



CPI Antitrust Chronicle

June 2014 (2)

Antitrust and the Grocery/Food Sector in New Zealand

Andrew Matthews & Gus Stewart
Matthews Law

Antitrust and the Grocery/Food Sector in New Zealand

Andrew Matthews & Gus Stewart¹

I. INTRODUCTION

Antitrust issues are very much alive in the New Zealand grocery sector, arising in a number of contexts, including: (i) merger approvals, (ii) abuse in relation to demand-side market power, and (iii) fair trading, each of which is discussed below. And given an established supermarket duopoly in New Zealand, we expect continued scrutiny for this sector.

The grocery sector in New Zealand is characterized by two main supermarket chains, one of which is currently being investigated by the New Zealand Commerce Commission (“NZCC”) in relation to alleged anticompetitive conduct. The two large players in New Zealand are Foodstuffs and Progressive Enterprises (“Progressive”). Foodstuffs is NZ-owned, and its main retail brands are “New World,” “PAK’nSAVE,” and “Four Square.” Progressive is ultimately owned by the Australian Woolworths Group, and following the rationalization of its three brands (“Countdown,” “Foodtown,” and “Woolworths”) in 2009 its main retail brand in New Zealand is Countdown.

A few years ago The Warehouse (a large general merchandise retailer) tentatively began expanding its operations into grocery products with its “Extra” stores. However, following failed attempts by both Foodstuffs and Progressive to gain regulatory approval to acquire The Warehouse (as discussed further below), we have not seen the Extra stores having any material impact on the grocery sector.

II. THE MERGER CONTEXT: GROCERY MERGERS IN NEW ZEALAND

In late 2006 and early 2007, Foodstuffs and Progressive each submitted (voluntary) applications for NZCC clearance to acquire The Warehouse Group. Both applications were declined as the NZCC was “not satisfied” that the acquisitions would not have, or would not be likely to have, the effect of substantially lessening competition in a number of local supermarket markets. The parties appealed the NZCC’s decisions to the High Court, which allowed the appeal and granted the clearances. The NZCC further appealed the High Court’s decision to the Court of Appeal, which allowed that appeal and then set aside the clearances (i.e. the applications were declined).

Progressive's acquisition of Woolworths New Zealand in 2001

There is interesting history to these proposals, which may have suggested that the NZCC would be unlikely to grant the clearances.

¹ Andrew Matthews is Principal at Matthews Law, providing expertise in competition law (antitrust), consumer law, regulation, and trade and policy issues. Gus Stewart is Associate in the same practice.

In 2001 (prior to its acquisition by Woolworths Australia in 2005), Progressive sought clearance to acquire Woolworths New Zealand (which was then owned by Hong Kong-based Dairy Farm Group). (Woolworths Australia and Woolworths NZ were separate, independent entities at the time, albeit with the same brand.) At the time, this was a proposal for a “three to two” merger. Progressive's application was lodged the day before the merger test under the Commerce Act 1986 was changed from a “dominance” test to a “substantial lessening of competition” (“SLC”) test. The NZCC considered the application under the dominance test and clearance was granted.

Foodstuffs challenged the NZCC's decision to consider the merger under the “old” test, which was more permissive, focusing only on single-firm market power. It argued that Progressive's application should have been determined under the law in force on the date on which the application was decided, i.e. the “new,” tougher, SLC test, which looked at a lower level of single-firm market power as well as coordinated effects risks.

Foodstuffs failed in the High Court but succeeded on appeal to the Court of Appeal. Progressive lodged a fresh clearance application, which the NZCC considered under the SLC test and declined clearance.

Ultimately, however, the Privy Council found that the NZCC was correct to have applied the dominance test and, in 2002, Progressive was able to complete its acquisition of Woolworths New Zealand.

Clearly against that backdrop further acquisitions will likely be problematic and market power issues could be a concern. That proved to be the case as the discussion below shows.

The “flip side” to the concentrated supermarket industry structure has been that it has been possible to obtain clearance for mergers involving supermarket suppliers, due to the supermarkets’ considerable countervailing buyer power. For example, this was a factor in the NZCC’s 2004 clearance for Colgate-Palmolive to acquire Campbell Brothers’ laundry additive, laundry detergent, and dishwashing detergent businesses.

III. THE DEMAND-SIDE MARKET POWER CONTEXT: THE NZCC’S INVESTIGATION INTO ALLEGED ANTICOMPETITIVE CONDUCT BY COUNTDOWN

The NZCC is investigating a complaint against Countdown for alleged anticompetitive practices. The investigation was prompted by a letter it received from then MP Shane Jones from the Labour party (who ironically was then offered a job by the National-led government, resulting in MP Jones exiting parliament).

The letter, which was released under parliamentary privilege, asked Dr. Mark Berry (NZCC chair) to investigate Countdown’s “anti-competitive and allegedly extortionary behaviour.” It accused Countdown of abusing its market power by demanding large payments from suppliers “allegedly to defray margins or losses on earlier transactions.” Non-compliant suppliers would allegedly have their products black-listed at the supermarket. It was also alleged that any suppliers who revealed the arrangement would have their supply contracts with Countdown terminated.

MP Jones noted, “Such allegations are significant of themselves but of extra concern given the market power that currently exists in the New Zealand supermarket sector.”

Clearly supermarket buyer power is getting attention in New Zealand, and continued scrutiny can be expected, especially in light of similar concerns offshore. But just as in other jurisdictions where these issues arise (such as the United Kingdom and Australia), demand-side market power issues are complex given the usual presumption that downward pricing pressure is pro-competitive.

In particular, there could be inherent challenges with applying New Zealand's misuse of market power (monopolization) test in s36 of the Act given that, among other things, the *prohibited purpose* must be to restrict, prevent, or deter competition. The prohibition on anticompetitive arrangements under s27, while still challenging, may be a more fruitful approach for the regulator to take as it may be arguable that the conduct has exclusionary effects.

It is interesting that apparently only one of the two supermarket chains is being investigated. Nor are we aware of any allegations of collusion between the two chains. The outcome of the NZCC investigation is awaited with interest, although it appears unlikely that enforcement action will be taken given the challenges with the s36 test and the NZCC's past record of enforcement action (having brought only a handful of successful s36 cases since the enactment of the Commerce Act in 1986 and having publicly signaled its dissatisfaction with the current test).

It has been suggested by some politicians (particularly from the opposition) that it may be time to introduce a code of conduct governing supermarket behavior. It is also worth noting that the New Zealand Productivity Commission has very recently recommended a review of whether or not s36 is achieving its purpose of preventing the anticompetitive exercise of market power.

Despite the challenges discussed above in relation to section 36, the NZCC seems to be increasingly considering the potential harm from demand-side market power in the merger context. Its June 2013 *Merger & Acquisition Guidelines* has a new section devoted to mergers between competing buyers, commenting:

Buyer market power is, in many ways, the mirror image of market power on the selling side. In particular, it is the ability to profitably depress prices paid to suppliers to a level below the competitive price for a significant period of time such that the amount of input sold is reduced. That is, the price of the product is depressed so low that (some) suppliers no longer cover their supply costs and so withdraw supply (or related services) from the market. Such an outcome reduces the amount of product being supplied damaging the economy.

IV. THE FAIR TRADING CONTEXT: THE RELEVANCE OF CONSUMER PROTECTION LAWS

As is the case with many other jurisdictions, over the past decade or so the NZCC has increasingly seen consumer protection laws as a useful tool in ensuring well-informed and competitive markets.

Supermarkets, like all other persons "in trade," are subject to the Fair Trading Act 1986 ("FTA") which, among other things, prohibits certain misleading and deceptive conduct. The FTA is enforced by the NZCC and supermarkets have naturally been subject to considerable scrutiny for their advertising.

For example, in March 2013 the NZCC issued a media release noting that it had warned Progressive about misleading advertisements about beer sale promotions. The release noted that Progressive claimed customers could save "at least 20%" or "at least 25%" off all beer at its supermarkets.

The NZCC believed that consumers had expected the 20 percent- to 25 percent-off claim to mean either:

- that they would save 20 percent to 25 percent off the price at which the beer was offered for sale immediately prior to the promotion, OR
- that they would save 20 percent to 25 percent off the usual price of the beer.

In fact, the NZCC's investigation indicated that, in many cases, the discount was calculated off neither of these prices, but the "standard shelf price" for the products. Further, that it had often been a lengthy period of time since the beer had been offered at the standard shelf price.

The Consumer Guarantees Act 1993 ("CGA"), as its name implies, provides statutory warranties to consumers. While not enforced directly by the NZCC, it is a breach of the FTA to mislead consumers as to their rights under the CGA, and the NZCC can take enforcement action for that conduct.

V. CONCLUSION

In summary, like many other jurisdictions, supermarket conduct is subject to considerable scrutiny. The issues being considered in New Zealand seem to reflect broader concerns considered internationally by antitrust regulators. We can expect continued focus on demand-side market power issues and vigilance on advertising by supermarkets. It is possible that we may see further enforcement action against supermarkets or perhaps some form of regulatory regime.