

COMPETITION ALERT

DECEMBER (NO.2) 2007

2007 YEAR IN REVIEW

This Alert looks back at some interesting developments in New Zealand competition law in 2007.

Woolworths and Foodstuffs proposed acquisition of The Warehouse

The most high profile of the merger activity in 2007 involved separate clearance applications by New Zealand's leading supermarket chains, Woolworths and Foodstuffs, to purchase The Warehouse - New Zealand's largest general merchandise retailer and recent entrant into the grocery industry, having opened three "supercentre" *Extra* stores that offer grocery and general retailing under one roof, with plans for more around the country. After considering the applications for almost 100 days the Commerce Commission ("**Commission**") declined both clearance applications.¹

Woolworths and Foodstuffs appealed this decision and it was overturned in the High Court by Mallon J (who was sitting with a lay member - an economist, Dr S King). The decision ultimately rested upon whether the Court was satisfied that the *Extra* concept would be successful.

The Court was of the view that there was a real prospect that The Warehouse would not continue with the *Extra* concept, and even in the unlikely event that the *Extra* concept was pursued, the Court believed that it would not have the potential to be a vigorous competitor, as its main focus would always be on general merchandise. The Court was satisfied that the acquisition of The Warehouse by either Woolworths or Foodstuffs would not lead to a substantial lessening of competition in the supermarket market. For more detail, see our first December Alert, "The High Court - Where Everyone Gets a Clearance?".²

The Commission has, however, announced it will seek leave to appeal the High Court's decision, with the Commission chair, Paula Rebstock, citing the important precedent the decision sets and the detrimental implications it believes the decision will have on the long-term interests of supermarket consumers as reasons for the appeal. Consequently, it seems apparent that this merger dispute will extend well into 2008.

Review of the Clearance and Authorisation Provisions under the Commerce Act 1986

During 2007, the Ministry of Economic Development ("**MED**") issued a Discussion Document outlining its consideration of potential changes to the clearance and authorisation procedures in the Commerce Act 1986 ("**Act**"). See our June 2007 Alert for further details.³ After receiving and considering submissions on this Discussion Document, the MED intends to implement the following changes to the Act by early next year:

- (a) enabling the Commission to apply to the High Court to enforce undertakings to divest shares or assets approved as part of a clearance or authorisation of a merger;

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1. Commerce Commission, Decision 606 & 607: Foodstuffs (Auckland) Ltd, Foodstuffs (Wellington) Co-operative Society Ltd and Foodstuffs (South Island) Ltd and Woolworths Limited and The Warehouse Group Limited, June 8, 2007, available at <http://www.comcom.govt.nz/PublicRegisters/ContentFiles/Documents/PUBLIC%20VERSION%20Decision%20606%20and%206070.pdf> (last visited Oct. 4, 2007).

2. <http://www.russellmveagh.com/doclibrary/public/Competitionlaw/ComplawDec07.pdf>.

3. <http://www.russellmveagh.com/doclibrary/public/Competitionlaw/ComplawJun07.pdf>.

- (b) allowing the Commission to consider and accept minor variations to approved undertakings to divest shares or assets; and
- (c) removing the 20 day statutory timeframe within which the Commission is required to hold a conference following the release of a draft determination for a restrictive trade practice authorisation proceeding.

A further round of consultation on other issues in the Discussion Document is scheduled to take place between now and April 2008.

Review of the regulatory control provisions of the Commerce Act 1986

The MED also conducted a review of the regulatory control provisions of the Act during 2007. See our April 2007 Alert for further details.⁴ After receiving submissions on its discussion document entitled "Review of Regulatory Control Provisions under the Commerce Act 1986", the MED announced the following changes in November:⁵

- (a) Part 4 (the part of the Act that allows goods and services to be placed under price control and/or quality control where there is limited or lessened competition) and Part 4A (the part of the Act that applies a 'thresholds' regime for electricity lines businesses, which enables price and quality control to be imposed if businesses breached thresholds set by the Commission) come together in a single regulatory framework, which will provide for alternative forms of regulation in addition to conventional price control including:
 - (i) Information disclosure;
 - (ii) A negotiate/arbitrate regime;
 - (iii) A "default/customised price path" regime, which replaces the threshold regime.
- (b) The test for whether regulation may be imposed becomes "*there is little or no competition and prospect of competition and there is substantial scope for the exercise of market power, taking into account the effectiveness of existing regulation or arrangements*" and "*the benefits of regulation in meeting the objectives of the (new) purpose statement clearly exceed the costs of regulation*".
- (c) The rules for how costs and prices should be calculated (input methodologies) will be spelt out in advance by the Commission. These decisions will be subject to merits review by way of appeal to the High Court.

Increasing numbers of cartel investigations and prosecutions

The Commission claims that, due to its "increased investigative expertise" and the operation of its Leniency Policy, it is discovering an increasing number of cartels to prosecute. In October this year, the Commission indicated that it was pursuing around seven cases that it believes could be characterised as "hard core" cartels.⁶ No doubt further investigations have begun since then.

During 2007, the Commission commenced proceedings against Alstom Holdings SA, Siemens AG and Schneider Electric Industries SA for alleged price fixing in relation to equipment for electricity sub-stations and also commenced proceedings against Visa Board and its executives in relation to alleged price fixing in the cardboard box industry. The proceedings the Commission brought late last year against Visa, MasterCard and 11 financial institutions for alleged price-fixing in relation to interchange fees are still ongoing. All these proceedings are at an early stage and are not expected to be heard for some time. We understand that the Commission intends to commence another proceeding on an overseas defendant in the very near future. The Commission has also followed overseas regulators in launching investigations into the airline and freight-forwarding industries.

The Commission states that it expects to commence four to six prosecutions in each of the next two years.

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Part 4 and Part 4A come together in a single regulatory framework, which will provide for alternative forms of regulation in addition to conventional price control.

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4. <http://www.russellmveagh.com/doclibrary/public/Competitionlaw/ComplawApr07.pdf>.

5. (2007, November 23). Greater Certainty for Businesses after Commerce Act Review. The Ministry of Economic Development website. Retrieved December 14, 2007 from http://www.med.govt.nz/templates/MultipageDocumentTOC_32531.aspx.

6. Rebstock, P. (2007). Competition and the role of the Commerce Commission. Aon Lunch with Paula Rebstock, 9 October 2007. Wellington, New Zealand: Wellington Chamber of Commerce available at <http://www.comcom.govt.nz/MediaCentre/Speeches/speechtoaonlunchatthewellingtoncha.aspx> (last visited Oct. 15, 2007).

Cooperation agreement between NZCC and ACCC

Another important development in enforcement activity is the increasing desire of the Commission to cooperate and share information with the Australian Competition and Consumer Commission ("ACCC"). In furthering this desire the Commission signed a cooperation agreement with the ACCC in July 2007 that will make it easier for the two commissions to coordinate activities and cooperate with each other.

The agreement achieves this by enabling the creation of a formal framework (a protocol) through which the two commissions will share information, evidence and documentation in respect of their investigations, prosecutions and enforcement decisions. See our August 2007 Alert for further details.⁷

Proposal to allow judgments to be enforced across the Tasman

An important step in the harmonisation between New Zealand and Australian competition law is the recent release of a working paper prepared by senior officials from several Australian and New Zealand government departments proposing a number of legislative changes aimed at making it easier to enforce judgments between Australia and New Zealand, and making it possible to enforce penalties and fines across the Tasman. The proposals include making all civil and criminal pecuniary penalties (including penalties under the Commerce Act 1986 and Australia's Trade Practices Act 1974) enforceable in both countries. The proposals contained in this working paper would make it much easier for New Zealand competition regulators to obtain and enforce judgments against Australian businesses and individuals trading in New Zealand, where civil penalties are currently enforceable only in limited circumstances. These proposals would increase the risk of falling within the reach of both Australian and New Zealand regulators and will increase the focus on compliance of businesses on both sides of the Tasman.

Greater extra-territorial reach of the Commerce Commission

The recent decision of the High Court in the continuation of the *Koppers Arch*⁸ litigation (the initial decision having been referred to in our April 2006 Alert) represents a subtle but significant broadening of the scope of extra-territoriality in New Zealand. This decision suggests that New Zealand courts need not consider the location of specific acts or omissions said to give rise to a breach on the part of an individual defendant. Instead, they may simply ask whether the defendant is liable for a penalty under s 80 in respect of a "course of conduct" agreed, permitted, encouraged or otherwise supported anywhere, but ultimately implemented in New Zealand. On this interpretation, it is irrelevant where a defendant was located when he or she acted (or failed to act) in breach of the Commerce Act, and nor is it relevant whether communications were received within New Zealand instructing such a breach. The New Zealand courts appear to be adopting the European "implementation test", meaning that the courts will have jurisdiction as long as a breach is implemented in New Zealand. This decision is being appealed to the Court of Appeal and the appeal will be heard in the first half of 2008.

Conclusion

2007 was again an active year for the Commission. The government's decision to increase the Commission's litigation fund, coupled with the Commission's stated desire to increase the public's awareness of its work, will ensure that the Commission continues to be in the headlines in 2008.

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7. <http://www.russellmcveagh.com/doclibrary/public/Competitionlaw/ComplawAug07.pdf>.

8. *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805.