SUBJECTING COMPETITION LAW EXEMPTIONS TO A RULE OF REASON: NEW ZEALAND COURTS PUSH AT THE BOUNDARIES OF STATUTORY INTERPRETATION

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I INTRODUCTION

Legislatively mandated exemptions from some or all of the liability creating provisions of their competition statutes are a feature of both New Zealand and Australian trade practices law. Most of these provisions have escaped judicial scrutiny. Nor are they particularly well integrated into the general body of competition law. Their capacity to undermine attempts to bring a principled approach to competition analysis is therefore considerable. In an ideal world exemptions and substantive rules would form part of a coherent whole. This can only really be effected by legislative intervention, in structuring exemptions, and by legislative restraint in curbing the tendency in any bureaucracy to want to create new ones.

If legislatures fail to take on this role, judges cannot easily do so, given that the only mechanism available to them is the traditional one of deconstructing black letter rules using the blunt instrument of statutory interpretation. Just how difficult and contentious this can be is illustrated by the decision of the New Zealand Court of Appeal in *AstraZeneca Ltd v Commerce Commission and Pharmaceutical Management Agency*.[1] A majority of that Court rather unconvincingly sought to read down seemingly clear language in a statutory exemption by conjuring out of thin air limitations on its scope and application not apparent on the statute's face and only dimly discernable in its legislative history. The resulting rule of reason represents a degree of judicial adventurousness not often seen in competition cases on either side of the Tasman. If nothing else, *AstraZeneca* demonstrates the urgent need to look at the issue of statutory exemptions as part of any across the board reform process. Outside the area of intellectual property this has not generally been done.[2]

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1 [2008] NZCA 479 ('*AstraZeneca*').

2 See, eg, Intellectual Property and Competition Review Committee, Parliament of Australia, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000). To date this Review has borne no real legislative fruit. See Ian Eagles and Louise Longdin, 'Competition in Information and Computer Technology Markets: Intellectual Property Licensing and Section 51(3) of the Trade Practices Act 1974' (2003) 3 *Queensland University of Technology Law and Justice Journal* 31.

II RULES OF REASON ACROSS JURISDICTIONS

If one stands back and looks at the structure of competition regimes in common law jurisdictions two broad types emerge. The first and oldest is the United States model where the competition statute is viewed simply as an initial authority for judges to paint with a broad brush as they build up the law case by case with little need to refer back to the archaically worded statute. The other model is that operating in Australia and New Zealand where the words of the statute have primacy and concepts of reasonableness, efficiency and public benefit enter into the analysis only to the extent that the words of the statute permit. *AstraZeneca* is interesting precisely because it seeks to graft the United States approach onto an otherwise intact Antipodean structure for, what is on the face of it, an exceedingly limited purpose.

In the United States, the rule of reason first found its way into the antitrust lexicon in the dissenting judgment of White J in *United States v Trans-Missouri Freight Association*.[3] That case, of course, involved the interpretation of a liability creating provision in the antitrust statute itself, rather than as in *AstraZeneca,* which involved wrestling with a self-contained exempting provision found elsewhere in statute. Nevertheless the two analytical techniques were very similar. At issue in *Missouri Freight* was the proper interpretation to be given to section 1 of the *Sherman Antitrust Act*, 15 USC §§ 1–7 (1890), which stated (and still states) that:

> Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal.

Nowadays this cornerstone provision in United States antitrust legislation is routinely read as though it commences with the words 'every unreasonable contract' to avoid the conclusion that *all* restrictive agreements are illegal without question or qualification. However, what now seems intuitively the right approach was far from being seen as such when *Missouri Freight* was decided; it was, after all, not the view of the majority of the Supreme Court in that case. It remains to be seen whether *AstraZeneca*'s similarly creative approach to statutory interpretation represents tomorrow's generally applicable orthodoxy, one equally able to stand the test of time,[4] or becomes an embarrassing aberration to be strictly confined within the narrow statutory context that gave rise to it.

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3 166 US 290 (1897) ('*Missouri Freight*'). In this case the US Federal Government had charged several railroad companies who had formed an organisation to regulate the prices they charged for transportation with breaching the *Sherman Act*. By way of defense, the railroad companies claimed they were not in breach because their organisation was intended not to drive prices up but rather to keep them low and that besides the railways were governed by a range of other laws. The majority of the Supreme Court held, however, that the *Sherman Act* prohibited all such combinations, irrespective of their purpose and moreover contained no exception. Justice White was ironically the sole dissenting judge in that case and it was only when his approach was taken up by later courts that it gained analytical traction.

4 'Time' is of course relative in this context; witness the respectably antique mischief rule first promulgated by Sir Edward Coke in *Heydon's Case* (1584) 3 Co Rep 7; 76 ER 637 and compare it with the question begging rebuke to Denning LJ delivered by Lord Simonds in *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, 190–1 for venturing too far beyond the words of the statute.

III *ASTRAZENECA*: LEGISLATIVE AND POLITICAL FRAMEWORK

As in many developed countries, New Zealand's government subsidises the cost of certain pharmaceutical drugs. Its expenditure of taxpayers' money on medicines used in hospitals and prescribed by general medical practitioners is managed by a Crown entity, Pharmac, whose role it is to maintain a schedule of subsidised pharmaceuticals and negotiate prices and conditions with suppliers. Pharmac is further charged with securing 'the best health outcomes that are reasonably achievable from pharmaceutical treatment and from within the amount of funding available'.[5]

As a monopsonist purchaser of pharmaceuticals on behalf of District Health Boards throughout New Zealand, Pharmac has by any measure substantial market power and its activities, including developing expenditure management strategies that include cross deals to tie markets and prices for different products together by way of setting subsidies, are potentially assailable under the *Commerce Act 1986* (NZ) ('*Commerce Act*'). In particular, section 36(2) (closely mirroring the wording of section 46(1) of the *Trade Practices Act 1974* (Cth) ('*TPA*')) states that persons with a substantial degree of power in a market must not take advantage of that power for the purpose of:

(a) restricting the entry of a person into that or any other market; or

(b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or

(c) eliminating a person from that or any other market.

Given that Pharmac's role was to drive hard bargains with pharmaceutical drug suppliers – a role that may involve anti-competitive activities – it was thought necessary by its legislative sponsors that Parliament provide an exemption not only from section 36 but indeed from all of the Act's restrictive trade practice provisions as contained in Part 2 of the *Commerce Act*.[6] Immunity

5 *New Zealand Public Health and Disabilities Act 2000* (NZ) s 47(a). By one of those strange historical twists *AstraZeneca* came before the courts in New Zealand not long after the 2007 Australian High Court decision in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 ('*Baxter*'). Both *Baxter* and *AstraZeneca* involved giant pharmaceutical companies who unilaterally offered their products priced only in bundled form to official purchasing authorities and claimed immunity when challenged by the relevant competition authority. Both cases too, involved a judicial reading down of statutory exemptions. In *Baxter* the majority of the High Court substantially narrowed Crown and derivative Crown immunity. Trans Tasman parallels should not be pushed too far, however. At issue in the Australian proceedings were: (i) The reach of exemptions in the *Trade Practices Act* that stipulate that the normal competition rules apply to the Government, Government agencies and those contracting with the Government in situations in which the Government can be regarded as carrying on a business. (The equivalent New Zealand provisions in *Commerce Act* ss 5 and 6 were not invoked in *AstraZeneca*.); and (ii) The constitutional issues raised as to the judicial nature of Australian States and Territories as legal persons and/or emanations of the Crown that have no resonance in a unitary polity such as New Zealand.

6 Part 2 serves broadly the same function as Pt IV of the *TPA*.

was to extend not only to Pharmac but also to anyone negotiating with that body. Parliament duly obliged with section 53 of the *New Zealand Public Health and Disabilities Act 2000* (NZ) (*Public Health Act*).[7]

Section 53 provides:

> Exemption from Part 2 of Commerce Act 1986
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> (1) In this section, unless the context otherwise requires,
>
> agreement
>
> (a) includes any agreement, arrangement, contract, covenant, deed, or understanding, whether oral or written, whether express or implied, and whether or not enforceable at law; and
>
> (b) without limiting the generality of paragraph (a), includes any contract of service and any agreement, arrangement, contract, covenant, or deed, creating or evidencing a trust
>
> pharmaceuticals means substances or things that are medicines, therapeutic medical devices, or products or things related to pharmaceuticals.
>
> (2) It is declared that nothing in Part 2 of the Commerce Act 1986 applies to
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> (a) any agreement to which Pharmac is a party and that relates to pharmaceuticals for which full or part-payments may be made from money appropriated under the Public Finance Act 1989; or
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> (b) any act, matter, or thing, done by any person for the purposes of entering into such an agreement; or
>
> (c) any act, matter, or thing, done by any person to give effect to such an agreement.

IV A PROCEDURAL TRIGGER

While *AstraZeneca* was ultimately about the scope and application of section 53, the case did not come before the Court as a direct test of any party's substantive liability, but was instead triggered by the attempted exercise by the Commerce Commission, New Zealand's competition regulator, of its evidence gathering powers under section 98 of the *Commerce Act*.[8] This provision allowed the Commission to issue a written notice requiring persons to supply it with documents and/or information where the Commission considered it necessary or desirable for the purposes of carrying out its functions and exercising its powers under the Act. The Commission issued just such a notice to AstraZeneca relating to its negotiations with Pharmac because it wished to investigate whether the

7 Section 53 forms part of a growing trend in New Zealand not to include exemptions from competition scrutiny in the competition statute itself but instead place them in the enabling legislation setting up the body whose activities are to be protected. See, eg, *Education Act 1989* (NZ) s 159K and *Civil Aviation Act 1990* (NZ) s 91.

8 Failure to comply with a s 98 notice is an offence under s 103(1) of the *Commerce Act* and could lead to a fine of up to NZ$10,000 for an individual or up to NZ$30 000 for a corporation. It is also an offence under s 103(2) to deceive or knowingly mislead the Commission.

former had breached section 36(2) of the *Commerce Act* by tying together the supply of several of its pharmaceutical products in circumstances where there were no reasonable substitutes available for one of those products, Betaloc IV.

AstraZeneca thereupon sought refuge under section 53(2)(b) of the *Public Health Act* and claimed that both the notice served upon the company and the purported investigation by the regulator were *ultra vires*. In the view of the Commission, however, such an assumption placed the cart before the horse. It argued that the facts of any given case must be properly ascertained before exemption from the reach of Part 2 of the *Commerce Act* could be invoked. The Commission, in effect, claimed that AstraZeneca's challenge to the validity of the section 98 notice was premature.

V EVENTS LEADING UP TO THE CASE

AstraZeneca had been the sole supplier of Betaloc CR (a slow release beta-blocker drug in tablet form used to treat a range of heart related conditions) under a three year contract with Pharmac since December 2003. AstraZeneca's patent for the main active ingredient in Betaloc CR had been due to expire around the time of the contract and unsurprisingly Pharmac saw no reason to renew the agreement with AstraZeneca on the same generous terms. It planned to procure a cheaper generic beta-blocker, either by direct negotiation with another international supplier or via a tender process. Suddenly vulnerable to the emergence of competitors, AstraZeneca's initial reaction was to attempt in the first half of June 2007 to negotiate a new long-term agreement with Pharmac under which it would continue to supply its Betaloc CR tablets tied to several other AstraZeneca products. Significantly the proposed bundle of tying items did not include a pharmaceutical drug related to Betaloc CR that Pharmac was known to be particularly keen to procure because there were very limited substitutes for it. This sought-after product, Betaloc IV, was a solution typically administered in hospitals by intravenous drip to patients in critical care following a heart attack. Whilst AstraZeneca had distributed Betaloc IV in small amounts directly to District Health Board hospitals, the drug had never previously been the subject of any agreement between the drug company and Pharmac.

When Pharmac declined AstraZeneca's tying proposal, AstraZeneca warned Pharmac on 23 May 2007 that it intended to withdraw supply of Betaloc IV saying that:

> if we are unsuccessful in securing long-term commercial certainty for Betaloc CR then we will be forced to also review the commercial viability of Betaloc IV, which we currently distribute to District Health Board hospitals as a service line.

The company formally withdrew supply of Betaloc IV on 30 July 2007. Pharmac then proceeded to negotiate an alternative supply of a substitute product for Betaloc IV from Novartis, prompting AstraZeneca, when apprised of this development, to resume supply of Betaloc IV to hospitals on a month by month basis.

These decisions drew adverse media attention to AstraZeneca in August 2007; it was suggested that the company was gambling with the lives of acutely ill patients to protect itself from competition in the market for the supply of off-patent Betaloc CR tablets. The Commerce Commission thus decided to conduct an investigation into whether AstraZeneca had market power for the supply of intravenous injection beta-blockers in New Zealand and had taken advantage of that market power during its negotiations. The Commerce Commission investigated whether the latter was achieved by illegally intending to tie supply of Betaloc CR tablets to the continued supply of Betaloc IV intravenous injection pharmaceuticals for the anti-competitive purpose of preventing sales of generic beta-blockers. If intending to do so, AstraZeneca would be in breach of section 36 of the *Commerce Act*. To this end the authority issued on 31 October 2007 a notice to AstraZeneca under section 98 of the *Commerce Act* requiring it to disgorge information and records relating to the supply of Betaloc tablets and injections, including all correspondence between Pharmac and the company relating to the relevant negotiations from June 2006 onwards.

VI THE JUDGMENT AT FIRST INSTANCE

Justice Panckhurst in the High Court[9] pared the issues to be resolved down to three:

(1) What was the proper role of the Commission in this case?

(2) What was the reach of the section 53 exemption in relation to anti-competitive conduct? In other words could it exempt pharmaceutical companies from liability for unilateral or collusive misconduct not instigated or approved of by Pharmac or did such conduct fall outside the exemption?

(3) Was the Commission's issue of the section 98 notice proper in light of (1) and (2) above and did the notice therefore trump the exemption?[10]

That this was the appropriate analytical framework was accepted by all members of the Court of Appeal and for that reason merits detailed exploration here.

A The Role of the Commission

The Commission's powers of compulsion under section 98 are to be exercised 'where the Commission consider it necessary for the purposes of carrying out its functions and exercising its powers' under the *Commerce Act* as a whole. However, the nature and scope of those powers and functions are not to be found in any single, across the board, legislative grant and have to be inferred

9 *AstraZeneca Ltd v Commerce Commission* [2008] HC WN CIV 2007–485–002580 (Unreported, Panckhurst J, 16 April 2008).

10 Ibid [45].

from the many different roles given to the Commission as scattered across the separate Parts of New Zealand's competition statute.

The absence of any overriding statutory framework against which to assess the legality of the Commission's actions meant that Panckhurst J was free to apply two fundamental, and these days incontestable, principles of judicial review. His Honour ruled that however widely and subjectively the nature of the information sought might be cast, it still needed to be related to the particular subject matter which gave an administrative agency jurisdiction to investigate in the first place.[11] Nor, his Honour thought, could the wide formulation shield the Commission's subjective consideration from objective scrutiny.[12] Having found that this was the appropriate two-pronged test to apply to the Commission's activities, Panckhurst J somewhat anticlimactically went on to find that its exercise of the section 98 power was perfectly orthodox by both these guiding administrative law principles. This was apart from the vexed question as to whether the subject matter of the Commission's investigation was not blocked off under section 53.[13] It was not, Panckhurst J said, for AstraZeneca to pre-empt the outcome of the investigation by assertions as to what the result might be,[14] a finding that was approved[15] and remained undisturbed on appeal.

B The Meaning and Effect of Section 53

In the view of Panckhurst J, the scope of the exemption in section 53 was not to be assessed in a legislative vacuum. Instead, it was to be considered in light of Pharmac's main stated objective, as set out in section 47 of the *Public Health Act*, namely to secure for eligible persons pharmaceuticals which promote the best health outcomes reasonably achievable within the budget provided. Once contextualised in this way it was easy to go on to hold that the reason for providing the exemption was to allow the agreements that Pharmac structured itself to be unassailable under the *Commerce Act*. Justice Panckhurst thus accepted counsel's argument that the purpose of the exemption was to protect Pharmac in its role of concluding arrangements that are in the public interest and for the public benefit. The exemption was not conjured into being to allow pharmaceutical companies with substantial market power to engage in anti-competitive behaviour.

To reach this conclusion Panckhurst J relied heavily on the speech of the then Minister of Health in the House of Representatives when the earliest version of section 53 was being introduced,[16] a speech that highlighted the fact that the reason for the exemption was to enable Pharmac to operate as a monopsonist with statutorily enhanced market power for the very purpose of negotiating better

11 Ibid [49].
12 Ibid [50].
13 Ibid [51].
14 Ibid [55].
15 *AstraZeneca* [2008] NZCA 479, [14] (Glazebrook J).
16 This was the *Health Reforms (Transitional Provisions Act) 1993* (NZ) s 29. See also the *Finance Act 1994* (NZ) s 2. Interestingly enough, the earlier version contained no equivalent to s 53(2)(b).

prices and terms for the procurement of pharmaceuticals.[17] This statement of policy fortified Justice Panckhurst's view that section 53 was aimed, as his Honour put it, at the attainment of a public benefit (although note that these words do not occur in the section itself) and 'extends to pharmaceutical suppliers because this is necessary to ensure that Pharmac is free to enter into collusive purchasing arrangements'.[18] The exemption did not exist, his Honour ventured, for the protection of pharmaceutical suppliers generally. Its availability, he thought, had to be 'closely linked to actions occurring in the context of a pharmaceutical agreement or for the purpose of entering into such an agreement.'[19]

Justice Panckhurst did not, on the other hand, think that there was any requirement that a concluded agreement with Pharmac had to be reached before the exemption in section 53(2)(b) could be invoked. Somewhat paradoxically his Honour based this conclusion on a plain reading of section 53 as a whole, and found particularly convincing the emphasis placed in the subsection on anything done 'for the *purposes* of entering' an agreement to which Pharmac is a party. His conclusion (not disturbed by the appellate court) was that as 'long as the aim of the challenged conduct was the conclusion of an agreement of the required kind, the exemption remained available.'[20]

C The Status of the Notice

Although Panckhurst J thought AstraZeneca's alleged anti-competitive behaviour may well have taken place in the context of contractual negotiations and might thus turn out to be for the purpose of securing an agreement with Pharmac, such a conclusion was too speculative at this early stage of the investigative process.[21] Thus his Honour preferred to find that until the Commission was in full possession of the facts, it was entitled (if not obliged) to have taken the view that it was 'necessary and desirable to issue a section 98 notice in order to carry out its statutory functions'.[22]

VII *ASTRAZENECA*: THE COURT OF APPEAL ANALYSIS

The majority of the Court of Appeal (Glazebrook and MacKenzie JJ) dismissed AstraZeneca's appeal and upheld the validity of the notice issued by the Commerce Commission. However, there was a strong dissenting judgment by Fogarty J in which his Honour found that AstraZeneca's conduct enjoyed the

17 See *AstraZeneca Ltd v Commerce Commission* [2008] HC WN CIV 2007–485–002580 (Unreported, Panckhurst J, 16 April 2008) [76]. In an unusual display of political amity the Minister's remarks were echoed by the Opposition's spokesperson on public health: New Zealand, *Parliamentary Debates*, House of Representatives, vol 540, 1124, 1133.

18 *AstraZeneca Ltd v Commerce Commission* [2008] HC WN CIV 2007–485–002580 (Unreported, Panckhurst J, 16 April 2008) [76].

19 Ibid.

20 Ibid [60].

21 Ibid [67].

22 Ibid.

benefit of the exemption regardless of what further details about AstraZeneca's conduct might become available to the Commission. While these opposing viewpoints can on the face of it be expressed as a tug of war between literal and purposive approaches to statutory interpretation, this is in significant respects a contrived polarity. The starting point for all three members of the Court of Appeal was the text of section 53 itself (as indeed it was for Panckhurst J).

A Plain Meaning Versus Purposive Interpretation: Real Conflict or Shadow Boxing?

While Fogarty and MacKenzie JJ both dutifully noted that section 5 of the *Interpretation Act 1999* (NZ) mandates that the text of any statutory provision is to be read in the light of its purpose,[23] their Honours proceeded to follow this legislative prompt to very different effect. At the onset of his brief judgment MacKenzie J conceded that a literal interpretation of the exemption would cover 'any act, matter or thing' done for the purposes of entering an agreement with Pharmac but immediately denied that that interpretation *must* prevail. Justice MacKenzie determined that any court determining the substantive issues, with the benefit of a full factual context in which to consider them, must heed the Supreme Court's interpretation of section 5 in *Commerce Commission v Fonterra Co-operative Group Ltd*.[24] The Court there found that plain meaning must always be cross-checked against purpose, and that the social, commercial or other objective of the enactment in question could not be ignored when carrying out this task.

Justice Fogarty similarly commenced his analysis by finding that the object of the exemption was to protect Pharmac's ability to structure agreements in ways that might otherwise be open to challenge under Part 2 of the *Commerce Act*. His Honour furthermore agreed that it was not the purpose of the Government when introducing the Bill to facilitate attempts by the pharmaceutical companies to put pressure on Pharmac, and went on to point out that whatever view of section 53 one took, it clearly extended the benefits of its protective umbrella to persons other than Pharmac. 'Any person' in section 53(2)(b) simply cannot be read any other way. It is finding the intended link between that phrase and 'any act, person or thing' that is the problem. Here there is no obvious legislative purpose to be discovered and it is the plain meaning of the latter words or nothing. [25] If that plain meaning permits, as it clearly does,

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23 See *AstraZeneca* [2008] NZCA 479 for Justice Fogarty's discussion at [48] and Justice MacKenzie's at [81]. For similar legislative prompting in Australia, see *Acts Interpretation Act 1901* (Cth) s 15B; *Acts Interpretation Act 1954* (Qld) s 14B; *Acts Interpretation Act 1987* (NSW) s 34; *Acts Interpretation Act* (WA), s 19; *Acts Interpretation Act 1931* (Tas) s 8B; *Acts Interpretation Act 1984* (Vic) s 35; *Interpretation Act* (NT) s 62B; *Legislation Act 2001* (ACT) s 139 replacing *Interpretation Act 1967* (ACT) s 11B.

24 [2007] 3 NZLR 767.

25 Curiously neither Fogarty J not the majority thought it worthwhile to reflect that perhaps the legislature, in using the phrase in s 53 of the *Public Health Act* was here following its own penchant for precedent by following closely in the footsteps of section 43(1) of the *Commerce Act* which stipulates that nothing in Pt 2 of the statute 'applies in respect of *any act, matter, or thing* that is, or is of a kind, specifically authorised by any enactment' (emphasis added).

supplier initiated bundling of products across different markets initiated by the pharmaceutical supplier then so be it. The inclusive language in section 53(2)(c) cannot be ignored simply because it has an inconvenient consequence.[26] Justice Fogarty's reasoning is hard to fault. While a purposive interpretation will trump (indeed in New Zealand must trump)[27] a literal one, this presupposes that the two approaches are at odds in a particular case and that the legislative objectives are discoverable with the assistance of sources outside the text.[28] Neither situation applied here in Justice Fogarty's view. Having (in our view, rightly) insisted on the primacy of the text in these particular circumstances, Fogarty J unfortunately fell back on that *cri de coeur* uttered by generations of flummoxed judges when faced with legislative conundrums of this kind saying, in effect, that: 'If Parliament had really meant X they would have said X instead of saying Y. Since they said Y, Y is what they mean.' Reasoning so obviously circular is incapable of providing any logical exit from any statutory construction, however framed.[29]

For her part, Glazebrook J saw no problem with reading down general language to accord with what her Honour saw as the purpose of the statute.[30] As her Honour put it:[31]

> pharmaceutical companies [are not given] carte blanche to engage in anti-competitive conduct at Pharmac's expense, contrary to the statutory purpose of securing pharmaceutical arrangements that are for the public benefit.

So far, so purposive. It is only when her Honour goes on to express the tentative view (tentative because this was how her Honour perceived her role in interlocutory appeals such as *AstraZeneca*) that anti-competitive conduct is covered by the exemption only to the extent it generates the requisite public benefit[32] and that (tentatively again) there were 'credible' arguments for importing a reasonableness test into section 53 that the logic begins to fray. It frays further when Glazebrook J proceeds to speculate that first, there might be forms of anti-competitive behaviour that were outside the exemption as a matter of law, singling out here unilateral withdrawal of a previously supplied product as an example; and secondly that the twin tests of reasonableness and public benefit (clearly distinct concepts in her Honour's view, although her Honour does not elaborate on the difference between the two) could plausibly be applied to anti-competitive conduct on the part of *either* Pharmac or those with whom it deals.

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26 *AstraZeneca* [2008] NZCA 479, [47].

27 Unlike s 15AA of the *Acts Interpretation Act 1901* (Cth) which merely expresses a preference, albeit a strong one.

28 Such sources do not and cannot replace the text but merely throw light on its meaning, as s 5 of the *Acts Interpretation Act 1999* (NZ) makes clear.

29 We are here referring to Justice Fogarty's observation that had Parliament intended to exempt unilateral anti-competitive conduct, one would have expected the existing text ('any act, matter or thing done') to confine the exempted conduct to parties to Pharmac's conduct, as stated in *AstraZeneca* [2008] NZCA 479, [68].

30 Drawing on discussion in Jim Evans, 'Reading Down Statutes' in Rick Bigwood, *The Statute :Making and Meaning* (2004) 123 and John F Burrows, *Statute Law in New Zealand* (3rd ed, 2003) 139.

31 *AstraZeneca* [2008] NZCA 479, [11].

32 Ibid [12].

While these are interesting speculations (and, to be fair, Glazebrook J does not present them as anything else) they are far too sketchily developed to provide much of a guide as to the reach of section 53 in future cases. Given Justice Glazebrook's view of how courts should approach questions of law raised at the interlocutory stage this is not surprising. What *is* perhaps surprising is her Honour's perception that a purposive approach *requires* one to read tests of public benefit or reasonableness into the provision.[33] This is not so. A purposive reading of section 53 can be undertaken without any such interpolation. It can be arrived at quite independently. All that is required is that the court have regard to the Act's structure, social context and legislative history. Having done this, it is perfectly reasonable for a court to reach the conclusion that the construction of section 53 urged on them by the pharmaceutical companies would thwart that purpose. Reconstructing the section in the way suggested by Glazebrook J was not necessary to answer any question that was before the court. Judges should not lightly act in the manner of parliamentary counsel drafting an amendment.[34] It is significant that MacKenzie J who also adopted a purposive approach was able to reach the same conclusion as Glazebrook J without inserting into the section tests of public benefit and reasonableness. Reading a section down to reach a particular and limited result is a much gentler and less invasive technique than reading words into it.

That members of the Court of Appeal in *AstraZeneca* were divided on the fundamentals of statutory interpretation is obvious. It would be a mistake, however, to present this as simply a clash of grand theory in which the literal and purposive approaches to statutory interpretation fight it out in a purely abstract way. Context is as important as content and two other factors must be kept in mind when applying *AstraZeneca*. The first is the way in which the case came before the Court of Appeal and the second is the obvious interdependence of the exempting provision and the wider competition law. The former explains, but does not excuse, the curiously hesitant nature of the majority's findings of law while the latter invites us to ask why there should be such a disconnect between those findings and the competition principles expressed in the *Commerce Act*.

B Linking the Exemption with the Rest of Competition Law

One of the anomalous features of *AstraZeneca* is the Court's dissection of terms and concepts, which while having a clear resonance in the context of competition law as a whole, are analysed as if no such link existed. It could be argued, of course, that this is the fault of the legislature and that Parliament, by placing this particular exemption where it did, intended to signal that it was to be walled off from the liability creating rules set out in the *Commerce Act*. This is overly simplistic for two reasons. The first is that statutes are not infrequently

33 A clearer, albeit extra curial, exposition of Justice Glazebrook's views on this subject is to be found in Justice Susan Glazebrook, 'Filling the Gaps' in Rick Bigwood, *The Statute:Making and Meaning* (2004) 153.

34 That it sometimes necessary to fill in gaps in a statute to make it work at all is conceded. See, eg, *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530, 542; *Re Bank of New Zealand* [1977] 2 NZLR 239, 247. Such cases are (and should remain) rare.

construed in the context of other statutes especially where one of those statutes is the substantive parent to an exempting child.[35] The second is that in *AstraZeneca* it is the court itself that simultaneously creates and then ignores the overlap in terminology.

1 *Reasonableness and Public Benefit*

New Zealand competition law is no stranger to the notion of public benefit. As in Australia, it is placed at the heart of the authorisation process by statute[36] and the courts have generally endorsed both the Commerce Commission's understanding of the public benefit test and the methodology used to apply it.[37] Importantly for our purposes, however, it has never been used to read down the liability creating provisions of Part 2 of the *Commerce Act* themselves. Similarly, while New Zealand judges have on occasion suggested that a reasonableness requirement can be read into at least one Part 2 provision,[38] such attempts have to date been rejected on appeal.[39] It is somewhat surprising, therefore, that Glazebrook J should have chosen to ignore those more general trends when glossing section 53 in the way her Honour did. Part of the difficulty here is that it is not entirely clear whether Glazebrook J was suggesting that the *application* of section 53 should itself be subjected to case by case balancing or that its *meaning* was to be ascertained (presumably once and for all) by viewing it through the lens of reasonableness and public benefit. Given the highly contingent form in which her Honour's views are expressed, either could be the case.

2 *Unilateral Versus Collective Misconduct*

Section 53 is structured in a rather unusual way. The exemption it creates is expressed as applying to the whole of Part 2 and thus in theory is capable of embracing all the forms of potentially anti-competitive conduct there set out. However, its focus on 'agreements' (however broadly defined) makes it ill suited to dealing with unilateral assertions of market power unless such unilateral assertions are ancillary to the making or enforcing of an agreement of some kind. Like its Australian counterpart Part 2 runs the full gamut of anti-competitive behaviour. Some of its provisions take the form of rules of reason, other are per se. More importantly for our purposes, the restrictive practices 'pie' can also be sliced by distinguishing between multilateral dealing and unilateral action. While it is true that, as with section 46 of the *TPA*, the multilateral/unilateral divide does not necessarily correspond to that between section 36 and the rest of Part 2

35 New Zealand judges are not averse to construing statutes as part of a linked series or scheme, see *Tasman Pulp & Paper Co Ltd v Newspaper Publishers Association of NZ Ltd* [1983] NZLR 600, 605 (Cooke J); *Hawkes Bay Hide Processors of Hastings v Commissioner of Inland Revenue* [1990] 3 NZLR 313, 318 and *Neumegen v Neumegen* [1998] 3 NZLR 310, 323 (Thomas J, dissenting). For Australian counterparts, see *Trade Practices Commission v Collings Construction Co Pty Ltd* (1994) 130 ALR 115 and *R v Mailes* (2001) 53 NSWLR 251.

36 *Commerce Act* s 61; cf *TPA* s 90.

37 See *Fisher & Paykel v Commerce Commission* [1990] 2 NZLR 731, 842; *Air New Zealand Ltd v Commerce Commission (No 6)* (2004) 11 TCLR 347.

38 *Clear Communications Ltd v Telecom NZ Ltd* (1993) 4 NZBLC 105, 340, 103, 354 (Gault J).

39 Most famously by the Privy Council in *Telecom v Clear Communications Ltd* [1995] 1 NZLR 385, 403.

of the *Commerce Act*, it is the latter that has traditionally been resorted to when allegations of single party misbehaviour have been made.[40]

The second unusual feature of section 53 is that it adds to the much litigated terminology of 'contract, arrangement or understanding' the further explanatory embellishment that these may be oral as well as written, implied as well as expressed, and unenforceable as a matter of law. Missing from section 53, however, is any reference to a 'provision' in a contract, arrangement or understanding to be found in the liability creating section 27 of the *Commerce Act* (virtually identical in its terms to section 45(2)(ii) of the *TPA*). In section 27 it is the 'provision' to which the anti-competitive purpose must attach, not the contract, arrangement or understanding as a whole. This drafting quirk has been used by New Zealand courts to hold that as long as the party responsible for the 'provision' has an anti-competitive purpose, it does not matter whether that purpose is shared by other parties to the contract, arrangement or understanding.[41] Although this particular dissonance between the two statutes was not explored in *AstraZeneca,* the wisdom of having one set of words for imposing liability and another for negating it is likely to prove problematic in the future. On the wider issue of whether unilateral conduct could ever be brought within the exemption, Glazebrook J, for one, was prepared to accept the possibility that 'unilateral action to withdraw a product may not be covered if the purpose is anti-competitive' and that there might be 'some relevance in the fact that AstraZeneca seemingly had no desire to achieve an agreement with regard to Betaloc IV, even if a new replacement agreement for Betaloc CR was sought'.[42] By contrast, Fogarty J, while accepting the abstract possibility that section 53 could protect against liability under section 36 of the *Commerce Act*, saw no reason to decide the point in the absence of any evidence that AstraZeneca's purpose in withdrawing Betaloc IV was due to anything other than profitability concerns. As his Honour put it:[43]

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40 Resale price maintenance will usually be unilaterally imposed and requires no formal assent by those on whom it is imposed before liability is established (see *Commerce Act* s 37). Conversely, while Australian and New Zealand courts have tended to shy away from European notions of collective dominance it is perfectly possible for a firm with substantial market power to take advantage of that market power through a coerced agreement or arrangement.

41 *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, 584; *Tui Foods Ltd v New Zealand Milk Corporation Ltd* (1993) 4 NZBLC 103,335, 103,338. New Zealand courts were helped towards this conclusion by the existence of the *Commerce Act* s 2(5)(a) which requires the 'purpose' of a provision to be determined by looking at the 'purpose' of the party who caused that provision to be included in the contract, arrangement or understanding. Although s 4F(1**)** (i) of the *Trade Practices Act* is similarly worded, judicial opinion appears to be divided as to whether it can be used in the same way. See *ASX Operations Pty Ltd v Pont Data Pty Ltd* (1990) 97 ALR 513, 528; cf *Carlton and United Brewers Pty Ltd v Bond Brewing Ltd* (1987) ATPR ¶40-820; *News Ltd v Rugby Football League Ltd* (1996) ATPR ¶41-446. Although the High Court of Australia has had, as yet, no opportunity to definitely rule on the matter, the *Port Nelson* approach does not sit easily with the view expressed by Gummow and Callinan JJ in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 that it would be artificial to attribute a particular purpose to a 'provision' by uncoupling it from the wider agreement in which it is embedded.

42 *AstraZeneca* [2008] NZCA 479, [13].

43 Ibid [62].

> If AstraZeneca withdrew Betaloc IV simply because it was not commercial to supply it in small quantities then that benign purpose cannot in itself constitute breach of Part 2 of the Commerce Act, as those sections do not impose an obligation to supply non-essential services.

Nor would his Honour allow counsel for the Commission or Pharmac to sidestep this evidentiary vacuum by putting forward the argument that a possible purpose for withdrawing Betaloc IV could have been to put pressure on Pharmac not to conclude arrangements with AstraZeneca's generic competitors. Even accepting that such an argument might be open on as yet unfound facts, Fogarty J said the only interest AstraZeneca had in fending off competitors was to ensure that Pharmac went on taking Betaloc CR from itself. This downstream purpose would be within section 53 because it was 'any matter or thing done' to pursue an agreement with Pharmac and thus could not be excluded by any future factual finding.[44]

3 *Mixed Motives and Multiple Purposes*

It is a feature of both the Australian and New Zealand competition statutes that they require the decider of fact, in weighing anti-competitive purpose in the Act's substantive provisions, to pay regard to 'any substantial purpose or reason' defendants may have had for doing what they did, even if that was not their sole reason or purpose. In Australia this requirement is to be found in section 4F(1)(b) of the *TPA*. Its New Zealand equivalent is section 2(5)(b) of the *Commerce Act* which reads that for the purposes of that Act (emphasis added):

> [A] person shall be deemed to have engaged, or to engage, in conduct for a particular purpose or for a particular reason if
>
> (i) That person engaged or engages in that conduct for that purpose or reason or for purposes or reasons that included or include that purpose or reason; *and*
>
> (ii) That purpose or reason was or is a substantial reason.

There is, however, no equivalent provision in the *Public Health Act*. Notwithstanding such absence, Fogarty J ruled that the use of the plural 'purposes' in section 53(2)(b) mandated a similar result, that is, a party did not lose the benefit of the exemption simply because entering into an agreement with Pharmac might be only one of its purposes.[45] Interestingly, although Fogarty J does not address the point, such reasoning would not require the contract making motive to be substantial. As long as it was 'a purpose', however marginal, section 53 would apply.

Somewhat surprisingly Glazebrook J reaches the same conclusion as Fogarty J on the issue of mixed purposes, although she gets there by a rather more direct route. As her Honour puts it:[46]

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44 Ibid [65].
45 Ibid [74].
46 Ibid [10].

> If a pharmaceutical supplier accedes to an arrangement proposed by Pharmac that might otherwise be open to challenge under the Commerce Act, it is likely that at least one of the purposes of the supplier would be anti-competitive. It would defeat the purpose of s 53 if the pharmaceutical supplier was at risk under the Commerce Act in such circumstances.

C The Perils of Interlocutory Indeterminism

In reaching the conclusions their Honours did, both Glazebrook and MacKenzie JJ placed great weight on the fact that they were being asked to decide matters in advance of any substantive hearing. However, this awareness influenced them, in different ways, and to different degrees. Nor is it clear precisely what they mean by sounding this cautionary note. It was certainly true that, as Panckhurst J had ruled, further facts needed to be found in order to determine the validity of the notice issued by a Commission properly seized of jurisdiction. It does not necessarily follow, however, that the jurisdictional point itself needs to wait upon events in the same way. Placing the correct construction on section 53 would seem to be as pure a question of law as one could find, and this remains true whichever way a court may choose to decide the jurisdictional issue.

Furthermore, it is one thing to say that the meaning of a particular provision can sometimes depend on the societal context in which it is enacted[47] and quite another to make it depend on narrow factual outcomes in a particular case. And yet this seems to be what Glazebrook and MacKenzie JJ are saying. In Justice Glazebrook's case this way of looking at things may derive from her Honour's suggestion that public benefit and reasonableness went to the case by case *application* of section 53 as well as to constructing its meaning. As we have already argued, however, this importation of case by case balancing into the analysis has nothing to do with any possible construction of section 53, however purposive. It is, in any event, entirely missing from Justice MacKenzie's analysis.

One might also observe that the whole point of having preliminary issues of law mount the appellate ladder before trial is to have those issues definitively and accurately determined. Remitting them back to the lower court achieves little but delay and expense.

VIII CONCLUSION

AstraZeneca has two immediate lessons, one for the legislature, the other for the courts. The lesson for the legislature is the short sightedness of scattering exemptions throughout the statute book rather than concentrating them in the competition statute itself where they can take advantage of a common

47 See *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767, 776. This principle is not new, see *River Wear Commissioners v Adamson* (1877) 2 App Case 743, 763 (Lord Blackburn). It is also conceded that changes in the social or economic climate post enactment can be relevant, not an issue here one would have thought, given the brief time that had elapsed since the passage of s 53.

terminology and a common jurisprudence. The lesson for the courts is that it can be dangerous to fill perceived gaps in a statute with open ended concepts such as reasonableness and public benefit especially when dealing with interlocking statutes. Once this particular interpretative methodology is accepted in relation to the exemption, there is no obvious logical reason why it should not be extended to the *Commerce Act*'s own operative provisions. If this occurred, the process would be hard to contain in a consistent or principled way. Better to stay with the words of the statute as Fogarty J did and wait for Parliament to make the appropriate amendments to secure what all members of the Court of Appeal agreed was the appropriate policy outcome: an exemption that could not be turned on its head to allow an anti-competitive assault on the public purse.

There is also a third lesson to be drawn from *AstraZeneca* and this time it is for would be law reformers. No evaluation of the effectiveness of past or projected attempts to reform competition law can be effective if it ignores the role of statutory exemptions. They are simply too obvious a way of bypassing or subverting the reform process. They need to be brought into it.