

New Zealand's competition laws are contained in the Commerce Act 1986. The purpose of the Commerce Act is to "to promote competition in markets for the long-term benefit of consumers within New Zealand". The pro-competitive purpose of the Commerce Act is achieved by:

- regulating mergers; and
- regulating market behaviour.

The underlying theme of New Zealand's competition laws is that the best way to ensure that New Zealand's scarce resources are used most efficiently is to promote competition within markets, thereby giving individual firms the incentive to maximise their internal efficiency.

Structure of the regulator

The Commerce Commission is the statutory body responsible for administering the Commerce Act. It is also responsible for administering other statutes such as:

- Fair Trading Act 1986, which is New Zealand's principal consumer protection legislation;
- Telecommunications Act 2001;
- Electricity Reform Act 1998; and
- Dairy Industry Restructuring Act 2001.

The Commerce Commission consists of five full commissioners, a telecommunications commissioner, two cease and desist commissioners and two associate commissioners. The Commerce Commission employs economists, lawyers and industry experts to support the commissioners. These staff collect information, receive submissions and undertake investigations in order to provide the commissioners with the information and recommendations necessary for the commissioners to make decisions.

Relationship with government

The Commerce Commission is independent of both the executive and political arms of government. While 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 his or her political allegiance. Indeed, the Commerce Commission is frequently commended for its political neutrality. Nevertheless, the Commerce Act provides for a specific mechanism under which the government can communicate its economic policies to the Commerce Commission. However, under the Act, the Commerce Commission is only obliged to "have regard" to these economic policy statements and case law has confirmed these statements are not binding.

Merger regulation

The Commerce Act prohibits a firm from acquiring the assets or shares of another business if that acquisition would have the effect or likely effect of substantially lessening competition in any New Zealand market.

The Commerce Act provides for a voluntary pre-transaction notification regime permitting the acquiring firm to apply to the Commerce Commission for a 'clearance' or an 'authorisation' of the transaction. The Commerce Commission will grant a 'clearance' if it is satisfied that the transaction will not be likely to substantially lessen competition in any market. The Commerce Commission has published Mergers and Acquisition Guidelines, which outline the analytical approach followed by the Commission when determining whether any transaction would be likely to substantially lessen competition. However, consistent with the underlying economic rationale of the Commerce Act, even if an acquisition would be likely to substantially lessen competition, the Commerce Commission may grant an 'authorisation' if it is satisfied that the economic benefits flowing from the acquisition would outweigh any anti-competitive detriments.

The Commerce Act provides a statutory timeframe in which the Commerce Commission is obliged to reach decisions regarding clearance and authorisation applications within 10 working days and 60 working days respectively. However, in practice these periods are regularly extended with the agreement of the applicant(s).

In the event that an acquiring firm does not apply to the Commerce Commission for a clearance or an authorisation, the Commerce Commission can commence proceedings in the High Court seeking an injunction to prevent the acquisition occurring (prior to the acquisition occurring), or penalties and divestment if it is able to prove that a breach of the merger provisions would be likely to occur (in the context of an injunction) or has occurred in the case of penalties or divestment. Third parties can also seek damages for breach in the High Court.

The Commerce Commission (via its two specialist cease and desist commissioners) can also issue 'cease and desist orders', which are temporary administrative injunctions that prevent continuing 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. The power to issue cease and desist orders was introduced in 2001. The Commerce Commission has yet to exercise this power.

Anti-competitive practices—regulation of market behaviour

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

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Bell Gully has one of New Zealand's leading competition law practices. Led by partners Phil Taylor, Jill Mallon and Roger Partridge, all with material experience in this speciality, the team provides accurate and practical advice on mergers and acquisitions, restrictive trade practices as well as providing strategic solutions for businesses.

The competition law team has successfully assisted clients in many major New Zealand and cross-border Commission investigations. Recent experience includes: acting for Air New Zealand on its application for authorisation of its strategic alliance proposals with Qantas Australia; securing a formal clearance for ANZ Banking Group (New Zealand) Limited to acquire the National Bank of New Zealand from its parent, Lloyds TSB; securing a formal clearance for Burns, Philp & Company to acquire Goodman Fielder; and achieving clearance for Cendant Corporation (Avis) to acquire Budget Rental Cars.

- competition in a market;
- exclusionary provisions, which are deemed to substantially lessen competition in a market;
- resale price maintenance; and
- a firm with a substantial degree of market power from taking advantage of that market power for an anti-competitive purpose.

As with mergers, even if a practice would be likely to substantially lessen competition, the Commerce Commission may grant an authorisation if it is satisfied that the economic benefits flowing from the practice would outweigh any anti-competitive detriment.

THE AUTHORITY

The authority

How long is the head of agency's term of office?

Paula Rebstock was appointed chair of the Commission in December 2003 for a term of three years.

When is he/she next due for reappointment?

See above.

Which posts within the organisation are political appointments?

The governor general, on the recommendation of the minister of commerce, appoints commission members for their knowledge of and experience in areas relevant to the Commission's interests. At least one commission member must be a barrister or solicitor.

The Telecommunications Act created the position of telecommunications commissioner, who is also a full member of the Commission, and is appointed by the governor general on the recommendation of the minister. Each member holds office for a term not exceeding five years.

The minister of commerce may appoint associate members. The governor general may also appoint up to two cease and desist commissioners who must be barristers or solicitors. These commissioners are appointed for the sole purpose of hearing and determining applications for cease and desist orders.

Resources

What is the agency's annual budget?

For the current financial year, 2004–2005, the Commission will receive funding from the crown of NZ\$17.2 million.

How many staff are employed by the agency?

One hundred and twenty-five, as at October 2004.

Political structure

To whom does the head of the agency report?

The Commission was established under the Commerce Act 1986. It is a crown entity under Schedule Four of the Public Finance Act 1989.

The Commission is an independent quasi-judicial body with responsibility for enforcement and regulatory control under a number of general and specific regulatory regimes set out in the Commerce Act, Fair Trading Act 1986, Electricity Industry Reform Act 1998, Telecommunications Act 2001, the Dairy Industry Restructuring Act 2001 and the Credit Contracts and Consumer Finance Act 2003.

The Commission is independent and is not subject to direction in its enforcement and regulatory control activities.

There is an output agreement between the Commission and the minister of commerce as the responsible minister, and the

ministers of commerce, communications and energy as the purchase ministers. The output agreement specifies what the Commission will deliver with its funding, and the basis on which the Ministry of Economic Development monitors the Commission's performance in output delivery.

Do any industry-specific regulators have competition powers?

Yes.

If so, how do these relate to your role?

The Commerce Commission enforces both general competition and industry-specific legislation in New Zealand.

Review process

Which body hears appeals against the agency's decisions?

Direct appeals against Commission decisions can be made to the High Court in New Zealand. Appeals against High Court decisions go to the New Zealand Court of Appeal, followed by the Supreme Court of New Zealand.

Is there any form of judicial review beyond that mentioned above? If so, which body conducts this?

Administrative law provides for parties to seek judicial review of the Commission's process, again to the High Court.

Reform

Are there any plans to reform the competition law?

The Ministry of Economic Development is currently considering possible changes to the Commerce Act. Those changes are understood to be administrative in nature.

When did the last review of the law occur?

The Commerce Act 1986 was reviewed and subsequently amended in May 2001.

Those amendments included:

- Refining the thresholds relating to anti-competitive behaviour (Section 36) and to anti-competitive mergers (Section 47)
- Increasing deterrence to anti-competitive behaviour by strengthening the penalties, remedies and associated court processes
- Giving the Commerce Commission new cease and desist order powers
- Updating the means by which price control may be implemented

Commerce Commission

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Ray Hemmingway
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