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IS SECTION 36 ADEQUATE TO GUARANTEE ACCESS TO ESSENTIAL FACILITIES?

MEASURING THE SUCCESS OF LIGHT HANDED REGULATION

LLM RESEARCH PAPER
ADVANCED COMPETITION LAW
LAWS 503

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON
WELLINGTON 1995

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ABSTRACT

New Zealand, like many other countries, is seeking to improve its living standards. Politically, considerable effort is being expended in achieving this improvement by encouraging the pursuit of "efficiency" in the use of resources of all descriptions by those most able to use them. Recently, successive governments have considered "light handed" policies, an expression this paper will explain in due course, are appropriate to achieve such efficiency. This paper examines some issues arising from light handed legislative incentives to provide for efficiency through competition. Particularly, this paper will look at the level of success Section 36 of the Commerce Act 1986 enjoys in guaranteeing access to resources described as Essential Facilities. This paper adopts a narrow definition of Essential Facilities. Essential Facilities are former state owned network facilities which largely still occupy monopoly positions. Essential Facilities are increasingly facing competition at the same time as their traditional status as state owned network facilities is changing through deregulation and privatisation. This paper reveals there are strong academic and commercial doubts that Section 36 is able to guarantee access to Essential Facilities. By treating "access" as a key concept and concentrating narrowly on issues of denial of access and pricing of access, this paper similarly expresses strong doubts that the political aspirations for Section 36 to guarantee access to Essential Facilities are being met. This paper will include some comparative comment from, particularly, Australia and its treatment of issues of access to Essential Facilities. Such comment will reveal that if competition achieves efficiency and stimulates economic growth and initiative, then the Australian position is that access to Essential Facilities similarly needs to be specifically facilitated to assist the competition process. By comparison Section 36, is not facilitative and consequently is not adequate to guarantee access is available to Essential Facilities in New Zealand. This paper will also consider steps other than resort to Section 36, which could be taken to improve the adequacy of access to Essential Facilities.

The text of this paper (excluding Contents page, footnotes, bibliography and annexures) comprises approximately 16,000 words.

I INTRODUCTION

1. An Overview

1.1 In recent years New Zealand has undergone a political facelift. One consequence has been that intensive and specific regulation of industry and commerce has become unfashionable. Instead, "light handed" regulation has been favoured. The political intention of light handed regulation has been to promote competition as a regulator of business relationships. By retaining few legislative or regulatory barriers to competition, the political intention has been to encourage an efficient use of resources within the business community.[1]

1.2 Specifically, the Commerce Act 1986[2] provides New Zealand's predominant regulatory framework to encourage business efficiency. The Act is designed to promote competition within markets in New Zealand, on the basis that rivalry between firms ensures maximum efficiency in the use of resources.[3]

1.3 Successive governments have expressed their intentions that the Act also regulate competition where Essential Facilities, sometimes called natural monopolies, exist.[4] Historically, Essential Facilities in New Zealand have not been exposed to competition and popularly have included such as state entities and have been protected by statute accordingly. Now however, Essential Facilities are increasingly being deregulated and also privatised, to both traditional and new participants. These steps will not immediately alter the apparent monopolistic characteristics of Essential Facilities so that

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1 See, for example, Government Policy Statement, December 1991, regarding the Telecommunications markets, quoted in Patterson R H, Competition Issues for Natural Monopolies and Essential Facilities, Utility Markets Summit Wellington 27/28 April 1995.

2 Called in this paper "the Act".

3 See *Tru Tone Limited v Festival Records Retail Marketing Limited* [1988] 2 NZLR 352:358.

4 But see this paper's definition following in section 2 of this paper.

arguably, governmental reliance upon the Act to regulate competition for efficiency purposes within these areas appears incongruous.

1.4 In explanation, whilst the Act is designed to promote competition, conversely, the Act also limits certain behaviour which for purposes of the Act is regarded as being uncompetitive or monopolistic. Section 36 of the Act proscribes the extent to which monopolistic behaviour is tolerated. This paper canvasses whether the Act and Section 36 in particular, as an example of contemporary light handed legislation, effectively assists or implements the political aspirations of encouraging competition within Essential Facilities. More particularly, this paper will concentrate on determining whether Section 36 is adequate to guarantee access to Essential Facilities.[5]

1.5 A number of arguments will be discussed. First, in terms of a definition of Essential Facilities,[6] a New Zealand definition will be attempted.[7] The structural and ownership characteristics of Essential Facilities in New Zealand have altered substantially. Even in the United States of America the ambit of Essential Facilities has never been universally acknowledged, indicating a lack of understanding and acceptance of the concepts. Accordingly this paper will establish its own definition of Essential Facilities for purposes of the arguments which follow. Secondly, adherence to light handed legislation is a relatively new phenomenon in New Zealand, where formerly stringent regulation prevailed. Consequently, the business community has taken some time to familiarise itself with both the strengths and weaknesses of legislation of the nature of Section 36 and arguably commercial uncertainty and confusion has resulted. Further, while Section

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5 In considering "access" to Essential Facilities, this paper is proceeding on the basis that "access" is pursued in the furthering of the promotion of competition, that is, access is sought and given on a competitive basis.

6 Note, this requires inquiry of facilities which can be described as "essential". It is not directed towards defining the "Essential Facilities Doctrine". The Doctrine will be considered in section 6 of this paper.

7 "Essential Facilities" as a term arose first in the United States of America. The adoption of the term in New Zealand without giving consideration to political social and judicial distinctions between the two countries may be inappropriate.

36 is expressed broadly, a lack of specificity and also recent case law indicates judicial confusion as to the ambit and effects of the section also exists. An analysis of Section 36 will be undertaken to attempt to resolve the uncertainty. Thirdly, this paper will examine concepts of access to Essential Facilities and particularly the adequacy of access when considered against first, the definition of Essential Facilities as adopted in this paper and secondly the real or imagined confusion created by the interpretation and application of Section 36. Whilst each of the arguments this paper will discuss could be considered as separate topics, in this paper, access issues are a key concept. Accordingly, this paper argues both denial of access and pricing of access issues require careful consideration. "Sufficiency" of access, similarly, requires examination. This paper argues access issues in these terms are currently topical in view of the difficulties of providing uniform procedures to observe and to facilitate access.[8] Finally, this paper argues there are if not alternatives to Section 36, then certainly complementary mechanisms which operate. On this basis, a specific access regime can be sustained without prejudice to the political aspirations of "efficiency" in the use of resources.

1.6 It is anticipated the arguments this paper will discuss can best be examined by discussion and reference to examples as appropriate. Some comparative material from, particularly, Australia will be considered. The Trade Practices Act 1974 (Australia) Section 46, being comparable legislation to Section 36, will be examined as will the Australian attitude towards access issues. This paper draws together the arguments set out in the preceding paragraphs and argues a number of conclusions are likely. First, Essential Facilities have a specific definition. Access to Essential Facilities therefore needs to meet any specific requirements of that definition. Secondly, Section 36 is rather too "light handed" and is not sufficiently facilitative to guarantee access to Essential Facilities. Thirdly, the adequacy of regulating

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[8] See *Telecom Corporation of New Zealand Limited v Clear Communications Limited* [1995] 1 NZLR 385, access issues difficulties are clearly defined.

the consequences of denial of access and imprecision in pricing of access has not reached an acceptable level. Australia favours the introduction of specific access legislation. Whilst specific access legislation in New Zealand may seem to conflict with political aspirations of efficiency and the best use of resources, this paper also concludes that the presence of alternatives or complements to Section 36 indicates that there is sufficient goodwill to enable a specific access regime to operate in New Zealand. This paper will now develop these arguments in the following sections.

II ELEMENTS OF THE EQUATION

2. Essential Facilities Defined

2.1 "Essential Facilities"[9] is a term often encountered in the competition law environment. It is not inaccurate however, to assert that a consistent and universally accepted definition of the term is more illusory than real. Yet, it is necessary to define Essential Facilities and to examine the origins of the contemporary definition to provide, first, an appreciation of the types of facilities which might be essential but secondly, to provide a focus for the arguments which follow. Given the areas upon which this paper seeks to concentrate however, this section will discuss these matters much more summarily than would a paper devoted exclusively to an examination of Essential Facilities. The emphasis will be to provide a definition of Essential Facilities which is relevant to New Zealand. This will mean that examples of Essential Facilities in the United States of America, where the concept of an essential facility first arose, may not be treated similarly in this country.

2.2 Despite a hesitancy to unquestioningly accept an United States of America definition in New Zealand, a consideration of the conceptual and case law origins from that country must be made. Essential Facilities arise in the context of economic activities, but a concise description is impossible. Current opinion holds that Essential Facilities display natural monopoly characteristics. Consequently, such facilities can not be economically duplicated. That is, from a competition viewpoint, to duplicate the particular facility would not make any economic sense unless the particular

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[9] This section defines "Essential Facilities" for purposes of this paper. This section is not commenting on or intending to comment on the Essential Facilities Doctrine. The Doctrine will be considered in Section 6.

facility was virtually exhausted as to capacity. Duplication otherwise would be wasteful and inefficient[10].

2.3 Whilst academically convenient, some difficulties arise with such a definition. Essential Facilities and natural monopolies are not strictly interchangeable terms. Natural monopolies will always be essential. Essential Facilities on some definitions however, need not be natural monopolies[11]. Traditionally, "natural monopoly" has been an economic term to describe an activity or industry in which only one entity operates as production is most efficiently carried out in this manner.[12] This is as a result of the characteristics of the activity or industry, rather than as a result of the entity holding any licence or patent. Clearly, this is a cost function. A single entity occupies a strategic position and is able to produce at lower cost than an alternative group of entities.[13]

2.4 In contrast to "natural monopoly" "Essential Facilities" is a legal term, though not a term of art. The term is used where facilities cannot be practically duplicated by competitors. Such facilities may have developed by accident. Historically, the state sector is replete with Essential Facilities as a consequence of state infrastructural development and ownership. Common examples include electricity grids, telecommunications and rail networks, pipelines, ports and airports. Whilst natural monopolies, as referred to in the preceding paragraph, arise from competition, clearly Essential Facilities on the basis set out in this paragraph do not.[14]

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10 See, for example, F G Hilmer, Independent Committee of Enquiry into a National Competition Policy (AJ Law, Commonwealth Government Printer Canberra 1993) page 240.

11 See, Guarantee of Access to Essential Facilities (Ministry of Commerce Discussion Paper, Wellington, December 1989) page 1.

12 See footnote 11, page 2, quoting Schmalensee R, The Control of Natural Monopolies (Lexington Books, USA, 1979) page 3.

13 See footnote 12.

14 That is, "natural monopolies" on this basis are not used interchangeably in this paper with "Essential Facilities.".

2.5 Essential Facilities give rise to both economic and legal implications. David Gerber argues that economically, Essential Facilities are those which have the ability to impede any users production or access to a market.[15] That is, one economic unit is able to impede another. Further, Gerber argues all Essential Facilities share four characteristics.[16] First, they are unique. Without uniqueness, potential users are able to seek access to a competing facility. Secondly, uniqueness must be preserved. The facility owner achieves preservation by only selling access to the facility or perishable output from the facility. Ownership of the facility itself is retained. Thirdly, the facility must be centrally located. Whilst perhaps more figurative than literal, unless users are drawn to the facility, uniqueness will be irrelevant. Finally, the facility must have the ability to impede or facilitate the users business. This concept is described as functional control by allowing or impeding access to the facility[17].

2.6 Gerber further argues that, legally, a judicial finding that a facility is essential is generally dependent upon determining how badly a refusal to deal harms both competitors and competition generally.[18] Simplistically, on this basis Gerber suggests "essentiality" has a variable standard because "harm" is variable and the courts have not been consistent in their application of a definition.[19]

2.7 The commentary in this section to date is aimed at providing an appropriate definition of Essential Facilities in New Zealand so that the further arguments in this paper can be developed. Clearly, whilst the concept of describing facilities as essential is understandable, in practice there is less

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15 Gerber DJ, Rethinking the Monopolists Duty to Deal: A Legal and Economic Critique of the Doctrine of Essential Facilities (1988) 74 Virginia Law Review 1069:1072

16 See footnote 15, pages 1073, 1074

17 See footnote 15, pages 1073, 1074

18 See footnote 15, page 1075

19 See footnote 15, page 1075

certainty as to "essential" facilities[20]. Complicating factors include the case law origins to which reference was made previously. Tye argues no single case comprehensively examines Essential Facilities[21]. Elsewhere, Areeda appears to share similar views, apparently considering Essential Facilities have evolved from inconsistent court descriptions of a wide range of facilities.[22].

2.8 Other impediments to an acceptable definition of Essential Facilities include the differing views academics have on the differing characteristics of Essential Facilities owners. Some will own the facility only, but leave production to others. Yet other owners will own the Essential Facilities but compete directly in the same areas or markets as the users of the facility. Still other owners may compete but in areas or markets outside of those of the users of the facility. Conceptually, should the differing characteristics of the owners of Essential Facilities make any difference to the treatment and description of Essential Facilities?

2.9 Daniel Troy argues in the negative[23]. Troy argues determination that a facility is essential to a particular entity requires consideration of three factors. First, can an entity's end product or service be produced or marketed without use of the facility or is it necessary so that the entity can participate in the relevant market? Secondly, should the entity be expected to duplicate the facility? Lastly, is the entity's ability to produce the end product or service within the market necessary to the entity's commercial existence in that product line? Under the first consideration, do acceptable substitute facilities exist, or can the facility be dispensed with? Under the second consideration, is duplication of the facility a standard cost of entry

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20 See footnote 17

21 Tye, W.B. Competitive Access, a Comparative Industry Approach to the Essential Facility Doctrine (1987) 8 Energy Law Journal 337: 344

22 Areeda P, Essential Facilities: An Epithet in Need of Limiting Principles (1990) 58 AntiTrust Law Journal 841: 842, 843 - although dealing with the Doctrine, Areeda clearly had difficulties accepting the cases quoted dealt with "Essential Facilities", to be able to invoke the Doctrine.

23 Troy DE Unclogging the Bottleneck: A New Essential Facility Doctrine (1983) 83 Columbia Law Review 441:464

for the particular market and the line of business in that endeavour and locale? Under the third consideration unless the entity was established elsewhere, the facility would be essential[24].

2.10 Troy believes his definition of Essential Facilities is consistent, whether or not the owners of such facilities compete with suppliers or customers. His rationale is a refusal to deal or to allow use, has the same economic effect whether the Essential Facilities owner competes or not. Further, an anti-competitive intent is likely to be apparent. Thirdly, by looking at the effects of the action any distinction between integrated and non-integrated entities is rendered irrelevant[25].

2.11 Troy's analysis of Essential Facilities is not supported by Tye. Tye argues that whilst economists have analysed vertical foreclosure issues, which, Tye says parallel Essential Facilities, no similar analysis has been carried out on Essential Facilities.[26] Accordingly, economic theory and the law have not addressed the same issues in respect of Essential Facilities. Further and relevantly for New Zealand, Tye says there are special problems when applying the concept of Essential Facilities to regulated industries in the course of deregulation. Enforcement of a definition of Essential Facilities may conflict with the regulatory goals underlining the deregulation.[27] In contrast to Troy too, Tye argues that Troy's three part test[28] by focussing on the effects of an Essential Facilities owners actions may obscure the fact the Essential Facility owner is infringing competition, the protection of which of course is at the heart of anti-trust legislation.

2.12 The commentary to date has examined some of the conceptual difficulties in defining Essential Facilities. There are extensive other materials which

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24 See footnote 23 at page 465
25 See footnote 23 at page 471
26 See footnote 21 at page 345
27 See footnote 21 at page 345
28 See paragraphs 2.9 and 2.10 of this paper.

similarly can be consulted and which similarly illustrate that whilst the concept of describing facilities as essential is undoubted, not all commentators believe they are describing the same things[29]. Gerber, Troy, Areeda and Tye do not agree whether Essential Facilities are natural monopolies or arise from competition, whether the economic or the legal implications predominate or whether competing owners should be treated differently to non-competing owners. Given the conceptual difficulties noted to date to provide a definition of Essential Facilities this section will now consider whether case law provides any superior assistance, following which this section will conclude by attempting a definition of Essential Facilities relevant to New Zealand.

2.13 As indicated at the outset of this section, the conceptual difficulties in defining Essential Facilities are not helped by the alleged unsatisfactory logic of the early case law from the United States of America. Again extensive materials analysing the classic cases can be found. This paper will not reproduce detailed analysis but in accordance with the paper's objectives, a summary will assist define Essential Facilities in a New Zealand context.

2.14 The *Terminal Railroad Association*[30] case involved a monopoly facility acquired by a group of rail operators. An extensive number of railroads met at St Louis and use of Terminal Railroads facility was required. Duplication of the facility was not feasible. The court required the rail operators to admit non-members to their group so that access to the rail facility was made available. The court considered this to be the most efficient option available to overcome both exclusion and disadvantage of non-members.

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29 Gerber, Troy, Areeda and Tye are but four examples of academic commentators on this subject.

30 *United States v Terminal Rail Road Association* 224 US 383 (1912)

2.15 In the *Associated Press*[31] case, a group of newspaper owners created Associated Press. Members obtained access to news stories generated within the group, as well as generating news stories independently. Economies of scale resulted as was desired. New members were admitted provided they did not compete with an existing member. The court held such an admissions policy breached Section 2 of The Sherman Act although the court did not require Associated Press to allow any applicant to join. At issue was the ban on members competitors joining the group. Areeda argues only one Justice in the case, Frankfurter J, raised any essential facility concepts by comparing Associated Press with a public utility and requiring it to serve the public.[32]

2.16 Areeda argues that this narrow suggestion now appears to have been expanded by later cases to be authority to require access be given to rivals if the facility is useful, essential to a rival's competitive position and to the market and if admission of rival's is consistent with the legitimate purposes of the venture. Areeda does not agree with such a summation[33]. Additionally, the influence of *Otter Tail Power Co* v *.United States*[34] is similarly regarded as ill-founded.

2.17 In *Otter Tail Power Co v United States*[35], municipalities requested Otter Tail either sell electricity wholesale or carry electricity purchased elsewhere over Otter Tails lines. Otter Tail refused, wishing to retain the local distribution business. The court held Otter Tail to be in breach of the monopolisation provisions of Section 2 of the Sherman Act. Otter Tail, however, was subject to regulation by the United States Federal Power Commission. That agency held statutory obligations to regulate both prices

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31 *Associated Press v United States* 326 US 1 (1945)
32 See footnote 22, page 843
33 See footnote 22, page 844
34 410 US 366 (1973)
35 See footnote 34

and the terms of access. Otter Tail could have been regulated without resort to the Sherman Act.

2.18 Finally, in *Aspen Skiing Co v Aspen Highlands Skiing Corp*[36] two ski companies offered ski tickets for use on skifields owned by each company. Aspen Skiing withdrew from the arrangements and whilst Aspen Highlands lost some patronage, it remained viable. Nevertheless, on appeal the court held the joint ticket arrangement to be an essential facility. Further, Aspen Skiing's intent was to create or maintain a monopoly. The court believed the two companys' co-operation to be efficient, whereas by implication, by withdrawing from the arrangement was to illustrate an illegitimate business purpose.

2.19 Against the background of the commentary to date it is now necessary to determine a definition of Essential Facilities which is relevant to New Zealand. This paper should not be criticised for spending some time analysing the origins of a definition. It has been necessary to do so, to show that whilst Essential Facilities concepts have developed over a significant period of time there is still academic and case law disagreement as to the ambit of a definition. In these circumstances what is the position in New Zealand? Michael Walls recently delivered a paper at a Trade Practices Workshop of the Law Council of Australia.[37] Walls said the topic of Essential Facilities and how they should be treated under competition law has received little attention in recent years in New Zealand. Indeed it is only since 1984 and the rapid corporatisation of state owned entities thereafter that has begun to focus attention on Essential Facilities. It is apparent there will be little New Zealand academic comment to assist define Essential Facilities.

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36 472 US 585 (1985)

37 Walls M, Essential Facilities in New Zealand, Another Chapter Begins? The Trade Practices Workshop Fremantle, Western Australia 14/16 July 1995.

2.20 Under case law, in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Limited*,[38] Barker J considered the Essential Facilities definition and drew upon United States of America authority for his observations. The case arose when the ARA contractually agreed to allow the operation of only two car rental services at Auckland Airport but sought a declaration as to whether it was able to consider licensing a third operator. The third operator argued the ARA was able to negotiate as a refusal would be in breach of several provisions of the Act. Unsurprisingly, an existing licence holder did not agree. Relevantly, the court held the ARA was in a dominant position under Section 36 of the Act and had a monopoly. Only the ARA licensed rental car operations at the airport, so that any other rental car operation seeking access to the Airport was obliged to deal with the ARA.

2.21 Whilst citing the *Terminal Railroad Association*[39] case, Barker J also considered *Hecht v Pro Football Inc*[40] to be illustrative of several United States of America decisions. In that case, a group of promoters sought to obtain a professional football league franchise. The promoters brought a private anti-trust action against the owners of a rival league. The promoters alleged restrictive covenants in a lease of a stadium to which the rival league had access, prevented the promoters from similarly using the stadium. The promoters claimed an illegal restraint of trade, but moreover as the stadium was the only facility suitable for professional football the covenants prevented their franchise application proceeding.

2.22 The court, at Appeals level, determined the existence of a product market, that of professional football, but the relevant geographic market was disputed. The court agreed with the promoters that the geographic market constituted the area of effective competition. In this case, the city

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38 [1987] 2 NZLR 647

39 See footnote 30

40 570 F 2d 982 (1977)

metropolitan area was the geographic market rather than the entire country.[41] For purposes of this paper, the court considered Essential Facilities to be as follows;[42]

> *"To be essential, a facility need not be indispensable it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. Necessarily this principle must be carefully delimited. The anti-trust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."*

The court cited *Terminal Railroad Association*[43] and *Otter Tail*[44] as authority for the origins of Essential Facilities.

2.23 Barker J adopted that definition[45], describing it as appropriate in the instant case. Notably, however, the judgment made no further detailed attempt to explain or to delimit, in the words of *Hecht v Pro Football Inc.*[46], the ambit and nature of an Essential Facility. In subsequent years, neither has any further New Zealand authority provided any superior assistance. As with overseas authorities the concept of an Essential Facility is accepted but the parameters of a definition remain murky. Nevertheless this paper argues a definition of Essential Facilities relevant to New Zealand can be determined..

2.24 The Ministry of Commerce has highlighted one aspect of an Essential Facilities definition. That is, academic and case law commentary reflect that it is not end-consumers who are concerned to define Essential

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41 See footnote 40 at pages 988-989
42 See footnote 40 at pages 992-993
43 See footnote 30
44 See footnote 34
45 See footnote 38 at page 680
46 See footnote 40 at pages 992-993

Facilities. The concept is one sought by business consumers who similarly to the Essential Facilities owner seek to service end-consumers. To be able to do to, access to Essential Facilities is required.[47] Accordingly, are the elements of the Essential Facilities definition as supplied in *Hecht v Pro Football Inc.*[48] and thereafter in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Limited*[49], appropriate to the New Zealand context?

2.25 Under the United States of America case law, several examples of Essential Facilities seem inappropriate to the New Zealand context. For example, are railroad connections truly economically infeasible to duplicate? In New Zealand until recently there were no private rail networks in any event. Similarly news gathering operations? Arguably such a result would be untenable today. Further, resort to the Essential Facilities concept in the *Aspen*[50] case appears ill founded because in that case a marketing arrangement was at issue, not a facility. Facilities have physical or mechanical connotations rather than such as products or arrangements. Further, the definition itself recognises the Essential Facilities concept must be carefully delimited. The Essential Facilities concept demands a narrow definition within the New Zealand context.

2.26 A narrow definition is clearly favoured by the Ministry of Commerce[51], who argue that in New Zealand only the former state owned network facilities are regarded as Essential Facilities. This paper argues that that view is consistent with what is appropriate to the New Zealand context. Prior to deregulation and privatisation, New Zealand was relatively well served by network facilities. This country lacks sufficient population and investment however, to economically duplicate network facilities following

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47 Guarantee of Access to Essential Facilities, Discussion Paper, Ministry of Commerce, Wellington December 1989.

48 See footnote 40

49 See footnote 38

50 See footnote 36

51 See footnote 47

deregulation and privatisation even if arguably the new entrants should be providing them. There is too, an element of pragmatism in a narrow definition of Essential Facilities. Apart from network facilities, there are very few facilities which are used to the exclusion of other access seeking parties. Sports facilities are rarely individually owned. Service and other facilities are still widely available on a regional basis. Practically, New Zealand has little need to adopt a wide definition of Essential Facilities. Restricting the definition of Essential Facilities to former state owned network facilities in the New Zealand context provides both economic and commercial common sense.

2.27 This section has taken some time to consider a definition of Essential Facilities. In reaching a conclusion, this section is not considered the Essential Facilities doctrine but merely a definition of those facilities which can be described as essential. The definition of Essential Facilities in New Zealand when restricted to former state owned network facilities provides consistency with Gerbers four characteristics[52] and Troys three characteristics are similarly appropriate[53]. Nevertheless the more extreme United States of America case law examples are removed. This paper uses the definition of Essential Facilities provided in this section throughout the remaining sections.

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[52] See footnote 16

[53] See footnote 23

3. Section 36 of the Commerce Act 1986

3.1 This section of the paper analyses Section 36. First, the aims of the Act and the constituent parts of Section 36 are noted, following which reference is made to statutes from other jurisdictions which have influenced the wording of Section 36. Thereafter, a summary of the relevant case law is noted. In this way, this section will illustrate the initial political aspirations for Section 36. The case law summary will illustrate that whatever the initial political aspirations were, in fact Section 36 has been a difficult piece of legislation to interpret. This section of the paper concludes that consequently the adequacy of Section 36 to guarantee access to Essential Facilities has been compromised.

3.2 The Act is designed to promote competition within markets in New Zealand. To do so, the Act seeks to prevent the acquisition[54] and misuse of excessive economic power by[55] entities operating within particular markets.[56] For purposes of this paper, the Act prohibits entities which have excessive economic power in the markets in which they operate from using that power for the purposes of restricting entry to the particular market, or for the purposes of preventing or deterring competitive conduct or for eliminating an entity from a particular market.[57]

3.3 The Act then, is an economic tool. The Act is not as a code for all competition law matters[58] but where it does apply, the Act has been described as light handed regulation. That is, the Act does not contain any barriers to competitive activities, but parties in competition with each other are expected to regulate their relationships recognising conduct which the

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54 See Patterson R.H. Competition Issues for Natural Monopolies and Essential Facilities, Utility Markets Summit Wellington 27/28 April 1995 page 1

55 See footnote 54

56 See footnote 54

57 See the wording of Section 36, as set out in the Appendix

58 See for example Section 7 of the Act and see later in this section some limitations on the application of Section 36

Act proscribes. Owners of Essential Facilities are subject to the Act for these reasons. Specifically, Section 36 is integral in determining the success of promoting competition within Essential Facilities as defined in this paper.

3.4 Section 36 has constituent parts, each of which interplay and are separately and collectively the subject of significant academic and judicial comment. Further, interpretation and emphasis of the constituent parts appears to have varied since enactment, so that consistency of treatment of Section 36 is not always apparent. The section appears in the appendix. In summary, no person who has a dominant position in a market, shall use that position for a purpose proscribed in Section 36(1)(a), (b) or (c), largely those activities referred to in paragraph 3.2 above. "Person" as defined in section 2(1) extends to include individuals, associations of entities and need not be a separate legal entity. Nevertheless, the allusion to monopolists is apparent.[59] Section 3(8) and section 3(1A), again appearing in the appendix define "dominant position" and "market" respectively. Section 2(5)(b) defines "purpose".

3.5 It is these latter three constituent parts which are important in determining the general effectiveness of Section 36. In terms of the general characteristics of the section, Section 36 has not been enacted to enable traders to challenge the efficacy of the activities of other traders in an unrestricted sense. Instead, Section 36 is designed to promote competition by prohibiting certain anti competitive conduct. This means the section is not designed to control for example the owners of Essential Facilities generally, but only in situations where the owners of Essential Facilities act in a dominant position in a market for which they display anti-competitive purposes. Vigorous competition is permitted, indeed promoted, until the anti-competitive threshold is crossed.

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[59] See the words "any association of persons whether incorporated or not"

3.6 Section 36 is based on Section 2 of the Sherman Act in the United States of America, Article 86 of the Treaty of Rome and Section 46 of the Australian Trade Practices Act 1974.[60] Under Section 2 of the Sherman Act, it is an offence to monopolise or attempt to monopolise any part of the trade or commerce among states or with foreign nations. Article 86 of the Treaty of Rome prohibits abuse of a dominant position within the Common Market. Examples of abuse include directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. Under Section 46 of the Australian Trade Practices Act 1974, it is an offence to take advantage of a substantial degree of market power in a market for purposes of eliminating or substantially damaging a competitor or preventing entry to a market. Inferences can be drawn from conduct in this regard.[61]

3.7 Whilst Section 36 contrasts with the words of Section 2 of the Sherman Act, the similarities with both Article 86 of the Treaty of Rome and Section 46 of the Trade Practices Act 1974 are more pronounced. Section 36 is a self help regulation to which disgruntled parties have resort. Nevertheless, any alleged offender under the section is not required to positively carry out any particular activities, but merely to cease carrying out any anti-competitive behaviour. In this regard, Section 36 is limited in application. The section does not address the regulation of competition in the widest sense. Where Essential Facilities are concerned, there are doubts, for example, that Section 36 applies in every instance where any alleged offender does not compete with the intended user, such as an airport company and an airline. Whilst each interacts, neither competes in the same market.[62] Yet a Section 36 action arose in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Limited*[63] where the Airport and Rental Car companies were not in the same market.

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60 See footnote 54 pages 4 and 5

61 All such provisions are set out in the Appendix

62 See *Air New Zealand Limited v Wellington International Airport Company Limited*, CP 829/92 and CP 13/93 Wellington Registry 15 October 1993

63 See footnote 38

3.8 Section 36 is not unique merely by providing interpretational difficulties. Nevertheless, such difficulties do affect the ability of Section 36 to guarantee access to Essential Facilities. The section may be of limited application[64] and may not apply where parties are incapable of acting anti-competitively against each other.[65] On the definition of Essential Facilities in New Zealand, that of former state owned network facilities undergoing deregulation and privatisation, whilst theoretically competition is available, this paper argues in practice the competitive environment will be compromised if there are doubts the legislative guarantor of access to Essential Facilities always applies.

3.9 In summary, some conceptual issues arise. The introduction of competition to Essential Facilities in New Zealand has created some difficulties. Structurally, at least initially, deregulation and privatisation have not always produced streamlined or efficient entities.[66] Privatisation has resulted in non-traditional parties seeking access to Essential Facilities. Combined with these characteristics, the political aspirations for Section 36 were always bold. This paper argues that the economic basis to Section 36 has been difficult for the business community and the judiciary to assimilate to practically promote competition. Characteristically, competition exists in markets which on authority do not exist in neat clearly delineated sections. Markets overlap and otherwise boundaries become blurred. Geographic markets also exist and interact.[67] These are difficult concepts and this paper accepts New Zealand inevitably will have difficulty in achieving immediate success. Indeed Michael Walls suggests New Zealand is a specialist laboratory for the theories of prominent economists from the United States of America, and elsewhere.[68] Nevertheless, an assessment of whether

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64 See paragraph 3.7

65 The wording of Section 36 proscribes anti-competitive behaviour

66 This is a theme which will be developed in section 5 of this paper

67 See *Queensland Wire Industries Pty Limited v The Broken Hill Pty Company Limited* (1989) 167 CLR 177: 196

68 See footnote 37 page 1

Section 36 remains appropriate to guarantee access to Essential Facilities needs to be constantly reviewed.

3.10 Whilst there is no universally accepted method of regulating markets and competition generally, New Zealand, along with Australia focuses on a purpose based approach in Section 36, to ascertain, for example, the reasons for an Essential Facility owner's actions. The purpose based intent of the section is limiting and not conducive to positively promoting competition. Adding confusion is that whilst legislation as provided under Section 36 is usually interpreted in terms of its ordinary meaning, clearly the political aspirations were for economic considerations of "efficiency".[69] Legal practice and economic aspirations need to be reconciled.

3.11 Chicago school economists seek efficiency per se. The Act similarly seeks to encourage the efficient use of resources. Yet, efficiency and competition do not coincide. In purely efficient terms, a single operator of a facility may be desirable, but at the expense of competition. Under the Act, rivalry is sought as the promoter of the efficient use of resources. On this basis a literal interpretation can not be given to Section 36, the section being part of an economic tool. Economic requirements mean the section needs to be considered in a broader more sophisticated sense. Such a requirement presents difficulties for usual legal practice in the sense that the mix of diverse economic and legal disciplines can frustrate a practical result in any particular instance.

3.12 This section of the paper to date has illustrated first the constituent parts of Section 36 but also the political aspirations that the section perform any economic role. This section has also illustrated some doubts Section 36 will always be appropriate and that the economic basis of the section is understood. Yet, Section 36 seeks to protect competition itself, not individual competitors and this suggests the section should be interpreted

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[69] See footnote 47 in the Foreword

on economic principles and not on justice to individual parties.[70] This section then, will now consider how Section 36 in fact, has been treated judicially in support of its conclusion that Section 36 has been compromised. There have been a significant number of cases. This paper will not analyse previous decisions in detail. Instead with the decision in *The Commerce Commission v Port Nelson Limited*[71] the latest pronouncement is available. It is sensible to consider this decision in summary of a number of decisions involving Section 36 as the judgment makes some sense of earlier seemingly irreconcilable approaches. The changing influences of interpretation of Section 36 are illustrated.

3.13 The Commerce Commission issued proceedings against Port Nelson Limited, under a number of headings. Difficulties had arisen between the Port and an independent pilotage company. That company sought to compete with the Port in providing pilot services. The Port fixed various charges offering discounts on combined services and low charges for pilotage. Further, the Port had refused to hire tugs to vessels unless its pilots were engaged. It was alleged, the Port's actions collectively breached Section 36 amongst other provisions of the Act. It should be noted, these proceedings did not involve allegations of denial of access to Essential Facilities, but of offences under Section 36. It is for purposes of interpreting Section 36 that the decision is discussed.

3.14 The Court considered the component parts of Section 36 by considering the definition of the relevant "market".[72] As alluded to earlier in this section,[73] the Court held a market to be a loose generality, a field of buyers and sellers of goods and services, amongst whom there can be substitution. A market has time dimensions and functional level and product and geographic

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70 Land J. Monopolisation : The Practical Implications of Section 36 of The Commerce Act 1986 (1988) 18 VUWLR 51: 52

71 CP No 12/92 Nelson Registry 2 June 1995

72 See footnote 71 page 37

73 See paragraph 3.9 and footnote 67

dimensions. Markets are objective facts which exist.[74] A market is not a discrete concept where trading activities can be slotted in, but they overlap and there must be potential for competition even in the absence of actual competition at the time.[75]. Similarly, there are sub-markets or parts or sectors of larger markets.[76]

3.15 In the instant case of course, the Commerce Commission was required to identify whether on the facts markets existed. The Commerce Commission alleged various "markets" existed, including port services, tug services and pilotage services to which the court agreed. Next, the court considered a definition of dominance, but considered too, whether an economic or legal interpretation of dominance was required.[77] The court identified dominance in Section 36 was drawn from Article 86 of the Treaty of Rome and stated the European interpretation of dominance, has been an economic, as opposed to a dictionary meaning.[78] As authority for this proposition *Re Continental Can Co Inc.*[79] was cited. Particularly,[80]

> *undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers.*

Such a position may result from market share, or such share combined with technical knowledge, raw materials or capital. They have the power to control production or determine prices.[81] As can be seen, this is similar language to the now enacted Section 3(8) of the Act.[82]

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74 See footnote 71 page 37
75 See footnote 71 page 37
76 See footnote 71 page 37
77 See footnote 71 pages 39-40
78 See footnote 71 page 40
79 (1972) CMLR D11
80 See footnote 79 at paragraph 3
81 See footnote 80
82 See Appendix

3.16 The court, at this point continuing its review of the case law to date to trace the development of judicial interpretation of Section 36, noted Parliamentary debates referred to *Re Continental Can Co Inc*[83] at the time of the enactment of Section 36. Several earlier New Zealand decisions similarly drew upon that authority.[84] The Commerce Commission is noted as consistently favouring an economic interpretation of dominance under Section 36. The court noted however, a varying standard as to dominance, variously "acting without regard to competitors", or "having a commanding influence on", both being a high standard.[85] In *Re Magnum Corp Limited v Dominion Breweries Limited*,[86] the Commerce Commission says the court, noted dominance as possessing sufficient market power (economic strength) to enable the dominant party to behave to an appreciable extent in a discretionary manner without suffering detrimental effects.[87] Subsequently, the court says, the Commission then applied a new standard, based on dominance being a measure of market power, stressing largely independence of behaviour and an ability to effect changes in price and other terms without suffering adversely.[88]

3.17 The court also noted a retreat on the Commission's part from a point of economic interpretation of a high standard of dominance to a lesser requirement. In *Re Broadcast Communications Limited*[89] and *Re Carter Holt Harvey Limited*[90] appreciable or "discernible extent" became the Commerce Commissions measure. Of more significance, however, and as noted next by the court was the decision in *Telecom Corporation of New Zealand v Commerce Commission*[91]. In this decision three of four cellular

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83 See footnote 79
84 See footnote 71 page 41
85 See footnote 71 page 41
86 (1987) 1 NZBLC (Com) 99-504 see footnote 71 page 41
87 See footnote 71 page 41
88 See footnote 71 page 43
89 (1990) 2 NZBLC (Com) 99-526 see footnote 71 page 43
90 (1990) 2 NZBLC (Com) 99-527 see footnote 71 page 43
91 [1992] 3 NZLR 429

frequencies were tendered. Telecom was the highest bidder and became entitled to frequency AMPS-A subject to Commerce Commission clearance. Clearance was refused although Telecom's purchase of another frequency was approved. Telecom offered to give up that other frequency if it could retain AMPS-A, but also challenged the lack of clearance. The High Court upheld the Commerce Commission's decision but the Court of Appeal thereafter, did not. The issues were whether Telecom was in a dominant position without having AMPS-A and further would having AMPS-A strengthen Telecom's dominant position. The case turned on the definition of dominant position.

3.18 The Court of Appeal in the case[92] held dominance was not argued as being used in Section 36 in any particular technical sense, and should be given its ordinary meaning. Dominance was based on the degree of control a person had over the market involving his or her goods or services. Undertakings were in a dominant position when they have the power to behave independently, that is without taking into account their competitors' purchasers or suppliers. Dominance was not absolute but had to be strong enough to ensure an overall independence of behaviour. This involved a qualitative assessment of the degree of market power.[93]

3.19 The conclusion, the court noted in *The Commerce Commission v Port Nelson Limited*[94] was the demise of economic based standards of dominance. Particularly, in *Telecom Corporation of New Zealand Limited v The Commerce Commission*[95] the Court of Appeal drew on Australian precedent to indicate common economic usage was subordinate to ordinary sense.[96] This position has been strongly attacked by Ross Patterson and to a

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92 See footnote 71 page 44
93 See footnote 71 and summary of these points, pages 44-45
94 See footnote 71
95 See footnote 91
96 See footnote 71 page 45

lesser extent by Jim Farmer.[97] For precedent purposes, however, legal interpretation of dominance now prevails over economic interpretation.[98]

3.20 The court next considered further limbs of Section 3(8), particularly, the tests for the presence of dominance. The *Re Continental Can Co Inc*[99] origins are noted, however the court considered those origins alone were not determinative. Indeed, the court highlights significant factors from the *Re News Limited/INL*[100] decision, such as market structure, and the extent of acts of others to be important[101].

3.21 The court next considered "use" of such a dominant position, noting the presence of a dominant position in itself is not a difficulty but only becomes so if the dominant position is used. Drawing directly from precedent of the Privy Council in *Telecom Corporation of New Zealand Limited v Clear Communications Limited*,[102] the court noted that use of a dominant position does not result if the party acts the same as another who is not in a dominant position but otherwise in the same circumstances would have acted.

3.22 Purpose remains a vital constituent element. Subjective and objective interpretations of purpose have vacillated as being significant. In this regard *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Limited*[103] for example, favours an objective interpretation whilst *New Zealand Magic Millions Limited v Wrightsons Bloodstock Limited*[104] for example, indicates a subjective approach. The Court was faced with seeming inconsistency, but was reluctant to accept entirely a subjective

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97 See Respectively Patterson R.H. The Rise and Fall of a Dominant Position in New Zealands Competition Law, From Economic Concept to Latin Derivation (1993) 15 NZULR 265 and Farmer J.A. Deregulation and Competition: Is the Commerce Act Working? (1993) NZ Recent Law Review 14 : 18-20

98 See footnote 71 page 49

99 See footnote 79

100 (1987) 1 NZBLC (COM) 99-500. See footnote 71 page 41

101 See footnote 71 pages 49-50

102 See footnote 8 and footnote 71 pages 51 and 52

103 See footnote 38

104 [1990] 1 NZLR 731

approach should prevail. Rather than provide, dogmatically, for either approach to purpose, it is clear the courts believe objective purpose can be discerned from subjective acts. Examples given include inferences from acts of participants and subjectively revealing their purpose from memoranda and similar materials.[105] Australia appears to favour a subjective approach but again contrary precedent can be discerned.[106]

3.23 Section 36 is regarded as a technical section and is widely drafted. Nevertheless the section requires certainty of interpretation if it is to be effective to assist regulate access to Essential Facilities. This section has considered the constituent parts of Section 36. Further, this section has considered the political aspirations for Section 36. Finally, the case law interpretation has also been considered. This paper argues, on the latest judgments, the judicial interpretation is diverging from the political aspirations to create uncertainty and thereby compromises the ability of Section 36 to perform its envisaged role. This paper also argues the divergence of political aspirations for and judicial interpretation of Section 36 are likely to become more pronounced as precedent firms from Appellate Courts.

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105 See footnote 71 pages 25-29 and the cases noted

106 See footnote 71 pages 25-29 and the cases noted

4. The Access Issues

4.1 This paper asks whether Section 36 is adequate to guarantee access to Essential Facilities. To this point Essential Facilities have been defined.[107] Similarly, this paper has considered aspects of Section 36. To answer the question this paper poses however, now requires access issues be examined. This paper argues access issues have received far less consideration than either of Essential Facilities or Section 36. Yet access is a key concept. Access is sought to overcome the economic infeasibility of duplicating Essential Facilities. This section argues that the requirements to first, penalise denial of access and secondly facilitate access with appropriate pricing mechanisms include both certainty and uniformity of treatment. This section examines issues of denial of access and of pricing of access and concludes both certainty and uniformity in treatment of access issues are integral to "efficiency" in providing access to Essential Facilities.

4.2 To offend under Section 36, a person must use a dominant position in a market for the proscribed purposes, or at least one of them. If this does not occur or if the parties do not compete, then no offence is disclosed. As has been illustrated, however, an Essential Facilities owner will often compete directly with other parties or indirectly either up or downstream from the markets in which they themselves operate.[108] Accordingly the Essential Facilities owner may transgress Section 36 if dominance for a proscribed purpose is made out. Predominantly, difficulties will arise in two areas, first in denial of access to Essential Facilities and secondly in pricing of access to Essential Facilities.

4.3 Successive governments have relied on Section 36, to guarantee access to Essential Facilities.[109] A guarantee of access implies a positive action, yet as has been illustrated, Section 36 does not require any alleged offender to

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107 Remembering "Essential Facilities" and not the Essential Facilities doctrine has been the focus

108 See for example, Telecom and Clear compete directly, Airport Companies and Airlines compete indirectly

109 See footnote 11

take any positive steps, merely the section prohibits certain anti-competitive conduct. If Section 36 is prohibitive rather than facilitative, then how are denial of access and pricing of access issues resolved? It is the absence of facilitative mechanisms in Section 36 that persuade this paper to argue the access issues are clearly a key concept to address.

4.4 It is instructive first to consider some conceptual aspects of access. The Ministry of Commerce has made it clear they consider access to Essential Facilities should be guaranteed.[110] In December 1989 the Ministry confirmed its position in a further paper.[111] But consider however, the basis of guaranteeing access. It has been argued by Areeda that to accept a premise of guaranteed access to Essential Facilities is to argue a facility is essential and then be guaranteed access. That is, rather than consider a logical basis upon which access issues should be resolved by emphasising the character of the desired facility as essential, access could not be refused.[112]

4.5 Such a step would be open to criticism and, it is submitted, correctly. Such a step would be inconsistent with aims of efficiency. Further, on such a basis, arguments of sufficiency of access arise, which similarly impact on efficiency. To declare a facility essential thereby guaranteeing access, may open up access to any third party irrespective of the viability of the access seeker. Is this the intent of guaranteeing access? Should there be, instead, a threshold to achieve before allowing access to be pursued by any access seeker? Such a requirement may amount to a self regulatory mechanism if a certain level of financial clout or particular skill levels were required, or if specific technological skills or competence need to be displayed. Clearly a weeding out process occurs if informally anyway. For example Clear Communications Limited as a new entrant has demonstrated the financial

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110 Guarantee of Access to Essential Facilities, Discussion Paper, Ministry of Commerce Wellington, August 1989

111 See footnote 11

112 See footnote 22

ability to continue to seek access to Telecom's network facilities as well as technical competence. Arguably this need not always be so if access flowed merely from defining a facility as essential.

4.6 Further, it may be sufficient to satisfy access requirements to an Essential Facility even though access is not exercised by those able to do so. However, should theoretical access be available, but the Essential Facilities owner be secure in the knowledge access will never be exercised because access seekers lacks the ability to do so? It surely cannot be efficient to allow access, but not realistically enable that access to be exercised. Under the Act, competition must be workable competition.[113] This paper argues access, similarly, must be workable access, failing which to be required to provide access is unrealistic.

4.7 Tye describes the process as competitive access.[114] Competitive access illustrates access to an Essential Facility cannot be separated from pricing the access or setting the terms of access. Only by dealing with these issues will it be apparent whether the desire to provide access will be realistic or not. As is indicated, if terms of access are nevertheless imposed, the access seeker may still not be able to take advantage of that position if the terms are unworkable. Workable access cannot be achieved, whether because the return is inadequate or for other reasons, such as lack of acumen or ability to serve a market.[115]

4.8 Accordingly, access must be determined on its own terms, and not simply by deeming a facility as essential. On this basis however, the issue arises as to whether an Essential Facilities owner can ever be obliged to allow access to an Essential Facility. Tye has some particular views relevant to the New Zealand context where former state owned network facilities are and have

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113 The Act, section 3(1)
114 See footnote 21
115 See footnote 21 page 341

been undergoing deregulation and privatisation. His views can be considered against a review of denial of access matters.[116]

4.9 Denial of access to Essential Facilities may occur directly. Alternatively, denial of access may occur constructively. Such steps generally have strategic motivations whereby access is denied, for example, to delay or deter ultimate access or specifically to prevent access. In contrast to a direct refusal to provide access to an Essential Facility an owner may seek to disadvantage competitors. Access might be offered but only on uneconomic or impractical terms. Such steps would include requiring any access seeker to comply with higher technical standards than the Essential Facility owner. As a corollary, the access seeker could be required to constantly upgrade its technology so as to keep apace of the Essential Facilities owner's economies of scale.[117]

4.10 Further, an Essential Facilities owner could simply impose lengthy delays in access, require significant rentals or implement predatory strategies by maintaining low charges for access in competitive areas but recover elsewhere in areas in which a monopoly existed. Such strategies enable a maximising of profit even if this requires any intended users of the Essential Facility pass on the higher charges.[118]

4.11 The changing nature in structure and ownership of Essential Facilities in New Zealand and the first time exposure of Essential Facilities to competition has also impacted on access issues. Whilst more in the nature of a constructive denial of access, Tye says it is recognised that deregulation of previously strictly controlled industries does not immediately allow effective competition nor access to Essential Facilities.[119] Economies of scale and short term barriers to entry remain during an initial period. In

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116 See footnote 21 page 338
117 See footnote 11 pages 19-20
118 See footnote 11 pages 19-20
119 See footnote 21 page 338

response, Tye argues competitive access is achieved by enabling at least initially virtually all access seekers access to the Essential Facility. Further, as some parties in the competitive loop would be eliminated over a period of time, ultimate deregulation will still occur.[120]

4.12 Whilst this paper is sympathetic to Tye's competitive access proposals, immediate inconsistencies are apparent. In which circumstances and to which regulated or deregulated entities should access be allowed to Essential Facilities? Further, such steps are inconsistent with the intention to have Section 36 determine access issues in respect of Essential Facilities without legislative or regulatory barriers. As reliance upon competition is sought, this paper argues a piecemeal retention of regulatory access systems which Tye favours will create uncertainty and confusion. Further, Tye's rationale for competitive access systems by regulation in an initial stage is unhelpful. Tye's concern appears to be that limitations on competition at one place in a market undergoing deregulation must not impact on competition at other competitive levels.[121] Yet under Tye's proposals, uncertainty is likely as to whom would obtain protective access whilst undergoing deregulation and upon what terms, which may be inefficient or uneconomic. This paper argues either a regulatory regime is applied universally or the prevailing alternative is applied

4.13 This paper also argues that the foregoing arguments of allowing competitive access are inconsistent with matters of pricing of access to Essential Facilities. The structural and ownership changes in Essential Facilities are an issue. As Tye[122] says, through deregulation and privatisation the former objectives of Essential Facilities are now redundant. This is true. Essential Facilities are required to be commercially competitive. The former political or social activities of such entities such as supporting regional development

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120 See footnote 21 page 338

121 See footnote 21 page 341

122 See footnote 21 page 344

and subsidisation now play no part. Further, former involvement in policy making and other non competitive activities have ceased, but structural "flab" remains. Light handed legislation was envisaged to provide a framework in which participants could negotiate and determine all pricing of access issues. In the absence of alternative suppliers of Essential Facilities, results have not been spectacular, but too, a lack of skill expertise and experience and an unfamiliarity with the practicalities of Section 36 have not helped. It is difficult to see Tye's piecemeal regulatory approach facilitating satisfactory pricing mechanisms.[123]

4.14 A further complicating factor in pricing of access to Essential Facilities concerns again the variety of attributes of the owners of Essential Facilities. First, the owner may compete with an intended user on a direct basis in the same market. Telecom and Clear and their use of telecommunications networks are obvious examples. In such a case the Essential Facilities owner not only owns the facility but uses it as well. Secondly, the owner may provide the Facility only but not directly compete with the intended user. An airport company offering the network facility (airport) to airlines is an obvious example. Presently, in the former case, any party seeking to price access to an Essential Facility will have recourse to Section 36 as an option to control an uncooperative Essential Facilities owner. In the latter case, Section 36 recourse will not usually be available.[124] Does its make sense from an access standpoint that a mechanism for pricing of access might be determined by the identity of the parties and not by certain and uniform procedures?

4.15 This section of the paper has sought to raise access issues to a key concept level. Yet there are clear deficiencies with a lack certainty and uniformity of procedures for access. Under Section 36, as guarantor of access to Essential Facilities, an offender need not take any positive steps to facilitate

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123 That is, if Tye proceeds on a case by case basis, certainty and uniformity of treatment are unlikely.

124 See cases at footnote 8 and footnote 62 respectively

access. Section 36 does not address sufficiency of access.[125] Denial of Access can take on many forms[126]. Conceptually, pricing of access at present, falls to be determined depending on the characteristics of the owner of the Essential Facility. This has been illustrated by the Privy Council decision in *Telecom Corporation of New Zealand Limited* v *Clear Communications Limited.*[127]

4.16 Clear issued proceedings to obtain injunctive relief of a mandatory nature requiring Telecom to provide access to its telecommunications network in Wellington. Whilst Clear intended to construct a network in central business districts, Telecom's network was required for the larger local calling area. This was so that access was available in the local area for Clear subscribers. The price issue was crucial. What should Clear pay for access to Telecom's network? Arnold[128] argues, economically, three principles are relevant. First, access and usage should be charged separately. Access enables calls to be made by use of the network which is in place. Costs are incurred whether calls are made or not. Additional costs then arise as calls are actually made. These are usage costs. Secondly, price must recover incremental costs, not just marginal costs. Marginal cost recovery meets the costs of producing the next unit of production. In the telecommunications industry, if working to capacity the next increment of production will be particularly high as a new or further capacity must be created. Incremental costs ease recovery of such demand, the future costs. Thirdly, common costs are recovered. Essentially these include mark up, whereby a recovery is made over and above simply averaged out costs. Arnold says, these are sometimes called fair and reasonable costs, but such a description is not helpful.

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125 See paragraphs 4.5 and 4.6

126 See paragraphs 4.9 and 4.10

127 See footnote 8

128 Arnold T. The Courts, the Commerce Act and Pricing of Access to Essential Facilities, Law and Economics Association of New Zealand, Wellington 5 December 1994 pages 8-10

4.17 Telecom advanced what is now the Baumol/Willig rule, named after American economists who suggested it. Essentially Telecom could charge Clear a price equivalent to the difference between the price Telecom received from a CBD subscriber for providing the telecommunication link and the average incremental cost which Telecom saved by not having to provide a link since the subscriber was with Clear. In short, in a fully contestable market, someone selling to a competitor the facilities necessary to provide a service that the seller could otherwise provide would demand a price equal to the revenues they would have obtained if actually providing the service.[129]

4.18 Baumol and Willig called the rule the efficient component pricing rule. The Privy Council claimed the rule allowed the recovery of the opportunity cost of the owner as in a contestable market the owner would not give up access at a cost lower than the owner would otherwise have achieved for providing access itself. Accordingly the Privy Council said use of this pricing structure could not be use of a dominant position for anti-competitive purposes. Further, on the advice of a further economist[130] Telecom would not be acting anti-competitively if its actions required Clear to succeed solely on its own efficiency.[131]

4.19 The High Court was of the view that any monopoly profits in the rule would be competed away if Clear were able to be more efficient than Telecom.[132] Thus competition was enhanced. The Court of Appeal did not agree regarding Monopoly rents. It held passing such rents on, did breach Section 36 in being anti-competitive.[133] The Privy Council however held the Court of Appeal was not entitled to overturn the monopoly rents position. Further, the Privy Council said Clear had not demonstrated it

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129 See footnote 8 at pages 405 and 406

130 American economist Dr Kahn, see footnote 8 page 398 also described as Professor Kahn

131 See footnote 8 at page 407 - Dr Kahn's comparative parity, see page 396

132 See footnote 8 page 407

133 See footnote 8 page 407

could not compete if the rule applied. Additionally, the Act provided for price control elsewhere.[134]

4.20 The Privy Council's use of the Baumol/Willig rule has been attacked as simplistic, legalistic and plainly wrong.[135] But for pricing of access issues what does the decision mean and did Section 36 play any role in determining the pricing of access? It is argued Section 36 was relevant only to determine in the Court's eyes that there was no use of a dominant position for a proscribed purpose in the steps taken by Telecom. It is further argued however, that clearly determining the pricing of access was never a function Section 36 was designed to do. In short, provided Section 36 was not breached, the pricing of access could be determined on a basis to which the parties could ultimately agree. All the Privy Council was saying was there is recognition Clear and Telecom do not agree but nevertheless Section 36 has not been breached and Telecom's use of the Baumol/Willig rule in this instance was acceptable.[136] Accordingly, there is recognition that the Baumol/Willig rule may not be an appropriate measure for all occasions but the fact of its use meant that there is now a narrow role for Section 36 to play in determining both use and purpose.[137]

4.21 This paper treats access as a key concept. To promote competition and to overcome the economic infeasibility of duplicating Essential Facilities, access must be granted. This paper accepts however access can never be granted, or priced consistently in all cases. Nevertheless, access can be given certainty and uniformity procedurally. Section 36 does not provide a procedural regime and as a consequence "efficiency" is unlikely to follow. This theme is examined in the next section of this paper.

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134 See footnote 8 at page 408

135 See for example, Van Roy Y, The Privy Council Decision in *Telecom v Clear:* Narrowing the Application of section 36 of the Commerce Act 1986 (1995) NZLJ 54.

136 See footnote 8 at page 408

137 See footnote 135 at page 60

III MEASURING THE SUCCESS

5. The Adequacy of Section 36

5.1 To date, this paper has defined Essential Facilities in New Zealand. Secondly, issues regarding Section 36 have been identified. Thirdly, this paper has sought to raise the importance of access issues. It is now necessary to discuss the practical implications of the arguments and to draw the various sections together to answer the question posed by this paper. As a general statement, it is axiomatic that there will be competing views as to whether Section 36 is adequate to guarantee access to Essential Facilities. Some argue Section 36 is not sufficiently explicit to require or cajole access be made available to an Essential Facility. Further, the burden of proving a party acted with anti-competitive intent is very difficult. The converse argument is that Section 36 is expressed in broad terms so that general principles are available and more explicit regulatory procedures are not necessary.[138]

5.2 This paper argues however, that "access" is a key concept. Whilst, Essential Facilities and Section 36 each have their own peculiarities and must be individually analysed, to confirm the adequacy of Section 36 to guarantee access to Essential Facilities requires that "access" be adequately treated. As argued in Section 4 of this paper, access demands certainty and uniformity of action and response, but is this achieved by Section 36.

5.3 Essential Facilities were formerly state network facilities performing state functions for the collective good. Subsequently these have been structurally ineptly deregulated and privatised.[139] They now perform functions for individual owners who have, perhaps, quite unfairly retained the network facilities which were formerly state (collectively) owned. Should not this

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138 See footnote 11

139 Particularly in the early days of deregulation. See too, the Health Reforms of 1993, where entities were protected in their initial stages.

situation have been specifically addressed? Can Section 36 be effective in such circumstances? The section is charged with performing a facilitative role, yet the section is not a facilitative provision. Section 36 proscribes certain anti-competitive behaviour.[140] Can it be seriously argued access is facilitated both sufficiently and adequately in such circumstances, where a new entity has acquired ownership of arguably facilities which should never have been given away?

5.4 Against this background, this section argues there are a number of commonly accepted limitations as to the adequacy of Section 36 to guarantee access to Essential Facilities. These will be discussed, leading to the conclusion Section 36 is of limited adequacy for its intended role. Pre-eminently, for whose benefit does Section 36 exist? Section 36 does not exist to allow traders on an unrestricted basis to challenge other traders generally. Section 36 is only available where parties compete so that coverage under the section is limited. Yet unless coverage can be sustained, some disgruntled parties are seemingly without access to the Act's predominant remedy for access difficulties. Further, as has previously been noted, once coverage is available, any party acting in contravention of the section is not obliged to act in any way positively, but merely to desist acting anti-competitively.[141]

5.5 These points illustrate the difficulties inherent in relying upon Section 36 to guarantee access to Essential Facilities. The very nature of the task Section 36 is asked to perform but fails to perform can be summarised concisely. That is, the section is asked to perform a facilitative purpose but is not expressed in language appropriate to that purpose. Accordingly, it is argued Section 36 fails, simply because the task asked of it is inappropriate.

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140 See Section 36 in Appendix

141 See paragraph 3.7

5.6 Essential Facilities owners are in a privileged position. In addition to owning the Essential Facility, the knowledge inherent in ownership is also within the province of the Essential Facility owner. To compete efficiently, any party must have the same level of knowledge as the Essential Facility owner. Without an equal knowledge, an access seeker is disadvantaged. This disadvantage is manifested in an inability to determine the correct technology to adopt or to put in place correct pricing principles for the output of the Essential Facility. *Telecom Corporation of New Zealand Limited v Clear Communications Limited*[142] litigation clearly illustrates the imbalance of knowledge in pricing principles. Section 36 does not facilitate disclosure of requisite information. Not only is disclosure of information not facilitated, but neither does the section require any timely activities by an Essential Facilities owner. Note however, this is not to say Section 36 is deficient for not promoting a timely disclosure of relevant information, but simply that it is a task inappropriate to the provisions of Section 36.

5.7 A corollary to these characteristics of Section 36, is what is termed the "transactional" costs implications arising from the requirements of Section 36 to perform inappropriate tasks. As an illustration, as an Essential Facilities owner is subject to Section 36 only in a limited range of activities, a party alleging a breach of Section 36 is placed in the position of expending significant costs on the chance a breach of Section 36 will be made out. Such costs include representation in litigation, including the discovery process, engaging expert witnesses and counsel and engaging associated personnel and time costs. A consequence of the process is total uncertainty. Further, any favourable result does not resolve the process, but merely requires the competing parties to continue to negotiate a solution.[143]

5.8 The preceding paragraphs merely illustrate previously disclosed deficiencies of Section 36 in regulating the access process to Essential

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142 See footnote 8

143 See footnote 54 page 5

Facilities. It may be unfair to regard Section 36 as inadequate for its stated purposes if only because exception can be taken with the proscriptive rather than facilitative nature of this section. An appropriate response to determining the adequacy of Section 36 must also be sought from case law.

5.9 *Telecom Corporation of New Zealand Limited v Clear Communications Limited*[144] currently encapsulates the role of Section 36 as a mechanism in pricing of access issues. In summary, various commentators including Ross Patterson,[145] Charles Sweeney[146] and others[147] assert the decision has rendered Section 36 ineffectual for its stated purposes in access issues. It is accepted, seemingly, that Telecom was not under any general duty to assist Clear, but the criticism of the Privy Council decision rests on the very narrow interpretation the Court gave to "use" of a dominant position in terms of the section arising from a reluctance to "set" prices. By so doing, Telecom was able to escape sanction for its pricing methodology, notwithstanding other constituent parts of Section 36 were breached.

5.10 The interpretative thrust of case law in respect of Section 36, as outlined in section 3 of this paper has undermined the political aspirations for the section. Section 36 is overtly an economic tool, but successive decisions in recent years have slowly chipped away the economic interpretation of Section 36 to the point where it is clear the section is now interpreted more in terms of the ordinary meaning of the words of the section. Ironically, the Court in earlier Telecom proceedings[148] indicated markets, dominance and competition are all economic terms but nevertheless favoured an ordinary meaning approach. The Privy Council has continued this thrust. The Privy Council considered Telecom did intend to deter competition and was in a dominant position. Nevertheless, the Privy Council decided Telecom did

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144 See footnote 8

145 See footnote 97

146 See the National Business Review, November 4, 1994, Privy Council Creates Headache for New Zealand

147 See for example the Independent, July 7, 1995, Article on Telecom and Clear by N Mandow

148 See footnote 91 page 441

not use its dominant position. A dominant position would not be used unless the party acts in a way a person not in a dominant position would act.[149]

5.11 This part of the judgment appears to have been misinterpreted or misreported as more appropriately "use" of a dominant position is not evident if a party acts in a way an alternative party not in a dominant position would act. The Privy Council considered it dangerous to argue that the presence of an anti-competitive purpose translated to use of a dominant position.[150] On this basis, the Privy Council considered the Baumol/Willig rule was not use of a dominant position and was accepted as an appropriate model for what would be charged in a perfectly contestable market.

5.12 What are the consequences for the adequacy of Section 36 in assisting pricing of access issues if such a result occurs? Two aspects illustrate. First, the classic Australian decision on Section 46 of the Trade Practice Act 1974 is not consistent with the Privy Council's approach.[151] As the language between the sections is similar, commentary on the Australian decision may indicate just how incorrectly Telecom has been decided. Secondly, can the Privy Council's decision be in any way beneficial to arguing Section 36 does guarantee access to Essential Facilities? Are the requirements identified in this section of the paper, of certainty and uniformity promoted?

5.13 First, in *Queensland Wire Industries Pty Limited v The Broken Hill Pty Company Limited*,[152] BHP produced a fencing device described as a Y Bar. Y Bars were an integral part of a star picket post. BHP refused to supply Y Bars to Queensland Wire Industries, since that company wished to

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149 See footnote 8 page 403

150 See footnote 8 page 403

151 See *Queensland Wire Industries Pty Limited v The Broken Hill Pty Company Limited* (1989) 167 CLR 177

152 See footnote 151

compete with BHP in making star picket posts. Later, supplies were made but at inflated prices. The relevant Australian provision, Section 46 of the Trade Practices Act 1974, appears in the Appendix. The Court held BHP to be in a position to substantively control the market and had a substantial degree of market power.[153]

5.14 The Court determined the presence of BHP's market power enabled BHP to manipulate the supply of Y Bars. The Court considered the words of section 46 to "take advantage of" its position did not require hostile intent. Merely to do so was to "use" its position. Further, it was clearly only because of its position that BHP could act as it did, specifically, there was an absence of competitive conditions, whereas inferentially BHP could not have done so in truly competitive conditions. The test from *Queensland Wire Industries Pty Limited v The Broken Hill Pty Company Limited*[154] seems consistent with New Zealand intent prior to decision in *Telecom Corporation of New Zealand Limited v Clear Communications Limited*[155] Divergence however now seems apparent. The courts in Australia did not require evidence of intent and draw inferences from the facts.

5.15 Secondly, can *Telecom Corporation of New Zealand Limited v Clear Communications Limited*[156] be interpreted as an indication Section 36 guarantees access to Essential Facilities? In fact, this section argues the decision has little to do with access regimes. This paper argues the decision does no more than assert, in the Privy Council's view, Telecom's pricing methodology did not offend Section 36. The decision has not provided a blanket regime to determine the mechanism of access. This is the greatest difficulty flowing from the *Telecom Corporation of New Zealand Limited v Clear Communications Limited*[157]. The decision directs attention to an

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153 See footnote 151 pages 193 and 197
154 See footnote 151
155 See footnote 8
156 See footnote 8
157 See footnote 8

interpretation of Section 36, but by so doing obscures that the decision does not assist Section 36 put in place a certain and uniform access regime for Essential Facilities. Accordingly alternatives to Section 36 need to be pursued. This paper will now argue alternative or complementary regimes to Section 36 for access purposes, are clearly necessary on the basis that asking Section 36 to regulate access is asking that to perform a function for which it is not designed.

6. Alternative or Complementary Mechanisms of Determination?

6.1 To consider that there may be alternative mechanisms pursuant to which access to Essential Facilities may be determined could be construed as acknowledging Section 36 supposedly the guarantor of access is inadequate for its appointed purpose. Yet, as this paper argues, the characteristics of Section 36 appear to demand that there be alternatives. But perhaps this is too harsh an indictment on Section 36. Perhaps suggesting alternatives to Section 36 may be no more than recognising the limitations of the language of the section and, as illustrated in this paper, that Section 36 is not an access regime generally, but seeks not to prevent competitive entry to markets. On this basis, it may be more accurate to suggest alternatives to Section 36 are in fact complementary to Section 36.

6.2 Remembering however that it is an argument of this paper that the status of access needs to be treated more importantly, this section looks at other mechanisms than Section 36 to which resort is made when a party seeks access to Essential Facilities. The intention is to ascertain in terms of paragraph 6.1, whether first, such mechanisms are indeed alternatives to Section 36, in the sense that they perform the same function or secondly whether they either complement or perform functions other than those of Section 36. Additionally, do certainty and uniformity of treatment of access issues follow?

6.3 There are generally considered to be three alternative mechanisms to Section 36 as access regulators. They are, first the Essential Facilities Doctrine,[158] secondly Judicial Review and thirdly the Doctrine of Prime Necessities. Each of the three mechanisms themselves could be the subject of individual papers. This paper will not analyse the three mechanisms in such detail. Rather, this section will illustrate these alternatives (or complements) to Section 36 lead to a conclusion that there may be other

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158 Note, this section now deals with the Essential Facilities Doctrine as opposed to defining Essential Facilities which was the subject of section 2 of this paper.

ways to regulate access for certainty and uniformity and New Zealand should consider access issues in a sophisticated fashion to alleviate access difficulties.

6.4 Notably, given the access regulation difficulties which this paper has highlighted as a characteristic of Section 36, each of the three mechanisms this section considers are themselves flawed by uncertainty as to application and relevance. Accordingly, this paper's treatment of them as illustrative of the requirement to treat access issues with some sophistication should be considered against that background.

6.5 First, there is debate in New Zealand and in Australia as to whether the Essential Facilities Doctrine is recognised although case law has drawn on its influences.[159] Not surprisingly the origins of the Doctrine lie in United States of America case law, illustrated in Section 2 of this paper as also being the origins of the term "Essential Facilities".[160] The modern authority for the Essential Facilities Doctrine however is *MCI Communications Corporation v American Telephone and Telegraph.*[161] MCI was engaged in providing private line communications for business and governmental organisations. MCI sued American Telephone and Telegraph alleging restraint of trade and monopolisation offences.

6.6 MCI alleged American Telephone and Telegraphs facilities were essential to its operations, but MCI had been refused interconnection access on a reasonable basis. American Telephone and Telegraph campaigned against MCI's planned provision of other services. Further, it argued providing access to MCI was not in the public interest. The Court held the refusal of access to be unlawful.[162] A monopolist's control of an Essential Facility enables control from one production stage to another and between markets.

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159 See footnote 158. This paper distinguishes the Essential Facilities Doctrine and Essential Facilities.
160 See the cases at paragraphs 2.14 - 2.18 of this paper.
161 708 F 2d 1081 (1983)
162 See footnote 161 at page 1133

Accordingly, anti trust laws require firms controlling Essential Facilities to make the facilities available to others on a non-discrimination basis.[163]

6.7 The Court considered four elements were necessary to establish liability to make access available to an Essential Facility under the Essential Facilities doctrine.[164] First, there must be control of an Essential Facility by a monopolist. Secondly, a competitor must be unable to practically duplicate the facility. Thirdly, there must be a denial of use of the facility. Lastly, the feasibility of providing the doctrine must be considered. The Court considered American Telephone and Telegraph had no legitimate business reason for denying access to MCI to the interconnection facilities.[165] The Essential Facilities Doctrine is well entrenched in United States of America case law, but this is not the position in New Zealand or Australia.

6.8 There are some limitations of the Doctrine. Some consider the Doctrine is nothing more than a device to aid a determination of evidence disclosing inferentially, an anti-competitive intent.[166] On their own, the four elements identified in MCI will not be sufficient to impose a duty to make access available, further facts will be necessary.[167] Notably therefore, the Essential Facilities Doctrine on this basis does not act as or to provide an access regime. Resort to the Doctrine seeks to effect exactly the role Section 36 is doing, that is, identifying whether a party is acting anti-competitively. New Zealand case law illustrates the Essential Facilities Doctrine aids interpretation of Section 36, but does not determine or assist provision of an access regime to Essential Facilities.[168]

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163 See footnote 161 at page 1132
164 See footnote 161 at pages 1132 and 1133
165 See footnote 161 at page 1133
166 See footnote 15 page 1070
167 See footnote 161, page 1133, no legitimate business reason to deny access
168 See following paragraph

6.9 In *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Limited*[169] Barker J drew again upon *Hecht v Pro Football Inc*[170] in defining the parameters of the Essential Facilities Doctrine. Barker J noted in that case[171]

> *"Where facilities cannot practicably be duplicated by would be competitors those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility."*

New Zealand does not unanimously support the use of the Doctrine. In *Union Shipping NZ Limited v Port Nelson Limited,*[172] the Court acknowledged its reluctance to import the Doctrine into New Zealand given the untested nature of the Doctrine at Appellate level in the United States of America

6.10 The Australian position is similar. In the Federal Court in *Queensland Wire Industries Pty Limited v The Broken Hill Pty Company Limited,*[173] the Doctrine was considered to be inappropriate to assist interpretation of that country's Section 36 equivalent. The Australian section was said not to readily accommodate the Doctrine.[174] Pengelley[175] argues this view refuses to recognise the economic basis to the Doctrine. The Doctrine he says prevents denial of access or restriction on entry into a market.[176] Secondly, the Federal Court said the Essential Facilities Doctrine was also considered a gloss on the Sherman Act.[177] Pengelley is dismissive of this criticism.[178] Further, the Federal Court said it could not determine the ambit of the

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169 See footnote 38
170 See footnote 40
171 See footnote page 38 page 680
172 [1990] 2 NZLR 662 at page 704
173 The Federal Court decision, (1988) ATPR 40-841
174 See footnote 173 page 49,076
175 Pengelley W, the Essential Facilities Doctrine and the Federal Court (1988) 4 Australian and New Zealand TPA and MLB (no 4) 57
176 See footnote 175 page 59
177 See footnote 173 page 49,076
178 See footnote 175 page 60

Doctrine.[179] Again Pengelley says this is a doubtful reason not to recognise the Doctrine.[180]

6.11 More importantly for access purposes, the Federal Court in *Queensland Wire Industries Pty Limited v The Broken Hill Pty Company Limited*[181] considered it was not the best forum to be demanding a party give access to an Essential Facility. This is somewhat unsatisfactory. Whilst it is recognised the Essential Facilities Doctrine is conducive to facilitating access[182], this paper argues that in New Zealand the Doctrine would be no more effective in determining the terms of access than Section 36 will be. Doubts as to the application do not produce certainty or uniformity. Given the Privy Council's restriction of the application[183] of Section 36 it is argued the Essential Facilities Doctrine should be regarded as a complement to Section 36 rather than an alternative.

6.12 A second alternative to Section 36 guaranteeing access to Essential Facilities is said to arise in the area of Judicial Review of the actions of statutory bodies acting in accordance with their empowering statutes. It is immediately apparent, however, considerations of this nature do not involve considerations of the influences of Section 36 at all. This is notwithstanding access issues, both of denial and of pricing arise. Further, the Privy Council has considered whilst Judicial Review may be available, the prospects for successful challenges are very limited[184]. In *Mercury Energy Limited v Electricity Corporation of New Zealand Limited*[185], the parties entered into a preliminary agreement for the new commercial environment but could not read a final agreement. ECNZ gave notice to terminate the preliminary agreement. Mercury Energy sought various relief to keep the agreement on foot until final agreement was reached.

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179 See footnote 173 pages 49,076 and 49,077
180 See footnote 175 page 60
181 See footnote 173
182 In the sense that the criteria if met, assists the grant of access.
183 See footnote 8
184 See footnote 185 following, page 388
185 [1994] 2 NZLR 385

6.13 Whilst most causes of action were struck out, the Judicial Review relief was appealed to the Privy Council. The Privy Council held in principle, the actions of ECNZ were amenable to review as it constituted a Public Body. Nevertheless, such a review involved interfering with a body acting pursuant to statutory powers. Only plausible allegations such as acting other than in accordance with the law might bring relief. Unreasonableness in the sense of bad faith or ulterior motives might qualify[186]. Realistically therefore such a step is not a viable alternative to Section 36. In *Air New Zealand Limited v Wellington International Airport Company Limited*[187] various airlines banded together to challenge the Airport Company's landing fees structure. Their challenge failed. In terms of judicial review however the Court noted[188] the Airport did not have a free hand. It was bound by statute to act as a commercial undertaking. The Airport had certain obligations. It could not act haphazardly, but must act efficiently. The court was satisfied the legislative intent was as long as the Airport acted properly in accounting and managerial matters, costs recovery on more than one basis was permissible. Acting commercially did not connote only one method of operation. Again, therefore there is little to indicate judical review is a viable alternative to Section 36.

6.14 A third alternative to Section 36 is the Doctrine of Prime Necessities. At common law, monopoly suppliers of certain necessities, such as water are obliged to supply such necessities in exchange for receipt of a reasonable price and without unreasonable discrimination[189]. Importantly whilst arguably the Essential Facilities Doctrine perhaps complements and aids interpretation of Section 36, the Prime Necessities Doctrine is a separate common law mechanism, established by a long line of cases.

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186 See footnote 185 page 391

187 See footnote 62

188 See footnote 62 pages 18-45

189 Said to originate from Lord Hales "Treatise de Portibus Maris" Essay in the late Seventeenth Century see footnote 62 page 11

6.15 Consideration of several classic decisions will suffice. As has been discussed, Section 36 applies only where a dominant position is used for a proscribed purpose[190]. Arguably, as *Telecom Corporation of New Zealand Limited v Clear Communications Limited*[191] illustrates, a refusal to allow access to an Essential Facility, or allowing access only on unreasonable terms may not constitute a breach of Section 36. Accordingly, as an alternative to Section 36, the Doctrine of Prime Necessities needs to be viewed as filling a gap in remedial action for disgruntled parties where access is otherwise denied. Further, to invoke the Doctrine of Prime Necessities will necessarily require the Prime Necessity to also be an Essential Facility.

6.16 The elements of the Doctrine of Prime Necessity seem clearly established[192]. There must be the presence of a Public Utility or other body. That Utility or other body must have a practical monopoly and be supplying a service or commodity of Prime Necessity. Further, the supply must be made at a reasonable price and without discrimination.

6.17 In *Dominion of Canada v City of Levis*[193], the court was asked to compel the City of Levis to supply water to a Governmental building. Although supply had been offered, the parties could not agree on price and ultimately was cut off. Under the relevant statute, no exemption from payment was available to the government. Without statutory authority existing, the court considered the government obligated to pay a fair and reasonable price[194]. Further, water was a matter of prime necessity and it would be inconvenient to exclude government buildings only on a basis of their not being liable for taxation. Accordingly, the court implied an obligation that water be

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190 See paragraph 3.5 of this paper as an example

191 See footnote 8

192 Land J. The Prime Necessities Doctrine: Where Does It Fit? Sixth Workshop, Competition Law and Policy Institute of New Zealand, Wellington 4-6 August 1995

193 [1919] AC 505

194 See footnote 193 page 513

supplied in return for payment, outside of the express rights of any statute[195]. As to a "reasonable price", the court noted a consistent fee was requested over several years, but an increase sought with increased consumption. The court considered the fee "not unreasonable" but little more reason was discernible[196].

6.18 This decision has been applied in New Zealand. In *State Advances Superintendent v Auckland City Council*[197], the court held that where a water supply authority has a practical monopoly, there is a requirement to supply water to all who seek it provided a fair and reasonable price is paid. Similarly, in *Wairoa Electric Power Board v Wairoa Borough*[198], the Board was considered to have a monopoly of a commodity of Prime Necessity, electrical energy. As there was nothing in the statute from which the Board gained its authority to supply, to indicate otherwise, the Court implied that supply would be made on fair and reasonable terms[199].

6.19 A similar result followed in *South Taranaki Electric Power Board v Patea Borough*[200]. The Board sought declarations, following a disagreement with the Borough as to the price it charged for electrical supply, that its charges were reasonable. The Board also sought declarations it was not a monopoly and the *Levis*[201] decision did not apply. The court held since previously supply had been made there were no grounds to now interrupt the supply. Further the *Levis* decision[202] did apply and electricity even if not a commodity, was merchantable and a prime necessity[203]. Interestingly, the decision of whether the price requested was fair, was referred to the Registrar and an Accountant, or to some other referee[204].

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195 See footnote 193 page 513
196 See footnote 193 page 514
197 [1932] NZLR 1709
198 [1937] NZLR 211
199 See footnote 198 page 216
200 [1955] NZLR 954
201 See footnote 193
202 See footnote 193
203 See footnote 200 page 960
204 See footnote 200

6.20 Finally, in *New Zealand Rail Limited v Port Marlborough New Zealand Limited*[205], New Zealand Rail brought proceedings claiming a right to use Port Marlborough's facilities on payment of a reasonable fee. Port Marlborough sought discovery of financial records of New Zealand Rail who resisted[206]. The court looked to see whether a reasonable fee was payable and how would that fee be determined. The court held it was permissible for different formulae to be used and New Zealand Rail information was relevant to determine and appropriate formula. New Zealand Rail appealed and on appeal the court held assessment of a proper fee would be focused on the Port Terminal, including the assets employed and the costs of running in a notionally competitive market[207].

6.21 The profitability of New Zealand Rail was not considered a matter in issue, such that discovery of its financial information has restricted. Relevantly, however, the court's assessment of a reasonable fee arises issues of whether the courts are able to determine the efficient level of pricing[208].

6.22 Contrast the application of the Doctrine of Prime Necessities with Essential Facilities[209] as defined. Ownership of the facility appears to be irrelevant. Publicly and privately owned facilities are subject to the Doctrine. Whereas previously State Owned ownership of Essential Facilities would have meant little role for the Doctrine of Prime Necessities as access would have been freely available, arguably privately owned facilities in fact require greater policing which the Doctrine of Prime Necessities may assist.

6.23 Despite privatisation, Essential Facilities do characterise practical monopolies[210]. Duplication of network facilities will not be economically

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205 [1993] 2 NZLR 641
206 See footnote 205 page 643
207 See footnote 205 page 644
208 See footnote 205 page 644
209 In this sense, "Essential Facilities" not the "Doctrine" of Essential Facilities
210 In the sense that as network facilities, duplication is not economically feasible

feasible but, does the Doctrine fail at the final consideration in terms of the nature of the commodity or service? This paper has defined Essential Facilities as former state owned network facilities. These are such as telecommunications grids and electricity grids. Yet are these similarly considered Prime Necessities and vice versa? Water and electricity are clearly so[211]. Sewerage and rubbish services are not so clearly determined[212]. Interestingly, port services and telephone services have not specifically fallen for determination. United States of America case law suggests a lack of clarity as to ambit and this paper too has difficulty accepting Prime Necessities are necessarily Essential Facilities.

6.24 Importantly in terms of this paper, access provided on the basis of payment of a fair and reasonable fee again does not establish an access regime. The cases have not determined with certainty and uniformity in establishing the basis for a fair and reasonable fee. Yet, note the subtle difference in accessing Prime Necessities rather than Essential Facilities. Access is available to Prime Necessities under that Doctrine. The issue was to determine price. With Essential Facilities access may be denied without the parties ever discussing price. The concepts do not serve the same ends.

6.25 This section of the paper has looked to determine whether there are alternatives or complements to Section 36 in determining access to Essential Facilities. This section has argued that in fact three of the more commonly touted alternatives to Section 36 in fact serve as either aids to interpretation of Section 36 or as performing complementary roles not so much to Section 36 but to determining access as to terms and as to price. As indicated at the outset to this section to achieve both certainty and uniformity in the provision of access New Zealand needs to invoke other methods to regulate access to Essential Facilities.

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211 See footnote 192 pages 7 and 8

212 See footnote 192 pages 7 and 8

IV PROSPECTS FOR THE FUTURE

7. Is Regulation Preferable?

7.1 This paper asks, is Section 36 adequate to guarantee access to Essential Facilities? To provide an answer this paper has first, defined Essential Facilities so that an appreciation of facilities which are essential is obtained. Secondly, issues relating to the strength and weaknesses of Section 36 have been identified. Thirdly, access issues have been canvassed to identify specific requirements. Thereafter this paper has drawn these areas together and provided some indication of the adequacy of Section 36 to guarantee access. This paper is drawn to the conclusion that Section 36 is inadequate for its stated purpose. This paper has then considered whether some apparent alternatives or complements to Section 36 were satisfactory and addressed those situations which Section 36 did not. Again, this paper has concluded the requirements for access have not been met.

7.2 This section of the paper then, suggests there is yet a further alternative to Section 36 and that is, in some respects a retreat back to the safety of regulation and provision of a specific access regime from which the desired certainty and uniformity of treatment of access issues can result. This section of the paper, first looks at the report of the Hilmer Committee in Australia,[213]. which has suggested a specific legislative regime in that country would be appropriate to guarantee access to Essential Facilities. Secondly, this paper also looks at access proposals from the MUMS group in New Zealand which supports the concepts the Hilmer Report suggests even though not duplicating those concepts entirely. The MUMS group suggests similarly a specific access regime would be beneficial in New Zealand. The form of a specific access regime is not settled however and this section also looks at alternative dispute resolution. Irrespective of

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213 F.G. Hilmer, Independent Committee of Inquiry into a National Competition Policy (A J Law, Commonwealth Government Printer, Canberra 1993) called the "Hilmer Report"

settlement of the final form of an access regime, this section concludes regulation is preferable to the current position.

7.3 Beginning with the Hilmer Report, given the desire to harmonise New Zealand and Australia business laws, the report is instructive. An initial observation is the Hilmer Report reveals Australia has very similar concerns to New Zealand in its objectives to reform its economy, enhance its living standards and cement a national competition policy.[214] There is recognition free and open competition is "The engine which drive efficiency".[215] Accordingly, achieving efficiency and economic growth and social objectives requires vigorous competition but not excessive conduct. The Hilmer Report considers aspects of access to Essential Facilities against this background.[216]

7.4 The Hilmer Report concurs that the introduction of effective competition requires competitors have access to facilities which exhibit natural monopoly characteristics and hence cannot be duplicated economically.[217] Similarly, the Hilmer Report agrees there is little obvious agreement as to the terms of granting access and of pricing of access.[218] As in New Zealand, the potential to impose monopoly pricing or to covertly deny access is recognised. In the absence of structural reform of Essential Facilities, or at least meaningful structural reform, the Hilmer Report further recognises there is a challenge to provide a mechanism to encourage competition by protecting the interests of potential new entrants whilst ensuring the owner of the Essential Facilities is not unduly disadvantaged.[219]

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214 See footnote 213 page 2
215 Australian Prime Minister Paul Keating quoted in the Hilmer Report - page 1
216 See footnote 213 pages 1 and 2
217 See footnote 213 page 240
218 See footnote 213 page 253
219 See footnote 213 page 257

7.5 In summary, the Australian position mirrors New Zealand's difficulties. Submissions to the Hilmer committee indicated a lack of confidence the Section 36 equivalent in Australia[220] was adequate to provide access to Essential Facilities for exactly the reasons articulated in Section 5 of this paper.[221] Nevertheless, the Hilmer committee was conscious to look to limit the circumstances in which one entity would be required by law to make access to its facilities available to another. As is commonly expressed, a balance of public interest and protection of owners incentives for investment need be made. On this basis, the Hilmer committee expressed support for a legislated right of access.[222]

7.6 There is however recognition such an approach must also include provision to ensure efficient competitive activity occurs with a minimum of uncertainty and delay in access issues. The Hilmer committee was not convinced such a requirement demanded industry specific legislation as in its view whilst industry generally may have unique characteristics, access must involve common considerations. Additionally, the Hilmer committee considered lessons could easily be learned for industry wide benefit from a more generalist regime.[223]

7.7 With these objectives, the Hilmer committee looked at general rules in creating an access regime,[224] considering first, when should an access regime be created. The report considered this aspect to require a practical decision in the public interest, ultimately a discretionary legislative step. In this instance, the public interest would require access to enable effective competition in an upstream or downstream activity. Further, the significance of the industry and the impact of competition would need to be considered. Again, the interests of the facility owners would also require

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220 Section 46, Trade Practices Act (Australia) 1974
221 See footnote 213 page 247
222 See footnote 213 page 248
223 See footnote 213 page 248
224 See footnote 213 pages 250 to 260

safeguarding. Such steps too, it is suggested, should be subject to vetting before an independent body, but if approved then be enforceable.

7.8 The Hilmer Report next considered, once having established users rights of access, the pricing of access. In short, a fair and reasonable fee should be payable. The report recognises neither economic theory nor general notions of fairness determine an appropriate fee. Nevertheless, pricing issues require considerations of the extent of use of the capacity of the facility, proposed utilisation, recovery of capital costs and the impact of incentives to continue to upgrade and maintain facilities. If prices are too low, investment is not encouraged and conversely if too high, access is deterred. The report considered either a Minister or independent regulator of prices might be appropriate, generally favouring a Ministerial involvement. In the event of failure of agreement, arbitrations should be available.

7.9 Thirdly, protection of the interests of the facility owner included a need not to unduly impede the owners use of the facility. Does the owner have priority of access and is preference similarly given to objectively determined efficiency related users? Clearly standard provisions could not be envisaged. The report next recognised some additional safeguards might be necessary to protect competitors. Particularly, the report says such steps would be relevant in a newly competitive market. On this basis, such steps may be necessary only on an interim basis until competition has established itself. During the protective period however, costs, data, public access agreements and general competitive rules could be required. Ministerial protection is a further option.

7.10 The Hilmer Report also suggests remedies where access negotiations fail. Particularly, the report favours an arbitration process, commercially binding upon the parties. If ignored or abused, civil actions for injunctions or damages should be available. Pecuniary penalties are a further option. Finally, outside of the Hilmer Report access regime suggestions, individual

legislation similarly provides access requirements. The Hilmer Report sees such alternatives continuing in a complementary fashion unless a party considered that alternative to be unduly restrictive, discriminatory or detrimental. In such an instance access to the Hilmer Report regime would be available.

7.11 In recognition of the peculiarities of the Australian State and Federal political system, the Hilmer committee received submissions as to whether "State" owned Essential Facilities should be treated any differently than privately owned facilities.[225] Whilst some concession to characteristics of State ownership was made, in general the Hilmer committee considered its access regime would be applicable irrespective.

7.12 Can New Zealand take any cognisance of the suggestions emanating from the Hilmer Report? Clearly our political system is structurally different both as to Federal and State distinctions but also too, as to the degree of regulation of industry and commerce. The high degree of potential ministerial involvement in the Hilmer proposals is totally inconsistent with New Zealand's current support of high-handed regulation. For example whilst the Act provides for price control, as pointed out in the Privy Council, there have been sufficient indications the Government will not resort to implementation of such controls. Accordingly New Zealand may have some conceptual hesitation.

7.13 This paper argues however that some form of arbitration process is recognised as a pre-requisite for determining access issues.[226] The MUMS group in New Zealand consists of a diverse group of network facilities users.[227] The group has strong views contained in a report to the Ministry of Commerce that a specific access regime is preferable to Section 36 as a

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225 See footnote 213 page 250

226 See the Hilmer Report and the MUMS group proposals following

227 Includes a collection of major users of monopoly services such as Electrical, Airline, Courier and Stevedore groups

guarantor of access to Essential Facilities. The MUMS group have expressed some access regime requirements.[228] The primary objective of an access regime should be to create a competitive environment in an upstream or downstream market. To do so, the parties should initiate the process which should be timely, cost effective, should resolve the issues in a predictable fashion and be economically efficient.[229] In terms of the Hilmer Report, such a regime would be charged with ensuring access to Essential Facilities followed where competition was promoted on an economically efficient basis in the public interest. Would such a regime enable each parties' business interests be recognised? Would the Essential Facilities owners interests and incentives be safeguarded? If the aims of the Act are to promote competition in an efficient manner then a facilitative access process is essential and certainly preferable to Section 36 and its limitations.

7.14 Is Arbitration the answer? What constitutes a suitable arbitration process? The MUMS group[230] suggests an amendment to the Act, whereby an access arbitration process is implemented. The MUMS group suggests imposing a legal obligation upon an Essential Facilities owner to provide access unless for legitimate technical or commercial reasons, access should not follow.[231] The access regime would apply to persons in a dominant position in a market offering goods or services, access to which is essential to enable a new entrant to supply goods or services in a market other than the market for the Essential Facility owner. Additionally access would be on the basis of further promoting competition in a market other than the market for the Essential Facility service. As can be seen this would encourage competition in markets other than that of the Essential Facility owner and consequently says the MUMS group promote competition.

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228 The MUMS group proposals, page 10 (unpublished)
229 See footnote 228 pages 10-11
230 See footnote 228 page 11
231 See footnote 228 page 13

7.15 Access should be provided on international "best practice" standards including providing sufficient information for a considered access request to be made. The MUMS group says best practices are discernible by collating information from individual industries worldwide, as to competitive steps to be undertaken. Best practice, the MUMS group says, has been considered in the United States of America[232] and requires more than the minimum, the merely adequate or the merely appropriate. Additionally best practices would automatically continually upgrade in standard as research, practice and experience expand.[233]

7.16 Clearly, the practical steps to be undertaken to provide access include an initial request to the Essential Facilities owner.[234] The Essential Facilities owner would respond with terms and price and if accepted, a contract concluded. In the event of dispute, the access arbitration process would be invoked, subject to time constraints. During the arbitration process all relevant documents would be tabled and pre-hearings, inspections and identification of issues determined. The MUMS group envisages circumventing the difficulties of defining "Essential Facilities" by looking more to situations where entities are in dominant positions. The Act, they say, has provided ample precedent for interpretative purposes. Further, "dominance" extends into areas outside of merely Essential Facilities so as to enable the arbitration process to be of wider application.[235]

7.17 The MUMS group also suggests a "half-way house" during the arbitration process. They suggest that if the parties do not agree on terms of access when requested then during the arbitration process the access seeker would be entitled to access on the terms suggested by the Essential Facilities owner and the Essential Facilities owner would be obliged to supply on those terms. At the end of the arbitration process an adjustment of the

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232 See footnote 228 page 14 quoting Schafer's Case 872 F. Supp 689 (1995)
233 See footnote 228 page 14
234 See footnote 228 pages 15-16
235 See footnote 228 pages 15-16

parties positions would be made depending on whether, for example, price was too high or too low at the outset or if more or less favourable terms result. On this basis the Essential Facilities owner would not be able to delay either directly or indirectly access to the Essential Facility.[236]

7.18 The MUMS group suggests the dispute resolution process should be the traditional single arbitrator/umpire model although they are not adverse to such as a panel of experts. The key according to the MUMS group is that the process be initiated quickly and then tightly constrained. On this basis various time periods would be imposed for each step of the process but the MUMS group envisage the dispute resolution process beginning no later than 12 weeks from the date of the initial request with a requirement that a result be given within perhaps four weeks from the completion of the process. The MUMS group see their suggestions as both promoting competition by removing delays to the process but also promoting economic sufficiency because of the cross market influences and areas in which access is to be made available.[237]

7.19 This paper argues a specific access regime to Essential Facilities is preferable to the current position whereby Section 36 is asked to perform a function it is not equipped to do. Further, the Hilmer Report is a comprehensive study into providing certainty and uniformity for access. The MUMS group proposals similarly support the general theme of the Hilmer Report. Do the Hilmer Report and the MUMS group proposals provide the final answer however?.

7.20 Contrast the MUMS group proposal with, say, an Alternative Dispute Resolution process. Such processes are becoming increasingly popular as alternatives to perceived cost, time and procedural deficiencies of the traditional judicial system. In a speech to the Arbitrators Institute of New

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236 See footnote 228 pages 15-16

237 See footnote 228 page 16.

Zealand's annual conference, on 21 July 1995, the Minister of Commerce noted methods other than litigation are being demanded to settle disputes. Costs, privacy concerns and process control are cited as reasons for the desire for alternatives. The Minister considered Alternative Dispute Resolution presented an opportunity to resolve issues with a business approach rather than a legal approach. Some difficulties were noted in the area of Essential Facilities where regulating ongoing relationships or defending of principles might require a more formal resolution of a commercial dispute

7.21 Gunderson and Thomson[238] argue nevertheless most commercial disputes are resolved pursuant to some form of Alternative Dispute Resolution in any event, and litigation does not often proceed to full conclusion. In this regard Alternative Dispute Resolution is quite usual. Nevertheless the two main forms of Alternative Dispute Resolution are Arbitration and Mediation. Whilst arbitration is a form of Alternative Dispute Resolution, Gunderson and Thomson query whether mediation on an even less formal basis has a role to play. Arbitration as illustrated by the Hilmer Report and the MUMS group proposals is still a formal process both procedurally and on the basis of the decisions made by an arbitrator. Mediation on the other hand is certainly designed as a facilitative process whereby options and alternatives are considered to reach a consensual agreement. The mediator facilitates the result and does not express opinions or offer advice.[239]

7.22 Mediation is seen as a "win-win" situation, thus avoiding a breakdown of relationships. Further, creative solutions can be achieved unfettered by both precedent and formalised procedures. Nevertheless it must be queried whether it is realistic to have an expectation that hard nosed commercial competitors would submit to a mediation process. Gunderson and Thomson cite some successes,[240] but not apparently with any relevance to access to

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238 B Gunderson and T Thomson, Alternative Dispute Resolution in the Commerce Act 1986, paper delivered to the Utility Markets Summit 27/28 April 1995.

239 See footnote 238 page 4.

240 See footnote 238 pages 4-5.

Essential Facilities. The recent history of commercial access litigation reveals the parties will use the existing system to its fullest extent to protect their positions rather than look to facilitate access. Notwithstanding the aims of the Commerce Act 1986, to promote competition, an advantage achieved is not easily or willingly compromised.

7.23 It is with some reluctance that this section of the paper concludes a specific access regime is necessary. In some respects such a conclusion is a backward step. Yet, it is clear certainty and uniformity produce a fair result in an area which is very important in promoting competition and efficiency. The present regime is unsupportable.

8. Conclusions

8.1 In response to the question this paper asks, is Section 36 adequate to guarantee access to Essential Facilities, the overwhelming conclusion is in fact, Section 36 is woefully inadequate. This paper has endeavoured however, to attribute the inadequacy of Section 36 not to the section itself, but to unrealistic political aspirations. Section 36 is envisaged to be a facilitative economic tool, yet is expressed only in language which is proscriptive of certain anticompetitive behaviour.

8.2 Politically, Section 36 is indicative of light handed legislation where an absence of regulatory barriers is envisaged to promote competition. From competition, economic efficiency in the use of resources and consequently improved living standards were to flow. Deregulation and privatisation of Essential Facilities has been an integral part of this political process, on the premise private sector models would similarly improve efficiency.

8.3 This paper argues, however that light handed legislation, deregulation and privatisation have not provided a climate for Section 36 to adequately to guarantee access to Essential Facilities. This paper has defined Essential Facilities in New Zealand.[241] Merely by removing statutory protection from Essential Facilities does not make those facilities efficient. Whilst Telecom for example has been privatised, the network facilities simply "became" Telecom's. Internal cultural and structural reforms are necessary when any Essential Facilities are privatised, although without simply replacing one set of regulations with another.[242] A failure to do so, is to risk entrenchment of the state sector characteristics.[243]

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241 See section 2 of this paper

242 See Farmer JA at footnote 97 page 14

243 Particularly, if former policy making procedures and other administrative tasks, for example, are not separated out from commercial tasks.

8.4 As New Zealand grapples with the implication of privatised Essential Facilities, so too the effects of the constituent parts of Section 36 have been difficult for the business community and the judiciary to assimilate. The paper has illustrated the difficulties[244] with the consequence the political aspirations for Section 36 have been compromised. The compromise is graphically illustrated by raising access issues as a key concept. Access to certain Essential Facilities must be given if competition is to be promoted and economic efficiency to follow.[245] Yet, unless access can be provided to Essential Facilities on both certain and uniform terms, delays, disputes and inefficiencies will follow.

8.5 This paper supports the conceptual thrust of the Hilmer Report and the MUMS group proposals[246] that a legislated access regime to Essential Facilities is necessary to achieve commercial satisfaction. Such a regime would not be perfect. In particular some of the Hilmer Report's proposals appear unwieldy and too discretionary.[247]There are, too, dangers of piecemeal or ad hoc legislative changes although such dangers are an incident of providing certainty and uniformity. Nevertheless, the MUMS group proposals contain some distinct advantages. The process the MUMS group envisages is subject to control by the participants but nevertheless removes some emotion.[248] The process contains interim procedures to ensure momentum is continued. Finally, if arbitration is required a tight timetable toward resolution is envisaged.[249]

8.6 If access to Essential Facilities is to be guaranteed so that economic efficiency is enhanced, Section 36 must be replaced as the mechanism to achieve the guarantee. The section is clearly inappropriate. The Hilmer Report but more importantly, the MUMS group proposals provide a

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244 See section 3 of this paper

245 On the basis that it is inefficient and wasteful to require duplication of facilities

246 See footnotes 213 and 228 respectively

247 See for example Ministerial involvement, footnote 213 page 250

248 See footnote 228 pages 15 and 16, time frames and interim steps suggested, arbitration if necessary

249 See footnote 228 page 16

conceptual basis from which a specific access regime can result. Determination of access terms and pricing flow from a facilitative mechanism to provide workable competition and economic efficiency. Clearly light handed regulation is in demise.

V APPENDIX

Section 36(1)

No person who has a dominant position in a market shall use that position for the purpose of:

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

(b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or

(c) Eliminating any person from that or any other market.

Section 2(1)

"Person" includes a local authority, and any association of persons whether incorporated or not.

Section 3(1A)

Every reference in this Act, except the reference in section 36A(1)(b) and (c) of this Act, to the term "market" is a reference to a market in New Zealand for goods or services as well as other goods or serves that, as a matter of fact and commercial common sense, are substitutable for them.

Section 3(8)

For the purposes of sections 36 and 36A of this Act, a dominant position in a market is one in which a person as a supplier or an acquirer of goods or services either alone or together with any interconnected body corporate is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in a market regard shall be had to:

(a) The share of the market, the technical knowledge, the access to materials or capital of that person or that person together with any interconnected body corporate;

(b) The extent to which that person is constrained by the conduct of competitors or potential competitors in that market;

(c) The extent to which that person is constrained by the conduct of suppliers or acquirers of goods or services in that market.

Section 2(5)(b)

For the purposes of this Act;

A person shall be deemed to have engaged, or to engage, in conduct for a particular purpose or a particular reason if:

(i) That person engaged or engages in that conduct for that purpose or reason or for purposes or reasons that included or include that purpose or reason; and

(ii) That purpose or reason was or is a substantial purpose or reason.

Section 2 Sherman Act

Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons to monopolise any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanour.

Section 46(1) Trade Practices Act 1974

A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

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

Article 86 Treaty of Rome

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States:

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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