The Meaning of 'Use' of a Dominant Position: from Queensland Wire *to* Electricity Corp *v* Geotherm Energy

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This article aims to focus on the New Zealand and Australian courts interpretation of "use" of dominance in s36(1) of the Commerce Act 1986, and "take advantage of market power" in s46(1) of the Trade Practices Act 1974 (Cth). The article finds that a narrow test for the meaning of "take advantage of market power" has been derived from the Australian High Court decision, Queensland Wire Industries *v* BHP, *and this test has been criticised by commentators. The author contends that the actual test derivable from* QWI *is a broad causation test, which is not inconsistent with the New Zealand Court of Appeal's approach to the meaning of "use of a dominant position" in* Electricity Corp *v* Geotherm Energy.

I INTRODUCTION: "USE" OF DOMINANCE IN THE CONTEXT OF SECTION 36 (1) AND THE COMPARATIVE AUSTRALIAN PROVISION.

The purpose of the Commerce Act 1986, as its long title says, is to permit competition in markets in New Zealand, and to this end section 36 of the Act aims to regulate monopolisation. Section 36(1) of the Commerce Act provides:

> Use of a dominant position in a market-
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> No person who has a dominant position in a market shall use that position for the purpose of-
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> 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.

Section 36 attempts to reconcile freedom of a monopoly to compete with the protection of the competitive process, by requiring proof that a dominant firm is in breach when its purpose is to deter or eliminate competition, irrespective of the effect of its conduct. Thus it is not the possession of monopoly power nor yet the use of power per se that the section is designed to combat, but the use of a dominant position for the purposes proscribed in paragraphs (a) to (c).

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The section is modelled on section 46 of the Australian Trade Practices Act (Cth) 1974, subsection (1) of which states:

> (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -
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> (a) eliminating or substantially damaging a competitor... in that or any other market;
> (b) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The sections are similar but with some differences. "Substantial market power" is a lower threshold than "dominance"[1] and in the past "take advantage" has been given a less neutral interpretation than "use".[2] Australian decisions are far more numerous than those to date in New Zealand, and are persuasive authority in New Zealand courts as the Commerce Act is based on the Australian legislation, and because of the desirability of uniformity where possible, pursuant to the CER.[3] So New Zealand cases on "use of dominance" have considered and been influenced by Australian jurisprudence and interpretation of "take advantage of substantial market power", especially by the leading High Court authority *Queensland Wire Industries* v *BHP*.[4]

To establish a breach of section 36 a plaintiff needs to prove, on the balance of probabilities:[5]

(a) that a defendant was in a dominant position in a market; and
(b) that it used its position for one of the purposes proscribed by section 36(1).

The threshold test is thus dominance in a market. This concept has been comprehensively treated elsewhere,[6] but may need further consideration after the Court of Appeal decision in *Telecom*.[7] Assuming that a plaintiff has been able to prove that

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1 *Telecom Corp of New Zealand* v *Commerce Commission & ors*, [1992] 3 NZLR 429, 442, per Richardson J.

2 Per Pincus J at first instance in *Queensland Wire Industries Pty Ltd* v *Broken Hill Pty Ltd* (1987) ATPR ¶40-810.

3 Australia - New Zealand Closer Economic Relations Trade Agreement. But Richardson J has warned in Telecom, above n 1, not to rely on Australian cases where the statutory language is different.

4 *Queensland Wire Industries* v *Broken Hill Proprietary Ltd & anor* [1988] 167 CLR 177; (1989) ATPR ¶40-925, hereinafter *QWI*.

5 *Tru Tone Ltd* v *Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352, 358; (1988) 2 NZBLC 103,286, 103,291.

6 See for eg L F Hampton "Section 36(1) of the Commerce Act: an analysis of its Constituents Elements",179, 182, in R J Ahdar (ed) Competition Law and Policy in New Zealand (Law Book Co, Sydney, 1991) Also J D Heydon Trade Practices Law (Law Book Co, Sydney, 1991), 2531-2571; Y van Roy, below n9, 58-67.

7 For a brief discussion of "Dominance in a Market" see Appendix of J November "The Meaning of 'Use' of a Dominant Position in a Market for a Proscribed 'Purpose' : the

the defendant has a dominant position in a market it is then necessary to prove "use" of that position, and finally that such use was for a "purpose" proscribed by section 36(1) (a), (b) or (c).

Writing of the Australian Trade Practices Act, Alexiadis has said:[8]

> For too long lawyers have viewed the constituent elements of section 46 as being mutually exclusive heads of enquiry. In economic terms, however, it is imperative that the interrelationship between market definition, market power and the impugned conduct be acknowledged.

This interrelationship is what the decided cases demonstrate. As van Roy[9] has commented: "[i]t is clear that the issue of 'use of a dominant position" was considered to be intertwined with the issue of 'purpose'." From the point of view of the syntax of section 36 the verb "shall use" is modified by the adverbial clauses that follow, (for the purpose of ...(a),(b) or (c)), so that it is not easy to separate "use" from the "purposes" that follow.

Equally important however is the link between "use" and "dominance". A "use of dominance" must be proved; "use" is a necessary though not a sufficient condition for a breach of the section. If there is no use of dominance a purpose enquiry is not required. But separation of "use" from "purpose", and ascertaining the link between "use" and "dominance" has lead to the derivation of a narrow test for the meaning of "use" (or "take advantage " in Australian terms), from *QWI*.[10] This in turn has lead to criticism of the test derived. This article intends to show that the actual test for "take advantage of market power" derivable from *QWI* is a broad causation test, and not dissimilar to the approach adopted by the New Zealand Court of Appeal in interpreting "use of dominance."

Jurisprudence of Section 36 (1) of the Commerce Act 1986" unpublished LLM Research Paper 1992, held at VUW Law Library. This paper also discusses the meaning of "purpose". See now also R H Paterson "The Rise and Fall of a Dominant Position in New Zealand Competition Law: from Economic Concept to Latin Derivation" 15 (3) (1993) NZULR 265.

8 P Alexiadis "Refusal to Deal and 'Misuse of Market Power' under Australia's Competition Law" [1989] ECLR 436, 447.

9 Y van Roy, *Guidebook to New Zealand Competition Laws* (2 ed CCH, Auckland,1991), 150.

10 Above n 4. See below part II B 1 for the narrow test.

II AUSTRALIAN DECISIONS AND ACADEMIC COMMENT

A *Queensland Wire Industries* v *BHP: Taking Advantage of Market Power*

In *QWI*,[11] the High Court of Australia held that in refusing to supply QWI with star picket posts for fencing manufacture except at exorbitant prices, in order to retain its monopoly in star picket fence production, BHP had taken advantage of its market power for the purpose of deterring or preventing QWI from engaging in competitive conduct in that market, and was therefore in breach of section 46(1)(c).

Two main issues were comprehensively canvassed: first the definition of a market and substantial market power, and secondly the meaning of "take advantage of market power". The trial judge (Pincus J) thought "take advantage" had a pejorative connotation, implying reprehensible or predatory conduct. All the High Court judges, however, thought the phrase does not require a hostile intent inquiry. It is "morally indifferent". It is the purpose of the corporation which decides whether its conduct is anti-competitive or predatory.

As Mason CJ and Wilson J said:[12]

> [A]n infringement [of sec 46] may be found only where the market power is taken advantage of for a purpose proscribed in para (a) (b) or (c). It is these purpose provisions which define what uses of market power constitute misuses.

Toohey J thought there was no relevant misuse of market power unless the corporation had one of the purposes proscribed by the paragraphs of section 46(1). Deane J thought likewise.[13]

Mason CJ and Wilson J concluded:[14]

> The question is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section, thereby undermining competition...

Unfortunately the question has not remained quite so simple. This is partly because in rejecting Pincus J's interpretation of "take advantage", the judges needed to discuss the meaning of that phrase separately from the "purpose" requirement. Purpose was not really an issue in the case; BHP's purpose was apparent from internal documents and its dealings with QWI.[15]

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11 Above n 4.
12 Above n 4, CLR 191; ATPR 50,010.
13 Above n 4, CLR 214; ATPR 50,023 per Toohey J; CLR 194-195; ATPR 50,012 per Deane J.
14 Above n 12.
15 Above n 4, CLR 197-198; ATPR 50,014.

> Its refusal to supply Y-bar to QWI otherwise than at an unrealistic price was for the purpose of preventing QWI from becoming a manufacturer or a wholesaler of star pickets [for fencing]. The purpose could only be and has only been achieved by such a refusal of supply by virtue of BHP's substantial power in all sections of the Australian steel market. In refusing supply in order to achieve that purpose BHP has clearly taken advantage of its substantial power in that market.

Thus Deane J clearly links the refusal to supply both with BHP's substantial market power and with its purpose.

Mason CJ and Wilson J said:[16]

> In effectively refusing to supply Y-bar to the appellant BHP is taking advantage of its substantial market power. It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant.

This sentence stresses the causal relationship between BHP's conduct and its market power, (a facet of the structure in which it operated). Counsel for QWI suggested that the relevant question was: "is BHP refusing to supply Y-bar because of its dominant power (due to the absence of competitors) in the steel products market?"[17]

Toohey J agreed that the answer must be "yes", and continued:

> The only reason why BHP is able to withhold Y-bar ... is that it has no other competitor in the steel product market who can supply Y-bar... It is exercising the power which it has when it refuses to supply QWI with Y-bar at competitive prices; it is doing so to prevent the entry of QWI into the star picket market;

Here Toohey J also emphasized the link between BHP's market power, the use of that power and the purpose for which it is used. The only test for the meaning of "take advantage" derivable from the above dicta is a broad causation test: is BHP (or the firm with market power in question) refusing to supply (or engaging in certain conduct) by virtue of its substantial market power?

If the answer is "yes", the firm is taking advantage of market power. If the answer is "no" the firm may be acting by virtue of a contract for example, or some other rights.[18] To contravene section 46 the conduct must be exercised by a firm with substantial market power, and be an exercise of that power, and it is simply this causal connection between market power and conduct that the High Court stressed. The use of power may look like "normal business practice", so a purpose enquiry is necessary to see if the conduct was anti-competitive.

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16 Above n 4, CLR 192; ATPR 50,011.

17 Above n 4, CLR 216-217; ATPR 50,025.

18 Below part II C1.

It is probably Dawson J who could be taken to have articulated the test for "taking advantage" that has been formulated, when he said in his brief consideration of this aspect:[19]

> ... there can be no real doubt that BHP took advantage of its market power in this case. It used that power in a manner made possible only by the absence of competitive conditions.

It is submitted that Dawson J was referring specifically to BHP's refusal to supply in the circumstances of the case, as indeed were all the judges; he was not referring to the category of conduct (a refusal to supply), but to the conduct of BHP in the particular case, as being possible only in the absence of competition.

B The Test for "Take Advantage"

1 The narrow test derived from QWI

Hanks and Williams consider:[20]

> [T]he decision [*QWI*] does not merely dispose of Pincus J's construction of take advantage; it proposes a clear alternative. To take advantage of one's market power is to do something which can only be done because of one's market power - that could not be done if the market in which one operated were vigorously competitive.

The authors' authority for this proposition is the passages cited above.[21] Referring to those same passages Corones says:[22]

> ... in order to constitute a taking advantage of market power, the conduct must be of a kind that a corporation can only "get away with" if it has market power. The conduct in question can only be engaged in because of the corporation's substantial market power. It is a function of that power and could not be engaged in under competitive conditions."

Corones continues: " the *QWI* test appears to have been derived from the TPC's submission for leave to intervene."[23] Unfortunately such formulations have lead to a

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19 Above n 4, CLR 202; ATPR 50,016.

20 F H Hanks and P L W Williams "Implications of the Decision of the High Court in Queensland Wire" [1990] MULR 437, 444.

21 Above n 4, per Mason CJ & Wilson J, CLR 192; ATPR 50,011; Dawson J, CLR 202; ATPR 50,016; and Toohey J, CLR 216-217; ATPR 50,025. It is interesting to note that Alexiadis (above n 8, 448) cites these same passages under "Indicia of Market Power". The New Zealand Court of Appeal in *Electricity Corp* v *Geotherm*, below n 85, 649, referred to these passages as showing that the conduct must be considered in its commercial context.

22 S G Corones "Misuse of Market Power" Editorial Commentary in A I Tonking & R J Alcock (eds) *Australian Trade Practices Reporter*, (CCH Australia Ltd 1991), 3761.

23 Above n 22, 3761. However, the TPC's formulation of the *QWI* test is "whether the corporation in question [emphasis added] would have behaved differently in a

narrow interpretation of the Justices' dicta in *QWI*, which it is submitted, is subtly different from what the High Court judges were saying.

The difference can be illustrated by considering the two main types of "use of a dominant position" referred to by Vogelenzang.[24] First are cases where the act can only be performed by a firm in a dominant position, for example monopoly pricing. Such "uses of dominance" would be covered by the narrow test. Secondly, there are cases where the act can be performed by anyone, for example a refusal to supply, but the effect on market conditions would not occur, or would be greater if the firm were dominant. BHP's refusal would fit in this broad category, and *QWI* confirms that section 46 covers this type of conduct when it is an exercise of substantial market power.

2 *Criticism of the narrow test*

The narrow test would only apply to cases where substantial market power is the sine qua non of the conduct, (for example monopoly pricing), that is, the act can only be performed by a market power firm. Such cases would be relatively rare. The test is therefore defective as various writers have pointed out.[25] Clearly the category of BHP's conduct (refusal to sell) could have taken place under competitive conditions.

Applying the narrow test, if the answer to the question "is the corporation doing something which can only be done in a non-competitive market?" is "yes", presumably the "use" threshold is passed and a purpose enquiry is now relevant. But what if the answer is "no"? Does that mean there is no contravention of the section because the "use" hurdle has not been passed? This cannot be right where a firm has used its substantial market power but in a way in which it would be possible to act in a competitive environment, and with a proscribed purpose, as in fact BHP so acted in refusing to supply.

Because this test is narrow, if it were to be applied in New Zealand where dominance is a higher threshold than substantial market power,[26] very little conduct by dominant firms would be caught by section 36.

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competitive market, that is whether its conduct was made possible only by the absence of competitive conditions." [See Trade Practices Commission "Section 46 TPA: Misuse of Power", a background paper, February 1990, p27.] This formulation clearly derives from Dawson J. It looks at the cause of the conduct of the corporation in question, rather than the category of conduct. [See also TPC "Misuse of Market Power", Guideline on section 46 of the TPA.]

24 P Vogelenzang "Abuse of a Dominant Position in Article 86; the Problem of Causality and Some Applications" (1978) 13 Comm Mkt LRev 61 ,66 & footnote 9a.

25 See for example W Pengilley "Denial of Supply and Misuse of Market Power in Australia" Special Report", Australian Trade Practices Reporter, 16 Mar 1989, 16; L F Hampton, above n 6, 198-199, & Y van Roy, above n 9, 152. Van Roy gives various examples of its defects. All these commentators, however, assume this is the High Court judges' test, which this article disputes.

26 Above n 1.

The test also seems to lead to a non-neutral connotation of "take advantage". It is submitted that Hanks and Williams must be wrong when they say:[27]

> As interpreted by the High Court the phrase 'take advantage of market power' is sufficient, of itself, to distinguish between competitive and non-competitive conduct.

This is clearly not so and would undermine the neutrality of the phrase; it confuses the cause of and the reason for conduct. As Hill and Jones said in a New Zealand context[28] "use" is a neutral term, "purpose" is the central concern of section 36. The judges in *QWI* all agreed that take advantage was "morally" neutral,[29] so conduct such as a refusal to supply, or a reduction of prices should not be considered "predatory", unless there is an exclusionary purpose proved pursuant to paras (a)-(c). Firms with substantial market power can of course use their power beneficially, as Deane J pointed out in *QWI*.[30]

The conduct simpliciter will almost always be ambiguous; it "makes no economic sense",[31] unless by reference to market power and purpose. The American Judge Easterbrook has said:[32]

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

Likewise Wilcox J observed in a recent case:[33]

> [T]he outward manifestation of a decision to engage in predatory pricing is a lowering of prices, an action which, on its face, is pro-competitive. The factor which turns mere price cutting into predatory pricing is the purpose for which it is undertaken.

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27 Above n 20, 448. See also Pengilly, above n 25, 14.

28 B Hill & M Jones, *Comparative Trading in New Zealand: the Commerce Act 1986*, (Butterworths, 1986) 77-78.

29 Economics is no less value-laden than other subjects (above n 8, 458) and "competitive" connotes "good", whereas "anti-competitive" connotes "bad", so "take advantage" cannot mean act in an anti-competitive way if it is to be a neutral phrase.

30 Above n 4, CLR 194; ATPR 50,012, "...a trading corporation can 'take advantage' of its trading power to advance trade and competition for the benefit of its shareholders, its employees and those with whom it deals..." Examples might include support of the arts by sponsorship, or support of conservation by use of recyclable material.

31 Above n 8, 447.

32 F Easterbrook "On Identifying Exclusionary Conduct" (1986) 61 Notre Dame L Rev 972, 972, emphasis added.

33 *Eastern Express PL* v *General Newspapers PL* 1991 ATPR ¶41-128, 52,895, emphasis added.

So, while competitive and anti-competitive conduct look alike there will have to be a purpose enquiry to determine whether the conduct was predatory and thus whether there has been a contravention of the section.

3 The actual broad QWI test

The narrow test is not only defective in that it applies to conduct that can only be engaged by market power/dominant firms, and confusing in that it creates a "use" threshold which could lead to a non-neutral connotation of "use", but it is also not, it is submitted, derivable from the High Court judgments. The judges in the passages cited as authority for this test were simply emphasizing that there must be a causal link between the market power and the conduct of the firm in question; BHP's refusal to supply was by virtue of its market power.[34] Their Honours were referring to BHP's conduct in all the circumstances of the case; they were not saying that the conduct must fall into a category of behaviour that could only be carried out in a non-competitive environment. As Alexiadis says:[35]

> ... [T]he High Court...insisted that a successful action under section 46 could be brought only where there is a proven causal link between the possession of a relevant market power and the impugned conduct, such conduct having as its purpose one of the proscribed aims outlined in section 46 (1)(a)-(c)...

The conduct is not confined to Vogelenzang's first category[36] where dominance is the sine qua non of the behaviour; the *QWI* decision shows that the link between the possession of market power and the conduct in question is broader and includes Vogelenzang's second category, where the act can be done by anyone but the effect would only occur or would be strengthened if the act was done by a firm actually exercising its substantial market power.

C Australian Decisions on "Taking Advantage of Market Power"

1 Before QWI

As Hampton says:[37]

> [The High Court] reasoning [in *QWI*] ... seeks to confine the role of the misuse provision to conduct which has its source, either wholly or partially, in market power.

It follows that if the conduct has its source wholly or mainly in some attribute or right other than market power there will be no "use of dominance", (in New Zealand terms). Sources of conduct are not mutually exclusive of course; sometimes an

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34 Above n 4, CLR 192; ATPR 50,011, per Mason CJ and Wilson J, and CLR 194-195; ATPR 50,012, per Deane J.

35 Above n 8, 467.

36 Above n 24.

37 Above n 6, Hampton, 199.

exercise of a contractual or other right may involve the exercise of market power, and would then be a "use" of dominance. There is a line of cases in Australia prior to *QWI* on "taking advantage" of some source other than market power, the first of which was *Top Performance Motors*.[38] In this case the applicant argued that the respondent was exercising its market power when it terminated a dealership agreement. Joske J found that the respondent for various reasons was dissatisfied with the performance of the applicant as its dealer, and said:[39]

> ... I am satisfied on the evidence that the respondent genuinely considered that it should terminate the agreement for the sake of and in order to protect its legitimate trade and business interests... In my view exercise of its contractual right to terminate a contract for the genuine purpose of protecting trade and business interests is not taking advantage of a power of controlling a market within the meaning of s 46.

Joske J was saying in effect that the termination of the dealership was for the purpose of protecting business interests, the applicant being an unsatisfactory dealer; this is not necessarily to say that the termination was not an exercise of its market power. Smithers J, however, looked at the cause of the respondent's action and concluded that the respondent took advantage of the terms of the dealership contract, not of its market power.[40]

Land says[41] this approach is incorrect as the "contractual provision may only have been imposed because of the market power". But equally the contractual provision may have been imposed not because of the market power, but because there was a provision in the contract enabling a party to terminate an unsatisfactory dealership, and the party availed itself of that provision. This certainly seems to have been the evidential basis of the *Top Performance* decision. It is submitted that Heydon is right to say:[42]

"Reliance on a contractual right has no necessary bearing on whether market power is exercised; the question is whether the contractual right is the result of market power."

Despite academic criticism of *Top Performance*[43] it is submitted that Smithers J's reasoning was correct. If the applicant had been pressured into signing a contract unfavourable to itself by a firm with substantial market power, enforcement of those terms may well have been a "taking advantage of market power", but if the contract was not brought into existence by the exercise of market power there is no reason why termination pursuant to the terms of the contract was "taking advantage of market

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38 *Top Performance Motors Pty Ltd* v *Ira Berk (Qd) Pty Ltd* (1975) 5 ALR 465.

39 Above n 38, 468.

40 Above n 38, 472.

41 J Land "Monopolisation: the Practical Implications of Section 36 of the Commerce Act 1986" (1988) 18 VUWLR 51, 69.

42 J D Heydon, *Trade Practices Law* (Law Book Co,Sydney, 1989), 2603, footnote31.

43 See articles noted by Heydon, above n 42, 2596 and 2603, footnotes 24, 25 and 30. See also below n 54.

power". Presumably not all actions taken by firms with substantial market power involve a use of their market power.[44]

Top Performance was followed in Australia in *Ah Toy* v *Thies*[45] and *Warman* v *Envirotec*.[46] In the latter case it was found that the market power firm had taken advantage of legal rights to confidential information and copyright material rather than its market power.[47] As Heydon says "there are difficult questions of causation here",[48] but these cases are in fact a good example of the application of the *QWI* broad causation test: "was the conduct in question engaged in by virtue of the defendant's market power?"

It has been said that this line of cases would have to be read in the light of the construction of "take advantage" by the High Court in *QWI*.[49] Hampton considers:[50] "[s]uch comments would appear to signal the judicial abandonment of the distinction" (between the exercise of market power and the exercise of some other right), and he is critical of the *Top Performance* line of cases. But it is respectfully submitted that the logical conclusion of abandoning the distinction would be that any action by a dominant firm, whatever its source, would be a use of dominance. This would be to "downplay use"[51] and the issue of whether the conduct had its source wholly or partially in market power, which Hampton had drawn attention to earlier in his chapter,[52] would be redundant.

2 *After QWI*

In *Dowling* v *Dalgety*[53] Lockhart J found that none of the respondents had a substantial degree of power in the market, so the claim under section 46 failed. But he considered the question of whether there would have been a taking advantage of market power by way of obiter dictum. The conduct at issue was a refusal to allow the applicant to join the respondents' association or to purchase an interest in their sale yards. Lockhart J thought that ownership of the land on which the sale yards were erected and the rights which flow from ownership and from membership of the association, were rights which caused a degree of market power to come into existence.

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44 See Heydon, above n 42, 2596 for a similar example.

45 *Ah Toy Pty Ltd* v *Thies Pty Ltd* (1980) 30 ALR 271.

46 *Warman International Ltd* v *Envirotec Australia Pty Ltd* (1986) 67 ALR 253.

47 Compare s 36(2) of the New Zealand Commerce Act: "For the purposes of this section, a person does not use a dominant position in a market for any of the purposes specified in paragraphs a)-c) of subsection (1) of this section by reason only that that person seeks to enforce any statutory intellectual property right within the meaning of section 45(2) of this Act".

48 Above n 42, 2598.

49 *Australian Performing Rights Association* v *Ceridale Pty Ltd & ors* (1991) ATPR ¶41-074, 52,129.

50 Above n 6, 203.

51 See Hampton's criticism of Tipping J in *NZ Magic Millions*, below n 79.

52 Above n 37.

53 *Dowling* v *Dalgety Aus Ltd & ors* (1992) ATPR ¶41-165.

But the respondents were taking advantage of ownership rights rather than of market power.

His Honour found *Top Performance* to be authority for the proposition that to terminate a franchise pursuant to a contractual right to do so does not necessarily constitute a "taking advantage of market power" for the purposes of section 46. It is submitted that this is right, and that Walker is making an unwarranted extension of Smithers J's reasoning in *Top Performance* when he says:[54] "[a]pplying generally the reasoning of Smithers J would mean that the exercise of contractual rights could never amount to a taking advantage of market power within s 46."

Lockhart J in Dowling referred to *Ah Toy* and *Warman*,[55] and then cited Dawson J, the only High Court judge in *QWI* who could be taken to have disapproved of the *Top Performance* reasoning when he said:[56]

> Nor is it helpful to categorise conduct as has been done, by determining whether it is the exercise of some contractual right...The fact that action is taken pursuant to the terms of a contract has no necessary bearing upon whether it is the exercise of market power in contravention of sec 46.

His Honour concluded that:[57] "[Dawson J's dictum] does not support the view that the cases to which I have referred are wrongly decided..."

It is respectfully submitted that this is correct, and that the learned editor of the ATPR is wrong to criticize Lockhart J's approach.[58]

Broderbund Software v *Computermate*[59] is an illustration of a taking advantage of a statutory right rather than of market power. The Court found that in seeking to prevent

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54 G de Q Walker in a casenote on *Top Performance* (1976) ALJ 89, 92.

55 Above n 45 and n46.

56 Above n 4, CLR 202; ATPR 50,016, emphasis added.

57 Above n 53, 40,278.

58 Above n 53, 40,250. The editors said:

> "His Honour follows the High Court rejection in *QWI* of the distinction between the exercise of contractual or proprietary rights and the use of market power."

With respect, the High Court did not reject this distinction, (and Lockhart J certainly did not); Dawson J's dictum is the only authority cited for this suggestion and does not support it. The editors further submit that the relevant assessment should focus on the purpose and not the nature of the right exercised. They say once purpose is established it is no answer that the right exercised was legal, contractual or proprietary in nature.

However, this is to put the cart before the horse. The first question is whether the firm took advantage of its market power or of some other right, (ie whether the market power was the cause of the conduct.) If a taking advantage of market power is established a purpose enquiry then follows to see if the conduct was anti-competitive.

59 *Broderbund Software Inc* v *Computermate Products (Aus) Pty Ltd* (1992) ATPR ¶41-155.

the parallel importation of computer software Broderbund was not exceeding the rights conferred on it by section 37 of the Copyright Act (Cth), and had not used its market power for any of the purposes proscribed by section 46(1).[60] The implication here would be that conduct in compliance with statutory rights, but not in excess of those rights would not be "taking advantage of market power."[61]

In *ASX* v *Pont Data*[62] the distinction between the exercise of market power and the use of other rights was implicitly affirmed when the Court said:

> The present is not a case in which one would characterise or treat what occurred simply as the exercise or exploitation in good faith of legal rights... to the exclusion of the taking advantage of a substantial degree of power in a market...

O'Keefe v *BP*[63] illustrates an application of the *QWI* broad test for "take advantage". The Court said:

> ...it seems to me that... BP has imposed the price it has as a consequence of the degree of power it has in the market of supplying wholesale petroleum fuel.

It was therefore seriously arguable that there had been a taking advantage of market power.

After *QWI* it might be thought from the academic discussion and the TPC guidelines[64] that all the judges would be applying a test for "take advantage". The only test that could be applied following the High Court judgments is the causation test referred to: was the corporation's conduct by virtue of its market power? However, the issue in decisions following *QWI* has mostly been the "purpose" for which the conduct was undertaken.

In *Berlaz* v *Fine Leather Care*[65] the question was said to be whether a termination of a distributorship was due to Berlaz' unsatisfactory performance, or to FLC's purpose of eliminating Berlaz as a competitor. Pincus J avoided the question of use of market power and went directly to the purpose of the respondent, in the same way as Joske J had done in *Top Performance*. He found that although FLC was dissatisfied with Berlaz as a distributor, it had made no attempt to compromise differences and had shown a growing determination to get rid of Berlaz. Thus there was an arguable anti-competitive purpose.

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60 Above n 59, 40,114.

61 Compare the New Zealand Court of Appeal re the reasonable exercise of statutory rights in *Electricity Corp* v *Geotherm*, below part III B.

62 *ASX Operations Pty Ltd* v *Pont Data Australia Pty Ltd* (1991) ATPR ¶41-069, 52,066.

63 *O'Keefe Nominees Pty Ltd* v *BP Australia Ltd* (1990) ATPR ¶41-057, 51,738, emphasis added.

64 Above n 23.

65 *Berlaz Pty Ltd* v *Fine Leather Care Products Ltd* (1991) ATPR ¶41-118, 52,766.

Similarly in *APRA* v *Ceridale*[66] the Court presumably considered the conduct (issue of proceedings to refrain the infringement of a licence) was neutral or ambiguous, and focussed on the purpose for which it was undertaken.[67]

> The only suggested conduct was a contravention of para (c), that is APRA denied licences 'for the purpose of deterring or preventing a person from engaging in competitive conduct in that or any other market.'... But there is no basis for saying that this was APRA's purpose. APRA had nothing to gain by putting the respondents out of business.

Wilcox J in *Eastern Express*[68] said that Toohey J in *QWI* had suggested that the phrase "take advantage of" means no more than "use":[69]

> As it seems to me, the real issue on this aspect of the case is whether ESN has taken advantage of its market power for one of the purposes proscribed by s46(1)(a) (b) or (c).

So recent Australian decisions have not generally been articulating or applying a "take advantage" test derived from *QWI* or from anywhere else. They have mainly been concerned with the question "whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section".[70] In their concern to avoid giving a pejorative meaning to "take advantage" the judges seem to have overlooked the need to establish a causal link between the possession of substantial market power and the conduct at issue.

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66 Above n 49.

67 Above n 49, 52,129.

68 *Eastern Express Pty Ltd* v *General Newspapers Pty Ltd* (1991) ATPR ¶41-128, 52,893-4.

69 Above n 68, 52,893-52,894. Likewise Lee J, in *Taprobane Tours WA Pty Ltd* v *Singapore Airlines, Ltd* (1990) ATPR ¶41-054, 51,705, said the words "take advantage of market power" simply mean use the power available to a corporation in a market. The principle issue was whether Singapore Airlines had refused to continue to deal with Taprobane, one of its tour operators, except in a limited way, for a proscribed purpose.

70 Above n 14, per Mason CJ and Wilson J.

III NEW ZEALAND CASES ON USE OF DOMINANCE

A *High Court Cases*

1 *Before QWI*

The use of dominance in the *Auckland Regional Authority* v *Mutual Rental Cars*[71] was the acceptance by the ARA of only two rental car operators with booths at Auckland airport, its purpose being to exclude any others. Applying the *QWI* causal test, ARA was acting by virtue of its dominance. As Barker J said:[72]

> [I]ts means of achieving [its] object was the use of its dominant position to exclude competitors of the successful concessionaires. The collateral contracts therefore had the purpose of excluding other potential concessionaires."

However Barker J was not really concerned with the use of dominance issue; he distinguished *Ah Toy* on the ground that the purpose of giving effect to the contractual obligation in that case was not anti-competitive, but was for legitimate business reasons.[73]

2 *After QWI*

In *New Zealand Magic Millions* v *Wrightsons*[74] Tipping J concluded that Wrightsons was in a position to exercise a dominant influence over the supply of auction services in New Zealand for the sale of thoroughbred yearlings. The question was whether Wrightsons' constant threat of changing of its auction dates to clash with Magic Millions' inaugural sale date, (which was restricted to Wellington Anniversary holiday weekend), was in order to prevent Magic Millions' entry into the market.

The judge first succinctly dealt with "use" of a dominant position.[75] After citing Mason CJ and Wilson J's "illuminating comment" that it was the purpose provisions which defined what uses of market power constitute misuse, and that "[t]he dominant party only falls foul of the section if the power is used for a prohibited purpose", Tipping J said:[76]

> It seems to me that the key question is not so much whether a dominant party has used its dominant position but rather whether or not its conduct is proved to have been for one or more of the proscribed purposes.

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

72 Above n 71, 680.

73 Compare Joske J's approach in *Top Performance*, above n 38, and Pincus J in *Berlaz*, above n 65.

74 *New Zealand Magic Millions Ltd* v *Wrightsons Bloodstock Ltd* [1990] 1 NZLR 731; (1990) 3 NZBLC 101,501.

75 Above n 74, NZLR 761; NZBLC 101,527.

76 Above n 75.

Further he ventured the following proposition:[77]

> [i]t is not a breach of s36 if a person, albeit with a dominant position, simply acts in a competitive manner...However if someone with a dominant position takes some action for a purpose proscribed by s36, than clearly they are using their dominant position in a manner which s 36 prohibits.

It is the purpose of the conduct which is for Tipping J the dividing line between legitimate and illegitimate conduct[78] and His Honour was satisfied that Wrightsons had the real and substantial purpose of eliminating Magic Millions from the market.

However, there should first be an inquiry into whether there was a causal link between the "use" and the "dominant position". Not all actions by a dominant firm are a "use of dominance". In commenting on this decision Hampton says Tipping J has downplayed "use" (as indeed His Honour has done), and there is a danger that the Courts will ignore the "use" element.[79] It is difficult to reconcile this with Hampton's approval of the apparent "judicial abandonment of the distinction" between the use of dominance and the use of other sources of action.[80] It is submitted that there must be a finding of "use of dominance", that is that the firm's conduct was at least partially by virtue of its dominance, not essentially pursuant to some contractual or statutory right for example. But the problem lies more in formulating the narrow test of "use". This is illustrated by the *Union Shipping* case where the Court looked separately at "use of dominance".

In *Union Shipping* v *Port Nelson Ltd*[81] the Court found that PNL dominated the entire market, however defined, due to its ownership of the wharf facilities and plant. In discussing "use" the Court said:[82] "There must be a 'use' of [a] dominant position for an infringement." And: "If a person simply acts in a normal competitive fashion, as he would whether dominant or not that person can hardly be said to be 'using dominance'." This comes near to saying that if a dominant firm acts in an anti-competitive (predatory) manner it is "using its dominance", which undermines the neutrality of "use" and comes close to the rejected Pincus J test.[83] With respect, a dominant firm acting in a "normal competitive fashion" (lowering its prices, refusing to supply) may well be "using dominance"; however it will not be breaching the section unless it also acts with one of the proscribed purposes.

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77 Above n 74, NZLR 761;NZBLC 101,528.

78 Above n 74, NZLR 761-762; NZBLC 101,528.

79 Above n 6, Hampton, 200.

80 Above n 6, 203. Hampton says that "the distinction carried to its logical conclusion would effectively eviscerate the misuse provisions of any real meaning."

81 *Union Shipping Ltd* v *Port Nelson Ltd* [1990] 2 NZLR 662; (1990) 3 NZBLC 101,618.

82 Above n 81, NZLR 706; NZBLC 101,645.

83 Above n 2.

McGechan J continued:[84]

> [PNL's] present demands are possible only because of its dominant position. Its demands, at times stark, are a use of that dominance.

While it was true in the case that the excess wharf charge was a use of dominance only possible because of PNL's monopoly position, so the narrow test would have applied (dominance being the sine qua non of the conduct - monopoly pricing), this does not mean the Court was endorsing a general test along these lines. However, the possibility remains that such a test of "use" will be derived from *Union Shipping*, as it was from *QWI*, and also that the Court's discussion of "use" could lead to a non-neutral connotation of "use of dominance", as meaning acting in an anti-competitive manner.

B The Court of Appeal.

The Court of Appeal has not had the opportunity to comment on the *QWI* meaning of "take advantage of market power", except in interlocutory proceedings. In *Electricity Corp* v *Geotherm*[85] the respondents as plaintiffs had alleged, inter alia, that the appellants had used and were intending to use their dominant positions in various electricity, supply and distribution markets for purposes proscribed by section 36 (1)(a), (b) or (c) of the Commerce Act 1986, in breach of that section.

In a pretrial judgment the High Court held that an application to strike out the plaintiffs' claims failed. On appeal the Court of Appeal held that to succeed the respondents must establish first that it was not tenable that their alleged conduct amounted to a use of a dominant position in a market. It was thus necessary for the Court to consider what is meant by "use of a dominant position" and then to examine the alleged conduct to consider whether it fell within this meaning. Gault J, giving the judgment of the Court said: [86]

> The conduct prohibited by the section is the use of the dominant market position for the proscribed purposes. There will be circumstances when the use of the market power and the purpose are not easily separated but the two requirements must be kept in mind.

The Court of Appeal also noted that following *QWI* "use" had a neutral not a pejorative meaning, and that "the distinction between vigorous legitimate competition by a corporation with substantial market power and conduct that contravenes the section is in the purpose of the conduct." It was not the conduct itself that amounted to a use of market power for a prohibited purpose, but the conduct in the market context for a prohibited purpose. "This", said the Court of Appeal, "illustrates the difficulty in separating use of market dominance and purpose."[87]

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84 Above n 81, NZLR 707; NZBLC 101,646.

85 *Electricity Corporation Ltd* v *Geotherm Energy Ltd* [1992] 2 NZLR 641.

86 Above n 85, 646-647, emphasis added.

87 Above n 85, 649.

A test for the meaning of "use of dominance" based on s 3(8) of the Act, was laid down:[88]

> To 'use' [a dominant position] would be actually to exercise or to attempt to exercise a dominant influence over production, acquisition, supply or price in the relevant markets.

This is not inconsistent with the causal test for take advantage of market power in *QWI*. There must be more than conduct by a firm in a dominant position with one of the proscribed purposes; there must be an attempt to exercise or an actual exercise of dominance. However, the Court was not satisfied that "use of a market position" was the same as "use of market power". Arguably the "use of a dominant position" means the "use of the market power flowing from that position". Importantly, the former was not confined to market activity in production, supply acquisition or price, but could include threats and other means of influencing those activities, (as in the *NZ Magic Millions* case). There must however, be "a clear and direct link between the influence and the dominant position",[89] as for the High Court of Australia in *QWI*.

The use of dominance alleged in the case consisted of a series of acts and statements.[90] Of the policy statements by Electricorp to retain its monopoly, the Court said:[91]

> We are not satisfied that statements made on behalf of a company in a dominant position as to [its] intended exercise of market power to deter potential competitors, made in circumstances that make them in fact likely to deter competition, could not fall within s36. Such statements may be said to 'use' a dominant position if it is the dominant position that gives the statements the force amounting to deterrence.

Likewise their Honours found that attempts to induce two government agencies to transfer land adjacent to Geotherm's land to Electricorp, so as to exclude Geotherm's competitive power generation and preserve Electricorp's access to the geothermal source, could be a use of dominance. Concerning acquisitions and proposed acquisitions of potential energy sources (surplus Maui gas) the Court said:[92]

> We consider that a person in a dominant market position who exercises influence flowing from that dominance in order to secure control over resources may be said to use the dominant position. If this is done for one of the proscribed purposes s36 would be contravened.

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88 Above n 85, 648.

89 Above n 85, 649.

90 The Court noted that Barker J in the High Court had found that a combination of small matters, each in themselves being incapable of being held anti-competitive, may in some cases justify a claim, above n 85, 647.

91 Above n 85, 650, emphasis added.

92 Above n 85, 654.

As to denying access to advice to Geotherm, the Court found that attempts to influence key specialist advisers to withhold services from potential competitors might well constitute "use of a dominant position", particularly if they take the form of offers of incentives such as continuing employment by the dominant party.

The Court's conclusion concerning the exercise of rights of objection to planning approval is more debatable. Their Honours said that even a monopolist must be entitled to make a case to the appropriate licensing or other authority for preservation of its monopoly. The submission of reasonable arguments to that end and the taking of reasonable steps to prepare the case could not in themselves amount to a use of a dominant position in a market.[93] But the exercise of statutory rights is not necessarily beyond the scope of section 36.[94]

> ...[T]echnical knowledge and access to material and capital are factors in the capacity to influence production and supply and going to market power. If in a particular case they are an element of a dominant position and are used in the course of the exercise of statutory rights for a proscribed purpose, s36 might be breached. It is difficult to envisage a situation in which there will be a contravention by the reasonable exercise of rights of objection.

This brings in the concept of reasonableness.[95] If a dominant firm is acting reasonably in terminating a contract, because for example a dealer is unsatisfactory, does this mean it is using contractual rights, whereas if it is not acting reasonably it may be using its dominance, that is, exerting pressure by the full weight of its market power? This could well be the case, but it is submitted that the distinction should rather be based on the cause of the conduct, whether it was by virtue of a statutory or contractual right or essentially by virtue of its dominance. If, as the Court of Appeal put it, the dominant position gave the conduct its force,[96] then the behaviour is a "use of dominance". However, the reasonable exercise of a statutory or contractual right may well be evidence of conduct being essentially an exercise of those rights, rather than being by virtue of dominance.

IV CONCLUSION.

Thus the New Zealand Court of Appeal test for "use of dominance" derives from the statutory wording in section 3(8) of the Commerce Act : to actually exercise or attempt to exercise a dominant influence over production, acquisition, supply or price in the relevant market. There must be a link between the exercise of the influence (the

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93 Above n 85, 655.

94 Above n 85, 651.

95 Compare *APRA* v *Ceridale*, above n 49: exercise of rights in good faith; see also *Cadbury Schweppes PL* v *Kenman Development PL* (1991) ATPR ¶41-116, 52,757 : "There may well be circumstances in which the unreasonable pursuit of a claimed legal right against a less powerful competitor by a corporation with substantial market power could amount to taking advantage of that power, but that case is not this case... Cadbury's conduct could not be categorised as unreasonable."

96 Above n 91.

conduct) and the dominance. The conduct can range from statements to the exercise of statutory rights. Clearly this includes conduct that could be engaged in by any firm, not just "monopolistic" type of behaviour.

This approach is not dissimilar to that of the Australian High Court in *QWI* which also decided that there must be a causal link between the conduct and the market power. But this is a wide link: to "take advantage of substantial market power" does not mean to do something which can only be done by a substantial market power corporation. It means to do something, which could possibly (but not necessarily) be done by any firm, by virtue of one's substantial market power. Once it has been established that a corporation has substantial market power, the next question is whether it acted by virtue of that power. This is the broad *QWI* causation test.

"Use of dominance" is a necessary condition of contravention of the section, but not in itself a contravention of the section. The final question therefore is whether the firm had one of the anticompetitive purposes proscribed by the section.[97] Use of market power per se is prima facie neutral. It is the use of power plus a proscribed purpose which is the second threshold test, the first being dominance in a market, these two compound elements together being sufficient conditions for a contravention.

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97 For a discussion of the meaning of "purpose" in the context of s36(1) see above n 7, November.