

THE HANDBOOK OF COMPETITION ENFORCEMENT AGENCIES

2014

A Global Competition Review special report
published in association with:

Bell Gully

GCR |
GLOBAL COMPETITION REVIEW

Overview

Torrin Crowther and Glenn Shewan

Bell Gully

New Zealand's competition laws are found in the Commerce Act 1986. Its purpose is "to promote competition in markets for the long-term benefit of consumers within New Zealand". This is achieved by regulating mergers and market behaviour.

Structure of the regulator

The Commerce Commission is the statutory body responsible for administering the Commerce Act. It is also responsible for administering certain consumer protection and sector-specific legislation.

The Commission currently consists of five full commissioners, a telecommunications commissioner, two cease-and-desist commissioners and an associate commissioner. It also employs economists, lawyers and industry experts to support the commissioners. The staff collect information, receive submissions and undertake investigations to provide the commissioners with the information and recommendations necessary to make decisions. Except in limited circumstances, businesses and their advisers interact with the investigating teams rather than the commissioners.

Relationship with government

The Commission is independent of both the executive and legislative arms of government. Although commissioners are appointed by the governor general on the recommendation of the minister of commerce, commissioner appointments are made based on a person's experience and knowledge, rather than on his or her political allegiance. Indeed, the Commission is frequently commended for its political neutrality.

Merger regulation

The Commerce Act prohibits the acquisition of shares or assets of a business if that acquisition would have the effect, or likely effect, of substantially lessening competition in any New Zealand market. It applies to offshore acquisitions to the extent they affect a market in New Zealand.

The Commerce Act provides for a voluntary pre-transaction notification regime, permitting the acquirer to apply to the Commission for a clearance or an authorisation of the acquisition.

The Commission will grant a clearance if it is satisfied that the acquisition will not, or will not be likely to, substantially lessen competition in any New Zealand market. The Commission has published Mergers and Acquisitions Guidelines, which outline the analytical approach and processes it follows. The Commission has an active economics division, which typically provides economic analysis to assist with the qualitative analysis and the decision-making process.

Acquisitions that are likely to substantially lessen competition may be authorised by the Commission if it is satisfied that the economic benefits to the New Zealand economy (both producers and consumers) flowing from the acquisition would outweigh any anti-competitive detriments. The Commission has developed a streamlined authorisation process which allows it to make decisions on straightforward authorisation applications within 40 working days, provided certain criteria are met.

The Commerce Act requires that the Commission reach decisions regarding merger clearance and authorisation applications within 10 and 60 working days respectively, or 40 working days should the streamlined authorisation process apply. However, in practice these periods are regularly extended with the agreement of the applicants. For clearance applications, recent experience suggests merging parties should allow at least 40 to 50 working days. Longer time frames are not unusual – ultimately, the time taken depends on the Commission's workload at the time and the complexity of the issues raised.

If an acquiring firm does not apply to the Commission for a clearance or an authorisation, the Commission can commence proceedings in the High Court seeking an injunction to prevent the acquisition occurring, or penalties and divestment if it is able to prove that a breach of the merger provisions has occurred. Vendors can also be liable under the ancillary liability provisions (a point confirmed by the Court of Appeal). Third parties can also seek damages for breach in the High Court.

The Commission (via its two specialist cease-and-desist commissioners) can also issue cease-and-desist orders, which are temporary administrative injunctions

that prevent the continuation of anti-competitive behaviour. Cease-and-desist orders can only be issued where it is necessary to act urgently in the interests of the public and to prevent serious loss or damage.

Anti-competitive practices – regulation of market behaviour

The Commission is responsible for investigating anti-competitive market behaviour and can, where it deems appropriate, commence proceedings in the High Court against any body corporate or individual. In appropriate cases, the Commission may also issue a cease-and-desist order in respect of such behaviour.

The Commerce Act does not contain an exhaustive list of behaviours that are specifically prohibited. Rather, there is an overriding prohibition against any provision of a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in any New Zealand market. However, the Commerce Act does specifically prohibit:

- price fixing (that is deemed to substantially lessen competition in a market);
- exclusionary provisions (although there is a defence if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market);

- resale price maintenance; and
- a firm with a substantial degree of power in a market taking advantage of that market power for a proscribed anti-competitive purpose.

As with mergers, the Commission can grant authorisation for certain practices that might otherwise breach the Commerce Act (although not for a misuse of market power) if it is satisfied that the economic benefits to New Zealand flowing from the practice would outweigh any anti-competitive detriment.

Cartels are unlawful under the Commerce Act and subject to civil sanctions. Parliament is expected to pass an amendment Bill during the course of 2014 to criminalise “cartel conduct”. If the Bill is passed in its current form, individuals convicted of cartel conduct will be liable to imprisonment for up to seven years.

The Commission administers a leniency policy designed to destabilise cartel behaviour affecting New Zealand markets. Under the policy, the first person to inform the Commission of cartel behaviour receives immunity from prosecution, while subsequent persons can seek reduced penalties under the Commission’s cooperation policy. Additionally, a company or individual can also apply for conditional immunity from prosecution even after the Commission has knowledge of the cartel but does not yet have sufficient evidence to launch court proceedings.



Torrin Crowther
Bell Gully

Torrin heads Bell Gully's market-leading competition/antitrust law practice, which has been voted "Elite" by *GCR 100* for the past nine years.

Torrin advises on the full spectrum of competition-related matters – with particular expertise on cross-border M&A and cartel leniency issues. His work also includes acting for corporate clients to successfully resolve Commerce Commission investigations into alleged cartel and market power conduct and working with clients to develop and implement effective compliance programmes.

He is the principal day-to-day competition law contact for many of the region's largest companies, including Air New Zealand. Torrin can call on strong working relationships with regulators to resolve his clients' legal issues quickly and effectively.



Glenn Shewan
Bell Gully

Glenn returned to Bell Gully in early 2012, bringing a wealth of international experience to the team. He advises on all aspects of competition law, having assisted clients with large-scale cartel investigations and advised on misuse of market power issues. Before returning to Bell Gully, he was a managing associate in the London office of a leading magic circle firm, where he advised clients on the competition aspects of global M&A transactions, including Rio Tinto on its acquisition of Canadian aluminium producer Alcan and its proposed iron ore joint venture with BHP Billiton. Since returning to New Zealand, Glenn has advised Vodafone on its successful application for clearance to acquire TelstraClear (a transaction that combined New Zealand's second and third largest telcos) and Bauer Media on its acquisition of rival magazine titles, in addition to providing a range of advice on mergers and behavioural issues to many of New Zealand's largest companies.

BELL GULLY

Vero Centre, 48 Shortland Street
PO Box 4199
Auckland 1140
New Zealand
Tel: +64 9 916 8800
Fax: +64 9 916 8801
info@bellgully.com

Torrin Crowther
torrin.crowther@bellgully.com

Glenn Shewan
glenn.shewan@bellgully.com

www.bellgully.com

Bell Gully's competition practice, led by Torrin Crowther, is recognised as a leader in the New Zealand legal market. *Global Competition Review's GCR100* – a guide to the world's top competition law practices – has ranked the practice as "elite" for each of the past nine years, its highest ranking in New Zealand. The 2014 edition notes that Bell Gully's competition practice is "consistently ranked as one of New Zealand's elite competition practices".

The team plays a role in most of the major competition transactions and court proceedings in New Zealand, and has particular experience in relation to the New Zealand competition law aspects of large-scale cross-border M&A transactions as well as multi-jurisdictional cartel investigations (including on behalf of leniency applicants). The team works closely with Bell Gully's market leading corporate M&A team and counts among its members a number of high-profile litigation specialists.

Bell Gully enjoys a strong relationship with the Commerce Commission, and its frequent involvement in international mergers, JVs and cartel investigations means it has established excellent relationships with leading law firms and economic consultancies internationally.
