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Wellington, we have a problem:   
Application of Competition Law to the Public Sector in the 21st Century

Ben Hamlin[[1]](#footnote-1)\*

The provisions that apply the Commerce Act 1986 to the Crown are outdated, and do not reflect changes over the past nearly forty years, including reforms of the public sector’s structure and scope. Any revision will require the drawing of new lines as to where competition law should apply in full. This article suggests that public bodies should only be able to limit competition where expressly authorised by Parliament, it is reasonably necessary to achieve some public purpose or it is permitted by a Commerce Commission authorisation.

Foreword

One of the most interesting papers I have recently read was Cass Sunstein’s “Economic Constitution of the United States”.[[2]](#footnote-2) It got me thinking about our unwritten economic constitution, and how we might identify the parts of it. When one reached the unwritten “competition” heading, what would be there? How would our economic constitution protect consumers from the power of New Zealand’s biggest monopoly – one whose annual revenue is seven times greater than Fonterra – our Government?

Sunstein sets out an interesting discussion of the Executive Order 12291, which provides a foundation for regulatory impact analysis - cost-benefit analysis of proposed regulation - that stretches from Reagan to Biden. At its core is the principle - Sunstein calls it the “Reagan-Bush-Clinton-Bush-Obama-Trump-Biden consensus“ - that government should promote human welfare, and that accounting the costs and benefits of government action is one way of making this more likely.

It is a noble approach, and has much to commend it. In New Zealand the production of a regulatory impact statement (RIS) fulfils a similar function. A RIS provides a high-level summary of the problem being addressed, the options and their associated costs and benefits, the consultation undertaken, and the proposed arrangements for implementation and review. RIS are prepared in accordance with all of government guidance on what must be included and considered.

But Wellington, we have a problem. Except to the limited extent mentioned later in this paper, consideration of the impact on competition is limited or absent from much regulatory impact analysis. Moreover, based on the outcomes we see, and the frequency with which competition is limited, its easy to suspect that little weight has been given to competition. Responsibility for regulatory analysis has recently shifted from its long term home in Treasury to the new Minister of Regulation, which may provide an opportunity for this to change (particularly if Dr Crampton has anything to say about it).

In this paper, as well as discussing the ‘Crown exception’, I attempted to identify other tools that might be used to increase Government’s emphasis on competition and constrain government attempts to limit it. I see the Act, its exceptions, and the policy process for dealing with Government limits on competition as ideally operating as a coherent whole. In a perfect world, cost benefit analysis might well be applied in all cases to determine whether a particular Government action should be permitted to limit competition. But as an exception, such an approach would be uncertain, unpredictable, and costly to administer and enforce. It is not an approach that would be favoured by lawyers, who prefer certain, predictable, swift and efficient means for resolving issues, like the judicial system. As the late Justice Hammond put it:[[3]](#footnote-3)

Karl Llewellyn once said, somewhere, that “sometimes we just need a rule”.

Attached to this paper in the conference materials should be my attempt to craft such a rule, in the hope that discussion at this conference might improve it. Perhaps, if copies are left lying around long enough in enough bars in Wellington, Parliament might eventually adopt it.

I Introduction – is it time to bury the Crown exception?

2023 saw a renewed focus on the Crown for lawyers, as we adjusted from Te Kuini to Te Kīngi, Queen’s Counsel to King’s Counsel, and from *Reg v Brown* to *Rex v Brown*. For New Zealand competition lawyers, that might lead you to focus on the Crown’s liability under the Commerce Act 1986. Much like the coronation ceremony for King Charles III, it appears long overdue for review, modernisation, and improvement.

While it was once an accepted legal maxim that “the King can do no wrong”, a more modern view is that if the Crown, or its servants, have breached an obligation that would also have been owed by private individuals, then the Crown should be liable in the courts.[[4]](#footnote-4) As the Legislative Design and Advisory Committee guidance notes, legislation should apply to the Crown unless there is good reason not to:[[5]](#footnote-5)

The starting point is that the Crown should be bound by an Act and secondary legislation made under it, unless the application of a particular Act to the Crown would impair the efficient functioning of government. Mere convenience is an insufficient justification for not binding the Crown. Legislation that does not bind the Crown should not grant the Crown an unfair benefit or unexpectedly or adversely affect third parties.

The Legislation Act 2019, however, provides the opposite — that legislation does not bind the Crown unless it expressly provides that the Crown is so bound.[[6]](#footnote-6) The general application of the Commerce Act to the Crown is therefore governed by two provisions that extend the Commerce Act to the Crown. I will refer to these collectively as the Crown exception.

Since 1979, the Crown and Crown Corporations have been subject to New Zealand’s competition law, when engaged in trade. The legislative provisions have not been updated in line with reforms of the state sector since that time and are a poor fit for the modern executive. It is also arguably out of step with OECD guidance on avoiding undue governmental restrictions on competition.[[7]](#footnote-7)

As Eagles and Longdin have noted, legislative exceptions to the Commerce Act are not well integrated into our competition law, have largely escaped judicial scrutiny, and have considerable potential to undermine a principled approach to competition law.[[8]](#footnote-8) The OECD cautions against such exceptions, and recommends that, where they are justified, they should nevertheless be kept under review, and be no broader than necessary.[[9]](#footnote-9)

It is not clear that this approach has been adopted in New Zealand in regard to existing exceptions. The Commerce Act has generally been reviewed in a “targeted” but ad hoc manner, with only the shipping and intellectual property exceptions considered in the past decade.[[10]](#footnote-10) It appears that no review has considered the scope of the broad exception given to government.

It is not unusual internationally for government action to be partially or wholly excluded from competition law scrutiny.[[11]](#footnote-11) In a small jurisdiction like New Zealand, however, there is perhaps greater potential for government to have an overly large footprint in the commercial arena, whether as a participant, customer, funder or regulator.[[12]](#footnote-12) An overly broad exception for government activity may in turn result in more significant effects than in other jurisdictions.

II The Statutory Context for the Crown Exception to the Commerce Act

The Commerce Act applies to any person, whether or not they are in trade.[[13]](#footnote-13) Most prohibitions in the Commerce Act apply to conduct by a person, which is defined as including “any association of persons, whether incorporated or not.”[[14]](#footnote-14) The definition of person also expressly applies to any local authority, in contrast to the exception provided in Australia.[[15]](#footnote-15) The Commerce Act also applies to non-profit organisations, including sporting activities[[16]](#footnote-16) and industry bodies or associations.[[17]](#footnote-17)

Section 5 of the Commerce Act provides that:

**Application of Act to the Crown**

1. Subject to this section, this Act shall bind the Crown in so far as the Crown engages in trade.
2. The Crown shall not be liable to pay a pecuniary penalty under section 80.
3. The Crown shall not be liable to be prosecuted for an offence against this Act.
4. Where it is alleged that the Crown has contravened any provision of this Act and that contravention constitutes an offence, the Commission or the person directly affected by the contravention may apply to the court for a declaration that the Crown has contravened that provision; and, if the court is satisfied beyond a reasonable doubt that the Crown has contravened that provision, it may make a declaration accordingly.

Section 6 of the Commerce Act provides that:

**Application of Act to Crown corporations**

1. This Act applies to every body corporate that is an instrument of the Crown in respect of the Government of New Zealand engaged in trade.
2. Notwithstanding any enactment or rule of law, proceedings under Part 6 may be brought against a body corporate referred to in subsection (1).

These exceptions were first added to the Commerce Act 1975 by way of amendment in 1979. The purpose of the amendment was, succinctly put, to ensure that “government corporations and departments that trade” came under the same legislation as other market participants.[[18]](#footnote-18) Examples of conduct that led to the amendments included the State Coal Mine’s refusal to supply coal, and the involvement of the State Insurance Office in a “collective pricing” agreement.[[19]](#footnote-19) These provisions came not long after equivalent amendments had been made to the Trade Practices Act 1974, implementing the recommendations of the Swanson Report.[[20]](#footnote-20) That report took the view that:[[21]](#footnote-21)

… the Commonwealth Government should be prepared to accept for itself, in relation to its commercial activities, restrictions which it places on others. The same standards of commercial conduct are clearly as appropriate for officers of the Government as for persons in a less protected position.

These provisions were in substance re-enacted in their present form in 1986.

The primary difference between the s 5 and s 6 exceptions is that the Crown, even when subject to the Commerce Act, is not subject to a civil pecuniary penalty or prosecution for an offence.[[22]](#footnote-22) Crown corporations are. These exceptions do not, on their face, extend to officers and employees of the Crown or Crown corporations, instead relying on more general statutory immunities for good faith actions undertaken by such officers and employees.[[23]](#footnote-23)

Although it has not been judicially tested in New Zealand, it has been suggested that where the Crown is a party to an agreement or understanding that contravenes the Commerce Act, other parties to the practice may be found liable even though the Crown will not.[[24]](#footnote-24)

Consideration of the scope of the Crown exception would not be complete without referring to s 43 of the Commerce Act, which in practice will often apply to government actions. Section 43 relevantly provides that:

**Statutory exceptions**

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

Section 43 provides that pt 2 of the Commerce Act, which contains the prohibition on restrictive trade practices, does not apply to any act, matter, or thing that “is, or is of a kind, specifically authorised by any enactment”.[[25]](#footnote-25) The Privy Council in *Apple Fields Ltd v New Zealand Apple and Pear Marketing Board* has made clear that *specific* authorisation means just that.[[26]](#footnote-26)

The Board was the single desk seller of apples and pears grown in New Zealand. It charged a levy on fruit supplied to it, and an additional levy on new suppliers or existing suppliers who expanded production. The High Court found that the levy had the effect of substantially lessening competition.[[27]](#footnote-27) In the Court of Appeal, the Board raised s 43 for the first time, and argued it had statutory authority to charge the levy. The Court unanimously allowed the Board’s appeal.[[28]](#footnote-28) The Court considered s 43 was intended to cover cases where the terms of an enactment showed that limits on competition were inevitable, or at least highly likely, if the authority given was exercised.[[29]](#footnote-29)

The Privy Council disagreed. Although expressing “natural reluctance to differ from a unanimous Court of Appeal in New Zealand on a point of construction of New Zealand legislation”, their Lordships were forceful in their interpretation of the provision:[[30]](#footnote-30)

Section 43(2) makes it abundantly clear that a statutory authorisation embracing a class of acts which may or may not amount to restrictive practices is not a specific authorisation which will satisfy section 43(1). This is so even if, as here, the particular act in question is not only authorised generally by the statute, but also requires under the statute, and has obtained, the specific authority of the Minister. This seems to their Lordships to indicate that nothing less will do than either a statutory authorisation of the very act in question or, if it is one of a class or kind of authorised acts, that the whole authorised class would, if not so authorised, fall foul of the prohibitions in Part II of the Act of 1986.

The Privy Council’s approach requires significantly greater use of express authorisation. Respectfully, that is no bad thing. Parliament is free to create exceptions to competition law, but it should do consciously, transparently, and with justification. The parliamentary process will, unless Parliament decides otherwise, provide an opportunity for submission from affected parties, including the Commerce Commission. The Select Committee can test whether the exception is needed, and if so whether it is appropriately scoped.

The Commerce Act itself contains something of a grab-bag of exceptions,[[31]](#footnote-31) and there are now a range of express authorisations outside the Commerce Act. These express authorisations for the purposes of s 43 have been adopted on something of an ad hoc basis. While some are concerned with purely private commercial matters,[[32]](#footnote-32) most of the exceptions involve government activity. Some insight can be gained into the functions that the drafters thought might otherwise be challenged under the Commerce Act. The activities include economic regulatory regimes,[[33]](#footnote-33) creation of monopoly service providers,[[34]](#footnote-34) joint purchasing,[[35]](#footnote-35) monopsony purchasing,[[36]](#footnote-36) creating or managing payment systems,[[37]](#footnote-37) agreements that limit the supply of goods,[[38]](#footnote-38) the operation of producer boards,[[39]](#footnote-39) and industry promotion activities.[[40]](#footnote-40)

The need to include ad hoc exceptions at frequent intervals may suggest that the existing Crown exception is defective. But it might also suggest that, in some parts of Government, there is a concern to ensure that limits on competition are authorised by Parliament, and only as broad as necessary. That approach is consistent with the approach of the Privy Council in *Apple Fields*.

Whichever is the case, it would be highly desirable for exceptions to the Commerce Act to be drafted and interpreted in a consistent manner, and with regard to the purposes and text of the Commerce Act. At present, these provisions are scattered through the statute book with no central repository or reference for them. They are relatively untested in the courts but, given they have not been drafted consistently over time, the courts may struggle to interpret them in a consistent manner.

While future drafters could draft new exceptions in a consistent manner, a redrafting of all the existing exceptions may not be realistic, given the competing demands in the legislative program. There are some steps that could be taken to introduce a greater measure of order, including interpretative guidance to assist the court when interpreting exceptions in the Commerce Act, and cross references to all such exceptions in an appendix to the Commerce Act.

Finally, the Commerce Commission’s ability to grant authorisation to conduct needs to be noted.[[41]](#footnote-41) In simple terms, the Commission may authorise conduct where the benefit to the public arising from the conduct exceeds the detriments it causes. While conduct is subject to an authorisation from the Commission the restrictive trade practices of the Commerce Act do not apply to it.[[42]](#footnote-42) In some circumstances, public organisations have sought authorisation, such as the TAB (previously the New Zealand Racing Board),[[43]](#footnote-43) the Electricity Corporation of New Zealand,[[44]](#footnote-44) Regional Health Authorities,[[45]](#footnote-45) and New Zealand Post.[[46]](#footnote-46)

In *NZME Ltd v Commerce Commission*, the Court of Appeal confirmed that the Commission’s analysis need not be confined to weighing benefits and costs in the form of economic efficiency.[[47]](#footnote-47) As the Court noted, although the Commission may not possess significant expertise in relation to other benefits, its processes enable it to obtain that expertise where necessary.[[48]](#footnote-48) It has previously considered a range of public benefits including reduced pollution,[[49]](#footnote-49) health benefits of breastfeeding,[[50]](#footnote-50) media plurality,[[51]](#footnote-51) reduced stigma for psychiatric patients,[[52]](#footnote-52) safer handling of hazardous substances,[[53]](#footnote-53) and social effects of plant closures.[[54]](#footnote-54)

The Commission operates a transparent process when considering an application for authorisation. In deciding whether to authorise conduct, it is the Commission’s practice to undertake extensive consultation, including consultation of affected parties. A draft decision is usually published, on which submissions and cross submissions are made. Oral hearings are frequently held. The Commission’s final reasons for authorisation are provided in writing, and usually provide extensive justification. The Commission may impose conditions on authorisation.[[55]](#footnote-55) Affected parties who participated in the Commission’s process may appeal to the High Court.[[56]](#footnote-56)

III Is it Clear Who “the Crown” is in Modern New Zealand?

Although the Legislation Act provides guidance as to when legislation will bind the Crown, it does not attempt to address the question of who the Crown is. The Commerce Act is likewise silent. Given the foundational role of the Crown in New Zealand’s constitutional and legal order, it might be expected that it was obvious who or what the Crown is, beyond being “a piece of jewelled headgear under guard at the Tower of London”.[[57]](#footnote-57)

The authors of *Gault on Commercial Law* suggest that “all Government and quasi-Government bodies which are not Crown corporations” can be treated as the Crown.[[58]](#footnote-58) That appears to be a pragmatic response, but perhaps an oversimplification. As Williams J has recently noted in *Stafford v Accident Competition Corporation*,[[59]](#footnote-59) citing Dame Alison Quentin-Baxter and Professor Janet McLean KC in their text *This Realm of New Zealand*, the answer to who is the Crown is context sensitive because the role of the Crown continues to change:[[60]](#footnote-60)

[D]efining the Crown with any precision is difficult because, as a corporation, its exact nature remains “somewhat obscure”. The work “the Crown” must do and the machinery with which it does it have both changed radically from medieval times of absolute personal rule to today’s constitutional monarchy and its framework of parliamentary and bureaucratic government. This transformation, the authors suggest, has made the concept of the Crown itself somewhat elastic. As a result, the case law on the subject is confusing, and statutory usage inconsistent. “The Crown” is defined differently depending on the particular function and the area of law.

Fully exploring the literature over who is, or is not, the Crown is beyond the scope of this article, and the Court of Appeal in *Stafford* was divided on the whether it was arguable the Accident Compensation Corporation was the Crown for the purposes of that case. But it is sufficient to note that Williams J and Courtney J agreed that in the absence of an express statutory statement, the question will be determined by a common law control test: whether the legislation establishing the relevant entity provides for effective control of the entity by the Government of the day.[[61]](#footnote-61) Relevant to analysis of ss 5 and 6 of the Commerce Act, Courtney J noted the courts tends to be cautious in concluding, for the purposes of a statutory immunity, that an entity is an instrument of the Crown.[[62]](#footnote-62)

As noted above, the purpose of the 1979 amendments to the Commerce Act 1975 was to ensure that “government corporations and departments that trade” within the scope of the Commerce Act came under the same legislation as other market participants.[[63]](#footnote-63) Since that time there has been significant change in both the structure of the public sector and how it relates to the private sector. There has also been a blurring of the distinction between them.

It is an understatement to say that New Zealand has seen substantial public sector reform since ss 5 and 6 and its predecessors were enacted. Significant legislative changes since then include the introduction of the State Owned Enterprises Act 1987, Public Finance Act 1989, Crown Entities Act 2004, and Public Service Act 2020. These have created many different types of organisation, with differing levels of independence from the government of the day, differing mechanisms of control, differing funding arrangements, and different objectives.

Under this legislative framework, the Public Service Commission identifies 17 different types of “central government organisations”. The organisations include:[[64]](#footnote-64)

* Public Service departments, departmental agencies (for example, National Emergency Management Agency or the Social Wellbeing Agency) and interdepartmental executive boards (for example, Climate Change Chief Executives Board)
* Non-Public Service departments (for example, NZ Defence Force, NZ Police)
* Crown entities, which including Crown agents (for example, ACC, Earthquake Commission, Te Whatu Ora / Health New Zealand), autonomous Crown entities, independent Crown entities, Crown entity companies (for example, Crown research entities), school boards of trusties, and tertiary institutions.
* Independent statutory entities
* Public Finance Act 1989 Schedule 4 organisations (for example, Agricultural and Marketing Research and Development Trust or New Zealand Government Property Corporation)
* Public Finance Act 1989 Schedule 4A companies (for example, City Rail Link Ltd, Crown Infrastructure Partners Ltd)
* The Reserve Bank of New Zealand
* Officers of Parliament (for example, Parliamentary Commissioner for the Environment)
* State-owned enterprises (for example, Transpower, NZ Post, Landcorp Farming Ltd)
* Mixed ownership model companies (Genesis Energy, Mercury NZ, Meridian Energy)

As David Blacktop has noted, at the time ss 5 and 6 of the Commerce Act and its predecessors were introduced, New Zealand’s economy was characterised by heavy government involvement in the economy through price controls, state run monopolies, and tariff and licensing requirements.[[65]](#footnote-65) The relationship between the state sector and the private sector since then has changed in at least three major ways.

First, there has been a significant reduction in government trading entities. With the possible exception of the electricity sector, government today does not seek to own businesses in competitive markets. The businesses it owns include tend to operate in markets with limited competition and include businesses that were renationalised after corporate failure.

Second, there has been a greater focus on service delivery through private sector or non-governmental agencies. Many core government services, including health, housing, and education, are wholly or partially funded by government but delivered by the private and not-for-profit sectors. Māori-led organisations of many types are increasingly recognised for their role delivering services to their community, including through Whānau Ora.[[66]](#footnote-66)

Third, there has been an increased use of industry-led or industry-involved regulatory approaches, resulting in significant public power being exercised by industry bodies. For example, the Gas Industry Company serves as the industry regulator of many aspects of the gas industry, performing roles under the Gas Act 1992 that might otherwise be performed by an independent crown entity such as the Electricity Authority or Commerce Commission.

At the same time, since the Commerce Act 1986 was passed, the courts have recognised that public powers, and powers with significant public consequences, are no longer only exercised entities that form part of the public service.[[67]](#footnote-67) Some of these decisions will be regulatory in character and have the potential to promote or hinder competition.[[68]](#footnote-68)

In the author’s view, ss 5 and 6 of the Commerce Act ought to be revisited in light of the significant changes that have occurred since 1986. This is necessary to ensure the provision is clear and its scope is appropriate. This is for a number of reasons.

First, identifying who is the Crown is not as straightforward as a competition lawyer might expect, given the large number of different types of public sector organisation, their differing purposes and statutory frameworks, and the differing degrees of ministerial control applying to them. The purpose of the provisions does not materially assist is identifying, in the face of an increasingly complex system of public organisations, who is intended to be covered by the provision and who is not.

Second, it may be that this limb of the Crown exception is narrower than has been assumed. Decisions in this area to date have focussed on the “in trade” aspect of the definition. But both *Stafford* and *Apple Fields* suggest that the appellate courts may interpret the exception narrowly. This would be consistent with OECD guidance that recommends exceptions to competition law are interpreted narrowly.[[69]](#footnote-69)

These issues may be addressed by adapting the definition of “Crown organisation” used in the Crown Organisations (Criminal Liability) Act 2002. The definition of Crown organisation includes the various types of entities under the Public Service Act 2020, the Crown Entities Act 2004 and the Public Finance Act 1989, together with a defined list of “government-related organisation[s]”.[[70]](#footnote-70) This provision is clear, covers the vast majority of public organisations, and could be readily adapted to include other organisations not covered by it.[[71]](#footnote-71)

There is a third issue, however, that would remain unaddressed by such a reform. Compared with the position in 1986, whether an organisation is or is not part of the Crown is a less useful predictor of whether it is exercising a public power. Providing an exception to organisations on the basis of whether they meet the definition of Crown has the potential to exclude bodies who exercise public functions in the public interest. It is likely that such conduct could be authorised by the Commerce Commission if it was satisfied the conduct lessened competition. But the difference in treatment calls into question whether the lines drawn by the current exception are in the right place.

IV Is it Clear When the Crown is in Trade?

The Commerce Act includes a definition of “trade” which is extremely broad: any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services.[[72]](#footnote-72) The same definition is also found in s 2 of the Fair Trading Act 1986. It has been suggested that in this context “trade” does not necessarily require a purely commercial relationship, given the breadth of concepts such as “undertaking” and the definition of “acquiring” goods and services.[[73]](#footnote-73)

The definition has no equivalent in the Competition and Consumer Act 2010 (Cth). The Australian legislation does, however, provide a useful list of conduct that does not amount to carrying on business for the purpose of their exception.[[74]](#footnote-74) This includes imposing and collecting taxes, levies, and fees, granting of licenses, transactions entirely within the “Crown” family, and the acquisition of products under legislation where there was no choice but to acquire them. It may be that, if the trade definition is retained in the Crown exceptions, there is some benefit in clarifying amendments of a similar nature.

The leading authority on the application of the definition of trade to the Crown is *Glaxo New Zealand Ltd v Attorney-General*.[[75]](#footnote-75) Glaxo had applied to the Minister of Health, seeking to list an antibiotic branded as Ceporex for subsidised use outside of hospital pharmacies. The Minister’s decision to decline to list Ceporex was challenged by way of judicial review, and also sought declarations the Minister had contravened s 36 of the Commerce Act.

The High Court struck out this claim on the basis the Minister was not in trade.[[76]](#footnote-76) Barker J approved of the approach adopted by the Commerce Commission in *Re NZ Medical Association*,[[77]](#footnote-77) in which it had been held that the Crown was not in trade when agreeing the subsidy payable to medical practitioners for child consultations:[[78]](#footnote-78)

The words “engages in trade” 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.

Barker J noted the decision in the case before him was similar. The power was as to the subsidy provided, and Minister was not involved in any contract for the supply or sale and purchase of pharmaceuticals either at wholesale or retail level. While the Minister’s actions might *affect trade*, they were not *in trade*.[[79]](#footnote-79)

The Court of Appeal upheld the judgment of the High Court, agreeing with its application of *Re NZ Medical Association*. The Court considered there was plainly no trade, business, industry, profession, or occupation involved, and that the regulatory function was not an activity of commerce, although it might affect it. The Court considered that the Minister’s functions might involve an “undertaking relating to the supply of goods and services”, but concluded:[[80]](#footnote-80)

However, we do not think the word “undertaking” — broad as it may be — is apt to describe the Minister’s actions in deciding whether or not to specify a drug and impose conditions under s 99. That word reflects the idea of settled activity or enterprise. The fact that there is a procedure for reference to a specialist committee for advice, and incorporation of her decision into the established drug tariff, does not convert the need for the Minister to make a series of separate decisions into “an undertaking” within the definition of trade. Moreover, having regard to the overall tenor of that definition and the general purpose of the Commerce Act, 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 her under s 99.

Both the High Court and Court of Appeal went on to consider s 43(1) finding that if it were wrong as to whether the Minister was in trade, the relevant statutory provisions were more even more specific than in the Court of Appeal’s decision in *Apple Fields*, and that s 43(1) would apply.[[81]](#footnote-81) As noted previously, the Privy Council overturned that decision.

The decision in *Glaxo* was not, however, the final word on the Crown’s role in pharmaceutical funding. In *Astra Pharmaceutical v Pharmaceutical Management Agency*, Astra brought a claim against Pharmac in relation the listing of drug known as Losec.[[82]](#footnote-82) One of Astra’s claims was that Pharmac had, in trade, contravened the Fair Trading Act.

Gallen J declined to strike out the claim, distinguishing Pharmac’s functions from those of the Minister in *Glaxo*, given their contractual and commercial nature:[[83]](#footnote-83)

[Glaxo] indicates that wide as the section is, it is to be construed in context and with a degree of common sense. With respect, when a Minister in the situation of the Minister in the *Glaxo* case is clearly engaged in regulatory activity which as a consequence will have some effect on commercial activity, it is straining common sense to regard the decision as having been made in trade. The situation in this case differs since the defendant was directly involved on a contractual basis and contemplated commercial gains or advantages.

…

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 moneys 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.

Gallen J’s decision was upheld on appeal.[[84]](#footnote-84) It is not entirely clear from the High Court judgment or the judgment on appeal what his Honour meant when referring to “commercial gains” and “financial advantage”. But the operation of Pharmac is well understood. It negotiates to achieve the best prices it can, using savings to fund additional drug purchases. If that is a “commercial gain” then it may be a common one. Government agencies who procure goods or services will frequently have a limited budget, and savings on one contract may often be used to fund additional purchases on another.

At trial, Gendall J found that Pharmac was in trade, although the Fair Trading Act claim failed on the merits.[[85]](#footnote-85) His Honour reached that conclusion on the basis that some of Pharmac’s functions were in trade, while others were not:[[86]](#footnote-86)

It is possible for a person to act in trade for some purpose and not in trade for other purposes. … That is the case here. 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.

*Glaxo* has been followed consistently, albeit mostly in the context of the Fair Trading Act, although the later decision in *Astra* *Pharmaceuticals* appears to have been largely overlooked.[[87]](#footnote-87) The result of applying *Glaxo* has invariably been that the relevant function is not in trade. *Glaxo* has been applied in two cases involving Commerce Act claims.

In *Clee v Attorney-General* *for the Legal Services Agency* the Crown was alleged to have contravened s 36 of the Commerce Act by determining to change the way in which legal aid lawyers would be allocated to matters, removing defendant choice and reducing the potential for competition between lawyers.[[88]](#footnote-88) The Court in declining interim relief, cited *Glaxo* and noted the difficulties the plaintiffs would have in establishing the Crown was in trade.

In *Integrated Education Software Ltd v Attorney-General*, the Crown was alleged to have contravened s 36 of the Commerce Act by refusing to accredit its software.[[89]](#footnote-89) Schools were not required to use accredited software, but subsidies were offered to facilitate the adoption of accredited software. Williams J found that *Glaxo* applied, and that the Ministry was not in trade as the accreditation regime itself and the subsidies provided by the Ministry of Education to schools involved the exercise of policy based regulatory functions.

Australian commentators have suggested that findings that Crown conduct is in trade are rare, and that therefore there was “questionable merit” in adopting the New Zealand provisions.[[90]](#footnote-90) This may be because, in some cases, the courts have applied *Glaxo* beyond its apparent intent, in situations where services were being supplied or acquired in circumstances that would appear commercial.

First, in *Marina Holdings Ltd (in rec) v Thames-Coromandel District Council*, the District Council was alleged to have contravened the Fair Trading Act by, in trade, wrongly issuing a building code of compliance certificate.[[91]](#footnote-91) The Associate Judge followed *Glaxo*, and the claim was struck out as it was a regulatory function, despite the fact that the legislation envisaged that the council and private sector might compete to offer inspection services. The correctness of this decision has been doubted,[[92]](#footnote-92) and it appears to take too broad a view of *Glaxo*. Given the purpose of the Crown exception, the supply of a good or service in a potentially competitive market should generally be subject to the Commerce Act, even if the service is one that is required by a regulatory regime.

Second, in *Te Whanau O Waipareira Trust v Attorney-General*, the Crown was alleged to have breached the Fair Trading Act in its dealings when funding the plaintiff to deliver services to vulnerable families.[[93]](#footnote-93) Priestley J held that the contractual relationships between the Ministry and Family Start providers did not constitute trade, without giving reasons. While the decision may well have been correct for other reasons, without further articulation it is arguably inconsistent with *Astra Pharmaceutical*. The Crown was procuring services on a contractual basis, likely in a competitive market, to meet its public purposes.

Where the Crown, in carrying out a function, provides a service which can be commercially purchased from others, then Crown immunity should not apply, and to the extent *Marina Holdings* finds otherwise it should not be followed. Similarly, as in *Astra Pharmaceuticals*, the contractual procurement of goods or services by the Crown generally will be in trade, notwithstanding that the ultimate objective is the furtherance of the public good.

Further, the nature of trade may change over time. Some caution should be exercised in situations where the Crown operates an accreditation or licensing scheme that controls access to a market. The fact the function has a “gatekeeper” role does not, without more, mean that function is sufficiently regulatory that it should not be subject to Commerce Act scrutiny. A “gatekeeper” role is not uncommon in the commercial world, and might be performed by a software platform, network operator or professional licensing body, and would rightly be subject to the Commerce Act if used to substantially lessen competition.

Ultimately, the application of the Crown exception will be context sensitive. In each case the court will look at the nature of the Crown’s public function in relation to the conduct, what the Crown seeks to achieve through its conduct, and the nature of the mechanism that is used by Crown to achieve its purpose. The fact that the public body has some regulatory functions, or that the conduct ultimately achieves a public benefit, will not be sufficient. If the mechanism used is commercial in character, such as a contractual arrangement or tendering situation, it is more likely to involve the Crown “in trade”.[[94]](#footnote-94)

V Constraints on the Crown’s ability to limit on competition when not in trade

The Commerce Act is not, however, the only mechanism to ensure that Government does not unduly limit competition without some compelling justification.

First, many government policy decisions are subject to competition assessments in their development, through the preparation of a regulatory impact statement. The Government has communicated to departments its expectations for the design of regulatory systems, one of which is that a regulatory system will seek “to achieve [its] objectives in a least cost way, and with the least adverse impact on market competition, property rights, and individual autonomy and responsibility”.[[95]](#footnote-95) These are incorporated into Cabinet’s Impact Analysis Requirements,[[96]](#footnote-96) and impacts on competition are, at least in theory, considered in Treasury’s guidance on best practice for conducting impact analysis.[[97]](#footnote-97)

Many government agencies will have little experience with competition and may need some assistance. The Commerce Commission has published guidance to assist public officials to identify and mitigate potential competition issues when developing policies or initiatives which may change market structure or behaviour.[[98]](#footnote-98) The OECD has also published a Competition Assessment Toolkit to assist with identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives.[[99]](#footnote-99)

In theory, these requirements should play an important role in ensuring competition is not subject to limitations that are not necessary to achieve the objectives that Government sets out to achieve. In practice, inclusion in a regulatory impact assessment that is conducted at the end of policy development may see competition become another box to be ticked, with little substantive consideration to alternative options that limit competition to a lesser extent.

Second, where regulatory decisions are undertaken by way of secondary legislation, that instrument may be subject to review by Parliament’s Regulations Review Committee. That Committee may investigate a complaint and ultimately refer secondary legislation to the House for disallowance.

One of the grounds on which the Committee may make a referral is that a regulation provides for matters that are more appropriately dealt with in primary legislation.[[100]](#footnote-100) In this author’s view, and as discussed later, significant limits on competition are more appropriate for parliamentary authorisation through an enactment. The Regulations Review Committee applied this ground when criticising the creation of a statutory monopoly for Kiwifruit Marketing via regulation.[[101]](#footnote-101)

Other grounds for referral may also be relevant. A regulation that limits competition may not be in accordance with the general objects and intentions of the empowering statute or may involve some unusual or unexpected use of the power.[[102]](#footnote-102) On at least one occasion the Committee has considered whether regulations that ought to enhance competition were in fact contrary to the object of the legislation.[[103]](#footnote-103)

Third, there is also the potential for anti-competitive government action to be challenged by way of judicial review.[[104]](#footnote-104) Actions to restrict competition may be outside the contemplation of the Parliament in drafting the empowering provisions, and therefore unlawful or unreasonable. It is arguable that legislation should not readily be interpreted as empowering the government to impose limitations on competition unless it is expressly provided for or a necessary implication of the statutory framework. This would seem to be a logical corollary of the Privy Council’s decision in *Apple Fields*, on the ambit of s 43, in which legislative instruments are not readily construed as providing an exception to the Commerce Act.

In many cases the relevant conduct may involve an administrative decision as to how the government intends to procure services or offer a concession. The exercise of public power may, in this case, have a commercial flavour. In such cases, the New Zealand courts have proven themselves reluctant to intervene. It is now well established that in a commercial context, judicial review will normally only be available where there is fraud, corruption, or bad faith, or some analogous situation.[[105]](#footnote-105) This raises the potential for a significant gap where the decisions of government are sufficiently commercial that the court will be reluctant to intervene, but sufficiently regulatory that they are not taken “in trade”.

Finally, and most recently added, pt 3A of the Commerce Act enables the Commerce Commission to undertake market studies. When examining competition for the goods or services that are under study, the Commission can, and so far has, look at how government is affecting competition.[[106]](#footnote-106) It is very early days in the life of the New Zealand market study function, so it remains to be seen whether the government adopts Commission recommendations in relation to government policies that limit competition.

Taken together, these factors may provide some additional reassurance that, although not subject the Commerce Act, the government may be constrained in its ability to limit competition without some compelling justification. If the Crown exception were to be reviewed and its breadth continued, it may be desirable for these forms of constraint to be strengthened.

VI When should the Crown be able to limit competition?

It has long been accepted that trading enterprises owned by the state should be subject to “competitive neutrality” — a level playing field with those enterprises not owned by the state.[[107]](#footnote-107) Tying the Crown exception to situations when the Crown is in trade goes a long way to achieving “competitive neutrality” in relation to competition law. Is there reason to believe it should go further?

When the Harper Review looked at the application of competition law to the Australian federal, state, and local government, it noted the Crown’s capacity to enhance or harm competition went further than its commercial arrangements, and included a range of policies and regulations that may affect competition.[[108]](#footnote-108) The Harper Review noted, and endorsed, that a tenant of Australia’s National Competition Policy has been that competition should not be impeded unless it must be, in order to secure the public interest.[[109]](#footnote-109)

More recently, market studies in New Zealand have prompted calls for greater focus on the role of government in creating limits on competition.[[110]](#footnote-110) Concerns have been raised over government created barriers to entry in a range of industries, including insurance and medical professions. The application of competition law has been seen as potentially imposing more discipline on government. As Dr Eric Crampton noted:[[111]](#footnote-111)

… it is great fun to imagine how regulatory quality, and real competition, might improve if regulators worried about starring in a later Commerce Commission investigation should their drafted rules do more to protect competitors from competition than to further any real public interest.

The concern that government efforts to achieve some public purpose may result in harm to competition is not unique to Australia and New Zealand. Indeed, some economists would suggest this is a feature of government intervention that may see firms welcome the prospect of regulation.[[112]](#footnote-112) Some regulators may agree.[[113]](#footnote-113)

In 2009, the OECD adopted a recommendation that called for governments to identify public policies, existing or proposed, that unduly restrict competition and to adopt more pro-competitive alternatives.[[114]](#footnote-114) The recommendation recognised that public policy could unduly restrict competition, but that such policies could frequently be reformed in a way that promotes market competition while achieving their public policy objectives. The recommendation defined a policy as unduly restricting competition when the restrictions on competition needed for achieving public interest objectives are greater than is necessary, when taking into account feasible alternatives and their cost. The 2009 recommendation focused primarily on regulatory assessment during the development or review of government policies.

In 2014, the OECD reviewed member countries’ experience in implementing the recommendation.[[115]](#footnote-115) The review noted that a number of jurisdictions had developed systems of challenge whereby the competition authority could either directly overrule government decisions challenge them via an independent body.[[116]](#footnote-116) These challenges were seen as something of a last resort, where more informal advocacy had failed. This was found to be an effective measure to reduce undue restrictions on competition, including because “the possibility of future challenge of unnecessarily restrictive policies appears to be a consideration during the initial proposal of policies and measures”.[[117]](#footnote-117) It was noted that the possibility of challenge was missing from the existing recommendation.

A revised recommendation was published in December 2019.[[118]](#footnote-118) Arguably the only material change was as additional passage in Recommendation A on exceptions to competition law.[[119]](#footnote-119) This recommended that exceptions should be narrowly drafted and interpreted:

Governments should ensure that exceptions from competition law are no broader than necessary to achieve their public interest objectives and that these exceptions are interpreted narrowly. Exceptions should only apply to those business activities that are required to achieve the stated policy objective. This principle also implies that any new exception should be defined for a limited period of time, typically by including a sunset date, so that no exception would persist when it is no longer necessary to achieve the identified policy objective.

The recommendation was a general one, not limited to exceptions provided to state actors, but logically applying to them. Taken together with OECD definition of undue limits on competition, it provides a useful benchmark against which any exception can be tested.

Against that benchmark, the Crown exceptions in the Commerce Act fare poorly. They apply broadly to the Crown in all its activities when not engaged in trade and have not been reviewed in nearly forty years. No consideration is given to any particular limit on competition is necessary to achieve any particular public purpose. No consideration is required of alternative, less restrictive options that might achieve that purpose without harming competition.

VII An Exception Only for Limits on Competition that are Reasonably Necessary?

As noted above, it is not always clear who the Crown is, nor when it is in trade. Both of these matters should, and could, be made more certain. But minor changes would not address the fact that much public power is exercised by bodies who are not the Crown, nor that the current exception permits the government to limit competition even where that is unnecessary and harmful to the public. While there are some other mechanisms, they do not appear to be sufficient.

One response to this would be to repeal the Crown exception and provide simply that the Commerce Act applied to the Crown.[[120]](#footnote-120) Government action to limit competition would then need to obtain Parliamentary approval through express statutory authorisation for the purposes of s 43 of the Commerce Act, or Commission approval via an authorisation under s 61. From a transparency perspective, this would be a significant improvement on the current position. The Crown would be required to justify to Parliament, or the Commission, why a limitation on competition was necessary to achieve some public benefit.

Such an approach would, however, involve considerable up-front resources to prepare a number of up-front legislative exceptions, and ongoing resources to prepare new ones. Failure to identify areas where an exception is required, resulting in actual or threatened legal challenge, might also be said to impair the efficient functioning of government, adopting the language of Legislative Design Advisory Committee.

An alternative would be to include a limited Crown exception, providing the Commerce Act did not apply to conduct that was reasonably necessary to achieving a public purpose. It may be that, if appropriately drafted, it need not be a Crown exception at all, and could also apply to other non-crown organisations seeking to advance the public interest.

It would not be difficult to draft such a provision based on the collaborative activity exception inserted into s 31 of the Commerce Act by the 2017 amendments to the Commerce Act. This provision provides an exception from the cartel prohibitions for provisions of an agreement that are reasonably necessary for the purposes of the collaborative activity.

In the six years since the introduction of s 31, the Commission has decided one clearance application under s 65A.[[121]](#footnote-121) No case law has been forthcoming. As yet the only guidance on reasonable necessity is to be found in the Commission’s published guidelines.[[122]](#footnote-122) The Commission has noted that reasonable necessity has been found to be “a standard used in everyday language and one that should require no undue elaboration”.[[123]](#footnote-123) It is said to be a high standard, but need not be essential, but more than merely desirable, expedient, or preferable. It requires consideration of the alternative available options — options that are practically workable and do not limit competition or are significantly less restrictive.

This test, in substance, appears well aligned with the OECD approach, and could be expected over time to reduce the impact of government on competition. Competition lawyers and their clients would also no doubt welcome the additional guidance on what “reasonable necessity” means that such a provision would likely generate. It might be observed that any difficulties for the Crown would be no more than the difficulties it had already placed on others, harking back to the approach of Swanson Report.

But there is perhaps a more fundamental benefit to such a provision. An exception framed in terms of reasonable necessity would require Government to justify, through the courts if required, the limitations on competition imposed by its policy decisions. As Butler has stated, in the context of the Bill of Rights: “The culture of justification contributes to principles of good government, such as transparency, accountability, rational public policy development, [and] attention to differing interests”.[[124]](#footnote-124)

The Commerce Act was enacted as part of a series of economy wide reforms that sought to place reliance on the operation of market forces, turning over to the private sector activity that was previously undertaken by the state.[[125]](#footnote-125) Much of that change remains intact nearly forty years later. Given that reliance, and the benefits to New Zealand consumers that are contingent on competition, significant and enduring limits on competition are most appropriately dealt with by parliamentary authorisation. An exception based on reasonable necessity might nevertheless reduce the reliance on ad hoc parliamentary exemptions, enabling the development of a more coherent approach to what conduct or body is exempted, and of a standardised and predictable approach to their interpretation.

It is likely that a narrower Crown immunity would result in some discomfort for government. But as Legislative Design Advisory Committee has noted, “mere convenience is an insufficient justification for not binding the Crown”.[[126]](#footnote-126) The fact that Crown immunity does not apply does not leave the government without options. The power to specifically exempt conduct remains, but with the transparency and political accountability that brings. As the Australian High Court has noted, when interpreting their application of Crown immunity to state actions:[[127]](#footnote-127)

Moving away from the particular facts of the present case, promotion of competition and fair trading is at least as likely to be for the benefit of government purchasing authorities as it is to be a potential invasion of government interests. … If State Parliaments see State interests to be threatened by competition law, they have the power of exemption given by s 51(1) of the Act, provided, of course, they are willing to accept the political responsibility of exercising that power with the necessary specificity.

In the long term, a combination of judicial and parliamentary scrutiny would promote greater transparency and scrutiny of decisions to limit competition. This would likely improve the quality of decision-making, and the consideration of less intrusive policy alternatives. It would also, to the extent this were a concern, reduce the ability of powerful interests, commercial or otherwise, to seek to limit competition through influence on Government action.

One potential objection to such an approach is that applying the Commerce Act to the Crown more broadly could result in the regulator or the courts adjudicating on government policy decisions and weighing up competition and public benefit objectives. But that is something the Commerce Act already requires the Commission and courts to do in the authorisation context, as noted earlier. Moreover, the potential for parliamentary authorisation remains, where needed.

VIII Conclusion

The provisions that apply the Commerce Act to the Crown are outdated, and do not reflect changes over the past nearly forty years, including reforms of the public sector’s structure and scope. The current exception may not cover some conduct that is in the public interest, because public powers are exercised by someone other than the Crown. The current exception also permits limits on competition which are broader than necessary, merely because the Crown is not in trade.

Revising the law will require the drawing of new lines as to where competition law should apply in full. This article suggests that bodies exercising public power should only be able to limit competition where expressly authorised by Parliament, it is reasonably necessary to achieve some public purpose, or it is permitted by a Commission authorisation.

If, instead, the existing provisions are in substance retained, then it should be made clearer who is the Crown, and when the Crown is in trade. In addition, greater consolidation and consistency in relation to express authorisations is both desirable and achievable.

Whichever approach is adopted, any exceptions to competition law should be transparent, clear, and no broader than needed. They should also encourage justification of decisions made under them to limit competition. Finally, any changes should be kept under review. Ideally, before the reign of King William V.

1. \* Barrister, Clifton Chambers. The views expressed in this article are the author’s alone. [↑](#footnote-ref-1)
2. Sunstein, Cass R. 2024. "The Economic Constitution of the United States." Journal of Economic Perspectives, 38 (2): 25–42 [↑](#footnote-ref-2)
3. *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, (2008) 14 ELRNZ 61 at [97]. [↑](#footnote-ref-3)
4. Law Commission *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014) at [1.4]. [↑](#footnote-ref-4)
5. Legislative Design and Advisory Committee *Legislation Guidelines* (September 2021) [at 54](http://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/issues-relevant-to-all-legislation-2/chapter-11/). [↑](#footnote-ref-5)
6. Section 22. [↑](#footnote-ref-6)
7. OECD *Recommendation of the Council on Competition Assessment* (OECD/LEGAL/0455, 2022). [↑](#footnote-ref-7)
8. Ian Eagles and Louise Longdin “Subjecting Competition Law Exemptions to a Rule of Reason: New Zealand Courts Push at the Boundaries of Statutory Interpretation” (2009) 32 UNSWLJ 309. [↑](#footnote-ref-8)
9. OECD *Recommendations of the Council on Competition Policy and Exempted or Regulated Sectors* (OECD/LEGAL/0181, 2022). [↑](#footnote-ref-9)
10. MBIE *Discussion paper: Review of Section 36 of the Commerce Act and other matters* (25 January 2019), as implemented in the Commerce (Criminalisation of Cartels) Amendment Act 2019; and Cabinet Economic Growth and Infrastructure Committee “Response to New Zealand Productivity Commission’s Freight Inquiry: Regulation of International Sea and Air Freight Competition” (25 March 2013) EGI (13) 44. [↑](#footnote-ref-10)
11. See, for example, Competition and Consumer Act 2010 (Cth), s 2A; Competition Act RSC 1985 c C-34, s 2.1; Competition Act 1998 (UK), s 73(1); and *United States Postal Service v Flamingo Industries* *(USA) Ltd* 540 US 736 (2004) at [4], approving *Sea-Land Service Inc v Alaska Railroad* 659 F 2d 243 (DC Cir 1981) and citing *United States v Cooper Corp* 312 US 600 (1941). [↑](#footnote-ref-11)
12. This is not to suggest that government involvement must lessen competition. In smaller economies, government may have a greater role in addressing market failure, including by acting as a market maker or provider of last resort. [↑](#footnote-ref-12)
13. Certain conduct by consumers not in trade is, however, subject of its own exception: s 44(1)(h). In addition, some of the prohibitions in the Commerce Act contain elements that may in effect require that a person is in trade. Although any person may be party to an agreement that contains a cartel provisions, at least two parties to the agreement must be in competition with each other (as that term is defined) in relation to the goods or services to which the provision relates. [↑](#footnote-ref-13)
14. Commerce Act 1986, s 2. [↑](#footnote-ref-14)
15. Competition and Consumer Act 2010 (Cth), s 2BA. [↑](#footnote-ref-15)
16. *Re Speedway Control Board of New Zealand (Inc)* (1990) 2 NZBLC (Com) 104,521; and *Re New Zealand Rugby Football Union Inc* NZCC Decision No 580, 2 June 2006. [↑](#footnote-ref-16)
17. *Commerce Commission v Ophthalmological Society of New Zealand Inc* (2004) 10 TCLR 994 (HC). [↑](#footnote-ref-17)
18. (2 October 1979) 426 NZPD 3263. [↑](#footnote-ref-18)
19. (9 November 1979) 427 NZPD 4217. For the real competition trainspotters, Dame Ann Hercus was deputy chair of the Commerce Commission prior to her election to Parliament at the 1978 election. [↑](#footnote-ref-19)
20. Trade Practices Act 1974, s 2A, inserted in 1977. See Trade Practices Act Review Committee *Report to The Minister for Business and Consumer Affairs* (August 1976) (the Swanson Report). For more information on the development of the provision, see Deborah Healey and Jack Coles “From ‘carries on a business’ to ‘in trade or commerce’: Efficiency in government or semantic endeavour?” (2018) 26 CCLJ 47. [↑](#footnote-ref-20)
21. At [10.25]. [↑](#footnote-ref-21)
22. This article focusses on the application of the substantive prohibitions of the Commerce Act to the Crown and does not explore the application of the enforcement and investigative provisions. For discussion of this and other approaches see Steven Price “Crown immunity on trial — the desirability and practicability of enforcing statue law against the Crown” (1990) 20 VUWLR 213 at 231–243. [↑](#footnote-ref-22)
23. Public Services Act 2020, s 104; and Crown Entities Act 2004, s 121. These immunities are limited to civil liability. [↑](#footnote-ref-23)
24. *Gault on Commercial Law* *— Commerce Act 1986* (online ed, Thomson Reuters) at [CA5.01]. See also *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2007] HCA 38, (2007) 232 CLR 1 at [63]–[68]. [↑](#footnote-ref-24)
25. The equivalent Australian provision is Competition Consumer Act 2010, s 51(1). [↑](#footnote-ref-25)
26. *Apple Fields Ltd v New Zealand Apple and Pear Marketing Board* [1991] 1 NZLR 257 (PC). [↑](#footnote-ref-26)
27. *Apple Fields Ltd v New Zealand Apple and Pear Marketing Board* HC Christchurch CP544/88, 21 March 1989. [↑](#footnote-ref-27)
28. *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158 (CA). [↑](#footnote-ref-28)
29. Per Cooke P at 165; and see also Richardson J at 174. [↑](#footnote-ref-29)
30. *Apple Fields Ltd*, above n 23, at 265. Although not referred to by their Lordships, a majority in the Full Federal Court of Australia took a similarly narrow approach to the equivalent Australian provision in *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 (FCA). See also the discussion in Yvonne van Roy “Apple Fields and the Privy Council: s 43 of the Commerce Act 1986 revisited” [1991] NZLJ 166. [↑](#footnote-ref-30)
31. Section 44. [↑](#footnote-ref-31)
32. Screen Industry Workers Act 2022, s 7. [↑](#footnote-ref-32)
33. This would include the Retail Payment Systems Act 2022, s 52; Electricity Industry Act 2010, s 130; Telecommunications Act 2001, ss 63, 78, 156AZC and 156AZF; and Gas Act 1992, s 43ZZR. [↑](#footnote-ref-33)
34. Fisheries Act 1996, s 296C. [↑](#footnote-ref-34)
35. Accident Compensation Act 2011, s 305. [↑](#footnote-ref-35)
36. Pae Ora (Healthy Futures) Act 2022, s 74. [↑](#footnote-ref-36)
37. Land Transport Management Act 2003, s 95. [↑](#footnote-ref-37)
38. Human Tissue Act 2008, s 64. [↑](#footnote-ref-38)
39. Pork Industry Board Act 1997, s 14 and Meat Board Act 2004, s 14. [↑](#footnote-ref-39)
40. Education and Training Act 2020, s 517. [↑](#footnote-ref-40)
41. Commerce Act, s 61. [↑](#footnote-ref-41)
42. Commerce Act, s 58A. [↑](#footnote-ref-42)
43. *The New Zealand Racing Board* [2016] NZCC 17. [↑](#footnote-ref-43)
44. *Electricity Market Company Ltd, Electricity Corporation of New Zealand Ltd, Contact Energy Ltd* NZCC Decision No 277, 21 November 1995. [↑](#footnote-ref-44)
45. *Midland Regional Health Authority, Health Waikato Ltd* NZCC Decision No 275, 1 August 1995. The Central Regional Health Authority also filed an application related to the joint acquisition of liver transplant services on 3 February 1997, and withdrew it on 4 April 1997. [↑](#footnote-ref-45)
46. The Minister of Transport and New Zealand Post filed an application related to an exclusive dealing contract for personalised plates the joint acquisition of liver transplant services on 17 December 1987, and withdrew it on 18 January 1989. [↑](#footnote-ref-46)
47. *NZME Ltd v Commerce Commission* [2018] NZCA 389, [2018] 3 NZLR 715 at [76]–[81]. [↑](#footnote-ref-47)
48. At [79]. [↑](#footnote-ref-48)
49. *Nelson City Council and Tasman District Council* [2017] NZCC 6 at [111]–[112]. [↑](#footnote-ref-49)
50. *Infant Nutrition Council Ltd* [2015] NZCC 11 at [69]–[71]. [↑](#footnote-ref-50)
51. *NZME Ltd and Fairfax New Zealand Ltd* [2017] NZCC 8. [↑](#footnote-ref-51)
52. *Midland Regional Health Authority, Health Waikato Ltd*, above n 42, at [318] and [323]–[336]. [↑](#footnote-ref-52)
53. *Refrigerant Licence Trust Board* NZCC Decision No 735, 25 November 2011 at [77]–[81]. [↑](#footnote-ref-53)
54. *Re Weddel New Zealand Ltd (in rec and in liq)* CC Decision No 273, 2 February 1995 at [255]–[257]. [↑](#footnote-ref-54)
55. Commerce Act, s 61(2). [↑](#footnote-ref-55)
56. Commerce Act, s 92. [↑](#footnote-ref-56)
57. *Town Investments Ltd v Department of the Environment* [1978] AC 359 (HL) at 397. [↑](#footnote-ref-57)
58. *Gault on Commercial Law*, above n 21, at [CA5.01]. [↑](#footnote-ref-58)
59. *Stafford v Accident Compensation Corporation* [2020] NZCA 164, [2020] 3 NZLR 731. [↑](#footnote-ref-59)
60. At [302] (footnotes omitted). [↑](#footnote-ref-60)
61. At [125], [307] and [309]. [↑](#footnote-ref-61)
62. At [124] and [131]. [↑](#footnote-ref-62)
63. (2 October 1979) 426 NZPD 3263 at 3263–3264. [↑](#footnote-ref-63)
64. Te Kawa Mataaho Public Service Commission “Ngā whakahaere kāwanatanga Central government organisations” <www.publicservice.govt.nz>. [↑](#footnote-ref-64)
65. David Blacktop “Application of competition and consumer law to the Crown: the New Zealand perspective” (paper presented to the ACCC/AER Regulatory Conference, Brisbane, August 2015). [↑](#footnote-ref-65)
66. See for example, the service delivery model described in *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942, [2022] 2 NZLR 148 at [6]–[9]. [↑](#footnote-ref-66)
67. See for example *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA); *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA); *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC); and *Falun Dafa Association of New Zealand Inc v Auckland Children’s Christmas Parade Trust Board* [2009] NZAR 122 (HC). [↑](#footnote-ref-67)
68. For example, licensing or industry standard setting decisions, or decisions as to what type of advertising or promotional activity is ethical. See also Alan Bollard and Paul Scott “Competition and the Legal Profession” [1996] NZLJ 275. [↑](#footnote-ref-68)
69. OECD *Recommendation of the Council on Competition Assessment*, above n 4. [↑](#footnote-ref-69)
70. Crown Organisations (Criminal Liability) Act 2002, s 4. [↑](#footnote-ref-70)
71. For example, the Reserve Bank does not appear to be covered by the definition of Crown organisation. [↑](#footnote-ref-71)
72. Commerce Act, s 2. [↑](#footnote-ref-72)
73. *Fairnington Investments Ltd v New Zealand Kiwifruit Marketing Board* (1994) 6 TCLR 254 (HC) at 261–262. [↑](#footnote-ref-73)
74. Competition and Consumer Act, s 2C. [↑](#footnote-ref-74)
75. *Glaxo New Zealand Ltd v Attorney-General* [1991] 3 NZLR 129 (CA). [↑](#footnote-ref-75)
76. *Glaxo New Zealand Ltd v Attorney-General* [1991] 3 NZLR 129 (HC). [↑](#footnote-ref-76)
77. *Re NZ Medical Assn* (1988) 7 NZAR 407 (NZCC). [↑](#footnote-ref-77)
78. At [9]. [↑](#footnote-ref-78)
79. *Glaxo New Zealand Ltd*,above n73,at 133. [↑](#footnote-ref-79)
80. At 139–140. [↑](#footnote-ref-80)
81. *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd*, above n 25. [↑](#footnote-ref-81)
82. *Astra Pharmaceuticals (NZ) Ltd v Pharmaceutical Management Agency Ltd* (1999) 9 TCLR 99 (HC). [↑](#footnote-ref-82)
83. At 104–105. [↑](#footnote-ref-83)
84. *Pharmaceutical Management Agency Ltd v Astra Pharmaceutical (New Zealand) Ltd* CA39/99, 15 April 1999. [↑](#footnote-ref-84)
85. *Astra Pharmaceuticals (NZ) Ltd v Pharmaceutical Management Agency Ltd* HC Wellington CP186/98, 15 March 2000 at [81]. Other aspects of the judgment were partially overturned on appeal: *Astra Pharmaceuticals (NZ) Ltd v Pharmaceutical Management Agency Ltd* [2001] 1 NZLR 415 (CA). [↑](#footnote-ref-85)
86. At [81]. [↑](#footnote-ref-86)
87. For example, *Rod Milner Motors Ltd v Attorney-General* (1995) 6 TCLR 696 (HC), overturned on appeal in *Rod Milner Motors Ltd v Attorney-General* [1999] 2 NZLR 568 (CA); *Chisholm v Auckland City Council* [2002] NZRMA 362 (HC); *Arms v New Plymouth District Council* HC New Plymouth CIV-2006-043-399, 14 May 2008. [↑](#footnote-ref-87)
88. *Clee v Attorney-General for the Legal Services Agency* HC Auckland CIV-2010-404-7101, 12 November 2010. [↑](#footnote-ref-88)
89. *Integrated Education Software Ltd v Attorney-General on behalf of the Ministry of Education* [2012] NZHC 837. [↑](#footnote-ref-89)
90. Healey and Coles, above n 17. [↑](#footnote-ref-90)
91. *Marina Holdings Ltd (in rec) v Thames-Coromandel District Council* (2010) 12 NZCPR 277 (HC). [↑](#footnote-ref-91)
92. Blacktop, above n 62, at [38]. [↑](#footnote-ref-92)
93. *Te Whanau O Waipareira Trust v Attorney-General* [2012] NZHC 3107. [↑](#footnote-ref-93)
94. For example, there was no dispute that the public body was in trade in either of the tendering situations in *Gregory v Rangitikei District Council* [1995] 2 NZLR 208 (HC), or *New Zealand Private Hospitals Association-Auckland Branch (Inc) v Northern Regional Health Authority* HC Auckland CP440/94, 7 December 1994 [↑](#footnote-ref-94)
95. Government of New Zealand *Government Expectations for Good Regulatory Practice* (April 2017) at 2. [↑](#footnote-ref-95)
96. Cabinet Office Circular “Impact Analysis Requirements” (26 June 2020) CO (20) 2. [↑](#footnote-ref-96)
97. The Treasury *Guidance Note on Best Practice Impact Analysis* (June 2017). [↑](#footnote-ref-97)
98. Commerce Commission and Ministry for Business, Innovation and Employment *Competition Assessment Guidelines* (January 2022). [↑](#footnote-ref-98)
99. OECD *Competition Assessment Toolkit: Volume 3 Operational Manual* (2019). [↑](#footnote-ref-99)
100. Standing Orders of the House of Representatives 2020, SO 327(2)(f). [↑](#footnote-ref-100)
101. Dean R Knight and Edward Clark *Regulations Review Committee Digest* (7th ed, New Zealand Centre for Public Law, Wellington, 2020) at 99, citing Regulations Review Committee “Report of the Inquiry into the Appropriateness of Establishing the Kiwifruit Marketing Board Through Regulations” [1988] AJHR I16. [↑](#footnote-ref-101)
102. Standing Orders of the House of Representatives, SO 327(2)(a) and SO 327(2)(c). [↑](#footnote-ref-102)
103. Knight and Clark, above n 111, at 63, citing Regulations Review Committee “Complaint Regarding the Dairy Industry Restructuring (Raw Milk) Regulations 2001” [2007] AJHR I16K. [↑](#footnote-ref-103)
104. For example, the decision in *Glaxo* involved claims in judicial review and the Commerce Act. [↑](#footnote-ref-104)
105. *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [91]; and see also *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC); *Pratt Contractors v Transit* *New Zealand* [2003] UKPC 83; and *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470. [↑](#footnote-ref-105)
106. See for example, Commerce Commission *Market study into the retail grocery sector: Final report* (8 March 2022) at [9.24]–[9.56]. [↑](#footnote-ref-106)
107. OECD *Recommendation of the Council on Competitive Neutrality* (OECD/LEGAL/0462, 2022). [↑](#footnote-ref-107)
108. Ian Harper and others *Competition Policy Review: Final Report* (The Treasury, 31 March 2015) at 96. [↑](#footnote-ref-108)
109. At 97. [↑](#footnote-ref-109)
110. Eric Crampton “Dr Eric Crampton: Taking a closer look at Commerce Commission’s market studies” *The New Zealand Herald* (online ed, 11 August 2022). [↑](#footnote-ref-110)
111. Eric Crampton “The crippling cost of bureaucracy” (25 October 2019) newsroom <www.newsroom.co.nz>. [↑](#footnote-ref-111)
112. See, for example, George J Stigler “The theory of economic regulation” (1971) 2 The Bell Journal of Economics and Management Science 3. [↑](#footnote-ref-112)
113. Bruce Yandle “Bootleggers and Baptists — The Education of a Regulatory Economist” (1983) 7 AEI Journal on Government and Society 12. [↑](#footnote-ref-113)
114. OECD *Recommendation of the Council on Competition Assessment* (OECD/LEGAL/0376, 2022). [↑](#footnote-ref-114)
115. OECD *Experiences with Competition Assessment: Report on the Implementation of the 2009 OECD Recommendation* (2014). [↑](#footnote-ref-115)
116. Lithuania, Mexico, Italy, Chile, and Spain were given as examples, at 41. [↑](#footnote-ref-116)
117. At 42. [↑](#footnote-ref-117)
118. OECD *Recommendation of the Council on Competition Assessment*, above n 4. [↑](#footnote-ref-118)
119. At II(A)(3). This in part reflected the OECD’s 1979 *Recommendation on Competition Policy and Exempted or Regulated Sectors*, above n 6. [↑](#footnote-ref-119)
120. Amendments to s 43(1) would be required to place restrictions on regulations that limited competition without appropriate parliamentary authorisation. [↑](#footnote-ref-120)
121. *Anytime NZ Ltd* [2022] NZCC 22. [↑](#footnote-ref-121)
122. Commerce Commission *Competitor Collaboration Guidelines* (January 2018) at [120]–[127]. [↑](#footnote-ref-122)
123. *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [93]. [↑](#footnote-ref-123)
124. Andrew S Butler “Limiting Rights” (2002) 33 VUWLR 113 at 130. [↑](#footnote-ref-124)
125. David Caygill “Deregulation — Finesse or Folly” [1988] NZLJ 77. See also Michael Taggart “Corporatisation, privatisation and public law” (Inaugural Lecture presented at University of Auckland, 12 September 1990) at 30–31. [↑](#footnote-ref-125)
126. Legislative Design and Advisory Committee, above n 2, at 54. [↑](#footnote-ref-126)
127. *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*, above n 21, at [48]. [↑](#footnote-ref-127)