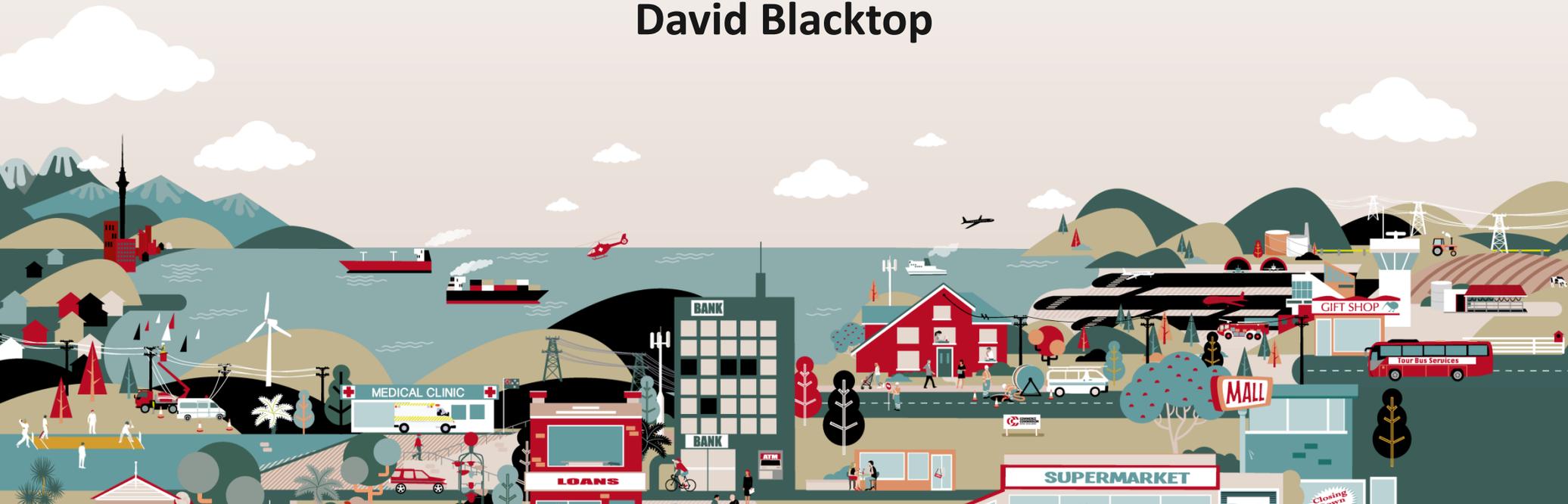


# Application of competition and consumer law to the Crown: the New Zealand perspective

Presentation to ACCC/AER conference

6 August 2015

David Blacktop



# Introduction

- Caveat: personal views
- Commerce Act 1986 and Fair Trading Act 1986 apply to the Crown insofar as they are “engaged in trade”
- Origins in changes to the law in 1979
- Carried over to the new Acts in 1986
- Major reform agenda in New Zealand over the period since 1986



# The statutory context

- Commerce Act, ss 5 and 6; Fair Trading Act ss 4 and 5
- Trade defined
  - ...any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land
- Specific legislative exemptions available for RTPs – s 43, Commerce Act
  - PHARMAC
  - Fibre Broadband rollout



# ‘Engaging in trade’

- Leading case: *Glaxo NZ Limited v A-G* (High Court and Court of Appeal)
- Concerned Minister’s decision not to fund a drug
- Distinction between:
  - Activity of a commercial nature – in trade
  - Activity of a regulatory or administrative nature – not in trade
- Court found Minister not in trade



# But the facts matter

- *Astra Pharmaceuticals (New Zealand) Ltd v Pharmaceutical Management Agency Ltd*
- Context: PHARMAC decides what drugs to fund
  - does this through commercial contract with suppliers
  - does not buy or sell drugs itself
- PHARMAC engaged in trade – underlying policy objective the same as Minister in *Glaxo*?
- Postscript: exemptions and unintended consequences



# Integrated Education Software

- Ministry of Education established an accredited provider scheme
- Provided ‘aggressive’ incentives for schools to use accredited suppliers
- Plaintiff not accredited and lost its customers as a result – claimed breach of s 36
- Ministry not in trade
  - ... sensible policy objectives consistent with [Ministry’s] statutory functions and able to be implemented by regulatory style programmes



# Marina Holdings Limited



- Council wrongly issued a building code of compliance
- Plaintiff claimed misleading and deceptive conduct
- Claim struck out on basis Council not in trade
- But, Building Act allowed third parties to conduct building inspections

I do not accept the comparison with the private building certifier. That is clearly a commercial activity per se, which simply removes one aspect of the Council regulatory functions. ... This is not a case of the Council providing services



# Rod Milner Motors Ltd

- Tender for licences for imported cars
- Ministerial decision affected value of licences after they were granted
- Claim conduct was misleading or deceptive
- Minister not in trade

Minister's functions involve controlling imports and protecting industry and the exchequer by a system of licensing and tariffs. ... While that obviously bears directly on the trade of others, I do not consider the Minister himself is in "trade"

....



