FACILITATING AND REGULATING COMMERCE

COMMENTARY ON THE CONFERENCE SESSION "REGULATING AND FACILITATING COMMERCE"

Susy Frankel*

The three papers that were presented in the Regulating and Facilitating Commerce session represented entirely different aspects of the notion of facilitating and regulating commerce. Douglas White provided a description of the emergence of competition law under the Commerce Act, and its development during Sir Ivor Richardson's time on the bench. Alan Galbraith considered whether the courts facilitate commerce. Bob Dugan discussed the way in which the Internet affects all areas of commerce, and consequently, many doctrines of law.

To the purist free market ideologist, to regulate is not to facilitate, but to hinder. However, this is an extremist view. All free markets have some kind of regulation. It is simply the degree of that regulation that determines its "free", or other, status. Many people are surprised to learn that the World Trade Organisation philosophy of free trade does not equate to trade without tariffs. World Trade Organisation free trade means reducing rather than eliminating tariff barriers and, in some instances converting, non-tariff barriers to tariff barriers.

New Zealand's competition policy, as reflected in the Commerce Act 1986, is the means by which any control of competition, in a general sense, is regulated by the law. There are a number of areas of law that do not incorporate their own competition policy and therefore effectively default to the Commerce Act, as regards rules of competition. In some

---

* Senior Lecturer in Law, Victoria University of Wellington.

instances, those areas may be better served by incorporating their own clear limitations on what is acceptable commercial conduct and what is legitimate competition. Otherwise, there is a risk that some anti-competitive behavior will fall through the holes in a general competition law and not be caught by the specifics of another law. Intellectual property provides a pertinent example. The Commerce Act expressly provides an exclusions from certain restrictive trade practice provisions if:[1]

> the entering into of a contract or arrangement or arriving at an understanding in so far as it contains a provision authorising any act that would otherwise be prohibited by reason of the existence of a statutory intellectual property right.

In addition, a person cannot take advantage of a substantial degree of market power, which would infringe the Act except, if the person is only enforcing a statutory intellectual property right.[2]

These intellectual property "exceptions" appear to rest on assumptions that intellectual property has its own balance between competing interests. The relevant competing interests in the field may be between trade competitors, but also, more generally, between owners of intellectual property rights and users of intellectual property rights, whether or not those users compete in trade with the owners. In the field of copyright, for example, the Copyright Act 1994 provides for permitted uses of copyright works.[3] These permitted uses are often mistaken for allowing competitors to freely compete with a copyright work. Permitted uses may allow competitors to make use of existing copyright works in certain prescribed ways, but the philosophy behind permitted uses is not one of permitting competition. It is largely to allow non-competing uses to flourish, in order to allow the creation of more copyright works. A copyright work must be original, but it is well recognised that originality is a low threshold to cross.[4] This low threshold means that copyright subsists in works that may be particularly apt to uses that are anti-competitive. Such works have included timetables, football coupons, fantasy football games, taxi log-books, and a host of "mundane" works, which copyright law categorises as original literary works. Permitted uses are really relevant to third party use of copyright works. The "mundane" copyright works are unlikely to be the subject of the main permitted uses, such as private study or research, or criticism or review. The most celebrated example of copyright being used anti-competitively, in relation to such works, comes from the

---

1 Commerce Act 1986, s 45.

2 Commerce Act 1986, s 36.

3 Copyright Act 1994, s 42-43.

4 Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (Lexis Nexis Butterworths, Wellington, 2002) 5.6.

European Union *Magill* case,[5] that concerned television timetables. The television station kept listings for its own use claiming copyright to prevent competitors from selling television guides including its listings. The European Court of Justice considered that the intellectual property right in question was too broad and infringed the competition policy of the European Union. It is beyond the scope of this commentary to discuss the reasoning of the Court of Justice[6] or likely outcome of such a case in New Zealand, but the subject matter shows how intellectual property rights can potentially be used in an anti-competitive way, not simply because it is an intellectual property right but because of the nature of the subject matter of the right.

A balance between protecting intellectual property, but not allowing anti-competitive conduct, is not expressly found in New Zealand intellectual property law. The Commerce Act 1986 cannot be used to fill this gap, because either the matter is excluded by dint of an intellectual property exception or the copyright work in question is part of a market and not a market in itself. The principle of market definition is discussed in *Tru Tone*,[7] outlined in Douglas White's paper.[8]

Alan Galbraith outlined the way in which he considered courts require commercial expertise in order to facilitate commerce. He stated that a number of potential litigants in commercial disputes may avoid the court process altogether and use arbitration in order to facilitate commerce or commercial needs.[9] In particular, he highlighted the absence of specialist commercial courts and Judges as being a deterrent to many potential litigants.[10] The call for specialist commercial courts was joined with enthusiasm at the conference by a number of commercial litigators. Notably, however, it was not embraced with enthusiasm by the Chief Justice, Dame Sian Elias. She is joined in the view that specialised courts may not be desirable by Australia's Federal Court Justice Robert French, who stated:[11]

> I have long been opposed in principle to the idea of "specialist" courts and "specialist" divisions within a court. The pressure for their formation seems to be reflective of a deep

---

5 *Radio Teletifs Eirann v Commission of the European Communities* [1995] 4 CMLR 718 (ECJ).

6 For further discussion see Valentine Korah "The Interface Between Intellectual Property Law and Antitrust: The European Experience" (2001) 69 Antitrust Bulletin 801.

7 *Tru Tomes Ltd v Festival Records Retailing Market Limited* [1988] 2 NZLR 35 (CA).

8 Douglas White QC "Facilitating and Regulating Commerce" (2002) 33 VUWLR, 821, 826.

9 Alan Galbraith "Facilitating and Regulating Commerce: The Court Process" (2002) 33 VUWLR, 841, 854.

10 Galbraith, above, 847.

11 Jeremy Curthoys "In Conversation with Justice Robert French" (2002) 50 Intellectual Property Forum 6, 8.

> human need for membership of small clubs of like minded persons who restrict access by speaking to each other in arcane shorthand-allegedly in the interests of efficiency. We have seen pressure for specialisation in intellectual property, competition law, human rights, tax, native title, industrial relations and others... One of the great strengths of the law is the facility it offers to cross-fertilise concepts and approaches from one area to another. Specialisation leads to intellectual inbreeding and risks the development of excessively comfortable relationships between judges and members of the relevant specialist bar. I am not satisfied that legal excellence is a product of these systems.

Galbraith suggested a revival and greater use of the Commercial List procedure used in the Auckland High Court.[12] Ironically, commercial litigators have argued that a Commercial List case is too commercially specialised to remain on the Commercial List.[13]

But what is a "commercial dispute"? Such a phrase is difficult to define. Commercial law may involve contractual matters of either a generalist or specialist nature (such as construction contracts), insolvency matters, tax issues, property matters, intellectual property matters, particularly patent cases,[14] to name but a few. Do each of these merit specialist judges? A Commercial Court may perhaps cover all commercial specialties or may be limited to some commercial areas. A Commercial Court that deals with many commercial areas, rather than just one, may be less likely to become overly narrow in its thinking or subject to doctrinal influences (see discussion below).

Without a doubt, our judiciary has specialists whose specialty is used in the deciding of cases, but that is not the same as having a specialist court with a dedicated Judge or Judges to a specialist jurisdiction.

Many reasons may be raised against over specialisation. First, in a litigation market, the size of New Zealand specialist courts may be an expensive luxury. Such Courts are more likely to operate in isolation and become narrow in their legal doctrine because the number of cases will be small, as will the number of specialist judges. Specialisation in a field of law, while important for counsel, is not necessarily important for the judiciary, whose specialty is the art of the Judge. The issue of specialisation is far from just a New Zealand concern and I draw on overseas sources, particularly the United States, to highlight some of the issues that judicial specialty raises, even in that large litigious forum.

---

12 Galbraith, above.

13 *Coopers Animal Health (NZ) Ltd v Ancare Distributors Ltd* [1990] 1 NZLR 408 (HC).

14 For a discussion of specialist Patent Courts in Australia, see Justice Douglas Drummond "Are the Courts Down Under Properly Handling Patent Disputes?" (2000) 48 Intellectual Property Forum 10.

The venerable Judge Learned Hand was opposed to specialist courts. He mastered specialist areas and has gone down in history as a leading judge in copyright, trade mark, patent, and maritime matters, among other commercial areas. Of Learned Hand's expertise, his biographer wrote[15]

> To most lawyers and judges admiralty and patent cases are particularly arcane. Most maritime and patent litigation is handled by a specialized bar, with its own bar associations and whose members seem to occupy a legal world apart. Yet Hand recurrently had to resolve disputes in these fields, and when Congress periodically considered establishing specialized courts to decide patent cases he steadfastly opposed those proposals: he believed that it was healthy, for the judges and for the law that generalists decide disputes even in specialized areas; he feared that specialized tribunals would produce unduly narrow judges.[16]

The author did, however, note that: "… maritime and patent lawyers would have little reason for worry about generalist judges if all incumbents had matched Learned Hand".[17]

The potential for "tunnel vision" of Judges because of the narrow field of cases in specialist courts was more recently highlighted by a Report on the United States Federal Court of Appeals for the Federal Circuit.[18] The Report also considered the potential that counsel and Judges may impose their own view of policy even when the case before them is more limited.[19] This concern over policy influence is also shared by Richard Posner who has argued that antitrust lawyers cannot be regarded as objective.[20]

> Antitrust theorists notoriously are divided over the goals of antitrust law - over whether that law is designed and should be interpreted to promote social and political values having to do with decentralizing economic power and equalizing the distribution of wealth or whether the law should merely foster the efficient allocation of resources…These cleavages, reflecting deep and at the moment unbridgeable divisions in ethical, social or political and economic thought, most basically over the justness and robustness of free markets, would not be eliminated by committing the decision of antitrust appeals to specialized courts; on the contrary, they would

---

15 Gerald Gunther *Learned Hand The Man and the Judge* (Alfred Knopf Inc, Washington DC, 1994) 307.

16 The United States has specialist appellate courts for some patent cases, but not for maritime cases. This can be compared to the United Kingdom which has specialist courts for patent cases and its maritime High Court is heralded as a world leading specialist Court.

17 Gunther, above.

18 American Bar Association Section of Antitrust Law *Report on the United States Federal Court of Appeals for the Federal Circuit* (ABA, Washington DC, 2002), 10.

19 Section of Antitrust Law, above.

20 Richard A Posner *The Federal Courts Challenge and Reform* (Harvard University Press, Cambridge (Mass), 1985 and 1996) 251.

> be exacerbated. A "camp" is more likely gain the upper hand in a specialized court…Not only would most appointments to a specialized antitrust court be made from the camps; but experts are more sensitive to swings in professional opinion than an outsider, a generalist, would be.

New Zealand commercial litigators argue that a specialised commercial court will bring greater certainty to the law and that certainty facilitates commerce. Posner is also not persuaded that specialised courts bring any measure of commercial certainty or uniform policy to the judicial process:[21]

> The appearance of uniform policy that would result from domination of the specialized court by one of the contending factions in antitrust policy would be an illusion; a turn of the political wheel would bring another of the warring camps into temporary ascendancy.

Bob Dugan's paper outlines the impact of the Internet on a number of doctrines of law. His overall conclusion is that New Zealand is better to stand back, rather than to jump into the trap of over-regulation.[22] Certainly international experience is showing that over-regulation is problematic in many fields and does not necessarily facilitate commerce or indeed protect the "little person". The situation in New Zealand where recent legislation, such as the Personal Property Securities Act 1999, fails to deal adequately with security interests relating to, or created in, the technological world, is less than desirable. Also regrettable is the malingering on the Order Paper of technology statutes, such as the Electronic Transactions Bill. Although, as it is arguably now outmoded, perhaps the snail pace of legislative reform is a blessing.

Nonetheless, inaction is not without its problems. Not all law is technology neutral. Some laws, for example, copyright law, have consequences for Internet activity, even though the drafters clearly had not performed their task with the Internet in mind. The act of infringing copyright by copying may, under New Zealand law, include transient copying, such as viewing material online.[23] Such transient copying may amount to an infringement, even though it is not something a copyright owner, who willingly places its work on the Internet, is likely to sue for. It is, however, a potential claim for the copyright owner who has not consented to its work being on the Internet or distributed in a particular way. Yet regulation has seen transient copying become a permitted use of copyright works in certain jurisdictions where the transient nature is, for example, to allow a computer user to view a website rather then to download a document. The New

---

21 Posner, above.

22 Benedict Dugan and Bob Dugan "The Internet and the Law" *Roles and Perspectives in the Law*, 853, 885.

23 Copyright Act 1994, s 2. Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (Lexis Nexis Butterworths, Wellington, 2002) 5.11.2.

Zealand situation is not clear, particularly not for bodies such as Internet Service Providers, who may not be immune from copyright infringement actions, even where they have no control over an infringement and have not ignored infringements to which they are alerted. Nonetheless, the "technology updating" of intellectual property law in the United States and Australia is subject to heavy criticism as being beyond the desirable reach of intellectual property law. As a relatively minor player in the international stage, New Zealand has not rushed to regulate the Internet and unless there is empirical evidence that this has harmed New Zealand's economic interests, there may be much to be valued in the "wait and see" approach.