

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

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David Blacktop, Principal Counsel (Competition), New Zealand Commerce Commission¹

Introduction

1. In recommending that Australia's Competition and Consumer Act be extended to cover all government activity that has a trading or commercial character, the Harper Review panel cited the New Zealand experience in support of its recommendation.²
2. As the panel pointed out, New Zealand's Commerce Act 1986 (**Commerce Act**) and Fair Trading Act 1986 (**FTA**) apply to the Crown and Crown Corporations insofar as they are engaging in trade.³
3. The current provisions have their origins in amendments made in 1979 to the Commerce Act 1975, the forerunner of the current Commerce Act. There is little information available on why Parliament considered that these provisions were introduced (certainly nothing rivalling the Harper Panel's detailed consideration of these issues). However, there are (at least) three interesting features of these amendments. First, in 1979, New Zealand's economy was characterised by heavy government involvement in the economy through price controls, state run monopolies, and tariff and licensing requirements. Second, there was no right of private action under the Commerce Act 1975, so Parliament did not need to turn its mind to whether private parties would attack the Crown directly utilising the Act and the impact of any such attacks. And thirdly, the Labour opposition initially opposed the introduction of these clauses. This opposition was on the basis that the Labour members suspected the clauses were included at the behest of the then Prime Minister to allow an attack on the NZ Broadcasting Corporation's ability to exclusively publish television and radio listings in the Listener magazine.⁴
4. That last allegation was of course denied by the Government of the day, and no such attack utilising the Commerce Act was made.⁵ But the opposition scepticism – real or not – is perhaps indicative of concerns about extending the scope of competition and consumer laws to the Crown.
5. There appears to have been little policy debate about continuing to apply competition and consumer laws to the Crown when private remedies were introduced into New Zealand law in 1986 with the passing of the Commerce Act and the FTA. There was general concern at the time about private remedies leading to

¹ The views expressed in this paper are those of the author and not those of the Commerce Commission.

² Competition Policy Review Final Report, March 2015, p 279.

³ Commerce Act 1986, ss 5 and 6; Fair Trading Act 1986, ss 4 and 5.

⁴ (9 November 1979) 427 NZPD 4215.

⁵ Indeed in introducing the amendments the then Minister of Trade and Industry cited only one historic matter involving a state owned coal company refusing to supply a customer. (9 November 1979) 427 NZPD 4217.

vexatious and frivolous litigation,⁶ but that was a general theme, not one focussed on actions against the Crown.

6. Those Acts were both introduced as part of a broad range of reforms in New Zealand which have opened the economy up to imports by removing licensing requirements, and introducing competition and market mechanisms into many sectors. These sectors include electricity, health care, telecommunications, and broadcasting (unsurprisingly the Listener's monopoly to publish radio and television listings has been removed).
7. That broad macro perspective is important in my view. What I think it demonstrates is that New Zealand's competition and consumer laws have not prevented New Zealand's economic reform agenda occurring. A nuisance for the Crown and Crown Corporations in some cases no doubt, but hardly a handbrake.
8. Indeed, where the Crown has encountered perceived problems caused by the application of the Commerce Act to its activities, governments have made explicit and transparent policy decisions to dis-apply the Act. Examples include PHARMAC – our monopsony pharmaceutical funder, which I discuss in more detail later in this paper – and the roll out of our fibre broadband network. That is, rather than having a blanket or block exemption for government activities, governments have been required to explicitly set out why competition law should not apply.

New Zealand's statutory context

9. By virtue of ss 5 and 6 of the Commerce Act, and ss 4 and 5 of the FTA, New Zealand's competition and consumer legislation applies to the Crown and Crown Corporations insofar as they "engage in trade". "Trade" itself is defined in s 2 to mean:

...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.⁷

10. I will come back to how the courts have interpreted that phrase shortly. The reason we have two sections is that the remedies available against the Crown and Crown Corporations⁸ are different. A pecuniary penalty cannot be awarded against the Crown, whereas the full range of remedies is available against Crown Corporations.

⁶ (18 March 1986) 7 NZPD 508.

⁷ "Business" is also defined in the Act and means:

...any undertaking –

a) That is carried on for gain or reward; or

b) In the course of which –

i. Goods or services are acquired or supplied; or

ii. Any interest in land is acquired or disposed of –

otherwise than free of charge.

⁸ While not entirely settled, the Crown is likely to cover core central government departments, while Crown Corporations are likely to be all those listed in the Crown Entities Act 2004, including the Commerce Commission.

11. There is a second important piece of the legislative scheme. Section 43 of the Commerce Act provides that Part II of the Commerce Act – the restrictive trade practices provisions – do not apply to “any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act”.⁹ Perhaps unsurprisingly, there is no equivalent provision in the Fair Trading Act. That is, the Crown should not be able to legislate to act in an effectively misleading or deceptive manner. More puzzling is that there is no equivalent provision for mergers.¹⁰
12. So at least in relation to restrictive trade practices, s 43 acts as a safety valve for the Crown. As I mentioned earlier, what s 43 does, together with ss 5 and 6 is that it requires the Crown to turn its mind to the policy basis for excluding a particular trading activity from the restrictive trade practices provisions of the Act. Consistent with this view, New Zealand courts have construed what is specifically authorised narrowly. Merely acting in accordance with a statutory power or pursuant to a statutory function won’t be enough.¹¹
13. Nevertheless, there are a range of such authorisations on the statute book. The most high profile and controversial of which are probably PHARMAC – NZ’s central drug buying entity – exemption from the Commerce Act, and the authorisations put in place for the roll out of fibre optic networks across New Zealand.¹²

Engaging in trade – a distinction between regulatory/administrative decisions and commercial decisions

14. There have been a number of cases since 1986 in which the courts have considered when the Crown will be ‘engaging in trade’. These have largely arisen in markets where there are large monopoly rents to protect such as pharmaceuticals, or in situations where parties have felt that they have been disadvantaged as part of a decision made by the Crown.
15. As described in the Harper Review’s final report the leading case is the Court of Appeal’s decision in *Glaxo NZ Limited v Attorney-General* [1991] 3 NZLR 129 (CA). The central issue in that case was whether the Minister of Health was ‘engaging in trade’ in deciding, under powers conferred by the Social Security Act 1964, in what circumstances sales of a certain drug should be subsidised by the Department of Health. The Crown itself was not involved in buying or selling the pharmaceuticals, it simply subsidised the cost of their supply from pharmaceutical manufacturers to pharmacies etc.
16. When assessing what amounted to engaging in trade, both Barker J at first instance and the Court of Appeal drew a distinction between activity that is of a commercial nature and that which is of an administrative or regulatory character.

⁹ Commerce Act 1986, s 43.

¹⁰ There have been examples of mergers where Crown Corporations have engaged in mergers. For example, *Re AsureQuality/Proficiency Services Ltd* (2010) NZCC 703.

¹¹ *NZ Apple & Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158.

¹² See Telecommunications Act 2001, ss 156AZA and 156AZC.

17. Barker J in the High Court cited with approval a decision of the Commerce Commission in *NZ Medical Association* (1988) 7 NZAR 407. That case involved the Minister of Health and the Medical Association reaching an agreement as to the benefit payable in respect of practitioners' fees for child patient consultation. The Commission found that 'engages in trade' in terms of s 5 of the Act:

...may be argued to connote acting "in the course of trade" as distinct from "carrying on trade". If this first sense were taken, then it could at least be argued that the Crown, though not itself engaged in trade, was acting "in the course of" trade, ie in relation to a series of activities involving trade. However, the Commission considers that the better view of "engages" is that it is necessary for the Crown to be carrying on trade. In this case, the Crown is not itself engaging in a business activity in respect of this arrangement, and for that reason, in the view of the Commission, is not engaged in trade in terms of the Act.¹³

18. Barker J stated:

In my view the same situation applies here. The Minister is not 'engaging in trade'; her actions about subsidies obviously must affect trade but I do not consider that her activities under s 99 Social Security Act can come within the definition of 'trade' under the Commerce Act.¹⁴

19. On appeal, Casey J delivering the leading judgment of the Court of Appeal took a similar approach and stated that:

... we consider that this word is meant to cover activity of a commercial nature only. It is not apt to describe the regulatory action for welfare purposes expected of the Minister under s 99.¹⁵

20. On the facts of the case, Casey J found:

It is clear that the Minister was not engaging in trade as such, or in any business, industry, profession or occupation. Nor ... could her decision-making process be described as "an activity of commerce". It certainly has commercial effects, but the activity itself is the exercise of regulatory functions under the Act in order to achieve its social welfare purposes.¹⁶

21. What *Glaxo* does is set up a fundamental distinction: is the Crown engaged in an activity of a commercial nature, or is it engaged in an administrative or regulatory activity? Say it quickly and that sounds like a straight forward question of substance.

However, like all cases, the facts matter

22. Much depends on context and the form by which the Crown engages in the market and its activities. For example, after this decision the way in which New Zealand funds and decides on which medicines are subsidised was changed. Under the current model in New Zealand PHARMAC, on behalf of our District Health Boards,

¹³ *NZ Medical Association*, at 410.

¹⁴ *Glaxo NZ Limited v Attorney-General* [1991] 3 NZLR 129 (HC), at 133.

¹⁵ *Glaxo* (CA), at 139-140.

¹⁶ *Glaxo* (CA), at 139.

decides which medicines to subsidise. It then runs tenders and selects a provider. The drugs subsidised are included on the pharmaceutical schedule. District Health Boards (not PHARMAC) then acquire the subsidised pharmaceuticals from the providers. In one sense, the PHARMAC model represents the Crown deciding to introduce more of a market mechanism, or at least a more commercial model, into the provision of subsidised pharmaceuticals in New Zealand.

23. The PHARMAC model shares similarities with the model described in *Glaxo* and even more so with the Commission's decision in *NZ Medical Association*. On one view PHARMAC's conduct – like the Minister's was found to be – is focussed on subsidising drugs for a social welfare purpose (albeit using a commercial model). However, the courts have not been receptive to any argument that PHARMAC is not engaging in trade.
24. *Astra Pharmaceuticals (New Zealand) Ltd v Pharmaceutical Management Agency Ltd* (1999) 9 TCLR 99; involved a claim by Astra, the plaintiff, arising out of an agreement between PHARMAC and Astra about the listing of a drug, losec, on the pharmaceutical schedule (which is how a drug becomes subsidised). Astra claimed, among other things, that PHARMAC had engaged in misleading or deceptive conduct in breach of the FTA by disclosing certain information to a competitor. PHARMAC applied to strike out the proceeding, and argued among other things that the Commerce Act did not apply.
25. At first instance, Gallen J said Glaxo indicated that “wide as the section is, it is to be construed in context and with a degree of commonsense”.¹⁷ His Honour accepted the position of PHARMAC was somewhat analogous to that of the Minister in *Glaxo* but said “[t]he situation in this case differs since the defendant was directly involved on a contractual basis and contemplated commercial gains or advantages”.¹⁸ His Honour went on to say:

The evidence makes it clear that in the pursuit of its objectives, the defendant enters into arrangements with pharmaceutical providers designed to ensure that the overall consequence is a favourable one for the expenditure of public monies in terms of such subsidies. Once however it enters into such arrangements, it can hardly be said that it is merely regulating the supply of pharmaceuticals. It could be said that the defendant trades off its advantage in one area in order to ensure advantages in another and once the matter is put in that way, it is in my view impossible to say that the defendant's activities do not come within the definition. They involve financial advantage to the defendant even if that is ultimately for the National good.¹⁹

¹⁷ *Astra*, at 104.

¹⁸ *Astra*, at 104.

¹⁹ *Astra*, at 104-105.

26. His Honour was therefore not prepared at an interlocutory stage to say that PHARMAC's conduct was not in trade. On appeal, the Court of Appeal essentially endorsed Gallen J's view.²⁰

27. At trial, Gendall J in the High Court took a similar approach.

Whilst Pharmac has responsibilities to manage public funds, and act as a regulatory body, as well as to comply with the OIA, nevertheless it also, in my view, acts in trade in reaching contractual agreements with suppliers of pharmaceuticals. The contracts are as much commercial, as any other business agreement. They provide benefits to Pharmac as well as the contracting companies, balanced against competing risks. They are commercial, trade, "hard-bargained" contracts. In the concluding of its contract with Astra I am of the view that Pharmac was acting in trade.²¹

28. PHARMAC is an interesting example for two reasons. While the underlying policy goal seems similar to that of the Minister in *Glaxo*, the court reaches a very different result. The form by which that policy goal is achieved seems to matter. Second, PHARMAC more generally is an example of a specific exemption from the Commerce Act. Section 53 of the New Zealand Public Health and Disability Act 2000 provides as follows:

53 Exemption from Part 2 of Commerce Act 1986

(1) In this section, unless the context otherwise requires,—

agreement—

- (a) includes any agreement, arrangement, contract, covenant, deed, or understanding, whether oral or written, whether express or implied, and whether or not enforceable at law; and
- (b) without limiting the generality of paragraph (a), includes any contract of service and any agreement, arrangement, contract, covenant, or deed, creating or evidencing a trust

pharmaceuticals means substances or things that are medicines, therapeutic medical devices, or products or things related to pharmaceuticals.

(2) It is declared that nothing in Part 2 of the Commerce Act 1986 applies to—

- (a) any agreement to which Pharmac is a party and that relates to pharmaceuticals for which full or part-payments may be made from money appropriated under the Public Finance Act 1989; or

²⁰ *Pharmaceutical Management Agency Ltd v Astra Pharmaceuticals (New Zealand) Limited* CA 39/99, 15 April 1999.

²¹ *Astra Pharmaceuticals (NZ) Ltd v Pharmaceutical Management Agency Ltd* High Court, Wellington CP 186-98, 15 March 2000, at [81]. The issue was not taken on appeal as the High Court found that PHARMAC had not breached the FTA, notwithstanding it was engaging in trade.

- (b) any act, matter, or thing, done by any person for the purposes of entering into such an agreement; or
 - (c) any act, matter, or thing, done by any person to give effect to such an agreement.
29. I raise this exemption not only to highlight an example of the Crown making an explicit policy choice to dis-apply the Commerce Act, but also to highlight the need to carefully consider the scope of any such exemption.
30. In 2007, while in the course of negotiating an agreement for the supply of a drug coming off patent, it was alleged that Astra Zeneca threatened to withdraw supply of another product for which PHARMAC considered it had no ready substitute in breach of s 36.²² The Commission commenced an investigation and issued a statutory notice to Astra seeking information and documents. Astra challenged the Commission's jurisdiction to issue the notice on the basis that its conduct was exempted by s 53. The Supreme Court agreed that Astra's conduct fell within s 53.²³ Even though in this case, Astra consented to the Commission obtaining access to the documents and the Commission found there was no breach, the case illustrates the importance of being clear about the conduct that you wish to exempt.

A brief survey of other cases

31. The distinction between regulatory/administrative decisions and decisions of a commercial nature has been applied in a number of cases. While a full survey of the cases is beyond the scope of this paper, some cases highlight the way the courts have approached the question and applied *Glaxo*.
32. One of the most recent and most interesting cases is the 2012 decision of the High Court in *Integrated Education Software Limited v The Attorney-General on behalf of the Ministry of Education* [2012] NZHC 837.
33. The case arose out of the Ministry of Education's decision to encourage schools to establish a panel of accredited providers of school management software, and then providing financial incentives to schools to switch to the accredited provider. The plaintiff, Integrated, was a long time provider to schools and had a number of school clients. It failed to gain accreditation in either of the two accreditation rounds. As the Court found "there can be no doubt that IES' failure to achieve accreditation did have a significant impact on that company's fortunes".²⁴ The Court also referred to the Ministry's aggressive campaign to encourage schools to switch to accredited providers.
34. Integrated argued that the Ministry had taken advantage of its market power to remove it from the school management software market in breach of s 36. The Ministry argued that it was not engaged in trade, arguing that accreditation procedure was "a matter of high policy and a sensible technique for regulating

²² Ultimately, Astra gave the Commission access to the documents and no breach was found.

²³ *Astrazeneca Ltd v Commerce Commission* [2009] NZSC 92.

²⁴ *Integrated Software*, at [37].

quality in the provision of software services in the compulsory education sector to its overall benefit".²⁵

35. The Court held that the Ministry was not engaged in trade. Williams J interpreted *Glaxo* as standing for the proposition that where the Crown intervenes for regulatory or welfare purposes the Commerce Act does not apply. Ultimately, the Court found:

... the Commerce Act has no application to the circumstances of this case. In the first place, the principle in *Glaxo* clearly applies here. Both the accreditation regime itself and the limited subsidies provided by MoE to schools are the exercise of policy based regulatory functions. The purpose of accreditation was to ensure that schools were armed with knowledge about which providers met MoE's performance standards, and the funding assistance package was an incentive to encourage transition to providers who met those standards. Enhancing standards and encouraging schools to use providers that met the new standards, were sensible policy objectives consistent with MoE's statutory functions and able to be implemented by regulatory style programmes.²⁶

36. Arguably, this is a wider interpretation of *Glaxo* than the courts took when considering PHARMAC. When considering PHARMAC the courts appeared to accept that the substance of what PHARMAC was doing was analogous to the Minister's actions in *Glaxo*. Yet strictly applying Williams J's approach may suggest that PHARMAC should not be captured by the Commerce Act (arguably, it is an example of a Crown entity intervening for regulatory purposes) remembering that it, like the Ministry of Education, does not directly acquire the pharmaceuticals.
37. In saying this, I do not mean to suggest that the legislation should not apply to PHARMAC. Rather, the cases simply illustrate, in my view, the importance the Courts place on 'who' is carrying out the relevant acts. The further removed a body is from the core Crown the more likely the Acts will apply.
38. Another interesting case which perhaps illustrates this phenomena is *Marina Holdings Limited (in Receivership) v Thames-Coromandel District Council* (2010) 2 NZCPR 277. The defendant council had wrongly issued a building code of compliance and the plaintiff claimed this was misleading and deceptive conduct in breach of s 9 of the FTA. The Council applied to strike out the plaintiffs' FTA claim on the grounds it was not engaged in trade when conducting inspections and issuing codes of compliance. The plaintiff argued that the Council was engaged in trade because if the certification had been conduct by a third party (as permitted by the Building Act), the FTA would apply to the Council. Abbott AJ rejected the argument and said that the FTA did not apply because "the Council was clearly exercising its regulatory functions under the Building Act when it issued the code compliance certificate".²⁷ In relation to argument that the FTA would apply if carried on by a commercial contractor, the Court held:

²⁵ *Integrated Software*, at [97].

²⁶ *Integrated Software*, at [100]-[101].

²⁷ *Marina Holdings Limited*, at [54].

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.²⁸

39. With respect, I doubt the court's conclusion in this case particularly at an interlocutory stage. In my view, the fact that the underlying legislation enables competition between a council and third party providers is strongly indicative that the Crown will be engaged in trade.
40. Another relevant case, given the current exemption in the Competition and Consumer Act for granting or varying licences,²⁹ is *Rod Milner Motors Ltd v Attorney-General* (1995) 6 TCLR 696. The case involved the removal of restrictions on importing cars into New Zealand. The then Department of Trade and Industry ran a tender for licences. The plaintiff claimed that the Minister engaged in misleading and deceptive conduct in running the tenders (the details of which are not relevant for these purposes). After citing *Glaxo*, Ellis J found that:

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

Conclusion

41. New Zealand's competition and consumer law has applied to the Crown and to Crown corporations since 1979. This does not appear to have impeded the operation of Government. Indeed, the courts appear to have been much more ready to apply the legislation to entities set up by the Crown as opposed to core Crown departments or even local councils.

²⁸ *Marina Holdings Limited*, at [55].

²⁹ Competition and Consumer Act (Cth), s 2C.