Monopolisation: The practical implications of section 36 of the Commerce Act 1986

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Section 36 of the Commerce Act 1986 prohibits a firm that is in a dominant position in a market from using that position for certain anti-competitive purposes. Small traders affected by the conduct of a dominant firm which contravenes this section have the right to bring actions for injunctions or damages. The interpretation of section 36 is therefore of importance to both dominant firms and small traders. In this article the author considers the possible interpretations of section 36 and advocates an approach to interpretation based upon the economic objectives of the section. He points out, however, that in many areas the interpretation of section 36 is highly uncertain and that it is important for practitioners to recognise this uncertainty when advising clients as to the section's scope.

I. INTRODUCTION

This article concerns section 36 of the Commerce Act 1986 which regulates the conduct of monopolies and other dominant firms in New Zealand.[1] More specifically it will consider the possible interpretations of the constituent elements of section 36 and then draw conclusions as to the practical implications of the various interpretations.

When interpreting provisions in the Commerce Act it is important to keep in mind the Act's objective. The Act's immediate objective is the promotion of competition[2] but the ultimate objective is consumer welfare and economic efficiency.[3] In the absence of competitive restraints a firm is free to charge higher prices at the expense of the consumer. Also, in the absence of competitive pressures the incentive to reduce costs is lessened.[4]

It is especially important to keep the Act's objectives in mind when considering section 36. Section 36(1) provides:

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1 Section 36 was discussed in more detail by the writer in "Monopolisation: Section 36 of the Commerce Act 1986" (LL.M. Research Paper, Victoria University of Wellington, September 1986).

2 See long title to Commerce Act 1986.

3 N.Z. Parliamentary Debates Vol. 463, 1985; 4681, 4689; Department of Trade and Industry "Competition Policy and the Government's Legislative Proposals in the Commerce Bill" (1985, Wellington); Collinge "First Steps Under the Commerce Act 1986" (Commerce Commission Seminar: An Introduction to the New Commerce Act, Wellington, 26 March 1986), 11-12; *Ball Memorial Hospital Inc* v. *Mutual Hospital Insurance Inc* 784 F.2d 1325, 1338 (1986).

4 The writer considers the economic effects of an absence of effective competition in more detail in "Monopolisation: Section 36 of the Commerce Act 1986", supra n.1, 5-7.

"No person who has a dominant position in a market shall use that position for the purpose of —
(a) Restricting the entry of any person into that or any other market; or
(b) Preventing or deterring any person from engaging in competitive conduct in that or any other market; or
(c) Eliminating any person from that or any other market."

The particular purpose of section 36 is to prevent dominant firms using their power for the purpose of preventing or eliminating competition. If dominant firms could successfully use their power for that purpose they could prevent competitive restraints being exercised on them. Those restraints would have tended to make them price and produce at more economically efficient levels and would have encouraged them to produce at the lowest possible cost. Section 36, like all the other restrictive trade practices provisions in the Commerce Act is aimed at encouraging competition and therefore obtaining economic efficiency and consumer welfare.

The way section 36 is framed and the presence in the Commerce Act of private rights of action may, however, encourage the courts into thinking that the rights of individual traders are important under section 36. In particular the following factors may influence a court into placing undue weight on the interests of trades affected by the actions of a large firm:

(i) the fact that section 36 is framed in terms of the dominant concern using its power to affect some "person" rather than in terms of an effect on competition.
(ii) the fact that the person most likely to be visibly harmed by conduct of a section 36 kind will be the trader eliminated or deterred rather than the general public.
(iii) the fact that a right of action is given to the trader affected to recover damages for any loss suffered as a result of a contravention of section 36.

The tendency to regard the interests of the individual trader as important is to be avoided. It is inconsistent with the economic objectives of the Act to place undue weight on the interests of those affected by the actions of a large firm. The purpose of competition laws is the protection of competition not the protection of competitors.[5] An action taken by one firm which has the effect of harming another need not be considered illegitimate but could be perfectly consistent with efficiency aims.[6] A firm eliminated from the market may have been using society's resources inefficiently.

The United States monopolisation provision is section 2 of the Sherman Act. Recent cases under this provision have stressed the principle that competition laws should not

5 *Brunswick Corp* v. *Riegel Textile Corp* 752 F.2d 261, 266 (1984); *Ball Memorial Hospital Inc* v. *Mutual Hospital Insurance Inc,* supra n.3, 1338; *Auckland Regional Authority* v. *Mutual Rental Cars (Auckland Airport) Ltd* (1987) Unreported, Auckland Registry, CP 1373/86, 56.

6 Barwood "Implementation of a Competition Policy" (New Zealand Association of Economists Conference, Wellington, 20 February 1986), 25-26; *Ball Memorial Hospital Inc* v. *Mutual Hospital Insurance Inc,* supra n.3, 1338; *Olympia Equipment Leasing Co* v. *Western Union Telegraph Co* 797 F.2d 370, 379 (1986).

be allowed to deter competition.[7] In *Ball Memorial Hospital Inc.* v. *Mutual Hospital Insurance Inc.*[8] the U.S. Court of Appeals (Seventh Circuit) said:[9]

> "Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals — sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors. . . . The antitrust laws protect efficient production for the benefit of consumers . . .
>
> "Sometimes injury to rival firms can be a precursor to injury to consumers; after knocking rivals out of the market, a firm may curtail output and raise price. Section 2 may be used to prevent this conduct. Yet it must be used with the greatest caution. Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition. . . . an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster."

It is submitted that this passage is equally applicable to section 36 of the Commerce Act. It is important that the courts decide section 36 cases in accordance with the section's economic objectives and not in terms of "justice" between the dominant firm and the small trader.[10] Section 36 is included in the Commerce Act not for the protection of small traders but because the elimination of such traders could affect competition to the detriment of the consumer.

Similarly, the inclusion in the Commerce Act of private rights of action for traders affected is simply to ensure that the Act is enforced and should not lead to the conclusion that it is those traders whom section 36 is intended to protect.[11]

It is far from certain, however, that the courts in New Zealand will take an approach which affords sufficient weight to the economic objectives of the Act. The Australian courts, with respect, have failed to do so in most of the cases on section 46 of the Trade Practices Act 1974 (Aust.), the provision on which our section 36 was based.[12] Two of

7 *Berkey Photo Inc.* v. *Eastman Kodak Co* 603 F.2d 263 (1979); *Northeastern Telephone Co* v. *American Telephone and Telegraph Co* 651 F.2d 76 (1981); *Ball Memorial Hospital Inc* v. *Mutual Hospital Insurance Inc,* supra n.3.

8 Supra n.3.

9 Supra n.3, 1338.

10 Pengilley "New Zealand Commerce Legislation: The Likely Impact on Commercial Conduct in the Light of Australian Experience" [1986] N.Z.L.J. 111, 115-116; Pengilley "Lowering the Monopoly Powe Threshold: An Evaluation of the Australian Monopolization Amendments and their Likely Results" (1987) 11 Sydney Law Review 196, 207, 229.

11 N.Z. Parliamentary Debates Vol. 463, 1985; 4686, 4688, Vol. 469, 1986, 511; *Brunswick Corp* v. *Riegel Textile Corp,* supra n.5, 266.

12 See in particular *Top Performance Motors Pty Ltd* v. *Ira Berk (Queensland) Pty Ltd* (1975) 30 A.L.R. 465; *Ah Toy J Pty Ltd* v *Thiess Toyota Pty Ltd* (1980) 30 A.L.R. 271; *MacLean* v. *Shell Chemical (Australia) Pty Ltd* (1984) A.T.P.R. 40-462.

the first three New Zealand decisions on section 36 are also not encouraging.[13]

The possibility that the courts may place too much weight on the interests of individual litigants adds uncertainty as to the potential applicability of section 36. This uncertainty is of vital importance to practitioners. In advising clients as to the scope of the section regard must be had to each of two possible approaches. The courts could, possibly spurred on by the advice of lay members on the bench,[14] take a view of section 36 which affords sufficient weight to its economic objectives. Alternatively they could see section 36 in morality terms resulting in quite different interpretations of the section.

Section 36 has three important constituent elements;
(i) Dominance in a Market.
(ii) The Use of that Dominant Position.
(iii) A Purpose of Eliminating, Deterring or Restricting.
It is proposed to look in turn at these elements before briefly considering the remedies available in the case of a contravention of section 36.

II. DOMINANCE IN A MARKET

A. Market Definition

A firm cannot infringe section 36 unless, first of all, it is in a dominant position in a market in New Zealand. A market "is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive."[15] Outside of the boundaries of a market there will be a drop in substitution possibilities so that those within the market would collectively possess substantial market power.[16]

The power of a firm to raise prices or offer a worse deal depends on the possibility of both substitution in demand and substitution in supply.[17] Substitution in demand involves the substitution by consumers of one firm's product for the product of another or of one geographical source of supply for another. For example a firm having a monopoly over the supply of cruises to a particular island cannot raise prices to the detriment of the consumer if there are other islands nearby to which the consumer can take cruises with other firms.[18] Substitution in supply involves the substitution by a firm of one product for another in its production plan or one geographic source of supply for another. For example a firm having control over the production of light metal containers for fish and meat cannot raise prices to the detriment of its customers if

13 *Investment News Ltd* v. *Fourth Estate Ltd* (1986) Unreported, Wellington Registry, CP 448/86; *Bond & Bond Ltd* v. *Fisher & Paykel Ltd* (1986) 6 N.Z.A.R. 278; cf *Auckland Regional Authority* v. *Mutual Rental Cars (Auckland Airport) Ltd,* supra n.5.

14 See s.78(1) Commerce Act 1986.

15 *Queensland Cooperative Milling Association* (1976) 8 A.L.R. 481, 517.

16 *Re Tooth & Co Ltd and Tooheys Ltd* (1979) A.T.P.R. 40-113 at p.18,197.

17 *Queensland Cooperative Milling Association,* supra n.15, 517; *Re Tooth & Co Ltd and Tooheys Ltd,* supra n.16, p.18,196.

18 *Berndon Investments Pty Ltd* v. *Fitzroy Island (S.A.) Pty Ltd* (1983) A.T.P.R. 40-400.

producers of other kinds of light metal containers can easily adapt their production facilities to the production of containers for fish and meat.[19]

A market should be defined in terms of function, product, and geographical area e.g. the retail market for the sale of liquor in Auckland.[20] Market definition is a matter of fact in each case. Section 3(1) of the Commerce Act defines market as meaning "a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense".[21]

Some monopolisation cases both in the United States and Australia have shown an overly narrow approach to market definition. In some cases there may be a temptation to define the market narrowly when the court is confronted with a small trader who has been driven out of business and to whom the court feels it would be just to grant a remedy. This certainly seems to have happened in *U.S.* v. *Klearflax Linen Looms.*[22] In that case a distributor of "Klearflax" linen rugs had underbid Klearflax on a government contract. Klearflax then reduced the distributor's discount so as to prevent the distributor from competing for such contracts. The court found that the relevant market was not floor coverings or rugs or even linen rugs but "Klearflax" linen rugs! This finding enabled the court to hold that Klearflax had breached section 2 of the Sherman Act.

Such a narrow market definition is inconsistent with the economic objectives of section 36. The section is intended to promote competition not to protect individual competitors. If the market is defined too narrowly a firm may be held to be in a dominant position although it is in fact subject to effective competition. As a result conduct that can have no real anti-competitive effect may come within section 36.

Some Australian monopolisation cases have also taken an overly restrictive view of market. In the cases of *Top Performance Motors Pty Ltd* v. *Ira Berk (Queensland) Pty Ltd*[23] and *Ah Toy J Pty Ltd* v. *Thiess Toyota Litd*[24] there were held to be separate markets for Datsun and Toyota cars respectively. Hopefully the New Zealand courts will take a better approach to market analysis, based on "commercial common sense" and a recognition of the economic objectives of the section.

However, even if the New Zealand courts do not go as far as the cases referred to above, there is nevertheless a risk that they will adopt overly narrow market definition in cases where a small trader suffers at the hands of a larger competitor. This possibility be held to be "dominant" and who in turn are prone to actions against them based on section 36.

19 *Europemballage and Continental Can* v. *Commission* [1973] C.M.L.R. 199, 226-227.

20 See Collinge "Mergers and Takeovers: Towards a Competition Policy in New Zealand" Part I [1985] N.Z.L.J. 262, 265-266.

21 See also *Tucker/Edmonds* Commerce Decision No. 84, 21 June 1984, 5; (1984) 4 N.Z.A.R. 360, 361.

22 63 F.Supp. 32 (1945).

23 Supra n.12, 467.

24 Supra n.12, 275.

B. The Test of Dominance

The term "dominant position", which is derived from Article 86 of the EEC Treaty,[25] is defined by section 3(8) of the Commerce Act. Section 3(8) provides:

> "For the purpose 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 the goods or services in that market and for the purposes of determining whether a person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of the goods or services in a market regard shall be had to —
> (a) The share of the market, the technical knowledge, the access to materials or capital of that person or that person together with any interconnected body corporate.
> (b) The extent to which that person is constrained by the conduct of competitors or potential competitors in that market.
> (c) The extent to which that person is constrained by the conduct of suppliers or acquirers of goods or services in that market."

This definition is based largely on EEC case law on the definition of "dominant position".[26] The key test under section 3(8) is whether the firm is "in a position to exercise a dominant influence over the production, acquisition, supply, or price of the goods of services" in a market. In determining whether that key test is satisfied the factors in paragraphs (a)-(c) must be taken into account but these factors are not the only factors that may be considered.[27] The Commerce Commission has set out a fuller list of factors that might be relevant in *Proposal by News Ltd.*[28]

The interpretation of the term "dominant position" can conveniently be considered under four sub-headings as follows.

1. The Relevance of Competitive Restraints

The possession by a firm of a substantial share in a market can give rise to a presumption of dominance.[29] However, far more important than the firm's market share is the quality of the competition it faces. A firm with a large market share is not dominant if it is not able to act independently[30] of the few competitors it does have in making decisions as to the production, acquisition, supply or price of goods or services in the market.

25 Department of Trade and Industry "Commerce Bill 1985: A Background to the Bill and an Outline of its Provisions" (Wellington, August 1985), 15; *Auckland Regional Authority* v. *Mutual Rental Cars (Auckland Airport) Ltd,* supra n.5, 75.

26 *Re Continental Can Company Inc* [1972] C.M.L.R. D11, D27.

27 *Proposal by News Ltd* (1986) 6 N.Z.A.R. 47, 51.

28 Ibid, 51-52. See also *Magnum Corporation Ltd/Dominion Breweries Ltd* Commerce Commission Decision No. 182, 25 November 1986, 27-31.

29 *Magnum Corporation Ltd/Dominion Breweries Ltd,* supra n.28, 27-28; *Hoffmann-La Roche* v. *Commission of the European Communities* [1979] 3 C.M.L.R. 211, 275.

30 *Re Continental Company Inc,* supra n.26, D27; *Proposal by News Ltd,* supra n.27, 50.

The importance of taking into account the competitive restraints on a firm has not always been fully grasped in Australia. For example in *Williams* v. *Papersave Pty Ltd*[31] Sheppard J held that a 60 percent market share gave the respondent "a substantial degree of market power" under section 46 of the Trade Practices Act 1974 (Aust.) without considering the effectiveness of the competition that did exist. The clearest case of failing to take into account the relevance of competitive restraints, however, is the case of *MacLean* v. *Shell Chemical (Australia) Pty Ltd.*[32] That case concerned the market for cypermethrin (an ingredient in insect killers).

There were only two sources of supply of cypermethrin in Australia, Robert Young Pty Ltd and the respondent. The applicants originally obtained their supplies of cypermethrin from Robert Young. When Robert Young refused to continue supplying the applicants the applicants then obtained supply from the respondent. Eventually, however, the respondent also refused to supply the applicants except on terms onerous to the applicants. The applicants alleged that this conduct was a contravention of section 46 of the Trade Practices Act.

Toohey J concluded that the respondent had sufficient market power to come within section 46 by disregarding the existence of Robert Young! His Honour said:[33]

> ". . . since any supply of Cypermethrin through Robert Young Pty Ltd is closed to the applicants, the only effective source of supply is through the respondent. *From the point of view of the applicants,* the respondent is in a position effectively to control the market for Technical Cypermethrin."

As editorial comment to the case suggests, Toohey J. seems to have focussed "upon the fate of individual competitors rather than competition".[34] In considering the market power of the respondent its competitors simply should have been taken into account. In New Zealand section 3(8)(b) makes it clear that the court must consider the extent to which the allegedly dominant firm is constrained by the conduct of other competitors in the market.[35]

A final comment on the relevance of competitive restraints concerns competition from outside the market. Although section 3(8) only refers specifically to competition from within the market this does not mean that other competition cannot be relevant if has some constraining effect on the allegedly dominant firm. An example is the Commerce Commission decision in *Proposal by News Limited.*[36] In holding that the proposed merger between the parties would not result in any party having a dominant position the Commission took into account not just competition from within the market

31 (1987) A.T.P.R. 40-781 at p.48, 522.

32 Supra n.12.

33 Supra n.12, p.45, 337 (emphasis added).

34 (1984) A.T.P.R., p. 45,333.

35 Now also in Australia; see section 46(3)(a) Trade Practices Act 1974 as enacted by section 17 Trade Practices Revision Act 1986.

36 Supra n.27.

(the market for daily newspapers) but also competition from outside the market (weekly newspapers and broadcasting).[37]

2. Barriers to Entry and the Relevance of Potential Competition

An analysis of current market shares and the present degree of competition in the market may be insufficient to determine whether a firm has the ability to "exercise a dominant influence over the production, acquisition, supply, or price of the goods or services" in a market. A further crucial consideration will be whether there are barriers to entering a market, or indeed to expansion within a market. As Donald and Heydon have said:[38]

> "A firm may be able to change a monopoly price if it has less than 100 percent (or 50 percent or 33.3 percent) of the market provided that it would cost competitors too much to expand production to meet any increase in demand for their product caused by the monopolist increasing prices, and if new entry is difficult. Similarly, a firm with 100 percent of the market may not be able to charge a monopoly price for long if new entry is very easy and speedy."

The importance of potential competition has been stressed by the High Court in *Fletcher Metals Ltd* v. *Commerce Commission.*[39] In that case the court said:[40]

> "We are satisfied that it is the potentiality of new suppliers which achieves effective competition.
>
> . . . It is not only actual competition which as it were 'keeps a trader honest'. Potential competition can be equally salutary in producing the same result."

The relevance of the threat of potential competition to an assessment of dominance is in fact recognised by section 3(8)(b) which refers to the constraints placed on a firm "by the conduct of competitors and potential competitors". The threat of potential competitors should usually be sufficient to constrain a large firm except in cases where there are substantial and enduring barriers to entry. Where such barriers do exist a conclusion that a firm is dominant is more likely. One such case was the decision of the European Court of Justice in *United Brands Co* v. *Commission of the European Communities.*[41] In that case UBC, who had only 40-45 percent of the European banana market, were nevertheless held to be in a dominant position because of the extremely high barriers to entry faced by any potential competitors.[42]

Some common kinds of barriers to entry can be referred to briefly;

37 Supra n.27, 53.

38 *Trade Practices Law* (Law Book Company Ltd, Syndey, 1978) Vol. 1, para. 5.2.11 (p.215). See also *Ball Memorial Hospital Inc* v. *Mutual Hospital Insurance Inc,* supra n.3, 1335-1336.

39 (1986) 6 N.Z.A.R. 33. See also *New Zealand Steel Ltd* v. *Commerce Commission* (1986) 6 N.Z.A.R. 97.

40 Supra n.39, 43.

41 [1978] 1 C.M.L.R. 429.

42 Ibid, 490-491.

(i) Economic barriers such as high start-up and running costs and the attainability of economies of scale only at high levels of production.[43]

(ii) The possession by an existing firm in the market of an important intellectual property right or other technical knowledge not available to potential competitors.[44] Section 3(8)(a) recognises that a firm possession of "technical knowledge" may be relevant to whether it is in a dominant position.

(iii) The control by an existing firm in the market of the supply of a vital raw material.[45] Section 3(8)(a) also refers to a firm's "access to materials" as being relevant to whether it is in a dominant position.

(iv) The control by an existing firm in the market of a facility the use of which is essential for entry into the market. An example is *Otter Tail Power Co* v. *U.S.*[46] In that case Otter Tail had control of transmission lines the use of which was necessary for competition in the market for the retail supply of electricity.

(v) Vertical integration by an existing firm in the market thus closing off from potential competitors possible sources of supply or outlets.[47] Section 3(8)(c) makes the relationship between a firm and suppliers/outlets a factor which must be considered in deciding whether the firm is dominant.

(vi) The presence of contractual or other formal arrangements between an existing firm in the market and suppliers/outlets. A well-known example is Fisher & Paykel's exclusive dealing arrangements[48] which require dealers to sell only Fisher & Paykel products. These arrangements shut off from potential competitors outlets for their products and therefore make entry into the market much more difficult.

(vii) Statutory and regulatory barriers to entry such as import controls and licensing requirements or the conferral by government of the sole right to supply a certain

43 e.g. *United Brands Co* v. *Commission of the European Communities,* supra n.41; *Goodman Fielder Ltd/Wattie Industries Ltd* Commerce Commission Decision No. 201A, 14 May 1987, 7 (para 19), 11-12 (paras 34, 36), 21, 23 (paras 87, 89), 40, 46-47 (para 170), 50 (para 188), 57 (para 220), 59 (para 228), 62 (para 239).

44 e.g. *Warman International* v. *Envirotech Australia Pty Ltd* (1986) A.T.P.R. 40-714; *Goodman Fielder Ltd/Wattie Industries Ltd,* supra n.43, 21, 39-40, 45 (para 162), 50 (para 188), 57 (para 219).

45 e.g. *American Tobacco Co* v. *U.S.* 328 U.S. 110 (1946); *MacLean* v. *Shell Chemical (Australia) Pty Ltd,* supra n.12; *Goodman Fielder Ltd/Wattie Industries Ltd,* supra n.43, 11 (para 35), 50 (para 189), 59-60 (para 229), 63 (para 243); *Queensland Wire Industries Pty Ltd* v. *The Broken Hill Proprietary Company Ltd* (1987) ATPR 40-810.

46 410 U.S. 366 (1973). See also *Berndon Investments Pty Ltd* v. *Fitzroy Island (S.A.) Pty Ltd,* supra n.18; *Auckland Regional Authority* v. *Mutual Rental Cars (Auckland Airport) Ltd,* supra n.5; cf *Interface Group Inc* v. *Gordon Publications Inc* 562 F.Supp. 1235 (1983).

47 e.g. *United Brands Co.* v. *Commission of the European Communities,* supra n.41; *Goodman Fielder Ltd/Wattie Industries Ltd,* supra n.43, 24-25, 33-37, 43-47, 50 (para 187), 52-53 (para 202).

48 See *Bond & Bond Ltd* v. *Fisher & Paykel Ltd,* supra n.13; National Business Review, Wellington, New Zealand, 14 October 1985, pp 36-37.

good or service or of the right to control who does supply the good or service.[49] Care should be taken, however, in concluding that a firm is dominant because of the existence of such barriers. Government policy is to remove or lessen statutory restrictions on competition. In *Fletcher Metals Ltd* v. *Commerce Commission*[50] the High Court had to consider the relevance of import controls on certain steel products. The Court noted that the Minister of Trade and Industry had announced the gradual removal of the import controls. It concluded that the potential competition created was sufficient to render anti-competitive behaviour by Fletcher Metals unlikely.[51]

(viii) The existence of high transportation costs or other obstacles to transportation making competition from overseas or other parts of the country difficult or impossible.[52]

3. The Possibility of More than One Firm in a Market Having a Dominant Position

An interesting question is whether two large firms who co-operate and together control a market can each be said to be in a dominant position. In such a situation neither firm can be said to be "constrained by the conduct of competitors" in the market. An example is provided by the New Zealand film exhibition market where the two major firms, Amalgamated and Kerridge Odeon have an arrangement so that they are not in direct competition for films.[53] Each has exclusive rights to receive films from certain of the major overseas distributors. Arguably each firm is "in a position to exercise a dominant influence over the production, acquisiton, supply, or price of goods or services" in the market due to its relationship with the other. To hold firms like Kerridge Odeon and Amalgamated to be "dominant" is also consistent with the objectives of section 36. Since they are not subject to effective competition action taken by one of them to exclude a smaller competitor is as detrimental to the consumer as similar action taken by a solitary dominant firm.

However, section 36 does not apply to exclusionary actions taken *collectively* by a group of two or more firms or by a trade association on behalf of such a group. This is

49 e.g. *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty Ltd* (1978) 20 A.L.R. 129; *Ross Payne & Co* v. *Western Australian Lamb Marketing Board* (1983) A.T.P.R. 40-382; *Tytel Pty Ltd* v. *Australian Telecommunications Commission* (1986) A.T.P.R. 40-711; *Od Transport Pty Ltd* v. *Western Australian Government Railways Commission* (1987) A.T.P.R. 40-761; *Auckland Regional Authority* v. *Mutual Rental Cars (Auckland Airport) Ltd,* supra n.5.

50 Supra n.39.

51 Supra n.39, 43. See also *Goodman Fielder Ltd/Wattie Industries Ltd,* supra n.43, 12-13, 26-27, 57 (para 217).

52 e.g. *Goodman Fielder Ltd/Wattie Industries Ltd,* supra n.43, 19-20, 38-39, 47 (para 171), 49 (para 185), 58 (para 223), 61 (para 235).

53 Frankel "Exhibition and Distribution in New Zealand" (LL.B. (Hons.) Seminar, Victoria University of Wellington, June 1986); du Fresne "Movie Theatres in Chains" (N.Z. Listener, 27 October 1979), 14. This example is discussed in more detail by the writer in "Monopolisation: Section 36 of the Commerce Act 1986", supra n.1, 55-59.

because the group of firms or the trade association is not itself "a supplier or acquirer of goods or services" so as to come within the definition of dominant position in section 3(8).

The argument that a group of firms acting together could breach section 36 was raised in *Investment News Ltd* v. *Fourth Estate Ltd.*[54] In that case the four defendant companies refused to allow the plaintiff the right to exhibit its investment magazine at their Money Show. The plaintiff argued that the defendants had together used their dominant position (in the market for the publishing of investment magazines) for the purpose of preventing the plaintiff from competing with them.

Quilliam J. accepted that there was a serious question to be tried in relation to this argument. With respect, his Honour's conclusion appears erroneous as the defendants did not *collectively* publish any magazines. Not being the suppliers or acquirers of any goods or services in the market the defendants could not therefore be said to possess a dominant position under section 3(8). The defendants were, however, the joint suppliers of the right to exhibit at the Money Show. It might, therefore, have been possible to argue that the defendants' control *over the Money Show* resulted in their possessing a dominant influence over the market for investment magazines. This, however, seems most unlikely.[55] It is submitted, therefore, that the defendants' actions did not come within section 36 of the Commerce Act (although they might possibly have come within sections 27 or 29).

4. "In a Position to"

To be in a dominant position a firm must be "in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services" in a market. It is not necessary that the firm actually be exercising a dominant influence. It is sufficient that the firm be "in a position to" do so.

Australian case law holds that being in the position to dominate a market merely means having "the power" to dominate[56] and that a person can be "in a position to" dominate a market without having yet entered that market. The two most relevant cases are *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty Ltd*[57] and *Tytel Pty. Ltd.* v. *Australian Telecommunications Commission.*[58]

In the *Victorian Egg* case the Victorian Egg Marketing Board had statutory control of the wholesale market for eggs in Victoria. When a group of companies called Bartters Enterprises began selling eggs in Victoria the Board retaliated by engaging in price cutting activities in the Australian Capital Territory. Parkwood, the particular member of the Bartters group against whom the price cutting was aimed, argued that the Board's conduct contravened the Australian equivalent of section 36. Parkwood obtained an interim injunction largely on the ground that the Board were dominant in the Victorian

54 Supra n.13, 4.
55 *Interface Group Inc* v. *Gordon Publications Inc*, supra n.46.
56 *Trade Practices Commission* v. *Ansett* (1978) 20 A.L.R. 31, 45.
57 Supra n.49.
58 Supra n.49.

market and had unlawfully used their power in Victoria for the purpose of damaging Parkwood in the ACT market.[59] However, Brennan J also seemed prepared to accept as justifying an interim injunction an argument that the Board was in a position to control the ACT market even although it did not presently control that market.[60] Bowen CJ also referred to the possible argument that the Board's trading strength was such as to put it in a position to control the ACT market but rejected the argument because it had not been raised by counsel.[61]

The argument that a firm may be dominant in a market in which it is not yet established has been more clearly accepted in the *Tytel* case. In that case the respondents, Telecom, were set up by statute as the sole operator of the telecommunications network in Australia. It also rented and sold telephones to the public for attachment to the telecommunications service. Until June 1985, however, Telecom did not compete in the market for "premium" telephones (top of the range/multi-featured models). When Telecom did enter the market with a very low-priced model Tytel Pty Ltd argued that Telecom had thereby contravened the Australian equivalent of section 36. Jackson J was prepared to accept that Telecom were in a position to control the market for premium telephones even though they had only just entered that market. His Honour set out the arguments of Tytel Pty Ltd and his conclusions as follows:[62]

> "The applicants contend that at all times the respondent was in a position substantially to control the market for premium telephones, even prior to its entry to it. They support this contention by pointing to the evidence that the respondent 'had in place' a nationwide distribution organization with many 'Telecom Business Offices' throughout Australia, and to a number of matters deriving ultimately from the respondent's position under the Telecommunications Act. Thus it is pointed out that . . . the respondent is the sole operator of the telecommunications network in Australia, that its approval is required before its competitor's telephones may be attached to that system, and any such attachment is on terms and conditions fixed by the respondent . . . The respondent, it is also pointed out, is not subject to taxation . . . and thus is placed in a financial position potentially superior to that of its competitors. Further it is contended that the respondent has 'unlimited financial resources' and is thus able to withstand losses or lower profit levels far longer than its competitors.
>
> Whether it is ultimately proper to take all these matters into account is a matter to be determined at the final hearing. It seems to me clear, however, that in relation to the market for premium telephones there is sufficient [evidence] on which one might form the view that the respondent was in a position to control that market *either prior to or immediately upon entry into it.*"

It will, however, often not be essential to argue that a firm is dominant in the market it is just entering to establish that it has breached section 36. A firm will also be held to have breached section 36 if it is dominant in a market in which it *is* established and is

59 Supra n.49, 138.
60 Supra n.49, 147-148.
61 Supra n.49, 136-137.
62 Supra n.49, pp.47, 780-47, 781 (emphasis added).

using its power in that market to deter competition in the market it is just entering. Section 36 prohibits the use of a dominant position in a market to deter, restrict or eliminate traders in "that *or any other market*".

Both cases referred to above can be analysed in this way. The Victorian Egg Marketing Board were dominant in the Victorian egg market and were held to have used this power to damage Parkwood in the ACT egg market. In the *Tytel* case Telecom could also be said to have used their dominance in the telecommunications market to harm competitors in the premium telephone market.

This approach is not available, however, in the case of a firm which has market power in Australia and is now entering the New Zealand market for the first time. The firm cannot be said to be using its power in the Australian market to deter competitors in New Zealand. Such an argument is precluded by section 3(1) which defines market as "a market . . . within New Zealand". The Australian firm can only be caught under section 36 if it is in fact in a position to dominate the *New Zealand* market. This possibility was in fact adverted to by the Government in the Parliamentary debates on the Commerce Bill. According to Clive Matthewson:[63]

> "[I]f a firm is attacked in the [New Zealand] market by another firm, which by virtue of its strengths from outside the market can dictate what happens in the market, that firm can be judged as having a dominant position . . ."

It may be possible then for New Zealand firms to bring actions against large Australian concerns who are not yet established in New Zealand. Such an argument should only succeed if the Australian firm has such power that it truly can gain and retain dominance of the New Zealand market.[64] Nevertheless, even where the argument is not strictly justified, the threat of action could be a powerful bargaining tool for New Zealand firms faced with the entry of major Australian firms after the removal of import controls.[65]

III. "USE" OF A DOMINANT POSITION

For a dominant firm to have contravened section 36 it must have "used" its dominant position for one of the prohibited purposes. The word "use" was substituted for the wording "take advantage of" in the equivalent Australian section. There was some concern about this change.[66] It is submitted, however, that the change is not substantive. It is true that some early Australian cases saw the words "take advantage of" as involving an element of "conscious predatory conduct".[67] However, this is due to

63 N.Z. Parliamentary Debates Vol. 468, 1985; 8595.

64 cf *International Distribution Centres Inc* v. *Walsh Trucking Co Inc* 812 F.2d 786, 792, (1987).

65 The writer discusses this argument in more detail in "Monopolisation: Section 36 of the Commerce Act 1986", supra n.1, 47-55.

66 See for example submissions to Commerce and Marketing Select Committee by Lion Breweries Ltd, paras 3.14-3.15; Russell McVeagh McKenzie Bartleet & Co, para 3.2.7; Motor Vehicle Manufacturers' Association, para 4.7.

67 *Top Performance Motors Pty Ltd* v. *Ira Berk (Queensland) Pty Ltd*, supra n.12; *Ausfield Pty Ltd* v. *Leyland Motor Corporation of Australia Ltd* (1977) 14 A.L.R. 449; *Trade Practices Commission* v. *C.S.B.P. & Farmers Ltd* (1980) 53 F.L.R. 135.

the original section 46 of the Trade Practices Act 1974 (Aust.) not having an express requirement of predatory "purpose". The courts felt it necessary to read such a requirement into the words "take advantage of" to avoid penalising the pro-competitive conduct of dominant firms.[68] Now, however, the requirement of "purpose" is expressly included as part of both Australian and New Zealand provisions, removing the need for that interpretation of "take advantage of".

To the extent that there is any ambiguity the Parliamentary debates indicate that no change of substance was intended. At the committee stage of the Commerce Bill the opposition moved an amendment to adopt the Australian wording. This was defeated. The government saw the words "take advantage of" as superfluous and stated that the legal effect of the section would be the same as under the Australian wording.[69]

The most obvious "uses" of a dominant position to deter competition are where a dominant firm makes use of the fact that its customers cannot survive without its business. For example a dominant firm "uses" its position of dominance when it forces its customers not to deal with the dominant firm's competitors.[70] The customers of the dominant firm have no choice but to agree as the dominant firm's business is essential to them.

Another example is where the dominant firm refuses to deal with a trader that it wants out of the market. That trader will no longer be able to survive in the market because the dominant firm's business was essential to it. In this situation also the dominant firm has been able to eliminate a trader from the market by "use" of its dominant position.[71]

The situations just described, however, are not the only situations that can come within section 36. If they were, the effectiveness of the section would be greatly reduced. It is submitted, therefore, that a dominant firm will also be using its dominant position if it is taking advantage of an important aspect of its market power such as its financial strength or its possession of important technical knowledge. Some of the important "uses" of a dominant position are considered below.

A. The Use of Economic Power

The most common use of economic power to deter competition is the practice known as "predatory pricing". It is generally accepted that price-cutting by a dominant firm engaged in for the purpose of deterring competitors can constitute a breach of section 36. It would not, however, be consistent with the economic objectives of section 36 for a dominant firm to be penalised for merely making use of its cost efficiencies in order to

68 Donald and Heydon *Trade Practices Law,* supra n.38, para. 5.4.1 (p.230).

69 N.Z. Parliamentary Debates Vol. 470, 1986; 1180. However see now *Queensland Wire Industries Pty Ltd* v. *The Broken Hill Proprietary Company Ltd* where Pincus J interpreted the words "take advantage of" market power as involving a "misuse" of market power; supra n.45, p.48, 819. In New Zealand whether a use of market power is a misuse depends solely on the dominant firm's purpose.

70 *Berkey Photo Inc.* v. *Eastman Kodak Co,* supra n.7, 274-275.

71 *Berkey Photo Inc.* v. *Eastman Kodak Co,* supra n.7, 284.

price low. The lowering of prices to marginal cost is in fact a result that competition laws seek to obtain.[72]

Such pricing need not be penalised under section 36. The pricing of goods equal to, or above, cost is not a "use" of market power. When a dominant firm reduces its prices to cost it is not using its greater financial resources to price low, it is simply taking advantage of its cost efficiencies. Therefore if a dominant firm is not pricing below cost it will not breach section 36 even if it intends by such pricing to eliminate its less efficient competitors.

Where, however, a dominant firm prices below cost it is no longer just taking advantage or its cost efficiencies to price lower. Instead it is relying on an aspect of its market power, its financial strength.

Whether or not a firm is pricing below marginal cost has sometimes been seen as an indication of whether the firm has a predatory purpose.[73] Pricing below cost is not profitable and presumably a firm is only willing to incur the losses that result if it believes that it will profit in the long term. Pricing below marginal cost may therefore be an indication that a firm is seeking to eliminate its competitors so as to allow it to earn monopoly profits in the future. It is submitted, however, that the marginal cost test should be seen as more than just an indication of whether a predatory "purpose" does or does not exist. Instead pricing above marginal cost should always be held legal whatever a firm's purpose. In that situation the firm has only "used" its cost efficiencies, not its dominant position.

In the United States recent cases suggest that the marginal cost test is more than just an indicator of purpose and that the existence of an "intent to harm" is insufficient in itself to establish a breach of section 2 of the Sherman Act.[74] This interpretation is, it is conceded, largely untested under either section 36 or the section's Australian equivalent. The early Australian cases focus exclusively on the question of whether a predatory purpose existed.[75] However those cases were decisions on the Australian section in its original form i.e. before it was amended to include both "take advantage of" (or "use") and "purpose" requirements. Now that the two requirements are separate it is more likely that the Australian courts will recognise the argument that pricing above cost is not a "taking advantage" or "use" of market power. The most recent Australian predatory pricing case, *Od Transport Pty Ltd* v. *Western Australian*

72 Samuelson *Economics* (10 ed., McGraw-Hill Book Company, New York, 1976) Chap 25; *Northeastern Telephone Co* v. *American Telephone and Telegraph Co,* supra n.7, 87-88; *California Computer Products Inc.* v. *International Business Machines Corp* 613 F.2d 727, 742-743 (1979); *Barry Wright Corp* v. *ITT Grinnell Corp* 724 F.2d 227, 231-236 (1983).

73 Department of Trade and Industry "Clause 36, Predatory Pricing and Price Cutting" (Wellington, 1985) para 2(a); *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty Ltd,* supra n.49, 137-138; *O. Hommel Co* v. *Ferro Corp* 659 F.2d 340, 347 (1981).

74 *Barry Wright Corp* v. *ITT Grinnell Corp,* supra n.72, 232; *Telex Corp* v. *IBM Corp* 510 F.2d 894, 925-926 (1975).

75 *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty Ltd,* supra n.49; *Trade Practices Commission* v. *C.S.B.P. & Farmers Ltd,* supra n.67.

Government Railways Commission[76] does contain indications that proving below cost pricing will be necessary to establish a claim of predatory pricing.[77] However, until the matter is definitively decided dominant firms will be advised to watch all pricing policies which might affect their smaller competitors even if their prices do not actually fall below cost.

Another possible use of economic power is suggested by *Williams* v. *Papersave Pty Ltd.*[78] In that case the respondent had a 60 percent share of the market for the collection and treatment of waste computer paper in the inner Sydney metropolitan area. The applicant, an employee of the respondent, entered into negotiations for the lease of certain premises in which he hoped to establish a business in competition with the respondent. A director of the respondent discovered the applicant's intentions from a third person. The director then persuaded the agent for the lessor of the premises to lease the premises to the respondent rather than the applicant.

The applicant sought an injunction restraining the respondent from securing the lease on the ground that in so doing the respondent was breaching section 46 of the Trade Practices Act. Sheppard J held that the respondent in deciding to take a lease of the property had a purpose of preventing the applicant from entering the market or deterring him from engaging in competitive conduct. However section 46 had not been contravened because the respondent had not "taken advantage of" its market power. Sheppard J placed some relevance on the fact that the terms of the lease offered to the respondent were the same as those offered to the applicant. He stated "this is not a case where a corporation has endeavoured to induce a lessor to give it a lease by offering terms and conditions more advantageous to the lessor than those proposed by the other party".[79] It is submitted that the respondent would have been "taking advantage of" or "using" its economic power had it secured the lease by offering the lessor terms that were unrelated to the true value of the lease.

American Tobacco Co v. *U.S.*[80] illustrates a similar "use" of economic power. In that case conspiring tobacco manufacturers began making large purchases of cheaper tobacco in response to competition from rivals making cheap cigarettes. The effect of this was to deprive these rivals of their raw materials and force up the price of the raw materials so that the production of cheap cigarettes became uneconomic.

B. The Use of Statutory Advantages

In the case of statutory bodies an important aspect of market power may consist of statutory rights and privileges. The use of such advantages to deter competition may be a use of a dominant position. The best example is provided by *Tytel Pty Ltd* v. *Australian Telecommunications Commission.*[81]

76 Supra n.49.
77 Supra n.49, pp.48,246 and 48,249.
78 Supra n.31.
79 Supra n.31, p.48,525.
80 Supra n.45.
81 Supra n.49.

In that case the respondents (Telecom) had a statutory exemption from taxes. This meant, inter alia, that Telecom did not have to pay customs duty on telephones and other equipment which it imported. However, in order to avoid criticism that this exemption gave it an unfair competitive advantage Telecom commonly calculated its prices for the sale of imported goods as if customs duty had in fact been paid. The adjustment in price to take this into account was called "competitive loading".

When Telecom first entered the market for premium telephones it did not follow this practice but instead made use of its exemption from customs duty to price an imported telephone considerably lower than its competitors could match. It was held that there was a serious question as to whether this conduct breached section 46 of the Trade Practices Act.

Later Telecom in fact did increase the price of its telephone so as to include an element of competitive loading. Jackson J indicated that this higher price was one that Telecom could properly charge even though the applicants could not match this price either.[82] It appears, then, that Jackson J was of the opinion that as long as Telecom took account of its costs and made a competitive loading adjustment then it was not "taking advantage of" or "using" its market power. A failure to take into account competitive loading, however, would be a "use" of market power.

The *Tytel* case serves as a warning to those government controlled enterprises which are in dominant positions in their respective markets. Such enterprises risk breaching section 36 if they make use of any statutory privileges they possess for the purpose of deterring competition.

C. The "Use" of Legal Rights

There is some Australian authority for the proposition that a firm is not "using" its market power when all it is doing is taking advantage of a legal right to engage in certain conduct. The two contexts in which such arguments have been raised are the enforcement of intellectual property rights and the use of contractual rights of termination.

1. The Enforcement of Intellectual Property Rights

Warman International v. *Envirotech Australia Pty Ltd*[83] concerned the misuse of confidential information in the market for slurry pump parts. Warman, who were dominant in the market possessed a great deal of important technical information relating to the manufacture of slurry pump parts. Some ex-employees of Warman, however, were using this information for the purposes of Envirotech.

Warman brought proceedings against Envirotech alleging that:

(i) Envirotech had engaged in misleading or deceptive conduct[84] by representing that certain drawings were the property of Envirotech when in fact Warman had copyright in the drawings.

82 Supra n.49, p.47,784.

83 Supra n.44.

84 Under s.52 of the Trade Practices Act 1974 (Aust.) the equivalent of s.9 of the Fair Trading Act 1986.

(ii) Envirotech had infringed the copyright of Warman in certain Warman manuals and drawings.

(iii) Envirotech's use of the manuals and drawings constituted a misuse of confidential information.

Wilcox J held that the applicants had made out a prima facie case in respect of all of these claims. In response to Warman's claims, however, Envirotech submitted that the prosecution of the action against them constituted a contravention of section 46 of the Trade Practices Act.

Envirotech's argument could, it is submitted, have been rejected on the basis that Warman did not have a predatory purpose. Rather than simply bringing the action as a way of eliminating Envirotech from the market, Warman instead brought the action with the genuine purpose of protecting confidential information which was being misused. Wilcox J, however, rejected Envirotech's argument on a different ground altogether. In his view when Warman brought the action they were not "taking advantage of" or "using" their market power at all. His Honour said:[85]

> "There is no doubt that Warman enjoys a dominant role in the Australian slurry pump market and in the market for replacement parts for its pumps . . . This dominance may properly be described as 'a substantial degree of power' in the markets for pumps and for replacement parts. But in these proceedings it does not seek to take advantage of that power. Rather it seeks to take advantage of rights which it claims in respect of particular documents. Those rights depend upon the nature and source of the information in the documents. The rights, and Warman's position in this court would be exactly the same if it held only 10% of the market; indeed if it ceases altogether to manufacture pump parts".

This reasoning ignores the fact that the existence and degree of market power can depend upon the possession of technical information. Warman's possession of technical information was in fact an important aspect of its market power. It is therefore submitted that by taking advantage of its right to protect that technical information Warman was taking advantage of its market power.

At the least, however, the differences between the Australian and New Zealand provisions make the reasoning in *Warman* inapplicable. Section 3(8)(a) of the New Zealand Commerce Act expressly provides that a firm's possession of "technical knowledge" is relevant in assessing whether it is in a dominant position. It is submitted, therefore, that a firm's use of its technical knowledge can be considered a "use" of a dominant position, the legislature having indicated that technical knowledge can be an important aspect of such a position.

Further, section 36(2) provides an limited exception from section 36 in respect of the enforcement of intellectual property rights. The very presence of section 36(2) indicates that the legislature contemplated that the enforcement of intellectual property rights could be a "use" of a dominant position.

85 Supra n.44, p.47,827.

2. The Use of Contractual Rights

Top Performance Motors Pty Ltd v. *Ira Berk (Queensland) Pty Ltd*[86] concerned the termination by the respondent of the Datsun dealership held by the applicant. Smithers J held that the termination of the dealership agreement "depended not upon the respondent's control of the market but upon the terms of the agreement".[87] The dealership agreement gave each party power to terminate it on thirty days notice. It was this contractual provision, said Smithers J, that was taken advantage of, not the respondent's market power.

The approach of Smithers J has been criticised.[88] Despite that criticism, however, the approach was expressly approved of and followed in *Ah Toy J Pty Ltd* v. *Thiess Toyota Ltd.*[89] In New Zealand the argument has already been made in two cases. In *Bond & Bond Ltd* v. *Fisher & Paykel Ltd*[90] the raising of the argument did not prevent Barker J from holding that there was a serious question as to whether Fisher & Paykel had breached section 36. The argument was also considered in *Auckland Regional Authority* v. *Mutual Rental Cars (Auckland Airport) Ltd.*[91]

The Auckland Regional Authority had agreed with Avis and Hertz that only two rental car companies would be allowed to operate at Auckland airport. It refused to allow Budget to operate at Auckland airport and argued it was precluded from doing so by reason of its contracts with Avis and Hertz. Budget argued that the Auckland Regional Authority had used its market power for the purpose of deterring competition in the Auckland airport rental car market. In accepting Budget's argument Barker J. referred to the *Ah Toy* case but stated that that case had no application where a contractual right was being exercised for an anti-competitive purpose.[92]

It would seem, then, that the Australian approach will not be followed in New Zealand. It is submitted that the Australian approach is incorrect and that the exercise of contractual rights cannot sensibly be looked at in isolation from the circumstances in which they were brought into being or the circumstances in which they were exercised. A contractual provision may only have been imposed because of one party's market power. Secondly, why should a dominant firm who terminates supply to an existing dealer pursuant to a dealership contract be in a better position than a dominant firm who refuses to supply a trader requesting supply for the first time? In either case the dominant firm has the power to eliminate or restrict from the market the trader wanting supply. If the dominant firm uses that power for that specific purpose then it should come within section 36 whether it purports to rely on a contractual provision or not.

86 Supra n.12.

87 Supra n.12, 472.

88 Walker "Case note on *Top Performance ;Motors Pty Ltd* v. *Ira Berk (Queensland) Pty Ltd*" (1976) 50 A.L.J. 89, 92; Kewley "S.46: Monopolisation" (Trade Practices Lectures, Monash University Faculty of Law, Melbourne, 1975), 19.

89 Supra n.12, 275.

90 Supra n.13, 283.

91 Supra n.5.

92 Supra n.5, 80-81. See now also *Queensland Wire Industries Pty Ltd* v. *The Broken Hill Proprietary Company Ltd*, supra n.45, p.48, 817.

IV. THE REQUIREMENT OF "PURPOSE"

To contravene section 36 a dominant firm must have the "purpose" of eliminating, deterring, or restricting another trader. The purpose of eliminating, deterring or restricting need not be the only purpose of the dominant firm's conduct. It must, however, be a "substantial" purpose of that conduct.[93]

Purpose means goal or objective. The intention to do an act which it is known will have the consequence of eliminating a trader from the market is not enough. Instead what is required is "that the conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences."[94]

A dominant firm which refuses to supply an uncreditworthy retailer does not then have the purpose of eliminating that retailer. The necessary consequence of the dominant firm's action may have been that the retailer can no longer trade in the market. The dominant firm's objective, however, was not to eliminate the retailer but to avoid incurring bad debts.

It is convenient to discuss the requirement of purpose in relation to each of the major practices which are likely to come within section 36.

A. Predatory Pricing

Pricing below marginal cost can, for reasons discussed earlier in this article, indicate the existence of a predatory purpose. However, such pricing need not necessarily be motivated by a desire to eliminate competitors or restrict potential competitors. It may be due to other non-predatory reasons such as the disposal of an unwanted surplus of stock. For this reason pricing below marginal cost should be seen only as a prima facie indication that a predatory purpose exists, not as conclusive evidence of such a purpose.

Other indications as to whether a predatory purpose exists are:

(i) Whether the price-cut is of a temporary or permanent nature. If a dominant firm only lowers its prices for as long as it is necessary to eliminate a competitor and then promptly raises its prices a predatory purpose can properly be inferred.[95] Such a purpose cannot be inferred where a dominant firm's pricing continues for some years and where the elimination of the dominant firm's competitors would be unlikely to allow the dominant firm to recover the losses suffered during the period of low pricing.[96]

(ii) Whether the price-cut is limited just to those geographical areas where the dominant firm faces competition[97] or is selective in that the lower price is only

93 Section 2(5)(b) Commerce Act 1986.

94 Donald and Heydon *Trade Practices Law,* supra n.38, para 5.4.1 (p.229) cited in *Trade Practices Commission* v. *C.S.B.P. & Farmers Ltd,* supra n.67, 152.

95 *U.S.* v. *Corn Products Refining Co* 234 F. 964, 1012-1013 (1916); *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty Ltd,* supra n.49, 137.

96 *Matsushita Electric Industrial* v. *Zenith Radio Corp* 106 S.Ct. 1348 (1986).

97 e.g. *Borden, Inc* v. *Federal Trade Commission* 674 F.2d 498 (1982).

offered to customers of the dominant firm's competitor.[98] In either case the natural inference is that the price-cut is aimed at eliminating the competition faced by the dominant firm.

(iii) The timing of the announcement of the price-cut and its calculation. A good illustration is the case of *Trade Practices Commission* v. *C.S.B.P. & Farmers Ltd.*[99] In that case Rural Traders Co-operative (W.A.) Ltd (R.T.C.) arranged for a campaign to advertise the sale of urea at $145 per tonne, a price considerably less than the $178.70 per tonne charged by the market leaders, C.S.B.P. The day befor R.T.C.'s advertising campaign was due to start, however, C.S.B.P. announced a reduction of its price to $144.60. Fisher J held that there was no proof that C.S.B.P's conduct had been motivated by a desire to eliminate R.T.C. from the market.[100] One would have thought, however, that the timing of the price cut and the fact that the new price undercut R.T.C. by only forty cents supported an inference that C.S.B.P.'s purpose was to push R.T.C. out of the market.[101]

(iv) Whether the price-cutting firm had previously tried to secure the exit from the market of the competitor affected by the price-cut. Previous attempts to persuade[102] or threaten[103] the competitor into leaving the market might indicate that the price-cutting firm had a predatory purpose.

B. Refusals to Supply

A refusal by a dominant firm to supply another trader should only contravene section 36 if the refusal is truly motivated by a desire to eliminate or restrict that trader or deter it from engaging in competitive conduct. A refusal or termination of supply for reasons such as poor performance[104] or credit rating[105] is not motivated by such anti-competitive purposes. Nor is a refusal or termination of supply forced on a supplier by union pressure.[106]

98 e.g. *Engineering and Chemical Supplies (Epsom and Gloucester) Ltd* v. *AKZO Chemical BV* [1986] 3 C.M.L.R. 273.

99 Supra n.67.

100 Supra n.67, 155.

101 See Ransom "Monopolization and Price-Fixing — Good Cases Making Bad Law; Australian-United States Parallels and a Suggested Solution" (1981) 12 F.L.R. 308, 320-323; Trade Practices Commission *Annual Report,* 1979-1980, 97-99.

102 e.g. *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty Ltd,* supra n.49.

103 e.g. *Engineering and Chemical Supplies (Epsom and Gloucester) Ltd* v. *AKZO Chemical BV,* supra n.98.

104 e.g. *Top Performance Motors Ltd* v. *Ira Berk (Queensland) Pty Ltd,* supra n.12; *Becker* v. *Egypt News Company Inc* 713 F.2d 363 (1983). Cf *Mark Lyons Pty Ltd* v. *Bursill Sportsgear Pty Ltd* (1987) ATPR 40-809 where Wilcox J rejected an argument that a refusal to supply was necessary to preserve the image of the respondent's product and ensure adequate after sales service.

105 e.g. *Tavernstock Pty Ltd* v. *John Walker & Sons Ltd* (1980) F.L.R. 423; *Trace X Chemical, Inc* v. *Canadian Industries, Ltd* 738 F.2d 261 (1984) cf *General Industries Corp* v. *Hartz Mountain Corp* 810 F.2d 795, 804 (1987).

106 *Ausfield Pty Ltd* v. *Leyland Motor Corporation of Australia Ltd,* supra n.67.

It should be remembered that the objective of section 36 is not to deal with fairness as between individual traders. Rather it is to promote competition by preventing dominant firms from using their power for the purpose of eliminating or deterring competitors. The possibility, however, that a court will feel overly sympathetic to a trader refused supply should not be discounted. This may have been what happened in *MacLean* v. *Shell Chemical (Australia) Pty Ltd.*[107]

In that case the respondent had agreed to supply cypermethrin to the applicants on the basis that the applicants would enter into a joint venture agreement with the respondent for the production of a certain type of insect killer. However, a dispute arose between the parties as to whether the respondent had breached its obligations under the joint venture agreement. The applicants brought a court action against the respondents in respect of this alleged breach. A conference was held between the parties at which a representative of the respondent allegedly said that the respondent was unhappy about the bringing of the court action and that the applicants should bear in mind the consequences of an effective cut-off in supply of cypermethrin. Soon after, the respondent informed the applicant that they would in fact only supply under certain conditions. These conditions were not commercially viable to the applicants.

The applicants then brought injunctive proceedings arguing that the respondent was in breach of section 46. Toohey J held that the applicants had made out a sufficient case to be granted an interim injunction.

The respondent's action, however, was not motivated by a desire to monopolise the market for insect killers by driving the respondent out. Instead, its action was motivated by dissatisfaction with the conduct of the applicants which had caused a deterioration in the relationship between the parties. The refusal to supply in *MacLean* should not, therefore, have been held to breach section 46 of the Trade Practices Act. The possibility of a similar approach being taken in New Zealand must, however, be taken into account in advising dominant firms as to their potential liabilities under section 36 of the Commerce Act.

It is submitted that there are only two main types of refusal to supply which should be considered to be a breach of section 36. The first involves a situation where the dominant firm also competes or wishes to compete in the same market as the trader refused supply. A good example is the American case of *Eastman Kodak Co* v. *Southern Photo Materials.*[108] Kodak had a monopoly position as a manufacturer of photographic materials. In addition it started acquiring independent dealers in Atlanta, Georgia. Southern Photo, however, turned down an offer by Kodak to buy its business. Kodak then refused to continue to sell to Southern Photo at dealers' discounts. Such conduct would, it is submitted, fall within section 36. Kodak was using its dominance in the market for the manufacturing of photographic materials for the purpose of eliminating Southern Photo from the retail market.

107 Supra n.12.

108 273 U.S. 359 (1927). See also *Otter Tail Power Co* v. *U.S.*, supra n.46; *City of Mishawaka, Indiana* v. *American Electric Power Company, Inc* 616 F.2d 976 (1980); *Queensland Wire Industries Pty Ltd* v. *The Broken Hill Proprietary Company Ltd,* supra n.45.

The second type of refusal to supply which contravenes section 36 is where a dominant firm refuses to supply a trader who has done business with a competitor of the dominant firm. A good example is provided by *Bond & Bond Ltd* v. *Fisher & Paykel Ltd.*[109] Fisher & Paykel have exclusive dealing arrangements with their dealers which prohibit the dealers from stocking other brands of whitegoods. In October 1986, however, Bond & Bond opened premises called "Electric City" in which they sold whitegoods of other manufacturers alongside those of Fisher & Paykel. In protest at this action Fisher & Paykel refused to supply its whitegoods for the Electric City shop or to deliver whitegoods to Bond & Bond's warehouse. It was still willing to deliver whitegoods directly to Bond & Bond's shops other than Electric City.

Barker J held that there was a serious question as to whether Fisher & Paykel had contravened section 36. In the opinion of the writer Fisher & Paykel's conduct was a blatant contravention of section 36. Fisher & Paykel's self-confessed motive in refusing to supply Electric City was to prevent Bond & Bond from dealing with other manufacturers. Fisher & Paykel's conduct, then, at the very least had the purpose of "deterring" Bond & Bond from "engaging in competitive conduct". It is also arguable that a substantial purpose of Fisher & Paykel's conduct was to eliminate or restrict its own competitors and potential competitors in the market for the manufacture of whitegoods.

A final question relating to refusals to supply by a dominant firm is whether a dominant firm can breach section 36 by refusing to license an important patent. In *SCM Corp* v. *Xerox Corp*[110] the U.S. Court of Appeals (Second Circuit) stated that section 2 of the Sherman Act did not require a patent holder "to forfeit the exclusionary power inherent in his patent".[111] The same is probably true of our section 36. If a refusal to license a patent is motivated by a desire to restrict or eliminate a competitor (as will often be the case) the refusal appears to come within section 36(1). However, it is central to the patent system that a patent holder can only be forced to license his or her patent in the limited circumstances set out in section 46 of the Patents Act 1953. It is submitted, therefore, that the patent holder by enforcing his or her right of exclusivity merely "enforces or seeks to enforce any right under or existing by virtue of . . . [his or her] patent . . ." in terms of the exception in section 36(2).

C. Refusals to Allow Access to Essential Facilities

There are several United States decisions where refusals to allow access to essential

109 Supra n.13. See also *General Industries Corp* v. *Hartz Mountain Corp,* supra n.105; *United Brands Co* v. *Commission of the European Communities,* supra n.41. A third type of refusal to supply which contravenes section 36 occurs when a dominant suppliers refuses to supply a retailer whose methods provide a competitive threat to other retailers: *Mark Lyons Pty Ltd* v. *Bursill Sportsgear Pty Ltd,* supra n.104.

110 645 F.2d 1195 (1981).

111 Ibid, 1204. See also Pengilley "Lowering the Monopoly Power Threshold: An Evaluation of the Australian Monopolization Amendments and their Likely Results", supra n.10, 206 citing, inter alia, *U.S.* v. *Westinghouse Electric Corp* 648 F.2d 642 (1981).

facilities have been held to contravene section 2 of the Sherman Act.[112] An "essential facility" is one which is "incapable of duplication and circumvention and to which others must have access if they are to compete in a given market".[113] The United States decisions hold that a firm which competes in a market and which controls a facility essential for competition in that market cannot exploit its control over that facility by unreasonably refusing to allow its competitors access to the facility.

The essential facility line of cases is well illustrated by *Otter Tail Power Co.* v. *U.S.*[114] Otter Tail generated, wholesaled and distributed at retail electric power in Minnesota, North Dakota and South Dakota. It owned almost all of the areas transmission lines, which were essential for moving power to local distribution points. Two towns to which Otter Tail distributed power at retail decided to replace Otter Tail with municipal distribution systems. Otter Tail, however, refused to provide power at wholesale rates or allow use of its transmission lines to enable power to be transmitted from other wholesalers. The Supreme Court held that Otter Tail were in breach of section 2 of the Sherman Act both in refusing to sell power to the towns at wholesale rates and in refusing to allow access to its transmission lines.

In New Zealand a refusal to allow access to essential facilities can come within section 36 if the dominant firm concerned had the necessary predatory "purpose".

An example under the Australian equivalent of section 36 is the case of *Berndon Investments Pty Ltd* v. *Fitzroy Island (S.A.) Pty Ltd.*[115] In that case the applicant and the respondent both operated day cruises from Cairns to nearby islands and other locations around the Barrier Reef. In addition to operating cruises the respondent also controlled access to the only jetty on Fitzroy Island. The use of this jetty was important to a business of conducting tours to Fitzroy Island and loading passengers there. By refusing access to the jetty the respondent could prevent its competitors from running tours to the island. In 1983 the respondent did in fact refuse the applicant access (except on unreasonable conditions). Fitzgerald J held that there was a serious question to be tried as to whether a substantial purpose of the respondent was to eliminate the applicant or deter it from engaging in competitive conduct. His Honour did not however grant the applicant relief because he was not satisfied that there was a separate market for tours to Fitzroy Island alone.

In New Zealand the United States essential facility cases were referred to with approval in *Auckland Regional Authority* v. *Mutual Rental Cars (Auckland Airport) Ltd.*[116] To operate in the Auckland Airport rental car market required the granting of a

112 See for example *U.S.* v. *Terminal Railroad Association of St. Louis* 224 U.S. 383 (1912); *Gamco* v. *Providence Fruit and Produce Building* 194 F.2d 484 (1952); *Otter Tail Power Co* v. *U.S.*, supra n.46. *Aspen Skiing Co* v. *Aspen Highlands Skiing Corp* 472 U.S. 585 (1985) can also be explained as an essential facility case: *Olympia Equipment Leasing Co* v. *Western Union Telegraph Co*, supra n.6, 377.

113 *Auckland Regional Authority* v. *Mutual Rental Cars (Auckland Airport) Ltd*, supra n.5, 76.

114 Supra n.46.

115 Supra n.18.

116 Supra n.5. For the sequel to this case see *Henderson Rental Cars Ltd* v. *Auckland Regional Authority* (1987) Unreported, Auckland Registry, CP 1485/87.

licence by the Auckland Regional Authority. The Auckland Regional Authority granted licences to Avis and Hertz on the basis that no other licences were granted. By restricting the number of licences in this way the Auckland Regional Authority maximised the revenue it received. Barker J accepted Budget's argument that by refusing to grant licences to other rental car companies the Auckland Regional Authority was breaching section 36.

The case is different from most of the United States cases[117] and the *Berndon* case in that the Auckland Regional Authority did not itself compete in the market to which it controlled access. It is similar, however, in that the Auckland Regional Authority set out to deter competition in that market. The Auckland Regional Authority's main purpose was to maximise revenue but a substantial purpose of its conduct was to restrict competition so as to allow it to maximise revenue. It is therefore submitted that Barker J was correct in holding that the Auckland Regional Authority had breached section 36.

D. Exclusive Dealing and Related Practices

The exclusive dealing arrangements of Fisher & Paykel have been referred to above. It was not argued in the *Bond & Bond* case that Fisher & Paykel's exclusive dealing arrangements in themselves breached section 36. It seems almost certain, however, that Fisher & Paykel's exclusive dealing arrangements do breach section 36. They do if a substantial purpose of Fisher & Paykel was to prevent the entry of competitors (by closing off from them potential outlets for their products) and/or to deter the dealers from engaging in competitive conduct (by preventing them from dealing with the competitors of Fisher & Paykel). It is likely that such purposes were present (although combined with other purposes e.g. ensuring better display of Fisher & Paykel products).

It is likely that the exclusive dealing arrangements of other dominant firms will be similarly at risk under section 36. Also at risk will be other practices similar to exclusive dealing. One such practice involves the use of "fidelity rebates". Under this practice dealers are rewarded for dealing solely with a particular supplier by the giving of cash rebates. An example is *O'Brien Glass Industries Ltd.* v. *Cool and Sons Pty Ltd.*[118] In that case O'Brien was in a dominant position in the wholesale market for windscreens within a radius of 100 miles of Wagga. O'Brien offered fidelity rebates to retailers who agreed to purchase most of their requirements of windscreens from it. The purpose of this scheme seems to have been to eliminate O'Brien's major competitor, Bradley Bros. Pty. Ltd.[119] The applicant (Cools) was in fact a retailer who had not received the fidelity rebates. O'Brien was found to have breached sections 47 (exclusive dealing) and 49 (price discrimination) of the Trade Practices Act. The comments of Fox J, however,

117 cf *Hecht* v. *Pro-Football Inc* 570 F.2d 982 (1977) where, however, the essential facility doctrine was argued only in relation to section 1 of the Sherman Act not section 2.

118 (1983) 48 A.L.R. 625. See also *Hoffmann-La Roche* v. *Commission of the European Communities,* supra n.29; *U.S.* v. *Corn Products Refining Co,* supra n.95, 979-980.

119 Supra n.118, 632.

indicate that O'Brien could also have been held to breach section 46 (and our section 36). His Honour said:[120]

> "The finding is that [O'Brien] required retailers who wanted the best price to purchase most of their supplies from it. There can be no doubt that there was a purpose in this requirement. It was to coerce retailers into dealing with it and not, except to a limited extent, its competitors. The tendency was to lower the forces of competition in the market by reducing the capacity of retailers to choose between sources of supply, to weaken the trading position of competitors, and to inhibit the entry of other competitors."

Also at risk is the practice whereby dealers agree to take certain specified quantities of a dominant supplier's product where the quantities specified are so great that they amount to all or nearly all of the dealers' requirements. However such a practice is not as inherently anti-competitive as the exclusive dealing and fidelity rebate practices considered above. The United States case of *Barry Wright Corp* v. *ITT Grinnell Corp*[121] is a good illustration. In that case Grinnell agreed to buy over a two year period certain large quantities of mechanical snubbers (shock absorbers used in nuclear power plants) from the dominant manufacturer of such snubbers. The reasons for the agreement, however, were not anti-competitive. It was in fact not the dominant manufacturer but Grinnell who requested the arrangement. Grinnell did this because the arrangement would give it a stable source of supply. There was no evidence that the manufacturer intended to eliminate competition by entering into the agreement. Instead the evidence was that the manufacturer was in favour of the agreement because it allowed use of considerable excess capacity and allowed production planning that was likely to lower costs. As a result the U.S. Court of Appeals (First Circuit) held that the manufacturer had not breached section 2 of the Sherman Act.

E. The Enforcement of Intellectual Property Rights

Section 36(2) provides:

> "For the purpose of this section, a person does not use a dominant position in a market for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of this section by reason only that that person enforces or seeks to enforce any right under or existing by virtue of copyright, patent, protected plant variety, registered design or trade mark."

Subsection (2) of section 36 was inserted as a result of concern expressed in submissions to the Commerce and Marketing Select Committee as to whether section 36 would prohibit the enforcement of intellectual property rights by dominant firms. In a Department of Trade and Industry paper on intellectual property rights[122] it was said in respect of these submissions:[123]

120 Supra n.118, 632-633.

121 Supra n.72.

122 "Commerce Bill: Intellectual Property Rights" (Wellington, 1985).

123 Ibid, para 12. See also para 9(a).

> "Case law holds that a legal action to enforce an intellectual property right is not taken with a purpose such as envisaged by clause 36 of the Bill. That is, enforcement of an intellectual property [right] is taken with the purpose of protecting the right in question, and not with the purpose of restric[t]ing competition: *[U].S.* v. *LD Caulk.*[124] However so as to clarify this position, clause 45 might be amended to reflect this rule, and to remove any possible confusion."

The amendment (finally made within clause 36 itself rather than clause 45) was therefore intended to go no further than the rule in *LD Caulk.* That is, to allow the enforcement of intellectual property rights for the genuine purpose of protecting those rights. It is submitted that the *Warman* case,[125] discussed earlier in this article, comes within such a principle. Warman's action against Envirotech was brought in the genuine belief that Envirotech were breaching Warman's copyright in the drawings and manuals concerned.

One case which indicates the limits of the principle in *LD Caulk* is *Kobe, Inc.* v. *Dempsey Pump Co.*[126] In that case Kobe had accumulated a great number of patents for hydraulic pumps. Many of these patents were unused and none were licensed to others. Dempsey then developed a successful pump. Kobe, apparently without even having seen drawings of the pump, served notice that this pump infringed various of its patents. It then circularized its most important customers informing them of the impending patent infringement litigation. As a result of the suit and the circular the activities of Dempsey were brought to a standstill.

In defence of the infringement action Dempsey successfully counterclaimed that Kobe had breached the U.S. Sherman Act and recovered treble damages of $500,000. The claim for damages was successful even though one of Kobe's patents was found to have been infringed. It was held that the real purpose of the infringement action and the incidental activities of Kobe's representatives was "to further the existing monopoly and to eliminate Dempsey as a competitor."[127]

It is submitted that such conduct would also breach our section 36. Subsection (2), drafted as it is to reflect the American rule, would not exempt such conduct. Subsection (2) merely provides that a dominant firm does not have a purpose of restricting, deterring or eliminating "by reason only" that the dominant firm seeks to enforce an intellectual property right. In cases like *Kobe,* where the dominant firm is clearly motivated by a wish to eliminate a competitor, section 36 will still be contravened.

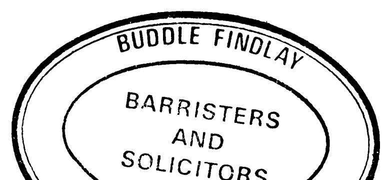
For completeness it should be noted that a small trader confronted with an intellectual property right action brought in bad faith will, in addition to any claim based on section 36, have a claim based on the tort of abuse of process of the court. That tort is committed where a plaintiff brings proceedings to effect an object for which the

124 126 F.Supp. 693, 708 (1954).

125 Supra n.44.

126 198 F.2d 416 (1952). See also *U.S.* v. *Besser Manufacturing Co* 96 F.Supp. 304 (1951) affirmed 343 U.S. 444 (1952); *Handgards Inc* v. *Ethicon Inc* 601 F.2d 986 (1979).

127 Supra n.126, 425.



proceedings were not designed. In *Speed Seal Products* v. *Paddington*[128] the English Court of Appeal held that the tort may be committed when an action based on misuse of confidential information is brought with the ulterior motive of damaging the defendant's business (rather than for the protection of any legitimate interest of the plaintiff).

F. Other Practices

The discussion above should not be taken as limiting in any way the kinds of practices which can be held to contravene section 36. Dominant firms will have to take care in engaging in any practices which might harm other traders. Two further practices, tying and coercive price leadership, are worthy of brief mention.

Tying occurs when a firm that has control of the market for the supply of a certain good specifies that a customer can only obtain the good if the customer also purchases another product of the supplier. One example of the practice is discussed in *Berkey Photo Inc.* v. *Eastman Kodak Co.*[129] Until 1954 Kodak, who had control of the market for colour film, sold colour film with a charge for processing already included. This gave customers little choice but to also use Kodak as their film processors. Such conduct wuld breach our section 36. Kodak were using their dominance in the colour film market for the purpose of restricting the entry of competitors into the market for film processing.

Coercive price leadership involves the giving of threatening notices to competitors to raise prices, with the indication that non-compliance will meet with reprisals.[130] Such conduct, when practised by a dominant firm, contravenes section 36 as its purpose is to "deter" its smaller competitors from "engaging in competitive conduct".[131]

V. THE REMEDIES

The Commerce Act provides strong remedies to back up its restrictive trade practices provisions. Section 80 allows the Commerce Commission to bring actions to recover penalties of up to $300,000 ($100,000 in the case of individuals). Section 81 gives the Commission and "any other person" the right to apply for injunctions restraining contraventions of Part II of the Act. Section 82 gives persons who have suffered loss as a result of a breach of Part II the right to claim damages.

It should be noted that the remedies provided by sections 80-82 will be available not just in respect of actual contraventions of section 36 but also in respect of:

128 [1986] 1 All ER 91.

129 Supra n.7, 270-271. The practice of tying is discussed more generally in *Berkey Photo* at 275-276.

130 Department of Trade and Industry "Commerce Bill 1985: Misuse of Monopoly Power" (Wellington, 7 October 1985), 6.

131 Ibid, para 15. See also Walker "Sec. 46: Monopolisation" *(Trade Practices Act,* Commercial Law Association Seminar Proceedings, Sydney, 1974), 46-47 discussing *F. T.C.* v. *Procter & Gamble Co.* 396 U.S. 586 (1967).

(i) aiding, abetting, counselling or procuring a contravention of section 36[132]

(ii) inducing the contravention of section 36 by threats, promises or otherwise

(iii) being in any way directly or indirectly, knowingly concerned in, or party to the contravention of section 36

(iv) conspiring with any other person in the contravention of section 36.[133]

Pecuniary penalties and injunctive relief are also available in respect of attempts to contravene section 36 and attempts to induce such a contravention.

The extensions of liability provided by sections 80-82 are important in considering who is potentially liable for a breach of section 36. Conduct by a dominant firm which contravenes section 36 will stem from decisions made by individuals within the firm. Those individuals risk liability under sections 80-82 on the grounds that they induced the breach of section 36 or were knowingly concerned in it. Also potentially liable are lawyers and financial advisers who advise firms to go ahead with conduct which turns out to contravene section 36.[134] Such people might be held to have counselled the contravention or to have been knowingly concerned in it.

The potential liability of dominant firms to pecuniary penalties for contraventions of section 36 will not be discussed in this article.[135] The Commerce Commission's workload is such that it is likely, in almost all cases, to leave the enforcement of section 36 to individual traders in the market.[136] Therefore of the remedies provided under the Act it is expected that the most commonly exercised or threatened will be interim injunction applications and actions for damages.

In respect of interim injunction applications it should be noted that normal interim injunction principles will not necessarily be applied in the same way. The normal approach to interim injunction applications is firstly, to see whether there is a serious question to be tried and if so, to see whether the balance of convenience favours the granting of an interim injunction.[137] In considering the balance of convenience the court will weigh up the potential harm to the defendant if relief is granted against the potential harm to the plaintiff if it is not.

The focus on the interests of the individual parties to litigation is, however, inappropriate in the case of an interim injunction application under the Commerce Act. The provisions of the Commerce Act are not intended to be applied in accordance with

132 *Refrigerated Express Lines (A'asia) Pty Ltd* v. *Australian Meat and Livestock Corp* (1980) A.T.P.R. 40-156.

133 *Bunny Industries* v. *Jones* (1979) 53 F.L.R. 160; *Refrigerated Express Lines (A'asia) Pty Ltd* v. *Australian Meat and Livestock Corp,* supra n.132.

134 Gault "Monopolisation: Section 36 of the Commerce Act 1986" (LL.B. (Hons.) Seminar, Victoria University of Wellington, September 1986), 9.

135 The writer does discuss this topic in "Monopolisation: Section 36 of the Commerce Act 1986", supra n.1, 135-139.

136 See Collinge "First Steps Under the Commerce Act 1986" supra n.3, 10.

137 *American Cyanamid Co* v. *Ethicon Ltd* [1975] A.C. 395; *Klissers Farmhouse Bakeries Ltd* v. *Harvest Bakeries Ltd* [1985] 2 N.Z.L.R. 129.

the private interests of individual litigants but in accordance with the public interest in the promotion of competition.

The importance of the public interest to interim injunction applications under the Commerce Act has already been stressed in *Direct Holdings Ltd* v. *Feltex Furnishings of New Zealand Ltd.*[138] That case can, however, be contrasted with the judgment in *Bond & Bond Ltd.* v. *Fisher & Paykel Ltd.*[139] Barker J, in declining Bond & Bond's application for an interim injunction, focussed almost exclusively on the potential effects to the parties of granting or not granting the application. With regard to the public interest his Honour simply asserted:[140]

> "Although the public interest assumes a more important aspect here than on an ordinary injunction application, I do not think that the public interest requires the issue of an injunction on the facts of this case."

With respect, it is difficult to accept that assertion. In enacting the Commerce Act the legislature has indicated that the promotion of competition is in the public interest. The injunction sought in *Bond & Bond* would have promoted competition and provided the consumer with a wider choice of brands of whitegoods. Further, it is submitted that there was a strong argument that Fisher & Paykel were in fact contravening section 36 and therefore a strong public interest in seeing that section enforced.

Claims for damages in respect of contraventions of section 36 will usually be made by the trader or traders restricted or eliminated from the market. The restriction or elimination of traders from the market may, however, allow the dominant firm to raise its prices at the expense of those to whom it sells its products. There is no reason in principle why those customers cannot recover the increased price paid as long as they can show that their loss was in fact caused by the breach of section 36.

Being able to sue in such circumstances may be more valuable than it would first appear. A dominant firm's customers may not be the widespread general public but could be a few medium sized firms. Those firms could suffer substantially from the dominant supplier increasing its price. In America it is not unusual for medium to large firms to claim substantial damages of this kind from their monopolistic supplier.[141]

The major problem in the making of such a claim under the Commerce Act will be to prove that the overcharging was in fact caused by the breach of section 36. As in America a purchaser will only be able to recover "for the price increment that 'flows from' the monopolist's anti-competitive conduct".[142] This will not necessarily be the same as the difference in price between the monopolist's price and the price that would prevail in a competitive market.

138 (1986) Unreported, Christchurch Registry, CP 242/86. See also in the United States *Ball Memorial Hospital Inc* v. *Mutual Hospital Insurance Inc,* supra n.3, 1333-1334.

139 Supra n.13. See also *Investment News Ltd* v. *Fourth Estate Ltd,* supra n.13.

140 Supra n.13, 288.

141 e.g. *Berkey Photo Inc* v. *Eastman Kodak Co,* supra n.7, 293-299.

142 *Berkey Photo Inc* v. *Eastman Kodak Co,* supra n.7, 297.

VI. CONCLUSION

The interpretation of section 36 is in many respects uncertain. It is important that practitioners advising clients as to the possible application of section 36 are aware of these uncertainties and their implications.

In the case of dominant firms the uncertainty as to how section 36 will be applied makes it more important that they carefully monitor any policies which might adversely affect other traders in the market in which they are dominant or in any other market. The alternative is to risk attracting large claims for damages or injunction proceedings. Defending such actions or even threats of such actions can also be extremely expensive both in terms of legal fees and lost managerial time.

The small size of the New Zealand market means that several industries are capable of sustaining only one or two large firms. As a result there will be quite a few New Zealand firms who could be considered dominant. However, it is not just firms in a dominant position in a market who will have to be careful to comply with section 36. Firms which are dominant in a particular product or area within a market will also have to take care. The possibility that a New Zealand court will take a narrow approach to market definition makes such firms also subject to actions under section 36 and to threats of such actions.

Those firms large enough to potentially be considered dominant will have to watch all practices which might harm smaller traders. In particular, however, large firms will have to monitor carefully their pricing and supply decisions. If a large firm desires to reduce prices to such a level which may hurt its competitors it should ensure that its prices do not fall below cost and that its cost accounting records will be adequate to prove this. It should also ensure that there is sufficient documentation of the reasons for the decision to cut prices where such reasons provide convincing evidence that the firm's actions were not motivated by a desire to hurt competitors.

In relation to the supply decisions of dominant firms, a dominant firm refusing supply should ensure that it has a good reason for so doing e.g. the trader refused supply has a poor sales record or has consistently delayed paying for goods supplied to it. Further, before making the decision not to supply, the dominant firm should ensure that it is able to easily prove that such a reason existed.

Other important potential sources of liability will be the exclusive dealing arrangements of dominant firms and the bringing of intellectual property infringement actions against competitors in the market. It has been suggested in this article that dominant firms requiring and enforcing exclusive dealing covenants in their favour will almost certainly be contravening section 36. With respect to the enforcement of intellectual property rights dominant firms cannot assume that section 36(2) will always immunise them from liability. They will, however, be unlikely to be held liable unless the circumstances suggest that their infringement action was not brought in good faith.

In the case of small traders affected by the actions of dominant firms the uncertainty as to how section 36 will be interpreted provides those traders with a strong bargaining tool. They will be able, in many situations, to argue persuasively that the dominant

firm's actions may be contravening the section and threaten legal proceedings unless the dominant firm either changes its ways or pays compensation.

A problem arises if the dominant firm is willing to defend any threatened legal proceedings. The costs of actually bringing such an action are high and a small trader will not have the resources available to it that the dominant firm will. Nevertheless the presence of section 36 will be a useful tool for small traders in their attempts to persuade dominant firms to refrain from taking actions which might cause them loss or inconvenience.