Antitrust Policy in New Zealand: The Beginning of a New Era

Rex J. Ahdar

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Antitrust Policy In New Zealand: The Beginning of a New Era

by

Rex J. Ahdar†


The author first provides a brief history of New Zealand antitrust law before 1986. He discusses the policy debates behind the enactment of the Commerce Act of 1986 and its reform in the Commerce Amendment Act of 1990. The author then outlines the scope of the Act and discusses its principal prohibitions. The author analyzes the New Zealand courts' construction of the Act in light of the policy issues that prompted its enactment and reform, and discusses the resulting implications for the future of antitrust in New Zealand. Finally, the author provides in depth illustrations of the New Zealand courts' reasoning in two cases in which the courts construed major provisions of the Act.

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I.

INTRODUCTION

Competition law and policy conjure up very little in the minds of most New Zealand lawyers. Some, over the years, have heard of the U.S. antitrust laws. Yet these seemed a peculiarly American institution, tailor-made for that great bastion of free enterprise but not readily transportable elsewhere. New Zealand, by contrast, was the archetypal welfare state: a small, heavily-regulated economy in the South Pacific.

Much has changed of late, however. The fourth Labour Government's systematic program of economic liberalization was the catalyst for widespread changes in virtually every area of life in New Zealand. Law, and in particular competition law, was no exception.
Although New Zealand has had competition laws for almost as long as the United States, the prevailing economic and social climate during the greater part of this century caused the New Zealand laws to languish. However, a virtual revolution in economic thinking in the 1980s, inspired by the Labour administration of 1984, has resurrected New Zealand competition law from its dormant, if not moribund, state. New Zealand now has a modern, robust, antitrust regime—the Commerce Act of 1986. The late 1980s can be characterized as the renaissance in New Zealand competition law.

Every renaissance follows a period of decline. A brief digression into New Zealand's checkered antitrust history helps us to appreciate better the new era ushered in by the Commerce Act of 1986.

A. The Early Years

Legislation specifically addressing monopolies first appeared in New Zealand at the turn of this century, with the Monopoly Prevention Act of 1908. Despite its title, this Act was not a comprehensive antitrust statute. It simply envisaged various trade remedies, such as the removal of customs duties, in areas where customers were concerned about the dumping of foreign agricultural implements or high prices for staple foodstuffs. The Monopoly Prevention Act suffered from its narrow product range and was rapidly submerged in the successive direct controls which followed.

The first antitrust statute worthy of the name was the Commercial Trusts Act of 1910. Resembling the American Sherman Act of 1890, this legislation had as its purpose “the repression of monopolies in trade and commerce.” The parliamentary debates concerning the Commercial Trusts Bill are replete with warnings of the “trust” problem in America and the dangers of such replication in New Zealand. Distrust of foreign monopolies, especially overseas oil companies, was a primary concern.

The Commercial Trusts Act imposed criminal sanctions for a wide range of offenses such as exclusive dealing, boycotts, and participation in a conspiracy to fix prices contrary to the public interest. Early litigation under the Act boded well for a vigorous antitrust policy. Heavy fines were imposed in the first major case, *Merchants Ass'n of New Zealand, Inc. v. The King*, where
the Colonial Sugar Company, the sole New Zealand manufacturer of refined sugar, and a merchants association conspired to maintain the price of sugar. The price maintenance had the effect of preventing merchants that did not belong to the association from entering the New Zealand sugar market. The Court of Appeal unanimously held this to be in breach of the Act, because the conspiracy to monopolize or control the demand or supply of sugar was "of such a nature as to be contrary to the public interest."\(^\text{10}\) The court did not find in this case any of the possible justifications for a monopoly arrangement, such as a need to secure "efficient and economical distribution" or the desire to prevent the "destruction . . . of an important local industry," that might have constituted a defense.\(^\text{11}\)

A decade later, however, antitrust was dealt a death blow by a decision that went all the way to the Privy Council (New Zealand's highest tribunal). In *Crown Milling Co. v. The King*,\(^\text{12}\) the defendants, Crown Milling of Dunedin and three other flour millers, formed a distribution company to act as the sole sales agent for flour. Mill owners entered into agreements with the company not to sell directly to the public. The company undertook to sell each month a proportionate quantity of each mill owner's output, the quantity calculated in accordance with a fixed scheme. The agreement contained provisions for determining the current price at which flour was to be sold through the sole agent.\(^\text{13}\) The defendants admitted that the combined effect of these agreements with the distributor had been the partial monopolization of the supply of flour in New Zealand and the control of the price of flour.\(^\text{14}\) The question then became whether this monopoly was contrary to the public interest in terms of the Commercial Trusts Act.

As Viscount Findlay for the Privy Council remarked at the outset, there had been a "singular difference of judicial opinion in this case."\(^\text{15}\) At first instance Justice Sim held the Crown had failed to establish its case.\(^\text{16}\) A benign purpose for this arrangement was accepted—stabilizing an industry otherwise subject to expensive, unrestrained competition. On appeal the Court of Appeal, by a bare majority of three judges to two, reversed the judgment of the Supreme Court.\(^\text{17}\) Chief Justice Stout, in one of the three separate majority judgments, observed:

It cannot . . . be said that this contract was not of a nature to be contrary to the public interest. First, Distributors, Ltd. [the sole distributor] had the power of fixing the price; second, it had the power of fixing the amount of production, and . . . it had the power of declaring that flour produced in New Zealand must

\(^{10}\) Id. at 1265.
\(^{11}\) Id. at 1268.
\(^{12}\) 1927 App. Cas. 394 (N.Z.).
\(^{13}\) Id. at 398-99.
\(^{14}\) Id. at 395.
\(^{15}\) Id. at 399.


be exported. . . . It is surely not necessary to show that the monopoly and control of food and its price are contrary to the public interest.\(^\text{18}\)

However, two members of the court were not so convinced, impressed instead by the defendants' claims of worthwhile stabilization and not unreasonable prices.\(^\text{19}\)

In a typically succinct judgment, the Privy Council upheld the defendants' appeal restoring Justice Sim's first instance judgment. Resolution of the issue turned upon the onus of proof and its discharge. The Court asked, "Has the prosecution established that on the facts of this particular case the monopoly or control was of a nature contrary to the public interest?"\(^\text{20}\)

Since the Commercial Trusts Act established criminal liability for contravention, the burden of proof applied "with special force" to the Crown.\(^\text{21}\)

Quite simply, the Crown had failed to discharge that burden.

Apart from setting a severe hurdle to successful enforcement of the Act, the Crown Milling case is now best remembered for the infamous dictum of Viscount Findlay: "It is not for this tribunal nor for any tribunal to adjudicate as between conflicting theories of political economy."\(^\text{22}\)

While Crown Milling need not necessarily have been a millstone around the neck of antitrust policy—for example, Parliament could have passed an amendment to the Commercial Trusts Act\(^\text{23}\)—social and economic factors pushed competition law into a period of decline.

B. "The Dark Ages"

American antitrust scholar, Corwin Edwards, summarized the next era of antitrust policy in New Zealand:

With the depression of the 1930's government policy turned away from efforts to curb restrictive arrangements. The change took three forms: a) failure to take action under the existing laws; b) amendment of the laws to reduce their field of application; c) extension of control by both public and private bodies, supported by new legislation.\(^\text{24}\)

With the next series of regulatory legislation—the Board of Trade Act of 1919,\(^\text{25}\) the Prevention of Profiteering Act of 1936,\(^\text{26}\) and the Control of Prices Act of 1947\(^\text{27}\)—the government moved away from a broad antitrust policy to the use of direct regulation as a means to deal with monopoly problems. For example, alleged cartel behavior by the international petrol companies in New Zealand was addressed by enacting the Motor Spirits

\(^{18}\) Id. at 789-91.
\(^{19}\) Id. at 793, 829 (Herdman, J. and Alpers, J., dissenting).
\(^{20}\) 1927 App. Cas. at 405-06.
\(^{21}\) Id. at 402.
\(^{22}\) Id.
\(^{23}\) See Donaldson, supra note 2, at 13.
\(^{24}\) EDWARDS, supra note 2, at 592-93.
\(^{25}\) Board of Trade Act, 1919, N.Z. Stat. 15.
\(^{27}\) Control of Prices Act, 1947, N.Z. Stat. 51.
The period of decline arguably reached its end by the late 1950s, when the National Government enacted the Trade Practices Act of 1958. Price control was not abandoned. Instead, the Act introduced new provisions designed to prohibit trade practices deemed contrary to the "public interest." The 1958 Act was modeled on the U.K. legislation (the Restrictive Trade Practices Act of 1956) and created various administrative officials whose tasks were to maintain a public register, investigate, and report on trade practices. Inquiries might thereafter follow, with court orders being the ultimate sanction. This cumbersome, bureaucratic system with its touchstone, the amorphous "public interest" standard, provoked dissatisfaction at the time. Various piecemeal efforts at reform followed in subsequent years.

A completely revised Act was passed in the mid 1970s—the Commerce Act of 1975—yet, philosophically, little had changed. Mergers and takeovers were, for the first time, proscribed in an antitrust statute. However, the public interest standard still prevailed, and enforcement remained the exclusive prerogative of the relevant public officials. Meanwhile, direct regulation in the guise of systematic price control continued unabated. Hunter M. Donaldson commented:

"It is essential to any understanding of New Zealand's competition policy in the 1970s to appreciate that it operated in the shadow of a continuous programme of price stabilisation measures which were directed at attacking an increasing rate of inflation by detailed prescriptive regulation. . . . Administratively, most price control and all trade practices investigative work was operated in parallel within the same division of the Department of Trade and Industry, with much of the available resource centred on price control."

An attempt by the Department of Trade and Industry to introduce a regime with a clear focus on competition foundered in 1982. In the early 1980s, few lawyers, judges, academics, economists, or policy-makers gave serious thought to competition law. Beyond a rare inquiry by the Examiner of Commercial Practices, the subject generated negligible interest. At the risk of making a colorful over-simplification, New Zealand competition law was still in the "dark ages."

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29. See Donaldson, supra note 2, at 14.
31. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, ch. 68 (Eng.).
32. Namely, the Commissioner (later Examiner) of Trade Practices and Prices, and other officers of the Trade Practices and Prices Commission.
33. See Edwards, supra note 2, at 637.
36. See Donaldson, supra note 2, at 18-19.
37. See id. at 21.
II.
THE MODERN ERA: THE COMMERCE ACT OF 1986

A. Rationale

The reasons behind the enactment of the Commerce Act of 1986 on April 28, 1986 by the Labour Government were threefold.

First and foremost, the Act must be set against the background of some quite momentous changes in economic thinking in New Zealand. The landslide victory of the Labour Party in 1984 ushered in a "revolution in economic theory" that, in marked contradistinction to earlier government policies of both major parties, emphasized liberalization, deregulation, and more markets. This strategy was to be quickly dubbed "Rogernomics" after the (then) Minister of Finance, Roger Douglas. The government believed that an effective competition policy would play an integral role in the strategy. The Minister of Trade and Industry, during the introduction to the Commerce Bill, began by stressing that:

The Bill represents a key part of the Government’s policy to improve the performance of the economy and to restore and maintain long term growth. . . . As its long title states, the purpose of the Bill is to promote competition in New Zealand markets. By doing so the Bill will ensure that, as New Zealand moves away from Government regulation of markets, that position will not be replaced by anticompetitive behaviour by individual companies or groups of traders.

Renewed faith in the efficacy of markets and an expanded private sector was tempered by the sober recognition of a fact of economic life. With controls lifted, private regulation might simply emerge to replace governmental regulation. A strong competition law was thus required.


That is not to say, however,

41. Hon. David Caygill, N.Z. PARL. DEB. (HANSARD) 4681 (June 11, 1985). (The long title of the Act is “To promote competition in markets in New Zealand.”)
that the adoption was in toto. The Commerce Act of 1986 is an imperfect mirror of the Trade Practices Act, and the key differences between the two have been carefully noted. In 1988, a review of the CER Treaty was conducted by the two governments. This led to an acceleration of the objective of completely free trade by five years—the abolition of trade barriers would be accomplished by mid-1990 instead of mid-1995.

The third major impetus behind the 1986 Commerce Act was a widely held disenchantment with the complex and cumbersome Commerce Act of 1975 which, as noted earlier, had been modelled on the U.K. legislation. There was clearly a need for "more effective measures to combat restrictive trade practices and... more effective mechanisms for complainants to resolve business grievances." The Australian legislation was invoked as the most desirable model, not just because it satisfied the harmonization objective, but also because it appealed as a robust antitrust regime.

B. Reform

Surprisingly, perhaps, steps to reform the Commerce Act began just two years after its passage. In 1988, the Minister of Trade and Industry initiated a review of the legislation. The motivation was less a response to perceived inadequacies of the Act than the honoring of a commitment to review the legislation after it had been in operation for two years. The Department of Trade and Industry published a comprehensive discussion paper outlining a number of changes: institutional, procedural, and substantive. The Department's paper drew a healthy number of submissions from legal firms, professional bodies, large corporations, and academics. Soon after, the Department, now transformed into the Ministry of Commerce, produced a second paper which synthesized the submissions and refined the earlier recommendations.

45. For example, there are no provisions explicitly addressing exclusive dealing, secondary boycotts, or price discrimination in the New Zealand Act. See, e.g., Tony Dellow and John Feil, Competition Law and Trans-Tasman Trade, in Competition Law and Policy in New Zealand, supra note 2, at 28-35.

46. See id. at 26.

47. Kerrin M. Vautier, Competition Policy and Competition Law in New Zealand, in Bollard and Buckle, supra note 39, at 53-55.


50. The particular proposals suggested will be discussed as the article proceeds.


52. Id.
The Commerce Law Reform Bill\textsuperscript{53} was thereafter introduced on December 12, 1989. The Bill embraced amendments to the Fair Trading Act of 1986\textsuperscript{54} and the Dumping and Countervailing Duties Act of 1988\textsuperscript{55} as well as to the Commerce Act. Some features of the Bill were:

- Streamlining of the merger regime to reduce delays,
- Provision for authorization of resale price maintenance,
- Elimination of the jurisdictional step in restrictive trade practice authorizations,
- Extension of the misuse of dominance prohibition to trans-Tasman enterprises as a complement to the abolition of anti-dumping measures,
- Extension of the extraterritorial operation of the Act,
- Restriction in the exemption providing for intellectual property rights,
- Revised definition of "market,"
- Increased pecuniary penalties, and
- Exemptions for so-called "bare transfers of monopoly."\textsuperscript{56}

Most of the proposed amendments were accepted as contained in the original Bill. However, a shock was in store for those who had followed the reform efforts when the Bill was reported back from the Commerce and Marketing Select Committee on June 21, 1990. Instead of the suggested streamlining of the existing merger regime, the long-standing mandatory pre-notification scheme for mergers and takeovers had been abandoned in favor of the Australian "strike down" model. More will be said on this later, but it is enough to note here that the eleventh hour change drew justifiable criticism that such a major change in competition policy should occur in this fashion. The Chairman of the Commerce Commission, Dr. Susan Lojkine, felt incensed enough to publicly criticize the changes: "It is disappointing, even deplorable, that such a far reaching change in competition law can be implemented at the last moment in the review process, in the privacy of select committee proceedings, without any opportunity for public scrutiny and debate."\textsuperscript{57}

Notwithstanding such criticism, the Bill was enacted on June 29, becoming, inter alia, the Commerce Amendment Act of 1990\textsuperscript{58}. The changes, apart from mergers, came into force immediately on July 1, 1990. The altered merger regime commenced six months later, thereby allowing a transitional period.

\footnotesize
\textsuperscript{53.} Commerce Law Reform Bill, 1989 (no public law number).
\textsuperscript{56.} Commerce Law Reform Bill, 1989.
\textsuperscript{57.} Takeover Change Deplorable, Lojkine Says, Otago Daily Times, June 25, 1990, at —.
\textsuperscript{58.} Commerce Amendment Act, 1990, N.Z. Stat. 84.
C. Enforcement

The Commerce Act continues the tradition of public enforcement. Significantly, it also introduces a private right of action.

1. Public Enforcement: The Commerce Commission

The five member Commerce Commission, currently led by Dr. Susan Lojkin, has, as its primary functions, the investigation of alleged breaches and the commencement of enforcement proceedings in the High Court for contraventions of the Act. Apart from injunctions, the Commission alone may seek "pecuniary penalties" of up to $500,000 against individuals and five million dollars against corporations infringing the Act. The Commission also has a decision-making function insofar as it must determine applications for immunity or authorizations from certain statutory proscriptions. Finally, the Commission under section 25 has a wide-ranging education function with regular publications, publicity programs, and press releases.

In the first year or so of the 1986 Act, the Commission was at pains to cooperate with the business community and espoused an "open door" policy. This informal assistance was highlighted by the practice of issuing "letters of comfort" to worried enterprises. In truth, these letters were something of a misnomer since the Commission's opinion was not binding in court. Not surprisingly, the procedure has been rarely invoked.

The Commission is independent of government in both its enforcement and decision-making roles, except that the Act makes a limited provision for formal communication of government economic policy. Section 26(1) states: "In the exercise of its powers under this Act, the Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister."

In Re New Zealand Kiwifruit Exporters Ass'n, the Commission made it clear that section 26 in no way compromises the Commission's independence. The section merely requires the Commission to "have regard to"...
transmitted policy statements, not to adhere blindly to them.\textsuperscript{68} The section has been virtually ignored in practice. Despite many obvious opportunities—sales of Crown assets or restructuring of key industries—the government has not invoked section 26. Perhaps the requirement in section 26(2), that the Ministerial statement be published in the \textit{Gazette} and laid before Parliament, acts as a disincentive to invoking this section.

The decidedly lenient stance of the Commission in the early years sensibly yielded to a more vigilant enforcement role as the 1980s closed. This was highlighted by the major prosecution against Brierley, Winstone, and Fletcher Challenge in 1989\textsuperscript{69} which, unfortunately for the Commission, resulted in a Pyrrhic victory against the contravening companies.\textsuperscript{70} Adverse comments by Justice McGechan in that case, concerning delays by the Commission in taking action, highlight the difficulties in public enforcement generally. Despite a support staff of seventy-three people,\textsuperscript{71} arguably the Commission is still under-resourced.

The Commission's enforcement task is made more difficult by the requirement that it must make a guarantee as to any damages that might be sustained before an interim injunction will be issued by the High Court.\textsuperscript{72} This has naturally been a source of contention on the Commission's part. The Commission argued in its 1988 Annual Report that this seemed "an inappropriate requirement where the Commission is acting as a public enforcement agency."\textsuperscript{73} It sought an exemption similar to that enjoyed by the Australian Trade Practices Commission.\textsuperscript{74} The 1990 amendments, however, brought no change in this regard.

Overall, the Commission's enforcement record is slight, even allowing for the small number of years the Act has been in existence. In the merger field, the case involving Brierley and Winstone was a notable setback. As to restrictive trade practices enforcement, priority has been given to the per se contraventions—sections 30 and 37.\textsuperscript{75} The first two decisions in this area were most unpromising.

In \textit{Commerce Commission v. Otago & Southland Vegetable and Produce Growers' Ass'n},\textsuperscript{76} the defendant retailers admitted contravening section 30 of

\begin{footnotes}
\item[68.] \textit{Id.} at 104,494.
\item[69.] \textit{Commerce Comm'n v. Fletcher Challenge, Ltd.} [1989] 2 N.Z.L.R. 554 (an action by the Commission against Fletcher Challenge, Brierley, and Winstone alleging that they had implemented a "merger or takeover proposal" before gaining clearance as required by section 50 of the Act as it then stood).
\item[70.] \textit{See} James A. Farmer, \textit{Competition Law}, 1989 N.Z. \textit{RECENT L. REV.} 209, 215 (the Commission succeeded in securing a declaration that the merger proponents were in contravention of the Act, but failed to obtain injunctive or divestiture relief).
\item[71.] As of June 30, 1990. It should be noted that the Commission must also devote resources to enforce the \textit{Fair Trading Act} of 1986.
\item[73.] \textit{COMMERCE COMMISSION ANNUAL REPORT} 1988 24 (Mar. 31, 1988).
\item[74.] \textit{Trade Practices Act}, 1974, § 80(6) (Austl.).
\item[75.] \textit{COMMERCE COMMISSION ANNUAL REPORT} 1989 14 (Mar. 31, 1989).
\item[76.] M 56/89, (H.C. Dunedin, July 17, 1990) (Holland, J.).
\end{footnotes}
the Act—the per se ban on horizontal price fixing. Under pressure from the vegetable and fruit growers, the retailers were virtually forced to agree to a fixed additional price for containers of produce. They reluctantly succumbed to price fixing in the face of a potential boycott by growers. The Commission sought to bring a stop to the practice. Justice Holland made a number of observations that this was new legislation, that the present case turned very much on its own peculiar facts, and that it should not be regarded as setting any sort of standard for the future. With that in mind, the justice viewed the present defendants’ conduct with “considerable sympathy” and imposed a nominal pecuniary penalty of five dollars per defendant. The case was certainly an unfortunate one for the Commission to have chosen as a signal to the commercial community that “the Commerce Act had teeth!” Moreover, the comment by Justice Holland, that “[t]his [wa]s not a criminal charge but it [wa]s so close to it that I consider that the same principles should apply,” does not bode well for successful future actions.

In the second case, Commerce Commission v. Wellington Branch of New Zealand Institute of Driving Instructors, the Commission sought pecuniary penalties for an alleged arrangement among Wellington driving instructors to fix the hourly fee for tuition. The action foundered, however, because the plaintiffs were unable to establish that an “arrangement or understanding” had been entered into. Justice Jeffries’ reasoning on the pivotal issue of collusion will be discussed later.

A third and more promising case, however, is Commerce Commission v. Herberts Bakery, Ltd. There, the defendant bakery conceded liability under the resale price maintenance prohibitions of the Act. Justice Fisher commented on the “danger that in a commercial environment, low penalties may constitute a financially acceptable risk.” Notwithstanding the defendant’s cooperative attitude at trial, he fixed a penalty of $5,000.

2. Private Enforcement

As noted above, a novel feature of the Commerce Act of 1986 is the introduction of a private right of action. Private individuals for the first time may seek injunctions and/or damages through the High Court for alleged

77. Id. at 9.
78. Id.
79. Id. at 10.
80. Id.
81. Id. at 11.
82. Id.
83. Id. at 9.
85. Id. at 563-64.
86. See infra notes 204-05 and accompanying text.
88. Id. at 730.
89. Id. at 731.
contraventions of part II of the Act (restrictive trade practices) and, since 1990, part III of the Act (the merger provisions). There is no private enforcement available with respect to breaches of the price control provisions in part IV, however. These remain the exclusive preserve of the Commission.

After a spate of interim injunction applications in the first year of the Act, a steady stream of High Court actions has emerged. Beginning with the Auckland Regional Authority case in 1987, successive years have seen increased litigation culminating in a trilogy in late 1989. Two cases have been appealed to the Court of Appeal and one, Apple Fields, Ltd. v. New Zealand Apple and Pear Marketing Board, received judgment from the Judicial Committee in London. The remedies have so far been confined to declarations and injunctions, with no damages recovered.

D. The Significance of Competition Law Today

Competition law has emerged from the periphery to a position approaching parity with mainstream legal subjects such as torts or company law. In terms of legal writing and commentary there has been a sizeable amount of ink spilled on the Commerce Act of 1986 in the relatively few years it has been in force. Law reviews now regularly feature articles on competition law. The New Zealand Recent Law Review, New Zealand's quarterly law review devoted to recent developments, designated competition law as a separate subject alongside the traditional topics.

Sadly, however, the various indexes and, indeed, the New Zealand Law Reports, still lump competition law under the umbrella of commercial law. It was a pity Parliament in the mid-1980s did not see fit to rename the new legislation the “Competition Act 1986” as Canada did when it replaced its antiquated Combines Investigation Act with the Competition Act of 1986. This change of nomenclature would have accurately reflected the policy shift as well as providing a helpful impetus to the development of antitrust in New Zealand.

96. “Company law,” as the term is used in this article, is the equivalent of American corporate law.
97. Combines Investigation Act, R.S.C., ch. C-34, § 1 (1975) (Can.).
An increasing volume of competition law cases are now being reported. Using the number of cases reported in the *New Zealand Law Reports* as a crude guide, there were approximately nineteen cases on trade practices matters and price control reported in the thirty-six year period from 1949 to 1985. Yet, in the five years since 1986, there already have been fourteen *Commerce Act* decisions reported. Leaving the official reports aside, two new report series, the *New Zealand Business Law Cases* ("N.Z.B.L.C."), (Commerce Clearing House) and the *Trade and Competition Law Reports* (Brooker & Friend), began in 1987 to publish many important Commerce Act decisions of both the Commission and the courts.

In December, 1990, the Judicial Committee of the Privy Council handed down its decision in the *Apple Fields* appeal, the first such occasion it had dealt with an antitrust appeal from New Zealand since *Crown Milling*.

Competition law seems here to stay and the *Commerce Act* of 1986 looms large on the horizon of statute law in New Zealand. As Justice McGechan recently observed: "The legislation [Commerce Act of 1986]... breaks new ground, reflecting the increasing complexity and maturity of the commercial environment in this country in recent decades, and the demands which that has imposed." 101

III.
The Policy Debate

A. The Rationale for Antitrust Policy

Unlike other areas of law, continuing unease exists as to whether there is a justifiable case for antitrust regulation at all. In company or criminal law such a question seems otiose, but in competition law a recurring and troubling theme is—Do we need it? Is the regulatory effort worth it? The conventional case for antitrust law can be framed in both socio-political and economic terms, although the latter has gained ascendancy in recent years.

The economic rationale for antitrust is theoretically straightforward. Legal intervention may be justified where an unconstrained market might lead to poor economic performance and inefficiency. Producers in an industry may possess varying degrees of monopoly or market power, and hence may have the ability to raise prices and restrict output to below the level which would emerge in a competitive situation. 102 The result, in orthodox welfare economics terminology, is a "deadweight" welfare loss to society. A

99. These figures must be read subject to the *New Zealand Law Reports* decision to increase to two volumes per year in 1973 and three volumes per year in 1989.


policy to promote competition attempts to avert this loss. The Court of Appeal in *Tru Tone, Ltd. v. Festival Records Retail Marketing, Ltd.*, 103 neatly summarized the economic objective of antitrust legislation: "[T]he Commerce Act is . . . based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources." 104

Apart from safeguarding against allocative inefficiency (deadweight loss), competition policy may also have positive effects upon the attainment of productive or "X" efficiency and technological or dynamic efficiency. 105

Measuring the contribution of antitrust to the economy is, as one might imagine, fiendishly difficult. Attempts to measure the deadweight loss attributable to monopolies place the loss, in terms of percent of GNP, at very low levels. 106 Ascertaining the links between antitrust and X efficiency is no easier. The intuitive view that vigorous rivalry forces companies to trim organizational fat and run a "tight ship" is not readily provable. 107 As for the antitrust/technological efficiency nexus, the evidence is again equivocal. The notion remains unproven that only large firms possess the necessary resources to carry out research and development, and therefore, innovation. 108 Despite the unsatisfactory state of the economic evidence, the belief in the virtues of a policy that promotes competition continues. 109

The socio-political case for antitrust policy is a diverse amalgam of beliefs that include distrust of big business and its political influence, preference for small locally-owned businesses, redistribution of wealth, and so on. 110 American antitrust has a venerable populist tradition, with the Sherman Act on one occasion being referred to by the U.S. Supreme Court as "the Magna Carta of free enterprise." 111 Whether New Zealand policy makers were concerned with non-economic effects of concentrated economic power is debatable, although one can find occasional dicta to support the view that populism exists in New Zealand also. 112

Competition law has come under an increasing number of attacks in the 1980s. Eleanor Fox and Lawrence Sullivan isolate three major challenges—

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104. Id. at 358.
107. Scherer, supra note 105, at 1002-10.
108. See id. at 1010-18.
112. See Ahdar, supra note 110, at 54.
the Chicago School, the "industrial policy advocates," and critical legal studies. No doubt the greatest impact so far has come from Chicagoans, whose thinking has been highly influential in the United States in the 1980s and has also trickled down to Australasia. Industrial policy advocates, such as Galbraith and Thurow, see large corporations as necessary and desirable to achieve technological advancement, and even to survive, in an increasingly global market where national boundaries and domestic markets mean little. Under this view, antitrust policy simply represents an expensive hindrance. D. T. Armentano suggests: "In a rapidly changing information and technological world, with an inevitable internationalization of markets, the burden of proof is clearly now on those who would retain the law to demonstrate why all antitrust regulation should not be abolished." The idea that antitrust intervention can impose costs upon businesses, hurting them in international markets, has been taken up by New Zealand business. However, it has not so far urged the complete abolition of antitrust law, but has instead married the above arguments with Chicagoan thinking to argue for a minimalist competition law.

Little will be said about the critical legal studies attack—antitrust law perpetuates an exploitative market system—except to note that it appears to have few adherents in New Zealand. This probably reflects the negligible impact the critical legal studies movement has had in New Zealand generally. The Chicago School presents the most serious challenge to antitrust law.

B. The Traditionalist versus Chicago School Debate "Down-Under"

The protracted, and often vitriolic, debate in American antitrust jurisprudence between so-called "Traditionalists" and "Chicagoans" is well documented. The former view the promotion of the competitive process as the appropriate goal of antitrust, while the latter see efficiency as the sole objective. The Traditionalists view efficiency as a major end-product of a policy promoting vigorous rivalry but not the sole goal. Various socio-political ends such as dispersion of economic power and wealth may also be achieved. Chicagoans, on the other hand, view efficiency as the exclusive goal with competition simply the means to that end. They see most business practices and methods of integration as efficiency-motivated and efficiency-enhancing. For them intervention is justified only in the plainest of cases. Fox and Sullivan

115. See, e.g., NEW ZEALAND BUSINESS ROUNDTABLE, ANTITRUST IN NEW ZEALAND: THE CASE FOR REFORM iii (1988).
116. See Fox and Sullivan, supra note 113, at 961-64.
summarize: "In antitrust, the most minimal law [for Chicagoans], given the existence of the statutes, is law that proscribes only clear cartel agreements and mergers that would create a monopoly in a market that included all perceptible potential competition."\(^{118}\)

In New Zealand, the debate over the goals of competition law\(^ {119}\) is diffused at the outset by the Parliamentary designation of the goal of the Commerce Act in the Act itself. Section 3(1), in turn, defines competition to mean "workable or effective competition," thereby eschewing any suggestion that the textbook notion of "perfect competition" is the statutory objective.\(^ {120}\)

But the matter has not rested there. A major plank in many of the submissions upon the review of the 1986 Act was that the goal of the Act should be narrowed to the pursuit of economic efficiency rather than competition.\(^ {121}\)

The New Zealand Business Roundtable, aided by overseas experts, produced a major paper advancing this Chicagoan thesis:

Adopting "competition" as an objective of antitrust law risks compromising the efficiency objective. Instead competition (in the sense of maximum rivalry) may be pursued as an objective in itself. The result may be to prevent efficiency-enhancing arrangements which reduce the number of players in a market or lower transaction costs. Practices which enhance efficiency overall but which result in greater market power may be prevented or deterred. An explicit recognition that the objective of the Act is to promote economic efficiency as a means to enhancing consumer welfare would improve the focus of the Act.\(^ {122}\)

The implications for competition law of an efficiency objective—minimalist law and enforcement—were no doubt one reason why big business advanced this position. It would leave them free to pursue their interests subject only to the rare challenge to a merger resulting in a monopoly, or to blatant price fixing on some essential product such as petroleum.

Not everyone, however, was persuaded that change was needed. Both the Commerce Commission and the Australian Trade Practices Commission favored retention of the present goal.\(^ {123}\)

Various academics, among whom I must be counted, likewise resisted change.\(^ {124}\)

The most persuasive and eloquent defense of the current goal—promotion of effective competition—was

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118. Fox and Sullivan, supra note 113, at 958.
119. For an interesting discussion, see Susan Lojkine, *Competition Law in New Zealand: A Look Ahead*, in *Competition Law and Policy in New Zealand*, supra note 2, at 104-14.
121. Submissions in favor of an efficiency objective included the New Zealand Business Roundtable, the Ministry of Forestry, AMP Insurance, Goodman Fielder Wattie, Ltd., the Insurance Council of New Zealand, the Electricity Corporation of N.Z., Ltd., the Economic Development Commission, the New Zealand Manufacturers Federation, and Fletcher Challenge, Ltd. The submissions are summarized in the first appendix (Annex 1) to the *Review of the Commerce Act 1986: Reports and Decisions*, supra note 51.
124. See id.
that advanced by a visiting American professor of economics, Douglas Greer. He provided a timely counterbalance to what was becoming a chorus of voices in favor of efficiency. Greer observed:

As a goal for competition policy, maintaining competition is a rather nebulous ideal. In some ways, this is a serious handicap. Yet a major reason for the imprecision is breadth of scope, which has its advantages. Workable competition encompasses a wider range of possibilities than static efficiency because it concerns structure and conduct in their own right as well as static performance, and it can also be stretched to reach dynamics as well as statics. In particular, it can be argued that maintaining competition simultaneously advances consumer welfare, fosters distributive equity, and promotes other ends, including static efficiency, to such a large degree that maintaining competition may be considered a multi-purpose goal serving several valued ends fairly harmoniously.\(^{125}\)

The debate over the proper objective of the legislation has been important. As Robert Bork once suggested, "everything else follows" from the answer to this fundamental question.\(^{126}\) For now the verdict has gone in favor of the Traditionalists. The Commerce Amendment Act of 1990 contained no change to the long title of the Act. Promotion of effective competition remains the goal and the principal offenses are still framed in terms of lessening competition, not efficiency. Nonetheless, while the Chicago School lost the war over the goal of the Act, it won several significant battles. The 1990 amendments abolished the mandatory pre-notification requirement for mergers, introduced authorization for resale price maintenance, and required regard for efficiency in authorization determinations. All were significant concessions to Chicago School proponents.

IV.

THE AMBIT OF THE ACT

An important question is—what is the precise ambit of the Commerce Act? Who is caught by competition law in New Zealand? The initial response would probably be companies trading in the domestic market. This answer would not, as we shall see, be entirely correct.

A. Jurisdiction—Who is Caught?

The capture of the Act is deceptively broad. The starting place is, of course, the detailed definition sections. The prohibitions in the Commerce Act are drafted in terms of "person." Section 2(1) defines "person" to include local authorities and associations, incorporated and unincorporated.\(^ {127}\) By virtue of section 4 of the Acts Interpretation Act of 1924,\(^ {128}\) "person" also

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includes natural persons, trustees, and partnerships. The sweep of the New Zealand legislation is thus broader than the Australian Trade Practices Act of 1974, which is directed to "corporations" rather than persons.

1. The Crown and Crown Corporations

The Commerce Act of 1986 explicitly states that the Crown is bound, although redress is limited to a declaration that contravention has occurred. Crown corporations are also caught by the Act and the full panoply of remedies is available this time. Many government departments, "corporatized" into powerful state-owned enterprises, must therefore be wary of the Act, especially section 36 which proscribes misuse of a dominant market position.

Returning to section 5, the Crown is bound only insofar as it "engages in trade." An interesting analysis of this phrase occurred in Glaxo New Zealand, Ltd. v. Attorney-General. The appellant drug company argued that the Minister of Health's decision not to list their new antibiotic drug, Ceporex, in the category of drugs receiving the coveted government subsidy was a misuse of a dominant position in the market for general prescription antibiotics in New Zealand. This novel argument foundered, however, on section 5(1). Was the Minister's exercise of her powers under section 99 of the Social Security Act of 1964 (listing pharmaceutical drugs qualifying for the government subsidy to pharmacists) "engaging in trade"? The appellants argued that her decision was an "activity of commerce" or an "undertaking relating to the supply of goods or services" within the definition of trade in section 2(1). Justice Barker disagreed: "The Minister is not 'engaging in trade'; her actions about subsidies obviously must affect trade but I do not consider that her activities under s[ection] 99 of the Social Security Act can come with the definition of 'trade' under the Commerce Act."

2. Agents and Employees

The conduct of "directors, servants or agents" of a body corporate acting with actual or apparent authority is deemed to have been engaged in by the company. This extension of liability poses serious problems, especially

130. Id. § 5(4).
131. Id. § 6(1).
for large corporations with numerous employees. In-house antitrust compliance programs, common in the United States, would seem to be a sensible prophylactic measure here also.

3. Professions

The professions have long maintained that they have a special need for ethical behavior and competent practice, a need better served by self-regulation than by the rigor of the law. This carried some favor in the Commerce Act of 1975, which specially permitted professional associations to fix a scale of fees. Similarly, until the landmark Goldfarb decision of the U.S. Supreme Court in 1975, the "learned professions" enjoyed immunity from American antitrust laws. All this has changed.

In New Zealand today the professions are clearly caught by the Commerce Act of 1986. The prohibition on anticompetitive conduct relates to markets for services as well as goods. Section 2(1) defines services to include "work of a professional nature" and trade to include "any profession." Rightly or wrongly, the legislature now treats the professions no differently from other sellers of services.

4. Non-Profit Organizations

The very title of the Act and its purposes would initially suggest that non-profit organizations, such as sporting bodies, clubs, and service organizations, would be outside the scope of antitrust law. A relatively obscure decision of the Commerce Commission in late 1989, however, suggests otherwise. In Re Speedway Control Board of New Zealand, Inc. the Commission had to consider an authorization application by the Speedway Board, which had indulged in various monopolistic activities under the guise of the "best interests" of speedway sport. An obvious argument arose: Was the Board, as a sporting body, not outside the reach of the Act? The Commission unanimously said no.

The Board's actions had serious repercussions in the market for speedway "services" to promoters, riders, and the public. The Commission, assuming for the moment that speedway was a non-professional sport, questioned whether there was an "in trade" requirement similar to that in the Australian Trade Practices Act. A close examination of the statutory definitions was called for. Section 2(1) provides: "Services includes any rights,

136. For a good example of such a program, see Joseph F. Brodley, Compliance, in ANTITRUST ADVISER (Carla A. Hills ed., 3d ed. 1985).
140. Commerce Act, 1986, § 2(1).
benefits, [or] privileges . . . conferred in trade; and, without limiting the generality of the foregoing, also includes the rights, benefits, [or] privileges . . . conferred under the following classes of contract . . . .”

The section then lists four types of contracts, such as insurance contracts and banker-customer contracts, as inclusive examples. The Commission read the second limb of the statutory definition of services (from the semi-colon) as containing no “in trade” requirement. The very definition of trade suggested non-profit organizations would be caught. Trade in section 2(1) is defined as including any “business,” which in turn is defined as: “an undertaking—(a) That is carried on for gain or reward; or (b) In the course of which—(i) Goods or services are acquired or supplied; or (ii) Any interest in land is acquired or disposed of—otherwise than free of charge.”

Again, the second limb of this definition indicated that non-profit undertakings, so long as goods or services were exchanged and incurred some payment, were caught. In any event, even if an “in trade” requirement existed, speedway, as a semi-professional sport, would have been embraced here.

As a matter of statutory interpretation, although the second limb of services does not limit the generality of the first, it could be argued that the first limb should limit the generality of the second. Contrary to the interpretation given by the Commission in Re Speedway, the first limb might be viewed as the general class of which the second is a non-exhaustive subset. As a matter of policy this interpretation would seem preferable. First, it harmonizes with the Australian recognition of an “in trade” requirement. Second, it would place non-profit, non-commercial organizations outside the Act. Monopolization by the wrestling federation or the girl guides is no doubt unpleasant, but is hardly, one would have thought, worthy of legal condemnation.

5. Extraterritoriality

Most antitrust regimes purport to have some extraterritorial effect. Section 4 of the Commerce Act states:

(1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

(2) Without limiting subsection (1) of this section, sec 36A of this Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand.

Subsection (2) was added in the 1990 amendments to reflect the wider ambit of the monopolization prohibition given the abolition of anti-dumping

144. Commerce Act, 1986, § 2(1).
145. Longdin, supra note 141, at R-75.
measures with respect to Australian goods (not services). The extraterritorial operation of the Act has yet to be tested in the courts beyond some comments of Justice Tipping in the *Magic Millions* case.\(^{148}\) The Justice took the view that in assessing competition in New Zealand markets, potential goods, or as in that case, services, supplied *in Australia* by firms not resident or trading currently in New Zealand, could not be considered.\(^{149}\) Rather, the goods or services had to be supplied within New Zealand before the impact of the Australian firms could be taken into account. Notwithstanding the 1990 amendment, Justice Tipping's analysis arguably still holds at least with respect to *services* supplied by overseas enterprises.

**B. Exemptions—Who is Immune?**\(^{150}\)

At the outset, it should be noted that a detailed mechanism for exemption from the Act for individual arrangements exists—authorization—which will be examined separately later.

1. **Restraint of Trade**

Section 7(1) of the Act, using somewhat awkward language, preserves the law on restraint of trade.\(^{151}\) This body of important common law continues to run parallel to antitrust law. The long list of exceptions in section 44(1) reinforces this point. "Contracts of service"\(^{152}\) or business contracts regulating conduct after termination of employment or protecting the goodwill of the business\(^{153}\) are exempt. If there was any lingering doubt as to the interrelationship between the common law and the Commerce Act of 1986, it was dispelled in *Hollinwood Importers (New Zealand) Ltd. v. Humphrey*.\(^{154}\) The defendant, a former manager of the plaintiffs, argued that the restraint of trade clause in his employment contract was an anticompetitive covenant under section 28 of the Commerce Act.\(^{155}\) Justice Sinclair would have none of this, holding that section 44(1)(c) expressly precluded the application of section 28(1) to restrictive covenants of this kind.\(^{156}\)

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\(^{149}\) Id. at 759.

\(^{150}\) By way of international comparison, it is interesting to note that the patchwork quilt of exemptions from American antitrust law has been estimated to account for between 11 to 20 percent of total American GNP. See S. Chesterfield Oppenheim, Glen E. Weston, and J. Thomas McCarthy, *Federal Antitrust Laws* 30 (4th ed. 1981).

\(^{151}\) Section 7(1) reads: "Nothing in this Act limits or affects any rule of law relating to restraint of trade not inconsistent with any of the provisions of this Act." Commerce Act, 1986, § 7(1).

\(^{152}\) Id. § 44(1)(c).

\(^{153}\) Id. § 44(1)(d).

\(^{154}\) CP 1522/89, (H.C. Auckland, Oct. 9, 1989) (Sinclair, J.) (involving an interim injunction application).

\(^{155}\) Id. at 5.

\(^{156}\) Id. at 6.
2. Intellectual Property

The appropriate interface between competition law and intellectual property is a traditionally vexing one.

Intellectual property law and policy seeks to grant exclusive property rights to create an incentive for technological innovation (patents), product quality and informed choice (trademarks) and artistic development (copyrights). On the other hand, antitrust policy seeks to preserve free from private regulation and monopolisation a self-adjusting, self-regulating marketplace operating on the premise of freedom of choice, freedom of opportunity and competitive rivalries.  

Under the Commerce Act of 1986, sections 36(2) and 45 contain the interface, their intention being to provide an exemption from competition law for various matters authorized under the specific intellectual property statutes, such as the Patents Act of 1953 and the Copyright Act of 1962.158 During the review of the 1986 Act, the Department felt, despite the lack of case law, that the existing relationship was too generously tilted in favor of intellectual property rights.159 Arrangements were protected that had anticompetitive effects extending beyond those necessary to give effect to the strict exercise of the intellectual property rights conferred. Nevertheless, the weight of submissions arguing against change, the Commerce Amendment Act of 1990 replaced the existing provisions with provisions seen as more consonant with the original legislative intent.160

3. Statutory Exemptions

Perhaps the most interesting category of exemptions are those envisaged under section 43. Section 43(1) reads: "Nothing in this Part of the 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."161

This provision has spawned some interesting litigation, including an appeal recently decided by the Privy Council. Statutory exemptions from antitrust law were recognized under the 1975 Commerce Act where, under a


161. For example, the New Zealand Institute of Patent Attorneys and the Copyright Council of New Zealand both opposed an amendment. See REVIEW OF THE COMMERCE ACT 1986: REPORTS AND DECISIONS, supra note 51, at 7, 10.

162. Sections 14 and 16 of the 1990 Amendment Act substituted a new section 36(2) and 45 respectively into the Commerce Act of 1986. Section 36(2) now states that the enforcement of a "statutory intellectual property right" by a dominant firm is not, of itself, a breach of section 36. Section 45 exempts arrangements entered into or giving effect to "statutory intellectual property rights" as defined in section 45(2).

different wording, practices "expressly authorised" by an Act were immune. Under the Commerce Act of 1986, the practices must be "specifically authorised." Moreover, the stipulation in section 43(2), that provision in "general terms" for the practice will not suffice, reinforces what was seen as the need for a tightening up in this area.

In an early Commerce Commission decision under the 1986 Act, the Commission outlined its stringent view of statutory exemptions. There had to be "a sufficiently definite or explicit and contemplated power to exempt the actions from the Commerce Act and not merely a valid action within a general power." Section 43 was, however, to receive its most comprehensive exegesis in New Zealand Apple and Pear Marketing Board v. Apple Fields, Ltd.

The Marketing Board is a statutory monopsony which is required under the Apple and Pear Marketing Act of 1971 to buy all apples grown or imported into New Zealand at prices fixed by itself and the New Zealand Fruitgrowers' Federation. The Board is empowered under this legislation to impose levies on growers to maintain and develop its facilities for storing and marketing apples. In particular, section 31(1) of that Act empowers the Board, with the Fruitgrowers' Federation's approval, to "impose on growers levies of such nature and incidence as the Board thinks fit" and these might extend to "all growers, or on any specified class or classes of growers." Increased production in the late 1980s meant the Board had to step up its cool storage and port facilities. The Board accordingly imposed a "second-tier levy" on apple growers, based on the amount by which the production of any given grower (including any new grower), exceeded that grower's production for the previous year.

Apple Fields, a new Canterbury grower, challenged this discriminatory levy. At first instance, the High Court found a breach of section 27 of the Act (but not sections 29 or 36, which proscribe exclusionary activity and misuse of dominance, respectively). Justice Holland held that the arrangement between the Board and the Federation had the effect of substantially lessening competition in the market for the supply of apples in New Zealand.

On appeal, the appellants introduced a new twist—was not the levy simply a "thing" specifically authorized in terms of section 43(1)? The Court of Appeal allowed this new line of defense and set out to see if the wording of

164. Commerce Act, 1975, § 27(3).
167. Id. at 412.
section 31 met the statutory criteria. Justice Richardson clarified the conflicting interests at stake:

[T]he Commerce Act does not incorporate and reflect all the public interest considerations under which commerce operates. It is not the only statutory expression of relevant public policies. Other statutes rely to a greater or lesser extent on regulation rather than competitive markets to achieve their public policy objectives in particular areas of the economy. Public regulation is provided for because of dissatisfaction with market results. Those laws are part of the legal framework within which competition law is to operate. Not surprisingly then the Commerce Act itself, through section 43 recognises that general competition policies must yield in appropriate cases to regulatory decisions.\textsuperscript{172}

The Court was unanimous that the Commerce Act did yield here. President Cooke pointed out that the Apple and Pear Marketing Act would not need to have specified in express terms for a second-tier levy in order to gain section 43 immunity.\textsuperscript{173} Instead, the President viewed the matter as involving a careful comparison of the conflicting policies underlying the two statutes. Thus:

The reasonable inference is that the exception in section 43 is meant to cover cases where the actual terms of an enactment show that limits on competition are inevitable, or at least highly likely, if the authority given is exercised. If the terms of the authorising enactment leave no doubt that anti-competitive measures were in contemplation, it will fall within the exception to the general regime of the Commerce Act intended to preserve competition.\textsuperscript{174}

Section 31 of the Marketing Act clearly contemplated discriminatory levies on certain growers, and such levies were highly likely to lessen competition. When the scheme and purpose of the section were compared with the Commerce Act, the conflict was "sufficiently clear on the face of the two statutes to justify holding that the give way rule in [section 43 of] the Commerce Act applies. . . ."\textsuperscript{175} The President was nagged by the thought that Parliament would have been loathe to override such a long-standing regulatory regime when it enacted the 1986 Act.\textsuperscript{176}

Justices Richardson and Casey took a more textual approach. Putting less emphasis upon the clash of regulatory and antitrust policies, their Honors stressed the words "of a kind" in section 43(1). Justice Richardson explained:

Section 43 is concerned with authorisations, not requirements, and it is sufficient that the act may be of a kind specifically authorised by the enactment. To come within the expression there must be sufficient particularity so that it may fairly be said that what has been done comes squarely within the contemplation of the statute. There is no litmus test.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{172} [1989] 3 N.Z.L.R. at 167.
\item \textsuperscript{173} \textit{Id}. at 164.
\item \textsuperscript{174} \textit{Id}. at 165.
\item \textsuperscript{175} \textit{Id}.
\item \textsuperscript{176} \textit{Id}.
\item \textsuperscript{177} \textit{Id}. at 174 (emphasis in original).
\end{itemize}
Section 31 of the Marketing Act did possess sufficient particularity here. The second-tier levy imposed upon new growers such as the plaintiffs was the kind of levy specifically authorized by section 31.

Apple Fields took the matter to the Privy Council, no doubt encouraged by President Cooke’s obiter findings that, but for section 43, he would have found the defendant Board had breached the Act. 178

The Privy Council “with natural reluctance” reversed the unanimous Court of Appeal. 179 The issue turned simply upon a “narrow point of construction.” 180 Was section 31 of the Marketing Act particular enough to constitute a “specific authorisation” under section 43? In the Judicial Committee’s view, section 43(2) made it “abundantly clear” that statutory authorization embracing a class of acts which may, or may not, amount to a restrictive trade practice was insufficient. Lord Bridge stated:

[N]othing less will do than either a statutory authorisation of the very act in question or, if it is one of a class or kind of authorised acts, that the whole authorised class would, if not so authorised, fall foul of the prohibitions in Part II of the Act of 1986. 181

The second-tier levy imposed by the Board pursuant to section 31(2) was certainly not explicitly named in the Act. Neither was the levy a kind of act which was necessarily anticompetitive. Even relaxing the standard to one of likelihood, as President Cooke had suggested, would not matter here. The “preponderant majority” of the kind of acts authorized would not operate in an anticompetitive manner. 182 Without too much effort, one could devise examples of discriminatory levies which were innocuous in competition terms. The High Court’s declaration that the Board had contravened the Commerce Act was restored. 183

The interrelationship between regulatory and antitrust law is an important one, indeed too important to be left to ad hoc decisions of the courts and expensive appeals. It would surely be sensible for Parliament to insert expressly into regulatory legislation, as Lord Bridge suggested, a clause explicitly stating the subordination of antitrust policy, should that be desired. An example of such a subordination clause can be found in the Civil Aviation Amendment Act of 1987. 184 Section 29D(2) declares Ministerial authorization “to be a specific authorisation by an enactment for the purposes of section 43 of the Commerce Act 1986.” 185 The Court of Appeal in Apple Fields

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178. Id. at 162.
180. Id. at 263.
181. Id. at 265.
182. Id.
183. Id. at 266.
185. Civil Aviation Amendment Act, 1987 § 29D(2).
saw this as not strictly necessary. The Privy Council's recent decision now suggests otherwise.

4. Other Exemptions—The "Intra-Enterprise Conspiracy"

A litany of other exemptions is contained in section 44. As noted earlier, restraint of trade covenants are exempt. Export cartels (involving goods that are exclusively bound for overseas) are likewise immune. An interesting exception is section 44(1)(b). Arrangements entered into between parties who are interconnected bodies corporate are exempt. The term "interconnected bodies corporate" is defined further to mean companies which are in a subsidiary-parent or subsidiary-subsidiary relationship. In essence, a company is a subsidiary of another if fifty percent or more of its shares are owned by the other or if the composition of its board is determined likewise.

Parliament, in enacting section 44(1)(b), has firmly rejected the doctrine that Americans refer to as the "bathtub" or "intra-enterprise conspiracy." This doctrine held that two members of the same group of companies could nonetheless, for antitrust purposes, be considered separate entities. Thus, concerted activity between the two companies that restricted competition could be enjoined. The U.S. Supreme Court dealt the death blow to this doctrine in the Copperweld case in 1984. The majority considered it unrealistic to defer to separate corporate identity where the parent and subsidiary had a "unity of interest" and lacked "independent centers of decision making."

Because single firm dominance under section 36 of the Commerce Act is evaluated by adding the market power of any interconnected body corporate to that of the person in question (section 3(8)), members of the same group of companies still have to be wary. Conceivably, predatory behavior by a small subsidiary could be caught, once the related bodies' power has been taken into account.

187. Id. § 44(1)(g).
188. Id. § 2(7).
192. Id. at 771.
193. Id. at 769.
V.
The Principal Contraventions

A. Introduction

The Commerce Act of 1986 classifies the prohibitions into categories designated by parts: part II contains the rules on "Restrictive Trade Practices"; part III, "Business Acquisitions" (formerly called, prior to 1990, "Mergers and Takeovers"); and part IV, "Control of Prices." The exculpatory procedure for otherwise anticompetitive arrangements—"Authorisation and Clearances"—is found in part V. I shall loosely adhere to the Act's categorization, although what follows is not a complete analysis of every section or proscription. Detailed commentaries do this. Rather, I have concentrated on selected major contraventions and developments therein.

B. Horizontal Restraints

Part II of the Act contains provisions regarding horizontal restraints. Horizontal restraints are those between firms on the same horizontal level of the chain of production. They are arrangements between two or more direct competitors in a market. One does not have to be an economist to see the potential for harm where rival manufacturers or retailers collude to fix prices, divide markets, or boycott new entrants.

1. Anticompetitive Arrangements

A major prohibition in the Act is found in section 27. In succinct fashion, section 27(1) states: "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."

Virtually every word in this prohibition is significant, and most are defined in the Act itself. The statutory definitions of such key words as "purpose" or "competition" are helpful in setting the initial parameters. But naturally, the full richness of such terms awaits a more complete exegesis as the case law develops.

One phrase that is not defined by statute, however, is "arrangement or understanding." All agree that these words were added to the familiar term "contract" in order to catch various forms of collusion not solemnized in a formal agreement. The colorful American image of the smoke-filled room

196. "Person," "contract," "provision," "purpose," "substantially," "competition," and "market" are defined in sections 2(1) and 3(1). See id. §§ 2(1), 3(1).
where clandestine price fixing plans are hatched, while something of a caricature, is perhaps what the legislature had in mind. An anticompetitive consensus hardly needs to be written in blood for the participants to act upon it.

In New Zealand, the only two cases to consider collusion in any depth have had mixed results. Auckland Regional Authority v. Mutual Rental Cars (Auckland Airport), Ltd.\textsuperscript{198} was the first substantive hearing under the 1986 Act. Budget, an ambitious Australian entrant into the New Zealand rental car market, brought proceedings against the Authority, which had entered into contracts with Avis and Hertz. The Authority had accepted only two rental car firms at the airport, believing that this maximized revenue. An unhappy Budget ultimately succeeded in persuading the High Court that the Authority’s decision was a misuse of its dominant position in the market for rental car concessions at Auckland airport.\textsuperscript{199} Of greater immediate interest, however, was Budget’s allegation that the two incumbent operators had colluded to exclude Budget from the airport.\textsuperscript{200}

Justice Barker found insufficient evidence of any arrangement or understanding between Avis and Hertz. Once the Authority agreed to accept tenders at the airport on a “one of two only” basis, and Avis and Hertz were successful tenderers, there was clearly no need to reach an arrangement to exclude Budget.\textsuperscript{201} Second, and more troublesome, however, was Justice Barker’s holding that, notwithstanding admitted “communication and co-operation of a general nature” between Avis and Hertz on the subject of airport tenders, there was no understanding here now.\textsuperscript{202} Hertz had made it plain that it abandoned any objection to Budget’s entry. His Honor observed that, “being such a loose concept, an understanding must be able easily to be terminated.”\textsuperscript{203} Perhaps so, but this line of reasoning has its problems. Should parties be able to reach an understanding, recant from it, and then face the future with confidence knowing that their abandonment will be enough for the courts? Is not the damage already done?

More recently, the High Court in Commerce Commission v. Wellington Branch New Zealand Institute of Driving Instructors\textsuperscript{204} gave consideration to “arrangement or understanding.” In a meeting of driving instructors in October 1987, concern was expressed about the price-cutting activities of one small company, the Triple A Driving School. A resolution was carried by eight votes to four in favor of a minimum price for driving lessons of thirty dollars per hour, this being above that charged by Triple A. Unusually for these types of cases, the resolution was recorded in the minutes and produced at trial. Furthermore, the agenda sent out for the next month’s meeting of

\textsuperscript{198} [1987] 2 N.Z.L.R. 647.  
\textsuperscript{199} Id. at 678-80.  
\textsuperscript{200} Id. at 660-65.  
\textsuperscript{201} Id. at 664.  
\textsuperscript{202} Id. at 663.  
\textsuperscript{203} Id. at 665.  
\textsuperscript{204} 1990 N.Z.A.R. 559.
the institute confirmed that the October meeting had decided upon the thirty dollar figure. At the November meeting, several participants began to get cold feet as the antitrust implications of their resolution dawned upon them. Opposition was thus expressed to the earlier resolution, culminating in a "correction" of the October minutes at the April meeting in 1988. The Commerce Commission sought a pecuniary penalty in the High Court alleging breach of section 30. A clear case? No, said Justice Jeffries. In a helpful passage he began:

Arrangements and understandings result from an apprehension shared by two or more persons that there will be accord among them as to future acts in a specified area. The cases refer to communication existing to attain the arrangement or understanding. In my view it would be wrong for a Court to set the test for establishment of an arrangement or understanding too high. A Court must look at the evidence with a sophisticated and detached eye, astute to subtlety and shrewdness in the commercial world.205

His Honor then contrasted these salutary remarks with the situation before him. Steps for price fixing must, he held, "reach the stage where there is an unambiguous intent to make the arrangement or understanding happen so that the [fixing of prices] would eventuate."206 Here, even if one viewed the discussion and resolution of the October meeting as steps towards price-fixing, these steps were "illusory and ineffectual."207 The subsequent recantation of the resolution meant the plan never fully got off the ground.

Again, however, there is the concern that the damage may have already been done. The Institute had shown itself averse to price cutting and price cutters. Recantation of this stance in light of the Commerce Act ramifications at a later date could be seen as purely self-serving. The reservation about this case is increased by Justice Jeffries' observation that completion of the rejection of the October resolution did not finally take place until nearly a year later (September 1988).208 While his Honor's observations on the approach to finding collusion for antitrust purposes are commendable, his reluctance to find collusion in the facts before him in the face of rather gift-wrapped direct evidence is unfortunate.

Before leaving this topic, I will briefly address conscious parallelism.209 This is the American term for the distinctive behavior of oligopolistic firms in following the prices of the market leader. Recognition of their mutual interdependence leads oligopolists to refrain from price competition in favor of rivalry, usually on the basis of services. The result? Rigid, uniform pricing despite the absence of collusion or agreement in the normal sense. American

205. Id. at 563-64 (citations omitted).
206. Id. at 564.
207. Id.
208. Id.
courts have refused to condemn such conduct per se.\textsuperscript{210} No recent New Zealand cases have addressed the issue.\textsuperscript{211} However, the Commerce Commission, in several investigations of suspected cartel behavior, has discontinued its investigation where the parties concerned convinced the Commission that their actions were simply individual decisions to follow the others' lead.\textsuperscript{212}

2. \textit{Price Fixing}\textsuperscript{213}

A major prohibition in any antitrust regime is one preventing horizontal price fixing—agreements between direct competitors to fix or set the prices for goods or services. Accordingly, section 30(1) provides that:

A provision of a contract arrangement or understanding shall be deemed for the purposes of [section 27] to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling or maintaining, of the price for goods or services, or any discount, allowance, rebate or credit in relation to goods or services, that are—
(a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or any bodies corporate that are interconnected with any of them, in competition with each other.\textsuperscript{214}

The condemnation of horizontal price fixing, regardless of its actual impact upon competition, reflects the hostility toward cartel behavior exhibited worldwide. The prohibition is not an absolute one, however, as authorization (as outlined in part V of the Act) is available to the parties concerned.\textsuperscript{215}

Surprisingly perhaps, there have been few decisions on section 30. The two High Court actions brought by the Commerce Commission in 1990 were, as we have seen, abject failures.\textsuperscript{216} The Commission has dealt with several authorization applications. Blatant minimum price fixing has been declined approval,\textsuperscript{217} whereas maximum price fixing, a more unusual situation, has received the Commission's blessing.\textsuperscript{218}

\textsuperscript{210} See Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954). For further discussion of U.S. case law on the legality of conscious parallelism, see generally Leslie Aldor, 

\textsuperscript{211} Under the Trade Practices Act of 1958, however, the Supreme Court had held that conscious parallelism without something more was insufficient to attract liability. See Re N.Z. Master Grocers' Fed'n, 1961 \textit{N.Z.L.R.} 177, 181.

\textsuperscript{212} See, e.g., \textit{No Evidence of Collusion}, \textit{OTAGO DAILY TIMES}, Sept. 29, 1988, at 1 (suspected price fixing between Ansett and Air New Zealand).

\textsuperscript{213} See generally Stevens and Dean, \textit{supra} note 209.

\textsuperscript{214} Commerce Act, 1986, § 30(1).

\textsuperscript{215} See \textit{infra} notes 300-21 and accompanying text for a discussion of authorization.

\textsuperscript{216} See \textit{supra} notes 76-84 and accompanying text.


\textsuperscript{218} Re New Zealand Kiwifruit Exporters Ass'n, [1989] 2 \textit{N.Z.B.L.C.} 104,485 (Com.).
One interesting determination is *Re Insurance Council of New Zealand, Inc.*,\(^{219}\) where the Commission dealt with the difficult issue of characterization.\(^{220}\) American courts have been careful not to characterize an arrangement as price fixing, which is condemned per se, until they find that it possesses cartel-like attributes.\(^{221}\) Not every arrangement involving some literal setting of price is price fixing in the antitrust sense.

The Insurance Council sought authorization for a clause in a "knock for knock agreement" between twenty-one of its insurance company members. Based on the premise that each company's drivers would be at fault (or not at fault) in motor vehicle accidents on a similar basis over time, the agreement stipulated that each company would bear the loss for its own insured client. The purpose of this agreement was to reduce or eliminate the administrative and litigation costs that would otherwise be incurred in establishing accident liability. Was this "price fixing" within the meaning of section 30? The Commission thought otherwise. It cited the leading Australian case on price fixing, where Justice Lockhart distinguished between "arrangements which directly or indirectly restrain price competition and those which merely incidentally affect it."\(^{222}\) The Commission observed:

> [T]he terms "fix," "control" and "maintain" are synonymous with an interference with the setting of a price, as opposed to allowing such price to be set in response to changes in the supply and demand for goods and services. Thus in a technical sense any agreement by competitors in a market which has an influence on, or interferes with the setting of a price amounts to "price fixing." However, following [Justice Lockhart], for that interference to have any significance in a competition sense, the price that is so fixed must not be "instantaneous or merely ephemeral," "momentary or transitory," or be the result of arrangements which merely incidentally affect it.\(^{223}\)

Here an important cost element in the price of motor vehicle insurance was removed by the agreement. In a technical sense the parties had fixed part of the price of this service, but this cost saving had, the Commission accepted, been passed on to consumers.\(^{224}\) Once this cost element had been removed, prices for vehicle insurance then moved in accordance with "normal competitive pressures."\(^{225}\) Furthermore, the large number of parties to the agreement, plus the existence of several other, non-member, insurance companies, showed that the market faced vigorous rivalry. This was a setting in which cartel behavior was improbable and the price fixing label inappropriate.

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\(^{219}\) [1989] 2 N.Z.B.L.C. 104,477 (Com.).


\(^{223}\) [1989] 2 N.Z.B.L.C. at 104,482.

\(^{224}\) *Id.* at 104,483.

\(^{225}\) *Id.*
3. Group Boycotts

The Auckland Regional Authority (ARA) case is the only instance of suspected boycotting to come before the courts so far. To reiterate, Budget alleged a collusive arrangement between the ARA, Avis, and Hertz to exclude Budget. This would have clearly breached the boycott proscription in section 29, but Justice Barker found that no three-way arrangement had ever been entered into. At most there were two two-way arrangements—Avis and ARA, and Hertz and ARA. For reasons outlined earlier, there was no need for Avis, Hertz, and ARA all to agree for the exclusion of Budget to occur. As section 29(1)(a) requires that at least two persons be direct competitors, neither of the two-way vertical agreements (between the airport authority and each individual rental car firm) fell within the proscription.

C. Vertical Restraints

Part II of the Act also contains provisions regarding vertical restraints. Vertical restraints are those between persons in a supplier-customer relationship. The potential for harm is not so readily apparent with vertical restrictions. Nonetheless the Commerce Act does address them.

1. Resale Price Maintenance ("RPM")

The Act contains detailed provisions proscribing resale price maintenance, i.e., the setting of price floors by manufacturers or suppliers. The harm is immediately obvious—price floors prevent discounting by resellers. Expressing the ban on RPM in statutory language is not as easy, however. Hence the Act accompanies its pithy prohibition in section 37(1) ("No person shall engage in the practice of resale price maintenance") with comprehensive definition and deeming provisions. In essence, threats, inducements, or simply withholding supplies because the reseller has indicated it will sell goods at a price below the specified price, is banned.

227. See supra note 201 and accompanying text.
228. Following anxiety expressed by some commentators, notably Pengilley, that section 29 was too broad in its ban, the section was amended in 1990. Section 13 of the Commerce Amendment Act of 1990 eliminates most potential situations of "overkill" attributed to the original section 29 by stipulating that the subject of exclusionary activity must be a direct competitor of the boycotting parties. See Warren J. Pengilley, The Exclusionary Provisions of the New Zealand Commerce Act in Light of United States Provisions and Australian Experience, 3 CANTA. L. REV. 357, 393-94 (1988).
229. For a full discussion, see Warren J. Pengilley, Resale Price Maintenance under the Commerce Act, in COMPETITION LAW AND POLICY IN NEW ZEALAND, supra note 2, at 249-79.
230. For examination of the full range of competitive effects both harmful and beneficial, see Lindsay F. Hampton, Resale Price Maintenance: Economic and Policy Analysis, 4 CANTA. L. REV. 75 (1989).
There have been virtually no cases on RPM under the 1986 Act. This is surprising in view of the heavy Australian litigation on RPM under the near identical sections in the Trade Practices Act. It would be optimistic to believe the practice of RPM is any less prevalent in New Zealand than elsewhere. Perhaps the paucity of cases is due to a general inertia in public enforcement by the Commission and a cautious “wait and see” attitude by potential private plaintiffs.

Despite the lack of case law, the Department, in its review of the Act, tentatively suggested that the absolute ban on RPM be lifted. As it then stood, RPM, unlike horizontal price fixing, could not be authorized. The Department was no doubt influenced by Chicago School arguments pointing to the efficiency-enhancing possibilities of RPM. Countering the “free rider” problem (some retailers taking advantage of the promotional efforts of others) is the most well-known justification for RPM. Submissions upon the review were evenly divided. Nonetheless, the Commerce Amendment Act of 1990 duly carried forward the Department’s recommendation by adding RPM to the list of practices that can be authorized in section 58. Despite this liberalization, it will be a surprise if many applicants succeed in obtaining authorization. A de facto absolute ban on RPM will probably still ensue, because of the difficulty of establishing that the alleged curtailment of free riding, through the imposition of RPM, is sufficient to outweigh the clear harm to price competition.

One form of vertical price fixing which has come before the courts, indeed the Court of Appeal, is maximum resale price fixing. The setting of price ceilings is not caught by the RPM provisions, which all assume a minimum price below which goods cannot be sold. Maximum resale pricing is, however, caught by the general proscriptions in sections 27 and 36.

2. Non-price restraints: Exclusive Dealing, Tying

The Commerce Act, although adopting most of the Australian Trade Practices Act’s provisions on competition, did not replicate section 47 of the latter. This section of the Australian Act contains a comprehensive provision

233. See Pengilley, supra note 229, at 253.
234. See id. at 251 for a brief overview of the widespread use of RPM internationally.
236. For a detailed discussion, see Hampton, supra note 230, at 76-84.
237. Five commentators (including myself) favored the status quo, while five others supported liberalization. See generally the synopses reproduced in REVIEW OF THE COMMERCE ACT 1986: REPORTS AND DECISIONS, supra note 51.
regulating exclusive dealing and tying. The former refers to arrangements between a supplier and its customer whereby the customer agrees to sell only the supplier’s product. Tying (or “full-line forcing”) describes the practice whereby a customer is required to take a second, additional good or service as a condition of obtaining the first product. Despite some early suggestion that the New Zealand legislature’s silence on these non-price vertical restraints implied they were exempt, the clear position now is that they are caught by the general prohibitions in sections 27 and 36. This is unambiguously confirmed by the Fisher & Paykel litigation discussed in detail in the next section.

D. Misuse of a Dominant Position

The Commerce Act’s provision dealing with the behavior of large dominant firms is section 36(1):

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

(a) Restricting the entry of any person into that or any other market;
(b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
(c) Eliminating any person from that or any other market.

The section is commonly seen as having three elements: (1) establishment of a “dominant position in a market”; (2) “use” of such dominance; and (3) use for one or more of the proscribed “purposes” (a), (b), or (c).

The section has recently been the subject of several interesting cases one of which, Magic Millions, will be discussed in the next section.

One element which merits brief discussion here is “dominant position in a market.” The Act defines this key phrase further in section 3(8) as: “One in which a person as a supplier or acquirer of goods or services either alone or together with any interconnected body corporate is in a position to exercise dominant influence over the production, acquisition, supply, or price of goods or services in that market.”

This definition then goes on to list three factors—(a) market share, technical knowledge, access to materials or capital; (b) constraints posed by current or potential competitors; and, (c) constraints posed by suppliers or acquirers—which must be taken into account in assessing dominance.
The Commerce Commission, very early on, made it clear that these mandatory factors were not exhaustive. Moreover, it then set about paraphrasing section 3(8) in a manner which was to prove contentious. In Re Magnum Corp., Ltd.-Dominion Breweries, Ltd., the Commission, in a determination of a merger proposal, reformulated section 3(8) in an oft-cited passage:

[D]ominance is a measure of market power. Being in a 'dominant position' is interpreted by the Commission, in essence, as having sufficient market power [economic strength] to enable the dominant party to behave to an appreciable extent in a discretionary manner without suffering detrimental effects in the relevant market[s]. This interpretation stresses independence of behaviour, i.e., conduct that is pursued independently of the presence, actions or reactions of existing or potential competitors, purchasers or suppliers.

In judicial review proceedings, the High Court gave its imprimatur to this passage, rejecting the applicant's arguments that the Commission had elevated the independence of behavior above the statutory criteria (subsections (a), (b), and (c)).

In the most recent full discussion of dominance, Re Broadcast Communications, Ltd., the Commission thought it appropriate to dispel any lingering suggestion that the independence test was some insuperable threshold:

[T]he dominance test is not an absolute test based on the ability to act independently. Indeed no person, not even a monopolist, acts without regard to competitors, suppliers or customers. Rather, the concept of dominance is based on the degree of control a person has over the market involving his or her goods or service. Dominance exists when a person is in a position of economic strength such that it can behave, to a large extent independently of that person's competitors. A person in a dominant position will be able to effect an appreciable change in the price and/or other aspects of supply in his goods and services and to maintain this change for an appreciable length of time without suffering a serious adverse impact on profitability.

Whether this revised version of the dominance standard will lead to the Commission finding dominance established more frequently, only time will tell.

The scope of section 36 was recently broadened. In a change which highlighted the interrelationship between competition and trade policy, the Commerce Amendment Act of 1990 introduced section 36A, entitled “Use of a dominant position in trans-Tasman markets.” A person who has a dominant position in a market in Australia, or in a combined Australian and New

248. For a fuller discussion, see David A. R. Williams, The Development of Merger and Takeover Regulation in New Zealand, in COMPETITION LAW AND POLICY IN NEW ZEALAND, supra note 2, at 284.
249. [1987] 1 N.Z.B.L.C. 104,073 (Com.).
250. Id. at 104,088 (emphasis added).
253. Id. at 448 (emphasis added).
Zealand market, will now be caught if it uses such a position for one of the proscribed purposes.

Section 36A is designed to fill the gap left by the abolition of anti-dumping controls with respect to Australian goods. In 1988, the Prime Ministers of Australia and New Zealand entered into the Memorandum of Understanding on Harmonisation of Business Laws as part of the review of the 1983 CER Treaty. The review saw an acceleration of the movement to free trade with this objective brought forward from 1995 to 1990. The memorandum recommended dismantling anti-dumping controls between the two nations by July 1, 1990, coupled with a strengthened monopolization prohibition to prevent predatory conduct by New Zealand firms in Australia and vice versa. Section 36A is the culmination of this effort. A similar amendment was made to the Australian Trade Practices Act which now sports a new section 46A.

Clearly anti-dumping law and competition law differ in both principle and practice. One commentator predicts that "[b]ecause of the different focus, it can be stated with assurance that it will be much more difficult to attack transactions under competition law than was the case under anti-dumping laws." Whether this is good or bad depends on one's faith in the principle of free trade versus a desire to protect and nurture domestic industry as a thing of value in itself.

Finally, the extension of section 36, giving it extraterritorial effect, has generated a need for closer cooperation between the enforcement agencies on both sides of the Tasman. The 1990 amendments introduced a number of measures to facilitate this cooperation. The Commerce Commission may, for example, now act as a conduit for the receipt of information or documents needed by the Australian Trade Practices Commission in section 46A proceedings and vice versa.

E. Mergers and Takeovers

Control of mergers and takeovers is relatively modern, traceable to the Commerce Act of 1975 which, for the first time, had a comprehensive merger
The former Act contained an elaborate mandatory prior notification scheme, that was carried over in the 1986 legislation. Part III of the Commerce Act of 1986, as it originally stood, cast a net over a range of acquisitions requiring prior notification to the Commission. Failure to notify and gain the requisite approval rendered the merger participants liable to pecuniary penalties, injunctions, or even divestiture of assets. The Act's pre-notification net caught two different classes of amalgamation. First, large mergers (i.e., those involving combined assets of at least one hundred million dollars, with the smaller participant being at least five million dollars) required notification. Secondly, mergers in sensitive industries such as daily newspapers or that crucial industry, beer, also qualified.

Once notified, the Commission had a maximum of one hundred working days to approve or deny the proposal. Most received clearance within the initial twenty day period, however. All was not lost, even if notification had not been given—section 67 empowered the Commission to give retrospective clearance or authorization. In all cases, the substantive test was the same. The Commission was obliged to give a clearance to the proposal unless it was satisfied the acquisition would result in, or strengthen, a position of market dominance. If dominance problems loomed, the participants could still seek an authorization on grounds that the likely public benefits from the proposal would outweigh the detriments therein. To reiterate, the clearance decision had to take place within twenty days, with a final authorization determination permitted a maximum further eighty days.

The rationale for this compulsory pre-notification regime is straightforward. Once mergers are consummated, structural dissolution (divestiture) is

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261. For further discussion see Williams, supra note 248, at 281-83.
263. Id. § 84.
264. Id. § 85.
266. For example, in the first two years of its operation, 809 merger proposals were registered under the Act with some 90% receiving clearance within the initial 20 day period. Commerce Commission Annual Report 1988, supra note 73, at 26-27. Similarly, in the year ending June 30, 1990, 355 of the 411 proposals notified were cleared within 20 days. The remainder were either withdrawn, returned to the applicants for resubmission, or cleared within the 100 day maximum. Some were still on hand at the end of the year. Significantly, none were halted. Commerce Commission Annual Report 1990 24-25 (June 30, 1990).
267. This provision was contained in the original section 66(7) of the Commerce Act of 1986.
seldom likely to succeed, should the merger be found to be anticompetitive.269 The merger is a fait accompli—the “eggs” are well and truly “scrambled.” The ex ante approach to merger control is well established in other jurisdictions.270

Under the original regime, many, indeed too many, acquisitions were swept in for determination.271 The business community complained of undue delays in obtaining approval. The Commission itself also complained of the heavy merger workload which detracted from its enforcement efforts in other areas such as restrictive trade practices.

The large number of predominantly innocuous acquisitions requiring the Commission’s consideration was exacerbated by the high threshold for illegality set by the 1986 Act. The substantive test was, and still is, the creation or strengthening of a dominant market position, something that few acquisitions were likely to engender. Only mergers resulting in very large market shares were in danger, and then an assertion that conditions of entry were such that potential competitors provided some discipline was likely to be accepted by the Commission as sufficient to assuage the prima facie appearance of dominance.272 A visiting American scholar commented: “All considered . . . it seems that New Zealand’s standard for determining dominance is too permissive.”273 This characterization appears to have been accurate in light of the raw statistics of New Zealand merger enforcement in the mid to late 1980s. Since the introduction of the 1986 Act, only ten mergers have been halted.274 This represents a tiny fraction of the number notified. The brutal reality was that the exercise was largely futile—vast numbers of mergers were being obliged to notify a Commission which, after scrutiny (and delay) approved nearly all of them.

Merger overhaul was high in the list of changes recommended in the review of the Act. The various reports suggested a careful streamlining of the

270. For example, the United States and Canada. See Williams, supra note 248, at 301-04.
271. See supra note 266.
273. Id.
procedure. The reports suggested raising significantly the triggering thresholds for pre-notification, to sweep in fewer acquisitions. A further suggestion was to cut time limits to reduce delays for business.

As noted earlier, however, a rude shock awaited those who had followed the reform exercise when the Commerce Law Reform Bill was reported back from the Select Committee. The mandatory nature of the pre-notification regime had been dropped, under pressure from big business interests such as the Business Roundtable. Opposition member (and now Minister of Commerce), Mr. Philip Burdon remarked:

At the eleventh hour the Government decided that it would dispense with and replace the present regime with a voluntary disclosure regime. That change has caused considerable concern in several circles that are closely associated with the administration of the Act: The Opposition is concerned that there will be a repetition of the kind of mischief that took place when Fletcher Challenge and Brierley Investments arranged for the carve-up of Winstones about three years ago, which the Commerce Commission rightly stated was an unsatisfactory position.

The reference to the "carve-up of Winstones" was a particularly apposite example. In Commerce Commission v. Fletcher Challenge, Ltd., the Commission succeeded in establishing that the defendant had contravened section 50 of the Act by implementing a merger proposal, within the First Schedule criteria, without first notifying it. However, divestiture was now out of the question. The court laid much of the blame at the feet of a dilatory Commission, which dragged its feet in bringing proceedings. This should not obscure the point, however, that, even had the Commission been more prompt, the matter was academic. From a structural viewpoint the assets were now inextricably mingled, making divestiture impossible. The lesson should be clear: ex post facto or "strike down" control of mergers is limited, given the practical difficulty of securing divestiture after any length of time.

What, then, is the deterrent to firms merging, now that notification is purely voluntary? Is the Commerce Act after January 1, 1991 (the date when the 1990 amendments to mergers came into force) simply a carte blanche to mergers? The legislature's reply would be that the dramatically increased pecuniary penalties for breach of the Act are a deterrent. A maximum pecuniary penalty of five million dollars can be imposed by the High Court for

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275. See Review of the Commerce Act 1986: A Discussion Paper, supra note 49, at 43-51. The Department commented that the present notification and preclearance system may be imposing unnecessary costs on both the Commission and the business community. Id. at 45.
276. See supra note 57 and accompanying text.
280. Id. at 623-24.
contravention. Whether firms, especially large firms, would consider the risk an acceptable one, is a moot point. First, the merger has to be detected. Second, the imposition of pecuniary penalties has been seen by the courts as a quasi-criminal matter requiring stringent proof. Third, the substantive test itself is not readily satisfied. The Commerce Amendment Act of 1990 has retained the demanding dominance standard. The test is contained in section 47(1), which states that acquisitions of business assets or shares which result in the creation or strengthening of a dominant position in a market, are prohibited. As I have already argued, the dominance standard is one seldom reached if the first five years of determinations by the Commission are any guide. Overall, merger control in the 1990s appears to be a largely optimistic aspiration.

F. Price Control

Part IV of the Act contains a price control regime. New Zealand has had a long history of resort to price control as a means to combat problems of monopoly, and the legislature probably did not feel confident enough to jettison it completely when the 1986 Act was passed.

The Minister of Commerce may recommend to the Governor-General that prices for goods or services should be controlled if the Minister is satisfied that the items will be supplied or acquired in "a market in which competition is limited or is likely to be lessened," or where it is necessary or desirable for the prices to be controlled in the interests of users, or consumers, or suppliers. The Minister may require the Commission to investigate and report back on the need or continuance of price control measures. Once goods or services are subject to price control they must be supplied in accordance with the authorized price, which is determined at the Commission's

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281. Commerce Act, 1986, § 83 (as amended by Commerce Amendment Act, 1990, § 29) (the maximum penalty with respect to individuals is now $500,000. The original maxima under the 1986 Act were $300,000 (companies) and $100,000 (individuals)).
282. One Opposition member during the Second Reading of the Bill, remarked: "Five million dollars is chicken-feed to some companies, and will not prevent anything." Hon. Warren Kyd, N. Z. PARL. DEB. 2401 (June 26, 1990).
283. The Commission was alerted to the acquisition of Winstones by Brierley and Fletcher Challenge by a mole in one of the companies concerned. See Commerce Comm'n v. Fletcher Challenge, Ltd., [1989] 2 N.Z.L.R. 554, 601.
285. Following the introduction of a new section 69 by the 1990 Amendments, mergers may also be subject to the substantial lessening of competition test in section 27. See Williams, supra note 248, at 295.
286. See generally Donaldson, supra note 2.
288. Id. § 53(2)(b).
289. Id. § 54.
290. Id. § 55.
discretion, taking into account certain mandatory factors. The price control regime was left untouched by the 1990 amendments.

At the commencement of the Act, some nine items, including butter, cement, and steel, were subject to price control. Three years later this had dwindled to one—natural gas. There have been a number of determinations of the Commission fixing the price of natural gas that have adopted an accounting rate of return/capital assets pricing model ("CAPM") as a method for analyzing profitability and therein.

The use of the CAPM formula was unsuccessfully challenged in the High Court in a comprehensive examination of the alternative international approaches to price control.

There is little doubt that price control in the 1990s will remain as an "important last-resort mechanism to deal with problems arising from market dominance." The Commission has nicely summarized the difficulties with the mechanism:

The price control provisions of the Act represent an attempt to substitute the Commission's decision for the normal price-setting dynamics of a competitive market... price-setting by a regulatory body suffers from considerable handicaps in comparison with the pricing outcomes of the competitive process... If the Commission were required to choose between preserving a competitive environment or allowing the acquisition or strengthening of a dominant position together with an extension, or retention, of price control, then [it] would choose to preserve the competitive environment.

G. Authorization and Clearances

Parties to a potentially anticompetitive and illegal trade practice or business acquisition can obtain "immunization" against an antitrust suit. The Commerce Act calls this protection "authorisation." The essence of this statutory peace of mind is simple to state. The parties have the burden of satisfying the Commerce Commission that so-called "public benefit" flowing
from the arrangement outweighs the anticompetitive harm caused. The authorization function of the Commission is its major decision-making function under the statute. "Clearances" are determinations that a proposed business acquisition will not strengthen or result in market dominance in breach of section 47(1). It is authorization, however, to which I will devote the greater discussion.

Most anticompetitive conduct can be authorized, including horizontal price fixing, group boycotts, and, after 1990, resale price maintenance. A notable exception, however, is misuse of a dominant position. This is absolutely prohibited, subject only to the intellectual property exception in section 36(2). Despite variation in the statutory wording, the test for authorization with respect to all practices is the same—do the prospective public benefits outweigh the competitive harm likely to follow? Establishing this is a stiff challenge to budding applicants.

Several obstacles lie in the path of applicants in authorization proceedings. First, the Commission has consistently required the applicants to show a causal nexus between their conduct and the alleged benefits. If the benefits would result anyway, regardless of the conduct, then nothing crucial turns upon it being approved by the Commission. Second and similarly, if the benefits can be achieved by some less anticompetitive means than the restrictive practice or merger, this is a significant factor going to the weight to be attached to the benefits. Third, the Commission quite rightly has given short shrift to vague assertions of public benefits. The more rigorously reasoned and quantified the claim, the better chance it stands. Fourth, the Commission concerns itself with net benefit. Thus, any associated detriment intrinsic to the claimed benefit must first be set off against the benefit before the ultimate balancing can take place.

On the other hand, in the applicants' favor is the very wide construction of "public benefit." This is not restricted to economic benefits such as efficiency, but has included such things as maintenance of public confidence in the stock exchange, lower unit wage costs, and enhanced job security.

An important change to the Act was made in 1990. In a series of decisions prior to the change, the Commission had declined to accord serious

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302. Compare id. § 61(6) with id. §§ 61(7) and (8) and id. § 66(3)(b).
303. For a fuller treatment with detailed citations see Ahdar, supra note 64, at 242-47.
305. See, e.g., Re Carter Holt Harvey, Ltd. - The Crown, Decision No. 228 (Apr. 5, 1989), ¶ 123.
weight to efficiencies and other cost savings redounding to the parties where it could not be established that these were to be passed on to the consumer. In these decisions, the Commission, somewhat controversially, had implied a distributional objective into the Act. A dollar saved by a company in a merger, for example, was not necessarily worth as much as a dollar saved to the consumer. To arrest this development, the Commerce Amendment Act of 1990 inserted a new section 3A. This provision now requires the Commission "to have regard to" any efficiencies likely to result when evaluating public benefit. This positive obligation should ensure that due weight is now accorded economies of scale savings and the like, despite not being directly passed on to the consuming public. A dollar saved by a firm will now be a dollar saved to society's resources, regardless of its final resting place.

Finally, some comment on the procedural aspects of the authorization process is required. The process is a sophisticated one with detailed publicity and notification requirements, as well as draft determinations and conferences of parties envisaged under the Act. The fine detail will not be examined. Two aspects are worthy of discussion, however. Both concern restrictive trade practice as opposed to merger authorizations.

First, there is no time limit for final determination of restrictive trade practice applications for authorization. Business acquisition authorizations must be completed within sixty working days of registration. Yet the verdict on trade practices can be much tardier. Unfortunately, long delays have been endemic in the early years of the Act. The Fisher & Paykel application is an obvious example. Final determination was given on April 4, 1989, over two years after registration on February 17, 1987. Plainly, some time limit is required, yet the 1990 amendments contained no change in this regard. Perhaps the legislature hoped that the curtailment of the merger regime would free up Commission resources sufficiently to expedite handling of restrictive trade practice authorizations without the need for a formal time limit. Time will tell.

Second, the Commission, from its first authorization determination of a restrictive practice, decided that the mere making of an application for authorization was not enough to give it jurisdiction. The Commission had to

312. However, in one notable discordant decision, the idea of a distributional goal for the Act was vigorously rejected. Re N.Z. Co-operative Dairy Co, Ltd.-Auckland Co-operative Milk Producers, Ltd., [1988] 1 N.Z.B.L.C. 104,320, 104,358 (Com.).
313. Commerce Amendment Act, 1990, § 3A.
314. For further discussion, see generally Ahdar, supra note 64.
decide for itself if the practice was one to which the Act applied. If the practice was one which, in net terms, was competitively harmless, then the Commission had no power to proceed further. In a large number of determinations, the Commission, applying this initial inquiry, decided that it lacked jurisdiction to hear the application further. The legal effect of this was not that the practice was therefore illegal. Rather, it simply meant that it had not received statutory immunization. The difference in practice, however, was rather fine since it would be a brave litigant who would challenge an arrangement in court proceedings once the Commission had pronounced it innocuous. In the review of the Act, the Commission was criticized as implying a de facto clearance procedure for restrictive trade practices. Practices receiving the “no jurisdiction” verdict were, in practice, being cleared. With this concern in mind, the Commerce Amendment Act of 1990 introduced a small but significant change of wording into the Commerce Act to ensure that the jurisdictional inquiry was henceforth eliminated.

VI. TWO ILLUSTRATIVE CASES

This penultimate section has a different emphasis. Two major cases have been selected as illustrations of the courts’ treatment of the complex legal and economic issues typically arising in competition law litigation. The decisions are discussed in chronological order.

A. Misuse of a Dominant Position: The Magic Millions Case

In *New Zealand Magic Millions, Ltd. v. Wrightson Bloodstock, Ltd.*, one of the recurring conundrums in antitrust law came before the High Court—the distinction between healthy competitive behavior versus pernicious predatory behavior by a dominant firm.

The defendant, Wrightsons, had held annual sales of thoroughbred yearling horses at Wellington for sixty years. In the late 1980s, following pressure from breeders and buyers (who are concentrated in the upper North Island), Wrightsons shifted its annual sales to Karaka, near Auckland. The Wellington Racing Club, which had hosted the yearling auctions in conjunction with its summer carnival in late January each year, decided to fill the gap.
left by Wrightsons’ departure. It invited an Australian company, Magic Millions Gold Coast, Ltd., to hold yearling sales during the club’s summer carnival. A subsidiary of the Australian firm, New Zealand Magic Millions, Ltd., was established to run the sales commencing in January 1989 at Wrightsons’ old sales complex.\(^{324}\)

An annoyed Wrightsons responded swiftly. Soon after the plaintiff announced its 1989 dates, Wrightsons announced a change in the dates of its Auckland sales to clash with Magic Millions’ sales.\(^{325}\) Furthermore, Wrightsons announced a change in the structure of its auction sales. Thoroughbred yearling sales were to be divided into two groups: “K1” yearlings were sold in the premiere sale and fetched on average $100,000 each, while “K2” yearlings contained the residual, less valuable, horses, the average price being approximately $20,000.\(^{326}\) Magic Millions initially sought to compete in this second class (K2).\(^{327}\) Wrightsons linked its K2 sales to its K1 sales so that buyers and breeders were encouraged to attend both. This linking, combined with the revised dates, effectively precluded buyers and breeders from attending the plaintiff’s sales. Threatened with legal action, Wrightsons struck a hasty compromise for the 1989 season, averting a clash of dates.\(^{328}\)

The next season, however, the battle recommenced. Following Magic Millions’ release of its sales dates, Wrightsons announced its dates.\(^{329}\) The second day of Wrightsons’ premiere K1 sale clashed with the first day of Magic Millions’ auctions, while the first day of the K2 sale clashed with the plaintiff’s second day. Given the geographic distance between the two auction sites few, if any, buyers or breeders could attend both sales. The plaintiffs sought an injunction alleging a breach of section 36 of the Commerce Act. An interim injunction was issued in May 1989\(^{330}\) to avoid a clash for the 1990 season, but the question of dates in subsequent years still remained.

The substantive hearing was held before Justice Tipping in late 1989. Justice Tipping, in a lengthy decision, granted an injunction for three years, ending January 31, 1993, preventing Wrightsons from holding its auctions of yearlings on dates used by Magic Millions. Justice Tipping certainly saw the classic antitrust dilemma on the facts before him:

\[^{324}\text{Id. at 735.}\]
\[^{325}\text{Id. at 736.}\]
\[^{326}\text{Id. at 737.}\]
\[^{327}\text{Id. at 752.}\]
\[^{328}\text{Id. at 738.}\]
\[^{329}\text{Id. at 739.}\] The clash in dates is shown in this chart:

<table>
<thead>
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<th>18</th>
<th>19</th>
<th>20</th>
<th>21</th>
<th>22 (January 1990)</th>
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<tr>
<td>MM</td>
<td>Race</td>
<td>MM</td>
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<tr>
<td>WK1</td>
<td>WK1</td>
<td>WK2</td>
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The abbreviations are: “MM” = Magic Millions; “Race” = $1 million race for 2 year old horses; “W” = Wrightsons; K1 = Premiere sale; K2 = sale of lesser quality yearlings.

\[^{330}\text{New Zealand Magic Millions, Ltd. v. Wrightson Bloodstock Ltd, CP 270/89, (H.C. Wellington, May 9, 1989).}\]
It was submitted that the change of dates and the re-organisation of sales into K1 and K2... was all done simply to meet the emerging competition provided by Magic Millions. In other words, it was a legitimate competitive response rather than an illegitimate response designed to stifle competition rather than promote it.331

According to Justice Tipping, however, the correct approach was not to address this separately, but to work methodically through the constituent elements of section 36 of the Act.

As to the relevant market, taking into account substitutability on both the demand and supply sides, his Honor held that the market was the facilitation of the sale of thoroughbred yearling horses by auction in New Zealand. Attempts by the defendant to broaden the market to sales of horses of all ages, or sales by other means such as private treaty, were unsuccessful. Auction sales of yearlings had emerged over a long period as a distinctive separate market. Justice Tipping found it useful to follow Wrightsons' own dichotomy and divide the market into an "A sector" (K1) and a "B sector" (K2). He emphasized that this division was made purely to aid the analysis and not for the purposes of attracting liability to each sector.332 In this respect his Honor's choice of the phrase "sector" was inspired since it helped to defuse some of the usual controversy generated from judicial categorization of markets into "sub markets."333

Having defined the market, Wrightsons' dominance was apparent. Working through the statutory criteria in section 3(8), Wrightsons clearly was in a position to exercise a dominant influence in the market. It had the largest market share (around seventy-seven percent of the yearlings sold at auction by value in 1989); it could change its dates as it wished without constraint from Magic Millions or, indeed, from buyers or breeders. Wrightsons' ability to divide sales into two divisions and then tie them in a way which suited its purposes further indicated its economic strength.

Wrightsons' undisputed dominance in the A sector could work to its advantage in the B sector also. By tying the two, its strength in the premiere division could extend to the B sector. Buyers and breeders who wanted to secure the top horses (K1) could not attend auction sales of lesser horses (K2) by Wrightsons' competitor, Magic Millions, conducted many miles away on similar dates. The defendant's strength in premiere yearlings enabled it, through the tie, to gain dominance in the market for yearlings as a whole.334

The issue was, had Wrightsons used its dominant position? This element in section 36 was down-played by Justice Tipping, who considered that where a dominant firm acted for one of the proscribed purposes, it was "almost

332. Id. at 752.
333. For a discussion of the use of submarkets to aid analysis, see Maureen Brunt, Market Definition Issues in Australian and New Zealand Trade Practices Litigation, in COMPETITION LAW AND POLICY IN NEW ZEALAND, supra note 2, at 144.
axiomatic" that such a person had used its dominant position.\textsuperscript{335} This approach has its attractions, yet, as later authority has shown,\textsuperscript{336} it can lead to mischief unless one keeps in mind that the purposive conduct of the dominant firm must be firmly grounded in its market power.\textsuperscript{337} Justice Tipping suggests later in his judgment, however, that this is what he had in mind: "It is not a breach of s[ection] 36 if a person, albeit with a dominant position, simply acts in a competitive manner."\textsuperscript{338}

Had Wrightsons acted for one of the proscribed purposes? Magic Millions claimed Wrightsons' actions were for the purpose of preventing or deterring it from engaging in competitive conduct and to eliminate it from the market. Justice Tipping viewed the defendant's conduct as difficult to justify in economic terms unless it had an anticompetitive purpose.\textsuperscript{339} Statements by the managing director of Wrightsons ultimately proved damning. The director admitted the defendant would keep changing the dates "as often as necessary" to prevent Magic Millions from holding its inaugural sale and, further, that the tie was introduced lest Wrightsons "not be competitive enough" in the face of the new rival.\textsuperscript{340}

The elements of section 36 being satisfied, injunctive relief for the next three years was granted, precluding a clash of dates. One might quibble with the duration of this order—three years might appear to be somewhat generous protection extended to a new entrant. Yet, as Justice Tipping reminded the parties, the order could be varied should the circumstances merit it.\textsuperscript{341}

The conundrum of separating healthy robust behavior of dominant firms from exclusionary or predatory conduct is perhaps made more difficult than usual by the wording of section 36 itself. The section speaks of restriction or elimination of "any person." Hence, read literally, purposive actions by dominant firms against individual competitors might well be caught under this section. Section 36 does not explicitly require that there be harm to the competitive process as a whole.\textsuperscript{342} Dominant firms might hence be tempted not to compete vigorously, to "pull their punches" lest they fall foul of the Act. This might in turn provide less efficient and less innovative firms an undeserved opportunity to compete. However, "interpreted intelligently," section

\begin{itemize}
\item \textsuperscript{335} Id. at 761.
\item \textsuperscript{337} The possible danger is that competitive conduct of dominant firms, conduct which firms not possessing dominance could equally indulge in, might be proscribed. For an extensive discussion, see Hampton, supra note 243, at 194-204.
\item \textsuperscript{338} [1990] 1 N.Z.L.R. at 761.
\item \textsuperscript{339} Id. at 762.
\item \textsuperscript{340} Id. at 763.
\item \textsuperscript{341} Id. at 768.
\item \textsuperscript{342} Cf. Commerce Act, 1986, § 27 (prohibiting only conduct that "has the purpose or has or is likely to have the effect of substantially lessening competition").
\end{itemize}
need not lead to this. The early signs are that the monopolization prescription will not be interpreted so as to protect individual competitors "except insofar as" this protection promotes competition in the market as a whole.

Arguably, *Magic Millions* was consistent with this. Protecting the plaintiff was necessary for there to be any competition at all in the market. The incumbent dominant firm was required to refrain from certain rivalrous activity, but only for a period. Thereafter the battle could continue unabated.

B. Exclusive Dealing: The Fisher & Paykel Saga

The protracted saga surrounding Fisher & Paykel's long-standing exclusive dealing arrangements was resolved by the High Court in 1990. The issue in *Fisher & Paykel, Ltd. v. Commerce Commission* was, as the court observed, "deceptively simple." Did the exclusive dealing agreements between Fisher & Paykel ("F & P") and its dealers have the likely effect of substantially lessening competition in the market for distribution and sale to retailers of so-called "whitegoods" (domestic appliances such as refrigerators, washing machines, and dryers)\(^{346}\)

By the mid-1980s, F & P had emerged as the only New Zealand manufacturer of whitegoods. However, following the dismantling of protection by the fourth Labour Government in tandem with the conclusion of the CER Treaty, Australia's sole two whitegoods manufacturers, Email/Simpson and Hoover, had quickly gained a foothold as the decade closed.\(^{349}\)

Naturally F & P's pervasive franchise agreements came under attack. For some forty years F & P had maintained an exclusive dealing policy. Retailers secured a supply of the prestigious F & P brands only on the condition that they not sell whitegoods made by rival manufacturers. F & P's stranglehold appeared strong—fifty-five percent of the 815 retail outlets selling whitegoods at that time were tied to F & P. These outlets, in turn, accounted for seventy-five percent of all the whitegoods sold nationally.\(^{350}\)

Further, F &
P's market share was increased by an additional five percent when whitegoods manufactured by it and sold under license by Whiteware Corporation were taken into account. Whiteware's products were seen as a “fighting brand” for F & P to use in non-F & P franchised outlets. 351 F & P had secured the so-called “prime” nation wide retail chains. Finally, although the arrangements could be terminated by ninety days notice, dealers rarely did so. 352 In fact, the dealers (the “F & P Dealers Franchise Association”) supported continuance of exclusive dealing. 353

Confronted by an early challenge under the 1986 Act, 354 F & P applied to the Commerce Commission for authorization of their franchise arrangements. Following an extensive investigation, the majority of the Commission (three out of four) declined authorization. Led by the (then) chairman, John Collinge, the majority acknowledged at the outset that exclusive dealing per se was not unlawful and that the Commerce Act carried no presumption against this species of vertical restraint. 355 Nonetheless, the anticompetitive effects of the practice, in the majority's view, clearly outweighed any public benefits or procompetitive effects likely to flow from the exclusive dealing arrangement before them. 356

Drawing guidance from the U.S. Department of Justice Vertical Restraint Guidelines of 1985, 357 the majority pointed to the following anticompetitive effects:

[A]lthough difficult to quantify, the EDC [exclusive dealing clause], significantly raises rivals' costs of distribution. In practice, F & P dealers are clearly unwilling to switch out of dealing in F & P products. By virtue of foreclosing a significant number of distributors (which have an importance in the retail market beyond their numbers), the EDC has the effect of increasing rival suppliers' costs of operating through the remaining retailers or increasing rival suppliers' costs involved in developing new outlets. 358

In terms of section 27, the practice had the effect of limiting or hindering the expansion of F & P's rivals, and hence inhibiting interbrand competition. The majority could see few public benefits flowing from the practice. 359 Transaction cost savings (of approximately $3.8 million) might be realized, yet would be unlikely to be passed on to the public. In light of the new section 3A, 360 this aspect of their determination must now be open to question. F & P argued the exclusive dealing clause was necessary to prevent free riding

351. Id. at 104,409.
352. Id. at 104,410.
353. Id. at 104,442 (Vautier, dissenting).
356. Id. at 104,426.
357. The Commission wisely refused to mechanically adopt these guidelines, as is, into New Zealand competition law. See id. at 104,391-92.
358. Id. at 104,413.
359. See id. at 104,418-26.
360. discussed supra note 313 and accompanying text.
by other suppliers on F & P’s heavy investment in its dealers and in brand promotion. Exclusive dealing, it was said, also curtailed “switch selling” by dealers—switching customers attracted originally by F & P products to other manufacturer's whitegoods possessing a higher retail markup. The majority doubted whether exclusive dealing was really necessary to ensure F & P continued its investment in the product and its dealers. F & P had the normal commercial incentive to advertise and train its dealers, irrespective of an exclusive dealing stipulation. Moreover, it seemed curious that this “anti-theft device,” as F & P dubbed exclusive dealing, was not imposed over its “brown goods” range of products (televisions, videos, etc.).

In an almost equally long minority opinion, Commission member K. M. Vautier down-played the current degree of foreclosure and, instead, emphasized the dynamics of the market: “[E]xclusion of rival suppliers—from the estimated 50 percent of retail outlets in F & P’s dealer network—is not the same as exclusion from the defined market . . . . Whatever the precise amount of capacity presently affected by the practice, this need not necessarily be static for a significant period of time.”

The key retailers currently tied would not necessarily retain this advantage in the future. Hoover and Email/Simpson might attract F & P dealers to switch to them. Minimum efficient scale of retail distribution was not a problem here. Furthermore, advertising expenditures to establish brand awareness or reputation did not, in the minority’s view, represent a sunk cost. The procompetitive nature of exclusive dealing was stressed—“an innovation in organizational terms.” Overall, in net terms, the practice did not substantially lessen competition. Thus the Commission, in the minority’s opinion, had no jurisdiction to proceed further with the application.

Twelve months later the High Court upheld F & P’s appeal. It agreed with the minority that, notwithstanding F & P’s current undoubted market power and large capture of retail distribution, the majority had overstated the problem: the foreclosure was not significant in the “medium term.” F & P’s rivals could readily expand through a variety of means.

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362. Id. at 104,423-24.
363. See id. at 104,407 (¶ 4.23); see also id. ¶¶ 7.7 and 7.11.
364. Id. at 104,458 (emphasis added).
365. See also Benjamin A. Klein, Perfect Competition as a Criterion for Antitrust Policy: Brand Names, Entry Barriers and Exclusive Dealing in the Fisher & Paykel Case, in COMPETITION LAW AND POLICY IN NEW ZEALAND, supra note 2, at 65, 68, and 77-83.
367. Fisher & Paykel, Ltd. v. Commerce Comm’n, [1990] 2 N.Z.L.R. 731 (the High Court in the appeal simultaneously heard an action for a declaration, brought by F & P's rivals, that the exclusive dealing arrangements contravened the Act. Justice Barker took the sensible expedient of hearing both matters together).
368. Id. at 753.
that Email and Hoover were larger, on an international scale, than F & P, their potential market power could well surpass that of F & P.\footnote{369}

The emphasis upon the dynamics of the market by the High Court is to be welcomed. However, the temporal perspective adopted—the so-called "medium term"—carries with it some obvious dangers. Apart from the inherent vagueness of the notion, the time frame envisaged is one in which, meanwhile, the incumbent can exercise its market power to the detriment of both consumers as well as competitors. Perhaps it was only because the currently smaller rivals of F & P were giant Australian firms that the reliance upon future expansion opportunities was so confidently asserted. If the competitors of F & P had been small domestic companies, the High Court may well have viewed the extent of foreclosure and costs of expansion less favorably. The final outcome was certainly close to the line,\footnote{370} and the eloquent testimony of the appellant’s overseas antitrust experts—acknowledged by the court\footnote{371}—undoubtedly played a big part. The High Court’s judgment was to prove the final pronouncement. A belated bid by Email/Simpson to take the case on appeal was rejected by the Court of Appeal, the appellants having delayed lodging the appeal to an unreasonable extent.\footnote{372}

VII.

CONCLUSION

As the 1990s unfold, competition law in New Zealand can look forward to a healthy future. Given support for the antitrust legislation from both major political parties, repeal of antitrust law seems remote. That is not to say, however, that further refinements to the legislation will not be forthcoming. Amendments to the Commerce Act of 1986 will inevitably occur as experience reveals its shortcomings. The legislature has already made one recent revision—the Commerce Amendment Act of 1990.

The decisions of both the Commerce Commission and the courts can be fairly said to involve a high degree of economic sophistication. Moreover, international experience has been freely drawn upon, but solely as an aid to analysis, not as a mechanical determinant of a problem at hand.

Competition law in New Zealand is, despite its long legislative history, still in its early stages. A solid body of case law is developing, although many important areas of antitrust—joint ventures, group boycotts, and resale price maintenance, for example—remain uncharted waters. While this is no doubt

\footnote{369} Id. at 766.
\footnote{370} The High Court observed, "[O]ur decision must come down to a value judgment. . . . Not without some hesitation, we come to the view that the majority was in error in finding that the EDC breached section 27." Id. at 766.
\footnote{371} Id. (the appellant’s experts were Professors William Baxter (Stanford) and Benjamin Klein (UCLA)).
problematic for businesses (and their advisors), it means exciting times ahead for antitrust scholars. For the latter, the renaissance was long overdue.