# CHAPTER 1

# Scheme, Administration and Reach of the Commerce Act 1986



## 1.1 Introduction

Most developed market economies seek by legislative intervention to promote competitive markets as part of the system for the efficient allocation of resources.[1] Competition law, or anti-trust as it is often called, attempts to ensure that the market mechanism is not endangered through the aggregation of economic power or monopolistic practices or concerted anti-competitive conduct between market participants. New Zealand's competition law finds legislative expression in the Commerce Act 1986. Since the 1980s, New Zealand has undergone a radical shift moving from a highly-regulated economy to being one of the most market-oriented economies in the OECD group of countries. Underpinning the reliance on market forces are the legal controls in the Commerce Act 1986. The Act plays a pivotal role in policy making. It is not surprising, therefore, that there has been a vigorous debate about the objectives of the legislation, its substantive provisions, and the role of the courts and the Commerce Commission. Various groups have called for a strengthening of New Zealand's competition law, particularly as regards its application to network industries. The government has responded to these calls in various ways. First, it enacted the Commerce Amendment Act 2001, which strengthened the generic competition law provisions of the Commerce Act 1986. Second, it inserted a new pt 4A into the Act providing for a special regime of targeted control of electricity lines businesses. Third, it requested the Commerce Commission to conduct investigations under the general price control provisions of pt 4 of the Commerce Act into airports and gas pipelines. Finally, the government has enacted legislation allowing

1. JD Heydon *Trade Practices Law* (Law Book Co, Sydney, 1989) at [1.10].

the Commerce Commission to take on a tailored regulatory role in specific industries like telecommunications, electricity and the dairy industry.[2]

In 2007, the Ministry of Economic Development undertook a review of regulation under pts 4, 4A and 5 of the Commerce Act. That review led to Parliament enacting the Commerce Amendment Act 2008 which repealed pts 4 and 4A and substituted a new pt 4 dealing with regulated goods or services.

On 13 October 2011, the government introduced a Bill into Parliament, the Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-1). The Bill is chiefly concerned with the introduction of parallel civil and criminal regimes directed at hard core cartel conduct, namely, price-fixing, restricting output, market allocation and bid rigging.[3] The Bill also makes a number of other amendments to the Commerce Act 1986 including the provisions that govern jurisdiction and penalties. The Bill passed its first reading in Parliament on 24 July 2012 and is currently before the Commerce Committee. The Committee is due to report the Bill back to the House in May 2013.

## 1.2 Object of the Act

### 1.2.1 Statutory object

#### *(a) Original long title*

As originally enacted, the long title of the Commerce Act 1986 stated that it was "[a]n Act to promote competition in markets within New Zealand".

Some commentators expressed concern regarding the lack of detail in the long title and suggested it could be interpreted to mean that the promotion of competition was an end in itself rather than a means of achieving more efficient markets.

Such concern was alleviated to some extent by the remarks of Richardson J in the Court of Appeal in *Tru Tone Ltd v Festival Records Retail Marketing Ltd*,[4] where his Honour said:

> In terms of the long title the Commerce Act is an Act to promote competition in markets in New Zealand. It is based on a premise that society's resources are best allocated in a competitive market where rivalry between two firms ensures maximum efficiency in the use of resources.

#### *(b) Public benefit developments*

Debate continued about the extent to which consumer interests should be taken into account under the authorisation provisions, particularly in the merger context.

2. See Electricity Industry Reform Act 1998; Telecommunications Act 2001; Dairy Industry Restructuring Act 2001. For the Commission's role in these areas, see Commerce Commission *Briefing for Incoming Ministers* (Commission Commission, Briefing paper, March 2004).
3. For a detailed discussion of parallel civil and criminal regimes see Chapter 5.
4. *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358.





Before the Commerce Amendment Act 1990, the Commission accepted wide-ranging public benefit arguments in the context of authorisation applications, but stressed that the effects of benefits should be sufficiently widespread to satisfy the "public" quality of a benefit. While recognising efficiency gains as a public benefit, the Commission, with one notable exception, *Re New Zealand Co-op Dairy Co Ltd/Auckland Co-op Milk Producers Ltd*,[5] took the view that before it could accord significant weight to such gains, it had to be satisfied that it was likely that the gains would be passed on to the consumer in the form of lower prices, better terms or conditions or improved quality ranges, for example.

Presumably, as a reaction to the Commission's approach, Parliament, as part of the 1990 amendments, inserted a new s 3A, which provides that in determining whether, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, the Commission must have regard to any efficiencies resulting from such conduct. While the enactment of s 3A arguably reflected a legislative intention for the Commission to give primary consideration to efficiency arguments, s 3A's enactment did not rule out consideration of other public benefit arguments. Nor did it resolve the question of whether distributional issues were irrelevant.

In the 1992 Interdepartmental Review of the Commerce Act, the majority of participants (the Ministry of Commerce and the Treasury) recommended that the government should amend the authorisation test as follows: (1) by replacing the words "benefit to the public" with "benefit to New Zealand"; (2) by amending s 3A to ensure that in the authorisation of mergers the courts and the Commission give primary consideration to the consideration of productive, allocative and dynamic efficiencies; (3) by amending s 3A to clarify that decision makers should take no account of the identity of those who are the beneficiaries of efficiency gains; and (4) by issuing a s 26 statement of the government's policy in relation to the transfer of wealth between consumers and producers to the effect that the government's policy is to value resources equally regardless of who will be the recipients of any benefit.

In February 1993, Cabinet endorsed these recommendations and announced that it would introduce amending legislation in late 1993. This did not happen.

Meanwhile, the Commerce Commission issued a set of public benefit guidelines (since withdrawn) incorporating many of the recommendations of the Interdepartmental Review.[6] The guidelines adopted a total welfare approach and ignored distributional effects. The Commission has since acted under the methodology set out in the guidelines.

#### *(c) New purpose test*

The Commerce Amendment Act 2001 repealed the long title and substituted a new purpose provision in the form of s 1A, which reads:

5. *Re New Zealand Co-op Dairy Co Ltd/Auckland Co-op Milk Producers Ltd* (1988) 1 NZBLC (Com) 104,320.
6. See Commerce Commission *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act* (October 1994).

> The purpose of this Act is to promote competition in markets for the long-term benefit of consumers in New Zealand.

The new purpose statement first appeared in Supplementary Order Paper (37) but was cast in different language:

> The purpose of this Act is to facilitate the efficient operation of markets through the promotion of competition for the long-term benefit of consumers.

When the Commerce Amendment Bill and related Supplementary Order Paper (37) were reported from the Commerce Select Committee on 1 February 2001, two changes had been made to the purpose statement. First, the phrase "the efficient operation of markets" was deleted. Second, the reference to "consumers" was qualified to read "consumers within New Zealand". The Commerce Committee in its report[7] expressed the following views on the purpose statement:

> We consider that the addition of the purpose statement will not fundamentally change the interpretation of the Act. It is clear that the statement will confirm the existing approach that competition is a means to an end, not an end in itself. The difference is that it does this more explicitly than the existing long title, and clarifies that it is the impact on the long-term welfare of consumers within New Zealand that should be the overarching goal when assessing market behaviour. Also, the Act retains the clear demarcation between the role of the courts and the Commission. The courts determine whether conduct is anti-competitive and, therefore, illegal. The Commission considers applications for authorisations. That function is not within the functions of the courts, except on appeal.
>
> We, however, consider that the proposed purpose statement should be simplified to emphasise and reinforce the primary purpose of the Act in promoting competition for the long-term benefit of consumers within New Zealand. This can be accomplished by excluding reference to the efficient operation of markets. We also considered whether the words "long-term" may lead the courts and the Commission to over emphasise dynamic efficiency at the expense of more immediate benefits. We accept the words "long-term" on the basis that welfare is defined as the welfare of consumers within New Zealand. The authorisation process should continue to be seen largely as an efficiency exception. We recommend the addition of an amended version of the statement in the SOP.

While some of the submissions to the Select Committee supported the new purpose statement, others criticised the apparent pro-consumer bias of the provision, suggesting that income distributional concerns would be given weighting over welfare effects.

This view seems incorrect. The new purpose statement is compatible with a total welfare approach. Total welfare takes account not only of the interests of consumers but also of producers. The term "total welfare" can be defined as the sum of consumer surplus and producer surplus (total surplus) plus consideration of consumer choice and innovation. That the legislature had in mind such an approach is discernible from the remarks of the Minister of Commerce, the Hon Paul Swain in Parliament:[8]

7. Commerce Committee *Report on the Commerce Amendment Bill (296-2)* at 7.
8. (27 February 2001) 590 NZPD 7972.





> [The purpose statement] makes clear that competition is not an end in itself but a means to promote the welfare of New Zealanders. Consumers are given special mention as they are the ultimate beneficiaries of competition. However, the welfare of all New Zealanders will continue to be important … The focus on competition in the purpose statement also does not preclude wider benefit issues being taking into account where appropriate. It simply clarifies that there should be a presumption in favour of competition, and competition must prevail unless the efficiencies of other public benefits are shown to exceed the detriments from the lessening of competition.

A Ministry of Commerce senior competition policy analyst, expressing his personal views, likewise emphasises the continuing validity of the efficiency-based approach:[9]

> The current purpose of the Act is "to promote competition in markets for the long-term benefit of consumers within New Zealand". The phrase "long-term benefit to consumers" is, in economic terms, very close to, if not the same as, the concept of dynamic efficiency. Certainly this is the approach followed by the Commerce Commission. In a recent speech, the Chair of the Commission said:
>
> > Parts II and III of the Commerce Act do not have their own purpose statement. The Commission is therefore guided by the purpose statement of the Act which is to "promote competition in markets for the long-term benefit of consumers within New Zealand". The Commission considers that an efficiency-based approach to the analysis of agreements and business acquisitions is consistent with the objectives of the Act.

Ultimately, it will be the courts who will determine whether the new purpose statement dictates a departure from existing practice. In *Giltrap City Ltd v Commerce Commission*,[10] McGrath J in the Court of Appeal made some observations on the purpose of the Act. After referring to Richardson J's comments in *Tru Tone*, his Honour said:[11]

> Section 1A of the Act stipulates its purpose as being to "promote competition in markets for the long-term benefit of consumers within New Zealand". While the provision was inserted by the 2001 amendment, that was in substitution for the previous long title which is not materially different.

In *Air New Zealand v Commerce Commission (No 6)*,[12] the High Court rejected the suggestion that the introduction in 2001 of s 1A required a change in approach to s 3A so as to exclude benefits which do not flow directly to consumers. The Court said:[13]

> We are satisfied the introduction of s 1A should not disturb the Commission's established practice of treating as neutral any wealth transfers between New Zealand consumers and producers. Determinations of authorisation

9. Submitted by New Zealand to the OECD *Global Forum on Competition Policy in Small Economies* (31 January 2003) at 18, quoting "The Commission's Approach Across its Responsibilities", a speech by John Belgrave to the Competition Law and Policy Institute of New Zealand (August 2002).
10. *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA).
11. *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [76].
12. *Air New Zealand v Commerce Commission (No 6)* (2004) 11 TCLR 347.
13. *Air New Zealand v Commerce Commission (No 6)* (2004) 11 TCLR 347 at [241] and [242].

> applications under the Act are properly concerned with balancing any efficiency detriments associated with breaches of the statutory completion standard, against any efficiency gains that may result from the business acquisition or contractual arrangement in question. It is the balancing of these real resource impacts on the economy that best services the long-term interests of consumers. The inclusion of ad hoc welfare transfers, which are not losses to society, would distort the efficiency assessment by assuming additional economic harm to the public of New Zealand. In any event, consumers might well be the ultimate beneficiaries.
>
> This issue is confined to wealth transfers within New Zealand. Transfers between New Zealand and other countries are not necessarily regarded as welfare neutral.

On a more general level, the High Court in *Turners & Growers Ltd v Zespri Group Ltd* observed:[14]

> Interpretation of the relevant provisions of the Commerce Act is governed by well-established principles of statutory interpretation and previous decisions of appellate courts. The meaning of a statutory provision must be ascertained from its text and in light of its purpose and in determining purpose the court must have regard to both the immediate and the general legislative context and its social, commercial or other objective: Interpretation Act 1999, s 5 and *Commerce Commission v Fonterra Co-op Group Ltd*.[15]

## 1.3 The Substantive Parts of the Commerce Act 1986

Like most anti-trust statutes, the Commerce Act 1986 is concerned with two types of phenomena that give rise to or buttress market power: restrictive trade practices; and market forms and behaviour which, collectively, one may describe as "the market dominance" problem.

In addressing the above types of phenomena, the Commerce Act employs a number of prohibitions and regulatory mechanisms, which are classified into categories designated by Parts.

Part 2 of the Act deals with "Restrictive Trade Practices". Normally such practices are associated with concerted conduct that is anti-competitive in nature. While pt 2 embraces such conduct, it does not limit itself to concerted activity. Part 2 singles out the more blatant types of anti-competitive conduct — exclusionary arrangements (s 29), horizontal price-fixing (s 30) and resale price maintenance (ss 37 and 38) — for special condemnation, that is, the conduct is illegal per se without any need for the plaintiff to show that it has the purpose or effect of substantially lessening competition. Many other manifestations of concerted behaviour may have a detrimental effect on competition in a particular fact situation. To ensure such behaviour is subject to scrutiny under the Act, pt 2 contains a general prohibition section (s 27) that employs a rule of reason approach; that is, the court examining a challenged practice will condemn it only if the party attacking it establishes that the practice has the purpose or effect of substantially lessening

14. *Turners & Growers Ltd v Zespri Group Ltd* (2011) 13 TCLR 286 at [73].
15. *Commerce Commission v Fonterra Co-op Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].





competition in the market as a whole. As noted above, Part 2 is not limited to concerted behaviour. It also regulates the taking advantage of substantial market power for certain anti-competitive or exclusionary purposes: s 36. Part 2 is of fundamental importance to all those engaged in commercial activity.

Part 3 of the Act, regulating "Business Acquisitions" (referred to prior to the Commerce Amendment Act 1990 as "mergers and takeovers") reflects a concern for the structural dimension of market power. The key provision in pt 3, s 47, prohibits any person from acquiring assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market. Before the Commerce Amendment Act 2001 came into effect, s 47 prohibited any person from acquiring assets of a business or shares if, as a result of the acquisition, that person or another person would be, or would be likely to be, in a dominant position in a market, or that person's or another person's dominant position in a market would be, or would be likely to be, strengthened. To avoid the consequences of contravening the section, the acquirer will need to apply to the Commerce Commission for a clearance and/or authorisation. A clearance or authorisation is valid for 12 months after the date the Commission gives it or the High Court confirms the determination. If the acquisition takes place within that period, no person may take action against it.

Part 4 of the Act, as substituted by the Commerce Amendment Act 2008, provides for the regulation of the price and quality of goods and services where there is little or no competition. Part 4 has its own purpose statement in s 52A, which is aimed at safe-guarding the long-term benefit of consumers in the market where there is little or no competition by promoting outcomes consistent with competition. Part 4 provides for a broad range of regulatory instruments including information disclosure, a negotiate/arbitrate regime and a default/customised price-quality path regime. The new pt 4 requires the Commerce Commission to determine regulatory input methodologies, and provides for merit appeals against such determinations. Specific regulation is provided for electricity lines, gas pipelines, and specified airport services. As pt 4 deals with regulation rather than competition law the authors have decided not to explore the subject further.

Finally, pt 5 of the Act provides for most of the practices caught by the Act, and business acquisitions, to be authorised (or cleared in the case of business acquisitions), in effect, immunised from legal challenge, by reference to prescribed public benefit tests. Part 5 also provides for authorisations in respect of controlled goods or services.

## 1.4 Exceptions and Exemptions

### 1.4.1 Matters specifically authorised by any enactment

Section 43(1) provides:

> (1) Nothing in this Part of this Act applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act.

Section 43(2) seeks to clarify the scope of the exception by providing that an enactment or Order in Council does not provide specific authority if it provides in general terms for an act, matter or thing notwithstanding that it requires or is subject to approval or authorisation by a Minister of the Crown, statutory body or a person holding any particular office.

The Privy Council in *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd*[16] took a narrow view of the exception. At issue was whether a second-tier capital levy imposed by the board on new growers and growers wishing to expand production was "specifically authorised" by the Apple and Pear Marketing Act 1971. Section 31(1) of that Act empowers the board, with the approval of the Fruitgrowers' Federation, to "impose on growers levies of such nature and incidence as the Board thinks fit" and these might be imposed on "all growers, or on any class or classes of growers": s 31(2). The Court of Appeal unanimously held that the levies were specifically authorised and hence fell within the protection of the s 43 statutory exception. In overturning the Court of Appeal, the Privy Council rejected the emphasis the Court of Appeal judgments had put on the role of producer boards. It saw the matter simply as a question of construction. Was s 31 particular enough to constitute a "specific authorisation" under s 43? The Privy Council said:[17]

> Section 43(2) makes it abundantly clear that a statutory authorisation embracing a class of acts which may or may not amount to restrictive practices is not a specific authorisation which will satisfy s 43(1). This is so even if, as here, the particular act in question is not only authorised generally by the statute, but also requires under the statute, and has obtained, the specific authority of the Minister. This seems to their Lordships to indicate that nothing less will do than either a statutory authorisation of the very act in question or, if it is one of a class or kinds of authorised acts, that the whole authorised class would if not so authorised, fall foul of the prohibition in Part II of the Act of 1986.

While not insisting that every act of the kind authorised must be anti-competitive, the Privy Council took the view that the statute must authorise acts of a kind "of which the preponderant majority will continually operate in an anti-competitive way".

Following the Privy Council's decision, several statutes have expressly stated that nothing in pt 2 of the Commerce Act 1986 will apply to certain conduct. Normally, such a statement will suffice to prevent the Act's application. See, for example, *Researched Medicines Industry Assoc of NZ Inc v Pharmaceutical Management Agency Ltd*,[18] where the Court of Appeal discussed the application of such a statement in s 2 of the Finance Act 1994 to Pharmac's conduct.

16. *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 (PC).
17. *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 (PC) at 265.
18. *Researched Medicines Industry Assoc of NZ Inc v Pharmaceutical Management Agency Ltd* [1998] 3 NZLR 12, (1998) 8 TCLR 320 (CA).





In *Transpower NZ Ltd v Todd Energy Ltd*,[19] the Court of Appeal applied *Apple Fields* in ruling that s 19 of the Electricity Amendment Act 2001 is not sufficiently specific to comprise an authorisation for the purposes of s 43 of the Commerce Act. The Court said:[20]

> It would be going well beyond [s 19's] intended purpose to conclude that it had the effect of shielding Transpower from any allegation of non-compliance with Part 2 of the Commerce Act. The effect of s 19 is to make sure that services are paid for but it does not follow that Transpower is not liable for damage caused by, for example, its refusal to deal or to refuse to depart from its policy in some way.

In contrast, the Court found that the Electricity (Transpower's Pricing Methodology) Regulations 2004 do constitute an authorisation for the purposes of s 43, by virtue of reg 4(5), which says expressly that "the methodology is expressly authorised for the purpose of s 43.

### 1.4.2 Specific exceptions — s 44

Section 44 excludes from the operation of pt 2 the following:

1. Partnership agreements between individuals in so far as the agreement relates to the terms of the partnership, the conduct of the partnership business and competition between the parties: s 44(1)(a).
2. Contracts, arrangements or understandings, or covenants where the only parties thereto are or would be interconnected bodies corporate: s 44(1A). The exception does not apply to contracts, arrangements and understandings between interconnected bodies corporate for the purposes of ss 36 and 36A.
   (Note: Section 83 of the Electricity Industry Reform Act 1998 provides that for the purposes of pt 2 of the Commerce Act, an electricity lines business and an electricity supply business that do not have ownership separation shall be deemed to be separate bodies corporate that are not interconnected, despite the fact that they may have a common owner. This means that the s 44(1A) exception does not apply to contracts, arrangements, or understandings between electricity lines businesses and electricity supply businesses even if they have a common owner.)
3. Contracts of service or contracts for the provision of services containing provisions restricting the work individuals may engage in during, or after the termination of, the contract: s 44(1)(c).
4. Contracts for, or covenants in connection with, the sale of a business or of shares in the capital of a body corporate carrying on a business that is solely for the protection of the purchaser in respect of the goodwill of the business: s 44(1)(d).
5. Contracts, arrangements or understandings containing provisions relating to remuneration and conditions of work: s 44(1)(f).
6. Contracts, arrangements and understandings relating exclusively to the export of goods or services provided that particulars are submitted to

19. *Transpower NZ Ltd v Todd Energy Ltd* [2007] NZCA 302.
20. *Transpower NZ Ltd v Todd Energy Ltd* [2007] NZCA 302 at [205].

the Commerce Commission within 15 days of making the arrangement: s 44(1)(g).

7. Actions undertaken in concert by users of goods or services otherwise than in trade against the suppliers of those goods or services: s 44(1)(h).
8. Contracts, arrangements or understandings containing provisions relating exclusively to international shipping to or from New Zealand: s 44(2). This exemption does not apply to the carriage of goods to or from a ship or the loading or unloading of a ship: s 44(3).
9. Acts done to give effect to a provision of a contract, arrangement or understanding, or to a covenant referred to in s 44(1)(a)–(g) and 44(1A).

### 1.4.3 Statutory intellectual property rights[21]

Section 45(1) provides that nothing in Part 2 (except for ss 36, 36A, 37, and 38) applies to the entering into of a contract or arrangement or understanding *in so far as it contains* a provision authorising any action that would otherwise be prohibited by reason of the existence of a statutory intellectual property right. As the italicised words indicate, the s 45(1) exemption appears to be confined to the grant of a licence to use and exploit a statutory intellectual property right of the type defined in s 45(2). Other anti-competitive restraints, even if they are contained in a licence agreement, would not be exempt.

Sections 36(3) and 36A(4) provide that a person does not take advantage of substantial market power "by reason only" that that person seeks to enforce a statutory intellectual property right within the meaning of s 45(2). Misuse conduct involving intellectual property rights going beyond mere enforcement action could breach the sections.

The law relating to restraint of trade and breaches of confidence is not affected by the Commerce Act: s 7(1) and (2).

## 1.5 Penalties and Remedies

### 1.5.1 Pecuniary penalties

Under s 80, the Commission may institute proceedings in the High Court for recovery of pecuniary penalties from persons who have contravened any of the provisions of pt 2 of the Act. The standard of proof is that applying in civil proceeding: s 80(3).

Note that s 80 extends to those who attempt to contravene a provision of pt 2 or induce, or attempt to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision. The section also catches the activities of those who aid, abet, counsel, procure, conspire with

21. See generally Ian Eagles and Louise Longdin "Subjecting Competition Law Exemptions to a Rule of Reason: New Zealand Courts Push at the Boundaries of Statutory Interpretation" (2009) 15(1) UNSWLJ Forum 309. See also Ian Eagles "Regulating the Interface Between Competition Law and Intellectual Property in New Zealand" (2007) 13 NZBLQ 95; Ian Eagles and Louise Longdin *Refusals to License Intellectual Property: Testing the Limits of Law and Economics* (Hart Publishing, Oxford, 2011).





others or are in any way, directly or indirectly, knowingly concerned in or a party to the contravention.

The Commerce Amendment Act 2001, which came into force on 26 May 2001, made significant changes in the penalty provisions for breaches of pt 2.

A court may order a maximum penalty of $500,000 in the case of an individual: s 80(2B)(a). This amount is unchanged from that fixed by the Commerce Amendment Act 1990. In respect of a body corporate, however, s 80(2B)(b) states the maximum penalty (formerly $5 million) is the greater of $10 million; or either:

(a) if it can be readily ascertained and if the court is satisfied that if the contravention occurred in the course of producing a commercial gain, three times the value of any commercial gain resulting from the contravention; or
(b) if the commercial gain cannot be readily ascertained 10 per cent of the turnover of the body corporate and all of its interconnected bodies (if any).

The Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-1) clarifies the turnover limb by linking it to turnover in each accounting period in which the contravention occurred.

Note the term "commercial gain" is not defined. The Commerce Committee in its report rejected calls to make the term more specific, noting:[22]

> [T]hat the approach is not a novel one and there are similar provisions in five other statutes, including the Resource Management Act 1991 and the Electricity Industry Reform Act 1998.

"Turnover" is defined in s 2 to mean "the total gross revenues (exclusive of any tax required to be collected) received or receivable by that body corporate within New Zealand".

The Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-1) proposes to insert a new subs (2c) providing that in proceedings for a contravention of new s 30, a defendant that claims that an exemption in any of new ss 31–33 applies must prove that it does so on the balance of probabilities. This is the opposite of the burden of proof that applies to the criminal provision: new s 82B.

### 1.5.2 Matters relevant to penalty[23]

Before the enactment of the Commerce Amendment Act 2001, s 80(2) provided that in determining an appropriate penalty, the court should have regard to all relevant factors; including the nature and extent of the act or omission, the nature and extent of any loss or damage suffered by any person as a result of the act or omission, the circumstances in which the act or omission took place, and whether or not the person had previously been

22. Commerce Committee *Report on the Commerce Amendment Bill (296-2)* at 24.
23. See generally Mary-Anne Borrowdale "Sufficient Severity: A New Era of Commerce Act Penalties" 22nd Annual Workshop of the Competition Law & Policy Institute of New Zealand (Inc), 5–6 August 2011, Wellington.

have set its prices at such a high level that a further price increase above the current prices would not be profitable. The application of the SSNIP test in these circumstances would lead to a too-wide market definition, which in turn might lead to a calculation of small market shares, and to a finding that the firm does not possess substantial market power.[121]

This problem in competition policy analysis is known as the "Cellophane fallacy"[122] after the widely discussed decision of the United States Supreme Court in *United States v El du Pont de Nemours & Co.*[123] Posner and Easterbrook explain the Cellophane fallacy in their casebook *Antitrust: Cases, Economic Notes and Other Materials*:[124]

> To include products that were good substitutes for cellophane *at the price at which cellophane was being sold by its sole producer* begged the question whether the producer had a monopoly. If he had a monopoly and was charging a monopoly price, that would make substitutes attractive which at a competitive price would be considered grossly inferior alternatives. In fact it seems almost certain the cross-elasticity of demand between cellophane and other flexible packaging materials for many important uses would have been very low had cellophane been sold at a price substantially nearer its cost.

121. Massimo Motta *Competition Policy: Theory and Practice* (Cambridge University Press, Cambridge, 2004) at 105.
122. For a full discussion of the "Cellophane fallacy" see Simon Bishop and Mike Walker *The Economics of EC Competition Law* (2 ed, Sweet & Maxwell, London, 2002) at 98–104.
123. *United States v El du Pont de Nemours & Co* 351 US 377 (1956).
124. Richard Posner and Frank Easterbrook *Antitrust: Cases, Economic Notes and Other Materials* (2nd ed, West Publishing Co, St Paul, 1981) at 362 (emphasis in original).



# CHAPTER 3

# General Prohibition Section

## 3.1 Introduction

Section 27 of the Commerce Act 1986 is the catch-all provision. The section applies to all types of anti-competitive arrangements whether horizontal or vertical. Unlike ss 29 and 30, for the purposes of s 27 it does not matter that none of the parties are in competition with each other; there must, however, be duality of action in the form of a contract, arrangement or understanding. In the absence of this element, the section has no application.

The section has much in common with s 1 of the Sherman Act 1890 (US), which prohibits "[e]very contract, combination … or conspiracy, in restraint of trade or commerce". A significant difference between the New Zealand and United States provisions is that s 27 is not limited to provisions which are restrictive in nature, although it is likely that any challenged provision will be of this type. The key question under s 27 is whether the provision has the purpose or effect of substantially lessening competition in a market.

The section is based on s 45 of the Australian Trade Practices Act 1974 (Cth) (since 1 January 2011, known as the Competition and Consumer Act 2010 (Cth)). In its original form s 45 was worded in a manner similar to s 1 of the Sherman Act in that it prohibited contracts, arrangements or understandings "in restraint of trade or commerce". Those responsible for the drafting of the original version of s 45 no doubt intended "restraint of trade" to have a meaning similar to its counterpart in s 1 of the Sherman Act and not the narrower meaning that the words "covenant in restraint of trade" have at common law. In *Quadramain Pty Ltd v Sevastapel Investments Pty Ltd*,[1] however, the High Court of Australia opted for the common law meaning, thus importing into s 45 all the technical limitations of the doctrine of restraint of trade at common law.

The *Quadramain* decision led to a major redrafting of s 45. In the new version of s 45, enacted in 1977, the drafter made no reference to "restraint

1. *Quadramain Pty Ltd v Sevastapel Investments Pty Ltd* (1976) 133 CLR 390.

of trade" or related concepts. Instead, s 45 incorporated a test of anti-competitiveness, applied to every provision whatever the nature of the agreement or provision may be. To ensure that provisions in relation to covenants annexed to or running alongside an estate or interest in land would be subject to the Act, the drafter added new provisions to s 45 replicating to a large degree the prohibitions and exemptions applying to provisions in contracts, arrangements and understandings.

The New Zealand legislation follows the Australian approach, but the drafter has simplified the drafting and sets out the various prohibitions in separate sections. Section 27 contains the general prohibition applying to contracts, arrangements and understandings while s 28 applies a similar prohibition to covenants. The analysis of the s 27 test of anti-competitiveness is equally applicable to s 28.

## 3.2 Section 27

Section 27 of the Commerce Act provides:

> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (3) Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.
>
> (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

### 3.2.1 "Person"

Like the other substantive provisions in the Act, the s 27 prohibition is addressed to persons. Section 2(1) defines "person" as "includ[ing] a local authority, and any association of persons whether incorporated or not". It is difficult to conceive of any entity, organisation, or human being which does not come within the definition of "person" for the purposes of the Act.

"Person" would include the Crown and Crown corporations. Section 5 provides that the Crown is bound by the Act in so far as it "engages in trade". The High Court and the Court of Appeal examined the latter term in *Glaxo New Zealand Ltd v Attorney-General*.[2]

There are limited remedies available against the Crown if it is engaging in trade and its conduct breaches the Act. No pecuniary penalties are available (s 5(2)), and the Crown is not liable to be prosecuted for an offence against the Act: s 5(3). Section 5(4) provides for the Commission, or the person directly

2. *Glaxo New Zealand Ltd v Attorney-General* [1991] 3 NZLR 129 (HC), aff'd *Glaxo New Zealand Ltd v Attorney-General* [1991] 3 NZLR 129 (CA) at 138. See also *Integrated Education Software Ltd v Attorney-General* [2012] NZHC 837.





affected by a contravention of the Act by the Crown, to obtain declaratory relief if the contravention constitutes an offence. Private damages actions against the Crown for breaches of the restrictive trade practices provisions appear to be available, as such proceedings are civil in nature and do not involve offences. Section 6 makes it clear that Crown corporations engaged in trade, for example, state-owned enterprises, are subject to the full effect of the Act's provisions.

Trade and professional bodies are obviously an "association of persons" and hence a person for the purposes of s 27. The conduct of such bodies as well as their constitutions, rules and codes of ethics may be open to attack under s 27. The members of such bodies may easily become parties to anti-competitive arrangements resulting from recommendations and decisions of general meetings and ruling bodies relating to such matters as price dissemination schemes, terms and conditions of trading or methods of marketing, credit reporting schemes, product certification programmes, and rules governing membership qualifications and expulsions. Note the special deeming provisions in s 2(8)(a) and (b) which overcome any technical difficulties that might otherwise arise in imposing liability on members. See also *Re the Wellington Fencing Materials Assoc*,[3] which suggests that the concepts of arrangement and understanding will encompass a wide range of association activity.

The decision of the Commerce Commission in *Re Speedway Control Board of New Zealand (Inc)*[4] revealed that non-profit organisations such as sporting bodies may also face problems under s 27 if anti-competitive conduct is involved.

Under s 31(2) of the Companies Act 1993 the constitution of a company is binding between the company and each shareholder, and also between shareholders themselves. In *Eastern Express Pty Ltd v General Newspapers Pty Ltd*,[5] the Federal Court of Australia held that a provision in a company's constitution was anti-competitive in terms of the Australian equivalent of s 27.

### 3.2.2 "Enter into" and "arrive at"

The New Zealand Act does not define the term "enter into". Before amendment in 1977, s 45(2) of the Australian legislation used the phrase "entered into", but this was abandoned in 1977 and the phrase "arrived at" substituted. In addition, the amendment gave an expansive definition of "arrived at", namely "'arrive', in relation to an understanding, includes reach or enter into": s 4(1). A similar definition appears in s 2(1) of the Commerce Act. "Enter into" can also be contrasted with another Australian equivalent: "make". The terms in the Australian definition were the subject of judicial

3. *Re the Wellington Fencing Materials Assoc* [1960] NZLR 1121.
4. *Re Speedway Control Board of New Zealand (Inc)* (1990) 2 NZBLC (Com) 104,521.
5. *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 103 ALR 41, (1991) ATPR 41-128.

comment in *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)* where Fisher J said:[6]

> It may well be that the notion of "entering into an understanding" postulates the concept of this occurring at a particular moment of time between two persons in each other's presence whereas an understanding may be arrived at over a subsequent period when for example by a series of acts the proposal is adopted by the other party.

### 3.2.3 "Give effect to"

By s 27(2) and (3) the parties are prohibited from giving effect to the provision of a contract, arrangement or understanding, whether entered into or arrived at before or after the commencement of the Act. Section 2(1) defines "give effect to" as:

> **Give effect to**, in relation to a provision of a contract, arrangement, or understanding, includes —
>
> (a) do an act or thing in pursuance of or in accordance with that provision;
>
> (b) enforce or purport to enforce that provision.

In *Tradestock Pty Ltd v TNT (Management) Pty Ltd*,[7] Smithers J in relation to an equivalent Australian definition said:

> It is to be observed that an act done by way of implementation of a contract, arrangement or understanding would necessarily be done in "pursuance thereof". If the only acts struck at by the Act are those done by way of implementation of the contract, arrangement or understanding then there is no work left to be done by the words "or in accordance with". And there is good reason for thinking that those words are intended to cover the situation where what is done is or may be done for reasons other than to implement the understanding.

## 3.3 Contract, Arrangement or Understanding

For s 27 to apply there must be a contract, arrangement or understanding.[8]

### 3.3.1 Provision

Note that s 27, like ss 29 and 30, is directed at particular provisions of contracts, arrangements, or understandings, rather than against the contracts, arrangements, or understandings themselves. To prove a breach of s 27 a plaintiff must establish that a provision of a contract, arrangement or understanding has the requisite anti-competitive purpose or effect. The essence of the s 27(1) and (2) prohibitions is the entering into, or giving effect to, a contract, arrangement or understanding containing an anti-competitive provision. Section 2(1) defines "provision", in relation to an understanding or arrangement, as meaning "any matter forming part of or

6. *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)* (1979) 26 ALR 609, (1979) 40 FLR 83, (1978) ATPR 40-126 at 18,347.
7. *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1978) ATPR 40-056 at 17,571.
8. See Chapter 2 for a discussion of these terms.





relating to the understanding or arrangement". A similar approach is likely to apply in respect of a provision of a contract.

Carr J in *Australian Competition & Consumer Commission v Australian Medical Assoc Western Australia Branch Inc* saw the distinction between offending provisions and the contracts, arrangements or understandings themselves, as significant:[9]

> In my view, the distinction is important because I think that it is possible for a person to give effect to an understanding without necessarily giving effect to an offending provision of it ie by giving effect to its other provisions.

In some cases it will be the contract, arrangement, or understanding itself that will have the requisite anti-competitive purpose or effect. Thus, in *Commerce Commission v Ophthalmological Society of New Zealand Inc*,[10] Gendall J held that an arrangement designed to prevent, obstruct or hinder entry by Australian doctors into the Southland routine cataract surgery market had both the purpose and effect (both likely and actual) of substantially lessening competition in that market. While noting the distinction in s 27 between provisions and arrangements, his Honour equated the provision in the arrangement with the arrangement itself.

### 3.3.2 Enforceability

Section 89(6) clarifies the status of contracts containing offending provisions; the subsection provides that where a provision of a contract contravenes the Act, it will not affect the enforceability of any other provision of the contract. Note, however, that s 89(2) confers wide powers upon the court to vary or cancel contracts and to require compensation or restitution to be paid. For a case where s 89(2) was invoked see *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd*.[11] Section 89(5) expressly excludes the operation of the Illegal Contracts Act 1970 to contracts entered into in contravention of the Commerce Act 1986. Thomas J in *Howick Parklands Building Co Ltd v Howick Parklands Ltd*[12] suggested that, irrespective of the Illegal Contracts Act 1970 and notwithstanding a statutory illegality, the courts possess a residual power to enforce a contract where it would be inequitable or unconscionable to allow a defendant to maintain that the contract was void or illegal.[13] One must reassess this view in the light of the Full Federal

9. *Australian Competition & Consumer Commission v Australian Medical Assoc Western Australia Branch Inc* (2003) 199 ALR 423, (2003) ATPR 41-945 at 47,260.
10. *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC).
11. *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd* (1997) 7 TCLR 463. See also Dennis Carlton and David Goddard "Contracts that Lessen Competition: What is Section 27 For and How has it been Used?" in Mark Berry and Lewis Evans (eds) *Competition Law at the Turn of the Century* (Victoria University Press, Wellington, 2003) 136 at 166–168.
12. *Howick Parklands Building Co Ltd v Howick Parklands Ltd* [1993] 1 NZLR 749 (HC).
13. See Van Roy "The Enforceability of Contracts which are Illegal under the Commerce Act 1986" [1994] NZLJ 181.

Court of Australia's decision in *News Ltd v Australian Rugby Football League Ltd*.[14] There, the Full Court held that the power in s 87 of the Trade Practices Act 1974 (Cth) to declare a contract void does not alter the ordinary rule that where a statutory provision provides that a contract is contrary to law, the contract is void. The court does not have the discretion to refuse to declare the agreement void.

In *Telecom New Zealand Ltd v Clear Communications Ltd*,[15] Fisher J examined several issues relating to the enforceability of agreements alleged to be in breach of s 27. After a protracted dispute, Telecom and Clear entered into an interconnection agreement in September 1995. The parties entered into a substituted set of agreements on 18 March 1996, which included a settlement agreement, resolution of existing litigation and a principal interconnection agreement. Following Telecom's introduction of capped calls, Clear became concerned about paying for toll calls on a time basis as provided for under the interconnection agreement. Telecom refused to modify the agreement or negotiate. The impasse led Clear to withhold a proportion of payments due under the agreement making adjustments for the alleged anomalies. In response, Telecom sought a declaration that Clear had breached the agreement by withholding payment and judgment for the sum owing. Clear counterclaimed stating that the agreement contravened s 27; that to give effect to the agreement would breach s 27(2); that Telecom's demands under the agreement were a breach of s 36; and that Telecom's conduct breached an undertaking it gave to the government in 1988.

In the present case, Telecom sought to strike out Clear's three Commerce Act 1986 causes of action, arguing that the issues had already been resolved by the two agreements. While acknowledging the utility of compromise agreements and the existence of United States authority upholding competition law compromises, Fisher J said it is one thing to compromise rights and obligations that have already accrued and another to enter into an agreement that purports to govern future market conduct. His Honour distinguished the American cases as they concerned agreements to pay compensation for past competition law breaches. His Honour found that Clear was targeting Telecom's attempt to control post-contract conduct. Clear was not seeking to resile from the settlement of any past disputes. His Honour said the essence of Telecom's argument was that it was possible to contract out of s 27. Rejecting this argument, his Honour said:[16]

> Any attempt to contract out of the statutory prohibitions in s 27(1) would seem contrary to the express provisions of s 27, contrary to the implied purposes of the statute, and contrary to public policy.

14. *News Ltd v Australian Rugby Football League Ltd* (1996) 139 ALR 193, (1996) 64 FCR 410, (1996) ATPR 41-521 at 42-662.
15. *Telecom New Zealand Ltd v Clear Communications Ltd* (1997) 6 NZBLC 102,325.
16. *Telecom New Zealand Ltd v Clear Communications Ltd* (1997) 6 NZBLC 102,325 at 102,332.





Relying on Australian authority, his Honour said that, subject to the question of severance, a contract that contravenes s 27 is itself void. Further, the fact that Clear was a party to the agreement did not disqualify it as a plaintiff. There was no warrant for reading the remedy provisions (ss 81 and 82) so as to exclude parties to the impugned agreement. Nor was that possibility supported by anything in s 27. Finally, his Honour observed that the fact that s 89(2) would expressly authorise the Court to cancel the interconnection agreement did not derogate from the ordinary rule that a contract made in the face of a statutory prohibition is, subject to severance, void. Because of s 89(5), neither could the Court rescue the agreement under the Illegal Contracts Act 1970. His Honour dismissed Telecom's strike-out application. The Court of Appeal affirmed Fisher J's decision.[17]

## 3.4 Purpose

The prohibition will apply if a provision of an arrangement has the prohibited purpose or effect, or is likely to have the prohibited effect. A plaintiff needs to satisfy only one of these limbs. If a provision has the prohibited purpose, it does not matter that the purpose is not achieved, or is unachievable. Alternatively, if the provision has or is likely to have the prohibited effect, that suffices irrespective of whether it has the prohibited purpose or not.

The meaning and nature of "purpose" is a recurrent theme in the analysis of most of the restrictive trade practices provisions in Part 2 of the Act. For convenience, the commentary addresses the various issues associated with the purpose concept in the s 27 discussion. The reader should bear in mind that, for the most part, the purpose discussion below is equally relevant to the purpose tests employed in ss 29, 30 and 36.

### 3.4.1 The meaning of "purpose"

To date the most detailed discussion of the meaning of purpose under the Commerce Act is that of the High Court in *Union Shipping NZ Ltd v Port Nelson Ltd*:[18]

> The concept of anti-competitive "purpose" arises under both ss 27 and 36. Under the statutory definition in s 2(5) "purpose" is not confined to "sole purpose". Engaging in multi-purpose conduct which includes that anti-competitive purpose, will suffice as long as that anti-competitive purpose is "substantial". "Substantial" means "real or of substance". Like so many mental concepts, the reference to "purpose" has its difficulties. The word is not merely "intention". Intention to do an act, which is known will have anti-competitive consequences, in itself is not enough. "Purpose" implies object or aim. The requirement is that "the conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences".[19]

17. See *Telecom New Zealand Ltd v Clear Communications Ltd* CA206/97, 9 December 1997. For a critique of the case see Richard Dammery "Section 46 of the Trade Practices Act: The Need for Prospective Certainty" (1998) 6 CCLJ 246.
18. *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC) at 707.
19. JD Heydon *Trade Practices Law* (Law Book Co, Sydney, 1989) at [5-400].

### 3.4.2 Multiple purposes

Section 2(5)(a) overcomes the problems arising at common law concerning multiple purposes. It provides that a provision of a contract, arrangement or understanding shall be deemed to have had, or to have, a particular purpose if the provision was or is included in the contract for that purpose or purposes that included or include that purpose; and that purpose was or is a substantial one. Thus, the proscribed purpose need not be the sole or dominant purpose; it must, however, be a substantial purpose. Section 2(1A) defines "substantial" as "real or of substance". More than one substantial purpose is possible.

### 3.4.3 Subjective or objective test of purpose

There is some difference of judicial view in both Australia and New Zealand as to whether the test of purpose under the concerted provisions of the legislation (ss 27, 29 and 30) is objective or subjective or a mixture of the two. The same issue also arises under s 36. Under the concerted provisions one is concerned with the purpose of a provision in a contract, arrangement or understanding, whereas under s 36 the focus is on the purpose of a person that has a substantial degree of power in a market. However, this distinction should not alter the basic approach to purpose in the various sections of the Act. A non-uniform approach would result in confusion, as proceedings often involve claims under both s 36 and one or more of the concerted provisions.[20]

### 3.4.4 The Australian cases

Apart from two early cases favouring an objective approach to purpose,[21] the Australian authorities endorse a subjective approach.[22] The High Court of Australia's decision in *News Ltd v South Sydney District Rugby League Football Club Ltd*[23] has settled the issue in favour of a subjective interpretation.

In *News Ltd*, Gummow J highlighted the important role that s 4F (corresponding to s 2(5) of the Commerce Act) plays in the construction of the concerted provisions:[24]

> The operation of s 4F upon provisions stated to have a particular purpose is significant. The phrase "the provision was included in the contract ... for that purpose or for purposes that included or include that purpose" suggests that s 4F requires examination of the purposes of the individuals by whom

20. *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406, (1995) 5 NZBLC 103,762 at 103,774.
21. See *Trade Practices Commission v TNT Management Pty Ltd* (1985) 58 ALR 423, (1985) ATPR 40-512 at 46,136; *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 44 ALR 173, (1982) ATPR 40-315 at 43,898.
22. See, in particular, Toohey J's observations in *Hughes v WA Cricket Assoc (Inc)* (1986) 19 FCR 10 at 37 and 38, (1986) 69 ALR 660, (1986) ATPR 40-736; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 97 ALR 513 at 527.
23. *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 200 ALR 157, (2003) 215 CLR 563.
24. *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 200 ALR 157, (2003) 215 CLR 563 at [62] (footnotes omitted).





> the provision was included in the contract, arrangement or understanding in question. Moreover s 4F contemplates that a provision may be included in a contract, arrangement or understanding for a plurality of purposes and, in such circumstances, directs that the relevant purpose must be "substantial". This is a further indication that the Act requires examination of the purposes of individuals, the inevitable multiplicity of which may be contrasted with an examination of the "objective" purpose of an impugned provision. In this way, the introduction of a "substantial purpose" test avoids difficulties in discerning the relevant purpose of multiple parties to a contract, arrangement, understanding.

Justice McHugh expressed reservations about the subjective approach to purpose but was not prepared to depart from it given it had stood for 17 years, and the Full Court of the Federal Court had endorsed it.[25] Given the terms of s 4F, his Honour thought that s 4D was clearly open to the construction that "purpose" in both sections means the subjective purpose of the makers of the provision. His Honour opined that it was impossible to hold that the subjective interpretation was plainly wrong.

In his dissenting judgment, Kirby J said that for textual and policy reasons, a court should adopt an objective approach. In his Honour's view, the line of authority to the contrary was wrong. In *Rural Press Ltd v Australian Competition & Consumer Commission*,[26] Kirby J adhered to his opinion that an objective construction of s 4D was preferable but acknowledged that following *News Ltd* he was bound to accept the validity of the subjective approach.

Several Australian cases have endorsed the view that purpose in the context of s 46 of the Trade Practices Act 1974 (Cth) (corresponding to s 36 of the Commerce Act) is to be ascertained subjectively.[27] Contrary to this trend, however, the Full Federal Court in *General Newspapers Pty Ltd v Telstra Corp*[28] favoured an objective ascertainment of purpose in the s 46 context as the primary approach. According to the Full Court, if inferences from conduct or circumstances establish anti-competitive purpose, it is not a defence to say subjective purpose is otherwise. Subjective thinking, however, may cast light on what the transaction was designed to achieve. In their joint judgment, Davies and Einfeld JJ interpreted the High Court of Australia's comments

25. *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 200 ALR 157, (2003) 215 CLR 563 at [41].
26. *Rural Press Ltd v Australian Competition & Consumer Commission* (2003) 203 ALR 217, (2003) ATPR 41-965 at 47,601 and 47,602.
27. See *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd* (1990) 97 ALR 513 (Full Court); *Taprobane Tours WA Pty Ltd v Singapore Airlines Ltd* (1990) ATPR 41-054; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 106 ALR 297, (1992) ATPR 41-167 at 40,303 per Lockhart and Gummow JJ; *Dowling v Dalgety Australia Ltd* (1992) ATPR 41-165; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) ATPR 41-693 at 42,867–43, 868 per Sundberg J.
28. *General Newspapers Pty Ltd v Telstra Corp* (1993) ATPR 41-274 at 41,697 and 41,698.

in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[29] as stipulating that the ultimate test is an objective test.

### 3.4.5 The New Zealand cases

The New Zealand case law similarly reveals divergent views. Support for an objective test is found in the following authorities: *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd*;[30] *Tru Tone Ltd v Festival Records Retail Marketing Ltd*;[31] *Re Fisher & Paykel Ltd (No 2)*;[32] *Fisher & Paykel Ltd v Commerce Commission*;[33] *Union Shipping NZ Ltd v Port Nelson Ltd*;[34] *Commerce Commission v Ophthalmological Society of New Zealand Inc.*[35]

Support for a subjective test may be traced first to the judgment of Holland J in *Apple Fields Ltd v New Zealand Apple and Pear Marketing Board*.[36] At issue in *Apple Fields* was whether a second tier levy imposed by the Apple and Pear Marketing Board on new growers and existing growers expanding production breached ss 27, 29 and 36 of the Commerce Act. In respect of the s 27 claim Holland J held that while the levy did not have the requisite anti-competitive purpose its likely effect was to lessen competition substantially, thus breaching s 27. Holland J dismissed the ss 29 and 36 claims for lack of an anti-competitive purpose.

The Court of Appeal overturned the judgment of Holland J but determined the case on the basis that the levy was "specifically authorised" by the Apple and Pear Marketing Act 1971 and hence fell within the scope of the statutory exception in s 43 of the Commerce Act. On appeal, the Privy Council reversed the decision on the s 43 issue, restoring the decision at first instance that the levy was likely to have an anti-competitive effect.[37]

The interpretation of "purpose" was not directly in issue before the Court of Appeal, but Cooke P nonetheless disagreed with the findings of Holland J on the question of purpose. The approach of Cooke P in this context has subsequently been taken to be consistent with the objective approach.[38] In *Apple Fields*, Cooke P stated that the board, in imposing the levy, had set out

29. *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177.
30. *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC) at 662.
31. *Tru Tone Ltd v Festival Records Retail Marketing Ltd* (1988) 2 NZBLC 103,081 at 103,092.
32. *Re Fisher & Paykel Ltd (No 2)* (1989) 2 NZBLC (Com) 104,377.
33. *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC) at 740.
34. *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC).
35. *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC) at [118] and [119].
36. *Apple Fields Ltd v New Zealand Apple and Pear Marketing Board* (1989) 2 NZBLC 103,564 (HC).
37. *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 (PC).
38. See *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC) at 708.





to reduce the attraction to enter the industry or make new plantings and that the levy inevitably carried out a policy or purpose of restricting production. However well motivated, the levy had a substantial purpose of deterrence of entry.[39] Accordingly, Cooke P may well have found a breach of the purpose tests in ss 27, 29 and 36 had it not been for the s 43 exemption issue. In *New Zealand Milk Corp Ltd v McDonald*,[40] Cooke P reiterated the same approach in a case involving s 36.

With the exception of *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd*,[41] where Tipping J came out firmly in favour of the subjective test in the context of s 36, cases subsequent to *Apple Fields* support the objective test.[42] On appeal in the *Clear* case,[43] Cooke P and Gault J did not discuss purpose in any detail, but their application of the concept is consistent with the objective approach being the primary standard. The Privy Council in the same case acknowledged that "it is legitimate to infer 'purpose' from use of a dominant position producing an anti-competitive effect".[44] This has been interpreted as the adoption of the objective test: *Commerce Commission v Port Nelson Ltd*,[45] in which McGechan J pointed out that the approach of the Privy Council in *Clear* did not exclude taking subjective thinking into account. This was because the Privy Council relied on Telecom's internal memoranda which showed that it did in fact have an anti-competitive purpose.

The Court of Appeal in *Tui Foods Ltd v New Zealand Milk Corp Ltd* addressed the objective/subjective issue in the context of s 29. Cooke P said:[46]

> I am disposed to think that, if a purpose is discernible on the face of a contract or arrangement having regard to the express terms considered in the light of any relevant surrounding circumstances, such a purpose will qualify under the statute. That might be described as an objective approach. But it is at least conceivable that there may also be cases where, although the purpose is not so apparent, it can be shown by evidence dehors a contract or arrangement that the intention of the party who sought the inclusion of the relevant provision was of a kind falling within the prohibition in s 29, and it may be that in such a

39. *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158 (CA) at 162.
40. *New Zealand Milk Corp Ltd v McDonald* [1993] 2 NZLR 543 (CA). See also *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 (CA) at 147; *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1993) 4 NZBLC 103,340, (1993) 5 TCLR 413 (CA).
41. *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 at 762, (1990) 3 NZBLC 101,501 (HC)
42. See *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC); *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1992) 27 IPR 481, (1992) 5 TCLR 166 at 198.
43. *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1993) 4 NZBLC 103,340, (1993) 5 TCLR 413 (CA).
44. *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 402.
45. *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 at 103,775.
46. *Tui Foods Ltd v New Zealand Milk Corp Ltd* (1993) 5 TCLR 406 at 409, (1993) 4 NZBLC 103,335.

## 5.20 Exemption for Joint Buying and Promotion Agreements

The existing s 33 exemption for joint buying and promotion agreements has essentially been carried forward into new s 33 but amended to remove the uncertainty about the scope of "collectively acquired". More specifically s 33(c) ensures that where there is a collective negotiation of the price for goods or services, followed by individual purchasing at the collectively negotiated price, the joint agreement will not have the purpose, effect or likely effect of price-fixing (as defined in s 30A(2)). Further, s 33(d) provides for an intermediary to take title to goods and resell them or supply them to another party to the group without breaching the prohibition on price-fixing. The s 33 exemption is as follows:

> **33 Exemption for joint buying and promotion agreements**
>
> A provision in a contract, arrangement, or understanding does not have the purpose, effect, or likely effect of price-fixing (as defined in **section 30A(2)**) if the provision —
>
> (a) relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement, or understanding; or
>
> (b) provides for joint advertising of the price for the resupply of goods acquired in accordance with **paragraph (a)**; or
>
> (c) provides for a collective negotiation of the price for goods or services followed by individual purchasing at the collectively negotiated price; or
>
> (d) provides for an intermediary to take title to goods and resell or resupply them to another party to the contract, arrangement, or understanding.

Note the exemption is limited to price-fixing. It does not extend to the other types of cartel conduct in s 30A.

While parties who collectively acquire goods may agree on the advertised resale price, the exemption does not go so far as to permit agreement to resell at the advertised price.

## 5.21 Penalties for Civil and Criminal Breaches

The penalties for civil and criminal breaches of cartel conduct are discussed at [1.5] and following.



# CHAPTER 6

# Taking Advantage of Market Power

## 6.1 Section 36 of the Commerce Act

Broadly, the objective of s 36 of the Commerce Act 1986 is to prevent firms with substantial market power from engaging in illegitimate unilateral anti-competitive conduct. Section 36 is a necessary complement to other pt 2 prohibitions against cartel arrangements and vertical restrictions in that it is directed to ensure that the effects of such arrangements cannot be achieved individually by a person in a position of substantial market power. As a leading Australian text has noted:[1]

> There is little point in proscribing the fixing of prices at anti-competitive levels or the limiting of production by agreement between competitors if the purpose of achieving like results by one in a monopoly position (and hence, often, their achievement) is not controlled.

As originally enacted, s 36 of the Commerce Act 1986 performed the role of regulating the conduct of persons who occupied a dominant market position in New Zealand. The section was directed not to the creation and continued existence of such positions but to their use for certain proscribed anti-competitive purposes. That form of s 36 was modelled largely on art 86 of the Treaty of Rome (now art 102 of the Treaty on the Functioning of the European Union (TFEU)) and s 46 of the Trade Practices Act 1974 (Cth) (since 1 January 2011, known as the Competition and Consumer Act 2010). The section also had parallels with s 2 of the Sherman Act 1890 (US) in so far as that section applies to conduct.

With the enactment of the Commerce Amendment Act 2001, Parliament changed the s 36 threshold test from a "dominant position in a market" to "a substantial degree of power in a market". Since 1986 the latter test has been the threshold test in s 46 of the Trade Practices Act 1974 (Cth). The substantial market power test is a lower test than dominance and increases the number of market participants subject to the disciplines of the section. The Commerce Amendment Act 2001 also changed the second element of

1. JD Heydon *Trade Practices Law* (Law Book Co, Sydney, 1978) at 205.

s 36, replacing "use" (of a "dominant position") with "take advantage of" (a substantial degree of power in a market), thus aligning the wording with the current s 46 of the Competition and Consumer Act 2010 (Cth). This commentary refers to both sections as the misuse of market power provisions.

The impetus for changing the threshold test stemmed from the Court of Appeal's decision in *Telecom Corp of New Zealand Ltd v Commerce Commission*,[2] adopting a dictionary-based approach to dominance. A perception by officials that the Privy Council in *Telecom Corp of New Zealand Ltd v Clear Communications Ltd*[3] departed from the accepted interpretation of the meaning of "use", explains the adoption of the "taking advantage" wording.

The anti-competitive purposes of the misuse provisions, apart from the reversal in order of the proscribed purposes and the reversal of the terms "deterring" and "preventing", are the same in both the Australian and New Zealand statutes. The 2001 Amendment added a new s 36B to the Commerce Act 1986, empowering the courts to infer anti-competitive purpose from relevant conduct and circumstances. Section 36B appears to have been based on s 46(7) of the Trade Practices Act 1974 (Cth), inserted into the Australian legislation by the Trade Practices Revision Act 1986 (Cth).

Note that the Australian section has no exception similar to s 36(3) of the Commerce Act 1986 relating to the enforcement of statutory intellectual property rights.

Amendments to the Australian section in 2007 and 2008 have resulted in some important differences emerging between the Australian and New Zealand misuse regimes.

In 2007, the Australian Federal Parliament in response to populist pressure to protect small business competitors added a new s 46(1AA) to the s 46 framework. Section 46(1AA) prohibits corporations with a substantial share of a market, having regard to the number and size of its competitors in the market, from selling goods or services for a sustained period at a price below their relevant cost of supply. As with s 46(1), a corporation must act with an anti-competitive purpose. Because the new prohibition focuses on market share and does not contain a "taking advantage" element, it significantly extends the application of s 46 to below-cost pricing activity. The prohibition, known as the "Birdsville Amendment",[4] became law on 25 September 2007.

The Birdsville Amendment received heavy criticism, particularly for its employment of a "market share" test. In response, the Federal Government attempted to replace the "market share" concept with the orthodox market power standard used in s 46(1). The proposed amendment failed to pass the Senate. However, the government in the Trade Practices Legislation

2. *Telecom Corp of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA).
3. *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).
4. Section 46(1AA) is colloquially known as the "Birdsville Amendment" on account of it being sponsored by Queensland Nationals Senator, Barnaby Joyce who purportedly conceived it while at the Birdsville Hotel.





Amendment Act 2008 was successful in adding s 46(1AAA) to the scheme of s 46. The new provision states that a corporation may contravene s 46(1) even if the corporation cannot, and might not ever be able to, recoup losses incurred. Curiously, the new recoupment provision does not apply to the Birdsville Amendment.

The Trade Practices Legislation Amendment Act 2008 also added a new s 46(6A). The new provision attempts to clarify the "taking advantage" element by allowing the court to have regard to whether the corporation's conduct was:

(a) materially facilitated by its substantial degree of market power;
(b) engaged in, in reliance on its substantial degree of market power;
(c) likely to have been engaged in if the corporation lacked a substantial degree of market power; or
(d) otherwise related to its substantial degree of market power.

Factors (a) and (c) do little more than reflect current judicial approaches to the determination of taking advantage of a substantial degree of market power.[5] Factors (b) and (d), however, raise the interesting question of whether plaintiffs may now find it easier to establish the necessary connection between the conduct and the market power that courts require.

## 6.2 Statutory Prohibition

### 6.2.1 The current prohibition in s 36

Section 36(2) of the Commerce Act 1986 prohibits:

1. A person that has a substantial degree of power in a market;
2. From taking advantage of that power;
3. For the purpose of —
   (a) restricting the entry of a person into that or any other market;
   (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
   (c) eliminating a person from that or any other market.

For there to be a breach of s 36, all three elements have to be present.[6] The onus of proof is on the plaintiff to establish the three elements.[7] The standard of proof is the ordinary civil standard, namely the balance of probabilities.[8]

### 6.2.2 Person

Section 36 of the Commerce Act 1986 is addressed to "persons". Section 2(1) defines "person" as including "any association of persons

5. For a discussion on taking advantage, see [6.5] and following.
6. *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 402.
7. *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 at 743, (1990) 3 NZBLC 101,501 (HC).
8. *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358.

whether incorporated or not". This means that a person is not necessarily a legal entity. If only a separate legal entity could take advantage of a substantial degree of power in a market, commercial groups could easily evade s 36. The phrase "any association of persons" appears to encompass an association of persons operating as a single business unit or commercial entity. For example, an unincorporated joint venture would fall within the definition.

Trade and professional associations are obviously an "association of persons" and hence a person for s 36 purposes. The former s 3(8) definition of "a dominant position in a market" required the person in the alleged dominant position to be a supplier or an acquirer of goods or services. This limited the scope for the liability of trade associations under s 36, as such bodies normally do not supply or acquire goods themselves. The repeal of s 3(8) by the Commerce Amendment Act 2001 removed this limitation. Both suppliers and acquirers now fall within the purview of s 36(2), even though there is no express reference to persons acting in such capacities, in comparison to s 46(4)(c) of the Trade Practices Act 1974 (Cth). A person with a substantial degree of power in a market may be able to take advantage of that power either on the selling side or the buying side.[9]

In determining whether a person has a substantial degree of power in a market, s 36(4) of the Commerce Act 1986 allows for the aggregation of power held by two or more persons that are interconnected. However, in the absence of any interconnected body corporate link as defined in s 2(7) and (7A), aggregation is not permitted under s 36(4). Australian authority suggests that, in assessing whether an individual firm has a substantial degree of market power, it is legitimate to have regard not only to its individual power but to additional power that it has through agreements, arrangements or understandings with others.[10] The Trade Practices Legislation Amendment Act (No 1) 2007 inserted s 46(3A) to confirm this.

In a tightly oligopolistic market it is possible that more than one firm may have a substantial degree of power in a market. The Second Reading speeches accompanying the 1986 amendment to s 46 of the Trade Practices Act 1974 (Cth) indicate that one of the purposes of lowering the threshold was to extend the reach of s 46 so as to cover oligopoly markets where there are two or three firms of comparable size. In such circumstances, if the market is characterised by barriers to new entry, each firm may possess a substantial degree of market power.[11] The Trade Practices Legislation Amendment Act (No 1) 2007 (Cth) resolved any lingering doubt concerning this issue by inserting a new s 46(3D) which provides:

9. See *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) ATPR 41-935 at 47,027.
10. See *Dowling v Dalgety Australia Ltd* (1992) ATPR 41-165 at 40,247; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 106 ALR 297, (1992) ATPR 41-167 at 40,299.
11. Stephen Corones *Competition Law in Australia* (5th ed, Lawbook Co, Pyrmont, 2010) at [2.240].





> To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.

### 6.2.3 Correct approach to interpreting the statutory prohibition

In several decisions, the High Court of Australia has ruled that the proper approach to the construction of s 46(1) of the Trade Practices Act 1974 (Cth) (corresponding to s 36(2) of the Commerce Act 1986) is a sequential approach.

In *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition & Consumer Commission*, Gaudron, Gummow and Hayne JJ said:[12]

> [A]s s 46 is framed and has been interpreted in this Court, what is required first is an assessment of whether the firm in question possessed a substantial degree of market power, having regard to considerations such as those referred to by Heerey J [the *Boral* trial judge] and, if so, then asking whether the firm has taken advantage of that power for a proscribed purpose and in that way abused the power.

McHugh J in his judgment in *Boral* also identified the issues relevant to the construction of s 46(1). His Honour stated:[13]

> Section 46 of the Act poses four issues for determination. First, the court must identify the relevant market in which the conduct occurred. Second, the court must determine whether the alleged offender had a substantial degree of market power. Third, the court must determine whether the alleged offender has taken advantage of that market power. Finally, the alleged offender must have engaged in the conduct for one of the proscribed purposes. This is the way in which s 46 is structured, and that is the way courts should apply it.

McHugh J also stressed the importance of keeping the legislative object of the section in mind:[14]

> When a court applies the provisions of s 46 it must do so with the legislative object of the section in mind. While conduct must be examined by its effect on the competitive process, it is the flow-on result that is the key — the effect on consumers, not the effect on other competitors. Competition policy suggests that it is only when consumers will suffer as a result of the practices of a business firm that s 46 is likely to require courts to intervene and deal with conduct of that firm. As Mason CJ and Wilson J pointed out in *Queensland Wire*:[15]
>
> > [T]he object of s 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to an end.

The sequential approach to the construction of the prohibition guards against the danger of proceeding too quickly from a finding of purpose to a

12. *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition & Consumer Commission* (2003) 195 ALR 609, (2003) ATPR 41-915 at [184].
13. *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition & Consumer Commission* (2003) 195 ALR 609, (2003) ATPR 41-915 at [264].
14. *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition & Consumer Commission* (2003) 195 ALR 609, (2003) ATPR 41-915 at [261].
15. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177 at 191.

conclusion about taking advantage. The High Court of Australia in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* warned of this danger.[16]

Members of the High Court in *Boral* observed that the Full Federal Court in that case had made the same error as the Full Federal Court in *Melway*. Glesson CJ and Callinan J commented:[17]

> To a substantial extent, the reasoning of the Full Court appears to have been affected by an error of the same kind as was corrected by this Court in *Melway*. The Full Court began with the purpose of eliminating or damaging a competitor and reasoned inferentially from that.

McHugh J agreed, stating:[18]

> In my opinion, the Full Court erred in finding that BBM had breached s 46. Its error was the result of placing too great an emphasis on BBM's purpose of removing competitors and its desire of holding or increasing its market share and raising prices to profitable levels.

These statements illustrate that any analysis of s 36 beginning with purpose or intent is likely to be flawed.

It is likely that defendant appellants will be quick to argue that lower courts have made the same error as the Full Court did in *Melway* and *Boral*. However, the High Court of Australia in *NT Power Generation Pty Ltd v Power and Water Authority* showed it would not entertain such arguments if it was clear that the lower courts had followed the proper sequential approach.[19] There, the High Court rejected the respondent's submission that the trial judge's conclusion was vitiated by the error of inferring too quickly an exercise of market power from a proscribed purpose. The Court said the findings of the trial judge on market power, and exercise of that power, were carried out earlier than, and quite independently of, his findings about purpose.

The High Court of Australia is not alone in warning of the danger of reasoning backwards from the presence of an anti-competitive purpose. The Privy Council majority in *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* said that it was left with the "strong impression" that the trial judge, Williams J, in his predatory pricing analysis overlooked the warning which the Board gave in *Telecom Corp of New Zealand Ltd v Clear Communications Ltd*[20] that, while it is legitimate to infer "purpose" from use of a dominant position producing an anti-competitive effect, it may be dangerous to argue the converse that because the anti-competitive purpose was present, therefore there was use of a dominant position.[21] The Privy Council

16. *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) ATPR 41-805 at [31].
17. *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition & Consumer Commission* (2003) 195 ALR 609, (2003) ATPR 41-915 at [141].
18. *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australian Competition & Consumer Commission* (2003) 195 ALR 609, (2003) ATPR 41-915 at [263].
19. *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 210 ALR 312, (2004) ATPR 42-021 at [139].
20. *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) at 402.
21. *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2004] UKPC 37, [2006] 1 NZLR 145 at [40].





said that Williams J drew the inference simply from the fact that Carter Holt was in a dominant position because of its relationships with distributors, that its purpose was a proscribed purpose and that it had "used" its dominant position for that purpose. Earlier in their judgment, the Privy Council majority said that it would have been better if Williams J had dealt with the issues of use and of purpose separately, and if he had dealt with them in the order in which these issues were mentioned in s 36 of the Commerce Act 1986.[22]

## 6.3 Relevant Market

### 6.3.1 Identification of the relevant market

Defining the relevant market is the first step in determining whether a firm has contravened s 36 of the Commerce Act 1986. The delineation of the relevant market is important because it is only by reference to the supply or acquisition of some description of goods or services that a court can assess the respondent's market power.

The reader is referred to Chapter 2 for a detailed discussion of the market concept. What follows are some principles and applications that are of particular relevance in the s 36 context.

### 6.3.2 *Queensland Wire* guiding principles

In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*,[23] various members of the High Court of Australia made a number of important statements of general principle concerning market definition.

In a joint judgment, Mason CJ and Wilson J emphasised the interrelatedness of the concepts of market and market power:[24]

> The analysis of a s 46 [of the Trade Practices Act 1974 (Cth)] claim necessarily begins with a description of the market in which the defendant is thought to have a substantial degree of power. In identifying the relevant market it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated.

Deane J spoke of the need to keep in mind the actual conduct alleged when defining the market:[25]

> In the case of an alleged contravention of the provisions of s 46(1) [of the Trade Practices Act 1974 (Cth)] there will ordinarily be little point in attempting to define relevant markets without first identifying precisely what it is that is said to have been done in contravention of the section.

22. *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2004] UKPC 37, [2006] 1 NZLR 145 at [26].
23. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177.
24. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177 at 187.
25. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177 at 195.

His Honour, noting the limited guidance concerning the market concept in the Trade Practices Act 1974 (Cth) itself, commented:[26]

> That is not surprising since the word is not susceptible of precise comprehensive definition when used as an abstract noun in an economic context. The most that can be said is that "market" should, in the context of the Act, be understood in the sense of an area of potential close competition, in particular goods and/or services and their substitutes.

Dawson J emphasised the importance of both demand and supply side substitutability in determining the ambit of the market:[27]

> In setting the limits of a market the emphasis has historically been placed upon what is referred to as the "demand side" but more recently the "supply side" has also come to be regarded as significant. The basic test involves the ascertainment of the cross-elasticities of both supply and demand, that is to say, the extent to which the supply of or demand for a product for a product responds to a change in the price of another product. Cross-elasticities of supply and demand reveal the degree to which one product may be substituted for another, an important consideration in any definition of a market.

### 6.3.3 Potential for dealings sufficient

In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*,[28] the issue arose as to whether there could be a market for a product even though all sales of the product were internal transactions between a parent company and its downstream subsidiary. Deane J said that it would be unreal to completely disregard the distinction between the parent and its subsidiary for the purposes of market definition. But even if one ignored the distinction, his Honour thought that the evidence established a local market for the product in question even though there had been no local arm's length sales. His Honour reasoned:[29]

> [A] market can exist if there be the potential for close competition even though none in fact exists. A market will continue to exist even though dealings in it be temporarily dormant and suspended … [and even if] there is no supplier of, nor trade in, … goods at a given time — because, for example, one party is unwilling to enter any transaction at the price or on the conditions set by the other.

In a similar vein, Toohey J said:[30]

> It would be a curious consequence if the offerings by BHP of a limited supply of [a particular steel product known as] Y-bar established a market for that product but the withholding of supply altogether meant that there was no market.

26. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177 at 195.
27. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177 at 199.
28. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177.
29. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177 at 196.
30. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177 at 211 and 212.





Dawson J, the third judge who commented on the issue, cautioned against too inflexible an approach:[31]

> Too rigid an approach in defining a market is apt to lead to unrealistic results. In this case the submission was made that Australian Wire Industries (AWI) and The Broken Hill Proprietary Co Ltd (BHP) being treated as one, there was no market for Y-bar. But the existence or non-existence of sales of a product cannot conclude whether a market exists or not. It must be sufficient to constitute a market that there is a product for exchange, regardless of whether exchange or negotiation has actually taken place.

The High Court of Australia revisited the issue under discussion in *NT Power Generation Pty Ltd v Power and Water Authority*.[32] There, a statutory authority (PAWA) declined to make access to its infrastructure available to a potential competitor (NT Power). The majority of the High Court held that the fact that PAWA had never supplied infrastructure services to anybody in the past, and was never directed by the relevant Minister to do so, did not mean that a market in transmission and distribution services did not exist. The majority ruled it was sufficient that there was potential for dealings in transmission and distribution as NT Power was willing to acquire them and PAWA abstained from providing them. Thus, a market could exist. The majority said that even if the observations of the three justices in *Queensland Wire* were dicta, the dicta should be followed.

## 6.4 Substantial Degree of Power in a Market

### 6.4.1 Meaning of "substantial"

The question arises as to how much market power is "substantial" for the purposes of s 36 of the Commerce Act 1986. The s 2(1A) definition of "substantial" as meaning "real or of substance" is of no assistance as the definition does not apply for the purposes of s 36 or s 36A.

Given the legislative intention to align the New Zealand threshold test with the Australian test, some guidance may be gleaned from the parliamentary materials accompanying the Trade Practices Revision Act 1986 (Cth), which, inter alia, enacted the current Australian test. Paragraph 41 of the Explanatory Memorandum accompanying the Trade Practices Revision Act 1986 (Cth) stated that in the context of s 46(1) the word "substantial" is intended to signify "large or weighty" or "considerable, solid or big".

In *Eastern Express Pty Ltd v General Newspapers Pty Ltd*, Lockhart and Gummow JJ adopted the Explanatory Memorandum's interpretation of "substantial":[33]

> For a corporation to have a substantial degree of market power it must have a considerable or large degree of such power. The difficulty lies not in defining

31. *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577, (1989) 167 CLR 177 at 200.
32. *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 210 ALR 312, (2004) ATPR 42-021.
33. *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 106 ALR 297, (1992) ATPR 41-167 at 40,300.