how the hypothetical seller would act in a competitive market. It laid down the following test.\(^6^6\)

> It cannot be said that a person in a dominant market position “uses” that position for the purposes of ss36 [if] he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.

This became known in New Zealand as the counterfactual test.  

**Melway**

The next significant case is the High Court of Australia’s decision in *Melway*.\(^6^7\) Melway had 80 to 90 percent of the Melbourne street directory market. The parties agreed this was the market and that Melway had substantial market power in it. Melway had a selective distribution system for its street directories. It divided the retail market into various segments and appointed exclusive wholesalers to each segment. There was strong retail competition but in general wholesalers were only allowed to sell to their segment. Thus, there was no competition in each

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\(^6^4\) *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

\(^6^5\) *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 403.

\(^6^6\) *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 403.

Melway believed that this system was efficient and maximized sales. It had used this system ever since it began in Melbourne. It used the same system in Sydney where it had 10 percent of the market. Melway decided to terminate its wholesaler distributor for the automotive parts segment (Robert Hicks) and appoint another in its place. Hicks broke into 2 companies. Hicks, the previous distributor asked that Melway supply it with 20-50,000 street directories. Hicks wanted them for sale to the automotive parts segment and new customers. Thus, Hicks was going to ignore Melway’s segmented distribution system and sell to whom it wanted. Melway refused. Hicks sued alleging a breach of s46.

The majority of the High court characterized the conduct not as a refusal to supply but rather as Melway maintaining its distribution system. It endorsed the counterfactual test for taking advantage from QWI. It decided that Melway had not taken advantage of its substantial market power as it would have refused to supply Hicks in order to maintain its distribution system even if it had no market power. It noted the procompetitive effects of such a system and how Melway had such a system when it lacked market power.

The High Court however noted some qualifications to the QWI counterfactual approach in that asking how a firm would behave if it lacked market power involved economic analysis. This was only valid if it could be undertaken with sufficient cogency.

As counterfactual analysis may not be cogent in all cases, this suggested the High Court thought there were alternative approaches. The High Court recognized other tests, in particular Deane J’s purpose based test. It said when discussing QWI “Deane J’s approach was different” and it illustrated Scalia J’s point in Eastman Kodak that conduct which a firm without market power may be procompetitive but when carried out by a firm with substantial market power may be anticompetitive.

It recognized another approach which became known as the material facilitation approach. It held s46 may be breached if the market power which a firm has made it easier for the corporation to act for the proscribed purpose than otherwise would be the case. Or in other words if the market power materially facilitated the conduct even though it may not have been absolutely impossible without the power.

Boral

This was an Australian predatory pricing case. Heerey J, at trial, found no breach of s46 as the defendant lacked substantial market power. He also discussed take advantage where he dealt

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with recoupment. He held that if a firm with substantial market power priced below cost with the aim of eliminating rivals so that in due course it can recoup its losses, that was “taking advantage” Only a firm with substantial market power can lower prices knowing it can recoup prices. He also reiterated how the presence of a legitimate business rationale was essential in determining whether there had been a taking advantage. He derived this from US law. The majority of the High Court agreed with Heerey J.76

**Carter Holt Harvey**

This was a New Zealand predatory pricing case.77 The Privy Council reaffirmed the counterfactual test from *Telecom*. It said it was both legitimate and necessary to apply it to determine whether a firm had used its dominant position78. It also approved Heerey J’s legitimate business rationale test from *Boral*.79

**NT Power**

The High Court of Australia revisited s46 in *NT Power*.80 This was a refusal of access case. In the Full Federal Court Finkelstein J said Deane J’s purpose test was a different test than the counterfactual test and applied it separately in finding liability under s46 using both tests. A majority of the High Court of Australia agreed and said Finkelstein J’s reasoning was sound.81

**0867**

Here the Supreme Court of New Zealand82 reaffirmed the *QWI* test, albeit it renamed it the comparative exercise. Rather than saying that the Australian authority showed two other tests viz: Deane J’s purpose test and material facilitation it held that “appropriately analysed” the tests were merely examples of the counterfactual test. This was controversial but it is the law in New Zealand.83

The reason for the counterfactual test is that it emphasizes how there must be a causal connection between the conduct alleged and substantial market power. Unless there is a person cannot have used or taken advantage of market power.

As French J(as he then was) observed:84

It is …an essential element of a cause of action based on s46 that the alleged contravener is said to have used its market power. The conduct must either by necessary implication from its very nature or by reference to other pleaded facts and circumstances constitute a use of that power. It is not sufficient to show that a corporation with market power has

77  *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 (PC).
76  *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 (PC) at[60].
79  *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 (PC).at [54].
83  Paul G Scott “Taking a Wrong Turn? The Supreme Court and Section 36 of the Commerce Act” (2011) 17 NZBLQ 260.
engaged in conduct for the purpose of preventing entry of another person into a market or
detering or preventing a person from engaging in competitive conduct in that or any
other market. An extreme example illustrates the point. If a corporation with substantial
market power were to engage an arsonist to burn down its competitor’s factory and thus
deter or prevent its competitor from engaging in competitive activity, it would not
thereby contravene s46. There must be a causal connection between the conduct alleged
and the market power pleaded such that it can be said that the conduct is a use of that
power.

This is unlike the US where such arson would be a breach of s2. Cases such as Conwood\textsuperscript{85}; Caribbean Broadcasting\textsuperscript{86} and Walker\textsuperscript{87} would not be a breach of ss36/46.

Given this similarity, one can list a number of principles that should govern the interpretation and
development of monopolisation law in both the United States and Australasia.\textsuperscript{88} My project requires me
to consider them.

**Monopolisation principles**

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

Third, a firm with substantial market power only commits monopolisation if it harms the competitive
process. Such conduct harms consumers. Consequently, the law proscribes it. As the United States
Supreme Court noted in Spectrum Sports Inc v McQuillan\textsuperscript{89} “the law directs itself not against conduct
which is competitive, even severely so, but against conduct which unfairly tends to destroy competition
itself.”\textsuperscript{90} Similarly, the New Zealand Supreme Court in Commerce Commission v Telecom\textsuperscript{91}, when
discussing the High Court of Australia’s decision Boral\textsuperscript{91} concerning predatory pricing, stated:\textsuperscript{92}

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

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\textsuperscript{85} Conwood Co v US Tobacco Co 296 F3d 768 (6\textsuperscript{th} Cir 2002).
\textsuperscript{86} Caribbean Broadcasting Systems Ltd v Cable & Wireless PLC 148 F 3d 1080 (DC Cir 1998).
\textsuperscript{87} Walker Process Equipment Inc v Food Machinery and Chemical Corp 382 US 172 (1965).
\textsuperscript{88} This list is based on the principles contained in United States Department of Justice “Competition and Monopoly: Single Firm
Thus, to be liable a firm must act with the purpose of preserving its substantial market power through practices that exclude or hinder rivals but do not benefit consumers.

Fourth, flowing on from the previous point, monopolisation provisions (indeed competition law as a whole) protects competition, not competitors. Mere damage to a competitor alone does not breach the monopolisation provisions. The reason is that normal vigorous competition injures rivals. As one United States court has noted, “[a]ll lawful competition aims to defeat and drive out competitors”.

The United States Supreme Court has said “the purpose of of the [Sherman] Act is not to protect businesses from the workings of the market; it is to protect the public from the failure of the market.” Bork has noted:

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

The New Zealand Supreme Court in held the same thing. The Privy Council in noted:

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

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

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

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

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

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93 See below.
94 Great Escape Inc v Union City Body Co 791 F 2d 532 (7th Cir 1986) at 541.
99 Goldwasser v Ameritech Corp 222 F 3d 390 (7th Cir 2000) at 397.
As Areeda and Turner pointed out, the problem becomes acute in situations where conduct by a firm without substantial market power can be efficiency-enhancing. Yet, the same conduct is anti-competitive when a firm with substantial market power carries it out.\footnote{Phillip E Areeda and Donald Turner 3 Antitrust Law (Little, Brown and Co, Boston, 1978) at [806e].} Areeda and Turner gave the examples of lease-only practices, predatory pricing, tying and exclusive dealing.\footnote{Phillip E Areeda and Donald Turner 3 Antitrust Law (Little, Brown and Co, Boston 1978) at [806e].} Scalia J cited Areeda and Turner in the tying case of \textit{Eastman Kodak}. He said:\footnote{\textit{Eastman Kodak Co v Image Technical Services Inc} 504 US 451 (1992) at 488.}

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

Another scenario where the problem of distinguishing becomes acute is where the same conduct is both anti-competitive and pro-competitive. It has both aspects. The paradigm example is exclusive dealing.\footnote{United States Department of Justice “Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act” (2008) at 6-7 (withdrawn May 2009) at 131.} Exclusive dealing occurs when one or more distributors agree to buy from only one supplier and not to carry other suppliers’ products for the agreement duration. The pro-competitive effects include stimulating distributors to sell more of the supplier’s products by focusing all their efforts on selling one product. It can prevent free riding, reduce costs and business uncertainty, protect a product’s quality and reputation and improve monitoring effectiveness.

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

Sixth, as a result of these problems in distinguishing, and the sparse statutory language of the monopolisation provisions, it is up to the courts to fashion rules.\footnote{A similar problem arises in the context of general tax avoidance rules.} As shown above, \textsection 2 does not tell courts how to distinguish between competition on the merits and anti-competitive conduct. Rather, Congress left that task to the courts. As the United States Supreme Court noted,\footnote{\textit{National Society of Professional Engineers v United States} 435 US 679 (1978) at 688.} Congress “expected the courts to give shape to the statute’s mandate by dra drawing on the common law tradition” to further the statutory goals.


> In \textit{Telecom v Clear} the Privy Council observed that the words of \textsection 36 provided no explanation as to the distinction between conduct which does, and conduct which does not, constitute use of a dominant position.
United States courts, given s 2’s sparse words, have not limited themselves to one formulation of a rule against monopolisation. *Grinnell* is not the sole test. The Supreme Court in *Aspen Skiing Co v Aspen Highlands Skiing Corp* ("*Aspen*")\(^\text{109}\) established another test. Citing Bork, it held that improper exclusion was “exclusion not the result of superior efficiency.”\(^\text{110}\) It called conduct which attempted to exclude rivals on some basis, other than efficiency, “predatory” conduct. It further adopted Areeda and Turner’s definition of predation.\(^\text{111}\) This states:\(^\text{112}\)

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

The Supreme Court in *Aspen* also held that it was relevant whether there was a legitimate business justification for the conduct.\(^\text{113}\) In *Eastman Kodak v Image Technical Services* the Supreme Court held that “liability [for monopolisation] turns on whether valid business reasons can explain [the defendant’s] actions”.\(^\text{114}\) Lack of valid business reasons means liability for the monopolist.

An influential lower court decision is the DC Circuit Court of Appeals’ decision in *United States v Microsoft Corp.*\(^\text{115}\) After a plaintiff has established a prima facie case, the monopolist may proffer a pro-competitive justification for its conduct. The plaintiff then has the burden of rebutting it.

Thus, under United States law, the black letter law is not merely *Grinnell*. These tests apply as a general rule for monopolisation. It is important to have a general rule. As the DC Circuit Court of Appeals noted,\(^\text{116}\) “[a]nti-competitive conduct can come in too many forms, and is too dependent upon context for any Court or commentator ever to have enumerated all the varieties”.

Along with general rules, United States courts have developed specific rules which apply to particular types of monopolistic conduct. The classic example is predatory pricing. In *Brooke Group Limited v Brown and Williamson Tobacco Corp*,\(^\text{117}\) the Supreme Court held that a successful claim for predatory pricing requires, “first, proof that the prices complained of are below an appropriate level of cost and, second, a demonstration that the competitor had a reasonable prospect … or a dangerous probability of recouping its investment in below − cost prices”.\(^\text{118}\) This specific rule applies to predatory pricing rather than the general rules the Supreme Court established in *Grinnell*, *Aspen* and *Eastman Kodak*.

Seventh, given that the consequences of a finding of monopolisation are severe, the rules for monopolisation should be clear and certain.\(^\text{119}\) As the Privy Council noted in *Telecom v Clear*, s 36

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\(^\text{112}\) Phillip E Areeda and Donald Turner 3 *Antitrust Law* (Little, Brown and Co, Boston 1978) at 78.


\(^\text{115}\) *United States v Microsoft Corp* 253 F 3d 34 (DC Cir 2001).

\(^\text{116}\) *Caribbean Broadcasting Systems Ltd v Cable & Wireless PLC* 148 F 3d 1080 (DC Cir 1998) at 1087.


\(^\text{119}\) See above.
should be “construed in such a way as to enable the monopolist, before he enters upon a line of
conduct, to know with some certainty whether or not it is lawful”.120

The High Court of Australia in *Melway Publishing v Robert Hicks* agreed.121 The Privy Council in
*Carter Holt Harvey* said “the law would be failing in its duty if it did not make clear to [the
monopolist] what he can and cannot do...”.122

I have elsewhere argued that the New Zealand Supreme Court's departure from Australian law
has failed to uphold these principles and impacted on the certainty and effectiveness of the
law.123 Of course, this may be a feature of all monopolization litigation, as the fifth
monopolization principle mentioned above shows it is often difficult to distinguish between
aggressive competition and monopolization.

**Refusals to Supply**

I shall examine refusals to supply (inter alia) as an act of monopolization in this project.

I shall be exploring the differences in law and examining whether New Zealand should follow
US Law. Australasia’s leading case is *NT Power*. There the Power and Water Authority (PAWA)
was a vertically integrated company in the Northern Territories of Australia. It owned or
controlled electricity generation facilities. It also owned transmission facilities which carried
power of 33kW and above. It also owned distribution facilities which consisted of low voltage
electricity lines leading into the meter box of each customer. PAWA also retailed electricity. In
1998 NT Power bought a gas fired power station located at a mine. It decided to generate
electricity from its surplus power at this station and sell that electricity to consumers in two of
the Northern Territories urban areas. It would be competing with PAWA. To do so it sought
access to PAWA’s transmission and distribution facilities. PAWA refused pending the
introduction of an access regime that was expected in 2000. NT Power sued alleging a breach of
s46. Thus using US antitrust terminology one can see the case as involving the denial of access
to an essential facility.

The majority of the High Court of Australia applied the standard counterfactual test from *QWI*
to hold that PAWA had taken advantage of its substantial market power in denying NT Power
access. In doing so the court assumed a hypothetical competitive market. Features of this market
were as follows. PAWA had the capacity to allow third parties to use its infrastructure. There
was at least one other firm with a similar infrastructure in the same geographic area with PAWA
and that firm had spare capacity for third parties. The court assumed that in the hypothetically
competitive market both PAWA and the other firm would make their infrastructure available to
third parties on reasonable terms and conditions. The court also assumed PAWA would lose
retail business to an effective rival for the supply of electricity if it did not grant access.

The court held in a competitive market PAWA would provide NT access to its infrastructure. It
did so for two main reasons. First a profit maximizing firm in a competitive market would not

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123 Paul G Scott “Taking a Wrong Turn? The Supreme Court and Section 36 of the Commerce Act” (2011) 17 NZBLQ 260.
stand by and allow a rival to provide transmission and distribution services. It would at least contest the business. Second PAWA would not be deterred from bidding for this business because such access would introduce competition in the downstream electricity market. The reason was that PAWA would face such competition whether or not PAWA granted access. The rival could access the other firm’s hypothetical infrastructure.

Thus using counterfactual analysis PAWA had taken advantage of its market power as it would have been irrational for PAWA to deny access in a competitive transmission/distribution market.

The Court also held there was a taking advantage by using Deane J’s purpose test from QWI. It held PAWA’s purpose to exclude NT Power from the retail electricity supply market could not have been achieved had it not been for the power vested in PAWA’s infrastructure. Accordingly it was self-evident that PAWA had used its market power to keep NT Power out of the electricity market.

This case is markedly different from The US law on refusals to supply as exemplified by Trinko. While Trinko involved access to a telephone network its principles should apply to an electricity network. In contradistinction to NT Power the Trinko Supreme Court held that a unilateral refusal to deal must involve a sacrifice in the sense of sacrificing an opportunity to make a sale. There was no such irrational behavior in Trinko. Yet under counterfactual analysis there was in NT Power.

The Trinko Court seems to limit liability for refusals to deal where the defendant had voluntarily established and later stopped a course of dealing with the plaintiff. This was the case in Aspen which the Trinko court said was at the outer boundary of liability. Yet Aspen would be a slam dunk case for liability under ss36/46. In Aspen the defendant did not come up with a legitimate business justification for its conduct in stopping the joint ski ticket. As in Melway the defendant in Aspen used a joint ticket in resorts where it faced competition. Not having a joint ticket in the resort where it had market power would mean an Australasian court would find a taking advantage of substantial market power.

The Trinko court also limited liability for refusal to supply to those cases where the defendant was already selling a product or service to others but refused to sell it to the plaintiff. If the defendant had never supplied there can be no liability for refusal to supply to a plaintiff. This is not the case in Australasia. Both QWI and NT Power involved a product and services which the defendant had never offered to supply before. This did not prevent liability for refusing to supply.

The Trinko court also noted the administrative problems of granting access. It would turn the courts into de facto regulators. They lack the expertise to do so. Australasian courts have no such qualms and do not mention the supposed administrative problems in setting a price. There were no such qualms in either QWI nor NT Power.

The Trinko court also mentioned that granting access would lessen the incentive of firms to invest in infrastructure if they are forced to share. Also a new entrant will not have the incentive
to invest in new assets if it can just use an incumbent’s assets. The court has also praised the pursuit of monopoly profits saying: \(^{124}\)

The opportunity to charge monopoly prices – at least for a short period – is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.

It may be this protecting incentives to invest and innovate do not apply with equal force in Australasia. To a large extent firms which have substantial market power in the US have done so by winning the competitive game. They have been more efficient and bested their rivals. This is not necessarily so down under. Often the size of the market means there is only room for one firm in the market. Also a large number of firms especially in New Zealand are former government firm that have been privatized. Their place in the sun is not due to superior performance.

In such circumstances it may be more appropriate to require access under competition law. In any event my project will examine this area closely. It will also look at essential facilities as \(NT\) Power is best explained as an essential facility case and the \(Trinko\) court showed a marked lack of enthusiasm for the doctrine.

I shall also be looking at margin or price squeezes as the US Supreme Court dealt with them in \(Linkline\). \(^{125}\) New Zealand’s Court of Appeal has also recently dealt with the issue under s36. \(^{126}\) The law differs as the Court of Appeal found the defendant liable. I do not think a US court would do so. This shall require discussing the ECPR in the context of margin squeezes and I shall consider Learned Hand’s transfer price test from Alcoa. I am attracted to this for New Zealand.

I shall also be looking at price fixing and collective boycotts.

\(^{125}\) \(Pacific Bell Telephone Co v linkLine Communications Inc\) 555 US 438 (2009).
\(^{126}\) \(Telecom Corp of New Zealand Ltd v Commerce Commission\) [2012] NZCA 278.