

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.

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



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

⁵ SCB Decision at [97]



