Submissions on Draft Misuse of Market Power Guidelines

Background

- I have practised law as an employed solicitor in law firms in New Zealand and the United Kingdom, as a general counsel for public listed companies and, for the last 17 years, as a barrister.
- I have more than 35 years' experience in competition law in New Zealand and Australia including the application of competition law to sporting bodies, promoters and organisers, specifically those involved in motorsport.

Submissions

- 3. As an interested party in the Commission's draft Misuse of Market Power Guidelines (the "Guidelines"), I make the following comments and submissions.
- 4. For the reasons set out below, I suggest that "sporting" be added to "trade and professional bodies and non-profit organisations" in para. 9 of the Guidelines and that specific mention be made of sporting organisations and bodies under the sub-headings Substantial Market Power and What Factors Contribute to a Firm's Market Power? on page 9.
- 5. I have in the past witnessed (and still continue to witness) a poor level of understanding of competition law on the part of motorsport governing bodies. Some even persist with the mistaken belief that their not-for-profit status¹ with voluntary membership means that, under the Act's definition of "trade", they are not bound by the Act at all.

¹ Most of them are societies incorporated under the Incorporated Societies Act 1908

- 6. This is despite the authorisation decision of the Commission in *Speedway Control Board* of New Zealand (Inc)²; Decision No 242; [1989] NZComComm 20; (1990) 2 NZBLC (Com) 104,521, dated 14 December 1989 (the "SCB Decision") where at [27], the Commission said:
 - 27. A non profit-making objective does not exempt an association from the provisions of the Commerce Act, nor does the fact that membership of an association is voluntary nor that members have a common interest. Many trade and professional associations would meet those criteria. The Commission does not consider that these are relevant factors in its consideration of whether or not a matter before it falls within s.27, s.29 or other provisions of the Act.
- 7. In my experience, the poor level of understand may be because the services supplied by sporting organisations and bodies are not instantly recognisable by some of them as fitting within the traditional concept of a market for the purposes of the Act.
- 8. Also, it is at times simply too easy for a sporting organisation or body to justify disaffiliation of a member as just another form of discipline for bringing the association and/or the relevant branch of motorsport into disrepute when what they are doing is, in reality, misusing a substantial market power.

The Affiliation Market

9. The services supplied by sporting governing bodies and associations were described by the Commission in the SCB Decision as the "Affiliation Market":

[93]...the market for affiliation refers to the services which a body such as SCB supplies to promoters/clubs e.g. the provision of competition rules, officials' expertise, licensing of tracks

10. The relevance of the SCB Decision to the new section 36 and the motorsport Affiliation Market may not be immediately apparent to some of the current market participants because it was in relation to conduct in breach of sections 27 and 29 (now section 30) – because of course, the Act did not at the time permit applications for authorisation of conduct potentially in breach of section 36.

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² Speedway Control Board of New Zealand Incorporated changed its name in 1994 to Speedway New Zealand Incorporated

- 11. However, although now nearly 33 years old, the SCB Decision contains valuable precedent for sport governing bodies, especially in motorsport, that (so the Guidelines might perhaps go on to explain) have applicability to the new section 36 and potentially, for any of them considering applying for authorisation under the new sections 58(6A) to 58(6D).
- 12. While the major motorsport governing bodies in New Zealand have competitors in the Affiliation Market³, those alternative suppliers are unable to supply substantially close substitute services. This is due to the country-exclusivity held by the major governing bodies under their international affiliations to the world governing bodies⁴. Because of this, their competitors in the New Zealand market can not supply the drivers'/riders' international competition licences that are generally needed to compete in the international motorsport events outside New Zealand that are recognised by those world bodies which are the most prestigious ones and therefore the ones most important for the development of a driver's or rider's professional racing career.
- 13. It is likely for this reason that the competitors to the main participants in the motorsport affiliation services market have struggled to gain the foothold they have in their home market, Australia: The Australian motorsport market is much larger than New Zealand's, meaning there are more professional careers available domestically and the desire and need to compete offshore to further a career is not as strong. This in turn means that there is not such a demand for international licences. Indeed, there are only a handful of motorsport drivers and riders in New Zealand who make a living as a professional. While nearly all career-aspirant New Zealand drivers and riders must leave their country to make a living, in Australia, they need not.

³ eg. Australian Auto-Sport Alliance Pty Ltd/AASA (NZ) Limited, Recreational and Competitive Event Resources (RACERS)

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⁴Eg. Fédération Internationale de l'Automobile, Fédération Internationale de Motocyclisme

- 14. There is sometimes the belief amongst motorsport affiliation service suppliers that so long as their rulebook does not expressly say so, pressure on a members' officers (nearly all of whom are volunteers) and on the promoters and organisers (eg. subtle threats of disaffiliation, less favourable treatment in the allocation of dates/events, the withholding of licences/permits etc.) is an acceptable response to the member having used or having threatened to use the affiliation services of a competitor.
- 15. Perhaps a reminder could therefore be added to the Guidelines that something less formal than rules or contracts between an association and its members, like merely a consensus or meeting of minds leading to an expectation as to future conduct may be in breach of section 36 eg. Commerce Commission v Ophthalmological Society of New Zealand Inc. (2004) 10 TCLR 994 (HC) at [104].
- 16. The SCB Decision also contains helpful authority on what has at times been the practice of some motorsport governing bodies to participate in price fixing, restricting output and market allocating in the market for competitors, dates and events. This, so some believe, being because they do not participate in that market and that it is a market contested solely between their event-promoter and event-organiser members.
- 17. While probably arrangements containing cartel provisions and therefore not appropriate for the Guidelines, the withholding of the supply of affiliation services to enforce a cartel provision will probably also breach section 36.
- 18. I therefore suggest that something be added to the Guidelines along the lines of the Commission's response in the SCB Decision to a proposal that the governing body did not participate in the market for competitors, dates and events:

In this case, two or more clubs/promoters are in competition with each other in acquiring the services of speedway competitors and the clubs/promoters enter into an arrangement to which SCB is a party, through their agreements with SCB. Further the purpose of the arrangement is to restrict the supply of speedway tracks and the services of speedway competitors to other speedway promoters. SCB has explicitly stated this purpose.⁵

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⁵ SCB Decision at [97]

And:

Thus the agreement between SCB and promoters/clubs restricts the supply of speedway tracks and the services of speedway competitors to non-member promoters. The Commission considers that this restriction represents an exclusionary provision in terms of s. 29. The relevant provisions are clause l(c) and l(h) of the Promoter's Agreement and Rules 4-1-18 and 4-2-1.6

19. This approach was re-affirmed in New Zealand Rugby Football Union Incorporated; Decision No 580; [2006] NZComComm 10; 2 June, 2006:

325. The Commission also notes that, in accordance with the approach taken in Re Speedway Control Board of NZ (Inc) [1989] NZComComm 20; (1990) 2 NZBLC (Com) 104,521, it is legitimate for the Commission, in assessing the effects of agreements over which the Commission has jurisdiction, also to consider the effect of any "interconnected" agreements. (Such an approach appears consistent with s 3(7)(b).)⁷

Chris Abbott 18 November 2022

⁶ SCB Decision at [99]

For the purposes of sections 27 and 28, the engaging in conduct shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if—

⁷ Section 3(7)(b) of the Commerce Act 1986:

⁽a) the engaging in that conduct; and

⁽b) the engaging by that person in conduct of the same or a similar kind—taken together, have or are likely to have the effect of substantially lessening competition in that market.