Articles

The unfulfilled promise of New Zealand’s monopolisation law: Sources, symptoms and solutions

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New Zealand’s monopolisation prohibition — s 36 of the Commerce Act 1986 — is not an effective weapon in the antitrust armoury. Proving a violation of s 36 is most difficult as the paucity of successful cases illustrates. Based on a laudable concern that efficient, innovative conduct might be curtailed, the New Zealand courts have overcompensated by promulgating a strict counterfactual test for ‘taking advantage of’ that thwarts effective prosecution of monopolising conduct. This article traces the reasons for this unduly lenient approach and puts forward several suggested solutions — including a multi-stage, burden-shifting, composite test — aimed at reviving s 36 as an effective enforcement tool against single-firm conduct that curtails effective competition.

1 Introduction

New Zealand’s monopolisation prohibition — taking advantage of a substantial degree market power — is found in s 36(2) of the Commerce Act 1986. It is fair to say that this prohibition has not fulfilled its promise. In an earlier essay I argued that New Zealand’s monopolisation law resembled a quagmire.\(^1\) Recently, the Commerce Commission has lost two more s 36 cases in the High Court.\(^2\) The quagmire seems to have deepened.

In this article I wish to consider the steps policy-makers might take toward reshaping s 36 so it can be effective monopolisation law. The discussion is in three parts. First, I retrace the tangled path to date in an effort to answer the question: what are the reasons for the poor record? Second, I explore the question of reform: what are the possible solutions? In the third section, I test how the proposed solutions would apply to the two most recent monopolisation cases.

2 What are the reasons for the poor record?

The track record of successful prosecutions — public and private — of s 36 is poor. By my count there have been only four successful monopolisation

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suits in the 22 years the Act has been in force. Along the way there have been some major setbacks, including the two high profile losses in the Privy Council — *Clear v Telecom* and *Carter Holt Harvey*. The reasons for the ineffectiveness of s 36 to date can be divided into three, the first of which is a perennial challenge.

**The slippery nature of the phenomenon**

The meaning of ‘monopolize’ has been one of the puzzles of US antitrust law for the entire century of its existence. A former Chairman of the New Zealand Commerce Commission, Dr Susan Lojkine, once described s 36 as ‘philosophically untenable’. United States scholars and judges have been similarly perplexed: s 2 of the Sherman Act, the US monopolisation prohibition, ‘has been a source of puzzlement to lawyers, judges and scholars’. Despite over a century of jurisprudence, American monopolisation law has been described as ‘poorly defined’ and in a ‘sad state’ consigned to employing ‘vacuous standards’ and ‘conclusory’ labels that fail to offer any real help in distinguishing good behaviour from bad. There is an inherent tension in formulating any monopolisation law. We want to curtail large powerful firms from stifling their rivals and entrenching themselves as the dominant player in the market. We also wish to encourage powerful firms to engage in healthy competitive behaviour that might lead to greater innovation, efficiency, choice and so on. We want the powerful to compete, but not predate; we want them to produce the better possum trap, not just engage in tactics to stop others making better possum traps. There is no shame in admitting that the phenomenon is very difficult to regulate and the task of striking the right balance is formidable. New Zealand’s struggle is not unique.

**The statutory provision**

It might be that the wording of our monopolisation prohibition is deficient, in the sense that it sets the threshold for contravention too high or uses infelicitous phrases or clumsy language that produce unintended

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3 Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd [1987] 2 NZLR 647; NZ Magic Millions Ltd v Wrightson Bloodstock Ltd [1990] 1 NZLR 731; Union Shipping NZ Ltd v Port Nelson Ltd [1990] 2 NZLR 662 and Commerce Commission v Port Nelson Ltd [1996] 3 NZLR 554. I do not include a raft of suits where the plaintiff secured interim relief — usually an injunction — against the defendant monopolist. See the appendix of the ‘Quagmire’ article, above n 1, for a comprehensive chronology of the s 36 cases.


consequences. Parliament thought it had addressed that very concern when s 36 was amended in 2001 to facilitate more effective enforcement. The ‘toughening up’ of s 36 would, policy-makers hoped, be achieved by changing two of the three elements that comprise the offence, and also by adding a new provision to make it easier to prove monopolisation.

First, the initial triggering threshold of illegality was lowered — the defendant no longer had to possess a ‘dominant position in a market’ but simply a ‘substantial degree of power in a market’. Second, the connecting element ‘use’ was replaced with the phrase ‘take advantage of’. Both changes brought the NZ proscription into line with its Australian counterpart, s 46 of the Trade Practices Act 1974 (Cth). Third, proof of ‘purpose’ could now be established through inferences from conduct and other relevant circumstances: s 36B.

Yet, these changes seem to have not made one whit of difference. There have been no successful s 36 suits since the 2001 amendments came into force. The reason lies in the basic stance of the courts, to which I now turn.

The courts’ interpretation of s 36

Basic (dis)orientation

As I have argued before, I believe the basic orientation of the courts is wrong. The courts have a misplaced sympathy for powerful firms — although it would be an exaggeration to describe them as having a ‘love affair with monopoly’, as one US commentator recently characterised the American Supreme Court’s stance. The origin of the solicitude lies in the seemingly innocuous proposition that, as the Privy Council put it in *Telecom*: ‘A monopolist is entitled like everyone else to compete with its competitors.’

The fate of the commission was pretty much sealed in the two most recent cases — *Bay of Plenty Electricity* and *Telecom* — once the High Court quoted these baneful words.

Although pronounced as it were a self-evident truth, the proposition is simply wrong. It is specious because powerful firms are not the same as small, ordinary firms. They are not ‘like everyone else’ because their economic strength renders them especially likely to damage the competitive process. That is the correct starting premise and that is why we have sections like s 36. If legislatures really believed that powerful corporations were the same as

11 See the Commerce Amendment Act 2001.
13 See Ahdar, above n 1, at 261–5.
16 *Commerce Commission v Bay of Plenty Electricity Ltd* (unreported, Wellington HC, CIV-2001-485-917, Clifford J and Prof M Richardson, 13 December 2007) at [375] and [385(b)].
17 *Commerce Commission v Telecom Corp NZ Ltd* (2008) 12 TCLR 168 at [102].
non-powerful ones we would not have a monopolisation prohibition at all. But policy makers have always believed powerful firms are different. As Justice Antonin Scalia observed:

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 might even be viewed as pro-competitive — can take on exclusionary connotations when practiced by a monopolist.18

Powerful firms deserve special scrutiny and this should be, and is, expressed in a suitably crafted law to ensure their potential for anti-competitive behaviour remains just that, unrealised. In New Zealand the law says their freedom to compete is curtailed to the extent they deploy their substantial market power for an anti-competitive purpose.19 In this sense then, market dominant firms are, to use a somewhat maligned European phrase, under a ‘special responsibility’.20

Courts have been beguiled by the prospect that the innocent, efficient monopolist will be stymied. There is a litany of terms to describe this dire situation: over-deterrence, ‘false positives’ (wrongful prohibition), ‘chilling’ pro-competitive behaviour, and so on.21 The origins of this solicitude lie in a dictum of Judge Richard Posner in a 1986 case, Olympia, where the renowned Chicagoan philosopher-jurist opined:

the lawful monopolist should be free to compete like everyone else: otherwise the antitrust laws would be holding an umbrella over inefficient competitors . . . a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches.22

The Posner umbrella metaphor, however, is suspect. The ‘otherwise’ in the passage above is highly dubious since it simply presumes that the lawful monopolist is efficient and that its rivals are not. There is no empirical evidence proffered for this assertion. The umbrella proposition is in reality a non sequitur — a monopolist may or may not be more efficient than newcomers. In the United States it is conceivable that the monopolist may be the efficient survivor of a vigorous battle for survival. By contrast, in New Zealand we have many privatised companies that were state-owned

18 Eastman Kodak Co v Image Technical Services Inc 540 US 451 at 448 (1992). See also LePage’s Inc v 3M 324 F 3d 141 at 151–2 (3d Cir, 2003): ‘a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist’s behavior.”

19 In Carter Holt, the majority of the Privy Council referred to the right of the dominant firm to compete ‘so long as he does not use his dominant position for the purpose of producing an effect which is anti-competitive’: [2006] 1 NZLR 145 at [8].


22 Olympia Equipment Leasing Co v Western Union Telegraph Co 797 F 2d 370 at 375 (7th Cir, 1986) (emphasis added).
enterprises, which were, in turn, bloated government departments. A common reason for corporatisation and then privatisation of former state enterprises was that the process was necessary to upgrade and modernise inefficient public institutions that were ailing through under-investment and lethargy. But of course the privatised monopolies initially faced little competitive pressure when they emerged in the newly deregulated economy. The owners of Telecom and the like inherited an inefficient enterprise and (understandably) did their best to deter incipient competition that might erode their monopoly position — the very competition needed to stimulate innovation and efficiency.

As Michael Boudin pointed out, as antitrust law becomes ‘more deeply and technically economic, judges and lawyers will resort to metaphor in order to simplify new abstractions’. But the danger is that while the metaphor may, at best, enlighten understanding, it may also mislead: ‘because [metaphor] equates two things that are not identical, the opportunity for distortion is always present.’

The Posnerian metaphors have, I suggest, become misleading. Nonetheless, the opportunity is there to redress the problem at the rhetorical level. So, instead of the image of a monopolist ‘helping’ its rivals or ‘pulling its punches’ or ‘holding umbrellas’ over its competitors, we need persuasive counter-images. The image of the ‘level playing field’ has been tried, but not terribly successfully of late and perhaps needs to be quietly mothballed. The following possibilities might be worth advancing: ‘not setting a trip wire’; ‘not imposing roadblocks’, even ‘not slipping a banana peel under your rivals’ feet.’

The very merits of the notion of helping competitors and holding umbrella’s may even need be challenged. What is so repugnant about the idea of assisting one’s rivals (for the greater good of society) even in the robust world of commerce? Why is it so repellent? If this is all too idealistic and other-worldly then one can return to Lord Atkin’s approach in Donoghue v Stevenson: the positive moral command ‘love your neighbour’ becomes, in law, the negative injunction ‘you must not injure your neighbour’. If monopolists cannot be forced to share assets or assist rivals then, at the very least, they can be required not to deliberately hinder or trip up their competitors.

**Undue concern for business certainty**

Courts frequently fret about the uncertain boundaries of the monopolisation ban and the implications of this for a powerful firm. Here we encounter the first of the two traditional and major criticisms of monopolisation law. I will call it ‘the prior guidance complaint’.

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25 Ibid.
26 Ever since the High Court decision in Fisher & Paykel Ltd v Commerce Commission [1990] 2 NZLR 731 at 746 — where the court agreed with a US expert’s characterisation of the level playing field concept as ‘insidious’ — the metaphor appears to have had little sway.
27 [1932] AC 562 at 580.
In Carter Holt the Privy Council noted that contravention exposed the dominant firm to ‘a quasi-criminal penalty’ and so ‘[t]he law would be failing in its duty if it did not make it clear to him what he can and cannot do when he is in that predicament [of seeing his market share being eroded by others]’. One wonders what is so special about large firms that they are entitled to greater prior guidance than other citizens, individual and corporate, who must negotiate the broad general strictures of the civil and criminal law.

Monopolisation prohibitions must necessarily be couched in broad language given the fact that the forms of monopolising conduct and the factual circumstances in which it occurs vary widely: ‘the means of illicit exclusion, like the means of legitimate competition, are myriad.’

There is obviously merit in the law providing ex ante guidance, but the point can be, and is, overstated. To insist upon a single neat, ‘bright-line’, ex ante test suitable for all kinds of strategic behaviour by dominant firms may be expecting the impossible. William Comanor makes this point. In responding to the plea by FTC Chairman, Deborah Majoras, that the standards for evaluating dominant firm conduct ‘must be clear and practical to administer’, he explains:

While . . . that appears to be an obvious objective, it actually runs counter to the need to tailor policy actions to individual circumstances. Where circumstances differ, a single standard cannot usefully be applied, so this condition is not so easily met. Where different firms face widely different market conditions, proposing a single rule will lead to wrong-headed results in many of them. There is a need to tailor specific policy actions to the circumstances at hand, which makes it difficult to develop a simple set of standards.

In addition, detailed definitions and over particularisation may provide ‘loopholes’ for dominant firms to escape. A case-by-case or ‘rule of reason’ approach is justified.

Juries and judges in the United States seem to proceed on the basis that they ‘cannot define monopolisation but they know it when they see it’. This statement may be exasperating to some, but is inevitable given the slippery, complex nature of the phenomenon.

Misplaced emphasis on the ‘taking advantage of’ element as the pivotal one

The second of the two traditional ‘bugbears’ of monopolisation law is what I will call ‘the winnowing criticism’.

The concern here is that the legal test will not accurately distinguish...
between the healthy, vigorous, competitive and the pernicious, predatory actions of powerful firms — it will not ‘winnow’ the wheat from the chaff. In particular, the greater evil of an insufficiently discriminating test seems to be that the test will be overly broad in its reach and thus ‘chill’ the (presumed) efficient and worthy monopolist from innovative market conduct.34

But the innovative monopolist thesis is unconvincing. The Schumpeterian hypothesis — that large firms possessing significant market power are the driving force in innovation and technological progress — has ‘accumulated the largest body of empirical literature in the field of industrial organization’.35 Yet, despite this exhaustive empirical work, the results, as Posner concedes,36 remain inconclusive: the monopolists-are-superior-innovators hypothesis remains unconfirmed.37 Moreover, as Peter Carstensen argues, monopolists have little incentive to support innovation that could erode their market dominance. He notes, for instance, that ‘the break-up of AT&T released an enormous amount of technology held back because it was inconsistent with that company’s economic self interest’.38

In the search for an accurate litmus test, the judges in the s 36 cases have been loath to rely upon the purpose element to winnow the good conduct from the bad. (As I shall explain later, this rejection of the purpose element as the winnower is a wrong turning, as this element, properly understood, can serve as an effective discriminator.) Unfortunately, the purpose requirement has been consistently given a broad interpretation that makes it an easy element to fulfill. A priori powerful large firms are assumed to act with hostility towards their rivals. It is, the courts surmise, in the very nature of monopolists and dominant firms (indeed, all firms) to seek to eliminate or deter their opposition. The purpose element, construed so broadly, is a poor winnower, as it has the potential to sweep the actions of a great number of dominant firms into the monopolisation ban.

If purpose cannot be the litmus test then the other element, ‘taking advantage of’, must now do the work. The take advantage of element is simply there to ensure that there is ‘a causal relationship’ between the substantial market power and the impugned conduct.39 But this limb was suborned into another role — one for which it was not designed. It became the test of good versus bad conduct. As we know, the courts developed a hypothetical comparison or ‘counterfactual’ test of what constitutes a taking advantage of. The Privy Council in Clear v Telecom (under the former s 36 wording) expressed it this way:

34 See, eg, Elhauge, above n 10, at 267.
39 Carter Holt [2006] 1 NZLR 145 at [51].
In their Lordships’ view it cannot be said that a person ‘uses’ that position for the purposes of s 36 unless (sic sc ‘if’) he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.\textsuperscript{40}

If a powerful firm simply acts in the same fashion that an ordinary firm in that same position would have, then there is no ‘use’ and thus no contravention of the section. To take advantage of substantial market power is do something that only a dominant firm (now, a firm with a substantial degree of market power) could do.

Here we see the full flowering of the courts’ acceptance of the erroneous ‘a monopolist is equally entitled to compete’ premise. A powerful firm is entitled to compete just as much as an ordinary firm. So, if it does something that an ordinary firm lacking substantial market power could do (for example, it cuts its prices or it refuses to supply its product), it ought not to be condemned. It has done nothing wrong. Accordingly, ‘take advantage of’ was moulded to reflect this understanding of good versus bad behaviour. Good conduct (by a dominant firm) is conduct an ordinary firm in a competitive market could engage in; bad conduct is that which an ordinary firm could not undertake.

As a litmus test for distinguishing monopolising versus competitive conduct, this strict ‘but for’ test is a poor test. Its deficiencies have been well documented and it would be tedious to rehearse them again here.\textsuperscript{41} In brief, the strict counterfactual test ignores the fact that conduct engaged in by both dominant and non-dominant firms may have dramatically different effects upon competition; it is very difficult to apply (prompting debate over precisely what are the salient factual features and circumstances that have endowed the defendant with substantial market power) and it requires courts to engage in hypothetical comparisons that are ‘wholly unreal’.\textsuperscript{42}

The counterfactual test does achieve the aim of providing certainty, but it is the wrong kind of certainty. The counterfactual test is nothing less than a ‘green light’ for aspiring monopolists to proceed with business as usual for, as the lengthy record of unsuccessful s 36 cases shows, it is not difficult for a defendant monopolist to show that a non-dominant firm in the same circumstances would have done just the same.

In all the talk (a ‘mantra’ as Carstensen dubs it)\textsuperscript{43} of chilling efficient conduct and false positives we are apt to lose sight of the dangers of the pendulum swinging too far in the direction of lax enforcement. Just as there are false positives, there are ‘false negatives’. There is danger in failing to intervene and in not finding a violation where the dominant firm’s conduct subverts competition. Carstensen cautions:

once the legal system has blessed an unjustified exclusionary practice, this may have great negative impact both in the specific industry and the general economy because

\textsuperscript{40} \textit{Telecom} [1995] 1 NZLR 385 at 403; (1995) 32 IPR 573 at 592. Looking back, it was a bad omen that the Privy Council used the wrong word (‘unless’ instead of ‘if’) in its original formulation.

\textsuperscript{41} See Ahdar, above n 1, at 271–2, for a full discussion.

\textsuperscript{42} \textit{Carter Holt} [2006] 1 NZLR 145 at [81].

\textsuperscript{43} Above n 38, at 302.
such a ruling will empower other dominant firms to adopt the same strategy. Thus the error will replicate itself as the initial decision becomes a precedent for rejecting challenges to similar conduct.\textsuperscript{44}

This comment could have been written about New Zealand.

\section*{3 What are the solutions?}

\textbf{Abolish the section}

A radical response would be to repeal s 36. If the monopolisation offence is, as Dr Lojkine once lamented, simply untenable,\textsuperscript{45} it might be better for a competition law to instead combat cartels (and the other serious conduct offences such as group boycotts and resale price maintenance) and to rely on prophylactic structural regulation — merger control — to prevent the creation of concentrated markets and dominant firms. Abolition of the monopolisation prohibition would truly be radical and unprecedented in the antitrust world and probably foolish. Any competition law worthy of the name would seem to have a gaping hole if it omitted a prohibition upon anti-competitive outcomes achieved by single-firm, unilateral action.\textsuperscript{46}

\textbf{Amend the section}

New Zealand could have another attempt at amending s 36. In 1999 and 2000 there were two changes floated.

\textbf{Reverse onus of proof}

In 2000 the Ministry of Commerce suggested a new provision.\textsuperscript{47} The Select Committee considering the amendments to the Commerce Act were invited to report back on which of two options for reducing the evidential burden of establishing ‘purpose’ in s 36 it preferred. The one ultimately chosen and implemented through the Commerce Amendment Act 2001 was, as noted earlier, s 36B — that purpose may be inferred from conduct. The one rejected was that in s 36 cases brought by the commission there would be a reverse burden of proof on the defendant to demonstrate it did not take advantage of its market power for one of the proscribed purposes.

\textbf{An effects test}

A private member’s bill introduced by the opposition Alliance MP, Laila Harré, entitled the Commerce (Control of Dominant Position) Amendment Bill 1999 included an effects test alongside the existing purpose proscriptions. The bill sought to strengthen s 36 ‘by placing the emphasis on preventing anti-competitive conduct rather than requiring proof of an anti-competitive purpose’.\textsuperscript{48} No person who had a dominant position in a market would be permitted to use that position ‘in a manner that has, or is likely to have the

\begin{footnotesize}
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\item \textsuperscript{44} Ibid, at 321.
\item \textsuperscript{45} See above n 7 and accompanying text.
\item \textsuperscript{46} See J D Heydon, \textit{Trade Practices Law}, Vol 1, Law Book Co, Sydney, 2001, at [5.10].
\item \textsuperscript{47} Ministry of Commerce, ‘Backgrounder on the Commerce Act Reforms’, 5 April 2000, p 3.
\item \textsuperscript{48} Explanatory Note, Commerce (Control of Dominant Position) Amendment Bill 1999, No 265 — I.
\end{itemize}
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effect, of substantially lessening competition in a market’. The bill was opposed by the National Government and was narrowly defeated, on its way to a second reading, by 61 votes to 59.\(^{49}\)

Interestingly, in Australia there have been six attempts since 1979 to incorporate an effects test into s 46 of the Trade Practices Act, and on every occasion the proposal was rejected. The most recent consideration — by the Joint Select Committee on the Retailing Sector 1999 (the Baird Committee) — concluded that ‘an “effects” test would not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct’.\(^{50}\) Furthermore, if an effects test were added then consideration would need to be given to permitting authorisation for potentially contravening conduct. Overall, ‘the committee is of the view that such far reaching changes to the law may create much uncertainty in issues dealing with misuse of market power’.\(^{51}\) Based on the arguments supporting the consistent rejection of the test by the various legislative committees, as well as the experience of an effects test under Pt XIB of the Trade Practices Act — which provides that the Act is breached if a telecommunications provider with substantial market power engages in conduct that has the effect of substantially lessening competition — Landrigan et al argue that the case for an effects test (compared to the present purpose test) has ‘a considerable way to go’.\(^{52}\)

The arguments against an effects test are the familiar ones — the test is a poor winnower of good versus bad, it would be too broad thereby chilling healthy conduct and it would generate uncertainty. The uncertainty cry is of course a charge that can be brought against any change in the law and as such should not be given dispositive weight. The supposed failure of the test as an evaluative standard is, as I have argued, not fatal, as any single test has its drawbacks. Perhaps the most serious shortcoming is the test’s potential reach. Much conduct by powerful firms might, whatever its purpose, have the effect of lessening competition in the relevant market. This being the case, an effects test might unduly expose dominant firms to liability.

One reply might be, as the Baird Committee suggested, to accompany the introduction of an effects test with provision for authorisation. Monopolisation — currently the only restrictive trade practice that is not authorisable under the Commerce Act — would then also be capable of being exempted on public benefit grounds. Another answer would be to insert a defence into the section to enable the defendant to advance pro-competitive justifications for its conduct. This is the option I favour in a composite test developed later in this article.

Adoption of the substantial lessening of competition test for monopolisation would harmonise the legal standards for all antitrust offences — the cartel and agreement prohibitions, monopolisation and mergers. If a single firm’s conduct is significantly preventing or hindering effective competition in the market (and not just adversely affecting particular rivals) then prima facie it


\(^{51}\)Quoted in Landrigan et al, ibid.

\(^{52}\)Ibid, at 288.
should be liable, just as collective action by firms would be. If a powerful firm cannot advance efficiency justifications or other public benefits then its actions ought to be proscribed.

Yet more tests

The effects test does not exhaust the possibilities. The monopolisation literature has spawned many more, for example:

- the economic sense test — does the impugned conduct make economic sense only because it is likely to eliminate competition?
- the efficient competitor test — is the impugned conduct ‘likely in the circumstances to exclude from the defendant’s market an equally or more efficient competitor’?
- the consumer welfare standard — does the impugned conduct adversely affect consumer welfare in the sense that it raises prices and reduces output?
- the profits-sacrifice test — does the impugned conduct indicate that the defendant is willing to sacrifice short-run profits in a fashion that would not be profitable unless it obtained long-run returns made possible by excluding rivals?

An affirmative answer to each of these questions points to prima facie liability. Exhaustive analysis of these tests is beyond the scope of this article, but suffice to say that they all have their flaws — for example, critics maintain that they are overly complex, or too narrow and thus under-deter anti-competitive conduct.

The least restrictive alternative inquiry

One further matter — really more of a relevant supplementary inquiry than a stand-alone test — has been advanced by Carstensen. This is the least restrictive alternative question: is the impugned conduct the least anti-competitive means available to the defendant to implement its lawful goal? This is by no means a new question, but it is a very useful query

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56 See Comanor, above n 30, at 388 and 395; Rebel Oil Co v Atlantic Richfield Co 51 F 3d 1421 (1995) at 1433.
57 See Elhauge, above n 10, at 268–94; Kauper, above n 8, at 1626.
60 Carstensen, above n 38, at 301 and 315–16. Carstensen draws upon the reference by the Supreme Court in Aspen Skiing Co v Aspen Highlands Skiing Co 472 US 585 (1985) at 605, that it is relevant to consider whether the defendant monopolist ‘has impaired competition in an unnecessarily restrictive way’.
61 For example, it was mentioned by the High Court in passing in Fisher & Paykel [1990] 2 NZLR 731 at 741.
because it underscores the point that the powerful firm will often have a range of choices open to it. If the same results can be achieved in other lawful, less competition inhibiting ways, the defendant ought to pursue these. The onus ought to be upon the defendant to show that less restrictive methods are not open to it.

**Towards a multi-stage, burden-shifting, composite test**

The US Court of Appeals in *Microsoft* put forward an interesting multi-stage monopolisation test with shifting burdens of proof. Whether or not it is a ‘milestone’ or ‘landmark’ in the evolution of US monopolisation law remains to be seen, but is, I suggest, a highly useful attempt to articulate the sort of sophisticated and nuanced composite test necessary in this area.

The ‘principles’, as the Court of Appeals calls them, are expressed as four steps, but really they come down to three. In summary they are:

- **First**, the plaintiff must demonstrate that the defendant monopolist’s conduct has an anti-competitive effect. It is harm to the competitive process that is required here, not harm to particular competitors per se.
- **Second**, the defendant may proffer a ‘pro-competitive justification’ for its conduct. This is ‘a nonpretextual claim’ that its conduct is a form of competition on the merits because it involves, for example, greater efficiency. The burden then shifts back to the plaintiff to rebut the claim.
- **Third**, if the monopolist’s justification stands unrebutted, then the plaintiff must demonstrate that the anti-competitive harm from the conduct outweighs the pro-competitive benefit. In determining whether the net effect of the conduct is harmful the focus is on the effect of the conduct and not the intent behind it. Intent is only relevant to the extent it casts light on the likely effects of the impugned conduct.

Here we see that the purpose inquiry is jettisoned and replaced by an effects test, coupled with the opportunity for the defendant to raise what are, in Australasian terms, basically public benefits. Unlike authorisation, however, the burden is on the plaintiff to show that the harmful effects outweigh the benefits.

We could similarly devise a multi-layered composite test to meet the NZ situation. As a possible stating point, here is my suggestion:

**First**, the plaintiff must show:

- (a) an anti-competitive effect from the defendant’s conduct — namely, a substantial lessening of competition in a market; and
- (b) an anti-competitive purpose on the defendant’s part.

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62 United States v Microsoft Corp 253 F 3d 34 (DC Cir, 2001).
64 Waller, above n 14, at 741.
65 Hovenkamp, above n 9, at 153, is more lukewarm, describing it as ‘elaborate’ but ‘also fairly unfocused’.
Having satisfied both requirements, a prima facie case of contravention is established.

Second, the burden is then on the defendant to demonstrate:
(a) a plausible, benign reason for its conduct; and (b) there is no other less restrictive alternative open to it (to achieve a lawful object) than the conduct at issue.

This composite test is not a substantial departure from the present situation. Currently, plaintiffs commonly point to, and courts (implicitly) expect to see, harm to the competitive process before the case is taken seriously. The present requirement for the plaintiff to establish an anti-competitive purpose remains, as does the opportunity for the defendant to proffer an alternative lawful reason for its conduct. The new requirement that the conduct be the least restrictive choice available to the defendant has been added.

Resurrect divestiture

If one was really serious about monopoly — and was frustrated at the impotency of a conduct provision such as s 36 — one could re-introduce the divestiture power that was a feature of the Commerce Act 1975. There is ongoing support for that venerable ‘trust-busting’ remedy and its salutary effects upon competition in the United States. Canadian competition law also recognises the possibility of divestiture of the assets of dominant firms found to have abused their dominance.

Promote alternative interpretations

Re-emphasise ‘purpose’ as the pivotal element

Earlier in this article I described the shift from reliance upon ‘purpose’ to ‘take advantage of’ as the key element or winnower of good versus bad as a wrong turning. When one goes back to the landmark cases it is clear that purpose was always seen as the pivotal element to determine liability. In \textit{Queensland Wire}, Toohey J commented that the purpose element setting forth the three proscribed purposes was ‘the key expression in s \textit{46(1)}’, while Mason CJ and Wilson J explained that it was the purpose provisions, set out in paras (a), (b) and (c), ‘which define what uses of market power constitute misuses’. Gault J in \textit{Clear v Telecom} likewise stated: ‘[i]t is the purpose of the conduct which distinguishes what is proscribed from what is legitimate.’ Kirby J, dissenting in \textit{Melway}, insisted that the key to distinguishing misuse or

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\item 67 Section 65. The divesture remedy was never utilised: see J Collinge, \textit{The Law Relating to Restrictive Trade Practices and Monopolies, Mergers and Take-Overs in New Zealand}, 2nd ed, Butterworths, Wellington, 1982, at [7.08].
\item 69 See s 79(2) of the Competition Act 1985.
\item 70 \textit{Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd} (1989) 167 CLR 177 at 214; 83 ALR 577 at 602.
\item 71 (1989) 167 CLR 177 at 191; 83 ALR 577 at 584.
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\end{footnotesize}
wrongful use of market power resided in the identification of the purpose of the company.\textsuperscript{73} Thus, while, on some occasions, purpose might be readily found, on others ‘there could be real contests’ about the defendant company’s purpose and such contests may lead to the conclusion that the real purpose was outside the statutory ban.\textsuperscript{74} For example, a refusal to supply an article to a would-be competitor may be due to the latter’s poor credit record.

A solution to the current quagmire then may be to re-emphasise purpose as the litmus test. There is a response to those who would argue that purpose would be satisfied too quickly and too many dominant firms would be exposed to liability. It is important here to distinguish between a diffuse, generalised desire to thwart competitors and preserve dominance and market share versus a tailored, targeted aim to achieve one of the three designated anti-competitive outcomes set out in the section. If a general, hostile intent to ‘crush’ one’s rivals were all that was needed, then few dominant firms could deny this and the purpose element would indeed be easily satisfied. But this is not what s 36’s purpose element contemplates. As Williams J, the trial judge in \textit{Commerce Commission v Carter Holt Harvey Building Products Ltd} observed:

\begin{quote}
Every commercial organisation wants to block its competitors in the sense of putting obstacles in the way of their commercial success and making it harder for them to be profitable. This is the normal interplay of commerce. There is nothing sinister or untoward in such manoeuvres.\textsuperscript{75}
\end{quote}

William Young J similarly explained recently: ‘Many business decisions which are aimed at improving a particular firm’s profitability will be intended to, or will necessarily, damage competitors and such an intention can easily be confused with anti-competitive purpose.’\textsuperscript{76}

But the two are distinct. Purpose, as the High Court in \textit{Union Shipping} clarified (drawing upon \textit{Queensland Wire}), means more than a broad, diffuse desire to stymie rivals, or prevent the erosion of one’s market share: it requires a distinct, focused, anti-competitive ‘object or aim’.\textsuperscript{77} Thus, ‘[t]he requirement is that “the conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences”’.\textsuperscript{78} There must be an intent to achieve one of the three designated anti-competitive purposes set out in s 36(2).\textsuperscript{79} Did the defendant ‘positively aim to produce the restriction of competition resulting’?\textsuperscript{80} This narrow interpretation of purpose is meant to exclude the general anti-competitive impulse and the activity undertaken for a benign, lawful purpose: ‘The activity covered will not be prohibited, despite foreseen anti-competitive effects, if it arises for unrelated legitimate reasons.

\textsuperscript{73} \textit{Melway} (2001) 205 CLR 1; 178 ALR 253; 50 IPR 257; [2001] HCA 13; BC200100872 at [103].
\textsuperscript{74} Ibid, at [104].
\textsuperscript{75} (2000) 9 TCLR 535 (HC) at 609.
\textsuperscript{76} \textit{ANZCO Foods Waitara Ltd v AFFCO NZ Ltd} (2005) 11 TCLR 278; [2006] 3 NZLR 351 at [144].
\textsuperscript{77} \textit{Union Shipping} [1990] 2 NZLR 662 at 707 per McGechan J and R G Blunt.
\textsuperscript{78} Ibid, at 707.
\textsuperscript{79} Ibid, at 707, adopting Toohey J in \textit{Queensland Wire} (1989) 167 CLR 177 at 214; 83 ALR 577 at 602.
\textsuperscript{80} Ibid.
without purposive pursuit of those anti-competitive outcomes in themselves. So, for example, price-cutting ought not to be condemned, despite the foreseen hindering of new entrants, if it arises from (say) a desire to quit excess stock or to launch a new product, without the purposive pursuit of the stifling or vanquishing of the new entrants themselves.

It is potentially misleading then to say: ‘both hard competition (which the Commerce Act is designed to protect) and anti-competitive conduct includes the deliberate harming of rivals.’ Hard competition does contemplate a general desire to triumph and, in the broad sense, that is ‘deliberate’, but it does not embrace specific, focused strategies aimed at harming rivals.

Admittedly, the line between a generalised desire to stymie competition and preserve dominance versus a targeted aim to deter a particular competitor or competitors, while conceptually clear, may be difficult to draw in practice. But judges are well used to discerning the fine nuances and shades of intent in other contexts (most notably, the criminal law) and there is little reason to believe they could not so here.

**Encourage adoption of the Melway test for ‘take advantage of’**

A more easily satisfied, and I would argue, realistic test of causation was propounded in passing in Melway. There, the majority of the High Court said that a firm possessing a substantial degree of market power may be said to be taking advantage of it where the firm:

- 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 . . . 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.

This is an eminently more sensible and realistic approach. It has been only sporadically applied in the post-Melway Australian case law. Regrettably, it has yet to feature in the NZ case law. Recently new life was breathed into this test. The Trade Practices Amendment Bill 2008 inserts a new provision, s 46(6A), to assist the court in deciding whether the ‘take advantage of’ has been met. The court may have regard to four non-exhaustive matters, including: (a) whether the conduct was materially facilitated by the corporation’s substantial degree of power in the market.

81 Ibid.


84 The ACCC failed to convince the majority of the High Court in Rural Press Ltd v ACCC (2003) 216 CLR 53; 203 ALR 217; [2003] HCA 75; BC200303758 at [53] that the defendant’s conduct satisfied the materially facilitated test. The ACCC successfully argued that test was met in the Full Federal Court decision: ACCC v Australian Safeway Stores Pty Ltd (2003) 129 FCR 339; 198 ALR 657; [2003] FCAFC 149; BC200303400 at [333].

85 Melway was cited by the Court of Appeal in Telecom Corp NZ Ltd v Commerce Commission (2001) 10 TCLR 182 at 187, but the materially facilitated test was not mentioned. The Court of Appeal in Carter Holt (2001) 10 TCLR 247 at 263 also cited Melway, but again omitted any mention of the materially facilitated test. Most recently, Melway was cited by the High Court in Telecom (0867) (2008) 12 TCLR 168 at [102] but with no mention of the test.
for it includes a new test that is surely most helpful to plaintiffs, namely, ‘(d) whether the conduct is otherwise related to’ the defendant’s market power.

**Develop a different counterfactual test: the equally-matched rival**

A modified version of the counterfactual test might be useful. As discussed earlier, currently the court is required to envisage a hypothetical firm (the hypothetical comparator) that does not possess substantial market power but is otherwise in the ‘same circumstances’ or the ‘same position’ as the defendant dominant firm. Identification of the salient factual features and circumstances — financial strength, longstanding arrangements with distributors, etc — that have endowed the defendant with a substantial degree of power in a market has proved a highly complex, unreliable and haphazard task.\(^6\) The hypothetical firm’s actions must be those of a firm lacking the economic muscle and other advantages of the defendant. Yet, in some cases this is not done and thus the comparison is no comparison at all. The court has simply compared the actions of the defendant dominant firm with those of a hypothetical firm (supposedly ordinary and non-dominant) yet possessing the same dominance characteristics that the defendant has. It is hardly surprisingly then that the answer to the counterfactual test is negative — the defendant’s action is no different than the ordinary firm’s and thus there is no taking advantage of market power.

A simpler approach might be to posit the presence of one identical, equally-matched rival to the defendant and asking would, as a commercial likelihood, the defendant still be able to engage in the impugned conduct.\(^7\) This is a variant on the familiar but broader question: would the defendant be able to do the acts in issue ‘if it were operating in a competitive market’?\(^8\)

It is easier to contemplate what would happen if one similar-sized rival posed a constraint to the defendant than trying either to hypothesise an entirely new workably competitive market containing the defendant or artificially stripping the defendant of its power-enhancing attributes and then relocating it in the re-configured market.

4 What if . . .? Counterfactual resolution of two recent cases

In this final section I wish to take the two most recent s 36 cases and consider what might have been the result if the court had adopted one or other of the suggested cures outlined in the previous section of this article.

**For want of a meter: the Bay of Plenty Electricity case**

The case

Bay of Plenty Electricity (BOPE) owned the approximately 22,000 electricity meters located in the domestic and small business customers’ premises

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86 See Ahdar, above n 1, at 271.
87 I am indebted to my 2008 Competition Law student, Clifford Robinson, for this version (written in the heat of an examination!).
88 *Queensland Wire* (1989) 167 CLR 177 at 192; 83 ALR 577 at 585–6 per Mason CJ and Wilson J.
throughout the eastern Bay of Plenty. It refused to lease its meters to its rivals — Mighty River, Genesis, Meridian, TrustPower and so on. Competitors were forced then either to install their own meters or purchase the BOPE meters — both more costly alternatives. BOPE also engaged in various obstructive tactics such as delaying negotiations with new entrants over meters, exaggerating to customers the inconvenience of switching to a new supplier and increasing the switching costs by dragging its heels when a changeover to a different supplier was proposed. The commission alleged breaches of ss 36 and 27 and both actions failed.

The defendant was held not to have a substantial degree of power in a market. In the main market pleaded — a local market for metering services — the defendant did not have a substantial power as alternatives such as installation of meters were seen as viable substitutes open to rivals.\(^9\) The defendant’s no-leasing policy then could not be the reason for the existence of, nor contributed to the existence of, the pleaded markets and BOPE’s dominance in them. The High Court summarised:

the core conduct of BOPE which the commission impugned, namely, BOPE’s — admitted — policy of not leasing its in situ meters, was neither an unlawful refusal to supply nor did it — in any relevant sense — raise costs faced by its rivals. To that extent, the commission did not establish its case against BOPE under s 36.\(^9\)

Two other more promising lines of attack were, unfortunately, not available to the commission as they had not been pleaded and it would be unfair for the defendants to let the case now proceed on these bases. First, the various instances of obstructive conduct taken collectively (obstructive conduct) would have satisfied the counterfactual test for taking advantage of, but the action would have still foundered as the conduct would not have been of sufficient magnitude to delineate the pleaded local market nor give BOPE substantial market power in it. Second, it might be that BOPE was dominant in a relevant market by virtue of its lack of rivals in the deregulated environment without the need to point to the impugned conduct (both the no-leasing policy and the obstructive conduct) as a source of power. The market power threshold having been met, the impugned conduct would have also failed the counterfactual test. However, the pleading deficiency ruled out this action.

Although the commission failed to establish the first threshold element of s 36 (possession of substantial market power) the High Court had plenty to say about the merits of the conduct at issue. As noted earlier, the baneful Posnerian umbrella and helping-hand metaphors are trundled in to portray the defendant as innocent, besieged incumbent. The court is moved to reaffirm that:

(a) A firm with lawfully acquired monopoly power is not required to assist its competitors . . .

(b) A firm in a monopoly position is entitled to compete with its competitors. It does not have to ‘hold an umbrella over inefficient competitors’ . . .\(^9\)

\(^8\) Commerce Commission v Bay of Plenty Electricity Ltd (unreported, Wellington HC, CIV-2001-485-917, Clifford J and Prof M Richardson, 13 December 2007) at [421].

\(^9\) Ibid, at [357].

\(^9\) Ibid, at [385].
BOPE was cast as having to 'subsidise' its rivals, 'tilt the otherwise level playing field' in their favour, provide the dreaded 'helping hand' and be bludgeoned into 'enforced sharing'. The ominous spectre of a court as a sort of 'central planner' having to set prices and be embroiled in ongoing monitoring and regulation of an industry was raised and was no doubt a further reason for the court's desire to refrain from finding a contravention here. The court added — quite rightly in my view — there was no need to import the US 'essential facilities doctrine' into NZ monopolisation law. The *Queensland Wire* case provided a sufficient precedent for resolving the refusal to supply cases. As it was, the court thought the meters were not an essential input here in the way that y-bar was in the *Queensland Wire* case. In the court's view, the evidence did not establish that it was prohibitively costly or 'impracticable' for BOPE's rivals to use the alternatives (to leasing) of installing their own meters or purchasing BOPE's. These were close substitutes and thus the market must be redrawn to reflect that. Once re-contoured, BOPE's dominance disappeared. Put differently, BOPE's rivals were disadvantaged somewhat by the no-leasing policy, but not unduly — the costs of the alternatives were 'not economically significant', nor a barrier to entry.

It seems the *Telecom* counterfactual test was not satisfied as the court remarks that the no-leasing policy 'imposed no additional costs that they would not otherwise have faced in a workably competitive market'. By contrast, as noted earlier, the obstructive conduct 'would not have been available to BOPE in a workably competitive market'.

On the purpose front, the court commented obiter that this limb would have been satisfied. By engaging in its no-leasing and obstructive conduct, BOPE had the purpose of restricting entry and preventing and deterring its rivals from engaging in competitive conduct with it in the electricity retail supply market.

**Counterfactual resolution**

This case foundered on first limb — the market definition/market power threshold. Let us assume the pleading niceties could have been met and BOPE was found to have a substantial degree of power in a market — perhaps due to residual dominance in the retailing (not meter) market itself. The purpose element was met anyway. Using the *Melway* materially facilitated test, the
take advantage of element would have clearly been met. Implementation of no-leasing policy was clearly made easier by the defendant’s market power. The obstructive conduct satisfied the demanding *Telecom* test and so a fortiori it would have passed the *Melway* test.

If there was one other similarly matched rival to BOPE it is most unlikely BOPE would have been able to sit back and let a rival lease its meters.

Using my composite test, first, I suggest BOPE’s conduct clearly had the effect of substantially lessening, in the sense of ‘hindering’, competition in the market. Its purpose, as found, was one of the prohibited purposes. A prima facie case was established. Could BOPE point to a valid justification for its policy of not leasing its meters? It did not offer one. The question whether there were less restrictive alternatives open to BOPE becomes otiose. BOPE would thus appear to have violated s 36.

**Dialing up anti-competitive conduct: the *Telecom (0867)* case**

**The case**

In 1999 Telecom introduced a change to its services to residential customers to address the burgeoning use of the internet. In 1996 Telecom and Clear had entered into an interconnection agreement (ICA) which enabled Clear to provide local interconnections using Telecom’s network. An aspect of this was terminating charges. Take a Telecom customer who made a call on that network to another person who was a customer on a different network, say Clear. The calling customer’s network had to pay a termination charge to the network used by the recipient, the network where the call terminated. Under the 1996 ICA Clear was required to pay Telecom a higher rate per minute for calls terminating with it than Telecom was required to pay Clear. This rosy picture for Telecom turned decidedly sour when internet use blossomed. Dialing up the internet by residential consumers quickly became a major use of Telecom’s local access network. With the internet a person would dial up (originate) its calls with an internet service provider (ISP) and nothing is originated back the other way. If a large number of ISPs are on a rival network such as Clear (as they were) and most of the callers are Telecom customers (as they were), then Telecom is faced with having to pay a very large amount in terminating charges to the other network. On the other hand, Clear had very few residential customers and Telecom received little by way of termination charges. Given that the charging rate is on a per minute basis, this situation was exacerbated by the fact that internet calls are much longer than voice calls. Add to this that Telecom was constrained by the Kiwi Share Obligation (KSO) to provide residential customers with free and unlimited phone line access for a fixed monthly fee, and Telecom’s bind becomes apparent.

Clear and the ISPs made the most of the situation. Clear were able to keep their charges to the ISPs to a minimum, or even free, with Clear and the ISPs in effect sharing the termination charge revenue paid by Telecom.

Telecom’s solution was to introduce a new 0867 prefix number for internet calls. Residential customers calling a phone number with the 0867 prefix would not be charged for their calls, but if they chose not to do so they would be charged two cents per minute after 10 hours of use per month. The two cent
surcharge did not however apply to the 0873 number used by Telecom’s own ISP, Xtra.

Naturally, this created a strong incentive for residential customers to either use Xtra or the numbers with the 0867 prefix. Not wanting to lose customers to Xtra, the other ISPs were ‘incentivised’ to use a network that had the 0867 prefix. And, if carriers such as Clear did not enter into a new agreement with Telecom for the 0867 prefix, they in turn risked losing ISPs on their network. To obtain the 0867 number range, carriers such as Clear were required to enter into a new agreement with Telecom and lost their right to be paid termination fees for calls to those numbers under the 1996 ICA. So, the 0867 device was a splendid way to extricate itself from an agreement that was costing Telecom millions of dollars. The government received advice that the 0867 initiative was in breach of the KSO but ultimately agreed not to object to its implementation subject to certain conditions.

Competing carriers and ISPs who shared termination revenues were described as being ‘very exercised’ by the 0867 strategy. The ISPs and the carriers, Clear included, eventually joined up to the new arrangement.

The commission argued that the 0867 device was monopolising conduct under s 36. The High Court had little difficulty in concluding that Telecom was dominant in the market for fixed-line retail services to residential customers. However, the other two limbs were not satisfied. Applying the Telecom counterfactual test the court was led:

inexorably to the conclusion that a non-dominant firm in Telecom’s position in a competitive market would have been able to introduce the 0867 service in order to deal with the termination fee and network capacity issues which concerned Telecom.

It follows that in introducing the 0867 service Telecom did not use its dominance in the market for fixed-line retail telephone services to residential customers.

The court also traversed the question of purpose, although strictly speaking it was unnecessary to do so. One might wish it had not, for it held that the purpose limb had not been satisfied either. Here, the evidence indicated there were two ‘equal ranking and inseparable’ purposes behind the defendant’s actions (one benign, the other anti-competitive), neither one ‘dominant or primary’ compared to the other. The valid reason was to manage the overload on the network caused by the growth in internet traffic. The goal of eliminating termination charge payments to rival carriers and their ISPs was the other. The court accepted ‘without question’ that Telecom knew its strategy would impair its rivals and those of Xtra and this was clearly one its objectives. Given that, as the court noted, the anti-competitive purpose under s 36 need not be the sole purpose, but simply a ‘substantial’ purpose, one

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108 Ibid, at [72].
109 Ibid, at [74].
110 Ibid, at [45].
111 Ibid, at [89].
112 Ibid, at [99].
113 Telecom estimated it would need to spend $205m over the next three years to support the projected growth in network usage: ibid, at [71].
114 Ibid, at [104].
115 Ibid, at [96].
would have thought this element was squarely met. But, strangely, the court found this took the commission’s case ‘no further’.116 Instead, it went on the emphasise the ‘pro-competitive effects’ of the 0867 device, commenting that it did ‘not accept that it was injurious to competition even in the short-term’.117 The termination payment scheme under the 1996 ICA had led to ‘inefficient outcomes’ and thus the 0867 regime would yield a ‘more competitive environment’118 and even ‘increased dynamic efficiency’.119

Here, the court seems to have been beguiled by the Olympia ‘entitled to compete like everyone else’ dictum, which it cites.120 In evaluating purpose, the court appears to be still thinking of the conclusion it reached under the counterfactual test: ‘In seeking to reduce its costs Telecom was engaging in normal profit maximizing behaviour to be expected of any firm, dominant or otherwise.’121 It is ‘normal profit maximizing behaviour’ to subvert competition if one can. And, to re-hash old criticisms, conduct that can be engaged in by dominant and ordinary firms can have drastically different effects.

It is no answer under the Act to say the anti-competitive purpose existed alongside a benign objective. As for the view that the conduct was efficient, that too is no defence. There is no efficiency defence in s 36. As the High Court said in BOPE, the plaintiff is not required to prove that the defendant’s actions had somehow harmed competition or was likely to create inefficiencies: ‘The philosophy underpinning s 36, in New Zealand law, [...] that competition law has been harmed if the ingredients of that section are established.’122 The Act presumes competition to be harmed if powerful firms take advantage of that power for a prohibited purpose.

**Counterfactual resolution**

The take advantage of element using the Melway materially facilitated test clearly would have been met regarding the introduction of the 0867 device. A significant purpose of the defendant was to deter rivals from engaging in competitive conduct.

If there was one other similar rival to Telecom in the local residential calling market it would have been unlikely that Telecom would have been able to introduce a dial-up number prefix nor convince rival carriers to sign up to the new no-termination-charge agreement.

Applying my composite test, first, Telecom’s conduct had the effect of substantially lessening, in the sense of ‘hindering’, competition in the market. Clear and other rivals of Telecom were significantly disadvantaged. The purpose behind the introduction of the device was one of the prohibited purposes. A prima facie case was established. Could Telecom point to a valid justification for its policy of not leasing its meters? Quite clearly the

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116 Ibid, at [105].
117 Ibid, at [108].
118 Ibid.
119 Ibid, at [112].
120 Ibid, at [102].
121 Ibid, at [102].
122 BOPE (unreported, Wellington HC, CIV-2001-485-917, Clifford J and Prof M Richardson, 13 December 2007) at [381]. See also ibid, at [386].
management of the overload on its network was a legitimate justification for addressing the problem. But did it need to use the 0867 method? Were there less restrictive alternatives open to it?

As the commission argued, there were less restrictive options here.123 It could have offered payments to ISPs on rival networks to attract them to move to Telecom’s network. If it had done so Clear might have responded and triggered off increased competition. Telecom could have also renegotiated its 1996 ICA with Clear and the other networks. Those rivals would have benefited from the substantial compensation Telecom would have needed to offer for them to give up their right to termination payments. Overall then, Telecom pursued a legitimate objective, but by an unnecessarily anti-competitive means and thus it contravened the Act.

5 Conclusion

New Zealand can have an effective monopolisation law, but not if the present interpretation of s 36 continues. The courts have tried to satisfy the two major traditional goals of monopolisation law that recur throughout the literature and cases. Ideally, first, any monopolisation law must give adequate prior guidance to dominant firms so they can know beforehand what conduct is permissible, and, second, the law must successfully distinguish between the predatory and the healthy, competitive actions of powerful firms. Courts are constantly reminded that the failure to attain either objective — to provide certainty or to discriminate accurately between the good and bad — risks deterring dominant firms from engaging in efficient and innovative conduct that would benefit consumers and society.

In terms of the first ideal, the NZ courts have succeeded in providing certainty, but it is, I believe, certainty at a severe cost. They have developed a strict counterfactual test for the ‘taking advantage of’ element in s 36 that provides dominant firms with a great deal of assurance. Such firms can be confident that their actions against rivals are highly unlikely to ever be found unlawful. The current test is, I believe, unduly generous to dominant corporations. If my assessment is correct, then it follows that the courts have failed to meet the second ideal of devising a law that is sufficiently discriminating. The present law is too lenient — it dramatically under-deters a wide range potentially anti-competitive conduct.

There are many possible cures to the present situation and I have identified three in particular. First, we might amend the section and insert a multi-stage, burden-shifting, composite test. I have put forward one formulation of such a test. It combines a competition effects test with the current purpose test and couples this with the opportunity for the defendant to rebut prima facie liability by demonstrating it has a benign purpose and that it has employed the least restrictive means to achieve its objectives. Second, we might leave the section as is, but encourage the courts to adopt an alternative interpretation of the ‘take advantage of’ element. Here, there are two paths. First, the ‘materially facilitated’ test from Melway (which features in the latest amendment to s 46 of the Trade Practices Act) might be adopted or, second,

a different version of the counterfactual test based on the notion of an equally-matched rival might be employed.

The adoption of any of these three tests would not necessarily be a complete answer to the monopolisation puzzle. Nonetheless, they do represent modest attempts to revive a law that presently is in urgent need of resuscitation.