

COMPETITION LAW REFORMS IN NZ & AUSTRALIA: *Changes, issues & options for IP Lawyers**

Legalwise IP Licensing Fundamentals (9 November 2023)

1. Previously the New Zealand *Commerce Act 1986*¹ and the Australian *Competition & Consumer Act 2010*² contained (apparently broad) exceptions, which disapplied the usual “restrictive trade practices” provisions for *statutory intellectual property rights (SIPRs)* in some circumstances.
2. While the prohibitions may (or may not) have been as broad as some competition lawyers thought, there was certainly debate as to their scope. More clearly there was a gap between many competition lawyers and IP lawyers as to the exact degree to which SIPRs were protected from the application of those competition law (antitrust) statutes.
3. At the extreme, some IP lawyers thought the exceptions disapplied competition law entirely, whereas some competition lawyers thought they added little protection other than recognising that SIPRs were a valid property right, like any other property right.
4. Regardless, both jurisdictions relatively recently removed the exceptions as part of the reforms introducing new *misuse of market power* provisions in s 36 of the *Commerce Act*³ and s 46 of the *Competition & Consumer Act*.⁴
5. Prior to that, both countries jurisdictions introduced tough new cartel laws, which include criminal liability.⁵
6. These two sets of law together **fundamentally change the law**, meaning that **IP lawyers must understand the Commerce Act** (and maybe the *Competition & Consumer Act*) when negotiating and drafting contracts and settlements.
7. This paper discusses the New Zealand position. But the principles also apply to Australia.

Relevant prohibitions in the New Zealand Commerce Act (Act)

Section 27 – anti-competitive arrangements

8. Section 27 prohibits entering, or giving effect to, a contract, arrangement or understanding (**CAU or arrangement**), containing a provision that has the purpose, effect, or likely effect of substantially lessening competition (**SLC**) in a market. Section 28 has an equivalent prohibition for covenants.

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¹ Commerce Act 1986: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87623.html>

² Competition and Consumer Act 2010 (Cth): <https://www.legislation.gov.au/Details/C2023C00400>

³ Commerce Act 1986, s 36: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM88281.html>

⁴ Competition and Consumer Act 2010, s 46: http://www5.austlii.edu.au/au/legis/cth/consol_act/caca2010265/s46.html

⁵ In New Zealand, this is covered in ss 30 – 33 of the *Commerce Act* – summarised in 1 page at <https://www.matthewslaw.co.nz/wp-content/uploads/2023/10/ML-Summary-of-the-cartel-prohibition-October-2023.pdf>.

For more information on Australia see the ACCC’s website: <https://www.accc.gov.au/business/competition-and-exemptions/cartels>. There are a number of material differences between the two countries, but the rules are broadly similar.

9. An **arrangement** requires a consensus or meeting of minds amongst the parties involving a commitment to act (or refrain from acting) in a certain way. It can be something less than a formal contract and captures “nudge and wink” type agreements.
10. In *Lodge & Ors v Commerce Commission*⁶ the Supreme Court upheld a Court of Appeal judgment finding that Lodge Real Estate Limited and its director were part of an anti-competitive price fixing agreement with four other Hamilton real estate companies to pass on to vendors the cost of advertising properties on Trade Me (See discussion below). The High Court ordered Lodge to pay \$2.1 M for price-fixing.
11. In doing so the Supreme Court stated (at [58]):

*...If there is a consensus or meeting of minds among competitors involving a **commitment from one or more of them to act (or refrain from acting)** in a certain way, that will constitute an **arrangement (or understanding)**. The commitment does not need to be legally binding but must be such that it gives rise to an expectation on the part of the other parties that those who made the commitment will act or refrain from acting in the manner the consensus envisages. [emphasis added]*

12. Different CAU can be aggregated to determine likely competitive effects. Section 2(5) of the Act provides:⁷

For the purposes of section 27, a provision of a contract, arrangement, or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if that provision and—

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

(b) the provisions of any other contract, arrangement, or understanding to which that person or any interconnected body corporate is a party—

taken together, have or are likely to have the effect of substantially lessening competition in that market.

13. The first / leading case on point is *Port Nelson Ltd v Commerce Commission*.⁸ This was seen as a “monopolisation” or “misuse of market power” case, as there were refusals to supply and tying of services.⁹ On the latter the court aggregated different contracts to determine “likely effects” (even though those likely effects had not transpired).
14. “Likely” means “a real chance”; rather than “more likely than not”.¹⁰
15. The SLC test compares the state of competition *with* vs *without* the relevant provision(s), on a forward-looking basis.¹¹ Factors that may be looked at include:¹²

⁶ [2020] NZSC 25.

⁷ Commerce Act 1986, s 2(5): <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87945.html>

⁸ [1996] 3 NZLR 554.

⁹ Commerce Commission media release “Court of Appeal upholds High Court decision and \$500,000 penalties against Port Nelson Ltd” (3 July 1996): [https://comcom.govt.nz/news-and-media/media-releases/archive/court-of-appeal-upholds-high-court-decision-and-\\$500,000-penalties-against-port-nelson-ltd](https://comcom.govt.nz/news-and-media/media-releases/archive/court-of-appeal-upholds-high-court-decision-and-$500,000-penalties-against-port-nelson-ltd)

¹⁰ *Woolworths & Ors v Commerce Commission* (HC) (2008) 8 NZBLC 102,128 (HC) at [111]. See also NZCC Mergers & Acquisitions Guidelines (May 2022): https://comcom.govt.nz/_data/assets/pdf_file/0020/91019/Mergers-and-acquisitions-Guidelines-May-2022.pdf at [2.27]

¹¹ *Commerce Commission v Woolworths Limited* (CA) (2008) 12 TCLR 194 (CA) at [63]

¹² *Re Closure of Whakatu and Advanced Works* (1987) 2 TCLR 215 at 227. See also NZCC *Competitor Collaboration Guidelines* (January 2018): https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf at [147].

- a. The extent to which competition is foreclosed by the agreement and what alternatives others in the market have.
 - b. Whether the agreement has the effect of threatening independent initiatives of operators in the market.
 - c. Whether the agreement has the effect of causing operators in the market to compete less vigorously.
 - d. Whether the agreement enables the parties to exercise power over others eg over persons contracting with the parties or their competitors.
 - e. Whether the agreement affects the ability or desire of potential entrants to enter the market.
16. A **market** means 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.¹³ Substitution possibilities can be assessed across different dimensions, including: product, geographic, supply chain level, customer, and time.¹⁴
17. Market definition is a tool to provide a basis for analysis of the competition issues to be decided.¹⁵ There is therefore scope for legitimate differences of opinion.¹⁶

Section 30 – cartel provisions

18. Section 30 prohibits entering into or giving effect to a CAU or covenant that contains a cartel provision (**CP**). A CP is a provision that has the purpose, effect, or likely effect of “*price fixing*”, “*restricting output*”, or “*market allocating*” (as defined in section 30A¹⁷).
19. There is quite different legislative drafting in Australia, but in substance the law is largely the same (namely a *broad per se test*). NZ is perhaps broader as the “purpose/(likely) effect condition” applies to all CPs.
20. In practice, this drafting breadth means just about all CAU (or covenants, **CAUc**) between actual / potential competitors will risk having a CP & need to be assessed.
21. Some other points to bear in mind are:
- a. Only 2 parties to the CAUc must be “in competition”. This test expands to include those “*likely to be*” (ie have a *real chance* of being) in competition and but for the CP.¹⁸
 - b. Parties can be “*in competition*” on the buy-side to *acquire* goods or services (ie *demand side*), and “*goods*” and “*services*” have long (inclusive) definitions (section 2¹⁹).

¹³ Commerce Act 1986, s 3(1A): <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87945.html>

¹⁴ NZCC *Mergers and acquisitions Guidelines* (May 2022):

https://comcom.govt.nz/_data/assets/pdf_file/0020/91019/Mergers-and-acquisitions-Guidelines-May-2022.pdf at [3.14].

¹⁵ *Brambles New Zealand Ltd v Commerce Commission* (2003) TCLR 868 (HC) at [137].

¹⁶ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 (HCA) at 196; quoted in *Brambles New Zealand Ltd v Commerce Commission* (2003) TCLR 868 (HC) at [135].

¹⁷ Commerce Act 1986, s 30A: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM7416018.html>

¹⁸ Commerce Act 1986, s 30B: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM7416024.html>

¹⁹ Commerce Act 1986, s 2: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87631.html>

- c. Section 30B (Additional interpretation relating to cartel provisions)²⁰ means there is a “look-through” test: parties to the CAUC include “interconnected bodies corporate”.²¹
- d. The test (and s 36) applies to a “person”: Under section 2 “**person**, includes a local authority, and any association of persons whether incorporated or not”.²² This has not yet received much attention.
- e. As a related point, there is a broad reach for **industry associations** (a real risk area). Subsections 2(8) and (9) provide:

(8) For the purposes of this Act,—

- (a) any contract or arrangement entered into, or understanding arrived at, or covenant given or required to be given, by an association or body of persons, shall be deemed to have been entered into, arrived at, given, or required to be given by all the persons who are members of the association or body:
- (b) any recommendation made by an association or body of persons to its members or to any class of its members shall, notwithstanding anything to the contrary in the constitution or rules of the association or body of persons, be deemed to be an arrangement made between those members or the members of that class and between the association or body of persons and those members or the members of that class.

(9) Nothing in subsection (8) applies to—

- (a) any member of an association or body of persons who expressly notifies the association or body in writing that he disassociates himself from the contract, arrangement, understanding, or covenant or any provision thereof and who does so disassociate himself:
- (b) to any member of an association or body of persons who establishes that he had no knowledge and could not reasonably have been expected to have had knowledge of the contract, arrangement, understanding, or covenant.

22. Unlike Australia:

- a. The CP test has no nexus to market definition.
- b. The test for purpose is arguably an objective test subjectively informed,²³ whereas the test in Australia is a subjective one, but in practice this may be a fine distinction.

23. Liability can extend to accessorial liability and can include “attempts”.²⁴ There is also criminal liability for intentionally engaging in cartel conduct.²⁵

Protections – exceptions & clearance (or authorisation)

24. There are exceptions from the CP prohibition where the party(ies) can demonstrate that the CPs fall within one of the three exceptions available, namely for: (1) *collaborative activities*, (2) *vertical supply contracts*, and (3) *joint buying and promotion agreements*.

25. **Annex A** is a one-page summary of the CP prohibition and exceptions.

²⁰ Commerce Act 1986, s 30B(c): <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM7416024.html>

²¹ Defined in Commerce Act 1986, s 2: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87631.html>

²² Commerce Act 1986, s 2: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87631.html>

²³ *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* [2006] 3 NZLR 351 (CA).

²⁴ Commerce Act 1986, s 80(1): <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM89442.html>

²⁵ Commerce Act 1986, s 82B: <https://www.legislation.govt.nz/act/public/1986/0005/latest/LMS485452.html>

26. There is no case law on the cartel exceptions yet.
27. The New Zealand Commerce Commission (**NZCC**) may, perhaps understandably, take a conservative position, as seen in comments at **Annex B** from its January 2018 *Competitor Collaboration Guidelines*.²⁶
28. There is a voluntary clearance regime for collaborative activities.²⁷ The NZCC is (again) naturally taking a cautious approach.
 - a. It declined the one (and potentially only) clearance application to date by *Anytime Fitness*,²⁸ a fitness club chain with a franchise model proposing to introduce a pricing policy for its franchisees including minimum and maximum prices.
 - b. The NZCC was not satisfied the standardised pricing provisions were “*reasonably necessary*” – suggesting a high hurdle (for clearance at least). This was despite the NZCC’s preliminary view that the proposal was unlikely to SLC.

Section 36 – (anti-competitive) misuse of substantial market power (SMP)

29. Section 36 prohibits a person with substantial market power (**SMP**) from engaging in conduct that has the purpose, effect, or likely effect of SLC in that market, or a vertically related market.
30. **Market power** is the capacity to act without constraint. As explained by the Supreme Court:²⁹

A firm has market power when it is not constrained in the way in which it would be constrained in a competitive market. Any firm that is substantially unconstrained by competitive pressures has substantial market power.
31. More than one firm may have a substantial degree of power in a market.³⁰ A large market share, or the possession of IPR, may or may not give power.
32. Section 36 now uses the SLC test also used in ss 27 and 47. Previously (before 5 April 2023), s36 instead required a “taking advantage of” SMP for a prohibited purpose. The change to a SLC test means NZ law is again largely aligned with Australia’s and the old “safe harbour” of normal business conduct to defend actions by dominant firms is gone.
33. The new test recognises that single firm conduct by dominant firms can have anticompetitive effects which are unlikely when undertaken by small firms. “*Special duties*” may be an unpopular phrase, but firms with SMP will have additional responsibilities. However, this does not prohibit a firm from obtaining or strengthening market power by developing a product or process that is superior to the product or process of its rivals.³¹

²⁶ NZCC *Competitor Collaboration Guidelines* (January 2018):

https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf

²⁷ Commerce Act 1986, ss 65A-65B: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM7415570.html>

²⁸ NZCC media release “Commission declines clearance for Anytime NZ Limited’s collaborative activity clearance application” (30 May 2022): <https://comcom.govt.nz/news-and-media/media-releases/2022/commission-declines-clearance-for-anytime-nz-limiteds-collaborative-activity-clearance-application>

²⁹ *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2010] NZSC 111 at [33].

³⁰ NZCC *Misuse of Market Power Guidelines* (March 2023):

https://comcom.govt.nz/_data/assets/pdf_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf at [41].

³¹ NZCC *Misuse of Market Power Guidelines* (March 2023):

https://comcom.govt.nz/_data/assets/pdf_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf

34. The test will remain hard to prove. Distinguishing vigorous competition (which benefits consumers on the long run) from exclusionary anti-competitive conduct is challenging. Having a *clear legitimate commercial rationale* for “conduct” will remain important.
35. Market definition is relevant to s 36 both in relation to whether a firm has SMP and in relation to the competitive effects of the conduct. Expect arguments on market definition to be a real feature of the new test, and cases may be brought on the “purpose” aspect as actual / likely anticompetitive effects may be seen as harder to prove.
36. Expect vigorous debate - for example an IPR may grant a monopoly over a certain invention, but this may not translate to SMP depending on the market and the constraints that act on the firm. Also we would argue that a longer timeframe should be taken when considering anticompetitive effects.
37. It is for this reason that **we submitted**³² that:
7. *The OECD’s 2019 background note on Licensing of IP Rights and Competition Law recognised potential anti-competitive effects of reseals to license IP, but stressed:*³³

Imposing a duty to license can limit the value of legitimate IP rights, diminish the returns to innovation, work at odds with IP systems and, ultimately, stifle innovation (Shapiro and Teece, 1994, p. 158[41]; Shapiro, 1995, pp. 502-503[42]). Moreover, a number of the potentially procompetitive effects of IP and its licensing stem from the licensor’s ability to limit the number of firms permitted to deal in the new technology. It is widely acknowledged that, as far as competition policy is concerned, the licensor should generally be free to refuse to license other firms, and to limit exploitation of the innovation either to itself or to its selected licensee(s) (OECD, 1989, p. 103[4]; OECD, 2004, pp. 39-40[11]).
 8. *Competition analysis regarding enforcing IPR may therefore require greater consideration of dynamic efficiency given the role IPR may play regarding innovation, incentives, and long-term market outcomes.*³⁴ *This has impacts on the temporal aspects of market definition as well.*
 9. *We recommend greater recognition of the pro-competitive (and competitively neutral) bases for refusing to supply IPR, and for setting supply prices and related conditions.*
38. We also submitted on **purpose**³⁵ that:
23. *Glazebrook J in the Court of Appeal in ANZCO held “the purpose that must be proved for ss 27 and 28 [ie under the SLC test] is one that has, as an end in view, the substantial lessening of competition in a market. Where it is obvious that that could not be achieved if the provision or the covenant were implemented then, assessed objectively, the provision or the covenant cannot have that purpose”.*³⁶

³²Matthews Law - Submission on draft Misuse of Market Power Guidelines (18 November 2022)

<https://www.matthewslaw.co.nz/wp-content/uploads/2022/12/ML-Submission-on-draft-Misuse-of-Market-Power-Guidelines-November-2022.pdf> This was prior to the NZCC advising it would issue separate IP{ guidelines. We submitted again to similar effect in that process.

³³ *Licensing of IP Rights and Competition Law – Background Note* (OECD, 6 June 2019) at 31:

[https://one.oecd.org/document/DAF/COMP\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf)

³⁴ See also *Competition Policy and Intellectual Property Rights* (OECD, Paris, 1989) at 10:

<https://www.oecd.org/regreform/sectors/2376247.pdf> (“long-run consumer welfare depends on the dynamic efficiency of the economy as well as its tendency towards allocative efficiency. Dynamic efficiency includes the invention and commercial introduction of new products and processes which enhance welfare both by increasing the quality of goods and by promoting growth through increased productive efficiency”).

³⁵ Matthews Law - Submission on draft Misuse of Market Power Guidelines (18 November 2022)

<https://www.matthewslaw.co.nz/wp-content/uploads/2022/12/ML-Submission-on-draft-Misuse-of-Market-Power-Guidelines-November-2022.pdf>

³⁶ *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [257].

24. *This was affirmed by the Court of Appeal in Todd Pohokura, which summarised the following principles on purpose under the SLC test.*³⁷

- (a) The test for assessing purpose is an objective one, but evidence of subjective purpose can be adduced and taken into account in assessing objective purpose.
- (b) Purpose is not the same as effect or likely effect. However, the purpose that must be proved for s 27 is one that has, as an end in view, the substantial lessening of competition in a market.
- (c) Where it is obvious that could not be achieved if the provision in question were implemented then, assessed objectively, the provision cannot have had that purpose.
- (d) There may be a role for subjective evidence of purpose. However, that would only be where such evidence exists, and it would be restricted to cases where it is “borderline” as to whether there might be an anti-competitive effect.

25. *We note bare purpose can be difficult to reconcile with the Act’s purpose of promoting competition. As stated by Glazebrook J “In my view, the Commerce Act is designed to protect and promote competition. It regulates only those activities that threaten competition and is based on the premise that normally the market should be left to operate by itself. It would be inconsistent with such a philosophy to regulate wishful thinking that could in fact objectively have no anti-competitive effect. Where there is doubt, the market should be left alone.”*³⁸

26. *We recommend expanding the Guidelines to address the purpose element of the test.*

39. We note, however, the subsequent recent High Court covenants case³⁹ which we acted on. It is difficult to reconcile with the Court of Appeal’s prior findings. (One of the authors was a junior on the earlier matter at the initial advisory stage, the covenant there being successfully upheld.) This is noted in paragraph 63 below (discussing risks).

Section 37 – resale price maintenance

40. Section 37 prohibits minimum resale price maintenance (**RPM**). This generally involves specifying a price below which a reseller cannot resell goods.
41. RPM only applies to goods, not services. “Goods” means personal property of every kind (whether tangible or intangible), and so encompasses IP.⁴⁰

Section 47 – anti-competitive business acquisitions

42. Section 47 prohibits acquiring assets of a business or shares if the acquisition has the effect or likely effect of SLC in a market.
43. Provisions of a CAU that provide for the acquisition or disposition of assets of a business or shares can only be examined under s 47 (not ss 27/30). There may be ambiguity at the margin whether some contracts to acquire assets are contracts under ss 27/30, or business acquisitions under s 47 – ie whether the assets amount to “assets of a business”.
44. There is a voluntary clearance regime for proposed business acquisitions.

³⁷ *Todd Pohokura Ltd v Shell Exploration NZ Ltd* [2015] NZCA 71 at [256].

³⁸ *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [262].

³⁹ [https://comcom.govt.nz/news-and-media/media-releases/2023/\\$500k-penalty-in-land-covenant-case-for-trying-to-stop-bunnings-building](https://comcom.govt.nz/news-and-media/media-releases/2023/$500k-penalty-in-land-covenant-case-for-trying-to-stop-bunnings-building)

⁴⁰ Commerce Act 1986, s 2: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87631.html>

Some risk areas

45. The NZCC has guidelines on the application of competition law to intellectual property rights (**IP Guidelines**). Some of the risk areas the IP Guidelines identify are discussed below.⁴¹

Refusals to license IP

46. While licensors are generally entitled to choose who to license their IP to, competition concerns can arise if this restricts competition from developing in downstream markets. For example if access to the IP is an essential input with few or no alternatives. Similar issues can arise if the IP holder is willing to license the IP, but at a price that would prevent an equally or more efficient firm to compete effectively downstream.

Exclusivity / restrictive licensing

47. These may harm competition by restricting (foreclosing) other parties from gaining access to the IP. It is relevant to the *with vs without* analysis if absent the restrictions, the licensor would not grant the licence at all rather than allowing a license without restriction.

Tying and bundling / portfolio licensing

48. Tying occurs when product A is only available if the buyer also agrees to buy product B. Bundling occurs when products are offered at a lower price if the products are purchased as a package. This type of conduct may extend the market power associated with a product or IPR to other markets / products.

Pricing arrangements / restraints on output

49. These may contain CPs if the licensee and licensor are actual or potential competitors. They could also constitute RPM if they relate to the resale of licensed goods.

No-challenge provisions

50. No-challenge provisions that have the purpose or effect of ensuring the continued existence of IPR that would otherwise be challenged and set aside may harm competition.

Grant-back provisions

51. These may harm competition if they reduce the licensee's incentives to develop a competing technology while also contributing to the market power of the licensor by engaging in research and development for the licensor's technology.

Long-term agreements

52. An agreement could be unlikely to SLC when it is entered to, but become likely to SLC over time, in which case continuing to give effect to the agreement would breach the Act.⁴²

Pay-for-delay agreements

53. These may contain output restriction or market allocations CPs, or may SLC.

⁴¹ NZCC IP Guidelines (April 2023): https://comcom.govt.nz/_data/assets/pdf_file/0017/312308/Intellectual-property-guidelines.pdf

⁴² *Trade Practices Commission v Milreis Pty Ltd and others* (1997) 14 ALR 29 FLR 144 at 168; see also *Shell (Petroleum Mining) Company Ltd v Kapuni Gas Contracts Ltd* (1997) 7 TCLR 463 (1997) 7 TCLR 463.

54. As noted in the NZCC's IP Guidelines:⁴³

***Agreements between a patent-holding firm and a generic manufacturer** in which the generic manufacturer agrees to refrain from or delay entering with the generic version of a drug following the expiration of the drug's patent may be considered an **output restriction or market allocating cartel agreement within the meaning of section 30**. Agreements that do not fall within the scope of section 30 may nevertheless substantially lessen competition on the basis that they would delay new entry, maintaining the price and market share of the patented product. [emphasis added]*

Settlement agreements

55. These may harm competition if parties agree not to compete.

Consolidated Alloys

56. For example, in 2015 the NZCC issued a warning to Consolidated Alloys for including an "anti-competitive clause" in a negotiated IP settlement with its competitor Edging Systems.⁴⁴

The clause was included in a settlement agreement to resolve a commercial dispute involving Edging Systems' alleged breach of Consolidated Alloys' registered patent. Under the settlement Edging Systems agreed:

- a. to pay Consolidated Alloys a lump sum (the **lump sum payment**) and royalties on annual sales of EZ-Edge for an undisclosed period of time and subject to a minimum annual payment (the **annual royalty payments**); and
- b. not sell any other soft-edge flashing products covered by the patent other than EZ-Edge until June 2023 ie eight years past the expiry of the patent (the **selling restriction**).

57. The NZCC assumed for its analysis that Consolidated Alloys held a valid patent ("a matter that only a court could determine"; we wonder if it would be quite so neutral now, especially with cartel developments since).

58. The NZCC concluded that in its view:

- a. The lump sum payment and annual royalty payments did not breach the (then applicable) price fixing prohibition or have the purpose or (likely) effect of substantially lessening competition in a market.
- b. The selling restriction did not breach the (then applicable) price fixing prohibition but did have the purpose and (likely) effect of substantially lessening competition in the markets for edge products and soft-edge flashing products.

Juno Pharmaceuticals

59. In Australia, the ACCC issued a draft determination proposing to decline Juno, Celgene and Natco's authorisation application to enter a settlement and licence agreement. The agreement was proposed to resolve patent infringement and revocation proceedings between Celgene

⁴³ NZCC IP Guidelines (April 2023): https://comcom.govt.nz/_data/assets/pdf_file/0017/312308/Intellectual-property-guidelines.pdf at [103.4].

⁴⁴ NZCC Metal Roof Flashings – Investigation Report (5 October 2015): https://comcom.govt.nz/_data/assets/pdf_file/0024/94371/Investigation-report-Metal-roof-flashing-5-October-2015.PDF; see also our newsletter on the case: <https://www.matthewslaw.co.nz/commerce-commission-warns-party-over-ip-settlement/>

(the supplier of branded cancer treatment products) and Natco and Juno (who were seeking to enter the market with generic cancer treatment products).⁴⁵

60. Under the proposed agreement, Celgene would grant a non-exclusive license to Natco to manufacture cancer treatment products, and to Juno to import, keep, use or dispose of Natco's cancer treatment products. The launch dates of the proposed licence agreement were not disclosed but were earlier than the expiry of Celgene's patents and earlier than the likely launch date if Natco and Juno had continued and been successful in the litigation.
61. The parties withdrew their application so a final determination was never made.

Moola.co.nz

62. These risk areas highlight the broad scope of the CP prohibition when agreements are reached between parties "in competition". For example in *Commerce Commission v Moola.co.nz Ltd*⁴⁶ the High Court granted declarations that Moola breached the CP prohibition by agreeing with its competitors not to bid on each other's brand names on Google Ads. The NZCC's media release stated:

The cartel conduct involved Moola reaching agreements with other consumer credit or loan providers to not bid on each other's brand names on Google Ads and to also 'negatively match' certain keywords so that their advertisements would not show when those keywords were used

...

The Commission filed proceedings against Moola in July 2021 seeking declarations that entering into and giving effect to the agreements breached the cartel provisions of the Commerce Act 1986.

Moola co-operated with the Commission's investigation, accepted that it contravened the Act, and agreed to declarations being made by the Court.

Broader risks with restraints

63. More broadly, there are risks with restraints. There have been two recent cases in which a restraint was admitted to be in breach of the Act.

First Gas Ltd

64. In *Commerce Commission v First Gas Ltd*⁴⁷, First Gas admitted a restraint of trade preventing a competitor, GasNet, from engaging in the provision of gas distribution services in the Bay of Plenty region for a period of five years was in breach of s 27. First Gas also admitted its acquisition of GasNet's business was in breach of section 47. It was ordered to pay a total of \$3.4M in pecuniary penalties.

⁴⁵ ACCC *Juno Pharmaceuticals Pty Ltd & Ors – Draft determination* (23 March 2022): https://www.accc.gov.au/system/files/public-registers/documents/Draft%20Determination%20-%202023.03.22%20-%20PR%20-%20AA1000592%20Juno%20%26%20Ors_0.pdf

⁴⁶ [2021] NZHC 3423.

⁴⁷ [2019] NZHC 231.

NGB

65. In *Commerce Commission v NGB Properties Ltd*⁴⁸, NGB admitted a restrictive covenant placed on land preventing it from being used as a hardware store was in breach of s 28 because it had the *purpose* of SLC in a market. NGB was ordered to pay a total of \$500K in pecuniary penalties.

Practical steps to reduce risks

66. Practical options to address risk could include:
- a. Restructuring arrangements to remove potential CPs.
 - b. Structuring arrangements to try fit within an exception.
 - c. Documenting the commercial rationale for the arrangements.
 - d. Briefing the NZCC on what you're doing and why, with a supporting legal opinion.
 - e. Applying for clearance and / or authorisation.
67. Feel free to get in touch if you want to discuss further: andrew.matthews@matthewslaw.co.nz

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Matthews Law

⁴⁸ [2023] NZHC 2005.

Annex A: Summary of the cartel prohibition & exceptions

Prohibition: No person may enter into a contract, arrangement or understanding (**CAU**) or give a land covenant that contains a **cartel provision**, or otherwise give effect to a **cartel provision**. To be caught a provision does not have to be in a contract; a CAU can be a “wink and nod” type agreement. A cartel provision is a provision in a CAU that has the purpose, effect or likely effect of:

PRICE FIXING	RESTRICTING OUTPUT	MARKET ALLOCATING
<p>Fixing / controlling / maintaining:</p> <ul style="list-style-type: none"> price, discount, allowance, rebate or credit for/in relation to goods or services supplied or acquired by 2 or more parties in competition. 	<p>Preventing / restricting / limiting:</p> <ul style="list-style-type: none"> the (likely) production of goods; the (likely) capacity to supply services; the (likely) supply of goods/services; or the (likely) acquisition of goods/services supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other. 	<p>Allocating between parties:</p> <ul style="list-style-type: none"> the persons or classes of persons to/from whom the parties supply/acquire goods/services; or the geographic areas in which the parties supply/acquire goods/services in competition with each other.

[1] Or where the provision “provides for” any of the above.

[2] References to parties being “in competition” includes likely competitors & those whom “but for” a cartel provision would, or would be likely to, be in competition in relation to the supply or acquisition of those goods / services.

Exceptions: The main exceptions are below. There are also specific exceptions (eg for partnerships, exports, corporate groups).

COLLABORATIVE ACTIVITY	VERTICAL SUPPLY CONTRACTS	JOINT BUYING & PROMOTION
<p>The cartel prohibition does not apply if, at the time of entering into / arriving at or giving effect to the cartel provision:</p> <ul style="list-style-type: none"> the person and 1 or more other parties are involved in a collaborative activity, ie: <ul style="list-style-type: none"> enterprise, venture or other activity in trade carried on in cooperation by 2 or more persons not for the <i>dominant purpose of lessening competition</i> between 2 or more of the parties; and the cartel provision is <i>reasonably necessary</i> for the purpose of the collaborative activity. 	<p>The cartel prohibition does not apply where a contract (but not an arrangement or understanding):</p> <ul style="list-style-type: none"> is between a (likely) supplier of goods or services and a (likely) customer of that supplier; and the cartel provision: <ul style="list-style-type: none"> relates to the (likely) supply of goods or services to the customer (including the maximum price of resupply); and does not have the <i>dominant purpose of lessening competition</i> between 2 or more parties to the contract. 	<p>A provision in a CAU does not have the purpose, effect or likely effect of price fixing if the provision:</p> <ul style="list-style-type: none"> relates to collective acquisitions (direct or indirect); or provides for joint advertising of the collectively acquired goods / services; or provides for a collective negotiation of the price followed by individual purchasing at the collectively negotiated price; or provides for an intermediary to take title to goods and resell them or resupply them to another party to the CAU.
<p><i>In addition, the restrictive trade practices exceptions (eg for partnerships, exports and more) also apply.</i></p>		

Anti-competitive “arrangements” are also illegal: Even if a cartel exception applies, provisions of a CAU or covenant are still prohibited if they have the purpose or (likely) effect of substantially lessening competition. Examples of CAU which *may* fall within the prohibition include *exclusive or long-term supply agreements and price discrimination*.

Penalties: Non-individuals (eg bodies corporate) face penalties of up to the greater of: \$10M; or three times any commercial gain (or 10% of NZ group turnover if the gain is not known). Individuals face penalties of up to \$0.5M per contravention. In the case of cartels, courts can order that an individual not be a director promotor, manager of a body corporate for up to 5 years.

Criminalisation: Since **8 April 2021** it is a **criminal offence** to intend, at the time of entering / giving effect to the alleged cartel provision (**the relevant time**), to engage in price fixing, restricting output or market allocating. It will be a **defence** if, at the relevant time, the defendant believed on reasonable grounds that an exception applied. Defendants will face significant fines, and individuals may also face up to **7 years’ imprisonment**.

Annex B: NZCC Competitor Collaboration Guidelines (January 2018) excerpts**Excerpts on collaborative activity exception:**

102 *To qualify as a collaborative activity the parties need to be combining their businesses, assets, or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly. They need to be doing something more than simply agreeing how to run their separate businesses. This interpretation is consistent with the focus of the exception being on the substance of what the parties are doing – ie, does this look like cartel conduct or not?*

...

105 *It is the ‘carrying on ... in cooperation’ language that indicates that the parties must be combining their businesses, assets, or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly. This is consistent with both the ordinary meaning of ‘cooperate’ – ‘work jointly towards the same end’⁵³ – and the Court of Appeal’s comment that the ordinary and natural meaning of ‘carrying on’ suggests some degree of continuity or repetition.⁵⁴ ⁵⁵ It is also consistent with the fact that the ‘carried on ... in cooperation’ language is different from the ‘contract, arrangement or understanding’ language used in section 30, implying Parliament intends something different for an activity to be ‘carried on ... in cooperation’ than simply a shared expectation about how at least one of the parties will act or refrain from acting, in relation to its own business.*

106 *What this means in practice is that an agreement between competitors about how to run their separate businesses would not have the necessary quality of ‘carrying on ... in cooperation’ to amount to a collaborative activity. For example, suppose two businesses enter into an agreement to add a surcharge to the products that they sell in competition with one another. Regardless of the rationale behind this surcharge, this agreement would be unlikely to meet the first criteria of the collaborative activity test.*

...

121 *Whether a cartel provision is reasonably necessary for the purpose of the collaborative activity is assessed objectively⁶⁰ That assessment is made by the courts or by the Commission at the time the cartel provision was entered into or given effect to.⁶¹*

...

123 *The phrase ‘reasonably necessary’ has been described as being a standard used in everyday language and one that should require no undue elaboration.⁶² Nevertheless, we have outlined some general principles we will apply when assessing whether something is reasonably necessary.*

Cartel provision need not be essential to be reasonably necessary

124 *By using the term ‘reasonably necessary’, Parliament has signalled that a cartel provision need not be essential for the collaborative activity. This means that a party does not need to show that, ‘but for’ the cartel provision, the collaborative activity would not occur.⁶³*

125 *We say this for two principal reasons.*

125.1 *While ‘necessary’ reflects a high standard – its dictionary definitions include ‘indispensable, requisite’ – Parliament has chosen to qualify it by ‘reasonably’, ie, within reason.*

125.2 *‘Reasonably necessary’ is used in other legal contexts in New Zealand⁶⁴ and in other jurisdictions. Most relevantly it is used in the United States Federal Trade Commission and the United States Department of Justice’s Antitrust Guidelines for Collaborations Among Competitors (US Guidelines) and section 45 of Canada’s Competition Act. It is clear from the explanatory materials to the Amendment Act that when including the phrase in the collaborative activity exception, Parliament had in mind the US Guidelines and the way the US Guidelines used the phrase ‘reasonably necessary’. The US Guidelines*

do not require a cartel provision to be essential in order to be excluded from the US per se price fixing rules.⁶⁵

Requires something more than merely desirable, expedient, or preferable

126 *However, a cartel provision will not be reasonably necessary if it is merely desirable, expedient, or preferable. Something more than that is required. When interpreting ‘reasonably necessary’ in the context of the Resource Management Act, Whata J said for something to be reasonably necessary it must be ‘clearly justified’.⁶⁶*

Assessment requires consideration of other available options

127 *Determining whether something is reasonably necessary requires consideration of the alternative available options open to the parties. By alternative available options we mean options that are practically workable – as opposed to theoretical or extravagant possibilities – and which either:*

127.1 *do not involve a cartel provision; or*

127.2 *involve a cartel provision that is significantly less restrictive in scope than the cartel provision in issue.*

How we will assess whether a cartel provision is reasonably necessary for the purposes of a collaborative activity

128 *In assessing whether a cartel provision is reasonably necessary for the purposes of the collaborative activity, we will first look to understand what interest or interests the parties are trying to protect or promote by using the cartel provision. That is, what are the parties trying to achieve with the cartel provision? For example, is the cartel provision designed to:*

128.1 *significantly reduce the parties’ risk in achieving the collaborative activity’s purpose(s) (eg, it deters free-riding or ensures an equitable sharing of profits derived from the collaboration);*

128.2 *significantly reduce the cost of achieving that purpose;*

128.3 *significantly shorten the timeframe for parties to achieve that purpose; or 128.4 align the parties’ incentives?*

129 *Second, it will be important for us to understand how important or significant that interest(s) is in assisting the parties to achieve the collaboration’s purpose(s).*

130 *In essence, these two questions ask: why have the parties included the cartel provision?*

131 *Third, in assessing whether the cartel provision is reasonably necessary we will then consider the following types of factors.*

131.1 *The scope of the cartel provision itself, including its duration, its geographic scope, relationship to the parties’ businesses, and the products and markets to which the provision applies. A cartel provision may not be reasonably necessary when it applies for a significantly longer period of time, or has a significantly greater geographic scope than is required for the parties to achieve the purpose(s) of the collaborative activity.*

131.2 *The available alternatives that would enable the parties to pursue their collaboration/protect the relevant interest. Parties should be able to explain why they have chosen the cartel provision as opposed to other alternatives. It is not enough for a party to simply say that they would not enter into the collaboration in the absence of the cartel provision.*

Excerpts on **vertical supply contracts exception**:

- 69 *There are four criteria that must be met for the vertical supply exception to apply.*⁴⁰
- 69.1 *A supplier or likely supplier of goods or services (A) and a customer or likely customer of that supplier (B) must have entered into a contract. The exception is not available where the parties only have an agreement or understanding. This means the exception is only available where the parties have entered into a legally enforceable supply contract for consideration.*
- 69.2 *The contract must contain a cartel provision. If there is no cartel provision, then there is no need for the exception in the first place.*
- 69.3 *The cartel provision in the contract must relate to the supply or likely supply of goods or services by A to B, including to the maximum price at which B may resupply the goods or services supplied by A to B ('B's maximum resale price').*
- 69.4 *The cartel provision must not have the dominant purpose of lessening competition between A and B.*

70 *We describe how we approach the last two of those criteria below.*

Relates to the supply of goods or services from A to B

- 71 *The term 'relate to' is imprecise as to the degree of connection required. However, we consider it requires a relatively close connection between the cartel provision and the act of A supplying goods or services to B for B to resupply.*
- 72 *Whether there is a sufficiently close connection between a cartel provision and the supply of goods or services from A to B will depend on the facts of each case. It is a question of substance rather than form. This means that a cartel will not automatically 'relate to' the supply of goods from A to B simply because it is included in a supply contract.*
- 73 *However, at one end of the spectrum some provisions will invariably 'relate to' the supply of goods from A to B.*
- 73.1 *Supply contracts will, for example, set the price at which A will supply goods or services to B. Such a provision will relate to the supply of goods or services from A to B.*
- 73.2 *Similarly, a provision which does no more than prevent B selling goods or services supplied by A above a maximum price will relate to B's maximum resale price and therefore be regarded as related to the supply of goods from A to B.*
- 74 *At the other end of the spectrum, some provisions are far less likely to 'relate to' the supply of goods from A to B. For example, if A restricted B's ability to price or sell different goods or services to those being supplied by A.*
- 75 *Other restrictions which A may impose on B (or vice versa) fall in between these ends of the spectrum. Examples of such restrictions might be: A setting out where B can resupply A's goods or services, A dictating the quantity of A's goods B can resupply, or A dictating B's resupply price other than by setting a genuine maximum resale price.*
- 76 *The facts we would examine in determining whether the cartel provision relates to the supply of goods from A to B may overlap with the facts we would examine in determining the purpose of the cartel provision (which we discuss below).*

77 *Particularly in the context of determining whether a cartel provision in a contract relates to the supply of goods or services from A to B, we would look at the history and nature of the supply relationship between the parties of which the relevant cartel provision forms part. For example, if A would not supply B in the absence of the cartel provision, then the cartel provision is likely to relate to the supply of goods or services from A to B. That said, such an argument will be less persuasive where A has supplied B with the goods or services in the past without the cartel provision.*

Dominant purpose of lessening competition

...

79 *In contrast to other parts of the Commerce Act, the words 'lessening competition' are not qualified by 'substantially'. All that is required is a dominant purpose of lessening competition between the parties.⁴² The absence of the qualifier 'substantial' means that there is no need for the provision's dominant purpose to be to lessen competition between the parties in a way that is real or of substance. Any lessening of competition is sufficient.*

80 *The dominant purpose is the main or principal reason for the provision.⁴³ In other words, the prevailing objective of the cartel provision must not be to lessen competition between the parties. If it is – that is, if the cartel provision is simply a device to engage in anti-competitive conduct – then the exception will not apply.*

81 *This 'not for the dominant purpose' test is primarily an objective test for the courts or the Commission to assess. While primarily an objective test, evidence of subjective purpose may be relevant.*

82 *There is no bright line as to when an aim or objective of a cartel provision becomes the dominant purpose. It is up to the parties to the agreement to show that the cartel provision does not have the dominant purpose of lessening competition.*

83 *A key question we will ask in assessing the dominant purpose of the cartel provision is whether the cartel provision is designed to increase output or lower prices to consumers. In making that assessment, we will consider matters including:*

83.1 *the parties' conduct;*

83.2 *the broader context of the supply relationship between the parties of which the relevant supply contract and the cartel provision form part; and*

83.3 *the cartel provision's role in that supply contract and the relationship between the parties.*

84 *It may also be relevant to know whether such provisions are common in similar supply contracts.*

85 *If the provision is not designed to increase output or lower prices to consumers, and the parties are unable to point to any other legitimate purpose for the cartel provision, then we are likely to consider that the dominant purpose of the provision is to lessen competition between the parties. In that case, the exception would not apply.*

Annex C: Relevant Commerce Act 1986 provisions

27 Contracts, arrangements, or understandings substantially lessening competition prohibited

- (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (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.
- (3) Subsection (2) applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.
- (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

30 Contracts, arrangements, understandings, or covenants containing cartel provisions prohibited

- (1) No person may—
 - (a) enter into a contract or arrangement, or arrive at an understanding, that contains a cartel provision; or
 - (ab) give, or require the giving of, a covenant that contains a cartel provision; or
 - (b) give effect to a cartel provision.
- (2) See [section 80](#) for liability to a pecuniary penalty, and [section 82B](#) for criminal liability, for contravention of this section.

30A Meaning of cartel provision and related terms

- (1) A **cartel provision** is a provision, contained in a contract, arrangement, understanding, or covenant, that has the purpose, effect, or likely effect of 1 or more of the following in relation to the supply or acquisition of goods or services in New Zealand:
 - (a) price fixing:
 - (b) restricting output:
 - (c) market allocating.
- (2) In this Act, **price fixing** means, as between the parties to a contract, arrangement, understanding, or covenant, fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of,—
 - (a) the price for goods or services that any 2 or more parties to the contract, arrangement, understanding, or covenant supply or acquire in competition with each other; or
 - (b) any discount, allowance, rebate, or credit in relation to goods or services that any 2 or more parties to the contract, arrangement, understanding, or covenant supply or acquire in competition with each other.

- (3) In this Act, **restricting output** means preventing, restricting, or limiting, or providing for the prevention, restriction, or limitation of,—
- (a) the production or likely production by any party to a contract, arrangement, understanding, or covenant of goods that any 2 or more of the parties to the contract, arrangement, understanding, or covenant supply or acquire in competition with each other; or
 - (b) the capacity or likely capacity of any party to a contract, arrangement, understanding, or covenant to supply services that any 2 or more parties to the contract, arrangement, understanding, or covenant supply or acquire in competition with each other; or
 - (c) the supply or likely supply of goods or services that any 2 or more parties to a contract, arrangement, understanding, or covenant supply in competition with each other; or
 - (d) the acquisition or likely acquisition of goods or services that any 2 or more parties to a contract, arrangement, understanding, or covenant acquire in competition with each other.
- (4) In this Act, **market allocating** means allocating between any 2 or more parties to a contract, arrangement, understanding, or covenant, or providing for such an allocation of, either or both of the following:
- (a) the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other:
 - (b) the geographic areas in which the parties supply or acquire goods or services in competition with each other.

30B Additional interpretation relating to cartel provisions

In this Act, in relation to a cartel provision,—

- (a) if a person is a party to a contract, arrangement, understanding, or covenant, each of the person's interconnected bodies corporate is taken to be a party to the contract, arrangement, understanding, or covenant; and
- (b) if a person (**person A**) or any of person A's interconnected bodies corporate supplies or acquires goods or services in competition with another person (**person B**) or any of person B's interconnected bodies corporate, person A is taken to supply or acquire those goods or services in competition with person B; and
- (c) a reference to persons in competition with each other for the supply or acquisition of goods or services includes a reference to—
 - (i) persons who are, or are likely to be, in competition with each other in relation to the supply or acquisition of those goods or services; and
 - (ii) persons who, but for a cartel provision relating to those goods or services, would, or would be likely to, be in competition with each other in relation to the supply or acquisition of those goods or services.

30C Cartel provisions generally unenforceable

- (1) No cartel provision is enforceable.

- (2) However, nothing in subsection (1) affects the enforceability of a cartel provision in—
- (a) a contract or covenant to which [section 31](#) applies; or
 - (b) a contract to which [section 32, 33, 44A\(4\) or \(5\)](#), or [44B](#) applies.

31 Exception for collaborative activity

Exception for entering into cartel provision

- (1) Nothing in [section 30\(1\)\(a\)](#) applies to a person in relation to a cartel provision if, at the time of entering into or arriving at the contract, arrangement, or understanding that contains the provision,—
- (a) the person and 1 or more other parties to the contract, arrangement, or understanding are involved in a collaborative activity; and
 - (b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.

...

Exceptions for giving effect to cartel provision

- (2) Nothing in [section 30\(1\)\(b\)](#) applies to a person in relation to a cartel provision if, at the time of giving effect to the cartel provision,—
- (a) the person and 1 or more other parties to the contract, arrangement, understanding, or covenant that contains the provision are involved in a collaborative activity; and
 - (b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.
- (3) Nothing in [section 30\(1\)\(b\)](#) applies to a person in relation to a cartel provision that constitutes a restraint of trade if—
- (a) the person and 1 or more other parties to the contract, arrangement, understanding, or covenant that contains the provision were involved in a collaborative activity that has ended; and
 - (b) the cartel provision was reasonably necessary for the purpose of the collaborative activity; and
 - (c) the collaborative activity did not end because the lessening of competition between any 2 or more parties became its dominant purpose.

Meaning of collaborative activity

- (4) In this Act, **collaborative activity** means an enterprise, venture, or other activity, in trade, that—
- (a) is carried on in co-operation by 2 or more persons; and
 - (b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.
- (5) The purpose referred to in subsection (4)(b) may be inferred from the conduct of any relevant person or from any other relevant circumstance.

32 Exception for vertical supply contracts

- (1) Nothing in [section 30](#) applies to a person in relation to a cartel provision in a contract, if—
- (a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and
 - (b) the cartel provision—
 - (i) relates to the supply or likely supply of the goods or services to the customer or likely customer, including to the maximum price at which the customer or likely customer may resupply the goods or services; and
 - (ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.
- (2) The purpose referred to in subsection (1)(b)(ii) may be inferred from the conduct of any relevant person or from any other relevant circumstance.

33 Exception for joint buying and promotion agreements

A provision in a contract, arrangement, or understanding does not have the purpose, effect, or likely effect of price fixing if the provision—

- (a) relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by some or all of the parties to the contract, arrangement, or understanding; or
- (b) provides for joint advertising of the price for the resupply of goods or services acquired in accordance with paragraph (a); or
- (c) provides for a collective negotiation of the price for goods or services followed by individual purchasing at the collectively negotiated price; or
- (d) provides for an intermediary to take title to goods and resell or resupply them to another party to the contract, arrangement, or understanding.

36 Misuse of market power

- (1) A person that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in—
- (a) that market; or
 - (b) any other market in which the person, or an interconnected person,—
 - (i) supplies or acquires, or is likely to supply or acquire, goods or services; or
 - (ii) supplies or acquires, or is likely to supply or acquire, goods or services indirectly through 1 or more other persons.
- (2) In this section, a person has a **substantial degree of power in a market** if—
- (a) the person has a substantial degree of power in the market; or
 - (b) the person, together with 1 or more interconnected persons, has a substantial degree of power in the market; or

- (c) 1 or more interconnected persons of the person have a substantial degree of power in the market; or
- (d) 2 or more interconnected persons together have a substantial degree of power in the market.

36B Purposes may be inferred

The existence of any of the purposes specified in [section 36](#) or [section 36A](#), as the case may be, may be inferred from the conduct of any relevant person or from any other relevant circumstances.

37 Resale price maintenance by suppliers prohibited

- (1) No person shall engage in the practice of resale price maintenance.
- (2) For the purposes of this section, a person engages in the practice of **resale price maintenance** if that person (in this section referred to as the supplier) does any of the acts referred to in subsection (3).
- (3) The acts referred to for the purposes of subsection (2) are—
 - (a) the supplier making it known to another person that the supplier will not supply goods to the other person unless the other person agrees not to sell those goods at a price less than a price specified by the supplier:
 - (b) the supplier inducing, or attempting to induce, another person not to sell, at a price less than a price specified by the supplier, goods supplied to the other person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier:
 - (c) the supplier entering or offering to enter into an agreement, for the supply of goods to another person, where one of the terms is or would be that the other person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier:
 - (d) the supplier withholding the supply of goods to another person for the reason that the other person—
 - (i) has not agreed to the condition mentioned in paragraph (a); or
 - (ii) has sold, or is likely to sell, goods supplied to him by the supplier, or goods supplied to him by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price specified by the supplier as the price below which the goods are not to be sold:
 - (e) the supplier withholding the supply of goods to another person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the other person—
 - (i) has not agreed not to sell those goods at a price less than a price specified by the supplier; or
 - (ii) has sold or is likely to sell goods supplied or to be supplied to that third person, by the other person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold.
- (4) For the purposes of subsection (3),—

- (a) where the supplier makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier:
 - (b) where a set form, method, or formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that set form, method, or formula, that price shall be deemed to have been specified by the supplier:
 - (c) where the supplier makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price ascertained by calculation from or by reference to a set form, method, or formula specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier:
 - (d) where the supplier makes a statement to another person of a price that is likely to be understood by that person as the price below which goods are not to be sold, that price shall be deemed to have been specified by the supplier as the price below which the goods are not to be sold:
 - (e) anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.
- (5) For the purposes of this section, **sale** includes advertise for sale, display for sale, and offer for sale, and **sell**, **selling**, and **sold** have corresponding meanings.

38 Resale price maintenance by others prohibited

- (1) No person (in this section referred to as the third party) shall—
- (a) make it known to another person that the third party proposes to engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of any goods to, or the acquisition of any goods from, that person unless that person agrees not to sell those goods at a price less than the price specified by the third party; or
 - (b) engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of goods to, or the acquisition of goods from, another person for the purpose of inducing that person not to sell those goods at a price less than a price specified by the third party.
- (2) For the purposes of subsection (1),—
- (a) where the third party makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified in respect of the first-mentioned goods, by the third party:
 - (b) where a set form, method, or formula is specified by or on behalf of the third party and a price may be ascertained by calculation from, or by reference to, that set form, method, or formula, that price shall be deemed to have been specified by the third party:
 - (c) where the third party makes it known, in respect of any goods, that the price below which those goods are not to be sold is a price ascertained by calculation from or by reference to a set form, method, or formula specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the third party:

- (d) where the third party makes a statement to another person of a price that is likely to be understood by that person as the price below which goods are not to be sold, that price shall be deemed to have been specified by the third party as the price below which the goods are not to be sold:
 - (e) anything done by a person acting on behalf of, or by arrangement with, the third party shall be deemed to have been done by the third party.
- (3) For the purposes of this section **sale** includes advertise for sale, display for sale, and offer for sale, and **sell**, **selling**, and **sold** have corresponding meanings.

43 Statutory exceptions

- (1) Nothing in this Part applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act.
- (2) For the purposes of subsection (1), an enactment or Order in Council does not provide specific authority for an act, matter, or thing if it provides in general terms for that act, matter, or thing, notwithstanding that the act, matter, or thing requires or may be subject to approval or authorisation by a Minister of the Crown, statutory body or a person holding any particular office, or, in the case of a rule made or an act, matter, or thing done pursuant to any enactment, approval or authorisation by Order in Council.

...

44 Other exceptions

- (1) Nothing in this Part applies—
- ...
- (d) to the entering into of a contract for, or the giving or requiring the giving of a covenant in connection with, the sale of a business or shares in the capital of a body corporate carrying on a business in so far as it contains a provision that is solely for the protection of the purchaser in respect of the goodwill of the business:

...

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.
- (2) For the purposes of this section, a reference to a **person** includes 2 or more persons that are interconnected or associated.
- (3) For the purposes of this section, a person is **associated** with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other.
- (4) A person is not able to exert a substantial degree of influence over the activities of another person for the purposes of subsection (3) by reason only of the fact that—
- (a) those persons are in competition in the same market; or
 - (b) one of them supplies goods or services to the other.

Competition law reforms in NZ & Australia: Changes, issues & options for IP Lawyers

Legalwise IP Licensing Fundamentals

9 November 2023

Matthews Law

COMPETITION · REGULATION · POLICY · STRATEGY

Overview

Why do we need to know this?

- Previously the *Commerce Act* and *Competition & Consumer Act* had IP exceptions
- There was divergence (including between competition & IP lawyers) as to the level of protection IPRs had from the application of those competition law (antitrust) exceptions
- However, whatever protection there was is now gone. Both countries removed the IP exceptions with the introduction of new *misuse of market power provisions* (ss36 / 46)
- Both countries also have tough new *cartel laws* with criminal liability
- IP lawyers must “know the rules” when drafting & negotiating contracts and settlements

Learning objectives

What we will be covering

- New misuse of market power regimes (both now have a competitive effects test)
- Removal of the IP exceptions in the competition law regimes (which gave a measure of protection to contracts and enforcement of IP rights)
- Expansion – and criminalisation – of cartel conduct which covers most agreements between competitors (except to the extent exceptions apply), notably including IP dispute settlements

Misuse of market power prohibition

Change to an “effects” test

OLD SECTION 36

1. A person with substantial market power (**SMP**)
2. Must not take advantage of that power
3. For the purpose of
 - restricting the entry of a person into a market
 - preventing or deterring a person from engaging in competitive conduct in a market, or
 - eliminating a person from a market

NEW SECTION 36

1. A person with substantial market power (**SMP**)
2. Must not engage in conduct
3. That has the purpose, effect, or likely effect, of substantially lessening competition (**SLC**) in
 - that market, or
 - any other market in which the person (or its interconnected bodies corporate) supplies or acquires, or is likely to supply or acquire, goods or services, whether directly or indirectly through other persons.

Consequences of new test to be aware of

– Key consequences

- NZ law is again largely aligned with Australia's
- The “*safe harbour*” of normal business conduct to defend actions by dominant firms is gone
- The test recognises dominant firm (unilateral) conduct can have anti-competitive effects which are unlikely when undertaken by small firms: “*special duties*” may be an unpopular phrase but firms with SMP have additional responsibilities
- Despite being called an (economic) *effects test* due to the new focus on markets (rather than targeted competitors), a *purpose* component to the prohibition remains
- The test is not unique – NZ has had the same test for contracts for decades and mergers since 2001. Many Australian experts say in practice the same change there has not been as great as expected. Although there has been an uptick in private litigation

Predictions for the new test

– *Key consequences*

- Having a clear legitimate *commercial rationale for conduct* remains important
- Expect arguments on *market definition and purpose* to be key
- The test will be hard to prove on (likely) effects; perhaps less hard on *purpose*
- Distinguishing vigorous competition (benefitting consumers on the long run,) from exclusionary anticompetitive conduct is challenging

Who does the prohibition apply to?

– *Who it captures and when it “bites”*

- In NZ came into force 5 April 2023
- Still only applies to persons with **substantial market power (SMP)**
 - Depends on the relevant market
 - Market power = lack of effective competitive constraint
 - More than 1 person in a market can have SMP
- Does not prohibit firms with SMP from *out-competing* competitors
 - Concern is *exclusionary conduct*



Cartel prohibition

Smoke-filled room not required

No person may enter into a contract, arrangement or understanding (**CAU**) or give a land covenant (**CAUc**) that contains a **cartel provision** (or otherwise give effect to a cartel provision). A cartel provision is a provision with the purpose or (likely) effect of:

PRICE FIXING	OUTPUT RESTRICTING	MARKET ALLOCATING
<i>Fixing / controlling / maintaining:</i> <ul style="list-style-type: none">• price, discount, allowance, rebate or credit• for/in relation to goods or services• supplied or acquired by 2 or more parties in competition.	<i>Preventing / restricting / limiting:</i> <ul style="list-style-type: none">• the (likely) production of goods;• the (likely) capacity to supply services;• the (likely) supply of goods/services; or• the (likely) acquisition of goods/services• supplied or acquired (as applicable) by 2 or more parties to the CAU in competition with each other.	<i>Allocating between any 2 or more parties:</i> <ul style="list-style-type: none">• the persons or classes of persons to/from whom the parties supply/acquire goods/services; or• the geographic areas in which the parties supply/acquire goods/services• in competition with each other.

Or where the provision “provides for” any of the above.

The cartel prohibition is **very broad** – most arrangements between actual or potential competitors risks being caught

Cartel exceptions

Disapplying the prohibition

COLLABORATIVE ACTIVITY	VERTICAL SUPPLY CONTRACTS	JOINT BUYING & PROMOTION
<p>The cartel prohibition does not apply if, at the time of entering into / arriving at or giving effect to the cartel provision:</p> <ul style="list-style-type: none">the person and 1 or more other parties are involved in a collaborative activity, ie:<ul style="list-style-type: none">enterprise, venture or other activity in tradecarried on in cooperation by 2 or more personsnot for the dominant purpose of lessening competition between 2 or more of the parties; andthe cartel provision is reasonably necessary for the purpose of the collaborative activity.	<p>The cartel prohibition does not apply where a contract (but not an arrangement or understanding):</p> <ul style="list-style-type: none">is between a (likely) supplier of goods or services and a (likely) customer of that supplier; andthe cartel provision:<ul style="list-style-type: none">relates to the (likely) supply of goods or services to the customer (including the maximum price of resupply); anddoes not have the dominant purpose of lessening competition between 2 or more parties to the contract.	<p>A provision in a CAU does not have the purpose, effect or likely effect of price fixing if the provision:</p> <ul style="list-style-type: none">relates to collective acquisitions (direct or indirect); orprovides for joint advertising of the collectively acquired goods / services; orprovides for a collective negotiation of the price followed by individual purchasing at the collectively negotiated price; orprovides for an intermediary to take title to goods and resell them or resupply them to another party to the CAU.

- Even if an exception applies, cartel provisions are still subject to the SLC test
- Collaborative activity clearance eg Anytime Fitness
- Authorisation – Net public benefits test

Comparison with Australia

Some differences

1. *In competition* – includes persons who but for a CP would likely be in competition
2. Purpose – subjective or objective?
3. No exclusive dealing prohibition
4. No exclusive dealing or RPM anti-overlap provisions
5. Tension between vertical vs collaborative activity

NZCC guidelines

'Soft law'

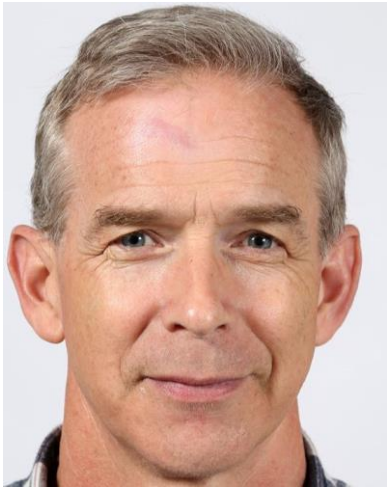
- IP guidelines: https://comcom.govt.nz/data/assets/pdf_file/0017/312308/Intellectual-property-guidelines.pdf
- Misuse of market power guidelines: https://comcom.govt.nz/data/assets/pdf_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf
- Competitor collaboration guidelines: https://comcom.govt.nz/data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf
- Cartel leniency and immunity policy: https://comcom.govt.nz/data/assets/pdf_file/0023/90437/Cartel-Leniency-Policy-and-Guidelines.pdf

Risk areas

Take caution

- Refusals to licence
- Exclusivity / restrictive licensing
- Tying and bundling / portfolio licensing
- Pricing arrangements / restraints on output
- No-challenge provisions, grant-back provisions
- Long-term agreements
- Pay-for-delay agreements
- Settlement agreements eg Consolidated Alloys
- Other restraints – eg Moola, NGB, First Gas

Questions?



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