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Overview

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New Zealand's competition laws are found in the Commerce Act 1986. Its purpose is 'to promote competition in markets for the long-term benefit of consumers within New Zealand'. This is achieved by regulating mergers and market behaviour.

Structure of the regulator

The Commerce Commission (the Commission) is the statutory body responsible for administering the Commerce Act. It is also responsible for administering certain consumer protection and sector-specific legislation.

The Commission typically consists of five full commissioners, a telecommunications commissioner, two cease-and-desist commissioners and two associate commissioners. The Commission employs economists, lawyers and industry experts to support the commissioners. The staff collect information, receive submissions and undertake investigations in order to provide the commissioners with the information and recommendations necessary to make decisions. Except in limited circumstances, businesses and their advisers interact with the investigating teams, rather than the commissioners.

Relationship with government

The Commission is independent of both the executive and legislative arms of government. Although commissioners are appointed by the governor general on the recommendation of the minister of commerce, commissioner appointments are made based on a person's experience and knowledge, rather than on his or her political allegiance. Indeed, the Commission is frequently commended for its political neutrality.

Merger regulation

The Commerce Act prohibits the acquisition of shares or assets of a business if that acquisition would have the effect, or likely effect, of substantially lessening competition in any New Zealand market. It applies to offshore acquisitions to the extent they affect a market in New Zealand.

The Commerce Act provides for a voluntary pre-transaction notification regime, permitting

the acquirer to apply to the Commission for a clearance or an authorisation of the acquisition. The Commission will grant a clearance if it is satisfied that the acquisition will not, or will not be likely to, substantially lessen competition in any New Zealand market. The Commission has published Mergers and Acquisitions Guidelines, which outline the analytical approach it follows. The Commission has an active economics division, which often undertakes econometric analysis and merger simulation to assist with the qualitative analysis and the decision-making process.

Acquisitions that would be likely to substantially lessen competition may be authorised by the Commission if it is satisfied that the economic benefits to the New Zealand economy as a whole (both producers and consumers) flowing from the acquisition would outweigh any anti-competitive detriments.

The Commerce Act requires the Commission to reach decisions regarding clearance and authorisation applications within 10 and 60 working days respectively. However, in practice these periods are regularly extended with the agreement of the applicants. For clearance applications, recent experience indicates that 40 to 60 working days should be used as an approximate guide. Ultimately, the time taken depends on the Commission's workload at the time and the complexity of the issues raised.

If an acquiring firm does not apply to the Commission for a clearance or an authorisation, the Commission can commence proceedings in the High Court seeking an injunction to prevent the acquisition occurring, or penalties and divestment if it is able to prove that a breach of the merger provisions has occurred. Vendors can also be liable under the ancillary liability provisions (a point recently confirmed by the Court of Appeal). Third parties can also seek damages for breach in the High Court.

The Commission (via its two specialist cease and desist commissioners) can also issue cease-and-desist orders, which are temporary administrative injunctions that prevent the continuation of anti-competitive behaviour. Cease-and-desist orders can

only be issued where it is necessary to act urgently in the interests of the public and to prevent serious loss or damage.

Anti-competitive practices – regulation of market behaviour

The Commission is responsible for investigating anti-competitive market behaviour and can, where it deems appropriate, commence proceedings in the High Court against any body corporate or individual.

In appropriate cases, the Commission may also issue a cease-and-desist order in respect of such behaviour.

The Commerce Act does not contain an exhaustive list of behaviours that are specifically prohibited. Rather, there is an overriding prohibition against any provision of a contract, arrangement or understanding that has the purpose, effect, or likely effect, of substantially lessening competition in any market.

However, the Commerce Act does specifically prohibit:

- price fixing, which is deemed to substantially lessen competition in a market;

- exclusionary provisions (although there is a defence if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market);
- resale price maintenance; and
- a firm with a substantial degree of power in a market taking advantage of that market power for a proscribed anti-competitive purpose.

As with mergers, the Commission can grant authorisation for certain practices that might otherwise breach the Commerce Act (although not for a misuse of market power) if it is satisfied that the economic benefits to New Zealand as a whole flowing from the practice would outweigh any anti-competitive detriment.

The Commission has implemented a leniency policy designed to destabilise cartel behaviour affecting New Zealand markets. Under the policy, the first person to inform the Commission of cartel behaviour receives immunity from prosecution. Cartel investigations remain a focus for the Commission.

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Bell Gully is a member of the GCR 'Top 100' list of top competition law practices worldwide and was recently identified as New Zealand's leading competition law practice in a review of New Zealand by GCR. The team provides the full range of competition law advice and is comprised of competition law specialists with corporate and litigation expertise.

Bell Gully enjoys a strong relationship with the Commerce Commission, and its frequent involvement in international mergers and cartel investigations means it has established excellent relationships with leading law firms and economic consultancies internationally.

The competition law team has successfully assisted clients in many major New Zealand and cross-border matters. Recent experience includes: acting and obtaining Commission clearance for pharmaceutical company Schering-Plough on its bid for Dutch competitor Organon BioSciences (owned by Akzo Nobel) and advising British American Tobacco in respect of the New Zealand aspects of its worldwide sale of various cigar brands. Bell Gully is also representing Woolworths on its bid for discount retail chain The Warehouse Group. Bell Gully successfully led the High Court appeal against the Commission's decision to decline clearance for that proposal, and is acting for Woolworths as the matter proceeds to the Court of Appeal. Bell Gully has successfully resolved a number of investigations into market conduct for its clients, and is currently acting for various firms alleged to be involved in major cartels.