

Competition Alert

22 December 2008

2008 YEAR IN REVIEW

This Alert looks back at some of the interesting developments in New Zealand competition law in 2008.

CARTEL ENFORCEMENT

Review of Leniency and Cooperation policies in cartel enforcement

The Commerce Commission ("**Commission**") is continuing to place a major focus on cartels. The Commission states that it currently has 11 active cartel investigations and that these investigations are in a range of industries, including electricity (the gas insulated switchgear cartel), air cargo, freight forwarding and cardboard manufacturing. Seven of these 11 cases originated through the Commission's leniency programme; however, despite this apparent success of the current programme, the Commission states that it is currently reviewing its Leniency and Cooperation policies in order to assist in the future identification of cartels.¹

The criminalisation of cartels and the implications for New Zealand

The release of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 by the Australian Government means that criminalisation of cartel conduct in Australia could soon become a reality.² Given the close relationship of trans-Tasman business laws, it would be surprising if New Zealand does not ultimately follow Australia's lead and introduce criminal sanctions for serious cartel conduct. The Commission has made it clear that criminalisation of cartel conduct is on its agenda.³

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The introduction of the Bill serves as a timely reminder of the severity with which cartels are being punished globally and legal practitioners and commercial parties in New Zealand should monitor the Australian process with interest.

MERGER REGULATION

Development of the Accessory Liability Tests

The Court of Appeal's judgment in *Commerce Commission v New Zealand Bus Ltd*⁴ in May 2008 was expected to provide guidance for the commercial community on the test for accessory liability in the merger context.⁵ Unhelpfully, this decision offered two different and potentially inconsistent tests for when a vendor may be considered liable as an accessory for a business acquisition that contravenes the Commerce Act 1986 ("**Act**").

Consequently, there will be a question for future cases as to how to incorporate the approaches of the Court of Appeal into a single test. While there must be knowledge of the essential facts, two inconsistent overlays were applied to this; first, "dishonest participation" and, secondly, "knowledge of a real risk of contravention". Neither of these two overlays are particularly certain in their application. While this area of law remains uncertain, parties, particularly vendors, should be careful to satisfy themselves that they do not attract liability under either test.

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Woolworths and Foodstuffs proposed acquisition of The Warehouse

The most high profile merger decision in 2008 was the Court of Appeal's judgment in *Commerce Commission v Woolworths Limited & Ors*,⁶ in which the clearance applications of Woolworths and Foodstuffs to acquire separately up to 100% of The Warehouse were refused.

The Commerce Commission issued its reasons for declining the clearance application in June 2007 on the grounds that it was not satisfied that the proposed acquisitions will not have, or will not be likely to have, the effect of substantially lessening competition in the specified local retail markets.⁷ The High Court disagreed with the approach taken by the Commission. It held that the Commission was required to "make up its mind" whether a substantial lessening of competition is likely.⁸

The Court of Appeal overturned the High Court's approach. It read the High Court as adopting an erroneously binary approach: a substantial lessening of competition was either likely or it was not.⁹ Rather, the Commission should approach the giving of a clearance by direct reference to the statutory test. The Commission should grant a clearance only if it is satisfied that a substantial lessening of competition is not likely; in all other cases a clearance should be declined.¹⁰ The High Court had wrongly inverted the statutory test by requiring the Commission to grant a clearance unless satisfied that a substantially lessening of competition was likely.¹¹ This decision may lead the Commission to be more willing to decline clearance applications in the future.

INTERNATIONAL ENFORCEMENT COOPERATION

The signing of the trans-Tasman Court Proceedings and Regulatory Enforcement Treaty

In July 2008, the Australian and New Zealand governments signed a treaty on trans-Tasman Court Proceedings and Regulatory Enforcement.¹² The impending implementation of this treaty will result in greater harmonisation of Australasian competition law and will increase the reach and effectiveness of Australian and New Zealand competition regulators.

Despite the close economic and legal ties between Australia and New Zealand, the two countries have generally treated cross border civil disputes with each other the same way as they would treat disputes with other foreign countries, which means that pecuniary penalties for breach of the Act imposed in New Zealand are unenforceable in Australia. The treaty is designed to start the process to remove these restrictions preventing the Commission from enforcing civil penalties obtained under the Act against Australian businesses and individuals resident in Australia that are trading in New Zealand.

"The treaty proposes that each government enact legislation extending the range of civil court judgments that can be enforced across the Tasman, allowing criminal fines issued under regulatory regimes to be enforced in the other country and there is the potential that the treaty could lead to legislative changes enabling the Commission to compel persons in Australia to provide information, documents or interviews."

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The passing of legislation to implement the treaty is only a matter of time and is expected on both sides of the Tasman in 2009 following parliamentary scrutiny.

The Commerce Commission (International Co-operation and Fess) Bill

In September 2008 the Commerce Commission (International Co-operation and Fess) Bill ("**Cooperation Bill**") was introduced into Parliament. The Cooperation Bill proposes to extend the scope of the Commission's powers of cooperation with other international competition regulators, primarily with the Australian Competition and Consumer Commission ("**ACCC**"). The Commission currently has four existing cooperation agreements in place, namely with Australia, the United Kingdom, Canada and Taiwan. The Cooperation Bill acknowledges these established relations, although it will amend them in certain respects.

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The introduction of the Cooperation Bill follows the recently enacted Australian legislation which also seeks to facilitate increased cooperation between the Commission and the ACCC.¹³ The main justification for the Cooperation Bill is to ensure that any assistance given by the Commission to overseas regulators is reciprocated. The Cooperation Bill requires formal agreements with overseas regulators establishing cooperation to be in place before any investigative assistance can be given. In addition, as the Commission has been criticised for the length of time it takes to make decisions, safeguards on the diversion of resources away from its primary domestic function are proposed by this Cooperation Bill. Before agreeing to assist a foreign regulator, the Commission will be required to determine whether the request would substantially affect its ability to perform its domestic function.

At this stage it is uncertain as to when the Cooperation Bill may be introduced as it is only at its First Reading in Parliament and it is unclear whether the new Government will make this Bill a priority.

GOVERNMENT REGULATION

Reform of the Regulatory Control Provisions of the Commerce Act 1986

The Commerce Amendment Bill ("**Amendment Bill**") received its royal assent on 16 September 2008 and has extensively reformed the regulatory control provisions of the Act (Parts 4, 4A and 5).¹⁴ These amended provisions will affect those businesses that do not face competition or the threat of competition. In practice, this tends to be the core infrastructure sector. Broadly speaking, the amendments are designed to provide greater certainty on regulatory scope, in an effort to facilitate increased infrastructure and investment by regulated businesses, while preventing the exercise of market power.

The Bill incorporated Parts 4 and 4A, and relevant provisions of Part 5, into a single regime, and introduced a new purpose statement that states that the purpose is to achieve outcomes one would expect in a competitive market and is given teeth by its incorporation into the test for regulation. While the test is very complex, the intention is that the benefits of regulation in meeting the objectives of the new

purpose statement will need to clearly exceed the costs of regulation.

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CONCLUSION

2008 was yet again another busy year for the Commission. With the criminalisation of cartels edging closer to becoming a reality in Australia, the Commission will be pushing hard for New Zealand to follow suit. The Commission's continuing desire to increase the public's awareness of its work will ensure that it continues to be in the headlines in 2009.

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1. Rebstock, P. (2008). Speech to Wellington District Law Society. Paper presented at Law Practitioners Seminar Series, 18 November 2008. Retrieved from the New Zealand Commerce Commission website: <http://www.comcom.govt.nz//MediaCentre/Speeches/ContentFiles/Documents/Paula%20Rebstock%20-%20Speech%20to%20Wellington%20District%20Law%20Society%2018%2011%202008.pdf>.
2. See our October 2008 Alert for more details. http://www.russellmveagh.co.nz/ docs/CompAlertOct08_173.pdf.
3. Paula Rebstock, *Speech to the New Zealand Institute of Management*, 21 March 2007, in which she 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."
4. [2007] NZCA 502 (Hammond, Arnold and Wilson JJ).
5. See our June 2008 Alert for more details. http://www.russellmveagh.com/ docs/CompLaw13June2008_131.pdf.
6. [2008] NZCA 276.
7. 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%20607.pdf>.
8. At [105].
9. At [103-105].
10. At [95] and [107].
11. At [107].
12. See our July 2008 Alert for further details http://www.russellmveagh.com/ docs/CompAlertJul3008_148.pdf.
13. Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act 2007.
14. See our March 2008 Alert for more details. http://www.russellmveagh.com/ docs/CompLawMar08_107.pdf.

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