

NEW ZEALAND

(1 September 2000 – 31 August 2001)

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Executive summary

1. This report summarises the major developments in New Zealand's competition law, the enforcement of that law, and in competition policy generally, over the period 1 September 2000 to 31 August 2001.

2. Legislation was passed on 26 May 2001 aimed at strengthening the core provisions of the Commerce Act 1986, New Zealand's key competition statute, and the enforcement powers and resources of New Zealand's competition enforcement agency, the Commerce Commission. Key amendments include:

- a new purpose statement focused on “promoting competition in markets for the long term benefit of consumers within New Zealand”;
- amending key prohibitions against misuse of a dominant position prohibition (section 36) and anticompetitive mergers (section 47);
- increasing deterrence to anticompetitive behaviour by strengthening the penalties, remedies and associated court processes;
- giving the Commerce Commission new cease and desist order powers; and
- modernising the price control provisions.

3. A range of microeconomic reforms further enhanced competition in markets in New Zealand. The Electricity Industry Bill was passed, and the Telecommunications Bill is to be passed soon, in response to two Ministerial Inquiries into the respective sectors. Two further Bills are currently before Parliament seeking to deregulate the export marketing arrangements for the dairy industry and apple and pear industry.

4. The Dairy Industry reform will give the Commission an enforcement and adjudication role in relation to domestic dairy markets.

5. In the area of enforcement, during the year the Commerce Commission opened 50 restrictive trade practice investigations under the Commerce Act.

6. Finally, in the 2000/01 financial year, funding for the Commerce Commission for enforcement was NZ\$5.098million (US\$2.222m).

Changes to competition laws and policies, proposed or adopted

7. The following summarises the major developments in New Zealand's competition policy in the period 2000/2001.

Changes to competition law

Amendment to Commerce Act 1986

8. The Commerce Amendment Act 2001 was passed on 26 May 2001 aimed at strengthening the core provisions of the Commerce Act (New Zealand's key competition statute) and the enforcement powers and resources of New Zealand's competition enforcement agency (the Commerce Commission).

9. A new purpose statement clarifies that competition is not an end in itself but a means to promote the long term benefit of consumers within New Zealand.

10. Two key prohibitions in the Act are strengthened. The prohibition against use of a dominant position is amended to prohibit persons with a substantial degree of power in a market from taking advantage of that power for anticompetitive purposes. The amendment is intended to address previous narrow interpretation of "dominance" and "use" by harmonising the legislation with the Australian legislation.

11. The prohibition against anticompetitive business acquisitions is amended to prohibit acquisitions that substantially lessen competition. This amendment will allow the Commerce Commission to consider a wider range of potentially anti-competitive mergers and acquisitions. It also imports an analytical test applied in other jurisdictions.

12. The amendments also strengthen the penalties and other remedies for sanctioning restrictive trade practices. The new measures include extending the statutory limitation period to increase the likelihood that offences will be detected and making offending profitless for bodies corporate and their agents by increasing the amount and range of sanctions that may be imposed.

13. The ability of the Commerce Commission to intervene in anticompetitive conduct is enhanced by removing the requirement for the Commission to give undertakings as to damages when seeking an injunction and granting the Commission powers to issue cease and desist orders.

14. Finally, the Bill updates and strengthens the generic price control regime in the Commerce Act. The new provisions will allow the Commission to impose such control and to use a range of instruments for that purpose including incentive-based controls on firms in markets where competition is limited.

New Electricity Industry Bill and Telecommunications Bill

15. Legislation was introduced to the House to amend the regulatory arrangements for New Zealand's electricity and telecommunications industries. These reforms were a response to two Ministerial Inquiries into the respective sectors.

16. The Electricity Industry Bill has recently been passed. It is primarily aimed at encouraging the electricity industry to develop its own solutions to ensure that electricity is delivered in an efficient, fair, reliable and environmentally sustainable manner to all consumers. However, if the industry fails to meet these objectives, the Bill provides for the government to intervene and regulate to impose requirements. The regulation that may be imposed is wide reaching, and includes the establishment of an Electricity Governance Board, which may make rules over the operation of electricity markets. The Commerce Commission is also given powers to impose price control on electricity lines businesses, administer

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information disclosure, carry out an audit of the valuations of fixed assets of line owners and conduct a review of the asset valuation methodology.

17. The Telecommunications Bill is still before Parliament but is expected to be passed in 2001. It provides for a dispute resolution regime for access to regulated telecommunications services. In the first instance, the telecommunications industry is encouraged to reach commercially negotiated agreements for access to telecommunications services. However, the Bill also provides that certain telecommunications services may be regulated if regulation will result, or is likely to result, in net economic benefits to New Zealand. The provider of regulated services will be required to provide that service to persons seeking access. If the parties are unable to reach agreement on the terms of that access, then the Commerce Commission is empowered to resolve disputes in accordance with specified access obligations. For this purpose a new Telecommunications Commissioner is to be appointed.

Producer Board Reform

18. Further legislation is currently before the House relating to export marketing arrangements applying to the dairy industry and the apple and pear industry.

19. The Dairy Industry Restructuring Bill provides for the regulatory and structural reform of the dairy industry. The Bill removes restrictions on exporting New Zealand dairy products with a view to stimulating investment and innovation in the New Zealand dairy manufacturing and exporting sector. The reforms are dependent upon an amalgamation between the two major New Zealand co-operative dairy companies taking effect. Further measures in the Bill will impose obligations on the newly amalgamated dairy company to promote the efficient operation of dairy markets in New Zealand until competition emerges.

20. The Apple and Pear Industry Restructuring Act Repeal Bill provides for the liberalisation of export marketing of apples and pears. Both Bills are expected to be passed in 2001. Other relevant measures, including new guidelines.

Changes to Commerce Commission procedures

New business acquisition guidelines

21. The Commerce Commission recently released its new business acquisition guidelines following the passage of the Commerce Amendment Act 2001. These guidelines outline how the Commerce Commission intends to administer the new "substantially lessening competition" threshold in considering business acquisition applications.

22. Under the amendment, the Commission will have to look both at what market power the merged entity would have in its own right, and also at what would happen to competition amongst the remaining firms if a competitor were removed. Under the previous law, the Commission could only consider if a merged entity would, on its own, be dominant in a market.

23. As a consequence of the change in the business acquisition threshold, the Commission has adjusted what are called the "safe harbours". These specify the levels of post-acquisition market shares below which the merger is unlikely to raise competition concerns. A comparison between the new safe harbours and the previous safe harbours is shown in the table below.

New safe harbours	Previous safe harbours
<p>The merged entity would have 40 percent or less of the relevant market, unless there is a "concentrated market"</p> <p>In a "concentrated market" (where 3 firms total 70 percent or more of the relevant market) then the merged entity must have not more than 20 percent of the market</p>	<p>the merged entity would have 40 percent or less of the relevant market; or</p> <p>the merged entity would have 60 percent or less of the market and at least one competitor would have at least 15 percent of the market.</p>

24. The new safe harbours are similar to those used in Australia, but have been adapted to take account of the specific characteristics of many New Zealand markets.

New leniency policy

25. The Commerce Commission released its new leniency policy for "whistleblowers" in August 2000. It describes how the Commission will exercise its discretion and be lenient if a party co-operates and provides information to the Commission prior to an investigation being initiated.

Government proposals for new legislation

26. There are no specific proposals for new competition legislation. However, a number of policy reviews underway may have competition implications.

27. The Government recently announced a review of the gas sector. Key issues for the review include the overall efficiency of the gas sector and the current regulatory environment. Factors affecting consumer choice, such as pricing and fixed charges, will be examined. The review will also cover issues relating to gas take-or-pay contracts. These issues include the effects of these contracts on the efficiency of gas use and an examination of whether the contracts result in gas-fired electricity generation displacing hydro, causing unnecessary water spill.

Enforcement of competition laws and policies

Action against anti-competitive practices

Summary of activities of the Commerce Commission

28. The New Zealand Commerce Commission is the agency charged with enforcing the Commerce Act. Its key enforcement activities during the year to 31 August 2001 are outlined below. More information can be obtained from the Commission's web site:
<http://www.comcom.govt.nz>.

Investigation

29. The Commission opened 50 restrictive trade practice investigations during the 2000-01 year. Restrictive trade practice investigations include investigations of anti-competitive arrangements between

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competitors, the use of a substantial degree of market power in a market to hinder competition, and breaches of the Electricity Industry Reform (EIR) Act.

30. The Commission closed 48 restrictive trade practice enforcement cases during the year. The average time to complete a restrictive trade practice enforcement investigation was 165 days.

31. Where, as the result of an investigation into an alleged restrictive trade practice or an alleged breach of the EIR Act, a breach can be established, the Commission has the option of either administrative resolution or penalty action.

32. The Commission employs two broad types of administrative resolution: warnings and settlements. The particulars of warnings and settlements are decided on a case-by-case basis. The emphasis is on ensuring that problems are rectified and that effective competition is restored.

Warnings and Settlements

33. During the year, the Commission issued eight warnings and settled in two cases.

Summary of activities of courts on anticompetitive practices

34. At the beginning of the period the Commission had five restrictive trade practice cases before the courts. One case is at an appellate stage on a preliminary issue, one case completed its trial stage and judgement is awaited; one case was at an appellate stage and two cases are progressing through procedural stages.

35. Two cases involve alleged use of a dominant position for an anti-competitive purpose and two cases involve alleged exclusionary conduct and one case involves alleged price fixing.

Mergers and acquisitions

Investigation

36. New Zealand has a voluntary pre-merger notification regime. The Commission identified a total of 239 non-notified business acquisitions during the year. The Commission initiated follow-up investigation into 45 of them.

37. The Commission closed 37 business acquisition enforcement cases during the year. The average time to complete a business acquisition enforcement investigation was 138 days.

38. At the beginning of the year the Commission had one business acquisition enforcement action before the courts. The Commission issued one new enforcement proceeding during the year.

Adjudication

39. Under the Commerce Act, parties may lodge a notice with the Commission seeking a clearance or authorisation of a business acquisition.

40. In the case of an application for a clearance of a business acquisition received on or before 25 May 2001, the Commission must grant a clearance if it is satisfied that dominance will not be acquired or strengthened, in which case, the Commission does not consider the extent of the public benefits. The same process applies to business acquisition clearance applications received after 25 May 2001, but the threshold is one of a substantial lessening of competition.

41. The clearance process has a statutory completion time of 10 working days. This time can be extended by agreement between the applicant and the Commission.

42. An application for authorisation of a business acquisition or restrictive trade practice requires the Commission to consider the benefit to the public of the acquisition or trade practice, and to weigh this against the resulting or likely detriment to competition.

43. The Commission is required to provide a determination of an application for authorisation of a business acquisition within 60 working days. There is no statutory time limit for an authorisation of a restrictive trade practice. However, the Commission will generally aim to complete these within 60 working days.

44. During the 2000/01 year, the Commission received one business acquisition authorisation application and 42 clearance applications.

45. The clearance process provides applicants with rights of appeal to the court. Interested parties can also issue administrative law challenges against the Commission. During the 2000/01 year there were three appeals against the Commission's decisions and one administrative law challenge.

The role of competition authorities in the formulation and implementation of other policies

Electricity

46. The Electricity Industry Reform Act 1998 provides for the restructure of the electricity industry to facilitate competition and restrict relationships between electricity lines and supply businesses that may not be at arms length. The Commerce Commission has extensive enforcement and administration functions under the Act. It may also recommend the Governor-General make regulations for specific purposes.

47. The Commission is responsible for determining applications for exemptions from the Act. During the year the Commission received two exemption applications. There is one pending administrative law challenge against an earlier Commission decision declining an exemption.

48. The new Commerce Amendment Act (no 2) provides for the Commerce Commission to impose price control on large electricity lines businesses on its own initiative, rather than make a recommendation to the Minister of Commerce. The Commission is to decide on thresholds for imposing price control for large electricity lines businesses. In addition, the Commission must check disclosed asset values of electricity lines businesses and conduct a review of the valuation methodologies, which is currently optimised deprival value.

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Telecommunications

49. The Telecommunications Bill provides for a dispute resolution regime for specified and designated telecommunications services to be administered by a Telecommunications Commissioner and the Commission. In addition, the Commission will be required to report on compliance with the Telecommunications Service obligations and allocate the cost of this obligation, to all liable parties.

Airports

50. The Commerce Commission is continuing with its inquiry into airport services. Airfield activities are the activities undertaken (including the facilities and services provided) to enable the landing and take-off of aircraft. The Minister of Commerce has required the Commission to report by 1 August 2002 on whether he should recommend the introduction of price controls on airfield activities provided by the three main international airports. The Commission is due to deliver its final report in November 2001.

Dairy sector

51. The Dairy Industry Restructuring Bill provides for the Commerce Commission to fulfil enforcement and dispute resolution roles.

Resources of the commerce commission

Resources overall

Total Annual budget:	\$(NZ)	8.64 million	\$(US) 3.77 million
Annual competition budget:	\$(NZ)	5.3 million	\$(US) 2.3 million

Employees

Category	Numbers	FTE
Economists	3	3
Lawyers ¹	4	3.8
Other professionals ²	22	22
Support staff	12	11.2
All staff combined	41	40

1 The commission instructed 15 external lawyers, a full time equivalent of approximate 5 lawyers

2 The Commission also instructs external professional adviser including economists, valuers and accountants.

Human resources

Category	Numbers	FTE
Enforcement against anticompetitive practices ³	20	19.5
Merger review and enforcement	16	16
Advocacy efforts	5	5

52. The period covered is 1 July 2000 – 30 June 2001. The staff numbers are as at 30 June 2001.

Publications relating to the commerce Act 1986

The Commission has published a series of free brochures on the provisions of the Act. These are available at the Commission's offices. They include the following:

The Commerce Act: a General Guide (February 1999) (withdrawn due to recent amendments to the Act)
Guidelines to the Analysis of Public Benefits and Detriments (October 1997)

Business Acquisitions Guidelines (2001) (withdrawn and replaced by a Practice Note due to changes in the threshold).

The Commission publishes a quarterly newsletter, *Fair's Fair*. It provides topical information about the Commission's recent and current work. This includes education activities, investigations, decisions, enforcement, and appointments of senior staff. Another publication is *Compliance*, which focuses in detail on one or two topics of long-term interest to business people, lawyers, advisers and others interested in the Commerce and Fair Trading Acts.

3 Excluding unfair or misleading practices which fall under consumer protection provisions of the law, where these exist.