New Zealand Antitrust: Some Reflections on the First Twenty-Five Years

Mark N. Berry
Chairman
New Zealand Commerce Commission

I. INTRODUCTION

New Zealand’s antitrust law turned twenty-five in 2011. The Commerce Act,\(^1\) enacted in 1986, provides New Zealand’s first coherent antitrust regime. Earlier legislative attempts to regulate competition, dating back to 1908, had focussed on a mix of goals and considerations. The imposition of price controls, and prevention of profiteering, were central themes through many of the decades up until the 1970s. From this point, up to 1986, a limited range of trade practices were assessed against a mix of social, economic, competition and reasonableness factors.\(^2\) Such rules had no particular antitrust pedigree.

The Commerce Act was essentially based upon the Australian Trade Practices Act of 1974 (which was renamed the Competition and Consumer Act in 2010).\(^3\) Australia had adopted antitrust legislation, influenced to a significant degree by the Sherman and Clayton Acts, twelve years before the enactment of the Commerce Act. Therefore, there was some knowledge and experience of what we were about to adopt back in 1986. But, the appropriateness of adopting such an antitrust law model for a small and remote economy, such as New Zealand, was still largely unknown.

The Commerce Act contains a reasonably high level of prescription, running into some 118 sections. However, there are only a handful of key provisions under the

\(^1\) Commerce Act, 1986 (N.Z.). This Article is based upon a guest lecture presented by Dr Berry at the Loyola University Chicago School of Law on 2 April 2012. The views expressed in this Article are entirely those of the author.


\(^3\) Competition and Consumer Act, 2010 (Austl.).
Act governing restrictive practices and mergers. Most of these provisions, like the central provisions of the Sherman and Clayton Acts, contain briefly stated prohibitions of broad application.

The history of antitrust in New Zealand reflects that, in application, there have been four key provisions under the Commerce Act over the first twenty-five years. These are section 27 (contracts, arrangements or understandings which substantially lessen competition), section 30 (price fixing), section 36 (monopolization), and section 47 (mergers).

This Article provides an overview, and selective remarks, on the first twenty-five years of antitrust in New Zealand. The scheme of this Article is as follows:

1. This Article begins with a brief overview of the policy challenges which have faced New Zealand in the framing of an antitrust regime. An understanding of New Zealand antitrust requires an appreciation of the small nature of its economy, and its remoteness from its major trading partners.4

2. The next part of the Article discusses the application of the catch-all prohibition against contracts, arrangements or understandings which may substantially lessen competition under section 27. Regrettably, at least for the purposes of this review, the traffic of section 27 cases in the first twenty-five years has not been significant. Nonetheless, two case studies on exclusive dealing and long-term contracts in the energy sector serve to demonstrate the workings of section 27.5

3. A consideration of section 27 also involves the related issue of cartel conduct. Cartel conduct is deemed by section 30 to be unlawful under section 27. There has been considerable activity under section 30. The application of a per se rule under section 30 has resulted in the application of predictable case-law principles. However, there is currently some debate around the extent to which conduct by cartels outside New Zealand may escape liability,

4 See infra part II.
5 See infra part III.
even though they affect markets in New Zealand, and this is the primary topic for discussion in this section.\textsuperscript{6}

4. The final key restrictive trade practices matter discussed is monopolization. There has been significant monopoly litigation over the first twenty-five years of the Commerce Act. This Article outlines the case-law developments to date, and highlights the serious problems now facing the application of the monopoly provision, section 36.\textsuperscript{7} \textsuperscript{8}

5. Not surprisingly, a significant jurisprudence has emerged on the question of mergers. Levels of concentration which may be surprisingly high to some outside observers have been permitted in New Zealand. For the most part, merger analysis under the Commerce Act has been conventional by international standards. However, there is one important qualification to this, and this relates to forward-looking counterfactual analysis. New Zealand stands apart in the adoption of multiple counterfactual analysis. This approach is potentially flawed. Given the novelty of this issue, this section of the Article pays particular attention to this subject.\textsuperscript{9}

\textsuperscript{6} See \textit{infra} part IIID.

\textsuperscript{7} See \textit{infra} part IV.

\textsuperscript{8} For completeness, the existence of two other restrictive trade practices provisions are noted in passing here. Section 37 prohibits the practice of resale price maintenance, and section 29 prohibits what are known as “exclusionary provisions”. The resale price maintenance and exclusionary provisions have had insignificant application under the first twenty-five years of the Commerce Act. The issue of resale price maintenance has attracted limited attention to date, and developments in this area do not justify any particular attention in the context of this Article. For an outline of resale price maintenance case studies, see Matt Sumpter, \textit{NEW ZEALAND COMPETITION LAW AND POLICY}, 2010, 230-35. Section 29 (pertaining to exclusionary provisions) as currently formulated, is essentially no different in application to section 27. Section 29 comes in two parts, namely a prohibition and a defense. The section prohibits contracts, arrangements or understandings between competitors which have the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, any person who is in competition with the boycotting parties. However, there is a defense to the prohibition if the exclusionary provision does not have the purpose, effect or likely effect of substantially lessening competition in a market (i.e. the section 27 test). Accordingly, this provision is of little practical application today. However, one instance where the exclusionary provisions may have application is the case of an application for an authorisation of such conduct. In this setting, the presence of an exclusionary provision can form the basis for the establishment of competitive detriment, thus conferring jurisdiction upon the Commerce Commission to grant authorisation. See \textit{Fonterra Co-operative Group Ltd.} [2012] N.Z.C.C. 7, [112] – [116].

\textsuperscript{9} See \textit{infra} part V.
The next section describes the workings of New Zealand’s authorisation test, or efficiencies defense. A case study traces the methodology followed in a recent merger case. Regrettably, the redaction of confidential material makes it difficult to do justice to this case study. Nonetheless, the outline in this section is hopefully informative of the New Zealand approach to such cases.\footnote{See infra part VI.}

A final section provides some concluding observations.

II. OVERVIEW OF THE COMMERCE ACT

A. Background

New Zealand is a case study of a small economy, which is remote from its major trading partners. New Zealand has a population of a little over four million. This smallness means that many markets are highly concentrated and this in significant part sets the scene for the state of competition which may be expected in domestic markets. Coupled with this are the impacts which necessarily flow from New Zealand’s remoteness. While low government trade barriers promote competition from imports, New Zealand’s remoteness creates natural barriers to trade by increasing transportation costs. It also deters reliance upon imports where there may be concerns about timeliness and reliability of supplies.\footnote{For a recent case study, see Pact Group Pty. Ltd. and Viscount Plastics (N.Z.) Ltd [2012] N.Z.C.C. 11, [191], [254].} This is not to suggest that import competition does not have a significant influence upon competition in New Zealand markets. In many cases the prices for goods in concentrated markets are constrained by actual or potential import competition. However, domestic firms can in some cases look to earn rents by charging up to import-parity price. Of course, this concern dissipates where import-parity pricing is not the key competitive constraint.

In her leading work on the subject of competition law in small market economies, Professor Michal Gal suggests that there are three main economic characteristics of
small economies: high market concentration levels, high entry barriers and inefficient levels of production.\textsuperscript{12} All of these characteristics are observable in New Zealand. New Zealand manufacturing markets are more concentrated than those of most other countries.\textsuperscript{13} Smallness of an economy can also affect the height of barriers to new entry, although there are dangers that this concern may be over-stated. There is the issue of scale economies. In small economies a significant fraction of output may be manufactured in sub-optimal volumes by sub-optimal plants.\textsuperscript{14} A recent study concluded that New Zealand industry, relative to five other countries in the relevant sample, had the lowest revenue to capital employed ratio and significant diseconomies of scale.\textsuperscript{15} These market circumstances are not as a rule conducive to new entry. It has also been suggested that other entry barriers facing small economies include various factors of production, such as the availability of skilled labour and access to a diversified range of inputs for production.\textsuperscript{16} It is, however, not altogether clear these should properly be regarded as entry barriers because they are factors of production experienced by all parties.\textsuperscript{17} It should also be appreciated that, notwithstanding the smallness of markets in New Zealand, there are many instances of new entry (actual or potential).

These background economic circumstances set the scene and challenges for competition policy in New Zealand. Small concentrated markets with significant barriers to entry are unlikely to exhibit the competitive dynamics of markets not reflecting these characteristics. The policy response to these circumstances is not,
however, straight forward. There exists a basic tension between productive efficiency and competitive conditions. In many markets in New Zealand demand means that only a few firms can operate at productively efficient levels of manufacture. New entry may often create diseconomies of scale, unless domestic firms are also able to export their output.

While recognisable benefits arise from having industry operating at productively efficient levels of output, having a small number of firms in a market can result in the creation and realisation of market power. This can also dampen dynamic efficiency, particularly where the threat of import competition is not real.

These problems faced New Zealand’s legislators at the time the Commerce Act was enacted in 1986. There was no real debate about whether we should adopt an antitrust regime which conformed to international best practice. That was a given. The problem was to assess how competition laws should be fashioned for this small market economy. There was a desire to develop an economy characterised by productively efficient firms. But the pursuit of this goal also brought with it the prospect of markets characterised by a few large firms (by New Zealand standards), to which market power risks may attach. There were, therefore, competing challenges which needed to be addressed at the same time under the one law.

B. Goals

The first, and perhaps most problematic, issue in the context of this policy design was the question of the goals of competition laws. While it is generally acknowledged that competition laws strive to promote competition, questions remain about why the competitive process is valued. The history of competition laws, particularly in the U.S., reflects fluctuating views as to appropriate goals for antitrust. The modern-day debate is whether the goal of economic efficiency should prevail, or whether greater weight should attach to concerns about wealth transfers resulting from the exercise of market power.

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This debate is of particular relevance to small market economies. Indeed, the choice of goal in such markets is likely to impact upon market structure and performance. Policy trade-offs need to be made. Granting economic efficiency primacy over other goals focuses upon ensuring that the mix of goods and services most preferred by consumers is produced at minimum cost. The pursuit of such a goal, all going well, should result in competition for the long-term benefit of consumers as firms strive to become productively and dynamically more efficient. The pursuit of an efficiency goal will also enhance the international competitiveness of domestic firms where this overcomes the issue of scale economies. This was an important part of the background fabric to the Commerce Act. It was feared that alternative goals in a small market economy which focused on short-term distributional goals, or involved preserving inefficient firms, would come at a cost.

When first enacted, the Commerce Act did not make the goal of the Act abundantly clear. The Long Title to the Act was as follows: “An Act to promote competition in markets within New Zealand”. Nonetheless, early judicial consideration of this Long Title tended towards adopting an efficiencies goal for the Act. In *Tru Tone Ltd. v. Festival Records Retail Marketing Ltd.* the Court of Appeal stated that the Act was “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.” More recently, there has been legislative clarification of the issue through the introduction of the current purpose statement under the 2001 amendments to the Commerce Act. Section 1A of the Act now provides that: “the purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.”

While comments around this new purpose statement in the course of legislative deliberations were ambiguous, the reference to long-term benefits was seen to have a strong connection with efficiency goals. The Commerce Committee noted that: “An efficiency analysis considers the net present value impacts of any arrangement...”

\[20\] Commerce Amendment Act 2001, sec. 4.
on productive, allocative and dynamic efficiency. This would be consistent with long-term consumer welfare.”

Combined with this purpose statement is an efficiencies defense under the Commerce Act which applies to both restrictive trade practices and merger authorisations in cases where there are market power findings leading to the identification of detriments. In such cases, these practices and mergers can be authorised on the grounds that there are public benefits which outweigh such detriments. On this question, the legislation directs under section 3A that:

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.

Accordingly, a goal of economic efficiency prevails, and this has set the scene for the application of the Commerce Act. This goal has affected case-law principles and their application, as will be apparent from the following discussion on how the Commerce Act has been applied in the first twenty-five years.

III. CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS WHICH SUBSTANTIALLY LESSEN COMPETITION

A. Central Provisions and Basic Concepts

The central provision of the restrictive trade practices part of the Act is section 27. This section provides that no person may enter into or give effect to a provision of a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in a market. This section of the Article begins with an outline of general principles under section 27, followed by two case studies relating to exclusive dealing and long-term contracts.

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21 Commerce Committee (Report (296-2)), 7 (2001).
22 See infra part VI for further discussion of this defense.
23 This, and other key sections of the Act, are reproduced in the Appendix to this Article.
The concepts of “market” and “competition” are further defined in the Act. Section 3(1A) provides that the term “market is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common-sense, are substitutable for them.” Standard market definition principles have applied from the outset. A leading decision of the Australian Trade Practices Tribunal which pre-dates the Commerce Act, namely *Queensland Co-operative Milling Assn. Ltd.*, served as a case providing first principles. It discussed the concept of market in the following terms:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is, of course, a monopolistic market). Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm’s product to another, or from this geographic source of supply to another.

As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives. It is the possibilities of such substitution which sets the limits upon a firm’s ability to ‘give less and charge more.’

Notwithstanding the adoption of these standard principles, the legislative requirement that markets be “in New Zealand” means that in some cases geographic market boundaries will be artificially narrow from a proper economic perspective.

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26 Some complexity has arisen in cases involving markets which have components both within and outside of New Zealand. A case on point is *Commerce Commission v. Air New Zealand Ltd.*, High Court, Auckland, CIV 2008-404-008352, 24 August 2011. This case involved price fixing in relation to inbound and outbound air cargo services to New Zealand. It was argued that there was a clear geographic cut off between the relevant markets at the place of origin (where collusion had occurred) and New Zealand points of destination. The Court concluded that a
However, to the extent that this is a problem, it is normally overcome under entry barrier analysis.

The concept of “competition” is defined under section 3(1) to mean “workable or effective competition”. This legislative formulation of the concept of competition can be traced to U.S. antitrust law origins. Again, first principles were enunciated here in the pre-Commerce Act case, *Queensland Co-operative Milling Assn. Ltd.*, which stated:\(^{27}\)

As was said by the US Attorney-General’s National Committee to Study the Antitrust Laws in its Report of 1955 (at p 320):

‘The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sectors, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements…’

Or again, as is often said in US antitrust cases, the antitrust of competition is undue market power, in the sense of the power to raise price and exclude entry.

Various principles of general application have emerged in relation to ascertaining whether competition has been substantially lessened under section 27. Three principles, in particular, are noteworthy.

First, the inquiry is centred upon counterfactual analysis. As Justice Smithers said in *Dandy Power Equipment Pty. Ltd. v. Mercury Marine Pty. Ltd.* “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” and there is a need to “ask oneself how and to what extent there would have been competition

\(^{27}\) Supra note 24, 187-88. This statement of principle has also been routinely endorsed in New Zealand. See, e.g., *Fisher & Paykel Ltd. v. Commerce Commission* [1990] 2 N.Z.L.R. 731, 759; *Tru Tone*, supra note 19, 363.
therein but for the conduct.” In other words, a comparative assessment is required into the state of competition both with and without the practice in question.

Second, section 27 is concerned with a “net” effect on competition, with both pro-competitive and anti-competitive effects being taken into account. An allied point here is that it is open to the Court to have regard to any efficiencies which are pro-competitive.

Third, it is clear from the New Zealand jurisprudence that section 27 is concerned with the level of rivalrous conduct, rather than the fate of individual competitors.

B. Exclusive Dealing

Exclusive dealing is a practice which lends itself well to a case study under the substantial lessening of competition test. There has been one test case on this subject, namely Fisher & Paykel. This was one of the first cases to be determined under the Commerce Act of 1986.

Fisher & Paykel had for many years been the leading manufacturer and wholesaler of whiteware (namely refrigerators, washing machines and the like). It was Fisher & Paykel’s practice to enter into exclusive dealing arrangements with its retailers. Such exclusive distribution arrangements were terminable by either party on ninety days’ notice.

Prior to 1987, Fisher & Paykel had enjoyed a position protected by import licensing and tariffs. However, beginning in 1987, these barriers to import competition were progressively removed. Notwithstanding the emergence of import competition at the time of hearing in 1989, Fisher & Paykel still remained by far the largest player in the market. It held approximately an 80% market share and held

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29 Fisher & Paykel Ltd. v. Commerce Commission, supra note 27, 740; ANZCO, id., 405.
32 Supra note 27.
exclusive dealership arrangements with around 450 of the total 800 to 850 outlets retailing whiteware in New Zealand.

This case involved an appeal from a decision of the Commerce Commission (by a majority) that this exclusive dealing arrangement should not be authorised. The High Court reversed this finding and found that the Fisher & Paykel exclusive dealing arrangements did not contravene section 27. Regrettably, the High Court’s analytical framework is not altogether clear, given that its analysis is confined solely to a range of concluding propositions.

The Court first found that Fisher & Paykel had a significant degree of market power by virtue of factors including its historic monopoly supply position and high market share. However, this conclusion is internally inconsistent because the Court then observed, in its next breath, that Fisher & Paykel was nevertheless constrained by its competitors with the removal of artificial barriers to entry, particularly for Australian imports.

Most significantly the Court concluded that in the absence of artificial barriers to entry, exclusive dealing arrangements can have positive pro-competitive effects provided that a significant component, in this case access to retail space, had not been foreclosed. On the facts no significant foreclosure of retail space was found to exist as a result of the Fisher & Paykel exclusive dealing arrangement.

Apart from this emphasis on foreclosure, the Court also attached some weight in this case to the fact that the exclusive dealing arrangement could be terminated upon ninety days’ notice. It is not clear whether this point served to indicate that only short term exclusive dealing arrangements should be regarded to be permissible. There was no elaboration on this point. A preferable view in analysing the significance of this point is that it was simply a further factor to be taken into account in justifying the conclusion that section 27 was not contravened in this case. Presumably the ability of retailers to switch at relatively short notice supported the

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33 Id., 767.
34 Id.
35 Id.
conclusion that the Fisher & Paykel exclusive dealing arrangements did not foreclose access to retail space for new entrant competitors who proposed to compete against Fisher & Paykel in this market. Clearly, it is arguable that the case did not turn on this point alone. So long as a new entrant was not foreclosed from access to adequate retail space, it appears that the view of the Court in *Fisher and Paykel* was that section 27 was not contravened.

Interestingly, the Court concluded by noting that it had derived substantial assistance from U.S. legal thinking in reaching its conclusions, and it commented in passing that if its views earned it “the appellation of ‘Chicago School’, then so be it.”

**C. Long-term Contracting: A Case Study**

One sector in which there has been some Commerce Act litigation in the first twenty-five years of the operation of the Act is the energy sector. The most significant of these cases is *Shell (Petroleum Mining) Co. Ltd. v. Kapuni Gas Contractors Ltd.* This case related to the long term Kapuni gas contract which was entered into in 1967, some nineteen years prior to the commencement of the Commerce Act. Nonetheless, the legality of the contract under section 27 was open to assessment in the 1990s because section 2(3) of the Act provides that any provision of a contract may be rendered unenforceable if in contravention of section 27, even though at an earlier time the relevant anticompetitive effect may not have been present. Further complicating the landscape was the impact of another provision of the Commerce Act, section 3(5), which provides that an assessment of section 27 liability takes into account not only the contract asserted to be unlawful, but also any other contractual arrangements in combination with the contract under dispute. A problem for the defendants was that their 1967 gas entitlements to Kapuni field gas were supplemented in 1973 by entitlements to gas from the Maui field.

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36 *Id.* Professors Benjamin Klein and William Baxter appeared as experts on behalf of Fisher & Paykel in this case, and it is in this context that the Court made these comparative observations to U.S. law.

37 *Supra* note 30.
New Zealand has few natural gas fields. At the time of trial, Kapuni and Maui were the only two significant gas fields in production. Kapuni was owned by Shell and Todd, although they were required to sell all Kapuni gas to the Crown. The Crown’s rights to Kapuni gas had been assigned to Kapuni Gas Contracts Ltd. (“K.G.C.L.”), being a wholly owned subsidiary of Fletcher Challenge Ltd. (which in turn was a 33% shareholder of Natural Gas Corporation (“N.G.C.”)). K.G.C.L. on-sold this gas to petrochemical companies and to N.G.C. Gas from the Maui field was committed to N.G.C., Methanex (a petrochemical company) and Contact (an electricity generator).

Shell and Todd, the owners of the Kapuni field, argued that section 27 rendered unenforceable the long-term contract under which they had agreed to sell all Kapuni gas to the Crown. Shell and Todd argued that the combined effect of the Kapuni and Maui contracts was to commit all gas to N.G.C., other than gas used for electricity generation and petrochemical production. Plainly, as a result of these contractual arrangements, N.G.C. held substantial market power over the supply of gas to the wholesale and reticulated gas markets. One of the plaintiffs, Todd, provided evidence of potential customers it could supply, in competition with N.G.C., if it was allowed access to Kapuni gas. These buyers included companies in other significant New Zealand sectors, such as the dairy sector.\textsuperscript{38}

Market definition assumed some significance in this case, as the defendant argued that there was a single market in New Zealand for all gas. The Court concluded that the relevant markets in this case were those for the wholesale and retail sale of natural gas.\textsuperscript{39} In so doing, the Court regarded the argument that other forms of gas (such as land-fill gas, coal-gas, port-a-gas and liquefied natural gas) and other energy sources (such as light fuel oil, coal and electricity) were not sufficiently close substitutes because such alternative forms of energy were in the medium-to-long run either priced substantially above the price for natural gas, or available only in small volumes. This finding resulted inevitably in a conclusion of liability because it resulted in the identification of N.G.C. as being dominant in the wholesale market, and as having a substantial degree of market power in the retail market.

\textsuperscript{38} Id., 516-17.  
\textsuperscript{39} Id., 527.
The Court’s analysis of the long-term contract here makes interesting reading, because it involves a consideration of competing concerns regarding on the one hand foreclosure of competition under a contract which had run for 29 years already, and could run for another 20 years (depending on the life of the Kapuni field), and on the other hand the efficiency and pro-competition effects that long-term contracts may have in incentivising high risk and high cost exploration and production of natural gas.\(^\text{40}\)

On this issue, the Court first noted a tension which exists here under a statute which both prohibits provisions of contracts, arrangements or understandings which substantially lessen competition and permits such matters under an authorisation regime which is based upon efficiencies defense considerations. One view is that the efficiencies defense is available only to parties who have the foresight to seek prior authorisation, and that the scheme of the Act otherwise prohibits defendants from raising such issues in defense of breaches of section 27 where no prior authorisation has been obtained. However, the Court recorded here that efficiencies were also relevant to the assessment of section 27, absent authorisation. As the Court noted, “there is now a recognisable trend for efficiencies to be considered in terms of their pro-competition effect.”\(^\text{41}\)

The Court’s ultimate analysis of this efficiency and section 27 liability question is something of a hybrid assessment. Authorisation-type analysis infects the way that the Court analyses the section 27 issue. The Court noted that had there been an authorisation application here, it would have been likely that this would have been granted for a fixed period long enough to allow recovery of the capital investment, a return on that investment and to maintain an acceptable level of exploration. On this basis the Court suggested that the Kapuni gas contract may have been permitted to run until either 1991 or 1996. However, this litigation fell outside of this time dimension and the Court progressed to the inevitable conclusion that exploration and

\(^{40}\) *Id.*, 528. For further discussion of these themes, see A.I. Tonking, *Long-term Contracts: When are they Anti-competitive?* 6 COMPETITION & CONSUMER LAW JOURNAL 13, 23-27 (1998).

\(^{41}\) *Id.* This view was in part based upon a review of U.S. case-law trends. *Id.*, 528-29.
efficiency considerations were not sufficient to overcome the foreclosure of competition which arose from N.G.C.'s control over output from the two fields.\textsuperscript{42}

In granting relief in this case, the Court endeavoured to find a solution which would be inducive of competition. It decided that the remaining reserves of the Kapuni gas field should be divided equally between the plaintiffs and defendants. The Court was able to impose this remedy because section 89(2)(a) of the Commerce Act entitles the Court to vary contracts, so long as such variation is consistent with the Act. The Court was persuaded that this outcome would provide a competitive outcome while still maintaining a reasonable balance between the parties’ economic interests.\textsuperscript{43}

\textbf{D. Cartels}

The prohibition against cartel conduct is, in essence, a subset of section 27. Section 30 provides that price fixing between competitors is a deemed contravention of section 27, with no requirement of proof of competitive harm. Price fixing between competitors is deemed to be unlawful under section 30.\textsuperscript{44} Therefore, there has been no per se/rule of reason debate on this subject under New Zealand law. Significantly, price fixing does not constitute a criminal offense under New Zealand law, however, it appears likely that this position will soon change.\textsuperscript{45}

Section 30 of the Commerce Act has had significant application over the first twenty-five years of New Zealand antitrust. There have been some seventeen sets of completed judgments, over a wide range of markets. The offense was somewhat trivialised in the earliest case, \textit{Commerce Commission v. Otago and Southland Vegetable and Produce Growers Assn.},\textsuperscript{46} where only a $5 penalty was imposed. Penalty trends have been upwards, particularly in recent times. The current high-

\begin{itemize}
\item \textsuperscript{42} Id. 532.
\item \textsuperscript{43} Id. 536.
\item \textsuperscript{44} There are provisions which exempt the application of this per se rule. These exemptions include joint venture pricing (section 31), price recommendations to not less than 50 persons (section 32) and joint buying and promotion arrangements (section 33).
\item \textsuperscript{46} (1990) 4 T.C.L.R. 14.
\end{itemize}
water mark case for penalties against an individual defendant is *Commerce Commission v. Qantas Airways Ltd.* 47 where a penalty of $6.5 million was imposed.

The reason for this traffic of cartel cases in New Zealand is no doubt the per se nature of the offense. The plain wording of section 30 has drawn the New Zealand courts to conclude that the mere establishment of the elements of section 30 leads to an irrefutable presumption that the practice is deemed to have the purpose, effect or likely effect of substantially lessening competition. 48 As is always the case, such an approach to rule-making is arbitrary, but as the Supreme Court observed in *U.S. v. Container Corp. of America*, such rules “are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result.” 49

The key elements of section 30, whether there is a contract, arrangement or understanding which may substantially lower competition through the “fixing, controlling or maintaining” of prices has been subject largely, and predictably, to dictionary definition meanings. 50 Accordingly, most cases proceed on the basis of black letter law assessments as to whether there exists a requisite contractual, or other understanding or arrangement 51 which may have the purpose, 52 effect or likely effect of substantially lessening competition, through the fixing, controlling or maintaining of prices for goods or services.

To the extent that there is a live issue regarding the interpretation of section 30, it pertains to the meaning of the requirement that the conspirators be “in competition with each other”. This issue came to a head in the recent decision of *Commerce

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47 High Court, Auckland, CIV 2008-404-8366, 11 May 2011, [64].
51 To establish a contract, arrangement or understanding, the question is whether an exchange between the parties involved in the putative arrangement or understanding has engendered an expectation that at least one person would act in the manner that the consensus envisaged. See, *Giltrap City Ltd. v. Commerce Commission* [2004] 1 N.Z.L.R. 608, [15], [17].
52 The issue of whether the purpose test is objective has been a matter of some debate. The leading authority, by a majority, is to the effect that the purpose test is to be objectively applied, but subjective assessments may be legitimate in borderline cases where there is evidence of subjective anti-competitive effect, coupled with evidence as to equivocal anti-competitive effect. See, *ANZCO, supra* note 28, [250] – [265].
This case also involved an inter-related issue pertaining to the extra-territorial application of the Commerce Act under which section 4 states that the Act "extends to the engaging in conduct outside New Zealand by any person resident in or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand." This case is part of the litigation taken by a number of antitrust agencies concerning alleged cartel activities between airlines supplying air cargo services in relation to fuel and security surcharges. The conduct in question involved, in material part, arrangements entered into by the defendants outside of New Zealand.

Three main questions arose in determining the application of section 27, via section 30, in this case. First, was market definition a necessary requirement for the establishment of whether the airlines were "in competition with each other" for the purposes of section 30? Second, was it necessary to establish that such competition was in a market in New Zealand? Third, was it necessary under section 4 to establish that the conduct in question was prohibited under the Commerce Act?

On the first question, the High Court endorsed the position that a market is required to be established because section 30 is an extension of section 27, and section 27 plainly requires the establishment of an anti-competitive outcome in "a market".

As to the second question, the High Court ruled that the requirement that there be a market in New Zealand survives the effect of the section 30 deeming provision. An element of judicial pragmatism entered the analysis at this point. It would not be necessary, for example, for a plaintiff to plead and prove a market in every claim under section 27 via section 30 where there is no suggestion that the market is outside New Zealand. However, there would need to be an answer to any such claim where the market in question was wholly outside New Zealand.

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53 Supra note 26.
54 Id., [92], [95], [96].
55 Id., [76].
To some extent there may appear to be some inconsistency as to the strictness of the market definition exercise in the context of the above discussion on the first and second questions. Ultimately, this matter is likely to be of no particular moment. If it is apparent on the facts that there is actual competition between the alleged conspirators in New Zealand, then an exhaustive inquiry into the precise boundaries of the market may not be necessary. Provided that there is an identification of some plausible market definition assessment, that should suffice.

Turning to the final issue of extra-territorial application, the matter is somewhat more complicated. On its plain wording, section 4 states that the Commerce Act extends to conduct outside New Zealand where such conduct affects a market in New Zealand. Curiously, the High Court in *Air New Zealand* read this provision to require that section 4 is only established where the conduct is both “prohibited by a substantive provision of the Act if it occurred in New Zealand, and ‘affects a market in New Zealand’ by affecting competition in the market in New Zealand in respect of which that substantive provision is alleged to have been breached.” This conclusion appears to misread section 4. On a plain reading of section 4 it is not apparent that its operation depends on the establishment of an offense. Rather, this provision serves simply to stipulate what evidence may be taken into account in the assessment of liability under the Act.

IV. THE MONOPOLY PROBLEM

A. Background

Apart from section 27, the other pivotal restrictive trade practices provision is section 36(2). This is the monopolization provision which prohibits firms with a substantial degree of market power from taking advantage of that power for various prohibited purposes. These purposes include restricting new entry, preventing or deterring competitive conduct, and eliminating persons from any market. Section 36

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56 The extra-territorial reach of the Commerce Act under section 4 is also subject to the requirement that the conduct in question is engaged in by a person resident or carrying on business in New Zealand. See *Poynter v. Commerce Commission* (2010) 12 T.C.L.R. 399.

57 *Supra* note 26, [261].
applies to the achievement, or potential achievement of these proscribed purposes in both the market in which power is held, and any other market where the leverage effect of monopolization may be, or may become, apparent. This is a provision of real importance in the New Zealand setting, as will be apparent from the introductory remarks to this Article. There is a particular need for robust monopolization provisions in small market economies, where high levels of concentration exist.\footnote{See Gal, supra note 13, 311-12.}

There is nothing unusual about the current legislative prohibition against monopolization. The simplicity of the provision mirrors in some respects section 2 of the Sherman Act. The judicial interpretation of the section can, however, only be described as problematic.

Section 36 is essentially based on the monopolization provision of the Australian antitrust law, namely section 46 of the Competition and Consumer Act 2010. This provision was substantially amended in 2007 and 2008,\footnote{For example, in 2008 section 46 (6A) was introduced to legislate tests for whether a corporation took advantage of market power. This provision directs that Courts may, without limitation, have regard to whether (a) the conduct was materially facilitated by the corporation’s substantial degree of market power, and (b) whether the corporation acted in reliance on its substantial degree of market power, and (c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of market power. Another of the 2008 amendments provided that predatory pricing may contravene section 46, even if the corporation cannot, and might not even be able to, recoup losses incurred in supplying the goods. See section 46 (1AAA). There are two other main limbs to section 36. First, there is the threshold question as to whether the defendant has a “substantial degree of market power”. The case-law on this concept has centred upon identifying whether there is power that enables a corporation to behave independently of competition (see Eastern Express Pty. Ltd. v. General Newspapers Pty. Ltd. (1992) 35 F.C.R. 43, 62-63) and whether there is an absence of competitive constraint (see Boral Besser Masonry Ltd. v. Australian Competition and Consumer Commission (2003) 215 C.L.R. 374, [121], [136], [137-38]). Assuming that a firm meets the market power threshold under section 36, and is found to have taken advantage of that power, there is a final inquiry as to...} but there is a significant body of Australian case-law prior to such amendments, and reliance has been placed upon this by the New Zealand judiciary.

This part of the Article will first provide an overview of the Australian case-law under section 46 which remains of direct relevance to the New Zealand setting, followed by a review of the approach taken by the New Zealand courts to section 36. The focus of the discussion will be upon the problematic “taking advantage” limb of section 36.\footnote{There are two other main limbs to section 36. First, there is the threshold question as to whether the defendant has a “substantial degree of market power”. The case-law on this concept has centred upon identifying whether there is power that enables a corporation to behave independently of competition (see Eastern Express Pty. Ltd. v. General Newspapers Pty. Ltd. (1992) 35 F.C.R. 43, 62-63) and whether there is an absence of competitive constraint (see Boral Besser Masonry Ltd. v. Australian Competition and Consumer Commission (2003) 215 C.L.R. 374, [121], [136], [137-38]). Assuming that a firm meets the market power threshold under section 36, and is found to have taken advantage of that power, there is a final inquiry as to...}
B. Australian Jurisprudence

Three different approaches to what constitutes the taking advantage of market power have emerged under the Australian case-law.

1. Counterfactual Test

A focal point of the Australian case-law has been upon the so-called “counterfactual test”. The foundation case for this test was *Queensland Wire Industries Ltd v. The Broken Hill Pty. Co. Ltd.* (“Q.W.I.”). B.H.P. produced around 97% of steel made in Australia. It also supplied around 85% of Australia’s requirements for steel and steel products. One of B.H.P.’s products was a Y-bar which was a crucial part for the manufacture of rural star picket fences. Imports accounted for only around 1% of such fences. B.H.P. only sold its Y-bar to a subsidiary company A.W.I. and only exported to companies in which it had a financial interest. Q.W.I., a competitor of B.H.P., asked B.H.P. for supplies of Y-bar so that it could commence the manufacture of its own star picket fences. B.H.P. first refused to supply and then offered to supply at prices which were high, to the point of amounting to a constructive refusal to deal.

Q.W.I. successfully brought an action for monopolization. Four of the five High Court of Australia judges considered that a firm will not have taken advantage of its power if it would have acted in the same manner in a competitive market. There was no particular analysis on how this counterfactual test may properly address the policy concerns of monopolization. Rather it was, on the facts of that case, seen to be a pragmatic way to assess the claim. However, the test was to take on a life of its own.

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62 *Id.*, 183-84.
63 *Id*.
64 *Id*.
65 *Id.*, 184.
66 *Id.*, 192 (per Mason C.J. and Wilson J.), 202 (per Dawson J.) and 216 (per Toohey J.).
In all subsequent cases, the counterfactual test has been a focal point, either in name or in application. However, some limits have been placed on the application of the counterfactual test as the sole or dominant test. In *Melway Publishing Pty. Ltd. v. Robert Hicks Ltd.*, the High Court of Australia stated that the counterfactual test should be considered in all cases, but should only be undertaken where this could be done with sufficiency cogency. There was recognition in *Melway* that other tests should apply where counterfactual analysis could not be cogently undertaken.

2. The “Justice Deane” Approach

In *Q.W.I.*, another of the judges used a different test to determine whether B.H.P. had taken advantage of its market power. Justice Deane stated:

[B.H.P.’s] refusal to supply Y-bar to Q.W.I. otherwise than at an unrealistic price was for the purpose of preventing Q.W.I. from becoming a manufacturer or wholesaler of star pickets. That purpose could only be, and has only been, achieved by such a refusal to supply by virtue of B.H.P.’s substantial power in all sections of the Australian steel market as the dominant supplier of steel and steel products. In refusing to supply in order to achieve that purpose, B.H.P. has clearly taken advantage of that substantial power in that market.

This test is based upon an assessment of purpose, and recognises that the concepts of taking advantage and purpose should not be evaluated in isolation of each other. This test has been referred to with approval in subsequent cases. In *Melway* the High Court noted that “Justice Deane’s approach was different” to the counterfactual test formulated in *Q.W.I.* Justice Deane’s approach relies upon direct observation of purpose and conduct, and does not involve any comparative assessment of the kind envisaged under the counterfactual test.

3. The “Materially Facilitated” Test

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69 *Id.*, [48], [53].
70 *Supra*, note 61, 197-98.
71 *Supra*, note 68, [48]. See also *N.T. Power Generation Pty. Ltd. v. Power and Water Authority* [2004] H.C.A. 48, [149-50], noting that Deane J. had adopted an “alternate approach”.

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A third approach foreshadowed in *Melway*, the “materially facilitated” test, was discussed in the following terms.\footnote{Melway, supra note 68, [51].}

Dawson J’s conclusion that B.H.P.’s refusal to supply Q.W.I. with Y-bar was made possible only by the absence of competitive conditions does not exclude the possibility that, in a given case, it may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the existence of the power, even though it may not have been absolutely impossible without the power. To that extent, one may accept the submission made on behalf of the ACCC, intervening in the present case, that s 46 would be contravened if the market power which a corporation had made it easier for the corporation to act for the proscribed purpose than otherwise would be the case.

This test, like Justice Deane’s test, is not framed in comparative terms. The material facilitation test has been recognised in subsequent Australian cases as another basis upon which to determine the taking advantage limb of section 46.\footnote{See Australian Competition and Consumer Commission v. Australian Safeway Stores Pty. Ltd. [2003] F.C.A.F.C. 147, [325-33].} However, there is no further articulation of the test in these cases, and it has not to date provided a basis upon which any monopolization case has been decided in Australia.

C.  *New Zealand Jurisprudence*

Until 2004, the Judicial Council of the Privy Council sat as New Zealand’s highest appellate court. In July 2004, the Supreme Court of New Zealand was established and this assumed the appellate function previously performed by the Privy Council. The journey through the jurisprudence on section 36 begins with two decisions of the Privy Council, and ends with a recent Supreme Court decision.

The first case was *Telecom Corp. of N.Z. Ltd. v. Clear Communications Ltd.* (“*Telecom/Clear*”).\footnote{[1995] 1 N.Z.L.R. 385.} This case involved a dispute over the access price Clear had to pay Telecom to connect to its fixed copper Public Service Telecommunications
Network. The case centered upon the application of the Efficient Component Pricing Rule. Telecom argued that it would not be abusing its dominant market position if it demanded a price equal to the revenue it would have received had it provided the services itself. This test resulted in the framing of an approach which derived from Q.W.I. That is, if Telecom’s terms were no higher than those which a hypothetical firm would seek in a perfectly competitive market, Telecom was not using its dominant position. This lead the Privy Council to fashion the following statement of principle on the taking advantage, or use, limb of section 36:

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

This sole counterfactual approach was affirmed by the Privy Council in a later case, Carter Holt Harvey Building Products Group Ltd. v. Commerce Commission. In Carter Holt Harvey the Privy Council said that it was both legitimate and necessary to apply the counterfactual test to determine if a firm had used its dominance. Accordingly, the effect of Telecom v. Clear and Carter Holt Harvey was to impose on New Zealand a sole counterfactual test. To be fair, the Privy Council simply relied on the counterfactual arguments before it, and was not asked to consider whether either the Justice Deane or the material facilitation tests may apply.

This background sets the scene for the decision of the Supreme Court in Commerce Commission v. Telecom Corp. of N.Z. Ltd. (“0867”). Prior to this appeal, all New Zealand courts had been bound to follow the sole counterfactual test set down by the Privy Council. The 0867 appeal provided the Supreme Court with an opportunity to make a choice. Would it continue to follow the sole counterfactual test?
approach set down by the Privy Council; or would it prefer the wider approach adopted by the High Court of Australia, as outlined above? Regrettably, the Supreme Court’s misinterpretation of Australian case-law squandered this opportunity. The Supreme Court convinced itself that, appropriately analysed, all of the Australian tests could be regarded as involving a comparison between actual and hypothetical markets. It also asserted that the predictability of outcome would be harmed by the application of a range of tests. This reading of Australian case-law is clearly problematic, given the clear expression in that jurisdiction that there are “different” and “alternate” tests apart from the counterfactual test, as already noted.

Against this background, the Supreme Court formulated the following comparative exercise test, which is in all but name, an endorsement of the sole counterfactual test:

A firm with a substantial degree of market power had the potential to use that power for a proscribed purpose. To breach s 36 it must actually use that power in seeking to achieve the proscribed purpose. Anyone asserting a breach of s36 must establish there has been the necessary actual use (taking advantage) of market power. To do so it must be shown, on the balance of probabilities, that the firm in question would not have acted as it did in a workably competitive market, that is, if it had not been dominant.

The Supreme Court provided some additional guidance on the application of this comparative test. The Court stressed that the question of what a firm with a substantial degree of market power would do in a hypothetically competitive market is a matter of practical business or commercial judgment, and is not necessarily a

81 Id., [17] and [21].
82 Id., [30].
83 Id., [34]. There is the possibility that the Supreme Court did attempt to expand the test to include material facilitation. For example, at one point it said: “market power gives some advantage if it makes easier – that is, materially facilitates – the conduct in issue.” Id. [33]. However, this passing reference is difficult to elevate to a new test having regard to the express endorsement throughout the decision of the sole counterfactual approach. See, e.g., another expression of the counterfactual test at [31]: “[T]he essential point is that if a dominant firm would, as a matter of commercial judgment, have acted in the same way in a hypothetically competitive market, it cannot logically be said that dominance has given it the advantage that is implied in the concepts of using or taking advantage of… a substantial degree of market power.”
mattered of economic analysis. Further, in determining the hypothetical market, a court must strip away all aspects of the firm’s dominance.

In the limited time since the delivery of this decision, it has received strong criticism. The leading commentary to date concludes that:

The Supreme Court has missed the point, misread Australian law and taken a wrong turn by confirming the counterfactual test as the sole determinant for “use” or “taking advantage of substantial market power”. It has left no room for alternative tests.

Such criticism has also been coupled with calls for legislative change to section 36. For the time being, however, section 36 remains constrained to the world of a sole counterfactual (or comparative) test.

D. Critique

The judicial preference for a counterfactual test in Australasia is problematic. Nonetheless, it has prevailed, notwithstanding strong criticism from commentators over the years. The continued application of this test is highly problematic for the following reasons.

First, the application of the test is plagued with uncertainty. A first step in the test is to construct the hypothetically competitive market comparator. The construct that a court may accept here is highly unpredictable.

See Scott, supra note 67, 282. A contrary view appears in a recent commentary by Paul Sumpter in which he asserts that it was correct for the Supreme Court not “to advance New Zealand common law to reflect the statutory position in Australia”. See Paul Sumpter, “Competition Law”, NEW ZEALAND LAW REVIEW 113, 123 (2012). Sumpter misses the fundamental point that the Australian case-law before the Supreme Court was that which pre-dated the 2007 and 2008 amendments to the Competition and Consumer Act.

See e.g. Scott, id., 283; Oliver Meech, “Taking Advantage” of Market Power, NEW ZEALAND LAW JOURNAL 389, 392 (2010).

For references to this commentary, see Scott, supra note 67, fn 14. See also Gal, supra note 12, 99-106.

See Mark N. Berry, The Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions, 32 LAW & POLICY IN INT’L BUS. 263, 312 (2001). A suggested solution to this uncertainty in the Court of Appeal decision in 0867 was that the Court should determine this matter as a preliminary question. Such outcome would only prolong litigation. See Commerce Commission v. Telecom Corp. of N.Z. Ltd. (2009) 12 T.C.L.R. 457, [74].
identification of such a hypothetically competitive market, how reliably can it be predicted how the monopolist would act in it? Little guidance or comfort can be taken from the Supreme Court’s “commercial judgment” test in 0867.90

Second, from a policy perspective, relative market performance assessments are inappropriate. It is not difficult to identify instances where unilateral conduct may be of no concern, or even pro-competitive, when undertaken by a non-dominant firm in a competitive market, but may well be anticompetitive and cause consumer harm when engaged in by a dominant firm. These concerns are of potentially greater resonance in a small market economy, such as New Zealand. Take, for example, the case study of exclusive dealing where a dominant firm’s exclusive dealing arrangements exist in markets with high entry barriers and where the extent of these arrangements results in the foreclosure of either upstream or downstream competition. Under the sole counterfactual test we are required to construct a hypothetically competitive market comparator which will bear no resemblance to the real world problem. In this artificial competitive market would the now non-dominant monopolist have imposed the same exclusive dealing requirements? The answer will probably be “yes”, because exclusive dealing may be economically rational and may have pro-competitive effects in the hypothetically competitive market under review. On this analysis, the plaintiff in a monopoly case in New Zealand faces insurmountable problems in seeking relief in circumstances where this may well be warranted. This kind of analysis has the potential to play out in much the same way in almost all those situations where section 36 may be considered to have application.91

For the moment, New Zealand monopolization law sits in an unfortunate position. While the legislative provision itself demonstrates no particular problems, the judicial analysis of it has seriously narrowed its application. Pragmatically, the only way

90 For discussion on the reluctance of the U.S. courts to engage in such but-for analysis, see Jeffrey M. Cross, J. Douglas Richards, Maurice E. Stucke & Spencer Weber Waller, “Use of Dominance, Unlawful Conduct, and Causation under Section 36 of the New Zealand Commerce Act: A U.S. Perspective” NEW ZEALAND BUSINESS LAW QUARTERLY (2013) (pending publication).

91 There are also observations under U.S. law which reflect that but-for analysis is too differential to the monopolist. See United States v. Microsoft Corp. 253 F. 3d 34,79 (D.C. Cir. 2001) (per curiam).
forward is for an amendment to section 36. Hopefully, any such legislative review will not be confined to the potential adoption of the revised monopolization provisions now contained in section 46 of the Competition and Consumer Act. As noted above, counterfactual analysis is unreliable and controversial in its application. Further, the content and application of the Justice Deane and material facilitation tests are unclear and uncertain.

A properly informed review of section 36 will require an international survey of the subject. There is no easy solution to the problem; indeed the history of antitrust reflects a “continuing, and perhaps never ending, search for an appropriate (monopolization) rule.” In any such review, close consideration should be given to U.S. monopolization law which focuses upon the likely or actual competitive effects of the defendant’s conduct. At the least, such a test endeavours to address the real-world harm that may attach to monopolistic conduct, and this is clearly preferable to hypothetical thought experiments.

V. MERGER ANALYSIS

Mergers are governed by section 47. This section prohibits acquisitions which would, or would be likely to, have the effect of substantially lessening competition in a market. Not surprisingly, a significant jurisprudence has emerged under this section. This jurisprudence centers upon forward-looking counterfactual analysis, which most often will be based upon the use of the status quo as the relevant counterfactual. However, in small markets where at times the status quo is not a likely option, a counterfactual based upon known likely market developments is potentially more appropriate. Therefore it is understandable that, in this setting, New Zealand jurisprudence stands somewhat apart from U.S. law; and not without its difficulties as will become apparent.

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92 See Berry, supra note 89, 264.
93 For an outline of this test and its relevance to New Zealand, see Cross, Richards, Stucke & Waller, supra note 90.
A matter which outside observers may find notable about the New Zealand merger regime is the high levels of concentration which have been permitted. But this outcome is hardly surprising in small economies where large firm or plant size is required in order to achieve efficient levels of production.

The table below sets out a sample schedule of mergers which were approved in 2010 and 2011. This table has been constructed in random sequence, so as to preserve confidentiality for these market share details. The market share for the merged entity is included, together with the three firm concentration ratio.

### MERGER APPROVALS 2010 – 11

<table>
<thead>
<tr>
<th>Mergers</th>
<th>Market Shares</th>
<th>3 Firm Concentration Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>19% and 42%</td>
<td>56% and 60%</td>
</tr>
<tr>
<td>B</td>
<td>98%</td>
<td>100%</td>
</tr>
<tr>
<td>C</td>
<td>82%</td>
<td>100%</td>
</tr>
<tr>
<td>D</td>
<td>72%, 38%, 28% and 58%</td>
<td>100%, 97%, 90%, 100%</td>
</tr>
<tr>
<td>E</td>
<td>30% - 41%</td>
<td>78% - 93%</td>
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<tr>
<td>F</td>
<td>38% and 93%</td>
<td>87% and 100%</td>
</tr>
<tr>
<td>G</td>
<td>30% - 36%</td>
<td>83% - 88%</td>
</tr>
<tr>
<td>H</td>
<td>54%, 41% and 43%</td>
<td>91%, 74% and 74%</td>
</tr>
<tr>
<td>I</td>
<td>7%, 19% and 46%</td>
<td>100%, 70% and 97%</td>
</tr>
<tr>
<td>J</td>
<td>56%, 71% and 89%</td>
<td>75%, 100% and 95%</td>
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<tr>
<td>K</td>
<td>68%</td>
<td>80%</td>
</tr>
<tr>
<td>L</td>
<td>31% and 41%</td>
<td>95% and 67%</td>
</tr>
<tr>
<td>M</td>
<td>93%</td>
<td>100%</td>
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<tr>
<td>N</td>
<td>42% and 38%</td>
<td>100%</td>
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<td>O</td>
<td>97%</td>
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<tr>
<td>Q</td>
<td>48%</td>
<td>92%</td>
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<tr>
<td>R</td>
<td>84%</td>
<td>100%</td>
</tr>
</tbody>
</table>

New Zealand has, by international standards, a conventional merger prohibition. As already noted, section 47(1) prohibits acquisitions of assets of a business or shares which would have, or be likely to have, the effect of substantially lessening
There is a voluntary pre-merger notification regime which means that merger parties have three procedural options. First, if merger parties believe that their transaction does not contravene section 47 they can implement the merger without reference to the Commerce Commission. Second, merger parties may apply to the Commission for clearance of their proposal. The Commission is required to give clearance under section 66 if it is satisfied that the merger will not contravene the section 47 test. Finally, in more problematic cases where mergers are likely to result in a substantial lessening of competition, applicants can seek authorisation on the basis that there are public benefits which outweigh the detriments flowing from the potential lessening of competition. Section 67 provides what is, in essence, an efficiencies defense in the case of such mergers. This authorisation provision has been little used. There have been only two merger authorisation applications over the last two calendar years.

The substantive approach to the analysis of the section 47 substantial lessening of competition test for the most part follows international norms. Readers of the New Zealand Commerce Commission Mergers and Acquisitions Guidelines will soon observe that its content bears a striking resemblance to the substance of earlier versions of the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.

There is, nonetheless, one crucial matter of difference. The view has been taken in this part of the world that the substantial lessening of competition test, by its very language, begs a comparative assessment. What will be the comparative competitive state of the markets both with and without the merger? This

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94 From 1986 to 2001 this provision contained a dominance test. This test was interpreted as requiring the establishment of more than high market power. See Commerce Commission v. Port Nelson Ltd. (1995) 6 T.C.L.R. 406, 441. Further the provision was considered to relate only to unilateral and not co-ordinated effects. See Telecom Corp. of N.Z. Ltd. v. Commerce Commission [1992] N.Z.L.R. 429, 442. The introduction of the substantial lessening of competition test under the Commerce Amendment Act 2001 was intended to lower the market power threshold under section 47, and to require that merger analysis extend to take account of the potential for collusive or oligopolistic behaviour. For further background on this amendment, see Mark N. Berry & Morag Bond, The Redirection of the Merger Threshold, in COMMERCIAL LAW ESSAYS: A NEW ZEALAND COLLECTION 119, 122-23 (David Rowe & Cynthia Hawes, eds., 2003).

95 Enforcement action may nonetheless be taken by the Commission if it has competition concerns. See Commerce Commission v. New Zealand Bus Ltd. (2006) 11 T.C.L.R. 679.

comparative question has become known under New Zealand antitrust law as yet another so-called “counterfactual” test. This test has become regarded as “elementary” to the analysis of section 47.97

The courts have developed principles which govern the application of this counterfactual test. First, the counterfactual test “focuses upon a possible change along the spectrum of market power rather than whether or not a particular position on that spectrum, i.e. dominance has been attained”.98 In other words, it is necessary to plot the points of the merger (the factual) and the likely state of affairs without the merger (the counterfactual) along the market power continuum ranging from perfect competition at one end to monopoly at the other. It is this comparative market power assessment of the factual and counterfactual which forms the essential basis for determining whether there may be a substantial difference between the two identified levels of market power.

Another key interpretative matter, which flows on from the above principle, is what approach is taken in relation to the identification of the counterfactual? Inevitably, this forward-looking assessment will be highly problematic in many cases. In some cases it could be that more than one counterfactual may be likely. The test for likelihood requires only that the counterfactual be “more than possible” and that “it need not be more probable than not.”99 In Woolworths Ltd. v. Commerce Commission the Court reflected on this possibility and enunciated the following principles in cases where more than one counterfactual may be possible:100

We consider that the correct approach is that we must assess what are the possibilities. We are to discard those possibilities that have only remote prospects of occurring. We are to consider each of the possibilities that are real and substantial possibilities. Each of these real and substantial possibilities become counterfactuals against which the factual is to be assessed. If in the factual as compared with any of the relevant counterfactuals competition is substantially lessened then the acquisition has a “likely” effect of substantially lessening competition in a market.

100 Id., [122].
An obvious related question which arises under this multiple counterfactual approach is whether any given merger decision should take into account the possibility that one of the identified counterfactuals may be most likely to occur. On this point the Court considered that “where there is more than one real and substantial counterfactual it is not a case of choosing the one that we think has the greater prospect of succeeding”.\(^{101}\) Accordingly, merger analysis is now directed at identifying all likely counterfactuals, and making the competition assessment in respect of the least favourable counterfactual, even if it may not be the most likely counterfactual.\(^{102}\)

Counterfactual analysis can be problematic, because predictions as to the future structure and workings of markets are inherently uncertain. The alternative of taking the status quo as the point for comparison is not necessarily more reliable. In small economies markets can foreseeably change, at times with some degree of speed. In a number of cases, there are often only some three to four competitors in any given market. The investigation into such mergers can often reveal future market plans which reflect likely changes in the scale and scope of competition. In such cases, status quo counterfactuals would be inappropriate. Accordingly, the Australasian counterfactual approach is perhaps more fit for purpose than status quo assumptions. However, the multiple counterfactual approach formulated in Woolworths is problematic. The central objection to this approach is the risk of false negatives. Decision-makers are placed in an unfortunate position when they are required to decline a merger approval because one possible counterfactual does not pass the test, notwithstanding that there may be a more likely counterfactual under which approval would be given.\(^{103}\)

\(^{101}\) Id., [118].

\(^{102}\) New Zealand merger jurisprudence largely follows Australian precedents. Section 50 of the Australian Act also contains a substantial lessening of competition threshold. However, while counterfactual analysis is also required in Australia, the multiple counterfactual approach outlined in Woolworths has not been expressly contemplated under Australian case-law. See, e.g., Australian Competition and Consumer Commission v. Metcash Trading Ltd. [2011] F.C.A.F.C. 151, [226] -[237].

\(^{103}\) For wider discussion of the multiple counterfactual problem, see Mark N. Berry & Paul G. Scott, Merger Analysis of Failing or Exiting Firms Under the Substantial Lessening of Competition Threshold, 16 CANTERBURY L. REV. 272, 287-88 (2010).
Apart from this current framework problem, it is fair to say that the traffic of merger cases over the first twenty-five years of the Commerce Act have travelled well enough.

VI. A WINDOW ON THE EFFICIENCIES DEFENSE

A final part of the Commerce Act which warrants comment in this short overview of key provisions is the authorisation (or efficiencies defense) process under the Act. As already mentioned, where parties propose to enter into, or give effect to, any restrictive trade practice which may breach any section of the Act (other than the monopolization provision), they may seek prior authorisation of the practice from the Commerce Commission. Section 61(6) requires that the Commission must authorise any such application where it is likely that there is “a benefit to the public which would outweigh the lessening of competition” that would result or be likely to result from the practice. A similar provision applies in respect of mergers which may not be cleared on substantial lessening of competition grounds. Such mergers can, nonetheless, be authorised under section 67(3), on the grounds that it will be likely to result “in such a benefit to the public that it should be permitted”.104 As already noted, the public benefit test centers upon efficiencies.105

A recent case, Godfrey Hirst N.Z. Ltd. v Commerce Commission,106 serves to illustrate the workings of the efficiencies defense in New Zealand in the merger law context. As earlier outlined, the authorisation process under section 67(3) requires the Commission to consider whether a merger should be permitted on grounds of countervailing public benefits, notwithstanding a finding of a likely substantial lessening of competition. The standard methodology for undertaking this

104 The efficiencies defense has been applied in parallel manner under both sections 61(6) and 67(3), notwithstanding the different wording of the authorisation test. See Godfrey Hirst N.Z. Ltd. v. Commerce Commission, High Court, Wellington, CIV 2011-485-1257, 23 November 2011, [82] – [90].
105 The inquiry nonetheless extends beyond efficiency gains. As the High Court noted in Air New Zealand Ltd. v. Commerce Commission (No. 6), supra note 98, [319]: “[b]enefits include efficiency gains (s 3A of the Act) and anything of value to the community generally.” Other points to note from Air New Zealand, id., are that only net benefits are to be included. Any costs incurred in achieving efficiencies must be taken into account, and transfers of wealth which achieve no benefit to society as a whole should be disregarded. Further, the claimed benefits must result from the acquisition. Benefits which may be likely without the merger are not to be included.
106 Supra note 104.
assessment\textsuperscript{107} is first to assess detriments (or welfare losses) as quantified to the extent possible under three categories of efficiency losses, namely allocative, productive and dynamic. These detriments must then be measured against public benefits. These benefits include efficiency benefits (or welfare gains), consistent with section 3A, and these are also required to be quantified to the extent possible. Such benefits are also assessed under parallel efficiency criteria namely likely allocative, productive and dynamic efficiency gains. Other benefits may be advanced by the applicant, although in practice it is rare for any such benefits to carry much weight. The Commission is required to form a view on the range, magnitude and likelihood of all claimed benefits. Both a qualitative and quantitative judgment call is required. The outcome ultimately rests on where the balance lies between the detriments and the benefits.

\textit{A. Background}

\textit{Godfrey Hirst} is a case study of a two-to-one merger situation. This case concerned the proposed merger of New Zealand’s two remaining wool scours, namely Cavalier and New Zealand Wool Services.

The relevant markets in this case were defined as being the North and South Island markets for the supply of wool scouring services.\textsuperscript{108} Wool scouring is the process by which wool clipped from sheep is cleaned and prepared for use in other processes. Not all wool grown in New Zealand is scoured. Some wool is exported in greasy form. At present 78\% of New Zealand’s wool clip is exported (predominantly to China), and of these exports, 22\% of the clip is greasy wool.\textsuperscript{109}

Wool scouring is a high fixed cost/low variable cost business. Further, the industry is experiencing significant over-capacity in wool scouring facilities and this has driven the need for rationalisation. Between 1983 and the present day, New Zealand’s sheep flock has declined 53\% (from a peak of 70 million to 33 million

\textsuperscript{107} Id., [53].
\textsuperscript{108} Id., [54].
\textsuperscript{109} Id., [17].
sheep). Cavalier had three wool scouring plants in the North Island and one in the South Island. New Zealand Wool Services had one plant in each Island. Cavalier proposed, post-merger, to close one plant in each Island and to achieve related rationalisation benefits.

The two largest domestic customers of scoured wool in New Zealand are Cavalier and Godfrey Hirst, and they compete in the market for the manufacture of carpets. Previously, Godfrey Hirst owned a wool scour, but sold this to Cavalier in 2009. At the time of this sale Godfrey Hirst entered into a contract with Cavalier for the provision of scouring services. However, this was only for a fixed term. Godfrey Hirst opposed this merger because of the risk it saw in being beholden to wool scouring services from its major rival in the carpets market. While it was dependent on such services under contract from Cavalier, Godfrey Hirst still thought it important that the threat of it switching to New Zealand Wool Services should remain.

B. The Detriments

On the question of allocative inefficiency losses, the Commission was required to assess likely price increases post-merger. Critical factors here in the assessment of market power included the prospect of new entry and the prospect of increased export of greasy wool to China. It was this threat of new entry, and the threat of export of greasy wool to China, that was seen as the ultimate price cap. The Commission modelled allocative inefficiency losses over a range of demand elasticities (-0.05, -0.5 and -1.0) and over a range of price increase assumptions (5%, 10% and 15%). The Commission made a judgment call that a detriment value corresponding to a 10% price increase and a demand elasticity of -1.0 was the most likely allocative inefficiency loss. This equated to the likely allocative efficiency loss as being an NPV of $14.7 million over a five year period. This finding was upheld on appeal.113

110 Id., [16].
111 Id., [29].
112 Id., [127] - [129].
113 Id., [190].
Turning to potential productive efficiency losses, the High Court again endorsed the Commission’s findings on this highly speculative subject matter. This matter addresses losses that may arise from reduced incentives to minimise costs and to avoid loss in the absence of competitive pressure. However, forward-looking assessments of potential organisational slack are notoriously difficult to make, and depend substantially on surrounding market circumstances. Ongoing competitive threats in the form of new entry or the China export constraint, coupled with shareholder incentives to drive productive efficiencies, were material to the Commission’s findings. The Commission considered that the productive efficiency loss may be in the range of 1% and 5% of pre-merger variable costs. It made a qualitative judgment at a mid-point range of 3%.

Dynamic efficiency losses, like productive efficiency losses, are notoriously difficult to quantify. While monopolists may lack the pressure to invest and innovate compared with a competitive market setting, there is no robust methodology for making the calculation. The Commission in this case focussed on the long-term competitive threat of China’s scouring industry, and considered that this would spur innovation. Further, the key innovations in this market came from outside the market, in the form of equipment manufacturer innovations. These factors suggested that any losses in dynamic efficiencies were likely to be limited.

Consistent with earlier authorisation decisions, the Commission attempted to quantify this detriment by multiplying total revenue by a factor. Given the perceived smallness of the detriment, the Commission used a range of losses of 0 to 1%, and took a mid-point to reach its final decision.

The High Court took issue with the Commission using a start point of 0 on this range essentially because the removal of New Zealand Wool Services would be likely to remove at least some potential dynamic efficiency from the market. Nonetheless, the Court accepted that the Commission’s use of a mid-point (0.5% of

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114 Id., [191] – [201].
115 Id., [229].
industry revenue) was not wrong.\textsuperscript{116} In so doing, the Court recognised the need for pragmatism in this assessment.

\textbf{C. The Public Benefits}

A range of countervailing benefits were claimed by the applicant, Cavalier. First, there were productive efficiency gains in the form of operating and administrative cost savings. The challenge for the applicant was to establish that these cost savings would be likely achieved, and that they would not otherwise occur in the counterfactual (without the merger). The applicant established to the Commission’s satisfaction that cost savings in the order of 14\% of pre-merger operating and administrative costs would be likely. Significant among these cost savings were energy costs, repairs and maintenance and administration expenses (primarily salaries). Some claimed savings were rejected relating to fringe benefits for cars and council rates, because these were viewed as “transfers” rather than public benefits.\textsuperscript{117}

On appeal, the High Court rejected the suggestion that these cost savings were functionless, as argued by Godfrey Hirst, because they concerned fewer resources (electricity, gas, land, labour) being used to scour the same volume of wool.\textsuperscript{118} Overall, the Court endorsed the findings on this category of public benefit.\textsuperscript{119}

The next head of public benefit concerned the sale of surplus land and buildings. As mentioned earlier, this merger if implemented would result in the closure of two existing wool scour plants. Throughout the Commission’s deliberations, it was accepted that freeing-up surplus land and buildings was a public benefit as those resources could then be deployed to other productive uses. Godfrey Hirst used the appeal as an opportunity to test this proposition. The Court accepted that this was appropriately a head of public benefit because fewer land and building resources were needed for the scouring operations in the factual compared with the

\textsuperscript{116} \textit{Id.}, [247].
\textsuperscript{117} \textit{Id.}, [250].
\textsuperscript{118} \textit{Id.}, [271].
\textsuperscript{119} \textit{Id.}, [281].
counterfactual, thereby releasing land for other productive uses.\textsuperscript{120} Further, the Court endorsed the value of $8 million for this surplus land and buildings.\textsuperscript{121}

It is noteworthy here to mention that the acceptance of the claimed benefits thus far was sufficient to outweigh the quantified detriments.\textsuperscript{122} The public version of the decision does not, of course, reveal the precise numbers, because confidentiality attached to significant portions of the quantification before the Commission and the Court.

Finally, the Commission emphasised that the ultimate decision was not undertaken purely on a quantitative basis. This, it said, was supplemented by a qualitative assessment. The Court observed that this method involved some circularity, and that it was not clear what had gone into the qualitative assessment other than the quantitative assessment of most likely detriments and benefits.\textsuperscript{123}

While there is some validity to this view, it needs to be appreciated that there is a significant overlap between quantitative and qualitative methods. One does inform the other. It is not always possible to say that both methods of analysis involve discrete decision-making paths. However, the ability to “stand back” and make an overall qualitative assessment after the quantification has been done is desirable. This final check may provide appropriate push back in cases where instinctively the numbers in the final assessment may not look right.

\begin{footnotesize}
\textsuperscript{120} Id., [296].
\textsuperscript{121} There were two other claimed heads of public benefit which were not ultimately determinative of this case. Cavalier had argued that the merger would enable it to create a wool superstore. This, it was argued, would lead to efficiencies (including freight savings) by eliminating duplication of resources in the storage and handling of wool (including wool sorting, cleansing and testing at one site, rather than at multiple sites). The Court concluded that this development may also be likely to occur in the counterfactual and indicated that if this matter had been crucial to the outcome it may have referred the matter back to the Commission for reconsideration. \textit{Id.}, [313]. The final benefit claim, quality improvements with brighter wool, also involved a difference of opinion between the Commission and the Court. Cavalier argued that with the merger there would be the likelihood that it could achieve improved quality, it being accepted that increase in brightness could increase wool value by 4 cents per kilogram. The Commission reached the view that these benefits could be achieved in the counterfactual. In this case the Court thought that this may not be so and again indicated that if the case had turned on this point, it would have referred the matter back to the Commission for further consideration. \textit{Id.}, [321].
\textsuperscript{122} Id., [321].
\textsuperscript{123} \textit{Id.}, [323].
\end{footnotesize}
VII. SOME CONCLUDING THOUGHTS

New Zealand competition policy and jurisprudence has come far in the first twenty-five years of the operation of the Commerce Act. Admittedly, there has been a good deal of free-riding on international experience throughout this journey.

The efficiency policy framework of the Act appears sound, although its application in a small economy always poses tensions. High concentration to enable productive efficiency has the potential to benefit consumers. But, at times, it might give rise to the prospect of the exercise of undue market power. This tension is almost always present.

While there has been limited traffic under our catch-all section 27 provision relating to trade practices, the formulation of its tests and their application does not appear to pose any particular concerns. The analysis in cases such as Fisher & Paykel and Kapuni is likely to be regarded as internationally acceptable, depending on policy preferences. The problems surrounding the per se price fixing rule, section 30, are of no great magnitude. They are in the nature of bedding down. This provision will, of course, take on a new life with the likely introduction of criminalisation in the near future.

Merger analysis has also been robust in its approach and application. There are good reasons for the application of a forward-looking counterfactual approach to mergers in a small market economy, notwithstanding that in some cases this may involve some difficult future predictions. The one problem area under New Zealand merger law is the multiple counterfactual approach, as formulated by the High Court in Woolworths. This is a matter requiring further thought given the false negative risk that it inevitably introduces.

Finally, the current state of the jurisprudence on monopolization is the low point of New Zealand antitrust over the first twenty-five years. The decision of the Supreme Court in 0867 has serious implications for section 36. The application of monopoly rules based on hypothetical thought experiments, involving the creation of make-
believe market structures and predictions of behaviour in make-believe worlds, is highly problematic. Section 36 is in urgent need of amendment.

APPENDIX

KEY PROVISIONS OF THE COMMERCE ACT, 1986 (NEW ZEALAND)

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

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

Section 29: Contracts, arrangements, or understandings containing exclusionary provisions prohibited
(1) Subject to subsection (1A) for the purposes of this Act, a provision of a contract, arrangement, or understanding is an exclusionary provision if
(a) it is a provision of a contract or arrangement entered into, or understanding arrived at, between persons of whom any 2 or more are in competition with each other; and
(b) it has the purpose of preventing, restricting, or limiting the supply of goods or services to, or the acquisition of goods or services from, any particular person, or class of persons, either generally or in particular circumstances or on particular conditions, by all or any of the parties to the contract, arrangement, or understanding, or if a party is a body corporate, by a body corporate that is interconnected with that party; and
(c) the particular person or the class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or understanding in relation to the supply or acquisition of those goods or services.
(1A) A provision of a contract, an arrangement, or an understanding that would, but for this subsection, be an exclusionary provision under subsection (1) is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.

Section 30: Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition
(1) Without limiting the generality of section 27, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price
Section 36: Taking advantage of market power
(2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of
(a) restricting the entry of a person into that or any other market; or
(b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
(c) eliminating a person from that or any other market.

Section 47: Certain acquisitions prohibited
(1) A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

Section 61: Determinations of applications for authorisation of restrictive trade practices
(6) The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(1) to (4) 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; or
(c) the giving or the requiring of the giving of the covenant; or
(d) the carrying out or enforcing of the terms of the covenant 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.

Section 66: Commission may give clearances for business acquisitions
(3) Within 10 working days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall either
(a) if it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or
(b) if it is not satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance for the acquisition.
Section 67: Commission may grant authorisations for business acquisitions

(3) Within 60 working days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall

(a) if it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or

(b) if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted, by notice in writing to the person by or on whose behalf the notice was given, grant an authorisation for the acquisition; or

(c) if it is not satisfied as to the matters referred to in paragraphs (a) or paragraph (b), by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance or grant an authorisation for the acquisition.