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Competition and antitrust in New Zealand

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Key points about competition law in New Zealand

Competition law is governed in New Zealand by the Commerce Act 1986 (the Commerce Act).

The purpose of the Commerce Act is to promote competition in markets for the long-term benefits of New Zealand consumers. To this end, the Commerce Act sets out a number of prohibitions on various forms of anti-competitive behaviour and provides for significant financial penalties for a breach of those provisions.

The Commerce Commission (the Commission) is the regulatory body that administers and enforces the Commerce Act.

The detail

Mergers and acquisitions

The Commerce Act sets out the rules which apply to mergers and acquisitions affecting markets in New Zealand. The Commerce Act prohibits an acquisition of shares or business assets which would result in a substantial lessening of competition (SLC) in any market.

The Commission has published 'safe harbour' guidelines indicating that competition is unlikely to be substantially lessened where, should an acquisition proceed, either of the following conditions exist:

- In markets where the three largest firms (post-transaction) comprise less than 70% of the market, the merged firm would have a market share of less than 40%.
- In markets where the three largest firms (post-transaction) comprise more than 70%, the merged firm would have a market share of less than 20%.

Obtaining Commission approval

Parties to a proposed acquisition have a choice as to whether to apply for and implement their proposal in accordance with the prior approval of the Commission, or to proceed without approval. Applications are voluntary, so are **normally** only made where the 'safe harbour' guidelines are not met and there is a risk of the Commission forming the view that acquisition will cause a SLC.

Obtaining the prior approval of the Commission provides protection against the Commission or any other person taking legal action under the Commerce Act provided the merger or acquisition is completed within 12 months from the date of the Commission's approval.

The Commission is able to issue one of two types of approval to a proposal:

- A clearance, which is a confirmation that the acquisition is not unlawful (i.e. that it will not result in a substantial lessening of competition in any market).
- An authorisation, which is an approval for an acquisition which would otherwise be prohibited. An authorisation will only be granted if the Commission is satisfied that there is enough public benefit in the acquisition to outweigh the detriments of the substantial lessening of competition caused by it.

The normal time frame for the Commission to decide on a straightforward application for clearance is about eight weeks, though it is normal to engage with the Commission informally before submitting an application. An application for authorisation will usually take at least three months.

Penalties for breach of business acquisition provisions

The maximum penalty for a company for a breach of the business acquisition provisions of the Commerce Act is a fine of NZ$10 million or three times the commercial gain resulting from the breach (or 10% of turnover if this cannot be easily established). The maximum penalty for an individual is a fine of NZ$500,000.

In addition, the High Court may order a person or company to dispose of specified assets or shares acquired in breach of the Commerce Act.

Individuals or companies may also take private legal action, for example, by applying for an injunction to stop an acquisition or seeking damages for loss suffered as a result of an acquisition.

Restrictive trade practices

The Commerce Act prohibits the following collective restrictive trade practices:

- **Practices substantially lessening competition:** The Commerce Act prohibits a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in the market. This section is very broad in its application, and it is not necessary for there to be a legally binding contract for there to be a breach.

- **Cartel provisions:** The Commerce Act also prohibits the entering into, or giving effect to, a contract, arrangement or understanding containing a cartel provision. A cartel provision is a provision that has the purpose, effect or likely effect, of:
    - Price fixing: Where competitors fix, control, or maintain the price of a product or service.
    - Restricting output: Where competitors prevent, restrict or limit the production, supply or acquisition of a particular good or service.
    - Market allocating: Where competitors allocate a market between themselves, for example according to geographical area.

Individuals involved in cartel conduct are committing a criminal offence.

The Commerce Act prohibits the following unilateral restrictive trade practices:

- **Taking advantage of market power:** Where a company has substantial market power, it must not take advantage of that market power with the purpose, effect, or likely effect of substantially lessening competition. The Commerce Act prohibits a company with a substantial degree of market power from taking advantage of that power to:
    - Restrict the entry of a competitor.
    - Prevent or deter a competitor engaging in competitive conduct.
    - Eliminate a competitor from the market.

    An example of where an abuse of market power might arise is predatory pricing. This is where a business sells its products below market value in order to chase its competitors out of the market due to an inability to compete.
- **Resale Price Maintenance:** Suppliers cannot fix the price of their goods sold by other retailers. Furthermore a supplier cannot enforce a minimum price for resale (whether by specifying a minimum price or by setting restrictions on the ability to discount).

Penalties for restrictive trade practices

The Commission has a range of enforcement options available to it depending on the extent and severity of a breach and the public interest involved. In some cases the Commission will merely issue a warning; in more serious cases prosecution in the High Court can occur.

As with breaches of the acquisition provisions, an individual can face penalties of up to NZ$500,000 per breach and, for companies, the penalty can be up to the greater of NZ$10 million, three times the value of any commercial gain resulting from the contravention, or 10% of the turnover of the company (and any interconnected companies).

How we can help you

- Understanding and reviewing the Commerce Act compliance requirements for your business, including in respect of planned acquisitions.
- Employee/management training materials for Commerce Act compliance.
- Drafting or reviewing of contracts with competitors.
- Drafting or reviewing supply agreements.
- Drafting and filing clearance or authorisation applications.
- Assisting in responding to Commission investigations.
- Bringing or defending a claim under the Commerce Act.

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