

TABLE OF CONTENTS

Executive Summary 2

1. Changes to competition laws and policies, proposed or adopted..... 3

2. Enforcement of competition laws and policies 5

3. The role of competition authorities in the formulation and implementation of other policies 15

4. Resources of the Commerce Commission 18

5. Publications relating to the Commerce Act 1986 19

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 1998 to 31 August 1999.

2. In terms of competition law, draft legislation is currently before the Parliament that seeks to strengthen the Commerce Act's:

- misuse of a dominant position prohibition (section 36);
- threshold for business acquisitions (section 47); and
- penalties, remedies and associated court processes.

These legislative proposals will not be enacted prior to the general election in November 1999. However, they will be carried over for consideration by the new Parliament.

3. In the area of enforcement, during the year the Commerce Commission opened 49 Commerce Act cases for investigation. As well, a case brought by the Commission against Elanco Animal Health resulted in the second highest single penalty imposed against a firm under the Act to date. This award, together with the penalties imposed in 1997/98 against 12 meat companies, indicates that the New Zealand courts are now imposing an appropriate level of penalty for breaches of the Commerce Act. Previously there had been a concern that the courts were imposing penalties that were too low in comparison with the significance of the offending.

4. Competition in markets in New Zealand was further enhanced by a range of microeconomic policy measures. On 1 July 1999 the Government introduced competition in part of the market for accident compensation insurance. As well a number of changes to the regulatory regime for the electricity sector that were announced in the previous year were implemented during 1998/99.

5. Finally, from 1 July 1999 on funding for the Commerce Commission was increased by \$1.3 million. Part of this extra funding will be used to strengthen enforcement of the Commerce Act.

1. Changes to competition laws and policies, proposed or adopted

1. The Commerce Act 1986 regulates the process of competition in New Zealand. Its purpose is to promote competition in markets within New Zealand. The Act covers anti-competitive conduct in markets within New Zealand, and also overseas business activity insofar as New Zealand markets are affected.

2. No amendments were made to the Act during the year ended 31 August 1999. However, draft legislation is currently before the Parliament that seeks to amend the Act's:

- misuse of a dominant position prohibition (section 36);
- threshold for business acquisitions (section 47); and
- penalties, remedies and associated court processes.

1.1 Proposed changes to section 36

3. Section 36 seeks to prevent dominant firms from using their market power to prevent or eliminate competition, while at the same time still allowing those dominant firms to compete. The problem with this section is that it has, through judicial interpretation, become considerably weaker than when the section first came into effect.

4. When the Parliament introduced this provision in 1986, it expected the courts to give an economic interpretation to the word "dominance". Up until 1992 the courts did this, they interpreted "dominance" to mean "high market power". However, in 1992 in *Telecom Corp of NZ Ltd. v Commerce Commission* the courts relied on the ordinary meaning of the word "dominance" and this approach raised the threshold for section 36. Then on appeal in 1994, the Privy Council added a new test to section 36 that required "use" of a dominant position to be proved. This further increased the difficulty to prove a section 36 contravention.

5. As well, during the 13 years that the Act has been in place, the courts have been inconsistent over whether "purpose" can be inferred from actions or circumstances (the plaintiff must prove "purpose" i.e. that the dominant firm intentionally used its market power to harm the competitive process). When purpose cannot be inferred, success in litigation becomes difficult as few firms document their intent to harm the competitive process.

6. A weak section 36 is of particular concern in the utilities markets. It is the key tool relied on by competitors of dominant firms to obtain access to essential facilities to enable effective competition to develop in particular markets. Although the importance of section 36 is not limited to utilities markets, this is where it is most important.

7. To address the section's weaknesses, draft legislation is before the House that will amend section 36 to ensure that the Act is interpreted by the courts the way Parliament intended in 1986, i.e., to:

- ensure the threshold is "high market power";
- remove the additional test relating to "use" introduced by the courts in 1994; and
- ensure that "purpose" can be inferred from conduct or circumstance.

8. This proposal is widely supported by both Government and Opposition Members of Parliament and by many parts of the business community.

NEW ZEALAND

1.2 Proposed changes to section 47

9. Section 47 of the Act prohibits mergers and acquisitions that create or strengthen a dominant position in a market. The threshold in the prohibition is single firm dominance. The threshold's role is to identify for scrutiny, by the Commerce Commission and the courts, those mergers that could be detrimental to the economy. However, the Act provides that such mergers can nevertheless be authorised if the merger is likely to generate public benefits that will outweigh the anti-competitive detriment.

10. The problem with the current threshold is that it does not allow the Commerce Commission and the courts to scrutinise mergers where high market power can be obtained in differentiated product/cost situations. It also ignores mergers that may facilitate collusion.

11. In response to these problems legislation is before Parliament that will recast the threshold by:

- resetting "dominance" to mean "high market power" in the same way as for section 36;
- moving the threshold away from just focusing on single firm dominance, to encompass "joint dominance". "Joint dominance" recognises that in some oligopoly markets, market power can be held and used collectively to raise prices; and
- making it clear that high market power does not necessarily require high market share.

1.3 Proposed changes to the Act's penalties, remedies and court processes

12. A review conducted in 1998 indicated that the Commerce Act is not consistently providing an effective deterrent to anti-competitive behaviour because:

- its penalties and remedies are likely to have very little deterrent effect for the largest firms in the economy, and in instances of large scale offending; and
- its associated court processes are costly and subject to lengthy delay.

13. To ensure that all firms have incentives to comply with the Act, reforms are currently before the Parliament that will strengthen the deterrent effect of the Act's penalties and remedies. This will be achieved through:

- providing an alternative maximum penalty for firms based on the value of the illegal gain. This will supplement the existing maximum of \$5 million;
- strengthening the sanctions facing individuals by prohibiting firms from indemnifying their agents for any penalty imposed (for the per se offences only) and giving the courts the discretion to prohibit the worst offenders (e.g. price fixers) from being managers or directors of bodies corporate for up to five years;
- increasing the incentives for private actions to be taken by allowing for the consideration of the interests of consumers in interim injunctions and through clarifying that the courts can award exemplary damages;

- increasing detection, via changing the statutory limitation periods so they run from when the cause of action was reasonably discovered, rather than from when the cause of action arose; and
- responding to the cost and delay issues through empowering the Commerce Commission to issue “cease and desist” orders (these orders would be similar to those used by the United States Federal Trade Commission).

2. Enforcement of competition laws and policies

2.1 Action against anti-competitive practices

a) Activities of the Commerce Commission

14. The New Zealand Commerce Commission is the agency charged with enforcing the Commerce Act. Its key enforcement activities during the year to 31 August 1999 are outlined below. More information can be obtained from the Commission’s web site: <http://www.comcom.govt.nz>.

Investigation

15. During the year the Commerce Commission opened 49 Commerce Act cases for investigation. This compares with 74 for 1997/98 and 57 for 1996/97. Some of the major cases investigated during the year included the following.

- Trans Power Access

An investigation commenced into an allegation by Todd Energy and Kiwi Co-operative Dairies that Trans Power were refusing the joint venture access to carry much of its co-generation electricity out of Taranaki on Trans Power’s 110 kV lines. Transpower is the state owned enterprise that owns and operates the network of transmission lines, substations, switchyards and control centres collectively known as the national grid.

Trans Power claims to be altering the structure of its contractual agreements with its customers to allow it to contract with electricity retailers rather than solely with asset owners. It intends to run a pilot programme, but this has not yet occurred. The Todd-Kiwi consortium is now taking private action.

- Livestock Improvement Corporation

During the year an investigation commenced into Livestock Improvement Corporation's (LIC) bundling of contestable services (artificial breeding and farm consultancy) with non-contestable services (herd testing and herd recording). Also, LIC were alleged to be not allowing access to the database it holds for the dairy industry. On completion of the investigation the Commission concluded that there was a likely breach of the Commerce Act, and negotiation commenced with LIC over settlement terms.

NEW ZEALAND

- Saturn/Telecom

Telecom is the dominant local area services operator. Saturn is a new entrant to this market, providing these services only in the Wellington and Lower Hutt area. In response to Saturn's entry, Telecom reduced its prices to match Saturn, but only in Wellington and Lower Hutt. It continued to charge higher prices in the rest of the country. It was concluded that Telecom's actions in matching Saturn's prices were not in breach of the Commerce Act as there was no evidence that Telecom was pricing its Lower Hutt services at below cost.

- ENZA

ENZA markets New Zealand apples and pears intended for export. This investigation focused on certain long-term arrangements and negotiations between ENZA and coolstore and packhouse operators in Hawke's Bay. The Commission found no evidence that these contracts or arrangements would prevent growers supplying fruit to a new exporter after deregulation of the industry. The Commission will continue to monitor the pipfruit industry to ensure that competition can develop effectively should the Government go ahead with its proposed deregulation of the industry.

Administrative Resolution

16. Many contraventions of the Act are addressed by way of an administrative resolution. The Commission employs two broad types of administrative resolution - warnings and settlements. During the year 15 warnings were issued (this compares with 11 for the previous year) and three administrative settlements reached (compared with eight for the previous year).

Warnings

17. The most significant warnings given during the year included:

- Enerco Gas

A warning was issued to Enerco Gas and channel partners in September 1998. This was in relation to allegations that Enerco Gas and Gas Solutions were price fixing retail gas appliances, trade-ins and credit available on gas appliances.

- Pharmacy Guild

The Commission initiated an investigation into the behaviour of the Pharmacy Guild regarding Health Funding Authority (HFA) funding. The Guild, on behalf of its members, has been negotiating with the HFA in respect of dispensing fees. The Guild was warned that this put it at risk under the price fixing provisions of the Act.

- Queenstown Lakes District Council

In September a warning was issued to the Queenstown Lakes District Council regarding an attempt to fix the prices for ground and sport facility hire, with another local provider, a Queenstown primary school. The affected market and the detriment were considered to be small.

- IATA

The International Air Transport Association (IATA) had promulgated a rule in its rulebook that precluded IATA accredited agents from rebating any part of the commission earned from the sale of international passenger air tickets to clients. IATA agreed to remove the offending provision from its rulebook.

- Napier City Council

The Napier City Council offers exclusive rights to its water network connections business to its in-house business unit. The affected market is relatively small and no specific complaints have been made to the Commission. The Council was warned that it is at risk of breaching the Commerce Act.

- South Wairarapa District Council

It was alleged that the South Wairarapa District Council would only allow their contractor, Serco, to maintain and carry out connections to its water network. After being advised that this exclusive contract is likely to risk breaching the Commerce Act, the South Wairarapa District Council advised that it would introduce an approved contractor scheme for connections work once its contract with Serco expires in June 1999.

- United Water

The complainant, a Papakura District Councillor, had received complaints from ratepayers regarding the behaviour of United Water (the Papakura District Council's franchise contractor). The complainant advised that HEB Contractors Limited has the current exclusive contract for all water maintenance and connections work. The complainant was aware of recent Commission work in this area, and wanted to ensure there was no issue against Papakura District Council (Papakura District Council are responsible under the contract for ensuring that certain performance criteria are met). The Commission received a written undertaking from Papakura District Council that it will amend its contract practice during the June 1999 tender round.

- Kumeu Real Estate

A complainant was concerned about the behaviour of some of its competitors in Kumeu. There is allegedly an arrangement between the competitors that when they acquire services from the complainant's business (that is, when buyers are provided for sole or exclusively listed properties) the competing real estate agents all pay the complainant 30 percent of their commission. The standard industry practice is that the commission is evenly shared. Warning letters were issued to the parties on 17 December 1998.

- NZAMI

A complainant alleged that the New Zealand Immigration Service (a government agency) had an arrangement with the Association of Migration and Investment (AMI) whereby members of the AMI could

NEW ZEALAND

have their visa applications processed quicker through a Christchurch branch. The members of the AMI are businesses that charge for assisting in processing resident applications. On 14 December 1998, a warning letter was sent to AMI detailing the provisions of the Commerce Act that trade associations need to consider when entering into supply arrangements. The case has been closed.

Settlements

18. The three settlements reached during 1998/99 are as follows:

- Lion Breweries

During 1998 New Zealand Breweries entered into a settlement with the Commission. The company responded to the Commission's concerns by removing the maximum pricing provision from its terms of trade agreement for independent retailers. As New Zealand Breweries and the retail liquor chain Liquor King are both owned by Lion Nathan, Liquor King was deemed to be a party to the arrangement.

- Ansett New Zealand/Ansett Express/Air New Zealand

The complainant alleged that Ansett Express has contracts with Air New Zealand and Ansett New Zealand giving it exclusive access to all cargo belly space on both airlines. These arrangements give rise to concerns about barriers to entry to the domestic same day freight forwarding market. Ansett Express and Ansett New Zealand both entered into settlements with the Commission to provide that 15 percent of Ansett New Zealand's belly space would be available to any person. This new contract mitigated the Commission's concerns.

- NZ Collision Repair Association

The complainant, State Insurance, wished to purchase new car parts direct from new car part suppliers. The NZ Collision Repair Association, which represents the majority of car repairers, has allegedly approached the suppliers in an attempt to prevent direct supply. State Insurance owns New Zealand Car Parts, which sells used car parts. It therefore competes with new car part suppliers. A search warrant was executed on NZ Collision Repair Association and evidence was located to support the allegations. A settlement was signed on 16 June 1999.

Consideration of restrictive trade practice authorisation applications

19. Three restrictive trade practice authorisation applications were received during the year, which are summarised below.

- Transpower New Zealand Ltd (1)

On 2 October 1998, Transpower applied to the Commission for authorisation of arrangements between users of the national grid on how matters affecting the common quality of electricity transmitted across the grid will be determined. The Commission issued a Draft Determination on 13 November indicating that the arrangements should be authorised. Subsequently, however, Transpower advised that the proposed arrangements were being altered and withdrew the application.

- Transpower New Zealand Ltd (2)

On 28 May 1999, Transpower applied to the Commission for authorisation of arrangements that contained many similarities to those in the 2 October 1998 application. Again the proposed arrangements related to users of the national grid deciding on matters affecting the common quality of electricity transmitted across the grid. The Commission issued a Draft Determination on 30 June 1999 and held a conference on 28 July.

The Commission concluded that the proposed arrangements fell within the Act's definition of price fixing, but considered that they would cause no lessening of competition. The Commission also concluded that public benefits would arise from lower transaction costs and improved security of supply. Accordingly the Commission authorised the arrangements on 13 August 1999.

- Telecommunications Number Administration Deed

On 22 January 1999, the Commission received an application from five telecommunications companies: Newcall Communications Ltd, Teamtalk Ltd, Telecom NZ Ltd, Telstra NZ Ltd, and Vodafone NZ Ltd, for authorisation of a proposed Number Administration Deed. The proposed Deed sets out principles for the independent administration of numbers, and a process to determine the preferred number portability solution. In its consideration the Commission found that the Deed contained an exclusionary arrangement. However the Commission considered that the exclusionary arrangement did not result in any competitive detriments and that the Deed would give rise to significant public benefits. The Commission authorised the Deed on 17 May 1999.

b) *Summary of court action*

20. One of the most significant case to conclude was Elanco Animal Health Ltd, Chemstock Animal Health Ltd & Ors. The Auckland High Court on 30 April 1999 imposed total penalties of \$700,000, after Elanco and Chemstock, two animal health remedies companies, admitted they had breached the Commerce Act by fixing prices for some of their products in 1996.

21. Elanco is a manufacturer and wholesaler of animal health remedies while Chemstock is a wholesaler. They compete in a nation-wide wholesale market, primarily supplying veterinarians. Elanco and Chemstock agreed they would not compete for customers, with Elanco keeping the larger veterinary practices and Chemstock the smaller. This agreement included both companies knowing the minimum prices Elanco would offer to smaller veterinary practices. In addition, Elanco attempted to include two other wholesalers in similar arrangements. The other wholesalers refused to be involved.

22. The Court ordered Elanco to pay a \$500,000 penalty and Chemstock to pay \$200,000. The penalty imposed on Elanco is the second highest single penalty imposed under the Act to date¹.

Appeals of court decisions

23. In addition there were two significant appeals. In the first appeal, the Privy Council rejected *Giltrap City Ltd & Ors* application for special leave to appeal to the Privy Council. *Giltrap City Toyota* will now face trial in the Auckland High Court to hear the allegations that it was involved in price fixing. This is the first time an appeal against Commission action has gone as far as the Privy Council.

NEW ZEALAND

24. The Commission is alleging that Giltrap was one of eight Auckland Toyota dealers that breached the Commerce Act by agreeing to limit the discounts available to buyers of new cars. In the Auckland High Court in December 1996 the other seven dealers admitted that at their regular monthly franchise meetings they discussed and eventually agreed on the maximum discounts they would offer to car leasing companies, fleet buyers and private individuals. Giltrap City Toyota successfully applied to the High Court to have the Commission's action against it, and its sales manager, struck out. The Commission appealed the strike out, and in December 1997 the Court of Appeal upheld the Commission's appeal, ordered the case be heard in the High Court and awarded \$5,000 costs to the Commission. Giltrap City Toyota then sought leave to appeal to the Privy Council but the Court of Appeal did not grant it leave. Following the Court of Appeal's refusal, Giltrap City Toyota applied to the Privy Council and sought special leave to have its appeal heard by the Privy Council.

25. The second appeal was Caltex NZ Ltd and Mobil Oil NZ Ltd unsuccessful application to the High Court to have the Commission's case struck out in February 1998. In the High Court Justice Elias did not accept their arguments that the Commission's statement of claim did not include enough detail and that the alleged arrangement or understanding could not amount to price fixing as described in the Commerce Act. Caltex NZ Ltd and Mobil Oil NZ Ltd then appealed Justice Elias's decision to the Court of Appeal. The appeal was heard on 3 September 1998, and the Court of Appeal rejected it for the reasons set out in Justice Elias's decision.

26. Other matters currently before the courts are:

- *Carter Holt Harvey Ltd* for below cost pricing in the home insulation market.
- *Caltex New Zealand Ltd, Mobil Oil New Zealand Ltd and Shell New Zealand Ltd* for fixing prices by a co-ordinated removal of free car washes in the greater Auckland area.
- *Fletcher Challenge Energy Ltd and the Electricity Corporation of New Zealand Ltd* for the strengthening or acquiring of dominance over natural gas production wholesaling, retailing and transmission; and arrangements relating to the Kupe gas field which substantially lessen competition in the wholesaling, retailing and transmission markets.
- *Ophthalmological Society of New Zealand and five ophthalmologists* for preventing two Australian ophthalmologists from performing cataract operations in the Invercargill area.
- *Fuller Cruises Northland Ltd and Far North Maritime Ltd* denial of access to boat ramps preventing competition.
- *Giltrap* for agreeing with other Toyota Dealers in the greater Auckland area to limit discounts offered to new car purchasers.
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2.2 ***Mergers and acquisitions***

Surveillance

27. New Zealand has a voluntary pre-merger notification regime. A total of 317 un-notified business acquisitions were identified during the year. This was below the 350 projected in the Annual Plan. Follow-up investigation was initiated on 75 of the acquisitions identified during the year, including:

- Ministry of Commerce radio frequency tender

In November and December 1998 the Ministry of Commerce conducted a radio frequency auction. The Commission received three complaints about the outcomes, alleging that dominance had been acquired or strengthened in Gisborne, Coromandel and Nelson. The situation in each of the three geographic markets was investigated. It was concluded that none of the three acquisitions would result in the creation or strengthening of a dominant position in the relevant markets.

- British American Tobacco/Rothmans

British American Tobacco and Rothmans International BV are planning to merge. This merger raised concerns because it would combine the suppliers of about 96 percent of the tobacco products sold in New Zealand. The two companies subsequently proposed to divest some of their brands to an unrelated company, Imperial Tobacco Group plc. The adequacy of the proposed divestment to maintain competition requires investigation, and this is continuing.

- Orica/Wattyl (Poly)

Orica New Zealand Limited (formerly ICI), which distributes the “Selley” range of household products, proposes to acquire the trademarks for the ‘Poly’ brand of household products from Wattyl New Zealand Limited. Issues involved in the investigation of the proposal include the product market definitions applicable to the diverse range of product lines, trends in retail product presentation, the countervailing power of the DIY retail chains, and the market strength of the major brands.

- Natural Gas Corporation Restructuring

Natural Gas Corporation Holdings (NGC) announced a proposal to restructure its business by creating three new listed companies from the existing company. NGC owns gas processing facilities, gas transmission pipelines, and distribution networks. It is also a gas wholesaler and retailer. NGC proposed to negotiate to acquire the Maui gas pipeline to be part of the separated gas transmission company. The Commission’s view was that the acquisition of the Maui pipeline would be likely to strengthen NGC’s dominance in the transmission market. NGC announced in June that the restructuring would not proceed.

Business acquisitions - clearance applications

28. 23 clearance applications were registered during 1998/99 this compares with 26 in the previous year. Of these, the most significant applications are outlined below.

- INL/Marlborough Express

The Commission cleared Independent Newspapers Limited to acquire the assets of The Marlborough Express Newspaper Company Limited on 2 October 1998. The “Marlborough Express” is the only daily newspaper published in the region, and some of INL’s other daily newspapers (principally “The Press”) are also sold in Marlborough. It was concluded that the merged entity would not acquire or strengthen dominance because (a) national and international news is available from other media outlets, and (b) advertising services in the print medium are available from other providers, including community

NEW ZEALAND

newspapers and advertising flyers, and because INL's newspapers published in other centres are not competitive avenues for advertising directed at readers in Marlborough.

- Western Bay/Eastbay

On 19 November 1998, the Commission gave clearance for Western Bay Health Limited to amalgamate with Eastbay Health Limited. The proposal represented the first occasion on which the Commission had been asked to consider the merger of public hospitals since the introduction of the Government's health reforms in 1993.

Major issues arising from the amalgamation included defining the relevant markets, and determining the likely competitive impact on those markets. The Commission concluded that the proposal would not raise any dominance concerns in relation to the provision of primary and tertiary healthcare services, and that while the parties to the amalgamation were the major supplier of secondary health care services in the Bay of Plenty, they would continue to be constrained, particularly by the purchasing power of the Health Funding Authority.

- Contact/Enerco

On 10 December 1998, the Commission cleared Contact (a state owned enterprise involved in the generation, wholesale and retail of electricity and the wholesale and retail of gas) to acquire the gas retailing business of Enerco. The assets acquired are Enerco's gas retailing business in Auckland, Hawke's Bay, Manawatu, Horowhenua and Wellington. This includes contracts for 112,500 connections, installed meters and all commercial undertakings. The Commission found that competition would remain in the national electricity retail market and in the North Island gas wholesale market, preventing Contact acquiring a dominant position in either. The Commission concluded that while Enerco is dominant in the relevant retail gas markets, the proposed acquisition would involve that dominance being transferred to Contact but with no strengthening occurring.

- Massey University/Auckland College of Education

On 24 December 1998, the Commission cleared Massey University to acquire the Auckland College of Education. This was the first adjudication application in the education sector.

The three relevant product markets were defined as the provision of programmes of study leading to primary school teaching qualifications, to secondary school teaching qualifications, and to in-service teaching qualifications. It was found that student teachers tend not to travel to distant institutions for training, and the geographic market was defined as the greater Auckland area. Existing and potential competitors were found to provide sufficient constraint.

- TransAlta/Contact Energy

The Commission cleared TransAlta to acquire 40 percent of Contact Energy Limited (a then state owned company involved in the generation and retail of electricity and in the gas industry) on 12 February 1999. Five relevant markets were identified: the national electricity generation and wholesaling market, the national electricity retail market, and three gas markets. It was concluded that dominance would not result in any of these markets.

TransAlta is a listed company that retails electricity in Auckland, Wellington, Nelson and Christchurch. It also generates electricity, retails natural gas and owns some natural gas distribution assets. TransAlta applied for and received clearance to purchase 40 percent of Contact. The remaining 60 percent was sold by way of public float. In approving the application for clearance, The Commission was satisfied that the proposed acquisition would not have negative impacts on competition in the electricity and gas markets.

- Alliant/Contact

Alliant International is a New Zealand incorporated company and a minority shareholder in a number of New Zealand energy companies. It is a wholly-owned subsidiary of Interstate Energy Corporation a United States incorporated company. In reaching a decision to approve the application to purchase Contact, The Commission was satisfied that the proposed acquisition would not have negative impact on competition in the electricity market.

- Weyerhaeuser/Carter Holt Harvey (Nelson Forests)

On 19 February 1999, the Commission declined clearance for Weyerhaeuser World Timberfund LP to acquire the forestry assets of Carter Holt Harvey in Nelson. The principal assets were approximately 28,000 hectares of forests. Weyerhaeuser has held a controlling interest in a forestry joint venture in Nelson since April 1997. The Commission concluded that the proposal would have resulted in dominance in the supply of logs in Nelson/Marlborough.

- Kiwi Co-op/South Island Dairy

On 20 January 1999, Kiwi Co-Operative Dairies Ltd (Kiwi) sought clearance to acquire the shares and assets of South Island Dairy Co-Operative Ltd (SIDCO). After considering the issues the Commission declined to give such a clearance in its decision on 26 February 1999.

On the same day Kiwi sought an authorisation to acquire SIDCO. On 30 March 1999 the Commission issued a draft determination stating that it had reached the preliminary view that the public benefits of the proposed acquisition were likely to outweigh the competitive detriments. However, on 30 April 1999 Kiwi withdrew its application.

- UnitedNetworks Limited/TransAlta

The Commerce Commission cleared UNL to acquire the gas distribution network assets of gas and electricity retailer, TransAlta New Zealand Limited. UNL, formerly Power New Zealand Ltd, previously purchased TransAlta's electricity distribution network and is principally an energy networks business. The Commission was satisfied that UNL's dominant position in the electricity distribution market would not be strengthened. The Commission was also satisfied that the acquisition would not result in TransAlta's current dominant position in the gas distribution market being strengthened as a result of UNL acquiring the gas network.

NEW ZEALAND

- Waste Management/Waste Care

On 14 May 1999, the Commission declined to give clearance to Waste Management to acquire 100 percent of the shares of Waste Care Limited because of concerns about access competitors would have to landfills in Auckland after two existing landfills closed. On 10 June 1999 the Commission cleared Waste Management to acquire Waste Care Limited on a basis that includes a divestment proposal affecting Auckland. Dominance concerns were not found in other regions.

- Taranaki Healthcare Limited/Fulford Radiology

On 19 March 1999, the Commission gave clearance for Taranaki Healthcare Limited and Fulford Radiology to form a 50/50 joint venture to provide radiology services in the Taranaki region. The Commission found that the proposed acquisition would result in substantial aggregation of market share in the market for the provision of routine radiology services and facilities in the Taranaki. However, the Commission concluded that the joint venture would not be dominant, largely because of the strong buying power of purchasers, such as the Health Funding Authority.

- Australian Gas Light Company (AGL)/ Natural Gas Corporation (NGC)

On 10 June 1999, the Commission cleared AGL to increase its shareholding in NGC from its present 33.3 percent holding to 100 percent. NGC undertakes the acquisition, transmission and marketing of natural gas throughout the North Island in addition to retailing electricity in the Waikato region.

- Ruapehu Alpine/Turoa Ski

On 14 June 1999, the Commission declined to give clearance to Ruapehu Alpine Lifts Limited to acquire Turoa Ski Resort Limited. The major issue in this application was the relevant geographic market, which was found to be the North Island. As the proposal would result in combining the only two significant commercial skifields in the North Island, and as new entry is improbable, clearance was declined.

Business acquisitions - authorisation applications

29. In New Zealand acquisitions that create or strength a dominant position in a market can nevertheless be authorised, if acquisition is likely to generate public benefits that will outweigh the anti-competitive detriment. Two applications for authorisation were received during the year. The first involving Kiwi Co-operative Dairies Limited and South Island Dairy Co-operative Limited was withdrawn. The second concerns the mega-merger in the dairy industry, which is the key part of the industry's transition path to full deregulation.

30. On 21 June 1999, the Commission received a notice seeking authorisation for a business acquisition of all of the shares of all of the New Zealand dairy co-operative companies and the New Zealand Dairy Board by a yet unnamed company "NewCo". The Commission in its draft determination in August 1999 indicated that on the basis of the information that it had received to date, it would be unlikely to grant an authorisation. Since the release of that determination the applicant withdrew its application but will make a new application for authorisation by early November.

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

3.1 *Essential Facilities*

31. New Zealand primarily relies on the Commerce Act 1986 to regulate access to essential facilities. The Act is complemented by information disclosure regulations designed to make transparent the performance of businesses with market power, and the threat of heavier handed regulation, such as price control, if monopoly power is abused.

Electricity

32. In the previous year the Government announced a number of changes to the regulatory regime for electricity. These reforms were implemented during the 1998/99 year.

33. The reforms are designed to address a number of issues in the generation, distribution and retail sectors, including:

- the dominance of ECNZ, a state electricity generator, in the generation sector (it controlled around 70 percent of total generation capacity) which resulted in higher wholesale prices, insufficient pressure on production costs and over capacity;
- the weak pressure on the costs and profits in the distribution sector (a natural monopoly) which allowed monopoly rents to be derived;
- barriers to retail competition e.g. retailers failing to provide low costs systems to enable customers to switch retailers; and
- uneconomic local generation – local electricity companies had incentives to cross-subsidise generation investments from distribution and retail customers not subject to competition.

Generation sector

34. In response to the dominance of ECNZ in the generation market, during 1998/99 this generator was split into three state owned enterprises. The remaining state-owned generator, Contact Energy, was sold in early 1999. United States based Edison Mission Energy bought a 40 percent cornerstone shareholding, with the remaining 60 percent being sold by way of a public float. As a result of the increased competition, wholesale prices have halved since the split of ECNZ in April 1999.

Distribution and retail sectors

35. To respond to the problems in the distribution and retail sectors the following reforms were announced in the previous year:

- ownership separation – monopoly lines businesses have to have different owners from the competitive businesses of electricity generation and retailing;

NEW ZEALAND

- power companies to be required to disclose better and more user-friendly information on prices, costs and efficiency. As well the government will publish improved analysis of disclosed information to enable better comparisons of the performance of power companies;
- enhancing the threat of price control for monopoly lines businesses e.g. through empowering the Commerce Commission to decide to apply price control within criteria set by the Government; and
- requiring the industry to establish low cost switching arrangements to enable customers to change retailers. If the industry fails to deliver within one year the Government will introduce a mandatory default system.

36. In the distribution sector the ownership separation was accomplished by early 1999. The result is that monopoly line companies are now no longer able to cross-subsidise electricity retail or generation operations. Revised and more prescriptive information disclosure regulations were promulgated and took effect in early 1999. The first set of information disclosed under these new regulations should be available by 31 August 1999.

37. However, the Government remains concerned about the behaviour of monopoly line companies and consequently in mid 1999 introduced legislation to place them under price control. This had not, however, been enacted at the end of the reporting period.

38. During 1998/99 a vigorous and competitive retail sector emerged. In April 1999 the industry introduced a profiling system which will enable consumers to switch retailers easily. The Government has part-funded an on-line information system to assist consumers in working out which of the new electricity retailers are offering the best deal. The address is <http://www.consumer.org.nz>.

Gas

39. During the year the gas industry finalised and put into effect a code relating to access to gas pipelines. The Gas Pipeline Access Code will assist in ensuring certainty and transparency for pipeline users and should enhance competition in the gas industry. Many of the important issues relating to access such as prices will be contained in information memoranda to be issued by pipelines owners. The Code is constructed in a way that many important issues will still be dealt with outside of it, but it outlines some important principles, such as not providing favourable treatment to affiliates.

40. In addition, a review was commenced to consider what changes should be made to the gas information disclosure regulations in the light of the amendments made to the electricity information disclosure regulations.

Telecommunications

41. There were three major developments in the regulatory regime for telecommunications during the year. First, following a three month deadline set in August 1998 by the Minister of Communications, a Number Administration Deed was signed by five telecommunications companies. The Deed provides for independent number administration, a process for determining future number portability requirements, and binding arbitration. The Deed was authorised by the Commerce Commission in May 1999. Subsequently, other telecommunications companies joined the Deed.

42. Second, in August 1999 the Government announced changes to the information disclosure regime. From 1 January 2000 Telecom will be required to publish separate financial statements, prepared using the avoidable cost allocation methodology, for its 'local loop' and 'other telecommunications' businesses. The company will also be required to calculate and disclose the net economic cost of its Kiwi Share obligations.

43. Third, in August 1999 the Government also announced that it intends to remove the requirement for certain operators of international services to be registered with the Ministry of Commerce (an amendment to the Telecommunications Act will need to be made to give effect to this decision).

Postal Services

44. Following the opening of the postal services market to full competition on 1 April 1998, registered postal operators were able to compete with NZ Post on all letters priced below NZ 80 cents (where NZ Post had a statutory monopoly). A total of 26 postal operators are now registered with the Ministry of Commerce, with many more companies providing courier and counter services. Competition has led to price reductions, with operators in many centers offering across town delivery at a rate 25 percent below the rate offered by NZ Post.

3.2 *The wider regulatory environment*

Accident compensation insurance

45. On 1 July 1999 the Government introduced competition in part of the market for accident compensation insurance. For the last 24 years accident compensation has been delivered and managed by a state monopoly (ACC). Employers and earners were all compulsorily required to buy accident compensation cover from ACC and ACC also delivered rehabilitation services.

46. From 1 July private insurers have been allowed to compete to deliver compensation insurance cover to employers for their employees' work injuries. The changes only relate to employees' work place injuries and injuries that happen outside of the workplace continue to be covered by the ACC.

47. Apart from introducing competition, the reforms are aimed at ensuring that the full insurance cost of work injuries is directly related to how safe a workplace is. The new regime gives almost complete freedom to insurers and employers to write the policies they want with as much risk as an employer wants to bear remaining with the employer, provided that a registered insurer finally guarantees the entitlements of an injured worker.

48. At the time of the changeover approximately two thirds of employers chose a private insurer for workplace accident cover. Employers that had not signed up with a private insurer were allocated to the new state insurer @Work. Currently there are seven private insurers in the market.

Producer Board Reform

49. In 1998 the Government announced its intention to remove the statutory backing for producer boards. These boards have statutory monopoly power over the acquisition and export of key agricultural products from New Zealand. Producer boards were invited by the Government to develop plans as to how

NEW ZEALAND

they would respond to a deregulated environment. On receipt of those plans, the Government has worked with the respective industries on the transitional measures necessary to achieve deregulation.

50. During the year enabling legislation was introduced to provide for a new regulatory framework for the marketing and exporting of primary products. This legislation seeks to enable the industries to reposition themselves so that they can respond positively to current and future challenges in international markets. This legislation was still being considered by Parliament as at 31 August 1999.

51. The most significant change involves the transition path for the dairy industry. This path evolves around the existing dairy co-operatives and the New Zealand Dairy Board merging into one processing and marketing co-operative – “NewCo”. The draft enabling legislation provides for the removal, from 1 September 2000, of the Board’s statutory powers conditional upon:

- the dairy co-operatives involved have agreed to the merger terms (farmers must agree by a 75 percent majority in each co-operative); and
- the Commerce Commission having authorised the merger.

52. The proposed new structure allows for alternative dairy processors to enter the market and purchase milk from farmers. On the marketing side, removal of the “single desk” may allow global firms with established brands and global distribution networks to enter the market.

4. Resources of the Commerce Commission

4.1 Resources overall

| Measure | 1999/00 | 1998/99 | 1997/98 |
|----------------------------|---|--|--|
| Annual budget | From 1 July 1999 the budget was increased to: NZ \$ 7.1 million (US \$ 3.6 million) | NZ \$5.8 million (US \$2.9 million ¹) | NZ \$5.8 million (US \$2.9 million) |
| Number of employees (FTEs) | | 70 | 78 |
| - economists; | | 3 | 2 |
| - lawyers; | | 10 | 7 |
| - other professionals | | 35 | 47 |
| - support staff; | | 22 | 22 |
| All staff combined | | 70 | 78 |

Note:

1. Based on the exchange rate as at 31/08/99 of 0.5094.

4.2 Human resources (FTEs) applied to:

| | 1998/99 | 1997/98 |
|--|----------------|----------------|
| a) Enforcement against anti-competitive practices ¹ | 14 | 16 |
| b) Merger review and enforcement; | 3 | 3 |
| c) Advocacy efforts | 7 | 7 |

Note:

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

4.3 Period covered by the above information:

1 July 1998 – 30 June 1999

5. Publications relating to the Commerce Act 1986

Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues, A Discussion Document, Ministry of Commerce, April 1999.

‘Compliance’ – Commission Commission’s monthly newsletter

Commerce Act publications updated in 1998/99 by the Commerce Commission:

- The Commerce Act 1986 – A General Guide, February 1999.
- The Commission’s Conference Procedures, September 1998.
- Business Acquisitions and the Commerce Act, 1999.

NOTE

1. The highest penalty imposed against a single firm is \$1.5 million. Richmond Limited, Lowe Walker NZ Limited and AFFCO NZ Limited all paid \$1.5 million each for their involvement in a price fixing arrangement between 12 meat companies.