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EXCLUSIVE DEALING AND THE COMMERCE ACT 1986

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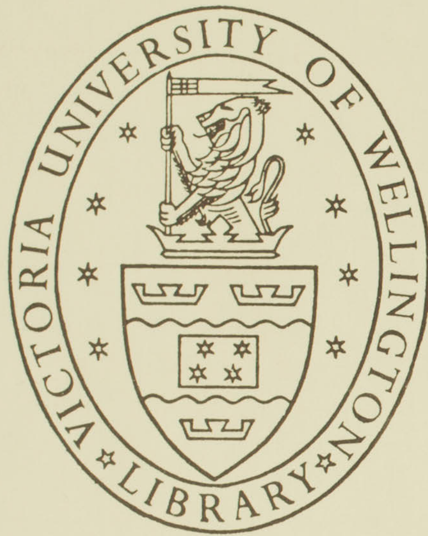
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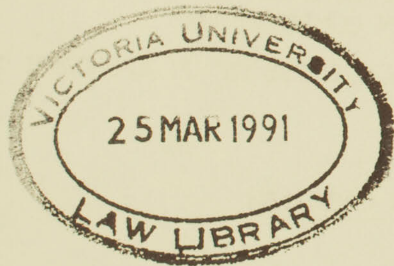
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1. INTRODUCTION

Exclusive dealing is a form of vertical restraint. That is, a restraint imposed by a person in one functional market, eg, a supplier, on a person in another functional market, eg, a distributor.

Vertical restraints on purchasing come in three forms: exclusive dealing, requirements contracts and tying arrangements. The essence of such arrangements is that the distributor's freedom to purchase whatever product, from whatever sources, in whatever quantity he or she chooses, is curtailed.

Exclusive dealing arrangements (EDAs) come about by agreement between the parties, although some inequality of bargaining power on the part of the distributor may well be evident. The terms of EDAs vary enormously. Examples include agreements that:

- require the distributor to stock the whole range of the supplier's products; or
- allow the distributor to specify what products from the range he or she will stock, but require that the distributor stock the supplier's brand exclusively; or
- provide that the distributor will stock only the supplier's brand of a particular product.

Requirements contracts allow a distributor access to a product if the distributor agrees to purchase all, or substantially all, of its requirements of the product from the supplier.

Tying arrangements require a distributor who wants to purchase one of the supplier's products to purchase something else at the same time. For example, in order to obtain a coffee machine, a distributor might have to purchase all of its supplies of coffee from the supplier.

This kind of arrangement is also known as full line forcing. If the distributor is required to purchase additional goods or services from a third party, that is a third line forcing agreement.

This paper is concerned with exclusive dealing arrangements because that was the kind of arrangement involved in the only New Zealand case to date of a vertical restraint on purchasing: Simpson Appliances (NZ) Ltd v Fisher & Paykel Ltd[1].

Fisher & Paykel Ltd (F&P) is the only New Zealand manufacturer of whiteware, ie, refrigerators, freezers, dishwashers, washing machines and driers. The company retails its products through approximately 190 franchised dealers covering approximately 450 of an estimated total of 800 retail outlets in New Zealand.

Each F&P franchised dealer is required to sign a contract containing an exclusive dealing clause (EDC) that reads:

> "5. (a) You will not stock, display or sell any product of the type listed in Schedule 1 other than that legitimately carrying the brand-name(s) listed in that schedule."

In addition, the standard contract between F&P and its dealers requires, among other things, that the dealer will honour the warranty and provide after-sales service during the products' life. Ninety days' notice in writing is required to terminate the agreement.

F&P products account for 85 percent of whitegoods sold in New Zealand. Seventy-five percent of the products are sold through F&P dealers covered by the EDC, while the other 10 percent are F&P products manufactured under the Shacklock brand and sold through non-F&P franchised stores.

It is necessary to describe briefly the changes to competition law and conditions in the whitegoods industry

that led to the litigation in this case.

The Acts that were the predecessors of the Commerce Act 1986 did not make exclusive dealing illegal. Section 50 of the Commerce Act 1975 made it illegal to engage in full line or third line forcing only. As will be explained in more detail in the next section of this paper, although the Commerce Act 1986 does not deal specifically with exclusive dealing, it can fall within one of the general provisions of the Act covering restrictive trade practices.

That change in the law being of recent origin it is not surprising to find that EDAs have been used in the New Zealand whitegoods industry for many years. Fisher & Paykel Ltd and its dealers have operated using an EDC for 40 years. While General Motors Ltd manufactured whitegoods in New Zealand it distributed its products under EDAs. McAlpine Industries Ltd, a company that distributed whitegoods, also used an exclusive dealing network, until it was bought out by Ceramco Corporation Ltd in 1986.

The whitegoods industry in New Zealand has only recently emerged from a long period of protection. In 1938 import licensing controls were imposed. The policy was not to grant licenses for the importation of goods that were being manufactured in New Zealand. However, in 1969 a special arrangement under NAFTA provided controlled access for goods of Australian origin, to complement New Zealand production. In line with the general trend towards the deregulation of industry, since 1984 import controls in the whitegoods industry have been gradually removed. They were finally phased out on 30 June 1988. Under the Australia-New Zealand Closer Economic Relations Trade Agreement (CER for short) Australian whitegoods became licence exempt and duty free from 1 July 1987. Further reductions in tariffs on whitegoods from other countries are to occur in the future.

Fisher & Paykel Ltd is now the only New Zealand manufacturer of whitegoods, with its competition coming from imported whitegoods.

It was the combination of the law changes, the changing conditions in the whitegoods industry, and competitors jostling for position in the marketplace alongside an established company using exclusive dealing that set the scene for litigation over the competitive effects of that practice.

The catalyst for F&P applying to the Commerce Commission to have its exclusive dealing practice authorised was the confrontation it had with Bond & Bond Ltd, a company with which F&P had been associated with for 50 years.

Bond & Bond Ltd had a current franchise agreement with F&P signed on 14 November 1980, covering its 34 stores nationwide. On 18 October 1986 Bond & Bond Ltd opened a store called "Electric City" in Panmure, Auckland, stocking a wide range of electrical goods. Claiming to want to give customers as much choice as possible it started selling imported whitegoods in that shop side by side with F&P whitegoods.

Correspondence and discussion between the parties ensued, but failed to resolve the matter. F&P, which regarded Bond & Bond's action as a deliberate flouting of the EDA, sought to enforce the contract between the parties by refusing to supply its whitegoods to the "Electric City" shop,or to deliver them to Bond & Bond Ltd's warehouse, which was the central distribution point for all the company's shops. F&P was prepared to deliver its whitegoods direct to Bond & Bond Ltd's shops other than "Electric City". The problem with that was, those shops had limited storage space.

Bond & Bond Ltd responded by bringing an action under

section 81 of the Commerce Act 1986 for an interim injunction alleging F&P had breached sections 27 and 36 of the Act. At the hearing in the High Court[2] Barker J accepted a submission that, whatever the merits of granting an interim injunction based on section 27, the Court could not do so because the transitional provisions in section 111 prevented it. On the action based on the alleged breach of section 36 the High Court found that Bond & Bond Ltd had made out a serious question to be tried - that a substantial reason for F&P taking the action it had was to enforce its dominant position. However, the Court found that the balance of convenience favoured F&P, because if the injunction was granted and F&P won the substantive action, it would be almost impossible to restore the relationship F&P had built up with its customers over the years. Against this, Bond & Bond Ltd would suffer limited damage from being unable to sell F&P whitegoods in its "Electric City" store until the substantive action had been decided.

An important reason for the Court deciding not to grant an interim injunction was, during the hearing F&P had indicated it was willing to deliver whitegoods to Bond & Bond Ltd's warehouse if the company would undertake not to sell F&P whitegoods in any shop where it sold other manufacturer's whitegoods. The Court required Bond & Bond Ltd to give such an undertaking.

In concluding his judgment in the Bond & Bond case Barker J drew attention to the fact that once the transitional provisions relating to section 27 expired on 1 March 1987, Bond & Bond Ltd was free to plead a fresh cause of action against F&P based on section 27.[3]

The possibility of that happening prompted F&P to apply to the Commerce Commission for authorisation of its EDC. As will be explained in more detail in Part 2, authorisation gives parties to the practice immunity from actions in

the courts alleging that their practice contravenes the Act.

F&P's application for authorisation was received by the Commerce Commission on 27 February 1987. In accordance with the provisions of the Act the Commission investigated the practice, issued a draft determination and held a conference on the draft determination involving interested parties.

In a majority decision on the authorisation application the Commission concluded that F&P's EDC did substantially lessen competition in the market for the retail distribution of whitegoods. It further found that the public benefits resulting from the practice did not outweigh the lessening of competition, so it could not authorise the practice.[4] The dissenting member of the Commission did not find it necessary to consider the public benefit test because she found that the practice did not substantially lessen competition in the market, principally because F&P was constrained in its actions by potential competition.[5]

F&P appealed the Commission's decision to the High Court under section 92 of the Commerce Act 1986. On 24 July 1989 Barker J consolidated the appeal with a proceeding brought in the Commercial List by Simpson Appliances (NZ) Ltd and Email Ltd (Simpson/Email) for a declaration that the EDC contravened section 27 of the Act.[6] F&P counterclaimed against Simpson/Email, the Commerce Commission and Bond & Bond Ltd for a declaration that the EDC did not contravene section 27.

The judgment of the High Court (Barker J and R G Blunt) was handed down on 27 April 1990.[7] It found in favour of F&P, that the EDC did not substantially lessen competition in the market.

This paper will:

- outline the scheme of the Commerce Act 1986 as it relates to section 27 and authorisation applications, with particular reference to the practice of exclusive dealing;
- discuss the mode of analysis laid down in the cases by the Commerce Commission and the High Court to give form to the general words of the Act;
- analyse the F&P case to ascertain what principles come out of that case; and
- determine whether a general section in the nature of section 27 of the Commerce Act 1986 is effective to cover the practice of exclusive dealing or whether New Zealand should consider adopting a section specifically covering exclusive dealing similar to section 47 of the Australian Trade Practices Act 1974.

2. SCHEME OF THE COMMERCE ACT 1986

The Long Title to the Commerce Act 1986 states that it is:

> "An Act to promote competition in markets within New Zealand."

Although not expressly stated in the Act, the Act is one of a number of Government policy initiatives aimed at enhancing economic efficiency.[8] This link between competition and efficiency was made explicit by the Court of Appeal in Tru-Tone Ltd v Festival Records Marketing Ltd:

> "[The Long Title of the Commerce Act] is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources."[9]

Restrictive Trade Practices (RTPs) are governed by Part II of the Act. Exclusive dealing is not one of the practices the Act specifically deals with. If exclusive dealing is to be caught by the Act it must fall within the ambit of one of the general sections covering RTPs, section 27 or section 36. This is in contrast to the Australian Trade Practices Act 1974 on which the New Zealand Commerce Act 1986 was based. Section 47 of the Trade Practices Act sets out quite specifically what constitutes exclusive dealing. More will be said about this section in Part 12 of the paper.

It is not intended to enter into a discussion on how section 36 of the Commerce Act would apply in any exclusive dealing case brought under that section. That is best left until such a case arises. Note, however, that section 36 has a narrow application:

> "36. (1) No person who has a dominant position in a market shall use that position for the purpose of -
>
> (a) Restricting the entry of any person into that or any other market; 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."

The section only applies if the supplier is in a "dominant position" in a market. Those words have been interpreted to mean that the company must have a "dominant influence"[10], a "commanding influence"[11] or "the power to behave independently"[12].

Section 3(8) defines what a "dominant position in a market" is as follows:

> "For the purposes of sections 36, 66 and 67 of this Act, a dominant position in a market is one in which a person as a supplier or an acquirer of goods or services either alone or together with any inter-connected body corporate is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in a market regard shall be had to -
>
> (a) The share of the market, the technical knowledge, the access to materials or capital of that person or that person together with any interconnected body corporate:
>
> (b) The extent to which that person is constrained by the conduct of competitors or potential competitors in that market:
>
> (c) The extent to which that person is constrained by the conduct of suppliers or acquirers of goods or services in that market."

Those factors are not exhaustive. In News Ltd/Independent Newspapers Ltd[13] the Commerce Commission provided an extended list of factors that could be relevant in deciding whether a person is in a dominant position in a market.

The F&P case was argued under section 27(2). Therefore, this paper will concentrate on the requirements under that section, which states:

> "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."

A provision of a contract, arrangement or understanding that falls for consideration under section 27 will not be illegal unless it is sufficiently anti-competitive to warrant intervention under the Act, ie, unless it substantially lessens competition.

If a person thinks a provision of a contract, arrangement or understanding they want to give effect to may or would contravene section 27(2), it is open to them to apply to the Commerce Commission for authorisation of the provision under section 58(2). Section 61(6)(b) provides that the Commission may grant authorisation if the benefit to the public that will or will be likely to arise from giving effect to the provision would outweigh any detriment that would result. The effect of authorisation being granted is that the person is free to give effect to or to enforce the provision (section 58(1)(a)). That means they will be immune from any action brought against them in the courts alleging the provision contravenes section 27(2).

If a provision of a contract, arrangement or understanding that contravenes section 27(2) is proceeded with without being authorised (either because no application for authorisation is made, or because the Commission has refused to grant authorisation because insufficient public benefit has been shown to result from the provision) the person runs the risk that the Commission or a private litigant might bring an action in the High Court (Administrative Division) alleging contravention of section 27(2). A successful action by the Commission may attract pecuniary penalties of up to $500,000 in the case of an individual and up to $5,000,000 in the case of a body corporate (section 80). Private litigants who can show loss or damage caused by the defendant's conduct are entitled to damages (section 82).

The general rule found in section 59(1)(a) is that the Commission has no power to grant authorisation in respect of a contract or arrangement that has been entered into, or an understanding arrived at, before the Commission makes a determination on the authorisation application. There are two exceptions to that rule. Firstly, under section 35 it is possible to enter into a contract to which section 27 applies that contains a condition providing that the provision will not come into effect until authorisation has been granted. Application for authorisation must be made within 15 working days of entering into the contract. Secondly, the Commission may grant authorisation to give effect to a provision of a contract or arrangement entered into, or an understanding arrived at, before the commencement of the Act (section 59(2)(a)). This was the exception relied on in the F&P case. The EDCs that bound F&P and its franchised dealers were contained in contracts that pre-dated the commencement of the Commerce Act on 1 May 1986.

One further point to note about the scheme of the Act is that the Commerce Commission and the High Court (Administrative Division) have complementary roles. The former has jurisdiction to consider the public benefit and grant authorisations, while the latter has jurisdiction to decide whether a contravention of the Act has occurred.

3. ELEMENTS OF SECTION 27(2)

The elements of section 27(2) are as follows:

- that a person is involved;
- that the person wants to give effect to a provision of a contract, arrangement or understanding;
- that the contract, arrangement or understanding
  must have the purpose or
  has or is likely to have the effect
- of substantially lessening competition
- in a market.

For completeness, the following section contains a brief synopsis of the relevant points from the case law on the interpretation of section 27.

"Person" is defined in section 2 to include an association of persons whether incorporated or not.

To decide whether or not a contract exists between the parties one refers to the ordinary rules of contract, ie, the question is whether one party has made an offer, which the other party has accepted, and whether consideration has been given. The meaning of the words "arrangement or agreement" in the New Zealand Trade Practices Act 1958 was considered in Re Wellington Fencing Materials Association. The Trade Practices Appeal Authority stated:

> "The addition of the word 'arrangement' is clearly intended to convey something more than would be conveyed by the term 'agreement'. It may be suggested, perhaps, that the word 'arrangement' is intended merely to include an understanding between two or more persons intended to be observed by the parties thereto but not intended to create obligations enforceable by legal proceedings."[14]

The question of what constituted an arrangement also arose in British Basic Slag Ltd v Registrar of Restrictive Trading Agreements[15]. In the lower court Cross J's test, purportedly adopted by Diplock LJ in the Court of Appeal, was:

> " ... all that is required to constitute an arrangement not enforceable in law is that the parties to it shall have communicated with one another in some way, and that as a result of the communication each has intentionally aroused in the other an expectation that he will act in a certain way."[16]

Diplock LJ went on to say:

> " ... it is sufficient to constitute an arrangement between A and B if
> (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way,
> (2) such representation is communicated to B, who has knowledge that A so expected and intended, and
> (3) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way."[17]

The important points to take from the above two passages are that an arrangement requires:

- communication by at least one of the parties to the other about the communicator's future conduct;
- raising an expectation in the mind of the other party that the communicator expects his or her conduct to induce the other party to act in a particular way; and
- action by the other party, at least one of the reasons for the action being the communication or the communicator fulfilling his or her representation.

In many cases it will be difficult to show that an expectation had been raised in the communicator's mind that the other party would act in a certain way. For the purpose of finding an arrangement the Court in TPC v Nicholas Enterprises Pty Ltd & Ors[18] said that the courts may infer such an expectation from circumstantial evidence, eg, if all the parties subsequently take parallel action. However, it is open to a party to rebut any such inference by bringing evidence that would support another interpretation of the facts, eg, that the action was required for commercial reasons.

Whether "purpose" in section 27 should be read objectively or subjectively has been considered by the courts in a number of cases. Barker J in ARA v Mutual Rental Cars[19], following Smithers J in Dandy Power Equipment Pty Ltd v Mercury Marine Ltd[20], found that section 2(5)(a) contemplated an objective test. That section reads:

> "A provision of a contract, arrangement or understanding ... shall be deemed to have had, or to have, a particular purpose if -
> (i) The provision was or is included in the contract, arrangement or understanding ... for that purpose or purposes that included or include that purpose; and
> (ii) That purpose was or is a substantial purpose."

The High Court in Apple Fields Ltd v The New Zealand Apple & Pear Marketing Board[21] stated that the law on whether purpose is to be assessed on an objective or subjective basis is unclear. It noted that, after considering the authorities relied on by Barker J in ARA, Toohey J in Hughes v Western Australian Cricket Association (Inc) & Ors[22] preferred the subjective test. In Tru Tone Ltd & Ors v Festival Records Retail Marketing Ltd[23] the Court of Appeal did not have to deal with the question because it relied on the "effect" limb. However, it noted that the meaning of purpose "calls for careful analysis of the statutory scheme and setting"[24].

Both the majority of the Commerce Commission and the High Court in the F&P cases supported an objective meaning: because:

> "authorisation proceedings are more clearly concerned with the perceived effects of the practice rather than what was actually in the minds of the parties to the practice".[25]

All that can be said at this stage about whether purpose has an objective or a subjective meaning is that the weight of judicial opinion in the New Zealand High Court favours an objective meaning. However, until the Court

of Appeal considers the question, the law on this question cannot be considered to be settled.

"Substantially lessening competition in a market" is discussed in Part 5.4 of this paper.

4. METHODOLOGY IN ASSESSING WHETHER TO GRANT AN AUTHORISATION

In its decisions the Commerce Commission has attempted to set out principles to be applied and the mode of analysis to be used in order to give form to the general words of the Commerce Act.[26] Thus, in Re Weddel Crown Corp Ltd& Ors ("Whakatu")[27] it set out the methodology to be applied in assessing whether or not to grant an authorisation. Those principles were applied by the Commission to the exclusive dealing situation in the F&P case. This approach was endorsed by the High Court on appeal.[28]

Since then, the Commerce Amendment Act 1990 (the relevant parts of which became effective on 1 July 1990) has made changes in this area. In order to understand the effect of the changes it is necessary to examine what the previous law was.

Previously, the Commission's inquiry involved three steps:

1) It had to decide whether in accordance with section 58 it had jurisdiction over the matter, ie, whether the Commission believed the practice substantially lessened competition within the meaning of section 27. (That is sometimes referred to as the jurisdiction issue.) If the Commission decided it did not have jurisdiction, that was the end of the matter. If it did have jurisdiction -
2) There was a presumption of a net lessening of competition. However, it was still necessary to quantify the degree of lessening of competition (detriment) to be weighed against the public benefit.
3) Under section 61(6) the Commission was required to weigh up the benefits and detriments arising from the practice and if public benefits outweighed detriments authorisation would be granted.

The relevant sections provided:

> "58. (1) Subject to the provisions of this Part of this Act, the Commission may, upon application by or on behalf of any person, grant an authorisation for that person -
> (a) To enter into a contract or arrangement, or arrive at an understanding, to which section 27 of this Act applies:
> (b) To give effect to a provision of a contract or arrangement or understanding to which section 27 of this Act applies".
>
> "61. ...
> (6) The Commission shall not make a determination granting an authorisation under section 58(1)(a) to (d) of this Act unless it is satisfied that -
> (a) The entering into of the contract or arrangement or the arriving at the understanding; or
> (b) The giving effect to the provision of the contract, arrangement or understanding;
> ...
> as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom."

In the first case that arose under section 27, Whakatu, it was submitted that once an application for authorisation of a trade practice under section 58 had been made, the Commission should move to consider the public benefit question under section 61(6). The opposing view was that before the Commission could consider whether an authorisation should be granted it had to have concluded that the trade practice came within section 27.

In support of the first view it was argued that the 1986 Act had removed the ability for the Commission to grant a clearance for trade practices. If the Commission was required to decide whether a case did or did not fall within the terms of section 27, it would be tantamount to giving a clearance. An alternative argument was that the applicant had conceded jurisdiction by applying for an authorisation.

The Commission found in favour of the second view. It relied in particular on the actual wording of the Act. Section 58(1)(b) provided that the Commission may grant an authorisation "To enter into a contract, etc, to which section 27 of this Act applies" (emphasis added). The Commission noted that section 58 gives it the power to grant authorisations and that sections 61(6) and (7), which set out the criteria to be satisfied before an authorisation may be granted, specifically refer back to that section.

The Commission accepted that it had no power to give a clearance. It did not consider thaat the procedure in which a practice had to be shown to fall within section 27 before authorisation could be considered, was a clearance. That is because the Commission's decision does not bind any Court called upon to consider whether a contravention of section 27 has occurred.

In Re Chemists' Guild of New Zealand Ltd[29] the Commission said that an application for authorisation should not of itself create an adverse inference about whether the practice substantially lessened competition.

In deciding that in order for it to have jurisdiction the practice must contravene section 27 the Commerce Commission departed from the practice of its counterpart, the Australian Trade Practices Commission. Section 88(1)(a) of the Trade Practices Act 1974 (the equivalent of section 58(1)(a) of the Commerce Act 1986) states:

> "... the Commission may, upon application by or on behalf of a corporation, grant an authorisation to the corporation -
>
> (a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 [equivalent to section 27 of the Commerce Act]". (Emphasis added)

In its decision in Application of Shell Co of Australia & Neptune Oil Co Pty Ltd the Trade Practices Commission said:

> "The Commission thus does not see its duty as being to determine whether, in fact section 45 ... has been breached. This is a matter that only a court can decide. The Commission's function is to apply to the case the test laid down in section 90(5) [the public benefit test]."[30]

In Whakatu the Commerce Commission commented that the omission of the words "or might be" from section 58(1) of the Commerce Act seemed quite pointed because otherwise the section followed quite closely the wording of section 88 of the Trade Practices Act. The Commission viewed that as supporting its decision.[31]

After the Commerce Act had been in force for 2 years the Department of Trade and Industry (the competition functions of which are now incorporated in the Ministry of Commerce) conducted a review of the Act in light of developments and experience since its implementation. On the jurisdiction issue it found that the Commission's approach had resulted in a blurring of the respective responsibilities of the Commission and the High Court.

As a result of the Commission's approach a problem arose. If the Commission could not consider the issue of public benefit unless a practice contravened the Act, a practice that the Commission did not think contravened the Act could not be authorised. If circumstances in the market changed and the practice had a more serious effect on competition, that would leave the person at risk from a private action. Although the public benefit might outweigh the detriment arising from the practice, warranting the grant of an authorisation, the Court has no power under the Act to consider public benefit arguments.[32]

To clarify the situation the Commerce Amendment Act 1990 repealed the old section 58 and substituted a new section 58,

the relevant parts of which read:

> "58. (1) A person who wishes to enter into a contract or arrangement, or arrive at an understanding, to which that person considers section 27 of this Act <u>would apply, or might apply</u>, may apply to the Commission for an authorisation to do so and the Commission may grant an authorisation for that person to enter into the contract or arrangement, or arrive at the understanding.
>
> (2) A person who wishes to give effect to a provision of a contract or arrangement or understanding to which that person considers section 27 of this Act <u>would apply, or might apply</u>, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to give effect to the provision of the contract or arrangement or understanding." (Emphasis added)

The effect of the new section will be that when a person makes application to the Commission for authorisation, the Commission will assure that the practice substantially lessens competition and proceed immediately to assess the degree of lessening of competition and apply the public benefit test. If sufficient public benefits exist the practice will be authorised.

Only when a case goes to the High Court alleging contravention of section 27 will the question of whether the practice actually substantially lessens competition be decided. That is not to say that the arguments relevant to this question will not be before the Commission. As will be discussed in Part 11 of this paper, the Commission's decision on the public benefit test depends on a consideration of these arguments.

5. LEGAL PRINCIPLES APPROPRIATE TO THE FISHER & PAYKEL CASE

In setting out the legal principles appropriate to the F&P case the High Court quoted from textbooks and cases of various jurisdictions. It noted that apart from differences in emphasis there was little argument over relevant legal principles, apart from over the extent to which United States authority should be followed.[33]

5.1 MARKET

The first question to ask is, what is the relevant market? Market is defined in section 3(1A) as:

> "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".

The determination of the market will play an important part in the case, because if the market is cast too widely it will be more difficult to show a substantial lessening of competition. All the parties in the F&P case agreed that the relevant market was the market for the retail distribution of whitegoods in New Zealand.

5.2 COMPETITION

Competition is defined in section 3(1) to mean "workable or effective competition". The High Court found the definition of "workable competition" in Heydon's *Trade Practice Law* to be acceptable:

> "Workable competition means a market framework in which the presence of other participants (or the existence of potential new entrants) is sufficient to ensure that each participant is constrained to act efficiently and in its planning to take account of those other participants or likely entrants as unknown quantities. To that end there must be an opportunity for each participant or new entrant to achieve an equal footing with the efficient participants in the market by having equivalent access to the means of entry, sources of supply, outlets for product, information, expertise and finance. This is not to say that particular instances

> of the items on that list must be available to all. That would be impossible. For example, a particular customer is not at any one time freely available to all suppliers. Workable competition exists when there is an opportunity for sufficient influences to exist in any market, which must be taken into account by each participant and which constrain its behaviour."

"Effective competition" was discussed in the Queensland Co-operative Milling Association case[35] as follows:

> "Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:
>
> (1) the number and size distribution of independent sellers, especially the degree of market concentration;
>
> (2) the height of barriers to entry, ie, the ease with which new firms may enter and secure a viable market;
>
> (3) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
>
> (4) the character of "vertical relationships" with customers and with suppliers and the extent of vertical integration; and
>
> (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.
>
> Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct."

The High Court in the F&P case quoted extensively from the decision in a recent arbitration conducted under the aegis of the International Centre for Settlement of Investment Disputes, Mobil Oil v Her Majesty in right of New Zealand[36]. New Zealand law was being interpreted, and, in particular, the application of section 27 of the Commerce Act to the facts before the tribunal. The

arbitral tribunal was held in high regard by the Court because of the distinguished persons who comprised it. That tribunal regarded the term "competition" as importing relativities "to be assessed by reference to the impact of the practice upon the functioning of the relevant market".

5.3 SUBSTANTIAL

Substantial is defined in section 2 to mean "real or of substance". This definition was probably included in the Act to signal that it was appropriate to use Australian precedents in interpreting the term. It was the Full Federal Court of Australia in Tillmann's Butcheries Pty Ltd v Australasian Meat Industry Employees' Union & Ors that interpreted the term as meaning "real or of substance":

> "In the context of S.45D(1) of the Act, the word 'substantial' is used in a relative sense in that, regardless of whether it means large or weighty on the one hand or real or of substance as distinct from ephemeral or nominal on the other, it would be necessary to know something of the nature and scope of the relevant business before one would say that particular actual or potential loss or damage was substantial. As at present advised, I incline to the view that the phrase, substantial loss or damage, in S.45D(1) includes loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal."[37]

The High Court in the F&P case agreed with this formulation.[38]

The tribunal in the Mobil arbitration said that "substantially" should be judged in competition terms. The effect of this is that some matters have more importance than others. Specifically, the height of barriers to entry is the most important element of market structure.[39]

5.4 SUBSTANTIALLY LESSENING COMPETITION

In its decision on the Mobil arbitration the tribunal quoted a passage from the judgment of the Full Federal Court of Australia in Dandy Power[40], which has been

followed in all New Zealand cases in section 27:

> "To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening. To my mind one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been, is seen to be a substantial lessening of competition. I prefer not to substitute other adverbs for 'substantially'. 'Substantially' is a word the meaning of which in the circumstances in which it is applied must, to some extent, be of uncertain incidence and a matter of judgment. There is no precise scale by which to measure what is substantial. I think ... the word is used in a sense importing a greater rather than a less degree of lessening. Accordingly in my opinion competition in a market is substantially lessened if the extent of competition in the market whch has been lost, is seen by those competent to judge to be a substantial lessening of competition. Has competitive trading in the market been substantially interfered with? It is then that the public as such will suffer ... Although the words 'substantially lessened in a market' refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market."

From that passage the tribunal drew three points:

1) The desirability of interpreting the phrase "substantially lessening competition" as a whole;
2) The manner in which relativity is to be approached; and
3) The manner in which causality is to be assessed: it is necessary to assess the competitive functioning of a relevant market, with and without the disputed practice.

6. HIGH COURT'S APPROACH TO THE INTERPRETATION OF "SUBSTANTIALLY LESSENING COMPETITION"

The test used by the Commerce Commission in the F&P case to assist it in deciding whether there had been a substantial lessening of competition in a market in terms of section 27 was based on that propounded in USA Guidelines for Non-Price Vertical Restraints (VRGs). Counsel for F&P argued that, while the principles in Whakatu provide a sound starting point for analysing restrictive trade practices, exclusive dealing must be analysed within the appropriate economic framework. Since the Commission had adopted guidelines in respect to vertical integration for mergers and takeovers, he suggested it would also be appropriate to adopt guidelines in this area.[41] This the Commission did.

On appeal to the High Court the guidelines the Commission had formulated based on the VRGs were rejected. The Court stated that the VRGs had not found universal approval in the USA. It sounded a note of caution about accepting guidelines that have no foundation in the New Zealand statute. "The Commission's function", it stated, "is to assess the application of section 27 to every case that comes before it."[42]

The High Court noted that the words "substantially lessening competition in a market" had been subject to much judicial interpretation, both in New Zealand since the Commerce Act was introduced and in other jurisdictions with similar words.[43] As well as in the Commerce Act, the same phrase (or an equivalent phrase) appears in the:

- US Clayton Act 1914 (section 3);
- Australian Trade Practices Act 1974 (section 47 and others);
- Canadian Competition Act 1985 (section 77).

The Court felt that lengthy guidelines were unnecessary especially in respect of exclusive dealing, because if

there were not already sufficient precedents of the Commission and the Courts, sufficient would develop. In any case the Commission would usually have economic evidence before it to help it arrive at its decision.[44]

As the Canadian Competition Act is of recent origin, few cases have been decided under it. Therefore, it is the approach of the US and the Australian Courts in interpreting the words "substantially lessening competition" that will be of most use for our purposes.

7. UNITED STATES CASE LAW

Section 3 of the US Clayton Act 1914 states:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods ... for use, consumption, or resale within the United States ... on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods ... of a competitor or competitors of the ... seller, where the effect of such lease, sale or contract for sale on such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

A substantial body of case law dealing with vertical restraints, including exclusive dealing, has developed around this section in the US.

At several places in its judgment the High Court in the F&P case emphasised that developments in US anti-trust law and economics should be treated cautiously and not adopted uncritically, because of the different statutory regimes and vast differences in the markets. However, it also quoted a passage from the decision in the Mobil arbitration:

> "While the language and structure of the Australian and New Zealand Acts are very similar, though certainly not identical, there is a less close relationship between New Zealand and US law. Nevertheless we recognise that American anti-trust cases may suggest lines of analysis of the facts that may well be pertinent in application of New Zealand provisions."[45] (Emphasis added)

That appears to be how the High Court used US case law - to inform its analysis.

7.1 APPROACH OF US COURTS TO THE INTERPRETATION OF "SUBSTANTIALLY LESSEN COMPETITION"

In Standard Oil Co v US[46] the Court of Appeals for the Sixth Circuit laid down a test that has become known as the "quantitative substantiality" test. It states:

> "that the qualifying clause [the competition test] of section 3 [of the Clayton Act 1914] is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected".

The only inquiry is as to the actual percentage of the market that has been foreclosed to competition. No more need be said about this test because the High Court in the F&P case affirmed the Commission's decision that such a test was inappropriate in New Zealand given the vast differences in markets, both in terms of size and other circumstances.[47]

The landmark case on exclusive dealing that set out the tests to be applied in deciding whether a substantial lessening of competition in a market had occurred was Tampa Electric Co v Nashville Coal Co et al[48]. The plaintiff, an electricity generating company, sought a declaratory judgment that the defendant had wrongfully repudiated a contract to provide the plaintiff with all its coal requirements for the next 20 years. At first instance the Court declared that the contract violated section 3 of the Clayton Act.

On appeal the Court of Appeals for the Sixth Circuit deviated from the rule it had established in Standard Oil[49] and erected criteria which demand close scrutiny of the economic ramifications of an EDA in order to determine the probable anti-competitive effects of the practice.

The Court set out the following tests:

> "First, the line of commerce, ie, the type of goods wares or merchandise, etc, involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case. Second, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.
>
> ...
>
> Third, and last, the competition foreclosed by the contract must be found to constitute a substantial

> share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited as was pointed out in Standard Oil Co v US, supra.
> ...
>
> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in respect to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein."[50]

This test is commonly referred to as the "qualitative substantiality" test. It is applied where the seller is not dominant in the market and (a) the percentage of market foreclosure is not substantial; or (b) the seller or buyer needs the challenged practices to continue operating his or her business.

Later Courts have said that the plaintiff must show that other factors present in the market exacerbate the detrimental effect of the challenged restraints[51], ie, exclusive dealing alone cannot be anti-competitive. To evaluate the restraints and their probable effects in the market the courts have considered a range of economic factors including:

(1) the extent to which competition is foreclosed in the relevant market;
(2) the dominance of the seller in its industry;
(3) the relative strengths of the parties;
(4) the ease with which new outlets can be developed;
(5) the sales structure of the industry;
(6) the extent to which competition has flourished despite the use of the exclusive contracts; and
(7) the duration for which the arrangements are to run.[52]

The tests in the earlier cases were reaffirmed and further developed by the US Supreme Court in Continental Television

Inc v GTE Sylvania Inc[53]. In that case the Court overruled its decision in US v Arnold, Swinn & Co[54] that certain vertical restrictions were illegal per se, ie, illegal regardless of how reasonable the restraint was.[55] The Court held that the legality of vertical trade restrictions should be determined in accordance with the rule of reason.

There is some debate over what constitutes a rule of reason analysis. Broadly, it means that only restraints that unreasonably affect competition are held to be illegal. For example, even a significant restraint would not be illegal if it could be shown to have features that outweigh the lessening of competition. The formulation of the rule courts often rely on is from Justice Brandeis' opinion in Chicago Board of Trade v US:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."[56]

Posner does not find this a helpful formulation:

> "To be told to look to the history, circumstances, purpose and effects of a challenged restriction is not to be provided with usable criteria of illegality. If Justice Brandeis had said that the test was whether the restriction was on balance pro- or anti-competitive, this would at least have excluded criteria unrelated to competitiveness. Perhaps that is the meaning of the first sentence quoted above. Yet arguably competition should not be the exclusive determinant of an unreasonable retraint of trade. This formulation would prohibit those restraints that, while reducing competition, on balance increase efficiency."[57]

Beltone Electronics Corp[58], a decision of the Federal Trade Commission, is the most significant recent decision on exclusive dealing in the United States. It is discussed by R M Steur in his article "Exclusive dealing in distribution":

> "On the basis of its historical survey [of prior authorities on exclusive dealing], the Commission rejected foreclosure as the only pertinent criterion. It stated that the foreclosure standards 'are not well settled', and that even if they were, under the newer Sylvania standard foreclosure must be considered as 'only one of several variables to be weighed'. [Footnote omitted] The Commission noted that under Sylvania there must be close examination of the 'dynamics' of the market: 'More specifically, a proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any, for the exclusivity.'"[59]

7.2 APPLICABILITY OF US APPROACH TO NZ LAW

In any attempt to discover how the law of another country might help in the interpretation of one's own law, it is necessary to be aware of any differences between the two, and to recognise what effect those differences might have.

US law contains no equivalent of the authorisation procedure provided by the Commerce Act. Therefore, a person will not know conclusively whether a practice substantially lessens competition until an action is brought against them and the court has the opportunity to decide the matter. A decision that the practice is anti-competitive will result in penalties being imposed on the person. By contrast, in an authorisation application under NZ law, even if the Commission believes the practice substantially lessens competition, the person has a chance in the public benefit test to prove that the benefits flowing from the practice outweigh the lessening of competition, so the practice should not be prohibited.

It may be that because under US law there is only one chance to prove that the practice is not illegal, and the penalties are severe if the practice is found to be anti-competitive, the US test of substantially lessening competition may require consideration of matters that would not fit within the NZ test. An example of that would be public benefits arising from the practice.

A second difference arises from the wording of the Acts. Section 3 of the Clayton Act refers to "the effect of such ... sale etc on such condition, agreement or understanding may be to substantially lessen competition". Section 27 of the Commerce Act refers to "a provision that ... has or is likely to have the effect, of substantially lessening competition". It is arguable that this difference in wording is not significant because in Standard Fashion v Magrane-Houston Co[60], an exclusive dealing case under section 3, the Court interpreted "may" to mean "probable". Likewise in the New Zealand case of Air New Zealand v Commerce Commission[61] the High Court equated "likely" with "probable" rather than "possible".

Turning them to consider the US test of substantially lessening competition in the context of exclusive dealing. It appears that exclusive dealing alone cannot be anti-competitive. There must be other factors in the market, which, combined with the practice, increase its anti-competitive effects. The important factor from Tampa Electric[62] is the extent to which the ability of other traders to enter into or remain in the market is limited. To assist them in evaluating the effect of the restraint in the market the courts have in recent cases used economic evidence. Among the factors that have been considered is the extent to which competition is foreclosed in the relevant market. The test of that from Tampa Electric includes, among other things, taking into account "the proportionate volume of commerce involved in respect

to the total volume of commerce in the relevant market area".

The significance of that for our purposes is that that formulation as a measure of the extent to which competition in a market has been affected as a result of the practice, was specifically rejected by the Full Federal Court of Australia in Dandy Power[63] when it said:

> "Although the words 'substantially lessened in a market' refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market." (Emphasis added)

New Zealand courts have followed Dandy Power.

It should be noted in respect of the second economic factor (listed on page 29) the courts have taken into account, dominance is not an issue under section 27 of the Commerce Act.

One further point should be made about the US authority. The High Court in the F&P case commented -

> "that earlier US decisions appeared to concentrate on anti-competitive motives without adequately considering efficiency gains".[64]

The final two sentences in the quote from Justice Brandeis' opinion in Chicago Board of Trade (quoted on page 30) indicate a concern with motive in deciding whether a practice is anti-competitive. By contrast, the following quote from Posner illustrates the recent trend towards considering efficiency gains. The idea that competitiveness should not be the only determinant of the desirability of a vertical restraint, that the efficiency increasing aspects of the restraint should also be important, derives from the thinking of the Chicago School of Economic Theory. Their argument is that economic efficiency is the goal of anti-trust law.[65] Motive is not important in the NZ analysis of the anti-competitive effects of a practice, but efficiency gains are.

As will be evident when the NZ test of substantially lessening competition is discussed in Part 10 of this paper, the High Court in F&P adopted a framework for the analyis of exclusive dealing that is very similar to the one evolved by the US courts.

8. AUSTRALIAN CASE LAW

Although the Australian Trade Practices Act has a specific section covering exclusive dealing (section 47), the High Court in the F&P case noted that that did not affect the matters to be considered in a section 27 assessment.[66] Two Australian decisions were discussed by the High Court: Re Ford Motor Co of Australia Ltd[67] and Outboard Marine Australian Pty Ltd v Hecar Investments No. 6 Pty Ltd[68].

In the Ford case Ford Motor Co of Australia Ltd and Ford Sales Co of Australia Ltd were appealing against determinations of the Federal Trade Commission refusing to authorise Ford's mandatory solo franchising provision contained in an agreement with its dealers. Under that agreement dealers were required to sell only Ford motor vehicles, parts and accessories. On appeal the Trade Practices Tribunal upheld the determination of the Commission because it found that Ford had failed to establish that the benefit to the public resulting from the restrictive provision outweighed the detriment to the public arising from the lessening of competition.

The High Court in the F&P case distinguished the Ford case on its fact:

(a) site ties applied to almost half the Ford outlets, so dealers were not free to switch to other franchisers if they wanted to;
(b) Government policy created barriers to entry into the market by controlling the number of manufacturers and limiting imports;
(c) automobiles were a higher-cost commodity than whiteware so the cost of entering the dealership market was higher.

The first two factors create barriers to entry, which, as will be explained in Part 10, in conjunction with certain other conditions in the market, may result in there being a substantial lessening of competition in the market. No barriers to entry were found by the High Court in the F&P case.

With respect,it seems unlikely that the third factor is a material distinction. Entry costs and entry barriers are discussed at Part 10.1.1. The definition used there refers to a barrier to entry involving a distortion in the allocation of resources. While the cost of the commodity involved will affect the cost of entering the market, rather than having a distortionary effect on resource allocation, that will ensure that an optimal number of dealers enter. Otherwise it would always be possible to argue that the cost of entering a market was a barrier because there are always lower priced commodities around.

In considering the persuasiveness of the Ford case the High Court in the F&P case said, if the Ford case had been decided today it would likely not have been decided "in terms so forthrightly condemnatory of an EDC"[69]. That is because of the change in the economic thinking that has occurred over the past decade in respect of the competitive effects of EDAs.

Hecar is the leading Australian case on exclusive dealing. It is a judgment of the Full Federal Court of Australia. The facts are different from those of the F&P case, but the High Court found two aspects of the case to be useful. Firstly, the Judges agreed that it would be unlikely in an otherwise competitive market for something done to one competitor to result in a substantial lessening of competition. In the words of Fitzgerald J:

> "It would, I think, be an unusual and exceptional case in which it could be shown that competition in a generally competitive market was or was likely to be substantially lessened by a refusal to supply one of a number of competitive retailers in the market with a product otherwise freely available and competitively marketed. Further, where there is a market which is generally competitive, it plainly does not follow that conduct which affects the balance of competition by advantaging or disadvantaging a particular dealer or dealers or a particular product or products necessarily lessens

> the competition in the market. No doubt it may be necessary in an appropriate case to have regard to the position in the market of the individual dealers or products affected to see if the interference with the balance between competitors or competing products lessens competition in the market overall."[70]

The High Court in the F&P case considered that the Ford decision, with its emphasis on the effect of the solo franchising provision on Ford, rather than on competition in the market, did not sit easily alongside the more recent Hecar decision.

Secondly, the High Court found the reasoning of the Court in Hecar to be helpful.

While in Ford and Hecar the Trade Practices Tribunal and the Australian High Court respectively engaged in an analysis of the market, considered the state of competition therein and the likely effect of the conduct on competition in the market, in neither case was economic evidence used to help identify the pro- and anti-competitive effects of the practice and to aid the decision whether the practice substantially lessened competition in the market. There seems to be no reason why a future case could not involve such an economic analysis and indeed the tenor of the judgments in Hecar suggest that the Courts would welcome such an approach.

9. ECONOMIC EVIDENCE

9.1 GENERAL

The minority Commerce Commission judgment in Re Fisher & Paykel Ltd[71] noted that the Commerce Act contains no presumption against vertical restraints, except resale price maintenance.[72] Now that section 19 of the Commerce Amendment Act 1990 has made resale price maintenance an authorisable practice, the Act contains no presumption against vertical restraints at all. In contrast, the Australian Trade Practices Act, upon which the Commerce Act is based, contains a section specifically concerned with exclusive dealing. With the move towards harmonisation of New Zealand and Australian business law, the minority throught the fact the drafters of the New Zealand Act had decided not to follow the Australian approach reflected the considerable advances that had occurred in the international understanding of the economic effects of exclusive dealing and other vertical practices.[73] The High Court on appeal agreed with that assessment.[74] In the words of the minority:

> "The acceptance or otherwise of [vertical] arrangements will largely depend on their economic effects and, more specifically on their net effect on competition and efficiency."[75]

Although exclusive dealing is a vertical restraint its effect on competition is not identical to those of other vertical restraints. Steur states:

> "Although certain similarities exist among the various vertical restraints, it is misleading to suggest that all vertical restraints have the same pro-competitive and anti-competitive effects, and that all may be justified under a single economic equation. A proper analysis of exclusive dealing must use a different approach from that used in analyzing territorial and other resale restraints, because exclusive dealing creates significantly different pro-competitive and anti-competitive effects."[76]

He goes on to illustrate that a location clause, which is a resale restraint, requires the weighing of the

reduction of intrabrand competition (competition among manufacturers of the same generic product), against the stimulation of interbrand competition (competition among distributors of the product of a manufacturer). By requiring a distributor to resell from one location that prevents him or her from competing against other distributors of the same brand, and ensures that they compete with distributors selling other brands. It also eliminates intrabrand free riding, ie, prevents a distributor from taking advantage of promotional efforts undertaken by other distributors of the same brand without paying for them.

Steur suggests that the proper analysis for exclusive dealing involves the weighing of the reduction of interbrand competition through foreclosure of distributors against the stimulation of interbrand competition encouraging more concentrated promotion of the brand by distributors and the elimination of the interbrand free rider effect.

The significance of the different pro- and anti-competitive effects on the competition analysis undertaken in exclusive dealing cases will be discussed in Part 10.

9.2 PRO-COMPETITIVE EFFECTS OF EXCLUSIVE DEALING

There are argued to be four pro-competitive effects of exclusive dealing. Exclusive dealing may:

(1) Encourage maximum promotional efforts by distributors;
(2) Reduce interbrand free riding;
(3) Motivate distributors to undertake additional service-related obligations; and
(4) Reduce transaction costs.

Firstly, it is argued that exclusive dealing is a means of obtaining maximum promotional efforts from distributors, particularly when comparison shopping items are involved. (These are items that tend to be expensive and long-lasting, so people are more inclined to compare brands and prices before purchasing.) If distributors stock only one

brand of products their sales efforts are not diluted. Also, their success is tied to the success of that brand.[78]

Multibrand stockists have the ability to promote products to customers that provide the distributor with the best margin. For example, Manufacturer A might invest in advertising and informing customers of the benefits and features of its product. That cost will be reflected in the cost of product A to distributors. If Manufacturer B does not make such an investment, it can afford to lower the price at which it sells its product to distributors. Distributors are then in a position to use the information supplied in respect of Manufacturer A's product in selling Manufacturer B's product, thereby obtaining a higher margin.

In economic terms, taking advantage of something one has not paid for is called "free riding". Therefore, it is argued that the second pro-competitive effect of exclusive dealing is that it reduces or eliminates interbrand free riding. (Exclusive dealing does not affect intrabrand free riding.)

Thirdly, it is argued that exclusive dealing encourages distributors to undertake additional obligations:

> "Exclusive dealing may result in lower wholesale prices. Since suppliers must compete for retailers through wholesale contracts which may or may not require exclusive dealing, the supplier will have to lower the wholesale price to induce the dealer to deal exclusively in the products of the supplier. Exclusive dealing which results in a higher margin between wholesale and resale price may motivate dealers to expend more effort on promotion, carry larger inventories, and provide maintenance and repair service."[79]

This is a useful adjunct to the type of products usually sold by way of exclusive dealing. They tend to be comparison shopping items for which reputation is important.

Fourthly, exclusive dealing may reduce transaction costs. Manufacturers do not have to supply so many outlets and distributors can concentrate their sales and promotional efforts. These cost savings may result in lower retail prices allowing distributors to compete more effectively with rivals. Since the search for lower costs is an important aspect of the goal of profit maximisation, it is argued that vertical restraints must foster efficiency.

Marvel has argued that the only pro-competitive effect of exclusive dealing is that it creates a manufacturer's property right:

> "Manufacturers are assumed to wish to generate customers for their products through advertising and other promotional and brand-enhancement efforts most efficiently carried out at the manufacturer, rather than dealer, level. These customer-generating investments create business from which the dealer can readily profit, but there remains for the manufacturer the problem of charging its dealers for the additional custom. The simplest way to do so is by incorporating the charge for the manufacturer promotional effect into the wholesale price of the good. That is, the manufacturer offers the dealer a tie-in sale - the physical product together with a set of likely customers for that product. A problem with this tie-in arises if the dealer is able to benefit from the manufacturer's promotional effort while avoiding the promotional charge. If, for example, the additional customers are generated by advertising investments, the promotional charge is avoided if the dealer substitutes a similar, but unadvertised, brand for the advertised product. Exclusive dealing, by preventing this sort of substitution, provides the manufacturer with a property right to his promotional investment."[80]

He argues that exclusive dealing is not an efficient means of promoting increases in dealer services. In order to arrive at this conclusion, however, he assumes that exclusive dealers make fewer sales, resulting in lower margins, so the supplier has to reduce wholesale prices in order to compensate dealers. The effect of this is a higher cost per unit of dealer services.

Against this Steur has argued that the profits of exclusive dealers will not necessarily be lower because their promotional efforts will not be diluted among a number of brands, so total sales might be greater.[81]

Marvel acknowledged the possibility that an exclusive dealer's promotional effort might be superior to that of a multi-line dealer, but dismissed this as supporting an efficiency argument, because he thought if that was the case exclusive dealing would voluntarily be adopted by dealers.[82]

Steur disagrees that stimulation of suppliers' efforts is the only pro-competitive effect of exclusive dealing. Even though exclusive dealing might maximise the profits of both supplier and distributor, dependence on one supplier makes such arrangements an unattractive proposition to undertake voluntarily. He points out that often the arrangements are undertaken for pragmatic reasons, eg, because a dealer has limited space or facilities, so cannot handle more than one brand.[83]

9.3 ANTI-COMPETITIVE EFFECTS OF EXCLUSIVE DEALING

Three anti-competitive effects of exclusive dealing have been suggested:

(1) Foreclosure of rivals;
(2) Reduction of choice; and
(3) Under certain conditions, higher prices.

The first possibly anti-competitive effect of exclusive dealing is foreclosure of access to distribution outlets so that it is difficult for rivals to enter the market and compete. This may be achieved by creating barriers to entry or by raising rivals' costs of an essential ingredient.

Secondly, it has been suggested that exclusive dealing is anti-competitive because it reduces the range of

choice available to buyers, while foreclosing rival suppliers from doing business with exclusive dealers. Posner does not accept that that has any effect on competition, because one firm is removed from the market place, but another is substituted. Moreover according to Posner, if the foreclosure is the result of conduct by a dominant firm at an adjoining stage of production, that precludes anti-competitive effects, because a rival firm is free to enter both stages of production concurrently, since the foreclosure limits only single-stage entry. Posner's analysis relates to a single product firm.[84]

Comanor[85] argues that Posner's analysis falls down when applied to multiproduct firms with the likelihood of substantial economies of scale and scope. Economies of scope occur when costs substantially decrease in distributing a large number of products. The ordinary meaning of economies of scale is that costs decrease in distributing larger quantities of products. Comanor argues that exclusive dealing arrangements may have anti-competitive effects when there are substantial economies of scale and scope in the distribution sector, because the imposition of an exclusive dealing arrangement may raise rivals' costs of distribution. This argument was developed jointly with Frech in an article entitled "The competitive effects of vertical agreements?"[86]

The Comanor and Frech analysis illustrates the third anti-competitive effect of exclusive dealing. It derives the market conditions under which exclusive dealing can result in prices to consumers that are higher than they would have paid in the absence of the practice.

Comanor and Frech use two single product companies - an original manufacturer (M) and a new entrant (E) in their example. Two classes of customers exist:

1) Class A who perceive M's product as superior and

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are therefore prepared to pay more to obtain it, ie, they have a brand preference;

2) Class B who perceive no difference between M's product and E's product.

The analysis depends on two assumptions:

1) That M's distribution margin, ie, what it costs M to distribute the product including the retailer's mark-up, stays constant both with and without exclusive dealing -

   a) Because of economies of scale and scope under multi-product distribution before exclusive dealing is imposed; and

   b) Because of economies that result from exclusive dealing.

   Once exclusive dealing is imposed E can no longer take advantage of the lower costs of a multi-product distribution channel and consequently must pay the increased costs of a single-product distributor.

2) Even though exclusive dealing may result in lower distribution costs M might decide to price at the same level as its competitors.

Assume the following:

	$
Cost (c)	800
Distribution margin for M and E before exclusive dealing (also M's distribution margin after exclusive dealing)	150
E's distribution margin after exclusive dealing (X)	175
Brand preference (B)	100

Comanor and Frech found that prices to Class B consumers in the presence of exclusive dealing were always higher than without exclusive dealing, because of the increased costs of distribution through alternative distribution channels. For example,

Before exclusive dealing	C+D	800+150=$950
After exclusive dealing	C+X	800+175=$975

Whether Class A customers are better off or worse off under exclusive dealing depends on whether M adopts a high- or a low-price strategy. If M adopts a low-price strategy, it prices so that the price of its product to consumers is no higher than the price of E's product to them, that is: C+X 800+175=$975. Compare that to the price of M's product to consumers without exclusive dealing: C+B+D 800+100=150=$1050.

For Class A customers to face higher prices under exclusive dealing the increased cost of distributing the product alone must exceed the sum of the brand preference plus the multi-product distribution cost, ie, on the figures quoted above, E must exceed $250 (B+D). Put another way, the amount of the brand preference premium must be less than the difference between the multi-product distribution cost (D) and E's distribution costs after exclusive dealing, ie, in the above example (b) must be less than $25. Class A customers will face lower prices if the opposite applies, ie, X is less than B+D or B is greater than X-D.

If M adopts a high-price strategy it sets the highest price Class A customers will stand. The comparison is:

Without exclusive dealing	C+B+D	800+100=150=$1050
With exclusive dealing	C+B+X	800+100+175=$1075

Therefore, when M adopts a high-price strategy, prices to both classes of customers are higher in the presence of exclusive dealing.

Comanor and Frech conclude:

> "The implications of this analysis are striking. Under the specified market conditions, the original manufacturer profits by imposing exclusive dealing requirements on his distributors, regardless of his choice of pricing strategy."[87]

No mention of this scenario for exclusive dealing being anti-competitive was made in the judgments of the Commerce

Commission or the High Court in the F&P case. It would be interesting to know what such an analysis carried out in that case would have revealed, but there is insufficient information in the judgments to allow it to be tested.

It seems likely that it would be feasible to use such an analysis to provide the court in a future case with more information on whether an EDA is anti-competitive. Companies know their production costs and F&P was able to tell the Commission that exclusive dealing saved it $50 per unit in distribution costs. That only leaves the brand preference figure. Firms that engage in cost-plus pricing might have difficulty quantifying such a figure. For other firms one would have to consider how accurate the information they base this figure on is; whether in reality it is nothing more than a best estimate and as a consequence may be too unreliable to use in an assessment of anti-competitiveness.

9.4 ROLE OF ECONOMIC EVIDENCE IN EXCLUSIVE DEALING CASES

What is the role of economic evidence in exclusive dealing cases? Generally, direct evidence of whether there has been a substantial lessening of competition in a market will not be available, so courts will have to decide this question on the basis of circumstantial evidence as to conditions in the market and the conduct of firms.[88] As indicated by the previous two subsections, EDAs may have a number of pro- and anti-competitive effects. Economists have developed models that predict the impact market structure and other factors present in a market have on competition. The economic evidence presented to courts is a simplified version of the economic theory of the models, given to help courts make an informed decision about what the likely state of competition in the market is.

The High Court in the F&P case treated the economic evidence placed before it in the same way as it would treat any other expert evidence. It stated:

> "We prefer to search for the various indicia of anti-competitive behaviour from the evidence, ending up with a judgment - almost a jury question - formed by harkening to economic opinion."[89]

10. FRAMEWORK FOR A SECTION 27 INQUIRY INTO SUBSTANTIALLY LESSENING COMPETITION

The High Court judgment in the F&P case suggests that the section 27 test of "substantially lessening competition in a market" involves four steps:

(1) Define the market;
(2) Analyse the structure and functioning of the market;
(3) Weigh the pro- and anti-competitive effects of the practice;
(4) The Court must make a value judgment as to whether the practice substantially lessens competition in a market.

While that framework would apply to all vertical restraint cases arising under section 27, the content of the analyses at steps (2) and (3) will differ depending on the practice involved. (See the discussion in Part 9.1 of this paper as to the different pro- and anti-competitive effects of vertical restraints.)

The competition test the High Court in the F&P case found to be appropriate in exclusive dealing cases was:

- exclusive dealing
- in conjunction with barriers to entry at the retail level
- and the absence of actual or potential competitors who can exercise a real and significant influence upon the conduct of the incumbent firm
- may strengthen market power and substantially lessen competition.

10.1 STRUCTURE AND FUNCTIONING OF THE MARKET

The High Court in the F&P case accepted that a market is a dynamic process. It stated that the EDC should be seen in that context and market factors should be considered in that light. In its analysis of the market in which an EDA exists the court is looking for evidence

to indicate the extent to which the EDA has reduced interbrand competition or stimulated it.

10.1.1 Barriers to entry

Both the Australian Trade Practices Tribunal in the Queensland Co-operative Milling case[90] and the arbitral tribunal in Mobil[91] referred to barriers to entry as being the most important element of market structure. This is because barriers to entry may prevent or hinder competitors from entering or expanding in a market. As a general rule, the less competition there is in a market, the more likely the market is to show anti-competitive effects.

What constitutes a barrier to entry? In its decision in Re Fisher & Paykel Ltd[92] the majority of the Commerce Commission drew a distinction between entry costs and entry barriers. It said that not all entry costs represent a barrier; a judgment has to be made as to their extent and impact.

It is clear that the mere fact a competitor or new entrant will have to incur extra costs in order to expand or enter the market, will not be sufficient to constitute a barrier.[93] However, there is no consensus in the economic literature about what constitutes an entry barrier. A range of costs and circumstances have been suggested as deterring entry and many economists have gone on to consider the effect these have on the efficient allocation of resources.[94] For example, Weizsacker's definition of barriers to entry is:

> "[A] barrier to entry is a cost of producing which must be borne by a firm which seeks to enter into an industry but is not borne by firms already in the industry and which implies a distortion in the allocation of resources from the social point of view."[95]

Before the High Court in the F&P case a number of factors were argued as possibly creating barriers to entry:

- foreclosure of access to an important component;
- duration of the EDA;
- sunk costs.

Other factors that could constitute barriers to entry were mentioned:

- import controls and tariff barriers;
- economies of scale;
- transport costs;
- lack of opportunity for expansion.[96]

The High Court found tht import controls and tariffs had once created a substantial barrier to entry/expansion in the whitegoods market, but Australian whitegoods are now licence exempt and duty free and further reductions in tariffs on whitegoods from other countries will occur in future.

10.1.1.1 Foreclosure of access to an important component

Foreclosure of access to an important component is one of the possible anti-competitive effects of EDAs. In the F&P case counsel for Email/Simpson argued that because of its EDC F&P had been able to foreclose its competitors from getting access to the best retail outlets. Evidence before the Commission and the High Court showed that 55 percent of whitegoods retailing outlets, accounting for about 75 percent of sales, were F&P franchised outlets.

While the High Court accepted that F&P had had the pick of sites and dealers for historical reasons, it thought that demand for retail space was elastic. If the demand was there space would be made available by:

(a) existing retailers selling browngoods and/or other goods;

(b) expansion of space in existing outlets;

(c) new retail space being built;

(d) F&P dealers converting to non-exclusive outlets.

It did not accept that F&P was foreclosing retail space from competitors in the medium term, although short term

that might be the case. The difficulty F&P's competitors were having establishing themselves in retail outlets was no more than would be expected given the history of import and tariff protection that had existed in New Zealand until 1985.

10.1.1.2 Duration of the EDAs

A major area of disagreement between the majority and the minority of the Commerce Commission in Re Fisher & Paykel Ltd[97] concerned the effect the 90-days' written notice F&P dealers were required to give to terminate the EDA had upon entry or expansion in the retail market. The majority considered that the tie was not of short or finite duration. It relied on the fact that termination of the EDA by dealers is a rare event and that termination results in a commercial penalty, because the dealer no longer has access to F&P products, which account for about 75 percent of whiteware sales.

The minority argued that the tie was of short duration, because with changing market conditions and potential competition from imported whitegoods, changeover from supply by F&P to supply by rival competitors could occur quickly.

The High Court, on appeal, while acknowledging that no F&P dealer had made the switch, concluded:

> "The EDC can be terminated without penalty on only 90 days' written notice and could well be terminated if a dealer were to receive a comparable package from an F&P competitor."

No guidance is given in the High Court's judgment about what length of tie would have the effect of foreclosing access to retail outlets. It is likely that will be a question to be decided on the facts of each case.

10.1.1.3 Sunk costs

The question arose in the F&P case whether advertising is a sunk cost or a fixed cost and whether either or both of these costs create an entry barrier.

Baumol and Willig define fixed costs as -

> "those costs that are not reduced, even in the long run, by decreases in output so long as production is not discontinued altogether".[99]

Examples of fixed costs are rental payments or capital expenditure that can be recouped upon exit from the industry, less depreciation.[100]

Sunk costs are -

> "those costs that ... cannot be eliminated, even by total cessation of production. As such, once committed, sunk costs are no longer a portion of the opportunity cost of production".[101]

Examples of sunk costs are capital expenditure that cannot be recouped upon exit from the industry, except for scrap or advertising where the business is not sold as a going concern, so does not contribute to the intangible asset of goodwill.[102]

According to Baumol and Willig, fixed costs do not create an entry barrier because they fall on both the incumbent firm and the new entrant. Sunk costs may constitute an entry barrier:

> "This is because the entrant faces both higher incremental costs and risks as it invests in sunk capital and advertising, expenditures which for the incumbent are past and absorbed costs. A sunk cost may therefore become an entry barrier by increasing the adverse consequences of failure, and its role as a barrier to entry depends on the risk to which it subjects the entrant. A weakness of this branch of literature which should be noted is that many so-called sunk costs only attain this status on the failure of the business (eg, expenditures on advertising). However, if the business succeeds and/or its ownership is transferred, these same costs are viewed as investments in intangible assests (eg goodwill). [Footnotes omitted]"[103]

The majority of the Commission in Re Fisher & Paykel Ltd decided that advertising was a sunk cost that would make entry or expansion in the whitegoods market difficult for competitors.

The minority, with whose arguments the High Court agreed generally, viewed advertising as a fixed cost, because the establishment of brand awareness and a reputation are not only costs associated with start-up; they are an on-going cost for market participants in the face of both actual and potential competition. Advertising is available to be purchased by everyone. The fact that a new entrant will have to spend more on advertising than an established firm does not constitute a barrier to entry. It is a difficulty of competing against an established incumbent; that difficulty is greater the better the incumbent's reputation and products are.

Some economists argue that it is the cost of information that creates the real barrier and that advertising may actually reduce that barrier by lowering consumers' information and search costs.[104] In addition, while the new entrant may have to spend more in advertising to establish itself, if it was not able to do that, that would create more of a barrier.

Summary

The High Court in the F&P case concluded that there were no barriers to entry in the whitegoods market. Therefore, it was not necessary for the Court to consider what level of entry barriers would be sufficient to meet the competition test. However, the quote from Mr Jennings that the Court approved suggested that exclusive dealing in conjunction with existing entry barriers would have to result in a "substantial" barrier at the retail level.[105]

10.1.2 Actual or potential competition

The question arises whether in any analysis of the state of competition in a market, actual competition alone is relevant, or whether potential competition may also be taken into account. Section 3(3) of the Commerce Act provides:

> "the effect of competition in a market shall be determined by reference to all factors that affect competition in that market including competition from goods or services supplied or likely to be supplied by persons not resident or not carrying on business in New Zealand". (Emphasis added)

Potential competition is also referred to in the definition of "workable competition" the High Court in the F&P case adopted (quoted on p 21 of this paper).

Having established that potential competition is relevant, it should be noted that the likely effect of potential competition was not referred to by the majority of the Commerce Commission in the F&P case at first instance. Yet, it seems to be the factor that most influenced the minority of the Commission to decide that F&P's EDC did not substantially lessen competition.

What is potential competition? Previous Commission decisions have emphasised that:

> "the real potentiality of competition depends, not upon the mere existence of competitors 'on the fring' which might or might not compete, but upon evidence of a real and significant influence upon the incumbent firm or upon potential competitors so as to provide a competitive discipline or a deterrent to entry respectively".[106] (Emphasis added)

In order to be able to exercise a real and significant influence on the incumbent firm's conduct it is necessary for competitors or potential competitors to be able to achieve "successful"[107] or "viable"[108] entry into the market, although it is not necessary that they actually do so. Often the threat of competition will be sufficient to constrain the incumbent firm.

What constitutes a "real and significant influence"? In F&P's case the minority identified actual behavioural changes:

> "[T]here was evidence to suggest that actual/potential competition from imports had indeed influenced F&P's conduct, eg the bringing forward ot its R&D programme. The fact that F&P itself imported 7 per cent of total whitegoods supply in 1986/87, and 3 per cent in 1987/88, is also indicative of the Company's awareness of the changing market circumstances and of the need to respond to them on behalf of consumers."[109]

The minority went on to imply that it would be open to the Commission to conclude that a firm that engaged in pro-competitive/efficiency-inducing behaviour was constrained in its conduct, even though no actual change had occurred in its conduct.[110]

There is a link between entry barriers and potential competition. Imports are a source of potential competition when barriers to entry are low. The High Court disagreed with the finding by the majority of the Commission in the F&P case that the level of imports would be unlikely to rise unless F&P's EDC was removed. It stated:

> "What is absolutely clear is that the market is highly contestable and that F&P is constrained by the threat of more imports which will increase, given suitable competitive conditions".[111]

10.1.3 Market power

There was evidence in the F&P case that F&P branded products (Kelvinator and Frigidaire) sold through F&P franchised dealers account for approximately 75 percent of whitegoods sold, while products manufactured by F&P under the Shacklock brand and marketed by Whiteware Corp through non-F&P franchised dealers account for 10 percent of whitegoods sold. The High Court found it necessary to add a notional loading of 5 percent to F&P's market share to recognise Whiteware Corporation's contribution.

The High Court agreed with the Comission that market share is not a good indicator of the anti-competitive effects of a practice. The Court found a comment on market share from the joint judgment of Mason CJ and Wilson J in the High Court of Australia in Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Co Ltd to be helpful:

> "A large market share may well be evidence of market power (see Roche, at p 521; p 275 of CMLR), but the ease with which competitors would be able to enter the market must also be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power: (see Continental Can at p 248; p 227 of CMLR). There must be barriers to entry. As Professor F M Scherer has written, 'significant entry barriers are the sine qua non of monopoly and oligopoly, for ... sellers have little or no enduring power over price when entry barriers are nonexistent': Scherer, Industrial Market, Structure and Economic Performance, 2nd ed. (1980), p 11."[112]
> (Emphasis added)

Before the High Court in the F&P case Email/Simpson argued that product differentiation - the perception in the eyes of New Zealand consumers and retailers that F&P's product and service package is superior - is both an entry barrier and a barrier to mobility within the market preventing F&P dealers from moving to other suppliers. The High Court accepted that F&P's market power was to some extent enhanced by these factors, but agreed with the minority that reputation should not be lightly taken away under the guise of protecting competition.[113]

Summary

The High Court concluded that F&P does have significant market power at the moment, based on:

- its having been the monopoly supplier over a number of years;
- its New Zealand-based manufacturing plant;
- its high market share;
- its strong product and service package;

- its strong dealer network, supported by the EDC, which provides significant product differentiation.[114]

However, because of the structure of the market with no significant entry barriers, competitors established in the market and the potential for more competition, F&P is constrained in what action it can take.

10.2 PRO- AND ANTI-COMPETITIVE EFFECTS OF THE EDC

A key question in the F&P case before the Commerce Commission was where in the analytical framework any pro-competitive effects of the practice should be considered:

- in the context of section 27 itself?
- in the context of section 61, ie, as part of the [degree of] lessening in competition test? or
- in the context of the public benefit test?

The Commission found that it was appropriate to consider both pro- and anti-competitive effects in ascertaining whether the substantially lessening competition test in section 27 was met. This was because the danger of artificially distancing the analysis of any anti-competitive effects of a practice from any pro-competitive effects could result in a distorted view of the competition problem. The minority stated that this was of particular importance in the case of vertical restraints because of their internationally recognised pro-competitive/ pro-efficient capability as well as their anti-competitive capability in certain circumstances.

The High Court agreed with the Commission that if it could be shown that the net effect of the EDC was to promote competition, there could be no substantial lessening of competition in terms of section 27.[115]

In addition to pro- and anti-competitive effects of the practice, the High Court stated that efficiencies and inefficiencies that result from the practice should also be weighed, leaving other public benefits to be considered

under the public benefit test.[116] The reason for this is that a practice that is anti-competitive may nevertheless result in efficiency benefits.

While it is not possible to define "efficiency", the minority of the Commission stated:

> "Efficiency effects can arise from organisational as well as from technological innovation; the general purpose of economic organisation is to devise arrangements which economise on both production costs and transaction costs."[117]

An interesting question arises as a result of the enactment of a new section 3A by the Commerce Amendment Act 1990, which reads:

> "Where the Commission is required under this Act to determine whether or not, or the extent to which conduct will result, or will be likely to result, in a benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result, or will be likely to result from that conduct."

It could be argued on the basis of that section that since Parliament has seen fit to provide expressly for a consideration of efficiencies in the public benefit test, it would have done the same if it intended efficiencies to be a factor to be considered in determining whether the substantially lessening competition test in section 27 had been met.

Opposing that, one can argue as follows. The general purpose of the Commerce Act is to promote competition as a means of enhancing economic efficiency. If efficiencies are excluded from the inquiry into the substantial lessening of competition, practices that while reducing competition, on balance increase efficiency would be prohibited. It seems likely that the courts will continue to consider efficiencies in both the substantially lessening competition test and the public benefit test.

The Commerce Commission's position is that there is no inconsistency between section 3A and the consideration of efficiency effects in the section 27 test.[118] Section 3A was inserted in the Act in recognition of current economic thinking that efficiencies are a public benefit.

Another issue that arises in this area is how likely something has to be before the Commission or the Court will accept it as a pro-competitive (or anti-competitive) effect of a practice. Referring to the fact that no F&P dealer had terminated their EDA with F&P, the High Court said, if a major importer was to make a sufficient investment in its products and a sufficient commitment to the New Zealand market it was not "beyond the bounds of possibility"[119] that it could make its terms of dealing or its product package sufficiently attractive to make an existing F&P dealer change allegiance. The High Court agreed with the minority of the Commission that in this way the EDC was pro-competitive because it:

> "encourages rival sellers to find better/different/ innovative/more cost-effective ways of producing/ delivering/servicing their branded products and of finding favour with whiteware consumers".[120]

Despite the language the High Court used - not beyond the bounds of possibility - the likelihood of the EDC being pro-competitive in the way the Court and the minority envisaged is probably quite high, given that F&P's competitors are multinational companies with wide experience of whitegoods retailing. The likelihood of a practice having a pro- and anti-competitive effect would surely go to the weight the Court would attach to such an effect.

The pro-competitive effects of the EDC argued by F&P and accepted by the High Court were:

(1) That the EDC protects F&P's investment in its dealers and products by reducing interbrand free riding, resulting in a higher level of

service in support of its products and an improved quality product; and

(2) That the EDC provides benefits to consumers through lower real prices achieved through cost savings (amounting to $50 per item[121]) from this form of distribution and a higher level of efficiency.

Against those had to be balanced the anti-competitive effects of the practice:

(1) Short-term foreclosure of access retail outlets from competitors;

(2) Market power enhanced by economies of scale from undertaking production for Whiteware Corporation and product differentiation. However, the Court also referred to the diminution of F&P's market power since import controls and tariff barriers had been lifted, as evidenced by its inability to retain its share of the dishwasher market (down from 100 percent market share to 55 percent).

An additional factor referred to was side-by-side retailing. Although the High Court accepted that side-by-side retailing facilitated switch selling, which is anti-competitive, it felt that that should be weighed against the pro-competitive effects of that method of selling, including price competition, ease of comparison, consumer choice, and cost and efficiency savings from a reduced number of outlets. On balance it thought this factor did not favour one side or the other.

10.3 VALUE JUDGMENT BY THE COURT

A passage from Fitzgerald J's judgment in Hecar[122] was relied on by the High Court as articulating the dilemma it found itself in:

> "The ultimate question for resolution in this proceeding is dependent upon the inference to be

> drawn rather than upon any matter in respect of which the learned primary Judge possessed any advantage over this Court on appeal, although, of course, the inference which he drew is to be kept in mind. Indeed, in the end, the answer in this case really depends on little more than one's own instinctive impressions formed by weighing the various considerations in the particular market which favour one view of another."

From this it can be seen that in the end, the result in any case will depend on the inferences the Court draws from the facts put before it. Therein lies the key to the different decisions reached by the majority of the Commerce Commission and the High Court in the F&P case.

On the basis of the structure and functioning of the market and the net pro-competitive effects of the EDC, the High Court arrived at its judgment ("Not without some hesitation ...") that "the majority was in error in finding that the EDC breached S.27".[123]

11. PUBLIC BENEFIT TEST

Section 61(6) of the Commerce Act 1986 as amended provides:

> "The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(1) to (4) of this Act unless it is satisfied that -
> ...
> (b) The giving effect to the provision of the contract, arrangement or understanding;
> ...
> will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result or would be likely to result or is deemed to result therefrom."

The elements of the public benefit test are that the practice will result or be likely to result in:

- a benefit
- to the public
- arising from the restriction of competition
- which would outweigh
- the lessening in competition.

In its decisions the Commerce Commission has consistently taken the line that quantification of the degree of lessening of competition is required, because it aids the weighing process carried out in the public benefit test. In Re New Zealand Vegetable Growers Federation Inc & Ors the Commission stated:

> "Although the words of section 61(6) in this respect are obscure, commonsense dictates that, in 'weighing' the Commission is required to assess the extent of the lessening of competition which actually exists as a result of the practice and then consider the detrimental effects [as well as any positive effects] arising therefrom."[124]

Prior to the enactment of the Commerce Act 1990, before the Commission could consider the public benefit issue, it was required to have decided that it believed the practice had or was likely to have the purpose or effect of substantially lessening competition. That was the

jurisdiction issue discussed in Part 4 of this paper. For the purpose of the public benefit test the Commission would simply quantify the lessening of competition and proceed to weigh the benefits and detriments.

Under the amended Act the Commission assumes, without deciding, that the practice substantially lessens competition. Therefore, it will now be necessary for the purposes of the public benefit test for the parties to argue the question of whether the practice substantially lessens competition, to enable the Commission to form a conclusion on the degree of lessening of competition.

Public benefit has been the subject of analysis elsewhere, so it is not intended to canvas the matter here.[125]

Strictly speaking, the High Court in F&P was not required to consider the public benefit issue because it concluded that F&P's EDC did not substantially lessen competition in the market. However, it briefly stated its view on the matter in case its judgment was appealed.

Private benefits in the form of cost savings achieved through greater efficiency, even if not passed onto consumers, have an element of public benefit.[126]

The main public benefit argued to arise from the use of the EDC was the continued manufacture of whitegoods in New Zealand by F&P. Neither the majority of the Commerce Comission, nor the High Court, accepted that the presence or otherwise of the EDC, would determine whether or not F&P continued manufacturing in New Zealand. The significance of this argument is that any benefits must stem from the practice. The Court did accept that if the company closed up there would be some loss of employment in New Zealand, which would be unlikely to be replaced. Any losses of F&P employees at the distribution and retail level would be replaced by competitors' employees.

Neither did the High Court accept that if the EDC went F&P would cease to be a substantial exporter of whitegoods and whitegoods technology, although it accepted there might be some initial loss of profits as a result of a reduction in market share.

Both the majority of the Commerce Commission and the High Court found that F&P had failed to make out public benefits that would be sufficient to warrant authorisation of the practice.

The law changes implemented by the Commerce Amendment Act 1990 have had the effect of changing the focus of cases before the Commerce Commission. In the Trade Practices Acts 1958 and 1975 the public interest was the all-important factor. Under the 1986 Act and section 27 in particular, that changed to competition. Unless the practice substantially lessened competition, public benefit was not an issue. Now, the issue before the Commission is, does the practice have a net public benefit?

It has been the experience in competition law cases in New Zealand that few have been able to meet the rigorous requirements of the public benefit test. What will be the implications of this change?

Firstly, it is possible that because public benefit is the substantive issue more effort will be channelled into thinking up public benefit arguments.

Secondly, most cases that will arise in the future will involve proposed practices. If they do not meet the public benefit test they will no doubt not be implemented. This is even more likely to be the case given the increased penalty limits enacted by the Commerce Amendment Act. With the threat of heavy penalties, companies are unlikely to be willing to institute a practice, wait for a competitor

to sue them, and hope they can prove that the practice does not substantially lessen competition. A further deterrent to the act and hope scenario is the fact that the decision whether a practice substantially lessens competition is so heavily dependent on the inferences the Court draws from the facts before it. It will be almost impossible in any case to advise clients how a Court is likely to decide a matter.

Thirdly, and most serious, is the problem illustrated by the F&P case: if that case came before the Commerce Commission for authorisation today, authorisation would not be granted because it could not meet the public benefit test. For the reasons given in the previous paragraph, the practice would be unlikely to be continued with. Yet, the EDC was found not to substantially lessen competition. That result - that practices that do not substantially lessen competition would be discouraged - seems to be inconsistent with the purpose of the Act, which is "to promote competition" (emphasis added). Instead of having the situation that the Act recognises other policies exist that, when a practice substantially lessens competition, outweigh competition as a policy; the Act now says, net public benefits always override competition as a policy in authorisation proceedings.

When the new section 3A inserted by the Commerce Amendment Act is taken into account the fact that the competition policy is subservient to net public benefit in authorisation proceedings perhaps results in less of a conflict with the purposes of the Act. That is because section 3A requires that in considering benefit to the public the Commission shall have regard to efficiencies that will, or will be likely, to result from the conduct; and the role of the Act is to promote competition as a means of achieving efficient allocation of resources.
However, the new section is not likely to result in more cases being able to meet the public benefit test, because

the Commission and the Courts have always considered efficiencies in the public benefit test.

12. DOES NEW ZEALAND NEED A SECTION LIKE SECTION 47 (AUSTRALIA)?

Reference has been made at various points throughout this paper to the specific section covering exclusive dealing in the Australian Trade Practices Act, section 47 (a copy of which is attached to this paper as Appendix 1). As mentioned on p 38 of this paper, the minority of the Commerce Commission in the F&P case suggested that the reason the Commerce Act did not include a separate section dealing with exclusive dealing was because of the progress that had been made in understanding the competitive effects of EDAs in the period between the enactment of the Trade Practices Act in 1974 and the Commerce Act in 1986. Instead of being considered to have anti-competitive effects, exclusive dealing is now considered to be a normal commercial practice unless it is shown to substantially lessen competition. The High Court also agreed with this. Hill and Jones have suggested that a general standard was adopted in respect of exclusive dealing because the US experience had shown that the adopting of a specific exclusive dealing provision added nothing to general standards imposed under the US equivalent of section 27.[127]

Sections 47(1) and (10)(a) of the Australian Trade Practices Act prohibit a corporation from engaging in the practice of exclusive dealing if the conduct "has the purpose, or has or is likely to have the effect, of substantially lessening competition". That is to the same effect as section 27 of the Commerce Act. However, section 27 has a wider ambit than section 47 - all forms of exclusive dealing, including third line forcing, are subject to the substantially lessening competition test. Under section 47(10) of the Trade Practices Act third line forcing is not subject to the substantially lessening competition test; it is illegal, but authorisable.

The Australian Trade Practices Act provides two means by which a corporation wanting to engage in exclusive dealing can avoid liability for suit: notification or authorisation. Where a notification has been lodged with the Trade Practices Commission under section 93 setting out the conduct or proposed conduct that may contravene section 47, the conduct is deemed not to substantially lessen competition. If the Commission thinks the corporation's conduct does substantially lessen competition it may conduct an inquiry and if the competition test is met, and the conduct does not result in a net public benefit, protection may be withdrawn (sections 93(3) and (4) and 93A). Third line forcing is not a notifiable practice.

The New Zealand authorisation sections (sections 58 and 61) have the same effect as the Australian authorisation sections (sections 88 and 90), but New Zealand has no equivalent to the notification procedure.

On 1 July 1988 the Australian and New Zealand Governments signed a Memorandum of Understanding on the Harmonisation of Business Law. Under that agreement the parties were required to -

> "... examine the scope for harmonisation of business laws and regulatory practices, including the removal of any impediments that are identified ..."

and identify areas appropriate for harmonisation, by 30 June 1990. In respect to exclusive dealing the Report to Governments by the Steering Committee of Officials of 30 June 1990 concluded:

> "8.20 Section 47 of the Australian Trade Practices Act contains a prohibition against exclusive dealing. There is no corresponding provision in the New Zealand Commerce Act. However, the Steering Committee considers that, except in respect to third line forcing, the New Zealand provision that prohibits agreements that substantially lessen competition (section 27), is similar in effect to the Australian provision that prohibits exclusive dealing.

Australian law allows corporations to obtain immunity for exclusive dealing conduct (other than third line forcing), by lodging a notification with the Australian Trade Practices Commission that it is engaging in such conduct. Notification is subject to the review by the Australian Trade Practices Commission using authorisation criteria.

"8.21 In Australia third line forcing is prohibited per se whereas in New Zealand it is subject to the substantially lessening competition test. The Steering Committee considers that the per se nature of the Australian provision should be reviewed."

The problem with relying on section 27 of the Commerce Act in its present form to cover exclusive dealing stems from the way provision has been drafted. Under section 27 the cause of action is entering into or giving effect to a contract that substantially lessens competition. A disgruntled dealer, therefore, who wanted to challenge the legality of an EDA he or she was a party to, would find themself without an action. If the EDA was proved to substantially lessen competition the contract would be treated as void being contrary to public policy. Section 89(5) of the Commerce Act confirms that the Illegal Contracts Act 1970 does not apply to contracts entered into in contravention of the Commerce Act. At common law parties to a void contract cannot take any action to enforce it.[128]

By contrast, the cause of action under section 47 of the Australian Trade Practices Act is engaging in the practice of exclusive dealing, so the disgruntled dealer would have no trouble bringing an action alleging the practice contravened the Act.

<u>Summary</u>

Current economic thinking is that exclusive dealing is as likely to have pro-competitive/pro-efficient effects as it is to have anti-competitive effects, so it should be treated as a normal commercial activity unless shown to substantially lessen competition. On that basis a specific section to cover exclusive dealing is not necessary.

However,in the New Zealand context a separate section framed in terms similar to section 47 of the Australian Trade Practices Act is arguably required to provide a disgruntled party to the exclusive dealing contract with an action. While there are obviously ways the problem with section 27 in its present form could be overcome, eg, by the dealer procuring a competitor of the supplier to bring an action, it seems unsatisfactory that it should be necessary to go those lengths.

13. CONCLUSIONS

After the F&P case the law relating to exclusive dealing under section 27 of the Commerce Act 1986 is reasonably clear. Exclusive dealing is to be considered a normal commercial practice unless it substantially lessens competition. The High Court in the F&P case used US case law and economic thinking in particular to help it to establish a framework that is appropriate for the analysis of exclusive dealing. Exclusive dealing has different competitive effects from other vertical restraints, so the appropriate economic analysis requires that the reduction of interbrand competition be weighed against the stimulation of interbrand competition.

The competition test the High Court in F&P set down was: exclusive dealing, in conjunction with barriers to entry, absence of actual or potential competition and market power may lead to a substantial lessening of competition. It is likely that exclusive dealing plus barriers to entry must create a substantial barrier to entry. Competitors must be able to achieve successful or viable entry into the market.

Since actual evidence of a substantial lessening of competition is unlikely to be available, economic evidence is a useful predictor of the impact market structure and other factors present in the market have on competition. Courts will use that evidence in the same way they would any other expert evidence, to inform their analysis.

In the end, however, the Judge has to make a value judgment as to whether or not he or she thinks the practice is anti-competitive. The result will very much depend on the inferences the Judge takes from the facts before him.

Two further points are worth noting. Firstly, since the amendments inserted into the Act by the Commerce

Amendment Act 1990 the substantive issue in an authorisation application before the Commerce Commission is whether the practice results in net public benefits. This may result in practices, although they do not substantially lessen competition, being refused authorisation because they do not produce net public benefits.

Secondly, because of the way section 27 of the Act has been drafted, a disgruntled dealer who is a party to an EDA, and who wants to challenge the legality of the instrument, will not have an action. To overcome this problem it is recommended that New Zealand should consider adopting a section covering exclusive dealing similar to section 47 of the Australian Trade Practices Act 1974.

With the High Court judgment in the F&P case, exclusive dealing has been approved by the Court as a legitimate competitive tool available to all the competitors in the whitegoods market should they so desire to use it.

FOOTNOTES

1. Unreported, CL 41/89 & 42/89, 27 April 1990, Barker J and G R Blunt, Auckland.
2. Bond & Bond Ltd v Fisher & Paykel Ltd [1986] 6 NZAR 278 (HC).
3. Ibid, 288.
4. Decision No. 225, 4 April 1989.
5. Decision No. 225A, 31 March 1989.
6. Fisher & Paykel Ltd v Commerce Commission [1989] 2NZLR 635.
7. Above n1.
8. Department of Trade & Industry, Review of the Commerce Act 1986, August 1988.
9. [1988] 2 NZLR 352, 358.
10. TPC v Ansett Transport Industries (Operations) Pty Ltd (1978) 20 ALR 31.
11. News Ltd/Independent Newspapers Ltd (1986) 6 NZAR 47, 50.
12. Idem.
13. Ibid, 51-52.
14. [1960] NZLR 1121.
15. (1963) 2 All ER 807; (1963-1964) LR 4 RP 116.
16. Ibid, 154.
17. Ibid, 155.
18. (1979) ATPR ¶41-126.
19. [1987] 2 NZLR 647.
20. (1982) ATPR ¶40-315.
21. (1989) 2 NZBLC 103,564, 103,567.
22. (1986) ATPR ¶40-736.
23. (1989) 2 NZBLC 103,741.
24. Ibid, 103,294.
25. Above n1, 20.
26. Above n4, 9.
27. Decision No. 205, 22 July 1987.
28. Above n1, 17.
29. (1987) 1 NZBLC ¶99-501.
30. TPC 167A.
31. Above n27, 11.
32. Above n8, 57.
33. Above n1, 86.
34. (1989) Vol 1, p 1548, 3.210.
35. (1976) ATPR ¶40-012, 17246.
36. Above n1, 72-74.
37. (1979) ATPR ¶40-138.

38. Above n1, 21.

39. Above n36.

40. Above n20.

41. Above n4, 13.

42. Above n1, 18.

43. Idem.

44. Idem.

45. Above n1, 67.

46. 337 US 293 (1949).

47. Above n1, 19.

48. 365 US 320 (1960).

49. Above n46.

50. Above n48, 327-329.

51. Ryko Manufacturing Co v Eden Services, 823 F. 2d 1215, 1233.

52. Taggart v Rutledge, 657 F. Supp. 1420, 1444-1445.

53. 43 US 36 (1977).

54. 388 US 365 (1967).

55. Because of the difficulty of analysing large quantities of economic data some practices that have a pernicious effect on competition and lack any redeeming virtue are presumed to be unreasonable and illegal: per Black J in US v Northern Pacific Railway 356 US 1 (1958).

56. 246 US 231 (1918).

57. "Exclusionary practices and the anti-trust laws", 41 U Chi L Rev 506, 527-532 (1974).

58. [1979-1983 Transfer Binder] Trade Reg Rep (CCH) ¶21,934 (FTC 1982); 100 FTC 68 (1982).

59. 60 Cornell L Rev 101, 110 (1983).

60. (1922) 258 US 346.

61. [1985] 2 NZLR 338, 341-2.

62. Above n48.

63. Above n20.

64. Above n1, 76.

65. H D Melton, "Vertical restrictions and the distribution process: A practical review of economics and the rule of reason after Sylvania", 38 Louisiana L Rev 1022, 1054 (1978).

66. Above n1, 79.

67. (1977) 32 FLR 65.

68. (1982) ATPR ¶43-980.

69. Above n1, 94.

70. Above n68, 43,990.

71. Above n5.

72. Ibid, 3.

73. Idem.

74. Ibid, 32.

75. Ibid, 3.

76. Above n59, 114.

77. Ibid, 116.

78. M MacCrimmon and A Sadanand, "Models of market behaviour and competition law: Exclusive dealing", Osgoode Hall LJ,Vol 27 No. 4 (1989) 709, 737.

79. Idem.

80. "Exclusive dealing", 25 Jnl of Law & Econ, April 1982, 1, 6-7.

81. Above n59, 128.

82. Above n80, 5.

83. Above n81.

84. Above n57.

85. "Vertical arrangements and anti-trust analysis", NY Uni L Rev, 1153, 1161 (1987).

86. Am Econ Rev, June 1985, 539.

87. Ibid, 542.

88. Above n78, 718.

89. Above n1, 24.

90. Above n35.

91. Above n36.

92. Above n4.

93. Above n1, 23.

94. M Tollemache, *"Barriers to Entry" and Competition Law: Philosophical and Policy Links*, Commerce Commission Occ Paper No. 3, Nov 1988, 19.

95. "A welfare analysis of barriers to entry", 11 Bell Journal of Economics, 399-420, 400 (1980).

96. Above n1,48.

97. Above n4 and n5.

98. Above n1, 93.

99. "Fixed costs, sunk costs, entry barriers and sustainability of monopoly", 96 Quarterly Journal of Economics, 405, 406 (1981).

100. Above n94, 23.

101. Above n99.

102. Above n100.

103. Idem.

104. Ibid, 28.

105. Above n1, 23.

106. Above n1, 23-4.

107. Above n1, 24.

108. Above n35.

109. Above n5, 35.

110. Idem.

111. Above n1, 58.

112. (1989) ATPR ¶40-000, 50,009.

113. Above n1, 60.

114. Above n1, 92.

115. Above n1, 21.

116. Ibid, 22.

117. Above n5, 8.

118. From a conversation with a member of the Commission's legal department.

119. Above n1, 57.

120. Above n5, 77.

121. Ibid, 65.

122. Above n68, 43,990.

123. Above n1, 92.

124. Decision No. 206, 29 July 1987.

125. See in particular J G Collinge, "Determining public interest under the Commerce Act: A review to date" in _International Perspectives on the Application of Competition and Consumer Laws_, Commerce Commission Occ Paper No. 1 (1987); Y van Roy, _Guidebook to New Zealand Competition Laws_ (1987, CCH (NZ)), pp 190-195.

126. Above n1, 95.

127. "New rules on competition: The background and implications of the Commerce Act 1986", NZLJ June 1986: 190-6, 192.

128. Cheshire & Fifoot, _Law of Contract_ (1984, 6th NZ ed, Butterworths), 250.

[47] Exclusive dealing

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

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

(8) 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.

(9) 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.

(10) 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-sections (2), (3), (4) or (5) or paragraphs (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.

(11) 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.

(12) 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.

(13) 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-sections (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-sections (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.

BIBLIOGRAPHY

BOOKS

Cheshire & Fifoot, Law of Contract (1984, 6th NZ ed, Butterworths).

Department of Trade & Industry, Review of the Commerce Act 1986, August 1988.

Tollemache, M, "Barriers to Entry" and Competition Law: Philosophical and Policy Links, Commerce Commission, Occasional Paper No. 3, November 1988.

Van Roy, Y, Guidebook to New Zealand Competition Laws (1987, CCH (NZ)).

ARTICLES

Baumol and Willig, "Fixed costs, sunk costs, entry barriers and sustainability of monopoly", 96 Quarterly Journal of Economices, 405 (1981).

Collinge, JG, "Determining public interest under the Commerce Act: A review to date" in International Perspectives on the Application of Competition and Consumer Laws, Commerce Commission Occasional Paper No. 1 (1987).

Comanor, WS, "Vertical arrangements and anti-trust analysis", NY Uni L Rev, 1153 (1987).

Comanor and Frech, "The competitive effects of vertical agreements?", Am Econ Rev, June 1985, 539.

Hill and Jones, "New rules on competition: The background and implications of the Commerce Act 1986", NZLJ June 1986, 190-6.

MacCrimmon and Sadanand, "Models of market behaviour and competition law: Exclusive dealing", Osgoode Hall LJ, Vol 27 No. 4 (1989), 709.

Marvel, HP, "Exclusive dealing", 25 Jnl of Law and Econ, April 1982, 1.

Melton, HD, "Vertical restrictions and the distribution process: A practical review of economics and the rule of reason after Sylvania", 38 Louisiana L Rev, 1022 (1978).

Posner, "Exclusionary practices and the anti-trust laws", 41 U Chi L Rev 506 (1974).

Steur, RM "Exclusive dealing in distribution", 60 Cornell L Rev 101 (1983).

Weizsacker, "A welfare analysis of barriers to entry", 11 Bell Journal of Economics, 399-420 (1980).

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