Collective pricing - A practical guide to section 30 of the Commerce Act 1986

Miriam R Dean*

The law and practice of price fixing in New Zealand is here considered in the context of advice to clients. Sections 27, 30, 31, 32 and 33 of the Commerce Act 1986 are examined, examples given, and comment is made on the relevant New Zealand and overseas decisions.

I COLLECTIVE PRICING: INTRODUCTION

Collective pricing, or price fixing, may be regarded as the "hard core" of antitrust or competition laws. It is first on the Commerce Commission's list of priorities for restrictive trade practice work and therefore a trade practice with which all practitioners should be reasonably familiar.[1] People in business may suggest that fixed prices are reasonable or cause no injury to the public. However, the simple reality is that:[2]

> [T]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition ...

Essentially, collective pricing involves, as the name suggests, agreements between competitors to fix the price for goods or services. The key provision of the Commerce Act 1986 ("the Act") is section 30. The policy behind section 30 is that price fixing between competitors (subject to certain exemptions which are discussed later) is so inherently anti-competitive that section 30 *deems* the practice to be illegal per se - that is, price fixing agreements are automatically assumed to substantially lessen competition and therefore contravene section 27 of the Act. Section 27 of the Act is a general catch - all provision which provides inter alia that no person shall enter into a contract, arrangement or understanding which has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market. It is to be

---

* Barrister and Solicitor of the High Court of New Zealand. This article is based on a paper delivered as part of the New Zealand Law Society Seminar *The Commerce and Fair Trading Acts: The Must Knows* by W Pengilley, MR Dean, BP Henry (June 1989). The Law Review gratefully acknowledges the agreement of the Law Society to the publication of the article.

1 *Report of the Commerce Commission for the year ended 31 March 1987*, 9, a report presented to the House of Representatives after the first 11 months of the Act's operation.

2 *US* v *Trenton Potteries Co* 273 US 392, 398 (1927).

emphasised that the actual offence creating provision is section 27. In relation to price fixing, however, a breach of section 27 is established by a "breach", or more correctly, the application of section 30 of the Act.

In short, section 30 reflects the per se objection to price fixing agreements. In accordance with the whole philosophy of the Act, prices are to be regulated by the competitive process.

II SECTION 30: THE KEY ELEMENTS

Section 30 provides:

> Certain provisions of contracts, etc with respect to prices deemed to substantially lessen competition -
> (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 and services.

Section 30 is substantially the same as section 45A(1), (7) and (8) of the Trade Practices Act 1974 (Aust). Essentially, section 30 will apply where the following elements are satisfied:

(1) There is a *contract, arrangement* or *understanding*.

(2) The parties to the contract, etc are *in competition with each other*.

(3) A provision of the contract, etc has the *purpose* or *effect* (or is *likely* to have the 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.

(4) The goods or services must be *supplied* to or *acquired* by one or more of the parties to the contract, etc or resupplied by their customers.

Each of these four elements is considered in turn below.

A Contracts, Arrangements or Understandings

None of these terms is defined in the Act. However, the broad concept of "contract, arrangement or understanding" is not a new one in trade practice law; these terms have counterparts in British, American and Australian trade practice legislation.[3]

There is no difficulty in the use of the term "contract", which is intended to have its normal common law meaning; ie an agreement between two or more parties which involves binding obligations enforceable at law. Any price fixing case is more likely, however, to focus on the existence of an arrangement or understanding: the "wink or nod" agreement.

Essentially, an arrangement or understanding will exist where there has been some form of *communication* between the parties and there is an *indication* of *mutual intention to follow a common course of action.* An arrangement or understanding is therefore apt to describe something less than a legally "binding contract or agreement"[4], ie there being no intention to create legal relations. The critical element in any arrangement or understanding is that the minds of the parties must be at one. The requirement for a "*meeting of minds*" is a common theme in the case law and is probably the most useful way of defining either term.

The concept of arrangement or understanding was usefully considered (in the context of section 45 of the Australian Trade Practices Act) by the Federal Court in *TPC* v *Nicholas Enterprises Limited*[5] where Fisher J, having examined the relevant authorities[6], concluded:[7]

> That a *meeting of minds* is an essential feature of sec. 45 of the Act was the view of Smithers J. in the *Ira Berk* case ... Smithers J. said at ATPR p17, 116; A.L.R. p469:
>
> > "... it would follow that the *existence of an arrangement* of the kind contemplated in sec. 45 *is conditional upon a meeting of the minds* of the parties to the

---

3 Note that the word "understanding" was not included in the Commerce Act 1975 (which replaced the Trade Practices Act 1958). Its origin (at least in so far as New Zealand law is concerned) can be traced to the provisions of the 1974 Australian Trade Practices Act.

4 *Re The Wellington Fencing Materials Association* [1960] NZLR 1121, esp. 1129-1130.

5 (1979) ATPR 40-126.

6 In particular, Fisher J relied on *Re British Basic Slag Ltd's Agreements* [1963] 2 All ER 807 which contains a helpful analysis of the concept of "arrangement".

7 The judgment of Fisher J was approved by the Full Court of the Federal Court in *Morphett Arms Hotel Pty Limited* v *TPC* (1980) ATPR 40-157 subject to one qualification. Bowen CJ held that it may not be necessary for *each* party to an arrangement or understanding to have accepted an obligation qua the other. However, in this regard, see also *TPC* v *Email Limited* (1980) ATPR 40-172, 42,377 where Lockhart J suggests that an arrangement or understanding without mutual commitment would be rare.

> arrangement in which one of them is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man *to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way,* at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement."
>
> It seems to me also that an *understanding* must involve the meeting of two or more minds. Where the *minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs* or the *adoption of a particular course of conduct,* it would seem that *there would be an understanding within the meaning of the Act* [emphasis added].

The key element therefore is the existence of some *commitment* whereby the parties accept rights and/or obligations which may or may not be legally binding in a contractual sense, but nevertheless enable each party to rely on a particular course of action by the other. It should be noted that in *TPC* v *Email Limited*[8] Lockhart J observed that there is:

> ... [a] fundamental distinction between a *hope or prediction of future behaviour* on the one hand and the *expectation* of certain behaviour on the other; that is behaviour which, as a result of communication between the parties, the party restricted is at least morally bound to adopt [emphasis added].

The term "arrangement" or "understanding" was considered by Barker J in *Auckland Regional Authority* v *Mutual Rental Cars (Auckland Airport) Limited*[9], one of the first cases under the 1986 Act. After referring to various of the cases and texts, Barker J suggested that "a good discussion" of the words "arrangement" or "understanding" is to be found in the submission of the Australian Trade Practices Commission to the New South Wales Price Commission - *Enquiry into Prices and Distribution of Motor Vehicle Spare Parts,* July 1978:[10]

> An arrangement or understanding comes into existence as a result of some communication between the parties; the communication can however, occur by written or spoken word the one to the other or by one observing and interpreting the other's behaviour. It is

---

8 (1980) ATPR 40-172, 42-377.

9 [1987] 2 NZLR 647. See also *Commerce Commission* v *Fletcher Challenge Ltd & Others* (Wellington High Court, 20 April 1988, CP 335/88 McGechan J) where McGechan J was required to determine, as part of the Commission's case that Fletcher Challenge & Others had breached s50 of the Act (prohibition on implementing a merger or takeover without prior clearance) whether there existed an "arrangement" between the parties concerning the ownership and control of Golden Bay Limited. Although the judgment does not contain any legal analysis of the meaning of arrangement, it is clear from his Honour's analysis of the relevant evidence that he proceeded on the footing that the determinative factor was the presence or otherwise of any *commitment* by the parties to the alleged arrangement.

10 W Pengilley "Exclusionary provisions of the New Zealand Commerce Act in light of United States decisions and Australian experience" Auckland Trade Practices Workshop, March 1987, republished in (1988) 3 Canta LR 357.

sufficient if the result of that communication is an expectation or hope[11] in each party that the other is likely to act or not act in a particular way or for a particular purpose. There is no difference between an arrangement or an understanding in terms of anti-competitive purposes or effect. Any differences are a matter of degree - for instance, an understanding is likely to be more informal, communication more subtle, the means of achieving the anti-competitive purpose or effect more vague or even open to independent unilateral action etc. The Courts have recognised subtlety and disguise as inevitable hallmarks of illegal collusion.

1 The evidential test

Any analysis of section 30 of the Act must necessarily, even if only briefly, touch on questions of evidence and procedure. This is because "[q]uestions of evidence in relation to contracts, or understandings are totally interwoven with the concept of what constitutes such a contract arrangement or understanding".[12] Consequently, it is important that lawyers are familiar with questions of evidence and procedure for such matters will clearly be relevant in advising clients in deciding whether or not to proceed with possible risk taking situations.

In many cases, a finding on the existence of an arrangement or understanding will involve the court drawing inferences from a wide range of circumstantial evidence. Arrangements or understandings are rarely provable by direct evidence. The Australian experience is that circumstantial evidence may consist of:

- Evidence of parallel conduct;
- Evidence of joint action by the parties in relation to relevant matters;
- Evidence of collusion between the parties;
- Evidence of opportunities (such as industry meetings) for the parties to reach an understanding.

The most common evidence of an arrangement or understanding between competitors is proof of a meeting (or even a telephone call) and then proof of a common course of action following the meeting. Take the following examples:

* *the lunchtime negotiation*: In *TPC* v *Nicholas Enterprises Pty Ltd*[13] eight liquor retailers met at a hotel luncheon. A discussion on pricing ensued. The court found that an arrangement or understanding was reached between some of the retailers whereby the hoteliers agreed to fix the allowance offered to the public on each purchase of a dozen 740ml bottles of beer.

* *the coffee shop meeting*: In *TPC* v *David Jones (Australia) Pty Ltd*[14] a coffee shop meeting was held between retailers of Sheridan manchester products. A uniform price list was distributed at the meeting. Following the meeting, the

---

11 Note, however, the comments of Lockhart J in *Email*, above n8, 42-377.
12 Australian Trade Practices Reporter Vol 1, 4-300, 2, 881 (CCH Australia Ltd).
13 Above n5.
14 (1986) ATPR 40-671.

same pricing structures were exhibited by all the retailers who had been in attendance. The acts relied upon exhibited such a concurrence of "time, character, direction and result" that, taken in conjunction with the meeting and in the circumstances in which it was held, they encouraged the court to draw an inference that the acts were "the outcome of pre-concert".

* *the telephone conversation*: *US* v *American Airlines & Crandall*[15]. Mr Crandall, Chief Executive of American Airlines, telephoned one of his competitors. The conversation went as follows:

Crandall: I think it's dumb as hell for Christ's sake, all right, to sit here and pound the ... out of each other and neither one of us making a ... dime.

Puttnam: Well -

Crandall: I mean, you know, goddamn, what the ... is the point of it?

Puttnam: Nobody asked American to serve Harlingen. Nobody asked American to serve Kansas City, and there were low fares in there, you know, before. So -

Crandall: You better believe it, Howard. But you, you, you know, the complex is here - ain't gonna change a goddamn thing, all right. We can, we can both live here and there ain't no room for Delta. But there's, ah, no reason that I can see, all right, to put both companies out of business.

Puttnam: But if you're going to overlay every route of American's on top of over, on top of every route that Braniff has - I can't just sit here and allow you to bury us without giving our best effort.

Crandall: Oh sure, but Eastern and Delta do the same thing in Atlanta and have for years.

Puttnam: Do you have a suggestion for me?

Crandall: Yes. I have a suggestion for you. Raise your goddamn fares twenty percent. I'll raise mine the next morning.

Puttnam: Robert, we -

Crandall: You'll make more money and I will too.

Puttnam: We can't talk about pricing.

Crandall: Oh bull ..., Howard. We can talk about any goddamn thing we want to talk about.

In view of the clear risks which clients run when communicating with their competitors (or dealing with their trade associations) Warren Pengilley has suggested some pragmatic and useful rules which clients should be advised to follow to avoid

---

15 743 F 2d 1114 (1984).

infringing the Act and these are set out in the Appendix to this article. The rules are simple but can often make the point far more effectively for the client than a turgid legal discussion of the relevant statute and case law.

It should be noted that the Australian courts have observed in a number of cases that, where facts and evidence are peculiarly within the knowledge of a defendant, the absence of a credible explanation as to the action of the defendant will be a significant factor in drawing an inference that an arrangement or understanding did in fact exist. This was the situation in the *David Jones* case where the defendants, although denying any arrangement, did not give the court any explanation as to their conduct. On the other hand, in *TPC* v *Email*[16], where the Commission relied purely on circumstantial evidence that electricity meter manufacturers had fixed prices, the Court was satisfied after hearing evidence from all the defendants that their parallel pricing could be explained on the basis of commercial considerations quite unconnected with any collusion and explicable by the history and nature of the industry. Therefore, there may be little option but to have a defendant give evidence in a price fixing case.

In this context, it should be noted that the Act confers on the Commission wide powers of investigation and enforcement. For example, section 98 gives the Commission power, inter alia, to requisition documents and even to inspect and remove documents under warrant.[17] Section 99 empowers the Commission to take evidence. Section 79 then allows the court to receive evidence which would otherwise be inadmissible in injunction and damages proceedings.[18] Practitioners should also note the provisions of section 90 which provide that any conduct by a director, agent etc on behalf of a company is deemed to have been engaged in by the company itself.

---

16 Above n 8.

17 See *Commerce Commission* v *O'Neil,* District Court Wellington, Judge BJ Cullinane, 30 May 1989 where the Secretary of the Wellington Branch of New Zealand Institute of Driving Instructors was fined $2,000 (out of a maximum $4,000) for not responding to a s 98 notice requesting information of alleged price fixing amongst Association members.

18 Of key importance is the fact that the section permits the admission of evidence which would "not otherwise be admissible". This appears to be principally aimed at hearsay evidence not already permitted under any of the 1980 exceptions to the Evidence Act 1908. Note, however, the Court of Appeal in *Pallin* v *Department of Social Welfare* [1983] NZLR 216 (when discussing a provision) held that this did *not* give the court the power to override "rights and/or duties to withhold evidence". In other words, information may still be excluded or withheld in reliance on a statutory privilege or on other grounds such as legal professional privilege. For further general comments on this area see Mathieson *Cross on Evidence* (4 NZ ed, Butterworths, Wellington, 1989) 38-42. No similar provision is contained in the Australian Trade Practices Act, however, assistance may usefully be gained by an analysis of Order 33 of the Federal Court Rules - refer *Pearce* v *Button* (1986) 8 FCR 408; *Warea Pty Ltd* v *Waterloo Industries Pty Limited* (1986) 12 FCR 152; and also the English equivalent; RSC Order 38, r 3(1); refer *H* v *Schering Chemicals Limited* [1983] 1 All ER 849. Section 79 was also considered by McGechan J in two trial rulings in *Commerce Commission* v *Fletcher Challenge and Others* (unreported, Wellington High Court 29 April 1989, CP 335/88).

To date, there have been no reported cases brought under section 30 which indicate the range of situations in which the courts will find a price fixing arrangement or understanding to exist. Several proceedings for pecuniary penalties for breach of section 30 are, however, presently before the courts. Furthermore, the *Fletcher Challenge* case[19] does provide an excellent illustration of the kind of factual analysis which may be required to determine the existence or otherwise of any arrangement or understanding (in that case in the context of the merger and takeover provisions of the Act). There, McGechan J rejected allegations by the Commission as to the existence of an arrangement between the various parties based largely on documentary evidence. In his Honour's view, it was a case where "appearances from documents, taken in isolation, [were] deceptive": "*Discussions yes: possibilities yes: commitment no*".[20]

2 *Price leadership*

Section 30 does not apply if one company merely "follows" the prices of another: competitors are free to decide *independently and in the exercise of their own judgment* to follow the prices of a competitor. While "price fixing done in tawdry, smoke-filled hotel rooms is a crime, identical pricing completely without collusion generally is not".[21] This practice is known as "conscious parallelism". In such circumstances, no "contract, arrangement or understanding" is involved and hence no potential for infringement of section 30 of the Act exists.

However, it is important that clients are aware of the potential dangers of conscious parallelism. Overseas courts have been prepared to hold that an arrangement or understanding is established on the basis of parallel conduct and similar pricing structures. The 1955 US Attorney-General's report on antitrust laws[22] contains a useful list of questions which have guided the US courts in determining whether parallel action in any case infringes their antitrust laws. These are:

- How pervasive is the uniformity?
- Does the uniformity extend to price alone or to all other terms and conditions of sale?
- How nearly identical is the uniformity?
- How long has the uniformity continued?
- What is the time lag, if any, between a change by one competitor and that of others?
- Is the product involved homogeneous or differentiated?
- In the case of price uniformity, have the defendants raised as well as lowered prices in parallel fashion?

---

19 Above n 9.

20 Above n 9, 108 and 39 respectively.

21 Shenefield, Ass US Attorney-General: Antitrust Speech, June 29, 1977. See A Ramson and W Pengilley *Restrictive Trade Practices: Judgments, Materials and Policy* (Legal Books, Sydney, 1985) 367.

22 *Report of the Attorney-General's National Committee to Study the Antitrust Laws* (United States Government Printing Office, 1955).

- Can the conduct, no matter how uniform, be adequately explained by independent business justification?

It is suggested that provided:

- clients do not exchange price lists;
- clients do not meet and discuss pricing with their competitors; and
- any visible uniformity in prices can be satisfactorily explained by price leadership effects, by common costs of production, or calculation of margins on historical data etc,

there should be minimal, if any, risk involved in following another supplier's price lists.

B In Competition with Each Other

Section 30 only applies where two or more of the parties (including their interrelated bodies corporate) to the contract etc are in competition with each other. The section is therefore aimed at *horizontal* agreements, eg an agreement between competing wholesalers as to the prices they will charge retailers. Vertical agreements, eg a supply agreement between a wholesaler and a retailer are not covered.

Competition includes *potential* competition, ie parties will be *deemed* to be in competition with each other notwithstanding that they may in fact have agreed not to compete (section 30(2)). It is therefore no defence, as some clients would seem to believe, that because they do not *actually* compete with their competitors because, for example, of a tacit market sharing agreement between them, that section 30 will not apply. It should be stressed that such a defence is unlikely to meet with success. The simple reality is that business people do not make price fixing arrangements with parties who are not their competitors. There is no point in doing so.

C Fixing Prices

1 Price

"Price" is defined in section 2 as follows:

> "Price", includes valuable consideration in any form, whether direct or indirect; and includes any consideration that in effect relates to the acquisition or supply of goods or services or acquisition or disposition of any interest in land, although ostensibly relating to any other matter or thing.

The concept of "price" fixing is further extended to include price related terms, ie allowances, discounts, rebate or credit.

2 *Fixing, Controlling or Maintaining*

These terms were the subject of a decision by Lockhard J in *Radio 2UE Sydney Pty Limited* v *Stereo FM Pty Limited & Anor.*[23] This case concerned the question of possible contravention of section 45A (ie section 30) as a result of two radio stations offering purchasers of radio advertising time a combined rate card which aggregated the two stations' separate charges. Lockhart J defined the concept of "fixing" in these terms:[24]

> ..fixing of a price for the purposes of section 45A does not necessarily connote an element of permanency, but generally suggests the setting or determining of a price for a period of time that is not instantaneous or merely ephemeral. The person may fix a price for his goods knowing that he may wish to vary it at some future time, but generally not so soon as would to business people be regarded as merely momentary or transitory.

As to the term "maintaining" Lockhart J went on to say:[25]

> In my view "maintain" where used in section 45A has a similar connotation to the verb "fix" in that it involves some element of continuing, not merely being momentary or transitory. Generally, to maintain a price assumes that it has been fixed beforehand.

His Honour also considered that it was "important to distinguish between arrangements ... which restrain price competition and arrangements which merely *incidentally affect* it or had some connection with it". In particular, it was his view that "where competition is improved by an arrangement [he could not] perceive how it could be characterised as a price fixing arrangement within the ambit of those sections."[26] On a broader note, Lockhart J counselled that care should be taken in characterising conduct as price fixing: that such a finding "may have far reaching consequences to the competitors concerned."[27] On appeal, the Full Federal Court affirmed the decision and considered that there must be "an element of intention or likelihood to affect price competition before price 'fixing' can be established."[28] Notably, in *The Matter of an Application by the Insurance Council of New Zealand* for authorisation of an agreement known as a "knock for knock" agreement the Commission approved and adopted various dicta from the *Radio 2UE* case.[29]

Lawyers defending a price fixing charge will undoubtedly consider the *Radio 2UE* decision helpful to their cause and especially in light of the *Insurance Council of New Zealand* Case. However, the decision has been the subject of criticism[30] and there

---

23 (1982) 62 FLR 437.
24 Above n 23,449.
25 Above n 24.
26 Above n 23, 448.
27 Above n 23, 447.
28 (1983) 68 FLR 70, 72.
29 Decision no 236 (27 July 1989) paras 31 et seq.
30 See, for example, M Blakeney and A Freilich "The Per Se Prohibition of Price Fixing in Australia" (1986) 60 ALJ 668; Yvonne Van Roy *Guide Book to New Zealand*

must be a question as to whether an *intention* to affect market prices is in fact required by the words of the section. Therefore, in advising clients, lawyers should be cautious in taking too much comfort from the *Radio 2UE* decision.

3 Scope of the prohibition

It is to be emphasised that the scope of the prohibition is wide. The following points should be emphasised:

(i) The section applies not only to contracts etc which actually fix prices, but also to those which *provide for* the fixing of prices in the future, or in certain circumstances, or subject to certain conditions. Arrangements fixing maximum or minimum prices (because parties cannot reach agreement on actual prices) will therefore be caught.

(ii) It follows that prices may be fixed by competitors agreeing on a formula or some other method of calculation. Or, competitors may employ methods which, while not actually fixing a price, have the purpose of maintaining or controlling it, eg an arrangement between competitors as to the prices at which goods or services are to be advertised.[31]

(iii) Section 30 will apply to contracts etc which have either the purpose *or* effect of fixing prices. Where the purpose of the contract etc is to fix prices, it is no defence that the contract etc may not in fact have had that effect. It has been held that the test of "purpose" is an objective one and one which does not involve establishing the mens rea of the parties: *TPC* v *Tubemakers of Australia Limited*[32]. Section 2(5)(a) of the Act specifically provides that a provision is *deemed* to have a particular purpose if the provision is included for that purpose or for the purpose among other purposes and the particular purpose is a *substantial* one. Obviously, in having regard to the question of

---

Competition Laws (CCH, Auckland, 1987) 562; Hill & Jones *Competitive Trading in New Zealand* (Butterworths, Wellington, 1986) 67-88.

31 *Fyans Permanant Building Society Application* (1976) 1 TPCD: see G Taperell, R B Vermeesch and D J Harland *Trade Practices and Consumer Protection* (Butterworths, Sydney, 1983) para 560 fn 114.

32 (1983) ATPR 40-358 at 44, 325. Barker J in *Auckland Regional Authority* v *Mutual Rental Cars (Auckland Airport) Limited* [1987] 2 NZLR 647, 664 and 667 considered that the appropriate test is an objective one. The Commission in Decision 225 in the matter of an application by Fisher & Paykel Limited for authorisation of a restrictive trade practice suggested also at 22-23 that the "objective" test was the preferred one. However, Holland J in a recent decision, *Apple Fields Ltd & Anor* v *NZ Apple and Pear Marketing Board & Anor* (Christchurch High Court, CP 544/88, 21 March 1989), stated at 35 that in his view, as Parliament had referred to both purpose and effect, it had thereby intended the ordinary meaning of those words to apply - ie that purpose was *subjective* while effect was *objective*. Note, however, in practice, establishing a subjective purpose will be extremely difficult. The majority of cases will no doubt rely largely on circumstantial evidence from which the court will be asked to draw the necessary inference.

"purpose", the courts will consider a range of factors, including the subjective purposes of the parties, their actions and the actual effect of the provision.

(iv) Similarly, the converse also applies and the inclusion of an "effect" test means that purpose is irrelevant if the contract etc has the actual or likely effect of fixing prices. Essentially, a "likely" effect is a "probable" effect.[33] Thus, section 30 may catch contracts etc which do not at first glance even appear to be price related. In this regard, clients should be aware that the following types of agreements might well fall within section 30:

- quota arrangements, or more generally, arrangements providing for the control of the supply of products on to a market.[34]

- market sharing agreements as to products, particular customers or geographic areas. "Many of these agreements are a direct substitute for price fixing since it may be easier to divide the market and share it rather than try to agree on the prices to be charged".[35]

- information exchange agreements.

4 Information Exchange

It is reasonably common practice amongst New Zealand businesses (in particular in the context of trade associations membership) to compile and exchange information about matters common to the industry, including matters relating to pricing. In particular, trade associations often provide members with costing assistance and seek to promote uniform terms of trading, standard forms of contract and so on. Trade associations and recommended prices are discussed below.

On the one hand, it is perfectly legitimate for clients to seek to be well informed about market conditions. On the other hand, exchange of information may also be used as a method of price fixing, or more generally, it may have the purpose or effect of substantially lessening competition (section 27). Therefore, the distinction between what will, and will not, be considered "genuine" information exchange is important and is a matter upon which clients may frequently seek advice.

---

33 See inter alia *Air New Zealand* v *Commerce Commission* [1985] 1 NZLR 338 and *Fletcher Metal Ltd* v *Commerce Commission* (1986) 6 NZAR 33.

34 See for example *US* v *Socony Vacuum Oil* 310 US 150 (1940) and *Burnie Timber Co Pty Ltd* (TPC) A30050, 8 February 1980: *Australian Trade Practices Reporter* Vol 1, 3-655 at 2, 482.

35 Taperell, Vermeesch and Harland, above n 30, para 562; see also *Anscott Pty Ltd* (TPC) C3030-3031, 2 January 1975: see *Australian Trade Practices Reporter* Vol 1, 3-665, 2, 482.

For example, in *American Column & Lumber Company* v *US*[36] an arrangement between members of an association of hardwood manufacturers who, as part of an "open competition" plan, gave the association secretary daily reports of all sales and deliveries, copies of invoices, monthly reports of production and stock and a monthly price list (all used to assist the secretary in sending out periodical reports to members indicating sales made and summarising the various price lists) were found (by majority decision) to have engaged in fixing prices. As the US Supreme Court observed:[37]

> Genuine competitors do not make daily, weekly, monthly and yearly reports on the minutest details of their businesses to their rivals.

Useful guidance can be obtained from an information circular produced by the Australian Trade Practices Commission[38] as to the criteria which it applies in determining whether market information agreements are likely to have significant effects on competition and therefore contravene provisions equivalent to our sections 30 or 27. Market information agreements will *not* generally be considered to breach the Act if the following conditions are satisfied:[39]

(a) the agreement is a *genuine information exchange* directed towards information generally and not with the intent or effect of controlling or recommending prices

(b) the information collected pursuant to the agreement is collected independently and with *anonymity* of records being preserved

(c) the agreement assures the anonymity of members participating and that information is of such a nature as to be generalised, naming no particular producer or consumer

(d) the agreement is one pursuant to an industry structure in which particular members, producers or consumers cannot be identified from the figures obtained. This will normally mean that the industry will comprise a number of members sufficient to prevent identification from figures obtained

(e) the scheme is *voluntary* to industry members and may or may not be engaged in by particular industry members at their complete discretion

(f) the *results* of the information or agreement are *available to any persons* (including non industry members) on request

---

36 257 US 377 (1921).

37 Above n 35, 410, Cf *Maple Flooring Manufacturers Association* v *US* 268 US 563 (historical data; no parties named).

38 Circular No 14, 28 April 1976, CCH *Australian Trade Practices Reporter*, Vol 2 55-014 at 60, 164.

39 Above n 38, 60, 166.

(g) there is no question of the figures collected from the survey being used as a vehicle for recommending or policing pricing or other policies

(h) information is based on details of *past historical fact.* Pre-notification of prices or trading terms should not occur

(i) How frequently information is provided by parties and how up to date the information is, will be matters clearly relevant in assessing the likely competitive effects of the arrangement.

The Commission has since adopted the Australian guidelines in *Re New Zealand Medical Association*[40]

D Supplied or Acquired/Resupplied

Finally, section 30 requires that the goods or services must be supplied to, or acquired by the competitors, or resupplied by persons to whom the goods are supplied by the competitors. "Supply" and "acquire" are both defined in section 2 of the Act. "Re-supply" is defined in section 2(4)(e).[41]

The key point to note is that the prohibition extends to the *acquisition* of goods. Thus, *buying* co-operatives or groups may unwittingly fall foul of section 30 unless an appropriate exemption can be claimed.

III EXEMPTIONS

A number of exemptions from the automatic application of section 30 are provided for in the Act. These are considered in turn.

A Joint Venture Pricing: Section 31

Essentially, this section enables competitors who are joint venture partners to agree on the pricing of their respective inputs and outputs. The need for such an exemption in cases where partners to a joint venture are "in competition with each other" is obvious. If parties to a joint venture were still subject to the Act's prohibition, this

---

40 Decision no 220, (1988) 7 NZAR 407.

41 "Re-supply" is defined to include

> "(i) A supply of the goods to another person in an altered form or condition; and
>
> (ii) A supply to another person of other goods in which the goods have been incorporated."

For example, a manufacturer of refrigerators who buys components for incorporation into its refrigerators is to be treated as re-supplying those components when it sells the completed refrigerators. Similarly, if competing breweries agreed between themselves to attempt to control the price at which publicans resold beer supplied by the breweries, or either of them, the agreement would fall foul of s 30; see GQ Tapperell, RB Vermeesch and DJ Harland, above n 31, at paras 427 and 560.

would severely limit or restrict the joint venture operation from carrying on business, particularly in relation to the setting of prices.[42]

B Recommended Price Provisions by Trade Associations: Section 32

As a general observation, trade associations are, by definition, groups of competitors who meet and exchange information and may therefore provide fertile ground for anti-competitive pricing practices. Indeed, trade associations are singled out in the Act for special attention.[43] In particular, section 2(8) provides that an agreement entered into by a trade association is *deemed to be an agreement among all its members.* Similarly, a recommendation by a trade association to its members is treated as an arrangement between all its members.

Thus, the combined effect of these deeming provisions is that all members of a trade association are liable for pecuniary penalties, damages or injunctions for the association's conduct, irrespective of a particular member's actual involvement. This is unless the member has notified the association that he/she disassociates himself/herself from a particular contract or recommendation, or the member can establish that he/she had no knowledge of the contract or recommendation in question. In the latter case, the onus of proof is on the individual member to prove lack of knowledge.

Consequently, clients might be well advised to reconsider remaining members of trade associations where price fixing, market sharing or boycotting activities have been a prevalent feature of the association's activities in the past. As Pengilley has put it,[44] clients need to ask:

Put bluntly, if the association can no longer fix a price, is it worth preserving? Fellowship is one thing, fines are another.

1 Price recommendations issued by an association of 50 or more members

Section 32 exempts from section 30 price recommendations by trade associations which have not less than 50 members. The exemption applies only to the making of a genuine recommendation - any policing or enforcement of the recommendation is still subject to section 30. Furthermore, even genuine recommendations remain subject to scrutiny under section 27 as to their purpose or effect. In *Re The Collective Pricing Agreement of the Chemist Guild of New Zealand (Inc)*[45] the Commission listed the

---

42 For a useful discussion in the joint venture exemption, see Taperell, Vermeesch and Harland, above n 31, paras 569-572.

43 The former Chairman of the Commission, J Collinge, usefully identified areas at risk for trade assocations under the Commerce Act in a speech on 27 August 1986 to the Top Tier Group: "Trade Associations and the Commerce Act".

44 W Pengilley *Collusion Trade Practices and Risk Taking* (1978, CCH Australia Ltd) 29.

45 Decision No 167, 12 June 1986.

following factors which would be "strong evidence" that prices in a trade association list are not genuinely recommended prices:

(a) the pressing of members not to discount from the recommended price or the pressing of members to use the margins recommended;

(b) the offering of inducements or special privileges to achieve the foregoing;

(c) the pressuring of suppliers not to supply, or to supply upon relatively unfavourable terms, members who discount;

(d) announcements by a trade association that the price in question will rise;

(e) agreements by individual members with each other to keep to the recommended price.

The Commission has suggested that one way of ensuring that "recommended prices" are protected is to state in the price recommendation that "the prices contained herein are recommended prices only and there is no obligation upon members to charge such prices".[46] Notwithstanding the Commission's statement, it must be stressed that it is *actuality* which is relevant in competition law. The placing of any wording on documentation will not assist if the *actuality* is that prices are monitored or policed in any way whatsoever. Even informal monitoring or "suggestions" as to trading policy will be enough to take the prices out of the genuine recommendation category.

2 *Price recommendations issued by an association of less than fifty members*

If *under* 50 members are involved then *no* exemption can be claimed under section 32. Therefore, the treatment of these recommendations will depend upon whether or not they have the purpose or effect of price fixing contrary to section 30. If this is proved to be the case, then they are automatically subject to the prohibition in section 27.

If not, they will still be subject to the prohibition in section 27 if the evidence establishes that recommendation has the purpose or effect of substantially lessening competition in a market. In Australia, the publication of recommended price lists by trade associations has generally been found to be anti-competitive. For the approach of the Australian Trade Practices Commission to the use by small business associations of recommended prices lists see: *Retail Confectionery & Mixed Business Association (Victoria).*[47]

---

46 Above n 45.
47 (1978) 3 TPR 160.

C Joint buying and promotion arrangement: section 33

This section exempts from section 30 a provision in any contract, arrangement or understanding which:

(a) relates to the price for goods or services to be *collectively* acquired whether directly or indirectly, or

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

It is noted that the section 33 exemption only applies to goods and services which are *collectively* acquired. The term "collectively" is not defined in the Act. The acquisition probably need not be a joint acquisition. As Taperell, Harland & Vermeesch observe,[48] it is probably sufficient if, for example, members of a buying group use their combined bargaining power to negotiate a common purchase price but then place their own orders separately. An arrangement to appoint one of the members as agent to buy their total requirements would also seem to qualify. It should be noted that the exemption for advertising only applies to the resupply of goods collectively acquired, ie the exemption will *not* cover goods acquired individually by traders but jointly advertised. The Australian Trade Practices Commission has again usefully set out in an information circular[49] the elements which it considers to be important in assessing the effect on competition of joint buying and advertising schemes. It is likely that the same criteria will be applied by the New Zealand Commission and/or courts.

Although joint buying or advertising arrangements may be exempt from section 30, clients should be aware that such arrangements may still be caught by the wide ambit of section 27 if they have the purpose or effect of substantially lessening competition.

IV PENALTIES

There have been no New Zealand decisions which indicate the level of pecuniary penalties likely to be awarded by the courts for price fixing. The maximum penalties ($300,000 in the case of a company, $100,000 in the case of individuals: to be increased respectively to $600,000 and $200,000 as part of the proposed review of the Act) are high. The onus of proof is civil only.

Practitioners should ensure that their clients are aware that the "party" provisions of the Act are particularly wide. Sections 80, 81, 82 and 84 render a person liable to pecuniary penalties, injunctions and damages where that person has:

(i) aided or abetted a contravention;
(ii) induced or attempted to procure a contravention;
(iii) has been "directly or indirectly knowingly concerned" in a contravention; or

---

48 Above n 31, para 574.
49 Information Circular Number 15: CCH *Trade Practices Reporter*, Vol 2, 55-015, 60, 172.

(iv) conspired to contravene the Act.

In Australia some awards have been severe.

Examples

* *TPC* v *Pioneer Concrete (Aust) Pty Ltd*[50]. Five ready-mixed concrete companies admitted to price fixing after a severe price cutting war. Penalty: $250,000 against the five companies.

* *TPC* v *Allied Mills*[51] . Two large glucose manufacturers were found guilty of price fixing. Penalties: $50,000 each plus costs of $70,000.

* *TPC* v *Tubemakers of Australia*[52]. A supplier of steel products, its subsidiary and the subsidiary's manager pleaded guilty to an attempt to fix prices by trying to persuade other industry participants to limit discounts to 10%. Penalties: $15,000, $10,000 and $2,000 respectively.

* *TPC* v *David Jones (Australia) Pty Ltd*[53] . A number of retailers who met and agreed to adopt a price list for a particular brand of manchester which had previously been discounted were found to have breached the Act. Penalties: $15,000 each on David Jones and Myers, $6,000 on the two other parties, $1,000 on each of the five individuals involved.

* *TPC* v *Australian Autoglass Pty Ltd*:[54] Four companies admitted involvement in a number of separate agreements to fix the levels of discounts for replacement windscreens. One of these parties admitted to being "knowingly concerned" in one agreement by merely arranging for a distributor to attend a meeting where prices were discussed. Penalties ranging from $65,000 to $25,000 were imposed together with payment of the Commission's costs.

V AUTHORISATIONS

Price fixing contracts which are caught by section 30 (and therefore prohibited by section 27) *may* be authorised by the Commission upon the grounds that the contract etc would result in a net *public benefit* which would outweigh the lessening in competition that would otherwise result.[55] It has now been established that clients may apply for an authorisation even when in doubt as to whether the contract etc is

---

50 (1985) ATPR 40-590.
51 (1981) ATPR 40-252.
52 (1983) ATPR 40-358.
53 (1986) 8 ATPR 40-671 and see *Trade Practices Commission Bulletin* No. 42 (July-August 1986) at 3 for Fisher J's judgment on penalty.
54 (1988) 10 nATPR 430-881.
55 See ss 58, 60, 62-65. A prescribed form of application for authorisation has been issued by the Commission.

prohibited by the Act: refer application by *Weddel Crown Corporation Limited, Waitaki International Limited and W Richmond Limited*[56] - the *Whakatu* Decision.

The *Whakatu* decision concerned an application or authorisation of an arrangement relating to the permanent closure and sharing of the costs of the Whakatu and Advanced meatworks. A key issue in the *Whakatu* decision was whether, by virtue of their application, the applicants had conceded that their contract had the purpose or effect of substantially lessening competition pursuant to section 27. The majority of the Commission held that, by applying for an authorisation, the applicants had not in any way conceded that the activity would substantially lessen competition or contravene any part of the Act.

The decision is therefore important because it means that a party may apply for an authorisation without admitting that the practice, the subject of the application, is anti-competitive. Indeed, this was the course pursued by Fisher & Paykel Limited in its application for authorisation of its exclusive dealing agreements. In its decision on Fisher & Paykel's application,[57] the Commission endorsed the approach which it had followed in the *Whakatu* decision and emphasised that the "mere making of an application is not necessarily an admission that the practice is one to which section 27 or other appropriate section applied".[58] The Commission need establish a breach of section 30 or other provision as a "threshold test for jurisdiction only". Accordingly, the Commission's finding that there was insufficient public benefit to outweigh the substantial anti-competitive effects of Fisher & Paykel's exclusive dealing arrangements on competition did not "go to the legality of the practice itself".[59]

The *Whakatu* decision is notable also for its detailed discussion on a wide range of substantive and procedural issues. It provides a blueprint for the enquiries to be made, the questions to be asked and the issues to be considered by practitioners and others involved in the authorisation process.

There have only been two decisions to date dealing with authorisation of *price fixing* agreements:

- *NZ Vegetable Growers Federation Inc.*[60]
- *NZ Kiwifruit Export & Growers & Woolstorers.*[61]

---

56 Decision No 205, 22 July 1987.
57 Decision No 225, April 1988.
58 Above n 57, 10.
59 Above n 57, 80.
60 Decision No 206 (Note also the Association's subsequent appeal to the High Court (which was unsuccessful) - High Court, Wellington, MA31/87, Jeffries J, H G Lang Esq and E J Neilson Esq).
61 Decision No 221.

There is a useful discussion on the procedural and substantive principles involved in authorisation of restrictive trade practices under the Act in L L Stevens *Authorisation of Restrictive Trade Practices under the Commerce Act - Practice and Procedure.*[62]

VI CONCLUSION

The prohibition on price fixing contained in section 30 has been described as one of the "... so called 'classic cartels' which restricts competition as to price between competitors and [are] ... a fraud on the consumer and user"[63]. In view of the exposure to a wide range of civil sanctions (and the likelihood of a more aggressive role by the Commission in the policing and enforcement of trade practices following forthcoming changes to the Act), lawyers can very usefully assist their clients in ensuring compliance with the legislation. Moreover, lawyers themselves should be conscious of their own exposure to the prohibition on price fixing: there is no exemption for lawyers.

---

62 Commerce Act Workshop 21-22 May 1988, Wellington. The article usefully contains a schedule listing all applications for authorisation of restrictive trade practices filed with the Commission as at 6 May 1988.

63 J Collinge "First Steps under the Commerce Act 1986", Commerce Commission Seminar *An Introduction to the New Commerce Act,* 26 March 1986.

APPENDIX[64]

SUGGESTED RULES IN DEALING WITH COMPETITORS/TRADE ASSOCIATION

1 DO NOT CALL YOU COMPETITOR AND ASK WHAT HE IS CHARGING: If he tells the truth, you have the potential problem of having to prove that you have not entered into a price fixing agreement or understanding with him. If he tells you a lie, you have learnt nothing.

2 DO NOT REMAIN IN MEETINGS WHEN PRICES ARE BEING DISCUSSED: Head for the nearest door, fire escape, laundry chute or window. Make your exit with such ceremony so everyone will recall that you left. This may sound dramatic. The problem is that if you stay at the meeting, you will almost certainly be tarred with the collusion brush.

3 DO NOT BECOME INVOLVED AS AN EXECUTIVE OF AN ASSOCIATION: Which engages in price fixing or other pricing arrangements.

4 BE DILIGENT AT TRADE ASSOCIATION MEETINGS: Do not go "off the record" and discuss something illegal. Avoid "rump sessions" where the "true action" on the price fixing takes place. It is just as illegal if price fixing takes place without formality as with it.

5 PUT THE RULES OF YOUR ASSOCIATION IN ORDER: Do not let your trade association continue with such patently anticompetitive objects in its rule as:

> To stabilize prices by controlling and regulating the wholesale and retail prices and terms and conditions of sale generally and to eliminate unfair competition in buying and selling by manufacturers, wholesalers or retailers and to control and regulate supplies.

6 DO NOT SEND YOUR PRICE LIST TO YOUR COMPETITORS AS A MATTER OF COURSE: If this is done there is a possibility that Courts might find that an arrangement or understanding as to price has grown up between you. If your competitor wants your price list, it should not, in any event, be beyond his capacity to pick it up in the market place.

---

64 W Pengilley *Collusion Trade Practices & Risk Taking* (CCH Australia Ltd, 1978).

Now you've graduated - find out what else you qualify for.

GAME PLAN
FOR GRADUATES

You'll be surprised what The National Bank can do for you once you've completed your course.

Our new Game Plan package lets you choose from an extended range of banking options. These include special loan privileges, investment opportunities, a business finance facility and much more.

You set the priorities. You choose the options.

Call in and discuss your personal Game Plan at any branch of The National Bank.

Game Plan. Financial options to make the most of your new qualifications.

The National Bank of New Zealand Limited

The National Bank of New Zealand Limited can also provide special assistance for law graduates undertaking their practical training course. Call in and see us for details.