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**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE**

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN NEW ZEALAND

-- 2013 --

17-18 December 2014

This report is submitted by New Zealand to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 17-18 December 2014.

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English - Or. English

EXECUTIVE SUMMARY

1. This report presents the key competition law and policy developments in New Zealand for the year ended 30 June 2014.

2. The report is concerned primarily with two areas of New Zealand's competition law and policy that raise competition concerns under the Commerce Act 1986 (New Zealand's competition legislation): restrictive trade practices (that is, co-ordinated behaviour involving anti-competitive agreements and conduct involving the unilateral misuse of market power); and business acquisitions and mergers. As well as reporting on key activities and developments during the reporting period, the report includes information on the functions, organisational structure and resourcing of the New Zealand Commerce Commission (NZCC) – New Zealand's principal competition and regulatory authority – in relation to these two areas.

3. The report excludes developments in relation to other functions for which the NZCC is also the enforcement agency. These are various consumer laws and regulatory arrangements in relation to natural monopolies or other markets where competition either is not possible or is limited, with the exception that the report briefly comments on developments affecting the regulatory regimes for the dairy and telecommunications sectors.

4. Section 2 begins by commenting on the report of the New Zealand Productivity Commission into Boosting Productivity in the Services Sector and its recommendation to improve the competition regime and encourage innovation, including a review of s36 of the Commerce Act. It then describes the Ministry of Transport's review of Part 9 of the Civil Aviation Act 1990, and briefly discusses the Residential Construction Sector market study carried out by the Ministry of Business, Innovation and Employment (MBIE) in 2013. It goes on to provide updates on regulatory developments in the dairy and telecommunications sectors. This is followed by a discussion of new publications released by the NZCC in the form of guidelines and fact sheets aimed at making information available about the NZCC's work and educating the public about the provisions of the Commerce Act. Section 2 concludes with an update on a major legislative proposal to amend the Commerce Act: the Commerce (Cartels and Other Matters) Amendment Bill.

5. The next three sections of the report concentrate, for the reporting period, on: the NZCC's key activities (section 3); its role in the formulation of competition-related policies (section 4); and issues of the NZCC's organisational structure and resourcing (section 5).

6. To assess its effectiveness and ensure it is delivering value-for-money results, the NZCC carries out stakeholder surveys for the purpose of measuring its targeted advocacy work. It also undertakes *ex-post* reviews of its determinations in order to test the quality of its decision making and identify areas for improvement. Details of these for the reporting period are covered in the first part of section 6, together with an update on the New Zealand study on competition.

1. Introduction

1.1 Background

7. This report describes key competition law and policy developments in New Zealand during the period of 1 July 2013 to 30 June 2014. This period corresponds with the New Zealand government's fiscal year and the New Zealand Commerce Commission's (NZCC's) financial year.

8. The NZCC is New Zealand's primary competition enforcement and regulatory authority.¹ Its purpose is to achieve the best possible outcomes in competitive and regulated markets for the long-term benefit of New Zealanders.

9. The NZCC is responsible for enforcing laws relating to: competition, and economic regulation in markets where there is little or no competition and little or no likelihood of a substantial increase in competition (the Commerce Act 1986); fair trading (the Fair Trading Act 1986); and consumer credit contracts (the Credit Contracts and Consumer Finance (CCCF) Act 2003). In addition, it will have new enforcement responsibilities under the Credit Contracts and Consumer Finance Amendment Act 2014, (the 2014 Amendment Act), which will come into effect on 6 June 2015.

10. With respect to competition law, the purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers within New Zealand. The Act prohibits conduct that restricts competition (restrictive trade practices). It also prohibits the acquisition of assets of a business or shares if the acquisition leads to a substantial lessening of competition in a market.

11. Restrictive trade practices include anti-competitive co-ordinated behaviour and unilateral conduct. Co-ordinated behaviour refers to agreements between competitors not to compete with each other. Such agreements may relate to price fixing, restricting outputs, allocating customers, suppliers or territories, and bid rigging. Unilateral conduct includes a person or business taking advantage of their substantial degree of power in a market for an anti-competitive purpose, or specifying a minimum price at which their goods or services can be sold by another (resale price maintenance). The NZCC is responsible for enforcing the provisions of the Commerce Act relating to restrictive trade practices.

12. In addition to its enforcement functions, the NZCC has some quasi-judicial functions under the Commerce Act. It can approve a business acquisition or merger that does not substantially lessen competition (known as a clearance). It can also approve a business acquisition that is anti-competitive or a restrictive trade practice that involves an agreement (except one relating to price fixing) but which would ultimately benefit New Zealand consumers (known as an authorisation). The effect of clearance and authorisation determinations by the NZCC is to offer businesses protection from legal action under the Commerce Act.

13. The aim of the two pieces of consumer legislation – the Fair Trading and CCCF Acts – is to promote fair competition and help ensure consumers can be confident of the accuracy of the information they receive when making purchase choices. The Fair Trading Act prohibits false and misleading behaviour by businesses. It also specifies when consumers must be given information about certain products and promotes product safety. The CCCF Act covers consumer lending, consumer leases and buy-back transactions. It requires lenders to disclose certain information to consumers when they enter into a credit contract and sets out rules about interest, payments and credit fees. The 2014 Amendment Act introduces a set of lender responsibility principles and strengthens protections for borrowers in a number of other ways, including by increasing lenders' disclosure obligations and extending the cooling-off period for borrowers.

14. With respect to its economic regulation functions, the NZCC is responsible for implementing several pieces of legislation aimed at regulating natural monopoly businesses and other markets where competition either is not possible or is limited. Under Part 4 of the Commerce Act, the NZCC currently regulates: electricity lines and gas pipeline services supplied by electricity and gas distribution and transmission businesses; and specified airport services supplied at the three major international airports located in the cities of Auckland, Wellington and Christchurch. The Telecommunications Act 2001 regulates the supply of telecommunications services in New Zealand. The Telecommunications Act is administered by the NZCC under the stewardship of a

1 The NZCC's website address is: <http://www.comcom.govt.nz>.

Telecommunications Commissioner, a statutory position under the Act. Finally, the Dairy Industry Restructuring Act 2001 provides for the regulation of certain aspects of the dairy sector in New Zealand.

15. The NZCC is an independent government entity. Whilst it is primarily accountable to the Minister of Commerce for its performance and outputs, it is not subject to direction from the government in carrying out its enforcement, adjudication and regulatory control activities. The NZCC is, however, required to have regard to statements of government economic policy communicated by Ministers under the Commerce Act or the Telecommunications Act. The NZCC's independence requires it to be an impartial promoter and enforcer of the law.

16. The role of providing government with policy advice on competition matters belongs generally to the Ministry of Business, Innovation and Employment. The demarcation of roles between the NZCC and the Ministry ensures a clear separation and independence between the operational and policy functions within New Zealand's competition regime. That being said, whilst the primary role of the NZCC is an operational one, where relevant, the NZCC uses its experience to provide advice on policy developments and sectoral and legislative reviews, with particular focus on the operational aspects of a regime.

17. Internationally, the NZCC is actively involved with its counterpart agencies through forums such as the Organisation for Economic Co-operation and Development and the International Competition Network. In addition, the NZCC's relationship with the Australian Competition and Consumer Commission is strengthened through Commissioner cross-appointments.

1.2 *Scope of this report*

18. With the above background in mind, the purpose of this report is to describe developments in competition law and policy for the year ended 30 June 2014. The report addresses key competition developments concerning restrictive trade practices and business acquisitions and mergers. This includes comments on the relevant activities, organisational structure and resourcing of the NZCC. The report therefore excludes coverage of any developments related to the consumer laws which the NZCC enforces. It also ignores developments in the economic regulation of goods or services under Part 4 of the Commerce Act.

19. The report does, however, provide brief updates on the dairy and telecommunications sectors. The reason for so doing is that the regulatory regimes for these two sectors are more in the nature of regulating access to vertically-integrated businesses to promote competition in downstream markets. These access regimes are also transitory in response to how the relevant markets evolve due to, for example, technological or market structure developments. Structural changes in the telecommunications and dairy sectors can affect competition in the relevant markets and have implications for economic regulation versus the application of general competition laws.

2. *Changes to competition laws and policies, proposed or adopted*

2.1 *Summary of new legal provisions of competition law and related legislation*

20. Section 2.1 begins by discussing the New Zealand Productivity Commission report, *Boosting Productivity in the Services Sector*,² including its recommendation to review s36 of the Commerce Act. It then considers the Ministry of Transport's review of Part 9 of the Civil Aviation Act 1990 and the residential construction sector market study report carried out by MBIE in the

2 Available at: <http://www.productivity.govt.nz/inquiry-content/1624?stage=4>

reporting period³. It goes on to comment on recent competition-related developments in the dairy and telecommunications sectors.

2.1.1 *Productivity Commission Report*

21. The Productivity Commission released its report in June 2014. In this report it examined the level of competition in the provision of social services, finding that New Zealand has a very high productivity dispersion within sectors that indicates weak competition in those sectors. The Productivity Commission will further consider ways to enhance the productivity of social service provision, including examining the health and education sectors to determine what institutional and market arrangements would support improved performance.

22. The Productivity Commission also considered s36 of the Commerce Act, which prohibits misuse of market power, as part of its inquiry. It recommended that the Government review s36 and its interpretation, taking account of the current Australian Competition Policy Review into the equivalent Australian provision. It said that the review should include consideration of a more flexible evidential approach, including a greater focus of “effects” in order to gauge whether the conduct in question has harmed dynamic efficiency and providing for an efficiency defence.

23. The New Zealand Government has signalled its intention to review s36. The scope and timing of this review are yet to be determined, but it is unlikely to take place until after the final report of the Australian Competition Policy Review Independent Panel, which is due at the end of March 2015.

2.1.2 *Review of Competition Regime for International Civil Aviation*

24. Competition in international air services is currently regulated by both Part 9 of the Civil Aviation Act 1990 (CAA) and the Commerce Act. Certain international air services trade practices can be exempted from the Commerce Act if they meet criteria in the CAA and are authorised by the Minister of Transport.

25. In its 2012 International Freight Transport Services Inquiry, the Productivity Commission recommended, subject to a review of passenger-specific impacts, that the Government should consider removing the Commerce Act exemption for regulating international air services.

26. Competition in the aviation sector is desirable to promote international aviation services at a cost, frequency, quality and range of destinations that meet New Zealand’s needs.

27. The Productivity Commission considered that a process of authorising trade practices under a Commerce Act only regime would be more effective. It would impart a stricter public benefit test that will maximise the likelihood that efficiency-enhancing trade practices are authorised, and minimise the chances that harmful forms of competition are authorised.

28. The Ministry of Transport (MoT) is currently reviewing the provisions of Part 9 of the CAA as part of a broader CAA review. It is considering whether the competition regime for international air services should remain under the CAA as a sector specific regime, or be moved to the Commerce Act. The review of Part 9 is considering whether there is a case for international aviation to continue to be subject to a sector specific regime. The MoT is expected to focus on two primary options:

- a) A revised CAA regime which increases the transparency of the process and clarifies the way in which benefits and detriments on any proposed arrangements are to be taken into account;
- or

3 The options paper released during the reporting period is available at: <http://www.mbie.govt.nz/what-we-do/housing/residential-construction-sector-market-study/options-paper>

b) Removal of the exemption for aviation through repeal of part 9 of the CAA.

2.1.3 *Residential Construction Sector market study report*

29. In 2013, MBIE undertook a Residential Construction Sector Market study with a view to identifying and removing any undue barriers to competition and productivity in the New Zealand residential construction sector. As part of the study, MBIE conducted several rounds of stakeholder consultation and identified 24 wide-ranging options to help address such barriers, with options varying in terms of their complexity, effectiveness and expected speed of impact. Import barriers (namely, tariffs and anti-dumping duties on residential construction materials) were identified as an area where relatively quick benefits could be brought to competition in markets for building materials.

30. In June 2014, these import barriers were temporarily removed and MBIE is currently developing a bounded public interest test to allow the Minister of Commerce to take into account specific public interest factors when deciding on whether or not to impose an anti-dumping or countervailing duty (currently there are no public interest elements to the test).

31. MBIE continues to work through potential changes in other areas and the Government will be considering them in due course.

2.1.4 *Dairy sector*

32. The Dairy Industry Restructuring Act 2001 (DIRA) provided for an authorisation under the Commerce Act to allow for the formation of the dairy co-operative Fonterra. Upon its creation, Fonterra collected 96 per cent of New Zealand's milk production. In recognition of Fonterra's dominant market position, the DIRA set up a unique regulatory regime with the purpose of promoting the efficient operation of New Zealand dairy markets.

33. Fonterra was still subject to the provisions of the Commerce Act prohibiting restrictive trade practices. However, whereas the Commerce Act provides for *ex-post* examination of whether or not a company has taken advantage of market power, the DIRA is designed to act as an *ex-ante* incentive regime such that Fonterra does not have the incentive to act in an anti-competitive manner.

34. In particular, the DIRA promotes contestability in the market for farmers' milk through a requirement that Fonterra operate an "open entry and exit regime". This means that Fonterra must accept all milk supply offers from dairy farmers in New Zealand and allow relatively costless exit from the co-operative. These requirements ensure that Fonterra cannot "lock in" its farmer-suppliers and, as a consequence, Fonterra faces commercial incentives to pay efficient prices for farmers' milk and capital invested in Fonterra.

35. Amendments were made to the DIRA in July 2012 to further bolster the contestability of the market for farmers' milk. The amendments require greater transparency of how Fonterra sets the price it pays farmers for milk and introduce a new farm gate milk price monitoring regime to be undertaken by the NZCC.

36. Section 150A of DIRA specifies that the purpose of the milk price monitoring regime is to promote the setting of the base milk price⁴ by Fonterra that: (a) provides an incentive for Fonterra to operate efficiently, while (b) providing for contestability in the market for the purchase of milk from farmers.

37. Under the 2012 amendments to DIRA, the NZCC is required to carry out two statutory reviews of Fonterra's base milk price-setting for each milk season. The first review requires the

4 The base milk price is the price paid by Fonterra to dairy farmers for raw milk. It is also known as the 'farm gate' milk price.

NZCC to report by 15 December each year on the extent to which Fonterra's Farm Gate Milk Price Manual is consistent with the purpose of the milk price monitoring regime.⁵ The second requires the NZCC to review Fonterra's calculation of the base milk price for each season and report by 15 September each year on the extent to which it is consistent with the purpose of the milk price monitoring regime.⁶

2.1.5 *Telecommunications sector*

38. The Telecommunications Act 2001 created an industry-specific regulatory regime for telecommunications, overseen by the Telecommunications Commissioner within the NZCC.

39. The NZCC can set comprehensive terms and conditions for regulated wholesale telecommunications services, such as interconnection, unbundled local loop services and mobile termination. The NZCC can also recommend that new wholesale telecommunications services be regulated, and if the recommendation is accepted by the Minister for Communications, then the service can be added to the schedule of regulated services under the Telecommunications Act. The NZCC produces regular reports on developments in competition in telecommunications markets under its general monitoring powers.

40. In February 2013 the Government announced a review of the Telecommunications Act. The review will take account of the market structure, technology developments and competitive conditions in the telecommunications industry, including the impact of fibre, copper, wireless, and other telecommunications network investment.

41. The next phase of the Review will commence in early 2015, focusing on the optimal regulatory framework following the completion of the Government's UltraFast Broadband Initiative (a fibre-to-the-premises initiative that will reach at least 75% of New Zealanders in 2020).

42. New Zealand and Australia have agreed on a joint regulatory approach in response to historically high costs of trans-Tasman mobile roaming. NZCC and the Australian Competition and Consumer Commission will collect data and report regularly on wholesale and retail trans-Tasman mobile roaming services. Both Commissions will also gain new powers to intervene in the market if necessary, and legislation to enable these changes is being prepared.

43. To make broadband offerings easier for consumers to understand and compare across different providers, a new industry code was introduced by the New Zealand Telecommunications Forum in March 2014.

2.2 *Other relevant measures, including new guidelines*

44. The NZCC has a statutory role to provide guidance about the provisions of the Commerce Act. As part of this role, the NZCC publishes various written material to inform its stakeholders, such as guidelines and fact sheets.

5 The Commission published its final report on Fonterra's 2013/14 base milk price calculation after the reporting period, on 15 September 2014. See Commerce Commission Final Report on Fonterra's 2013/14 base milk price calculation at: <http://www.comcom.govt.nz/regulated-industries/dairy-industry/review-of-fonterra-s-farm-gate-milk-price-and-manual/statutory-review-of-milk-price-calculation-2/review-of-milk-price-calculation-201314-season/>

6 The draft statutory review of the Milk Price Manual for the 2014/15 season was published after the reporting period, on 14 October 2014. See Commerce Commission. Draft Report on the Review of Fonterra's 2014/15 Milk Price Manual at: <http://www.comcom.govt.nz/regulated-industries/dairy-industry/review-of-fonterra-s-farm-gate-milk-price-and-manual/statutory-review-of-milk-price-manual/201415-season/>

2.2.1 *Guidelines*

45. NZCC guidelines set out its analytical approach to its enforcement and regulatory work and provide in-depth information and guidance to assist businesses and other stakeholders to understand the Commerce Act and how to comply with it.

2.2.1.1 Competitor Collaboration Guidelines

46. The NZCC published its Competitor Collaboration Guidelines in the period. The purpose of these guidelines is to outline the NZCC's approach to assessing collaborations between competitors. They are designed to help the business community with its preparation for the upcoming amendments proposed in the Commerce (Cartels and Other Matters) Amendment Bill.

47. The Commerce (Cartels and Other Matters) Amendment Bill (the Bill) amends a number of provisions of the Commerce Act. In particular, it introduces a new cartel prohibition, which replaces the current prohibition on price fixing; provides three exemptions to the cartel prohibition for vertical supply contracts, joint buying arrangements, and collaborative activities; and enables parties involved in a collaborative activity that enter into an arrangement containing a cartel provision to seek clearance from the Commission for that arrangement.

48. The Competitor Collaboration Guidelines explain the NZCC's proposed approach to the changes in the Bill, if it is passed in its current form. They cover:

- a) the cartel prohibition and the consequences of engaging in cartel conduct;
- b) the three exemptions to the cartel prohibition for vertical supply contracts, joint buying arrangements, and collaborative activities; and
- c) the clearance regime for collaborative activities.

2.2.2 *Fact sheets*

49. Fact sheets published by the NZCC provide quick and easy to follow information about anti-competitive behaviour and/or NZCC policies or processes. They are designed to assist the general public, media, and small businesses that perhaps do not have legal advisers. Relevant fact sheets are provided by the NZCC to people who make enquiries of the NZCC. All fact sheets are available on the NZCC's website.

2.2.2.1 Product Stewardship fact sheet

50. The NZCC published a fact sheet during the reporting period explaining how the Commerce Act might apply to product stewardship schemes. Product stewardship is when all sectors involved with a product's life cycle share responsibility for the environmental effects that the product can cause. Such schemes can involve agreements between competitors, and the fact sheet aims to help businesses understand how they can operate those agreements without breaching the Act.

2.2.2.2 Health Sector fact sheets

51. The NZCC also published a series of fact sheets explaining how competition and consumer laws apply to the health sector. It notes that health professionals in New Zealand are subject to the same competition laws that apply to other businesses and individuals, and that the laws have day-to-day relevance for health professionals, particularly in situations where they may be discussing prices with competitors. The series includes the following fact sheets:

- a) *Setting Your Fees*: this fact sheet helps health professionals understand when and how setting their fees may raise concerns under the Commerce Act;
- b) *Professional Bodies*: this fact sheet discusses the risk that activities and agreements of professional bodies could breach the Commerce Act; and
- c) *Powerful Purchasers*: this fact sheet explains how rules against fixing prices, and other anti-competitive agreements and behaviour, apply to powerful purchasers of goods and services in the health sector.

2.3 Government proposals for new legislation

52. The Government is currently working on a significant amendment to the Commerce Act: the Commerce (Cartels and Other Matters) Amendment Bill. This Bill is part of New Zealand's commitment to achieving the outcomes identified in the *Single Economic Market Outcomes Framework* endorsed by the Prime Ministers of Australia and New Zealand in August 2009.

2.3.1 Commerce (Cartels and Other Matters) Amendment Bill

53. The Commerce (Cartels and Other Matters) Amendment Bill, introduced into the New Zealand Parliament on 13 October 2011, proposes a new exemption regime for collaborative activities, an associated clearance regime, and the criminalisation of hard-core cartel activities.

54. A key feature of the Bill is that it clarifies the definition of cartel conduct to include the forms of cartel behaviour as defined by the OECD: price fixing, output restriction, and market allocation. Cartel conduct is currently prohibited under section 30 of the Commerce Act only to the extent that there is an effect on the price for goods or services. The definition of cartel conduct in the Bill makes it clear that contracts, arrangements and understandings that contain, or give effect to, any of the specified forms of cartel conduct are prohibited.

55. As a counterbalance to this more inclusive definition of cartel conduct, the Bill focuses on the substance of collaborative conduct (rather than on the form) by introducing a collaborative activity exemption. The purpose of the exemption is to ensure that legitimate pro-competitive collaborations are not prohibited. The exemption applies to all pro-competitive, efficiency-enhancing collaborations and not only to structural joint ventures, as currently provided under the Commerce Act.

56. The Bill also introduces a clearance regime to enable firms to approach the NZCC for a ruling on whether a proposed arrangement entered into by parties involved in a collaborative activity would raise competition concerns. In order to grant a clearance, the NZCC would need to be satisfied that the arrangement would not have, or would not be likely to have, the effect of substantially lessening competition in a market, and that if the relevant activity contains a cartel provision, that the provision is reasonably necessary for the purpose of the collaborative activity.

57. The part of the Bill that has attracted the most attention is the proposed imposition of criminal sanctions for hard-core cartel offences. The Bill, however, sets high thresholds for "intent" and "beyond reasonable doubt" criteria which must be satisfied in order for criminal behaviour to be proven.

58. The Commerce Select Committee reported back on its consideration of the Bill, recommending that the Bill be passed with some amendments including repealing the out-dated competition regime for international shipping in the Shipping Act 1987. Under the Bill, competition in international shipping would be regulated under the Commerce Act. During the reporting period the Bill was being debated at its second reading before Parliament was dissolved for the election in August 2014. That debate is still to be completed, with eight speeches remaining.

3. Enforcement of competition laws and policies

3.1 *Anti-competitive practices*

3.1.1 *Summary of activities*

59. In the year ended 30 June 2014, the NZCC has commenced and/or completed a number of investigations, and has seen the progression of some important litigation. This litigation has related to cartels which have had effects internationally as well as in New Zealand. Further details of these are set out below.

60. Given macro-economic conditions, the NZCC has sought to find the most effective ways to help businesses comply with competition laws. Choosing the right enforcement approach and tools is critical.

61. Throughout the year the NZCC has undertaken both targeted and general education and advocacy work. Through this work, combined with the publication of enforcement action taken, the NZCC hopes to see a lift in business and consumer awareness of competition law, particularly in the sectors targeted by the NZCC.

62. During this reporting period the NZCC continued its targeted advocacy campaign in the health and disability sector, and in relation to the Christchurch region rebuild as a result of two major earthquakes.

63. Table 1 shows the actions taken by the NZCC against anticompetitive practices in the two years ended 30 June 2013 and 2014.

Table 1.

	2013/14	2012/13
Number of co-ordinated behaviour cases	11	10
Number of unilateral conduct cases	3	1

3.1.2 *Significant investigation cases*

64. The NZCC commenced a number of investigations including in the following areas:

- a) possible manipulation of currency rates and possible influencing of benchmarks in foreign exchange markets; and
- b) possible anti-competitive behaviour towards suppliers by a supermarket chain.

65. The NZCC issued warnings to:

- a) NZ District Health Boards and certain pharmacies as certain provisions, including a no discounting clause, were likely in breach of laws prohibiting agreements that substantially lessen competition.
- b) The Pharmacy Guild of New Zealand for likely breaching the Commerce Act by aiding, abetting, counselling or procuring DHBs and/or Guild members to likely breach laws prohibiting agreements that substantially lessen competition.
- c) Sky TV, a satellite TV provider, as certain provisions in their contracts with telecommunications retail service providers are likely to have breached laws prohibiting agreements that substantially lessen competition.

66. The NZCC obtained \$NZD 9.3m in penalties from proceedings involving anti-competitive practices in 2013/14.

3.1.3 *Significant court cases*

67. The period since 1 July 2013 has seen some significant judgments regarding penalties for defendants who have admitted entering into various cartels against which the NZCC has commenced proceedings. Penalty hearings have resulted from settlements entered into by the NZCC and defendants, in which an agreed penalty has been put to the Court.

68. Some of the judgments and their significance are discussed in turn below.

3.1.3.1 *Visy/Amcor trans-Tasman cartel case*

69. The final defendant in the Visy/Amcor cardboard packaging cartel was fined \$ 60,000 NZD plus costs by the High Court bringing the case to a close. The defendant was responsible for Amcor's New Zealand's cardboard packaging operations during the period. The court noted that the defendant facilitated collusive conduct between Visy and Amcor in relation to tenders for Fonterra, a large New Zealand customer of both parties.

3.1.3.2 *Air freight – Kuehne + Nagel fined*

70. The final party in the freight forwarding, Kuehne + Nagel were fined \$ 3.1 million NZD for their part in the freight forwarding cartel. The significance and further details of this case is described below.

3.1.3.3 *Carter Holt Harvey commercial timber cartel*

71. Carter Holt Harvey was fined \$ 1.85 million NZD for its part in fixing the price of MSG8 timber in the Auckland commercial market. The cartel ran for 6 months before breaking down. The NZCC became aware of the cartel when the other cartel member applied for leniency. A former manager at Carter Holt Harvey was also fined \$ 5000 NZD for his involvement.

3.1.4 *Significant cases with international implications*

3.1.4.1 *Kuehne + Nagel freight forwarding cartel proceedings*

72. The previous Annual Report noted that the NZCC had settled with all but one of the defendants, Kuehne + Nagel (K+N), who unsuccessfully challenged NZCC's jurisdiction in both the High Court and Court of Appeal.

73. The Court of Appeal Judgement ruling that the NZCC has jurisdiction to pursue action against K+N relied on the provision in the Act which stipulates that conduct engaged in *on behalf of* a body corporate by any person at the direction, or with the consent or agreement of the body corporate, can be attributed to the body corporate. As K+N itself did not carry out business in New Zealand, the NZCC did not argue jurisdiction under section 4 (application of the Act to conduct outside NZ). The judge found that there was evidence that actions conducted by K+N New Zealand could be attributed to K+N. The Court clarified that not all arrangements between a parent and its subsidiary indicated the existence of an agency relationship, but rather that the facts of this case provided evidence that this agency relationship between K+N and K+N NZ existed. As such, the NZCC had jurisdiction to proceed with litigation against K+N.

74. K+N were fined \$ 3.1 million NZD by the High Court on 8 April 2014. The level of penalty imposed on K+N was set with a deterrent objective in mind. The judge affirmed the importance of deterring international cartels from extending their operations into New Zealand.

3.2 *Mergers and acquisitions*

3.2.1 *Summary of activities*

75. The number of business acquisition and merger clearance applications continues to be lower than in previous years, which the NZCC believes is a result of the global financial downturn. However, the NZCC has noticed a small increase in the number of clearance applications received regarding global mergers.

76. Table 2 shows the number of merger clearance and authorisation applications received by the NZCC in the two years ended 30 June 2013 and 2014. It also shows any proposed or actual acquisitions or mergers for which clearances or authorisations were not sought but which were investigated by the NZCC to ascertain their effects on market structure and competition (market structure cases).

Table 2.

	2014/13	2013/12
Number of clearance applications processed	13	9
Number of authorisation applications processed	0	0
Number of market structure cases investigated	1	2

77. Table 3 sets out details of clearances related to merger and acquisitions activity in the year ended 30 June 2014. There were no authorisation applications processed in that period.

Table 3.

Case	Description	Resolution
Vector Limited and Contact Energy Limited	Application seeking clearance	Cleared
Baxter International Inc and Gambro AB	Application seeking clearance	Cleared
SKYCITY Entertainment and Otago Casinos	Application seeking clearance	Cleared
PropertyIQ and Terralink	Application seeking clearance	Cleared
King Pharmacy Group Ltd and Community Pharmacy Ltd	Application seeking clearance	Cleared
Menzies Aviation NZ Ltd and SkyStar Airport Services	Application seeking clearance	Cleared
Telecom NZ Ltd and The Crown	Application seeking clearance	Cleared
Vodafone NZ Ltd and The Crown	Application seeking clearance	Withdrawn
Bauer Media Group and APN Specialist Publications	Application seeking clearance	Cleared
Thermo Fisher Scientific Inc. and Life Technologies NZ Ltd	Application seeking clearance	Cleared
USG Corporation and Boral Limited	Application seeking clearance	Cleared
IAG (NZ) Holding Ltd and Lumley General Insurance (NZ) Ltd	Application seeking clearance	Cleared
BlueScope Steel (NZ) Limited and Pacific Steel Group	Application seeking clearance	Cleared

4. The role of competition authorities in formulating and implementing other policies

78. As discussed in section 1.1, the NZCC is an independent government entity responsible for enforcing various pieces of legislation. Although it may provide views on competition-related policy developments, this is usually restricted to commenting on operational matters. Fundamentally, to ensure an appropriate separation of policy and operational functions, the competition regime in New Zealand operates on the basis that responsibility for advising government on policy development issues falls upon the Ministry of Business, Innovation and Employment. However, the NZCC may provide advice on or information relevant to policy developments or legislative change when it has relevant expertise.

5. Resources of the NZCC

5.1 Human resources

79. The NZCC recognises that one of its most important resources is its people. For this reason, in the year ended 30 June 2014 the NZCC maintained its *Better investment in people* as one of its five on-going strategic programmes aimed at business improvement.

80. The NZCC is led by a Board made up of NZCC Members who are appointed by the Governor-General on the recommendation of the Minister of Commerce (in the case of the Telecommunications Commissioner, on the recommendation of the Minister for Communications and Information Technology) and Associate Commissioners who are appointed by the Minister of Commerce. In addition, under the Commerce Act the Governor-General on the recommendation of the Minister of Commerce must appoint two Cease and Desist Commissioners for the sole purpose of hearing “cease and desist” applications.⁷

81. NZCC Members have both governance and decision-making roles in exercising the NZCC’s powers and functions. At least one NZCC Member must be a barrister or solicitor. The NZCC Board is headed by the Chair and Deputy Chair, who are both NZCC Members. As at 30 June 2014, the Board comprised six Members (including the Telecommunications Commissioner) and one Associate Commissioner.

82. The Chief Executive is responsible for managing the NZCC’s operations and is accountable to the NZCC Board. The Chief Executive is supported by a senior leadership team consisting of three General Managers responsible for the branches of the NZCC: Competition; Regulation; and Organisation Performance.

83. The NZCC’s personnel have a wide range of skills and experience to ensure the organisation’s effective functioning. This includes people with backgrounds in economics, finance, engineering, business and law, and with a mix of both private and public sector experience. As at 30 June 2014, the NZCC employed 82 full-time equivalent (FTE)⁸ staff in the Competition Branch. This compares with 79.6 FTE staff employed as at 30 June 2013.

84. The Competition Branch deals with both competition and consumer law issues. All staff employed in the Competition Branch can potentially work on either competition or consumer issues. However,

7 Under the Commerce Act, the NZCC has powers to obtain orders against anti-competitive behaviour. Cease and Desist Commissioners are able to make orders to restrain anti-competitive conduct or require a person to do something to restore competition or the potential for competition in a market.

8 An FTE employee is equivalent to one employee working full time for a full year. There are likely to be fewer FTEs than actual people employed since some employees are hired on a part-time basis.

personnel are generally divided into teams according to areas of specialisation. Table 4 shows numbers of FTE staff in the relevant teams, and Table 5 shows the human resources (in person-years) applied to enforcement against anticompetitive practices, merger review and enforcement and advocacy efforts.

**Table 4. Competition branch:
Numbers of FTE employees as at 30 June 2014⁹**

Support staff	13
Investigators	41
Lawyers	14
Economists	3
Other Professionals	11
Total	82

Table 5. Human resources applied to enforcement¹⁰

Anti-competitive practices	9
Mergers	7
Advocacy	2
Lawyers	6
Economists	3

5.3 *Annual budget¹¹*

Table 6.

General Markets		
2013/14	2012/13	Change
\$14.596 million NZD	\$13.432 million NZD	\$1.137 million NZD
\$11.22 million USD	\$10.32 million USD	0.87 million USD

Table 7.

Commerce Commission Overall ¹²		
2013/14	2012/13	Change
\$39.492 million NZD	\$42.382 million NZD	-\$2.89 million NZD
\$30.35 million USD	\$32.57 million USD	-\$2.22 million USD

6. **New reports and studies on competition policy issues**

6.1 *NZCC resurvey of health sector stakeholders*

85. The NZCC resurveyed its health sector stakeholders. It emailed the survey to approximately 2,050 recipients and had 328 responses in total (or 16%, a sample that is not representative). 202 responses

9 Note that Table 4 shows the number of staff in the Competition Branch only, and does not include regulation or organisational performance branches. It also includes staff working on consumer protection issues.

10 Human resources (person-years) applied to: enforcement against anticompetitive practices; merger review and enforcement; and advocacy efforts.

11 The General Markets budget allocation includes enforcement of competition and consumer laws.

12 The budget for the Commerce Commission Overall covers competition, consumer and regulatory work in addition to organisational support.

were from those with business interests, of whom 75% were aware that the Commerce Act applies to them, compared to 54% of those who responded in 2012.

86. Surveying sectors before and after carrying out its targeted education and advocacy programmes enables the NZCC to measure how successful it has been in improving businesses' awareness and understanding. As it moves from one focus sector to another, it can improve awareness and understanding across a range of sectors in the economy.

6.2 New Zealand study on competition

87. The previous year's Annual Report discussed *Competition in New Zealand*, a multi-year research project involving the Ministry of Business, Innovation and Employment, the NZCC, the Ministry of Foreign Affairs and Trade, and the New Zealand Treasury.

88. There are no significant updates to report, but work on this research project is expected to resume in 2015.

89. *Competition in New Zealand* was undertaken to look at competition across the New Zealand economy and determine the nature and extent of competition in New Zealand industries. This recognises that there is currently little or no information of the degree of competition in the majority of industries in the New Zealand economy and how they compare with other economies. The aim of the project is to answer the following questions:

- How competitive are sectors in New Zealand?
- What is the link between the degree of competition and firm outcomes, such as innovation, productivity and management practices?
- How do these compare with other countries?
- What are the implications for competition policy and economic policy more generally?

90. The project uses firm level data from the prototype Longitudinal Business Database (LBD) held by Statistics New Zealand. The research team has drawn on international literature and engaged external experts to help develop frameworks and methodologies.

91. The project has considered competition *in* the market (the traditional view), as well as competition *for* the market. Consequently the analysis has looked at the dynamics of markets and the actions and performance of firms to understand competition in New Zealand.

92. The following are key findings from the project so far:¹³

13 Some key papers to date are: Doan, T., Devine, H., Nunns, P. and Stevens, P. (2012). Firm Entry and Exit in New Zealand Industries. Wellington: Ministry of Economic Development, June. Available at: <http://www.nzae.org.nz/wp-content/uploads/2012/06/Stevens-et-al-NZAE-2012-Firm-Entry-Exit.pdf>; Devine, H., Doan, T. and Stevens, P. (2012). Explaining Productivity Distribution in New Zealand Industries: The effects of input quality on firm productivity differences. Paper presented to the New Zealand Association of Economists Annual Conference, Palmerston North 27–29 June. Available at: http://www.nzae.org.nz/wp-content/uploads/2012/07/Devine_Productivity-Distribution-NZAE-2012-14-June.pdf; Devine, H., Doan, T., Iyer., K., Mok, P. and Stevens, P. (2012). Decomposition of New Zealand firm productivity, 2001–2008. Wellington: The New Zealand Treasury and the Ministry of Economic Development. Available at: http://www.nzae.org.nz/wp-content/uploads/2012/07/Doan_NZAE-2012-submission_Tinh-Doan.pdf.

- Firm performance is very dispersed within New Zealand industries. The significant heterogeneity observed in firm productivity, even within narrowly defined industries, appears to be larger in New Zealand than in other countries (for example, research suggests that the top 10 per cent of firms in New Zealand are 9.1 times more productive than firms in the bottom 10 per cent, whereas the difference in Denmark is between 1.6 and 3.5 times).

Within markets the researchers expect firms to use the same or similar inputs therefore the differences in performance are stark. In New Zealand the researchers observe persistence in the distribution and firms tend to remain a top or bottom performer in the industry. This is interesting because in a competitive market poor performing firms would be expected to be weeded out of a market, allowing resource to be reallocated to a more productive use.

- Heterogeneity in the market influences the effect of competition on both the firm and the market. More efficient firms can gain greater market share, at the expense of less efficient firms who may be forced to shrink or leave the market. This must be taken into account when competition within markets is measured. Traditional measures of competition can incorrectly reflect changes in competition when profits are reallocated towards the more efficient firms and the least efficient firms become unviable and fail. The project uses a new measure of competition, the Profit Elasticity (PE) measure¹⁴, which is robust to the reallocation of market share.
- Levels of competition appear to be low in New Zealand. Despite being close to best practice in terms of competition policy settings, the level of competition in New Zealand industries is lower than the Netherlands and the United Kingdom (for which the researchers have a comparison across measures of PE). This may be a function of the size and distance of the New Zealand economy. The research shows that the industries with the most intense competition – on average, as measured by PE – are manufacturing and construction. It also suggests that there may be room to improve competition in some industries; for example, within service-based industries.
- High rates of firm entry and exit in New Zealand industries. Firm entry, exit and competition are interrelated. Entering firms create greater competition and competition in the market influences whether new firms enter. The ease with which a business can be started in New Zealand reflects the high rate of entry. However, while the performance of new firms increases quickly in the first few years of operation, in relation to that of incumbents, their performance does not appear to catch up to the level of incumbents. This raises the question of how low performing entrants can compete with higher performing incumbent firms and remain in the market.

93. How much do new firms contribute to improvements in performance and how much is it due to incumbents? Competition is a mechanism that drives firms to become more productive by becoming more efficient at what they do or being more creative to escape competition (for example, developing a new product). Productivity growth within an industry is caused by existing firms becoming more productive, more productive firms getting bigger and firms entering and exiting the industry. From decomposing productivity growth¹⁵ the researchers were able to show that the majority of contribution to productivity growth in New Zealand is from incumbents. There is a smaller positive net effect from more entering firms being more productive than the exiting firms they replace.

14 Griffith, R., Boone, J. and Harrison, D. (2005). Measuring Competition. AIM Research Working Paper Series, No. 22. Advanced Institute of Management Research.

15 Melitz, M.J. and Polanec, S. (2009). Dynamic Olley-Pakes Decomposition with Entry and Exit. University of Ljubljana, Working Paper No. 03/09.