The abolition of the group boycott prohibition from New Zealand competition law

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New Zealand competition law’s per se prohibition upon group boycotts (contracts, arrangements or understandings containing an exclusionary provision), s 29 of the Commerce Act 1986, is destined for the scrap heap. Proponents of its repeal contend that its infrequent use and attenuated reach means its absence will not be missed, that hitherto s 29 has had a damaging chilling effect upon commercial activity and that the apparent ability of other provisions in the Act (especially the enhanced cartel offence) to fill the vacuum will assuage any lingering concerns. The article finds these justifications wanting and concludes that the preservation of the group boycott ban is warranted.

Introduction

When the Commerce (Cartels and Other Matters) Amendment Bill 2011 (Cartel Bill) was quietly but remorselessly wending its way through the legislative process, few noticed a pithy clause tucked away in the detail of the bill. Clause 6, a seemingly innocuous little section, is entitled, ‘Section 29 is repealed’ and the clause itself simply repeats those same four words. This change, however, is far more significant than the modest wording and inconspicuous placement of the repealing section would indicate.

Section 29 of the Commerce Act 1986 is New Zealand competition law’s group boycott prohibition. Strictly speaking, s 29 prohibits ‘contracts, arrangements or understandings that contain an exclusionary provision’. But these arrangements are more commonly referred to by their American appellation, group boycotts (also called ‘collective boycotts’ or ‘concerted refusals to deal’). These pernicious forms of business conduct describe the joint behaviour of competing firms to shut out and eliminate a rival. Sometimes the boycotters will enlist the assistance of a common upstream supplier to stem the flow of goods or services to the target firm. On other occasions, the object of the boycotters’ attack is the upstream supplier itself or a downstream customer or a common cluster of customers. Historically, antitrust law viewed exclusionary anticompetitive conduct by rival firms as sufficiently egregious to merit per se prohibition. A group boycott was seen as worthy of condemnation without the usual extensive intensive inquiry into its actual effects upon competition. This, at least, was the traditional wisdom.

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1 Bill 341-1, 13 October 2011.
New Zealand has seen fit to abolish the ban on group boycotts entirely. Antitrust law only has a half-dozen substantive offences and so the removal of one of the principal prohibitions represents, on its face, a definite weakening of the law.

This article examines the arguments given in support of the repeal of s 29 in light of the policy grounds for proscribing collective boycotts and the history of boycott litigation. It is my contention that the case for abolition is decidedly weak and that a group boycott prohibition still deserves its place in NZ competition law.

The per se ban on group boycotts

Group boycotts were subject to the per se ban in the United States from the earliest:

‘This Court’, explained the Supreme Court in *Northwest Wholesale Stationers* in 1985, ‘has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of s 1 of the Sherman Act’.2

In more recent times, beginning with *Northwest Wholesale Stationers* itself, the courts have been chary of too quickly characterising any alleged concerted refusal to deal as the sort of deleterious anticompetitive boycott situation that merits condemnation pursuant to the per se rule: ‘Some care is . . . necessary in defining the category of concerted refusals to deal that mandate per se condemnation.’3 This is because ‘not every cooperative activity involving a restraint or exclusion will share with the per se forbidden boycotts the likelihood of predominantly anticompetitive consequences.’4 The responsibility is upon the plaintiff to show that the conduct at issue is the sort of blatantly anticompetitive exclusionary conduct that antitrust law’s per se bans were designed to prohibit.5

In the not altogether helpful language of some commentators and judges:

it is incumbent upon the plaintiff to show that conduct in question is the sort of ‘naked’ group boycott warranting the application of the per se rule and its attendant harsh consequences.6

In *Northwest Wholesale Stationers*, the conduct — a wholesale purchasing cooperative by stationery retailers — enabled the defendant firms to achieve economies of scale and other cost savings. This then was not the kind of conduct deserving of categorisation as ‘group boycotting’ and thus the court held that the arrangement ought to be analysed under a rule-of-reason analysis.7

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3 Ibid, at 294.
5 Ibid, at 298.
The hostility to group boycotts (properly characterised) can be explained on two bases. A solid economic case can be made based upon the fact that the particular firm shut out is likely be an innovative or cost-cutting rival of the defendant boycotters. As Kirby J observed in *South Sydney*:

From an economic point of view, such exclusionary provisions [group boycotts] diminish the potential of unilateral decisions by market players; impose on others the aggregation of power which individual players may lack; and tend to be introduced by powerful market entities exerting what is the antithesis of competition. Such activities are frequently engaged in to prevent innovative market entry and to permit powerful players to divide the market like the Popes of old divided the world, for their own convenience and advantage.8

Consumers are deprived from enjoying the benefits the targeted firm’s output might otherwise bring to the marketplace. The defendants can, in the aftermath of a successful boycott scheme, maintain supra-competitive prices and resume the ‘quiet life’.9 Secondly, such concerted behaviour against other persons has been viewed as kind of ‘anti-social conduct, a type of business bullying in which a competitive party without economic muscle is being victimised’.10 Whatever the actual economic benefits the operation of the targeted firm might have delivered to customers, the defendants’ ‘ganging-up’ conduct is unfair and abusive.11 The abhorrence of this bullying behaviour that merits the imposition of a per se ban was described by the Full Federal Court in *Rural Press* this way:

One reason for this strict approach to boycotts may be that they are seen as objectionable on non-economic grounds as well as because of their potential to have an adverse impact on competition. In particular, they are disliked because they can be used to take away the freedom of firms and individuals to trade as they wish and because they can be used to threaten the very existence, commercially or professionally, of targets having little or no countervailing economic power. The potential for boycotts to generate and exploit power is seen as inherently objectionable, regardless of whether or not they are used to lessen competition.12

Group boycotts can take various forms. Following Haddon13 it is useful to classify them into three types. There is, first, what I will call the ‘direct horizontal boycott’. Here, the defendant boycotters refuse to deal with a rival.

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9 *Hovenkamp*, above n 6, at 208, 230.
11 Group boycotting was described as ‘an insidious and subtle practice’ that should be ‘stamped out’ by two Alliance Party MPs in the debates on the Commerce Amendment Bill 2001: see K Campbell (2001) 597 NZ *Parl Deb* 7979 and J Wright (2001) 597 NZ *Parl Deb* 8738.
The boycotters may, for example, be members of a trade association that refuses to admit the plaintiff to their association. Secondly, the ‘indirect horizontal boycott’ is where the boycotters invoke the assistance of a common upstream supplier to both themselves and to the intended target. For example, a group of vehicle tyre manufacturers might secure the upstream supplier of rubber to cut off supplies of that material to a rival car tyre maker. Thirdly, a ‘direct vertical boycott’ is where the boycotters agree not to supply their products or services to a downstream firm or not to acquire products from an upstream firm. An example would be where tyre manufacturers agree not to supply a particular discounting retail chain.

New Zealand’s group boycott ban is found in s 29(3) which states that:

No person shall enter into a contract, or arrangement, or arrive at an understanding, that contains an exclusionary provision.

Such contracts require careful delineation, so s 29(1) provides the definition:

29. Contracts, arrangements, or understandings containing exclusionary provisions prohibited
(1) Subject to subsection (1A), for the purposes of this Act, a provision of a contract, arrangement, or understanding is an exclusionary provision if —
(a) it is a provision of a contract or arrangement entered into, or understanding arrived at, between persons of whom any 2 or more are in competition with each other; and
(b) it has the purpose of preventing, restricting, or limiting the supply of goods or services to, or the acquisition of goods or services from, any particular person or class of persons, either generally or in particular circumstances or on particular conditions, by all or any of the parties to the contract, arrangement, or understanding, or if a party is a body corporate, by a body corporate that is interconnected with that party; and
(c) the particular person or the class of persons to which the provision relates is in competition with 1 or more of the parties to the contract, arrangement or understanding in relation to the supply or acquisition of those goods or services.

The weakening of the per se ban ... In two stages

Section 29 had been in operation only 4 years when it was amended. The definition of a group boycott was revised to narrow its coverage to horizontal boycotts (both direct and indirect). The target of the boycotters’ conduct had to now be a competitor of the boycotters (or at least one of them). This was achieved by the insertion of s 29(1)(c) (quoted above) by the Commerce Amendment Act 1990.

Why did the government amend the section? The responsibility for the change can be laid clearly at the feet of Dr Warren Pengilley, a leading Australian antitrust lawyer and a prolific and influential writer upon all matters antitrust. Pengilley argued at a competition law conference in 1987 in
Auckland, and in a series of articles, that Australian and NZ policymakers had ‘mistranslated’ the American group boycott ban. He contended that, under US law, the target of the boycotters had to be a direct rival of the defendants. Despite the fact that no NZ cases had applied s 29 vertically, so to speak (to proscribe conduct that thwarted the supply of goods or services to an upstream supplier or a downstream customer or customers), the government changed the law. The Department of Trade and Industry relied upon Pengilley’s writing. Yet there had been no instances where the supposedly overly broad reach of the per se ban had swept in and condemned conduct that, in Pengilley’s view, it ought not to have done. This then was a change predicated upon a hypothetical danger.

As it transpired, the Pengilley ‘overkill’ thesis was flawed. Dr Lindsay Hampton demonstrated convincingly that American group boycott law had no such requirement. The per se ban had been applied to vertical boycotts by the American courts. One need only cite *St Paul Fire and Marine Insurance Co v Barry*, where the Supreme Court said:

> the boycotters and the ultimate target need not be in a competitive relationship with each other. This Court has held unlawful concerted refusal to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to a deserved good or service because of a refusal to accede to particular terms set by some or all of the parties. See eg *Paramount Famous Corp v United States*, 282 US 30 (1930).

Unfortunately, the die had been already cast. The reach of the per se ban had been restricted upon an entirely erroneous basis.

The second amendment was equally, if not more, significant in terms of eroding the effectiveness of the per se ban. The Ministry for Enterprise and Commerce in 2001 received a number of submissions to yet another amendment to the Commerce Act contending that s 29 was still too broad. The thrust of these was, as the Select Committee explained, that the section ‘may capture pro-competitive arrangements involving a vertically integrated firm that also operates exclusive dealing agreements with downstream firms’. Some submissions sought the outright repeal of s 29. Abolition was one of the four options the committee considered. In the end, it chose to add a competition defence. Defendants would henceforth have the opportunity to...

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16 Hampton, above n 13.
17 483 US 531 (1978) at 543.
18 Commerce Committee Report on the Commerce Amendment Bill, 1 February 2001 p 9. See also *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351; (2005) 2 NZCCLR 759; 6 NZCPR 448 at [238] per William Young J.
19 Leading New Zealand law firm, Russell McVeagh, stated in its submission that the overkill of s 29 (in terms of threatening benign market conduct) came to its attention on ‘almost a weekly basis’, Commerce Committee Report, ibid, p 10.
prove that their agreement was not anticompetitive. Thus, the Commerce Amendment Act 2001 added a new subsection (s 29(1A)), which states:

A provision of a contract, an arrangement, or an understanding that would, but for this subsection, be an exclusionary provision under subsection (1) is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.

Again, this amendment was predicated upon a hypothetical danger for, at least in terms of the cases, no full substantive actions (aside from one interlocutory action) had been brought against vertically-integrated firms that also operated exclusive dealing with downstream firms.

Interestingly, both amendments to NZ’s boycott per se ban were recommended for adoption in Australia by the Dawson Report.20 The Federal Government, despite initially having supported the Dawson Committee’s recommendation, decided not to implement either,21 save for a restricted version of the competition defence (which caters for exclusionary provisions in arrangements that are ‘for the purposes of a joint venture’ and that do not have the purpose, effect or likely effect of substantially lessening competition).22

The case for abolition

Section 29 is redundant in the wake of the new s 30

With the passing of the new cartel prohibition — ostensibly broader in its reach than the former provision (s 30) — the view of the policy-makers is that s 29 will now be redundant. The Explanatory Note to the Cartel Bill states:

‘The conduct that [s 29] prohibits is now covered by the cartel prohibition in new section 30 so far as it relates to restricting output.’ The Commerce Commission agreed with the premise for repeal,23 as did the major commercial law firms, Bell Gully and Buddle Findlay.24

The new s 30, much like the former s 30, is aimed at cartels. It now criminalises certain ‘hard core’ cartel practices and, accordingly, more fully defines just what counts as ‘cartel conduct’ for the purposes of the Act. The revised s 30(1) states no person may enter into, or give effect to, a contract or arrangement, or arrive at an understanding that contains a ‘cartel provision’. Naturally, there is a detailed definition of this activity:

20 Review of the Competition Provisions of the Trade Practice Act, January 2003, chaired by Sir Daryl Dawson,. The New Zealand-style s 4D changes were recommendations 8.1 and 8.2 of the Report.
21 P Clarke and S Corones, Competition Law and Policy: Cases and Materials, 2nd ed, Oxford University Press, Melbourne, 2005, p 289. The non-implementation was ‘fortunate’ in the authors’ view, ibid.
22 Section 76C of the Competition and Consumer Act 2010 (Cth).
23 ‘Post repeal, s 27 and the new s30 will be sufficient to capture agreements containing exclusionary provisions that would have otherwise also fallen within s 29’; Commerce Commission, Supplementary Submission to the Commerce Select Committee, 22 November 2012, para 19
24 Bell Gully Submission to the Commerce Select Committee, 6 September 2012, para 39; B Findlay, Submission to the Commerce Select Committee, 6 September 2012, para 20.
30A. Meaning of cartel provision and related terms

(1) A cartel provision is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of 1 or more of the following in relation to the supply or acquisition of goods or services in New Zealand:

(a) price fixing;
(b) restricting output;
(c) market allocating.

(2) In this Act, price fixing means, as between the parties to a contract, arrangement, or understanding, fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of,—

(a) the price for goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
(b) any discount, allowance, rebate, or credit in relation to goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other.

(3) In this Act, restricting output means preventing, restricting, or limiting, or providing for the prevention, restriction, or limitation of,—

(a) the production or likely production by any party to a contract, arrangement, or understanding of goods that any 2 or more of the parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
(b) the capacity or likely capacity of any party to a contract, arrangement, or understanding to supply services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
(c) the supply or likely supply of goods or services that any 2 or more parties to a contract, arrangement, or understanding supply in competition with each other; or
(d) the acquisition or likely acquisition of goods or services that any 2 or more parties to a contract, arrangement, or understanding acquire in competition with each other.

(4) In this Act, market allocating means allocating between any 2 or more parties to a contract, arrangement, or understanding, or providing for such an allocation of, either or both of the following:

(a) the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other:
(b) the geographic areas in which the parties supply or acquire goods or services in competition with each other.

While much group boycotting activity is similar in its effect to a cartel, it does not necessarily involve the fixing or controlling of prices, which is a necessary element in one of the three forms of cartel violation, namely, s 30A(2). In a group boycott there is simply an intention to rid the market of another rival by refusing to trade with it or by choking off supplies to, or purchases from, it. In the vertical group boycott situation there is likewise a desire to exclude a
person from a downstream (or upstream) market. The boycotters have no immediate intention to fix prices. Nor do they undertake any tangible steps toward that immediate end.

It might, none the less, be said that there is an intention on the part of the boycotters to limit output, the second form of cartel conduct set out in s 30A(3). This is because a focused desire to eliminate a rival necessarily encompasses a desire to limit that firm’s output. So most, if not all, boycotting behaviour would seem to constitute a contract, arrangement or understanding that has the purpose of restricting the supply of goods to the target or the acquisition of goods from the boycotting parties to the targeted person or group of persons.

Turning to the third kind of cartel conduct, market allocation (s 30A(4)), most boycotting behaviour may equally well fit within that category as well. The boycotters have agreed upon the persons or classes of persons to or from whom they will supply or purchase goods or services.

There is no doubt that s 27 embraces group boycotting conduct. The general inevitably encompasses the particular. The prohibition upon anticompetitive conduct generally naturally includes particular instances of anticompetitive behaviour. But s 27 is a rule of reason not a per se provision. The onus is upon the plaintiff to positively demonstrate that this instance of exclusionary behaviour has the purpose, effect of likely effect of substantially lessening competition in a market. This is never a straightforward exercise.25 As William Young J in ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd observed when speaking of s 28 (identical to the s 27 proscription but simply extended to covenants):

In this context, it is important to recognise that assessment of anti-competitive effect is necessarily uncertain. Market definition is a fertile source of disagreement. Assessment of ‘effect’ and ‘likely effect’ under s 28 involves counter-factual analysis, ie, a hypothetical question comparing competition as events have panned out with the level of competition which would have obtained if the covenant had not been insisted on. A high level of evaluation is required and there is necessarily scope for differing opinions ... I agree that the uncertainties, expense and imperfections in trying to assess anti-competitive effect are very significant.26

The beauty of a per se rule is that once the conduct has been proven to have occurred, the practice is illegal forthwith without the arduous task of proving deleterious effects upon competition. ‘The trump card of antitrust law’27 (the per se rule) has been replaced with a wet bus ticket.

There is one notable instance where conduct that squarely fell within the s 29 prohibition was, instead (‘surprisingly’),28 challenged successfully under s 27.

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25 In the American context it has been noted that: ‘Rule of reason cases are far more difficult to win than are per se cases and are thus much less frequently even initiated’; C P Rogers III, ‘The Incredible Shrinking Antitrust Law and the Antitrust Gap’ (2013) 52 U Louisville L Rev 67 at 67.

26 [2006] 3 NZLR 351; (2005) 2 NZCCLR 759; 6 NZCPR 448 at [150].

27 United States v Realty Multi-List Inc, 629 F 2d 1351 (1980) at 1362-3 per Goldberg J; Professor Pengilley introduced this memorable phrase (and many others) to Australasian lawyers: See eg Pengilley, above n 10, at 371.

In *Commerce Commission v Ophthalmological Society of New Zealand Inc.*
the commission won its action against the sole Southland eye surgeon, Dr Rogers, a colleague based in Christchurch, Dr Elder (who did monthly outpatient visits to Southland) and the national association. Together, and led by Rogers, they had entered into an arrangement to exclude two Australian ophthalmologists from operating in Southland. The Ophthalmological Society decided resident surgeons would not provide ‘general oversight’ (supervision) of the ‘itinerant’ Australian surgeons, thus effectively preventing them from operating in New Zealand. These experienced and well-regarded overseas surgeons would have cleared up a large backlog of cataract patients and done so at a significantly lower cost, with consequent savings to Southland Health and thus the NZ taxpayer. The fee for the procedure quoted by Rogers was originally $1100 but, in the wake of the imminent entry of the overseas surgeons (prepared to do the procedure for $600), Rogers’ fee promptly lowered to $675.30 Putting aside the considerable cost savings that competition generated, the societal benefits in terms of the alleviation to the long-suffering vision-impaired patients of Southland cannot be discounted.

Gendall J summarised:

> In general terms, what occurred was concerted action by members of a profession, and its professional body, to assist a colleague avoid legitimate competition to protect what he, and his profession, regarded as his exclusive domain. It was lamentable and the media release of the NZMC [Medical Council] aptly states the position that the arrangement of the defendants’, and action of some of them, was: ‘an attempt by professional rivals to restrict the legitimate safe practice of medicine by an appropriately qualified doctor’.31

In the subsequent sentencing hearing, Gendall J noted the ‘flow-on effects’ to other markets, and even other professions.32 The action of the national society sent a signal to other hospitals that NZ medical professionals would — if the errant ophthalmologists were any guide — likely resist such efforts to recruit professionals from overseas to ease waiting lists and diminish consultants’ fees. Now, the commission still succeeded in its case. But the length of the court hearing (22 days) and the extensive evidence33 demonstrates what hard work it was to win what would have been a straightforward victory under s 29. Being as2 7 case, the court needed to undertake a market definition analysis. This inquiry, which can be complex, is, by contrast, usually otiose or

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30 Ibid, at [201].
31 Ibid, at [209].
33 As Gendall J (2004) 10 TCLR 994 at 997 recounts, the trial yielded ‘almost 400pp of direct evidence 825 pp of notes of cross and re-examination and 271 pp of submissions’.
perfunctory in s 29 cases.34 In group boycott proceedings, the boycotters (or, to be precise, some of them, viz, ‘any 2 or more parties to the contract’) simply have to be ‘in competition with each other’ — a conclusion that is readily inferred from the fact the defendants took the trouble to enter into an arrangement to stymie another firm.

Illustrations where s 29 worked much more efficiently to condemn anti-competitive conduct than s 27 would have done are not difficult to cite. In Commerce Commission v Wrightson NMA Ltd,35 five real estate agents in Picton and Blenheim agreed to prevent a new entrant, the Property Centre, from advertising alongside them in the local newspaper, the Marlborough Express (the Express). The Express published a property lift-out each week in which all the real estate firms advertised. The Property Centre sought to advertise in the Express in two ways that upset the incumbents. It advertised its commission and it set a commission rate lower that its rivals. One estate agent acted as the instigator to secure the others to threaten to withdraw their advertising unless the Property Centre advertisement was excluded from the lift-out section. The latter would still be able to advertise in the main body of the newspaper. Following a commission investigation, the defendant real estate agents admitted liability under s 29 and the High Court imposed pecuniary penalties upon them.36

If this case had been brought under s 27, the commission’s job would, I suggest, have been much tougher. It would have had to show that the exclusion of one real estate company’s advertisement from a section of the newspaper (not the entire paper) had the purpose or effect or likely effect of substantially lessening competition in the relevant market. Does it represent a ‘substantial’ reduction in competition between real estate firms if one real estate company is not featured in the specially-designed section in the town newspaper? Was there another newspaper for it to advertise in? And just what was the market? Was it newspaper advertising or did it include radio and ‘junk mail’ advertising?

I have been speaking about s 27. But the argument, it will be recalled, is that not that s 27 but rather the revamped s 30 will adequately address the same mischief that s 29 addressed. Prima facie it appears that, indeed, the output limitation and market division definitions of cartel will capture most, if not all, boycotting activity.

Section 29 is too broad and chills or captures benign or even pro-competitive conduct

The Select Committee report on the 2001 Amendment expressed this concern:

The wider issue is that section 29 may capture pro-competitive arrangements involving a vertically integrated firm that also operates exclusive dealing

34 In News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410; 139 ALR 193 at 330; 21 ACSR 635; BC9604667; the Full Federal Court said that market definition analysis was not required in group boycott lawsuits; Hampton with Scott, above n 28, at 126; See similarly Sumpter, above n 28, at 246-7.
36 The instigator of the boycott paid a penalty of $20,000 and the other four defendants $10,000 each: Ibid, at 103,674.
arrangements with other downstream firms. For example, a manufacturer might agree to sell its products through one or more, but not all potential retailers of the products. If the manufacturer also sells direct to the public through, say, the internet then it appears that the three conditions listed [in s 29(1)] will have been met. Such an arrangement is most unlikely to be anti-competitive because the distributor’s market power will usually be limited by inter-brand competition.37

One of the very few s 29 cases to reach court echoed this. Gault J in Tui Foods commented that the section ‘appears to extend to arrangements that may well enhance competition and involve reasonable competitive activity’38. He gave as an example the practice of graduated discounts for volume trading that were designed to capture business from competitors.39 I shall return to the Tui case and the concerns raised therein in the next section.

It is seldom utilised and thus its repeal is of little moment

The dearth of cases where s 29 has been pleaded as a cause of action suggest to some that the section’s abolition would mean little is lost. It is true there has been a paucity of s 29 cases. The number of full substantive hearings where a s 29 claim has been pursued and where the court has decided the issue is a mere two cases.40 Add to that there have been a handful of interlocutory injunction actions (four),41 striking-out applications (four)42 and agreed penalty decisions (two),43 and the total over a near three decade period is, indeed, meagre.

Turning to authorisations, under s 58(5) group boycotts may be authorised. The test is found in s 61(7): authorisation is granted if the applicants satisfy the commission that their arrangement will result in public benefits that outweigh the detriments engendered by the lessening of competition.44 The declining of jurisdiction is a

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38 Tui Foods Ltd v New Zealand Milk Corp Ltd (1993) 4 NZBLC 103,335 at 103,340; 5 TCLR 406.
39 Ibid.
41 Direct Holdings Ltd v Felix Furnishings of New Zealand Ltd[1986] 6 NZAR 245; Chatham Is Fisherman’s Co-op Co Ltd v Chatham Is Packaging Co Ltd (1988) 2 TCLR 605; Tui Foods Ltd v New Zealand Milk Corp Ltd (1993) 4 NZBLC 103 at 335; Clee v Attorney-General, Unreported, Auckland HC, CIV-2010-404-007101, 12 November 2010, Ellis J.
determination that the practice or conduct at issue presents ‘no real risk’ that s 29 applies, because there is ‘no reasonable possibility’ that it involves an exclusionary provision under s 29(1). Where jurisdiction was established (because the practice would or ‘might’ constitute an arrangement containing an exclusionary provision) it appears that only two applications have been refused authorisation. By contrast, it appears six applications have passed muster and been granted the immunisation the parties sought. The lack of litigation (and paucity of authorisation applications) does not necessarily mean the group boycott ban is, or has not been, effective. There are an unknowable number of boycott practices that but for s 29 may have been implemented.

The section’s coverage has already been greatly restricted and thus its repeal is now warranted

As the previous section of this article outlined, the effectiveness of the per se ban in s 29 has been significant attenuated by the two amendments (in 1990 and 2001). Commentators pronounce that s 29 ‘has been legislated out of existence [and has become] a dead letter’, there ‘is a fair argument that s 29 should be repealed’ and even the hope that ‘the Commerce Act’s most useless and enigmatic provision, s 29, will soon bite the dust’. But the fact that it is no longer as effective as it ought to be does not mean that it is deserving of the coup de grace. As I shall argue later, the section still has work to do. Indeed, I would argue that both of its amendments were ill judged and ought to be reversed. This is not likely to happen, but the case for its complete abolition is not merited. The patient is ailing, but is not deserving of being euthanised.

The case for its retention

Section 29 does not chill benign or pro-competitive conduct

An oft-heard complaint against antitrust law is that it chills productive business activity. This is a frequent plea in respect of monopolisation. But
the same charge is leveled against group boycotts law. Dr Pengilley in his writings on the subject paraded a litany of horribles where the per se ban on collective boycotts was, in his view, too heavy handed. But his examples of overkill are not, in my opinion, convincing.

In *Hughes v Western Australian Cricket Association (Inc)* the Federal Court found a violation of the group boycott prohibition when the WACA and the cricket clubs in Perth agreed not to allow Kim Hughes, a former Australian captain, to play for any club in that city. Hughes had led an unofficial ‘rebel’ Australian side to South Africa during the apartheid era. The WACA’s ban also meant that Hughes could not play for the state, nor for Australia. Pengilley charges that this is an instance of ‘overkill’ since clearly Hughes was not in competition with the clubs or the WACA. Nor did his absence (and that of three other rebel players also banned) substantially diminish competition in the market where clubs compete for the services of the best players in Western Australia. While Pengilley is indubitably right that Hughes was not in competition with the defendants (and thus, in New Zealand, would fail to satisfy s 29(1)(c) — a requirement absent in the Australian boycott section) and a substantial hindering of competition was similarly missing, the decision of Toohey J in *Hughes* amply fulfills a non-economic goal of boycott law: to prevent business bullying. Pengilley also proffered these examples of overkill:

(subject to the possibility of public benefit authorization ... ) drug companies, perhaps for genuine safety reasons, cannot agree not to supply certain products to supermarkets; hoteliers cannot agree not to supply liquor to drunks (who presumably constitute ‘a class of persons’); trade associations cannot agree to provide services to certain classes of outlets ... it would be illegal for credit card companies to agree not to provide services to adult entertainment outlets.

But, as he concedes at the outset, these instances are all capable of being authorised by the Commerce Commission if need be, and, undoubtedly would be authorised (unless the reason advanced was bogus).

More importantly, a court or the commission would undertake an initial ‘quick look’ characterisation analysis to decide if these situations bore any resemblance to the sort of egregious anticompetitive conduct the per se ban was meant to address. The per se rule may be ‘the antitrust trump card’, but the same judge immediately added that:

in light of the potency of the per se rule ... the invocation of this conversation-stopper must be limited to those situations which fairly fall within its rationale.

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52 See, eg, Pengilley, above n 14, at 1033-5.
53 (1986) 19 FCR 10; 69 ALR 660.
54 There were approximately 150 A-Grade cricketers who were talented enough to play for club, state and test teams: ibid, at 696.
55 Pengilley, above n 14, at 1035.
56 See Hovenkamp, above n 6, at 227.
57 *Realty Multi-List*, 629 F 2d 1351 (1980) at 1363, per Goldberg J.
Similarly, in a pithy fashion, the Supreme Court in *Northwest Wholesale Stationers* cautioned ‘It does not denigrate the per se approach to suggest care in application’.  

With a mature and sensible reading of the section, it is, I suggest, virtually certain no court would find the examples above ought to characterised as boycotts — despite the facts literally falling within the wording of the section. Just as they have undertaken the preliminary characterisation exercise with situations of alleged price-fixing, courts are adept enough to separate the pernicious anticompetitive chaff from the neutral or procompetitive wheat.

In New Zealand, a case frequently cited as evidence of the malign shadow cast by s 29 over healthy business conduct is *Tui Foods*. New Zealand Milk Corp and Tui Foods were milk processors. Before deregulation, the former had the upper half of the North Island to itself and the latter, the lower half of the North Island. Following deregulation, Tui offered a new contract to all route trade customers (ie, dairies, convenience stores and so on) in the greater Wellington area. These contracts provided a 3% rebate on all Tui products if the retailer stocked Tui products only. The contracts were of 6 months duration. NZMC sought an interim injunction to prevent Tui’s new agreements coming into force. The High Court granted it, holding that NZMC had made out an arguable case that the Tui contracts breached s 29. On appeal, the Court of Appeal affirmed. The appellant, Tui, conceded that ss 29(1)(a) and 29(1)(c) were satisfied. The focus of the argument was whether, pursuant to the remaining limb, s 29(1)(b), the purpose of the exclusivity conditions in the franchise contracts was to stem the acquisition of products from potential competitors of the franchisor (Tui), namely, NZMC. Cooke P held that this was the purpose. Gault J expressed some unease:

I admit to difficulty in seeing just what the section [s 29] is intended to target. In its terms where traders happen to compete are involved, it appears to extend to arrangements that may well enhance competition and involve reasonable competitive activity. I envisage for example graduated discounts for volume trading that clearly are intended to capture business from competitors (although falling short of predatory pricing). The difficulty I have in distinguishing between what reasonable competitive activity that presumably is intended not to be prohibited and activities that are targeted by the section leaves me in some doubt as to the appropriate approach to the substantive issue that arises in this case.  

In the end he agreed with the rest of the Court of Appeal that the purpose of the condition was anticompetitive in terms of s 29(1)(b) and that, overall, there was a strong arguable case for infringement of the section. The availability of

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60 (1993) 4 NZBLC 103,335.
61 Ibid, at 103,340.
the rebate here was conditioned on not acquiring products from any other source, rather than say the quantities product ordered.62

Gault J’s discomfort at the broad scope of s 29 and his wariness in too readily finding a violation — lest the section may catch too many innocuous or pro-competitive business practices — is understandable in the circumstances. For the facts of Tui Foods ought never to have been characterised as an instance of group boycotting conduct in the first place. This was really a case of exclusive dealing (and hence deserving of rule of reason evaluation under s 27), not a group boycott.

Recall that both plaintiff and defendant had agreed that s 29(1)(a) was satisfied. This limb requires there to be a contract, arrangement or understanding between persons of who any two or more are in competition with each other. But it is hard to find two parties to the same contract in Tui Foods that were ever in competition with each other. What we had in Tui Foods were myriad vertical arrangements between Tui Foods and a large number of particular shops, such as the second respondent, Clymas, an Upper Hutt shop. The shops never entered into a horizontal understanding with each other.

This is similar to Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd where the High Court found no breach of s 29.63 This was the first substantive case under the Act and one of the very few where s 29 was pleaded and a ruling given. In that case, the ARA, who owned and managed Auckland International Airport, had granted franchises to two rental car firms, Hertz and Avis. The plaintiff, Budget, who also sought to operate at the airport, unsuccessfully argued that it had been wrongfully excluded in violation of s 29. Barker J held here there were two vertical arrangements (ARA and Hertz, alongside ARA and Avis) not one trilateral agreement involving the ARA, Hertz and Avis.64 The airport and the rental car companies were obviously not in competition with each other. Furthermore, there was no evidence that Hertz and Avis had ever entered into an understanding. Indeed, as Barker J noted, there was no need for them to enter into an arrangement because each knew there were only two licences to be granted at the airport.65 The terms of the tender for licences had been clearly stated to be on a ‘one of two’ basis. The ARA had bound itself to a collateral undertaking to each rental company not to grant more than two rental car concessions while each licence remained in force. Thus, ‘the two independent collateral contracts made any “understanding” between the two competitors unnecessary’.66 There may be situations where the choice between a series of vertical arrangements versus one larger multi-party arrangement is not so clear-cut. In News Ltd v Australian Rugby Football League Ltd, the Federal Court had held the ARL and rugby league clubs had not breached the Australian equivalent of s 29.67 The ARL had secured the agreement of 20 rugby league clubs to loyalty

62 Ibid.
63 [1987] 2 NZLR 647 at 660-5.
64 Ibid, at 664: ‘It is fairly plain that there were two lots of two-way arrangements, not one lot of three-way arrangements.’
65 Ibid, at 664.
66 Ibid.
67 (1996) 58 FCR 447; 135 ALR 33; BC9600273.
agreements whereby the clubs would participate in the traditional ARL competition and not the newly-founded Super League run by News Ltd. Burchett J held that the Australian equivalent of s 29(1)(a) had not been satisfied.

They [the Loyalty Agreements] are ‘vertical’ arrangements, and they do not contemplate or require ‘horizontal’ arrangements between the clubs.68

On appeal, the Full Federal Court disagreed, finding instead there had been a group boycott entered into.69 The evidence made it clear the ARL and the clubs were all part of a broader understanding whereby each club not just hoped, but rather fully expected, other clubs to enter into the loyalty pact. This was not 20 separate vertical agreements (between the ARL and Manly, the ARL and St George, etc) but a multi-party arrangement with the ARL at the top as ringleader, so to speak, and the 20 competing clubs below all giving their tacit approval to a common undertaking.70 The entire transaction was an intertwined composite one pursuant incorporating a horizontal consensus.

The Select Committee seems to have had the Tui Foods case in mind when it alluded to pro-competitive practices that might be wrongfully swept into the s 29 ban. To reiterate, it claimed:

The wider issue is that section 29 may capture pro-competitive arrangements involving a vertically integrated firm that also operates exclusive dealing arrangements with other downstream firms. For example, a manufacturer might agree to sell its products through one or more, but not all potential retailers of the products. If the manufacturer also sells direct to the public through, say, the internet then it appears that the three conditions listed [in s 29(1)] will have been met. Such an arrangement is most unlikely to be anti-competitive because the distributor’s market power will usually be limited by inter-brand competition.71

First, to assert that it is ‘most unlikely’ that this arrangement would be anticompetitive is pure speculation, and ill-founded speculation at that. There is no guarantee the defendant’s market power would be limited by inter-brand competition and the experience of exclusive dealing in New Zealand — borne out by the Fisher and Paykel litigation72 — indicates that exclusive dealing is frequently the vehicle for the exploitation of market power by dominant incumbent firms given the lack of competitors in New Zealand’s typically highly-concentrated markets.

Second, and more tellingly, it is doubtful the scenario posited would be caught by s 29 for the reasons alluded to above. The retailers tied to the defendant pursuant to exclusive dealing agreements would be contracted by virtue of a series of vertical agreements not a composite trilateral agreement involving a horizontal understanding between the retailers inter se.

68 Ibid, at ALR 97. See also ibid, at 109
69 News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410; 139 ALR 193; 21 ACSR 635; BC9604667.
70 Ibid, at ALR 346.
The replacement for s 29 may, ironically, be even more chilling and intrusive than s 29

Ironically, the revised s 30, which proponents of repeal place their faith in, may work too well. Section 30(1)'s broad 'cartel provision' definition would appear to extend to boycotts that s 29 does not catch.

First, the restricting output and market allocation definitions of cartel conduct are wide enough to capture conduct in the nature of a direct vertical boycott. The parties to a standard quota or output cartel may agree to restrict the supply of goods or services. Section 30A(3) does not require the victims of the non-supply to be competitors of the boycotters. But, as noted above, s 29(1)(c) was introduced in 1990 to require that very thing. Market division refers to allocation between the parties of the persons or classes of person to whom the parties will supply or acquire goods or services. Again, the collective boycott of a class of customers would seem to fit within this section. But this behaviour would not be a group boycott under s 29.

Second, the definition of cartel in s 30A(1) refers to provisions of contracts, arrangements or understandings that have not just the 'purpose', but also the 'effect or likely effect' of fixing prices, restricting output or dividing up the market. Section 29(1), by contrast, only captures exclusionary conduct that has the 'purpose' of restricting access to or from rival firms. The legislative history of the Australian equivalent of New Zealand's s 29 — s 4D of the Trade Practices Act 1974 (Cth), now, the Competition and Consumer Act 2010 (Cth) — clearly shows that the Parliament in Canberra deliberately omitted an effects test from the group boycott ban. This, despite the Swanson Report recommendation for the per se offence to include arrangements whose purpose, effect or likely effect, was restricting the persons or classes of person who might be dealt with.

So, to revisit the earlier illustration, an arrangement between the tyre manufacturers not to supply tyres to a chain of retailers of dubious credit worthiness would not be a group boycott under s 29. The tyre retailers are not rivals of the boycotting tyre makers and thus s 29(1)(c) is not satisfied. But this vertical boycott might be an instance of a cartel of the restricting output or market division kind. The arrangement has the effect of restricting the supply of tyres that two or more of the parties to the arrangement supply in competition with each other: s 30A(3)(c). This same vertical boycott may represent an allocation between the rival tyre makers of the persons or classes of person to the parties supply tyres in competition with each other: s 30A(4)(a).

The potential overkill might be averted in two ways: by fitting the conduct at issue within the new exemption for 'collaborative activity' in the Act in s 31 or by seeking a clearance under the new mechanism provided in s 65A. But securing an exemption will not be straightforward.

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The collaborative activity exemption has several new hoops for the parties to jump through:

31. Exemption for collaborative activity
(1) Nothing in section 30 applies to a person who enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision, or who gives effect to a cartel provision in a contract, arrangement, or understanding, if, at the time of entering into the contract, arrangement, or understanding or giving effect to the cartel provision,—
   (a) the person and 1 or more parties to the contract, arrangement, or understanding are involved in a collaborative activity; and
   (b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.
(2) In this Act, collaborative activity means an enterprise, venture, or other activity, in trade, that—
   (a) is carried on in co-operation by 2 or more persons; and
   (b) is not carried on for the dominant purpose of lessening
(3) The purpose referred to in subsection (2)(b) may be inferred from the conduct of any relevant person or from any other relevant circumstance.

Applicants would need to establish — the onus, of course, falls upon them to make out the exemption— that their behaviour is a ‘collaborative activity’. First, the parties need to be undertaking an enterprise or venture, in trade, ‘in cooperation’ with each other. This, explains the Commerce Commission in its Competitor Collaboration Guidelines, requires the parties to be combining their businesses in such a way that it can, as a matter of ‘substance’ (and not just form) be said that they are working jointly towards the same end. Second, joint activity must not be engaged in for the ‘dominant’ purpose of lessening competition between them. This may or may not be an easy task to ascertain. There is no statutory definition of ‘dominant’ but the commission suggest that the ordinary meaning will pertain, that is, that dominant means ‘prevailing’ and ‘most influential’. Given that purpose can be inferred from conduct (s 31(3)) the applicants must hope that the tribunal view the purpose as benignly as the parties do. Notice that the threshold here is lower: the reduction of competition referred to in s 31(2)(b) need not be a ‘substantial’ lessening of competition (as the principal prohibition, s 27, requires), but simply a lessening. Anything more than a de minimis amount would presumably suffice.

The parties must then establish that their cartel conduct is ‘reasonably necessary’ for the success of the collaborative venture. The commission point

75 Ibid, at [5.2].
76 Ibid, at [5.4].
77 Ibid at [5.13].
78 Ibid, at [5.16].
79 Ibid, at n 60.
out that this is lower threshold than ‘essential’, so that is advantageous to applicants.80 But quite what threshold it represents remains to be seen. In its guidelines the commission state that the phrase means something more than ‘merely desirable, expedient or preferable’.81 In determining this, the analysis may get quite complex. The commission will consider what other ‘practically workable alternatives’ (in contrast to ‘theoretical or extravagant possibilities’) are open to the applicants to achieve their collaborative goals other than the conduct in question.82 This analysis, in turn, will see the commission asking a series of searching questions such as why the parties included the cartel provision in the first place and whether its scope (including its duration, geographic reach, relationship to the parties’ business and so on) is greater than necessary to achieve the parties’ collaborative objective.83

The s 31 exemption for collaborative activity is an exemption from the per se ban in s 30. The arrangement may still be unlawful if it has the purpose, effect or likely effect of substantially lessening competition in a market.84

Turning to the novel clearance mechanism for anti-competitive arrangements (prior to this, clearances were only available for mergers and acquisitions), s 65A states, in relevant part:

65A. Commission may give clearances relating to cartel provisions
(1) A person who proposes to enter into a contract or arrangement, or arrive at an understanding, that contains, or may contain, a cartel provision may apply to the Commission for a clearance under this section.
(2) The Commission must give a clearance under this section if it is satisfied that—

(a) the applicant and any other party to the proposed contract, arrangement, or understanding are or will be involved in a collaborative activity; and
(b) every cartel provision in the contract, arrangement, or understanding is reasonably necessary for the purpose of the collaborative activity; and
(c) entering into the contract or arrangement, or arriving at the understanding, or giving effect to any provision of the contract, arrangement, or understanding, will not have, or would not be likely to have, the effect of substantially lessening competition in a market.

This provision, unsurprisingly, mirrors s 31. There are, none the less, two differences. The reference to the ‘dominant purpose’ has been omitted. Indeed, there is no reference to purpose at all. Instead, the clearance will be given only if the arrangement does not have the effect or likely effect of substantially lessening competition in a market. Second, as just noted, the lessening of competition must be ‘substantial’. Once more the same interpretive minefield (to that facing them in the collaborative activity exemption route) awaits parties seeking to gain a clearance.

80 Ibid, at [5.31].
81 Ibid, at [5.33].
82 Ibid, at [5.34].
83 Ibid, at [5.35]-[5.38].
84 Ibid, at [2.6].
The commission have 30 working days to consider the clearance application, with failure to give consent deemed to be a denial of clearance. Applicants can apply to keep the fact of their clearance application confidential, although it is ‘highly unlikely’ requests for confidentiality will be granted if the application proceeds to stage 2, the assessment of the anti-competitive effects of the arrangement. Clearance applications are recorded on the Clearance Register in the commission’s website and decisions to decline or give clearance similarly noted, together with the issuance of a media release.

The dearth of cases is not a sign that the ban is ineffective

It is expensive to bring antitrust cases. The public enforcement body, the Commerce Commission, has responsibility for consumer protection (the Fair Trading Act 1986, the Credit Contracts and Consumer Finance Act 2003), a raft of specialist regulatory regimes (the Telecommunications Act 2001, the Dairy Industry Restructuring Act 2001, electricity line services and so on) as well as the Commerce Act 1986, and its scarce resources are necessarily marshalled carefully.

An example of a case that never got to a full hearing, but was none the less a widely reported happening in the business world was the Petrocorp dispute with New Zealand Refining in 1988. Petrocorp Exploration Ltd complained of being shut out from New Zealand’s sole oil refinery at Marsden Point, a facility operated by the defendant, from 1988-91. Petrocorp produced a large quantity of crude oil and condensate that needed to be refined. It complained it was not able to enter the market for the wholesale distribution of petrol because of an arrangement entered into by the defendant and the so-called ‘big four’ petroleum companies (BP, Shell, Caltex and Mobil) in 1988. Petrocorp held a 13.4% shareholding in the refinery, with around two-thirds owned by the big four and the balance held by the public.

Section 29 was pleaded as a cause of action along with ss 27 and 36. Petrocorp’s original claim filed in the Whangarei High Court in 1990 was for $91.6 million in compensatory damages and was later increased to $127 million. Meanwhile, the Minister of Energy, John Luxton, had been called upon to intervene and help resolve the parties’ differences. He declined. In March 1993, the parties announced a settlement. This deal did not enable Petrocorp to access the Marsden Point refinery.

85 Section 65A (4). The commission’s guidance of the process for clearances is set out in some detail in the Competitor Collaboration Guidelines, Ch 7.
86 CCG, above n 74, at [7.13].
88 Details of the dispute are largely confined to contemporaneous newspaper reports, although a confirmatory account can be found in the (successful) application by the defendant for further and better particulars of the statement of claim in Petrocorp Exploration Ltd v New Zealand Refining Co Ltd (1993) 7 PRNZ 53.

The abolition of the group boycott prohibition 97
Here then we have a case that never got to court, but none the less achieved sufficient notoriety in the commercial press to signal that anticompetitive conduct in the nature of boycotting was impermissible.

In 1996 the High Court would have imposed a pecuniary penalty upon the Rotorua Branch of the Motel Association of New Zealand. Moteliers in that city had expelled two members, Kiwi Lodge and Bel Aire Motel, for not removing their billboards from the footpath, billboards that advertised reduced rates. The branch agreed it had contravened s 29. But before the court could enter judgment, the branch was conveniently dissolved. Robertson J expressed concern at the timing of the disbandment of the defendant, adding:

my unease was increased when I learned that an overwhelming majority of its members had reorganised themselves into some new body.92 Although imposition of any pecuniary penalty was now rendered futile, he issued a declaration that the Commerce Act had been breached. The Commerce Commission was satisfied with the remedy of a declaration, ‘content that it [had] achieved at least the educative purposes of this exercise’.93 The court warned the moteliers that any future infringements of this kind would attract a substantially greater penalty than the modest $15,000 suggested during the hearing.

The Commerce Commission promptly issued a media release announcing that the High Court had sent a warning to trade and professional associations not to engage in anticompetitive boycotting behaviour of this kind.94

Conclusion

Group boycotts, or at least the direct suppression of them, seems to have reached a nadir. Interestingly, the comprehensive review of Australian competition law and policy95 has recommended that s 45(2)(a)(i) (combined with s 4D), its counterpart prohibition to New Zealand’s s 29, be abolished. The Harper Panel in its draft report did not spend long on the issue, but did reach the view that:

the prohibition of exclusionary provisions, separately from cartel conduct, is unnecessary and increases the complexity of the law. The definition of exclusionary provisions overlaps substantially with the definition of market sharing, a form of cartel conduct. The Panel recommends that the separate prohibition of exclusionary provisions be removed from the CCA [Competition and Consumer Act 2010 (Cth)].96

Harmonisation of Australasian competition law is desirable, but not, I would suggest, if this involves replicating a mistake on each side of the Tasman.

92 Commerce Commission v Rotorua Branch of the Motel Assoc of New Zealand Unreported, HC Rotorua, CP 7/95, 23 August 1996, Robertson J, at 3.
93 Ibid, at 4.
96 Harper Draft Report, above n 95, p 222.
Those who propose a change in the law bear the burden of justifying it. The notion that the group boycott proscription is simply parasitic upon a broader per se ban upon cartels is fashionable, but I believe it is misconceived. There is not, in my view, a convincing case in favour of repealing s 29. First, the paucity of litigated cases and authorisation determinations does not tell the whole story. For we may never know the actual hortatory effect of the s 29 per se rule. The group boycott ban may have quietly been serving its purpose of deterring anticompetitive and socially abhorrent exclusionary behaviour without this ever registering publicly in the form of statements of claim or applications for immunisation. The statement by Russell McVeagh that business concerns with s 29 came to its attention on ‘almost a weekly basis’ is a double-edged one. For while it might demonstrate the irksome intrusion of s 29, it might equally indicate that the section was doing its job. Potentially anticompetitive behaviour was being halted or restructured into another less deleterious form because of s 29.

Second, the suggested replacements for s 29 do not cover the same ground. Section 27, the general prohibition upon anticompetitive conduct, is a much more difficult weapon to use against alleged boycotting conduct. It is less effective than s 29. By contrast, the revamped per se ban upon cartels in s 30 may be overly broad, in that it may sweep in boycotts that were never caught by s 29. There are novel exemptions for cartel conduct in ss 31 and 65A, but these will by no means be easy to satisfy. If I am correct, then this is, indeed, ironic, as the refashioned cartel offence was meant to be the replacement for s 29: a prohibition that was thought to chill healthy business activity is now replaced by one with a potentially greater reach and capacity to deter commercial conduct.

Broad arguments from liberty that we should err on the side of non-intervention do not take us far, any more than cries from the business community that they find the section bothersome. It is the purpose of antitrust law to be ‘bothersome’ and to challenge ‘cosy’, ‘orderly’ anticompetitive practices that might otherwise continue unabated. The government’s solicitude for the views of the business community is understandable, yet is (at best) but half the story. For the Commerce Act 1986 is designed ‘to promote competition in markets for the long-term benefit of consumers within New Zealand’ — not the interests of the business community alone.

97 An antitrust heavyweight, Judge Posner, takes this view: ‘To treat boycotts as a substantive antitrust practice comparable to tying, collusive pricing, vertical integration, and the others would be to make what philosophers call a category mistake. A boycott is simply a method of self-help enforcement. It can be used by firms to enforce a cartel, in which event it is bad because cartels are bad’. ‘Boycotts are properly attacked under the antitrust laws only when they are used to enforce a practice that offends substantive antitrust policy’. R A Posner, Antitrust Law, 2nd ed, University of Chicago Press, Chicago, 2001, pp 238 and 241.

98 The ‘hortatory’ function of law is its channelling or signalling role, achieved by legal and judicial ‘incentives and disincentives ... to encourage behaviour of a positive or affirmative character’: P Atiyah, ‘From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law’ (1980) 65 Iowa L Rev 1249 at 1249.


100 See Kirby J (dissenting) in Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 205 CLR 1; 178 ALR 253; [2001] HCA 13; BC200100872 at [84], [96] and [122].

101 See s 1A.
Sometimes it is as well to just leave things alone. The repeal of s 29 is regrettable.

**Appendix**

Section 29 of the Commerce Act 1986 (NZ): A Chronology of Cases

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<tr>
<th>Case</th>
<th>Citation</th>
<th>Type of Proceeding</th>
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<td>Direct Holdings Ltd v Feltes Furnishings of New Zealand Ltd (HC)</td>
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<td>Auckland Regional Authority v Mutual Rental Cars (Auckland) Airport Ltd (HC)</td>
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<td>Chatham Islands Fisherman's Co-op Co Ltd v Chatham Islands Packaging Co Ltd (HC)</td>
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<td>Tui Foods Ltd v New Zealand Milk Corp Ltd (CA)</td>
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<td>Commerce Commission v New Zealand Motor Body Builders Assoc Inc (HC)</td>
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<td>Yes</td>
<td>Pecuniary penalty imposed ($15,000)</td>
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<td>Commerce Commission v Wrightson NMA Ltd (HC)</td>
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<td>Picture Perfect Ltd v Camera House Ltd (HC)</td>
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<td>Clear Communications Ltd v Sky Network Television Ltd (HC)</td>
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<td>[2015] NZCA 71</td>
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<td></td>
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