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CER AND COMPETITION LAW : HARMONISATION OF TRANS-TASMAN RESTRICTIVE TRADE PRACTICE REGULATION

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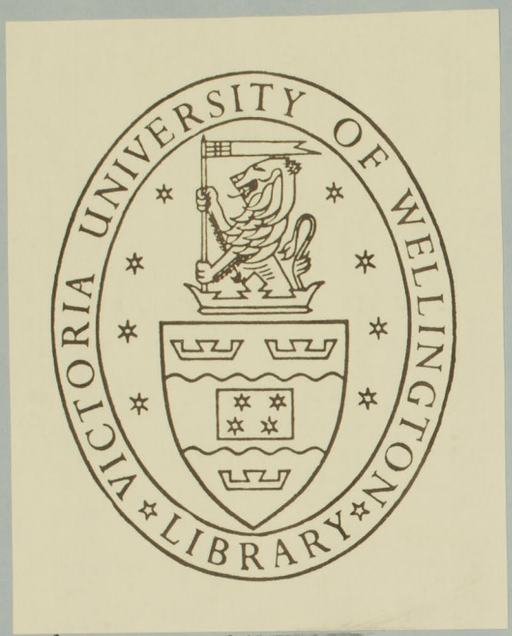

CONTENTS

		Page
1.	*Introduction*	1
2.	*Background to CER*	2
3.	*The New Legislation*	6
4.	*A Single Trans-Tasman Market*	9
5.	*The Differences between the Market Power Prohibitions in New Zealand and Australia*	12
6.	*Trans-Tasman Trade in Services*	19
7.	*Other Restrictive Trade Practices*	28
8.	*Trans-Tasman Mergers and Acquisitions*	40
9.	*Summary and Conclusion*	48
10.	*Footnotes*	51
11.	*References:* - *Texts and Articles*	57
	- *Documents and Reports*	58
12.	*Appendices:*	
	Appendix One : New Zealand Trade Practice Provisions	
	Appendix Two : Australian Trade Practice Provisions	
	Appendix Three : New Zealand Business Acquisition Provisions	
	Appendix Four : Australian Merger Provisions	

INTRODUCTION

Eight years on from the introduction of the Australia New Zealand Closer Economic Trade Agreement (the "CER Agreement"), the goal of business law harmonisation remains plagued with a number of unresolved issues, of which trade practice regulation is only one. In that area, 1 July 1990 saw a major step towards harmonisation with the introduction of legislation on both sides of the Tasman giving trans-Tasman effect to the market power prohibitions contained in the New Zealand Commerce Act 1986 and the Australian Trade Practices Act 1974.[1] The amendments widened the geographic definitions of "market" for the purpose of defining the locations of dominance, or in Australia's case, a substantial degree of market power, to include both New Zealand and Australia, effectively extending the jurisdiction of each Act. After looking at the background to, and terms of, this significant amendment, this paper discusses the concept of a single trans- Tasman market, the main differences between the new provisions in each country, and some of the implications of those differences. In the writer's view, the different market power threshold applying in each country may lead to some undesirable results in terms of the objectives embodied in the CER Agreement.

The new trans-Tasman market power provisions do not extend to conduct affecting competition in a market for services. This leaves a large gap in the sections' coverage when viewed in light of the significance of the service sectors to both economies. This paper proceeds to examine the Protocol on Trade in Services (signed as part of the 1988 review of the CER Agreement), and the consequences of significant service industries in both Australia and New Zealand being excluded from the trade liberalisation ideals embodied in that Protocol. The writer considers that the real benefits of that Protocol will only be seen when the governments of both countries are prepared to fully expose their service industries to competition from other Australasian firms.

The paper then looks at the restrictive trade practice regimes which are in place on either side of the Tasman and considers the significance of some differences between the two. The possibility of giving trans-Tasman effect to further restrictive trade practice provisions in both Acts is addressed and the case for consistency between the two regimes is advanced.

The paper then outlines the merger regimes presently operating in each country and canvasses a number of issues arising out of some differences that exist between the two regimes. The possibility of establishing a joint forum to rule on mergers with trans-Tasman effect is raised and the probable difficulties with such a proposal noted.

Finally, the writer offers a summary and some concluding comments on the material covered.

BACKGROUND TO CER

The concept of closer economic relations between New Zealand and Australia developed against the background of a longstanding political and economic relationship between the two countries. Under the 1965 New Zealand Australia Free Trade Agreement (NAFTA), trade between the two countries developed, at least initially, with the removal of a number of tariff barriers previously hindering free trans-Tasman trade. Unfortunately the NAFTA articles did not contain mechanisms for the progressive elimination of trade barriers that had been exempted from the initial agreement. It related only to a limited number of products which the two governments considered easy to liberalise. By the end of the 1970's it was clear that the benefits of NAFTA were seriously circumscribed by the large number of products that lay outside its scope.

As a result, the governments of both countries began negotiating a more comprehensive trading treaty to overcome NAFTA's shortcomings. Heads of Agreement were signed by both governments in December 1982 followed by the signing of the CER Agreement on 24 March 1984 (although the Agreement was deemed to have come into force on 1 January 1983). As had been the case with NAFTA, the CER Agreement related principally to trade in goods between the two countries. It provided a framework for the progressive removal of tariff and quantitative restrictions on trans-Tasman trade and is the most comprehensive bilateral trade agreement entered into by either country.

The stated principal objectives of the CER Agreement are:[2]

> *"(a) to strengthen the broader relationship between Australia and New Zealand;*
>
> *(b) to develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;*
>
> *(c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and*
>
> *(d) to develop trade between New Zealand and Australia under conditions of fair competition."*

In pursuance of these principal objectives the CER Agreement contains the following additional objectives:

> *"(i) the progressive reduction of tariffs in both countries on all goods originating in their respective territories with a view to the elimination of all tariffs by the end of 1987;*[3]

(ii) *the progressive liberalisation and elimination of quantitative import restrictions and tariff quotas on such goods;*[4]

(iii) *the elimination of revenue duties that discriminate against goods originating in and imported from the territory of a Member State in comparison with the duties or taxes charged on similar domestic goods;*[5]

(iv) *the reduction and elimination of quantitative export restrictions on trade between both countries;*[6]

(v) *a "working towards' the elimination of all export subsidies and export incentives on goods traded in the Area covered by the Agreement;*[7] *and*

(vi) *an active "working towards" the elimination of preferential treatment for domestic suppliers on government purchasing.*[8]*"*

More specifically, Article 12(1) of the CER Agreement addressed the concern that differences in legal requirements in the two countries could distort trade, by placing obligations on Member States to:

"(a) examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labelling and restrictive trade practices; and

(b) where appropriate, encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements."

Trade Practice Laws at the Time

At the time the CER Agreement was signed, New Zealand and Australia were following quite different paths in the regulation of competitive behaviour within their respective jurisdictions. Australia's Trade Practices Act 1974 and its 1977 amendments were enacted with the aim, inter alia, of promoting competitive behaviour and prohibiting certain anti-competitive practices. To this end it established the Australian Trade Practices Commission and provided both the Commission and private individuals, with recourse to the Federal Court system for a range of relief in respect of restrictive trade practices and other monopolistic behaviour.

Across the Tasman, the Commerce Act 1975 fell far short of its Australian counterpart in terms of promoting competition. Its aims included the protection of the interests of consumers and the development of New Zealand industry and commerce in line with economic policies of government. The Act was concerned with the public interest goals of resource utilisation, industrial and commercial development and efficiency, employment opportunities, and export trade, as well as competition. The Act conferred no private law remedies and was viewed by many as administratively cumbersome.

In 1986, New Zealand adopted a radically different direction in the regulation of restrictive trade practices, mergers and takeovers and other related issues. New Zealand's Commerce Act 1986 (the "Commerce Act") (and the Fair Trading Act 1986) was modelled on the Australian Trade Practices Act 1974 (the "Trade Practices Act").[9] Although a number of differences exist between the Acts they now share a common object of promoting competition and contain a number of broadly similar tests and procedures.

The 1988 Review of the CER Agreement

The CER Agreement made provision for a review of its operation in 1988.[10] By the time that review took place, New Zealand import licensing and Australia quota requirements had been substantially removed in relation to trans-Tasman trade and the tariffs on most items traded between the two countries had been abolished. Between 1983 and 1987, trans-Tasman trade doubled. As a result, the three goals set for the 1988 review were:[11]

(a) *to bring forward the removal of all tariffs and quantitative restrictions on goods from 30 June 1995 to the early 1990s;*

(b) *to examine the Australian and New Zealand business environments to identify those laws, regulations or other government interventions that constitute impediments to free trade, and examine ways of removing such impediments through harmonising approaches in these areas; and*

(c) *to consider extending the scope of the CER Agreement to cover trade in services.*

The 1988 review resulted in three protocols being signed and seven understandings being reached, extending the scope of the CER Agreement to a much more encompassing doucument than simply a trade agreement. Those additional agreements may be summarised as follows:

(a) *a protocol for the achievement of free trade in goods, without exception, by 1 July 1990, with anti- dumping procedures against goods originating in the free trade area being abolished from that date (and anti-dumping measures in effect or contemplated to be discontinued). Competition laws are to apply to anti-competitive conduct affecting trans-Tasman trade. The application of competition law is to be "in a manner consistent with the principles and objectives of the [CER] Agreement";*

(b) *a protocol extending the agreement to trade in services which binds the two countries to free trade in most services markets and to examination of free trade in markets where restrictions remain;*

(c) *a protocol on harmonisation of quarantine procedures;*

(d) *exchanges of letters of customs harmonisation, trade in dairy products and export prohibitions;*

(e) *agreements and statements on industry assistance policies, government purchasing policies and trans-Tasman shipping; and*

(f) *a memorandum of understanding on harmonisation of business laws, "including in particular reliance on competition law to redress predatory trade between both countries".*

It is clear, in theory at least, that the revised boundaries of the CER Agreement are wide and provide not only free trade across the Tasman but also lay the framework for a full integration of business activities of the two countries if that course is desired.

THE NEW LEGISLATION

New Zealand : Section 36A

As a result of the 1988 review and, in particular, the agreement that competition laws should apply to anti- competitive conduct affecting trans-Tasman trade, in 1989 New Zealand introduced into Parliament the Commerce Law Reform Bill. The provisions of that Bill, inter alia, extended the reach of the market dominance provisions in section 36 of the Commerce Act, to the use of a dominant position in any market within Australasia (with effect from 1 July 1990). The new provisions, introduced by the Commerce Amendment Act 1990 (into which the relevant clauses were enacted), provide as follows:

> *"SECTION 36A USE OF DOMINANT POSITION IN TRANS-TASMAN MARKETS*
>
> *36A(1) No person who has -*
>
> *(a) A dominant position in a market; or*
>
> *(b) A dominant position in a market in Australia; or*
>
> *(c) A dominant position in a market in New Zealand and Australia -*
>
> *shall use that person's dominant position for the purpose of -*
>
> *(d) Restricting the entry of any person into any market, not being a market exclusively for services; or*
>
> *(e) Preventing or deterring any person from engaging in competitive conduct in any market, not being a market exclusively for services; or*
>
> *(f) Eliminating any person from any market, not being a market exclusively for services.*

The following definitions relating to the term "market" were also inserted into the Commerce Act by the 1990 Amendment Act

> ***3(1A)*** *Every reference in this Act, except the reference in section 36A(1)(b) and (c) of this Act, to the term "market" is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.*
>
> ***3(1B)*** *The reference in section 36A(1)(b) of this Act to the term "market", in relation to a market in Australia, is a reference to a market in Australia for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.*
>
> ***3(1C)*** *The reference in section 36A(1)(c) of this Act to the term "market" in relation to a market in New Zealand and Australia, is a reference to a market in New Zealand and Australia for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.*

As a necessary corollary, a new section 4(2) of the Act extends section 36A "to the engaging in conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand." Section 4(2) was necessary as, prior to 1 July 1990, the jurisdiction of the Commerce Act was based on the normal rules of territorial application and was extended by section 4 to only a limited range of conduct outside New Zealand.[12] Prior to the change, no action could be taken against an Australian company which was otherwise party to a contravention of section 36, but not resident or carrying on business in New Zealand.

In addition, the Commerce Act provides for the Commerce and Trade Practices Commissions to use their information gathering powers in the other country.[13] The Law Reform (Miscellaneous Provisions) Bill (introduced shortly after the Commerce Law Reform Bill) made amendments to the Judicature Act 1908, the Reciprocal Enforcement of Judgments Act 1934 and the Evidence Act 1908. These amendments gave practical and procedural support for the extensions of scope and jurisdiction of New Zealand competition into Australia.

Further legislative support for this new trans-Tasman jurisdiction is found in the new section 6A of the Commerce Act which provides that section 36A (together with provisions relating to enforcement, remedies, appeals and some miscellaneous provisions) applies to the Crown in right of the Commonwealth of Australia and each of the States and Territories, and every body corporate established for the purposes thereof or under the law of a State, or in which a State has controlling interest, in so far as the Crown or that corporation engages in trade. Section 6B of the Act also states that neither the Crown nor a body corporate that is an instrument of the Crown is immune from the jurisdiction of the courts of New Zealand and Australia in relation to a contravention of section 46A of the Australian Act or the provisions of that Act relating to contravention.

Australia : Section 46A

At the same time as trans-Tasman market provisions were introduced into the Commerce Act, similar provisions were introduced into Australia's Trade Practices Act 1974 by the Trade Practices (Misuse of Trans-Tasman Market Power Act 1990. Section 46A(2) of the Trade Practices Act now provides:

"46A Misuse of market power - corporation with substantial degree of power in trans-Tasman market

46A(1) In this section:

"conduct", in relation to a market, means conduct in the market either as a supplier or acquirer of goods or services in the market;

"impact market" means a market in Australia that is not a market exclusively for services;

"market power", in relation to a market, means market power in the market either as a supplier or acquirer of goods or services in the market;

"trans-Tasman market" means a market in Australia, New Zealand or Australia and New Zealand for goods or services.

(2) A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:

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

(b) preventing the entry of a person into an impact market or;

(c) deterring or preventing a person from engaging in competitive conduct in an impact market."

Provisions also exist, similar to those in the Commerce Act, extending the Trade Practices Act's extraterritorial operation[14]; extending the information gathering powers of the Commerce and Trade Practice Commissions[15]; expressly providing for the application of the Act to the New Zealand Crown and Crown corporations[16]; and stating that the Commonwealth, the States and the Territories are not immune from jurisdiction of the Courts of Australia and New Zealand in relation to matters arising under section 36A and the powers of the Commerce Commission in relation thereto.[17]

A SINGLE TRANS-TASMAN MARKET

The concept of a "single trans-Tasman market" is rather different from the statutory concept of "market" which is customarily considered to be made up of elements of geography, product and functional level, within which there are a number of actual or potential transactions between buyers and sellers all of whom are sensitive to changes in price or supply. The single trans-Tasman market notion will not, other than in the most limited of cases, involve a market that stretches from the west coast of Australia to the east coast of New Zealand. While the market power required for a breach of section 36A or 46A may be sourcd in any market within Australasia, it is not of course necessary that the market in any case be that large. The legislation expressly provides that the source of market power may be found in either a New Zealand market, an Australian market or a market in both New Zealand and Australia.[18] In other words, the object of sections 36A and 46A is to widen the possible geographic boundaries of a market, for the purposes of identifying market power affecting a New Zealand or Australian market as the case may be (other than a market exclusively for services).

As with the domestic market power provisions in section 36 of the Commerce Act and section 46 of the Trade Practices Act, it is not necessary that an offending party act in a proscribed way in relation to the same market as that in which the offender's market power is held. There may be exercises of market power in a market in one geographic area which impact on competitive conduct in a different market in a different geographic area. This is precisely what the new trans-Tasman provisions anticipate. The target market (that is, the market in which the alleged proscribed conduct is occurring) may be in either country and this will determine whether the breach is one of the New Zealand or Australian section.

Sections 36A and 46A will provide redress for firms in both countries in a number of different scenarios including those outlined below:

- A firm resident in Australia seeking to carry on business in New Zealand may consider that a firm with a dominant position in a market in New Zealand is using that position for the purposes of restricting the Australian firm's entry into a New Zealand market. The "target" market is a New Zealand one and accordingly the Australian resident may have a cause of action under section 36A of the Commerce Act.

- Similarly, a New Zealand firm attempting to enter or engage in competitive conduct in a market in Australia would have a cause of action under the Trade Practices Act if a firm with a substantial degree of power in a market in Australia took advantage of that position for the purpose of eliminating or preventing the entry of the New Zealand firm into the Australian market.

- A New Zealand firm with a substantial degree of market power in any market within Australasia will be exposed under the Trade Practices Act in respect of its exporting behaviour in relation to Australian produced goods. Similar exposure under the Commerce Act threatens any Australian company with a dominant position in any market, which engages in conduct proscribed by section 36A(1) in the course of exporting goods to New Zealand.

In other words (as Kerrin Vautier has noted[19]), section 36A of the Commerce Act is an avenue for redress not only for a firm in New Zealand which alleges contravention by a firm with a dominant position in any market within Australasia, but also for a firm in Australia which alleges contravention by a firm with a dominant position in any market within Australasia, in relation to a New Zealand market (other than one for services only[20]).

Similarly, section 46A of the Australian Act is an avenue for redress not only for a firm in Australia which alleges contravention by a firm with a substantial degree of market power in any market within Australasia, but also for a firm in New Zealand which alleges contravention by a firm with a substantial degree of market power in any market within Australasia, again in relation to any market in Australia that is not one exclusively for services.

At first glance the references in sections 36A(1)(a) of the Commerce Act and 46A of the Trade Practices Act to, respectively, a New Zealand market and a market in Australia, appear superfluous[21]. It would seem that section 36 or 46 of the appropriate Act would already have caught the proscribed exercise of domestic market power by a person in a dominant posiotion in a New Zealand market or a person with a substantial degree of power in a market in Australia (as the case may be).

One case which may not be caught by section 36 of the Commerce Act is one where an Australian company is neither resident nor carrying on business in New Zealand, but is alleged to have used a dominant position in a New Zealand market for a proscribed purpose. It seems possible, at least in theory, that a dominant position in a New Zealand market could exist without residency or the carrying on of business within New Zealand. Section 3(8) of the Commerce Act deems dominance of interconnected bodies corporate of a person to be dominance of that person.[22] For example, an Australian firm may have subsidiaries operating in New Zealand any one of which is, or collectively are, dominant in a New Zealand market. Accordingly the Australian firm would be deemed to be dominant. Note also that section 3(8) defines a dominant position in a market as one in which a person "is in a position to exercise a dominant

influence ....". This suggests that dominance may exist, for the purposes of sections 36 and 36A, where the potential for that exists rather than actual, established dominance. One could expect that for a person to be caught by being "in a position" to exercise a dominant influence, it would need to be shown that a dominant influence could be exercised without undue time delay or capital expenditure. Under this scenario, as the Australian parent firm is not itself resident or carrying on business in this country it would probably not be caught by section 36(1) yet it may be caught by section 36A(1).

Sections 36A and 46A give recognition to the fact that New Zealand and Australian firms may be hampered in their competitive efforts, not only by firms in their own country, but by firms across the Tasman. This becomes increasingly possible as export restrictions and subsidies are phased out and import restrictions and tariff quotas eliminated. The notion of the "trans-Tasman market" in competition terms, effectively extends the net of potential "wrong doers" who may be subject to either country's market power prohibitions. This must surely result in more confident competitive behaviour by Australian and New Zealand firms both in their own country and in each other's.

THE DIFFERENCES BETWEEN THE MARKET POWER PROHIBITIONS IN NEW ZEALAND AND AUSTRALIA

It will be clear from the discussion so far that the New Zealand and Australian market power prohibitions in section 36A and 46A are not identical in their terms. The most obvious differences between them are the following:

- the proscribed conduct under the New Zealand section includes "restricting the entry" of any person into a market, and "eliminating any person" from a market[23]. By contrast, the relevant Australian terms are "preventing the entry" of a person into a market and "eliminating or substantially damaging a competitor" in a market[24];

- section 36A prohibits the "use" of the relevant level of market power while section 46A provides a corporation shall not "take advantage" of its market power; and

- section 36A requires that a "dominant position in a market" be established whereas section 46A refers to a "substantial degree of market power".

The obligation on New Zealand and Australia to examine the scope for harmonisation of their tests for restrictive trade practices, raises the question of the relevance of these differences and the neccessity for further amendment.

Restricting vs Preventing Entry

On its face New Zealand's use of the term "restricting entry" seems less absolute than Australia's more absolute reference to "preventing entry". Possibly an alleged wrongdoer may have the purpose of restricting but not preventing entry. Suppose a firm operates throughout New Zealand in a particular market, with the exception of a number of (perhaps uneconomic) geographic sub-markets. It is conceivable that the firm may act to restrict entry of a third party into its geographic trading areas (or at least its most profitable geographic markets) but not prevent entry absolutely. In practice however, the difference in purpose is probably one of little practical significance. In the example referred to, if the anti-competitive firm was not considered to be acting to prevent entry (which arguably it would be, albeit only in that part of the market in which it conducted business) it would clearly be caught by paragraph (e) in section 36A(1) which prohibits "preventing or deterring any person from engaging in competitive conduct". For this reason the writer is of the view the significance of the legislative difference will in practice be minimal and does not warrant priority in any forthcoming review of the section.

Eliminating Any Person vs Eliminating or Substantially Damaging a Competitor

The Australian threshold purpose appears lower than New Zealand's in this area in that the less serious purpose of "substantially damaging" is caught by the section in addition to the purpose of "eliminating". The term "substantially" has been discussed in a number of cases in both Australia and New Zealand in different contexts and its imprecision recognised[25]. It has been interpreted in Australia for the purposes of section 46 as requiring loss or damage that is more than trivial or minimal. As in section 27 of the Commerce Act, the term imports a notion of relativity. In the appropriate context it may mean "real or of substance". It can also mean "large, weighty or big". In any event it will of course be necessary to know something of the nature of the business concerned before any decision can be made as to whether damage is, in any case, substantial.

Regardless of the exact interpretation of the term, what is clear is that substantial damage may well fall far short of actual elimination (or rather the purpose of such). On that basis, the effect of the Australian provision will be (in theory at least) to catch a wider range of conduct than is possible under the New Zealand provision. It will however frequently be possible to rely on the widely drawn paragraph (e), already referred to, on the basis the anti-competitive purpose will generally include a purpose of preventing or deterring a person from engaging in competitive conduct. Again, the writer is of the view the difference between the provisions is more apparent than real.

Use vs Take Advantage Of

The New Zealand legislation refers to the "use" of requisite market power whereas the Australian Act prohibits a firm from "taking advantage" of specified levels of market power. While on its face the Australian term suggest some moral wrongdoing is required to establish breach, it is now clear following the High Court of Australia's decision in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietory Co. Ltd*[26] that the words "take advantage of" do not require an additional immoral, hostile or predatory intent be shown. In that case Mason CJ and Wilson J described the words as "morally indifferent" and equated them with the more neutral term "use".[27] The Court was of the view that a *use* of market power occurs when the conduct at issue is possible or profitable only because the firm had that market power or if the conduct is such that it would not be undertaken if the market were truly competitive.[28] This interpretation has been subsequently accepted by the Australian Trade Practices Commission.[29] and by the Federal Court of Australia in the recent decision *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd*.[30]

In this country Tipping J in *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd*[31] examined the term "use" in the context of an application for an injunction to restrain Wrightson Bloodstock holding its annual auction of thorough-bred yearlings near Auckland, on dates which clashed with those of the plaintiff's (a new entrant) at Wellington. His Honour appeared not to find the question of whether a dominant position had been used, significant. He was prepared to find "use" established if one of the anti- competitive purposes in section 36(1) was established. He considered that where a dominant person acts with a prohibited purpose "it is almost axiomatic that such person had used [his or her] dominant position for a prohibited purpose".[32] The key question was seen as not so much whether a dominant party has used its dominant position but rather whether or not its conduct is proved to have been for one or more of the proscribed purposes. If someone with a dominant position takes some action for a proscribed purpose, Tipping J considered that person would clearly be *using* that dominant position in a manner which section 36 prohibits.

More recently in *Union Shipping New Zealand Ltd v Port Nelson Ltd*[33] the New Zealand High Court specifically addressed the issue, noting there must be a "use" of a dominant position for infringement. The Court emphasised that the section does not state that a person who has a dominant position in a market may not "act" for proscribed purposes. The Court accepted that where "a person acts in a normal competitive fashion, as [he or she] would whether dominant or not, that person can hardly be said to be "using dominance"".[34] Thus the Court related the question of whether the person acted in a normal competitive manner to the element of "use" rather than "purpose", suggesting that that fact should be used to identify "use". This approach seems more in line with the comments made by the High Court of Australia in the *Queensland Wire* case.

While the approaches that have emerged in relation to drawing a link between levels of market power and examples of proscribed conduct have not been identical, it seems clear that in both New Zealand and Australia the test for making that link is one of "use" and that following *Union Shipping* and *Queensland Wire* this will involve an investigation of whether the conduct complained of would have occurred but for the market power of the incumbent in the market. In the writer's view, the difference in drafting between the two countries is probably of little if any practical significance.

Levels of Market Power

The most significant difference between the two trans-Tasman market power prohibitions is the level of market power required to be held by a firm before its conduct will fall foul of either section.

New Zealand

Section 36A of the Commerce Act applies to any person who or which has a "dominant position" in a market. There has been little judicial comment on the different market power thresholds in Australia and New Zealand, however Davison CJ in *Lion Corporation Ltd v Commerce Commission*[35] stated that the test for dominance carries a higher threshold than the "substantially lessening competition test" in section 27 of the Commerce Act. This is generally accepted as being the case.

The dominance threshold is relevant under the Commerce Act in provisions relating to both misuses of market power and business acquisitions and authority as to the meaning of the term "dominance" under one has been discussed and applied under the other. While an in-depth analysis of the term "dominance" is outside the scope of this paper, what can be said is that a finding of market dominance under the Commerce Act does not require complete independence of action. Rather, a level of market power enabling a party to act, to an appreciable extent, without regard to its competitors and without itself suffering losses (or at least losses that cannot be recovered in the long term) will be a highly relevant factor in establishing dominance. Also relevant will be factors such as market share, barriers to entry and constraints from other competitors and suppliers and acquirers of goods or services. An ability to exercise a dominant influence or to act independently in relation to the terms of supply or acquisition of goods or services suggests that for the purposes of the Act, there can, by definition, be no more than one firm at any one time, in a particular market, occupying a dominant position. The cases of *Re Continental Car Company Inc.*,[36] *Re News Ltd and Independent Newspapers Ltd*,[37] *Re Magnum Corporation Ltd and Dominion Breweries Ltd*,[38] *Lion Corporation Ltd v Commerce Commission*[39] and the *New Zealand Magic Millions*[40] decision are all cases which support this interpretation of dominance.

Australia

The present form of section 46 of the Australian Act, on which section 46A is based, came into force in 1986 and prohibits firms with a "substantial degree of power in a market" from acting in specified anti-competitive ways. Prior to 1986, section 46 referred to a corporation "being in a position substantially to control a market". The 1986 amendment was designed to lower the threshold for breach so that the section would apply not just to monopolists but, as the Attorney General stated in his Second Reading Speech, also "to major participants in any oligopolistic market and in some cases, to a leading firm in a less concentrated market".

The Explanatory Memorandum to the Trade Practices Amendment Bill, 1985 is illuminating in considering the significance of the legislative difference.[41] The Memorandum contained the following statement:

> *"46. A corporation having a 'substantial degree of market power' may have a lesser degree of market power than that of a corporation which 'would be or would be likely to be, in a position to...dominate a market'...'Dominance' connotes a greater degree of independence from the constraints of competition than is required by a 'substantial degree of market power'. Whatever the position in regard to 'dominance', more than one firm may have a 'substantial degree of power' in a particular market."*

The exact degree of market power that will constitute a "substantial degree of power" in a particular market is impossible to estimate precisely. On this point the Explanatory Memorandum noted that the word is used in several different contexts in the Act and that its meaning may change according to the context. Smithers J in *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd*[42] stated that the word "substantial" imports "a greater rather than a less" degree of power. In the recent Federal Court of Australia decision in the *Pont Data* case[43] Wilcox J reconfirmed his statement in the earlier decision in *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd*[44] that the word "substantial" in section 46 of the Australian Act should be given the same meaning as in other references in that Act, such as in the phrase "substantially lessening competition" in section 45 meaning "more than trivial or minimal" or "not insubstantial or nominal".

In the writer's view the concept of a "substantial degree of power" is an imprecise term. What is clear, is that in Australia more than one firm may hold that level of power in a particular market. Further, that level of market power will fall some way short of the degree of market power that is required under the Commerce Act to achieve the degree of independence of behaviour which typifies dominance.

Market Power Summary

Notwithstanding the inherent uncertainties that exist in applying the market power thresholds of section 46A of the Australian Act and section 36A of the Commerce Act, what is apparent is an obvious and intended difference between them.[45] The Ministry of Commerce in its 1989 review of the Commerce Act stated that the difference was of limited significance. The Ministry's report noted that both New Zealand and Australia had recently considered the thresholds for the application of sections 36 and 46 were appropriate to their domestic circumstances and that, consistent with the principle that domestic companies and those of Member States (under the CER

Agreement) should be treated equally within a free trade area, the same thresholds should also apply in the trans-Tasman context.[46] It seems likely that this view was responsible for the drafting of section 36A in its present form.

In the writer's view a number of anomalies currently present themselves:

- A New Zealand firm competing or attempting to enter a market in Australia could bring an action under section 46A of the Australian Act against any company with a substantial degree of market power taking advantage of that position for one of the proscribed anti-competitive purposes. By contrast, an Australian firm attempting to enter or already competing in a market in New Zealand would not have an avenue of redress against anyone other than someone occupying a dominant position in a market. Thus it appears the position of a New Zealand firm in Australia, being subjected to predatory conduct, may in some cases be more favourable than the position of an Australian firm in this country, being subjected to such conduct.

- The positions are reversed when considering exporting conduct. Assuming one of the proscribed anti-competitive purposes can be established, a New Zealand manufacturer exporting goods onto the Australian market will breach section 46A in Australia if it holds a substantial degree of market power in a New Zealand market. Contrast this with an Australian producer. Anti-competitive actions in the course of its export trade will escape the section 36A net if the producer has a substantial degree of market power but not a dominant market position in an Australian market. This is particularly significant in light of the relatively small number of Australian firms that will have sufficient market power to be dominant in an Australian market.

- Suppose a company from either country is engaging in conduct which inhibits entry to or deters competitive conduct in markets in both Australia and New Zealand. In some circumstances the conduct may be illegal in Australia under the lower market threshold test yet legal in New Zealand if the company does not occupy a dominant position in any market in either country.

In the writer's view the situations noted above evidence serious shortcomings in the trans-Tasman market power prohibitions in their present form. While there is no suggestion that the objectives of the CER Agreement always require, or will necessarily be met, by blanket duplication of business laws,[47] one must question the extent to

which the competitive objectives underlying the CER Agreement are advanced by anti-trust legislation which treats similar trading conduct differently depending on which side of the Tasman Sea it occurs.

The difficulty that exists in considering how to resolve this problem is that sections 36A and 46A cannot be considered in isolation. Those sections in turn are based on the market power thresholds prevailing in their respective domestic market power provisions: sections 36 and 46. It is not only desirable that anti-competitive conduct be treated similarly regardless of which side of the Tasman it occurs. If the aim of harmonisation of business laws is to remove impediments to business between New Zealand and Australia, as the writer submits it must be, it is also highly desirable that within each country, legislation treats similar conduct in the same way, regardless of whether the wrongdoer is a domestic company or a company carrying on business 2000 kilometres across the Tasman.

For these reasons, an alignment of the market power thresholds applying in section 36A and section 46A is likely only to occur as part of a wider view of the parent sections. At the time of writing there is no indication that either government is contemplating any change to that aspect of its Act. For so long as this remains the case, the writer considers that, in time, examples of the disparity in treatment of trans-Tasman competitors as noted above, will emerge.

TRANS-TASMAN TRADE IN SERVICES

One of the outcomes of the 1988 Review of the CER Agreement was the signing of the CER Protocol on Trade in Services (the "Services Protocol") which came into effect on 1 January 1989. While a number of service industries are excluded from the Services Protocol it nevertheless embodies a detailed framework for the development of free trade in services between New Zealand and Australia, and provides for the progressive inclusion of service sectors excluded from the Agreement at the time it was signed. This South Pacific development paralleled global trade politics where trading emphasis had traditionally been on goods. Only relatively recently has the extent to which services, such as telecommunications, transport and finance, facilitate and promote trade in goods, been recognised.

This part of the paper looks at the Services Protocol and then addresses the extension of the new prohibitions on use of trans-Tasman market power, to markets for services.[48]

Background to the Services Protocol

In the international scene, considerable motivation came from the United States in the 1979 Tokyo Round of GATT and at the 1982 GATT ministerial meeting in Geneva, to include services in trade negotiations. While the GATT document itself was directed at trade in goods, some of its essential features were applicable. For this reason the United States chose GATT as its forum for pursuing international service trade agreements. Responses from developed nations were mixed despite examples of services trade liberalisation taking place elsewhere in the world.

In the 1986 Punta del Este conference, trade Ministers agreed to negotiate on services using general GATT procedures. Their aim was "to establish a multi-lateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors". Despite this ambition, it became clear in the Uruguay GATT Round that while a multi-lateral framework on rules could be set down (proceeding on the fundamental GATT principles of most favoured nation, transparency and national treatment) negotiations between countries would have to be carried out separately. It was in this context that Australia and New Zealand (both active in supporting a services agreement in the Uruguay Round) negotiated the Services Protocol to the CER Agreement.

Protocol on Trade in Services

The formal aims of the Services Protocol are as follows:[49]

(a) *to reduce the barriers to and expand trade in services between Australia and New Zealand;*

(b) *to improve the efficiency and competitiveness of the services sectors of the two Member States;*

(c) *to establish a framework of transparent rules to govern trade in services between Australia and New Zealand; and*

(d) *to facilitate competition in trade in services.*

The Services Protocol expressly extends to all aspects of services including the production, distribution, marketing and sale of a service, as well as its delivery. Some of its essential principles include the following:

- *Market Access*[50]
  New Zealand and Australia suppliers are to be given equal rights of access to markets in each country.

- *National Treatment*[51]
  With the exception of "prudential, fiduciary, health and safety or consumer protection reasons", New Zealand and Australian suppliers are to receive equal treatment, including, without limitation, subsidies from the government of either country. In other words, foreign services should be treated no less favourably than domestic services.

- *Most Favoured Nation*[52]
  The "most favoured nation" principle requires that an advantage accorded to one party must be similarly accorded to all. The Service Protocol requires that in respect of services excluded by exemption, treatment of the other country can be no less favourable than for third countries.

- *Government Monopoly*[53]
  Each government has agreed in respect of services excluded from the Services Protocol because of government monopoly, revenue from such monopoly is not to be used to cross-subsidise products and services which are competing with those supplied from the other country.

Significantly, the Services Protocol makes provision for a review of those services expressly exempted from it at the time of signing, with a view to the liberalisation of trade in such services.[54] Australia and New Zealand may, at any time, either upon request of the other or unilaterally, remove, in whole or in part, services excluded by them, from the Services Protocol. The services currently exempted fall under the following headings:

Australia

- *Telecommunications*
- *Banking*
- *Airport Services*
- *Domestic Aviation*
- *International Aviation*
- *Coastal Shipping*
- *Construction Engineering Consultancy*
- *Broadcasting and Television*
- *Basic Health Insurance - Medicare*
- *Third Party Insurance*
- *Workers' Compensation Insurance*
- *Postal Services*

New Zealand

- *Airways Services*
- *International carriers - cabotage*
- *Radio and Television Broadcasting*
- *Shortwave and Satellite Broadcasting*
- *Telecommunications*
- *Postal Services*
- *Coastal Shipping*
- *Stevedoring*

Reactions to the Services Protocol were mixed, due to the significant service sectors (both in number and trade terms) excluded - many of which were government monopolies not private sector industries. One author noted that the Protocol appeared to simply codify the current sway of government interventions or monopoly powers in restraint of trade and, in the case of stevedoring and shipping, to tolerate those emanating from a protectionist trade union arrangement.[55] Comments were also made as to the different advantages accorded to each country.[56] It is easier to appreciate why Australia showed more reluctance than New Zealand to ensure full and equal access to services when the relative market sizes are compared and the significance of reciprocal access is borne in mind.

Notwithstanding such initial impressions the Services Protocol did provide for a governmental review prior to the end of December 1990. In a joint Prime Ministerial statement issued in July 1990 both countries reaffirmed their commitment to the further liberalisation of trade in services in accordance with the provisions of the Services Protocol and the intention that the exemption would be lifted from as many services as possible by 1 July 1995. New Zealand and Australian officials met in Canberra in December 1991 to discuss progress and noted that the process of micro-econimic reform underway in both countries was likely to lead to further changes in the respective inscriptions list over the period to 1 July 1995.

Trans-Tasman Market Provisions

A Market Exclusively for Services

As has already been noted, the 1 July 1990 amendment to the Commerce Act 1986 investing section 36A does not extend to "a market exclusively for services". In other words, a New Zealand firm presently has no right of redress against an Australian company which is otherwise party to a contravention of the misuse of market power provisions in relation to a New Zealand market for services where the Australian company is not resident or carrying on business in New Zealand (and therefore caught by section 36).

It is interesting at this point to note that section 36A of the Commerce Act and section 46A of the Australian Act do apply to conduct affecting a domestic market for both goods *and* services. This raises the question of the nature of the markets contemplated by the provisions. The writer submits the section was intended to cover goods which are supplied with services of some type such as after sales services, maintenance or instruction. In the writer's view the section has been cast in its present form to avoid any suggestion that such items are not within the term "market for goods", had the section referred simply to a market for goods. Strictly the reference is not necessary as both the Commerce Act and the Australian Act note that references to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services or both.[57]

The exclusion from the section of trans-Tasman conduct affecting "a market exclusively for services", contemplates those industries, the essence of which is the provision of a non-tangible service, albeit provided via a tangible form (for example, the provision of telecommunication or shipping services through the medium of a telephone system or ship). In a market "exclusively for services" the consumer will generally be paying for a right to use a certain facility and not some tangible object.

Notwithstanding the conceptual differences between the concepts of "goods" and "services", the reader will no doubt recognise the potential for legal argument as to whether a particular market is one "exclusively for services" or one made up of both "goods" and "services" components.

Trans-Tasman Services Market

Against the backdrop of a political push (at least from this country) towards progressive elimination of the number of services exempted from the Services Protocol, an obvious issue presents itself: *"Should the current trans-Tasman market power provisions be extended to include markets exclusively for services?"* The Steering Committee of Officials in its June 1990 Report to Governments on the Memorandum of Understanding Between the Government of Australia and the Government of New Zealand on Harmonisation of Business Law ("the June 1990 Report") stated that it considered the prohibition on trans-Tasman anti-competitive use of market power should be so extended to markets for services. Unfortunately the June 1990 Report contains no discussion on the matter.

Notwithstanding the current significant exclusions from the Services Protocol, the writer submits that there is no good reason in principle, why sections 36A and 46A should not protect markets which are exclusively for services. In light of the significance of the service industry to both economies, it is submitted the hole left by the current wording of the provision is a gaping one. At present no right of redress exists for a New Zealand resident attempting to enter a market for services in Australia in the event that an Australian company with a substantial degree of power in any market takes advantage of its position for the purpose of preventing the New Zealand firm entering. (If the company was already resident or carrying on business in Australia, section 46 of the Australian Act would apply.) Similarly a New Zealand firm with a dominant position in any market which uses its position for the purpose of restricting or preventing new entry by an Australian firm into a New Zealand market for services, may act without threat of Commerce Act proceedings. (Again, if the firm was already resident or carrying on business in New Zealand, section 36 of the Commerce Act would apply).

In the writer's view this position is anomalous and inconsistent with the objectives in the CER Agreement of reducing the barriers to trade in services between New Zealand and Australia and expanding and facilitating competition in trade in services. The June 1990 Report made provision for a further report on this issue to be prepared by officials by the end of June 1991. The wrtier had hoped that that report would take a similar view however at the time of writing that report is still to be released.

Three Exempt Industries

It is interesting to note briefly the competitive framework of three significant service sectors in Australia and New Zealand, each of which are currently exempted from the Services Protocol.

Aviation

Civil aviation was deregulated in this country prior to the signing of the Services Protocol and accordingly this industry appears only on the Australian list of exempt industries. The potential for New Zealand entry into the Australian domestic aviation market has become more topical since Australia's two airline policy terminated in October 1990 although initial indications from Australia were that outside investment would be limited to 15%. However, following the 1990 review of the Services Protocol, the Australian government announced it would lift limits to investments in Australian domestic airlines by foreign airlines operating in Australia, from 15% to 25% for an individual holding, and to 40% in aggregate. Until that occurs, Australian civil aviation effectively remains outside the CER umbrella.

Competition in trans-Tasman aviation (being aviation within Australia and New Zealand as well as across the Tasman) was the subject of a recently released report entitled "*Costs and Benefits of a Single Australasian Aviation Market*" prepared by a joint Australia/New Zealand study team.[58] The report was stated to have been prepared to assist the governments of both countries in considering whether the CER Agreement should be extended to include aviation services.

For the purposes of the study the single aviation market was defined in terms of, inter alia, free market access for all Australasian airlines to all Australasian markets with no capacity restrictions or tariff controls and unrestricted cabotage (allowing Australian and New Zealand international carriers to carry domestic passengers in Australia). As freight services across the Tasman are now largely deregulated, the focus of the study was on the passenger sector of that market. A range of market scenarios were examined in the study, with varying degrees and combinations of deregulation on trans-Tasman and Australian domestic air routes. Under each scenario examined, consumers enjoyed reduced airfares and an improvement in the quality of air services. The report suggests that as far as the airlines are concerned, deregulation would create new opportunities for entrants, while subjecting incumbent carriers to the rigours of

new competition. Any aggregate loss of profits by the airlines, together with any losses to airline employees, was subtracted from the consumer gains to estimate the net welfare outcome. In each case examined, net welfare gains resulted.

It is evident that the creation of a single aviation market (however that is ultimately defined) will have significant consequences for the economies of and relationship between both countries. From a legal perspective and for the furtherance of the CER objectives, the writer submits that what is most important is not that competition actually occurs throughout the Australasian aviation industry, but rather that a legal framework exists within which such conduct may occur if competitive forces so dictate.

Telecommunications

Full privatisation of the New Zealand government owned monopoly telecommunication industry occurred in June 1990. There are currently no regulatory barriers to Australian entry into the New Zealand telecommunications market. Like domestic airways, the Australian telecommunication industry is currently protected from foreign competition. It seems likely that full deregulation in Australia is a long way off although in the course of the 1990 review of the Services Protocol the Australian Prime Minister announced plans to introduce competition in the Australian telecommunications sector and to allow unrestricted competition in cordless telephone services. Until full deregulation occurs New Zealand will be unable to enter the Australian telecommunication market and provide real competition for the current dominant carriers. This state of affairs represents a significant hurdle in the free trade in services objective in the Services Protocol and, in the writer's view, will provide a stumbling block to full trans-Tasman competition. This is one area in which Australia's true commitment to liberalising free trade in services will be put to test in the months to come.

Shipping

Both New Zealand and Australia currently restrict coastal shipping to domestic carriers and have each included coastal shipping on the lists of excluded service industries in the Services Protocol. It seems, further, that the removal of either country's restriction in the near future will be slow. Stevedoring also features in the New Zealand list of exclusions, as a result of restrictions (industrial rather than legislative) relating to the handling of "less than container load". New Zealand did however indicate in the course of the 1990 Services Protocol review that it would be possible to remove this inscription. Australia has not imposed a similar restriction and competition from New Zealand firms would be possible on Australian wharfs.

In reflecting on the significant role played by the shipping industry in trans-Tasman trade in goods, the writer is of the view that a lack of competition in trans-Tasman shipping will provide a dramatic restraint on realisation of the aims of the CER Agreement overall. The large majority of New Zealand exports to Australia (worth NZ$2,609 million in 1988-89, representing 17.5% of New Zealand's total exports) were shipped to their Australian destination. Australia's exports to New Zealand in the same period were valued at A$2,210 million, although accounted for just over 5% of Australia's total exports. Profitability for such trade is severely affected by the terms of trade offered by trans-Tasman shipping companies.

Notwithstanding these facts, a 1980 joint Australian Bureau of Transport Economies and New Zealand Ministry of Transport study entitled "*Trans-Tasman Shipping*", found that trans-Tasman shipping costs could be reduced by up to 33% by traders operating between Australia and New Zealand as part of a service to another part of the world. Writers of the report considered the absence of effective competition in trans-Tasman shipping is a major reason for the excessive costs.

While there have been some attempts at waterfront reform in both Australia and New Zealand, high shipping charges across the Tasman remain. Their imposition serves to isolate the two countries in trade terms and poses, if not a major dis-incentive, a serious negative effect on the ability of manufacturers one either side of the Tasman to compete freely. It is clear that shipping is a major blemish on the CER track record and one which, if not positively addressed, must take its toll on the realisation of the CER objectives.[59]

Summary

While the 1988 signing of the Services Protocol was a significant development for both the New Zealand and Australian economies, in the writer's view, its effect is severely circumscribed by the industries exempted from its provisions. Those exempt industries are significant both in terms of the value of trade possible in relation to them and, more specifically, because of the effect that domestic protection of trans-Tasman shipping has on the competitiveness of trans-Tasman trade in goods in general. Officials from both countries in the course of the 1990 review agreed to consult further about the possible scope of amendments to the Service Protocol inscriptions of industries in which reform was either already in motion or contemplated. The Protocol will be reviewed again formally during the course of a proposed review of the CER Agreement in 1992.

Despite the best of stated intentions of legislators on both sides of the Tasman to fulfil the aims of the Services Agreement, the liberalisation of trade in the currently exempted industries will require significant government policy changes which in many of those industries, will not be without some opposition. The writer considers that at the end of the day, the real effectiveness of the Services Agreement and in turn the CER Agreement will rest on the willingness of each government to expose its presently protected service industries to competition from other Australasian firms. Until this occurs the aims of expanding trade in services and improving the efficiency and competitiveness of both New Zealand and Australian service sectors will remain as only partly fulfilled ideals.

OTHER RESTRICTIVE TRADE PRACTICES

In its 1990 Report the Steering Committee report on Harmonisation of Business Laws made the following comments in relation to the extension of other trade practice prohibitions to trans-Tasman markets:[60]

> *"The Steering Committee considers that the desirability of extending the extra-territorial reach of other provisions of the [Commerce Act and the Australian Act] to trans-Tasman markets, in a similar manner to that in which ss46A/36A are to apply, should be given serious consideration. It regards this as a very important harmonisation issue."*

As previously noted, the report anticipated from officials in both countries on this issue has yet to be released.

In the writer's view the possibility of harmonising further restrictive trade practice provisions requires consideration of the following issues:

- To what extent do Australian and New Zealand restrictive trade practices laws involve similar tests?
- What is the significance of the absence in the New Zealand Act of provisions covering secondary boycotts, exclusive dealing and price discrimination?
- To what extent is amendment of either the New Zealand Commerce Act or the Australian Trade Practices Act required by the CER objectives?

The Commerce Act regulates trade practices in five broad areas: arrangements substantially lessening competition; exclusionary provisions; price fixing; use of a dominant position in a market (which will not be discussed in this section); and resale price maintenance. (Extracts of these sections are set out in Appendix One.) The Australian Act focuses upon broadly similar practices while making additional provision for the practices of secondary boycotts, exclusive dealing and price discrimination. (Extracts of these sections are set out in Appendix Two.) The differences, where they exist, between the provisions in each country are discussed below along with the significance of those differences in terms of facilitating free and equal trade between New Zealand and Australia and permitting competition by a firm from one country within the other's jurisdiction.

Arrangements Substantially Lessening Competition

The primary "catch all" prohibition in both Australia and New Zealand is one against the entering into or enforcement of any contract, arrangement or understanding (hereafter, "contract") which has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market. The relevant provisions, section 27 of the Commerce Act and section 45 of the Australian Act, are very similar in their terms and effect. There should be no real difficulty in extending the class of persons whose contracts will be subject to the provisions, to persons resident or carrying on business in New Zealand, or Australia, as the case may be, to the extent that conduct affects a market in Australia, or New Zealand, respectively.

One significant difference between the two sections is that section 45 of the Australian Act does *not* apply to a contract or a proposed contract insofar as it provides for the acquisition of any shares in the capital or any assets of a body corporate.[61] Unfortunately in New Zealand, section 27 currently *applies* to any contract from the acquisition of assets of a business or shares from any person *unless* the assets or shares are acquired in accordance with a current clearance or authorisation.[62] This position, which emerged from the hurried passage of the Commerce Amendment Bill 1990 through Parliament, results in some anomalies. One of the most obvious is that where parties to an acquisition consider their proposal does not require clearance, since no person is in a dominant position as a result of the acquisition, but may substantially lessen competition, they may apply for clearance nevertheless so as to avoid possible exposure to section 27. Another, is that specific protection from section 27 is given only while a clearance or authorisation is in force. Clearances and authorisiations remain in force for a 12 month period, suggesting that after that period has passed the protection given by the Act ceases. It would be absurd if this was the case for the protection given against the business acquisiton regime in section 47 of the Act. The position of cleared acquisitions viz section 27 is less certain.

Section 27 should not in the writer's view apply to acquisitions of shares or assets. The Commerce Act needs to be amended, preferably immediately, but at the latest, by such time as section 45 of the Australian Act and section 27 of the Commerce Act are given extraterritorial application. Until this occurs, acquisitions which take place in New Zealand may face an additional hurdle of avoiding section 27 of the Commerce Act, where no similar hurdle exists in Australia. The writer considers the New Zealand position to be anomalous and inconsistent with the much used "level playing field" ideal which is the backbone of the fundamental principals of the CER Agreement.

Exclusionary Provisions

Section 29 of the Commerce Act and section 45 of the Australian Act both prohibit the entering into, or the giving effect to, of any exclusionary provisions. The Australian Act defines a provision of a contract to be exclusionary if:[63]

(i) the contract is made between persons any 2 or more of whom are "competitive" with each other, meaning those parties (or any interconnected body corporate) are, or are likely to be, or, but for the provision of any contract would be, or would be likely to be, in competition with each other; and

(ii) the provision has the purpose of preventing or restricting the supply or acquisition of goods or services to or from particular persons in particular circumstances or on particular conditions by all or any of the parties to the contract (including a related body corporate).

Since July 1990 New Zealand's definition of an exclusionary provision has differed from Australia's in that in addition to the elements referred to above, the particular person or class of persons to which the provision relates must be in competition with one or more of the parties to the contract.[64] Prior to July 1990, it was considered that without this third limb to the definition of exclusionary provision the section applied too widely.[65]

The application of section 29 of the Commerce Act is now severely more limited than the application of the equivalent Australian provision. The requirement that the person to whom supply is to be restricted (or from whom acquisition is to be restricted) must be in competition with at least one party to the contract, means that the classic market share arrangement where the "victim" is a supplier or an acquirer of the restricted goods or services but not a competitor of any party to the contract with respect to those goods or services will not be caught. Such market share arrangements will currently be caught by the Australian Act.

Notwithstanding the individual merits or otherwise of the two exclusionary provision sections, the fact remains that in their present form their scope differs. While in some cases brought under section 29, an action under section 27 may also be made out,[66] this will of course only be possible if the purpose or effect or likely effect of the contract is to substantially lessen competition.[67] Such purpose or effect will not always be

present and for this reason, prior to its amendment, section 29 provided in the writer's view a useful backup section for a victim of collusive conduct designed to restrict supply to or acquisition from it. Unless that victim is in competition with at least one of the parties to the contract it will find no relief in this country.

For the purposes of section 29, a person is in competition with another if that person or any interconnected body corporate is or is likely to be in competition with the other person. This results in the anomalous position in New Zealand, that if the victim retailer, which is not in competition with either party to the contract, has a wholesaling parent in competition with the parties to the restrictive contract which relates to all companies within the victim's group, section 29 may apply. If however the victim's parent is a non trading holding company, no relief exists for the victim under the section.

The effect of the different exclusionary provisions in Australia and New Zealand means that Australia is providing relief under its Act for a type of anti-competitive conduct, namely market share arrangements, which will in most cases escape the Commerce Act net, other than in those limited cases where the victim competes with one of the contracting parties or in cases where the arrangement substantially lessens competition in a market.

In the writer's view a good argument exists that in both countries the prohibition on exclusionary provision should be removed for the reason that if collusive conduct is significant in competition terms, it will come within the substantial lessening of competition clauses in any event. If the specific prohibitions are to remain, the legislative differences must be addressed when the extraterritorial effect of the sections is being considered. As exclusionary conduct is currently authorisable in both countries it would be prudent in that event to return in New Zealand to the pre-July 1990 position for the identification of exclusionary provisions. If the two sections are given extraterritorial application without their terms being harmonised, we will be left with the undesirable possibility of some market share arrangements being permitted if they occur in New Zealand but not if they occur in Australia.

Price Fixing

Section 30 of the Commerce Act and section 45A of the Australian Act each deem a provision of a contract to substantially lessen competition for the purposes of section 27 and 45, respectively, if the provision has the purpose or has or is likely to have the effect of fixing, controlling or maintaining, or providing for the fixing or controlling or maintaining of the price for or any discount, allowance, rebate or credit in relation to,

goods or services that are, or are to be, supplied or acquired by any of the parties to the contract or any related bodies corporate in competition with each other. In addition, the sections extend to such a provision in relation to goods or services that are resupplied by persons to whom the goods are supplied by any of the parties to the contract or any related body corporate thereof, that are in competition with each other.

Exempted from both of these deeming provisions are certain agreements for the purposes of a joint venture; certain recommendations as to prices for the supply or acquisition of goods or services where the parties thereto are not less than 50 in number; and certain agreements relating to the price of goods collectively acquired or the joint advertising of the price for the resupply of goods so acquired.[68]

The number of price fixing cases in New Zealand and Australia have been relatively few. It seems clear from a review of those cases that have proceeded to the Commerce Commission, Trade Practice Commission or the Courts that a reasonably standard approach has been taken in both countries to what are essentially identical provisions.[69] One possible exception to this stems from the Full Federal Court of Australia's decision in *Radio 2UE Sydney Pty Limited v Stereo FM Pty Limited*[70] where the Court found that the issuing of a rating card for advertising on two unrelated radio stations did not breach section 45A of the Australian Act because each station separately fixed its own rate. In the course of that decision the Court stated that there must be "an element of intention or likelihood to affect price competition before price "fixing" can be established.

Such an approach is contrary to the strict terms of the Australian and New Zealand price fixing provisions which each require only that the proscribed *effect* of fixing be established. While in the writer's view it is doubtful that the *Radio 2UE* case can be taken to have imposed an additional element to be made out by a plaintiff in a price fixing action, it is likely that in any case in which an effect of price fixing (likely or actual) is shown, that some element of "intention or likelihood to affect price competition" will necessarily exist. Sections 30 of the Commerce Act and 45A of the Australian Act are two sections which will not in the writer's view require amendment either for the general objectives of the CER Agreement or in the event that trans-Tasman effect is in time accorded to price fixing contracts.

Resale Price Maintenance

Both the Commerce Act and the Australian Act prohibit any person from engaging in the practice of resale price maintenance, being a form of vertical control where either a manufacturer or dealer is responsible for a price floor being set, below which goods cannot be sold at retail. Each Act contains detailed provisions defining acts that constitute resale price maintenance for the purposes of the legislation. Although not identical in form, both Acts, subject to the comments below, detail substantially the same acts in defining the practice of resale price maintenance. They include both unilateral acts of a supplier, such as a refusal to supply for the reason that goods have been resold below a specified price (indirect resale price maintenance), and joint practices, where both supplier and purchaser agree to a minimum resale price (direct resale price maintenance). Both Acts exclude from the practice of resale price maintenance recommendations as to resale price provided it is clear that there is no obligation upon the ultimate seller to comply with the recommendation.[71]

At the time of writing there have been no applications filed with the New Zealand Commerce Commission for authorisations for resale price maintenance and only a small volume of judicial discussion of the provisions.[72] Australia has, as could be expected, a growing body of jurisprudence in relation to its resale price maintenance prohibition[73] and it seems probably that the New Zealand Courts will made every reasonable endeavour to attempt to see the two countries' provisions interpreted consistently.

Some differences do exist between the retail price maintenance provisions in Australia and New Zealand. Those differences are as follows:

(i) The Commerce Act prohibits any "person" from engaging in resale price maintenance. This may occur by reason of agreements with or unilateral acts towards, any other "person". Under the Australian Act no corporation may engage in resale price maintenance in relation to a "second person", while a person (not being a corporation) will come within the section only where that person carries out an act of resale price maintenance where the person to whom the goods are supplied is a corporation. In other words, suppose in Australia two non-corporate persons enter into an agreement for the supply of goods from one to the other on the condition that the person being supplied will not sell the goods at a price less than the price specified by the supplier. This agreement will not amount to resale price maintenance as defined by the Australian Act. In Australia the supplier may be a natural person only if the entity receiving supply is a corporation.

(ii) The Commerce Act contains a prohibition on third party resale price maintenance which is not covered by the Australian Act. Section 38 of the Commerce Act prohibits any person (referred to as the "third party"):

(a) making it known to another person that the third party proposes to engage in conduct (either alone or in concert with another) that will hinder or prevent the supply of any goods to, or the acquisition of any goods from, that person unless that person agrees not to sell those goods at a price less than the price specified by the third party; or

(b) engaging in conduct (either alone or in concert with another) that will hinder or prevent the supply of goods to, or the acquisition of goods from, another person for the purpose of inducing that person not to sell those goods at a price less than a price specified by the third party,

Section 38(2) defined "specified price" for the purpose of the third party resale price maintenance prohibition.

(iii) Since July 1990 New Zealand has made resale price maintenance an authorisable trade practice.[74] In Australia it remains a per se offence.

The fact that the Australian resale price maintenance provisions do not apply to natural persons supplying goods unless the entity receiving the supply is a corporation will probably not be a significant issue in most cases. When both parties to resale price maintenance are natural persons, it is unlikely (although not inconceivable) that the volume of goods being supplied will constitute a significant proportion of the market to which they relate.

The issue of third party resale price maintenance is a matter which needs further consideration by officials. The practice does not appear to be a common one in New Zealand. While the writer's view, this is not sufficient reason to abandon it for the sake of consistency between the two Acts, it does suggest that if agreement cannot be reached between the two countries on this issue, the matter, in practice, may not be overly significant

With respect to authorisation of resale price maintenance, the writer considers that this is a matter which requires amendment of the Australian Act. It is now widely recognised, at least outside of Australia, that in some instances, resale price maintenance may have pro-competitive effects.[75] Provision in the Australian Act

permitting authorisations of the practice will not only reflect current thinking but also permit companies operating in Australia the same ability as exists in New Zealand in appropriate cases, to stipulate resale prices.

Secondary Boycotts, Exclusive Dealing and Price Discrimination

Unlike the Australian Act, the Commerce Act does not contain express prohibitions against the practices of second boycotts, exclusive dealing and price discrimination. The Australian Act contains detailed provisions setting out the conduct that will constitute those practices.

Secondary Boycotts

Primary boycotts have already been referred to under the earlier discussion on exclusionary provisions. Section 45D of the Australia Act is directed at what are commonly termed "secondary boycotts" which arise when one group of people cause another group to refuse to deal with the target of the boycott. Section 45D prohibits one person, in concert with another, from engaging in conduct which hinders the supply of goods or services by a third person to, or the acquisition of goods or services by a third person from, a corporation ("the target"). That conduct must have both the purpose and effect, or likely effect, of causing either substantial loss to the corporation's business, or a substantial lessening of competition in any market in which the target or a related body corporate supplies or acquires goods or services. In addition, section 45D(1A) prohibits two or more persons engaging in conduct that hinders another person engaging in overseas or interstate trade or commerce.

For a number of reasons, Section 45D is an unusual provision in the regulation of restrictive trade practices. First, liability depends on establishing both purpose and effect, whereas all other provisions require one or other of those facts be established. Secondly, the causing of loss to an individual suffices for liability. Thirdly, it brings within the Australian Act the behaviour of trade unions, a matter outside the normal bounds of anti-trust legislation which focuses on combinations of market strength rather than combinations of labour. Finally, the section does not apply to corporations acting in a proscribed fashion but rather to those who act to injure corporations. The section was enacted upon the recommendation of the Swanson Committee[76] to prevent trade in some industries being affected by employees who feared loss of jobs in the face of price competition. Boycotts by petrol tanker drivers against price cutting service stations in Australia in the early 1970's were a source of much complaint.

There is clearly some overlap in the application of section 45D with section 45 of the Australian Act in that to the extent the arrangement or agreement to boycott has the purpose or effect of substantially lessening competition in a market, the matter will be actionable under both of those sections. Section 27 of the Commerce Act, being, as already discussed, in substantially similar terms to section 45 of the Australian Act, will provide relief in New Zealand in similar circumstances for targets of secondary boycotts. Unlike section 45D of the Australian Act, the market in which a substantial lessening of competition must occur for the purposes of section 27 of the Commerce Act, need not be a market in which the victim of the agreement to boycott, itself supplies or acquires goods or services. Section 3(4) of the Commerce Act which defines market for the purpose of section 27 , is framed in inclusive terms only.

Where section 45D does provide more extensive coverage than is found anywhere in the Commerce Act is in respect of secondary boycotts which do not substantially lessen competition in any market but have the purpose and effect (actual or likely) of causing substantial loss or damage to the business of the target. In the writer's view this is not a discrepancy which the goals of the development of trade between New Zealand and Australia and the harmonisation of restrictive trade practices between the two countries, demand rectifying. The New Zealand legislature has determined that agreements relating to trading conduct should be prohibited only where they have the purpose or likely effect of substantially lessening competition in any market. In all other cases (with the exception of per se offences) trading entities are free to determine their own business relationships.

Exclusive Dealing

Section 47 of the Australian Act prohibits a corporation, in trade or commerce, from engaging in the practice of exclusive dealing.[77] Such practice, in general terms, involves the corporation supplying or offering to supply goods or services, either generally or at a particular price, or giving or allowing a discount, rebate or allowance in relation thereto, on the condition that the person to whom the corporation supplies (etc) (including any related body corporate) will not acquire or resupply certain goods or services from or to, a competitor of the corporation (or a related body corporate), *or* will acquire from or resupply to only certain classes of persons or persons in certain places.[78]

The definition of exclusive dealing also extends to a refusal by the corporation to supply goods or services to any person for the reason that that person (or a related body corporate) has not limited its supply or acquisition of goods as directed by the supplier in a manner referred to above.[79] Acquisitions or offers to acquire goods or services subject to any similar term of exclusivity will also amount to an act of exclusive dealing.[80]

Third line forcing is also prohibited by the Australian Act under the exclusive dealing "umbrella".[81] That practice involves a corporation supplying or offering to supply goods or services or giving or allowing a discount rebate or allowance in relation thereto, on the condition that the person to whom the corporation supplies (etc.) (including any related body corporate) will acquire goods or services of a particular kind or description from another person. Refusals to supply, for non compliance, are also caught.[82]

Third line forcing will be caught by the section regardless of its actual competitive effects. The other types of exclusive dealing referred to above will only be subject to the prohibition against exclusive dealing if the engaging by the corporation (alone or with any related body corporate) in that conduct (including other conduct of a similar kind) has the purpose, or has or is likely to have the effect, of substantially lessening competition in any market.[83]

A corporation in Australia engaging or proposing to engage in exclusive dealing conduct , other than third line forcing, may avoid liability by lodging a notification thereof, with the Trade Practices Commission.[84] Where a notification has been lodged the corporation's conduct is deemed not to have a substantial lessening effect on competition for the purposes of section 47. Protection can be withdrawn by the Commission if it is satisfied that the conduct is likely to have a substantially lessening effect on competition which is not outweighed by the public benefit likely to result therefrom. It is also possible in Australia to seek authorisation from the Commission for an exclusive dealing practice.[85]

In New Zealand, many exclusive dealing practices fall for examination under the general provisions of section 27 of the Commerce Act, already referred to. The case of *Fisher & Paykel Limited v Commerce Commission*[86] is a good example of this. For this reason most exclusive dealing practices will be examined against similar legal tests, regardless of under which country's legislation they fall to be examined. There are some exceptions to this:

(a) In Australia third line forcing is, prima facia, prohibited, regardless of its competitive effect. In New Zealand, supplying goods or services on the condition that the purchaser acquires other goods from a third party must have the purpose, effect or likely effect of substantially lessening competition in a market before it will come within section 27 of the Commerce Act;

(b) *Refusing* to supply goods or services because the purchaser has dealt, or refused to cease dealing, in a competition's products, or has failed to accept some restriction on resupply or refuses to also acquire other goods from a third party, will not involve a "contract, arrangement or understanding". Accordingly, section 27 will not apply to those types of exclusive dealing. Such refusals may be caught in appropriate circumstances, if at all, by section 36.

New Zealand officials have in the past expressed the view that a specific exclusive dealing clause is not required in the Commerce Act due to the wide coverage of section 27.[87] With the exception of third line forcing and the refusals to supply, just referred to, the writer is of the view that this is the correct position. Further amendment to either Act can, in terms of the CER Agreement and the declared aim of harmonising business laws, only be justified if real inconsistencies in application exist between the two Acts.

In relation to third line forcing and the refusals to supply which come within the definition of exclusive dealing in the Australian Act, the discrepancy is clear. While third line forcing may be a less common form of exclusive dealing, the writer takes the view that that is insufficient reason to maintain the difference in treatment accorded to that practice, if trans-Tasman application is to be given to the provisions. In relation to the more typical forms of exclusive dealing where supply is made, subject to certain exclusivity requirements, the writer is of the view that section 27 is sufficiently consistent with the Australian position for the objectives of the CER Agreement and provides suitable coverage for such practices.

Price Discrimination

Like exclusive dealing, price discrimination is a practice expressly addressed in the Australian Act but left, in New Zealand, to the more general coverage provided, in appropriate circumstances, by other provisions of Part II of the Commerce Act.

Section 49 of the Australian Act deals with the problem of a seller discriminating in its dealings with different customers. It prohibits a vendor discriminating between buyers of goods "of like grade and quality" in relation to: the price charged for goods;

discounts allowed; credits, rebates or allowances given; services given with the goods; or payment arrangements for services provided with the goods. Such discrimination is prohibited if it is of such a magnitude or of such a recurring or systematic character that it has, or is likely to have, the effect of substantially lessening competition in a market in which the corporation, or the persons the subject of the discrimination, supplies goods. Price discrimination will not be caught by the section if the defendant vendor establishes that such discrimination makes only reasonable allowance for the cost differences in manufacture, distribution, sale or delivery, or is constituted by action taken in good faith to meet a price or benefit offered by a competitor.

The section is a contentious one and its repeal was recommended by both the Swanson Committee and the now defunct Trade Practices Consultative Committee in Australia.[88] It is highly debatable whether price discrimination, which is a per se offence incapable of authorisation, will necessarily be more anti- than pro-competitive.[89] Further, in view of the complexity of the elements of an unlawful price discrimination, it has been suggested the section may be of dubious value in affording protection to a person suffering discrimination.[90] There have been relatively few cases of price discrimination which have been successfully brought in Australia.[91] The Australian Trade Practices Commission has noted that normally only the most significant suppliers in a market could engage in price discrimination that substantially lessens competition.[92]

For the purposes of section 27 of the Commerce Act (as well as section 45 of the Australian Act), a provision of a contract will be deemed to have the effect of substantially lessening competition if it has that effect when looked at with the provisions of any other contract to which the person is a party. Accordingly, the extent to which a supplier's discrimination is evidenced by two or more contracts, the general prohibition in that section will apply to a case of price fixing in any event.

It is conceivable that price discrimination might meet the section 36 criteria on the basis that the vendor occupies a dominant position and its discriminatory pricing policy had one of the anti-competitive purposes proscribed by that section. To the extent that price discrmination exists in New Zealand and does not meet the tests imposed by section 27 or 36, it will probably not be subject to any other regulation under the Commerce Act. In light of the uncertainty that presently surrounds Australia's price discrimination provision it would be unwise at this stage for New Zealand to take any action to remedy the difference between the two Acts in this area. Rather the discrepancy, albeit not of major significance in practice, should be noted.

TRANS TASMAN MERGERS AND ACQUISITIONS

A comparison of New Zealand and Australia's respective merger legislation reveals two merger regimes which are already largely harmonised. The market power thresholds in both countries is 'dominance' and broadly similar administrative procedures are employed in each. While there have been only a small number of recent mergers that have affected markets in both countries, the Government Steering Committee on Harmonisation noted an increasing number of such mergers in its 1990 Report.[93] This fact the Committee noted, has given rise to suggestions that there should exist a common mechanism for the consideration of merger proposals that have a trans-Tasman dimension. The 1990 Report contained no formal recommendation on this point but stated that the matter should be given further consideration.[94]

This section of the paper outlines the current merger regimes in Australia and New Zealand and some of the differences between them. It also considers the necessity or desirability of the introduction of a formal procedure for the consideration of mergers affecting markets located in both countries. New Zealand and Australia's merger regimes are both currently based around a voluntary notification procedure. (Extracts of the relevant sections in both Acts are set out Appendices Three and Four.) Criticism has been levelled in both jurisdictions at their respective merger procedures and review has been mooted. No doubt in carrying out any review both New Zealand and Australia will be mindful of the procedures applying in the other country and, one hopes, the wider implications of any change in terms of the objectives of the CER Agreement.

The Merger and Acquisition Regimes in New Zealand and Australia

New Zealand Acquisitions

In New Zealand, the acquisition of any shares or assets of a business may be made without Commerce Commission consent provided the acquisition will not result or be likely to result in any person being in or strengthening a dominant market position.[95] In broad terms, where the parties consider dominance is likely to result the transaction should (with the exception of bare transfers of market power which are expressly excluded from the provisions) proceed only with the prior clearance or authorisation of the Commerce Commission. Clearance will be granted where the Commission is satisfied that the acquisition will not result or be likely to result in any person being in or strengthening a dominant position in a market.[96] Authorisation will be granted where the public benefits flowing from a proposal are such that, notwithstanding

the resulting level of dominance, the proposal should be authorised.[97] If clearance or authorisation is not obtained for a transaction which does result in market dominance being acquired or strengthened, the Commerce Act makes provision for the transaction to be unwound and the parties subjected to significant penalties.[98]

The New Zealand legislation casts a wide dominance net in relation to business acquisitions. For the purpose of determining whether an acquisition will result or be likely to result in any person occupying or strengthening a dominant market position, where two or more persons are "interconnected" or "associated" and together are in a dominant position in a market, each of them is deemed to be in a dominant position in that market.[99] Persons are defined as "interconnected" if one of them is a body corporate of which the other is a subsidiary, both of them are subsidiaries of the same body corporate, or both of them are interconnected with bodies corporate that are so interconnected.[100] The Act provides that one person will be "associated" with another if that person is able (directly or indirectly) to exert a substantial degree of influence over the activities of the other.[101] While the test for a substantial degree of influence is not entirely clear,[102] the Act provided that such influence is not exerted by one person over another, by reason only of the fact that the persons are in competition in the same market or that one of them supplies goods or services to the other.[103]

Also relevant in assessing the scope of New Zealand's business acquisition regime is section 4(1) of the Commerce Act which provides that the Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand, to the extent that such conduct affects a market in New Zealand. The precise scope of section 4(1) is unclear. While on its face it appears to permit the Commerce Commission to intervene in merger transactions which take place outside New Zealand yet affect a New Zealand market, the normal rules of territorial application mean that the extended jurisdiction is limited to conduct of persons resident or carrying on business in New Zealand. In the writer's view the section does not provide a basis upon which the Commerce Commission could intervene in a business acquisition occurring in Australia which may have some effect on a market in New Zealand.

It is interesting to note the reference in section 4(1) to "engaging in conduct". The phrase "engaging in conduct" is defined in section 2(2) of the Act in terms which suggest that section contemplates trade practice activity rather than merger activity. Section 2(2) states that a reference to engaging in conduct shall be read as reference to doing or refusing to do any act including the entering into, or giving effect to, a

provision of a contract or arrangement; the arriving at, or the giving effect to a provision of, an understanding; or the requiring of the giving of, or the giving of a covenant. All of these phrases are of course phrases used in sections 27 and 28 of the Act relating to contracts, arrangements, understandings and covenants substantially lessening competition. In the writer's view section 4(1) is more readily applicable to restrictive trade practices than business acquisitions and is of limited assistance in examining acquisitions which take place offshore but affect a New Zealand market. The issue remains a moot point.

In its June 1990 Report the Steering Committee of Officials stated that it considered that acquisitions taking place outside New Zealand that affect New Zealand markets will be subject to the Commerce Act as a result of section 4 of that Act.[104] The writer respectfully submits that the position is not as clear as the officials have suggested. In light of the normal rules of territorial application of state laws one would have expected the business acquisition regime in the Commerce Act to have expressly acknowledged the extension of its provisions to overseas acquisitions and the power of our Commerce Commission to investigate overseas mergers, if this indeed was the case. While the Australian Act contains a provision similar to that in section 4 of the Commerce Act, it was nevertheless still considered necessary there to enact section 50A (discussed below) setting out the extended jurisdiction of the Act's merger procedures to mergers occurring outside Australia and affecting a market within.

It is also interesting to note that when the Commerce Law Reform Bill 1988 was introduced, it gave the Commerce Commission extraterritorial jurisdiction in respect of overseas mergers which created or strengthened dominance in New Zealand markets. The provision was removed prior to the Bill coming into force. It is unclear whether this occurred because it was considered undesirable for such extraterritorial jurisdiction to exist or because, on reflection, it was considered that section 4 already covered acquisitions occurring outside New Zealand affecting markets within New Zealand.

Acquisitions in Australia

Section 50 of the Australian Act relates to and proscribes acquisitions of shares and assets between a corporation (defined as a foreign corporation, or Australian trading or financial corporation, or holding company of any of them) and a body corporate. It prohibits acquisitions of shares or assets of a body corporate (other than bare transfers) if they result in a corporation being, or being likely to be, in a position to dominate a market for goods or services, or, substantially strengthen the power of a corporation

that is already in a position to dominate a market (but only if the body corporate acquired (or a related or associated body corporate) is or is likely to be a competitor of the corporation).

The Australian Trade Practices Commission will only authorise an acquisition with any of these affects if it is satisfied that the acquisition will result or be likely to result in such a benefit to the public that it should be allowed to take place.[105] This resultant public benefit has been described as "a net or overall benefit after any detriment to the public resulting or likely to result from the acquisition has been taken into account".[106] The Australian Act permits a corporation to enter into a contract to acquire shares or assets, expressed to be subject to a grant of authorisation[107]. Where parties proceed to acquire assets or shares, contrary to the procedure in the Act, a range of remedies exists broadly similar to those in the Commerce Act.[108]

As a result of recent amendments, similar provisions exists in the Australian Act to those in the Commerce Act in relation to related and associated companies for the purposes of assessing dominance. Section 50 will now catch mergers if:[109]

(i) any company associated with, not just related to, the acquiree body corporate is or is likely to be a competitor of the dominant corporation;

(ii) any company associated with, not just related to, a corporation acquires another body corporate in circumstances:

(a) that result in the corporation becoming dominant; or

(b) where the corporation is already dominant, the acquired body corporate (or an associated or related body corporate) is or is likely to be a competitor of the dominant corporation and the acquisition substantially strengthens the dominant corporation's power.

It has been suggested that these amendments were made to overcome the difficulties faced in *TPC v Australian Iron & Steel, BHP and Ors*.[110]

As in New Zealand's regime, section 50 of the Australian Act extends to mergers occurring outside Australia only to the extent that the parties thereto are "incorporated or carrying on business within Australia" or "Australian citizens or persons ordinarily resident within Australia". More significantly, and unlike New Zealand, the Australian

legislation provides the Trade Practices Tribunal with extraterritorial powers in related to acquisitions occurring outside Australia which affect markets within. Under section 50A of the Australian Act the Trade Practices Tribunal is empowered to make a declaration ordering a party, who or which has acquired goods in the preceding 12 months, to cease carrying on business in a stated market. In effect, the provision operates as a divestment order. Power to make the declaration exists where:

(i) a person acquires, outside Australia, a controlling interest in any body corporate (including control via a subsidiary company); and

(ii) the body corporate thereby obtains a controlling interest in one or more "corporations"; and

(iii) the controlling interest either puts, or is likely to put, the person in a position to dominate a substantial market for goods or services in Australia, or an Australian State or Territory, or substantially strengthens the person's existing dominance in that market; and

(iv) the net result of the acquisition is not a benefit to the public such that the acquisition should be disregarded.

To date there have been no cases decided under Australia's section 50A. It seems clear however, that the Tribunal's power is a very wide one. In the writer's view it provides Australian businesses with a level of comfort in relation to foreign mergers, which is clearly absent in New Zealand.

Australia and New Zealand Legislative Comparisons

While the business acquisition tests and procedures under the Commerce Act are broadly similar to those set out in the merger provisions in the Australian Act, some differences do exist. They include the following:

(i) For the purpose of New Zealand's merger regime a market is "a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them".[111] By contrast, section 50(3)(a) of the Australian Act states that a reference in section 50 of the Act to a market for goods or services is to be construed as a reference "to a substantial market for goods or services in Australia, in a State, or in a Territory". It appears from those references that some mergers in Australia which result in dominance, will nevertheless escape the section 50 regime if that

resulting dominance is not in respect of a substantial market. By contrast, it is clear from the New Zealand legislation that once the boundaries of a particular market have been delineated, section 47 of the Commerce Act will be contravened if the acquisition resulting in any person being in or strengthening a dominant position. It matters not in New Zealand that the market is not "substantial", however that term might be defined.

While section 50(3)(a) of the Australian Act has not been the subject of judicial comment, the meaning of the provision has been said to be as follows:[112]

> *"The market must be "substantial" in a State of Australia, and if, for example, one is seeking to acquire a corporation whose main activities are confined to but spread across a particular State, say, New South Wales, it should not now undo the acquisition merely because the merger will remove a significant degree of competitive conduct in, say, Newcastle. In other words the matter should be looked at according to the spread of activity of the merged enterprise across the whole State, and not merely, or necessarily, one part of it."*

While the precise scope of section 50(3)(a) remains unclear it seems that the restriction imposed by it has been of little significance in merger cases in Australia. In the writer's view the section makes it clear that the merger regime in the Act is not concerned with acquisitions which affect markets that are so small and, in trade terms, insignificant, that they raise no real competition concerns.

It is however difficult to image an example of a market in which an acquisition of dominance will be of no competitive concern. For this reason, the absence in the Commerce Act of a requirement that a market affected by a merger be a "substantial market" will in all likelihood not be of significant practical concern for those proposing business acquisitions in New Zealand. In the writer's view the legislative difference does not, despite first impressions, create a more disadvantageous trading regime in this country than exists in Australia.

(ii) A further qualification to the terms of the Australian legislation is that a person who is already dominant in an Australian market will be prohibited by section 50 from acquiring the shares in another, only if that existing dominance will be *substantially* strengthened.[113] The New Zealand provision will catch any acquisition which results in a person's existing dominant position being strengthened, by any amount. On its face, the terms of the New Zealand section

appear to disadvantage New Zealand companies when compared with the Australian provision which clearly anticipates some degree of permissible additional market strength after a position of dominance has already been acquired.

If the use of the term "substantial" in this context means "more than trivial or nominal" then there is probably little difference between the two prohibitions. If the term "substantial" means "considerable" or "large" then the writer considers that the two prohibitions do have quite different coverage. The New Zealand section does not provide for a "safe harbour" of any type once the dominance threshold has been reached.

(iii) The writer considers that the Commerce Act does not (despite the views of the Steering Committee of Officials on Harmonisation of Business Laws)[114] permit examination by the New Zealand Commerce Commission of acquisitions that take place outside New Zealand. The only exception to this is where the party acquiring shares or assets if resident or carrying on business in New Zealand. The writer considers this is a shortcoming in the Commerce Act, the effect of which will, as commercial relationships between New Zealand and Australian companies increase and strengthen under CER, become increasing apparent. In the writer's view it is anomalous to protect the competitive integrity of New Zealand's markets to the extent they are harmed by New Zealand traders, but effectively ignore similar conduct when it originates offshore. The writer is of the view that the Commerce Act should be amended to incorporate provision (similar to those in section 50A of the Australian Act) in relation to the acquisition outside New Zealand of a controlling interest in any New Zealand company.

A Trans-Tasman Merger Forum

The possibility of an increasing number of acquisitions or mergers which have competitive consequences for markets in both Australia and New Zealand, raises the issue of the necessity or desirability of introducing some type of joint forum for the consideration of such transactions. Clearly such a move to share control over business activities raises a number of issues of state sovereignty and would probably be rejected by some as a matter of principle. The subject of a trans-Tasman forum has been raised by some academics and members of the judiciary at a time which Australia has recently abolished its appeals to the Privy Council, the only court previously shares by with New Zealand, and New Zealand is itself questioning a continued Privy Council appeal

procedure.[115] The issue has been raised in relation to other areas of the trade practice legislation apart from mergers as well as in relation to other areas of law affected by the CER Agreement such as tax law, customs regulation and company and securities laws.

Short of federation between Australia and New Zealand, a number of possibilities exist for an interjurisdictional forum to resolve future trans-Tasman legal disputes. They include a regional Privy Council, using the High Court of Australia, a South Pacific Court of Appeal and a trans-Tasman Commercial Court. Space does not permit a full discussion of each of those options, however there is a growing volume of commentary on this topic.[116] The writer is of the view that the most likely and readily palatable of those options is probably a trans-Tasman commercial court. This option does however raise a number of practical issues not the least of which are the current inability to exclude the constitutional prerogative review of the High Court of Australia of all Australian Courts and the probably invalidity of any attempt to create an appeal from any Australian Court to a body outside Australia. In light of these difficulties, one writer in this area considers that a trans-Tasman court would not be acceptable (and neither would any of the other options referred to).[117]

The resolution of this issue will probably not seriously be addressed until there have been a number of significant commercial law cases which have arisen and been of a nature crying out for resolution in some type of joint forum. Until that occurs it is likely that the status quo will remain.

SUMMARY AND CONCLUSION

1. The tans-Tasman application accorded to the market power prohibitions in New Zealand's Commerce Act 1986 and Australia's Trade Practices Act 1974 constitute a significant step forward in the advancement of the objectives of the CER Agreement and the later Memorandum of Understanding on the Harmonisation of Business Law. While the new provisions have yet to be tested the writer maintains that the different market power thresholds prevailing in each country may give rise to discrepancies in the treatment of similar conduct depending in which country the conduct occurs.

2. The scope of the reform is limited by the exclusion from section 36A of the Commerce Act and section 46A of the Australian Act of persons with a dominant position in a market exclusively for services. In addition, competition in a number of significant services industries is hindered by the exclusion of industries such as trans-Tasman shipping and air passenger services and Australian telecommunications, from the CER Protocol on Trade in Services. Real competition in these areas will require significant further domestic deregulation which will of course take some time, even if the terms of sections 36A and 46A are extended to markets for services in the meantime.

4. While Australia and New Zealand restrictive trade practice legislation is already drafted in broadly similar terms, a number of differences existed between them. These include:

   - the application of New Zealand's restrictive trade practice provisions to business acquisitions;

   - the limited scope of New Zealand's exclusionary provision section which, since July 1990, does not cover agreements between competitors not to supply or acquire from a third party, unless that third party (or an interconnected body corporate thereof) is in competition with one of the parties to the agreement;

   - the absence in Australia of restrictions on resale price maintenance where both the supplier and the purchaser/retailer are non-corporate entities;

- the absence in Australia of any restrictions on third party resale price maintenance;

- the inability to obtain authorisation for resale price maintenance in Australia;

- the absence of express provision in New Zealand for secondary boycotts;

- the limited coverage provided by the Commerce Act for acts of exclusive dealing which may not come within the ambit of section 27, such as certain refusals to supply and third line forcing.

5. While some of the discrepancies between the restrictive trade practice coverage of the two sections will in practice be more significant than others, the writer is of the view that all of those sections should, as far as possible, be more closely aligned. While the aim of harmonisation of Australia and New Zealand business law does not necessarily require duplication of laws, the writer considers that in the context of trade practices regulation a large number of examples of unnecessary differences exist in drafting. Where the differences are matters of more substance it is imperative that the potential significance of those differences are understood by officials in both countries prior to any further reform.

6. In the area of regulation of business acquisitions, broadly similar legal thresholds and procedures are in place in Australia and New Zealand. Some legislative differences do exist between the tests however. The most obvious of these are the fact that the merger provisions in Australia extend to parties already in a dominant position only if that position is "substantially strengthened" by the merger, and the requirement that dominance be increased in relation to a "substantial" market in Australia. The effect of these differences is not entirely clear but it is possible that they impose more stringent tests for contravention, leaving a larger number of mergers outside the scope of section 50 of the Australian Act than would be the case in New Zealand.

7. If the stated objectives of the CER Agreement and its subsequent protocols and understandings are to meet their full potential, as both Governments have repeatedly stated is their intention, the writer considers it essential that anti-competitive conduct in both countries be regulated in the same way. While acknowledging the existing similarities between the Commerce Act 1986 and the Trade Practices Act 1974 and the growing volume of jurisprudence that

is being applied across borders, it would be unfortunate if, having achieved general harmonisation, the discrepancies discussed in this paper are ignored. While the writer has taken the view that, there are some legislative differences which in practice will not be significant, it would be sensible if these provisions are harmonised in their terms, so that unnecessary time and costs are not wasted in opinioning on the relevance of those differences, or lack thereof.

8. Ultimately however, the fact remains that further harmonisation of Australia and New Zealand's trade practice laws will be constrained by considerations of sovereignty and desires by each country to follow different policy options. It may be that in any particular case, neither country will be prepared to amend its legislation to follow that which is in force in the other country. The writer hopes that the importance of closely aligned trade practice legislation will be recognised and legislative differences minimised.

FOOTNOTES

1 The amending Acts were, in New Zealand, the Commerce Amendment Act 1990, and in Australia, the Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990.

2 Article 1.

3 Article 4(3).

4 Article 5(3).

5 Article 7(2).

6 Article 8(1).

7 Article 9(1).

8 Article 11(1).

9 While an obvious conclusion is that the 1986 Act was a direct legislative response to the signing of the CER Agreement, one author has suggested the economic policies of the 1984 Labour Government may have been the primary source of legislative motivation rather than the CER objectives. See J Farmer, "Towards a Single Trans-Tasman Market : A Lawyer's Perspective" (1988) 33 World Competition Law and Economic Review p. 39, 41.

10 Article 22(3).

11 These goals were set by the then Prime Ministers of New Zealand and Australia, Mr Lange and Mr Hawke, when they met in November 1987 to discuss the progress under the CER Agreement and the impending review.

12 Section 4(1) of the Commerce Act states:

> "4(1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand."

13 Sections 98H and 99A.

14 Section 5(1A).

15 Sections 155A and 155B.

16 Section 46A(8).

17 Section 46B.

18 Sections 3(1A), (1B), and (1C).

19 K M Vautier "Trans-Tasman Trade and Competition Law" in Vautier, Farmer QC and Baxt (Eds) CER and Business Competition - Australia and New Zealand in a Global Economy (1990) CCH, p. 83.

20 The exclusion of services from the provisions is a matter worthy of a separate paper. For a discussion of issues see G. Allen, "The Deal on Services - A Necessary Step to Integration", below, fn 56.

21 Section 36A(1)(a) of the Commerce Act 1986 covers any person with a dominant poisition in a market in New Zealand while section 46A(1) and (2) covers, inter alia, a corporiation that has a substantial degree of market power in a market in Australia.

22 Section 3(8) of the Commerce Act gives some assistance in identifying dominance for the purposes of sections 36 and 36A of the Act.

23 Section 36A(1)(d) and (f).

24 Section 46A(2)(a) and (b).

25 See for example Re Howard Smith Industries Pty Ltd (1977) 28 FLR 385; Tillmanns Butcheries Pty Ltd v The Australian Meat Industry Employees' Union (1979) 42 FLR 331,338; and Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) 64 FLR 238, 276. For New Zealand authority on this term see The New Zealand Vegetable Growers Federation (Inc.) v Commerce Commission (unreported, High Court (Administrative Division) Wellington Registry, M 431/87, 17 August 1988, pp 13-15; and Fisher & Paykel Ltd v Commerce Commission [1990] 2 NZLR 731, pp. 758-759; (1990) 3 NZBLC 101,655, pp. 101,679-101,680.

26 (1989) ATPR 40-925.

27 Ibid, p 50,010.

28 Above fn 26, p. 50,011 (per Mason CJ and Wilson J); p 50,017 (per Dawson J); and p. 50,025 (per Toohey J).

29 "Misuse of Market Power: Section 46 of the Trade Practices Act 1974", Background Paper, Australian Trade Practices Commission, Canberra, February 1990, para 21.

30 (1990) ATPR 40-007, p. 51,124, with respect to the element of "purpose".

31 [1990] 1 NZLR 731; (1990) 3 NZBLC 101,501.

32 Above NZLR at p. 761, NZBLC at p. 101,528.

33 [1990] 2 NZLR 663.

34 Ibid, 706.

35 [1987] 2 NZLR 682, p. 686-687.

36 [1972] CMLR D11.

37 (1987) 1 NZBLC (Com) 104,051.

38 (1987) 1 NZBLR (Com) 104,073.

39 Above, fn 35.

40 Above, fn 31.

41 Australia's Acts Interpretation Act permits a Explanatory Memorandum to a Bill to be used in interpreting provision following their enactment.

42 Above, fn 25.

43 Above, fn 30.

44 (1987) ATPR 40-809.

45 Both New Zealand and Australia have considered the thresholds for the application of section 36 and section 46 respectively. Both countries have taken the view that their existing thresholds are appropriate to their domestic market

circumstances. See Department of Trade and Industry, Review of the Commerce Act 1986 Discussion Paper (August 1988); and Standing Committee on Legal and Constitutional Affairs, Mergers, Takeovers and Monopolies : Profiting from Competition? (May 1989).

46 New Zealand Ministry of Commerce Review of the Commerce Act 1986 : Reports and Decisions, Wellington, August 1989, Annex 2, p. 2.

47 The July 1988 Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Harmonisation of Business Laws (entered into following the 1988 review) notes that replication is not essential in order to bring about harmonisation. See also Report to Governments By Steering Committee of Officials (June 1990), p. (ii), para 5.

48 For background reading on the Services Protocol see : G Thomson "A Single Market for Goods and Services in the Antipodes", The World Economy, Vol. 12, No. 2, June 1989, p. 207.

49 Article 1.

50 Article 4.

51 Article 5.

52 Article 6.

53 Article 12.

54 Article 20.

55 G Allen, "The Services Sector Agreement : An Australian Private Sector View" Speech to the Trade in Services Conference, Auckland, September 1988.

56 G Allen "The Deal on Services - A Necessary Step to Integration" in Vautier, Farmer QC and Baxt (Eds) CER and Business Competition - Australia and New Zealand in a Global Economy (1990) CCH, p. 165 ff.

57 Section 2(4)(c) of the Commerce Act and section 4C(c) of the Trade Practices Act.

58 The joint Australia and New Zealand study team consisted of the Bureau of Transport and Communications Economics and Jarden Morgan NZ Limited (now CS First Boston New Zealand Limited) (Australian Government Publishing Services, Canberra, June 1991).

59 For background reading see D Trebeck and P Barnard "Ports and Trans-Tasman Shipping" in Vautier, Farmer QC and Baxt (Eds) CER and Business Competition in Australia and New Zealand in a Global Economy (1990) CCH, p. 189 ff.

60 Paragraph 8.15.

61 Section 45(7) of the Trade Practices Act.

62 Section 69 of the Commerce Act.

63 Section 45(2)(b), and for definition of "exclusionary provisions" see section 4D.

64 Section 29(1)(c).

65 Above fn 46, Memorandum For Cabinet Policy Committee, para 51.

66 Causes of action under both sections 27 and 29 were considered in ARA v Mutual Rental Cars [1987] 2 NZLR 647, p. 660-665 and Apple Fields Ltd v The New Zealand Apple and Pear Marketing Board (1989) 2 NZBLC 103,565, p. 103,581.

67 See for example Re South Pacific Tyres (NZ) Ltd, Commerce Commission Decision No. 247, 3 May 1990, where the Commission was of the view that the effects of a restraint against competition were not sufficiently "substantial" for the matter to come within section 27, while the elements of section 29 were present (authorisation being declined).

68 Sections 31-34 of the Commerce Act and section 45A(2)-(7) of the Trade Practices Act.

69 In New Zealand see : Re Chemists' Guild of New Zedaland (Inc.) (1987) 1 NZBLC (Com) 104,058; Re The Insurance Council of New Zealand Limited (Inc.) (1989) 2 NZBLC (Com) 104,477; and Commerce Commission v BP Oil New Zealand Ltd (1991) 3 NZBLC 99-219. In Australia see : Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1982) 62 FLR 437 and (1983) 68 FLR 70; TPC v Parkfield Operations Pty Ltd (1985) ATPR 40-526; 40-639; TPC v Cook-On Gas Products Pty Ltd (1985) ATPR 40-560; and TPC v David Jones (Australia) Pty Ltd (1986) 13 FCR 446. For a general discussion, see Y Van Roy, Guidebook to New Zealand Competition Laws (2 ed) CCH (1991), paras 560-569.

70 (1982) 62 FLR 437 and (upheld on appeal) (1983) 68 FLR 70.

71 Sections 37-42 of the Commerce Act and sections 48 and 96-100 of the Trade Practices Act.

72 Although see Direct Holdings Ltd v Feltex Furnishings of New Zealand Ltd (1986) 1 NZBLC 102,614; and Commerce Commission v Herberts Bakery Ltd (1991) 3 NZBLC 99-214.

73 See for example : TPC v Stihl Chain Saws (Aust) Pty Ltd (1978) ATPR 40-091; Mikasa (NSW) Pty Ltd v Festival Stores Pty Ltd (1973) 47 ALTR 136; TPC v Bata Shoe Co. of Australia Pty Ltd (1980) ATPR 40-161 and TPC v Mobil Oil Australia Ltd (1984) ATPR 40-482. See also Van Roy, above fn 69, chapter 8.

74 Section 58(7)-(8).

75 See for example A Bollard and R Bowie, "The Economies of Resale Price Maintenance in New Zealand" in A Bollard (Ed) The Economics of The Commerce Act New Zealand Institute of Economic Research, Monograph No. 52 (October 1989), pp. 144 ff

76 This was the name given to a committee established in Australia in 1976 (under Mr T B Swanson) to undertake a comprehensive review of the Trade Practices Act 1974. The recommendations of the Swanson Committee resulted in sweeping amendments to the Act in 1977.

77 Subsection (1).

78 Section 47(2).

79 Section 47(3).

80 Section 47(4).

81 Section 47(6).

82 Section 47(7).

83 Section 47(10).

84 Section 93.

85 Part VII

86 [1990] 2 NZLR 731.

87 See : Department of Trade and Industry, Review of the Commerce Act 1986, Discussion Paper, Wellington (August 1988).

88 Those recommendations were ignored by the Australian legislature.

89 Trade Practices Review Commiteee : Report to the Minister of Business and Consumer Affairs, 20 August 1976, Canberra, A G P S, Para 7 ff.

90 Idem.

91 See Cool and Sons Pty Ltd v O'Brien Glass Industries Ltd (1981) 35 ALR 445; Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd (1987) 75 ALR 581 (unsuccessful); and Pont Data Australia pty Ltd v ASX Operations Pty Ltd, above fn 30.

92 Refer The Fifth Annual Report of the Trade Practices Commission, discussed by R V Miller, Annotated Trade Practices Act (12 Ed) (1991) The Law Book Company Limited, Australia, p. 125, para 49/15.

93 Paragraph 8.17.

94 Idem.

95 Sections 47 and 48.

96 Section 66.

97 Section 67.

98 Sections 83-85.

99 Section 47(2).

100 Section 2(7).

101 Section 47(3).

102 The Chairperson of the Commerce Commission, Dr Susan Lojkine, has stated that the Commission is likely to seek some assistance in this regard, from the New Zealand Society of Accountants' accounting standard on business combinations, (SSAP 8) which requires one company to equity account the results of another company if it can exert a significant influence over the other company, and the investment is seen as a long-term one.

103 Section 47(4).

104 Paragraph 8.26(iv).

105 Section 90(9).

106 In re Rural Traders Co-operative (WA) Ltd & Ors (1979) ATPR 40-110, p. 18,123.

107 Section 50(4). The position is less clear in New Zealand as the equivalent New Zealand provision, section 51, was repealed from 1 January 1991, see M Berry and A Riley, "Beware the New Business Acquisition Provisions in the Commerce Amendment Act 1990", (1991) 21 VUWLR 91, p. 95-97.

108 Part VI.

109 Section 50 (1AA), (2A).

110 (1990) ATPR 41-001.
In that case the Australian Trade Practices Commission ("TPC") sought to restrain the second respondent The Broken Hill Proprietary Company Limited ("BHP")from taking over New Zealand Steel Limited ("NZ Steel") and also sought divestiture orders under section 81 of the Trade Practices Act to restore the status quo in the event that that takeover went ahead. The takeover did take place in New Zealand with the approval of the New Zealand Commerce Commission. The TPC asserted that as a result of the takeover would be or be likely to be a substantial strengthening of the power of BHP to dominate a market in Australia for steel and steel products, in contravention of section 50(1)(6) of the Australian Act. The takeover was effected through a string of subsidiaries in Australia and New Zealand which the TPC alleged had been used as a vehicle to enable BHP to gain control of NZ Steel without contravening Part IV of the Australian Act. In the course of striking out the whole of the TPC's pleading, Lockhart J interpreted the phrase "acquire, directly or indirectly" in section 50 as meaning that the interposition between an acquiring corporation and a target body corporate of a wholly owned subsidiary of the former may fall within section 50, but only where the subsidiary acts as agent or otherwise for or on behalf of the corporation as principal. (Note however, that even if the amendments to section 50 had been in force when the case was decided, the outcome would not have been different, because the acquiring company, a BHP subsidiary, was not resident or carrying on business in Australia.)

111 Section 3(1A).

112 W R McComas "Monopolisation and Mergers : What can be done?" Business Law Education Centre, Vol. 1977, No. 7, p. 35.

113 Section 50(1)(b)(ii).

114 Above fn 91.

115 Kirby, The Hon. Justice MD "CER, Trans-Tasman Courts and Australasia" (1983) NZLR 304; Kirby, The Hon. Justice MD "Closer Economic and Legal Relations Between Australia and New Zealand (1984) ALJ 383; Pengilley, W "On Trans-Tasman Banter and "things CER"", (1990) NZLJ 199.

116 Kirby, idem.

117 Idem.

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APPENDIX 1

SECTION 27 CONTRACTS, ARRANGEMENTS, OR UNDERSTANDINGS SUBSTANTIALLY LESSENING COMPETITION PROHIBITED

27(1) [Entering into prohibited] 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.

27(2) [Giving effect to prohibited] No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

27(3) [Existing contracts] Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.

27(4) [Unenforceable] No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

SECTION 28 COVENANTS SUBSTANTIALLY LESSENING COMPETITION PROHIBITED

28(1) [Covenants prohibited] No person, either on his own or on behalf of an associated person, shall—

(a) Require the giving of a covenant; or

(b) Give a covenant—

that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

28(2) [Terms unenforceable] No person, either on his own or on behalf of an associated person, shall carry out or enforce the terms of a covenant that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

28(3) [Existing covenants] Subsection (2) of this section applies to a covenant whether given before or after the commencement of this Act.

28(4) [Covenant unenforceable] No covenant, whether given before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market is enforceable.

28(5) [Retributive conduct prohibited] No person shall—

(a) Threaten to engage in particular conduct if a person who, but for subsection (4) of this section, would be bound by a covenant, does not comply with the terms of the covenant; or

(b) Engage in particular conduct because a person who, but for subsection (4) of this section, would be bound by a covenant, has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

28(6) [Presumption] Where a person—

(a) Issues an invitation to another person to enter into a contract containing a covenant; or

(b) Makes an offer to another person to enter into a contract containing a covenant; or

(c) Makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms,—

that person shall, by issuing that invitation, making that offer, or making that fact known, be deemed to require the giving of the covenant.

28(7) [Associated persons] For the purposes of this section, 2 persons shall be taken to be associated with each other in relation to a covenant or proposed covenant if, but only if,—

(a) One person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with the directions, instructions, or wishes of the other person in relation to the covenant or proposed covenant; or

(b) The persons are interconnected bodies corporate.

SECTION 29 CONTRACTS, ARRANGEMENTS, OR UNDERSTANDINGS CONTAINING EXCLUSIONARY PROVISIONS PROHIBITED

29(1) [Exclusionary provision defined] For the purposes of this Act, a provision of a contract, arrangement, or understanding is an exclusionary provision if—

(a) It is a provision of a contract or arrangement entered into, or understanding arrived at, between persons of whom any 2 or more are in competition with each other; and

(b) It has the purpose of preventing, restricting, or limiting the supply of goods or services to, or the acquisition of goods or services from, any particular person or class of persons, either generally or in particular circumstances or on particular conditions, by all or any of the parties to the contract, arrangement, or understanding, or if a party is a body corporate, by a body corporate that is interconnected with that party; and

(c) The particular person or the class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or understanding in relation to the supply or acquisition of those goods or services.

29(2) [Competition] For the purposes of subsection (1)(a) of this section, a person is in competition with another person if that person or any interconnected body corporate is, or is likely to be, or, but for the relevant provision, would be or would be likely to be, in competition with the other person, or with an interconnected body corporate, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.

29(3) [Entering into prohibited] No person shall enter into a contract, or arrangement, or arrive at an understanding, that contains an exclusionary provision.

29(4) [Giving effect to prohibited] No person shall give effect to an exclusionary provision of a contract, arrangement, or understanding.

29(5) [Existing contracts] Subsection (4) of this section applies to an exclusionary provision of a contract or arrangement made, or understanding arrived at, whether before or after the commencement of this Act.

29(6) [Unenforceable] No exclusionary provision of a contract, whether made before or after the commencement of this Act, is enforceable.

Price Fixing

SECTION 30 CERTAIN PROVISIONS OF CONTRACTS, ETC, WITH RESPECT TO PRICES DEEMED TO SUBSTANTIALLY LESSEN COMPETITION

30(1) [Price fixing contracts] Without limiting the generality of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—

(a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or

(b) Resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.

30(2) [Competitive Supply] The reference in subsection (1)(a) of this section to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

SECTION 31 JOINT VENTURE PRICING EXEMPT FROM APPLICATION OF SECTION 30

31(1) [Joint venture defined] For the purposes of this section—

(a) Joint venture means an activity in trade—

(i) Carried on by 2 or more persons, whether or not in partnership; or

(ii) Carried on by a body corporate for the purpose of enabling 2 or more persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate or an interconnected body corporate:

(b) A reference to a contract or arrangment entered into, or an understanding arrived at for the purposes of a joint venture shall, in relation to a joint venture by way of an activity carried on by a body corporate in terms of paragraph (a)(ii) of this subsection, be read as including a reference to the memorandum and articles of association, rules, or other document that constitute or constitutes, or is or are to constitute, that body corporate.

31(2) [Exceptions to price fixing presumption] Nothing in section 30 of this Act applies to a provision of a contract or arrangement entered into, or an understanding arrived at for the purposes of a joint venture, to the extent that the provision relates to—

(a) The joint supply by the parties to the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by those parties in pursuance of the joint venture; or

(b) The joint supply by the parties to the joint venture of services in pursuance of the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture, of services in pursuance of, and made available as a result of, the joint venture; or

(c) In the case of a joint venture carried on by a body corporate in terms of subsection (1)(a)(ii) of this section,—

(i) The supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) The supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by a person who is the owner of shares in the capital of the body corporate, or a body corporate that is interconnected with such a person.

SECTION 32 CERTAIN RECOMMENDATIONS AS TO PRICES FOR GOODS AND SERVICES EXEMPT FROM APPLICATION OF SECTION 30

32 Nothing in section 30 of this Act applies to a provision of a contract, arrangement, or understanding, to the extent that the provision recommends or provides for the recommending of the price for, or a discount, allowance, rebate or credit in relation to goods or services where the parties to the contract, or arrangement, or understanding include not less than 50 persons (bodies corporate that are interconnected being counted as a single person) who supply or acquire, in trade, goods or services to which the provision applies.

SECTION 33 JOINT BUYING AND PROMOTION ARRANGEMENTS EXEMPT FROM APPLICATION OF SECTION 30

33 Nothing in section 30 of this Act applies to a provision of a contract, arrangement, or understanding that—

(a) Relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement, or understanding; or

(b) Provides for joint advertising of the price for the resupply of goods so acquired.

SECTION 34 CERTAIN PROVISIONS OF COVENANTS WITH RESPECT TO PRICES DEEMED TO SUBSTANTIALLY LESSEN COMPETITION

34(1) [Price fixing covenants] Without limiting the generality of section 28 of this Act, a covenant shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition

in a market if the covenant has the purpose or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling or maintaining of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—

(a) Supplied or acquired by the persons giving the covenant or the persons entitled to the benefit of the covenant, or by any of them, or by bodies corporate that are interconnected with any of them, in competition with each other; or

(b) Resupplied by persons to whom the goods are supplied by the persons giving the covenant or the persons entitled to the benefit of the covenant, or by any of them, or by bodies corporate that are interconnected with any of them, in competition with each other.

34(2) [Competitive supply] The reference in subsection (1)(a) of this section to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for the covenant, would be in competition with each other in relation to the supply or acquisition of the goods or services.

Practices Substantially Lessening Competition Conditional Upon Authorisation

SECTION 35 CONTRACTS OR COVENANTS SUBJECT TO AUTHORISATION NOT PROHIBITED UNDER CERTAIN CONDITIONS

35(1) [Contracts and covenants] Notwithstanding anything in this Act, but subject to subsection (3) of this section,—

(a) A contract to which section 27 or section 29 of this Act applies may be entered into if the requirements of subsection (2) of this section are complied with:

(b) A covenant to which section 28 of this Act applies may be required to be given, or may be given, if the requirements of subsection (2) of this section are complied with.

35(2) [Conditional on authorisation] For the purposes of subsection (1) of this section, the requirements that must be met are—

(a) In the case of a contract to which section 27 or section 29 of this Act applies, that the contract shall be subject to a condition that the provision, or exclusionary provision, as the case may be, shall not come into force unless and until authorisation is granted to give effect to the provision, or exclusionary provision, and that application shall be made for that authorisation within 15 working days after the contract is entered into:

(b) In the case of a covenant to which section 28 of this Act applies, that the covenant is subject to the condition that it shall not have effect unless and until authorisation is granted to give effect to it and that application shall be made for that authorisation within 15 working days after the covenant is made.

35(3) [Implementation prohibited] Nothing in this section—

(a) Prevents the giving effect to a provision of a contract or an exclusionary provision, as the case may be, from constituting a contravention of section 27 or section 29 of this Act, as the case may be:

(b) Prevents the giving effect to a covenant from constituting a contravention of section 28 of this Act.

Use of Dominant Position in a Market

SECTION 36 USE OF DOMINANT POSITION IN A MARKET

36(1) [Prohibited purposes] 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.

36(2) [Intellectual property rights] For the purposes of this section, a person does not use a dominant position in a market for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of this section by reason only that that person seeks to enforce any statutory intellectual property right within the meaning of section 45(2) of this Act in New Zealand.

36(3) [Authorised practices excepted] Nothing in this section applies to any practice or conduct to which this Part of this Act applies which has been authorised pursuant to Part V of this Act.

SECTION 36A USE OF DOMINANT POSITION IN TRANS-TASMAN MARKETS

36A(1) [Prohibited purposes] No person who has—

(a) A dominant position in a market; or

(b) A dominant position in a market in Australia; or

(c) A dominant position in a market in New Zealand and Australia—

shall use that person's dominant position for the purpose of—

(d) Restricting the entry of any person into any market, not being a market exclusively for services; or

(e) Preventing or deterring any person from engaging in competitive conduct in any market, not being a market exclusively for services; or

(f) Eliminating any person from any market, not being a market exclusively for services.

36A(2) [Intellectual property rights] For the purposes of this section, a person does not use a dominant position in a market for any of the purposes specified in paragraphs (d) to (f) of subsection (1) of this section by reason only that that person seeks to enforce any statutory intellectual property right, within the meaning of section 45(2) of this Act, in New Zealand.

36A(3) [Authorised practices excepted] Nothing in this section applies to any practice or conduct to which this Part of this Act applies that has been authorised pursuant to Part V of this Act.

Resale Price Maintenance

SECTION 37 RESALE PRICE MAINTENANCE BY SUPPLIERS PROHIBITED

37(1) [Prohibition] No person shall engage in the practice of resale price maintenance.

37(2) [Practice of RPM] For the purposes of this section a person engages in the practice of resale price maintenance if that person (in this section referred to as the supplier) does any of the acts referred to in subsection (3) of this section.

37(3) [RPM acts] The acts referred to for the purposes of subsection (2) of this section are—

(a) The supplier making it known to another person that the supplier will not supply goods to the other person unless the other person agrees not to sell those goods at a price less than a price specified by the supplier:

(b) The supplier inducing, or attempting to induce, another person not to sell, at a price less than a price specified by the supplier, goods supplied to the other person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier:

(c) The supplier entering or offering to enter into an agreement, for the supply of goods to another person, where one of the terms is or would be that the other person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier:

(d) The supplier withholding the supply of goods to another person for the reason that the other person—

(i) Has not agreed to the condition mentioned in paragraph (a) of this subsection; or

(ii) Has sold, or is likely to sell, goods supplied to him by the supplier, or goods supplied to him by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price specified by the supplier as the price below which the goods are not to be sold:

(e) The supplier withholding the supply of goods to another person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the other person—

(i) Has not agreed not to sell those goods at a price less than a price specified by the supplier; or

(ii) Has sold or is likely to sell goods supplied or to be supplied to that third person, by the other person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold.

37(4) [Price set] For the purposes of subsection (3) of this section,—

(a) Where the supplier makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier:

(b) Where a set form, method, or formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that set form, method, or formula, that price shall be deemed to have been specified by the supplier:

(c) Where the supplier makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price ascertained by calculation from or by reference to a set form, method, or formula specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier:

(d) Where the supplier makes a statement to another person of a price that is likely to be understood by that person as the price below which goods are not to be sold, that price shall be deemed to have been specified by the supplier as the price below which the goods are not to be sold:

(e) Anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.

37(5) [Sale of defined] For the purposes of this section, "sale" includes advertise for sale, display for sale, and offer for sale, and "sell", "selling", and "sold" have corresponding meanings.

SECTION 38 RESALE PRICE MAINTENANCE BY OTHERS PROHIBITED

38(1) [Hindering supply] No person (in this section referred to as the "third party") shall—

(a) Make it known to another person that the third party proposes to engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of any goods to, or the acquisition of any goods from, that person unless that person agrees not to sell those goods at a price less than the price specified by the third party; or

(b) Engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of goods to, or the acquisition of goods from, another person for the purpose of inducing that person not to sell those goods at a price less than a price specified by the third party.

38(2) [Specified price] For the purposes of subsection (1) of this section,—

(a) Where the third party makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified in respect of the first-mentioned goods, by the third party:

(b) Where a set form, method, or formula is specified by or on behalf of the third party and a price may be ascertained by calculation from, or by reference to, that set form, method, or formula, that price shall be deemed to have been specified by the third party:

(c) Where the third party makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price ascertained by calculation from or by reference to a set form, method, or formula specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the third party:

(d) Where the third party makes a statement to another person of a price that is likely to be understood by that person as the price below which goods are not to be sold, that price shall be deemed to have been specified by the third party as the price below which the goods are not to be sold:

(e) Anything done by a person acting on behalf of, or by arrangement with, the third party shall be deemed to have been done by the third party.

38(3) [Sale defined] For the purposes of this section "sale" includes advertise for sale, display for sale, and offer for sale, and "sell", "selling", and "sold" have corresponding meanings.

SECTION 39 RECOMMENDED PRICES

39 For the purposes of section 37(3)(b) of this Act, a supplier of any goods is not to be taken as inducing, or attempting to induce, another person not to sell those goods at a price less than a price specified by the supplier merely because—

(a) A statement of a price is applied or used in relation to the goods or is applied to a covering, label, reel, or thing if the statement is preceded by the words "recommended price"; or

(b) The supplier has given notification in writing to the other person (not being a notification in the form of a statement applied to the goods or to any covering, label, reel, or thing as mentioned in paragraph (a) of this subsection) of the price that the supplier recommends as appropriate for the sale of those goods, if the notification, and each writing that refers, whether expressly or by implication, to the notification, includes a statement to the effect that the price is a recommended price only and there is no obligation to comply with the recommendation.

SECTION 40 WITHHOLDING THE SUPPLY OF GOODS

40 For the purposes of section 37(3)(d) and (e) of this Act, the supplier shall be deemed to withhold the supply of goods to another if—

(a) The supplier refuses or fails to supply those goods to, or as requested by, the other person; or

(b) The supplier refuses to supply those goods except on terms that are disadvantageous to the other person; or

(c) In supplying those goods to the other person, the supplier treats that person less favourably, whether in respect of time, method, or place of delivery, or otherwise, than the supplier treats other persons to whom the supplier supplies the same or similar goods; or

(d) The supplier causes or procures a person to act in relation to the supply of goods in the manner specified in paragraphs (a), (b), or (c) as the case may be, of this section.

SECTION 41 PREVENTING THE SUPPLY OF GOODS

41 For the purposes of section 38 of this Act,—

(a) The supply of goods shall be deemed to be prevented if—

(i) The supply of those goods is refused except on terms that are disadvantageous to the person acquiring the goods; or

(ii) The supply of those goods is on terms which are less favourable, whether in respect of time, method, or place of delivery, or otherwise, than the person who supplies the goods treats other persons to whom the same or similar goods are supplied:

(b) The acquisition of goods shall be deemed to be prevented if—

(i) The acquisition of those goods is refused except on terms that are disadvantageous to the person supplying the goods; or

(ii) The acquisition of those goods is on terms which are less favourable, whether in respect of time, method, or place of delivery, or otherwise, than the person who acquires the goods treats other persons from whom the same or similar goods are acquired.

SECTION 42 SPECIAL EVIDENTIARY PROVISIONS IN RESPECT OF CERTAIN RESALE PRICE MAINTENANCE PRACTICES

42(1) [Withholding supply] Where, in proceedings under this Act against a supplier for a contravention of section 37(3)(d) or section 37(3)(e) of this Act it is proved that—

(a) The supplier has acted in a manner referred to in section 40 of this Act; and

(b) During a period ending immediately before the supplier so acted, the supplier had been supplying goods of the kind withheld either to—

(i) The person in respect of whom the contravention is alleged; or

(ii) A person carrying on a similar business to that person; and

(c) During a period of 6 months immediately before the supplier so acted, the supplier became aware of a matter or circumstance capable of constituting a reason referred to in section 37(3)(d) or (e) of this Act—

it shall be presumed, in the absence of evidence to the contrary, that the supplier so acted on account of that matter.

42(2) [Exception] Nothing in subsection (1) of this section applies in respect of terms imposed by a supplier that are disadvantageous or treatment that is less favourable than the supplier accords other persons if the terms or treatment consists only of a requirement by the supplier as to the time at which, or the form in which, payment was to be made or as to the giving of security to secure payment.

SECTION 43 STATUTORY EXCEPTIONS

43(1) [Specifically authorised] Nothing in this Part of this Act applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act.

43(2) [General terms insufficient] For the purposes of subsection (1) of this section, an enactment or Order in Council does not provide specific authority for an act, matter, or thing if it provides in general terms for that act, matter, or thing, notwithstanding that the act, matter, or thing requires or may be subject to approval or authorisation by a Minister of the Crown, statutory body or a person holding any particular office, or, in the case of a rule made or an act, matter, or thing done pursuant to any enactment, approval or authorisation by Order in Council.

43(3) [Exceptions to authorisations] No act, matter, or thing authorised under section 7(2)(i) of the Sharebrokers Amendment Act 1981 or section 70(1)(n) of the Real Estate Agents Act 1976 as enacted immediately before the commencement of this Act, shall be taken to be specifically authorised under subsection (1) of this section.

APPENDIX 2

PART III — BUSINESS ACQUISITIONS

SECTION 47 CERTAIN ACQUISITIONS PROHIBITED

47(1) [Dominant position] No person shall acquire assets of a business or shares if, as a result of the acquisition,—

(a) That person or another person would be, or would be likely to be, in a dominant position in a market; or

(b) That person's or another person's dominant position in a market would be, or would be likely to be, strengthened.

47(2) [Interconnected, associated persons] For the purposes of this section and section 48 of this Act, where 2 or more persons are interconnected or associated and together are in a dominant position in a market, each of them is deemed to be in a dominant position in that market.

47(3) ["Associated"] For the purposes of this section and section 48 of this Act, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other.

47(4) [No substantial influence] A person is not able to exert a substantial degree of influence over the activities of another person for the purposes of subsection (3) of this section, by reason only of the fact that—

(a) Those persons are in competition in the same market; or

(b) One of them supplies goods or services to the other.

SECTION 48 BARE TRANSFER OF MARKET DOMINANCE EXCLUDED

48 Nothing in section 47 of this Act applies to the acquisition of assets of a business or shares if—

(a) Before the acquisition either—

(i) The person acquiring the assets or shares; or

(ii) The business the assets of which are acquired or the body corporate in which the shares are acquired, as the case may be,—

already had a dominant position in a market; and

(b) The acquisition has not resulted or will not result in the strengthening of that dominant position.

APPENDIX 3

PART IV — RESTRICTIVE TRADE PRACTICES

SECTION 45 CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS RESTRICTING DEALINGS OR AFFECTING COMPETITION

45(1) [Certain provisions made before 1977 amendment prohibited] If a provision of a contract made before the commencement of the *Trade Practices Amendment Act* 1977—

(a) is an exclusionary provision; or

(b) has the purpose, or has or is likely to have the effect, of substantially lessening competition,

that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation.

45(2) [Prohibited conduct] A corporation shall not—

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

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or

(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; or

(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision—

(i) is an exclusionary provision; or

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

45(3) ["Competition": sec. 45, 45A] For the purposes of this section and section 45A, "competition", in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

45(4) [Provision deemed to substantially lessen competition] For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely—

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party,

together have or are likely to have that effect.

45(5) [Section not to apply] This section does not apply to or in relation to—

(a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for sub-section 45B(9), would apply;

(b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for sub-section 45B(9), would apply; or

(c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to conduct that contravenes section 48 or would contravene that section if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods are to be sold or are to be advertised, displayed or offered for sale.

45(6) [Effect of authorization, notification] The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of sub-section 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of—

(a) engaging in conduct that contravenes, or would but for the operation of sub-section 47(10) or 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in sub-section 47(2), (4), (6) or (8), being an act done by a person at a time when—

(i) an authorization under sub-section 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of sub-section 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47.

45(7) [No application to agreements for acquisition of shares] This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital, or any assets, of a body corporate.

45(8) [No application to agreements between related bodies corporate] This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.

45(9) [Sub-section (2) not to apply to certain provisions] The making by a corporation of a contract that contains a provision in relation to which sub-section 88(1) applies is not a contravention of sub-section (2) of this section if—

(a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and

(b) the corporation applies for the grant of such an authorization within 14 days after the contract is made,

but nothing in this sub-section prevents the giving effect by a corporation to such a provision from constituting a contravention of sub-section (2).

SECTION 45A CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS IN RELATION TO PRICES

45A(1) [Price fixing agreements deemed to contravene sec. 45] Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.

45A(2) [Sub-section (1) not to apply to certain agreements for the purposes of joint ventures] Sub-section (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to—

(a) the joint supply by the parties to the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by those parties in pursuance of the joint venture;

(b) the joint supply by the parties to the joint venture of services in pursuance of the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate as mentioned in sub-paragraph 4J(a)(ii)—

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by—

(A) a person who is the owner of shares in the capital of the body corporate; or

(B) a body corporate that is related to such a person.

45A(3) [Sub-section (1) not to apply to certain price fixing agreements with more than 50 participants] Sub-section (1) does not apply in relation to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, to the extent that the provision recommends or provides for recommending, or would recommend or provide for recommending, the price for, or a discount, allowance, rebate or credit in relation to, goods or services, where the parties to the contract, arrangement or understanding, or the proposed parties to the proposed contract, arrangement or understanding, include—

(a) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who supply, in trade or commerce, goods or services to which the provision applies; or

(b) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who acquire, in trade or commerce, goods or services to which the provision applies.

45A(4) [Sub-section (1) not to apply to certain agreements on price of goods collectively acquired] Sub-section (1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision—

(a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or

(b) for the joint advertising of the price for the re-supply of goods so acquired.

45A(5) [Form of agreement not conclusive] For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of—

(a) the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or

(b) any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.

45A(6) [Certain agreements not to be deemed to have prohibited purpose] For the purposes of this Act but without limiting the generality of sub-section (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount,

allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

45A(7) [Certain agreements deemed to have prohibited purpose] For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods supplied as mentioned in sub-section (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods by persons to whom the goods are or would be supplied by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.

45A(8) ["Supply or acquisition by persons in competition"] The reference in sub-section (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

SECTION 45B COVENANTS AFFECTING COMPETITION

45B(1) [Certain covenants unenforceable] A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.

45B(2) [Prohibited conduct] A corporation or a person associated with a corporation shall not—

(a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which—

(i) the corporation, or any person associated with the corporation by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or

(ii) any person associated with the corporation by virtue of the operation of paragraph (7)(a) supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services, being a supply or acquisition in relation to which that person is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the corporation;

(b) threaten to engage in particular conduct if a person who, but for sub-section (1), would be bound by a covenant does not comply with the terms of the covenant; or

(c) engage in particular conduct by reason that a person who, but for sub-section (1), would be bound by a covenant has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

45B(3) [When person deemed to require giving of covenant] Where a person—

(a) issues an invitation to another person to enter into a contract containing a covenant;

(b) makes an offer to another person to enter into a contract containing a covenant; or

(c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms,

the first-mentioned person shall, by issuing that invitation, making that offer or making that fact known, be deemed to require the giving of the covenant.

45B(4) [Covenant deemed to have anti-competitive effect] For the purposes of this section, a covenant or proposed covenant shall be deemed to have, or to be likely to have, the effect of substantially lessening competition in a market if the covenant or proposed covenant, as the case may be, would have, or be likely to have, that effect when taken together with the effect or likely effect on competition in that market of any other covenant or proposed covenant to the benefit of which—

(a) a corporation that, or person who, is or would be, or but for sub-section (1) would be, entitled to the benefit of the first-mentioned covenant or proposed covenant; or

(b) a person associated with the corporation referred to in paragraph (a) or a corporation associated with the person referred to in that paragaph,

is or would be, or but for sub-section (1) would be, entitled.

45B(5) [Certain covenants do not contravene sec. 45B] The requiring of the giving of, or the giving of, a covenant does not constitute a contravention of this section by reason that giving effect to the covenant would, or would but for the operation of sub-section 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to engaging in conduct in relation to a covenant by way of—

(a) conduct that contravenes, or would but for the operation of sub-section 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in sub-section 47(2), (4), (6) or (8), being an act done by a person at a time when—

(i) an authorization under sub-section 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of sub-section 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47.

45B(6) [Sec. 45B not to apply to covenants binding related bodies corporate] This section does not apply to or in relation to a covenant or proposed covenant where the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant are persons who are associated with each other or are bodies corporate that are related to each other.

45B(7) [Deemed association in covenant] For the purposes of this section, section 45C and sub-paragraph 87(3)(a)(ii), a person and a corporation shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if—

(a) the person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions or wishes of the corporation in relation to the covenant or proposed covenant; or

(b) the person is a body corporate in relation to which the corporation is in the position mentioned in sub-paragraph 4A(1)(a)(ii).

45B(8) [Certain covenants not to contravene sub-section (2)] The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which sub-section 88(5) applies is not a contravention of sub-section (2) of this section if—

(a) the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorization to require the giving of, or to give, the covenant; and

(b) the person applies for the grant of such an authorization within 14 days after the covenant is given,

but nothing in this sub-section affects the application of paragraph (2)(b) or (c) in relation to the covenant.

45B(9) [Sec. 45B not to apply to certain covenants] This section does not apply to or in relation to a covenant or proposed covenant if—

(a) the sole or principal purpose for which the covenant was or is required to be given was or is to prevent the relevant land from being used otherwise than for residential purposes;

(b) the person who required or requires the covenant to be given was or is a religious, charitable or public benevolent institution or a trustee for such an institution and the covenant was or is required to be given for or in accordance with the purposes or objects of that institution; or

(c) the covenant was or is required to be given in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.

SECTION 45C COVENANTS IN RELATION TO PRICES

45C(1) [Application of sec. 45B(1)] In the application of sub-section 45B(1) in relation to a covenant that has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who are, or but for that sub-section would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them, in competition with each other, that sub-section has effect as if the words "if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services" were omitted.

45C(2) [Application of sec. 45B(2)] In the application of sub-section 45B(2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who would, or would but for sub-section 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them, in competition with each other, paragraph 45B(2)(a) has effect as if all the words after the words "require the giving of a covenant, or give a covenant" were omitted.

45C(3) [Certain covenants not to be taken as non-price fixing] For the purposes of this Act, a covenant shall not be taken not to have, or not to be likely to have, the effect, or a proposed covenant shall not be taken not to have the purpose, or not to have, or not to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of—

(a) the form of the covenant or proposed covenant; or

(b) any description given to the covenant by any of the persons who are, or but for sub-section 45B(1) would be, bound by or entitled to the benefit of the covenant or any description given to the proposed covenant by any of the persons who would, or would but for sub-section 45B(1), be bound by or entitled to the benefit of the proposed covenant.

45C(4) [Certain covenants deemed to have effect or purpose of price fixing] For the purposes of the preceding provisions of this section, but without limiting the generality of those provisions—

(a) a covenant shall be deemed to have, or to be likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods supplied as mentioned in sub-section (1) if the covenant has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance,

rebate or credit in relation to a re-supply of the goods by persons to whom the goods are supplied by the persons who are, or but for sub-section 45B(1) would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them; and

(b) a proposed covenant shall be deemed to have the purpose, or to have, or to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods supplied as mentioned in sub-section (2) if the proposed covenant has the purpose, or would have or be likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods by persons to whom the goods are supplied by the persons who would, or would but for sub-section 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them.

45C(5) [Reference to supply or acquisition of goods or services in subsec. (1)] The reference in sub-section (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

SECTION 45D BOYCOTTS

45D(1) [Persons not to engage in conduct hindering supply or acquisition by third person] Subject to this section, a person shall not, in concert with a second person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person (not being an employer of the first-mentioned person) or the acquisition of goods or services by a third person from a fourth person (not being an employer of the first-mentioned person), where—

(a) the third person is, and the fourth person is not, a corporation and—

(i) the conduct would have or be likely to have the effect of causing—

(A) substantial loss or damage to the business of the third person or of a body corporate that is related to that person; or

(B) a substantial lessening of competition in any market in which the third person or a body corporate that is related to that person supplies or acquires goods or services; and

(ii) the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing—

(A) substantial loss or damage to the business of the fourth person; or

(B) a substantial lessening of competition in any market in which the fourth person acquires goods or services; or

(b) the fourth person is a corporation and the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing—

(i) substantial loss or damage to the business of the fourth person or of a body corporate that is related to that person; or

(ii) a substantial lessening of competition in any market in which the fourth person or a body corporate that is related to that person supplies or acquires goods or services.

45D(1A) [Persons not to engage in conduct preventing third person from engaging in trade or commerce] Subject to this section, a person shall not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (not being an employer of the first-mentioned person) from engaging in trade or commerce—

(a) between Australia and places outside Australia;

(b) among the States; or

(c) within a Territory, between a State and a Territory or between two Territories.

45D(1B) [Defences to subsec. (1A) contravention] In a proceeding under this Act in relation to a contravention of sub-section (1A), it is a defence if the defendant proves—

(a) that the conduct concerned is the subject of an authorization in force under section 88;

(b) that a notice in respect of the conduct has been duly given to the Commission under sub-section 93(1) and the Commission has not given a notice in respect of the conduct under sub-section 93(3); or

(c) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him.

45D(1C) [Application of subsec. (1A) to one person not affected by other person proving defence] The application of sub-section (1A) in relation to a person in respect of his engaging in conduct in concert with another person is not affected by reason that the other person proves any of the matters mentioned in sub-section (1B) in respect of that conduct.

45D(2) [Para. 4F(b) not to apply to subsec. (1) or (1A)] Paragraph 4F(b) does not apply in relation to sub-section (1) or (1A) of this section but a person shall be deemed to engage in conduct for a purpose mentioned in that sub-section if he engages in that conduct for purposes that include that purpose.

45D(3) [Defence of legitimate industrial action] A person shall not be taken to contravene, or to be involved in a contravention of, sub-section (1) or (1A) by engaging in conduct where—

(a) the dominant purpose for which the conduct is engaged in is substantially related to—

(i) the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person; or

(ii) an employer of that person having terminated, or taken action to terminate, the employment of that person or of another person employed by that employer; or

(b) in the case of conduct engaged in by the following persons in concert with each other (and not in concert with any other person), that is to say—

(i) an organization or organizations of employees, or an officer or officers of such an organization, or both such an organization or organizations and such an officer or officers; and

(ii) an employee, or two or more employees who are employed by the one employer,

the dominant purpose for which the conduct is engaged in is substantially related to—

(iii) the remuneration, conditions of employment, hours of work or working conditions of the employee, or of any of the employees, referred to in sub-paragraph (ii); or

(iv) the employer of the employee, or of the employees, referred to in sub-paragraph (ii) having terminated, or taken action to terminate, the employment of any of his employees.

45D(4) [Subsec. (1) or (1A) still to apply to other person if subsec. (3) precludes one person from contravention] The application of sub-section (1) or (1A) in relation to a person in respect of his engaging in conduct in concert with another person is not affected by reason that sub-section (3) operates to preclude the other person from being taken to contravene, or to be involved in a contravention of, sub-section (1) or (1A) in respect of that conduct.

45D(5) [When organization to be deemed to engage in conduct in concert with "participants"] If two or more persons (in this sub-section referred to as the "participants") each of whom is a member or officer of the same organization of employees (being an organization that exists or is carried on for the purpose, or for purposes that include the purpose, of furthering the interests of its members in relation to their employment) engage in conduct in concert with one another, whether or not the conduct is also engaged in in concert with other persons, the organization shall be deemed for the purposes of this Act to engage in that conduct in concert with the participants, and so to engage in that conduct for the purpose or purposes for which that conduct is engaged in by the participants, unless the organization establishes that it took all reasonable steps to prevent the participants from engaging in that conduct.

45D(6) [Penalties for conduct contravening or deemed by subsec. (5) to contravene subsec. (1) or (1A)] Where an organization of employees engages, or is deemed by sub-section (5) to engage, in conduct in concert with members or officers of the organization in contravention of sub-section (1) or (1A)—

(a) any loss or damage suffered by a person as a result of the conduct shall be deemed to have been caused by the conduct of the organization;

(b) if the organization is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organization; and

(c) if the organization is not a body corporate—

(i) a proceeding in respect of the conduct may be instituted under section 77, 80 or 82 against an officer or officers of the organization as a representative or representatives of the members of the organization and a proceeding so instituted shall be deemed to be a proceeding against all the persons who were members of the organization at the time when the conduct was engaged in;

(ii) sub-section 76(2) does not prevent an order being made in a proceeding mentioned in sub-paragraph (i) that was instituted under section 77;

(iii) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in sub-paragraph (ii) is the penalty applicable under section 76 in relation to a body corporate;

(iv) except as provided by sub-paragraph (i), a proceeding in respect of the conduct shall not be instituted under section 77 or 82 against any of the members or officers of the organization; and

(v) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in sub-paragraph (i) that is instituted under section 77 or 82, process may be issued and executed against any property of the organization or of any branch or part of the organization, or any property in which the organization or any branch or part of the organization has, or any members of the organization or of a branch or part of the organization have in their capacity as such members, a beneficial interest, whether vested in trustees or however otherwise held, as if the organization were a body corporate and the absolute owner of the property or interest but no process shall be issued or executed against any other property of members, or against any property of officers, of the organization or of a branch or part of the organization.

45D(7) [Section not to affect other provisions of Pt. IV] Nothing in this section affects the operation of any other provision of this Part.

SECTION 45E PROHIBITION OF CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS AFFECTING SUPPLY OR ACQUISITION OF GOODS OR SERVICES

45E(1) [Prohibited conduct] Subject to this section, a person who has been accustomed, or is under an obligation, to supply goods or services to, or to acquire goods or services from, a second person shall not make a contract or arrangement, or arrive at an understanding, with a third person (being an organization of employees, an officer of such an organization, or another person acting for or on behalf of such an organization or officer) if the proposed contract, arrangement or understanding contains a provision that—

(a) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person or, as the case may be, from acquiring or continuing to acquire any such goods or services from the second person;

(b) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person except subject to a condition (not being a condition to which the supply of such goods or services by the first-mentioned person to the second person has previously been subject by reason of a provision of a contract existing between those persons) as to the persons to whom, as to the manner in which, or as to the terms on which, the second person may supply any goods or services; or

(c) has the purpose of preventing or hindering the first-mentioned person from acquiring or continuing to acquire any such goods or services from the second person except subject to a condition (not being a condition to which the acquisition of such goods or services by the first-mentioned person from the second person has previously been subject by reason of a contract existing between those persons) as to the persons to whom, as to the manner in which, or as to the terms on which, the second person may supply any goods or services.

45E(2) **[Consent of "target"]** Sub-section (1) does not apply in relation to a contract, arrangement or understanding that is in writing if the second person mentioned in that sub-section is a party to the contract, arrangement or understanding or has consented in writing to the contract or arrangement being made or the understanding being arrived at.

45E(3) **[Corporation to be involved]** In a case where the person first mentioned in sub-section (1) is not a corporation, that sub-section applies only if the second person mentioned in that sub-section is a corporation.

45E(4) **[Application of para. 4F(a)]** Paragraph 4F(a) applies in relation to sub-section (1) of this section as if sub-paragraph 4F(a)(ii) were omitted.

45E(5) **[Deemed supplier]** Subject to sub-section (6), a reference in this section to a person who has been accustomed to supply goods or services to a second person shall be construed as including a reference to—

(a) a regular supplier of any such goods or services to the second person;

(b) the latest supplier of any such goods or services to the second person; and

(c) a person who at any time during the immediately preceding period of 3 months supplied any such goods or services to the second person.

45E(6) **[Certain persons deemed not to be accustomed suppliers]** Where—

(a) goods or services have been supplied by a person to a second person pursuant to a contract between those persons under which the first-mentioned person was required over a particular period to supply such goods or services;

(b) that period has expired; and

(c) after the expiration of that period the second person has been supplied with such goods or services by another person or other persons and has not been supplied with such goods or services by the first-mentioned person,

then, for the purposes of the application of this section in relation to anything done after the second person has been supplied with goods or services as mentioned in paragraph (c), the first-mentioned person shall be deemed not to be a person who has been accustomed to supply such goods or services to the second person.

45E(7) **[Deemed reference to certain persons as acquirers]** Subject to sub-section (8), a reference in this section to a person who has been accustomed to acquire goods or services from a second person shall be construed as including a reference to—

(a) a regular acquirer of any such goods or services from the second person;

(b) a person who, when he last acquired such goods or services, acquired them from the second person; and

(c) a person who at any time during the immediately preceding period of 3 months acquired any such goods or services from the second person.

45E(8) **[Certain persons deemed not to be accustomed acquirers]** Where—

(a) goods or services have been acquired by a person from a second person pursuant to a contract between those persons under which the first-mentioned person was required over a particular period to acquire such goods or services;

(b) that period has expired; and

(c) after the expiration of that period the second person has refused to supply such goods or services to the first-mentioned person,

then, for the purposes of the application of this section in relation to anything done after the second person has refused to supply goods or services as mentioned in paragraph (c), the first-mentioned person shall be deemed not to be a person who has been accustomed to acquire such goods or services from the second person.

45E(9) **[Prohibition on prior agreements, etc.]** If—

(a) a person has, whether before or after the commencement of this section, made a contract or arrangement, or arrived at an understanding, with another person; and

(b) by reason of a provision included in the contract, arrangement or understanding, the making of the contract or arrangement, or the arriving at the understanding, by the first-mentioned person contravened sub-section (1) or would have contravened that sub-section if this section had been in force at the time when the contract or arrangement was made, or the understanding was arrived at,

a person shall not give effect to that provision of the contract, arrangement or understanding.

45E(10) **[Determination of earlier contravention]** In determining for the purposes of paragraph (9)(b) whether a contract or arrangement made, or understanding arrived at, before the commencement of this section would have contravened sub-section (1) if this section had been in force at the time when the contract or arrangement was made, or the understanding was arrived at, sub-section (2) shall be read as if the words "that is in writing" and the words "in writing" were omitted.

45E(11) **[Preservation of other provisions]** Nothing in this section affects the operation of any other provision of this Part.

SECTION 46 MISUSE OF MARKET POWER

46(1) **[Corporations taking advantage of substantial degree of market power for prohibited purposes]** A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of—

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

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

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

46(2) [Related bodies corporate — deeming provision] If—

(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or

(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market,

the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.

46(3) [Relevant factors in determining degree of power in a market] In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of—

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

46(4) [Relevant references in section] In this section—

(a) a reference to power is a reference to market power;

(b) a reference to a market is a reference to a market for goods or services; and

(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

46(5) [Mere acquisition of plant or equipment not sufficient] Without extending by implication the meaning of sub-section (1), a corporation shall not be taken to contravene that sub-section by reason only that it acquires plant or equipment.

46(6) [Exemptions] This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, by reason that an authorization is in force or by reason of the operation of section 93.

46(7) [Relevant purpose to be inferred from relevant circumstances] Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in sub-section (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

SECTION 46A MISUSE OF MARKET POWER — CORPORATION WITH SUBSTANTIAL DEGREE OF POWER IN TRANS-TASMAN MARKET

46A(1) [Definitions] In this section:

"conduct", in relation to a market, means conduct in the market either as a supplier or acquirer of goods or services in the market;

"impact market" means a market in Australia that is not a market exclusively for services;

"market power", in relation to a market, means market power in the market either as a supplier or acquirer of goods or services in the market;

"trans-Tasman market" means a market in Australia, New Zealand or Australia and New Zealand for goods or services.

46A(2) [Substantial degree trans-Tasman market power] A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:

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

(b) preventing the entry of a person into an impact market; or

(c) deterring or preventing a person from engaging in competitive conduct in an impact market.

46A(3) [Related bodies corporate — deeming provision] If:

(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of market power in a trans-Tasman market; or

(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to the corporation, together have a substantial degree of market power in a trans-Tasman market;

the corporation is taken, for the purposes of this section, to have a substantial degree of market power in the trans-Tasman market.

46A(4) [Relevant factors in determining degree of market power] In determining for the purposes of this section the degree of market power that a body corporate or bodies corporate has or have in a trans-Tasman market, the Federal Court is to have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate, in the trans-Tasman market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate, or of any of those bodies corporate, in the trans-Tasman market; or

(b) persons to whom or from whom the body corporate, or any of those bodies corporate, supplies or acquires goods or services in the trans-Tasman market.

46A(5) **[Mere acquisition of plant or equipment not sufficient]** Without extending by implication the meaning of subsection (2), a corporation is not taken to contravene that subsection merely because it acquires plant or equipment.

46A(6) **[Exemptions]** This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, because an authorisation is in force or because of the operation of section 93.

46A(7) **[Relevant purpose to be inferred from relevant circumstances]** Without limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its market power for a purpose referred to in subsection (2) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

46A(8) **[Application to New Zealand and New Zealand Crown corporations]** It is the intention of the Parliament that this section, and the provisions of Parts VI and XII so far as they relate to a contravention of this section, should apply to New Zealand and New Zealand Crown corporations to the same extent, and in the same way, as they respectively apply under section 2A to the Commonwealth and authorities of the Commonwealth.

46A(9) **[Application of sec. 46A(8)]** Subsection (8) has effect despite section 9 of the *Foreign States Immunities Act 1985*.

SECTION 46B NO IMMUNITY FROM JURISDICTION IN RELATION TO CERTAIN NEW ZEALAND LAWS

46B(1) **[No immunity from jurisdiction for certain New Zealand laws]** It is hereby declared, for the avoidance of doubt, that the Commonwealth, the States, the Australian Capital Territory and the Northern Territory, and their authorities, are not immune, and may not claim immunity, from the jurisdiction of the courts of Australia and New Zealand in relation to matters arising under sections 36A, 98H and 99A of the Commerce Act 1986 of New Zealand.

46B(2) **[Application]** This section applies in and outside Australia.

SECTION 47 EXCLUSIVE DEALING

47(1) **[Exclusive dealing prohibited]** Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing.

47(2) **[Supply of goods or services subject to a restriction]** A corporation engages in the practice of exclusive dealing if the corporation—

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation,

on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services or, if that person is a body corporate, a body corporate related to that body corporate—

(d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) will not, or will not except to a limited extent, re-supply goods, or goods of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) in the case where the corporation supplies or would supply goods, will not re-supply the goods to any person, or will not, or will not except to a limited extent, re-supply the goods—

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

47(3) **[Supplier's refusal to deal]** A corporation also engages in the practice of exclusive dealing if the corporation refuses—

(a) to supply goods or services to a person;

(b) to supply goods or services to a person at a particular price; or

(c) to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to a person,

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate—

(d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) has re-supplied, or has not agreed not to re-supply, goods, or goods of a particular kind or description, acquired directly or indirectly from a competitor

of the corporation or from a competitor of a body corporate related to the corporation; or

(f) in the case of a refusal in relation to the supply or proposed supply of goods, has re-supplied, or has not agreed not to re-supply, goods, or goods of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods, or goods of a particular kind or description, acquired from the corporation—

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

47(4) **[Acquiring goods or services subject to a restriction]** A corporation also engages in the practice of exclusive dealing if the corporation—

(a) acquires, or offers to acquire, goods or services; or

(b) acquires, or offers to acquire, goods or services at a particular price,

on the condition that the person from whom the corporation acquires or offers to acquire the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description—

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

47(5) **[Refusal to deal for prohibited reason]** A corporation also engages in the practice of exclusive dealing if the corporation refuses—

(a) to acquire goods or services from a person; or

(b) to acquire goods or services at a particular price from a person,

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has supplied, or has not agreed not to supply, goods or services, or goods or services of a particular kind or description—

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

47(6) **[Supplying goods or services subject to a third line forcing obligation]** A corporation also engages in the practice of exclusive dealing if the corporation—

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

(c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the corporation,

on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person.

47(7) **[Refusal to supply associated with forcing another person's goods or services]** A corporation also engages in the practice of exclusive dealing if the corporation refuses—

(a) to supply goods or services to a person;

(b) to supply goods or services at a particular price to a person; or

(c) to give or allow a discount, allowance, rebate or credit in relation to the supply of goods or services to a person,

for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person.

47(8) **[Restrictions or obligations in relation to leases and licences]** A corporation also engages in the practice of exclusive dealing if the corporation grants or renews, or makes it known that it will not exercise a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building on the condition that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate—

(a) will not, or will not except to a limited extent--

(i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(ii) re-supply goods, or goods of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description—

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

47(9) [Refusal to deal in relation to leases and licences] A corporation also engages in the practice of exclusive dealing if the corporation refuses to grant or renew, or exercises a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building for the reason that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate—

(a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(b) has re-supplied, or has not agreed not to re-supply, goods, or goods of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;

(c) has supplied goods or services, or goods or services of a particular kind or description—

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places; or

(d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

47(10) [Substantially lessening competition] Sub-section (1) does not apply to the practice of exclusive dealing constituted by a corporation engaging in conduct of a kind referred to in sub-section (2), (3), (4) or (5) or paragraph (8)(a) or (b) or (9)(a), (b) or (c) unless—

(a) the engaging by the corporation in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(b) the engaging by the corporation in that conduct, and the engaging by the corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.

47(11) [Subsections (8), (9) not to apply] Sub-sections (8) and (9) do not apply with respect to—

(a) conduct engaged in by, or by a trustee for, a religious, charitable or public benevolent institution, being conduct engaged in for or in accordance with the purposes or objects of that institution; or

(b) conduct engaged in in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.

47(12) [Subsection (1) not to apply] Sub-section (1) does not apply with respect to any conduct engaged in by a body corporate by way of restricting dealings by another body corporate if those bodies corporate are related to each other.

47(13) [Reference to "condition", "competition"] In this section—

(a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;

(b) a reference to competition, in relation to conduct to which a provision of this section other than sub-section (8) or (9) applies, shall be read as a reference to competition in any market in which—

(i) the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate,

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and

(c) a reference to competition, in relation to conduct to which sub-section (8) or (9) applies, shall be read as a reference to competition in any market in which the corporation engaging in the conduct or any other corporation the business dealings of which are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those corporations, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

SECTION 48 RESALE PRICE MAINTENANCE

48 A corporation or other person shall not engage in the practice of resale price maintenance.

SECTION 49 PRICE DISCRIMINATION

49(1) [Prohibited conduct] A corporation shall not, in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to—

(a) the prices charged for the goods;

(b) any discounts, allowances, rebates or credits given or allowed in relation to the supply of the goods;

(c) the provision of services in respect of the goods; or

(d) the making of payments for services provided in respect of the goods,

if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods.

49(2) **[Certain price discrimination not prohibited]** Sub-section (1) does not apply in relation to a discrimination if—

(a) the discrimination makes only reasonable allowance for differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from the differing places to which, methods by which or quantities in which the goods are supplied to the purchasers; or

(b) the discrimination is constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.

49(3) **[Onus of establishing subsec. (1) does not apply]** In any proceeding for a contravention of sub-section (1), the onus of establishing that that sub-section does not apply in relation to a discrimination by reason of sub-section (2) is on the party asserting that sub-section (1) does not so apply.

49(4) **[Attempts to induce or to enter transaction to obtain benefit of prohibited conduct prohibited]** A person shall not, in trade or commerce—

(a) knowingly induce or attempt to induce a corporation to discriminate in a manner prohibited by sub-section (1); or

(b) enter into any transaction that to his knowledge would result in his receiving the benefit of a discrimination that is prohibited by that sub-section.

49(5) **[Defence to prosecution under subsec. (4)]** In any proceeding against a person for a contravention of sub-section (4), it is a defence if that person establishes that he reasonably believed that, by reason of sub-section (2), the discrimination concerned was not prohibited by sub-section (1).

APPENDIX 4

SECTION 50 MERGERS AND OTHER ACQUISITIONS

50(1) [Prohibited mergers] A corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate if—

(a) as a result of the acquisition, the corporation would be, or be likely to be, in a position to dominate a market for goods or services; or

(b) in a case where the corporation is in a position to dominate a market for goods or services—

(i) the body corporate or another body corporate that is related to, or associated with, that body corporate is, or is likely to be, a competitor of the corporation or of a body corporate that is related to, or associated with, the corporation; and

(ii) the acquisition would, or would be likely to, substantially strengthen the power of the corporation to dominate that market.

50(1AA) [Related or associated corporations] A body corporate that is related to, or associated with, a corporation must not acquire, directly or indirectly, any shares in the capital, or any assets, of any other body corporate (in this subsection called **"an acquired body corporate"**) if:

(a) as a result of the acquisition, the corporation would be, or be likely to be, in a position to dominate a market for goods or services; or

(b) where the corporation is in a position to dominate a market for goods or services:

(i) the acquired body corporate, or another body corporate related to, or associated with, it, is, or is likely to be, a competitor of the corporation or of any body corporate related to, or associated with, the corporation; and

(ii) the acquisition would, or would be likely to, substantially strengthen the power of the corporation to dominate that market.

50(1A) [Acquisitions other than those by a corporation] A person other than a corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a corporation if—

(a) as a result of the acquisition, the corporation would be, or be likely to be, in a position to dominate a market for goods or services; or

(b) in a case where the person is in a position to dominate a market for goods or services—

(i) the corporation or a body corporate that is related to, or associated with, the corporation is, or is likely to be, a competitor of the person; and

(ii) the acquisition would, or would be likely to, substantially strengthen the power of the person to dominate that market.

50(2) [Corporation deemed to be in position to dominate market] If—

(a) a body corporate that is related to, or associated with, a corporation is, or two or more bodies corporate each of which is related to, or associated with, the one corporation together are, in a position, or likely to be in a position, to dominate a market for goods or services; or

(b) a corporation, and a body corporate that is, or two or more bodies corporate each of which is, related to, or associated with, that corporation, together are in a position, or likely to be in a position, to dominate a market for goods or services,

the corporation shall be deemed for the purposes of this section to be in a position to dominate that market, or to be likely to be in a position to dominate that market, as the case may be.

50(2AA) [Not restricted to acts in concert] In subsection (2), the reference to bodies corporate, or a corporation and a body or bodies corporate, together being in a position to dominate a market is a reference to their being in that position whether or not they would need to act in concert to achieve such domination and whether or not they have acted in concert to put themselves in that position.

50(2A) [Means of identifying associated bodies corporate] For the purposes of this section, a body corporate shall be taken to be associated with another body corporate (not being another body corporate that is related to the first-mentioned body corporate) if one of those bodies corporate (in this sub-section referred to as the "dominant body corporate") is, either alone or together with another body corporate that is, or other bodies corporate each of which is, related to the dominant body corporate, or associated with the dominant body corporate by another application or other applications of this sub-section, in a position to exert, or to be likely to be able to exert, whether directly or indirectly, a substantial degree of influence over the activities of the other body corporate.

50(2AB) [Not restricted to acts in concert] In subsection (2A), the reference to bodies corporate, together with another body corporate or other bodies corporate, being in a position to exert a substantial degree of influence is a reference to their being in that position whether or not they would need to act in concert to exert such influence and whether or not they have acted in concert to put themselves in that position.

50(2B) [Irrelevant considerations in determining whether corporation exerts influence over another] For the purposes of sub-section (2A), the fact that a body corporate is in a position to exert, or to be likely to be able to exert, a substantial degree of influence over the activities of another body corporate by reason only that—

(a) those bodies corporate are in competition in the same market; or

(b) one of those bodies corporate supplies goods or services to the other,

shall be disregarded.

50(2C) [Bare transfers of monopoly power] This section does not apply to the acquisition by a person of any shares in the capital, or any assets, of a body corporate where—

(a) before the acquisition, the body corporate was in a position to dominate a market for goods or services; and

(b) as a result of the acquisition, the person is not, and is not likely to be, in a stronger position to dominate that market.

50(3) [Interpretation] In this section—

(a) a reference to a market for goods or services shall be construed as a reference to a substantial market for goods or services in Australia in a State or in a Territory; and

(b) a reference to dominating a market for goods or services shall be construed as a reference to dominating such a market either as a supplier or as an acquirer of goods or services in that market.

50(4) [Effect of contract requirement as to authorization] Where—

(a) a person has entered into a contract to acquire shares in the capital, or assets, of a body corporate;

(b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted an authorization to acquire the shares or assets; and

(c) the person applied for the grant of such an authorization before the expiration of 14 days after the contract was entered into,

the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before—

(d) the application for the authorization is disposed of; or

(e) the contract ceases to be subject to the condition,

whichever first happens.

50(5) [When application deemed to be disposed of] For the purposes of sub-section (4), an application for an authorization shall be taken to be disposed of—

(a) in a case to which paragraph (b) of this sub-section does not apply — at the expiration of 14 days after the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorization; or

(b) if an application is made to the Tribunal for a review of the determination by the Commission of the application for the authorization — at the expiration of 14 days after the date of the making by the Tribunal of a determination on the review.

SECTION 50A ACQUISITIONS OUTSIDE AUSTRALIA

50A(1) [Declaration by Tribunal where controlling interest in corporation acquired outside Australia] Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8)(b), a controlling interest in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8)(b) in relation to the controlling interest, obtains a controlling interest in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that—

(a) as a result of the obtaining by the person of the last-mentioned controlling interest, the person would be, or be likely to be, in a position to dominate a substantial market for goods or services in Australia, in a State or in a Territory;

(b) in a case where the person is in a position to dominate such a market—

(i) the body corporate or another body corporate that is related to that body corporate is, or is likely to be, a competitor of the person or of a body corporate that is related to the person; and

(ii) the acquisition would, or would be likely to, substantially strengthen the power of the person to dominate that market; and

(c) the obtaining by the person of the last-mentioned controlling interest would not, in all the circumstances, result, or be likely to result, in such a benefit to the public that the obtaining of that controlling interest should be disregarded for the purposes of this section,

make a declaration accordingly.

50A(2) [Tribunal to give notice in writing] Where an application under sub-section (1) is made—

(a) the Tribunal shall give to—

(i) each corporation in relation to which the application relates; and

(ii) the Minister and the Commission,

a notice in writing stating that the application has been made; and

(b) the persons referred to in paragraph (a) and, if the application was made by another person, that other person are entitled to appear, or be represented, at the proceedings following the application.

50A(3) [Time within which application must be made] An application under sub-section (1) may be made at any time within 12 months after the date of the acquisition referred to in that sub-section in relation to which the application is made.

50A(4) [Revocation of declaration of Tribunal] The Tribunal may, on the application of the minister, the Commission or any other person, or of its own motion, revoke a declaration made under sub-section (1).

50A(5) [Tribunal reasons to be in writing] The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under sub-section (1).

50A(6) [Availability of extension period] After the end of 6 months after a declaration is made under sub-section (1) in relation to the obtaining of a controlling

interest in a corporation or 2 or more corporations by a person or, if the person, before the end of that period of 6 months, makes an application to a presidential member for an extension of that period, after the end of such further period (not exceeding 6 months) as the presidential member allows, the corporation or each of the corporations, as the case may be, shall not, while the declaration remains in force, carry on business in the market to which the declaration relates.

50A(7) **[Acquisitions excluded from section]** Sub-section (1) does not apply in relation to an acquisition referred to in that sub-section if sub-section 50(1) or (1A) applies in relation to that acquisition.

50A(8) **[Persons deemed to hold a controlling interest]** For the purposes of this section—

(a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A(1)(b)); and

(b) where a person holds a controlling interest (including a controlling interest held by virtue of another application or other applications of this paragraph) in a body corporate and that body corporate—

(i) controls the composition of the board of directors of another body corporate;

(ii) is in a position to cast, or control the casting of, any votes that might be cast at a general meeting of another body corporate; or

(iii) holds shares in the capital of another body corporate,

the person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast, or control the casting of, those votes or to hold those shares, as the case may be.

SECTION 51 EXCEPTIONS

51(1) **[Regard not to be had to acts or things approved or authorized by other legislation]** In determining whether a contravention of a provision of this Part has been committed, regard shall not be had—

(a) to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act other than an Act relating to patents, trade marks, designs or copyrights;

(b) in the case of acts or things done in a State — except as provided by the regulations, to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Act passed by the Parliament of that State; or

(c) in the case of acts or things done in a Territory — to any act or thing that is, or is of a kind, specifically authorized or approved by, or by regulations under, an Ordinance of that Territory.

51(2) **[Regard not to be had to certain contractual provisions]** In determining whether a contravention of a provision of this Part other than section 45D, 45E or 48 has been committed, regard shall not be had—

(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he may engage during, or after the termination of, the contract;

(c) to any provision of a contract, arrangement or understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by the Standards Association of Australia or by a prescribed association or body;

(d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while he is, or after he ceases to be, a partner;

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business — to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

51(2A) **[Certain acts by ultimate users or consumers outside trade or commerce excepted]** In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

51(3) [Inclusion of certain conditions not to be taken as a contravention of some provisions] A contravention of a provision of this Part other than section 46, 46A or 48 shall not be taken to have been committed by reason of—

(a) the imposing of, or giving effect to, a condition of—

(i) a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989*, or by a person who has applied for a patent or for the registration of a design; or

(ii) an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design,

to the extent that the condition relates to—

(iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention;

(iv) goods in respect of which the design is, or is proposed to be, registered and to which it is applied;

(v) the work or other subject matter in which the copyright subsists; or

(vi) the eligible layout in which the EL rights subsist.

(b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act* 1955, or the giving effect to such a provision; or

(c) the inclusion in a contract, arrangement or understanding between—

(i) the registered proprietor of a trade mark other than a certification trade mark; and

(ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act* 1955 or a person authorized by the contract to use the trade mark subject to his becoming registered as such a registered user,

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

51(4) [Section 51 to apply in determining whether certain provisions or covenants unenforceable] This section applies in determining whether a provision of a contract is unenforceable by reason of sub-section 45(1), or whether a covenant is unenforceable by reason of sub-section 45B(1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.

51(5) [Application] In the application of subsection (2A) to section 46A, the reference in that subsection to trade or commerce includes trade or commerce within New Zealand.