UNITED STATES V GOOGLE LLC: AN ANALYSIS UNDER SECTION 36 OF THE COMMERCE ACT 1986

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Monopolisation cases have become prevalent – at least in the United States where the Federal Government has sued a number of tech companies. A United States District Court found Google liable for exclusive dealing in the first of these cases. In 2020, New Zealand amended its monopolisation provision, s 36 of the Commerce Act 1986. It introduced a substantial lessening of competition test, meaning that a monopolist would be liable under s 36 if its conduct had the purpose, effect or likely effect of substantially lessening competition. The Government did so because it believed the old section did not capture much anticompetitive conduct. It gave exclusive dealing as an example of such conduct.

This article examines how a New Zealand court would decide the Google case under the old and new s 36. The United States decision is a useful comparison as United States monopolisation law requires a plaintiff to show the conduct had an anticompetitive effect. The article argues a New Zealand court would not find Google liable under the old s 36 but that it is unknown what it would do under the new s 36. The reason is that although New Zealand law requires courts to identify a counterfactual in the sense of identifying what would happen in the market without the challenged conduct, United States law does not. This means there is no evidence on the issue, making predictions difficult. However, the article argues that the new s 36 improves New Zealand's monopolisation law.

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I INTRODUCTION

Monopolisation cases, at least in the United States, have become popular. There, the Department of Justice has sued Google twice[1] and Apple once[2] under s 2 of the Sherman Act, while the Federal Trade Commission has brought proceedings against Amazon[3] and Meta (previously Facebook).[4]

In New Zealand, after prolonged inactivity, the Commerce Commission has filed proceedings under s 36 (and s 27) of the Commerce Act 1986, New Zealand's anti-monopolisation provision.[5] Private litigation is also on foot.[6] The proceedings will be under the new s 36. Parliament amended s 36 in 2020. It previously read:

> (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—
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> (a) restricting the entry of a person into that or any other market; or
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> (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
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> (c) eliminating a person from that or any other market.

It now reads:

> (1) 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—
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> (a) that market …
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> …

Previous case law on s 36, apart from the meaning of "substantial degree of power in a market", is now irrelevant. Part of the reason for s 36's reform was that Parliament thought the previous s 36

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1 United States Department of Justice "Justice Department Sues Monopolist Google for Violating Antitrust Laws" (press release, 20 October 2020); and United States Department of Justice "Justice Department Sues Google for Monopolizing Digital Advertising Technologies" (press release, 24 January 2023).

2 United States Department of Justice "Justice Department Sues Apple for Monopolizing Smartphone Markets" (press release, 21 March 2024).

3 Federal Trade Commission "FTC Sues Amazon for Illegally Maintaining Monopoly Power" (press release, 26 September 2023)

4 Federal Trade Commission "FTC Sues Facebook for Illegal Monopolization" (press release, 9 December 2020).

5 Commerce Commission "Commission files proceedings against GIB manufacturer Winstone Wallboards for anti-competitive conduct" (press release, 1 November 2024).

6 Kāinga Ora – Homes and Communities "Weekly Report" (2 February 2024) at 2.

did not capture types of monopolists' conduct that deserved condemning.[7] The new s 36, with its substantial lessening of competition (SLC) test, would result in liability in such situations. Proponents of reform also claimed that the new test would lead to more certainty as it is more straightforward to apply.[8] As no court has yet decided a case under the new s 36, whether these claims are valid remains unknown.

In the first of the United States Department of Justice cases against Google, the District Court for the District of Columbia held that Google had breached s 2 of the Sherman Act or engaged in illegal acts of monopolisation.[9] Section 2's test for monopolisation includes assessing the anticompetitive effects of a monopolist's challenged behaviour and balancing those effects against the procompetitive justifications of the behaviour.[10] It is a rough equivalent of New Zealand's new SLC test under s 36.

As New Zealand case law already exists on the effect of SLC under ss 27 and 47 of the Commerce Act, this article considers how a New Zealand court would decide *United States v Google LLC* under the new s 36. In this case, the District Court held Google liable for its exclusive contracts.[11] Exclusive dealing was one of the practices proponents for reform claimed that the old s 36 did not capture.[12] If the reformers' claims are correct, Google should be liable under the new s 36. It should also not be liable under the old s 36. In discussing how a New Zealand court would decide *Google*, this article will also consider the reformers' other claims about the new s 36.

To achieve this, Part II outlines the *Google* case, what the District Court decided and the United States monopolisation law it applied. Part III discusses how a court would have decided *Google* under the old s 36. It argues it is highly unlikely Google would be liable under the previous law. Part IV sets out the law on SLC and then discusses how a New Zealand court would apply that law. Part V offers some conclusions.

II UNITED STATES V GOOGLE LLC

The case concerned Google's search engine and exclusive contracts involving it.

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7 Ministry of Business, Innovation and Employment *Discussion paper: Review of Section 36 of the Commerce Act and other matters* (January 2019) [MBIE *Discussion paper*] at 6 and 17–18.

8 At 6, 17 and 19–21.

9 *United States v Google LLC* 2024 WL 3647498 (DDC 2024) [*Google*].

10 At 134.

11 At 257–258 and 265.

12 MBIE *Discussion paper*, above n 7, at 18.

A Background

Google produces a general search engine (GSE) called Google.[13] A GSE is software that finds information on the world wide web in an instant. It produces links to websites and other relevant information in response to a user query. The GSE retrieves, ranks and displays websites that provides the information the user wants.[14] Search engines make money by selling digital advertisements. This is lucrative. In 2021, in the United States, advertisers spent more than US 150 billion to reach search engine users.[15]

Google is the leading search engine and it dominates search. In 2009, 80 per cent of all United States search queries went through Google.[16] By 2020, it was nearly 90 per cent for all searches and 95 per cent for searches on mobile devices.[17]

Google's rival GSEs include Bing – a Microsoft product – Yahoo, DuckDuckGo, Ecossa and Brave.[18] Bing is Google's largest general search rival.[19] It is the only one that crawls the web and generates its own search results.[20] Bing only receives about six per cent of all search queries, while all of Google's rivals receive approximately 10 per cent of all queries in total.[21]

Google is the industry's highest quality search engine and Google has spent many billions of dollars on it.[22] Consumers use GSEs to find pages on the internet on their desktops and mobile phones. Most consumers access a GSE through a web browser or on a search widget that is preloaded on a mobile device.[23]

A web browser is a piece of software that retrieves and displays web pages, or in other words, allows users to access websites on the internet. Google has its own web browser called Chrome. It designed Chrome to "increase the speed and seamlessness" of users' web navigation.[24] Chrome's

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13 *Google*, above n 9, at 8.

14 At 14–16.

15 At 1.

16 At 1.

17 At 13–14.

18 At 13.

19 At 13.

20 At 13.

21 At 14.

22 At 46.

23 At 24.

24 At 8

default search engine is Google.[25] Other web browsers are Apple's Safari, which is preloaded on all Apple products; Microsoft Edge, which has Bing as its search engine; Firefox from Mozilla, which appears on desktop and mobile devices; and DuckDuckGo, which has an integrated browser and search engine.[26]

Google also developed Android, which is an open-source operating system for mobile devices. An open-source system allows third-party developers to create new smart devices and technologies by customising the Android system to the device and technology.[27]

A huge majority of Google's revenues from search come from digital advertisements. The largest component has been from advertisements displayed on Google's search engine results page.[28]

Search engine manufacturers can distribute their search engines to users on mobile and desktop devices in a number of ways. These include via browsers as the search bar or as a preset bookmark, search widgets on Android devices and search applications by downloading direct web searches. These are called search access points.[29] As mentioned above, most users access a GSE via a browser or search widget on mobile devices. The search access points are preset with a default search engine. As numerous users stay with the default GSE, the default GSE receives billions of queries through access points. The preloaded, out-of-the-box default GSE is the most efficient channel.[30] Google's actions in obtaining default placement are at the heart of the case.

B Allegations

The United States accused Google of, among other things, monopolising two markets: general search services and general search text advertising. It said Google did so by entering into exclusive contracts with mobile phone manufacturers (Apple, Samsung and Motorola), two major web browser developers (Apple's Safari and Mozilla) and three wireless carriers (AT&T, Verizon and T-Mobile) to ensure that Google is the default search engine on their products. The companies also agreed not to preload any other GSE on their devices. Google paid these companies in proportion to the number of searches Google gets from these searches. The sums Google paid were huge. In 2021, Google paid out $26.3 billion (about $20 billion to Apple) in revenue share.[31] Overall, about 70 per cent of all

25 At 9.

26 At 9–11.

27 At 8.

28 At 9.

29 At 24.

30 At 24.

31 At 101.

United States search queries go through search access points where Google is the default search engine. Thus, most devices in the United States come preloaded exclusively with Google.[32]

These contracts allowed Google to gain greater search user volume. This enabled it to provide better search results and better targeted (ie higher value) advertising. The Department of Justice argued these contracts made it more difficult for other search engine providers to obtain distribution for their search engines. This made it more difficult for other search engines to attract users to sell online advertising and consequently provide revenue to support the search platform. In short, the contracts pushed out rivals and prevented them from gaining market share. Preventing rivals from gaining market share prevented them from improving their service.

C United States Law

The Department of Justice alleged this breached s 2 of the Sherman Act as illegal monopolisation. Section 2 makes it illegal for a firm to monopolise. It provides:

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

The Supreme Court in *United States v Grinnell Corp* held that s 2 requires two elements:[33]

> … (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The DC Circuit Court of Appeals in *United States v Microsoft* set out how to evaluate monopolisation claims.[34] *Grinnell*'s first element has two inquiries: 1) market definition and 2) power within the relevant market. The plaintiff has the burden of establishing both.[35] *Grinnell*'s second element of "wilful acquisition of monopoly power" involves a multi-step burden-shifting approach in determining this.[36]

First, the monopolist's conduct must have an "anticompetitive effect". That is, it must harm the competitive process and thereby harm consumers. Harm to one or more competitors will not suffice.[37]

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32 At 3 and 26.

33 *United States v Grinnell Corp* 384 US 563 (1966) at 570–571.

34 *United States v Microsoft Corp* 253 F 3d 34 (DC Cir 2001) [*Microsoft*].

35 At 51.

36 At 58–59.

37 At 58–59.

Secondly, the plaintiff must show the monopolist's conduct has the requisite anticompetitive effect.[38]

Thirdly, the defendant may rebut this prima facie case by offering a procompetitive justification for its conduct. This is a "nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves … greater efficiency or enhanced consumer appeal".[39] If the defendant does so, the burden shifts back to the plaintiff to rebut that claim.[40]

Fourthly, if the plaintiff cannot rebut the defendant's procompetitive justification,[41] then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.[42]

D Market and Monopoly Power

The District Court held there was a market for general search services.[43] The evidence showed no adequate substitutes. Google has monopoly power in that market. The Court relied on Google's high market share[44] and the presence of significant barriers to entry.[45] These included extraordinarily high capital costs to enter the market,[46] Google's control of key distribution channels,[47] its high recognition[48] and the difficulty of entrants acquiring users to generate sufficient scale to be effective competitors.[49]

The Court also held there was a market for text advertisements.[50] These are advertisements which are displayed on a search engine results page in response to a user's query. As these appear when a consumer uses a GSE, there was a market for the same reasons there was a market for general search

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38 At 58–59.

39 At 59.

40 At 59.

41 At 59.

42 At 59.

43 *Google*, above n 9, at 146.

44 At 156.

45 At 157.

46 At 157.

47 At 158.

48 At 159–160.

49 At 161.

50 At 189.

services, and Google had monopoly power for the same reasons as it did in the general search services market.[51]

Conversely, the Court held while there was a product market for search advertising,[52] Google lacked monopoly power in that market[53] and that there was no market for general search advertising.[54]

Having decided the market and market power issues,[55] the District Court had to determine whether Google had engaged in "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident": *Grinnell*'s second limb. As the Judge put it, he had to determine whether Google had engaged in exclusionary conduct with respect to the relevant markets.[56] This involved focusing on the search distribution contracts, as the Department of Justice alleged Google used these to maintain its monopoly in the relevant markets. The case, thus, was one of monopoly maintenance.

The Department of Justice argued that Google's contracts were unlawful exclusive agreements that effectively blocked Google's rivals from the most effective channels of search distribution, ie from out-of-the-box default search settings.[57]

The Department of Justice alleged these contracts resulted in Google being the exclusive search engine on Safari and Firefox browsers. On Android devices, the Google search widget appears on the home screen and Chrome is the preloaded exclusive browser, except on Samsung devices.[58] Allegedly, these contracts effectively "lock up" half of all the market for search and nearly half the market for general search advertisements.[59] The Department of Justice argued these exclusive deals protected Google's dominant position and shielded it from meaningful competition.

After holding the contracts were exclusive, and relying on evidence from behavioural economists that defaults can strongly affect which search engines consumers use, as consumers form habits using a particular search engine that makes them highly unlikely to switch engines,[60] the District Court

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51 At 189–191.

52 At 166–180.

53 At 180–185.

54 At 191–197.

55 At 197.

56 At 197.

57 At 197.

58 At 197–198.

59 At 198.

60 At 202–214.

applied the *Microsoft* framework to determine whether Google breached s 2.[61] The first step involved considering whether the contracts had an anticompetitive effect, ie harmed the competitive process and thereby harmed consumers. The question was whether Google's exclusive contracts were reasonably capable of significantly contributing to Google's monopoly power in the relevant market.[62]

The District Court judge held the agreements had three primary anticompetitive effects: "(1) market foreclosure, (2) preventing rivals from [obtaining sufficient scale or economies of] scale, and (3) diminishing the incentives of rivals to invest and innovate in general search".[63] These are well recognised potential anticompetitive effects of exclusive dealing/contracts.[64] I deal with each in turn below.

1 Foreclosure

Foreclosure occurs when a firm denies rivals access to an essential good or service that it produces. A good or service is essential if the rivals who are denied access to it cannot cheaply or profitably duplicate it. So, foreclosure is behaviour that prevents rivals from accessing markets and thus shuts them out of competition. To be anticompetitive, the foreclosure must affect a large share of the market. If a large part of the market is not foreclosed then rivals can enter, remain or not be limited in their ability to compete.[65]

Other factors impact how anticompetitive an exclusive contract can be.[66] These are:

(1) The duration of the exclusive contract. The shorter they are, the less anticompetitive they are. As one United States court said: "[S]hort-term" exclusive agreements "present little threat to competition".[67] The Seventh Circuit Court of Appeals observed: "Exclusive dealing contracts terminable in less than a year are presumptively lawful …".[68]

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61 At 216.

62 At 216.

63 At 216.

64 Dennis W Carlton "A General Analysis of Exclusionary Conduct and Refusal to Deal—Why *Aspen* and *Kodak* are Misguided" (2001) 68 Antitrust LJ 659 at 663; Richard M Steuer "Exclusive Dealing in Distribution" (1983) 69 Cornell L Rev 101; Michael D Whinston *Lectures on Antitrust Economics* (MIT Press, Cambridge (Mass), 2006) at 133–197; and Richard A Posner *Antitrust Law* (2nd ed, University of Chicago Press, Chicago, 2001) at 229.

65 *Microsoft*, above n 34, at 70–71.

66 *Google*, above n 9, at 223.

67 *ZF Meritor LLC v Eaton Corp* 696 F 3d 254 (3d Cir 2012) at 286.

68 *Roland Machinery Co v Dresser Industries Inc* 749 F 2d 380 (7th Cir 1984) at 395.

(2) How easy the contracts are to terminate.[69] An exclusive contract that is easily terminable can negate substantially its potential to foreclose competition.
(3) Barriers to entry.[70] The higher the barriers to entry, the more unlikely it is that new rivals will enter and reduce the exclusive contracts foreclosure rate.
(4) Willingness to comparison-shop.[71] The more likely consumers are to shop around, the less likely it is that exclusive contracts have an anticompetitive effect.

The District Court Judge held that Google's exclusive contracts foreclosed 50 per cent of the general search services market by query volume.[72] Under United States law, this was sufficiently large to raise concerns. The judge cited Areeda's text which observed: "Percentages higher than 50 [per cent] are routinely condemned when the practice is complete exclusion by a contract of fairly long duration".[73]

As for duration, all the contracts were above one year, with some being five years with two–three year extensions possible, while others were two–three years long.[74] The contracts were not easy to terminate as the judge found "Google's partners cannot easily exit the agreements".[75]

As for barriers to entry, the District Court Judge had found that when considering monopoly power, the general search services market had considerable barriers to entry.[76] Further, the Judge found no evidence that consumers comparison-shop among general search engines.[77]

All of these factors showed the exclusive contracts foreclosed a substantial portion of the general search services market and impaired rivals' opportunities to compete.[78]

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69 *Google*, above n 9, at 225.

70 At 226.

71 At 226.

72 At 222.

73 At 223, quoting Phillip E Areeda and Herbert Hovenkamp *Fundamentals of Antitrust Law* (4th ed, Wolters Kluwer, New York, 2017) at [5.02].

74 At 224.

75 At 225.

76 At 226.

77 At 226.

78 At 226.

2 Preventing rivals from achieving scale

As for the second anticompetitive effect, the Judge found that the exclusive agreements prevented rivals from attaining sufficient scale to compete effectively.[79] The default position enabled this as it permitted Google to receive additional search volume beyond which it would otherwise receive.[80] The Judge held the exclusive contracts limited the query volumes of its rivals, thereby inoculating Google from any anticompetitive threat.[81]

3 Diminishing the incentives of rivals to invest and innovate

As for the third anticompetitive effect, the Judge found examples of the exclusive contracts reducing the incentives of rivals to invest and innovate.[82] One company, Neeva, withdrew from the market and the Judge found it was a situation of the exclusive contracts eliminating a nascent competitor.[83] The exclusive contracts decreased Microsoft's investments in GSEs due to Microsoft's limited distribution on mobile[84] while Apple did not bother to develop its own GSE due to the large revenue share it received from Google.[85]

Thus, the District Court Judge found that the Department of Justice had established a prima facie case under s 2 by showing the exclusive contracts had anticompetitive effects.

E Procompetitive Justifications

The Court then turned to whether Google had showed any procompetitive justifications for its agreements. Google claimed three procompetitive benefits. It said they:[86]

(1) Enhanced the user experience quality and output in the market for general search.
(2) Incentivised competition in related markets that resulted in benefits to the search market.
(3) Produced consumer benefits within the related markets.

As for the first claimed benefit, the District Court Judge held that exclusivity did not lead to these benefits. Google did not show that exclusivity across all search access points led to the claimed

79 At 226.

80 At 227.

81 At 234.

82 At 236–248.

83 At 236–237.

84 At 238–240.

85 At 240–244.

86 At 248.

benefits.[87] Further, the Court held a nonexclusive default would still provide all the benefits of convenience and efficiency that Google claimed.[88]

As for the second, Google argued that the exclusive browser agreements promoted competition because the browser owners used the revenue share to improve their products.[89] The Court noted the agreements did not require browser owners to use revenue share payments to improve their products and that there was no evidence that browser owners did so.[90]

As for the third claimed benefit, Google claimed the exclusive contracts promoted competition in related markets. The District Court Judge found there was no evidence of the exclusive contracts resulting in procompetitive benefits in related markets.[91]

As the Judge found that Google did not establish any valid procompetitive benefits to explain Google's exclusive contracts, there was no need to engage in the *Microsoft* balancing step.[92] Accordingly, Google breached s 2 by unlawfully maintaining its monopoly in the general search services markets through its exclusive agreements.[93]

F General Text Advertising Market

As for the alleged monopolisation in the general text advertising market, the Court went through the same analysis. Here, the Department of Justice alleged the anticompetitive effects were market foreclosure resulting in deprivation of scale to rivals, supracompetitive text advertisement pricing and product degradation through decreased transparency for text auctions.[94]

The Court held there was a market foreclosure and deprivation of scale to rivals for the same reasons as the general search services market and the evidence showed the exclusive contracts allowed Google to charge supracompetitive prices and degrade the quality of its text advertisements.[95] The degradation was that advertisers received less information in search query requests and they could no longer opt out of keyword matching.

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87 At 249.

88 At 249.

89 At 252–253.

90 At 253.

91 At 256.

92 At 257–258.

93 At 258.

94 At 258.

95 At 263.

Google did not argue the exclusive contracts contained any procompetitive benefits beyond the claims the Court had rejected in the general search services market.[96] Accordingly, the District Court Judge held Google's exclusive contracts breached s 2 as illegal monopoly maintenance.[97]

III HOW WOULD A NEW ZEALAND COURT DECIDE GOOGLE *UNDER SECTION 36?*

Section 36 of the Commerce Act is New Zealand's anti-monopolisation law. It aims to prohibit firms with market power using that market power to eliminate rivals or protect themselves from competition. New Zealand has recently amended s 36.[98] The events in *United States v Google LLC* took place both before and after the "new" s 36 took effect. One of the reasons for amending s 36 was that it allegedly failed to capture monopolists' conduct which deserved condemning. In short, it was not an effective weapon against monopolists.[99] To that end, this part considers whether Google's behaviour would fall within the "old" or "new" s 36.

As mentioned above, the old s 36 provided:

> (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—
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> (a) restricting the entry of a person into that or any other market; or
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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.

The section had four elements which a plaintiff had to establish to show a breach.[100] First, the plaintiff must have identified the relevant market. Secondly, the defendant must have had substantial market power in that market. Thirdly, the defendant must have taken advantage of that market power.[101] Fourthly, the defendant must have acted for one of the proscribed purposes.

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96 At 265.

97 At 265.

98 Commerce Amendment Act 2022, s 17.

99 MBIE *Discussion paper*, above n 7.

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

101 New Zealand law previously had the expression to "use" a dominant position. Parliament changed "use" to "take advantage" in line with Australian law.

Here, there would be no argument on market definition and Google having substantial market power. The issue would be whether Google had taken advantage of market power for one of the proscribed purposes.

A Test for "Take Advantage"

Prior to the New Zealand Supreme Court decision in *Commerce Commission v Telecom of New Zealand Ltd* (the *0867* case),[102] there were arguably three tests for "take advantage" or "use". The Privy Council in two decisions, *Telecom Corp of New Zealand Ltd v Clear Communications Ltd*[103] and *Carter Holt Harvey Building Products Group Ltd v Commerce Commission*[104] had laid down what became known as the counterfactual test for determining use of market power under s 36. In *Telecom* it said:[105]

> … it cannot be said that a person in a dominant market position "uses" that position for the purposes of s 36 [if they act] in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.

A majority of the Privy Council subsequently applied it in *Carter Holt Harvey*.[106] It went so far as to say the counterfactual test was the sole test for determining whether a defendant had abused its dominant position.

The counterfactual test derives from the High Court of Australia in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*.[107] There, four High Court judges, in determining whether BHP had taken advantage of its substantial market power, considered that a firm will not have taken advantage of its substantial market power if it would have acted in the same way in a competitive market.[108] Deane J used a different test. He inferred a taking advantage from the defendant's substantial market power and its proscribed purpose. He observed:[109]

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

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

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

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

105 *Telecom v Clear*, above n 103, at 403.

106 *Carter Holt Harvey*, above n 104, at [60].

107 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

108 At 192 per Mason CJ and Wilson J; at 202 per Dawson J; and at 216 per Toohey J.

109 At 197–198.

> 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 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 High Court of Australia re-examined s 46 of the Trade Practices Act 1974 (Cth), Australia's anti-monopolisation provision at the time, in *Melway Publishing Pty Ltd v Robert Hicks Ltd*.[110] There the majority reaffirmed the traditional counterfactual test for "take advantage" by asking how the defendant would have been likely to behave if it lacked the power it had[111] and whether it could have acted the way it did without market power.[112]

The High Court noted that asking how a firm would behave if it lacked substantial market power, for deciding whether it is taking advantage of its market power, involves a process of economic analysis. This was only valid if it could be undertaken with sufficient cogency.[113] As the counterfactual test may not be cogent in all cases, this suggested alternate tests. One was Deane J's purpose-based test, of which the High Court said "Deane J's approach was different".[114] It noted that some forms of behaviour are benign or even procompetitive when a competitive firm undertakes them, but are anticompetitive when a monopolist carries them out.[115] It cited Scalia J in *Eastern Kodak Co v Image Technical Services Inc* when he observed:[116]

> 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.

According to the High Court, Deane J's purpose test captured this sort of conduct.[117]

The High Court also recognised another approach – the material facilitation test. It said:[118]

> … 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

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

111 At [44].

112 At [61].

113 At [52].

114 At [48].

115 At [29].

116 *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 (1992) at 488. Scalia J cited Phillip E Areeda and Donald F Turner *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Aspen Publishers, New York, 1978) at [813].

117 *Melway*, above n 110, at [29].

118 At [51].

> 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.

Thus, it appeared following *Melway* that the High Court had established three tests for "take advantage": first, the *Queensland Wire* counterfactual test; secondly, the Deane J purpose test; and thirdly, the material facilitation test.

In *Melway*, the High Court determined the case on the basis of the counterfactual test alone. The parties did not argue for either the Deane J purpose test or material facilitation. The ACCC had introduced material facilitation for the first time in the High Court as an intervenor, and, as the parties had not run the case on this basis in the lower courts, there were neither findings of fact nor arguments necessary to support such an analysis.[119]

The key reason for the High Court finding no liability under the counterfactual test was that Melway had engaged in the challenged conduct (a system of selective distribution) before it had substantial market power; that is, it had engaged in the same conduct both before and after it had substantial market power. However, the High Court noted that Melway's creation and maintenance of its distribution system when it lacked market power did not mean that its maintenance when it had market power was not necessarily an exercise of its market power.[120] This suggests the maintenance of the system could be a taking advantage of market power. Further, it suggests that the counterfactual test was not the only one, as having the same distribution system before and after attaining substantial market power always passes the counterfactual test.

Heerey J's dissent in the Full Federal Court is also important. There he discussed the reasons why Melway had adopted its distribution system. He said these were efficiency-enhancing and therefore procompetitive and legitimate.[121] He introduced a legitimate business rationale test. If a defendant offers a legitimate business rationale – albeit one suggesting efficiency reasons for its conduct – there will be no taking advantage of substantial market power. In a subsequent monopolisation case, *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*, three High Court judges agreed with Heerey J's views on legitimate business rationale.[122]

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119 At [69].

120 At [68].

121 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [1999] FCA 664, (1999) 90 FCR 128 at [20].

122 *Boral Besser*, above n 100, at [171] per Gaudron, Gummow and Hayne JJ.

A majority of the Privy Council in *Carter Holt Harvey* approved Heerey J's legitimate business rationale test[123] and confirmed the counterfactual test, saying it was both "legitimate and necessary" to apply the counterfactual test to determine whether a firm had used its dominance.[124]

In the *0867* case, the New Zealand Supreme Court considered the test for "take advantage"/using a dominant position.[125] The ground of appeal was whether the Court of Appeal erred in applying the counterfactual test.

The Supreme Court first held that the concepts of "use" and "take advantage" involved the same inquiry.[126] They mean the same thing. It reaffirmed the Privy Council's decisions in *Telecom* and *Carter Holt Harvey*, thus reaffirming the counterfactual test. It rejected the Commerce Commission's submission that the Australian case law showed alternate tests (material facilitation and the Deane J purpose test) to the counterfactual.[127] Rather, they were part of normal counterfactual analysis. Material facilitation and Deane J's purpose test involved comparing the actual market and a hypothetical competitive market.[128] It said "[h]aving a range of tests, all potentially applying, depending on the circumstances and whether a comparative approach can 'cogently' be adopted, would not assist predictability of outcome".[129] It held such an approach was not consistent with the Australian cases when they are "appropriately analysed".[130]

The Court also endorsed Heerey J's business rationale test that the majority of the High Court endorsed in *Boral*.[131] The Court renamed the counterfactual test the "comparative exercise"[132] and noted that in performing it, one had to create a hypothetically competitive market that replicates the

123 *Carter Holt Harvey*, above n 104, at [54].

124 At [60(a)].

125 *Telecom 0867*, above n 102. For discussions on the case, see Oliver Meech "'Taking advantage' of market power" [2010] NZLJ 389; Paul G Scott "Taking A Wrong Turn? The Supreme Court and Section 36 of the Commerce Act" (2011) 17 NZBLQ 260; Matt Sumpter "Competition Law" [2012] NZ L Rev 113; Andrew I Gavil "Imagining a Counterfactual Section 36: Rebalancing New Zealand's Competition Law Framework" (2015) 46 VUWLR 1043; and Rex Ahdar *The Evolution of Competition Law in New Zealand* (Oxford University Press, Oxford, 2020) at 175–180.

126 *Telecom 0867*, above n 102, at [1].

127 At [30].

128 At [17] and [21].

129 At [30].

130 At [30].

131 At [26].

132 At [24].

actual market except that it eliminates or genuinely denies the defendant all aspects of its substantial market power.[133] It said:[134]

> … if the dominant firm would, as a matter of commercial judg[e]ment, have acted in the same way in a hypothetically competitive market, it cannot logically be said that its dominance has given it the advantage that is implied in the concepts of using or taking advantage of dominance or a substantial degree of market power.

It further said:[135]

> 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.

As seen in the above extracts, assessing how a firm would act in the hypothetically competitive market is essentially a commercial judgement.[136]

The Court went on to downplay the importance of economic analysis in monopolisation cases. Economic analysis could be helpful in constructing the hypothetically competitive market and to point to those factors which would influence a firm in that market. However, the "use" question was a practical one and the ultimate question was one of rational commercial judgement.[137] As the Court noted:[138]

> … deciding what the firm in question would or would not have done in that market will often be best approached simply as a matter of practical business or commercial judg[e]ment. Once the comparator market is identified, what the firm otherwise possessing a substantial degree of market power would or would not have done in that market is a business or commercial question.

The Supreme Court, in discussing *Melway*, said that in some cases one could make the comparative exercise without the need for economic analysis.[139] It said:[140]

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133 At [36].

134 At [31].

135 At [34].

136 At [35].

137 At [23] and [35].

138 At [23].

139 At [24].

140 At [24].

> *Melway* itself was that kind of case, there being direct evidence identifying what Melway, as the dominant firm, would have done without that dominance. It had acted in the same way as that impugned before it had acquired the dominance of which it was said to have taken advantage.

The Court phrased the test for "take advantage"/"use" as pure counterfactual analysis. It stated:[141]

> 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.

So the question is about how a hypothetical firm lacking substantial market power would have acted.

Given that is how the Supreme Court framed the law, the issue is: how would a New Zealand court decide *United States v Google LLC* under the old s 36? Under *0867*, a court asks: would Google have engaged in exclusive dealing with payments in a workably competitive market, ie if it had lacked market power? If so, Google has not taken advantage/used its substantial market power.

The answer is yes. It had acted in the same way before it had substantial market power as it did after. The case is like *Melway* where the defendant had the same distribution system before and after it had substantial market power. This means it is highly unlikely Google would be liable under the old s 36.

This reasoning had no impact in the United States. Google argued that because it had used its exclusive dealing system before it gained monopoly power, this meant no monopolisation. The District Court rejected this argument. It noted the case was not about how Google obtained its dominance.[142] The case was about whether Google had maintained its position through means other than competition on the merits.[143]

The District Court Judge held that, as a matter of law, some conduct can only be anticompetitive when a firm with monopoly power undertakes it. He cited the Second Circuit Court of Appeals in *Berkey Photo Inc v Eastman Kodak Co* where the Court observed: "… many anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals".[144] The District Court concluded: "It is Google's status as a monopolist that makes its distribution contracts exclusionary even if the same conduct did not have that effect when Google first began employing it".[145]

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141 At [34].

142 The Court noted it did so competitively ie "through superior foresight or quality": *Google*, above n 9, at 202.

143 At 202.

144 *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d 263 (2d Cir 1979) at 274–275.

145 *Google*, above n 9, at 203.

The District Court Judge's comments are consistent with the High Court of Australia's comments in *Melway* where it cited Scalia J in *Eastman Kodak*. The High Court said that Deane J's purpose test would cover this scenario.[146] However, this could not have happened in New Zealand, as the *0867* court held the Deane J purpose test was essentially counterfactual reasoning, saying it implicitly involves a comparative exercise.[147] Further, the Court stressed there was one test – not "a range of tests".[148]

As Google, like Melway, had engaged in the same conduct when it lacked substantial market power, no New Zealand court would find it had "taken advantage"/"used" its substantial market power. The *Melway* High Court's comments on the Deane J purpose test do not apply in New Zealand.

As Google had acted in the same way before it obtained monopoly power, under *0867*, a New Zealand court would not need to identify the hypothetical competitive market.[149] Direct observation suffices. It would also not need to engage in economic analysis. The Supreme Court noted that economic analysis may be helpful in constructing the hypothetical competitive market and how a defendant might act in that market.[150] But that would be unnecessary.

This downplaying of economic analysis is a particularly New Zealand concept. The *Melway* High Court did not deprecate it. One of the issues in *Melway* was how to characterise the conduct. Was it a simple refusal to deal or was it maintaining a segmented distribution system? In determining it was the latter, the High Court pointed out the system was an intrabrand restraint. The Court then shows how such restraints are not necessarily anticompetitive and can be procompetitive.[151] Under *0867*, this should have been unnecessary. Further, the District Court in *Google* examined not only how the exclusive agreements could be anticompetitive but also how Google claimed they were actually procompetitive.[152] This involves economic analysis.

The *0867* Supreme Court's eschewal of economic analysis is unhelpful, as exclusive dealing is the paradigm example of conduct that can be procompetitive or anticompetitive depending on the circumstances. Economic analysis is crucial in determining what it is. The District Court in *Google* recognised this and stated: "… exclusive agreements are not condemned per se by the antitrust laws,

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146 *Melway*, above n 110, at [29].

147 *Telecom 0867*, above n 102, at [17].

148 At [30].

149 At [24].

150 At [35].

151 *Melway*, above n 110, at [20].

152 *Google*, above n 9, at 248–258.

even if they involve a dominant firm".[153] It further cited *Microsoft*, where the DC Circuit Court of Appeals observed: "exclusivity provisions in contracts may serve many useful purposes";[154] and the Tenth Circuit Court of Appeals in *Re EpiPen Marketing, Sales Practices and Antitrust Litigation*: "Courts repeatedly explain that exclusive dealing agreements are often entered into for entirely procompetitive reasons and pose very little threat to competition even when utilized by a monopolist".[155]

This disrespect for economic analysis may be unique to the *0867* Supreme Court. In *Telecom Corp of New Zealand Ltd v Commerce Commission* (the "data tails" case),[156] a case involving margin squeezing, the Court of Appeal turned a Nelsonian eye to the Supreme Court's comments deprecating economic analysis and extensively discussed the pro- and anticompetitive aspects of margin squeezes.

As mentioned above, the *0867* Supreme Court mandated constructing a hypothetically competitive marketplace in determining whether a defendant has monopolised.[157] This is not the United States law. To the contrary, United States law is very much against constructing such hypothetical markets. The DC Circuit Court of Appeals in *Microsoft* observed:[158]

> To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.

Indeed, the *Google* Court held that showing s 2 monopolisation did not require "such thought experiments".[159]

The *0867* Supreme Court mentioned how asking whether the defendant had a legitimate business rationale was part of the comparative exercise in showing "take advantage"/"use".[160] This would not help Google. The District Court found that Google's claimed procompetitive justifications were not valid.[161] This means that Google lacked a legitimate business rationale for its exclusive contracts. Strictly applying a legitimate business rationale should mean a taking advantage/use of substantial

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153 At 214.

154 *Microsoft*, above n 34, at 69, quoted in *Google*, above n 9, at 214.

155 *Re EpiPen Marketing, Sales Practices and Antitrust Litigation* 44 F 4th 959 (10th Cir 2022) at 983, quoted in *Google*, above n 9, at 214–215.

156 *Telecom Corp of New Zealand Ltd v Commerce Commission* [2012] NZCA 278.

157 *Telecom 0867*, above n 102, at [32].

158 *Microsoft*, above n 34, at 79.

159 *Google*, above n 9, at 220.

160 *Telecom 0867*, above n 102, at [26].

161 *Google*, above n 9, at 256.

market power. However, this would be contrary to no liability under *0867*'s *Melway* counterfactual analysis. This shows one of the weaknesses of the counterfactual test in that it can be contradictory.

Another weakness is in how to frame the counterfactual. In *Google*, while Google had exclusive contracts and payments based on usage, the amount of the payments differed on whether the market was competitive. Once Google attained monopoly power, it paid tens of billions of dollars annually. It would not and could not have paid this amount when it lacked monopoly power. Yet strictly applying *0867*'s *Melway* reasoning would mean no liability. The payments' amount shows Google's financial strength. The High Court of Australia and the Privy Council had previously said that financial strength was not the same as substantial market power.[162] Further, the *0867* Court did not purport to overrule this authority. So a New Zealand court would not take account of the level of Google's payments in deciding liability. Thus, the old law involving counterfactual analysis is lacking.

IV THE NEW SECTION 36: SUBSTANTIAL LESSENING OF COMPETITION

The comparative exercise/counterfactual test was not popular and received numerous criticisms. In particular, critics argued that the Supreme Court's "take advantage"/"use" test let numerous examples of anticompetitive conduct go unchallenged.[163]

In New Zealand, the Ministry of Business Innovation and Employment (MBIE) was concerned the Court's test failed to capture categories of conduct which deserved condemnation. Following Scalia J's comments in *Eastman Kodak*, it noted that some conduct is harmful when a firm without market power carries it out, but the same conduct is harmful if a firm does have market power. One of the examples it gave was exclusive dealing.[164]

Further, constructing a hypothetical market was difficult and complex. It required a number of assumptions which can be unrealistic. Changes in the assumptions can change the result. As it was impossible to know what hypothetical market a court would construct, this led to costly enforcement and unpredictable results. This unpredictability affected day to day decision making.[165]

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162 *Boral Besser*, above n 100; *Carter Holt Harvey*, above n 104; and *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75, (2003) 216 CLR 53.

163 Katharine Kemp "'The Big Chill'? A Comparative Analysis of Effects-Based Tests for Misuse of Market Power" (2017) 40 NSWLJ 493 at 499; Katharine Kemp *Misuse of Market Power: Rationale and Reform* (Cambridge University Press, Cambridge, 2018) at 65–109; and Katharine Kemp "Uncovering the roots of Australia's misuse of market power provision: Is it time to reconsider?" (2014) 42 ABLR 329.

164 MBIE *Discussion paper*, above n 7, at 18.

165 At 6, 17 and 19–21.

MBIE claimed s 36 was lacking in not having an effects test whereby conduct breaches s 36 if it has an anticompetitive effect.[166] It claimed that this put New Zealand out of line with other countries' monopolisation provisions.[167] Also, arguably s 36 focused on the fate of individual competitors rather than on protecting competition. It did not require harm to the competitive process – only harm to rivals.[168] This claim was contrary to New Zealand authority.[169]

In any event, Australia amended its s 46. It now provides:[170]

> (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 …
>
> …

New Zealand followed. The new s 36 relevantly provides:[171]

> (1) 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) that market …
>
> …

So, whether Google breached s 36 depends on whether its exclusive contracts and payments amounted to conduct that has the purpose, effect or likely effect of substantially lessening competition.

The SLC test appears elsewhere in the Commerce Act so it has a well-established case law.[172] Section 2(1) defines substantial as "real or of substance". New Zealand courts have interpreted it as meaning not insignificant, not ephemeral, not nominal or minimal.[173] Any given effect need not be

166 At 9, 22, 23 and 28–30.

167 At 22.

168 Ian Harper and others *Competition Policy Review: Final Report* (March 2015) at 61.

169 *Telecom 0867*, above n 102, at [25]; and *Turners & Growers Ltd v Zespri Group Ltd* (2011) 13 TCLR 286 (HC) at [98] and [364].

170 Competition and Consumer Act 2010 (Cth), s 46.

171 Commerce Act 1986, s 36.

172 Sections 27, 28 and 47.

173 *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 (HC) at 433–434.

more likely than any alternative. The High Court said in *Woolworths Ltd v Commerce Commission* that "material" was a useful way of describing "substantial".[174]

As for "likely", an effect is likely if there is a "real and substantial risk" or a "real chance" that it will occur.[175] Courts have held that "likely" does not mean more likely than not, but rather means more than a mere possibility.[176] Other formulations are "real or of substance", "not remote chance or possibility" or "something that might well happen".[177]

As for "lessening", s 3(2) provides that a lessening of competition includes the "hindering or preventing of competition". Section 3(1) defines competition as "workable or effective competition".

In assessing whether conduct has the effect or likely effect of SLC, courts apply counterfactual reasoning. This comes from Smithers J in *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd*.[178] Courts compare the likely state of competition with the conduct (the factual) against the likely state of the market in the absence of the conduct (the counterfactual). In other words, courts compare the state of competition with the conduct against the state of competition without the conduct.[179] Hence some call it the "with and without" test. As the Court of Appeal said in *Woolworths*:[180]

> 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 …

Indeed, the Court of Appeal referred to the counterfactual test as being "elementary" to the analysis.[181] A counterfactual must also be likely. The Court assesses what is likely to occur with and without the conduct.

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174 *Woolworths Ltd v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) [*Woolworths* HC] at [129].

175 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 562–563

176 At 562–563.

177 At 563.

178 *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 (FCA) at 259–260.

179 *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [246].

180 *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, (2008) 12 TCLR 194 [*Woolworths* CA] at [63]. See also *Turners & Growers*, above n 169, at [85].

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

In *Re Closure of Whakatu and Advanced Works*, the Commerce Commission formulated a list of questions to assess whether competition is lessened. These are (adapted for unilateral conduct):[182]

- What is the extent to which competition is foreclosed by the [conduct] and what alternatives do others in the market have?
- Does the [conduct] have the effect of threatening independent initiatives of operators in the market?
- Does the [conduct] have the effect of causing operators in the market to compete less vigorously?
- Does the [conduct] enable the [monopolist] to exercise power over others, [for example] over persons contracting with the [monopolist] or their competitors?
- Does the [conduct] affect the ability or desire of potential entrants to enter the market in question?

Subsequent courts have adopted these questions.[183]

The "with and without" analysis involves comparing two states of competition which in some situations may both be hypothetical as neither the factual nor counterfactual has yet eventuated. One New Zealand court has gone further. Australian courts use only one counterfactual under the "without the conduct" counterfactual. They use the status quo of "with the conduct" as the basis of comparison.[184] In the merger case of *Woolworths*, the High Court noted 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 that the test for likelihood required that the counterfactual only need be "more than 'possible'" and that "it need not be 'more probable than not'".[185] This led the Court to formulate the following on counterfactual analysis:[186]

> 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 Court held then when assessing SLC, one does not just use the most probable counterfactual, ie the one that has the greatest prospect of occurring.[187] Rather, one identifies all likely counterfactuals

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182 *Re Closure of Whakatu and Advanced Works* (1987) 2 TCLR 215 (CC) at 227.

183 *ANZCO*, above n 179, at 244.

184 That is, the market without or before the proposed merger: Mark N Berry and Paul G Scott "Merger Analysis of Failing or Exiting Firms Under the Substantial Lessening of Competition Threshold" (2010) 16 Canta LR 272 at 287.

185 *Woolworths* HC, above n 180, at [112].

186 At [122] (footnote omitted).

187 At [118].

and makes the competition assessment in respect of the least favourable counterfactual, even if it may not be the most likely counterfactual.[188]

The *Woolworths* Court of Appeal used only one counterfactual in overturning the High Court, but it did not expressly reject the concept of multiple counterfactuals. It did not mention it. The Court of Appeal in *NZME Ltd v Commerce Commission*, another merger case, declined to comment on the issue. It noted:[189]

> … we express no view on the controversial question, which arose in *Woolworths*, whether this means the Commission must consider multiple counterfactuals where there [is] said to be more than one, or may use the one it thinks more likely.

Hopefully the High Court was a one-off jaunt, as multiple counterfactuals would create unpredictability, be difficult to apply and be contrary to the reasons for reform. In any event, no subsequent New Zealand case and no overseas jurisdiction which has an SLC test has used multiple counterfactuals.[190]

All New Zealand courts have agreed that the SLC test is concerned with the state of competition in the relevant market and not with the fate of individual competitors. Rather, it is concerned with the competitive process.[191] While this is so, and in line with the policy aims of the Commerce Act of protecting competition, one of the ways that conduct can harm competition is that in certain circumstances it can damage a competitor and thereby injure the competitive process itself.[192] New Zealand courts have recognised that sometimes damage to an individual rival can damage competition.[193]

In New Zealand, the SLC test is concerned with the net effect of the conduct on competition. Courts take into account the conduct's procompetitive efficiency gains in determining whether it has the effect of SLC.[194] Australian law differs in that efficiencies are less relevant. In other words, they assess whether the conduct substantially lessens competition without regard to efficiency. In

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188 Berry and Scott, above n 184, at 289.

189 *NZME Ltd v Commerce Commission* [2018] NZCA 389, [2018] 3 NZLR 715 at [86], n 113.

190 Ahdar, above n 125, at 226.

191 *ANZCO*, above n 179, at [242]; and *Port Nelson Ltd*, above n 176, at 564–565.

192 Robert H Bork "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division" (1965) 71 Yale LJ 775 at 775.

193 *Port Nelson Ltd*, above n 176, at 565.

194 *ANZCO*, above n 179, at [249]; *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC) at 740–741; *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd* (1997) 7 TCLR 463 (HC) at 528–531; and *Clear Communications Ltd v Sky Network Television Ltd* HC Wellington CP19/96, 1 August 1997.

Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission,[195] the defendant argued that its conduct, including exclusive dealing, would lead to a number of efficiencies and that these outweighed the lessening of competition. The efficiencies included maintaining economies of scale in its distribution network, discouraging free riding, enabling the defendant to continue investing in new products and discouraging retailers from dealing in pirate imports. The Full Federal Court rejected these efficiencies, saying "Furthermore, s 47 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".[196]

The phrase "rule of reason" comes from United States s 1 Sherman Act jurisprudence. Section 1 provides:[197]

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

While s 1 literally outlaws every contract in restraint of trade, the United States Supreme Court has interpreted s 1 so that it only applies to unreasonable restraints. In determining legality under s 1, courts use two ways of analysing conduct. First, a rule of reason examines all the challenged conduct's effects (both pro- and anticompetitive) before a court decides whether the conduct is unreasonable.[198] Secondly, a per se rule treats certain conduct as being so obviously anticompetitive that it is conclusively unreasonable. The court does not evaluate the conduct. It is deaf to any claimed procompetitive effect of justification. All a plaintiff must show is that the conduct falls within the per se category. If so, liability automatically follows.[199]

The classic account of how to evaluate conduct under the rule of reason is from Brandeis J in *Chicago Board of Trade v United States*. There he said:[200]

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is

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195 *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 193, (2003) 131 FCR 529.

196 At [273]. For a discussion on Australian law and how it is changing to take account of efficiencies in the SLC test, see Arlen Duke *Corones' Competition Law in Australia* (7th ed, Lawbook Co, Sydney, 2019) at 48–50.

197 Sherman Antitrust Act 15 USC § 1.

198 Thomas A Piraino Jr "Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act" (1994) 47 Vand L Rev 1753 at 1754.

199 *Federal Trade Commission v Superior Court Trial Lawyers Association* 493 US 411 (1990); and *United States v Topco Associates Inc* 405 US 596 (1972).

200 *Chicago Board of Trade v United States* 246 US 231 (1918) at 238.

> applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Under the analysis, a plaintiff must show an anticompetitive effect. A defendant can then present procompetitive justifications for the conduct. The courts have recognised a number of procompetitive justifications. These include increased output, creating operating efficiencies, making new products available, enhancing product or service quality and widening consumer choice.[201] The conduct must be reasonably necessary to achieve these procompetitive virtues. If a defendant has done this, the court then must balance the adverse effects against the procompetitive benefits and determine on balance whether the conduct is unreasonable.[202]

This in essence is the DC Circuit Court of Appeal's method of analysis from *Microsoft*[203] which the District Court Judge applied in *Google*. Moreover, the DC Circuit in *Microsoft* invoked the Supreme Court case *Standard Oil Co of New Jersey v United States*[204] which originated the rule of reason. The DC Circuit said the rule of reason supplies the proper inquiry under ss 1 and 2 of the Sherman Act.[205]

By being concerned with the net effect on competition, New Zealand courts apply a rule of reason analysis and that is what the SLC test under s 36 requires. It is sensible to take account of efficiencies for reasons other than following precedent. The aim of competition is to provide lower prices, higher output, improved products and services and more innovation. Efficiencies achieve these, as the Court of Appeal recognised in *Tru Tone Ltd v Festival Records Retail Marketing Ltd* by saying workable and effective competition is prized because it delivers efficiency gains to customers.[206] If the effect of the conduct is these benefits, it makes no sense to ignore them and say the conduct has substantially lessened competition. The conduct has resulted in the benefits of competition, yet a court is meant to find that despite this, the conduct substantially lessened competition. To condemn such behaviour is

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201 *Law v National Collegiate Athletic Association* 134 F 3d 1010 (10th Cir 1998) at 1023, citing American Bar Association *Antitrust Law Developments (Fourth)* (ABA Book Publishing, Chicago, 1997) vol 1 at 66–67.

202 For discussions on the rule of reason, see Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and Its Practice* (4th ed, West, St Paul (Minn), 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 (Minn), 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 (Minn), 2004) at ch 5.

203 *Microsoft*, above n 34.

204 *Standard Oil Co of New Jersey v United States* 221 US 1 (1911).

205 *Microsoft*, above n 34, at 58.

206 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358.

to say that an SLC occurs with a reduction in the number of rivals and that the fate of individual competitors determines whether there has been an SLC. New Zealand authority is to the contrary.[207]

An example illustrates the point. Three radiologists may combine their practices to form a joint practice. This conduct reduces three rivals to one. Yet combining may enable the new practice to make economies (no duplication of staff and equipment) and result in lower prices and higher output. The radiologists may now be able to offer 24-hour on-call services. It is ridiculous to say that this conduct has the effect of SLC. The procompetitive effect of the conduct is efficiencies – yet a court supposedly should ignore them. Further, such conduct promotes, and is an encapsulation of, the benefits of competition, so it is strange to say that the conduct has the effect of substantially lessening it.

To ignore efficiencies under the SLC test is to treat competition and efficiency as separate concepts. It is often not possible to do so. For example, conduct may enable a firm to acquire economies of scale and scope. These mean it can compete more effectively, the market will be more competitive and the process of competition will be improved. This is not an SLC. Ignoring efficiency is also deleterious with such conduct as exclusive dealing, as its raison d'être is to achieve efficiencies such as preventing free riding,[208] making the firm that imposes them more competitive. This too is not an SLC.

While monopolisation provisions like s 36 aim to curb monopolists' anticompetitive conduct, they do not aim to prevent such firms from competing vigorously.[209] As Judge Easterbrook noted: "Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally".[210] Monopolisation law does not require monopolists to "lie down and play dead".[211] So any monopolisation law must be able to distinguish between a monopolist's vigorous competitive behaviour and its anticompetitive behaviour. That is the task of the SLC test and that test only makes sense if it does not outlaw behaviour which enhances efficiency by lowering costs and prices and increasing output. As McHugh J observed in *Boral*:[212]

> Section 46 would be a vehicle for anti-competitive conduct if the most efficient firm in the market had substantial market power and by reason of its efficiency could not take market share from its rivals without contravening the section. This makes little sense from the perspective of achieving an efficient economy

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207 See *ANZCO*, above n 179; and *Port Nelson Ltd*, above n 176.

208 Posner, above n 64, at 230; and Benjamin Klein and Kevin M Murphy "Vertical Restraints as Contract Enforcement Mechanisms" (1988) 31 JLE 265 at 288.

209 *Spectrum Sports Inc v McQuillan* 506 US 447 (1993) at 459.

210 *Ball Memorial Hospital Inc v Mutual Hospital Insurance Inc* 784 F 2d 1325 (7th Cir 1986) at 1338.

211 *Goldwasser v Ameritech Corp* 222 F 3d 390 (7th Cir 2000) at 397.

212 *Boral Besser*, above n 100, at [280].

> with efficient resource allocation or for the benefit of consumers who can be provided with quality goods or services at lower prices.

That was under Australia's old s 46 but its reasoning applies to the SLC test as well.

Some commentators have argued that comparing pro- and anticompetitive effects is too difficult and best left for authorisation by the Commerce Commission.[213] This puts too much faith in the Commerce Commission and it may be impractical for a firm to apply for authorisation for its conduct given the cost, delay and unpredictability of the authorisation process. Further, an authorisation only lasts for a short period. In any event, such an argument is contrary to *ANZCO*. There, the Court of Appeal, in holding the SLC test was concerned with the net effect on competition, said it was necessary to balance the procompetitive effects against the anticompetitive effects in the market. This was despite authorisation being available under s 58 of the Act. In so doing, the Court rejected a submission that it is only during the authorisation process that the focus is on the procompetitive as well as the anticompetitive effects in the market.[214]

In any event, Australian law may be changing as courts are starting to accept that efficiencies may be relevant in assessing whether there has been an SLC. In *Australian Competition and Consumer Commission v Metcash Trading Ltd*,[215] the Federal Court noted that efficiencies from a merger may improve the merged entity's ability to act procompetitively, thus offsetting the adverse effects on competition resulting from a decrease in a number of rivals.[216] The Full Federal Court of Appeal accepted this.[217] Further, in *Melway*, the High Court accepted that, while Melway's selective distribution system restricted intrabrand competition, it promoted interbrand competition.[218] This is taking account of efficiency in applying the prohibitions in the Australian Act and not leaving efficiency for authorisation. Another example is Heerey J's legitimate business rationale test which the *0867* Supreme Court endorsed. It showed that courts do not treat efficiency and competition as separate concepts. In any event, the Commerce Commission, in its latest *Misuse of Market Power Guidelines*, says it will consider procompetitive effects of the conduct in the relevant market.[219]

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213 Ahdar, above n 125, at 103–105.

214 *ANZCO*, above n 179, at [249].

215 *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 967.

216 At [340].

217 *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCAFC 151, (2011) 198 FCR 297.

218 *Melway*, above n 110, at [20].

219 Commerce Commission *Misuse of Market Power Guidelines* (March 2023) at [78].

The role efficiencies play in assessing whether conduct is an SLC is not the only difference between Australian and New Zealand law. They differ on purpose as well.[220] The clash is over whether purpose is objective or subjective. Subjective purpose is the purpose of the relevant actor. It is in the mind of that actor. Objective purpose, on the other hand, is the purpose courts infer from the actions and circumstances. Courts do not need to refer to the relevant actor's mind. As the Federal Court put it in *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd*,[221] subjective purpose is the purpose in the mind of the person who engaged in the relevant conduct, whereas objective purpose is the purpose attributed to the act of engaging in that conduct and to be ascertained from the nature of that conduct, which is looked at in the light of the surrounding circumstances.[222]

Normally a plaintiff will prove subjective purpose by direct or indirect evidence of the relevant actor's state of mind. Documents usually reveal this. However, courts can infer subjective purpose. They will have to do so if no one gives evidence or if the court disbelieves the defendant.

In New Zealand, under s 27 and the old s 36, purpose is primarily objective but evidence of subjective purpose is relevant.[223] As the High Court in *Commerce Commission v Bay of Plenty Electricity Ltd* observed, "the primary enquiry is an objective one, but that evidence of subjective statements of purpose and intention can be relevant".[224]

A United States v Google LLC *under the New Section 36*

At first glance it appears that New Zealand's methodology for determining whether conduct is an SLC, and the DC Circuit's rule of reason approach, are essentially the same and would lead to the same result. But this is not necessarily so.

As for effect, a New Zealand court would have to engage in counterfactual analysis: that is, compare the state of competition with the exclusive contracts (the factual) with the state of competition without the exclusive contracts (the counterfactual); it would have to use the "with and without" test. Here things differ from the way the District Court Judge handled *Google*. United States courts do not engage in such analysis.

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220 Paul G Scott "The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law" (2011) 19(1) Wai L Rev 168; Katharine Kemp "A Unifying Standard for Monopolization: 'Objective Anticompetitive Purpose'" (2017) 39 Hous J Intl Law 113; and Kemp, above n 163, at 204–205.

221 *Dandy Power*, above n 178.

222 At 276–277.

223 *ANZCO*, above n 179, at [255]; and *Port Nelson Ltd*, above n 176, at 564.

224 *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 at [325].

The District Court held Google's conduct had to have an anticompetitive effect, ie harm the competitive process.[225] The plaintiff also had to show a causal link – that the conduct caused the anticompetitive harm.[226] Google argued that this required "but for" proof, ie but for the conduct the harm would not have resulted.[227] This is counterfactual analysis, as requiring a causal connection is the essence of counterfactual reasoning.[228] Any time one says that X caused Y, one is implicitly asserting in the absence of X, Y would not have occurred. To assess this, it is helpful to consider what the world would look like in the absence of X. So, with Google, one has to look at what competition would look like in the absence of the exclusive contracts. If there is no harm to competition in this world then Google's exclusive contracts did not cause the harm.

The District Court Judge emphatically rejected this, saying: "The plaintiff is not required to show that but for the defendant's exclusionary conduct the anticompetitive effects would not have followed".[229] He said such a standard would create substantial proof problems and cited the DC Circuit in *Microsoft*[230] where it said "neither plaintiffs nor the court can confidently reconstruct … a world absent the defendant's exclusionary conduct".[231] Indeed, the District Court Judge cited the plaintiff's witness saying that such "but for" analysis "would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts".[232]

As mentioned above, the District Court held the agreements had three primary anticompetitive effects.[233] These were market foreclosure, preventing rivals from achieving scale and diminishing the incentives of rivals to invest and innovate in general search. The District Court did not compare any of these to a market without the exclusive contracts. So, with foreclosure for example, it just required the plaintiff to show substantial foreclosure in the present world.

In New Zealand, a court has to do what the District Court said was both unnecessary and impossible to do: identify the appropriate counterfactual, ie what would have happened without the exclusive contracts. Here, things get uncertain. It is not just a matter of saying the counterfactual market is one without the exclusive contracts. It is quite possible that a court would find that, without

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225 *Google*, above n 9, at 215.

226 At 215.

227 At 216.

228 Cento Veljanovski "Market Power and Counterfactuals in New Zealand Competition Law" (2013) 9 JCL & E 1.

229 *Google*, above n 9, at 216.

230 At 216.

231 *Microsoft*, above n 34, at 79.

232 *Google*, above n 9, at 218.

233 At 220.

the exclusive agreements, the relevant firms would still have Google as their default search engine. The reason for this is that everyone agreed, and the District Court found that Google is the industry's highest quality search engine with hundreds of millions of daily users who trust it. Firms would still accept payment based on usage and these payments would be huge.[234] Under the way the New Zealand courts have interpreted "likely", it is strongly arguable that in the counterfactual, firms would still choose Google as the default search engine.

Further, given the huge cost of developing and maintaining a search engine, no new rival may have emerged had Google's exclusive agreements not existed. Given that, one can argue that the counterfactual is one where Google has the same default status without exclusive contracts. This would mean that the market foreclosure would be the same: rivals could not achieve sufficient scale to be effective competitors and rivals would still have diminished incentives to invest and innovate. In short, a court could find the factual and counterfactual are the same, resulting in no SLC.

As for the factors the District Court considered when assessing whether the foreclosure was significant, these would be relevant in New Zealand. However, while the evidence showed that the contracts had an anticompetitive effect on the existing market, it did not show that it would as compared to the counterfactual market. The reason was that there was no evidence on the issue and United States law does not require courts to compare competition with and without the conduct. So, the lack of such evidence is unsurprising.

What a New Zealand court would decide has to be uncertain as it all depends on which counterfactual a New Zealand court would use. As indicated, it is entirely possible that a New Zealand court could choose the status quo, which would mean no SLC. It seems remote, given Google's superiority as a search engine, that firms would not choose it as the default engine. However, given the District Court found significant foreclosure (both quantitatively and qualitatively) which "impair[ed] rivals' opportunities to compete",[235] that the agreements deprived rivals of scale needed to compete effectively[236] and that they decreased incentives to compete,[237] it is perturbing to consider that a New Zealand court might well find no breach. Google's behaviour deserved condemning and it is chastening to realise they might escape liability in New Zealand.

If a New Zealand court found the conduct had an anticompetitive effect, it would then consider Google's procompetitive benefits as part of determining the conduct's net effect. As mentioned above, the District Court Judge found there was no evidence supporting these procompetitive

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234 At 2.

235 At 226.

236 At 231.

237 At 234.

justifications.[238] This meant it was unnecessary for the District Court to balance the pro- and anticompetitive effects.

Several commentators have criticised the balancing exercise and claim that it is administratively challenging and may be prohibitively expensive.[239] These problems include doubt as to whether courts can accurately measure net consumer welfare effects of particular conduct. Elhauge claims:[240]

> [The] open-ended balancing inquiry [required by an effects-balancing test, when performed] by antitrust judges and juries would often be inaccurate, hard to predict years in advance when the business decision must be made, and too costly to litigate.

However, this is what New Zealand case law requires and for those who say the Commerce Commission should do it, the problems of accurate measurement, unpredictability, time and expense still remain.

In any event, in the United States often courts do not reach the balancing stage. The District Court did not in *Google*, as it rejected Google's claimed procompetitive justifications. In *Microsoft*, the defendant did not offer any procompetitive justifications for its conduct. Thus, balancing was unnecessary. In the Third Circuit cases of *United States v Dentsply International Inc*[241] (exclusive dealing) and *Le Page's Inc v 3M*[242] (bundled discounts), the defendants also did not offer any justifications, meaning balancing was unnecessary.

B Purpose of SLC

Given that the District Court for the District of Columbia did not find any support for Google's procompetitive justifications, a New Zealand court would likely infer an anticompetitive purpose of SLC. In the case's circumstances, it would not matter whether purpose is objective or subjective.[243] The reason is that Google trained its employees not to create "bad" evidence. It instructed employees not to use certain words in documents. It directed employees to avoid references to "markets", "market share" or "dominance"; to avoid discussions of scale and network effects; and "avoid metaphors

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238 At 248. A New Zealand court would likely find the same thing.

239 Einer Elhauge "Defining Better Monopolization Standards" (2003) 56 Stan L Rev 253; A Douglas Melamed "Exclusive Dealing Agreements and Other Exclusionary Conduct—Are there Unifying Principles?" (2006) 73 Antitrust LJ 375; and Mark S Popofsky "Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules" (2006) 73 Antitrust LJ 435. For a contrary view, see Steven C Salop "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard" (2006) 73 Antitrust LJ 311.

240 Elhauge, above n 239, at 317.

241 *United States v Dentsply International Inc* 399 F 3d 181 (3d Cir 2005).

242 *LePage's Inc v 3M* 324 F 3d 141 (3d Cir 2003).

243 *Google*, above n 9, at 275.

involving wars or sports, winning or losing".[244] It told them to "assume every document you generate … will be seen by regulators". It automatically deleted chat messages after 24 hours. Further, it instructed employees to automatically add its in-house lawyers on certain correspondence, thus claiming attorney/client privilege.[245] Consequently, there would be no direct evidence on purpose and a court would have to infer purpose. Calling this objective or subjective would not matter.

There is another area in which the difference between Australian and New Zealand law on purpose is significant. That is when it comes to the matter of whether a plaintiff can establish an anticompetitive purpose when it was impossible to achieve that effect. In *ANZCO*, William Young J and Anderson P held that it was,[246] whereas Glazebrook J held that it was not.[247] In *Turners & Growers*, the High Court observed that, if the conduct has no anticompetitive effect, it will not be possible to infer an anticompetitive purpose. For s 36, it held:[248]

> … 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.

Liability should be possible in such circumstances. Often a defendant will have a blatant purpose of damaging or eliminating a small rival. This rival may grow into a potential threat, so the incumbent damages or eliminates it. This is called harming nascent competitors. Areeda has noted that exclusive dealing arrangements that deny smaller firms access to retailers may "impair their ability to expand, thus becoming more effective competitors with the dominant firm. Indeed, the smaller [firms] may decline and even be forced to exit from the market".[249] The *Google* District Court found "[t]he loss of nascent competitors is a clear anticompetitive effect".[250] Microsoft is another example. Microsoft perceived Netscape as a potential rival to its operating system so it attempted to decrease Netscape's competitive viability.

The trouble with this is that this may not be the case in New Zealand. The nascent rival may be so small that hindering or even eliminating it would not SLC. The conduct would not have an effect on the market as a whole. Using the counterfactual test to examine purpose would not establish it, as the firm is too small to amount to an SLC. Glazebrook J in *ANZCO* held that one should use the

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244 At 274.

245 At 273–274.

246 *ANZCO*, above n 179, at [152]–[154] per William Young J and at [302] per Anderson P.

247 At [256]–[262].

248 *Turners & Growers*, above n 169, at [98] and [364].

249 Areeda and Turner, above n 116, at [1802d5].

250 *Google*, above n 9, at 237; and C Scott Hemphill and Tim Wu "Nascent Competitors" (2020) 168 U Pa L Rev 1879.

counterfactual test in establishing purpose.[251] This is quite contrary to Australian Federal Court authority.[252]

So, the defendant would escape liability for conduct deliberately aimed at hindering rivals and preventing them from growing into a threat. Such a defendant should be liable. Its conduct has no procompetitive benefit and is aimed at forestalling potential future competition. It should be liable under the purpose limb. If one has to have an effect before there can be purpose, then the purpose limb would be redundant. Taking out nascent competitors is a situation where Areeda once observed: sometimes the rule of reason can be applied in the "twinkling of an eye".[253]

There is one further way in which United States and New Zealand law differs. When it comes to an SLC, New Zealand courts will analyse each situation carefully. There will be no fixed rules. Conversely, the United States courts have developed rules that guide determining whether a breach of s 2 occurs. So, with exclusive dealing, as the *Google* Court noted, to be anticompetitive, the market foreclosure must be significant in that it must attain a certain share – for example 40–50 per cent foreclosure for s 2.[254] If it is less than that, the s 2 case fails. Another example is that an exclusive dealing contract terminable in less than a year is presumptively lawful.[255] Those rules do not exist in New Zealand, although they may develop with more cases.

V CONCLUSION

A New Zealand court would not find Google liable under the old s 36. As Google had used the exclusive contracts before it attained market power, its continued use of them after it had would mean no "taking advantage"/"use" under *0867*. Google would be liable under the old Australian law as its conduct falls within the Deane J purpose test as conduct that is only anticompetitive when a monopolist undertakes it. This reasoning did not apply in New Zealand as the *0867* Supreme Court held the Deane J purpose test was not a separate test – it was part of the counterfactual/comparative exercise test. As Google easily passed the counterfactual test, it would not be liable.

Given the *Google* Court found the exclusive contracts had a profound anticompetitive effect, it supports the reformers' view that the old s 36 was inadequate. It also points out the inadequacies of *0867* in that the counterfactual test and the Deane J purpose test lead to different results and, contrary to *0867*, are not the same.

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251 *ANZCO*, above n 179, at [278].

252 *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] FCA 826, (2006) ATPR ¶42-123 at [802]–[803].

253 Phillip Areeda "The 'Rule of Reason' in Antitrust Analysis: General Issues" (Federal Judicial Center, June 1981) at 37–38.

254 *Google*, above n 9, at 223.

255 At 224.

It is not possible to be so definitive over the new s 36. The reason is that it is unknown which counterfactual a court would choose. Under United States law, the District Court did not have to choose one. Accordingly, there was no evidence on the issue. Under New Zealand law, a court would have to choose one. This makes sense, as one can only say conduct substantially lessens competition by comparing it to something else. Even the *Google* District Court acknowledged that the anticompetitive effects of the exclusive contracts (foreclosure in particular), according to the plaintiff's expert, would "ideally" be estimated against a counterfactual world without the exclusive agreements.[256] However, the Judge held the law did not require it.

A New Zealand court may well choose the counterfactual of a market without the exclusive contracts. However, it is by no means certain.[257] A court could well choose the status quo by saying Google's default status would continue, meaning no effect of substantially lessening competition. Contrary to the reformers' claims, the new s 36 does not lead to greater certainty. This is especially so if a court decided to use multiple counterfactuals. If it did, the authority is unclear on which counterfactual to use.

As for purpose under the new s 36, one can strongly argue that given Google's contracts had no procompetitive justification, Google engaged in conduct with the purpose of substantially lessening competition. This reasoning would mean the new s 36 would be an effective check on monopolists seeking to take out or hinder nascent competitors. This depends on New Zealand courts following Australian law and not using the counterfactual to assess purpose.

While one cannot be certain of the impact of the new s 36, it is an improvement on the old s 36.

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256 *Google*, above n 9, at 216–226.

257 Berry and Scott, above n 184, at 284–288.