THE PURPOSE OF SUBSTANTIALLY LESSENING COMPETITION: THE DIVERGENCE OF NEW ZEALAND AND AUSTRALIAN LAW

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I. PART 1- INTRODUCTION

The Commerce Act 1986 is largely based upon Australia's Trade Practices Act 1974 (now called the Consumer and Competition Act 2010). This is especially so with the restrictive trade practice provisions. These are in Part 2 of the Commerce Act and Part IV of the Consumer and Competition Act. Both Acts, via s 27 in New Zealand and s 45 in Australia, proscribe contracts, arrangements and understandings that have the purpose or effect or likely effect of substantially lessening competition in a market.[1] In the Commerce Act's early days, New Zealand courts emphasised the efficacy of drawing on Australian authority on these provisions.[2] Indeed with CER New Zealand

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1 Section 27 provides:

(1) No person shall enter into a contract or arrangement or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market. (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market. (3) Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act. (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

Section 45 relevantly provides:

(2) A corporation shall not:

(a) Make a contract or arrangement, or arrive at an understanding if:

(i) The proposed contract, arrangement or understanding contains an exclusionary provision; or

(ii) A provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) Give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) Is an exclusionary provision; or

(ii) Has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(3) For the purposes of this section and section 45A, competition, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in the market in which a corporation that is a party to a contract, arrangement or understanding or would be a party to the proposed contact, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply and acquire, goods or services.

2 *Union Shipping NZ Limited v Port Nelson Limited* [1990] 2 NZLR 662 (HC) at 699-700; *Fisher and Paykel Limited v Commerce Commission* [1990] 2 NZLR 731 (HC) at 756.

courts noted it was desirable to do so.[3] However, with the purpose limb of s 27, ie proscribing contracts, arrangements and understandings that have the purpose of substantially lessening competition, New Zealand and Australian law has significantly diverged.

The divergence starkly occurred in the Court of Appeal's decision in *ANZCO Foods Limited v AFFCO NZ Limited*.[4] Subsequently as a result of an Australian Full Federal Court decision the law has widened further. In *ANZCO Foods* the majority decision of Glazebrook J has resulted in New Zealand's law going off on a different path from Australia's. In particular, the differences are as follows:

a) Whether the purpose test is objective or subjective?
   In Australia the requisite purpose is subjective.[5] In *ANZCO Foods* Glazebrook J, following Cooke P's approach in *Tui Foods Limited v New Zealand Milk Corporation*,[6] held that objective purpose was preferable but that courts could take account of subjective purpose in assessing objective purpose.[7] In short, both objective and subjective purpose are relevant.
   In *News Limited v South Sydney District Rugby League Football Club Limited*[8] the High Court of Australia expressly rejected the submission that both objective and subjective purpose are relevant; such an approach was impermissible.[9] Subjective purpose alone counts. The High Court's decision in *News Limited* was before *ANZCO Foods*. Yet, the Court of Appeal did not discuss it or even comment on how it was diverging from Australia.
b) Whether it is necessary to establish an actual or likely effect of substantially lessening competition for the purpose limb to apply, or in other words, if an apparently anticompetitive purpose could not be achieved, could there still be a breach of s 27?

A. *New Zealand Position*

In *ANZCO Foods* Glazebrook J held that a plaintiff must prove the purpose of substantially lessening competition. If it was obvious that that purpose could not be achieved if the provision were implemented then, assessed objectively, the provision could not have had that purpose.[10]

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3 *Fisher and Paykel Limited v Commerce Commission* [1990] 2 NZLR 731 (HC) at 756.

4 *ANZCO Foods Limited v AFFCO NZ Limited* [2006] 3 NZLR 351. This case was under s 28 of the Commerce Act which provides:

1) No person, either on his own or on behalf of an associated person, shall-
   (a) Require the giving of a covenant; or
   (b) Give a covenant –

that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

2) No person, either on his own or on behalf of an associated person, shall carry out or enforce the terms of a covenant that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

…

4) No covenant, whether given before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market is enforceable.

5 *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563.

6 *Tui Foods Limited v New Zealand Milk Corporation* (1993) 5 TCLR 406 (CA).

7 *ANZCO Foods*, above n 4, at [255].

8 *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563. For a discussion of Australian law see Stephen Corones *Competition Law in Australia* (5th ed, Lawbook Co, Sydney, 2010) at Chapter 6.

9 Ibid, at [63].

10 *ANZCO Foods*, above n 4, at [257].

William Young J dissented on this point. He held it was not necessary to establish an effect or likely effect of substantially lessening competition before the purpose limb applied. He held "… that where the purpose of a covenant is to substantially lessen competition in a market, there is no need to prove substantial anticompetitive effect or likely effect".[11] He further noted: "… there is no logical inconsistency between concluding that a covenant which has not been established to have had an actual or likely substantial anticompetitive effect may nonetheless be held to have had the purpose of substantially lessening competition".[12]

B. Australian Position

Again, the majority has diverged from Australian law. The Full Federal Court in *Universal Music Australia Pty Limited v Australian Competition and Consumer Commission* held that a party may have the purpose of substantially lessening competition even though that purpose was impossible to achieve.[13] The Full Federal Court decided *Universal Music* before *ANZCO Foods*. Yet, the Court of Appeal did not refer to it on this point. Interestingly, Glazebrook J cited *Universal Music* for another point.[14] Subsequent to *ANZCO Foods* the Full Federal Court in *Seven Network Limited v News Limited* reaffirmed its position that a purpose of substantially lessening competition did not have to be achievable, albeit by majority.[15]

Thus, the New Zealand law on the purpose of substantially lessening competition has significantly diverged from Australia. Indeed, the majority forged such a different path in apparent ignorance of some of the Australian authorities. While it cites Australian cases, it omits the most recent and relevant ones.

High Court of Australia and Federal Court decisions are not binding on New Zealand courts. So the divergence in of itself is no cause for concern; New Zealand courts do not have to apply Australian courts' reasoning blindly or slavishly. New Zealand courts' reasoning may be more rigorous and preferable. However, the *ANZCO Foods* Court of Appeal should have discussed the Australian cases. Ignoring the Australian jurisprudence is surprising at the very least.

Furthermore, the Australian jurisprudence and reasoning is preferable as a matter of statutory interpretation and economic analysis. The *ANZCO Foods* decision is a wrong turn. William Young J's reasoning and decision is preferable to the majority's. In showing this, Part 2 of this article discusses why Parliament has proscribed agreements that have the purpose, effect or likely effect of substantially lessening competition in a market. It also discusses the structure of s 27. Part 3 discusses what "purpose" in s 27 means. Part 4 deals with the issue of whether purpose is objective or subjective or a mixture of both. It argues that in line with Australian authority that it is subjective. It discusses the New Zealand approach that it can be a mixture of both but it rejects this approach. Part 5 deals with the situation where it is impossible or obvious that the effect of substantially lessening competition could never occur. Is it still possible for a court to find the requisite anticompetitive purpose? In line with William Young J's view it argues it is. Part 6 offers some conclusions.

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11 Ibid, at [152].

12 Ibid, at [153].

13 *Universal Music Australia Pty Limited v Australian Competition and Consumer Commission* (2003) 131 FCR 529 at 587.

14 *ANZCO Foods*, above n 4, at [247].

15 *Seven Network Limited v News Limited* [2009] FCAFC 166.

II. Part 2: Effect, Likely Effect and Purpose

Sections 27 and 28 deal with agreements. Section 27 covers provisions of contracts, arrangements and understandings. Section 28 covers covenants. One of competition law's key concerns is with agreements, especially between competitors. The reason for concern is that such agreements increase the risk of anticompetitive action, expand market power, create an anticompetitive restraint not otherwise possible and surrender decision-making autonomy on matters of competitive significance.[16]

A. *Why Section 27 Proscribes Purpose, Effect and Likely Effect of Substantially Lessening Competition*

Section 27 proscribes the provisions of agreements if they have the purpose or effect or likely effect of substantially lessening competition in a market. Good reasons exist for this.[17]

1. *Effect and likely effect*

As the effect or likely effect of a provision of an agreement is to substantially lessen competition, courts will condemn it under s 27 irrespective of purpose. This is how things should be. As Sullivan notes: "It is, in the end, effects - impacts upon the competitive process - which are of social consequence."[18] If an agreement's effect is to substantially lessen competition then society should not tolerate it. There is no benefit in letting it endure, n or is there any harm in proscribing it.[19] As for likely effect, if an agreement has or had the likely effect of substantially lessening competition there is no benefit in letting it endure. That the agreement may not have blossomed into an actual market effect is irrelevant. By the time of trial the market circumstances may have changed, court action may have had a freezing effect upon the conduct.

In determining whether an agreement has the effect or likely effect of substantially lessening competition, courts weigh up the pro and anticompetitive effects. They decide on balance whether the ultimate or net effect is to lessen substantially competition.[20] In so doing, Australasian courts analyse effect by comparing the market with and without the provision in the agreement.[21] This is called "counterfactual analysis". Courts consider the future state of competition in the relevant market with and without the challenged provision in the agreement. As Glazebrook J noted in *ANZCO Foods*:[22]

> When assessing whether there has been a substantial lessening of competition in a market, the phrase must obviously be construed as a whole. Essentially, this means that the competitive functioning of a relevant market must be assessed with and without the disputed covenant or practice.

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16 Phillip Areeda *Antitrust Law* (Little, Brown and Co, Boston, 1986) at [1402(a)].

17 This discussion is based on Paul G Scott "Price Fixing and the Doctrine of Ancillary Restraints" (1999) 7 Canterbury L Rev 403 at 405-406.

18 Lawrence A Sullivan *Handbook of the Law of Antitrust* (West Publishing Co, St Paul, 1977) at 194.

19 Thomas Kauper "The Treatment of Cartels under the Antitrust Laws of the United States" in C-K Wang, C-J Cheng, and L Lui (eds) *International Harmonisation of Competition Laws* (Martinus Nijhoff Publishers, A D Dordrecht, The Netherlands, 1995) 75 at 78.

20 *Fisher and Paykel*, above n 3, at 740.

21 *Stirling Harbour Services Pty Limited v Bunbury Port Authority* (2000) ATPR 41-752 at 41 and 267.

22 *ANZCO Foods*, above n 4, at [245]. See also Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010) at 188-192.

This balancing of pro and anticompetitive effects is similar to the way United States' courts assess agreements under s 1 of the Sherman Act. This is called "rule of reason" analysis.[23]

2. *Purpose*

As for purpose, courts will condemn an agreement when it has a substantial purpose of substantially lessening competition. The reason is that the parties to the agreement best know what they can achieve. They know the relevant market and the conditions in it. They would not have engaged in an anticompetitive scheme unless they believed they had a high chance of success.[24] If the parties believe they can successfully lessen competition, courts should accept that belief. In this way purpose serves as a surrogate or predictor of effect. If the parties have an anticompetitive purpose they must believe the arrangement will have an anticompetitive effect. Sometimes an agreement will not have a likely or actual anticompetitive effect despite there being an anticompetitive purpose. Liability should still arise. A party who says there should be no liability in these circumstances is saying we tried to behave anticompetitively, but due to circumstances beyond our control, we failed.[25] That they were wrong is no reason to condone their behaviour. Such a party is equally as blameworthy as a party who had the same purpose and who produced an anticompetitive effect. The structure of s 27 supports the notion of condemning on purpose alone.

The three limbs of s 27 proscribe provisions in contracts, agreements and understandings which have:

i) the purpose of substantially lessening competition in a market; or

ii) the effect of substantially lessening competition in a market; or

iii) the likely effect of substantially lessening competition in a market.

The limbs are disjunctive. Thus, the purpose limb of s 27 catches agreements that the effect and likely effect limbs do not and vice versa.[26] If this were not so and there had to be the requisite effect or likely effect, then the purpose limb would be redundant; Parliament does not legislate redundancies.[27] Also, it means that if courts find liability under the purpose limb they do not need to consider the effect and likely effect limbs. Whether these propositions are correct depends on the meaning of purpose in s 27.

III. Part 3: The Meaning of Purpose Under Section 27

The meaning of purpose has been the subject of much judicial comment. In Australia the discussion flows from the Privy Council's decision in *Newton v Federal Commissioner of Taxation*.[28] That case dealt with s 260 of the Income Tax Assessment Act 1936. That section covered contracts, arrangements or understandings which have the purpose or effect of tax avoidance. These

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23 *Standard Oil Co v United States* 221 US 1 (1911) at 60.

24 John R Allison "Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis" (1979) 16 Houston L Rev 761 at 767.

25 Phillip Areeda "The Changing Contours of the Rule of Reason" (1988) 54 Antitrust LJ 1 at 28.

26 Oliver Black *Conceptual Foundations of Antitrust* (Cambridge University Press, Cambridge, 2005) at 115.

27 Black, above n 26, at 115; Okeoghene Odudu "Interpreting Article 81(1): Object as Subjective Intention" (2001) 26 EL Rev 60 at 61; *Commerce Commission v Bay of Plenty Electricity Limited* HC Wellington CIV-2001-485-917, 13 December 2007, J Clifford and Professor Richardson at [339].

28 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1.

were void for tax purposes. The Privy Council held that: "The word 'purpose' means, not motive but the effect which it is sought to achieve - the end in view".[29]

Australian courts interpreting s 45 have cited *Newton* for the meaning of purpose. In *News Limited,* Glesson CJ defined purpose as the end sought to be accomplished by the conduct.[30] The High Court of Australia in *Rural Press Limited v Australian Competition and Consumer Commission* also adopted this definition.[31] Federal Courts have also adopted it. In *Seven Network Limited* the Full Federal Court observed that: "The purpose will be identified by examining the end sought to be accomplished by the provision".[32] It also noted that: "The purpose must be ascertained by identification of the end sought to be achieved".[33] Thus, the requisite purpose is the goal, objective or end.

New Zealand courts have not discussed purpose in as much detail as Australian courts. In *Union Shipping NZ Limited v Port Nelson Limited* the High Court observed: [34]

> The concept of anticompetitive "purpose" arises under both ss 27 and 36. Under the statutory definition in s 2(5) "purpose" is not confined to "sole purpose". Engaging in multi-purpose conduct which includes that anticompetitive purpose, will suffice as long as that anticompetitive purpose is "substantial". "Substantial" means "real or of substance". Like so many mental concepts, the reference to "purpose" has its difficulties. The word is not merely "intention". Intention to do an act, which is known will have anticompetitive consequences, in itself is not enough. "Purpose" implies object or aim. The requirement is that "the conduct producing the consequences was motivated or inspired by a wish for the occurrence of the consequences".[35]

Thus, under s 27 purpose means object or aim.

A. Purpose is Not the Same as Motive

The last sentence from the extract from *Union Shipping* speaks of motivation. However, the authorities show that purpose is not the same thing as motive. The Privy Council distinguished between motive and purpose in *Newton*.[36] In the s 46 monopolisation case *Queensland Wire Industries Pty Limited v Broken Hill Proprietary Co Limited,* the High Court of Australia observed:[37]

> If, however, the anticompetitive effects are within the defendant's purpose, questions of morality and motive become irrelevant: 'There is no breach of s 46 unless there has been a use of market power for one of the purposes proscribed by the section. But once it appears there has been use of market power for such a purpose, the section has been contravened and it adds nothing to consider the motives of the corporation taking advantage of the market power which it has'.

In *News Limited* Glesson CJ observed that:[38]

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29 Ibid, at 70.

30 *News Limited*, above n 5, at [18].

31 *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [66].

32 *Seven Network Limited*, above n 15, at [852].

33 Ibid, at [898].

34 *Union Shipping*, above n 2, at 707.

35 Donald and Heydon *Trade Practices Law* (Law Book Company, Sydney, 1989) at 2, 621.

36 *Newton*, above n 28, at 70.

37 *Queensland Wire Industries Pty Limited v Broken Hill Proprietary Co Limited* (1989) 167 CLR 177 at 189. Courts have tended to treat the meaning of purpose under the monopolisation provisions the same as under ss 27 and 45. This article does not discuss whether this is correct.

38 *News Limited*, above n 5, at [18].

> Purpose is to be distinguished from motive. The purpose of conduct is the end sought to be accomplished by the conduct. The motive for conduct is the reason for seeking that end. The appropriate description of characterisation of the end sought to be accomplished (purpose), as distinct from the reason for seeking that end (motive), may depend upon the legislative or other context in which the task is undertaken.

Glesson CJ then gave an example from the tax avoidance field. A person who entered into a tax avoidance agreement might have had the motive to increase his disposable income so he could give more to charity. This motive was irrelevant as to whether the agreement had the purpose of avoiding tax.[39] The same is true in the context of substantially lessening competition and in criminal law.[40] If someone plants a bomb on an aeroplane, his purpose under the law is to kill. This is so despite his motive having been to intimidate political opponents, gain publicity, show skill with explosives, collect life insurance or distract the police from his other criminal activities.

The Full Federal Court in *Seven Network* similarly distinguished between motive and purpose. It observed that:[41]

> Purpose is not the same as motive: *News Limited v South Sydney District Rugby League Football Club Limited* 215 CLR 563. Motive will demonstrate the reason or reasons why the provision might be included but not the purpose. The purpose will be identified by examining the end sought to be accomplished by the provision.

B. New Zealand's Position on the Difference between Motive and Purpose

New Zealand courts have drawn the same distinction. *Apple Fields Limited v New Zealand Apple and Pear Marketing Board* is an example. The plaintiffs had applied to the High Court for a declaration that that second tier levy that the Apple and Pear Marketing Board had imposed on new growers and existing growers who expanded production breached ss 27, 29 and 36 of the Commerce Act 1986. Holland J held that the purpose (under both ss 27 and 36) was not for the requisite anticompetitive purpose, rather it was to recover from those growers entering the market or increasing production a fair proportion of capital costs created by such entry and expansion. Accordingly, he held that under s 27 the purpose was not to lessen competition.[42]

On appeal, Cooke P disagreed with the High Court's findings on purpose.[43] Cooke P held that the Board, in imposing the levy, had set out to decrease the attraction to enter the market or make new plantings. In this light, the Board's motive was to increase fairness among growers. However, he held the levy "however well motivated has had a substantial purpose of deterring entry".[44]

The Australasian authorities are consistent on the meaning of purpose and how purpose differs from motive. However, as *ANZCO Foods* shows, they diverge greatly on whether purpose is subjective or objective or both.

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39 Ibid.

40 This example comes from Judge Posner's decision in *Johnson v Phelan* 69 F 3d 144 (7th Cir 1995).

41 *Seven Network Limited*, above n 15, at [852].

42 *Apple Fields Limited v New Zealand Apple and Pear Marketing Board* (1989) 2 NZBLC 103, 564 (HC) at 103 and 581.

43 *Apple Fields Limited v New Zealand Apple and Pear Marketing Board* [1989] 3 NZLR 158.

44 Ibid, at 162.

IV. Part 4: Subjective or Objective Purpose or Both

As mentioned above, Australia and New Zealand law differs on whether purpose is subjective or objective under s 27. What is the difference? By subjective purpose one means the purpose of the parties to the contract, arrangement or understanding.[45] Whereas objective purpose is that which the courts deduce or infer from the provision of the contract, arrangement or understanding in question.[46]

A. Australian Position on Subjective or Objective Purpose

Apart from a couple of early Federal Court decisions, Australian courts favoured subjective purpose.[47] *News Limited* settled the issue in favour of subjective purpose.[48]

B. Why the Australian Courts Use Subjective Purpose

Essentially there are two reasons why the Australian courts have chosen subjective purpose. First, s 45 contains both purpose and effect limbs. This means purpose is subjective because the effect limb would be redundant if the purpose limb concerned effect. If courts could infer purpose from effect and likely effect it would leave the purpose limb capturing nothing that the other limbs did not catch. This would create redundancies in the statutory wording. Also, as Gummow J noted in *News Limited*:[49]

> In addition, there is a danger that an examination of the objective purpose of a provision will give undue significance to the substantive effect of the provision, as opposed to the effect that the parties *sought to achieve* through its inclusion.

The second reason is s 4F. This relevantly provides:

> (1) For the purposes of this Act:
>
> (a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:
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> (i) the provision was *included* in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for *purposes that included or include that purpose*; and
> (ii) that purpose was or is a substantial purpose (emphasis added).

According to Gummow J in *News Limited*, and previously as a member of the Full Federal Court in *ASX Operations Pty Limited v Pont Data Australia Pty Limited (No 1)*,[50] the phrase “the provision was included in the contract … for that purpose or for purposes that included or include that purpose” suggests that s 4F requires examining the purposes of the individuals who were responsible for including the relevant provision in the contract, arrangement or understanding. This di-

45 *News Limited*, above n 5, at [126].

46 Ibid.

47 *Trade Practices Commission v TNT Management Pty Limited* (1985) 6 FCR 1; *Dandy Power Equipment Pty Limited v Mercury Marine Pty Limited* (1982) 44 ALR 173.

48 *News Limited*, above n 5, at [63].

49 Ibid.

50 *ASX Operations Pty Limited v Pont Data Australia Pty Limited* (No 1) (1990) 27 FCR 460.

rects attention to the purpose of those individuals.[51] Furthermore, s 4F suggests that the provision may have been included in the agreement for a number of reasons. It suffices if the purpose is substantial. This shows that the Consumer and Competition Act 2010 requires examination of the purposes of individuals. As there are many individuals to an agreement, there will be an inevitable multiplicity of purposes. This too supports examining the subjective purpose of those individuals.[52] Also the fact that s 4F specifically refers to multiple purposes does not support objective purpose; it is unusual to infer multiple purposes.

News Limited concerned s 4D which deals with exclusionary provisions. However, it is clear that its reasoning on subjective purpose covers s 45 as well. Subsequently, the High Court of Australia, following *News Limited*, held subjective purpose applied to s 45 in *Rural Press Limited v ACCC*.[53] So too did the Full Federal Court in *Seven Network*.[54] This reasoning should apply to the equivalent New Zealand provisions, ie ss 27 and 29 of the Commerce Act. Indeed *Tui Foods* was a s 29 case.

In *News Limited,* McHugh J would have favoured objective purpose. However, he held that because the Full Federal Court had consistently used subjective purpose for 17 years, and because of the strength of the s 4F argument he supported subjective purpose.[55] Kirby J dissented on this issue in *News Limited*.[56] Subsequently in *Rural Press* he noted that on the whole he still preferred objective purpose. However, following *News Limited* he was bound to use subjective purpose.[57]

C. New Zealand's Position on Objective and Subjective Purpose

The issue of objective or subjective purpose arose in *ANZCO Foods*. AFFCO is a substantial meat processing company. During the 1990s the meat processing companies believed New Zealand, and in particular the North Island, had too many meat processing plants competing for stock to slaughter. In 1994 Weddel NZ Limited (a substantial meat processing company) went into receivership. A number of meat companies, including AFFCO, formed a consortium for purchasing five Weddel meat processing plants and shutting them down. The consortium bought the Weddel properties from the receivers and requested encumbrances restricting future use of the land. The purpose was to decrease killing capacity in the North Island and, thus, help the existing companies' viability. These companies had all complained of excess capacity. The Commerce Commission approved their behaviour.

AFFCO had also been closing down and selling off its own plants, both before and after the Weddel receivership. Where the sale of a plant occurred, AFFCO required encumbrances to be registered over the land. These prevented use of the land for meat processing for 20 years. One of the properties was Waitara, at a reduced price. The initial purchaser of Waitara agreed to sell the site to ANZCO Foods Limited. ANZCO planned to use the Waitara site for cooling, freezing and storing meat for the production of smallgoods. This breached the encumbrance and AFFCO sued to enforce it.

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51 *News Limited*, above n 5, at [62].

52 Ibid.

53 *Rural Press Limited v ACCC* (2003) 216 CLR 53.

54 *Seven Network*, above n 15.

55 *News Limited*, above n 5, at [31]-[43].

56 Ibid, at [125]-[130].

57 *Rural Press*, above n 53, at [111].

In the Court of Appeal the issue was whether s 28 prevented enforcing the encumbrance. In the Court of Appeal the issue was purpose, not effect or likely effect. The reasons were the Waitara plant accounted for only about two percent of the North Island market for procurement of livestock. There were low barriers to entry, thus, with and without the encumbrance, competition would be unaffected.

1. *William Young J's views*

In *ANZCO Foods* William Young J noted that it was not easy to reconcile a rigorously objective approach with the words of the Commerce Act.[58] Essentially his reasons were the same as the High Court of Australia. His first reason was that on a purely objective approach there would be little obvious reason for Parliament to introduce the concept of purpose. This left "effect" and "likely effect" to do all the work.[59] His second reason was the same as the s 4F argument the High Court used in *News Limited*. He used the New Zealand equivalent of s 2(5). He observed:[60]

> The purely objective approach to "purpose" is not consistent with the definition of "purpose" in s2(5). While I agree that the concept of the purpose of a covenant connotes objectivity, the terminology of s2(5)(a)(i) in referring to the "purpose" for which a covenant was "required to be given" most obviously refers to the purposes of the relevant parties.

While William Young J cited the early Federal Court decisions of *Hughes v Western Australian Cricket Association (Inc)*[61] and *Pont Data* he did not mention *News Limited*. As his reasons for criticising a rigorously objective approach were essentially the same as the Australian courts' reason for favouring a subjective approach, it is a wonder he did not go the whole way and prefer a subjective approach to purpose.

However, he accepted previous Court of Appeal authority that both objective and subjective purpose are relevant. The cases show how this came about. The New Zealand courts were initially split on whether purpose was objective or subjective.[62] However, in *Tui Foods Limited,* Cooke P held both objective and subjective purpose were relevant. He said:[63]

> I am disposed to think that, if a purpose is discernible on the face of a contract or arrangement having regard to the express terms considered in the light of any relevant surrounding circumstances, such a purpose will qualify under the statute. That might be described as an objective approach. But it is at least conceivable that there may also be cases where, although the purpose is not so apparent, it can be shown by evidence dehors a contract or arrangement that the intention of the party who sought the inclusion of the relevant provision was of a kind falling within the prohibition in s29, and it may be that in such a case what may be called a subjective test is sufficient. It is unnecessary however for present purposes to express a definite view on that point because, on the face of this particular rebate arrangement and the evidence, it is manifestly well arguable in my view that there is no difference between an objective test and a subjective test: That both are satisfied.

McGechan J followed *Tui Foods* in *Commerce Commission v Port Nelson Limited* observing:[64]

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58 *ANZCO Foods*, above n 4, at [145].

59 Ibid, at [145].

60 Ibid.

61 *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10.

62 Lindsay Hampton "Fundamental Concepts" in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (2nd ed, Lexis Nexis NZ Limited, Wellington, 2007) at 887-888 listing authority.

63 *Tui Foods*, above n 6, at 409.

64 *Commerce Commission v Port Nelson Limited* (1995) 5 NZBLC 103, 762 (HC) at 103 at 777.

> Clearly, a plaintiff may establish anticompetitive purpose objectively, in the sense of inviting the inference from actions and circumstances. That will be the more ordinary approach. Alternatively, a plaintiff may establish anticompetitive purpose subjectively, in the sense of evidence otherwise of actual thinking. That will be less common, given evidential obstacles, but may occur through use of admissions. Where a plaintiff has both objective and subjective evidence, a plaintiff may - and doubtless will - present both. Any other approach is artificial. However, given the opening to a plaintiff to use subjective evidence, it should always be open to a defendant to attempt to rebut by subjective evidence. If open to a plaintiff, it should be open to a defendant. In that respect, the latest Australian approach [as set out in *General Newspapers Pty Limited v Telstra Corp* (1993) ATPR 41-274] is not adopted.

The Court of Appeal in *Port Nelson* agreed with Cooke P's comments in *Tui Foods*. It noted that the distinction between subjective and objective purpose is unimportant in practice.[65] Thus, as in *ANZCO Foods,* the Court of Appeal agreed the main approach for purpose under s 27 is objective with subjective relevant in marginal cases.

2. *Glazebrook J's views*

Glazebrook J accepted *Tui Foods* but came down heavily in favour of objective purpose. She reasoned that if the test were purely subjective it could excuse conduct that objectively has an anticompetitive purpose. Also a subjective test could expand s 27 to include procompetitive conduct, thereby frustrating the purpose of the Commerce Act.[66] Glazebrook J noted that using subjective purpose caused a difficulty because both hard competition and anticompetitive conduct involves the deliberate harming of rivals. If subjective purpose was the requisite purpose it could cover the deliberate harming of rivals.[67]

Regarding the s 2(5) argument of William Young J, her Honour noted that the Court of Appeal in *Port Nelson* held it was difficult to see how the purpose of a provision could be ascertained or negatived subjectively.[68] She held the words "required to be given" for s 28 (or "is included" for s 27) referred back to s 28 (or s 27). Also she held s 2(5) is not a general definition of purpose but deals only with the special situation of there being multiple purposes.[69]

Glazebrook J held that subjective purpose conflicted with McGrath J's decision in *Giltrap City Limited v Commerce Commission*.[70] *Giltrap* concerned whether a party (Mr McKenzie) had entered into a price fixing arrangement, rather than the issue of whether purpose is objective or subjective. *Giltrap* argued, contrary to minutes of a meeting and not saying anything to the contrary, its purpose was not to agree on prices. According to McGrath J:[71]

> It is plain for the language of the section that it is the purpose, or the actual or likely anticompetitive effect, of the *arrangement* that is the focus of s 27(1) rather than the purpose or expectation of those entering into it. It must follow that a person can be a party to a s 27 arrangement who does not personally intend to fix prices. The subjective intentions of individual parties to anticompetitive arrangements may differ, but the purpose of the statute is to prevent the public mischief that arises from the formation of any arrangements of this kind other than where permitted under the Act. This view of s 27 is reinforced by the objective standard for an unlawful arrangement of a *likely effect* of substantially lessening competition

65 *Port Nelson Limited v Commerce Commission* [1996] 3 NZLR 554 (CA) at 564.

66 *ANZCO Foods*, above n 4, at [256].

67 Ibid.

68 Ibid, at [258].

69 Ibid, at [259].

70 Ibid, at [258].

71 *Giltrap City Limited v Commerce Commission* [2004] 1 NZLR 608 (CA) at [73].

> in s 27(1). The wider context, in particular ss2(5)(a) and 30, clearly indicates that s 27(1) was precisely drafted to focus on the provision rather than the subjective intentions of the individual parties.

Glazebrook J also held that subjective purpose conflicted with the per se provisions of the Commerce Act, such as ss 29 and 30:[72]

> I also adopt the point made by McGrath J in *Giltrap City* that anything other than an objective ascertainment of purpose does not fit in with the per se provisions, such as ss29 and 30, which also refer to the concept of purpose - see at [238] above. It would be contrary to the intended mischief to which those provisions are aimed if a party were able to escape liability for conduct that is prohibited absolutely, on the basis of a subjective ascertainment of purpose.

Finally, she noted that Australian authority suggested a subjective approach. However, she concluded that there was little difference between the two countries' approaches because the Australian approach emphasised the result in view of the particular practice and not the participants' motive. Also she noted that courts would usually have to infer subjective purpose.[73] As with William Young J, Glazebrook J did not discuss the High Court of Australia's decision in *News Limited*.

D. Uncontroversial Points on Purpose

Before discussing Glazebrook J's reasons, it is necessary to note some points of agreement between objective and subjective purpose adherents. As many courts have noted, often there will be no difference between objective and subjective purpose.[74] The reason is that courts often have to infer subjective purpose. Courts have to do so because sometimes there will be no overt evidence of purpose. Evidence of state of mind is difficult to find, especially if companies have received competition law advice not to put things in writing.[75] Also subjective purpose does not involve a court accepting every proffered justification for behaviour.[76] The proffered purpose may be a pretext for the requisite anticompetitive purpose. As the High Court noted in *Union Shipping*[77] "protestations of inner thoughts which do not reconcile with objective likelihood are unlikely to carry much weight".

The United States Supreme Court monopolisation case, *Aspen Skiing Co v Aspen Highlands Skiing Corp*,[78] is an apt example. Aspen Skiing Co (Ski Co) and Aspen Highlands Skiing Corp (Highlands) operated rival skiing facilities in Aspen, Colorado. Of the four ski fields in Aspen, Ski Co owned three and Highlands one. Since 1962 the parties had operated an all-Aspen ticket coupon system that allowed skiers to ski on any of the four mountains. The parties distributed revenue from the all-Aspen ticket according to the number of coupons collected at each mountain. Highlands generally received 16 to 18 per cent of the revenue. For the 1976-77 season it only received 13.2 per cent. Before the 1977-78 season, Ski Co said it would only continue the all-Aspen ticket if Highlands accepted a fixed percentage of the revenues. Highlands found the percentage offered (13.2 per cent) unacceptable. Ski Co terminated the all-Aspen ticket. Ski Co then introduced its own three mountain ticket. It also started a national advertising campaign that suggested

72 *ANZCO Foods*, above n 4, at [260].

73 Ibid, at [263].

74 *Port Nelson*, above n 65, at 564; *News Limited*, above n 5, at [44]; *Rural Press*, above n 53, at [111].

75 Mark Berry "Competition Law" [2006] New Zealand Law Review 599 at 608-609.

76 *Union Shipping*, above n 34.

77 Ibid, at 707.

78 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985).

its mountains were the only ski fields in the area. Highlands tried to market its own all-Aspen ticket, but it failed because Ski Co refused to accept Highlands' tickets. Ski Co also refused to sell tickets for its mountains to Highlands. Without the all-Aspen ticket, Highlands' market share declined to 11 per cent.

Highlands sued, alleging Ski Co had monopolised the downhill skiing market in Aspen by refusing to cooperate in making the all-Aspen ticket available. One of the issues was whether Ski Co had a legitimate business purpose for discontinuing the all-Aspen ticket. Ski Co claimed it did because the system for monitoring usage and allocating revenue was unreliable and the system was cumbersome. Also Ski Co said that it did not want to be associated with Highlands' inferior services.

On Ski Co's purported purposes, the evidence showed Ski Co used the same type of joint multi-area tickets in other ski resorts where it operated but was not dominant. As for being administratively cumbersome, the evidence showed it took no longer to process an all-Aspen ticket than to accept payment by credit card at Ski Co's ticket windows. As for Highlands' inferiority, a number of Ski Co's executives sent their children to ski school at Highlands.

Thus, the Supreme Court had no difficulty in rejecting these purported purposes. They lacked credibility and were pretextual.[79] Thus, subjective purpose does not involve courts accepting every purpose a defendant puts forth, no matter how implausible.

1. *Discussion and countering of Glazebrook J's reasons for rejecting subjective purpose*

It is necessary to examine Glazebrook J's reasons for rejecting subjective purpose.

a) Excuse conduct that objectively would have an anticompetitive purpose

   Her Honour's first reason is that a purely subjective purpose could excuse conduct that would objectively have an anticompetitive purpose.[80] The problem with this argument is that such conduct will not escape liability under s 27. The likely effect or effect limb will catch it. If a court uses objective purpose and infers it then such conduct will inevitably fall within, at least, the likely effect limb. A court will only infer a purpose of substantially lessening competition if that is the likely effect of the conduct. This supports subjective purpose. As mentioned above, each of s 27's three limbs must catch conduct which the others do not. If purpose is objective that will not happen. In William Young J's words, it renders the purpose limb, with "no work to do".[81]

b) Capture procompetitive conduct

   Glazebrook J's next concern was that subjective purpose would catch conduct that is procompetitive.[82] However, she gave no example of such a situation. This argument depends on her defining anticompetitive purpose as the deliberate harming of rivals. She quoted Lord Coleridge in *The Mogul Steamship Company Limited v McGregor, Crow and Co and other*:[83] "It must be remembered that all trade is and must be in a sense selfish." She continued: "The

79 Ibid, at 609-610. See also: Marina Lao "Aspen Skiing and Trinko: Antitrust Intent and 'Sacrifice'" (2005) 73 Antitrust LJ 171; Ronald A Cass and Keith N Hylton "Antitrust Intent" (2001) 74 S Cal L Rev 657.

80 *ANZCO Foods*, above n 4, at [256].

81 Ibid, at [145].

82 Ibid, at [256].

83 *The Mogul Steamship Company Limited v McGregor, Crow and Co and other* (1888) 21 QBD 544 at 553.

> difficulty [with this] is that both hard competition (which the Commerce Act is designed to protect) and anticompetitive conduct involves the deliberate harming of rivals."[84]

This is the worldwide standard, mark one, all weather objection to using subjective purpose or intention as a means of proscribing anticompetitive conduct. The argument is that it is difficult, if not impossible, to distinguish between the purpose to compete aggressively and the purpose to substantially lessen competition. Every firm wants to beat its rivals. Thus, it is not always easy to determine whether a firm is beating its rivals by making its products more attractive and attending to consumer needs or by anticompetitive means that neither improve efficiency or satisfy consumers. According to this argument subjective purpose or intent does not distinguish the two scenarios.

However, if this argument is taken to its logical conclusion, it means that purpose should never be used to say whether conduct is anticompetitive or not. Yet, Parliament has chosen to proscribe the purpose of substantially lessening competition. Furthermore, courts have made it clear that the purpose of prevailing over rivals is not the requisite purpose under competition law. As Areeda and Hovenkamp note:[85]

> There is at least one kind of intent that the proscribed 'specific intent' clearly cannot include: The mere intention to prevail over one's rival. To declare that intention unlawful would defeat the antitrust goal of encouraging competition … which is heavily motivated by such an intent.

Courts do not ascribe the requisite purpose on harsh language couched in war like or sports metaphors. Such statements are insufficient.[86]

Furthermore, relying on subjective purpose does not require trawling through warehouses of documents to find incriminating statements. As mentioned above, courts can infer subjective purpose. This is likely to be the case if the firm in question has received capable competition law advice and sanitised any documents. Nor, contrary to Posner, does a competition law victory on purpose depend fortuitously on a plaintiff's happenstance discovery of incriminating evidence of a defendant's state of mind.[87] This is not to say that such evidence is of no utility. *Australian Competition and Consumer Commission v Boral Limited*[88] is an example. One of the defendant's documents read: "Our aim through 1996/97 and 1997/98 is to drive one competitor out of the market. The new plant gives us the ability to do this."[89] This shows anticompetitive purpose.

c) Interpretation of s 2(5)

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84 *ANZCO Foods*, above n 4, at [256].

85 Phillip Areeda and Herbert Hovenkamp *Antitrust Law* (2nd ed, Little, Brown and Co, Boston, 1986) at 806e.

86 *Advo Inc v Philadelphia Newspaper Inc* 51 F 3d 1191 (3rd Cir 1995); *US v AMR Corp* 335 F 3d at 1109, 1199 (11th Cir 2002); *Olympia Equipment Leasing Co v Western Union* 797 F 2d 370 (7th Cir 1986) at 379; *AA Poultry Farms Inc v Rose Acre Farms Inc* 881 F 2d 1396 (7th Cir 1989).

87 Richard A Posner *Antitrust Law – An Economic Perspective* (University of Chicago Press, Chicago, 1976) at 189-190.

88 *Australian Competition and Consumer Commission v Boral Limited* (1999) 166 ALR 410.

89 Ibid, at 448.

As for William Young J's argument on s 2(5)[90] (and indeed the High Court of Australia's argument on s 4F in *News Limited*), Glazebrook J noted that it was difficult to see how the purpose of a provision could be ascertained or negatived subjectively. She cited *Port Nelson* and *Giltrap*.[91]

McGrath J in *Giltrap* noted that:[92]

> This view of s 27 is reinforced by the objective standard for an unlawful arrangement of a *likely effect* of substantially lessening competition in s 27(1). The wider context, in particular ss2(5)(a) and 30, clearly indicates that s 27(1) was precisely drafted to focus on the provision rather than the subjective intentions of the individual parties: *Port Nelson Limited v Commerce Commission* [1996] 3 NZLR 554 (CA) at pp 563-564. Read together these provisions reflect the rigorous nature of the statutory regime regulating restrictive practices that tend substantially to lessen competition.

In this extract and the one at footnote 71, McGrath J is expressing that purpose alone does not suffice for liability under s 27. He is quite right to say that a person who does not intend to fix prices may be caught under the effect and likely effect grounds.

McGrath J also did not expressly deal with the s 4F (or New Zealand equivalent under s 2(5))[93] argument that convinced the Full Federal Court in *Pont Data* and the High Court in *News Limited*. His only discussion was on the words of s 2(5)(a) regarding the purpose of a provision. He says this focuses on the provision's purpose, not the subjective intentions of the individual parties. However, s 2(5) addresses the purpose of a provision that "was included" and "purposes that included that purpose".

The focus of s 2(5) purpose is on why the provision was included. That can only be the purpose of the party who included it, the subjective purpose. It is true that s 27 speaks of the purpose of a provision. However, when read with s 2(5) one determines that purpose by looking at the purpose of why it was included. Why a provision is included is not an objective inquiry; the reason as to why a provision was included is in the minds of the parties to the agreement. If purpose is objective one looks at the effect or likely effect of the provision and infers from those why the purpose was included. Again, this would render the purpose limb redundant.

Glazebrook J also held that s 2(5) only deals with the special situation of multiple purposes. The problem is that it will be rare that objectively speaking there will be multiple purposes. Conversely there are multiple parties to a contract, arrangement and understanding and these parties may have different purposes for including the provision. There will be multiple purposes and that is what s 2(5) addresses. The purposes of the makers of the provisions must be subjective.

As for the example of the evidence of Mr McKenzie in *Giltrap* that he had no intention of joining the others in price fixing, this seems to be a perfect example of pretextual and implausible purpose. Indeed Glazebrook J in the High Court trial of *Giltrap* rejected it.

d) Weaken the per se provisions

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90 Section 2(5)(a) provides:

(5) For the purposes of this Act-

(a) A provision of a contract arrangement or understanding, or a covenant shall be deemed to have had, or to have, a particular purpose if-

i) The provision was or is included in the contract, arrangement or understanding, or the covenant was or is required to be given, for that purpose or purposes that included or include that purpose; and

ii) That purpose was or is a substantial purpose.

91 *ANZCO Foods*, above n 4, at [258].

92 *Giltrap City*, above n 71, at [73].

93 See above n 90.

Glazebrook J also adopted McGrath J's view in *Giltrap* that anything other than objective purpose would weaken the per se provisions. [94]

This concern is not valid. Price fixing under s 30 is per se in the sense a plaintiff does not need to prove substantially lessening of competition in a market. The plaintiff only needs to show a fixing, controlling or maintaining of prices. Section 30 deems this to breach s 27. If a party enters into a price fixing agreement then the likely effect and effect limbs will catch that party. Subjective purpose does not mean that the per se provisions become toothless. Also, as with Mr McKenzie, it is unlikely that a court will believe the purported benign excuse of a party who enters into a blatant price fixing cartel.

E. A Further Divergence from Australian Law Resulting From Relying on Objective Purpose

As a result of favouring objective purpose, Glazebrook J used the counterfactual test in assessing purpose. As mentioned above, courts use this test to assess effect and likely effect. This too represents a break with Australian law, albeit not one evident at the time. In *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Limited and Woolworths Limited*, Allsop J doubted that it was appropriate to use a counterfactual test when assessing purpose. He observed:[95]

> Woolworths also submitted that as a matter of principle it was necessary to undertake a "counterfactual analysis" to analyse purpose. This was said to flow from *Stirling Harbour Services Pty Limited v Bunbury Ports Authority* (2001) ATPR 41-787 at [66]. That case included an allegation of an effect on competition. It can readily be accepted that one must, to assess effect, analyse the conduct with and without the conduct. However, it is meaningless and distracting to discuss the world with and without purpose. To require a case based only on purpose to contain a real effect on competition is to insert into the statute an element not provided for by parliament. I decline to do so.

This flows from the structure of s 45 (and s 27). As mentioned above, the purpose limb must catch agreements which the effect and likely effect limbs do not. Thus, it must be possible to condemn on purpose alone. If so, a court need not consider effect and likely effect and need not engage in counterfactual analysis.

The *Liquorland* case is an apt example. The Australian Competition and Consumer Commission sued Liquorland and Woolworths alleging (inter alia) breach of s 45. It alleged Woolworths and Liquorland had entered into, and given effect to, agreements with liquor licence applicants. These agreements had the purpose of substantially lessening competition. There were six agreements concerning liquor outlets. In each case Woolworths, who had or was going to have a takeaway liquor outlet in the area, objected or threatened to object to the grant of a third party's application for a liquor licence. The parties settled the objections on the basis that the third party agreed to restrictions being placed on its liquor licence and, therefore, its business. Liquorland also had outlets in the areas and also objected and was a party to the deeds settling the objections. It settled the s 45 case.

Allsop J held that "a substantial purpose of the objections [to the liquor licence applications] and of the deeds' provisions was to prevent the licence being or becoming the platform or vehicle

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94 *ANZCO Foods*, above n 4, at [260].

95 *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Limited and Woolworths Limited* (2006) ATPR 42-123 at [802]-[803].

for a market entrant without restriction on its licence" either now or in the future.[96] He held that the fact that Woolworths could have legitimately pursued the same result (through rights under the Liquor Act 1982) was irrelevant. Also, he held it was irrelevant that Woolworths could have won those cases or that the Court may have imposed those restrictions. The purpose was to lessen substantially competition as it was directed to the competitive process in a meaningful or relevant way. The purpose the parties sought to achieve was just such an effect.[97]

Allsop J did not use a counterfactual analysis to establish this purpose. Had he done so there may have been no finding of effect or likely effect. The reason is that without the deeds Woolworths would have proceeded and could well have achieved the same result, ie restriction on the applicants. This would mean no difference between the factual and counterfactual and no likely effect nor effect of substantially lessening competition. This shows the dangers of inferring purpose from effect and likely effect. Also the fact the applicants were small businesses was irrelevant. Needless to say, Allsop J used subjective purpose. So contrary to one of Glazebrook J's concerns, subjective purpose does not allow people to escape liability.

F. The New Zealand Approach that Both Objective and Subjective Approaches may be Relevant

One point of agreement in *ANZCO Foods* was that both William Young and Glazebrook JJ followed *Tui Foods* and held that both objective and subjective purpose were relevant under s 27. This is another sharp break with Australian law.

In *News Limited* the Australian Competition and Consumer Commission intervened in the High Court and submitted that both objective and subjective purpose were relevant, akin to the *Tui Foods* position. Gummow J emphatically rejected this submission. None of the other Judges mentioned it. Gummow J noted that:[98]

> Before this Court, the Australian Competition and Consumer Commission ("the ACCC"), as intervener, submits that both the subjective purpose of the parties to the relevant contract, arrangement or understanding and the objective purpose of the impugned provision are relevant when determining whether or not the provision falls within the purview of s 4D. However, a construction which, depending upon the facts of the case, may require examination of either the subjective purpose of the parties or the objective purpose of the provision, or both, is not the product of reasoned statutory interpretation and falls foul of the provisions in s 4F. In addition, there is a danger that an examination of the objective purpose of a provision will give undue significance to the substantive effect of the provision, as opposed to the effect that the parties *sought to achieve* through its inclusion. The consistent distinction drawn in the Act, particularly in s 45 when read with s 4D, between "purpose" and "effect" demonstrates the impermissibility of such an approach.

It appears *Tui Foods* was not cited; Gummow J does not mention it.

It is unusual how New Zealand Courts have simply followed *Tui Foods* without discussion. It was an appeal of an interim injunction and the issue was whether there was an arguable case. Neither party discussed objective or subjective purpose in detail. Cooke P tentatively, rather than definitively, stated his views. Yet subsequent courts have accepted his statement without analysis. While subjective and objective purpose are often the same and the difference generally unimportant in practice, conceptually they differ and on occasion can differ in practice. Indeed, *Tui Foods'*

96 Ibid, at [831].

97 Ibid, at [829].

98 *News Limited*, above n 5, at [63].

view that subjective purpose is relevant when one cannot discuss an objective purpose shows how objective purpose and subjective purpose can differ. *Tui Foods* results in "purpose" under s 27 meaning two different things.

It is a strange method of statutory interpretation that one word, ie "purpose", means two different things, and creates difficulties in application. It makes it difficult to apply the section. Thus, the Australian position is preferable.

All this makes it hard to agree with Glazebrook J's position that there is little difference between the Australian subjective approach and an objective approach.[99] Her reason was that "the Australian approach has regard to the end in view of the particular practice and not the motive of the participants".[100]

However, Australian law has regard to the end in view of the participants to the particular practice. That is the subjective purpose of the participants to the practice. Contrary to Glazebrook J's suggestion New Zealand courts do not equate motive with purpose. As in Australia, they differ; *Union Shipping* talks of purpose being object or aim.[101] That is not motive. Furthermore, Cooke P in *Applefields* effectively distinguished between motive and purpose.[102]

Objective and subjective purpose is not the only difference between *ANZCO Foods* and Australian law. They also disagree on whether, when it is obvious that a purpose of substantially lessening competition in a market could not be achieved, whether liability can still arise under s 27's purpose limb. This was the source of the biggest disagreement between Glazebrook and William Young JJ.

V. Part 5: Purpose of Substantial Lessening of Competition Impossible to Achieve

The issue has arisen in Australia. In *Universal Music* the Full Federal Court observed that:[103]

> We turn to the subject of purpose. A person may have the purpose of securing a result which is, in fact, impossible for that person to achieve. That no doubt explains the reference to purpose, in para (a) of s47(10) of the Act, as an alternative to effect and likely effect. The paragraph is satisfied if the relevant corporation has the requisite purpose, regardless of whether or not that purpose has been, or was or is likely to be, achieved. It may conceivably be satisfied even in a case where the Court finds a purpose could never in fact have been achieved; although that finding would be relevant in determining whether to infer the proscribed purpose.

The issue also arose in *Seven Network Limited* in which a majority of the Full Federal Court agreed with *Universal Music*. In doing so, they overturned Sackville J at first instance. Dowsett and Lander JJ noted that:[104]

> Whilst we accept that the Court must inquire as to whether a particular purpose is anticompetitive, it does not follow that the purpose must also be capable of achievement in the relevant market. The words "realistically capable of substantially lessening competition" do not appear in s 45 or s 4F. We agree that there must be a relevant market, that the relevant provision must have been included for the purpose of substantially lessening competition in that market, and that such purpose must be a substantial purpose

99 *ANZCO Foods*, above n 4, at [263].

100 Ibid.

101 *Union Shipping*, above n 2, at 707.

102 *Applefields*, above n 42.

103 *Universal Music*, above n 13, at 587.

104 *Seven Network*, above n 15, at [897].

> for such inclusion. We do not agree that the Court must inquire into whether the object sought to be achieved was "realistically capable of substantially lessening competition in the relevant market" if those words mean more than that the purpose must be anticompetitive in an identified market. Such an inquiry would be, in effect, an inquiry into whether the provision had the likely effect of substantially lessening competition in that market. That approach would obviate or blur the distinction between purpose and likely effect or effect.

They continued:[105]

> The vice which is addressed in s 45 by proscribing purpose is that of seeking to achieve an anticompetitive end. Section 45 also proscribes provisions which achieve, or are likely to achieve, an end. By proscribing anticompetitive purposes as well as effects or likely effects, parliament has cast its net widely so as to include provisions which simply have an anticompetitive purpose, whether or not they are achievable in the relevant market.
>
> We accept that likely effect of particular conduct may be a relevant consideration in assessing the purpose which attended it. If to a person's knowledge a particular end could not be achieved, it is difficult to see that he or she could have the purpose of doing so. That is because such knowledge could not readily co-exist with such a subjective purpose. However, the fact that a particular end may be impossible of achievement for reasons unknown to the relevant person does not exclude the possibility that he or she has the purpose of achieving that end.

On the issue they finally noted that:[106]

> We agree that there must be a relevant market, that the relevant provision must have been included for the purpose of substantially lessening competition in that market, and that such purpose must be a substantial purpose for such inclusion. We do not agree that the Court must inquire into whether the object sought to be achieved was realistically capable of lessening competition in the relevant market. Such an inquiry would be, in effect, an inquiry into whether the provision had the likely effect of substantially lessening competition in the market. That approach would obviate or blur the distinction between purpose and likely effect or effect.

Interestingly, Glazebrook J did not cite *Universal Music* on this issue. She, however, cited *Universal Music* on another issue.[107]

A. ANZCO Foods Judgments on the Issue

As mentioned above, the issue caused William Young and Glazebrook JJ to disagree.

1. *William Young J's approach*

William Young J's legal reasons were essentially the same as the majority of the Full Federal Court in *Seven Network Limited*. First, requiring that a purpose must be capable of achievement would mean inquiring into whether the purpose would have the likely effect of substantially lessening competition in that market. Such a distinction would obviate or blur the distinction between the purpose limb and the likely effect and effect limbs as separate contraventions. It would equate purpose with effect and likely effect.[108]

Second, courts should ease the need to prove substantial anticompetitive effect or likely effect because there are various uncertainties, expense and imperfections in assessing this issue. Where

105 Ibid, at [899]-[900].

106 Ibid, at [902].

107 *ANZCO Foods*, above n 4, at [247].

108 Ibid, at [145] and [147].

the purpose of an agreement is to substantially lessen competition there is no need to prove substantial anticompetitive effect.[109]

Glazebrook J's response was based on her view that purpose was objective. Given that the restraint in issue covered only two percent of the market in which barriers to entry were low and only involved a small competitor, she observed:[110]

> It must be remembered that, to fall foul of s28, the purpose must be to lessen competition in the North Island market and to do so substantially - see at [276] above. In this case, it is difficult to see how AFFCO could rationally have thought it could lessen competition in the whole North Island market (let alone to do so substantially) by not allowing a competitor to use a site that accounted for such a small proportion of the market. It must also be remembered that the intention to harm one competitor where there are numerous competitors in a geographically wide market (and it could only ever be one competitor who could have used the Waitara site) is unlikely to be relevant to the lessening of competition in the sense that the term is used in the Commerce Act.

Her Honour also thought William Young J's concerns over litigation risk were misguided. This concern would proscribe conduct where there were difficulties of evaluation or proof. The Commerce Act only regulates conduct that threatens competition and is based on the premise that the market should be left to operate by itself. She said it would be wrong to regulate wishful thinking that in fact objectively has no anticompetitive effect.[111] In essence, she thought William Young J's approach amounted to a per se approach to purpose, which would subvert the existing per se provisions.[112]

B. Nature of Encumbrance

It is necessary to characterise the conduct at issue in *ANZCO Foods*. Dealing with the Weddel consortium which bought and closed down the Weddel plants, this was a complaint that there was too much competition. Indeed the whole basis was that there was excess capacity. So the parties agreed to eliminate this capacity. The purpose of the scheme was to limit output. The need for such output limitation was that the industry was facing ruinous or cut-throat competition. This is often the excuse for forming a price fixing cartel. Indeed Judge Easterbrook has called it "the siren song of the cartel".[113] Parties cannot use this excuse to justify a price fixing cartel.[114] The reason is that this idea strikes at the heart of competition policy. The real justification of price fixing in such circumstances is that the parties are saying we do not like competition. Competition is hurting us. The proponent's argument is that a cartel enables them to stop the effects of excess capacity in industries with high fixed costs relative to variable costs. These industries will usually have excess capacity. When such firms compete or demand falls they will have to reduce price to where they barely recover variable costs. This will not be sustainable as all will be suffering substantial losses. Competition will be ruinous. A cartel enables "an orderly withdrawal of the excess capacity in the industry which is the root cause of the ruinous price competition."[115]

109 Ibid, at [152].

110 Ibid, at [279].

111 Ibid, at [262].

112 Ibid, at [278].

113 *Fishman v Wirtz* 807 F2d 520 (7th Cir 1986).

114 The following is based on Scott, above n 17, at 411-412.

115 Sullivan, above n 18, at 203.

The cartel benefits only its members. It does not benefit society. Society suffers from higher prices and decreased output until the cartel members have eliminated the excess capacity. Society does not value excess capacity. It prefers capital to be placed in alternative investments, not propping up excess capacity. There is no societal benefit in propping up firms that face ruinous competition. That some firms may exit is simply a fact of competition.

The economic consequence of a price fixing cartel is increased prices and decreased output. The same thing is true of an output limitation scheme. It too leads to reduced output and increased price. Economically the two are identical.[116]

This issue arose in *Todd Pohokura Ltd v Shell Exploration Ltd*.[117] There the High Court was not prepared to hold that output limitations as part of a joint venture constituted price fixing under s 30. The High Court noted that the plaintiffs cited no authority for the proposition that arrangements to fix output are to be treated as if they are arrangements for the fixing of price, for the purposes of s 30.[118] The High Court said it was unnecessary to decide the point.[119]

However, the United States Supreme Court case that established the per se rule against price fixing, *United States v Socony-Vacuum Oil Co,*[120] was an output limitation case. This case involved the oil industry.

Oil refining was depressed. Independent refiners had insufficient storage capacity and were dumping gasoline at give-away prices. This depressed prices. Such gasoline was termed distress gasoline and the major oil companies informally agreed to buy all of it from the independent refiners. They did not agree on a set price, rather they bought at the "fair going market price". As they had storage capacity and developed distribution systems, they succeeded in removing much of the distress gasoline from the market. Although such gasoline eventually reached the market, it had less effect on price than it would have had under competition.

The Government sued alleging price fixing under s 1 of the Sherman Act 1890. Douglas J held:[121]

> Thus for over 40 years this court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Here the oil companies had not agreed on uniform or fixed prices. They argued that price fixing was only per se illegal when the agreement resulted in uniform, fixed prices. Douglas J disagreed. He noted that:[122]

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

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116 George J Stigler *The Organization of Industry* (Homewood, Illinois, RD Irwin, 1968) at 39-63; Jack Hirshleifer, Amihai Glazer and David Hirshleifer *Price Theory and Applications* (7th ed, Cambridge University Press, Cambridge, 2005); Phillip Areeda and Louis Kaplow *Antitrust Analysis* (4th ed, Little Brown and Company, Boston, 1988) at 222-224.

117 *Todd Pohokura Ltd v Shell Exploration Ltd* HC Wellington CIV-1006-485-1600 13 July 2010, J Dobson and Professor Richardson.

118 Ibid, at [486].

119 Ibid.

120 *United States v Socony-Vacuum Oil Co* 310 US 150 (1940).

121 Ibid, at 221.

122 Ibid, at 226, above n 59.

It is still the law in the United States that output limitation is per se illegal.[123]

While output limitations do not fix prices under s 30, they constitute a control of prices. Lindgren J in *ACCC v CC (NSW) Pty Ltd* held that a controlling of price did not require some specificity as to price.[124] He held "controlling" a price meant that "an arrangement or understanding has the effect of 'controlling price' if it restrains a freedom that would otherwise exist as to a price to be charged".[125] He also observed that:[126]

> Concretes also submits that because the supposed UTF understanding left the tenderers with a great deal of freedom as to the price which they would charge, it did not have the effect of controlling price competition and therefore did not fall within the terms of [the Australia equivalent of s 30]. *It seems to me, however, that putting to one side de minimis cases, the degree of control, although relevant to penalty, is not relevant to the issue of contravention*. I do not consider the degree of control here to have been de minimis (emphasis added).

Although he did not cite Lindgren J, Salmon J appears to accept a similar definition of controlling in *CC v Caltex NZ Ltd,* where he adopted the Shorter Oxford Dictionary definition of control: "to exercise restrain or direction upon the free action of".[127] This definition covers the impact of output limitation. It is a controlling of price under s 30.

The High Court in *Todd* noted that:[128]

> Any agreement on price will obviously have an impact in the market and would rationally only be undertaken if the parties to it perceived their position in the market as sufficiently strong for them to be advantaged by it. In contrast, arrangements as to the level of output between joint owners of production facilities may have a legitimate rationale other than an intention to influence prices. The justification for attributing per se liability does not arise, and the consequences of arrangements such as the present should be measured by reference to the tests under s 27 itself. Accordingly, to the extent, if at all, that the off-take documents reflect an arrangement to limit supply, then it is not one that is to be treated as an arrangement to limit prices for the purposes of s 30.

This is true of output limitations that are part of, and necessary to, a legitimate joint venture.[129] However, it is not true where the whole point of the scheme is just to reduce output; such schemes are cartels.

Output limitation is cartel activity. The OECD defines a hard core cartel as: "[a]n anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by competitors to … establish output restrictions on quotas".[130]

So the Weddel consortium and its scheme was a cartel; with its encumbrances AFFCO wanted the same thing. It wanted to keep output down by preventing newcomers from using the plant to increase competition, about which the very thing the meat industry was griping. The encumbrances continued that output limitation and did so long after the end of the excess capacity problem. Arguably it would prevent this problem arising again.

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123 *NCAA v Board of Regents of the University of Oklahoma* 468 US 85 (1984).

124 *ACCC v CC (NSW) Pty Ltd* (1999) ATPR 43 477 at 43, 510–43 and 511; See also GQ Taperell, RB Vermeeschand, DJ Harland *Trade Practices and Consumer Protection* (3rd ed, Butterworths, Sydney, 1983) at 229.

125 Ibid, at 43 and 509.

126 Ibid, at 43 and 511.

127 *CC v Caltex NZ Ltd* (1999) 9 TCLR 305 (HC) at 311.

128 *Todd*, above n 117, at [488].

129 Scott, above n 17, at 424–427.

130 OECD "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels" (1998) at <www.oecd.org/dataoecd/39/4/2350130.pdf>.

AFFCO said the closure of Waitara was procompetitive. As William Young J noted, procompetitive seemed to mean simply an enhancement of AFFCO's financial position.[131] This is right: it may have improved AFFCO's cost structure, it did not improve competition anywhere. Private benefits to AFFCO, indeed any company, are not the benefits of competition.[132]

Furthermore, it was not as though the reduced output was necessary to any other procompetitive endeavour. There was no joint venture which enabled more to be produced or a new product to be developed.[133] It was a blatant output limitation which benefited only AFFCO and continued long after the excess capacity crisis had passed. As William Young J noted, AFFCO received a reduced price for Waitara which could only be justified as a result of the reduced competition flowing from the encumbrance.[134] In all these circumstances the only purpose can be to substantially lessen competition.

1. *Glazebrook J's view*

a) Affected only a small percentage of the market

Glazebrook J's first objection was that the encumbrance affected a small competitor in a small part of the market. She noted that s 27 is not concerned with the fate of individual competitors in a competitive market.[135] This is true. However, one of the ways in which parties to an agreement can lessen substantially competition is by practices in which the parties injure competitors and thereby injure the competitive process itself.[136] Competition law does not worry about the fate of individual competitors if their fate is the result of superior efficiency or facing better and cheaper products and services. Yet this was not the case in *ANZCO Foods*. The encumbrance simply prevented a competitor using the site. There were no efficiency gains or cheaper and better services as a result. Nor is the size of the victim dispositive. It may have been a maverick, a firm that was going to shake up the existing players.[137]

C. Ancillary Restraints Doctrine

One way of looking at the encumbrance is through the United States' doctrine of ancillary restraints.[138] This shows that despite the encumbrance having a small impact, it was still anticompetitive. Under this, courts divide restraints into two categories: naked restraints and ancillary restraints. The sole object of naked restraints is to restrain competition and enhance or maintain price. Ancillary restraints are ancillary to a lawful purpose and reasonably necessary to accomplish that purpose.

Naked restraints are unlawful without any further analysis. Ancillary restraints are lawful if they are ancillary (ie subordinate and collateral) to another legitimate agreement and necessary to

131 *ANZCO Foods*, above n 4, at [139].

132 *National Society of Engineers v US* 435 US 679 (1978).

133 *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979).

134 *ANZCO Foods*, above n 4, at [154].

135 Ibid, at [248].

136 Robert H Bork "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division Part 1" (1965) 71 Yale LJ 775 at 775.

137 Jonathan B Baker "Mavericks, Mergers and Exclusion: Proving Coordinated Effects Under the Antitrust Laws" (2002) 77 NYUL Rev 135.

138 See Scott, above n 17; *American Bar Association Section of Antitrust Law, The Rule of Reason* (American Bar Association, Chicago, 1999).

make that agreement effective. Only if the ancillary restraint is wider than necessary to achieve the legitimate purpose is the ancillary restraint unlawful.

United States' courts use this analysis when assessing restraints under the rule of reason.[139] If the restraint is naked they do not undertake full blown rule of reason analysis. They condemn it quickly. As Areeda and Hovenkamp note, sometimes the rule of reason can be applied in the "twinkle of eye".[140] The *ANZCO Foods* encumbrance was a naked restraint, and its whole purpose was to restrict competition. It was not ancillary to any legitimate purpose. Society need not put up with it. This is irrespective of the fact it only affected a small part of the market.

b) Finding the *ANZCO Foods* encumbrance had an anticompetitive purpose does not weaken the per se rule

Glazebrook J also noted:[141]

> In my view, the approach taken in William Young J's judgement would have the effect of making s28 a per se offence like exclusionary arrangements (s29) or price fixing (s30). His approach would mean that a supermarket complex could not sell off (with presumably a consequential price adjustment) excess adjoining land with a covenant that it cannot be used for another supermarket without having a purpose of substantially lessening competition imputed to it.

Arguably, this is so. In essence, such an encumbrance would be like the deeds in *Liquorland*. It prevents a new entrant from using the adjoining land as a platform or vehicle to compete. This is especially so if it is not ancillary to a legitimate purpose. This scenario is not off the wall in competition law terms.

As mentioned above, Glazebrook J argued that William Young J's approach would turn s 28 [and s 27] into a per se provision and be contrary to the mischief at which the per se provisions are aimed.[142] In a sense Glazebrook J has a point. If courts can condemn on purpose alone without the need for any effect or where it is obvious that there could be no anticompetitive effect, this seems to go against the purpose of the per se provisions. Why are they needed?

However, the reason for per se rules is they catch practices that have a "pernicious effect on competition and lack of any redeeming virtue".[143] A per se illegal agreement "has no single purpose except stifling of competition".[144] It is "manifestly anticompetitive"[145] and "plainly anticompetitive".[146] Thus, the reason for per se offences is that they catch conduct that is almost always anticompetitive.[147] Also, they save society expense. Rather than have a full blown trial to examine all of an agreement and the market involved, courts can condemn quickly. With per se offences the courts would come to the same result. It would find a breach of s 27 if it fully analysed the same behaviour.[148] Parliament has put price fixing in the per se category under s 30. Yet, the purpose of a naked price fixing cartel must be to substantially lessen competition. Why else

139 *American Bar Association*, note 125.

140 Areeda and Hovenkamp, above n 85, at 395.

141 *ANZCO Foods*, above n 4, at [278].

142 Ibid.

143 *Northern Pacific Railway v US* 356 1 (1958) at 5.

144 *White Motor Co v US* 272 US 253 (1963) at 263.

145 *Continental TV Inc v GTE Sylvania Inc* 433 US 36 (1977) at 49-50.

146 *National Society of Professional Engineers*, above n 115, at 692.

147 Ibid.

148 Paul Scott "Unresolved Issues in Price Fixing: Market Division, the Meaning of Control and Characterisation" (2006) 12 Canterbury L Rev 197 at 200-204.

did the parties do it? As for the lack of effect with price fixing cartels, Krattenmaker notes that: "Indeed, the very suggestion, in such cases, that the competing firms lacked market power is incredible. Why did they agree to fix prices if they could not do so?"[149]

The same reasoning applies to output limitation schemes. Arguably, these could amount to a controlling of price under s 30. In any event they have the same effect as price fixing. As s 27's purpose limb could catch naked price cartels so also could it catch naked output limitation schemes. There is nothing inconsistent with the per se provisions and finding liability under s 27 for a purpose that could not possibly have any anticompetitive effect.

VI. Part 6: Conclusion

There is now a large divergence between Australia and New Zealand on the purpose of substantially lessening competition. The Australian way is more principled and William Young J had the better argument in *ANZCO Foods*.

As for objective or subjective purpose, the Australian approach is more convincing. Relying on objective purpose leaves the purpose limb with nothing to do. If courts rely on objective purpose, then the likely effect and effect limbs will capture all instances of objective purpose. It is inconceivable that a court would find no liability under the likely effect limb, but be able to find an objective anticompetitive purpose. When proscribing purpose under s 27 Parliament cannot have intended this. Also contrary to Glazebrook J's views subjective purpose does not mean no liability when a party dreams up a benign purpose. Unless it is plausible, courts do not believe such reasons. Even if they do, liability still arises under the effect and likely effect limbs. Only by conflating the purpose to compete aggressively with the purpose to substantially lessen competition can Glazebrook J raise a problem with subjective purpose. Yet courts the world over have had no difficulty in distinguishing the two. Furthermore subjective purpose does not weaken the per se provisions. Liability still arises under the effect and likely effect limb. Contrary to Glazebrook J, objective purpose and use of counterfactual analysis to establish purpose can result in an anticompetitive scheme escaping liability. *Liquorland* is an apt example. In New Zealand, using Glazebrook J's analysis, the defendant would escape liability. Society does not benefit from such a result. As for New Zealand's approach of both objective and subjective purpose being relevant, this results in "purpose" under s 27 meaning two different things. As Gummow J noted in *News Limited,* this is "not the product of reasoned statutory interpretation".

As for impossible effect, the Australian approach is preferable. By allowing s 27 to catch such conduct it, too, means the purpose limb is not redundant. Also it allows blatant anticompetitive restraints such as the output limitation encumbrance in *ANZCO Foods* to be outlawed. Such restraints have no competitive effects and are simply designed to limit output and increase price. Allowing s 27 to capture them under the purpose limb does not weaken the per se provisions. Indeed one of the reasons for per se rules is that they shorten trials that would occur under full blown rule of reason or s 27 trials. The result would be the same under either type of analysis. There is no inconsistency between per se provisions and finding liability under s 27 for a purpose that could not have any anticompetitive effect.

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149 Thomas Krattenmaker "Per Se Violations in Antitrust Law: Confusing Offences with Defences" (1988) 77 Geo LJ 1965 at 173.

This is not to say Glazebrook J's views had no force: they did; she is not alone.[150] As for subjective purpose, Kirby J dissented on the issue in *News Limited*, while McHugh J would have preferred objective purpose but felt bound to follow it. As for impossible effect, the *Network Seven Limited* Full Federal Court split two to one, while the trial Judge had the same view as Glazebrook J.

However, what is disappointing is that in *ANZCO Foods,* the Court did not discuss the Australian authority. *News Limited* was a High Court of Australia case. It dealt with two of the issues in *ANZCO Foods*. To ignore it seems parochial, especially when the High Court of Australia completely rejected the notion that purpose can both be objective and subjective. Given that the main disagreement in *ANZCO Foods* was over impossible effect, it is strange that neither Glazebrook and William Young JJ discussed *Universal Music*, which dealt with the issue. It is even more unusual when *ANZCO Foods* cites *Universal Music*, albeit for another point.

The divergence with Australian law is important following *Commerce Commission v Telecom Corporation of New Zealand Ltd*.[151] There the Supreme Court noted that it was important that the restrictive trade practice provisions be broadly the same in both New Zealand and Australia.[152] Following *ANZCO Foods* they are not when it comes to the purpose of substantially lessening competition. Any future New Zealand Court of Appeal which deals with purpose under s 27 is going to have to confront the divergence squarely.

150 Berry, above n 75, at 612-613.

151 *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2010] NZSC 111.

152 Ibid, at [31].