

# Competition Alert

8 April 2009

## Better enforcement: the NZCC's moves to greater transparency and more efficient outcomes

*The New Zealand Commerce Commission came under a lot of criticism in the media during 2008 for the time it takes to deal with processes which businesses require guidance on quickly to pursue legitimate business objectives. In the past two weeks, the NZCC has released two process initiatives which go to the heart of how the NZCC carries out its existing responsibilities. The NZCC's new initiatives tackle the difficult issues of the absence of a simple process for obtaining the NZCC's views on restrictive trade practices and the manner in which the NZCC decides how to approach its enforcement responsibilities. This Alert considers the two initiatives and assesses what impact they may have.*

### Model litigant policy

In the first of the two process initiatives, the Commerce Commission ("**NZCC**") broke new ground in releasing its first-ever Model Litigant Policy ("**Policy**"). The Policy is intended to reflect the existing functions of the NZCC's legal services branch and introduce greater transparency by publicly restating the NZCC's intentions when engaging in civil litigation. In explaining the purpose to the Policy, the NZCC is clear that it is not intended to impose obligations on it that go beyond the legal and professional obligations ordinarily imposed on legal practitioners. The Policy lays out a set of principles that serve to guide the NZCC, both in its decision-making processes regarding the initiation or continuance of proceedings and also in determining how the NZCC conducts itself as a litigant.

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The key requirements of the NZCC under the Policy can be summarised as:

- » dealing with litigation promptly and efficiently;
- » considering (and where appropriate initiating) alternative means of avoiding or resolving litigation; and
- » not pursuing appeals unless it considers that to do so would be in the greater public interest.

The adoption of the Policy brings the NZCC in line with Australia's Commonwealth Model Litigant Policy ("**Commonwealth Policy**"), which the Australian Competition and Consumer Commission ("**ACCC**") is obliged to adhere to. The Commonwealth Policy was introduced in 1999 to counter a perception that the government was implementing a "win at all costs" approach to litigation. It stipulates that the Commonwealth must act "fairly but firmly" and, unlike the NZCC's policy, expressly requires all agents to act beyond the basic requirements of the Australian Bar Association Rules. The Commonwealth Policy guides the ACCC's decision-making processes in determining whether it should initiate or continue proceedings, as well as the manner in which it conducts itself as a litigant. The Commonwealth Policy has been influential in the ACCC's actions in the past, perhaps most notably in the ACCC's decision to discontinue cartel proceedings against Leahy Petroleum and its general manager, Robin Palmer<sup>1</sup>, in light of the evidence available to the ACCC.

One aspect of the Policy which potentially signals a change in the NZCC's approach to enforcement is its obligation under the Policy to consider, and initiate where appropriate, alternative means of avoiding or resolving litigation. This aspect of the Policy echoes recent trends by the ACCC to resolve investigations without recourse to litigious enforcement methods. Recognising that proceedings should

only be initiated to sanction the most egregious forms of anticompetitive conduct, the greater enforcement flexibility of a more responsive approach to regulatory enforcement should be welcomed in New Zealand. However, at present, the ability of the NZCC to pursue alternative means of enforcement is hampered due to the narrow range of enforcement tools at its disposal. For example, the NZCC does not possess the ability to accept court enforced written undertakings. By comparison, the ACCC has the option of seeking a wide range of enforcement remedies in the form of court enforceable undertakings, or community service orders under section 86C of the Trade Practices Act 1974 ("TPA"), which have in the past included the adoption of rigorous compliance programmes, and the establishment of educational funds by companies alleged to have breached the TPA.

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While the Policy is helpful in publicising how the NZCC can be expected to carry out its enforcement functions, its scope is perhaps limited to bringing greater transparency to the enforcement process. Save for the seldom invoked protections in the Bill of Rights Act (which rely upon enforcement through legal proceedings), there are no apparent checks on whether the NZCC is fulfilling its self-imposed obligations, nor any sanctions for departures from the Policy. As the NZCC appears to be of the view that its current approach to enforcement complies with the principles of the Policy, critics may argue that the Policy fails to address past criticisms of the way the NZCC has on occasion carried out its enforcement responsibilities.

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### Streamlining the Authorisation process

The second recent process initiative announced by the NZCC is the release of its draft streamlined authorisation process guidelines for both authorisations of restrictive trade practices under Part 2 of the Act and business acquisitions under Part 3 of the Act. The NZCC has released the guidelines setting out the criteria for determining which applications may constitute streamlined applications and the proposed process for adjudicating streamlined applications. With the ultimate goal of making the authorisation process more efficient and user friendly for both the NZCC and New Zealand companies, the NZCC has invited input on its draft guidelines from the business and legal communities.

In releasing the draft guidelines, the NZCC has been at pains to emphasise that the guidelines are only intended to apply to 'straightforward' authorisation applications. These might, for example, include:

- » applications for the authorisation of long-term exclusive supply contracts;
- » applications to authorise collective supply arrangements; or
- » salary caps for sporting competitions.

The NZCC contends that the new streamlined process will allow straightforward applications to be determined in a more timely manner, saving businesses crucial time and costs. It is also heralded by the NZCC as bringing greater transparency to its decision making process in the authorisation context. The NZCC expects the number of authorisations to markedly increase as a result of the streamlined process. 'Straightforward' applications will qualify where, for example, the issues raised by the application are limited or discrete, or the number of interested or affected parties is small. However, more complex applications will not qualify for the streamlined process and the NZCC's current authorisation processes will prevail.

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Currently, authorisations for mergers or acquisitions which potentially breach the Act but which are nevertheless in the public benefit are seldom sought, largely due to the significant time, complexity and costs involved in the authorisation process. The NZCC's current goal is to determine authorisations within 60 working days of the application, although in practice, difficult applications have taken twice as long. Under the streamlined process, the NZCC aims to have arrived at its determination within 40 working days of the application being registered, with an extension to 60 working days if a conference is required. This process will be timed from registration of the application. However, prior to registration, the process envisages that applicants will submit a request for their application to be streamlined. Within five working days of receipt of the request, the NZCC will notify the applicant whether its request has been accepted. The NZCC and applicant will then take part in pre-registration discussions, following which the applicant will register its application, thereby triggering the 40 working day process. By comparison, the Australian Competition Tribunal undertakes to make a decision within 90 working days of an application being registered, and allows an extra 90 working days for particularly complex decisions.

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While the guidelines for streamlined authorisation processes set an impressive target for the NZCC, the guidelines are clear that there are a number of issues which could derail the target timeframes. Under the guidelines the NZCC can withdraw an application from the streamlined process at any time, at which time the NZCC’s current timeframes for authorisations will apply. However, the biggest question concerning the streamlined guidelines is whether in fact they will be frequently invoked.

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The NZCC intends to publish revised guidelines once it has considered submissions. The NZCC initially requested submissions from interested parties by 13 April 2009, but has confirmed that it will consider any submissions received by 17 April 2009.

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1. A service station operator at Buangor had made allegations in relation to the wholesale petrol prices charged by Leahy Petroleum Ltd in Easter 2000.

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