

## Competition Law in New Zealand and the Medical Profession

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# COMPETITION LAW IN NEW ZEALAND

## THE COMMERCE ACT 1986 – THE NEW ZEALAND MEDICAL ASSOCIATION

### Introduction

1. The prohibitions contained in the Commerce Act are something many doctors may not consider in their daily activities yet, if not careful, an unwary doctor can easily fall foul of them.
  - 1.1 The purpose of this resource is to highlight some of the issues doctors need to keep in mind as they practise and operate their business. A number of matters may raise Commerce Act concerns. These include, but are not limited to:
    - merging with another medical practice;
    - agreeing fees;
    - entering into an exclusive arrangement for referral to a specialist or specialist facilities;
    - market sharing;
    - agreements to exclude a potential competitor;
    - bid rigging on tenders
    - collectivity negotiating contracts with hospitals or health funders; and
    - bans on advertising
  - 1.2 This resource is intended to give guidance on those issues that most commonly impact on medical practitioners; it is by no means exhaustive and should not be seen as a substitute for legal advice. In addition, further guidance can be obtained from the Commerce Commission which has produced the guidelines “*Anticompetitive Practices under Part II of the Commerce Act*” which can be found on its website: [www.comcom.govt.nz](http://www.comcom.govt.nz).

### Executive Summary

2. In New Zealand competition law is governed by two pieces of legislation, the Commerce Act 1986 and the Fair Trading Act 1986.

### Commerce Act 1986

- 2.1 The aim of the Commerce Act 1986 (“the Act”) is to promote competition by prohibiting activities which restrict competition. Thus;
  - The Act prohibits any contract, arrangement or understanding likely to substantially lessening competition. **(see pages 8 - 19)**

- Any contract arrangement or understanding containing an exclusionary provision that restricts dealings with a competitor is also prohibited. **(see pages 19 - 22)**
- Some types of contracts or arrangements by their very nature are deemed to substantially lessen competition. A classic example of this would be an agreement in respect of price fixing or fee setting. **(see pages 22 - 28)**
- It is prohibited for a person or business with a substantial degree of market power, to take advantage of their position for anti-competitive purposes. **(See pages 28 - 31)**

## The Fair Trading Act

- 2.2. The Fair Trading Act makes it illegal for anyone in trade, to engage in misleading or deceptive conduct. **(see pages 7 - 8)**

## Health Related Competition Issues

### a) Fees Schedules

- 2.3. While a medical body may want to issue recommended fees schedules which they share with members, such schedules can fall foul of the Commerce Act.
- 2.4. The Commerce Commission has however provided guidelines as to what is – and is not – acceptable, in regard to distributing pricing information to members. Key points as to what is acceptable include:
- The information disclosed does not identify individual member providers;
  - The scheme is voluntary;
  - The information is available to anyone (including non members) on request; and
  - The figures collated from the survey are not used as a vehicle for recommending or policing pricing, or other similar policies. **(see page 33)**

### b) Long Term Contracts

- 2.5. While the Commerce Act does not specifically address long term contracts, medical practitioners should be aware that there is a small risk that a long term contract may have the effect of substantially lessening competition. **(see pages 33 - 34)**

### c) Professional Bodies

2.6. The manner in which a professional body or other membership based organisation chooses to restrict membership can in certain circumstances breach the Commerce Act. This is likely to be the case where the restriction attempts to prevent or restrict a competitor in the market. The Ministry of Health has published guidelines for professional bodies on what is not acceptable. **(See pages 33-34)**

### d) Duty Rosters

2.7. Despite a concern among the medical profession that duty rosters may be prohibited by the Commerce Act, the Act does not in fact prevent their creation. A duty roster is likely to be in breach of the Act where it

- Prevents a medical practitioner entering a roster scheme; or
- Prevents the medical practitioner practising other than when rostered; or
- Two or more medical practitioners collectively exit a roster and care is not taken to ensure the effect or likely effect is anti competitive. **(refer pages 32-33)**

## Authorisations

2.8. The Commerce Commission has the ability to grant authorisations for conduct which would otherwise be in breach of the Act, if the net public benefit of the conduct outweighs the anti-competitive effect. However, the process is extremely expensive and complex with the result that it is unaffordable to most people or medium sized businesses.

2.9. Note that while agreement between business partners as to the partnership arrangement are exempt from the Act, this exemption does not apply to medical practitioners operating in small practice groups but not under a partnership agreement. **(See pages 34-35)**

## Penalties and Remedies

2.10. Where an action is brought by the Commerce Commission, individuals can be fined up to \$500,000 for a breach of the Act and body corporates up to \$10,000,000 or three times the value of the commercial gain, whichever is greater. In an action brought by some other person compensatory and punitive damages may be imposed. Anyone bringing a claim for the Commerce Act may seek an injunction as part of its remedies. **(see pages 35 - 36)**

## The Legislation – The Commerce Act 1986

### 3. An Overview of the Legislation.

3.1 The purpose of the Commerce Act 1986 (“the Act”) is “to promote competition in markets for the long-term benefit of consumers within New Zealand” (Section 1A). Essentially the Act seeks to promote competition by prohibiting activities which restrict competition i.e. price fixing, and by controlling the structure of market players through the Mergers and Acquisitions provisions.

#### Part 1 - The Commerce Commission (“the Commission”).

3.2 The Act re-establishes the Commerce Commission and details the membership requirements, terms of appointment and functions of the Commission.

3.3 The Commission is a body corporate and an independent Crown entity. Although the Commission members are politically appointed, the Commission is not subject to government interference in its regulation and enforcement functions. The Commission states that its purpose is “to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice”. The Commission further states that underpinning this purpose are three strategic goals, namely:

- (a) Markets are dynamic and all goods and services are provided at competitive prices; and
- (b) Consumers are confident of the accuracy of information they receive when making choices; and
- (c) Regulated industries are constrained from earning excess profits, face incentives to invest appropriately and share efficiency gains with consumers.

3.4 The Commission’s role is to enforce the Act, investigate matters that may contravene it and to make decisions on whether some restrictive trade practices, and business acquisitions, which would prima facie contravene the Act, should be granted the Commission’s authorisation.

#### Part 2 – Restrictive Trade Practices.

3.5 Part 2 of the Act generally prohibits arrangements between parties that substantially lessen competition and any person taking advantage of a substantial degree of market power for anti competitive purposes. It also has specific prohibitions relating to price fixing, exclusionary arrangements and resale price maintenance.

### **Part 3 – Business Acquisitions.**

- 3.6 Part 3 of the Act prohibits Mergers and Acquisitions that substantially lessen competition.

### **Part 4 (& Part 4A) – Controlled Goods and Services.**

- 3.7 Part 4 relates to the imposition of control of goods and services and Part 4A contains specific provisions applicable to the electricity industry.

### **Part 5 – Authorisations and Clearances.**

- 3.8 Part 5 provides the Commission with the power to grant an authorisation for a restrictive trade practice which would otherwise be in contravention of Part 2 of the Act if the benefit to the public outweighs the detriments of the anti-competitive behaviour.
- 3.9 Part 5 also allows the Commission to grant a clearance for an acquisition if it considers this would not lead to the substantial lessening of competition, or to grant an authorisation for an acquisition which would result in a substantial lessening of competition if the public benefit would outweigh that loss.

### **Part 6 – Enforcement, Remedies, and Appeals.**

- 3.10 This deals with cease and desist orders, the jurisdiction of the New Zealand Courts and penalties for restrictive trade practices and acquisitions which contravene the Act.

### **Part 7 – Miscellaneous Provisions.**

- 3.11 This part outlines the Commission’s statutory powers when executing its functions under the Commerce Act.

## **The Legislation – The Fair Trading Act 1986**

Set out below is a brief overview of the Fair Trading Act. For those wanting a more comprehensive guide to the Act we would refer you to the Commerce Commission’s website at [www.comcom.govt.nz](http://www.comcom.govt.nz) (*The Fair Trading Guide. A General Guide*)

### **4. An Overview of the Legislation.**

- 4.1 The Fair Trading Act is also designed to encourage competition and to protect consumers from unfair trading practices, misleading and deceptive conduct. It prohibits certain conduct and provides for the disclosure of consumer information in respect of goods and services and deals with product safety.
- 4.2 The Act applies to anyone in “trade” and it is not possible to contract out of the Act. The primary focus is on whether the person/s conduct is liable or likely to deceive or mislead. An intention to deceive or mislead is not

generally required and the negative consequence of the alleged deceptive or misleading conduct is also not material to any breach of the Act.

- 4.3 All medical practitioners should ensure that any statements made either directly to patients, or in advertisements, letters, brochures, websites etc. which relate to their qualifications and/or experience; the cost of their services; or their services generally, is entirely current and correct information. Generally, Medical Practitioners should ensure they provide patients with all the relevant facts,. They should use clear language and avoid ambiguity or jargon when speaking with patients and to correct any misunderstandings that may occur immediately. Claims or representations about professional qualifications, experience or services must not be misleading.
- 4.4 Although the Fair Trading Act does not impose a duty on Medical Practitioners to disclose financial interests, Medical Practitioners should ensure that if they have a financial interest in promoting a particular service or product, practitioner or hospital, that they disclose such an interest to the patient *if* non-disclosure would mislead the patient.

## **The Commerce Act and the Medical Profession**

### **5. Contracts, Arrangements or Understandings Substantially Lessening Competition Prohibited.**

5.1 Section 27 provides that:-

- (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) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.
- (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.

5.2 This section operates as a general prohibition applicable to a wide scope of actions i.e. contracts, arrangements and understandings, which have or are likely to have the effect of substantially lessening competition, regardless of whether or not the parties to such a contract, arrangement or understanding are currently in competition with each other.

- 5.3 Section 27 applies to both horizontal and vertical arrangements (ie arrangements between competitors, as well as between suppliers and acquirers of goods and services). Section 27 prohibits both “entering into” and “giving effect to” such arrangements, with section 80 dealing with ancillary liability, including attempts or inducements to contravene Part 2 of the Act.
- 5.4 For the section to apply there must be a **contract or arrangement** entered into or an **understanding** arrived at, which contains a *provision* which has the **purpose, the effect or is likely to have the effect, of substantially lessening competition.**

#### **Contract, Arrangement or Understanding.**

- 5.5 The common law meaning of “contract” being something that is enforceable at law<sup>1</sup> is extended by Section 2(6) of the Act which provides that a reference to contract shall also include a lease or a licence of any land or building. Establishing that a contract exists will usually be fairly simple.
- 5.6 The essential requirements of an “arrangement” are more difficult to determine. An arrangement clearly involves something less than what is required for a formal contract and both the New Zealand and Australian Courts have adopted a broad definition of the term. The Privy Council in a 1991 decision stated:

“Arrangement is a perfectly ordinary English word and in the context of Section 27 involves no more than a meeting of minds between two or more persons, not amounting to a formal contract, but leading to an agreed course of action”.<sup>2</sup>

- 5.7 Clearly an arrangement does not require an agreement to be in writing. It may be oral or arrived at by observing behaviour. It will often be difficult to determine whether a meeting of the minds has occurred and a New Zealand Court has observed the following:

“In my view it would be wrong for a Court to set the test of an establishment of an arrangement or understanding too high.....having thoughts about price fixing arrangements and even taking some steps and making some preparation will not be sufficient. Any steps or preparation for price fixing must reach the stage where there is an unambiguous attempt to make the arrangement or understanding happen so that the commercial design which is in contravention of the statute would eventuate. It does not necessarily have to be implemented for there to be a breach of the section and neither is it necessary for the commission to establish each defendant adhered to an arrangement or understanding so long as one member does so for and with another”.<sup>3</sup>

<sup>1</sup> *Hughes v Western Australian Cricket Assn (Inc)* (1986) ATPR 40-736

<sup>2</sup> *Applefield's Limited v NZ Apple & Pear Marketing Board* [1991] 1 NZLR 257 (PC), at P 261

<sup>3</sup> *C C v Wellington Branch NZ Institute of Driving Instructor's* (1990) 4 TCLR 19; (1990) 3 ALL NZBC 101, 913

- 5.8 An understanding is likely to be even less formal than an arrangement however the case law suggests that the essential elements of an arrangement must be present and the difference between the two may be only a matter of degree. An Agreement or understanding can be as informal as a ‘nod and a wink’.

***Example: Medical Practitioner A meets Medical Practitioner B at a social function. Their discussion turns to the on-call services they both provide to the local private hospital and Medical Practitioner A expresses her dissatisfaction with the remuneration rate. Medical Practitioner A informs Medical Practitioner B what she considers an appropriate rate of pay and adds she is aware that the area is short of Medical Practitioners to perform these services. She suggests that the two of them would be in a good negotiating position with the hospital to request the increased fee as they had almost no other alternatives. Although Medical Practitioner B had not considered this before, he agrees with Medical Practitioner A.***

- 5.9 The above discussion could constitute an ‘understanding’ between competitors to fix price although whether it would breach section 27 would depend on the further facts of the case. Even if it does not contravene s 27 directly however, doctors should note that this example is still likely to contravene this section via the deeming provisions contained in section 30. (see para...) Medical practitioners must be aware that contracts, arrangements or understandings need not be written, formal or have arisen out of a business context. They can be as simple as an informal, social discussion between colleagues and may not even require oral affirmation i.e. a nod and a wink.

#### **Proof of Contract, Arrangement or Understanding.**

- 5.10 Many contracts will be simply proven by direct written evidence. However proof that an arrangement or understanding exists often comes down to circumstantial evidence and the Courts have been willing to rely on such evidence where the circumstances naturally lead to the inference that an arrangement or understanding existed, i.e. parallel pricing or the removal of a competitor from a market. It should be noted however that merely because two competitors are charging the same fee for their services, does not in itself breach the Act.
- 5.11 Mention should also be made here of section 80 of the Act which provides that the Commission may seek pecuniary penalties from any person(s) who *attempts* to contravene a provision in Part 2 of the Act. Therefore although section 27 requires that some action has been taken, penalties and injunctive relief (if applicable), will apply to persons attempting, inducing or attempting to induce a breach of this section.

#### **Medical Partnerships – “Legal Form”**

- 5.12 Although members of the medical profession traditionally take a collegial approach to their roles, Medical Practitioners must keep in mind that for the

purposes of the Act Medical Practitioners, even those working within the same practice setting, are generally deemed to be competitors of each other.

- 5.13 The Commerce Act however does provide an exception to this in respect of medical practitioners working under a formal partnership agreement (provided that none of the partners is a body corporate). **(see further paragraphs ... and ...)**
- 5.14 Note also that if a partner in a medical practice enters into an agreement, arrangement or understanding, section 2(8) of the Act provides that every association or body of persons (ie including partners) is deemed to have entered into the agreement, arrangement or understanding. This has implications for doctors in partnerships as they might subsequently be found to be in breach of the Commerce Act as a result of the actions of one of their partners, even though they may not have had any knowledge of those actions.

### Purpose

- 5.15 Once it is established that a contract, arrangement or understanding exists, a particular provision within such arrangements will only breach section 27 if it has the ***purpose, the effect of, or is likely to have the effect of***, substantially lessening competition in a market.
- 5.16 Section 2(5) of the Act provides the following in order to assist in the interpretation of purpose:

“For the purposes of this Act—

- (a) A provision of a contract, arrangement or understanding, or a covenant shall be deemed to have had, or to have, a particular purpose if—
- (i) The provision was or is included in the contract, arrangement or understanding, or the covenant was or is required to be given, for that purpose or purposes that included or include that purpose; and
  - (ii) That purpose was or is a substantial purpose:
- (b) A person shall be deemed to have engaged, or to engage, in conduct for a particular purpose or a particular reason if—
- (i) That person engaged or engages in that conduct for that purpose or reason or for purposes or reasons that included or include that purpose or reason; and
  - (ii) That purpose or reason was or is a substantial purpose or reason.
- 5.17 It is clear from the above that the sole purpose of the provision need not be to substantially lessen competition, rather such a purpose may co-exist alongside other purposes which do not have such an intention. The requirement is merely that the anti-competitive purpose must be “**substantial**”. This would generally be considered by the Courts objectively.

Further, while a number of Australian decisions held that **all parties** to the contract, arrangement or understanding, must have a collective purpose, the New Zealand Courts in *Tui Foods Ltd v NZ Milk Corp Ltd*<sup>4</sup> found that a unilateral purpose would suffice as:

“if the party responsible for the presence of the provision in the contract has had such a purpose, then the purpose of the other party is not material; for the purpose of the first mentioned party is likely to be a substantial purpose and thus to satisfy the definition”.

- 5.18 As with proof of an understanding or arrangement, establishing that a purpose is anti-competitive will often need to be inferred from the terms and circumstances of the arrangement and from the conduct of the party.

### **Actual Effect and Likely Effect**

- 5.19 Whether a provision in a contract, arrangement or understanding has an **effect** or **likely effect** of substantially lessening competition will be determined on the facts in each case. The effect may not be immediate and may occur at a later stage from the time the arrangement was entered into. Clearly there must be a link between the provision and the anti-competitive effect although the provision alone does not need to be the sole element of the lessening of competition.

- 5.20 Whether a provision is likely to have an effect is generally accepted that the likelihood of such an effect must be “more probable than not”<sup>5</sup>. Recent case law suggests that more than a simple possibility is required. In assessing whether or not a provision of an arrangement is likely to have the effect of substantially lessening competition, the court may consider the combined effect of particular provisions in the arrangement and in other arrangements by one or more parties (section 3(5)). As such the effect of the arrangement on competition is determined by reference to all factors that affect competition in the market.

### **Substantial Lessening of Competition**

- 5.21 “Substantial” is defined in the Act as being “real or of substance” which the Courts have construed to mean that the lessening of competition should not be insignificant or nominal as opposed to it being required to be “large” or “weighty”. This will often be relative to the impact of the effect on the pertinent market although it does not need to be quantifiable.

- 5.22 When assessing whether a particular provision substantially lessens competition in a market, the courts will look to:

- (a) The nature and extent of the market with the conduct in question (“factual”).

<sup>4</sup> *Tui Foods Ltd v NZ Milk Corp Ltd* (1993) 5 TCLR 406; 4; NZBLC 103, 335

<sup>5</sup> *Air NZ Ltd v CC* [1985] 2 NZLR 338

- (b) The nature and extent of competition which would exist without the conduct in question ('counter-factual').
- 5.23 Analysis of the above needs to show a causative link between the conduct present in the market and the effect on competition of the same. These scenarios are often referred to by the Commission as the factual and the counter-factual.<sup>6</sup>
- 5.24 The Commission and the Courts will also consider the positive effects on competition which result from the conduct in question. They will weigh up the pro and anti competitive effects so that a "net" effect on competition is assessed. There are however limited parameters in which this is assessed. For example, section 27 applies not to contracts as a whole, but separately to each provision of a contract. Consequently, if a provision of a contract has the effect of reducing competition in the market, the pro-competitive effect of other provisions in the contract will not prevent that provision from contravening section 27. In addition, if the provision of that contract has a different competition effect in different markets, the net effect on competition in each market is considered and not the aggregate effect across all markets.
- 5.25 Along with all the above factors the Commission formulated the following questions in a 1987 case which assist in considering whether competition is being substantially lessened:
- (i) What is the extent to which competition is foreclosed by the agreement, and what alternatives do others in the market have?
  - (ii) Does the agreement have the effect of threatening independent initiatives of operators in the market?
  - (iii) Does the agreement have the effect of causing operators in the market to compete less vigorously?
  - (iv) Does the agreement enable the parties to it, to exercise power over others, for example, over persons contracting with the parties or their competitors?
  - (v) Does the Agreement affect the ability or desire of potential entrants to enter the market in question?<sup>7</sup>
- 5.26 The Commission will look at the impact of the conduct in question on the overall competitive process which will involve an analysis of the ability of other competitors to effectively compete and the ability of new potential competitors to enter the market. The Commission will however look at the effect on competition as a whole, and not necessarily on the effect of individual competitors.

**Example: Numerous New Zealand meat companies were ordered to pay in excess of \$5 million after the High Court agreed with the Commerce**

<sup>6</sup> Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) ATR 40-315

<sup>7</sup> RE Weddel Crown (1987) 1 NZBLC (Com) 104 2000

**Commission that they had entered into agreements which had the purpose of substantially reducing competition. The companies met regularly over time and essentially agreed on the prices they would offer to pay suppliers for livestock thereby restricting competition between themselves. A similar situation could arise in the medical profession should, for example Medical Practitioners agree amongst themselves the fees they will charge patients or at what price they will supply their services to other health care providers.**

#### **Definition of Market**

- 5.27 When looking at the effect of particular conduct in a market it is vital to accurately identify the relevant market. "Market" is defined in the Act as "a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them" (Section 3(1)(c)).
- 5.28 It is clear that economic substitutability is relevant in defining a market, i.e. goods and services that are close substitutes will fall into the same market. However the test used by both the Commission and the courts is to consider whether a small but sustained increase in price would result in consumers purchasing alternative products or engaging alternative services. If so, the price-increased products or services and the alternatives would be considered to be in the same market.
- 5.29 In assessing a market the courts will also look to the behaviour of producers of products or services and not focus solely on consumer behaviour. For example, if a supplier raised the price for services provided, what would be the likely response of competitor suppliers? Other suppliers with excess capacity to provide the services at a lower cost or suppliers with the ability to easily adapt to providing the services in question may be considered as part of the same market.
- 5.30 The above concept of market is known as ***the product market***, and is considered along with other dimensions of a market; namely the ***geographic*** extent of the market, the ***functional*** level of the market and the ***temporal*** level of the market.
- 5.31 The geographic extent of the market is related to the area over which the goods and services are purchased and competition between suppliers takes place. This will depend on the facts of the case so that a market may be restricted to a certain region or could include all of New Zealand and even further a field. Practically, it can be difficult to accurately pinpoint the geographic boundaries of a market.
- 5.32 The functional level of a market is the position of a product or service in the chain of production or distribution, i.e. wholesale and retail markets.
- 5.33 The temporal level is the timing of the market, i.e. whether the market is seasonal or has off and on peak periods. Such consideration is useful for

determining over which timeframe the product market should be assessed, i.e. whether long term substitution possibilities should be included or not.

- 5.34 It is interesting to note that in the decision of the Commission to grant clearance for the merger of two Wellington private radiology practices, the Commission determined that public and private radiology providers were not in the same market, but in separate markets. Their reasoning for this focussed on the absence of competition between public and private providers for funding of the operations, the difference in the cost of the services and the timeframes over which these services were provided. The government policy of the time, which did not encourage the public system to carry out private work, was also a factor. However, defining a market will always depend on the circumstances in each case. For example, in contradiction to the above, a recent case involving Ophthalmologists found that the provision of private and public cataract surgery was in the same market.

## Summary: Section 27 – Substantially Lessening Competition

The section requires that a contract, arrangement or understanding must exist. It does not need to be written or formal and can be as simple as a ‘nod and a wink’. The courts will look to see whether an agreement was reached as to an intended course of action i.e. a collusion.

The contract, arrangement or understanding must have a provision which has the purpose, effect or likely effect of substantially lessening competition. The substantial purpose of the provision needs to be anti-competitive to breach the section.

Substantial lessening of competition will often require an assessment of the factual and counterfactual scenarios in the appropriate market although the effect on competition must be ‘real’ and not nominal.

## 6. Case Study - The “Southland” Ophthalmologist Case

- 6.1 The case of the *Commerce Commission v Ophthalmological Society of New Zealand Incorporated*<sup>8</sup> is a good example of how Section 27 of the Act can apply to the medical profession.

### Facts of the Case

- 6.2 Southern Health was granted government funding for routine cataract operations for 225 patients to reduce the lengthy public waiting list. Doctor R was the local Southland Ophthalmologist and had performed this surgery in the past for Southern Health. He advised Southern Health that his fee per operation was \$1,100.00, which was higher than the budgeted funding available. In light of this and in consideration of Doctor R’s demanding workload Southern Health contacted an Australian ophthalmologist to negotiate his performance of the cataract operations.
- 6.3 When Doctor R discovered that an Australian ophthalmologist was planning to complete the surgeries he made several objections and complaints to Southern Health and to other Medical Practitioners and organisations about the intended arrangements. Doctor R considered that he could have performed the operations himself, possibly at a lower price and he was concerned for the welfare and safety of the cataract patients should the surgery be performed by the Australian Medical Practitioner. Doctor E raised these concerns also and their complaints eventually reached the Royal Australian & New Zealand College of Ophthalmologists. When the Australian ophthalmologist discovered these complaints and objections had been made he withdrew from the arrangement.

<sup>8</sup> (2004) 10 TCLR 994

- 6.4 Undeterred, Southern Health continued to seek an Australian ophthalmologist for the surgery. Whilst in negotiations with a prospective surgeon, Doctor R and Doctor E again took exception and sent letters of objection to Southern Health, the Royal Australian & New Zealand College of Ophthalmologists and raised the issue at the meeting of Christchurch Ophthalmologists. Importantly, the minutes of this meeting record that those present agreed that any extra work in the Southland CHE should be primarily offered to Southland consultants and would only be offered outside if Southland consultants were unable to provide the service. The motion was carried unanimously.
- 6.5 The Ophthalmological Society of New Zealand also became involved in that the President of the Society wrote a number of letters to Southland Health condemning the proposal and seeking to assist Dr R avoid the Australian competition.
- 6.6 Doctor R took it one step further and refused to supply supervision and “oversight services” to the Australian Medical Practitioner as did other Ophthalmologists in the region who were present at the meeting of Christchurch Ophthalmologists. These oversight services were necessary to enable then Australian Medical Practitioner to undertake the operations.
- 6.7 Given the complaints, the objections and the refusal to supply the necessary services, the Australian Medical Practitioner cancelled the arrangement and Doctor R performed the surgeries at the cost of \$675.00 per patient, a price which was only slightly higher than the fee expected to be charged by the Australian ophthalmologists.
- 6.8 The Commerce Commission took action against five individual ophthalmologists and the Ophthalmological Society of New Zealand claiming that their “arrangement” had breached section 27 of the Act by substantially lessening competition.
- 6.9 The Commission argued, and the High Court agreed, that each of the five Medical Practitioners and the Ophthalmological Society entered into an arrangement or understanding with the intention of hindering or preventing the Australian surgeons from performing cataract surgery and that such an arrangement or understanding had the purpose or had the effect of substantially lessening competition in a market.

“In general terms, what occurred was concerted action by members of a profession, and its professional body, to assist a colleague avoid legitimate competition to protect what he, and his profession regarded as his exclusive domain ..... The media release of the NZMC ..... aptly states the position that the arrangement of the defendants’, and actions of some of them, was an attempt by professional rivals to restrict the legitimate safe practice of medicine by an appropriately qualified doctor”<sup>9</sup>

## 7. Points of Note for the Medical Profession

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<sup>9</sup> Above n8

### **Contract, Arrangement or Understanding**

- 7.1 In considering this case Medical Practitioners should keep in mind that a breach of section 27 requires that a contract, arrangement or understanding must contain a provision which has the purpose or has the effect or likely effect of substantially lessening competition in a market. The following issues arose from the Ophthalmologist's case and are relevant to Medical Practitioners.
- 7.2 Medical Practitioners should remember that a written contract does not have to exist for the elements of section 27 to be met. An arrangement or understanding may arise when there is "consensus giving rise to an expectation that some proscribed action or inaction take place". In the ophthalmologists case, the meeting of the Society where unanimous support for Doctor R's predicament was given, and discussions amongst the ophthalmologists concerned were found to have amounted to an understanding or agreement that some action be taken in respect of the Australian surgeon.

### **Purpose**

- 7.3 To breach section 27 an understanding or arrangement must have a provision which has the *purpose* of substantially lessening competition. In a different factual scenario, it may well have been appropriate for Doctor R to have declined to provide supervision and oversight services to the Australian Medical Practitioners due to, for example, work overload or if he lacked the requisite skills. On the facts of this case the Court readily found that Doctor R's purpose in refusing to supply services was anti competitive and his decision not to supply services was in order to block the entry of the Australian Medical Practitioner.

### **Medical Associations and Societies**

- 7.4 This case illustrates that where a person acting within the scope of their authority under a professional association, breaches the Act, then both that person and the association or society under which they were acting, will be liable. Here the Ophthalmological Society and the President himself, had proceedings brought against them due to the President's involvement in the 'arrangement' and the Society was fined \$100,000.00.
- 7.5 Medical practitioners need also be aware of their conduct at meetings of professional societies and in particular, to voice any concerns over any action intended to be undertaken. In this case one of the ophthalmologists was found by the Court to have entered into the "arrangement" due to the minutes of the meeting of local ophthalmologists at which he was present, recording that there was unanimous support for Doctor R's predicament.

### **Patient Welfare & Safety**

- 7.6 In the above case, the ophthalmologist attempted to convince the Court that the arrangement was for the sole purpose of protecting patient safety as Doctor R was concerned that the Australian Medical Practitioner would return quickly to Australia and adequate post operative care would not be available. The Courts rejected this argument and found on an objective assessment of the circumstances that the purpose was anti-competitive.

“The reasons why persons may enter into an arrangement may differ, but if that arrangement has a **provision** that has the **purpose** of substantially lessening competition in the relevant market, a breach of section 27 arises<sup>10</sup>” [emphasis added]

- 7.7 Mistakes or misunderstandings may also not qualify as a defence. Some of the ophthalmologists prosecuted claimed that they entered into the arrangement on a misunderstanding of the terms of the Australian surgeons negotiations i.e. in respect of post operative care etc. However the requirements of section 27 were still met and the ophthalmologists were penalised.

#### **Intent not Outcome**

- 7.8 The Commerce Act is not solely focused on the effects of the anti-competitive conduct, rather its intention is to eliminate such conduct entirely. It is therefore irrelevant that the 225 cataract operations were undertaken finally for a price similar to that offered by the Australian surgeons.

#### **Geographical Boundaries**

- 7.9 The ophthalmological case also makes clear that local Medical Practitioners are not entitled to a monopoly within their region. Competition must be allowed from both within New Zealand and overseas, and attempts to deter such competition may be prosecuted under the Act. Medical practitioners need to keep in mind however that whilst they are not expected to encourage or assist competitors:

“ the proper practice of medicine must involve some cooperation between various colleagues in order for it to work. And it is the arrangement or understanding to collectively not cooperate that section 27 is aimed at; i.e. the group consensus”.<sup>11</sup>

## **8. Contracts, Arrangements, or Understandings Containing Exclusionary Provisions Prohibited**

- 8.1 Section 29 of the Act provides:-

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<sup>10</sup> Above, n8

<sup>11</sup> Above, n8, 1033

- (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.]
- (2) For the purposes of subsection (1)(a) [and (c)], a person is in competition with another person if that person or any interconnected body corporate is, or is likely to be, or, but for the relevant provision, would be or would be likely to be, in competition with the other person, or with an interconnected body corporate, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.
- (3) No person shall enter into a contract, or arrangement, or arrive at an understanding, that contains an exclusionary provision.
- (4) No person shall give effect to an exclusionary provision of a contract, arrangement, or understanding.
- (5) Subsection (4) of this section applies to an exclusionary provision of a contract or arrangement made, or understanding arrived at, whether before or after the commencement of this Act.
- (6) No exclusionary provision of a contract, whether made before or after the commencement of this Act, is enforceable.

**8.2** This section prohibits contracts, arrangements or understandings which contain an exclusionary provision that restricts dealings with a competitor. At least two of the parties to the contracts, arrangement or understanding must also be competitors.

- 8.3 One intention of this section is to prohibit boycotts, i.e. attempts to remove entirely a competitor from the market or to make it difficult for a competitor to compete effectively. The Commerce Amendment Act 2001 inserted subsection 1A which now provides even though an exclusionary provision may meet the definition under this section it is not to be considered an exclusionary provision if the provision does not have the purpose, effect, or likely effect, of substantially lessening competition in a market. Prior to this, if a contract or agreement had an exclusionary provision it was prohibited even if the purpose was not anti-competitive or if the effect of such a provision was minor.
- 8.4 The Commission gives the following three examples of potential exclusionary arrangements:
- (i) A group of competitors banding together and threatening a supplier so that the supplier stops supplying rival businesses with goods or services.
  - (ii) A group of competing suppliers reaching an Agreement to threaten a business so that it stops buying from a competing supplier.
  - (iii) Members in a Trade Association not accepting as members those in the same trade who discount the prices of their goods and services.

## **Summary: Section 29 – Exclusionary Provisions**

Section 29 prohibits agreements which contain exclusionary provisions which have the purpose, effect or likely effect of substantially lessening competition. If an exclusionary provision is proved, the onus will be on the defendant to prove it does not substantially lessen competition (section 1(A)).

At least 2 of the parties to the agreement must be in competition with each other. This will involve ascertaining whether the parties supply the same goods or services or whether they acquire goods or services from the same customers and should not require strict economic analysis. Potential competitors may also be included.

The ‘target’ of the exclusionary provision must be in competition with at least one of the parties to the arrangement.

The section is particularly aimed at collective boycotts.

## **9. Case Study – Australian Obstetricians – Boycotting**

### **Facts of the case**

- 9.1 In 2002, three Australian obstetricians came to an agreement to boycott the “No-Gap” funding arrangements which were offered by numerous private health insurers at the time. This resulted in approximately 200 patients being required to pay fees for in-hospital medical expenses which would otherwise have been covered by the ‘No-Gap’ arrangements.
- 9.2 The three obstetricians were required to repay this gap to the patients once the court found that they had breached the Australian competition laws.

### **Points of Note**

- 9.3 Whilst individual Medical Practitioners were free to conclude on whether to take part in the ‘No-Gap’ billing arrangements, it was the collusion, i.e. the agreement between the three obstetricians to collectively boycott these arrangements that breached the Australian legislation.
- 9.4 The ACCC chairman noted:

“Medical practitioners pressured by others to engage in such collective boycotts must resist succumbing to that influence as

such arrangements are contrary to the law and will be acted upon.”<sup>12</sup>

## 10. Certain Provisions of Contracts, etc, with Respect to Prices Deemed to Substantially Lessen Competition—

### 10.1 Section 30 provides:

- (1) Without limiting the generality of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—
  - (a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or
  - (b) Resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.
- (2) The reference in subsection (1)(a) of this section to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

### Elements

10.2 Section 30 prohibits price fixing and deems it to have, or likely to have, the effect of substantially lessening competition in a market. This is however subject to sections 31, 32 and 33 which provide some exceptions. These exceptions are

- where there is a joint supply by parties involved in a joint venture
- when there is a recommended retail price for fifty or more people, or
- where businesses or persons are involved in joint advertising and buying.

10.3 Section 30 requires the following elements to be satisfied in order to apply:

<sup>12</sup> *Federal Court Finds Rockhampton Obstetricians Boycott of “No-Gap” Billing Breached Competition Law*. ACCC Media release MR 264/02 (31 October 2002).

- (i) An **agreement**<sup>13</sup> must exist between either people or businesses; and
  - (ii) The parties to the above agreement must be in **competition with each other**; and
  - (iii) The agreement has the **purpose, effect, or likely effect**, of **fixing, controlling** or **maintaining** the price for goods or services, or any discount, allowance, rebate or credit in relation to those goods or services.
- 10.4 The agreement does not necessarily need to relate to the final price that consumers are charged but may relate to components of the price, such as discount levels, price ranges, credit and rebate levels etc.
- 10.5 Examples of where price fixing was found to have existed include:

***Petrol companies reached an agreement amongst themselves to no longer offer free car washes with petrol prices of \$20.00 or over. The Courts found that the carwash was a discount and that therefore price fixing had occurred and the three companies were fined a total of \$1.175 million.***

***A bus company (“Company A”) attempted to discuss with another bus company (Company B”) the appropriate tender price for bus contracts for the Regional Council. Although Company B declined to enter into such an agreement, by virtue of Section 80 and 81 of the Act (which regulates attempts at inducing others to enter into price fixing contracts) Company A was fined \$380,000.00.***

### **Fixing, Maintaining or Controlling the Price**

- 10.6 A provision in the agreement must either have the purpose, effect or likely effect of fixing, controlling or maintaining the price, or providing for the fixing, controlling or maintaining of price. The latter may be relevant in some circumstances where a negotiator is appointed to act on behalf of a group of medical practitioners, particularly where the negotiator has authority to bind the parties. There are potentially a wide range of arrangements that could control or maintain price, including dividing up the market between competing medical practitioners based on the services to be provided, the patients to be treated, or the contracts that would be tendered for.
- 10.7 As mentioned above, prices may be fixed by competitors agreeing on a final price, a minimum or a maximum price, or by agreeing on a formula for calculating price. The courts have indicated that the price does not have to be fixed permanently or even for a long period of time in order to breach section 30.

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<sup>13</sup> Refer above to paragraph 5.5ff p9 for earlier discussion as to what constitutes an “agreement, arrangement or understanding”

- 10.8 Any price fixing arrangements will be deemed anti-competitive irrespective of their actual effect on competition. However, case law has suggested that the courts may not construe an agreement as price fixing when the price fixing actually improves competition or which “merely incidentally” affects price. However Medical Practitioners should be cautious of any arrangements which intend to fix, control or maintain prices.

### **Control or Maintain**

- 10.9 “Control or maintain” extends the type of arrangements which can be caught by this section. Whilst these arrangements might not fix the price they will in some way interfere with price determination. An Australian decision holds that an arrangement or an understanding has the effect of “controlling price if it restrains a freedom that would otherwise exist as to a price to be charged”.<sup>14</sup> For example, formulas for calculating price, discount levels, a price range etc.
- 10.10 In the past a number of Trade Associations and other professional bodies have distributed and exchange price information amongst members. Whilst such a practice is risky in light of section 30, notwithstanding the narrow exception provided by section 32, the Commerce Commission in *re NZ Medical Assn*<sup>15</sup> provided the following guidelines for what is and what is not acceptable in such price exchanges:
- (a) The Agreement should be a genuine information exchange directed towards information generally.
  - (b) The information should be collected independently and anonymously.
  - (c) The Agreement should assume the anonymity of members and the information should be of a generalised nature, naming no particular consumer or producer.
  - (d) The industry structure should be such that particular members, producers or consumers, cannot be identified from the figures obtained.
  - (e) The scheme should be voluntary.
  - (f) The results should be available to any person/s (including non-industry persons) on request.
  - (g) The figures collected from the survey should not be used as a vehicle for recommending or policing pricing or other, similar policies.

<sup>14</sup> *ACCC v CC(NSW) Pty Ltd* (1999) 165 ALR 468, 504

<sup>15</sup> (1988) 1 NZBLC (Com) 104, 369

- (h) The information should be limited to historical facts. Pre-notification of prices or trading terms should not occur.
- (i) The frequency with which the parties provide information and how up-to-date it is will be of relevance in assessing the likely competitive effects of the arrangement.

10.11 Given point (g) above and the fact that the primary reason such information is gathered is for it to be used as a vehicle for recommending pricing, it is our view that these guidelines effectively preclude the exchange of such information.

### **Summary: Section 30 – Price Fixing**

Section 30 absolutely prohibits provisions in contracts, arrangements or understandings which have the purpose, effect or likely effect of fixing, controlling or maintaining prices by deeming them to substantially lessen competition.

The fixing, controlling or maintaining of discount allowances, rebates or credit is also prohibited.

Provisions do not have to specify an exact price i.e. an approximation may suffice and the price is not required to be 'fixed' for a specific duration to breach the section. The section may also apply to a formula for calculating prices, discount levels, collusive tendering and price ranges.

The section will capture price information exchanges which meet the required elements. However due to the benefits of genuine exchanges, the Commission has issues guidelines.

## 11. Case Studies

### Dunedin GP's Warned About Price Fixing

#### Circumstances

- 11.1 In May 2005 a group of Medical Practitioners whilst discussing their intention to join the Dunedin Primary Health Organisation, met and collectively decided on a maximum fee they would charge for patients between the ages of 6 and 17. The Commission investigated the conduct and, whilst the Medical Practitioners were only warned on this occasion, penalties provided in the Act (up to a maximum of \$500,000.00 for individuals), may have been imposed had the case progressed further and the GP's were found to have breached section 30 (and therefore deemed to have substantially lessened competition).
- 11.2 The Commission also noted the Governments move to increase funding for PHO's, in particular the addition of further categories of patients such as the 6 to 17 year olds and the over 65 year olds. They noted that in return for this increased funding medical providers are expected to reduce their patient fees.
- 11.3 In its media release, the Commission stated "GP's need to be aware of the price fixing provisions of the Act, especially when they are talking with other GP's. We urge competing GP's to avoid talking about prices, and to avoid exchanging pricing information".
- 11.4 "Competing GP's", are any Medical Practitioners not in partnership and will include Medical Practitioners in the same practice group. There is an exception in the Commerce Act for price fixing when the arrangement is made between members of a partnership (where none of the partners is a body corporate).

### Australian Anaesthetists Case

#### Circumstances

- 11.5 In 1997 the Australian equivalent of the Commerce Commission instituted proceedings against a group of anaesthetists who they claimed had breached the Australian equivalent of the Act by entering into an agreement to charge a fixed amount per hour for on-call services to private hospitals. The anaesthetists had also informed one private hospital that unless the hospital agreed to pay the fixed fees for the on-call services; then that group of anaesthetists would no longer supply services, i.e. would 'boycott' the hospital.
- 11.6 The matter was resolved before it went to trial with the anaesthetists and their professional association agreeing to undertake to the Court that they would not engage in any fixing controlling or maintaining of prices and would not attempt to prevent, hinder or lessen competition in the market. However, the

Commission made it clear that as this was the first enforcement action against medical practitioners following the Competition Policy Reform Act 1995 (Australian legislation) then no penalties were sought. They stated however:

“The ACCC will always take action where serious allegations of breaches occur. Professionals taking collective action on price or collectively withdrawing services risk serious consequences, including large pecuniary penalties. Professional associations that assist or coordinate such collective conduct are also at serious risk under the Act”.

11.7 The Commission in New Zealand has already strongly indicated that the medical profession will not be immune from prosecution under the Act.

## **Palmerston North Ophthalmologists**

### **Facts of the Case**

11.8 A proceeding involved four ophthalmologists from the Manawatu/Wanganui region who were found to have breached section 27 and 30 of the Act by fixing prices for the provision of specialist eye services to Mid Central Health Limited (“MCHL”). The ophthalmologists had decided to negotiate jointly with MCHL for the provision of after hours and on-call eye services. They agreed amongst themselves the fee for the supply of those services and submitted this collective position to MCHL.

11.9 They later entered into a contract arrangement with MCHL at a rate that applied to all four of them.

### **Outcome**

11.10 The Commerce Commission issued proceedings against each of the ophthalmologists and the Court found that the understanding that the parties would negotiate jointly and the contract itself, had the purpose and effect of fixing the prices paid by MCHL for services supplied by the ophthalmologists, and the ophthalmologists, had therefore breached section 27 and 30 of the Act.

11.11 Three of the ophthalmologists were fined \$15,000.00 each with the fourth ordered to pay \$10,000.00 as he was a party to the arrangements for a shorter period of time.

### **Note for Medical Practitioners**

11.12 It is important to note that the ophthalmologists were adamant that there was never an intention to breach the Act nor was there an awareness that the arrangement to jointly negotiate the supply of services was breaching the Act. In fact, the ophthalmologists stated that their primary objective was to provide a better standard of eye services than those which were being provided by the public hospital at the time. However as discussed, these matters are not

relevant as the elements of section 30 were met, i.e. the contract or arrangement had a provision with a purpose of fixing the price of services and was therefore deemed to have substantially lessened competition.

## 12. Taking Advantage of Market Power

### 12.1 Section 36 provides:

- (1) Nothing in this section applies to any practice or conduct to which this Part applies that has been authorised under Part 5.
- (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.
- (3) For the purposes of this section, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of section 45(2), in New Zealand.
- (4) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected.]

12.2 Section 36 prohibits a person or business with a substantial degree of market power from taking advantage of their market power to prevent competition in any market. Note that this section does not prohibit the existence of monopolies or the increasing of market power by means other than preventing competition.

### Elements

12.3 Section 36 had previously used a “dominance” test rather than the “substantial degree of power” test now applicable. The elements required to satisfy this section are therefore:

- (i) That a person or business has a **substantial degree of power** in the market;
- (ii) That person or business then **takes advantage** of that power;
- (iii) The **purpose** of the conduct in taking advantage of that power is to;
  - **restrict the entry** of any other person or business into a market, or to
  - **prevent or deter** a person or business from engaging in competitive behaviour in a market; or to

- *eliminate* any person or business from a market.

All three of these elements must be established.

- 12.4 Section 36A further prohibits people or businesses with a substantial degree of power in a market in either New Zealand, Australia, or both from taking advantage of that position for the anti-competitive purposes as defined, i.e. prevents Trans-Tasman abuse of market power.

#### **Substantial Degree of Market Power**

- 12.5 In assessing whether a substantial degree of power exists the leading case is *Boral v ACCC*<sup>16</sup> where it was agreed that the essence of power is absence of constraint, i.e. a person or business not being constrained by the conduct of competitors, suppliers or customers.
- 12.6 This will involve consideration of the competitors market share, technical knowledge and access to materials and/or capital, potential competitors in a market and barriers to entry.
- 12.7 It is important to note that the term “substantial” does not have the same meaning as that used in section 27; rather the Courts have interpreted substantial in this section to mean “large or weighty” or “considerable, solid or big”. However, as discussed above the Courts have found that a substantial degree of market control is where activities are not significantly restrained by competitors, suppliers or customers, which may not always require a dominant market share.

#### **Taking Advantage of the Substantial Degree of Power**

- 12.8 It is not enough to simply show that a person or business has a substantial degree of power in a market and that the purpose of that person or business’ behaviour was to restrict, prevent, deter or eliminate a person from the market. There also needs to be a connection between the person or business, and the **taking advantage** of the substantial degree of market power to achieve the anti-competitive consequence.
- 12.9 The Australian case of *Queensland v BHP*<sup>17</sup> developed a ‘factual/counterfactual test’ which involves analysing whether the behaviour was made possible only by the person’s substantial degree of market power (and therefore likely absence of competition). The test involves consideration of how the person or business would have likely behaved in a competitive market in which he or she did not have a substantial degree of market power. This requires creating a hypothetical market situation and comparing it to the facts of each case. However, both the Australian and the New Zealand

<sup>16</sup> (2003) 215 CLR 374;195 ALR 609

<sup>17</sup> (1989) 167 CLA 177;

Courts have been open to the possibility of establishing the connection without reference to economic analysis:

“it may be proper to conclude that a firm has taken advantage of market power where it does something that is materially facilitated by the existence of market power even though it may not have been absolutely impossible without the power”<sup>18</sup>.

- 12.10 More recently however the Privy Council in *Carter Holt Harvey* (ref?) has reaffirmed the counterfactual test as being necessary in determining whether there is a connection between power and conduct.

### **Purpose**

- 12.11 The substantial degree of market power must have been taken advantage of for the *purpose* of restricting entry into a market, deterring or preventing a person from engaging in competitive behaviour or eliminating a person or business from a market. The Courts have interpreted purpose as being more than an “intention” and requires the conduct to have the “objective or aim” of securing the anti-competitive consequences. The New Zealand courts have drawn a distinction between purpose and consequence. For example, where a person’s purpose may not have been to eliminate another business from the market even though they may have known that their conduct would likely have that effect.<sup>19</sup> However, the Courts have accepted that an anti-competitive purpose will exist when such a consequence is inseparable from the consequence which is the aim or objective of the conduct undertaken.
- 12.12 Proof of purpose may be inferred by conduct, actions and circumstances and generally a person will be presumed to have intended the natural and probable consequences of their actions.

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<sup>18</sup> *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128; 169 ALR 554;

<sup>19</sup> *Berlaz Pty Ltd v Fine Leather Care Products Ltd* (1991) 80 PR 41-118, 52, 768

## Types of Conduct which May be Prohibited Under Section 36

### Predatory Pricing

12.13 Predatory pricing is when a person or business engages in conduct having the purpose of deterring competition by setting very low prices, often selling below the firm's incremental costs of production and, in the event of being successful in this strategy, having the likelihood of raising prices to recoup losses. Whilst price cutting or underselling will not generally be considered to be predatory pricing, when these are used by a person or business with substantial market power for the purpose of eliminating a person or business from the market then it is likely to be caught under this section.

### Exclusive Dealing and Other Exclusionary Arrangements

12.14 Although exclusive dealing itself would not normally be considered anti-competitive, combined with a substantial degree of market power and an anti-competitive purpose it may breach section 36. Exclusive dealing is generally used to refer to an arrangement whereby a customer is restrained from dealing with any of its supplier's competitors. It can also include the following:

- (i) A requirement, by the seller that the buyer purchase additional goods or services from the seller as a condition of doing business.
- (ii) A requirement by the seller that the buyer purchase additional goods or services from a third party as a condition of doing business.
- (iii) Conditions imposed by customers limiting their supplier's freedom to supply others and conditions imposed by suppliers limiting their customer's freedom to resupply the supplier's goods to others.

### Price Discrimination

12.15 Price discrimination is the situation where goods or services are supplied at different prices to different classes of customers. The circumstances where this practice is most likely to be anticompetitive is in the case of a vertically integrated company that has substantial market power for a good or service that it supplies to itself for resale and to its competitors in a downstream market. If the vertically integrated company supplies the product to its competitors at a wholesale that is significantly higher than the price it supplies the product to itself, plus any additional costs incurred, then it might be engaging in price discrimination that may contravene the Act.

### Refusal to Deal

- 12.16 Refusals to deal do not in themselves breach the Act, however, when they involve collusion, boycotting and use of substantial market power such activities may be prohibited. A business with a substantial market power will breach section 36 if it refuses to deal with another business and its purpose in refusing to deal is to prevent, restrict or deter competition.
- 12.17 In *NZ Private Hospitals Association Auckland Branch Inc V Northern RHA*<sup>20</sup> it was argued by the Private Hospitals Association that the RHA, a Monopsony (a single buyer or purchaser of goods or services), had contravened Section 36 by reducing the numbers of providers it contracted with, and therefore as a consequence, the unsuccessful providers would be forced out of business. The Association was however unsuccessful in arguing that this was a breach of section 36 as the Court did not consider the purpose of the RHA was anti-competitive. In fact, the Court could find “no logical reason why Northern Health would want to have as its objective a reduction of competition in the market ...”.
- 12.18 The Courts also accept that there is no duty on a person or business with substantial market power to assist competitors and they still have a right to compete in the market.
- 12.19 Other practices which will possibly contravene Section 36 include refusal of access to essential facilities, abuse of legal rights by forcing potential or existing competitors to become involved in expensive and ongoing litigation proceedings, and unnecessary and excessive delays in fulfilling business agreements.

## Health-Related Competition Issues

### 13. Recommended Fee Schedules

- 13.1 Recommended fee schedules have in the past been used by professional groups and/or governing bodies to assist group members calculate appropriate fees for their services taking into account expected costs, expenses and required margins. Although the publishing of recommended fee schedules may only “recommend” a set fee or, more commonly a scale for the setting of fees, such schedules can potentially breach section 27 and 30 by coming to an agreement that has the purpose, effect or likely effect of fixing, controlling or maintaining the price for services.
- 13.2 Both the New Zealand Dental Association and the Pharmacy Guild have in recent times been warned by the Commerce Commission that the fee schedules they published were in potentially in breach of the Act. In regard to the former, while no apparent breach was found, as a result of the investigation the Dental Association agreed to ensure that any pricing information they made available was now made to all members of the industry as well as the public. As to the Pharmacy Guild the Commission found that for 11 years (1991-2002) its *Premiums Guide* stipulated for each

<sup>20</sup> 7/12/94 Blanchard J, HC Auckland CP 440/94

partially subsidised medicine, a price which included a 50% pharmacist mark up on the unsubsidised costs. This action was considered to be potentially anti-competitive.

- 13.3 Medical Practitioners need to be aware of the risk of breaching the Act and need to ensure that when dealing with competitors in their workplace and socially they do not arrive at agreements or understandings to fix, control or maintain the price of goods or services. As previously discussed an agreement or understanding does not require a formal contract and a mere “nod and a wink” may suffice.
- 13.4 The Commerce Act allows medical practitioners working in partnership to agree a schedule of fees. This limited exception however only applies if there is a formal partnership agreement (provided that none of the partners to the agreement is a body corporate). Thus, Medical Practitioners who choose to work together but without operating under a partnership agreement cannot agree to set the same patient fees. If they do so they will be found to be in breach of the Act.

## 14. Long-Term Contracts

- 14.1 The Act does not specifically deal with long term contracts and the Commission has no clear guidelines on the matter. However section 27 prohibits any contract from containing a provision that has a purpose, effect or likely effect of substantially lessening competition in a market and long term contracts may often have some anti-competitive effects. Note however that the risk is small and should not deter medical practitioners from entering into long term arrangements that are procompetitive (ie efficiency enhancing), competitively neutral or which benefit consumers. There are however public benefits which arise from long term arrangements and these will be weighed by the Courts. In a 1995 decision of the Commission regarding an application for authorisation of a 10 year service contract between Midland RHA and Health Waikato CHE, the Commission stated:

“a long term contract in the Health Sector may not by itself raise competition concerns under the Act. However, it is likely to raise concerns where there is a monopsony purchaser, a monopoly provider, or the barriers to entry to the relevant markets are high and there are potential or existing providers with the ability to contest the relevant market. In these circumstances, consideration should be given ..... whether a proposed contract could be negotiated for a shorter term.”

## 15. Professional Bodies

- 15.1 An area of concern regarding membership of a professional organisation is the manner in which potential members can be restricted, i.e. a breach of section 29.
- 15.2 Whilst member organisations can legitimately restrict new entries for reasons based on performance, quality standards etc, if membership is refused in an

attempt to prevent or restrict a competitor from competing in the market, it is likely to breach the Act.

- 15.3 The Ministry of Health's guidelines for PHO's suggest refraining from the following conduct:
- (a) agreeing on a price that member providers will charge patients or seek to obtain from the DHB; or
  - (b) allowing member providers on a PHO executive from being involved in negotiations with DHB's or other providers regarding a fee charged to patients or accepted from the DHB (it is suggested that a subcommittee is formed that does not include member providers to deal with contracting and pricing issues);
  - (c) encouraging the sharing of price information at Fee Review Committee meetings (it is suggested an independent person collects pricing information from each member provider separately);
  - (d) restricting membership to the PHO for anything other than legitimate reasons.

## 16. Duty Rosters

- 16.1 It appears a concern among the medical profession that after hours duty rosters may be prohibited by the Act. There is however no restriction in the legislation regarding after hours rosters and the issues arise only where such a roster may facilitate the type of conduct prohibited under the Act i.e. agreeing with competitors to fix prices, agreeing with competitors to exclude another competitor or entering into an arrangement which substantially lessens competition.
- 16.2 It is likely that the provisions regarding excluding competitors are at most risk of being breached by a roster system. If a medical practitioner is prevented from entering into a roster scheme, or prevented from practising other than when rostered, with the anti-competitive purpose of prohibiting or preventing the Medical Practitioner from competing in the market, then a breach of the Act is likely.
- 16.3 Agreements between Medical Practitioners to facilitate the provision of medical services to patients will generally amount to an 'agreement or understanding' under the Act. A roster organised or arranged by a hospital for its staff members is unlikely to be subject to the Act as the 'agreement' would not be between competitors.
- 16.4 Rosters should have the *purpose* of providing patient access to services and no restrictions should be placed on roster members. For example, Medical Practitioners should be free to practice and provide services to patients, even when not rostered. The roster should allow a minimum practice time not a maximum. For example if a group of Medical Practitioners agreed to provide after hours medical services 7 days a week but agreed that none of them would provide any service after 7 pm this could potentially breach the Act. Whether it does or not will be dependent on the facts of the case, i.e. whether

the group of Medical Practitioners was large enough and/or the practice area small enough to result in a substantial lessening of competition.

- 16.5 Medical Practitioners also need to be wary when exiting a roster. If two or more professionals have **collectively** decided to exit a roster system, care should be taken to ensure that the purpose, effect or likely effect of such an exit, is not anti-competitive. For example, if two or more medical practitioners agreed to exit a roster in order to inhibit the supply of medical services to a hospital this would raise competition concerns.
- 16.6 In Australia, a group of rural Medical Practitioners were concerned that their cooperative medical rosters may be deemed anti-competitive and breach the Australian equivalent of the Commerce Act. They requested exemption from the Act, stating that Competition Law issues were making it more difficult for rural communities to attract and retain Medical Practitioners. This request was declined however the ACCC made it clear that it did not regard the medical rosters in rural areas as a breach of the Act per-se.

## 17. Authorisations and Exemptions

- 17.1 The Commerce Commission has the ability to grant authorisations and exemptions for conduct which would otherwise be in breach of the Act, if the net public benefit or if the conduct outweighs the anti-competitive effect. Gaining these however are costly and complicated; unless the practitioner or organisation concerned has significant resources gaining an authorisation will not be an option.
- 17.2 Authorisations however cannot be granted for breaches of section 36 and 36(a) i.e. taking advantage of market power.
- 17.3 Other exceptions are set up in Section 44 in the Act and include:
- (i) Practices which are specifically authorised by other legislation;
  - (ii) Agreements between business partners in respect of their partnership (if none of the partners are a body corporate);
  - (iii) Agreements which restrict the work a person may do during or after termination of a contract or agreement, i.e. restraint of trade clauses in employment agreements.
  - (iv) Agreements between a purchaser and seller of a business to protect the goodwill of that business, i.e. restraint of trade in Agreements for Sale and Purchase.
  - (iv) Agreements between interconnected body corporates i.e. subsidiaries (although not from the actions prohibited in sections 36 and 36(a) – taking advantage of market power).

- (v) Agreements relating to wages, salaries or working conditions of employees.

17.4 As detailed above the Act provides that agreements between business partners are exempt from the Act. In this way many law and accountancy firms are not caught by the Act however Medical Practitioners who often practice in small practice groups rather than partnerships are not afforded this benefit.

## **18. Penalties and Remedies**

18.1 In an action brought by the Commerce Commission, if the Court finds that a person has breached the Act, it may impose a penalty of up to \$500,000.00 in respect of an individual, or in respect of a body corporate (this may include professional organisations and societies), \$10,000,000.00 or three times the value of any commercial gain which resulted from the breach of the Act, whichever is the greater. The Court is obliged to make an order for an individual to pay a monetary penalty unless there is good reason for not doing so.

18.2 In a civil action for breach of the Commerce Act the court has the ability to award compensatory and punitive damages. Any party bringing a claim under the Commerce Act has the right to apply for injunctive relief.