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Developments in New Zealand Competition Law and Policy

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New Zealand Commerce Commission

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I. INTRODUCTION

The New Zealand Commerce Commission ("NZCC") is an independent statutory body with responsibility for enforcing competition law. The Commerce Act 1986 prohibits anticompetitive behavior and structures in markets. It applies broadly across the economy, including the public sector. The NZCC also enforces consumer legislation and is the industry-specific economic regulator for the electricity lines, gas pipelines, telecommunications, dairy, and airport sectors.

The NZCC functions as both an enforcement agency with sanctions requiring decisions by New Zealand's High Court; and a quasi-judicial body, with power to give clearances and authorizations for business acquisitions, and authorizations for certain restrictive trade practices.

II. THE NEW ZEALAND COMMERCE COMMISSION'S APPROACH

Our purpose is to achieve the best possible outcomes in competitive and regulated markets for the long-term benefit of New Zealanders. The outcomes that we seek, in order to achieve this goal, are that markets are more competitive and that consumers are better informed.

Achieving a high impact cost-effectively is a key theme of the NZCC's competition work. In a time of fiscal constraint we continue to use the most effective ways to help businesses comply with competition laws. How well we do depends in a large part on the enforcement tools we use. Court proceedings and penalties are only part of that picture. Choosing the right enforcement tools and approach is critical, as is measuring our effectiveness in a meaningful way.

In late 2012 we published our Enforcement Response Guidelines. These guidelines clarify what enforcement responses we have available and what criteria and considerations we take into account when we decide which response to use. We have a broad range of possible enforcement responses, including both low level (such as compliance advice letters or warnings) and high level (such as court injunctions or other court proceedings).

We focus on areas where we can have the biggest impact through the most efficient use of taxpayer resources. Although litigation serves an important public function, we also actively encourage early resolution of matters through settlement, where appropriate, as a way to more quickly change behavior or bring about some other remedy.

We have always used a wide range of tools to achieve our goals. Advocacy and education are an important part of our approach as clearly those that have a good understanding of the law have a better chance of complying with it. We target our advocacy and education efforts at industry sectors where we see emerging issues or have reason for concern. Currently, our focus is

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on two areas: the rebuild of Christchurch following the damaging earthquakes in September 2010 and February 2011, and the health sector.

Christchurch will be an important hub for economic activity and growth for the New Zealand economy for up to the next ten years. Overseas experience tells us that post-disaster there is considerable potential for fraud and collusion as money begins to flow in the reconstruction phase. Therefore we need to ensure we are doing all we can to improve market participants' understanding about the benefits of competition and anticompetitive practices that may undermine competition.

In the health area we are focusing on increasing understanding of and compliance with competition and consumer laws among health professionals. In New Zealand there is a shift in the health sector to more integrated models of care with better coordination and collaboration between different health professional groups. This can bring with it risks under the Commerce Act, and so it is important we work with the sector to ensure health professionals are aware of their obligations under that Act.

III. WORKING WITH INTERNATIONAL COMPETITION AGENCIES

The Commerce Act has recently been amended to enhance cooperation between the NZCC and overseas competition, consumer, and telecommunications regulators. The new provisions reflect similar powers under Australian law. The provisions enable us to provide, on request, compulsorily acquired information and investigative assistance to overseas regulators if a relevant cooperation arrangement has been entered into. A relevant cooperation agreement may be between the New Zealand Government and the relevant overseas government, or between the NZCC and the overseas regulator.

The new provisions, together with a new cooperation agreement, will strengthen our already close relationship with the Australian Competition and Consumer Commission. The new provisions enable us to share information and resources more readily, to be more effective in our individual markets.

The legislation extends to all overseas competition, consumer, and telecommunications regulators. This provides the opportunity to further develop relationships with our international counterparts by putting in place more formal cooperation agreements.

IV. CO-ORDINATED CONDUCT

A suite of cartel cases have dominated the NZCC's competition program over the past few years. These cases have provided valuable insight and guidance on the jurisdictional reach of the Commerce Act and how financial penalties are set under the Commerce Act.

Three of these cases (*Visy, Kuehne+Nagel, Air Cargo*) have given clarity on when New Zealand courts have jurisdiction to consider international cartels.

The *Visy* case, which is currently before the courts, relates to an alleged trans-Tasman cardboard packaging price-fixing cartel between Visy Board Pty Limited, an Australian company, and one of its competitors. Visy admitted its part in the cartel in Australia, but denied the cartel extended to New Zealand.

The Court of Appeal clarified that if a defendant is resident in, or carrying on business in, New Zealand then its conduct offshore will be covered by the Commerce Act, provided that conduct "relates to" a New Zealand market.

The *Kuehne+Nagel* case arose from our proceedings against six freight forwarders alleging that the defendants were price-fixing. While five of the defendants settled with us and paid fines totaling NZ$8.5 million, Kuehne+Nagel International AG challenged the High Court's jurisdiction to hear proceedings against it, on the basis that it was a Swiss holding company uninvolved in the operation or management of freight forwarding.

The Court of Appeal confirmed that overseas parent companies can be held liable in New Zealand for the conduct of their New Zealand subsidiaries. This case is now before the High Court for determination.

In the *Air Cargo* case, we had to establish that there was a "market in New Zealand" for the inbound air cargo services allegedly the subject of price-fixing by the defending airlines.

The High Court found that inbound air cargo services were supplied in a market in New Zealand, and that the Court had jurisdiction over the alleged conduct relating to inbound air cargo services. The Court held that it was sufficient that part of the market is situated in New Zealand, noting that it "[saw] the fact that part of the service takes place in New Zealand as an important facet of the reality that part of the market is in New Zealand."

Since that decision, seven airlines have settled with us to date, bringing the total penalties ordered in the case to $25.475 million.

The penalty decisions provide valuable judicial guidance on the principles and processes that apply when calculating financial penalties under the Commerce Act.

V. UNILATERAL CONDUCT

We are hoping for legislative reform of section 36 of the Commerce Act, which deals with monopolistic conduct. The way in which section 36 has been interpreted by New Zealand's courts has created difficulties in applying the law. These difficulties have been reinforced by a decision by the Supreme Court involving the NZCC's case against Telecom New Zealand Limited for alleged misuse of market power in the internet dial-up industry.

The Supreme Court confirmed the counterfactual test laid down by the Privy Council as the sole test for assessing whether a firm with substantial market power has taken advantage of its substantial market power. This test, which asks what the firm with substantial market power would have done in a hypothetically competitive market, is not considered a relevant enquiry in any other jurisdiction except Australia, and even there it is not the sole test.

The decision has not delivered the alignment with Australian jurisprudence that we had sought in terms of being able to employ alternative tests for determining whether a firm has taken advantage of its substantial market power. As a result, given the complexity and cost of these types of cases, we are choosing which cases to investigate very carefully. We are hoping that legislative reform will address these issues.

VI. MERGERS AND ACQUISITIONS

The number of business acquisition and merger clearance applications continues to be lower than in previous years, which we believe reflects economic conditions. Despite the low level of clearance activity, we have seen an increase in the number of applications for authorization, receiving three in the last financial year. Two applications were for restrictive trade practice authorizations, the first we have received in many years. These involve considering whether the public benefits of certain practices outweigh the detriments arising from the loss of competition.

In 2012, we declined our first merger clearance application in over four years. The application came from epay to acquire Ezi-Pay. Both are distributor-agents for a range of pre-paid products, such as pre-paid mobile phone top-ups and gift cards.

While we were satisfied that the proposed acquisition would not substantially lessen competition in four of the relevant markets, we were not satisfied that the same was true for a fifth market—the distribution and in-store payment processing of pre-paid mobile phone top-ups. As a result, we declined the application.

Another recent clearance application of significance was Vodafone New Zealand's proposed purchase of TelstraClear Limited.

We assessed the potential impact of the purchase in a number of markets. The relevant markets included the provision of fixed line calling and broadband services to residential, as well as business customers, (with a particular focus on small businesses), long distance backhaul services, mobile phone services, and spectrum management rights for mobile phone services.

We also looked at the extent to which Vodafone and TelstraClear currently compete "head to head" and whether the loss of that rivalry would lead to a substantial lessening of competition.

Our conclusion was that we were satisfied that the proposed acquisition would be unlikely to substantially lessen competition in any of the relevant markets. As such, we cleared the application, allowing the purchase to go ahead.

VII. THE YEAR TO COME

2013 heralds significant change to the Commerce Act, in particular the parts that deal with coordinated conduct. A bill currently before the New Zealand parliament proposes amendments including the introduction of a new price-fixing prohibition, new exemptions, and, importantly, criminal sanctions for cartel conduct.

One of the new exemptions is for collaborative activities. This is a novel exemption that replaces the existing joint venture exemption. The collaborative activity exemption is designed to encourage and enable pro-competitive arrangements between competitors.

We expect the new laws to be in place in 2013, with the criminal sanctions coming into force two years later.