



Private Antitrust Litigation

in 35 jurisdictions worldwide

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2009



Published by
GETTING THE DEAL THROUGH
in association with:

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Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation?

In New Zealand, private antitrust litigation has developed as the poor cousin to regulatory proceedings brought by the competition law regulator, the Commerce Commission (the Commission). Although the current legislation, the Commerce Act 1986 (the Act), has been in effect for more than 20 years and provides for both regulatory and private action against parties engaged in anti-competitive conduct, comparatively few cases have been brought by private litigants.

However, in recent years legislative changes have consistently strengthened the ability of both the Commission and private litigants to bring proceedings for breaches of the Act's restrictive trade practices and business acquisition provisions, and the Commission has had several well-publicised successes. Although regulatory proceedings continue to dominate, there appears to have been a corresponding increase in private antitrust litigation (sometimes assisted by admissions made by defendants in the Commission's parallel proceedings).

Where private action has been taken, for example, in relation to the New Zealand effects of the international vitamins cartel, the plaintiffs have generally been companies rather than individuals. No plaintiff's class action bar has developed. This reflects a number of factors, including the high cost of antitrust litigation and the absence of American-style class action proceedings and contingency fee arrangements. The outcome of recent legislative changes providing for a limited form of contingency fee and a current Rules Committee review of the possible introduction of class action procedures are both matters for the future, but clearly will not result in increased levels of private antitrust litigation in the short term.

The more immediate changes are likely to be in the regulatory context, in particular:

- work on further harmonisation of New Zealand and Australian competition laws, which already have a great deal in common substantively, to enhance enforcement between the two jurisdictions has been underway for some time;
- the Commission continues to speak positively about the criminalisation of cartel conduct as a matter for further consideration (and in Australia the government is moving to criminalise serious cartel conduct); and
- in penalty proceedings under the Act, the High Court has indicated a willingness to uphold jurisdiction over foreign residents, with the first judgment on jurisdiction at appellate level likely late in 2008.

Inevitably, these developments will flow through into private antitrust litigation and can be expected to continue to strengthen the ability of private litigants to seek redress for breaches of the Act.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Yes. Part 6 of the Act expressly provides for private antitrust actions.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The High Court has jurisdiction to hear private actions for damages and applications for injunctions, as well as proceedings for the recovery of pecuniary penalties brought by the Commission. There is no specialist competition law tribunal.

4 In what types of antitrust matters are private actions available?

Private actions for damages and applications for injunctive relief are available for any breach of the Act's restrictive trade practices provisions (part 2 of the Act) and business acquisition provisions (part 3 of the Act). Private actions seeking injunctive relief for breach of the controlled goods and services provisions (part 4 of the Act) are also available (although we are not aware of any such actions).

The restrictive trade practices provisions of the Act prohibit collusive (cartel) conduct and unilateral conduct by a party having a 'substantial degree of power in a market'. In summary, the Act:

- prohibits a person from entering into or giving effect to a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition;
- deems all price-fixing arrangements (as defined in the Act) to substantially lessen competition regardless of their actual impact on competition in the market;
- prohibits a person from taking advantage of its substantial market power for the purpose of restricting the entry of another person into that (or any other) market, preventing or deterring them from competing or eliminating them from the market; and
- prohibits resale price maintenance.

In relation to business acquisitions, the Act prohibits acquisitions that would have or would be likely to have the effect of substantially lessening competition in a market.

5 What nexus with the jurisdiction is required to found a private action?

In the first instance, jurisdiction exists where a defendant is present in the jurisdiction, that is, is resident or carrying on business in New Zealand. This includes conduct outside New Zealand by a defendant who is resident or carrying on business in New Zealand, to the extent that such conduct affects a market in New Zealand (see section 4(1)).

In the case of defendants who are not resident or carrying on business in New Zealand, the High Court may assume jurisdiction

where the requirements of the High Court Rules for the service of process out of the jurisdiction are met (rules 219–220). For the purposes of private antitrust litigation, this is most likely to be where (under rule 219):

- any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand;
- it is sought to compel or restrain the performance of any act in New Zealand; or
- any person out of New Zealand is a necessary or proper party to a proceeding properly brought against some other person duly served or to be served within New Zealand.

Where a defendant who is not resident or carrying on business in New Zealand protests the jurisdiction of the High Court, the plaintiff must establish that there is a good arguable case against the defendant. As a matter of approach, the court starts from the premise that a foreign resident abroad will not be lightly subject to the local jurisdiction, but recent cases indicate the diminishing weight given to this principle (see *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 and *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805). In assessing whether there is a good arguable case, the court considers both whether the plaintiff has complied with rule 219 and the merits of the plaintiff's claim. The touchstone is whether the claim is more than merely speculative or conjectural.

The issue of jurisdiction under the Act, in particular in relation to conduct outside New Zealand by persons not resident or carrying on business in New Zealand, has recently been in issue in the *Koppers Arch* cartel penalty proceedings. The High Court upheld its jurisdiction over three foreign resident individuals. That decision has been appealed to the Court of Appeal, and was heard by the court in June 2008, with judgment awaited at the date of publication. The court's judgment will be the first appellate consideration of such issues under the Act.

The High Court has also held that jurisdiction exists over overseas companies that are not resident or carrying on business in New Zealand if those companies give effect to overseas anti-competitive conduct in New Zealand through New Zealand subsidiaries (see *Commerce Commission v British American Tobacco Holdings (NZ) Ltd* (2001) 10 TCLR 320 and *Bomac*).

- 6** Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes. Private actions can be brought against both companies and individuals, including those from other jurisdictions (see question 5).

As well as providing for liability for contravention of the Act, the Act also provides for ancillary liability, including for being in any way directly or indirectly, knowingly concerned in, or party to, a contravention of the Act. In the context of penalty proceedings brought by the Commission, the High Court has applied identically worded ancillary liability provisions to impose penalties on the employees of the companies primarily responsible for the breaches of the Act. See the *Koppers Arch* penalty judgments at (2006) 11 TCLR 581 and unreported, 4 October 2006, High Court, Auckland, Williams J. See also the Court of Appeal's recent judgment in relation to accessory liability in Commission penalty proceedings for breach of the business acquisition provisions of the Act, *New Zealand Bus Limited v Commerce Commission* [2007] NZCA 502 (the Commission has sought leave to appeal the accessory liability issue to the Supreme Court.)

Although to date the liability of individuals, in addition to their corporate employers, does not appear to have been considered by the High Court in private litigation, there is no reason to think the

court would take a different approach from that taken in penalty proceedings.

- 7** If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

New Zealand is not divided into multiple jurisdictions.

Private action procedure

- 8** Are contingency fees available?

Contingency fee arrangements in which the fee of the successful plaintiff's lawyers is calculated as a proportion of the amount recovered are not permitted (sections 333 and 334 of the *Lawyers and Conveyancers Act 2006*). However, 'conditional fee agreements' in which 'a lawyer agrees with a client that some or all of the lawyer's fees and expenses [...] are payable only if the outcome of that matter is successful' are permitted. Under such arrangements, the lawyer is entitled to charge a 'normal fee' (the fee that would be payable if it were not contingent on the outcome of the matter) plus an expressly agreed premium intended to compensate the lawyer for the risk of not being paid at all and the disadvantages of not receiving payments on account.

- 9** Are jury trials available?

No. All private antitrust litigation is heard by a judge alone or judge and lay expert (such as an economist).

- 10** What pre-trial discovery procedures are available?

Normal pre-trial discovery procedures under the High Court Rules apply in private antitrust litigation. The parties to private antitrust litigation are required to give discovery of documents that are or have been in their control and that are relevant to the matters at issue in the proceeding. Confidential documents must be discovered, but rights of inspection of confidential material may be restricted, for example to counsel and experts only. There is no right to inspect privileged documents. The court may order non-parties to give discovery if satisfied that such an order is necessary.

There is no equivalent to the deposition procedures available in the US, but parties to the proceeding can be required to answer interrogatories relating to factual matters in issue and to verify their answers by affidavit.

- 11** What evidence is admissible?

The Act allows the court to receive in evidence any statement, document or information that would not otherwise be admissible provided that, in the court's opinion, the evidence may assist it to deal effectively with the matter (section 79). Consequently, any information is potentially admissible even where, under the usual rules of evidence, it would be inadmissible. See also part 2 of the *Evidence Act 2006* in relation to hearsay evidence and statements of opinion and expert evidence.

- 12** Are private actions available where there has been a criminal conviction in respect of the same matter?

Breaches of the Act do not give rise to criminal liability but can result in penalty proceedings on the application of the Commission. A judgment awarding pecuniary penalties, which are intended to

deter rather than to compensate, does not prevent private actions being brought in respect of the same matter.

13 Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

Evidence or findings in penalty proceedings are relevant and can be relied upon by plaintiffs in parallel private actions, but the findings in the penalty proceedings do not appear to be binding on the court hearing the private action.

Giltrap v Commerce Commission (2001) 10 TCLR 190, 197-198, involved a situation where two alleged participants in a price-fixing cartel had not admitted liability but other members of the alleged cartel had done so and the court had imposed penalties on them. In seeking to establish the remaining parties' liability, the Commission argued that they should be bound by the orders consented to by the other parties. The court noted that parties can consent to judgment for a variety of reasons, including cost or litigation risk, without necessarily accepting that there was an anti-competitive arrangement. The judge left 'open the question as to whether it would be possible to infer that the other defendants agreed to the entry of judgment against them because they accepted that they had in fact entered into the arrangement. This would not be the same as saying that Giltrap City Toyota and Mr MacKenzie are bound by the consent judgment. Rather, it would merely be drawing an inference from the consent judgment and all the surrounding circumstances'.

14 What is the applicable standard of proof and who bears the burden?

The plaintiff has the burden of proof on the balance of probabilities, that is, the normal civil standard of proof in New Zealand (see *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352, 358).

15 What is the typical timetable for class and non-class proceedings? Is it possible to accelerate proceedings?

New Zealand does not have a system of class action proceedings (see question 18). A typical timetable for private antitrust proceedings would be between two and three years, depending on the number of parties, their approach to the litigation and the complexity of the proceedings.

Where the urgency of the situation justifies it, it is possible to apply to the High Court for an expedited hearing and thereby accelerate the typical timetable for the proceedings.

16 What are the relevant limitation periods?

An action for damages for breach of the restrictive trade practices provisions of the Act must be commenced within three years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered, but no action may be commenced more than 10 years after the matter giving rise to the contravention. See, for example, *Hook v Gulf Harbour Town Centre Limited (in liquidation)*, unreported, 2 March 2007, High Court, Auckland, Allan J (but note that the limitation issue is currently under appeal).

In relation to breaches of the business acquisition provisions of the Act, the reasonable discoverability test does not apply, and the action for damages must be commenced within three years from the time when the cause of action arose.

17 What appeals are available?

The same appeal rights available in any private litigation are also available in private antitrust litigation. That is, the parties to the

proceedings in the High Court may appeal to the Court of Appeal a final judgment and, in some circumstances, interlocutory orders. Subject to obtaining leave, there may also be a further right of appeal from the Court of Appeal to the Supreme Court.

Class proceedings

18 Are class proceedings available in respect of antitrust claims?

Class proceedings in the sense applicable in the United States are not available in New Zealand (see *Commerce Commission v Carter Holt Harvey* [2008] 1 NZLR 387, a case under the Fair Trading Act 1986, but note that the High Court's judgment is currently under appeal). However, the issue is currently under consideration by the Rules Committee, a body combining representatives of the judiciary, executive branch of government and New Zealand Law Society, which is in the process of developing a policy position and draft bill for consultation.

However, representative actions are currently available under the High Court Rules: where two or more persons have the same interest in the subject matter of a proceeding, one or more of them may, with the consent of the others or by direction of the court, sue (or be sued) on behalf of or for the benefit of all the persons with the same interest. All members of the class validly represented are bound by the judgment given in the representative action although not individually named as plaintiffs (or defendants).

19 Are class proceedings mandated by legislation?

Representative actions are mandated under the High Court Rules.

20 If class proceedings are allowed, is there a certification process? What is the test?

The representative can sue or be sued as of right with the consent of the others to be represented or by direction of the court – the test requires that representative and representees have 'the same interest in the subject matter of the proceeding'.

21 Have courts certified class proceedings in antitrust matters?

In practical terms, the requirement of identity of interest limits the usefulness of the procedure and it is relatively rarely used. However, in current proceedings against certain banks and Visa and MasterCard concerning interchange fees, certain retailer plaintiffs are being represented (the individual members of a cooperative company are represented by a company owned by the cooperative and the franchise operators are represented by the franchise owners).

22 Are 'indirect claims' permissible in class and non-class proceedings?

The wording of the damages provisions of the Act is broad enough to permit indirect claims – there is 'liability in damages for any loss or damage caused by [a] person engaging in conduct that constitutes [...] [a] contravention of [...] this Act'. However, the courts do not appear to have directly considered whether such claims are permissible and their application in New Zealand is therefore uncertain.

23 Can plaintiffs opt out?

Any member of the class represented can apply to the court for an order to be personally joined to the proceeding (for instance, where wishing to remain a plaintiff but dissatisfied with the conduct of the proceeding by the representative plaintiff) or to withdraw (where no longer wishing to participate in the action).

24 Do class settlements require judicial authorisation?

Judicial authorisation would not be required for settlement of private antitrust litigation involving representative actions.

25 If the country is divided into multiple jurisdictions, is a national class proceeding possible?

New Zealand is not divided into multiple jurisdictions.

26 Has a plaintiffs' class-proceeding bar developed?

No.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

The Act provides that a person is liable in damages for any loss or damage caused by that person engaging in conduct that constitutes a contravention of the restrictive trade practices and business acquisition provisions of the Act. The losses or damages recoverable are limited to the actual losses suffered, together with interest and legal costs.

28 What other forms of remedy are available?

Under the Act the court may grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of the restrictive trade practices and business acquisition provisions of the Act.

The court may also grant an interim injunction pending the trial of the proceeding. In deciding whether to grant an interim injunction, the court will apply the two-stage approach of the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, namely, determine whether there is 'a serious question to be tried' and, if so, consider whether the 'balance of convenience' favours the granting of the interim injunction. The Act also requires the court to consider and give any weight it considers appropriate to the interests of consumers or, as the case may be, acquirers.

Where any person who is a party to proceedings has suffered, or is likely to suffer, loss or damage by the conduct of another person in contravention of the restrictive trade practices provisions of the Act, under section 89 the court may make 'such other order or orders as it thinks appropriate' against the contravening person. The court can vary or cancel contracts entered into or containing a provision in contravention of the Act and require any person who is a party to the contract to make restitution or pay compensation to any other party to the contract.

Finally, although the Act is generally silent regarding declaratory relief, the Courts have held that they are entitled to make declarations – see *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 and *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554.

29 Are punitive or exemplary damages available?

Yes. The court can award exemplary damages against a person who has breached the restrictive trade practices provisions of the Act. In determining whether to grant exemplary damages and, if awarded, the amount of them, the court must have regard to whether a pecuniary penalty has been imposed on the defendant (in parallel proceedings brought by the Commission) and, if so, the amount of the penalty. We are not aware of any cases in which the court has awarded exemplary damages under the Act.

30 Is there provision for interest on damages awards?

Yes. In any proceedings for damages, the court has a discretionary power to award interest for the period from the date when the cause of action arose until judgment. Further, the High Court Rules provide specifically that every judgment debt carries interest from the time of judgment until the judgment is satisfied. Interest is at the rate prescribed for the time being under the Judicature Act (currently 8.4 per cent) or at such lower rate fixed by the Court.

31 Are the fines imposed by competition authorities taken into account when settling damages?

Penalties imposed by the courts in proceedings brought by the Commission are not taken into account in a claim for general damages – the damages will reflect the amount of the loss caused by the contravening conduct. However, the existence and amount of any penalties imposed by the court are taken into account in relation to exemplary damages (see question 29).

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The award of legal costs is at the discretion of the court, but the general (and almost universally applied) rule is that the successful party is entitled to a contribution to their actual legal costs from the unsuccessful party. Under the High Court Rules, the amount of the costs award is based on daily recovery rates specified by the rules and on a time allowance for each step in the proceedings. The daily recovery rates are intended to be two-thirds of reasonable actual daily rates, but in practice can be significantly less. The court retains a residual discretion to award increased (or decreased) costs, including costs on an indemnity basis, in particular circumstances, for example, where the unsuccessful party has unreasonably refused to accept a settlement offer.

33 Is liability imposed on a joint and several basis?

Yes, liability is imposed on a joint and several basis.

34 Is there a possibility for contribution and indemnity among defendants?

Yes. The courts can order contribution among co-defendants who have caused the same damage or loss.

35 Is the 'passing-on' defence taken into account?

The availability of a passing on defence under the Act has not been directly considered or decided by the New Zealand courts and its application in New Zealand is uncertain. However, as a matter of principle, a plaintiff who has passed on to its customers inflated costs resulting from the anti-competitive conduct of the defendant may be in no worse position than it would have been in the absence of such conduct, assuming that both its costs and price to its customers would have been lower without the anti-competitive conduct (in this regard, see the reference to absorbing inflated costs 'without recovery from purchasers' at paragraph [88] of *Bomac*). Whether that is the case will be a matter of fact to be determined by evidence in each case.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

In addition to the limitation defences available under the Act (see question 16), the Act contains a specific competition defence for

Update and trends

Recent judicial developments in antitrust litigation in New Zealand, in particular in relation to issues of jurisdiction over overseas conduct and accessory liability under the Act, continue to be dominated by proceedings brought by the Commission. However, three matters currently at various stages before appellate courts will also have ongoing procedural significance for private antitrust litigation. A decision of the Court of Appeal concerning jurisdiction is currently awaited (in the Koppers Arch proceedings) and the Commission has sought leave to appeal an issue of accessory liability in the Supreme Court (New Zealand Bus). Limitation issues under the Act are also expected to be argued before the Court of Appeal later this year or early next year (Hook). In terms of substantive developments, the Supreme Court declined leave in private antitrust proceedings between Transpower New Zealand Limited (the operator of the national electricity grid) and Todd Energy Limited (an electricity generator), effectively confirming a Court of Appeal judgment that held that a monopolist can breach the Act's prohibition on contracts, arrangements,

or understandings that have the purpose, effect, or likely effect of substantially lessening competition if, but for its conduct, new competition would emerge (see [2007] NZCA 302 and [2007] NZSC 106 respectively). The Supreme Court's refusal of leave also effectively confirmed the Court of Appeal's findings that merely reselling a product without adding any value does not create competition for the supplier of the product, and that for the purposes of an allegation of bundling of products or services in breach of the Act it is not necessary to plead that each service is in a separate market (that is, it is possible for tying or bundling to take place in the same market). Significant legislative changes to the controlled goods and services provisions of the Act are currently before parliament but do not alter the existing position of private litigants (whose rights are limited to seeking injunctive relief in certain circumstances). As indicated above, active consideration is also being given by the Rules Committee to the introduction of a form of class action proceedings but any changes to implement such a proposal (if accepted) are some time away.

exclusionary conduct (section 29(1A)) and price-fixing exemptions in the case of joint venture activity (section 31), trade association price recommendations (section 32) and joint buying and promotion arrangements (section 33).

37 Is alternative dispute resolution available?

Yes. Provided that the parties agree, private antitrust litigation can be resolved by mediation or arbitration. Under the High Court Rules, the parties can also agree to a judicial settlement conference,

in essence a form of mediation conducted by a judge. Most civil proceedings, including private antitrust proceedings, are settled prior to trial, whether by direct negotiation between the parties or through the other forms of alternative dispute resolution. (Of course, it is also open to a potential claimant to complain to the Commission and request that it take action. While such action does not result in compensation to the potential claimant, the complaint to the Commission may bring the contravening conduct to an end, for example through the Commission's 'cease and desist powers' under sections 74AA-74D of the Act.)

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