

# IT AIN'T NECESSARILY SO: *AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V PFIZER AUSTRALIA PTY LTD* AND THE REASONS FOR REFORMING S 36 OF THE COMMERCE ACT

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*The Government has indicated it is going to amend s 36 of the Commerce Act 1986. Its reasons are that s 36 fails to capture sufficient anticompetitive conduct, is difficult and complex to apply and makes litigation unpredictable. The Government proposes a substantial lessening of competition test which it claims will capture more conduct, make analysis more straightforward and provide a source of Australian authority for New Zealand courts. This article uses an Australian Federal Court case, Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd, to show that the claims for reform are overstated and in some cases incorrect. It argues the foundations of the case for reform of s 36 are wobbly and infirm.*

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## **I INTRODUCTION**

Section 36 of the Commerce Act 1986 is New Zealand's competition law anti-monopolisation provision. It aims to prohibit firms with market power from using that power to eliminate rivals or protect themselves from competition.<sup>1</sup> The section has four limbs which a plaintiff must establish to

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1 Section 36(2) provides:

A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—

- (a) restricting the entry of a person into that or any other market; or

show a breach.<sup>2</sup> First, the plaintiff must identify the relevant market. Second, the defendant must have substantial market power in that market. Third, the defendant must have taken advantage of that market power and fourth, the defendant must have acted for one of the proscribed purposes.

Some people are unhappy with how the courts have interpreted s 36 – in particular the "take advantage" limb.<sup>3</sup> This interpretation is called the counterfactual test or comparative exercise.<sup>4</sup> It requires constructing a hypothetical market in which the defendant lacks market power. One then asks would the defendant have engaged in the conduct at issue in that hypothetical market? If not, the defendant has taken advantage of its substantial market power.<sup>5</sup>

One such disgruntled person is the Ministry of Business, Innovation & Employment (MBIE).<sup>6</sup> It has consulted on whether the Government should amend s 36.<sup>7</sup> Its concern is that the interpretation of "take advantage" means that currently s 36 fails to capture categories of conduct which deserve condemnation. Some conduct is harmless when a firm without market power carries it out, but the same conduct is harmful if a firm has market power. MBIE says the counterfactual test fails to capture such conduct.<sup>8</sup> Furthermore, MBIE claims constructing a hypothetical market is difficult and complex, making cases unpredictable and establishing the "take advantage" limb hard.<sup>9</sup>

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- (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
  - (c) eliminating a person from that or any other market.

2 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [262].

3 Ministry of Business, Innovation & Employment *Targeted Review of the Commerce Act 1986: Issues Paper* (November 2015); and Cabinet Paper "Release of Discussion Document: Review of Section 36 of the Commerce Act and Other Matters" (16 January 2019).

4 *Commerce Commission v Telecom Corp of New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577 [0867] at [32].

5 At [32] and [34].

6 Ministry of Business, Innovation & Employment *Discussion Paper: Review of Section 36 of the Commerce Act and other matters* (January 2019) [MBIE Discussion Paper].

7 The Ministry of Business, Innovation & Employment's (MBIE's) papers, submissions and cross-submissions are available at: Ministry of Business, Innovation & Employment "Reviews of the Commerce Act 1986" <[www.mbie.govt.nz](http://www.mbie.govt.nz)>.

8 MBIE Discussion Paper, above n 6, at 6 and 17–18.

9 At 6, 17 and 19–21.

Australia has amended its equivalent anti-monopolisation provision viz, s 46 of the Consumer and Competition Act 2010 (Cth).<sup>10</sup> MBIE wants to adopt the Australian law and amend s 36 to provide:<sup>11</sup>

A person that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

MBIE claims such an amendment addresses s 36's underreach and removes the need to construct a hypothetical market. It fits more closely with the Commerce Act's general scheme, which is based on Australia's Consumer and Competition Act, and provides case law to New Zealand as our courts are likely to pay close attention to and often follow the Australian cases.<sup>12</sup>

More particularly, MBIE has accepted submissions that s 36 is lacking in not having an effects test, whereby conduct breaches s 36 if it has an anticompetitive effect.<sup>13</sup> Some claim under s 36's current "take advantage" test courts do not consider the competitive effect of a firm's conduct. This is not only harmful but also puts New Zealand out of line with other jurisdictions' monopolisation provisions.<sup>14</sup>

The Government has announced that it will amend s 36. While Australia has amended s 46, the Australian Competition and Consumer Commission (ACCC) has had a couple of cases proceeding under the old s 46 (ie the equivalent to s 36). One is *Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd*.<sup>15</sup> Here the ACCC accused Pfizer of taking advantage of its

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10 Section 46 used to provide:

- (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
  - (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation 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.

It now relevantly provides:

- (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in
  - (a) that market ...

11 MBIE Discussion Paper, above n 6, at 6.

12 At 6 and 33–34.

13 At 9, 22, 23 and 28–30.

14 At 22.

15 *Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd* [2015] FCA 113, (2015) 323 ALR 429 [Pfizer (FC)]. The other is *Australian Competition and Consumer Commission v Ramsay Health*

substantial market power and engaging in exclusive dealing, where the exclusive dealing had the purpose of substantially lessening competition under s 47. The Federal Court and Full Federal Court held that Pfizer had not breached either ss 46 or 47.<sup>16</sup>

Both Courts held that the ACCC established "take advantage" under s 46 but failed to show "purpose". Also, both Courts held that the ACCC failed to show the exclusive dealing had the purpose of substantially lessening competition. This suggests the proponents of reform's claims are overstated, if not misplaced. In particular, the "take advantage" limb causes s 36 to fail to proscribe monopolists' behaviour and that a substantial lessening of competition (SLC) test – especially such an effects test – will capture more behaviour. Moreover, MBIE's claim that New Zealand courts pay close attention to and often follow the Australian case law is misplaced. On both s 46 and SLC the judgments show that Australian and New Zealand law differs widely and that claims that New Zealand's monopolisation jurisprudence is an outlier are overstated.

This article uses *Pfizer* as a springboard to show that the foundations for MBIE's case for reform of s 36 are wobbly and infirm. To that end, Part II of this article outlines *Pfizer* and the two judgments. Part III discusses s 36's "take advantage" limb. It shows the limb's supposed difficulties are exaggerated. Critics suggest that s 36 fails to capture refusals to deal and exclusive dealing. Part III shows this is not so and New Zealand law, contrary to critics' claims, is not less lenient than United States jurisprudence. It also suggests that s 36 may on one interpretation proscribe the behaviour MBIE says it does not. It argues that the test for "take advantage" does not always necessitate constructing a hypothetical market. This part only suggests that as New Zealand's leading s 36 authority is loose in its language. Such an argument also depends on New Zealand and Australian law being the same. Part IV, therefore, discusses MBIE's claim that New Zealand courts often follow Australian cases. Starting with *Pfizer* this part shows such a claim is incorrect. One area where the law differs is over the purpose and effect of SLC in a market. As MBIE endorses a SLC test for monopolisation, Part V discusses whether such a test will result in increased liability. This Part argues a SLC test will not and it will not be a panacea as applying such a test is not straightforward. It further shows how claims that s 36 differs from the United States in not considering the conduct's effect on competition are incorrect. Part VI offers some conclusions including that MBIE's justifications for amending s 36 do not withstand analysis.

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*Care Australia Pty Ltd* [2020] FCA 308, (2020) 143 ACSR 333. There, the Australian Competition and Consumer Commission (ACCC) lost on both ss 46 and 47. The reason was not problems with the "take advantage" limb. Rather the Court held that the conduct the ACCC alleged to have been a "taking advantage" did not take place. The ACCC alleged the defendant told surgeons that if they went to a planned new day surgery centre that their access to the defendant's major operating theatre and operating time would be substantially reduced or entirely withdrawn. The Court held the ACCC did not establish this conduct occurred. So the ACCC failed on the facts – not the law.

<sup>16</sup> *Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd* [2018] FCAFC 78, (2018) 356 ALR 582 [*Pfizer* (FFC)].

## **II AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v PFIZER AUSTRALIA PTY LTD**

Pfizer is an Australian manufacturer and supplier of pharmaceuticals. It supplied a cholesterol lowering drug, atorvastatin, which it sold under the name "Lipitor". In January 2012 atorvastatin was the highest selling pharmaceutical in both volume and value under Australia's Pharmaceutical Benefits Scheme. Pfizer owned the patent for atorvastatin, allowing it to be the sole Australian supplier. The patent was due to expire in May 2012 and Pfizer was anticipating intense competition from generic manufacturers of atorvastatin when its patent expired and its revenues to decline dramatically. Accordingly, Pfizer developed a strategy to respond to this competition before and after its patent expired. Pfizer called this strategy "Project Leap" and it comprised Pfizer developing its own generic atorvastatin under the name "Atorvastatin Pfizer" and incentivising pharmacies to stock both Lipitor and Atorvastatin Pfizer in bulk.<sup>17</sup> The incentives included:

- (1) introducing a new distribution scheme by which it would no longer supply prescription pharmaceuticals through wholesalers. Rather it would sell directly to community pharmacies (the Direct to Pharmacy Model);
- (2) establishing a scheme under which pharmacies could accrue rebates on purchases of Pfizer products including Lipitor. For Lipitor, five per cent of a pharmacy's purchases would accrue and be credited as rebates. Pharmacies could not access the Lipitor rebates until the patent expired but the funds started accruing from January 2011 (the Accrual Fund Scheme); and
- (3) bundling the supply of Lipitor and its own generic Atorvastatin Pfizer to community pharmacies. This bundled offer tied the price charged for Lipitor to the amount of Pfizer's generic atorvastatin that the pharmacy agreed to purchase. Pharmacies could access some or all of the rebates which had been accumulating under the Accrual Fund Scheme if they purchased 75 percent of their anticipated generic requirements from Pfizer over six, nine or 12 months (the Bundled Offer).

The ACCC alleged Pfizer breached s 46 by implementing the above measures, as it was taking advantage of its substantial market power in the market for atorvastatin for the purpose of deterring or preventing other suppliers of generic atorvastatin from engaging in competitive conduct.<sup>18</sup> It also alleged Pfizer breached s 47 by requiring pharmacies who wanted to buy atorvastatin to also buy specific quantities of Lipitor. The ACCC alleged this constituted exclusive dealing with the purpose of substantially lessening competition in the national atorvastatin market.<sup>19</sup>

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<sup>17</sup> *Pfizer* (FC), above n 15, at [6].

<sup>18</sup> At [249].

<sup>19</sup> At [249].

### ***A Federal Court***

In the Federal Court, Flick J held that the relevant market was, as the ACCC claimed, "the Australia-wide market for the supply of atorvastatin to, and the acquisition by community pharmacies".<sup>20</sup> As Pfizer was the only supplier of atorvastatin, Flick J held it had substantial market power prior to January 2012 before its patent expired in May 2012.<sup>21</sup> He held that its substantial market power decreased the closer the expiry of the patent came. This was the result of preparatory activities which rivals undertook in anticipation of the patent expiring. He concluded that by January 2012 Pfizer no longer had substantial market power.<sup>22</sup>

### ***B Taking Advantage***

As for "take advantage", Flick J held that in implementing Project Leap Pfizer had taken advantage of its substantial market power.<sup>23</sup> This was because Pfizer procured terms from pharmacies which it would not have been able to procure had the market been competitive.<sup>24</sup> In particular, Pfizer could only have implemented the Direct to Pharmacy Model as the sole supplier of atorvastatin.<sup>25</sup> The pharmacies did not want to change their supply arrangements but had to. Flick J noted: "[t]he pharmacies did not like the Direct-to-Pharmacy Model – but they could not obtain atorvastatin ... from any other source."<sup>26</sup>

As for the Accrual Funds Scheme, this was a "taking advantage" as Pfizer could establish it even in the absence of any certainty on pharmacies' part, when Pfizer implemented it, as to how or when they could access their rebates.<sup>27</sup>

The Bundled Offer was also a "taking advantage" as the ability for pharmacies to access their accrued rebates was linked to the commitment to buy Pfizer's generic atorvastatin via the Bundled Offer. No other manufacturer could offer this.<sup>28</sup>

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20 At [251].

21 At [285].

22 At [286].

23 At [251].

24 At [300].

25 At [295].

26 At [295]–[297].

27 At [303].

28 At [303].

### ***C Purpose***

Under purpose, Flick J held that Pfizer did not have the purposes of preventing or deterring a person from entering the market or engaging in competitive conduct.<sup>29</sup> As for preventing, Flick J held Pfizer lacked this purpose as other generic manufacturers were inevitably going to enter and compete, and everyone knew this.<sup>30</sup> Flick J said he could not infer such "commercial naivety" by Pfizer that it could prevent entry. He further held Pfizer did not have the purpose of deterring competitive conduct because its purpose was ensuring it remained a viable supplier of atorvastatin in the future.<sup>31</sup>

The ACCC relied on draft internal Pfizer marketing documents which referred to "blocking" rivals.<sup>32</sup> In finding Pfizer lacked the requisite purpose, Flick J relied on Pfizer's witnesses' oral evidence. These were all of the persons who had any relatively important role to play in the development and execution of Project Leap.<sup>33</sup> They testified that subordinates had prepared the draft documents and denied that blocking meant preventing rivals from entering and competing. Rather, Pfizer wanted its stock in pharmacies before the patent expired so that it could compete when the generics entered. Flick J recognised the "tension between the competing inferences which could be drawn from the documents" but relied on the oral evidence.<sup>34</sup> While he held the documents "unquestionably provided a platform from which the ACCC could argue that the impugned conduct was undertaken for a proscribed purpose", the alternative explanations the witnesses gave of Pfizer's purpose satisfied him.<sup>35</sup> Accordingly, the s 46 case failed.

### ***D Exclusive Dealing***

As for s 47, the ACCC alleged the Bundled Offer was exclusive dealing because Pfizer offered the discounts (rebates) on the condition that pharmacies buy 75 per cent of their anticipated non-generic atorvastatin from Pfizer.<sup>36</sup> This had the practical effect that the non-Pfizer generic atorvastatin could not amount to more than 25 per cent of the total anticipated volume. The ACCC alleged this had the purpose of substantially lessening competition in the market. It did not run an "effects" or "likely effects" case.<sup>37</sup> Flick J rejected both contentions. He held that the bundled offer did not place

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29 At [339]–[340].

30 At [342].

31 At [344].

32 At [235] and following.

33 At [98].

34 At [346].

35 At [346].

36 At [438].

37 *Pfizer* (FFC), above n 17, at [570].

any restrictions on pharmacies from acquiring any particular volume of generic atorvastatin. Thus, there was no condition under s 47(2).<sup>38</sup> For the same reasons the ACCC failed to show purpose under s 46, Flick J held that it failed to show that Pfizer's purpose was to cause a SLC.<sup>39</sup>

### ***E Full Federal Court***

On appeal the Full Federal Court largely upheld Flick J's decision. However, it found he erred when he found that by January 2012, in the lead up to Pfizer's patent expiring, that Pfizer no longer had a substantial degree of market power.<sup>40</sup> It held that, while its market power may have diminished, it had not diminished enough to make Pfizer's market power less substantial.<sup>41</sup> Apart from that, it agreed with Flick J on "take advantage", purpose under s 46, exclusive dealing and purpose of SLC. The Court dismissed the appeal and the High Court of Australia refused the ACCC leave to appeal.

### ***III "TAKE ADVANTAGE" LIMB***

MBIE's main reason for amending s 36 is alleged difficulties with the "take advantage" limb – in particular, that it allegedly does not capture illegal conduct and that it is difficult and complex to apply. *Pfizer* counters such claims. That both the Federal Court and Full Federal Court found "taking advantage" using classic counterfactual reasoning shows that the limb is neither too difficult nor insurmountable.

Australian jurisprudence has more than one test for "take advantage".<sup>42</sup> These are: counterfactual analysis, material facilitation and the Deane J purpose test. Despite these other tests the ACCC seems to have relied solely on the counterfactual test and the Courts applied it.<sup>43</sup> So the "complex" and "difficult" "take advantage" limb was not why the ACCC lost. Rather, the Courts held the ACCC did not establish that Pfizer had the requisite anticompetitive purpose. Prima facie, this may seem contrary to *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* where the Privy Council observed:<sup>44</sup>

If a person has used his dominant position it is hard to imagine a case in which he would have done so otherwise than for the purpose of producing an anti-competitive effect; there will be no need to use the dominant position in the process of ordinary competition. Therefore, it will frequently be legitimate for a

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<sup>38</sup> *Pfizer* (FC), above n 15, at [446].

<sup>39</sup> At [451].

<sup>40</sup> *Pfizer* (FFC), above n 17, at [359].

<sup>41</sup> At [353]–[354].

<sup>42</sup> See below nn 113–122.

<sup>43</sup> *Pfizer* (FFC), above n 17, at [516].

<sup>44</sup> *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 402.

Court to infer from the defendant's use of his dominant position that his purpose was to produce the effect in fact produced.

*Pfizer* perhaps shows that the Privy Council lacked imagination on purpose. However, the Privy Council said one can infer anticompetitive purpose if the effect of the "taking advantage" was anticompetitive. If, as in *Pfizer*, the conduct has no anticompetitive effect it will not be possible to infer a proscribed purpose.<sup>45</sup> Flick J in *Pfizer* conversely said a court should be cautious to avoid equating a finding that a firm has taken advantage of its substantial market power with a conclusion that it did so for a proscribed purpose.<sup>46</sup>

*Pfizer*, in finding "taking advantage" but no purpose, is not unique. This happened in New Zealand in *Turners & Growers Ltd v Zespri Group Ltd*.<sup>47</sup> There the High Court applied a counterfactual analysis in constructing a hypothetical workably competitive market and asking whether a firm without substantial market power would not, as a matter of commercial judgment, have acted as the defendant did. The Court held such a firm without substantial market power would not have acted in the same way so the defendant had "taken advantage" of its substantial market power.<sup>48</sup> In regards to purpose the Court held the defendant had a real and substantial commercial purpose for its policy and, thus, did not have the requisite anticompetitive purpose.<sup>49</sup> Key to this finding was the defendant's conduct not having an anticompetitive effect.<sup>50</sup> The Court held that if conduct did not produce an anticompetitive effect then one cannot infer a proscribed purpose.<sup>51</sup>

So courts' interpretation of "take advantage" does not cause plaintiffs to lose all s 36 cases. However, MBIE's claim that the courts' interpretation results in firms escaping liability still arises. New Zealand has not had enough cases to make an informed judgment on the efficacy of s 36 and the "take advantage" limb. The more recent cases have included:

- (i) *Carter Holt Harvey Building Products Group Ltd v Commerce Commission*;<sup>52</sup>
- (ii) *Commerce Commission v Telecom Corp of New Zealand Ltd (0867)*;<sup>53</sup>

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45 *Turners & Growers Ltd v Zespri Group Ltd* (2011) 13 TCLR 286 (HC) at [96]–[98].

46 *Pfizer* (FC), above n 15, at [54].

47 *Turners & Growers*, above n 45, at [340].

48 At [362].

49 At [368].

50 At [98].

51 At [364]–[365].

52 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2004] UKPC 37, [2006] 1 NZLR 145.

53 *0867*, above n 4.

- (iii) *Commerce Commission v Bay of Plenty Electricity Ltd (BOPE)*;<sup>54</sup>
- (iv) *Telecom Corp of New Zealand Ltd v Commerce Commission (Data Tails)*;<sup>55</sup> and
- (v) *Turners & Growers*.<sup>56</sup>

Neither *Turners & Growers* or *Data Tails* support MBIE's claim. *Data Tails* was an emphatic victory for the Commerce Commission as it proved all of s 36's elements and the *Turners & Growers* plaintiff established the "take advantage" limb.<sup>57</sup>

In *BOPE* the Commerce Commission alleged that Bay of Plenty Electricity Ltd (BOPE) breached s 36 by unlawfully refusing to supply and raising rivals' costs.<sup>58</sup> The High Court found the defendant did neither.<sup>59</sup> The Commission lost for reasons other than use/take advantage as the High Court found the Commission failed to prove its pleaded market existed and, consequently, that BOPE had substantial market power in that market.<sup>60</sup> As for the defendant raising rivals' costs, the problem was that the Commission's economic expert did not agree with its theory.<sup>61</sup> Given this problem, the High Court did not discuss whether the refusal to supply and raising rivals' costs was a use/take advantage.

However, the Court pointed out that had the Commission both characterised the conduct and argued the case differently then it might have established the "take advantage" limb as such conduct would fail the counterfactual test.<sup>62</sup> Further, the Court said the defendant had the requisite proscribed purpose.<sup>63</sup> The Commission's loss is a litigation failure rather than any evidence that s 36 is deficient.

As for *Carter Holt Harvey*, a predatory pricing case, the Privy Council split three to two on the "use" limb.<sup>64</sup> There is a problem in using predatory pricing to evaluate monopolisation law. The practice is controversial as some doubt it exists or merits competition law concern.<sup>65</sup> Final courts

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54 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 [*BOPE*].

55 *Telecom Corp of NZ Ltd v Commerce Commission* [2012] NZCA 278 [*Data Tails*].

56 *Turners & Growers*, above n 45.

57 See *Data Tails*, above n 55; and *Turners & Growers*, above n 45.

58 *BOPE*, above n 54, at [356].

59 At [357].

60 At [421].

61 At [411]–[416].

62 At [362].

63 At [530].

64 See *Carter Holt Harvey*, above n 52.

65 Frank H Easterbrook "Predatory Strategies and Counterstrategies" (1981) 48 U Chi L Rev 263; and Robert H Bork *The Antitrust Paradox: A Policy at War with Itself* (2nd ed, Free Press, New York, 1993).

around the world have made it difficult for plaintiffs to win.<sup>66</sup> One can count the number of cases plaintiffs win on the fingers of a drunk sawmiller's hands. *Carter Holt Harvey* is also not a slam dunk case of a breach. Commentators are divided on it. Ahdar calls it an easy case,<sup>67</sup> whereas Berry says it was merely price matching and not a breach.<sup>68</sup> In any event, it and predatory pricing generally should not be the bellwether for s 36's effectiveness and the "take advantage" limb.

*Pfizer* and *Turners & Growers* show that plaintiffs can establish the "take advantage" limb. It is not a Sysphean task. While this is so, one of the main criticisms of the "take advantage" limb is that it enables firms to escape liability for some forms of anticompetitive behaviour and that plaintiffs can only prevail in the most egregious cases. Key to this is that some forms of behaviour are benign when a competitive firm carries them out – but are anticompetitive when a monopolist carries them out. Areeda and Turner pointed this out in their treatise.<sup>69</sup> Scalia J made it famous in *Eastman Kodak Co v Image Technical Services* when he quoted Areeda and Turner on the point:<sup>70</sup>

Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist.

So conduct that should be illegal for a firm with substantial market power may be legal for a firm without substantial market power because certain conduct may not have an anticompetitive effect, unless a firm already possessing substantial market power undertakes it.

Critics claim the counterfactual test means that s 36 does not capture this sort of behaviour. MBIE gives two examples: refusals to supply and exclusive dealing.<sup>71</sup> The Commerce Commission relies heavily on Gavil in support of this proposition.<sup>72</sup> Gavil not only argues that the counterfactual test does not capture refusals to supply and exclusive dealing but also that United States monopolisation

66 *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 US 209 (1993); *Boral*, above n 2; and *Carter Holt Harvey*, above n 52.

67 Rex Ahdar "Continuing Uncertainties Surrounding Predatory Pricing: Some New Zealand Reflections" (2002) 23(3) ECLR 142.

68 Mark Berry "Competition Law" [2005] NZ L Rev 267 at 270, 279 and 283–284.

69 Phillip E Areeda and Donald F Turner *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Aspen Publishers, New York, 1978) at [813].

70 Areeda and Turner, above n 69, at 300–302, as quoted in *Eastman Kodak Co v Image Technical Services* 504 US 451 (1992) at 488. See also *Berkey Photo Inc v Eastman Kodak Co* 603 F2d 263 (2nd Cir 1979) at 275.

71 MBIE Discussion Paper, above n 6, at 18; and Cabinet Paper, above n 3, at [11].

72 Andrew I Gavil "Imagining a Counterfactual Section 36: Rebalancing New Zealand's Competition Law Framework" (2015) 46 VUWLR 1043. See also Jeffrey M Cross and others "Use of Dominance, Unlawful Conduct and Causation under Section 36 of New Zealand's Commerce Act 1986: A United States Perspective" (2012) 18 NZBLQ 333.

law captures such conduct whereas New Zealand law does not. He uses *United States v Microsoft Corp* as evidence.<sup>73</sup> There, it was held Microsoft breached § 2 of the Sherman Act<sup>74</sup> by (inter alia) engaging in exclusive dealing. Gavil claims a New Zealand court would not do the same as the counterfactual test blesses exclusive dealing and refusals to supply.<sup>75</sup> These claims are highly contestable.

As for refusals to supply, Gavil says successful challenges to refusals to supply are likely to be rare.<sup>76</sup> He points out that following *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, United States law is strict on allowing refusals to supply to be an act of monopolisation.<sup>77</sup> He suggests that the seminal *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* case where the High Court of Australia found liability under s 46 for a refusal to supply an input was more a decision on the facts than strictly applying the counterfactual test.<sup>78</sup> This is highly debateable as *Queensland Wire* established the counterfactual test. Mason CJ and Wilson J observed:<sup>79</sup>

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. If BHP lacked that market power – in other words, if it were operating in a competitive market – it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.

As the New Zealand Supreme Court in *0867* pointed out, these comments involve "[a] comparison between the conduct of the firm in the actual market and that of the same firm in a hypothetically competitive market."<sup>80</sup> Gavil asserts that Mason CJ and Wilson J's "observations [in *Queensland Wire*] are not based on inferences drawn from a hypothetical competitive market, but from evidence relating to the defendant and its actual conduct in the market examined".<sup>81</sup> The High Court of

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73 *United States v Microsoft Corp* 253 F3d 34 (DC Cir 2001).

74 Sherman Antitrust Act of 1890 15 USC (US).

75 Gavil, above n 72, at 1072–1079.

76 At 1078. For a discussion on New Zealand law see Paul G Scott "Unilateral Refusals to Supply and the Essential Facilities Doctrine under New Zealand's Competition Law" (2018) 49 VUWLR 371.

77 Gavil, above n 72, at 1075, n 79; and *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 550 US 398 (2004).

78 Gavil, above n 72, at 1079, n 90; and *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

79 *Queensland Wire*, above n 78, at 192 per Mason CJ and Wilson J, 202 per Dawson J and 216 per Toohey J.

80 *0867*, above n 4, at [16].

81 Gavil, above n 72, at 1079, n 90.

Australia in *Melway Publishing Ltd v Robert Hicks Pty Ltd* did not regard it so.<sup>82</sup> After setting out the above extract from Mason CJ and Wilson J the Court commented: "the evidentiary basis for that conclusion is not entirely clear. It was not a finding made by Pincus J at first instance, or by the Full Federal Court on appeal."<sup>83</sup>

In any event, the *Queensland Wire* counterfactual test resulted in a vertically integrated firm unbundling part of its supply chain and offering an intermediate product to a rival when it had previously used all of the product for itself. As Toohey J said: "[t]he claim was in truth one for divestiture."<sup>84</sup> No court in the world had ever ordered anything of the sort in similar circumstances. In *Verizon* the United States Supreme Court said it would not order a firm to supply services or products that it used for itself and had never supplied to others. Only a statute could do that.<sup>85</sup> Thus, contrary to Gavil's claims, the counterfactual test means more liability for refusals to supply than United States law.

Further in *BOPE* the New Zealand High Court held that *Queensland Wire* establishes an essential facilities doctrine. It observed:<sup>86</sup>

From those cases it would appear that where a firm controls an essential facility or an essential input product it may in certain circumstances be required to supply that product, or access to that facility, at a "competitive" price. The case that best exemplifies that principle ... is *Queensland Wire*.

The Court continued:<sup>87</sup>

... *Queensland Wire* provides compelling authority for the imposition of an obligation to supply in New Zealand law. To the extent, therefore, that the essential facility/refusal to supply doctrine applies in New Zealand, it is the approach adopted in *Queensland Wire* ... that we think is applicable to the Commerce Act ... rather than the essential facilities doctrine as it is applied under ... the Sherman Act ...

In *Data Tails*, a price squeeze case, the Court of Appeal said it did not have to discuss whether *BOPE* was correct in saying a New Zealand essential facilities doctrine exists, but it held *Queensland Wire* and its counterfactual analysis required the defendant to supply access seekers.<sup>88</sup> This approach, based on *Queensland Wire*, is stricter on price squeezes than seen in the United States Supreme Court

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82 *Melway Publishing Pty Ltd v Robert Hicks Ltd* [2001] HCA 13, (2001) 205 CLR 1.

83 At [47].

84 *Queensland Wire*, above n 78, at 208.

85 *Verizon*, above n 77, at 410.

86 *BOPE*, above n 54, at [387].

87 At [397].

88 *Data Tails*, above n 55, at [132], n 153 and [136]–[140].

case of *Pacific Bell Telephone Co v linkLine Communications Inc.*<sup>89</sup> Under United States law from that case and *Verizon* the defendant in *Data Tails* would not be liable as it would not be obliged to supply.

Further, although *BOPE* does not discuss it, the High Court of Australia in *NT Power Generation Pty Ltd v Power and Water Authority* applied counterfactual analysis in holding the owner of a vertically integrated electricity company liable for refusing a rival electricity producer access to its transmission and distribution facilities.<sup>90</sup> The High Court, following Finkelstein J's dissent in the Full Federal Court,<sup>91</sup> held that in a competitive market the defendant would have granted the plaintiff access to its infrastructure. The High Court held the counterfactual approach was sound because if it was not then it would be very difficult ever to show that a firm whose monopoly power depends on infrastructure had taken advantage of its substantial market power.<sup>92</sup>

The High Court of Australia also rejected the defendant's argument that it was not taking advantage of its substantial market power but rather it was taking advantage of its property rights. The Court rejected this saying the "proposition that a property owner who declines to permit competitors to use the property is immune from s 46 ... is ... intrinsically unsound".<sup>93</sup> The United States Supreme Court in *Verizon* conversely was sympathetic to such a property rights argument, accepting that allowing access decreases efficiency by decreasing defendants' incentives to build infrastructure.<sup>94</sup> It was also unsympathetic to the essential facilities doctrine.<sup>95</sup> Thus, any claim that the counterfactual test limits liability for refusals to supply is misconceived.

As for exclusive dealing, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) found Microsoft liable under § 2 of the Sherman Act for exclusive dealing.<sup>96</sup> Key to the Court's reasoning was that Microsoft failed to show a legitimate business reason for its conduct.<sup>97</sup>

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89 *Pacific Bell Telephone Co v linkLine Communications Inc* 555 US 438 (2009).

90 *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48, (2004) 219 CLR 90 [*NT Power* (HCA)]. For discussions of the case see Mark Berry "Competition Law" [2006] NZ L Rev 599 at 602–608; and Scott, above n 76, at 389–391.

91 See *NT Power Generation Pty Ltd v Power and Water Authority* [2002] FCAFC 302, (2002) 122 FCR 399 [*NT Power* (FFC)] at [175].

92 *NT Power* (HCA), above n 90, at [147].

93 At [126].

94 *Verizon*, above n 77, at 408.

95 At 408.

96 *Microsoft*, above n 73, at 59.

97 At 59.

The Court noted Microsoft's only justification for its exclusive dealing contract with internet access providers was to preserve its market power. This was neither legitimate nor procompetitive.<sup>98</sup>

On one level, one can read *0867* as meaning the "take advantage" limb does not capture exclusive dealing because the Supreme Court phrased the test for "take advantage" as pure counterfactual analysis. It stated:<sup>99</sup>

Anyone asserting a breach of s 36 must establish there has been the necessary actual use (taking advantage) of market power. To do so it must be shown, on the balance of probabilities, that the firm in question would not have acted as it did in a workably competitive market; that is, if it had not been dominant.

The Supreme Court framed its test as a question about how a hypothetical firm lacking substantial market power would have acted. It said about the case:<sup>100</sup>

... the question ... is whether the Commerce Commission has shown, on the balance of probabilities, that in a hypothetical workably competitive market, so constructed, the non-dominant company X would not as a matter of commercial judgment have introduced the *0867* service as Telecom did.

It concluded: "[a]ccordingly, the Commission failed to show that in a hypothetical workably competitive market, because of fear of losing retail customers, company X would not have introduced an *0867* service."<sup>101</sup> Strictly applying that test means that exclusive dealing does not come within the "take advantage" limb.<sup>102</sup> The reason is exclusive dealing has both pro and anticompetitive effects. The anticompetitive effects only arise if a firm has market power. So a firm would impose exclusive dealing in a competitive market because it has efficiency enhancing effects. Such a firm that imposed the exclusive dealing would pass the counterfactual test as it would have acted this way in a competitive market. That a firm would impose exclusive dealing in a competitive market only shows that it may be efficiency enhancing. Simply because there is an efficiency benefit does not prevent the practice also being anticompetitive.

However, that arguably is reading a judgment like a statute. As Tipping J pointed out in *Ratrrays Wholesale Ltd v Meredyth-Young & A'Court Ltd*, "[j]udgments should never be construed like a statute and summarised conclusions should always be read in the light of the discussion which has led

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98 At 71. For discussion of the case see Andrew I Gavil and Harry First *The Microsoft Antitrust Cases: Competition Policy for the Twenty-first Century* (MIT Press, Cambridge (MA), 2014).

99 *0867*, above n 4, at [34].

100 At [42].

101 At [49].

102 Paul G Scott "Taking a Wrong Turn? The Supreme Court and Section 36 of the Commerce Act" (2011) 17 NZBLQ 260 at 276–278.

up to them."<sup>103</sup> We have a doctrine of *stare decisis*, not *stare dictus*, and a full reading of *0867* shows how Microsoft would not escape liability under s 36.

Under the United States doctrine of legitimate business rationale which the DC Circuit invoked in *Microsoft*, a defendant will be liable if it fails to establish a legitimate business rationale for its conduct.<sup>104</sup> Either a defendant can fail to have one as in *Microsoft* or the court may not believe the defendant's purported reason for its conduct as in *Aspen Skiing Co v Aspen Highlands Skiing Corp* and *United States v Dentsply Int'l Inc.*<sup>105</sup> Heerey J, in the Full Court in *Melway*,<sup>106</sup> and in the Federal Court in *Australian Competition and Consumer Commission v Boral Ltd*,<sup>107</sup> followed United States reasoning in adopting the concept of legitimate business rationale as a test for "take advantage". The High Court of Australia in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*<sup>108</sup> and the Privy Council in *Carter Holt Harvey*<sup>109</sup> enthusiastically adopted Heerey J's reasoning. The *0867* Supreme Court did likewise, saying that:<sup>110</sup>

[Heerey J] captured the essence of the comparative exercise necessary to determine whether use had been made of market power in the following way:

If the impugned conduct has a business rationale, that is a factor pointing against any finding that conduct constitutes a taking advantage of market power. If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power.

Thus, if a defendant fails to show a legitimate business rationale or proffers a pretextual one it will be liable under the "take advantage" limb. If a court is dealing with the legitimate business rationale doctrine then one does not have to construct a hypothetical market. Heerey J had no reason to construct such a market in *Australian Competition and Consumer Commission v Australian*

103 *Rattrays Wholesale Ltd v Meredyth-Young & A'Court Ltd* [1997] 2 NZLR 363 at 377 (HC).

104 *Microsoft*, above n 73, at 71; *LePage's Inc v 3M* 324 F3d 141 (3rd Cir 2003) at 152; and *United States v Dentsply Int'l Inc* 399 F3d 181 (3rd Cir 2005) at 196.

105 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 582 (1985); and *Dentsply*, above n 104.

106 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [1999] FCA 664, (1999) 90 FCR 128 at [20]. For a discussion of the doctrine see Paul G Scott "Legitimate Business Rationale and Section 36 of the Commerce Act 1986" (2018) 26 Wai L Rev 96.

107 *Australian Competition and Consumer Commission v Boral Ltd* [1999] FCA 1318, (1999) 166 ALR 410 at [158].

108 *Boral*, above n 2, at [175] and [196].

109 *Carter Holt Harvey*, above n 52, at [54].

110 *0867*, above n 4, at [26].

*Safeway Stores Pty Ltd.*<sup>111</sup> There, as part of the Full Federal Court, he held the defendant liable under the "take advantage" limb when the defendant failed to establish a legitimate rationale.<sup>112</sup> So, had *Microsoft* been a New Zealand case, then using *0867* reasoning it too would have been liable for its exclusive dealing. It had no legitimate business rationale so would fall within the "take advantage" limb. So the current s 36 is not a feeble weapon.

This leaves the *Eastman Kodak* scenario.<sup>113</sup> Does s 36 fail to capture this conduct as critics claim? Arguably it does but the problem may be the looseness of *0867*'s language. Australia's then s 46 had alternate tests for "take advantage". One was the material facilitation test. The High Court of Australia referred to this in *Melway*. It said:<sup>114</sup>

... in a given case, it may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the existence of the power, even though it may not have been absolutely impossible without the power. To that extent, one may accept the submission made on behalf of the ACCC, intervening in the present case, that s 46 would be contravened if the market power which a corporation had made it easier for the corporation to act for the proscribed purpose than otherwise would be the case.

However, the Court did not decide the case on this basis as the ACCC had introduced it on appeal. Neither party had argued it below nor were the findings of fact necessary to support the argument present.<sup>115</sup>

The second "take advantage" test was the Deane J purpose test introduced in *Queensland Wire*.<sup>116</sup> Deane J observed:<sup>117</sup>

[BHP's] refusal to supply Y-bar to QWI otherwise than at an unrealistic price was for the purpose of preventing QWI from becoming a manufacturer or wholesaler of star pickets. 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

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111 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [2003] FCAFC 149, (1999) 198 ALR 657.

112 At [329]–[330]. Similarly, in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 909, 310 ALR 165 the Federal Court relied on legitimate business rationale and did not construct a hypothetical market under the "take advantage" limb. The Court held the plaintiff failed to establish the limb.

113 See *Eastman Kodak*, above n 70.

114 *Melway*, above n 82, at [51].

115 At [69].

116 *Queensland Wire*, above n 78.

117 At 197–198.

of the Australian steel market as the dominant supplier of steel and steel products. In refusing supply in order to achieve that purpose, BHP has clearly taken advantage of that substantial power in that market.

The test differs from the traditional *Queensland Wire* test. The *Melway* High Court distinguished it from the other approaches in *Queensland Wire*.<sup>118</sup> It also called Deane J's approach "different".<sup>119</sup> It further observed that Deane J's test covered the *Eastman Kodak* situation where conduct can only be anticompetitive when a monopolist carries it out.<sup>120</sup> As with material facilitation, the High Court did not decide the issue using this test as the plaintiff had not argued it. The Court relied on the traditional *Queensland Wire* counterfactual analysis. Finkelstein J, in the Full Federal Court in *NT Power* said, citing *Melway*, "[a]lthough the other members of the High Court adopted a different approach Deane J analysis may still be utilised."<sup>121</sup> The High Court in *NT Power* agreed, noting: "Finkelstein J also adopted what he saw as an alternate approach – that of Deane J (Dawson J concurring) in *Queensland Wire* ...".<sup>122</sup>

The *0867* Supreme Court held that these tests (material facilitation and the Deane J purpose test) were part of normal counterfactual analysis.<sup>123</sup> However, as in *Melway*, the plaintiff in *0867* did not argue these alternate tests. It relied only on traditional counterfactual analysis and did so at all court levels. So the Supreme Court did not have to deal with an argument that the defendant was liable under the two "different" and "alternate" tests. If the Supreme Court faced such an argument it might have expressed its ultimate test differently. Further elucidation in the form of a plaintiff arguing only material facilitation or the Deane J purpose test may be necessary before determining whether the traditional counterfactual test is the only test for "take advantage".

If the Deane J purpose test is part of New Zealand law then s 36 captures conduct which falls under the *Eastman Kodak* scenario. As *Melway* said, this test is designed to capture such conduct.<sup>124</sup> If so, one of the main reasons for reforming s 36 falls away. However, this depends on accepting that material facilitation and the Deane J purpose tests differ from traditional counterfactual reasoning as Australian law says they do. Academic commentary strongly argues that they differ.<sup>125</sup> It also depends

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118 *Melway*, above n 82, at [47]–[48].

119 At [47]–[48].

120 At [29]. See *Eastman Kodak*, above n 70.

121 *NT Power* (FFC), above n 91, at [180].

122 *NT Power* (HCA), above n 90, at [149] (footnotes omitted).

123 *0867*, above n 4, at [17], [21] and [30].

124 *Melway*, above n 82, at [29].

125 Chris Noonan *Competition Law in New Zealand* (Thomson Reuters, Wellington, 2017) at 494–510; Scott, above n 91; Yvonne van Roy "Taking Advantage of Market Power: Should New Zealand Adopt the Approach of the High Court of Australia?" (2005) 11 NZBLQ 319; Rex Ahdar "Escaping New Zealand's Monopolisation

on the Supreme Court being wrong in its arguably obiter comments that they do not differ. This difference between Australian and New Zealand law shows a weakness in another of MBIE's purported justifications for reforming s 36 and that is the claim that New Zealand courts pay close attention to and often follow Australian cases on competition law. *Pfizer* shows this is untrue.

#### **IV DIFFERENCES IN LAW**

Normatively, given how certain provisions in New Zealand's and Australia's competition law are identical or virtually identical, judges should treat the provisions the same. As Australian law is older New Zealand courts should pay attention to it. The 0867 Supreme Court thought so, saying:<sup>126</sup>

It is important that the approach to the issue under consideration be broadly the same on both sides of the Tasman. Under agreements between the two countries competition law in New Zealand and Australia and associated enforcement provisions are increasingly being framed in a common way to address anticompetitive practices affecting trans-Tasman trade.

However, the approach on both sides of the Tasman is not broadly the same. As mentioned above, 0867 said the material facilitation and Deane J purpose tests for "take advantage" were versions of counterfactual analysis. They are all part of one overarching test – the comparative exercise.<sup>127</sup> *Pfizer* shows how Australian law has more than one test for "take advantage." Flick J observed:<sup>128</sup>

One test that may be applied to determine whether a corporation has taken advantage of its market power requires a comparison between what it has in fact done and what it would rationally do if it lacked substantial market power ...

The Full Federal Court agreed, saying:<sup>129</sup>

... the primary judge noted that one test that may be applied in order to determine whether a corporation has taken advantage of its market power requires a comparison between what the alleged contravener has in fact done with what it would rationally have done if it had lacked market power ...

Use of "one test" shows that Australian law has more than one test. These must be material facilitation and the Deane J purpose tests. To the extent that Heerey J's legitimate business rationale does not require constructing a hypothetical market test it too is another test for "take advantage".

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Quagmire" (2006) 34 ABLR 260; and Ian Eagles and Louise Longdin *Refusals to Licence Intellectual Property: Testing the Limits of Law and Economics* (Hart Publishing, Oxford, 2011).

126 0867, above n 4, at [31].

127 At [17], [21] and [30].

128 *Pfizer* (FC), above n 15, at [59].

129 *Pfizer* (FFC), above n 17, at [107].

*Pfizer* also shows how Australian law differs on purpose under s 36. Such purpose could be objective or subjective. With objective purpose courts infer it from actions and circumstances. Subjective purpose is the purpose of the person with substantial market power.<sup>130</sup> Courts can infer subjective purpose. They will have to if no one gives evidence or if the court disbelieves the defendant. In New Zealand, purpose under s 36 is primarily objective but evidence of subjective purpose can be relevant. New Zealand courts have deprecated any difference between objective and subjective purpose. The Court of Appeal noted in *Port Nelson Ltd v Commerce Commission*:<sup>131</sup>

As seems customary in cases under ss 27 and 36 we heard argument as to whether the proscribed purposes are to be ascertained subjectively or objectively. ... Much has been written on this distinction which generally is unimportant in practice. There will be very little difference in most cases between ascertaining subjective purpose by inference from what was said and done and ascribing objectively a purpose from evidence of what was said and done. ... So far as concerns s 36 ... we incline to the conclusion ... that purpose may be established or negative on either a subjective or an objective analysis.

So in New Zealand both objective and subjective purpose are relevant. As the High Court in *BOPE* observed: "the primary enquiry is an objective one, but that evidence of subjective statements of purpose and intention can be relevant".<sup>132</sup>

Australian law differs. It does not play down the difference between objective and subjective purpose. Purpose under s 46 is subjective. Flick J in *Pfizer* observed: "'purpose' is to be ascertained subjectively and not objectively".<sup>133</sup> In support of this, he cited *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* where the Full Federal Court observed: "[t]here was no dispute that in s 46 'purpose' was to be ascertained 'subjectively' rather than 'objectively'".<sup>134</sup> The *Pfizer* Full Federal Court agreed that s 46 purpose "is to be ascertained subjectively and not objectively".<sup>135</sup>

*Turners & Growers* shows the stark difference between the two jurisdictions.<sup>136</sup> The High Court observed:<sup>137</sup>

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<sup>130</sup> *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 622 (HC) at 709.

<sup>131</sup> *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 544 (CA) at 564. See also *Turners & Growers*, above n 45, at [99].

<sup>132</sup> *BOPE*, above n 54, at [325].

<sup>133</sup> *Pfizer* (FC), above n 15, at [46].

<sup>134</sup> *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 474–475.

<sup>135</sup> *Pfizer* (FFC), above n 17, at [467].

<sup>136</sup> *Turners & Growers*, above n 45.

<sup>137</sup> At [99].

... it is not necessary in the present case to address the question whether in the context of s 36(2) the "purpose" of the person is to be ascertained subjectively or objectively because Turners & Growers accepted that it should be determined objectively.

The New Zealand Courts that have discussed the issue do not cite the Australian cases. As with the plaintiff in *Turners & Growers*, they ignore the Australian law. This undermines MBIE's claim that New Zealand courts pay attention to Australian law.

The monopolisation provisions are not the only areas where interpretation of New Zealand and Australian law differs, despite virtually identical provisions. The most marked difference is over the purpose of substantially lessening competition in a market in s 27 of the Commerce Act<sup>138</sup> and s 45 of the Consumer and Competition Act.<sup>139</sup>

In Australia the purpose of substantially lessening competition is subjective.<sup>140</sup> *Pfizer* holds that purpose under s 47 is subjective.<sup>141</sup> The High Court of Australia held in *News Ltd v South Sydney District Rugby League Football Club Ltd* and *Rural Press Ltd v Australian Competition and Consumer Commission* that the relevant purpose under s 45 is subjective.<sup>142</sup> Conversely in New Zealand following *Port Nelson*<sup>143</sup> and more particularly *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd*,<sup>144</sup> the test for purpose is an objective one, but evidence of subjective purpose can be

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138 Section 27 relevantly provides:

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

139 Section 45 relevantly provides:

- (1) A corporation must not:
  - (a) make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition ...

For a discussion of the subject see Scott, above n 106, at 168.

140 *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45, (2003) 215 CLR 563 at [63]; and *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75, (2003) 216 CLR 53 at [111].

141 *Pfizer* (FC), above n 15, at [46]; and *Pfizer* (FFC), above n 17, at [467].

142 *News Ltd*, above n 140, at [63]; and *Rural Press*, above n 140, at [111].

143 *Port Nelson*, above n 131, at 564.

144 *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [255].

adduced in assessing objective purpose. Such evidence is restricted to cases where it is borderline as to whether there might be an anticompetitive effect.<sup>145</sup>

So in New Zealand both objective and subjective purpose are relevant. In holding this in *ANZCO* the Court of Appeal did not refer to the High Court of Australia having held purpose is subjective. The Court referred to earlier Federal Court decisions – the majority of which favoured subjective purpose. So much for Australian law influencing New Zealand courts.

The reason that *ANZCO* (and earlier the Court of Appeal in *Port Nelson*) and its progeny say both objective and subjective is relevant is that they follow Cooke P's comments in *Tui Foods Ltd v New Zealand Milk Corp* that courts could use both.<sup>146</sup> This too is a sharp break with Australian law. In *News Ltd* the ACCC intervened and submitted that both objective and subjective purpose were relevant. The High Court emphatically rejected the submission. Gummow J noted:<sup>147</sup>

... a construction which, depending upon the facts of the case, may require examination of either the subjective purpose of the parties or the objective purpose of the provision, or both, is not the product of reasoned statutory interpretation...

From the transcript Kirby J told the ACCC he was surprised that it made the submission.<sup>148</sup> If MBIE's claim that New Zealand courts take account of Australian courts' competition law jurisprudence had any validity then New Zealand courts should have discussed the High Court of Australia's view that holding both subjective and objective purpose are relevant is "not the product of reasoned statutory analysis".<sup>149</sup> New Zealand courts are majestically impervious to it and do not mention it.

As a result of saying both objective and subjective purpose are relevant, New Zealand law is uncertain. In *Turners & Growers* the parties agreed that purpose under s 27 was objective.<sup>150</sup> In *Lodge Real Estate Ltd v Commerce Commission* both parties relied on subjective evidence of purpose.<sup>151</sup> This shows Australian law has had no influence on New Zealand courts.

Another issue on purpose in *ANZCO* was whether a plaintiff could establish an anticompetitive purpose when it was impossible to achieve that effect. William Young J and Anderson P held that it

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145 *ANZCO*, above n 144, at [261]; *Todd Pohokura Ltd v Shell Exploration NZ Ltd* [2015] NZCA 71 at [256]; and *BOPE*, above n 54, at [339].

146 *Tui Foods Ltd v New Zealand Milk Corp* (1993) 5 TCLR 406 (CA) at 409.

147 *News Ltd*, above n 140, at [63].

148 *News Ltd v South Sydney District Rugby League Football Club Ltd* [2002] HCA Trans 363 (6 August 2002).

149 *News Ltd*, above n 140, at [63].

150 *Turners & Growers*, above n 45, at [82].

151 *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25 at [172].

was.<sup>152</sup> Glazebrook J held that it was not.<sup>153</sup> None of the New Zealand judges mentioned a number of Full Federal Court cases which held that a court can find purpose in such circumstances.<sup>154</sup>

Further differences between the two countries' laws arise over the effect of substantially lessening competition. In Australia, when assessing whether a provision has such an effect, courts take account of efficiencies only to a limited degree. The court in *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* noted s 45: "does not contain any 'rule of reason', or any scope to permit a substantial lessening of competition because it is balanced by claimed pro-competitive effects elsewhere".<sup>155</sup> Conversely, in *ANZCO* Glazebrook J noted: "the concern [under s 27] is with the net effect on competition and that it is thus necessary to balance the procompetitive effects (including efficiencies) against the anticompetitive effects in the relevant market".<sup>156</sup>

These differences have arisen in the context of the substantial lessening of competition (SLC) test. Australia has amended its monopolisation law to a SLC test. This is what MBIE and some submitters favour for s 36. It claims it would be beneficial as it will capture more anticompetitive conduct, be a more straightforward test which is easier to administer, and will align New Zealand and overseas jurisdictions, particularly the United States.<sup>157</sup> These claims are highly contestable and *Pfizer* shows why.

## **V SUBSTANTIAL LESSENING OF COMPETITION TEST FOR MONOPOLISATION**

In *Pfizer* the Federal Court and Full Federal Court held that *Pfizer* neither breached s 46 nor s 47. As for the latter they held the contracts did not have the purpose of SLC. The ACCC did not claim they had the effect of SLC. Thus, a SLC test will not result in plaintiffs inevitably succeeding. This has also been the New Zealand experience. In *Turners & Growers* the plaintiff lost under s 36 and all three limbs of s 27.<sup>158</sup> The same thing happened in *BOPE*.<sup>159</sup> In *Carter Holt Harvey* the Commerce

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152 *ANZCO*, above n 144, at [152]–[154] per William Young J and [302] per Anderson P.

153 At [256]–[262].

154 See for example *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 193, (2003) 131 FCR 529 at [249]; and *Seven Network Ltd v News Ltd* [2009] FCAFC 166 at [897], [899]–[900] and [902].

155 *Universal Music*, above n 154, at [273]. For Australian law see SG Corones *Competition Law in Australia* (6th ed, Thomson Reuters, Sydney, 2016) at [7.140]–[7.145].

156 *ANZCO*, above n 144, at [249].

157 MBIE Discussion Paper, above n 6, at 30 and 33–34.

158 *Turners & Growers*, above n 45, at [281]–[284].

159 *BOPE*, above n 54.

Commission won on s 36 and lost on s 27 in the High Court.<sup>160</sup> The Commission had abandoned any cross-appeal on s 27 in the Privy Council. So introducing a SLC test is not necessarily going to result in increased liability.

Another claimed reason for introducing a SLC test is that it will bring New Zealand law into line with overseas jurisdictions – particularly the United States – in requiring an effects test, in the sense of requiring an effect on competition as a prerequisite for liability. The Commerce Commission advocates for an effects test in that it wants s 36 to require that the conduct substantially lessens competition.<sup>161</sup> This is contrary to its position in *BOPE* where it argued that it did not have to prove that the defendant's actions somehow harmed competition.<sup>162</sup> That position is understandable as it is easier for plaintiffs to establish a breach.

However, the claim that the current s 36 fails to consider the effect that the conduct has on competition is incorrect. In *0867* the Supreme Court cited the High Court of Australia in *Boral* that s 46 was designed to prevent damage to the competitive process rather than to individual competitors.<sup>163</sup> The Court continued:<sup>164</sup>

Only uses of market power that damage competition rather than competitors per se are caught by the section. Vigorous legitimate competition by a firm with dominance may damage competitors but, ex hypothesi, does not damage competition and is therefore not a breach of the section.

So s 36 requires the conduct to have the effect of damaging competition. If it does not have this effect then the section does not apply. *Turners & Growers* reinforces this. There the High Court held the plaintiff had not established s 36 purpose. It observed:<sup>165</sup>

... if no anti-competitive effect is produced or achieved by the taking advantage of the person's market power, then it will not be possible to draw an inference of anti-competitive or proscribed purpose from that particular conduct.

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<sup>160</sup> *Carter Holt Harvey*, above n 52.

<sup>161</sup> Commerce Commission *Targeted Review of the Commerce Act Cross-submission to the Ministry of Business, Innovation and Employment* (21 July 2016) at 20–24.

<sup>162</sup> *BOPE*, above n 54, at [381].

<sup>163</sup> *0867*, above n 4, at [25]. See also *Boral*, above n 2.

<sup>164</sup> *0867*, above n 4, at [25]. See also *Turners & Growers*, above n 45, at [76].

<sup>165</sup> *Turners & Growers*, above n 45, at [98] and [364]. Noonan, above n 125, at 512, n 171 says the High Court put a gloss on the statutory language.

This means that before a court will infer purpose there needs to be an anticompetitive effect. This does not cover every case as a plaintiff could establish purpose by other evidence.<sup>166</sup> This is a de facto effects test and shows that in most cases the current s 36 does not fail to consider the effect of conduct.

By requiring harm to the competitive process rather than merely damage to individual competitors s 36 is similar to United States monopolisation law. In *Microsoft* the DC Circuit observed:<sup>167</sup>

... to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice.

This is the same as 0867. The United States Supreme Court observed in *NYNEX Corp v Discon Inc* that liability under § 2 of the Sherman Act requires that the challenged conduct harmed the competitive process. The Court said a "plaintiff ... must allege and prove harm, not just to a single competitor, but to the competitive process, ie, to competition itself".<sup>168</sup>

That is the effect United States law requires and it is the same in New Zealand. The requisite effect is not the effect of SLC, nor finding on balance that the anticompetitive effects of the conduct outweigh any procompetitive effects under a rule of reason assessment under § 1 of the Sherman Act. A finding of the requisite effect is a lower threshold than liability under § 1.

*Microsoft* shows this. There Microsoft was held liable, inter alia, for breaching § 2 for its exclusive dealing contracts.<sup>169</sup> However, they both held the contracts did not breach § 1. Microsoft had argued this finding of no liability under § 1 necessarily precluded it being liable under § 2. The DC Circuit rejected this, saying:<sup>170</sup>

... [Microsoft] argues that the District Court's holding of no liability under § 1 necessarily precludes holding it liable under § 2 ... we nonetheless reject Microsoft's contention ... we agree with plaintiffs that a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the ... share usually required in order to establish a § 1 violation.

The same thing happened in *United States v Dentsply* and *LePage's Inc v 3M* where the District Courts both found the defendants' exclusive dealing breached § 2, but not § 1.<sup>171</sup> In *Dentsply* the United States Court of Appeals for the Third Circuit observed: "[a]lthough not illegal in themselves,

166 *Turners & Growers*, above n 45, at [98].

167 *Microsoft*, above n 73, at 58.

168 *NYNEX Corp v Discon Inc* 525 US 128 (1998) at 135 and 139–140.

169 *Microsoft*, above n 73.

170 At 70.

171 *LePage's Inc*, above n 104. See *United States v Dentsply Int'l Inc* 277 F Supp 2d 387 (Del 2003); and *LePage's Inc v 3M* 2000 US Dist LEXIS 3087 (ED Pa, 14 March 2000).

exclusive dealing arrangements can be an improper means of maintaining a monopoly."<sup>172</sup> In *LePage's* the Third Circuit said:<sup>173</sup>

3M argues that because the jury found for it on LePage's claims under § 1 of the Sherman Act ... these payments should not be relevant to the § 2 analysis. The law is to the contrary. Even though exclusivity arrangements are often analyzed under § 1, such exclusionary conduct may also be an element in a § 2 claim.

So liability under § 1 is more restricted than under § 2. Furthermore, the District Court in *Microsoft* found Microsoft's bundling of its browser breached both § 1 and 2. The DC Circuit upheld the § 2 claim but reversed the finding on § 1. It sent it back to the District Court to assess whether on balance the bundling was anticompetitive and a breach of § 1.<sup>174</sup>

Assessment under § 1 of the Sherman Act is equivalent to New Zealand's SLC test in that a court weighs up the pro and anticompetitive effects and decides on balance whether the conduct is anticompetitive.<sup>175</sup> So under the proposed amendment to s 36 Microsoft would not be liable when it would be under the current s 36. Conduct which does not breach § 1 will not have the effect of SLC. As for Microsoft's bundling it is unclear whether it would fall within the amended s 36 as the parties settled without the District Court deciding whether the bundling breached the rule of reason. This shows that changing to a SLC test will not necessarily result in increased liability. The Commerce Commission has extolled the United States *Microsoft* result so there is an irony in the Commission advocating for a change which would result in Microsoft escaping liability when it would be liable under Heerey J's legitimate business rationale doctrine.<sup>176</sup>

Such a change would also be contrary to one of the main reasons for having monopolisation provisions. That is to prevent firms with substantial market power from engaging in conduct that prevents small rivals from growing into threats. Wu calls this the Kronos effect.<sup>177</sup> He derives it from

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<sup>172</sup> *Dentsply*, above n 104, at 187.

<sup>173</sup> *LePage's Inc*, above n 104, at 157 (footnotes omitted).

<sup>174</sup> *Microsoft*, above n 73, at 94–95. The District Court applied the per se rule against tying to the bundling. The Court of Appeals remanded and instructed the District Court to apply the rule of reason. See *United States v Microsoft Corp* 87 F Supp 2d 30 (DC 2000); and *United States v Microsoft Corp* 97 F Supp 2d 59 (DC 2000).

<sup>175</sup> *ANZCO*, above n 144, at [249]. For rule of reason see Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and Its Practice* (4th ed, West Academic, St Paul (MN), 2011) at chs 4–5; Andrew I Gavil, William E Kovacic and Jonathan B Baker *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (2nd ed, Thomson West, St Paul (MN), 2008) at ch 2; and Ernest Gellhorn, William E Kovacic and Stephen Calkins *Antitrust Law and Economics in a Nutshell* (5th ed, Thomson West, St Paul (MN), 2004) at ch 5.

<sup>176</sup> Commerce Commission, above n 161, at 13 and 26.

<sup>177</sup> Tim Wu *The Master Switch: The Rise and Fall of Information Empires* (Atlantic Books, London, 2010) at 24–27.

Greek mythology. Kronos was a titan and second ruler of the universe. An oracle warned him that one of his children would dethrone him. As a result, Kronos would eat his children as soon as they were born. The Kronos effect is a dominant firm's efforts to consume its potential successors in their infancy. Wu gives examples from the United States information technology industry and Microsoft is an apt example. Microsoft perceived Netscape as a potential threat to its operating system so it attempted to reduce Netscape's competitive viability. Current United States and New Zealand monopolisation law by not requiring a SLC can capture Kronos behaviour. Conversely, such behaviour is highly unlikely to amount to a SLC as the victim is small and the conduct would not have an effect on the market as a whole.<sup>178</sup> So changing to a SLC test can result in decreased liability.

Perhaps the main reason proponents want the SLC test is the claim that it is more straightforward to operate as it removes the need to postulate artificial hypothetical scenarios. This is debatable, as in assessing whether a provision in a contract or arrangement has the effect or likely effect of SLC one compares the likely state of competition "with" the provision (the factual) against the likely state of competition "without" the provision (the counterfactual).<sup>179</sup> The Court of Appeal in *Commerce Commission v Woolworths Ltd* said of the SLC test, albeit in a merger case:<sup>180</sup>

This exercise requires a comparison of the likely state of competition if the acquisition proceeds ("the factual") against the likely state of competition if it does not ("the counterfactual"). The expression "factual" is, in the context of a clearance application, a misnomer as it is just as hypothetical as the counterfactual. A substantial lessening of competition is "likely" if there is a "real and substantial risk" that it will occur ... Another way of putting it is that there must be a "real chance" that there will be a substantial lessening of competition ...

The Court of Appeal referred to the counterfactual test as being "elementary" to the analysis.<sup>181</sup> When assessing a SLC under s 45 Australian courts undertake a "with and without" analysis. The Full Federal Court first did so in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*.<sup>182</sup> It considered the state of competition with the restraint and without the restraint. This is all counterfactual analysis<sup>183</sup> and involves the same postulating of a hypothetical state of affairs as 0867's comparative exercise. It will lead to the same increase in enforcement costs and unpredictability.

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178 *ANZCO*, above n 144, at [246]–[249].

179 At [246].

180 *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, (2008) 12 TCLR 194 at [63]. See also *Turners & Growers*, above n 45, at [85].

181 *Woolworths*, above n 180, at [4].

182 *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38, (2000) ATPR 41-752.

183 The Federal Court in *Ramsay Healthcare*, above n 15, at [432] and [433] referred to the with and without comparison as involving counterfactuals.

New Zealand is likely to have even more unpredictability. When assessing the effect and likely effect under the SLC test, Australian courts use only one counterfactual – under "without the restraint". They use the status quo of "with the restraint" as the basis for comparison. As with s 36's "take advantage" comparative exercise, predicting the counterfactual is potentially difficult. It is even more pronounced in New Zealand following the High Court's decision in *Woolworths Ltd v Commerce Commission*, a merger case.<sup>184</sup> The reason is the High Court noted that in many cases there may be the likelihood of more than one counterfactual in the sense that more than one scenario may be likely without the restraint. It concluded this on the basis of it accepting that the test for likelihood required only that the counterfactual be "more than 'possible'" and that "it need not be 'more probable than not'".<sup>185</sup> This led the Court to formulate the following on counterfactual analysis:<sup>186</sup>

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

The High Court not only did not use the status quo as the factual but introduced multiple counterfactuals. It said when assessing SLC that one does not just use the most probable counterfactual, ie the one that has the greater prospects of occurring.<sup>187</sup> So decision-making under SLC is directed to identifying all likely counterfactuals and making the competition assessment in respect of the least favourable counterfactual, even if it may not be the most likely counterfactual.<sup>188</sup> Doing so will exacerbate unpredictability. There will be no help from overseas as no other jurisdiction which has an SLC test uses multiple counterfactuals. The case does not say when multiple counterfactuals are in play and what type of evidence supports multiple counterfactuals.<sup>189</sup> It will be even more difficult for litigants to know what scenarios the courts will choose as their counterfactuals. The focus of the case will then become counterfactual analysis which will determine the result. These are the criticisms of the current s 36. An SLC test will not improve things. Any suggestion that

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184 *Woolworths Ltd v Commerce Commission* [2008] NZCCLR 10 (HC) at 128.

185 At [112].

186 At [122].

187 At [118].

188 Mark N Berry and Paul G Scott "Merger Analysis of Failing or Exiting Firms Under the Substantial Lessening of Competition Threshold" (2010) 16 *Cant L Rev* 272 at 287.

189 At 286.

changing to an SLC is going to be less complex, less costly, more predictable, align New Zealand with other jurisdictions and lead to increased liability is fanciful.

The analysis of an SLC will not be straightforward for unilateral conduct that does not fall within s 27. Refusals to supply and price squeezes are an example. Presumably with refusals to supply the analysis will involve comparing the state of competition in the relevant market with the refusal and without the refusal. However, what happens if the defendant has a valid reason for not supplying – such as lack of capacity or the plaintiff is a bad credit risk? Refusing to supply in such circumstances does not breach the current s 36.<sup>190</sup> But where does this fit in a SLC analysis? Is it part of the with and without comparison? Or does a court consider it before comparing? Such factors do not fall within traditional SLC analysis under s 27 so courts will have to develop a new framework to account for such things in situations of purely unilateral conduct. Until they do uncertainty will ensue. So much for a SLC test providing certainty.

Overseas authority will not help. Sections 78(1) and 79 of Canada's Competition Act expressly ban price squeezes by a dominant firm if they have the purpose of impeding the expansion or entry of an unintegrated rival and are likely to substantially lessen competition.<sup>191</sup> There have been no cases and, as Elhauge and Geradin point out, no one has defined the conditions necessary to prove the price squeeze has anticompetitive effects.<sup>192</sup> Uncertainty prevails.

In a couple of cases viz, *Rural Press Ltd* and *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* the Australian courts found breaches of s 45, but not s 46.<sup>193</sup> A SLC test would capture such conduct. However, as both *Microsoft* and *Dentsply* show, there are cases where the conduct was monopolisation but would not amount to a SLC. It is debateable whether amending s 36 would result in an overall better situation. The defendants in *Rural Press* and *Cement Australia* would be liable under both ss 27 and 36, whereas the defendants in *Microsoft* and *Dentsply* would not be liable under competition law at all. This is not a net benefit.

## VI CONCLUSION

MBIE's main reason for amending s 36 is that the courts' interpretation of the "take advantage" limb is a problem as it is complex to apply, leads to unpredictability and allows firms to get away with some forms of anticompetitive behaviour. *Pfizer*, to the contrary, shows that plaintiffs can establish the "take advantage" limb but lose under the "purpose" limb. The plaintiff's failure was not due to the

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<sup>190</sup> *Mehway*, above n 82, at [104].

<sup>191</sup> Competition Act RSC 1985 C-34 (CAN).

<sup>192</sup> Einer Elhauge and Damien Geradin *Global Competition Law and Economics* (2nd ed, Hart Publishing, Oxford, 2011) at 493.

<sup>193</sup> *Rural Press Ltd*, above n 140; and *Australian Competition and Consumer Commission Pty Ltd v Cement Australia Pty Ltd* [2013] FCA 909, 310 ALR 165.

"take advantage" limb. This is not an Australian phenomena as *Turners & Growers* shows.<sup>194</sup> *BOPE* shows plaintiffs can also lose under s 36's other limbs.<sup>195</sup> Further, MBIE ignores the successes plaintiffs have had in refusals to supply and price squeeze cases where New Zealand's law is stricter on defendants than anywhere else in the world. New Zealand's law is not an outlier on monopolisation especially in comparison to the United States when one examines the cases.

MBIE's proposed SLC test will be worse for plaintiffs. As *Pfizer* shows, an SLC is not easier to establish because the *Pfizer* defendant would escape liability under the proposed SLC test. This test involves counterfactual analysis so such a test will be, at least, just as complex and unpredictable as the current s 36. By requiring the effect of SLC plaintiffs have a harder time than they do presently. Such a test would allow firms such as Microsoft to go unpunished when they would be liable under the current s 36. Stopping the Kronos effect would not be possible under the proposed new s 36. *Pfizer* also shows how New Zealand and Australian competition law differs on important areas, so the claim that New Zealand courts would follow Australian law is misconceived.

Monopolisation cases are a rich source of argument so disagreeing over such cases is common. One can easily disagree with *Rural Press* and other cases, but it is not worth amending s 36 so that the defendants would be liable under two sections when the consequence would be a defendant such as Microsoft escaping liability.

So, as for MBIE's claimed justifications for amending s 36, in the words of Porgy and Bess, "it ain't necessarily so".

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194 *Turners & Growers*, above n 45.

195 *BOPE*, above n 54.