THE *COMMERCE COMMISSION V AIR NEW ZEALAND* [2011] NZCA 64

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Abstract: This paper examines a recent challenge to the Commerce Commission's power to impose non-disclosure orders under the Commerce Act 1986. Argument before the Court claimed the orders unduly infringed on the NZBORA right to justice and freedom of expression. While the paper endorses the final result reached by the Court, it suggests that the treatment of freedom of expression raises questions about the robustness of rights protection in New Zealand.

Key words: NZBORA; freedom of expression; right to justice; commerce; non-disclosure orders

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Introduction

Commerce Commission v Air New Zealand (***Air New Zealand***)[1] is notable for those interested in promotion of fundamental rights for a number of reasons. The case involved a challenge by way of judicial review to the imposition of non-disclosure orders by the Commerce Commission pursuant to s 100 of the Commerce Act 1986. In allowing the Commission's appeal the Court of Appeal was required to address aspects of freedom of expression and the right to justice as affirmed in the New Zealand Bill of Rights Act 1990 (**NZBORA**).[2] This note briefly summarises the background to the case before

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1 *Commerce Commission v Air New Zealand* [2011] NZCA 64.

2 See New Zealand Bill of Rights Act 1990, ss 14 and 27 respectively.

addressing the aspects of the case that touch on NZBORA. The Court's approach in respect of the right to justice is endorsed as appropriate, but it is contended that the methodology employed in respect of the Court's consideration of freedom of expression raises important questions over the robustness of rights protection in New Zealand.

Background

The Commerce Commission is empowered to issue non-disclosure orders in respect of certain information in the course of discharging its functions under the Commerce Act 1986, and other empowering legislation.[3] Section 100 of the Commerce Act provides that the Commission may, subject to prescribed timeframes,[4] make an order prohibiting the "publication or communication" of "any information or document or evidence" given to or otherwise obtained by the Commission in connection with its operations.[5] It is an offence to publish or communicate any information or document or evidence contrary to a s 100 order, punishable on summary conviction by a fine.[6]

The impetus for *Air New Zealand* was an investigation by the Commission into alleged cartel activity in respect of the supply of air cargo services.[7] As part of its investigation, the Commission required a number of Air New Zealand employees to attend a compulsory interview conducted by a member of the Commission and Commission staff.[8] Counsel representing the employees were present at each of the respective interviews. At the majority of those interviews, the Commission issued an order pursuant to s 100 to prohibit disclosure by the interviewee and his or her counsel of anything said at the interview. The order purported to cover both the questions put to the

3 See, for example, Telecommunications Act 2001, s 15(i), which applies s 100 of the Commerce Act 1986 to the Telecommunications Act *mutatis mutandis*.

4 Commerce Act 1986, s 100(2).

5 Commerce Act 1986, s 100(1).

6 Commerce Act 1986, s 100(4).

7 See Commerce Act 1986, ss 27 and 30.

8 See Commerce Act 1986, s 98(c).

interviewee by the Commission, the interviewee's responses and any other documentary information exchanged between the parties.[9]

The Commission ultimately issued proceedings against Air New Zealand (and other airlines implicated in the Commission's investigation). In response, Air New Zealand's solicitors sought the discharge of the s 100 orders. The Commission indicated that it was willing to vary the orders so that the matters discussed at each of the interviews could be provided to named counsel and solicitors. Air New Zealand rejected that approach on the basis that "it did not allow the solicitors to discuss any of the information freely with their clients, potential witnesses (including those interviewed by the Commission) and counsel and solicitors for other defendants in the air cargo proceeding or defendants in the related proceedings".[10] As a result, Air New Zealand applied to judicially review various aspects of the Commission's s 100 orders. This was the first opportunity for s 100 to be considered judicially in the context of alleged cartel conduct.

In the High Court, Air New Zealand made three contentions that were ultimately put in issue on appeal. The first was that the scope of s 100 is limited to the purpose of protecting third party confidential information supplied to the Commission.[11] The purpose of protecting the integrity of the Commission's investigative process, which the Commission claimed in this case, was not a legitimate use of the s 100 power.[12] Andrews J rejected this contention, finding that the Commission was empowered to prohibit disclosure of the contents of the interviews.[13]

Air New Zealand's second contention was that questions put to the interviewee by the Commission were not within the scope of s 100. Only the information, documents, and answers given by an interviewee could be made subject to an order prohibiting disclosure. Air New Zealand's third contention was that the s 100 orders must necessarily expire on the commencement of

9 While the s 100 orders issued purported to extend to the underlying facts discussed in the interview, the Commission later conceded that this was not its usual practice nor was it its intention is the present case.

10 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [14].

11 This purpose had previously been upheld as a valid use of s 100 in a different context: see *Lion Corporation Limited v Commerce Commission* HC Wellington M666/86, 5 March 1987 at 15.

12 For an argument to this effect see David Goddard "Section 98 of the Commerce Act 1986: Where Do the Limits Lie?" (Paper presented to the Competition Law and Policy Institute of New Zealand, Wellington, 6 August 2006) at 19-23.

13 *Commerce Commission v Air New Zealand* HC Auckland CIV-2008-404-8352, 21 October 2009 at [44].

High Court proceedings. Andrews J ultimately accepted both these contentions,[14] and provided declaratory relief that the s 100 orders be of no further effect.[15]

All three findings were appealed (the first by Air New Zealand, and the second and third by the Commission), with the Court of Appeal finding in favour of the Commission in respect of all three issues. Only the first and third issues are examined in detail in this note. Notably, the appeal proceeded at the level of principle rather than the specific application of the Commission's approach to the s 100 orders, as the Commission did not seek for the s 100 orders to be re-instated if the High Court judgment was overturned. Accordingly, the Court of Appeal judgment may be of limited precedential value where the application of s 100 is challenged. However, that approach allowed the Court to consider the right to justice and freedom of expression at a principled level, squarely addressing the nature of s 100 and its relationship with NZBORA.[16]

Surviving the Issuing of Proceedings and the Right to Justice

It is convenient to address the right to justice first, which is related to Air New Zealand's contention that s 100 orders must expire when proceedings are filed. At issue was s 27(3) of NZBORA, which provides for equality of treatment between the Crown and individuals in the bringing and defending of civil proceedings. Air New Zealand contended that continuation of the s 100 orders after proceedings had commenced conferred on the Commission an advantage in litigation in breach of s 27(3). Andrews J had agreed, describing the orders as having a "chilling effect" on the ability to instruct counsel, and for counsel to provide advice.[17]

The Court of Appeal ruled that s 27(3) does not require that the exercise of a statutory power cease or be deferred as the result of the commencement of civil proceedings. Section 100 orders may therefore survive the issuing of

14 Ibid at [37], [60].

15 Ibid at [103].

16 For this reason the Court of Appeal's judgment is likely to be directly relevant to analogous statutory provisions, such as the Financial Markets Authority Act 2011, s 44 and the Takeovers Act 1993, s 31X.

17 *Commerce Commission v Air New Zealand* HC Auckland CIV-2008-404-8352, 21 October 2009 at [70].

proceedings if their continuation is for a proper purpose.[18] In the context of *Air New Zealand* a proper purpose would be where the investigation into alleged cartel conduct was continuing, which the Court accepted was the case. However, the Court emphasised that despite the continuation of the statutory power, it should be exercised "with restraint", and both the Commission and the Court will monitor the effect of s 100 orders to ensure no unfairness results as litigation proceeds.[19] With respect, this must be the correct outcome if it is accepted that the Commission has a legitimate interest in protecting the integrity of its investigations.

It has been argued that *Air New Zealand* presents an unreasonable interference with the right to be effectively represented by counsel.[20] The criticism is that the case gives s 100 an effect that is "broad and effectively override[s] legal privilege, denying parties like [Air New Zealand] the ability to discuss interview contents with counsel and thereby hampering its defence".[21] However, the s 100 orders issued by the Commission did not prevent any party from consulting counsel fully and frankly. The issue was the inability of counsel for Air New Zealand to consult openly with third parties – potential witnesses and fellow defendants – and not the ability of counsel to consult openly with their clients.[22] Where counsel are present at compulsory interviews, s 100 orders are unlikely to interfere with the right to justice as counsel and client (ie, the interviewee) are both able to discuss all matters freely. Further, if any interference can be shown to exist at all on the circumstances of a particular case it is likely to be demonstrably justifiable: any restriction is temporary, subject to judicial supervision to avoid prejudice, and not directly concerned with the solicitor-client relationship.[23]

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18 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [107].

19 Ibid at [114].

20 Lee Long Wong "Scope of Commerce Commission's powers under s100 of the Commerce Act 1986" [2010] 1 Human Rights Agenda 26 at 28.

21 Ibid at 27-28.

22 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [14]. The issue of counsel potentially having more information than his or her clients only resulted because of the Commission's proposed variation to the s 100 orders.

23 A slightly different issue arises if counsel's ability to advise clients is interfered with because counsel is acting for both an employee and the company at the same time. However, this is likely to create a conflict of interest in any event, prompting responsible counsel to refuse to act for one or both parties.

Scope of s 100 and Freedom of Expression

At the heart of *Air New Zealand* was the issue of the scope of s 100, which touched on the freedom of expression affirmed in s 14 of NZBORA. The Court observed the fundamental importance of the freedom of expressions,[24] but there is obvious potential for statutory powers to prohibit disclosure of certain information to interfere with this freedom. In resolving that tension, the Court applied the methodology for addressing NZBORA rights set out in *R v Hansen*.[25] The first step of that methodology is to ascertain Parliament's intended meaning in the absence of an NZBORA, values-based interpretative overlay. The Court found that the statutory language was deliberately broad, and there is nothing to indicate that the scope of s 100 is intended to be limited to third party confidential information.[26] The integrity of the Commission's investigatory process was a purpose related to the functions of the Commission under the Commerce Act, and so that purpose was found to fall within the ambit of s 100. The Court felt able to reach this interpretation quickly, and apparently without detailed consideration of the competing arguments.

With respect, the Court appears to have overlooked a tenable argument that s 100 is primarily concerned with the protection of third party information. Section 100 refers expressly to the circumstance where "any application for, or any notice seeking, any clearance or authorisation under Part 5" is before the Commission.[27] In this context, the Commission is not investigating potential breaches of competition law, but considering an application made to it. It is extremely unlikely that the Commission will find it necessary to protect its investigatory process, as the covert behaviour that characterises cartels is not present. Rather, the Commission will only be concerned to protect third party confidential information, so that parties engaging with the Commission do so fully and openly.

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24 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [67].

25 *Hansen v R* [2007] NZSC 7 at [92].

26 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [45].

27 Commerce Act 1986, s 100(1).

Only after this specific example is given does s 100 proceed in more generic terms to refer to "any other investigation or inquiry under this Act". It may be reasonable to infer that this generic language is intended to refer to processes similar to the specific clearance and authorisation applications specifically mentioned, [28] especially as analogous provisions are not expressed in this manner.[29] Accordingly, and despite the Court's conclusion, there does appear to be some rationale for preferring a narrow interpretation of s 100. This alternative interpretation is a tenable one, and as discussed below this may have important implications for the appropriateness of the methodology adopted and conclusion reached by the Court.

The second step in the *Hansen* methodology is to determine whether Parliament's intended meaning is apparently inconsistent with a relevant right or freedom. It was accepted by the Court that s 100 does limit freedom of expression,[30] and given the inherent nature of a prohibition on disclosure imposed by a valid s 100 order this finding appears to be uncontroversial. The third step in the *Hansen* methodology is to determine whether any apparent inconsistency identified in step two is a justified limitation in terms of s 5 of the NZBORA. In undertaking this third step the Court applied the test established in *R v Oakes*.[31] The first limb of the *Oakes* test is to determine whether the limiting measure (s 100) is sufficiently important to curtail the right to freedom of expression. [32] The Court emphasised the generic importance of the preservation of investigative integrity, which is a conclusive reason for withholding information under the Official Information Act 1982,[33] and has been recognised as a general right in New Zealand case law with respect to police investigations.[34] The Court also accepted the Commission's contention that the covert and subversive nature of cartel conduct required particular techniques to ensure effective detection and prosecution, including confidentiality of investigatory processes. In this context, the proposition that a

28 Application of the *ejusdem generis* maxim of statutory construction would appear to support this conclusion.
29 See Financial Markets Authority Act 2011, s 44; Takeovers Act 1993, s 31X.
30 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [65].
31 *R v Oakes* [1986] 1 SCR 103.
32 *Hansen v R* [2007] NZSC 7 at [104].
33 Official Information Act 1982, s 6(c).
34 *Commissioner of Police v Ombudsmen* [1988] 1 NZLR 385.

limited impairment of the right to freedom of expression was sufficiently important was described as "self-evident".[35]

The Court found there to be a rational connection between s 100 and the protection of the integrity of the Commission's investigatory process,[36] and that prohibitions on disclosure of information were necessary for this end.[37] The temporary nature of a s 100 order meant that s 100 was proportionate and no more than necessary to achieve the statutory objective.[38] Thus, the second limb of the *Oakes* test was also found to be satisfied. The jurisdiction within s 100 to prohibit disclosure of information for the purpose of protecting the integrity of the Commission's investigatory process in the context of cartels was therefore found to be a justified limit on the right to freedom of expression in terms of s 5 of NZBORA. This finding entailed a rejection of Air New Zealand's contention that the scope of s 100 is limited to the protection of third party confidential information.

If the *Oakes* test had not been satisfied, and s 100 was not found to be a justified limit on freedom of expression, the *Hansen* methodology would have then required application of s 6 of NZBORA. Section 6 requires that statutes be interpreted in a manner consistent with NZBORA rights where this "can" be done. *Hansen* makes this inquiry into interpretative consistency secondary to both an initial construction of the statutory provision and application of s 5. This is consistent with the understanding of NZBORA as a "bill of reasonable rights", not absolute rights.[39] In line with *Hansen*, the finding of a justified limitation on the right to freedom of expression in *Air New Zealand* meant there was no need to take the NZBORA analysis further.

While this effectively dealt with the primary NZBORA issue in the case, the court's application of *Hansen* in this context may reveal itself to be open to question on policy grounds. In particular, the "two-phase" interpretative approach promoted in *Hansen* does not appear to always afford due

35 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [70], [73].

36 Ibid at [74].

37 Ibid at [75].

38 Ibid at [74], [76].

39 Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 251 at 277. Compare the dissent of the Chief Justice in *Hansen v R* [2007] NZSC 7 at [6].

consideration to the promotion of NZBORA rights and freedoms.[40] That two-phase approach creates a separation between 'ordinary' statutory interpretation, which appears to be largely textual,[41] and a secondary consideration of NZBORA rights. The wider context of values that might influence the Court's construction is only applied where text and purpose reveal some perceived deficiency. This approach has been described as "dangerous" from a rights-based perspective as it reduces s 6 of NZBORA to a supplementary consideration,[42] and *Air New Zealand* appears to bear out this concern. As argued above, a tenable alternative interpretation based on the text and purpose of s 100 appears to have been available to the Court, although it was not addressed.[43] If this alternative approach was recognised, the s 6 interpretative requirement might have proved decisive. However, on the *Hansen* approach s 6 never features. This is partly because of the mandated order for considering ss 5 and 6 under the *Hansen* methodology, but also because the two-phase interpretative approach provides for a provisional and limited construction of the relevant statutory provisions that may never be revisited. The result is that the *Hansen* methodology appears to have obscured a full consideration of the freedom of expression that might otherwise be expected in light of each of ss 4-6 of NZBORA.

None of this is to say that the Court of Appeal did not reach the correct result in *Air New Zealand*. Given the compelling and obvious interest in maintaining the Commission's investigatory integrity, and the legislative history underpinning s 100,[44] the Court's resolution probably accords best with Parliament's intent.[45] However, it is worth questioning whether this is sufficient where NZBORA rights and freedoms are involved. The Courts ought to ensure that NZBORA issues are fully and openly addressed in the

40 The phrase is borrowed from Claudia Geirigner "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press in association with New Zealand Centre for Public Law, Wellington, 2008) 69 at 90-92.

41 In addition to *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [45] see *Hansen v R* [2007] NZSC 7 at [237]

42 Geirigner "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*", above n 40, at 91.

43 To be clear, it is not intended to argue that the more narrow interpretation advocated for by Air New Zealand is necessarily the better interpretation of s 100, just that the alternative interpretation is sufficiently strong that it is not "strained" in the sense suggested by Cooke P in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272.

44 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [52]-[55].

45 Under s 4 of the New Zealand Bill of Rights Act 1990, Parliament's intention is dispositive.

interpretation of relevant statutes, as well as seeking to arrive at the correct construction of Parliament's intent. *Air New Zealand* suggests that the *Hansen* methodology does not guarantee this, and in some circumstances may stifle rather than encourage sophisticated consideration of the rights implications of particular interpretative approaches.

NZBORA and Administrative Discretion

A final NZBORA issue is the Court's approach to administrative discretion. In explicating its reasoning, the Court made much of the distinction between the conferral of a statutory power in terms consistent with NZBORA, and the subsequent exercise of that power in specific circumstances. For instance, the Court emphasised that despite the wide scope of the justified limitation that s 100 represents, the specific decision to impose or continue a s 100 order must be taken carefully, and any established orders should be kept under review.[46] This might be taken as recognition that NZBORA analysis does not stop with the valid conferral of a statutory power, but must also be undertaken in respect of the specific exercise or practical operation of that power.[47] However, the Court went on to reject a submission to this effect, stating that "[t]he *Hansen* analysis has justified the existence of s 100 and there is no need to repeat the exercise".[48]

This approach may be at odds with Supreme Court precedent, where it was found in the context of a compulsory urine sample taken pursuant to a validly and legally exercised rule-making power that the individual instance of collection might still breach the right to freedom from unreasonable search and seizure affirmed in s 21 of NZBORA.[49] Perhaps *Air New Zealand* can be distinguished on the basis that it does not involve a rule-making power, but the Court of Appeal itself did not draw any such distinction. Regardless, it is unclear precisely what the position of the Court of Appeal is. One possible interpretation is that the Commission is merely required to act reasonably in

46 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [46].

47 See GDS Taylor and JK Gorman *Judicial Review: A New Zealand Perspective* (2 ed, LexisNexis, Wellington, 2010) at 804.

48 *Commerce Commission v Air New Zealand* [2011] NZCA 64 at [77].

49 *Cropp v Judicial Committee* [2008] NZSC 46 at [43].

an administrative law sense whenever it issues s 100 orders, but further NZBORA analysis is not required. Alternatively, NZBORA rights might be implicated in Commission decision-making as mandatory relevant considerations. The latter is the preferable approach. It is in the specific application of legislation and the exercise of administrative discretion that NZBORA rights and freedoms are most vulnerable. Despite the opacity of the Court's reasoning on this point, any interpretation to the effect of public decision-making on NZBORA rights and freedoms is irrelevant ought to be resisted.