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SHIFTING GROUND WITHIN THE
COMMERCE ACT:
IS THE NEED FOR COLLUSION DEAD?

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ABSTRACT

For many years, in United States, Australia and New Zealand there has been legislation prohibiting anti-competitive conduct on the part of monopolies. Allied with this has been a recognition that what a firm might not be able to achieve on its own, it might be able to do by colluding with other firms in order to bring about an anti-competitive effect. The policy reasons against monopoly are equally applicable to such conduct.

In reading the *Commerce Act 1986* it seems obvious that s 36 deals with the problems arising from monopolistic activities and s 27 is concerned with those firms which enter into contracts arrangements or undertakings in order to become *de facto* monopolies. This is certainly the interpretation given to the similarly structured United States *Sherman Act* of 1890.

The need for collusion has however been progressively weakened, to include schemes where parties are coerced into 'playing ball' and those where parties have knowledge of another's anti-competitive intent and participate nonetheless. In *Port Nelson Limited v Commerce Commission*, the New Zealand Court of Appeal appears to have struck a death blow by saying that where one party has the requisite anti-competitive purpose, so long as that is a 'substantial' purpose, whenever other parties, acting purely in their own self interest, contract with the first party there will be a breach of s 27, without any suggestion of collusion as to purpose.

exactly what
GM said

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 15,700 words.

SHIFTING GROUND WITHIN THE COMMERCE ACT: IS THE NEED FOR COLLUSION DEAD?

I INTRODUCTION

In the early years of the *Commerce Act 1986*, the main enquiry in applying *s 27*¹ was in deciding what distinguished a "contract" from an "arrangement or understanding" without any real consideration of the nature of a "contract arrangement or understanding" necessary to constitute a breach.

In particular, there was no enquiry into whether the parties to the alleged arrangement were completely *ad idem* as to all elements of that arrangement, including subjective elements such as their reasons for pursuing the arrangement. Essentially, and this may well have been the result of the Commerce Commission selective enforcement of the Act, the approach was that wherever there was some substantial lessening of competition resulting from two or more firms acting in concert, the Act was breached; the major issue in these cases being to establish that the firms were in some way acting pursuant to some arrangement or understanding, where no actual contract could be established.

One feature was that they targeted horizontal arrangements, that is arrangements between firms which should have competed with each other which had the purpose or effect of stifling that competition.

Given the wording of *s 27*, with its focus upon 'contract arrangement or understanding', it at first appears incongruous that it might be said that only one party need have the purpose of substantially lessening competition to constitute a breach. Recently however, the courts have had to consider situations where the contracts are between firms in a non-integrated vertical market (such as a supplier

¹ "27. **Contracts, arrangements, or understandings substantially lessening competition prohibited** - (1) No person shall enter into a contract or arrangement, or arrive at an understanding containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market".

and its customers). The purpose or effect of the supplier in entering these contracts has been to preserve the supplier's ability to restrict competition, so there is a horizontal market impact, but the difficulty has been that the other contracting parties cannot be seen to share the supplier's purpose.

Although there may be a "meeting of minds" in terms of reaching that particular contract, there may well not be (and perhaps will not generally be) a meeting of minds as to the purpose of the contract². This issue has arisen both in New Zealand, in the High Court³ and the Court of Appeal⁴ in the Port Nelson litigation, and in Australia, in the Federal Court in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd*⁵.

Does it matter? Surely if a firm has no dominance, in the sense of significant market power, any intention it may have in substantially lessening competition cannot, as a matter of elementary economics, be carried through into effect. Alternatively, if such a firm can impact a market in this way, can it not be seen as dominant in that market and thereby restrained in its conduct by *s 36*⁶?

One might think so, but the courts⁷ appear to have emasculated *s 36* by their interpretation of key elements within that section, in particular "dominant" and "use" where it refers to use of a dominant position for proscribed purposes.

² Given that a customer will not generally know that a particular price has been adopted to undercut potential or actual rivals and can be expected to act in its best interests and take the "best deal" in terms of price and service, it would be artificial to regard the customer as in any way sharing or adopting the supplier's motives or purposes. A customer who deliberately accepted a lesser deal (lesser because it was for lower services or a higher price) would be regarded as irrational.

³ *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762

⁴ *Port Nelson Ltd v Commerce Commission* (Unrep, CA 169/95, 3/7/96)

⁵ (1991) ATPR 41-069

⁶ **36. Use of a Dominant Position in a market** - (1) No person who has a dominant position in a market shall use that position for the purpose of -
 (a) Restricting the entry of any person into that or any other market; or
 (b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
 (c) Eliminating any person from that or any other market.

⁷ Endorsed by the Privy Council decision in *Telecom Corporation of NZ Ltd v Clear Communications Ltd* [1995] 1 NZLR 385

This development appears to have gone largely unnoticed in New Zealand, although Hampton⁸ has criticised it on the grounds of being "conceptually unsound and fails to take account of the genesis of s 27". This paper considers the development apparent in the Port Nelson litigation against the background of Hampton's views, paying particular attention to the following:

1. The justifications used for having provisions like s 27 on the statute books;
2. The development from the United States origin to New Zealand, *via* an intermediate period of incubation and amendment in Australia;⁹
3. The current status of s 36;
4. Whether the antipodean Courts have, albeit inadvertently, interpreted s 27 in such a way that it can be used to remedy perceived harmful effects of oligopolistic, particularly non-co-operative, behaviour.

⁸ Lindsay F Hampton *Port Nelson Ltd v Commerce Commission: Has the Court of Appeal read the need for concerted action out of s 27 of the Commerce Act?* Paper delivered to 7th Annual Workshop, Competition law and Policy Institute of New Zealand 1996

⁹ This is necessary because, for example, Hampton criticises the New Zealand courts for, in his view, departing from the interpretations of the United States *Sherman Act 1890*.

II JUSTIFICATION FOR LEGISLATIVE INVOLVEMENT

As long ago as 1776, Adam Smith issued a warning to the public against the dangers of firms talking amongst themselves when he wrote:

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."¹⁰

Smith's fear was that if these people of the same trade met together, there would be a natural tendency for them to act co-operatively for their own benefit, and act together in much the same way as a monopoly might, in respect of which he wrote:

"The monopolists, by keeping the market constantly understocked by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural price"

This is certainly consistent with the more recently expressed views of Areedaⁱⁱⁱ¹⁰ who, in discussing the emphasis of the American antitrust legislation on prevention of collusive conduct, gives as its *rationale* the fact that co-operation increases the risk of anti-competitive action, expands market power, creates an anti-competitive restraint not otherwise possible and surrenders important decision making autonomy on a matter of competitive significance.

In this context, Pengilly¹¹ in discussing the philosophic background of the *Commerce Act 1986* notes:

"History has long demonstrated that the absence of government regulation, without more, does not give rise to free enterprise. It gives

¹⁰ Volume VI, para 1402(b)

¹¹ Warren Pengilly *New Zealand Commerce Legislation: The likely impact on commercial conduct in the light of Australian experience* [1986] NZLJ 111, 112

rise to a system which is free in the sense that the Government does not directly assume responsibility [to decide who makes what]...But the responsibility for these decisions in the absence of an effective competition law is all too often not that of the individual decision maker but that of the private regulator operating through industry agreements, price cartel and the like. A truly private enterprise system demands that no individual or private group subvert the system itself. *The decision of a private regulator is still that of a regulator.*¹²

An economic justification in terms of competition eliminating the potential of 'dead-weight' loss and thereby increasing efficiency is provided in Appendix One. Related to this is the concept of transfers of wealth away from consumers to suppliers, which some argue to be harmful although the classical economists view is that if there is no alteration to the amount of production, it is not relevant who takes the benefit.

For many, these consequences are seen as sufficient to justify some restriction upon the powers of monopolies (or firms which join together to act like monopolies) to influence supplies or price.

For others, different considerations, such as a fear of political influence or a need to protect smaller independent firms are seen to justify some form of restriction.¹³

The critical factor to be taken from these stated objectives is that it is the conduct of monopolies or individual firms which band together to act like a monopoly which is seen to justify legislative action.

¹² Emphasis added. This discussion is developed in W J Pengilly *Private and Public Regulation under Competition Law: An Evaluation* (1981) 9 ABLR 3

¹³ A useful summary of the different justifications for what is called "antitrust law" in the United States is provided by Robert H Lande *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged* (1982) 34 Hastings LJ 65. Again, it is not the purpose of this paper to resolve which factors justify legislative control nor which should have primacy but rather to demonstrate what it is these attempt to justify.

III THE ORIGINS OF SECTION 27

A *United States Approach*

1 *The Sherman Act*

In 1890, the United States legislature prohibited "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce..."¹⁴

In s 2 of the same Act, it also made the activity of "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States..." unlawful.

It is necessary to consider the United States' Courts' interpretations of the wording of the *Sherman Act* in some detail, because these sections can be seen as the fountainhead of the New Zealand legislation.

Although one must be cautious in considering and applying United State's thinking to the New Zealand situation, there is judicial recognition that New Zealand is "following in the footsteps of a tradition", namely the *Sherman Act* and:

"In the trade practices area, the 1986 Act clearly follows in a general way a number of approaches adopted in Australia under the *Trade Practices Act 1974*, which in turn in some areas pick up principles developed under United States antitrust legislation."¹⁵

This paper is not concerned with s 2, which prohibits the setting up or attempted setting up of monopoly structures which, by definition, will have significant

¹⁴ Sherman Act, S1, 26 Stat. 209 (1890)

¹⁵ *Union Shipping v Port Nelson Ltd* [1990] 2 NZLR 662 at 700, per McGechan J and R G Blunt

market power and the consequent ability to influence price, supply and other factors within that market¹⁶.

2 *Contracts Combinations and Conspiracies*

By referring to contracts combinations and conspiracies¹⁷ in the *Sherman Act*, it is clear that s 1 is not concerned with the activities of one firm in isolation from other firms; it is only when restraint of trade arises from a "contract combination or conspiracy" that there is anything unlawful.¹⁸ Hovenkampⁱⁱⁱ¹⁹ describes this language as "vague and conclusory"²⁰ and says its "expansive text has always been the driving force in American antitrust policy"²¹.

¹⁶ This section however has no complete replacement in New Zealand, which has no specific prohibition against the establishment of a monopoly¹⁶ although the acquisition of dominance by merger or take-over activity is subject to *Part III, Commerce Act 1986*. Furthermore, any conspiracy to monopolize would, it appears, be subject to s 27.

¹⁷ Kintner draws a distinction between contracts on the one hand and combinations and conspiracies on the other by citing, at page 13, from *US v Kissel*, 218 US 601, 608 which in his view distinguishes them on the basis that a combination or conspiracy is the result of an agreement rather than the agreement itself. A contract represents an instantaneous meeting of the minds at the time of execution; whereas combinations and conspiracies are said to have the character of continuance, since they frequently embrace acts performed over a period of time. He then says "Since any form of restraint of concerted activity by two or more persons in restraint of trade may be condemned, the technical discussions of contract, combination and conspiracy are not important to the application of s 1."

¹⁸ Kintner at page 19 says: "A single person or entity acting alone is not subject to the strictures of s 1. Since the proscribed activities of contracting, combining or conspiring cannot be performed by a single person acting alone, it is well established that two or more persons are necessary to form an actionable contract, combination or conspiracy in restraint of trade."

¹⁹ Hovenkamp, Page 48-9

²⁰ In this context, "conclusory" appears to mean inconclusive or requiring conclusions to be drawn.

²¹ In *Standard Oil Co v United States*, 221 US 1, 59-60, the Supreme Court explained the width of the language on the following basis:

"...it was deemed essential by an all embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, old or new, which would constitute an interference - that is, an undue restraint."

After noting the wide range of factors providing a possible justification, he suggests it is appropriate to regard the *Sherman Act* as to some extent replacing common law rules:

"Most of the practices challenged under the *Sherman Act* had previously been addressed under common law rules. The framers of the *Sherman Act* believed that they were simply 'federalizing' the common law of trade restraints, making the common law more effective by creating a forum with jurisdiction over monopolies or cartels²² ...²³"

As Senator Sherman said in introducing the Act, it set "out in the most specific language²⁴ the rule of the common law which prevails in England and this country...²⁵" although in Hovenkamp's words "[t]he federal antitrust laws took on a life of their own."²⁶

Thus, at least when introduced, the Act was directed at monopolies and cartels. Kintner^{iv} saw the term "combination" as

"... the union or association of two or more persons to accomplish a common purpose. An essential element in the establishment of a combination is the conscious participation in the scheme by two or more minds...The courts will infer the required consent or agreement where the party **acquiesces** to the acts in question **with knowledge of their intended effect** or where the **acquiescence is the result of a coercive scheme.**²⁷"

and described a conspiracy in terms of a joint undertaking with a common purpose, intent or design. In terms of knowledge of the participants, he says:

²² "A cartel is an agreement among firms who should be competitors to reduce their output to agreed upon levels, or to sell at an agreed upon price. The firms acting in concert can earn monopoly profits just as a single firm monopolist." Hovenkamp, page 140

²³ Hovenkamp, page 53. Underlining added.

²⁴ Rather ironic, given later views as to the specificity of the language.

²⁵ 20 Cong.Rec 1167 (1889)

²⁶ Hovenkamp, page 53.

²⁷ Kintner, pages 6 -10. Emphasis added

"Those who, with knowledge of the conspiracy, aid or assist in carrying out the purposes of the conspiracy make themselves parties thereto and are equally liable or guilty with the original conspirators... Each party to the conspiracy need not have actual knowledge of every culpable transaction in question. It is enough that each conspirator knowingly participates in the common scheme in restraint of trade.²⁸"

It is clear that it is not the form utilised by two or more firms seeking to effect a restraint of trade, but the fact that they are which is important to the operation of the section, as seen in Sullivan:^v

"[C]ontract...combination or conspiracy becomes an alliterative compound noun, roughly translated to mean 'concerted action'. There is little need to grapple with issues about the meanings of the particular words of the statute nor to mark distinctions between them²⁹".

He draws a distinction between horizontal and vertical relationships but only says:

"[T]he concept of concerted action goes through a **subtle alteration** where it reaches not across a single view of distribution, but up and down between two or more such levels."

Finally in respect of the United States position, a very clear statement of the requirements in a horizontal context can be seen in *American Tobacco Co v United States*³⁰:

"Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a **meeting of minds in an unlawful arrangement**³¹, the conclusion that a conspiracy is established is justified"

²⁸ Kintner page 10.

²⁹ Sullivan, page 312. Emphasis added

³⁰ 328 US 781, 763 (1946)

³¹ Emphasis added. It is not only necessary that there be a meeting of minds, the parties' minds must meet in an unlawful arrangement.

As Hampton notes³² this is in the context of a case involving horizontal conduct. What "subtle alterations" are involved when the conduct is between firms in different levels, where the firms are unlikely to have the same purpose as each other when engaging in concerted action? According to Hampton:

"American law deals with the issue by distinguishing between motive and objective. A useful starting point is the statement of the Supreme Court in *Monsanto Co v Spray-Rite Service Corp*³³ that an agreement requires a showing of "a conscious commitment to a common scheme designed to achieve an unlawful objective. Commitment to the scheme is all important...As long as the parties are aware of the scheme's unlawful objective and partake in action that materially aids that objective they will be held to have engaged in concerted conduct."³⁴

3 *Resale Price Maintenance and Unilateral Refusals to Deal*

Two common situations of conduct between vertical segments of a market are resale price maintenance and unilateral refusals to deal. In order to consider the extent of participation required to constitute a breach, we can profit from a consideration of the United States treatment of these two schemes³⁵.

At least when the *Sherman Act* was first enacted, there were no specific provisions dealing with these situations. As a result, they came to be challenged under *s 1*. What is interesting is that the United State's courts did find that these arrangements did in some situations offend against the *Sherman Act*. Admittedly, even where there is a contract between a supplier and a purchaser which has the effect of restraining trade, the courts still look for a form of collusion as to the unlawful aspects of the contract.

³² Hampton, page 4

³³ 465 US 752, 763 (1963)

³⁴ Hampton, page 4

³⁵ To use a neutral word

Unfortunately, words like collusion get used without any real attempt being made to define them. It obviously connotes two or more parties acting to some extent 'in concert' anti-competitively. Beyond that, it is difficult to be more clear as to what amounts to collusion as various issues impact upon its meaning. For example, does 'acting in concert' require all parties to have knowledge, whether actual or constructive, of anti-competitive effect or will it suffice if one party the simply participates in some conduct of another (such as purchasing goods pursuant to a published price schedule) which is motivated by anti-competitive desires? Does collusion require that where one party has an anti-competitive purpose, the other parties must both know of and adopt that purpose? It is the difficulties in defining collusion which are at the heart of this paper.

Utton^{vi} devotes a chapter³⁶ to discussion of the concept of collusion, which in his terms, obviously connotes some formality, in that he anticipates some monitoring and incentives to participate (or at least disincentives to cheat). It is this kind of structure which he sees as targeted by *s1 Sherman Act*³⁷. He then gives³⁸ an interesting definition of a 'concerted practice' from the European Court as

"a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition ... which becomes apparent from the behaviour of the undertakings."³⁹

Kintner⁴⁰ says

"Section 1 is directed only at joint action. For a contract, combination or conspiracy in restraint of trade to be actionable under *s 1*, concerted action must be present. Concerted action refers to two or more persons acting together pursuant to an agreement, express or implied. Some

³⁶ pages 144 - 171

³⁷ page 152

³⁸ page 159

³⁹ *ICI v Commission* (1972) CMLR 418

⁴⁰ page 19

degree of participation by at least two parties is essential to create a combination or conspiracy within the reach of s 1."

The problem arose in the context of price fixing to determine the precise degree of participation needed on the part of those who wished to purchase supplies from a supplier who sought to dictate the price at which goods were to be resold. In many situations, the supplier would simply refuse to deal with those who did not agree to its terms. Concerted horizontal price fixing could easily be identified as in breach of the Act but:

"In any appraisal of the various forms of price fixing today, however, one should not ignore the fundamental bipartite distinction between 'horizontal' and 'vertical' price-fixing... Vertical price-fixing occurs within a single chain of distribution where, for example, a manufacturer makes an agreement with a wholesaler or retailer (or both) whereby the wholesaler or retailer is to re-sell the manufactured product at a certain price, above a stated minimum price, or below a stated maximum price... Vertical price-fixing is also commonly known as a resale price maintenance.⁴¹"

In 1911, an example of RPM was declared to be illegal under the *Sherman Act*.⁴² In this case, a supplier of medical products had a system of contracts with wholesalers jobbers and retailers, the purpose of which was to fix minimum prices at which goods could be re-sold at wholesale and retail. One wholesaler refused to enter, obtained medicines at cut price and induced some of those who had entered contracts with the Plaintiff to breach them by supplying the Defendant.

The validity of the arrangement under s 1 was the central issue.⁴³ As the contracts eliminated competition, they therefore restrained trade. As the scheme put together by the Plaintiff had the proscribed effect, it was illegal.⁴⁴ Obviously, each

⁴¹ Kintner page 67

⁴² *Dr Miles Medical Co v John D Park & Sons Co* 220 US 373, 31 S Ct 376 (1911)

⁴³ As again in the News Media case in Australia in 1996!

⁴⁴ Hovingkamp at pages 56 - 59 notes that decisions such as this one, which held that RPM was in breach of s 1 *Sherman Act* lead to the *Miller - Tydings Act of 1937*, 50 Stat 693 which permitted states to authorise RPM, but which was then overturned by the *Consumer Goods Pricing Act of 1975*, 89 Stat 801

participant at least had knowledge that the Plaintiff was attempting to set resale prices and would therefore remove fears of price competition from other suppliers of the same products. Apart from that, there appears to have been no enquiry into the purposes or motives of the participants.

Although it is a case involving concerted action among a number of wholesalers attempting to dictate resale prices, *United States v Trenton Potteries Co*⁴⁵ clearly expressed the evils of price fixing:

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices."

*United States v Colgate & Co*⁴⁶ marks the high point of the legitimacy of Resale Price Maintenance under *s 1*. In that case, Colgate made strenuous efforts to ensure that all those to whom it supplied its products resold at prices specified by Colgate and refused to supply those who would not adhere to its terms of trade.⁴⁷ Essentially, the dealers became obligated not to resell except at agreed prices but the court simply saw this as the right of customer selection, saying:

"In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal;

⁴⁵ 273 US 392, at 397

⁴⁶ 250 US 300, 39 S Ct 465 (1919)

⁴⁷ The indictment alleged the following conduct: "Distribution among dealers of letters, telegrams, circulars, and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not, requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon 'suspended' lists; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them, unrestricted sales to dealers with established accounts who had observed specified prices, etc" quoted at 306.

and, of course, he may announce in advance the circumstances under which he will refuse to sell.⁴⁸

As this was the basis on which the Supreme Court allowed the conduct, obviously there was no need to enquire into the attitudes or purposes of the dealers. Although it might be reasonable to suppose that given the option of accepting Colgate's terms or not having its products to sell, avoidance of those consequences would be the primary motive rather than any anti-competitive purpose, this could be seen as a form of coercion and thereby satisfying the element of collusion. This was not the approach taken however, although this case has been narrowly interpreted in later decisions.⁴⁹

In *Schrader* the court said it

"had no intention [in *Colgate*] to overrule or modify the doctrine in [*Dr Miles*] where the effort was to destroy the dealers' independent discretion through restrictive agreements...

"It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all those who fail to observe them, and one where he enters into agreements - whether express or implied from a course of dealing or other circumstances - with all customers throughout the different States which undertake to bind them to observe fixed resale prices."

In *Beech-Nut*:

"By these decisions it is settled that, in prosecutions under the Sherman Act, a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by

⁴⁸ *United States v Colgate* at page 307. In this way, the Supreme Court distinguished *Dr Miles Medical v John D Park*

⁴⁹ In both *United States v A Schrader's Son, Inc* 252 US 85 at 99, 40 S Ct 251 at 265 (1920) and *Federal Trade Commission v Beech-Nut Packing Co.* 257 US 441, 42 S Ct 150 (1922) the Court distinguished *Colgate*.

contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."⁵⁰

As Beech Nut had an elaborate enforcement scheme, it had gone beyond mere exercise of the right of customer selection and setting resale price terms, partly because it used others to bring about adherence to suggested resale prices, which took the conduct from the sphere of unilateral refusal to deal into an attempt to maintain prices "by utilizing...co-operative means"⁵¹.

Finally in this context, it is worth noting the Supreme Court statement in *United States v Parke-Davis & Co.*:⁵²

"In other words, an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organised if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy."

A key passage is:

"It was only by actively bringing about substantial unanimity among the competitors that Parke, Davis was able to gain adherence to its policy. It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will

⁵⁰ *Federal Trade Commission v Beech-Nut Packing Co* 257 US 441, at 452-3. One of these 'co-operative means' was to induce or compel jobbers, wholesalers and retailers not only to maintain its fixed resale prices but also to induce them to discontinue selling products to other jobbers wholesalers and retailers who did not maintain the resale prices. This violated *s 1 Sherman Act*

Another important case in this area is that of *United States v Bausch & Lomb Optical Co* 321 US 707 (1944) although that case did involve wholesalers agreeing to "police" the scheme. According to Kintner, page 137, this case marked the first time that the court expressly stated that actual agreement between two or more parties was not necessary to constitute a violation of *s 1* when it said "Whether the conspiracy or combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial." at 723

⁵¹ Kintner page 122

⁵² 362 US 29 at 43(1959)

also. But if a manufacturer is unwilling to **rely on individual self interest** to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping - a valuable feature in itself - by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price maintenance combination or conspiracy in violation of the *Sherman Act*.⁵³"

Having said that, the *Colgate* doctrine still has some validity, as seen in *Garrett's Inc v Farah Manufacturing Co*⁵⁴ where the manufacturer became aware that a firm it was supplying was discounting the product. As a consequence, the manufacturer ceased to supply it any further, but without involving any other party. The court held that there was no more than a unilateral act of customer selection, not a breach of the Act.

4 *Individual Purpose or Intention*

One matter which is made plain by the wording of the Act is that there is no obvious requirement to consider the purpose or intention of the parties to the contract combination or conspiracy.

As Areeda⁵⁵ says, it is often claimed that an agreement cannot breach the *Sherman Act* unless there is some purpose or effect to restrain trade. He goes on to say

"Intention is often superfluous to the analysis of reasonableness, for it adds nothing to the conduct from which it is usually inferred... To focus on an unreasonable intent that is inferred from undesirable conduct is simply to add an unnecessary step to the analysis."

⁵³ *Parke, Davis* page 46-7

⁵⁴ 412 F Supp 656 (1976)

⁵⁵ para 1506

He then demonstrates what he calls the "subordinate role of state of mind" by pointing out that an "innocent mental state" will never redeem conduct otherwise unlawful for being uncompetitive.

Utton⁵⁶ is to similar effect, where he says that even from the earliest cases, the US Supreme Court saw justification as irrelevant⁵⁷

5 Summary

To summarise the United States approach, it is clear that one firm can devise some scheme in restraint of trade but it will not become actionable under *s 1* unless other firms participate in it.

In the resale price maintenance and refusal to deal context, it is not the complying with the supplier's demands which constitutes the required degree of participation; rather that they decide to participate knowing that other participants will be bound not to act competitively and take advantage of it. Even that may be insufficient but it is clear that if any assist the supplier with its objective of fixing resale prices, then a "contract combination or conspiracy" is established.

On the other hand, it does appear that, particularly given the *Parke, Davis* decision that if a customer acts purely through self interest without any kind of pressure, coercion or inducement then there will not be a breach of *s 1*. As a result, if a firm with the objective of excluding entrants to or squeezing existing

⁵⁶ page 153

⁵⁷ He cites *United States v Trans-Missouri Freight Association* 166 US 290 (1897) where a price fixing agreement which arguably limited prices to a 'reasonable' rate was struck down; competition should determine the 'reasonable' price, not the railroad companies. Despite some relaxation in the depression years, *United States v Socony-Vacuum Oil Co Inc* 310 US 150 (1940) is the 'established precedent' to the *per se* illegality of price fixing, irrespective of purpose. As Justice Douglas wrote "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilising the price of a commodity in interstate or foreign commerce is illegal *per se*". There appears to be relaxation where there is a pro-competitive effect as in *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979) which upheld a system of blanket licences which set fees for royalties to compensate the composers of music.

competitors out of a market, lowers its prices and self interested customers simply take advantage of those prices, there will not be an unlawful restraint of trade unless at the very least those customers have some form of knowledge of the firm's objective when they contract with it, although even this may not be sufficient to establish a "commitment" on the part of those customers to the scheme.

Applying this matrix to the facts of recent New Zealand cases, it is clear that the situation in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd*⁵⁸ would be in breach. In that case, the airport authority, in order to maximise revenue from rental car concessions, decided to limit the number to two and charge a premium to the successful applicants. Those applicants, on the other hand, were willing to pay the premium (which on the face of it was contrary to self interest) in order to exclude competition.

It is equally clear that the facts in *Commerce Commission v Port Nelson Ltd*⁵⁹ would not qualify as a breach. There, the Port Company reduced certain charges below break-even point and allowed a global discount over a range of services, some of which were contestable and others were not in order to make life difficult (at least) for an entrant in a contestable service. The customers were never fixed with knowledge of the Port Company's purpose so, in taking advantage of the pricing regime and discount, can not be seen as committing to it.

⁵⁸ [1987] 2 NZLR 647

⁵⁹ (1995) 5 NZBLC 103,762

B Australian Approach

1 Trade Practices Act

Australia adopted virtually identical wording to the *Sherman Act* in s 4, *Australian Industries Preservation Act (Cth) 1906*, abandoned that approach in 1967 but returned to it with the *Trade Practices Act (Cth) 1974*. As was written in 1985:

"The legislation returns to the proscriptive approach of the *Australian Industries Preservation Act* and the *Sherman Antitrust Act* upon which it was based.⁶⁰ "

When one considers the original wording of s 45 *Trade Practices Act (Cth) 1974*, the borrowing from the *Sherman Act* is evident. *Subsection 45(1)* was in the following terms:

(1) A contract in restraint of trade or commerce...is unenforceable...

Of course, an argument can be mounted that all contracts necessarily involve some restraint of trade because when two parties agree on the performance of some obligation in exchange for some consideration, they are excluding others from performing the obligation in that particular instance. In other words:

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of the very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.⁶¹ "

⁶⁰ *Trade Practices Reporter* vol 1 Para 280, p 513 (1985 version of the looseleaf service)

⁶¹ *Board of Trade of City of Chicago v United States* 246 US 231 (1918)

To meet this difficulty, by *subsection 45(4)* a contract arrangement or understanding would only be in restraint of trade if it had certain defined effects on competition.

As a result of the decision in *Quadramann Pty Ltd v Sevastapol Investments Ltd*⁶², s 45 was amended to remove the reference to "restraint of trade" and, so far as is presently relevant, reads:

(2) A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition .

Comments about the status of the *Sherman Act* and United States decisions in Australian courts when called upon to deal with the *Trade Practices Act* are numerous. As one example, Lockhart J in the context of an allegation of price fixing in breach of s 45A said:

"My approach to the construction and operation of s 45A is generally in accord with the approach taken by the courts of the United States of America in decisions under the *Sherman Act*.⁶³ "

⁶² (1976) 133 CLR 390. This involved an application by one hotelier to enforce a covenant undertaken by his neighbour not to apply for a liquor licence. The High Court held that because it was a covenant running with the land, it was not a contract in restraint of trade in the sense meant in *Esso Petroleum Co v Harper's Garage (Stourport) Ltd* [1968] AC 269 and therefore was not the type of restraint contemplated by s 45.

⁶³ *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557, 568. He went on to identify that approach "They reflect the concern of those courts to carefully consider the relevant conduct before characterizing it as an arrangement in restraint of price competition and they distinguish between arrangements which directly or indirectly restrain price competition and those which merely incidentally affect it.

2 *Must there be Shared Purpose?*

Unlike the American legislation, purpose is introduced as a factor for consideration. One danger in dealing with the Australian legislation is that the phrase "contract arrangement or understanding" appears in a number of contexts within the Act coupled with the concept of purpose.⁶⁴

As a consequence, there is an evident conceptual fluidity to this term 'purpose' and, as will be discussed, judicial statements as to the meaning of purpose in one context may not necessarily hold true in another.

A very clear statement was made in the *Radio 2UE* case, where Lockhart J said:

"Section 45A can have no application unless there is some form of arrangement between people. There can be no arrangement without each of the parties communicating with each other and raising an expectation in the mind of the other. Otherwise there is no requisite meeting of the minds. There must be a consensus as to what is to be done and not just a mere hope as to what might be done or happen."⁶⁵

In this case however, the allegedly offending conduct was between competitors and the primary issue in that case was whether what they had done amounted to a "contract arrangement or understanding" to fix prices which, if proved, would have deemed the arrangement to be for the purpose of substantially lessening

⁶⁴ As examples, *s 45(2)(a)(ii)* is concerned with whether the purpose of a provision within a contract arrangement or understanding is to substantially lessen competition; in *s 45A* the provision is deemed to have that purpose if the provision has the purpose of fixing prices between competing parties to the contract arrangement or understanding. On the other hand, in *s 45D*, the prohibition is against persons engaging in conduct with another to hinder supplies from a third party to a fourth for the purpose of damaging that fourth party or substantially lessening competition. The concern here is not with the purpose of a provision but the purpose of conduct. Similarly, *s 47(10)* defines exclusive dealing in terms of particular conduct engaged in by a corporation for the purpose of substantially lessening competition. As prohibitions within *s 47* are also expressed in terms of conduct engaged in for particular prohibited reasons (*subsections (3) and (5)*) we cannot equate purpose with reasons

⁶⁵ page 43,920

competition. As a result, there was no need for the court to be concerned with any question of divergent purposes on the part of the alleged parties.

This case was following *Trade Practices Commission v Nicholas Enterprises Pty Ltd*⁶⁶ which is often cited as the source of the authority that for s 45(2)(a)(ii) to operate, there must be a meeting of minds and each party must have raised an expectation in the minds of the other.

That case involved an allegation that a number of hotels had reached an arrangement or understanding (there being no evidence to support a contractual agreement) that they would reduce the "allowance" on the purchase of a dozen to beer from three bottles to two (a device to bypass price controls imposed by conditions attached to liquor licenses).

The primary issue to be resolved was the meaning of an arrangement or understanding, and in particular, the extent to which a "meeting of minds" was necessary. His Honour quoted from *Re Basic Slag Ltd's Agreements (British Basic Slag Ltd v Registrar of Restrictive Trade Practices)*⁶⁷ :

"... there may be arrangements which may not be enforceable by legal proceedings, but which create only moral obligations or obligations binding in honour...For when each of two or more parties intentionally arouses in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so. An arrangement as so defined is therefore something 'whereby the parties to it accept mutual rights and obligations.'⁶⁸"

He then noted the *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd*⁶⁹ statement that:

⁶⁶ (1979) 40 FLR 83 per Fisher J

⁶⁷ [1963] 1 WLR 727 which involved s 6(1) *Restrictive Trade Practices Act (UK) 1956* which was expressed in terms of an arrangement "between two or more persons".

⁶⁸ page 739

⁶⁹ (1978) 53 ALJR 152

"an arrangement should be consensual, and that there should be some adoption of it. But...it is not essential that the parties are committed to it or are bound to support it."⁷⁰

Returning to the *Basic Slag* case, His Honour went on to find that the essential elements of the requisite meeting of minds to constitute an arrangement were:

1. Communication between each of the alleged parties;✓
2. Each to have raised an expectation in the minds of the other; and✓
3. Each to have accepted an obligation qua the other.⁷¹✓

He reinforced this view by quoting from *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd*⁷² where after noting *s 45 Trade Practices Act (Cth) 1974* was not in the same terms as *s 6(1)* of the UK legislation, it was said:

"but by parity of reasoning it would follow that the existence of an arrangement of the kind contemplated in s. 45 is **conditional upon a meeting of the minds** of the parties **to the arrangement** in which one of them is understood, by the other or others, and intends to be so understood, as undertaking... to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement.

"It seems to me also that an understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act."⁷³

⁷⁰ page 154

⁷¹ On appeal, Bowen CJ found "It seems to me that one could have an understanding between two or more persons restricted to the conduct which one of them will pursue without any element of mutual obligation, in so far as the other party or parties to the understanding are concerned." *Morphett Arms Hotel Pty Ltd v TPC* (1980) ATPR 40-157

⁷² (1975) ATPR 40,004

⁷³ page 17,116. Emphasis added.

The first of these paragraphs seems to impose a requirement of shared purpose but it must be said that in *Nicholas Enterprises*, it was clear that the alleged parties had the requisite shared purposes (reflected in their adopting the same pricing); the issue being as to whether their respective minds had met in such a way to create an arrangement or understanding.

His Honour did however say that "*prima facie* in my opinion an understanding is reached by two persons each with the other and there is no suggestion that it can be unilateral⁷⁴". This was in the context of a Trade Practices Commission submission that an understanding was made out as soon as one person at a particular lunch announced he would be reducing the bonus bottles on a particular date; his commitment would suffice to establish an understanding, as soon as others followed suit, even in the absence of communication of the similar conduct. It was still required that the persons to whom the proposal (even if it was an undertaking) adopt it themselves to constitute an arrangement.

Having found that the various publicans had reached an arrangement, he still had to consider whether it was in breach of s 45 by asking whether there was a provision which had the purpose, effect or likely effect of substantially lessening competition. This could be satisfied simply by the TPC establishing there was a purpose of fixing prices, without considering the further purpose of price fixing. As the result of the arrangement was to increase the price of beer sold by all parties, there was no room to doubt that the purpose or effect was price fixing. As the parties satisfied the further requirement of being in competition with each other, there was a breach.

The need for shared purpose came, albeit obliquely, before the court in *Trade Practices Commission v Email Ltd*⁷⁵. The two Australian manufacturers of electrical metering equipment (where Email had 60 to 70% of the market) produced identical price lists, supplied them to each other, adopted similar

⁷⁴ page 18,347

⁷⁵ (1980) 43 FLR 383 per Lockhart J

contractual price clauses with their customers and, when tendering for work (which was the source of the majority of work) tendered strictly in accordance with their (identical) price lists.

The court accepted this was a pure oligopoly, where each firm necessarily had to match the others or risk failure.⁷⁶ Here the parallel conduct was the result of market forces, not collusion.⁷⁷

The Trade Practices Commission nonetheless argued a breach of *s 45(2)(a)(ii)* on the basis of the forwarding of the price lists.⁷⁸ It simply asserted the communication constituted the necessary meeting of minds and gave rise to an expectation of inhibited conduct on the part of the other party when it came to setting prices, arguing that only one party to the arrangement needed to be inhibited.⁷⁹ Lockhart J in response said:

"For my part, I find it difficult to envisage circumstances where there would be an understanding involving a commitment by one party as to the way in which he should behave without some commitment by the other party. Unless there is some reciprocity of commitment I do not readily see why the parties would come to an arrangement or understanding."⁸⁰

Nonetheless:

⁷⁶ It is worth noting in this context that in a purely competitive market, one of the assumptions is that all information is instantly known. As a result, the sharing of prices could be characterised as going some way to create perfect competition, rather than lessening it. Further discussion of oligopolistic markets is contained in Appendix Two.

⁷⁷ page 391

⁷⁸ It did not argue there had been discussions nor contend that the prices would have not been substantially the same without the communication

⁷⁹ This was in reliance on a statement in *Morphett Arms Hotel Pty Ltd v Trade Practices Commission*: (1980) 30 ALR 88, 91-2, an appeal from the *Nicholas Enterprise* case: "[I]t seems to me that one could have an understanding between two or more persons restricted to the conduct which one of them will pursue without any element of mutual obligation, in so far as the other party or parties to the understanding are concerned."

⁸⁰ page 397

"...I incline to the view that there is no necessity for an element of mutual commitment between the parties to an arrangement or understanding such that each accepts an obligation *qua* the other; although in practice such cases would be rare."

On the facts, neither party considered itself as under any obligation to the other to forward or match prices but rather this was done without any arrangement or understanding for sound commercial reasons.

These cases demonstrate that the courts are looking for some form of mutually consensual behaviour before finding a breach of *ss 45A* and *45(2)(a)(ii)*. It is important to bear in mind the important qualification to the former that the price fixing must have effect across competitors (*i.e.* horizontally).

As recently as 1989, Heydon^{viii} wrote in terms of collusion being essential to constitute a breach of *ss 45 - 45C*. He writes:

"When will firms have reached the type of understanding or arrangement that must be examined in the context of its impact upon competition? How will it be proven that they have acted in concert? The statutory words are 'contract arrangement or understanding'. They suggest collusion, a 'meeting of minds', a consensus plan, having an anti-competitive *purpose* or an anti-competitive *effect*. There have been various detailed formulations of the elements of the consensus, but when reconsidered they do not take the matter very far."⁸¹

Interestingly, he goes back to the *Coal Vend* case⁸² as providing the best study of proof of arrangements. After noting that "combination", "arrangements",

⁸¹ para 4.260, page 2081. Despite this being a looseleaf service, the learned author seems to have seen no reason to have altered his views in recent years although he does discuss the decision in *ASX Operations Pty Ltd v Pont Data Systems Australia Pty Ltd* (1991) ATPR 41-069 in paragraph 1.1305 at page 803 in relation to its impact on the meaning of purpose.

⁸² (1911) 14 CLR 387

"conspiracy" and "understanding" were used interchangeably⁸³ he quotes the following passage:

"Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge."⁸⁴

The importance of this is that he regards "community of purpose" as an essential ingredient and cites long established authority as to how that might be proved. If community of purpose is not an essential ingredient, why then is there such an effort made to establish it?

The learned author then claims that the "most difficult question"⁸⁵ in this context is the nature of communication necessary to constitute an arrangement or understanding and concludes by saying communication between the parties is an essential element.⁸⁶ There is no appearance of any recognition that there might be some contract arrangement or understanding in a vertical context where there is a disparity in purposes in entering the arrangement.

As his analysis of what he calls "the problem of mutuality"⁸⁷ is entirely in terms of what external uniformity of conduct can be used to establish an agreement or arrangement, it is clear he can only see *s 45* as being breached by collusive conduct, the primary difficulty being in terms of proof of collusion.

⁸³ para 4.270, page 2082

⁸⁴ page 400, per Isaacs J

⁸⁵ para 4.290, page 2085

⁸⁶ para 4.320, page 2087

⁸⁷ para 4.340, page 2111

3 Refusals To Deal

As might be expected, the problem of refusals to deal has arisen in Australia and fallen to be considered under both *s 45(2)(a)(ii)* and *47(10)*. In *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd*⁸⁸ Mercury refused to continue supplying Dandy with Mercury outboards because Dandy was stocking a competitor's products. Dandy alleged a breach of *s 47(10)*, contending Dandy's **conduct** had the purpose or effect of substantially lessening competition.

Purpose of conduct suggests something quite different from the purpose of a provision in a contract. In establishing the meaning of purpose in this context, Smithers J said:

"The interpretation of the reference to "purpose" in *s 47(10)* depends upon the nature of the enactment and the context in which the particular provision appears. The nature of *Part IV* of the Act is that it aims to ensure a state of competitive trading by providing rules of conduct, penalties and remedies to persons who suffer if the rules are contravened. .. In *Hecar Investments No 6 Pty Ltd v Outboard Marine Australia Pty Ltd* (1982) ATPR 40-298 Franki J indicated that the test of purpose under *s 47(10)* was a subjective one. I think he was using the term subjective in the sense that the purpose was actually in the mind of the person engaging in that conduct.⁸⁹"

After considering the wording of *s 47(10)* he said:

"The purpose to be identified is the purpose which the engaging in the relevant conduct 'has'. This is a form of words hardly apt to refer to the subjective purpose of the person performing the relevant act and apt to induce an objective rather than a subjective approach.⁹⁰"

⁸⁸ (1982) ATPR 40-315

⁸⁹ page 43,897

⁹⁰ page 43,898

In support of this proposition, he quoted from *Slutzkin v Commissioner of Taxation*⁹¹:

"...It has long been settled that s 260 [*Income Tax Assessment Act 1936*] is not concerned with the subjective motives or the intentions of taxpayers but with the character of the acts done and transactions entered into...[W]hat must be looked at is the 'overt acts by which it [i.e. the arrangement] was implemented in order to ascertain its purpose."

In *Tillmanns Butcheries Pty Ltd v The Australasian Meat Industry Employees Union*⁹² Deane J had noted a disparity between s 45D(1) and s 260 *Income Tax Assessment Act 1936* and held that "The 'purpose' referred to in s 45D(1) is the operative subjective purpose of those engaging in the relevant conduct in concert." Smithers J compared s 47(10) and s 260 and said:

"But in relation to the form of words in s 47(10) the contrast is not to be seen. Both s 260 and s 47(10) are dealing with the nature of conduct rather than the minds of actors. Accordingly, there is much to be said for the view that the purpose referred to in s 47(10) is the purpose to be attributed to the act of engaging in the relevant conduct as revealed by the nature and character of that act. If this be correct the plaintiff will succeed in establishing the relevant purpose if it proves that the overt acts done in the course of engaging in the conduct were intrinsically of such a character that it is proper to infer therefrom that the purpose of the engaging in those acts was to substantially lessen competition in a relevant market."⁹³

What this is establishing is that by referring to the 'conduct', the legislation is to be taken as concerned with an objective assessment of the purpose of one party in engaging in that conduct. Applying this *rationale* to this arena seems entirely consistent with the United States approach where laudatory subjective intentions will not rescue conduct which otherwise contravenes the *Sherman Act*. As has been noted, the subjective intentions of the parties are not relevant. On the other

⁹¹ (1977) 140 CLR 314 at 329

⁹² (1979) ATPR 40-138 at 18-500

⁹³ page 43,899

hand, it does need to be borne in mind that the wording of the *Sherman Act* makes no reference to purpose at all, which emphasises a more objective approach.

In *ASX Operations Pty Ltd v Pont Data Systems Australia Pty Ltd*⁹⁴, the Australian courts had to grapple for the first time with the problem of unilateral behaviour and a purpose of substantially lessening competition which was not shared by all parties.

There, ASXO was the sole supplier of certain stockmarket data. Pont's business was the obtaining of stockmarket and other data from a number of sources and selling the combined information as a wholesaler to retailers, such as financial analysts. ASXO, through a subsidiary, was also engaged in selling the stockmarket information to retailers. Pont required access to the ASXO data in order to survive in the particular business and as a competitor to the ASXO subsidiary. The essence of the problem is neatly summed up in the following:

"The present is a case in which two parties, Pont and ASXO, are both rivals and at the same time ASXO is the sole supplier to Pont...of information which is essential to them if they are to continue to compete with ASXO in the services they offer to third parties."⁹⁵

Although ASXO did allow Pont access to the data, it only did so on the basis that Pont enter into three contracts restricting the use to which Pont could put the data. As an example, it could not on-sell immediately current data (which was critical) without paying fees for each 'access' to the data which customers of the ASXO subsidiary did not need to pay.

Pont commenced court proceedings, alleging, *inter alia*, a breach of *s 45(2)(a)(ii)* which is functionally identical to *s 27 Commerce Act 1986*. The court had little difficulty in finding that ASXO's purpose in including the restrictions in the

⁹⁴ (1991) ATPR 41-069

⁹⁵ Page 52,053

contracts was to preserve the wholesale market for ASXO (and so to lessen competition within that market). The issue then became one of whether ASXO's purpose could be equated with that of the contract itself or whether the contract was likely to have the effect of lessening competition.

The Full Federal Court noted that for s 46⁹⁶ the subjective purpose of those engaging in the relevant conduct was to be ascertained⁹⁷ but there was the "undoubted curiosity of legislation which speaks of the purposes of a provision, not of the purposes of those who devised and propounded the provision".⁹⁸ Furthermore, Pont had entered the agreements solely because it was essential to have access to the data, which would have been with-held had they not signed. In their submission, they were party to the contracts but not any anti-competitive purpose because it was a victim of any anti-competitive effect. The question was then asked (and it is a critical question in this context):

"Where not all the parties have the necessary subjective purpose, how is one to describe the contract they make as having a particular purpose in this sense?"

It is perhaps unfortunate that the question was framed in such a way as it suggests a willingness to strain the meaning of the Act's wording to bring such a situation within its ambit. Certainly, this was the result reached by the Full Federal Court, by referring to the interpretation given contract arrangement or understanding in the *Income Tax Assessment Act 1936*. It noted that "purpose" in that context had been defined as "not motive, but the effect which it is sought to achieve - the end in view"⁹⁹ and that it meant something more than being able to characterise a particular arrangement as a "tax dodge"¹⁰⁰. Ultimately however, the court said

⁹⁶ *Trade Practices Act (Cth) 1974* the equivalent of the New Zealand s 36 *Commerce Act 1936*

⁹⁷ citing *Hughes v Western Australian Cricket Association (Inc) & Ors* (1986) ATPR 40-736 at 48,043-45.

⁹⁸ page 52,059

⁹⁹ *Newton v Federal Commissioner of Taxation* 11 ATD 442 at 445. With respect, that seems rather to beg the question of by whom it is necessary that the effect be sought, all parties or just one?

¹⁰⁰ *Federal Commissioner of Taxation v Gulland* 85 ATC 4765 at 4787 where it was clear that the focus was necessarily, because of authority, on the form of a transaction rather than its substance

that decisions under that Act didn't necessarily support any particular interpretation of the *Trade Practices Act 1974* because it "is concerned with very different subject matter"¹⁰¹.

Attention was then paid to the effect of *Section 4F*¹⁰² which was clearly inserted to deal with the issue of multiple purposes, in that it provides that a provision has a purpose (lessening competition for example) if it was included for the particular purpose (of lessening competition) or that purpose was a substantial reason for its inclusion.

This was seized on as providing "considerable assistance"¹⁰³ as:

"Section 4F makes it plain that it is sufficient that a purpose was or is a substantial purpose, whether one is construing a section which is addressed to have a particular purpose... It also makes it clear that it is sufficient that the proscribed purpose was included in other purposes."¹⁰⁴

Furthermore

"...s 4F, in this operation, requires one to look to the purposes of the individuals by whom the provision was included in the contract arrangement or understanding... It therefore directs attention to the 'subjective' purposes of those individuals."

According to the Full Federal Court, this required a subjective consideration as to why provisions were included. As Pont alleged the provisions were included only because of ASXO's insistence, it became appropriate to look to ASXO's purposes, as the provisions were included as a result of its efforts. After finding that the agreements had the likely **effect** of substantially lessening competition, insofar as they required disclosure to ASXO of Pont's customers and prohibited wholesaling, the court held that that was sufficient to uphold the lower court's

¹⁰¹ page 52060

¹⁰² Largely similar to the s 2(5) *Commerce Act* definition of purpose

¹⁰³ page 52,060

¹⁰⁴ page 52,060

findings and was not prepared to infer a purpose of substantially lessening competition.

Given that the Full Federal Court chose not to make a finding as to whether the purpose breached *s 45(2)(a)(ii)*, its decision on the meaning of purpose in that context is strictly *obiter dicta*.

With respect there does appear to have been something of an exaggerated importance given to *s 4F*, which is really only a machinery provision to assist in interpreting the substantive provisions of the Act. That section clearly allows a court, when faced with a number of purposes for a provision to find a breach, so long as one of the purposes offends against the Act. It gives no obvious warrant however for regarding an objectionable purpose of only one party being sufficient. In the Australian context anyway, one particular argument against this interpretation is that there appears to be no difference in substance between the purpose of conduct¹⁰⁵ and the purpose of a provision in a contract. It seems that both can be established by finding the objectively determined subjective purpose of one party. This can only be viewed as contrary to the most basic principles of statutory interpretation, namely that if different words are deliberately chosen, that is a strong indication of an intended difference in meaning.

Having said that, there is considerable consistency with the approach taken in the United States, although no cases from that jurisdiction appear to have been cited before the court. There, a distinction has been drawn between coercive 'schemes'¹⁰⁶ organised by one firm and other schemes in which participation is purely on the basis of commercial self-interest. Even when 'downstream' firms have been coerced into participation, the scheme will be regarded as a contract combination or conspiracy, with one policy justification being that there is then an incentive on those forced to participate to involve the regulatory authorities to break the combination. Quite plainly, Pont Data had knowledge of the anti-

¹⁰⁵ as determined in the *Dandy Power Equipment Pty Ltd v Mercury Marine* case.

¹⁰⁶ this is intended to be a neutral term, not necessarily depicting something which is within or without the statutory prohibition.

competitive purposes of ASX and was coerced into adopting contracts tainted by such a purpose; it was either that or go out of that particular business.

The approach taken by the full Federal Court has been criticised by Burchett J in *News Limited v Australian Rugby Football League Limited*¹⁰⁷ the facts of which are summarised in footnote 107 below. Although he found that the structure set up by the Australian Rugby Football League was not an exclusionary provision as defined in *s 4D*¹⁰⁸ he did discuss the concept of purpose necessary to breach both that section and *s 45(2)(a)(ii)*¹⁰⁹.

His Honour referred to the previously quoted passage from *ASX Operations Pty Ltd v Pont Data Systems Australia Pty Ltd* that *s 4F* directs attention to the 'subjective' purposes of individuals and said:

"But to say that the purpose of the provision is to be ascertained subjectively is not to remove all difficulty. Under consideration is a provision of what is said to be a contract arrangement or understanding made or arrived at 'between persons any two or more of whom are competitive with each other'. Must the purpose be the purpose of all of them? Is it enough that the purpose is the purpose of one or some of them, and if so what about ... where the purpose is that of a party to the contract ... who is ... not competitive with any of the other parties?"¹¹⁰

¹⁰⁷ (1996) ATPR 41-466. We need not pay a great deal of attention to the facts. The Australian Rugby Football League had put in place a number of contracts with Rugby Football Clubs to field teams to play in a league. Each club was both exclusively bound and entitled to play in the league for five years, so there were contractual prohibitions against playing outside the league. As part of the contractual matrix, each club agreed to sign its players, coaches and other staff to contracts approved by the Rugby Football League as being consistent with the contracts between the league and individual clubs.

News Limited signed key players, coaches and staff into a "superleague" which would have brought the RFL structure to an end. Simultaneously, it commenced proceedings alleging that the agreements between the RFL and clubs and the clubs and their players, coaches and staff were in breach of *s 45(2)(a)(ii) Trade Practices Act (Cth) 1974* (among other alleged breaches).

¹⁰⁸ This section prohibits provisions between competitors which have "the purpose of preventing, restricting or limiting" supply or acquisition of goods.

¹⁰⁹ pages 41,700-704

¹¹⁰ page 41,700

In the face of a submission that the purpose had to be shared by all parties¹¹¹ His Honour referred to *ASX Operations Pty Ltd v Pont Data Systems Australia Pty Ltd* as authority for the proposition that "the subjective test could be satisfied by the purposes of some only of the parties to the agreement who were, as a matter of fact, responsible for it having been included in the agreement"¹¹² and said:

[This] decision ... was an unusual case where one party's peculiar position gave it a special preponderance of power in the negotiation of a contract. In general, and of their very nature, contracts arrangements and understandings made or arrived at between parties are characterized by their mutuality. Most often, it will be very difficult to find that a provision was included in fact for a particular purpose, where that purpose was confined to a single party. Where there is some kind of consensus, it is to be expected that a provision will have been included in it for purposes mutually agreed or contemplated.¹¹³

He goes on to say:

"[Section] 4F envisages cases where the proscribed purpose is but one of several purposes... But it has to be remembered that s 4D applies to contracts generally, and it would be strange if the legislature intended that a party's contract, entered into for an entirely innocent and appropriate reason, should be vitiated by a purpose confined to the other party to the other contract, which, since purpose does not have to be disclosed when contracts are concluded, may quite possibly remain

¹¹¹ based upon *Carlton and United Breweries (NSW) Ltd v Bond Brewing New South Wales Ltd* (1987) ATPR 40-820 at 48,880 where Wilcox J said "The purpose referred to in para (b) of the definition is a purpose common to the parties" where an arrangement was alleged between competitors. Here Tooth had sold its brewery business to Carlton but retained its hotel estate, giving an undertaking not to sell for five years and an option to purchase to Tooth. Carlton then sold the headleases of the hotels to a competing brewery, Tooheys, which gave Tooheys considerable power to increase sales of its products through the hotels, at the expense of Carlton. This proceeding concerned Carlton's application to injunct the putting into effect of the agreement, in the context of which the court was required to assess the strength of Carlton's allegation that the agreement amounted to an exclusionary provision, in breach of s 4D or was a contract arrangement or understanding for the purpose of substantially lessening competition, in breach of s 45(2)(a)(ii). Carlton failed because it had not established a critical element, namely that Tooth shared Toohey's anti-competitive purpose. Importantly, His Honour said "...to say that the purpose of another party is a very different thing from saying that the former shared the latter's purpose." (page 48,880)

¹¹² page 41,701

¹¹³ page 41,701

undisclosed... Furthermore, although it is clear that s. 4F applies to the construction of s 4D, it should not be overlooked s 4F is a general provision and there is some verbal infelicity in its application to s 4D. That is because s 4F, requiring a subjective interpretation of purpose, has to be applied to s 4D which is expressed in objective terms... I... conclude that the subjective purpose of one party only can hardly be regarded as falling within an intention the legislature has expressed by the words 'the provision has the purpose'."

He then appears to deal with the difficulty between the two sections by saying that limiting purpose to only 'substantial purposes' "profoundly affects the operation of s 4D¹¹⁴". After traversing a number of authorities concerning the meaning of 'substantial'¹¹⁵ he noted, in the context of a hypothetical joint tendering between competitors:¹¹⁶

"In the case of an ordinary commercial dealing, the purpose would simply be the pursuit by the tenderers of their own businesses. In other words, s 4D would strike at perfectly proper transactions if the legislature's careful insistence on an improper purpose were not insufficiently heeded. In the case of this particular section, it is the illicit purpose which is essential to an allegation of breach."

Unfortunately, he does not specifically address the problem which would arise if only one of the parties had the illicit purpose and in terms of factual findings, only holds that whatever proscribed purpose may have been present, it was not substantial. An interesting feature of that case is that while His Honour could not see any 'contract arrangement or understanding' between competitors...

Breach of s 45(2)(a)(ii) was also alleged. Because His Honour had held that the markets contended for by the plaintiff did not exist, he had no further need to consider this allegation so only in very brief terms mentioned that, because of his

¹¹⁴ page 41,702

¹¹⁵ including *Devenish v Jewel Food Stores Pty Ltd* (1991) ATPR 41-098, the *Dandy Power* and *Radio 2UE* cases and *Dowling v Dalgety Australia Ltd*

¹¹⁶ page 41,704

findings in regards to the alleged exclusive dealing arrangements, there was no contract arrangement or understanding nor relevant purpose.

With all respect to His Honour, this treatment of this allegation was overly cursory. In considering whether there was a contract arrangement or understanding in breach of *s 4F*, he was constrained to only consider the situation as between competitors. If the decision in *ASXO* was to be given full effect, he was required to consider the vertical arrangements between the Australian Rugby Football League and the member clubs and consider the question of purpose afresh.¹¹⁷ It is however interesting in itself that he saw no need to conduct such an enquiry.

An interesting feature however of this case is that there was no suggestion of coercion on the part of the Australian Rugby Football League, with the individual players and clubs signing up for their own self-interest; they were after all given a contractually enforceable exclusive right to participate in the League for five years.

¹¹⁷ These comments are echoed by the editorial comments at page 41,648

IV INTERPRETATION OF PURPOSE UNDER SECTION 27, COMMERCE ACT

By way of reminder, *s 27(1) Commerce Act 1986* reads:

"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 within a market."¹¹⁸

An interesting comment is made by Utton¹¹⁹ in relation to Section 1, Article 85 Treaty of Rome which prohibits agreements which have the **effect** of preventing etc competition, is that "since Article 85 is concerned with the effects rather than the substance of an agreement, it can be applied both to horizontal and vertical restrictions."

Although New Zealand has had some form of legislation dealing with competition since 1910¹²⁰, this was the first time this formulation had been used. The 1986 Act indicated a clear departure from the *Commerce Act 1975* with its style of defining numerous "restrictive trade practices" and then providing equally numerous "public interest" exceptions.

¹¹⁸ The wording is reminiscent of Areeda's rejection of a 'purpose or effect' component and indicates a clear embracing of these concepts as relevant. It is worth considering why Areeda so disfavoured purpose of conduct as having any place in antitrust analysis. In para 1506, he explains his position thus: "Such statements seem to call for inquiry into a defendant's state of mind. That inquiry invites the parties to examine thousands of documents, to depose nearly everyone, to resist early disposition on the ground that disputed intention requires trial, to burden the judge and jury with ambiguous evidence, and to invite decision on the basis of relative purity of heart rather than competitive impact... [S]earching out intent tends to make antitrust litigation interminable with the massive discovery or trial that threatens to overburden the system... **Even worse, emphasising purpose frequently masks a failure to analyze the conduct.** The judge or jury seems more comfortable examining the defendant's soul than analyzing his conduct and why antitrust policy calls for its prohibition or toleration." (emphasis added)

¹¹⁹ page 157

¹²⁰ *Commercial Trusts Act 1910*

There are very clear associations between *s 27* and *s 45(2)(a)(ii) Trade Practices Act (Cth) 1974*, which, as has been seen, itself had very clear associations with the 1890 United States *Sherman Act*.

In Hill and Jones^{ix}, *s 27* is described¹²¹ as a "general prohibition ... against any bi-lateral and multi-lateral relationships which in fact substantially lessen competition, or in fact have that purpose". They then identify a number of activities **between competitors** which will be the subject of scrutiny under the section. The focus of their commentary, as in the Australia, is on the proof of collusion, rather than giving any credence to the notion that there can be a breach of the section without anything in the nature of collusion being present.

A similar view appears to have been taken by other authors. In Farrar and Borrowdale^{x122}:

"Apart from the unilateral behaviour of dominant firms and the coercive practices of individual suppliers engaged in resale price maintenance, the focus of the Commerce Act is on collusive action arising from an agreement."

In the context of *s 27* specifically:¹²³

"Section 27 ... is the catchall provision; the section applies to all types of anti-competitive arrangements whether they be horizontal or vertical...[T]here must however be duality of action in the form of a contract, arrangement or understanding... The key question is whether the provision has the purpose or effect of substantially lessening competition."

¹²¹ page 49

¹²² page 643. It is appreciated that this text has been superseded by the Third Edition, published in 1996 but an attempt is being made here to give an account of the interpretation of 'purpose' prior to the decision in *Commerce Commission v Port Nelson Ltd*.

¹²³ page 673-4

The problem of whether purpose is to be seen subjectively or objectively is then considered but the question is not addressed at all of who, among the parties to a contract arrangement or understanding, needs to have the purpose.¹²⁴

One of the earliest New Zealand cases is *Auckland Regional Authority v Mutual Rental Cars*¹²⁵ in which the actions of the airport authority in entering into concession contracts with only two rental car companies and agreeing to exclude all others was challenged as being in breach of both s 29 and 27. Barker J found¹²⁶ that a 'meeting of minds' was required which necessarily involved communication. That however was to decide whether there was any contract arrangement or understanding at all between the competitors for s 29. For s 27, His Honour dealt with purpose very shortly, when he said:¹²⁷

"Purpose ... must be interpreted objectively...

Although ARA's stated purpose was to maximise revenue, a 'substantial' purpose of the collateral contracts was to lessen competition. The premium bids and the value attached to airport representation by [two incumbent rental companies] demonstrate this. This purpose was to deny a potential third entrant the ability to compete on equal terms... Indeed, if [witness for Avis] evidence is to be accepted ... a purpose from Avis' point of view is not to make large profits but to keep the troublesome competitor at a continuing disadvantage.

One very interesting feature of this case is that His Honour does not seem to have taken the trouble to find that either of the rental car companies shared ARA's purpose; he looked at the terms of the contract, ARA's motive and determined there was a provision with the proscribed purpose¹²⁸.

¹²⁴ This is particularly interesting given that reference is made to the *ASX Operations* case at page 679 but no mention is given to any possible significance that case might have on the definition of purpose. This is remedied in the Third Edition where the issue is specifically discussed at pages 651-3

¹²⁵ [1987] 2 NZLR 647 at 661-4 and 677

¹²⁶ page 664

¹²⁷ page 677

¹²⁸ At page 680, he wrote: "Although ARA's motive may have been to maximise rent, by accepting only two rental car operators, its means of achieving this objective was the use of its dominant position to exclude competitors of the successful concessionaires. The

Further consideration was provided by McGechan J and RG Blunt in *Union Shipping NZ Ltd v Port Nelson Ltd*¹²⁹. In that case, a factual finding was that PNL's wider purpose was to ensure maximised resource utilisation but "we do not doubt a subsidiary purpose ... has been and is to bar or inhibit USSL from using its own plant in the area of overlap between USSL and PNL forklifts."¹³⁰

This was found to be a purpose in contravention of s 36, namely preventing or deterring competitive conduct. The court seems to have accepted that PNL had the purpose of substantially lessening competition¹³¹ and then considered whether there was a **likelihood** of a substantial lessening of competition. No attempt however was made to translate PNL's purpose into the purpose of the proposed provision. In reaching this decision, the following was said¹³²:

"Under the statutory definition in s 2(5) 'purpose' is not confined to 'sole purpose'...Like so many mental concepts, the reference to 'purpose' has its difficulties... The word used is not merely 'intention'. Intention to do an act, which is known to have anti-competitive consequences, in itself is not enough. 'Purpose' implies object or aim. The requirement is that the 'conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences'¹³³.

collateral contracts therefore had the purpose of excluding other potential concessionaires."

¹²⁹ [1990] 2 NZLR 662. This case resulted from an attempt by PNL to make all users enter into "port User Licences" specific terms of which would require use of PNL provided plant or, when that proposal was not taken up by users, to pay a levy which included a 'handling charge' whether PNL plant was used or not. Against the background of an alleged dominance on the part of PNL, a shipper and a stevedoring company (both of which asserted the right to use their own plant) attacked these proposals as being in breach of s 27(1) by having the purpose or effect of substantially lessening competition within particular markets in the Port Nelson geographic area.

¹³⁰ page 710

¹³¹ This is not specifically stated but seems implicit in the following: "Did that contemplated contract have the purpose ... of substantially lessening competition...? The primary purpose was to maintain use of PNL plant and drivers at optimum level. The secondary purpose, as found, was to prevent or deter USSL from engaging in competitive conduct in a market... That purpose would have been likely to have that very effect on USSL. Having accepted that purpose and likely effect in relation to USSL ... would it have been likely to substantially lessen competition...?" at page 713, lines 45 - 54

¹³² at page 707

¹³³ citing Donald & Heydon *Trade Practices Law* 1989 para 5.400.

It is unfortunate that the court was attempting to discuss the concept of purpose here for the dual context of *s 27* and *36* as if there were no differences between the two. It proceeded with a discussion of whether the approach to purpose was subjective or objective, and in respect of *s 36* anyway, left the "question of principle open"¹³⁴. The reference in *s 36* is to using a dominant position for proscribed purposes whereas in *s 27* it is the purpose of a provision which is critical, so plainly there is potential for differences between the two.

An important feature is that whether the purpose was to be ascertained subjectively or objectively, there was not even a mention of whether PNL's anti-competitive purpose would be sufficient in itself to render the provision anti-competitive, with the focus instead being upon the **effect** of the provision.

The concept of purpose also received attention in *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd*¹³⁵. Without considering the matter at length, the court found that Wrightson's subjective purpose contravened *s 36*¹³⁶ and then had to face a curious submission that an injunction favouring Magic Millions would breach *s 27* because it would sanction an arrangement of the market which the parties could not have reached themselves. The court rejected this on the basis there would be no lessening of competition but also said¹³⁷

"Section 27 is aimed at contracts or understandings between parties having the collusive effect of reducing competition. To bring *s 27* into play there must I would have thought be some meeting of minds between the parties to the alleged contract or arrangement or understanding."

Unfortunately this teasing comment was not taken any further. It is possible to read His Honour as saying that, in addition to the contract arrangement or

¹³⁴ page 709 at line 39-40

¹³⁵ [1990] 1 NZLR 731 per Tipping J. For many years Wrightsons had run a thoroughbred horse auction. Faced with competition from Magic Millions, it countered by changing the dates of its auctions to coincide with those of the new entrant, as a 'spoiler' action. Magic Millions alleged breach of both *s 36* and of *27*.

¹³⁶ pages 762 - 4

¹³⁷ page 765, lines 1 - 5

understanding, there must also be some 'meeting of minds' as to anti-competitive purpose.

A *Unilateral Purpose*

One decision which deals specifically with this issue is that of *Tui Foods Ltd v NZ Milk Corp Ltd*¹³⁸ where, after certain concessions were made, the only issue was whether the purpose of a provision requiring exclusive purchases from Tui in order to qualify for a rebate was to prevent etc the acquisition of milk from anyone but Tui (in particular NZ Milk). In deciding whether purpose was a subjectively or objectively determined factor, Cooke J said:

"I am disposed to think that, if a purpose is discernible on the face of a contract or arrangement having regard to the express terms considered in the light of any relevant surrounding circumstances, such a purpose will qualify under the statute... There may also be cases where, although the purpose is not so apparent, it can be shown by evidence *dehors* a contract or arrangement that the intention of the party who sought the inclusion of the relevant provision was of a kind falling within the prohibition in s 29, and it may be that in such a case what may be called a subjective test is sufficient. It is unnecessary, however, for present purposes to express a definite view...

"It is sufficient in the light of s 2(5)(a) that one of the purposes of the inclusion of the provision should be an exclusionary one, provided that it is a substantial purpose. It seems inevitably to follow that if the party responsible for the presence of the provision in the contract has had such a purpose, then the purpose of the other party is not material, for the purpose of the first-mentioned party is likely to be a substantial purpose and thus to satisfy the definition"¹³⁹

¹³⁸ (1993) 5 TCLR 406; 4 NZBLC 103,335 which involved an arrangement under which milk vendors would receive a rebate, so long as they purchased exclusively from Tui franchisees. Proceedings were brought by one of Tui's competitors, alleging that this amounted to exclusive dealing, in breach of s 29.

¹³⁹ Page 409-410

These words have been quoted at length because they are the first words which unequivocally indicate an acceptance that the purpose of one party, so long as it is otherwise in breach of s 29, will not be prevented from constituting a breach just because it is not shared by any of the other parties. There is also an important reminder that it is the purpose of the provision which is critical; if that can be ascertained from the provision itself, the purpose of individual parties must be irrelevant.¹⁴⁰

It must be borne in mind with this case that it was an appeal from a decision of Heron J refusing an interlocutory injunction, so the court was only required to find an arguable case in favour of this approach¹⁴¹ rather than resolve the argument. Gault J was less enthusiastic than Cooke P, seeing some difficulty in applying s 29 in a way which would distinguish between permitted reasonable competitive activity and the activities targeted by the section but he was not persuaded that Heron J was wrong to find an arguable case¹⁴².

Against that background, the court was required to consider the situation which arose in *Commerce Commission v Port Nelson Ltd*¹⁴³..

¹⁴⁰ This point is expressly made by Heron J in the High Court where he said "...the case for an objective test ... does not allow for such a [shared purpose] submission. If a purpose can be derived objectively from the conduct of the parties, it presupposes that one or other of them may not have had the requisite purpose..."

¹⁴¹ Its actual decision, as seen on page 409, was that it was eminently arguable that the case fell within s 29(1)(b) and that the case was so strong that Cooke P was "certainly not prepared to interfere with the Judge's exercise of his discretion."

¹⁴² page 412

¹⁴³ (1995) 6 TCLR 406 (full text); (1995) 5 NZBLC 103,762 (McGechan J and Professor R G J Lattimore, main judgment delivered by McGechan J). PNL (Port Nelson Limited) was the owner and operator of wharves, berths, slipways, tug services (including two tugs (one medium sized and one very large)) and pilotage services (including a pilot launch) at Port Nelson, in respect of which it had a 21 year lease of all waterways.

All ships in excess of 100 gross registered tonne ("GRT") required the services of a pilot, and most ships in excess of 80 metres required the services of one or more tugs to enter the port. Both facilities were provided exclusively by PNL from its conception in 1988. It owned and crewed two tugs and one pilot launch, although the actual pilotage function was subcontracted to Tasman Bay Marine Pilots Limited ("Tasman Bay"). Pilotage was charged to ships at a particular rate per GRT with a minimum charge of \$173, a system which had been inherited from the former Nelson Harbour Board

At the end of 1990, the pilotage contract came up for renewal. Negotiations broke down so the contract was not renewed. PNL then provided a pilot service directly, using employed pilots. At the same time, Tasman Bay decided to set up a competing pilotage operation and requested PNL's advice as to what conditions would need to be met. An internal

Essentially the complaint there was that PNL's offering of a below cost pilotage charge and a global discount if certain contestable services were taken up was in breach of s 27. Detailed consideration was given as to whether there was a purpose of substantially lessening competition behind the offering of these terms and then whether such a purpose on the part of PNL would in itself be sufficient to constitute a breach of s 27.

His Honour noted the *Magic Millions* case and decision in *Stevedoring Services (Nelson) Ltd v Port Nelson Ltd*¹⁴⁴ as authorities requiring "some meeting of minds" between the parties or for contracts, arrangements or understandings to

PNL report stated that "[i]t is obviously vital at this time that we prevail in this situation..." and it advised Tasman Bay that its tugs and crew would not be available where any vessel was piloted by someone not employed by or contracted to PNL.

Tasman Bay published a scale of charges (\$130 to \$1,000), arranged insurance cover and hired a smallish tug.

As a result of the decision in *Stevedoring Services (Nelson) Ltd v Port Nelson Ltd* [1992] NZAR 5 PNL's charges were under independent review. The draft review suggested pilotage charges based on full cost recovery and a recommended rate of return of 14%. In light of the competition, PNL obtained a revision based on the allocation of only 20% of pilots salaries to the pilotage cost centre and a reduced rate of return and profit. The court found that the salary allocation was well under what was appropriate, leading to a substantial understatement of costs.

Coincidentally (it seems) PNL undercut Tasman Bay with a scale of \$100 to \$800. The final review report commented that the ROR used by PNL was well below average and produced recommended pilotage charges somewhat higher than the scale adopted by PNL.

Shortly afterwards, PNL implemented a discount regime. It was working on a system of flexible manning and contended that if ships took a package of services, this would mean reduced costs to PNL allowing it to pass that on in the form of a discount. It thus allowed a 5% discount if a package of services were taken (pilot or tug or ships lines plus port access, berthage, utilities, equipment, lines, wharfage and storage (the latter seven not being contestable)). Thus by taking on one of PNL's contestable services, a ship would gain access to a discount across a number of incontestable services. The converse was that those who used competitors for one of the contestable services would be forgoing the possibly substantial discount on PNL services, although for smaller ships using Tasman Bay's cheaper tug, the discount would not always equate to the cost saving in using the smaller tug.

At the same time, contrary to the accounting review recommendation, it revised its tug prices downwards to a "break-even" point, purportedly to align its charges with those in other ports. There would thus be an element of cross-subsidisation by other PNL activities. It also published a revised scale of pilot charges, to cover the size of ships which Tasman Bay was capable of piloting, given the constraint it was under with its small tug. The charges were still notably lower than Tasman Bay's.

Tasman Bay was not scared off by PNL's determination to "prevail" and continued in business, establishing a niche at the lower end of the market. In the four years running up to the hearing Tasman Bay had piloted 45% of all ships requiring pilots, but because of its access to only a small tug, this was 15% of tonnage or 20% of pilot revenue in Port Nelson. In tugs, Tasman Bay had handled 31% of ships or 10% of tonnage.

¹⁴⁴ [1992] NZAR 5 (per McGechan J)

have "some collusive effect"¹⁴⁵ of reducing competition. He quoted the following from his own decision in the latter case:

"PNL offers ... that it will contract on terms under which customers receive a discount if a full line of services is taken.... The contract so eventuating, in its resulting provision for such discount, is said to have the purpose effect or likely effect of substantially lessening competition... The offering of such contracts is said in itself to constitute attempts or inducements to enter into the proscribed."¹⁴⁶ⁿ

The particular relevance of this description of the factual situation in the *Stevedoring Services* case is that it is uncannily similar to what Port Nelson was doing following the competition from Tasman Bay, in offering the discount. In the earlier case, McGechan J observed:

"I have considerable doubts whether provisions in those contracts for such discounts can be said to have such purpose. A contract is a two way affair. Sometimes the purpose of a provision is clear. A contract between two wholesalers not to supply a particular retailer unless he meets certain terms carries its own united message. However, provision for a discount between supplier and customer may arise from quite divergent purposes. The supplier offering the discount may seek to capture the market. The purchaser taking the discount may seek simply to save money. That purchaser may not seek to lessen competition at all. To the contrary, he may be all in favour of its continuance, with further healthy discounts. It can hardly be said in such circumstances that the dominant purpose was to substantially lessen competition. Moreover, if a severable purpose of PNL is relevant, while such purpose may be to improve its own competitive position by increasing its market share upward to perhaps equality, I do not regard that purpose as one to lessen competition as a whole. At equality, competition would remain vigorous"

¹⁴⁵ without any apparent recognition that these could be very different concepts.

¹⁴⁶ page 20

On these authorities, there would only be a breach if an anti-competitive purpose could be ascertained on the part of at least two parties; the purpose of one party in itself would not suffice. In other words, the parties need to go beyond embracing the contract arrangement or understanding but must also be in agreement as to its purpose.

In the later case, His Honour noted¹⁴⁷ that these decisions rested on an "assumption" that the purpose must be common to both, simply because there are two parties to a contract, who must have reached a meeting of minds for the formation of the contract. In other words, as a result of finding that an arrangement or understanding must result from a meeting of minds, he is saying the courts have simply assumed that the meeting of minds must also extend to being as to anti-competitive purpose before there will be a breach, without exposing that to any critical examination.

Certainly, there is some validity in what he says. In the majority of cases already considered, the courts have been faced with a number of erstwhile competitors, acting similarly and, in those cases where purpose rather than effect has been important, having similar anti-competitive purposes. In these cases, the enquiry has predominantly been whether the similar conduct can be regarded as the result of some contract arrangement or understanding; has a meeting of minds produced the conduct?

On the other hand, an alternative view is that the reason the courts have not considered the necessity for a shared purpose is that the wording of the legislation and the weight of authority so obviously calls out for it that it goes without saying. We only have to consider the United States origins to see where *s 27* is rooted. Perhaps the reason that the issue of whether the section requires shared purpose has not received much judicial attention because would-be plaintiffs, faced with the unilateral conduct of a firm, have not seen *s 27* (or its overseas counterparts) as appropriate. Until recently, *s 36* would provide a remedy.

¹⁴⁷ Page 422

One major point of distinction between the two Port Nelson cases is that in the *Stevedoring Services* case, it had no dominance in the relevant market¹⁴⁸, indeed was the minor player whereas it was obviously dominant in the later case.

In any event, His Honour saw the Court of Appeal decision in *Tui Foods* as a clear statement that the purpose of the party responsible for the inclusion of a provision in a contract would suffice, which directly contradicted his own previously stated views. His Honour viewed the difference in approach as being a function of the different assumptions made. The Court of Appeal in *Tui Milk* had started from the premise that *s 2(5)(a)* contemplated a multiplicity of purposes, with the need being only to find a substantial anti-competitive purpose among them.

With respect, both McGechan J and the Court of Appeal appear to have misconceived the application of *s 2(5)(a)*. It is a basic fact of human nature that we never act for solely one purpose; no matter what we are doing, we will be motivated by a number of desires, intentions and purposes, sometimes in conflict with each other. For an incorporated body, the task of discovering the purpose of its conduct is more difficult, because it is arguably the aggregate of all the purposes of those who control it. The law has long recognised and provided for this, by allowing a dominant or substantial, as opposed to sole, purpose to be sufficient.

While *s 27* is expressed in terms of the purpose of the provision (which tends not to allow for examination of the (mixed) purposes of the parties), *s 2(5)(a)* allows an enquiry into why such a provision was included, and so does appear to invite examination of the parties' purposes. Because identifying one single purpose will be impossible, a 'substantial' anti-competitive purpose will suffice.

¹⁴⁸ which, at page 422 of *CC v Port Nelson Ltd* seems to be taken to negate any anti-competitive purpose on the part of Port Nelson.

The difficulty is that this section is seen as authorising the abandonment of any need for shared purpose, which is extremely unlikely to have been in the minds of the legislators when enacting it. No authority is given in *Tui Foods* for its interpretation and it is important to remember its context; an appeal on an interlocutory injunction application.

While he considered that the conclusion that a unilateral purpose would **inevitably** suffice was an overstatement, McGechan J considered himself bound by *Tui Milk*, despite that case being an interlocutory application¹⁴⁹ on a different section, saying:

"If, as the Court of Appeal has ruled, unilateral purpose will suffice for s 29, it would be anomalous to apply a different test to s 27."

This is ignoring the warning from the Australian cases to recognise that 'purpose' will differ from context to context, depending upon the precise wording of the particular section. *Section 29* is concerned with exclusionary provisions in contracts between competitors which have the purpose of limiting the supply of goods to or acquisition from some other person(s). His Honour said that in that context:

"It is more than likely one party (supplier) will wish to restrict the other (acquirer); while that latter would prefer to retain freedom. Unilateral anticompetitive purpose will be a norm.... The same need not necessarily be true of s 27..."

However, even with all such allowances, I do not see a sensible distinction... In both cases, the question is whether 'purpose' must be common, or can merely be unilateral. In both cases, s 2(5)(a) recognition of multiple purposes, including one (substantial)

¹⁴⁹ He describes the Court of Appeal as "the reasoned approach of a superior court, to be followed if there is some sensible distinction and good reason" at page 423.

anticompetitive purpose, applies... The difference, however, is one less of kind than of degree."

Again, with respect, objection must be taken to that statement. There are sensible distinctions to be drawn between *Tui Foods* and *Port Nelson*. In the former, the milk vendors accepted contractual terms preventing them from dealing with any competitor of Tui; they therefore had knowledge of Tui's anti-competitive purpose, which was 'writ large' upon the face of the contract and chose to conduct themselves upon those terms.

In *Port Nelson* however, while there were financial advantages for dealing with PNL, the shippers were free to deal with such competitors as existed. Using the American terminology, the Port Nelson appeal was to the individual self interest of potential customers, whereas Tui Foods went further, by including contractual prohibitions.

His Honour drew further support for this view from the Australian decision of *ASX Operations*¹⁵⁰, the decision in which was delivered after argument was concluded, so only limited reference was made.

Hampton sees this result as a consequence of the court separating out the various components of *s 27* which in his view was "bound to result... in a mechanical literal interpretation of the section..."¹⁵¹ The proper approach was to see the very

¹⁵⁰ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460; 97 ALR 513; 19 IPR 323; (1991) 13 ATPR 41-069 (full Federal Court) where it was stated that *s 45, Trade Practices Act 1974* (the Australian equivalent of *s 27(1)*) "operates upon contracts which will be between two or more parties, *some of whom may not have the proscribed purpose...* [It is therefore appropriate to look to *the purpose of the party as a result of whose efforts they* [the provisions alleged to be anti-competitive] *were included*"). Note that this case is somewhat different, in that one party to a contract was complaining that the other was acting in breach, by forcing particular provisions upon it.

¹⁵¹ page 6

words "contract arrangement or understanding" as necessarily importing the notion of concerted action. In other words, not only must the parties be party to some contract, they must also in some way be embracing the anti-competitive nature of that contract.

Quite plainly, the Court did not do that. It found a contract, it found a proscribed purpose and found that that purpose was a 'substantial purpose' of a provision of the contract without giving any consideration as to the character of the contract, which was simply for the supply of goods and services at specified prices. There was no specific agreement or 'meeting of minds' between the parties as to the possibility of any anti-competitiveness but that was irrelevant to the point that no consideration was given to PNL's customers purposes at all.

It is difficult to see where, as a matter of logic, this process will end. Is every contract entered into by a party with a purpose, no matter how unrealistic or futile, of substantially lessening competition going to lead to a breach of *s 27*?

As Arnold¹⁵² notes, whether this is an acceptable approach depends upon the policy objective one ascribes to the section. Taking *s 27* in isolation, the insistence upon a common purpose could be said to undermine the utility of the Act so the adoption of a unilateral purpose approach is arguably more consistent with an overall objective of maintaining competition.

The point is that this is unrealistic; there is no need to take it in isolation and indeed it is contrary to the apparent policy objectives behind *s 36* to do so. That section, along with other provisions such as the Resale Price Maintenance

¹⁵² "Competition Law" [1995] NZ Law Rev 370, at 382

prohibitions, can be seen as a clear statement of the limits upon conduct of single firms in New Zealand markets. If a single firm, not acting in conjunction with any other, is not in breach of s 36, it could be argued that the Parliamentary intention was that such conduct be permissible.

On appeal, the Court of Appeal saw fit almost immediately to "...say at the outset we have not been satisfied the court below proceeded on any wrong basis or made material findings that were not reasonably open"¹⁵³.

It simply said that it would considerably limit the effectiveness of the provision if the purpose had to be common to or shared by all. It said further that this approach was inconsistent with s 2(5)(a) which allows the purpose to be one of a number of purposes. After referring to *Tui Foods Limited v New Zealand Milk Corporation*¹⁵⁴ and *ASX Operations Pty Ltd v Pont Data Australia Ltd*¹⁵⁵ the court noted that parties may contravene the section in ignorance and said:

"But that may occur also where a proscribed effect or likely effect is involved. The objective of the statutory provision must be borne in mind. The promotion of competition should not be inhibited by the artificiality of search for unanimous purposes."

One major difficulty is with the Court of Appeal's blunt dismissal of *News Limited v Australian Football League Ltd*¹⁵⁶ as being irrelevant. As has been seen, Burchett J made cogent criticisms of the approach in *ASX Operations v Pont Data* and stated his views were equally applicable to the argument under s 45(2)(a)(ii)¹⁵⁷.

¹⁵³ page 2

¹⁵⁴ (1993) 5 TCLR 406

¹⁵⁵ (1990) 97 ALR 513

¹⁵⁶ (1996) 135 ALR 33,99

¹⁵⁷ Although this author has challenged that, at the very least we should have seen some discussion by the Court of Appeal.

Interestingly, after stating that it was immaterial that the *Tui Foods* case was founded on *s 29* to the validity of the *Port Nelson* decision, the court then dismissed the *News Limited* case on the ground it was based on *s 4D Trade Practices Act (Cth) 1974*, similar to our *s 29*. No explanation is given as to why some interpretations of *s 29* are useful in interpreting *s 27* and not others.

If we then consider what the Court of Appeal has to say on the issue of predatory pricing¹⁵⁸, it becomes clear that that court will regard any offer or sale of goods at below cost to be in breach of *s 27*, so long as the "substantial lessening of competition" requirement is met. As there is no logical reason to confine this approach to pricing below cost, the Court of Appeal appears to be saying that any **conduct** which has the purpose or effect of substantially lessening competition will breach *s 27* irrespective of whether a perpetrator acts in concert or alone or whether it is dominant or not.

While there might be merit in New Zealand adopting a conduct based test, this should perhaps be way of legislative change rather than a significant judicial rewriting of the statute. This is particularly so in light of the Australian statute which expressly refers to the purpose of conduct in sections such as *s 47(10)*. The New Zealand Legislature clearly had the Australian *Trade Practices Act* in mind when enacting the *Commerce Act 1986* and by not adopting a conduct based test can be seen to be disavowing such an approach.

B Subjective or Objective Ascertainment of Purpose?

Allied to whether purpose had to be shared is the issue of whether purpose is to be subjectively or objectively ascertained. It is not proposed to deal with this at

¹⁵⁸ (pages 29-30)

length. In *Port Nelson* McGechan J noted that the issue was one of "rampant uncertainty"¹⁵⁹.

He saw it as "standing out" that an *objective* approach will qualify and that where the objective evidence is lacking, *subjective* evidence would suffice. The Court of Appeal in *Tui Foods* had not however addressed the issue of which would prevail where there was a conflict between the two tests.

He went on to consider¹⁶⁰ Australian decisions, where a large number favoured the adoption of the subjective approach¹⁶¹ However the later decision in *General Newspapers Pty Ltd v Telstra Corp*¹⁶² "diluted"¹⁶³ the strength of these decisions.

McGechan J found¹⁶⁴ "The relevance of the subjective seems to be all one way." A strict application of *General Newspapers* would mean the Commerce Commission could use evidence of a defendant's intent to supplement its case but the defendant could not rely on this type of evidence to rebut inferences of a breach. His Honour held that the plaintiff could adduce evidence to establish a breach either objectively or subjectively but, if any subjective evidence was given, as a matter of justice, the defendant should be able to rebut it.

Having said that, the very use of the word purpose (and the deeming effect of s 2(5)(a)) as opposed to effect in s 27 must invite consideration of what a defendant intended when imposing a provision alleged to be in breach of the Act.

¹⁵⁹ The objective approach was taken in *ARA v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 while the subjective approach had been taken in *NZ Magic Millions Ltd v Wrightson Bloodstock Ltd* (*supra*) but the question had been left open in *Union Shipping NZ Ltd v Port Nelson Ltd* (*supra*). In *Tui Foods Ltd v NZ Milk Corp Ltd* (*supra*), the Court of Appeal had expressed the view that either an objective test or in some circumstances a subjective test would suffice.

¹⁶⁰ after noting the lack of concrete views expressed in *Telecom Corp of NZ Ltd v Clear Communications Ltd* [1995] 1 NZLR 385; (1994) 6 TCLR 138; 5 NZBLC 103,552. Telecom had tried to show their proposed interconnection pricing regime did not have an anti-competitive purpose to negate the inference from their conduct that they did. Their Lordships said (Page 403, 154, p 103,556):

"This was a hopeless task not only because it would be most improbable that Telecom lacked the purpose to deter its bitter rival, Clear, but also because its past conduct and certain of its internal memoranda show that it did in fact have that purpose."

¹⁶¹ Summarised in, and including, *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (*supra*)

¹⁶² (1993) 45 FCR 164; 117 ALR 629; 15 ATPR 41-274

¹⁶³ Page 427

¹⁶⁴ Page 429

One of the difficulties in dealing with the concept of purpose and whether it is to be subjective or objective is that there appears to be a merging together of two entirely separate concepts. As was discussed in the *Dandy Power* case, the differing words of the statute will determine whether it is the subjective purposes of the parties which are critical to constitute the breach or whether it is the more objective purpose of particular conduct or a provision of a contract. That is a completely different enquiry from whether the purpose is to be determined subjectively or objectively.

The Court of Appeal simply stated that the argument over whether purpose was to be measured subjectively or objectively is

"...unimportant in practice. There will be very little difference in most cases between ascertaining subjective purpose by inference from what was said and done and ascribing objectively a purpose from evidence of what was said and done."

What they have not dealt with is the issue of whether the enquiry is into the actual purpose of the party (which seems to be called for by *s 36* even if that is to be objectively determined) or the more objective purpose of a provision itself, which might in some cases be entirely independent of the parties to it. With respect, Barker J in his very brief statement of the position in *ARA Mutual Cars* seems to have been closest to what *s 27* actually requires without getting engaged by the morass presented by the subjective/objective debate.

C Dominance and Section 36

At first blush, the concept of a non-dominant firm unilaterally exerting influence to lessen competition is oxymoronic; if a firm is in such a position, it might be thought that the firm would be within the definition of dominance and the exertion of this influence would constitute a breach of *s 36*. In the introduction, the question was posed as to why, as PNL was so clearly dominant, its conduct was not in breach of *s 36*.

The issue as to what constitutes dominance did not arise because whatever test of dominance¹⁶⁵, it was met on the facts. The real difficulty with the application of s 36 was the Privy Council test of "use" in *Telecom Corporation of NZ Ltd v Clear Communications Ltd*¹⁶⁶:

"[I]t cannot be said that a person in a dominant market position "uses" that position for the purposes of s 36 unless he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.

The Court of Appeal expressed doubt with this, by saying

"[w]hile it is not easy to see why use of a dominant position should not be determined simply as a question of fact without the need to postulate artificial scenarios"¹⁶⁷

but was content "in this case" to adopt the approach. In the High Court, McGechan J had seen no 'use' in this sense when PNL set its prices and offered the discount. The Commerce Commission appealed but the Court of Appeal saw no practical reason to consider that cross appeal. It did however say that:

"Nevertheless it should be acknowledged that there is strength in the argument that a firm not in a dominant position in port facilities, tugs and pilotage would run considerable risk in structuring a discount so that it was not available until every required service was taken. Once one

¹⁶⁵ In the *ARA v Mutual Rental Cars* and the *NZ Magic Millions* cases, the court adopted the 'economic power' test from *Re Continental Can Co Inc* [1972] CMLR D11 but in *Telecom Corporation of NZ Ltd v Commerce Commission* [1992] 3 NZLR 429 at page 434, Cooke P reinforced the need to rely upon the words of the statute itself and adopted a more stringent 'dictionary' test, saying that to be dominant, a firm needed "a prevailing, commanding, ascendant, governing, primary, principal or leading influence" within a market. This case was confirmed as the "applicable authority" to determine the meaning of dominance by the Court of Appeal in *Port Nelson Ltd v Commerce Commission*. That obviously has the effect of limiting the numbers of firms which can be dominant, which is perhaps appropriate in New Zealand, given its relatively small economy and consequentially concentrated markets.

¹⁶⁶ [1995] 1 NZLR 385 at page 403

¹⁶⁷ page 42

service is declined there is no incentive to take any. Similarly, where a pilotage market is contestable the risk of charging below cost in the smaller vessel sector without the assurance of the ability to recover in the larger vessel sector would be real enough."¹⁶⁸

In effect, the Court of Appeal seems to be indicating that there was sufficient evidence for it to find use of the dominant position but de-emphasised that in favour of an authoritative statement as to the possible application of *s 27*.

The cumulative effect of the Court of Appeal decision in *Telecom v Commerce Commission* and the Privy Council in *Telecom v Clear* is to severely proscribe the possible application of *s 36*, limiting its applicability to those situations where firms have a 'commanding' influence and only engage in conduct that a firm not in that position would not be engaged in. The reason for this limitation is not clear, particularly as the courts are quite plainly prepared to see the conduct of such firms as in breach of *s 27*.

D Merits of This Approach

1 Purposive Approach

The Court of Appeal has asserted that it would be inconsistent with the purpose of the legislation to require a shared proscribed purpose among all parties to a contract arrangement or understanding. One could snipe and say that has not deterred them in the interpretation of "use" for *s 36*. In this context, it is worth noting what has been said to be the purpose or objective of the *Commerce Act*:

"It 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.' It is the [promotion of competition which the Court is directed to foster."¹⁶⁹

¹⁶⁸ page 44

¹⁶⁹ *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 at 699-700 quoting in part from the judgment in *Tru Tone Ltd & Ors v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 at 358.

If we consider *s 36* alongside its Australian counterpart¹⁷⁰, it becomes apparent that the New Zealand legislature was prepared to tolerate a higher degree of market power within individual firms before they would meet the threshold of applicability, presumably because of the smaller economy and consequent concentration of markets. Substantial market power is necessarily to be tolerated if we are to have any firms acting at or near economies of scale. This approach allows firms to gain significant market power, at the expense of competition to at least some extent, before they will be within the threshold test of *s 36*.

The current interpretation of *sec 27* is that firms which have not reached this threshold but nonetheless have some ability to influence a market and competition within it by unilateral action will be caught. This appears to be contrary to the plain meaning of *s 36* which favours tolerance. It must be remembered that in *Port Nelson*, the reason the conduct there was not in breach of *s 36* had nothing to do with a lack of dominance; rather it was the high level at which the Privy Council has set the meaning of 'use'.

Of course, if a firm acts unilaterally with the purpose of lessening competition, but has no appreciable market power one can expect it to have no effect. On the authority of *Port Nelson Ltd v Commerce Commission* that firm, despite the complete futility of its actions will be in breach of *s 27*. How is that consistent with the objectives of the *Commerce Act 1986*?

¹⁷⁰ Section 46, *Trade Practices Act 1974* is expressed in terms of corporations having a substantial degree of market power, not dominance.

2 *Tool For Dealing With Oligopolies?*

In appendix two is a discussion of the problems presented by oligopolies. Hovenkamp argues that in non-co-operative oligopolies, there is a problem of learned behaviour whereby firms, by trial and error in effect, learn they can restrict output or increase prices above the competitive equilibrium with impunity so there is real harm to the market.

He says that United States antitrust law is powerless to deal with this situation because of its insistence on the formalism of a contract combination or conspiracy. It is evident that New Zealand courts are not following this formalistic approach; there is an enquiry as to whether there is any anti-competitive purpose and then whether any contracts have been entered into pursuant to that purpose.

It is purely speculative, but possible to argue that an oligopolist has an anti-competitive purpose when it relies on a lack of competition from fellow oligopolists to raise prices. Following the *Port Nelson* decision, whenever the oligopolist has that purpose as a substantial purpose, perhaps by selling petrol at a premium over what could be obtained in a properly functioning market, there is the possibility of breach of s 27.

V CONCLUSIONS

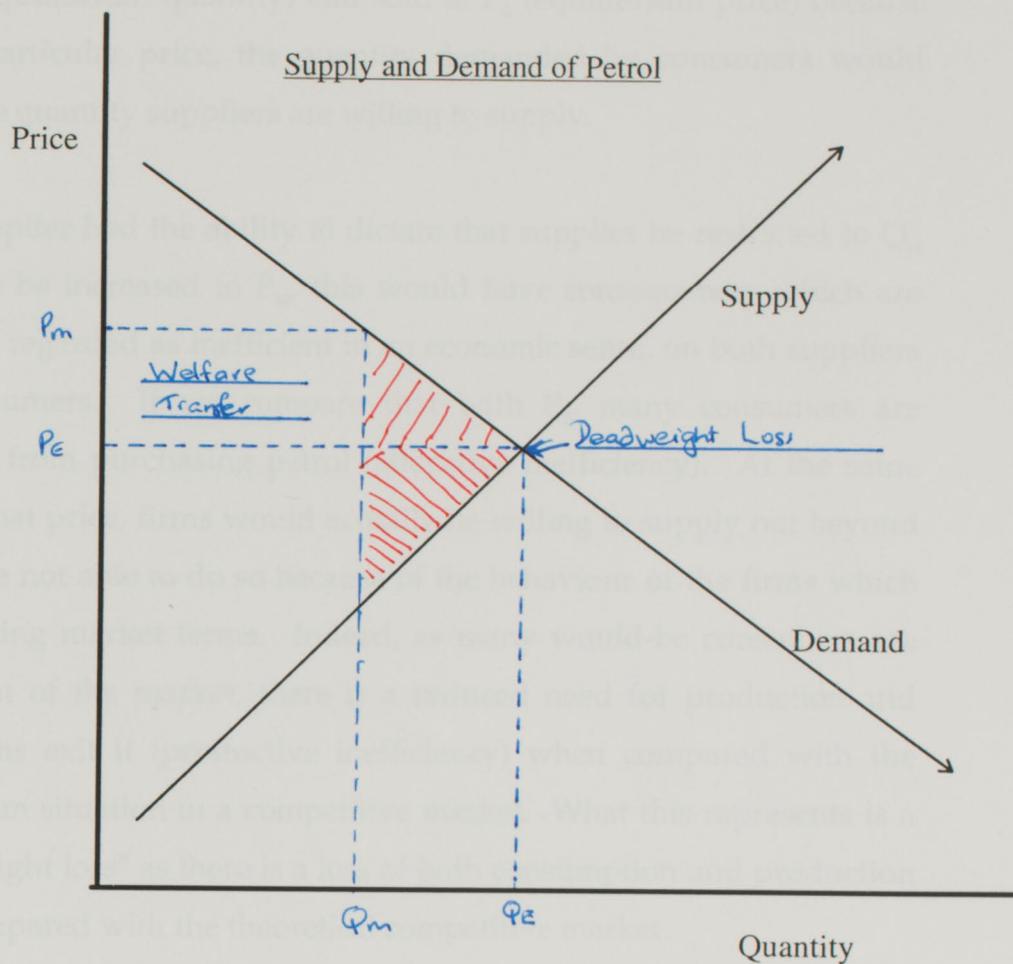
In the United States, it is apparent that s 1 of the Sherman Act still requires some form of collusive conduct, in the sense that two or more parties must be fixed with some degree of active participation in an anti-competitive scheme before a 'contract combination or conspiracy' will be found. The Courts have shown a willingness to treat as sufficient unwilling participation, through co-ercion, and situations where firms simply co-operate knowingly with a party which is acting anti-competitively. There remains however a search for shared anti-competitiveness.

It could be argued that *ASX Operations v Pont Data* notwithstanding, a similar approach is taken in Australia even though there are differences in the legislation. Pont Data would plainly come within the United States tests for coercion and therefor there are no inconsistencies apparent between the two countries.

In New Zealand however, the point has been reached that when customers act purely out of self interest with no reason to even suspect anti-competitive purpose on the part of their supplier, there can be breach of s 27. The search for some form of 'arrangement or understanding' appears to have been made redundant and, through a process of elision, that part of s 27 which says "enter into a contract or arrangement, or arrive at an understanding containing a provision" seems to have lost any purpose or effect. Instead, the courts have regarded the unilateral actions of one firm as equating to the elided words.

The 'legislative purpose' arguments in favour of such an approach have been given only in very summary form by the Courts, without appreciation of the heritage of the Act nor that there is an undermining of other elements within it, particularly s 36. Finally, in the light of the Court of Appeal decision in *Port Nelson Limited v Commerce Commission*, New Zealand has been thrown into a position of being unable to determine the extent to which contracts may offend against s 27.

APPENDIX ONE



If we dip into elementary economics for a moment, we can see a demonstration of the harm that might be done by rising the price above what Smith called the "natural price" which we will take as being the equilibrium price set by the intersection of demand and supply in a properly functioning competitive market¹⁷¹

Consider the above diagram illustrating supply and demand curves for petrol.

¹⁷¹ It is beyond the scope of this paper to analyse what is meant by a properly functioning market or the concept of an equilibrium price. For an explanation of the basic economic theory underpinning these terms, reference may be made to a number of introductory economics texts, such as *Stiglitz* or *Baumol & Blinder*. In addition, most antitrust texts contain some discussion of antitrust economics, such as *Areeda, Corones*, or *Hovenkamp*.

In a properly functioning competitive market, petrol will be supplied at Q_E (the equilibrium quantity) and sold at P_E (equilibrium price) because at that particular price, the quantity demanded by consumers would match the quantity suppliers are willing to supply.

If the supplier had the ability to dictate that supplies be restricted to Q_M and price be increased to $P_{M'}$, this would have consequences which are generally regarded as inefficient in an economic sense, on both suppliers and consumers. If we compare that with P_E , many consumers are excluded from purchasing petrol (allocative inefficiency). At the same time, at that price, firms would actually be willing to supply out beyond Q_E but are not able to do so because of the behaviour of the firms which are dictating market terms. Indeed, as many would-be consumers are priced out of the market, there is a reduced need for production and some firms exit it (productive inefficiency) when compared with the equilibrium situation in a competitive market. What this represents is a "dead-weight loss" as there is a loss of both consumption and production when compared with the theoretical competitive market.

There is a further effect on consumers which some argue to be harmful, in that it transfers wealth away from consumers to suppliers. If we look again at the graph, in a competitive market, petrol would be supplied at P_E . There is still some demand however for petrol at prices above P_E , which means that there are consumers who would pay more than P_E to purchase petrol. The fact that the market allows them to buy at less than they would be willing to pay provides a form of cost saving or wealth to those consumers. If the price is raised to P_M however, less consumers make this saving, which can be seen as a form of transfer of wealth to the supplier away from the consumer.

APPENDIX TWO

Hovenkamp discusses the position of cartels and oligopolies at length. In respect of cartels, he notes:

"Cartels are inherently more volatile than single firm monopolists. First, they can come into existence far more easily...But even absent legal restraint, the cartel is inherently more fragile than the monopolist [because] the interests of the cartel as a whole often diverge substantially from the interests of individual members. The nature of a cartel invites cheating by members.¹⁷²"

After referring to the need to prove some form of "agreement" among two or more firms to fix prices or reduce output to breach *s 1, Sherman Act* he identifies a problem with oligopolistic behaviour, as follows:

"Some conduct falls through a fairly wide crack in the Sherman Act. Although anticompetitive, there is no evidence that it resulted from explicit agreement among competitors. Nor is it the unilateral conduct of a firm that has or threatens to have monopoly power. (which would be caught by *s 2*). Since early in the nineteenth century, economists have argued that firms in concentrated markets can increase their prices above the competitive level without expressly communicating with one another, and certainly without the need for anything resembling a "conspiracy" or agreement among the parties.¹⁷³"

He suggests that oligopolistic behaviour might be just an example of the type of conduct which falls through this crack and argues that, despite the social costs of oligopoly, *s 1* does not apply. "In those areas where co-operative interaction among firms is likely to do the most damage, no "agreement" is required."

¹⁷² page 140-1

¹⁷³ page 151

He gives a detailed consideration of Cournot equilibrium¹⁷⁴ and concluded that firms within an oligopoly will charge their own profit maximising price with no real constraint, as each oligopolist will do same:

"One reason antitrust law has had so little success with oligopoly is its continued adherence to a common law concept of "agreement" that makes little sense in the context of strategic behaviour among competing firms. This agreement requirement frequently targets the wrong set of practices. *Non-co-operative* oligopoly situations are often more stable, and thus more easily sustained, than co-operative ones. For example, in the Cournot oligopoly described [earlier] each firm charges its own profit-maximising price, determined by equating its own marginal cost and marginal revenue on the assumption that other firms will hold their output constant. Adhering to the oligopoly price is profit-maximising behaviour, given the status quo. As a result, nothing resembling a common law contract or conspiracy will be found in the orthodox non-co-operative oligopoly."

The effect of this argument (supported by the Cournot equilibrium model) is that firms operating within an oligopoly (such as banks and petrol companies in the New Zealand context) will 'learn' that they can raise prices quite successfully because other members of the oligopoly, pursuing their own self interest will wish to do the same. There is no 'agreement' as such, just learned behaviour that as one adjusts prices, there is no attempt by others to undercut; instead there is a flow-on adjustment, with the result that the price level is above the competitive equilibrium price.

"Under SA analysis, the collusion question has generally reduced to consideration of whether there is sufficient agreement-like behaviour that one can say a "contract", "combination" or "conspiracy" existed among the parties. Historically, this kind of question caused a great deal of difficulty in the common law of contracts. By its language, Sherman s 1 invited the same problems into antitrust analysis of concerted behaviour. Many Sherman Act s 1 decisions hold that the

¹⁷⁴ pages 151-9

statute requires an explicit agreement, although evidence of the agreement may sometimes be circumstantial (parallel behaviour, benefit in higher prices for both). Much s 1 case law is preoccupied, not with the defendant's conduct as such, but with whether that conduct was undertaken pursuant to such an agreement. This unfortunate bit of formalism has been the major impediment to effective antitrust action against poor economic performance in oligopoly markets. In such cases the market structure itself produces a "consensus" about how each firm can maximise its own profits by tacitly participating in a strategy to maximise the joint profits of the group."

Hovenkamp¹⁷⁵ quotes the views of Professor Turner¹⁷⁶ who argued that it is rational and almost inevitable for such conduct to be beyond the reach of the Sherman Act, given the market structure:

"Each firm in an oligopoly market is forced by circumstances to consider its own profit-maximising rate of output, given the output of rivals and their anticipated responses to its own price and output decisions. To ignore these issues would be completely irrational. Furthermore no court could draft a decree that would force firms to 'ignore' each other in their market decision-making."

As Hovenkamp notes, in a truly non-co-operative oligopoly, ignoring each other is precisely what firms do:

"Indeed, under the Cournot assumption, each firm totally ignored the possible strategic choices that other firms could make¹⁷⁷."

Professor (now Judge) Posner responded with a competing view¹⁷⁸ by emphasising similarities between cartels and oligopolies:

¹⁷⁵ page 159

¹⁷⁶ Turner *The Definition of Agreement Under the SA: Conscious Parallelism and Refusals To Deal* 75 Harv LRev 655 (1962)

¹⁷⁷ page 160

¹⁷⁸ Posner *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan L Rev 1562 (1969)

"Whether firms in a concentrated market act in response to an express agreement or simply have read the market's clear signals in the same way should be a mere detail. Under this approach to oligopoly analysis, explicit cartel agreements are referred to as 'express collusion' while oligopolistic, interdependent behaviour is called 'tacit collusion'.

Hovenkamp then says:

"In short, often highly concentrated markets will not produce the classic Cournot equilibrium at all, but may actually yield competitive pricing. In that case, the firms may have to reach collateral agreements or understandings if they are to maintain prices at supracompetitive levels. For example, they may agree with each other that they will post sale prices publicly or at regular intervals, or that all transaction terms will be publicly announced...Some highly concentrated markets may in fact perform very competitively, unless the participants go the extra step of restructuring transactions or changing the way pricing information is disseminated. If they engage in these 'facilitating practices', the antitrust enforcer may be able to go after the practices directly."

He then discusses cheating and learning:

"The result is that the cheater quickly faces a competitive market that makes the cheating unprofitable. There will be a few price 'wars' until firms discover that any substantial amount of cheating is unprofitable. Soon firms will learn that any cut raises a substantial threat of collapse of the oligopoly, followed by an indefinite period of competitive prices. So the dominant strategy of each firm is not to cheat. Thus...oligopoly outcomes might be quite robust. Importantly, nothing about these stories requires an 'agreement' as the antitrust laws use that term."

and concludes by saying¹⁷⁹:

"All of this leaves us where we started, with a Sherman Act that is ineffective to remedy many situations that we think are anti-competitive.

¹⁷⁹ page 162

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