Exclusionary Bundling, Predatory Pricing and Section 36: *Carter Holt Harvey Products Group Ltd v Commerce Commission*

By Geoffrey Bertram*

Predatory pricing seems a simple idea; a powerful firm, wishing to exclude an equally or more efficient rival or would-be rival from its market, lowers the price of its product to a level at which the rival cannot survive, inducing exit and leaving the predator in command. The predator's market share is thus increased, or successfully defended, by a strategy which reduces the number of economically viable competitors and thereby reduces the extent of competition in the market.

While sightings are continually reported, in the past two decades successful court proceedings have been rare in the United States, Australia and New Zealand,[1] and the issue arises whether predatory pricing, in the sense of any sort of behaviour that could fall foul of section 36 of the Commerce Act 1986, exists. The Privy Council's rejection of the Commerce Commission's case in *Carter Holt Harvey Building Products Group Ltd v Commerce Commission*[2] echoes a pattern of legal decisions from *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp*[3] and *Brooke Group Ltd v Brown & Williamson Tobacco Corp*[4] in the United States to the Australian High Court's decision in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*.[5]

Chicago-School writers have criticised the traditional model of price predation for impugning conduct which is inherently competitive, not anti-competitive. Any vigorously competitive firm, so the argument goes, may cut its prices to gain market share from its rivals. Firms engaged in price-cutting should be presumed to be competitors, not predators, unless extremely stringent evidential tests are satisfied.

One necessary test used to be Areeda-Turner[6] – that the price set by the predator must be below some meaningful measure of that firm's supply cost, since (provided both firms' activities are confined to a single market and single product) an above-cost price can always be matched by an equally or more efficient competitor.[7] This was for some time regarded as a necessary bright-line

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[1] EU cases decided under the Treaty of Rome continue to sanction predation.

[2] [2006] 1 NZLR 145; (2004) TCLR 200.

[3] 475 US 574 (1986).

[4] 509 US 209 (1993).

[5] (2003) 195 ALR 609.

[6] Donald F Turner and Philip Areeda, 'Predatory Pricing and Related Practices Under Section 2 of the Sherman Act' (1975) 88 Harv L Rev 697.

[7] As is discussed later, above-cost predatory pricing is now recognised as a possibility; see e.g. Aaron Edlin 'Stopping Above-Cost Predatory Pricing' (2002) 111 Yale L J 941.

test for predation, though it can clearly not be sufficient. By driving price below cost the predator would be gambling that it can survive the resulting bloodletting longer than can its rivals; this must imply that the predating firm has access to financial resources sufficient to outlast the prey, and that short-run losses incurred during the price war can somehow be recovered, for otherwise 'victory' is pyrrhic.

This last observation led to Judge Easterbrook's bright-line test of recoupment in *AA Poultry Farms Inc v Rose Acre Farms Inc*.[8] Without the clear prospect of recovering losses by later raising the price of the predator's product, Easterbrook said, predation itself cannot be a rational strategy. This line of argument was central to both the Australian High Court in *Boral* and the Privy Council in *Carter Holt Harvey*. However, it is obviously incomplete; where predation in one market confers spillover benefits in another, recoupment in the target market will not be necessary to render predation a rational strategy. Such leveraging of market power from one market to another is clearly contemplated by the words 'that or any other market' in section 36 of the Commerce Act 1986.

Widespread, often uncritical, acceptance of Chicago produced in the 1990s a culture of judicial scepticism regarding the theory of price predation.[9] The essential Chicago-School argument that 'because of its costs to the would-be predator, predation is irrational and hence not likely to occur',[10] as originally formulated by Bork[11] and Easterbrook,[12] amounted in fact to little more than the trite (and circular) observation that if predatory pricing is irrational it will not be undertaken by profit-maximising firms. Therefore, they argued, courts should never expect to encounter predatory conduct; but this, with respect, is a *non sequitur*. If the facts of a given situation carry unmistakably the scent of anti-competitive conduct, the concern of a court ought to be to enquire which assumptions of the Easterbook-Bork story do not apply – not to assume the applicability of Easterbrook-Bork and reject allegations of predation accordingly. Fisher's dictum cuts both ways: 'Whenever predatory actions are alleged, it pays to analyze how the type of predation alleged could have been successful.'[13]

Such analysis in *Carter Holt Harvey v Commerce Commission* should quickly have drawn attention to two aspects of the Chicago model that did not apply; the restriction of analysis to a single product in a single market, and the idea that later recoupment in the form of a price increase by the predator is necessary to establish predation.

In this article I shall argue that the quest for bright-line tests based upon over-simplified economic theories has led the Australian High Court and the Privy Council up a blind alley. The central error lies in the assumption that both predator and prey operate in one and only one market, for a single product. In the real world, the most striking examples of predatory behaviour involve multi-product firms predating on single-product rivals. The strategic position of the predator typically spans more than one market, and its ability to prevail in the predated market rests not upon

[8] 881 F 2d 1396 (7th Cir 1989).

[9] The sceptics' arguments are reviewed approvingly by Paul Scott, 'Is a Dominant Firm's Below Cost Pricing Always a Breach of Section 36 of the Commerce Act?' (2004) 21 NZULR 106.

[10] A K Klevorick, 'The Current State of the Law and Economics of Predatory Pricing' (1993) 83 AER 162, 162; see also J A Ordover and G Saloner, 'Predation, Monopolization and Antitrust' in Richard Schmalensee and Robert D Willig (eds), *The Handbook of Industrial Organization* (North Holland: Amsterdam, 1989) 537.

[11] Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).

[12] Frank Easterbrook, 'Predatory Strategies and Counterstrategies' (1981) 48 U Chi L Rev 263.

[13] Franklin M Fisher, 'On Predation and Victimless Crime' (1987) 32 Antitrust Bulletin 85, 92.

superior productive efficiency relative to the prey, but rather upon the ability to leverage market power from one market to another through practices such as bundled discounting. Both Boral Besser Masonry and Carter Holt Harvey were multi-product firms confronting single-product rivals, and the conduct described in the facts of these cases does not match the single-product Chicago story.

Ironically, at the very same time that the Privy Council majority was delivering its decision in *Carter Holt Harvey v Commerce Commission*, the United States Supreme Court was denying *certiorari* in *3M v LePage's*, a decision which directly addressed the issues raised by multi-product predators, and which suggests that *Carter Holt Harvey* was wrongly decided.

I. *Carter Holt Harvey v Commerce Commission*: The Facts

A Carter Holt Harvey subsidiary, INZCO, manufactured and sold throughout New Zealand a range of home insulation products including Thick Pink Batts.[14] The firm was dominant in the market for this type of insulation. INZCO found its product line confronted, in the Nelson region, by a locally-produced substitute for Pink Batts named Wool Bloc, which was differentiated by the fact that it was made of wool and so was able to advertise on the basis of being more environmentally friendly than synthetics such as fibreglass batts.

Not only was the Wool Bloc product distinguished by branding characteristics that gave it a marketing edge in the eyes of many buyers; it also turned out that the local manufacturer, New Wool Products (NWP), could produce the insulation more cheaply than INZCO was able to produce and deliver a competing wool-polyester mix, even after extensive R&D efforts.

The distribution structure in the insulation market was significantly imperfect, relative to a competitive benchmark. Building-supply merchants in the Nelson area had an arrangement with INZCO to carry that company's range of building products with some degree of exclusivity, whereas Wool Bloc was sold directly to users and was not stocked on the shelves of building supply merchants.

Consider the position of a building-products merchant in a competitive environment. A highly competitive new product has entered the market, and is rapidly winning customer acceptance and eroding the market share of the products you currently stock. It might be supposed that the logical reaction would be to ask NWP for supplies of Wool Bloc in order to offer retail customers a full range of cost-competitive products to meet their insulation needs. Even if NWP were unwilling to sell to merchants at wholesale,[15] a sharp-eyed merchant in a fully-competitive market would surely look at joining the queue of retail buyers of Wool Bloc in order to put the product on its shelves, at a price including a margin to cover the selling costs, to attract custom from buyers interested in one-stop-shopping for a bundle of items and uninterested in seeking out the small local manufacturer to obtain Wool Bloc directly. A nationwide chain of hardware stores, receiving news of the

[14] This account is based largely upon the High Court judgment, [2000] 9 TCLR 535, Williams J.

[15] It is unclear how hard the merchants tried to secure supply from NWP. The High Court at [2000] 9 TCLR 535, para 83, describes negotiations between the merchants and NWP in intriguingly cloudy terms, which the Privy Council at [2006] 1 NZLR 145, para 20 translates into an unequivocal 'NWP had been free to sell its product through merchants if it wanted, but it had made a commercial decision not to do so' – a statement which, with due respect, entirely begs the questions of whether a commercial decision in the other direction would have been (a) possible, and (b) to the long-run benefit of consumers.

new product, might have seen a competitive opportunity and offered NWP a nationwide distribution arrangement in competition with Pink Batts.

Such was not, however, the actual course of events.[16] Instead of stocking the new low-cost Wool Bloc product, the Nelson merchants appealed to INZCO to supply a wool-based product that would 'enable them to compete with Wool Bloc'. Finding that INZCO could not supply such a product at a competitive price, the merchants again did not turn to NWP for supply. Instead they continued to lobby INZCO to bring down the price of its Wool Line product.

The story here is a variant on the so-called 'Chicago Three-Party Argument' discussed in a recent review by Farrell[17] and in detail by Bernheim and Whinston.[18] The game begins with an incumbent supplier, INZCO, and an incumbent coalition of buyers, the merchants, already mutually committed to an exclusive marketing arrangement. A new product, Wool Bloc, with costs lower than those of the incumbent supplier of Pink Batts for which Wool Bloc is a close substitute, presents the merchants with a choice between changing supplier or using the threat of NWP's entry to extract rents from their existing upstream partner, INZCO. INZCO then acts in conjunction with the merchants to try to force NWP out by marketing the new fighting brand of wool-polyester insulation, Wool Line, at a price 17-28 per cent below INZCO's supply cost and below the full-cost price of Wool Bloc to final users. The fall in price resulting from this action expands market demand, thereby raising the total surplus available to INZCO and the distributors, but enabling the distributors to capture more than 100 per cent of the increase, leaving INZCO worse off in relation to its Wool Line revenues, but secure in the affections of its distributors.

The Commerce Commission ran an Areeda-Turner ruler over the cost and price information, and proceeded against INZCO for predatory pricing. (At roughly the same time in Australia, in another building-products case, and on the basis of similar price/cost data, the ACCC proceeded against Boral for selling its concrete blocks below cost.) Having succeeded in the High Court[19] and the Court of Appeal[20] the Commerce Commission's case was rejected by the Privy Council[21] on the basis that INZCO was doing no more than compete vigorously, benefiting consumers in the process, and so had not breached section 36. The ACCC met the same fate in the Australian High Court.[22]

The majority in the Judicial Committee of the Privy Council found that INZCO was dominant and had undoubtedly had the purpose of driving Wool Bloc out of the market, but that it had not 'used' its position of market dominance to do so.[23] The majority argued that that 'the effect of preventing a monopolist from competing with its competitors like everyone else would be to protect inefficient competitors.'[24] Their Lordships did not provide any satisfactory explanation of how a

[16] Notwithstanding the assertion, repeated by the Privy Council at [2006] 1 NZLR 145, para 13, that INZCO's distribution agreements 'were continually under threat of defection'.

[17] J Farrell, 'Deconstructing Chicago on Exclusive Dealing' (2005) 50 *Antitrust Bulletin* 465, 473-478.

[18] D Bernheim and M Whinston, *Anti-competitive Exclusion and Foreclosure Through Vertical Agreements* (unpublished lecture, Centre for Operational Research and Economics, Université Catholique de Louvain, Belgium, 2000).

[19] *Commerce Commission v Carter Holt Harvey Building Products Group Ltd* [2000] 9 TCLR 535.

[20] *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2001] 10 TCLR 247.

[21] *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145.

[22] *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] 195 ALR 609.

[23] The new s 36 wording of 'substantial degree of market power' and 'take advantage of' makes no perceptible difference to the logic (such as it is) of the judgment.

[24] *Carter Holt Harvey v Commerce Commission*, above n 21, para 40.

'monopolist' could have 'competitors' to 'compete with like everyone else',[25] nor did they address directly the possibility that allowing monopolists to compete like 'everyone else' might destroy efficient competitors to the detriment of consumers, because monopolists are not like everyone else. They concluded, however, that 'the margin between legitimate competition and anti-competitive conduct is not crossed by the lowering of prices. It is crossed when the dominant firm uses its ability to *raise* prices without losing its market share.'[26] The Judicial Committee majority thereby adopted the recoupment rule for identifying 'use of a dominant position' in the context of alleged predatory pricing, as the Australian High Court had done in *Boral*.[27]

Having adopted this rule, the majority found against the Commerce Commission on the basis of the so-called 'counterfactual test' from *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd,*[28] and New Zealand's only predatory-pricing action to date had failed.

II. The Counterfactual Test

The Privy Council majority noted with apparent surprise that '[i]t is evident that the courts below showed a marked lack of enthusiasm for what has come to be known as the counterfactual test.'[29] A brief review of the application of that test by their Lordships in *Carter Holt Harvey* readily accounts for that lack of enthusiasm.

Start with the crucial section in which the majority's decision was explained:

> There must … be a causal connection between the dominant position and the conduct which is alleged to have breached s 36. That will not be so unless the conduct has given the dominant firm some advantage that it would not have had in the absence of its dominance. It is the ability to recoup losses because its price cutting has removed competition and allows it to charge supracompetitive prices that harms consumers. Treating recoupment as a fundamental element in determining a claim of predatory pricing provides a simple means of applying the section without affecting the object of protecting consumer interests …
>
> Their Lordships are not persuaded that the facts which were found proved in this case show that INZCO's conduct, in the face of strong competition from NWP and in response to the demands of its distributors, was any different from that which a non-dominant firm of equivalent financial strength would have resorted to in the same circumstances … [T]here was no evidence that the 'two-for-one' pricing of Wool Line was resorted to by INZCO with a view to charging supracompetitive prices at a later date on that or any other of its products … The price level had been set by NWP, and no one could sell a product comparable to Wool Bloc at a higher price and be competitive. Without the offer of a comparable product to that of its distributors INZCO was at risk of losing its market share …
>
> [F]rom start to finish it was the need to compete in the South Island regional market that was the driving force. This was not conduct in which INZCO was using, and thus abusing, its position of dominance.[30]

Notice in particular two things the Privy Council says here.

[25] This is not a new problem. Following *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC), there was much talk in New Zealand of monopolists behaving 'as otherwise-similar firms would do in a competitive market', a formulation which remained unintelligible to many observers including the present author.

[26] *Carter Holt Harvey v Commerce Commission*, above n 21, para 53.

[27] *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*, above n 22. *Boral* is cited as authority in the Privy Council judgment at [2006] 1 NZLR 145, para 60(c).

[28] Above, n 25.

[29] *Carter Holt Harvey v Commerce Commission*, above n 21 para 50.

[30] Ibid, paras 67-69.

Firstly, recoupment, in the form of a causal connection between the price war and the charging of ‘supra-competitive prices at a later date on that or any other products,’ is essential to prove a claim of predatory pricing and the necessary evidence was lacking in the *Carter Holt Harvey* case. In writing this at paragraph 68, their Lordships seem, with respect, to have overlooked their previous apparent acceptance[31] of Ralph Lattimore’s (and the Court of Appeal’s) view that the price of Pink Batts had always included high margins amounting to ‘super-profits,’ which meant that the pricing being defended by the INZCO attack on NWP was already ‘supra-competitive’ and would continue to be so. The most generous interpretation of the Judicial Committee’s argument would seem to be that, knowing that supra-competitive prices are not *per se* a breach of the Commerce Act 1986, and accepting that INZCO had started out with enough market power to charge such supra-competitive prices, the Board decided that protecting those not-illegal monopolistic margins by destroying new entrants threatening to compete them down constituted some sort of legitimate business justification for deploying the resources of a financially-strong firm in an attempt to crush a new rival. How the clearly-intended maintenance of the existing supra-competitive pricing of INZCO’s Pink Batts, post-predation, was to be distinguished from recoupment was not explained by their Lordships – let alone how consumers were in some way supposed to come out ahead.

Secondly, the actions taken by INZCO were in some sense an example of normal and legitimate business practice and in accordance in some way with economic notions of rationality and competitive behaviour. This is admittedly a loose translation of the passages above but, as will be seen shortly, it seems to be what the Board meant to say.

There is a pregnant passage in the Privy Council judgment, where the counterfactual test is directly and explicitly applied:

> It is by no means self-evident that INZCO would have behaved any differently if it had not been in a dominant position in the market when it was deciding what it should do to meet the competition which it was facing in that market from Wool Bloc. It would have been presented with the same complaint that the price which was originally set for Wool Line was uncompetitive. *The obvious response, in a truly competitive market, was to cut the price of Wool Line to a level that was competitive*.[32]

As economic reasoning this is not cogent. Imagine a truly competitive environment, assume (as the Privy Council evidently did) single-product firms, and consider INZCO with its Wool Line, trying to break into the submarket[33] for wool-based insulation products to attack the already-established Wool Bloc product. If INZCO is unable to match the price of the incumbent NWP without pricing below cost, then INZCO:

(i) is productively inefficient and should not have entered to start with, since society’s resources are being wasted; and

(ii) should exit quickly once the red ink starts to flow – and if it does not do so of its own volition, should rapidly be driven into insolvency, to the applause of anyone with a genuine commitment to economic efficiency in production.

There is, with respect, nothing ‘self-evident’ or ‘obvious’ about their Lordships’ suggestion that the correct way for a powerful but inefficient supplier to respond to a more efficient rival is to cut price below cost and hang in. The outcome of such a strategy, if successful, would be to destroy

[31] Ibid, para 48.

[32] Ibid, para 29, emphasis added.

[33] While INZCO was dominant in the market for building insulation products, it was NWP which introduced the new wool-based insulation product, presenting INZCO with the task of entering the newly-created submarket.

the efficient supplier which is able to supply profitably at the low price, leaving an inefficient new entrant which cannot sustain its entry price without cross-subsidy from somewhere else. In the standard economics textbook account, a well-functioning truly competitive market weeds out the productively inefficient in order to leave the efficient. The acid test is supply price, based on actual supply cost. INZCO's Wool Line failed that test. The inferior product achieved entry to the market only by a pricing strategy that could never have crossed the minds of the management of a neoclassical rational single-product firm under truly competitive conditions.

It is therefore doubly ironic that a couple of pages further on the Judicial Committee majority talks of 'preventing a monopolist from competing with its competitors like everyone else'[34] as though this is in some way a fair and reasonable characterisation of INZCO's behaviour, and says that the 'effect' of protecting firms such as NWP from predation by a productively-inefficient but financially strong monopolist would be 'to protect inefficient competitors.'

What can possibly have been in their Lordships' minds? I think we find the answer by reading carefully their (hostile) analysis of Professor Lattimore's opinions, and especially the passage: 'If it was rational for INZCO to [price below cost on Wool Line] in the face of competition from Wool Bloc, it would have been rational too for *anyone else* who was facing the same competition *and was seeking to meet the demands of its distributors*.'[35]

Professor Lattimore may have exposed himself to this by 'accept[ing] that it was rational for INZCO to continue with Wool Line because it gave it the range of products that distributors required and helped to keep out other products';[36] but (with respect) this is no excuse for the passages emphasised above. 'Anyone else' must presumably include non-dominant firms in competitive markets (after all, the behaviour is being defended as in some sense a generally acceptable and justifiable rule of good business practice); but such firms could never get away with INZCO's behaviour, because they do not have the market power to do so, and it is not rational to take short-run losses for no long-run gain. The Privy Council is here defending INZCO for acting in precisely the way that the Chicago theorists point to as irrational and therefore never likely to be observed in the real world – especially not in uncontested fact evidence before the New Zealand High Court.

There is still something highly significant in the second emphasised section above, relating to 'the demands of its distributors' and thereby to a wider canvas on which INZCO was acting as a multi-product, not a single-product, firm. In that setting, it could certainly be rational for INZCO to protect its position as preferred supplier to its distributors, and rational for the distributors to seek to maintain their exclusive arrangement or understanding with INZCO, even if they might have been able to get one of their bundle of retail products more cheaply from NWP. Once the argument moves from single-product predator and single-product prey, into the totally different arena of multi-product predator versus single-product prey, we enter a world beyond the self-imposed analytical boundaries of the Australian High Court majority in *Boral* and the Privy Council majority in *Carter Holt Harvey*.

Why, to provide the curtain-raiser for the next two sections, did the Nelson building-supply merchants not do what the Staples superstore in the United States did with LePage's sticky tape, namely sell it at store-brand prices alongside the premium-branded 3M product, and let customers

[34] *Carter Holt Harvey v Commerce Commission*, above n 21, para 40.

[35] Ibid, para 44, emphasis added.

[36] Ibid, para 44.

choose for themselves? Probably, one surmises, for precisely the same reason that generic sticky tape came into the United States market only once superstores had appeared with enough countervailing power to resist demands from the 3Ms and INZCOs of the world for exclusive rights to shelf space, and to stock the products of smaller competitors.

III. The Ground Shifts: *LePage's v 3M*

In both *Boral* and *Carter Holt Harvey*, the superior courts made reference to precedents set in the *Matsushita*[37] and *Brooke Group*[38] decisions of the United States Supreme Court, which laid down bright-line tests for predatory pricing, including recoupment after the event as well as below-cost pricing. A strong New Zealand precedent was set also by the Privy Council in *Telecom v Clear* where the conduct of the alleged monopoliser was to be judged against a competitive counterfactual – a test which led the Council to essentially the same bright-line criteria.

Notoriously, thus, in the decade up to 2003, predatory pricing was difficult to establish in the eyes of New Zealand, Australian, and American courts. Since 2000, however, there has emerged a strong current of thinking which is critical of the approach of the United States Supreme Court in *Brooke Group*. This view was articulated forcefully by Brodley, Bolton and Riordan[39] and Edlin,[40] and became manifest in the landmark decision of the United States Supreme Court in June 2004[41] to refuse to reconsider the March 2003 decision of the United States Court of Appeals (Third Circuit) in the case of *LePage's v 3M*.[42]

The exclusionary practice of which Minnesota Mining (3M) was accused was its offer of a 'bundled rebate' to retailers who stocked a full range of 3M products, including 'private brand'[43] lines. LePage's was competing with 3M in the supply of private-brand adhesive tape, for which LePage's had secured an 88 per cent market share, while 3M enjoyed a monopoly in the market for Scotch-brand tape. 3M introduced a bundled rebate scheme which provided a large price incentive for retailers to stock a full line of 3M products, including a private-brand tape newly introduced as a fighting brand to drive out the LePage's product. A direct result was that several large retail chains ceased to stock LePage's tape in order to benefit from the 3M bundled rebate scheme.

The Third Circuit Appeal Court ruled in 2003 that 3M's conduct was exclusionary under section 2 of the Sherman Act, and $68 million damages were awarded to LePage's Inc. The United States Supreme Court, before deciding whether to hear 3M's appeal, asked the United States Government for guidance. The response was an *amicus curiae* brief from Solicitor General Theodore Olsen and six other government lawyers, urging the Court to deny the petition for *certiorari*.[44] The Supreme Court accepted this advice two weeks before the Privy Council delivered its *Carter Holt Harvey* judgment, and the Third Circuit *LePage's* decision was allowed to stand.

[37] *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp* 475 U.S. 574 (1986).

[38] *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 U.S. 209, (1993).

[39] J F Brodley, P Bolton and M H Riordan, 'Predatory Pricing: Strategic Theory and Legal Policy,' (2000) 88 Georgetown L J 2241.

[40] A Edlin, 'Stopping Above-Cost Predatory Pricing', (2002) 111 Yale L J 941.

[41] Certiorari denied in *3M Co v Lepage's Inc*, LEXIS 4768 (US, 2004).

[42] *LePage's Inc v 3M* (2003) 324 F 3d 141 (3rd Cir).

[43] That is, tape bearing the brand name of the retailer who sells the product, rather than of the manufacturer.

[44] *3M v LePage: Brief for the United States as Amicus Curiae,* at <www.usdoj.gov> viewed 28 November 2006.

LePage's v 3M opened a devastating breach in the authority of the *Brooke Group* decision. A 'bundled rebate' scheme of the sort operated by 3M bears more than a mere family resemblance to the cross-subsidisation of Wool Line out of profits secured from INZCO's other product lines, including Pink Batts sold in geographic markets outside the Nelson region.

As several observers have noted, if a single-product firm is attacked by means of a bundled discount, offered to distributors by a multi-product predator with a full monopoly in all but one of the bundle of products receiving the rebate, then the full amount of the rebate may reasonably be attributed to the price of the one good supplied into a competitive market. If this approach is taken, the 3M price for its privately-labelled tape was not only below the price of the competing product supplied by LePage's, but may have been below the correctly-calculated 3M cost of supply also.[45]

The 3M pricing policy can be construed as a cross-subsidy from 3M's monopoly core business to a peripheral product facing competition. The Third Circuit Full Court clearly construed it in this way, as a means of excluding an equally-efficient rival:

> Depending on the number of products that are aggregated [in the bundle on which rebates are offered] and the customer's relative purchases of each, even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce.[46]

The *amicus* brief from the US Government echoed this theme:

> Unlike a low but above-cost price on a single product, a bundled rebate or discount can – under certain theoretical assumptions – exclude an equally efficient competitor, if the competitor competes with respect to but one component of the bundle and cannot profitably match the discount aggregated over the other products, even if the post-discount prices for both the bundle as a whole and each of its components are above cost.[47]

The *amicus* brief rather coyly concluded that 'the applicability of the *Brooke Group* approach to this business practice would benefit from further judicial and scholarly analysis.'[48]

The ground has therefore shifted significantly under the *Matsushita* and *Brooke Group* precedents, insofar as those precedents were understood to say that a combination of below-cost pricing and subsequent high probability of recoupment constitute necessary as well as sufficient bright-line tests for price predation, and that absence of either of these essential components constitutes a sufficient defence against a predatory-pricing charge. It is now clear in the United States that pricing behaviour which is (i) exclusionary in its effect in the relevant market (in the *Carter Holt Harvey* case, exclusionary of NWP in the market for wool-based insulation products) and (ii) sustainable only by virtue of a cross-subsidy from some other line of business or activity undertaken by the predator but not the victim, and in which the predator enjoys market power, can be in breach of section 2 of the Sherman Act, the (imperfectly substitutable) New Zealand equivalent for which is section 36 of the Commerce Act 1986.

The wording of section 36 explicitly includes the notion of power in one market being used to exclude competitors 'in that or any other market', which clearly foreshadows the possibility of a

[45] Below-cost pricing was not, however, alleged in the *LePage's* case, which was decided on other grounds. R W Davis, 'Pricing With Strings Attached – At Sea in *Concord Boat* and *Lepage's*, (2000) 14 Antitrust 70, notes that LePage's, like New Wool Products, survived the predation episode and the issue was simply the anti-competitive damage done.

[46] *LePage's Inc v 3M*, above n 42, 155, citing Philip Areeda and Herbert Hovenkamp.

[47] Above, n 44, 12-13.

[48] Ibid, 15.

multi-product, multi-market firm leveraging off its wider market power to achieve an anti-competitive purpose in a particular market or submarket.

IV. The Literature and American Law on Predatory Pricing and Bundled Discounts

Until very recently both the legal position in the United States on price predation, and the theoretical position in much of the economics and law literature both there and in New Zealand, rested upon the three analytical pillars discussed above, namely:

(i) the assumption that both predator and prey were single-product firms;
(ii) the Areeda-Turner test; and
(iii) the recoupment rule that predation could not be rational without subsequent recoupment, generally interpreted as an increase in price to a supra-competitive level once the predator had achieved its kill.

A. *Changed Landscape*

The past three years have radically changed this landscape in three ways. Firstly, the focus of debate now is on situations where a multi-product predator attacks a single-product prey: Minnesota Mining's attack on LePage's in the United States sticky-tape market, where the Third Circuit Court in 2003 spotted the problem, whereas the Privy Council in *Carter Holt Harvey* missed it entirely. The new term of art for predatory pricing is 'bundled discounting', also known as loyalty rebates.[49]

Secondly, the Areeda-Turner test of price below marginal (or average variable) cost has turned out neither necessary nor sufficient to identify price predation, partly because of its single-product focus, and partly because it assumes precisely the competitive conditions (constant industry-wide average variable cost and prevalence of a long-run perfectly-competitive market equilibrium) that are usually missing in interesting real-world predation events.[50] In particular, in situations where underlying average variable cost curves slope down for both players, the interests of consumers are not served by determining victory on the basis of financial strength, nor willingness and ability to cross-subsidise, nor the respective qualities of the law firms and QCs involved. The long-run interests of consumers (and of the economy as a whole) require that the market be dominated by whichever firm can achieve the lowest long-run cost – and there can be no presumption that this will be the more powerful firm.

[49] For a wide range of recent commentary on 'bundled discounting', 'exclusionary bundling', 'loyalty rebates' and the fallout from the *LePage's* judgment, see the Fall 2005 issue of Antitrust Bulletin 50(3), which contains papers by Ray Hartwell, Barry Nalebuff, Joseph Farrell, Richard Posner, Patrick Greenlea and David Reitman, Alan Meese, and Roy T Englert. On the economics of constructing legal tests for when rebates are exclusionary see especially Patrick Greenlea and David Reitman, 'Distinguishing Competitive and Exclusionary Uses of Loyalty Rebates' (2005) 50 Antitrust Bulletin 441.

[50] The initial attack on Areeda-Turner was led by Aaron S Edlin, 'Stopping Above-Cost Predatory Pricing' (2002) 111 Yale L J 941, and Brodley, Bolton, and Riordan, above n 35. The conventional riposte by Einar Elhauge, 'Why Above-Cost Price Cuts to Drive Out Entrants are Not Predatory – and the Implications for Defining Costs and Market Power' (2003) 112 Yale L J 681, was so full of qualifications and apparently minor concessions as to leave the main thrust of Edlin's critique unscathed – see, e.g., Edlin's contributions to the 'Roundtable on Recent Developments in Section 2', (2003) 18 Antitrust 15.

Thirdly, the recoupment rule was controversial from the outset,[51] and has died with the single-product predator and the dumping of *Brooke Group* by the *LePage's* court. Unambiguous quantitative definition and measurement of recoupment becomes intimidatingly difficult once the single-value measure of post-predation single-product price has been dropped. Qualitative evaluation of the strategic payoffs from the conduct complained of remains, inescapably, part of a court's analysis of allegedly anti-competitive business conduct.

B. From Brooke Group to LePage's

For a decade after *Brooke Group*, defendants in US antitrust cases, and lawyers advising clients on bundled discounting, appealed to the *Brooke Group* decision as a defence in law against a wide variety of charges of anti-competitive behaviour. 3M took refuge behind *Brooke Group* and lost. Davis gives a helpful checklist of the core propositions in *Brooke Group*:

> *Brooke Group* teaches that:
>
> - even a dominant firm may deliberately choose to forego short-term profits and instead price low in order to gain market share, so long as the price charged is above an appropriate measure of cost, 509 U.S. 209, at 222-223 …;
> - such strategic pricing is not, necessarily and always, pro-competitive (beneficial to consumers in the long run), but to distinguish between procompetitive above-cost pricing and anticompetitive above-cost pricing would be "beyond the practical ability of a judicial tribunal … without courting intolerable risks of chilling legitimate price cutting", id. at 224;[52]

and hence

> - injury in fact caused to a smaller player resulting from a dominant firm's strategic pricing is not actionable unless that pricing is below cost and unless there is an objective likelihood of recouping monopoly profits. *Id.* at 224-25.[53]

Four particular points stand out here, and it is in these areas that the American position has shifted sharply, or at least come under renewed pressure, since *LePage's*.

1. False-Positive-Aversion.

The Supreme Court's view in *Brooke Group* was not that judicial tribunals should presume that above-cost price cuts are never predatory. The *Brooke Group* position was that courts should avoid getting into the issue of considering allegations of above-cost price predation because of the risk of error (striking a 'false positive'), and because of the allegedly chilling effect of this risk on legitimate competition. This is no more than a practical criticism of the efficiency and analytical capacity of judicial tribunals – not an affirmative statement of principle that strategic price cuts are necessarily pro-competitive. This fear of false convictions stands in stark contrast to the Euro-

[51] Jessica L Goldstein 'Single Firm Predatory Pricing in Antitrust Law: the 'Rose Acre' Recoupment Test and the Search for an Appropriate Judicial Standard' (1991) 91 Columbia L Rev 1757.

[52] Ronald W Davis 'Pricing With Strings Attached – At Sea in *Concord Boat* and *Lepage's*, (2000) 14 Antitrust 69.

[53] Ibid, 69.

pean approach to predation under Article 86 of the Treaty of Rome, which is more concerned with 'false negatives' and correspondingly far more activist with respect to predatory pricing.[54]

The *Brooke Group* judgment said that '[a]s a general rule, the exclusionary effect of prices above *a relevant measure of cost* either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.'[55] The Court did not specify what exactly was meant by 'a relevant measure of cost', and this opens a gap into which it is potentially possible to slide the cost/price implications of bundling and other tying arrangements, so that cost could be measured as the aggregate incremental cost incurred by a predator to sell one more unit of the target good, including revenue foregone across sales of all product lines due to the effect of a bundled rebate kicking in.

As Davis says:

> In *Brooke Group* the Supreme Court recognized that above-cost pricing, with no strings attached, across the board, may sometimes be anticompetitive. The safe harbor that the Court established for above-cost pricing was not based on the perception that all such behavior is procompetitive, but rather on the belief that giving the courts license to separate the competitive from the anticompetitive would chill, and hence discourage, too much procompetitive behavior, and impose too great a burden on the courts.[56]

Edlin remarks, in discussing the same safe-harbour approach in the case of *United States v AMR Corp*, that:

> The safe harbor is very large when there is a lot of market or monopoly power, so that the firm's demand is very inelastic, and marginal revenue is far below price. In contrast, the safe harbor is very small when price is close to marginal revenue because the firm has very little market power. That's a peculiar kind of safe harbor. It is the opposite of what one would expect to avoid false positives. There may be a reason for a safe harbor, but it's strange to put it in by comparing a marginal concept like marginal cost with an average concept like price.[57]

So how should a court proceed? Davis in 2000 pointed out the implausibility of a court's being entirely unable to make progress on cases where predation was alleged in a bundled-discount context:

> If business people are rational, it follows that any complex program of package pricing or structured discounts must be based on some analysis, leading the relevant business people to conclude that adopting the plan is likely to be more profitable in the long run than not adopting it. Discovering or reconstructing

[54] The Privy Council acknowledged at *Carter Holt Harvey v Commerce Commission* above n 21, para 37 that recoupment had been rejected by the European Court in *Tetrapak* as a test for predation; and at paras 61-66 reviewed the European approach and identified crucial differences in the wording of Article 86 versus section 36 of the Commerce Act 1986. The Treaty of Rome does not require proof that market power has been 'used' (nor 'taken advantage of'), and the European Court does not accept the Privy Council's counterfactual test which places monopolist and non-monopolist on an equal footing before the law. On the contrary, monopolists are considered to have a 'special responsibility' not to behave in ways that might be acceptable for non-monopolists. In October 2004 (after both *Carter Holt Harvey* and *LePage's*) the OECD Competition Committee held a Round Table on Predatory Foreclosure, the proceedings of which were published in March 2005 as: OECD Directorate for Financial and Enterprise Affairs Competition Committee, *Predatory Foreclosure*, DAF/COMP(2005)14, Paris, March 2005, available at <www.oecd.org>. This document includes an interesting New Zealand delegation paper on the *Carter Holt Harvey* decision, and several fairly biting (albeit discreetly indirect) points about s 36 and the New Zealand case law from the Committee secretariat.

[55] Above n 4, 223, emphasis added.

[56] Davis, 'Pricing With Strings Attached', above n 52, 72.

[57] 'Roundtable: Recent Developments in Section 2', (2003) 18 Antitrust 18.

> that business analysis should be relatively easy, as litigation goes, particularly given that many people are likely to have been involved in developing and approving the program. In particular, it should not be beyond the ability of the plaintiff and the trier of fact to figure out whether defendant's plan either (a) is likely to be profitable even if the plaintiff does not exit the business, e.g., because the defendant is simply giving up margin on some sales in order to gain volume and market share, or, alternatively, (b) depends for its profitability on the assumption that the defendant's competitors will exit, permitting it to raise its prices. Deciding which of the assumptions underlies the plan in question ought not to be rocket science.[58]

2. The Bright Lines are No Longer Bright.

Brooke Group promised two bright-line tests, below-cost pricing (Areeda-Turner), and recoupment. Warren describes the erosion of the *Brooke Group* bright-line tests in *LePage's*:

> Prior to the *LePage's* decision, many practitioners and scholars read the case law to hold that, while there were few bright lines to follow, strategic pricing practices such as price-cutting and bundling would not be found to violate section 2 of the Sherman Act as long as prices did not drop below a certain measurement of cost. In particular, the most recent Supreme Court case on predatory pricing, *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*, contained strong language indicating that "above-cost prices that are below general market levels or the costs of a firm's competitors [do not] inflict injury to competition cognizable under the antitrust laws." However, in *LePage's*, the Third Circuit allowed a finding of illegal monopoly maintenance in the absence of a showing of below-cost pricing.[59]

There is thus nothing special about pricing above or below marginal cost, other than the convenience of judges trying to avoid judging hard cases. The issue is not whether Firm 1's price is above or below its own marginal cost, but whether it is above or below the shut-down price (average total cost) for its rivals. There is no need for recoupment unless the price prior to predation was already competitive. There is no presumption that price-cutting by a dominant firm is good or bad for consumers in the long run. The world of anti-competitive predatory conduct has become more complex, more interesting, and more difficult to adjudicate.

3. Single-Product Predation

The *Brooke Group* decision dealt only with single-product price predation. *Brooke Group* arguably had no effect on earlier Supreme Court precedents regarding anti-competitive behaviour by multiproduct firms. Contemplating its relationship with the then-in-progress *LePage's* case, Davis commented that '[t]he *Brooke* Court considered only the question when strategically low pricing, as such, might violate the antitrust laws: it was not asked to think about the consequences, if any, of a "string" attached to a low price.'[60]

Where a strategic price has strings attached – for example, where a dominant multiproduct firm uses bundled discounts across a range of products (in some of which it has a monopoly) to squeeze a smaller competitor in a single-product market (as was the case in *LePage's v 3M* and in

[58] Davis, above n 52, 72

[59] Joanna Warren 'Comment: *LePage's v. 3M*: An Antitrust Analysis of Loyalty Rates', (2004) 79 New York U L R 1605, 1606.

[60] Davis, above n 52, 69.

Carter Holt Harvey) – the result can be anti-competitive,[61] and it is no defence for the defendant to claim that its single-product price was above cost, as 3M did in *LePage's*. Davis again:

> LePage's problem was not predatory pricing, it was that if a customer bought any substantial amounts of its private label tape, the customer would lose the rebate not only on the buyer's purchases of Scotch™ and other 3M tape, but also on the PostIt™ notes purchases as well. To meet such a deal, LePage's would have had to cut its price substantially … The issue was not the low price but rather the string attached to the low price.[62]

This does point to a test that might be used: assuming a hypothetical equally-efficient competitor in the private-label market, what price cut would such a competitor have to make in order to match the bundled discount incentive on buyers to switch?[63] If the required price is clearly below cost, then the bundled discount is anti-competitive.

Some authors (including Davis in the passage quoted above) have made a terminological distinction between the narrow concept of 'predatory pricing' (the single-product case) and 'exclusionary conduct' (the bundled-discount case). The latter can be defined as:

> conduct that intentionally, significantly and without business justification excludes a potential competitor from outlets (even though not in the relevant market), where access to those outlets is a necessary though not sufficient condition to waging a challenge to a monopolist and fear of the challenge prompts the conduct.[64]

As the United States Supreme Court had noted in *Aspen Skiing Co v Aspen Highlands Skiing Corp*:

> [t]he question … whether conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [the plaintiff-competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting to exclude rivals on some basis other than efficiency', it is fair to characterize its behavior as predatory.[65]

An example of the new writing in this field is Nalebuff's model of 'exclusionary bundling':

> Under exclusionary bundling, a firm with market power in good *A* and facing actual (or potential) competition in good *B* prices an *A-B* bundle in a way that makes it impossible for equally-efficient one-good rivals selling *B* to compete. Exclusionary bundling has a foreclosure effect similar to that of [single-product] predatory pricing, but the two practices have important differences. Unlike traditional predatory pricing, the exclusionary behavior need not be costly to the firm. The intuition is that under predation, the firm actually has to charge a price below cost and thus loses money that it later has to recoup. Under exclusionary bundling, the firm has only to threaten to raise its unbundled prices if the bundle is not bought. All customers are led to buy the bundle and so the threat need never be carried out.[66]

[61] For an in-depth review of the recent literature on bundled discounts, see T A Lambert, 'Evaluating Bundled Discounts' (2005) 89 Minn L Rev 1688. See also B Kobayashi, *Not Ready for Prime Time? A Survey of the Economic Literature on Bundling* (Law and Economics Working Paper Series 05-35, George Mason School of Law, available at <www.ssrn.com>).

[62] Davis, above n 52, 70

[63] Warren, above n 59, 1631, has proposed a test along these lines to apply to above-cost loyalty rebates: 'The plaintiff should be allowed to show that an equally efficient producer of the competitive product would find it unprofitable to continue producing. This requirement addresses the fundamental exclusionary aspect of loyalty rebates: foreclosure of equally efficient single-product rivals due to discounts aggregated across multiple products.'

[64] Eleanor M Fox, 'What is Harm to Competition? Exclusionary Practices and Anti-competitive Effect' (2003) 70 Antitrust L J 371, 390, commenting on *Microsoft*.

[65] 472 US 585 (1985), 605.

[66] Barry Nalebuff, 'Exclusionary Bundling' (2005) 50 Antitrust Bulletin 321, 321.

Nalebuff goes on to argue that the courts have always implicitly accepted this line of argument, and that numerous cases before *LePage's* rested on such reasoning. He concludes that:

> The theory of exclusionary bundling brings together tying and predation. Exclusionary bundling is akin to predation in that when prices and costs are calculated correctly, the implied price of *B* to the customer is below cost. But, unlike predation, an implied price below cost need not imply any actual or even potential profit sacrifice. This is because the implied price is based on the alternative a la carte price of *A*, a price that might never be charged to a customer … The primary difference between exclusionary bundling and predation pricing is that there is no need to establish recoupment.[67]

4. Monopolists and Recoupment

The *Brooke Group* requirement for recoupment implicitly starts from a competitive price. The District Court Judge in *LePage's* (Judge Padova), however, determined that:

> There is no separate recoupment requirement when the defendant is *already* a monopolist … In other words, if the theory of the case is that the defendant is trying to protect its ability to price monopolistically, not gain the ability to charge a monopoly price, it seemed to make no sense to require the plaintiff to prove that the defendant would recoup its predatory investment by charging even higher prices in the future.[68]

Similarly, the Third Circuit decision said:

> Assuming *arguendo* that *Brooke Group* should be read for the proposition that a company's pricing action is legal if its prices are not below its costs, nothing in the decision suggests that its discussion of the issue is applicable to a monopolist with its unconstrained market power. … 3M is a monopolist; a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior.[69]

Admittedly, on this particular issue, the Third Circuit Court attracted a direct rebuttal in the United States Government *amicus* brief:

> But this Court's language [in *Brooke Group*] plainly applies to a monopolist. The Court stated, without qualification, that in a "claim alleg[ing] predatory pricing under s 2 of the Sherman Act ... a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." 509 U.S. at 222. Whether to extend *Brooke Group* to bundled pricing properly depends on considerations other than whether the defendant is a monopolist.[70]

Nevertheless, it is clear that the Third Circuit position contains a very significant acknowledgment of the validity of the European view that monopolists are not to be treated analytically as on a par with non-monopolists – an inescapable corollary of which is that the Privy Council's 'counterfactual test' in *Telecom v Clear* and *Carter Holt Harvey* is unsound.

[67] Ibid, 365.

[68] Davis, above n 52, 71.

[69] *LePage's Inc v 3M*, above n 42, 151-152.

[70] Above n 44, footnote 11.

V. Concluding Remarks

The recent literature has rediscovered a number of long-familiar reasons why the predatory-price claim of the Chicago School (that the phenomenon makes no economic sense) loses validity once simplistic neoclassical perfectly-competitive assumptions are dropped.[71]

The first problem with Chicago is the static cross-section nature of the story, when in practice strategic behaviour must rest upon expectations of the discounted present value of future cash-flows. The neoclassical comparative-static treatment of predatory pricing in legal discussions is too often divorced from the dynamic considerations that drive strategic behaviour. If the relevant issue is 'damage to competition,' then the appropriate way to think about it is the long-run quality-adjusted price that consumers will have to pay for the product.

By 'quality-adjusted price' I mean the benefit consumers derive from each dollar spent on the product in the relevant market. This depends not just on the number on the price label, but also on the characteristics embodied in the product to which the label is attached. An improvement in technology, workmanship or reliability has the effect of lowering the true price even if the nominal price remains the same.[72] The true price in the future will depend not only on the degree of monopoly power in the market post-predation, but also on the impact of short-run exclusionary contests on technical progress. A court should worry more about a powerful firm which kills a highly innovative new start-up competitor, than about one which merely puts a slow-moving laggard to sleep. Yet there seems to be little in-depth analysis before the courts of the effect on the pace of technical progress of strategic behaviour in defence of market shares.

The second problem is the Chicago assumption of a single-product predator in a world where virtually all actual cases have involved both multi-product predators and some degree of bundling. *Carter Holt Harvey* was not about a single-product firm. Had the Privy Council judges read *LePage's* before pronouncing, they might have decided quite differently – because *Carter Holt Harvey* was an example of a 'bundled discount', of the sort the Third Circuit Court punished in *LePage's*, and the European Court of First Instance in *Michelin II*.[73]

A third problem is the rhetorical imagery. Predation brings a vertical dimension to the horizontal competitive process determining market shares. Antelopes compete horizontally for space in their environmental niche (market) while their predators coexist in the same niche, but vertically – surviving by feeding off those below them in the food chain. What the predator exercises is not superior ability at the activities of horizontal competition (eating faster, running faster, breeding better, digesting better …) but superior power in head-to-head combat. Power is intrinsic to the predator's success, by definition. But while predation is inherently vertical, the complaints most often heard in so-called 'predatory pricing' cases have more to do with horizontal brutality than with vertical culling. The word 'predation' itself may have got us off to the wrong start in competition-law thinking.

[71] For an entertaining alternative critique from an Austrian point of view, not further discussed in the present paper, see W Anderson, 'Pounding Square Pegs into Round Holes: Another Look at the Neoclassical Theory of Predatory Pricing' (2003) 6 Quarterly Austrian Journal of Economics 23.

[72] A well-known example is the price of personal computers. The computing power acquired per dollar of purchase price has risen dramatically while the nominal shelf price of a PC has fallen only gradually.

[73] See B Sher and A Ojala, 'Abuse of Dominance: Effects and Inherent Effects Under Article 82: Michelin 2 and Van den Bergh Foods' (2003-2004) Competition Law Insight 7.

A fourth problem is the false-positives-aversion arising from a misapplication of the doctrine of innocent-until-proven-guilty. Adam Smith long ago pointed out that rights of the individual such as presumption of innocence should be radically reversed as soon as the individual changes roles to become a 'businessman' or a 'merchant'. Smith's reasoning was that the ever-present incentive for any business is to eliminate competition, and consolidate market power, by whatever means are available. This translates to a presumption of guilt whenever one sees businesspeople congregating together or behaving in ways that seem directed to the acquisition and maintenance of power to exploit consumers. The Europeans, it seems to me, have correctly understood the two sides of the Enlightenment, namely liberty of the individual and restraint on corporatist power.[74] It is ironic that New Zealand, a tiny economy in which market power hangs like low fruit from the trees in many markets, should have adopted the false-positive-aversion of the United States whose market of 300 million people virtually guarantees space for new species to get a fair crack of the evolutionary whip.

While overseas developments since 2000 should have greatly improved the prospects of success with a claim of predatory pricing of the INZCO sort, it cannot be said that New Zealand's legislators have covered themselves with glory. Section 36 of the Commerce Act has been amended to replace 'dominance' with 'a substantial degree of market power', and 'use' with 'take advantage of'. Neither of these changes has, on the face of it, made it any easier to prove exclusionary or predatory behaviour, and neither has brought New Zealand any closer to the philosophy and wording of the Treaty of Rome's Article 86.

Because the Privy Council decision in *Carter Holt Harvey* was under the old wording of 'dominance' and 'use', and because of the blessedly vigorous dissent by two of the five Law Lords, the way is nevertheless open to test the waters under the amended wording as to whether the change in wording has had a material effect on the scope of section 36. In particular a ray of hope is offered by the fact that section 36 has always been worded to include the use of power in one market to exclude persons from any other market.

Section 36 of the Commerce Act 1986 has failed the test of the sole New Zealand predatory-pricing case to date. It is unfortunate that after taking ten weary years to wind its way slowly through the courts, the *Carter Holt Harvey* case reached the Privy Council at the same time as *3M v LePage's* was being decided by the United States Third Circuit, and the Privy Council judges were writing their opinions before the United States Supreme Court denied *certiorari*. The absence of any reference to *LePage's* in the Privy Council judgment (in particular, by the dissenting two) raises the question how different the outcome in *Carter Holt Harvey* might have been had it been decided six months later by the same bench of judges, or alternatively if the Commerce Commission's legal team had been able to run the *LePage's* case in argument.

[74] For recent discussion of the Europe-US contrast in competition law, see the colloquium in Antitrust Bulletin Spring-Summer 2004; e.g. W Kolasky 'What is Competition? A Comparison of U.S. and European Perspectives', (2004) 49 Antitrust Bulletin 29, and G Niels and A Ten Kaate 'Introduction: Antitrust in the U.S. and the EU – Converging or Diverging Paths?', (2004) 49 Antitrust Bulletin 1.