

COMPETITION LAW AND POLICY IN THE NEW ZEALAND

NEW ZEALAND

(1st September 2003 – 31 August 2003)

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COMPETITION LAW AND POLICY IN THE NEW ZEALAND

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 2002 to 31 August 2003.

2. During the reporting period, no changes were made to the Commerce Act, New Zealand's key competition statute.

3. Two bills are currently before Parliament providing technical amendments to the Commerce Act and a further two bills are in development to be introduced this year that will make some consequential amendments to the Commerce Act. In particular, the proposed Electricity and Gas Amendment Bill will introduce amendments to the regulation of the electricity and gas sectors and expand functions of the new Electricity Commission to include responsibility for ensuring security of supply. The Bill will consequently amend the Commerce Act to define the relationship between the New Electricity Commission and the Commerce Commission.

4. In addition, New Zealand is shortly to undertake a further limited review of the Commerce Act that will look at various issues including information sharing between competition authorities, cross-border jurisdiction of merger sanctions, and the efficacy of the Act's regulatory control provisions.

5. In the area of enforcement, the Commerce Commission opened 29 restrictive trade practice or Electricity Industry Reform Act enforcement cases for investigations and authorised three applications of restrictive trade practices. The Commerce Commission completed 21 business acquisition investigations into non-notified mergers or acquisitions during the year and received 26 clearance applications, one application for a merger and three applications for exemptions under the Electricity Industry Reform Act.

6. In the transport sector, the Minister of Commerce decided not to impose regulatory control under Part IV of the Commerce Act (*Controlled goods and services*) on the airfield activities supplied by the three major New Zealand international airports (Auckland, Wellington and Christchurch). The Minister decided that the relatively small net benefits to acquirers and negative net public benefits of such control did not warrant the imposition of control on Auckland or Wellington. The Minister also decided that there was no basis for imposing such control on airfield activities for Christchurch International Airport. During the reporting year, Ministers also decided that a formal control inquiry by the Commerce Commission into the seaports sector was not warranted. A preliminary report found that the New Zealand ports industry was generally competitive, with limited market power, and that prices compared well internationally.

7. The Commerce Commission has continued its role in implementing economic and access regulations for electricity lines business, specified and designated telecommunications services and specified dairy markets. In addition, the Minister of Energy requested the Commerce Commission to undertake an inquiry into the gas sector to determine whether the supply of gas transmission and distribution services should be subject to regulatory control pursuant to Part IV of the Commerce Act.

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

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

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9. Specific regulations relating to electricity, telecommunications, and dairy sectors are contained in the Electricity Industry Reform Act 1998 and Part 4A of the Commerce Act, the Telecommunications Act 2001 and the Dairy Industry Restructuring Act 2001. These sectors, however, continue to be regulated within the generic framework provided by the Commerce Act, with specific regulations providing additional provisions for the achievement of competition objectives within these industries.

Changes to Competition Law and Related Legislation

The Commerce Act 1986

10. During the reporting period, no changes were made to the Commerce Act.

Related Legislation (Agricultural Marketing)

11. The New Zealand government continued its reform of agricultural producer boards. Two producer boards were deregulated in this period:

- The Wool Industry Restructuring Act was passed in 2002 and provided for the deregulation of the New Zealand Wool Board. The Wool Board was a statutory entity charged with carrying out industry-good activities, such as research and development. These activities are to be carried out by new private entities.
- The Hop Industry Restructuring Act 2003 deregulated controls on the export of hops and dissolved the Hop Marketing Board. The Hop Marketing Board was a statutory entity operating single-desk arrangements for the sale and export of hops. With deregulation of the industry, the commercial activities of the old Hop Marketing Board have been transferred to a new private company.

Other Relevant Measures, Including Guidelines

Business Acquisitions

12. The Commerce Commission's Practice Note on its application of the substantially lessening of competition test (SLC) under section 47 of the Commerce Act was drafted prior to the change to this SLC threshold in May 2001. The Commission has now applied the threshold for a full year and is in the process of updating the Practice Note, now to be known as the Merger and Acquisition Guidelines. During this year, the Commission has sought comment on the draft guidelines from interested parties and is in the process of finalising the revised document.

Leniency Policy

13. In addition, the Commerce Commission is currently revising its leniency policy and developing a separate amnesty policy relating specifically to cartel behaviour in breach of Part II (restrictive trade practices) of the Commerce Act. These policies will be informed by comparable policies of other enforcement authorities, including Australia, United States and the European Union.

Government Proposals for New Legislation

The Commerce Act 1986

14. There are two bills currently before Parliament providing for technical amendments to the Commerce Act:

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- The Consumer Protection (Definitions of Goods and Services) Bill 2001 clarifies the definition of goods and services under the Commerce Act. The main purpose of the Bill is to provide that the provision of electricity services is subject to consumer protection legislation.
- The Business Law Reform Bill 2003 includes amendments to the procedures of the Commerce Commission to provide greater flexibility in holding of meetings. In addition, it provides that, for the avoidance of doubt, Associate Members of the Commerce Commission may be warranted to carry out functions of the Commerce Commission under Acts other than the Commerce Act.

15. Two further bills are currently in development for introduction this year:

- The proposed Crown Entities Bill is to provide a consistent framework for the establishment, governance and operation of Crown entities and to clarify accountability relationships between Crown entities, their board members, the Crown and Parliament. This Bill will apply to the Commerce Commission and will continue to protect its independence. The Bill will make a number of consequential amendments to the Commerce Act.
- The proposed Electricity and Gas Amendment Bill is to amend regulation of electricity and gas sectors and expand the functions of the new Electricity Commission to include responsibility for ensuring security of supply. This Bill will consequentially amend the Commerce Act to define the relationship between the new Electricity Commission and the Commerce Commission in the electricity and gas sectors. (The implications for the electricity and gas sectors are discussed in more detail below.)

New Zealand is shortly to undertake a review of the Commerce Act that will look at various issues including information sharing between competition authorities, cross-border jurisdiction of merger sanctions, and the efficacy of the regulatory control provisions in the Commerce Act. A discussion document is to be released to initiate consultation.

Energy Sector

▪ Electricity Industry

16. In 2003, the Government has determined that the industry self-governance model for electricity has failed and an Electricity Commission is to be established to oversee electricity markets (from October 2003). A Bill is proposed to be introduced to the Parliament this year to expand the functions of the Electricity Commission to include ensuring security of supply. The industry will continue to be subject to general provisions of the Commerce Act and the Commerce Commission will continue to have some responsibilities in respect of the industry, although the interface between the Electricity Commission and the Commerce Commission is to be clarified.

▪ Gas Industry

17. In October 2002, the Government considered the review of the natural gas sector. It has now directed the gas industry to develop self-governance measures to ensure the efficient operation of markets. The proposed Electricity and Gas Amendment Bill will include backstop regulatory powers to be triggered if the industry is unsuccessful in achieving the government's objectives.

Agriculture Producer Boards

18. The Government is currently considering proposals to reform the New Zealand Meat Board. The Meat Board is a non-trading board charged with carrying out industry good activities. A farmer referendum on the reforms was held in August 2003, and a Bill is proposed to be introduced to Parliament later this year.

II. Enforcement of competition laws and policies

Summary of Activities of the Commerce Commission

19. The Commerce Commission is charged with enforcing a range of regulatory regimes, both general and industry specific. Its key enforcement activities during the year to 30 June 2003 are outlined below. More information can be obtained from the Commission's web site: www.comcom.govt.nz

Anti-competitive Practices

20. The Commerce Commission undertakes market behaviour investigations as part of its responsibilities under the Commerce, Dairy Industry Restructuring (DIR) and Electricity Industry Reform (EIR) Acts.

21. Where, as the result of an investigation into an alleged anti-competitive behaviour or an alleged breach of the EIR Act, a breach can be established, the Commission has the option of administrative resolution (warnings and settlements) or prosecution.

Market Behaviour Investigations (Anti-competitive Behaviour)

22. The Commerce Commission opened 29 restrictive trade practice investigations under Part II of the Commerce Act during 2002/03 and resolved 50. Such investigations include anti-competitive arrangements between competitors, the use of a substantial degree of market power in a market to hinder competition, and breaches of the EIR Act.

23. Of the 50 resolved, the Commission closed 43 investigations after finding no apparent breach, issued four warnings, achieved a settlement for one investigation and began civil proceedings in two cases. One case involved alleged taking advantage of a substantial degree of power in a market and the other involved alleged price fixing.

24. In addition, the Commission opened two dairy industry behaviour investigations, and closed two after identifying no apparent breach of the legislation.

Details on the two alleged anti-competitive cases are as follows:

Aquanaut Pty Limited

25. The Commission commenced proceedings against Aquanaut Pty Limited in September 2002 alleging that the company engaged in resale price maintenance. It is alleged Aquanaut induced or attempted to induce a South Island dive equipment retailer not to sell Aquanaut diving products below a specified price. The parties are in the process of completing the discovery process and the trial is expected to be held in 2004.

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BASF NZ Limited (BASF) and Others

26. In December 2000, the Commission concluded an investigation into BASF, Rhone Poulenc NZ Limited and Roche Products NZ Limited. The investigation was initiated following admissions by the parent company of a global cartel involving vitamin products. Substantial penalties were imposed in the United States and Australia. The Commission found that the cartel also operated in New Zealand between 1992-94. It is also likely that the New Zealand market was affected by further agreements reached in Asia between 1994-97. The Commission did not prosecute the companies because it considered that the three-year limitation period for bringing a prosecution applied.

27. Following a High Court decision of April 2002, in proceedings brought by customers of the three companies, that the three-year limitation provision for private proceedings did not apply (when a party could not have known of the unlawful behaviour), the Commission re-opened its investigation and commenced a civil prosecution in August 2002.

28. However, in April 2003, on an application from the defendant companies, a different High Court judge disagreed with the previous High Court decision and determined to strike out the proceedings on the grounds that they were time-barred.

29. Faced with two seemingly inconsistent High Court decisions, the Commission decided not to appeal. This matter is now resolved.

Market Behaviour Authorisations (Anti-competitive Behaviour)

30. An application for authorisation of a restrictive trade practice requires the Commerce Commission to consider the benefit to the public of the trade practice, and to weigh this against the resulting or likely detriment to competition. There is no statutory time limit for an authorisation of anti-competitive behaviour. However, the Commission will generally aim to complete these within 60 working days.

31. The Commission commenced the period with two authorisations on hand, and received a further two applications during the financial year. The Commission granted one authorisation and declined to grant a second authorisation. The Commission ended the period with two applications on hand, but authorised one of them in September.

Electricity Governance Board (Decision 473)

32. In December 2001, the Electricity Governance Board Limited (EGBL) applied to the Commerce Commission for the authorisation of an arrangement, in the form of a rulebook and supporting agreements, which would restructure the basis under which electricity was traded and delivered in New Zealand.

33. On 30 September 2002, the Commission granted an authorisation to the applicant to enter into the arrangement and to give effect to various specified primary and secondary provisions of the rulebook. The authorisation is subject to a number of conditions, and a time limit expiring on the fourth anniversary of the rulebook commencement date, or on 31 March 2007, whichever is the earlier.

34. In October 2002, Comalco New Zealand Limited filed an appeal against the Commission's authorisation.

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The Marketplace Company (Decision 474)

35. In May 2002, The Marketplace Company, the market administrator of the New Zealand Electricity Market (NZEM), applied for an authorisation for a proposed arrangement that would require, after a delay of 14 days, the disclosure of bids to purchase electricity and offers to sell electricity through the NZEM. At the time of the application, bids and offers were disclosed after a delay of four weeks.

36. The Commission decided an authorisation was not required, because it considered that the disclosure of bids and offers after a delay of 14 days did not lessen competition in the electricity market. There was consequently no need for the Commission to balance public benefits against loss of competition.

Air New Zealand Limited / Qantas Airways Limited

37. In December 2002, Qantas and Air New Zealand entered into (conditional) agreements that would result in:

- the two airlines entering into a 'strategic alliance'; and
- Qantas being issued (in stages) new equity amounting to up to 22.5% of Air New Zealand's enlarged share capital.

The Commission received a joint application from the parties for a restrictive trade practice authorisation and an application from Qantas for a business acquisition authorisation to implement the terms of their proposed agreements. For ease and efficiency, the Commission decided to consider the applications together (refer to Market Structure Authorisations for more detail).

Preussag (OMV), Shell and Todd

38. In December 2002, the Commission received an application from Preussag Energie, Shell Exploration and Todd Petroleum Mining for authorisation to enter into arrangements to jointly market and sell gas produced from the Pohokura field off the Taranaki Coast.

39. In September 2003, the Commission decided to authorise the joint marketing and selling of gas produced from the Pohokura field subject to certain conditions. The conditions should ensure that the benefits to the public (i.e. earlier development of NZ's largest new gas field) associated with the joint venture arrangements are realised and that the detriments to current and future competition (caused by joint marketing) in the affected market are reduced. The three conditions that the Commission has imposed are:

- the parties can market and sell gas jointly after 30 June 2006 only if Pohokura field is fully operational by that date;
- if the applicants want to sell their interests in the Pohokura field, the sale must be conditional on any purchaser(s) obtaining a clearance or an authorisation from the Commission; and
- the applicants do not prevent purchaser from onward reselling of gas to third parties.

40. For more information, refer www.comcom.govt.nz/adjudication

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Mergers and Acquisitions

Market Structure Investigations (Mergers and Acquisitions)

41. The Commerce Commission completed 21 business acquisition investigations into non-notified mergers or acquisitions during the year. These investigations are generally completed in 1-2 months, but a small number may take longer. The Commission did not issue any new court proceedings during the year.

Market Structure Clearances (Mergers and Acquisitions)

42. Under the Commerce Act, parties may lodge a notice with the Commerce Commission seeking a formal clearance or authorisation of a proposed merger or acquisition.

43. In considering a clearance application, the Commission's role is to determine whether the merger or acquisition has, or is likely to have, the effect of substantially lessening competition in any market. The clearance process has a statutory completion time of ten working days. This time can be extended by agreement between the applicant and the Commission.

44. The Commission commenced the period with three clearances on hand, and received 26 applications during the financial year. The Commission completed 29 applications, which included three applications received before the start of the year. Twenty-five applications were granted, two of which were conditional on undertakings by the parties that certain assets were to be divested. Of the remaining applications, in two cases the Commission was not satisfied that the acquisitions would not result in a substantial lessening of competition in a market. Two clearance applications were withdrawn. The Commission had no application on hand at the end of the year.

45. All clearance decisions are available on the Commission's website, www.comcom.govt.nz

46. The clearance process provides applicants with rights of appeal to the court. Interested parties can also issue administrative law challenges against the Commission. During 2002/03 there were two appeals of the Commission's clearance decisions.

National Foods / NZ Dairy Foods (Decision 459)

47. In March 2002, the Commission declined an application for clearance from National Foods Limited to acquire New Zealand Dairy Foods Limited as it found that the proposed merger would or would be likely to substantially lessen competition in the yoghurt and dairy dessert market. The Commission also found that National Foods and Fonterra Co-operative Limited were associated because Fonterra was in a position to exercise a substantial degree of influence over National Foods.

48. National Foods appealed and sought judicial review of the Commission's decision. In June 2002, the High Court, at the Commission's and National Foods request under s94(i) of the Commerce Act, directed the Commission to reconsider the issue of association.

49. In Decision 459A, the Commission found that it was satisfied that the factual circumstances had changed including the involvement of some of Fonterra's major competitors in National Foods, such that Fonterra would no longer have a substantial degree of influence over National Foods. Accordingly National Foods then withdrew its appeal and application for judicial review.

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Brambles New Zealand Limited (Decision 495)

50. In May 2003, Brambles New Zealand Limited lodged an appeal to the High Court against the Commission's determination under s 66(3)(a) of the Commerce Act to decline a clearance for Brambles proposed acquisition of the business and assets of GE Capital Returnable Packaging Systems Limited.

51. The appeal against the Commission decision is the first since the change in threshold to substantial lessening of competition. The appeal is set down for September 2003.

Market Structure Authorisations (Mergers and Acquisitions)

52. The Commerce Commission considers applications for merger and acquisition authorisations under the Commerce Act and exemptions under the Electricity Industry Reform Act.

▪ Commerce Act

53. Market structure authorisations under the Commerce Act primarily involve proposed mergers and acquisitions where the parties consider that a proposed acquisition will result, or is likely to result, in a substantial lessening of competition in a market. The Commission must grant an authorisation if it is satisfied that the public benefit directly attributable to the acquisition outweighs any detriment.

54. During 2002/03 the Commission received one application for authorisation of a merger, which is still on hand at the end of the financial year.

Air New Zealand Limited / Qantas Airways Limited

55. In December 2002, Qantas applied to the Commerce Commission for a market structure authorisation to acquire up to 22.5 percent of Air New Zealand. This application was accompanied by a joint application by Qantas and Air New Zealand for a restrictive trade practice authorisation (refer to Market Behaviour Authorisations above) to enter and give effect to potentially anti-competitive arrangements subsequent to the acquisition. The Commission considered both applications in one process due to their interconnected nature.

56. The Commission released its draft determination in April 2003. In the Commission's preliminary view, the overall detriment expected to result from the proposed alliance would clearly outweigh the expected benefits. The Commission plans to deliver its final determination in September 2003.

57. For more information, refer www.comcom.govt.nz/adjudication/qantasairnz

▪ Electricity Industry Restructuring Act

58. The EIR Act prohibits a person from being simultaneously involved in electricity supply and electricity lines businesses. It, however, allows the Commerce Commission to grant exemptions if it is satisfied that the cross-ownership or involvement proposed would not inhibit competition in the industry or permit cross-subsidisation of generation assets or electricity retailing with electricity lines businesses. The Commission may also grant exemptions if it is satisfied that the involvement would result in relationships between lines and supply businesses that are at arms length.

59. During the period the Commission received three applications for exemptions under the EIR Act. One exemption was granted (see below), with two on hand at the end of the year.

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Samford Lee Maier Junior (Decision 483)

60. Samford Lee Maier applied to the Commission in September 2002 for an exemption under the EIR Act. Mr Maier is a director of Mighty River Power Limited, an electricity supply business. He is also a director of New Plymouth Equity Advisers Limited (“NPEAL”), an advisory group to the New Plymouth District Council, which holds a 47.7% shareholding in Powerco Limited, an electricity lines business.

61. The Commission considered that Mr Maier has a material influence over Powerco by virtue of his directorship of NPEAL and is therefore involved in Powerco. However, the Commission granted Mr Maier an exemption from the application of section 17, subject to two conditions. This was on the grounds that it was satisfied that Mr Maier’s role was as an advisor on governance issues relating to the Council’s shareholding in Powerco, rather than as an advisor on operational matters relating to Powerco.

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

62. In New Zealand there is a division in responsibilities for competition policy and operations between the Ministry of Economic Development and the Commerce Commission.

63. The Ministry of Economic Development is responsible for advising the Government on competition policy and the competition issues associated with other proposed government policies.

64. The Commerce Commission is an independent statutory entity and is responsible for enforcement, adjudication and regulatory control under a number of competition related statutes. The Commission is also responsible for enforcement of the Fair Trading Act 1986 relating to consumer protection. The Commission’s role in formulating policies is limited to undertaking inquiries and reporting in response to specific Ministerial requests. In the last three years, the Commission also has gained a role in implementing economic and access regulations for electricity lines businesses, specified and designated telecommunications services and specified dairy markets.

65. The following is a brief summary of activities by the two agencies over the review period in respect of formulation and implementation of other policies.

Transport sector

Airports

66. In May 1998, the then Minister of Commerce requested the Commerce Commission to carry out an inquiry into airfield activities supplied by the three major New Zealand international airports (Auckland, Wellington and Christchurch). The purpose of the inquiry was to assist the Minister in determining whether to impose regulatory control under Part IV (*Controlled goods and services*) of the Commerce Act. A decision to impose regulatory control would require the supply of airfield activities to be subject to authorisation by the Commerce Commission, and such authorisation may relate to the prices, revenues and quality standards of those services.

67. In 2002, the Commerce Commission reported to the Minister of Commerce and recommended that the airfield activities supplied by Auckland International Airport be subject to control. Following advice from the Ministry of Economic Development, however, the Minister of Commerce decided that the relatively small net benefits to acquirers and negative net public benefits of such control did not warrant the imposition of control on Auckland, or Wellington (despite a recent increase in landing charges in Wellington). The Minister agreed that there was no basis for imposing control on airfield activities for Christchurch International Airport.

68. A copy of the Commerce Commission report and the advice papers on Control of Airports is available at http://www.med.govt.nz/buslt/bus_pol/airports/decisions/advice-20030509/index.html

Seaports

69. In 2001, the Ministers of Transport and Commerce initiated a review of port companies' market power to determine whether a formal control inquiry by the Commerce Commission into the seaports sector was warranted. A preliminary report found that the New Zealand ports industry was generally competitive, with limited market power, and that prices compared well internationally. In 2002, the Ministers determined that no further intervention was required.

Electricity Sector

70. In October 2000, the Government responded to a Ministerial Inquiry into the Electricity Industry. One of the Government's decisions was to charge the Commerce Commission with responsibilities for implementing a targeted control regime for electricity lines businesses under Part 4A and sections 70 to 74 of the Commerce Act. The Commerce Amendment (No 2) Act 2001 provided for this regime.

71. The Commerce Commission has four main responsibilities for electricity lines businesses under the new regime.

Recalibration of Asset Values

72. In 2002, the Commission completed its audit and recalibration of asset values based on the prescribed optimised deprival value (ODV) methodology. The Commission also made recommendations for amendment of the ODV Handbook. The Commission published its closing report at the beginning of this financial year.

Performance Thresholds

73. As part of the targeted control regime, the Commerce Commission is required to develop performance thresholds and assess the performance of electricity lines businesses against those thresholds. If a lines business is found in breach of one or more thresholds, the Commerce Commission may further investigate the business, and, if necessary, impose control on its line services (prices, revenue or quality).

74. The Commerce Commission announced in March 2003, its decision to adopt two thresholds – a price path threshold (of the form of CPI-X) and a quality threshold and set the thresholds in June. The purpose of the price threshold is to provide incentives for lines businesses to:

- reduce their prices in real terms (and therefore to improve efficiency),
- be limited in their ability to extract excessive profits, and
- share the benefits of efficiency gains with consumers.

75. The purpose of the quality threshold is to provide incentives for lines businesses to not allow their reliability to fall (as a means of reducing costs in response to the price path threshold), and for them to provide services at a quality demanded by consumers.

76. The Commerce Commission will make its first assessments of lines businesses' performance against those thresholds in late 2003.

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Asset Valuation Methodologies

77. In 2002, the Commerce Commission initiated its review of the asset valuation methodologies that could be used to value the system fixed assets of electricity lines businesses. The Commission released its draft decision, proposing that either historical cost or replacement cost valuation may be used, if consistently applied. A final decision on asset valuation methodologies is to be made this year.

Information Disclosure Regime

78. The Commerce Commission is to develop information disclosure requirements to support the new threshold regime. In addition, responsibility for monitoring the information disclosure regime is to transfer from the Ministry of Economic Development to the Commission in 2003/04. In January 2003, the Commission indicated that it intended to require each lines business to disclose audited regulatory accounts. Further work is ongoing.

Gas

79. On 30 April 2003, the Minister of Energy requested the Commerce Commission to undertake an inquiry into the gas sector to determine whether the supply of gas transmission and distribution services should be subject to regulatory control. This inquiry was requested by the Minister of Energy pursuant to Part IV of the Commerce Act. The Minister has requested the Commission to complete the inquiry by 1 November 2004.

80. During the review period, the Commerce Commission has released a draft framework paper for undertaking the inquiry and held a public conference on this paper. A decision on the framework for carrying out the inquiry will be released shortly.

Telecommunications

81. The Commerce Commission's main functions under the Telecommunications Act 2001 include:

- Resolving access disputes between carriers;
- Undertaking costing and monitoring activities relating to the Telecommunications Service Obligations and apportioning the annual net cost between Telecom and liable carriers; and
- Monitoring the regulatory regime and recommending to the Minister changes (additions, modifications or amendments) to the list of regulated and specified services.

Access Determinations

82. The Commerce Commission commenced the year with one application for an access determination on hand. The Commission received a further 10 applications and resolved three during the period.

- Interconnection

83. In November 2002, the Commission issued its first determination for designated access services applied for by TelstraClear Limited in regard to interconnection with Telecom's fixed Public Switched Telephone Networks (PSTN) and interconnection with TelstraClear's fixed PSTN (Decision 477). In its determination, the Commission set the interconnection price at 1.13 cents per minute. The Commission then received three applications for review of the price.

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84. In June last year, the Commission separated into two, the application by TelstraClear for a determination in relation to access to Telecom New Zealand's network, deciding initially to investigate the interconnection service. In July 2003, the Commission gave notice to the parties that it would also investigate the wholesale application.

- Wholesale (Resale) Services

85. In May 2003, the Commerce Commission delivered its determination relating to the supply of services on a wholesale basis between Telecom and TelstraClear. The Commission has set a wholesale price of 16 percent off Telecom's standard retail prices, effective for 18 months from 12 May 2003. TelstraClear and Telecom New Zealand applied for a review of the discount rate set in the Commission's decision.

- Additional applications

86. The Commission received a further three applications for access determinations during the year.

87. In November 2002, TelstraClear applied for a determination in relation to residential wholesale services.

88. The second application was filed by CallPlus Limited in December 2002 and requested a determination on interconnection with Telecom's fixed PSTN, including both price and non-price terms of such access, and on retail services. The Commission decided to proceed with the interconnection element in the first instance and deferred a decision to proceed with the wholesale services element.

89. In March 2003, five carriers – TelstraClear Limited, Callplus Limited, Compass Communications Limited, ihug Limited and WorldxChange Communications Limited – applied to the Commission for a determination relating to local telephone number portability and cellular telephone number portability service.

Telecommunications Service Obligations

90. In June 2003, the Commerce Commission released its draft determination on the calculation of Telecom's net cost of complying with its TSO for the period 20 December 2001 (the commencement date of the Act) to 30 June 2002 (the end of Telecom's financial year). The Commission considers the cost for that period to be \$38.84 million.

91. The cost will be apportioned between Telecom, TelstraClear Limited, WorldxChange Communications Limited, Vodafone New Zealand Limited, CallPlus Limited, Compass Communications Limited, Teamtalk Limited, The Internet Group Limited (ihug) and Global One Communications (recently merged with Equant New Zealand Limited), in proportion to their retail revenues.

92. The final determination is to be issued shortly.

93. For more information on the draft determination, refer to

<http://www.comcom.govt.nz/telecommunications/obligations/TSOdraftdetermination27june2003.pdf>

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Other Reports and Inquiries

94. The Commerce Commission is also carrying out a review of the desirability of regulating access to the unbundled elements of Telecom's local loop network and public data network. A final report is due on December 2003.

95. Part of the Commerce Commission's preparatory work for making access determinations involved a benchmarking study to identify interconnection prices in comparable countries, and development of parameters for pricing methodologies. The benchmarking report was released in August 2002.

96. For more information, refer www.comcom.govt.nz/telecommunications

Dairy Sector

97. Under the Dairy Industry Restructuring Act 2001, the Commerce Commission has both enforcement and regulatory control roles within the dairy industry. In particular, the Commission's role in the dairy industry is to promote the efficient operation of raw milk and product markets in New Zealand by:

- enabling new entrants processors to buy raw milk and ingredients from Fonterra (the new dairy organisation) at non-discriminatory prices;
- monitoring whether Fonterra's farm suppliers are being prevented from entering or exiting in response to price signals; and
- determining disputes between Fonterra and existing or potential shareholders.

98. In the course of the reporting year, the Commerce Commission released two determinations under the Dairy Industry Restructuring Act. The first related to setting Fonterra's discount rate. The Commerce Commission set the discount rate at 11.7 percent which compares with the discount rate proposed by Fonterra of 8.25 percent. The second determination related to a dispute over the default price of milk between independent dairy producer and a subsidiary of Fonterra. The Commerce Commission determined that Fonterra's subsidiary breached the Raw Milk Regulations under the DIR Act for a specified period, and ordered Fonterra to pay monetary compensation to the independent producer.

IV. Resources of the commerce commission

1. Resources overall (current numbers and change over previous year):

a) Annual budget (in your currency and USD):

| | | |
|-----------------------------------|---------------------|---------------------|
| Total Annual Budget 2002/03: | \$(NZ) 17.1 million | \$(US) 10.1 million |
| Annual Enforcement Budget 2002/03 | \$(NZ) 6.8 million | \$(US) 4 million |

(conversion rate @ 0.46 cents)

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b) *Number of employees (person-years):*

| Category | Numbers | FTE |
|---------------------|----------------|------------|
| Economists | 5 | 5 |
| Lawyers | 8 | 8 |
| Other professionals | 23 | 23 |
| Support staff | 8.5 | 8 |
| All staff combined | 44.50 | 44 |

99. The Commerce Commission also comprises:

- the Network Access Group (telecommunications) with 9 plus 0.5 support person; and
- the Network Performance Group (electricity) with 8 plus 0.5 support person.

Note that both groups are supported by legal, economic and corporate expertise within the Commission.

2. *Human resources (person-years) applied to:*

| Category | Numbers | FTE |
|---|----------------|------------|
| Enforcement against anticompetitive practices | 30 | 30 |
| Merger review and enforcement | 9 | 9 |
| Advocacy efforts ¹ | 5 | 5 |

3. *Period covered by the above information:*

100. The information collated in the above tables relates to Commission resources as at 30 June 2003.

V. **References on competition policy issues**

Commerce Commission

Merger and Acquisition Guidelines (to replace the Commission's Practice Note on its application of the substantially lessening competition test under section 47 of the Commerce Act) – due for release in the next financial year (see page 2).

Ministry of Economic Development

Review of Port Companies' Market Power: Advice paper (November 2002), available at http://www.med.govt.nz/buslt/bus_pol/portsreview/advice/index.html

¹ The Commission does not advocate. These figures are litigation efforts for the period

COMPETITION LAW AND POLICY IN THE NEW ZEALAND

Part IV Inquiry into Airfield Activities at Auckland, Wellington and Christchurch International Airports:
Control of Airports advice (May 2003), *available at*
http://www.med.govt.nz/buslt/bus_pol/airports/decisions/advice-20030509/index.html