

Competition Alert

22 December 2009

2009 Year in Review

This Alert looks back at some of the interesting developments in New Zealand competition law in 2009.

New Commission Chair

In March 2009 the Commission announced that Dr Mark Berry would be replacing long serving Chair, Paula Rebstock. Ms Rebstock's tenure had been considered in some quarters to be marked by the Commission taking an aggressive, pro-regulatory stance. Some commentators predicted that the appointment of Dr Berry coupled with the new centre-right National-led Government would see a watering down of enforcement and prioritising of resolving regulatory regimes to provide businesses with certainty. Experience to date, however, suggests that while Dr Berry has improved timeframes for completing administrative processes, there has not been significant movement in the Commission's substantive approach to competition or regulatory decision making.

Criminalisation of cartel conduct

With the recent passage of the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009, serious cartel conduct in Australia is now a criminal offence.¹

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Although there have not yet been any formal moves towards criminalisation in New Zealand, the Commission has made it clear that criminalisation of cartel conduct is on its agenda.² The Prime Minister has also indicated that criminalisation is an issue worth considering, and the Minister of Commerce, Simon Power, has indicated to a parliamentary select committee that he has been looking into the possibility of

jail sentences for those operating cartels.³ The Ministry of Economic Development is now working on a consultation paper on this proposal.

In light of these signals and the close relationship of trans-Tasman business laws, it would be surprising if New Zealand does not introduce criminal sanctions similar to those in Australia within the next 18 months to two years.

Interchange proceedings

During 2009 the Commission reached settlements with various parties in its proceedings against Visa, MasterCard and a number of retail banks under sections 27 and 30 of the Commerce Act 1986 (*Commerce Commission v Cards NZ Limited & Ors*)⁴ (the "**Interchange Proceedings**"). The proceedings were hotly contested with the Commission taking a novel and arguably very 'technical' approach to characterising the conduct.

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In the settlements, Visa and MasterCard agreed to change the way the scheme rules apply in New Zealand. Breaking with historical Commission practice, settlement was finalised on the basis that no party accepted any liability for the alleged price fixing and no party paid any penalty. Visa and MasterCard paid the Commission costs of NZ\$2.6 million and NZ\$3 million respectively. The terms of the settlement enable retailers to pass on costs associated with credit cards to the consumers that use them through surcharges.

Alstom Holdings SA (Schneider)

In *Commerce Commission v Alstom Holdings SA & Ors*⁵ the High Court imposed an agreed penalty of \$1.05 million on Schneider SA in relation to its participation in a cartel regarding gas insulated switchgear. This was the first case

in New Zealand to come before the Court as a result of a leniency application. High Court proceedings are continuing against the other corporate defendants in the case, Alstom and Siemens. Of significance was that a fine of that order was imposed notwithstanding little or no competitive impact in New Zealand.

Extra-territorial jurisdiction

The March 2009 Court of Appeal ruling in *Neil Harris v The Commerce Commission*⁶ extended the New Zealand courts' extra-territorial jurisdiction over overseas residents alleged to have breached the Commerce Act. According to the *Harris* decision, it now appears that New Zealand courts will have jurisdiction for any specific act or omission that results in a party entering into, consenting to, or authorising an anti-competitive understanding that is "directed at a New Zealand market" and is ultimately "implemented" in New Zealand. An appeal was heard in the Supreme Court in November so we await final confirmation.

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The Commission's first successful section 36 prosecution in two decades

In *Commerce Commission v Telecom Corporation of New Zealand Limited & Anor* (the "**Data Tails case**")⁷ Justice Hansen held that, between March 2001 and late 2004, Telecom took advantage of its market power to deter existing and potential competition in high-speed data transmission markets. This was the first time in almost two decades that there has been a successful prosecution under section 36 of the Commerce Act. Although this case does not materially alter the legal tests for finding a contravention of section 36, practitioners may now think twice before advising businesses that have a strong market presence on the legality of certain conduct.

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In addition, on 30 October 2009 the Supreme Court granted leave to the Commission to appeal the decision in *Commerce Commission v Telecom Corporation of New Zealand Limited & Anor* (the "**0867 case**")⁸, on the grounds that the Court of Appeal erred in applying the section 36 counterfactual test. As the current Supreme Court judges significantly overlap

with the Court of Appeal bench that was overturned by the Privy Council in *CHH v Commerce Commission* (the "**INZCO insulation case**")⁹, on the question of the application of the counterfactual test, it will be interesting to see how the Supreme Court approaches these important questions in 2010.

The Commission cannot go "fishing" for information

The recent Supreme Court decision in *AstraZeneca Ltd v Commerce Commission*¹⁰ has confirmed that the Commission cannot use its compulsory information requests (section 98 notices) to go "fishing" for information. The Supreme Court concluded that "the Commission's purpose in issuing a section 98 notice must be the investigation of some activity which may be unlawful under the Commerce Act". Therefore, any section 98 notice must be founded on a reasonable belief that there may be undiscovered facts that could give rise to a breach of the Commerce Act. The Commission cannot issue a section 98 notice in the absence of such a reasonable belief and the "Commission is certainly not entitled to proceed on the basis that it can issue a notice first and then have its power to do so judged retrospectively by what it might find."

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Prosecution for non-compliance with section 98 notices

The case of *Commerce Commission v Aerolineas Argentinas SA*¹¹ in January 2009 is a reminder that, if the Commission issues a section 98 notice, it is important that it is complied with fully and in a timely manner. As part of an investigation into allegations of cartel conduct in the air cargo services industry, the Commission issued a section 98 notice to Aerolineas Argentinas requesting information to be provided by mid-November 2007. The required documents were not provided until April 2008 and the Commission brought proceedings for non-compliance with a section 98 notice. Aerolineas Argentinas was criminally prosecuted and fined NZ\$11,000.

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New Guidelines

The Commission also published two new guidelines aimed at improving Commission processes.

» Draft "failing firms" guidelines

Although there is currently no specific defence or exception in the Commerce Act which permits a competitor to acquire or merge with a "failing

firm”, given the difficult market conditions, the Commission in October 2009 released guidelines on how applications for mergers and acquisitions will be treated where one of the parties (usually the target) is “failing” or under financial stress.¹²

The Supplementary Guidelines on Failing Firms suggest that merger parties should provide complete and robust evidence that a firm is actually failing in order for the Commission to make a timely determination. The Guidelines do not suggest that the Commission intends to relax its previous approach, rather the Commission must still be satisfied that the merger will not result in a substantial lessening of competition.

» *New Streamlined Authorisation Guidelines*

The Commission may grant an authorisation for an agreement - including price fixing - or merger which might give rise to a lessening of competition if the Commission is satisfied that the transaction or business practice is likely to result in net public benefits. In the past, merger parties have been reluctant to submit themselves to the authorisation process as it was considered a costly and time consuming process. In June 2009 the Commission published guidelines for a new “streamlined process” for authorisations.¹³

Candidates for this process might include joint ventures where the technical requirements of the section 31 joint venture exception are not met, or failing firm mergers. Decisions are to be made within 40 working days (which is comparable to the standard clearance process). The streamlined process is intended to apply to transactions that have clear public benefits and a relatively limited impact on competition.¹⁴

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1. See our October 2008 Alert for more details: http://www.russellmcveagh.com/docs/CompAlertOct08_173.pdf.
2. Rebstock, P. (2007). *Speech to the New Zealand Institute of Management*. Paper presented at New Zealand Institute of Management, 21 March 2007. Retrieved from the New Zealand Commerce Commission website: <http://www.comcom.govt.nz/MediaCentre/Speeches/speechtothenewzealandinstituteofma.aspx>. Ms Rebstock commented that “we [the Commission] have a great deal of interest in seeing moves on the other side of the Tasman to provide significant sanctions for cartel conduct”.
3. Jail good idea for cartels, says Key. (2009, August 18). *The New Zealand Herald*. Retrieved December 14, 2009 from http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10591405.
4. High Court at Auckland CIV-2006-485-2353 (29 June 2009).
5. [2009] NZCLR 22.
6. As per: CA255/2007 *Neil Harris v The Commerce Commission*, CA256/2007 *Elias Joseph Akle v The Commerce Commission*, CA257/2007 *Andrew Robert Poynter v The Commerce Commission*, 18 March 2009 (Arnold, Hammond and O'Regan JJ).
7. High Court Auckland CIV 2004-404-1333 (9 October 2009).
8. High Court Auckland CIV 2000-485-673 (18 April 2008).
9. [2004] UKPC 37.
10. [2009] NZSC 92.
11. District Court at Auckland CRI-2008-004-011467 (21 January 2009) per Judge Aitken.
12. The Supplementary Guidelines on Failing Firms can be found at: <http://www.comcom.govt.nz/MediaCentre/MediaReleases/ContentFiles/Documents/Failing%20firms%20guidelines.pdf>.
13. The Streamlined Authorisation Process Guidelines can be found at: <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/Streamlined%20Authorisation%20Process%20Guidelines.pdf>.
14. See our April 2009 Alert for more details: http://www.russellmcveagh.com/docs/CompetitionAlertApril2009_211.pdf.

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