GETTING THE DEAL THROUGH

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Merger Control

The international regulation of mergers and joint ventures in 73 jurisdictions worldwide

2013

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New Zealand

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The competition aspects of mergers and acquisitions (mergers) affecting New Zealand are governed by the Commerce Act 1986 (the Act).

New Zealand's competition regulator is the Commerce Commission (www.comcom.govt.nz) (the Commission or the NZCC). The Commission adjudicates on applications for clearance or authorisation of mergers and can take enforcement action in the courts. Interested third parties can also enforce the Act directly.

2 What kinds of mergers are caught?

The Act prohibits any person (including bodies corporate) from acquiring business assets or shares if that would have, or would be likely to have, the effect of 'substantially lessening competition in a market' in New Zealand.

The term 'acquire' includes entry into an agreement to acquire assets or shares that is not conditional on competition clearance. The Commission cannot grant clearance or authorisation retrospectively (see question 9), so any proposed merger that might give rise to a substantial lessening of competition in a market in New Zealand should be made conditional on Commission approval.

3 Are joint ventures caught?

Joint ventures will be caught if they involve any acquisition of assets or shares that may substantially lessen competition.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

There is no definition of 'control' in the Act. Acquisitions of assets or shares, including minority or partial acquisitions, may breach the Act where:

- the acquirer will be able to 'directly or indirectly exert a substantial degree of influence over the activities of the other' (in which case the parties will be considered 'associated'). The NZCC considers that occurs where the acquirer is 'able to bring real pressure to bear on the decision-making process' of the target; and
- the 'association' between the parties is likely to substantially lessen competition in the market.

The NZCC's general working approach (although not determinative) is that:

- a shareholding of less than 15 per cent does not give rise to the necessary degree of influence;
- a shareholding between 15 and 20 per cent is unlikely to give rise to a substantial influence unless there are special circumstances;
- a shareholding between 20 and 30 per cent is likely to give rise to a substantial influence only if there are 'other factors', for example, evidence of influence on management and policy; and
- a shareholding of between 30 and 50 per cent is likely to give rise to substantial influence.

The proposed acquisition of an interest of 22.5 per cent of the shares in a listed company has been blocked by the Commission in the past, although that case turned on reasonably unusual circumstances.

5 What are the jurisdictional thresholds?

There are no asset or turnover thresholds in New Zealand. In theory, all mergers are subject to the Act. The essential issue is whether the acquisition of assets or shares will or would be likely to substantially lessen competition in a market in New Zealand.

While all mergers that are not cleared or authorised by the Commission are susceptible to challenge, the Commission's Mergers and Acquisitions Guidelines (the Guidelines), released in January 2004, identify post-merger market share 'safe harbours', beneath which the Commission is unlikely to have concerns about the competitive effects of a merger. These are:

- the merged entity would have a market share of 40 per cent or less, unless there is a concentrated market (ie, where three firms have 70 per cent or more of the market post-acquisition); or
- the market is a concentrated market post-acquisition, and the merged entity would have no more than a 20 per cent share.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Merger filings in New Zealand are voluntary.

Parties can (but are not obliged to) seek the Commission's clearance or authorisation of a proposed merger as there is no statutory requirement to notify the Commission. However, if a merger has been implemented, or been declared unconditional pending completion, it cannot then be cleared or authorised retrospectively.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

The same requirements apply for foreign-to-foreign mergers as for purely domestic mergers. Therefore, notification to the Commission of a foreign-to-foreign merger is voluntary.

The prohibitions in the Act extend to acquisitions outside New Zealand, 'to the extent that the acquisition affects a market in New Zealand'. The Commission, therefore, will consider the effect of a foreign-to-foreign merger on a market in New Zealand to determine whether there may be a substantial lessening of competition.

An offshore merger involving two or more major suppliers of a product or service to New Zealand, where there is no New Zealand presence, could therefore be caught by the Act. Practically,

the ability of New Zealand authorities to enforce any orders made against offshore companies may limit the application of this extra-territoriality provision.

To address such limits in respect of acquisitions by Australian businesses, New Zealand and Australia have signed a mutual enforcement treaty that effectively removes the bar on the Commission enforcing penalties as against Australian companies and directors, and the Australian Competition and Consumer Commission (ACCC) enforcing penalties as against New Zealand companies and directors. The Trans-Tasman Proceedings Act 2010 takes the elements of this treaty into effect and applies to both court-directed and regulatory enforcement, by both competition authorities. (Please note, the operative provisions of the Trans-Tasman Proceedings Act are not currently in force.)

To address limits in respect of acquisitions by businesses from other countries, the Commerce (Cartels and Other Matters) Amendment Bill (the Commerce Amendment Bill), currently before Parliament, proposes an additional process for the Commission to seek remedies in respect of business acquisitions by 'overseas persons'. This additional process would allow the Commission, where an overseas person acquires a 'controlling interest' in a New Zealand company (in essence a greater than 50 per cent interest in shares, or ability to control the board), to apply to the High Court, within 12 months of the acquisition, for a declaration that the acquisition will substantially lessen competition in a market in New Zealand. If the High Court makes such a declaration, it may make an order requiring the New Zealand company to:

- cease carrying on business in New Zealand, in the market to which the declaration relates;
- dispose of shares or assets as specified by the Court; or
- take any other action that the Court considers is consistent with the Act.

Contravention of any such declaration will be subject to the same penalties as for a breach of the usual merger control provision (the difference being that the penalties will be enforceable against the New Zealand company, rather than the overseas acquirer). The Commerce Amendment Bill was introduced to Parliament in October 2011 and we expect it to be enacted during 2013.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes, but not under the Act. Other potentially relevant legislation includes the Overseas Investment Act 2005 and its regulations, the Takeovers Act 1993 and the Takeovers Code made pursuant to it. Under the Overseas Investment Act 2005, the consent of the Overseas Investment Office will be required in respect of transactions that result in overseas investment in 'significant business assets' or 'sensitive land'. Every individual who commits an offence under the Overseas Investment Act is liable to imprisonment for up to 12 months or a fine of up to NZ$300,000, and every corporate body is liable to a fine of up to NZ$300,000.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Mergers cannot be cleared or authorised retrospectively so clearance or authorisation must be obtained prior to execution of a binding agreement that is not conditional on regulatory clearance. Merger parties are encouraged to contact the Commission as early as possible to inform the Commission about potential applications for clearance. If the relevant agreement for sale and purchase is conditional on regulatory approval, clearance or authorisation must be obtained prior to completion. From June 2011 to June 2012, the Commission determined 10 clearance applications, nine of which were cleared. Two of the clearances were conditional on divestment undertakings by the parties.

As notification is voluntary, no sanctions apply for failure to file. However, if the Commission believes that a merger infringes the Act, or that a proposed merger would infringe the Act, it may investigate and, if necessary, take proceedings, including seeking urgent injunctive relief, against the parties to the merger. In the 2010–2011 period, the Commission completed one market structure screening investigation, which was concluded on the basis that no further investigation was necessary.

Post-merger proceedings for breach are rare, with no such actions completed in the 2011–2012 period.

10 Who is responsible for filing and are filing fees required?

Applications for clearance or authorisation of a merger are made by the party wishing to acquire the relevant assets or shares. The fee for a notice seeking clearance is NZ$2,300 (including goods and services tax (GST)) per acquisition. The fee for a notice seeking authorisation is NZ$23,000 (including GST) per acquisition, although the Commission has the discretion to refund NZ$20,700 to the applicant if the authorisation is granted. These fees are proposed to be reviewed following the passage of the Commerce (International Cooperation and Fees) Bill and it is expected that the fee for a notice seeking clearance will be increased to NZ$8,400 (including GST). However, following the enactment of that Bill the Commission will be required to provide refunds to applicants to the extent that the filing fees exceed the cost to the Commission of determining an application.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Act gives the Commission 10 working days to decide on a clearance application and 60 working days to decide on an authorisation, but in practice the Commission invariably seeks extensions for clearance applications. If applicants do not agree to such an extension, it is open to the Commission to simply fail to make a determination in the prescribed time, in which case the application is deemed to have been declined. This means that the merging parties, in practice, always agree to reasonable extensions sought by the Commission.

The Commission, in its Mergers and Acquisitions Clearance Process Guidelines (July 2010) (Process Guidelines), which set out the Commission's procedural approach to merger filings, has committed to determining applications for clearance within an average of 40 working days of registration of the application. The Commission has received fewer clearance applications in recent years, due to the economic climate, and this decreased workload had enhanced the Commission's ability to determine clearance applications within 40 working days. However, the Commission has seen an increase in applications over the last 12 months compared with the previous two years and the average time for clearances completed between June 2011 and June 2012 is expected to be 60 working days, an increase from the average of 32 working days in 2010/2011. In addition to the Commission's increased workload, this expected increase can be attributed to several clearances during 2011/2012 taking significantly longer than 40 working days, for example:

- Seagate Technology Plc's application for clearance to acquire certain assets of the hard disk drive business of Samsung Electronics Co. Limited (a foreign-to-foreign merger) took 116 working days, as the Commission delayed its decision until American and European authorities had completed their competition assessment so that it could coordinate its decision with the decisions of those regulators (Decision No. 741, 15 December 2011); and
- Pact Group Pty Limited's application for clearance to acquire

the plastic pails business of Viscount Plastics (NZ) Limited took 137 working days while the Commission undertook its market inquiries and considered a subsequent divestment undertaking (Decision NZCC 11, 10 May 2012).

The quickest clearance decision during 2011/12 took 15 working days, and the speed of this decision was in part influenced by the commercial deadlines of the parties (Decision NZCC 8, 22 March 2012), which reflects a commitment in the Commission's September 2011 Clearance Fact Sheet that states that '[b]usinesses should advise us of any commercial deadlines to help ensure these are met where possible'.

As the Commission cannot grant clearance or authorisation retrospectively (see questions 9 and 12) any proposed merger that might give rise to a substantial lessening of competition in a market in New Zealand should be made conditional on Commission approval.

The Commerce Amendment Bill introduced to Parliament in October 2011 specifies 40 working days, rather than 10 working days, as the time frame allowed for by the Act for deciding a clearance application (subject to any alternative timetable agreed between the Commission and the applicant).

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

A merger that has been implemented cannot be cleared or authorised retrospectively.

If the Commission believes that a merger has breached the Act it can investigate and, if necessary, take proceedings to the courts. Courts can impose penalties of up to NZ$5 million for giving effect to a merger that substantially lessens competition, and can impose injunctions and make other orders, including orders for the divestiture of assets or shares. If the Commission was in the process of considering an application at the time of completion it would close that investigation without issuing a decision and open an investigation into a potential breach.

A Court of Appeal judgment released in June 2008 confirmed penalties imposed by the High Court in 2006 for a breach of the merger provisions of the Act. In that case, the Commission brought proceedings on the grounds that the acquisition either substantially lessened competition or was likely to result in a substantial lessening of competition. The Court agreed and the potential purchaser was ordered to pay a penalty of NZ$500,000 as well as costs to the Commission of NZ$600,000. The High Court also found two of the directors of the vendor liable as accessories for participating in the waiver of the condition precedent to obtain Commission clearance that was contained in the sale and purchase agreement. The Court of Appeal confirmed the primary finding of liability on appeal, but reversed the latter finding relating to the liability of the individual directors. Nevertheless, both acquirers and vendors need to be aware that, while merger clearance remains voluntary, seeking clearance may be the safest option for potentially problematic mergers.

If clearance is not obtained, third parties can also bring an action directly in the courts seeking a declaration that a merger breaches the Act and for injunctions and damages if they have suffered loss as a result of a merger that breaches the Act.

13 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Commission does not have jurisdiction to clear any merger after closing. Accordingly the New Zealand limb of the merger would need to remain conditional until clearance is obtained if clearance is required. As to divestments prior to clearance, see question 24.

14 Are there any special merger control rules applicable to public takeover bids?

No, however, in practice the Commission applies stricter shareholding guidelines for a finding of 'association' in the case of publicly listed companies than it does for privately held companies. In the case of a publicly listed company, the Commission normally examines shareholdings of 15 per cent or more (please refer to question 4).

The Takeovers Code (the Code) also applies to listed public companies and to certain non-listed companies where numbers of shareholders and asset threshold requirements are met. The Code does not raise competition law issues, and is administered by the Takeovers Panel, which is separate from the Commission. The Code is far-reaching and reasonably complex, and must be considered sensibly in the case of most public company acquisitions.

15 What is the level of detail required in the preparation of a filing?

There is a prescribed form of application for both clearances and authorisations. The forms are relatively detailed, and require information concerning the transaction, the parties, the rationale for the transaction, the applicant's view of markets and market shares, competitor information, comments on barriers to entry, etc. Economic evidence is often advisable for more complex clearance cases. In a complex application for authorisation, economic analysis of public benefits and detriments is required. In practice, this means an expert economist must be used in such an application.

The Commission requires a copy of the relevant sale and purchase documents, and the most recent annual report for each of the merger parties. If an annual report is not available, the Commission requests that a copy of the audited financial statements of the merger parties, detailing a profit and loss account, total turnover and profit before tax, and a balance sheet, be provided. It frequently requests a copy of underlying information memoranda so it is useful to review these before they are published.

16 What is the timetable for clearance and can it be speeded up?

Merger parties are encouraged to contact the Commission as early as possible to inform the Commission about potential applications for clearance. In most cases, this enables the Commission to plan ahead, which can help to expedite the assessment of an application for clearance.

The Commission has published the Process Guidelines, which set out the Commission's procedural approach to merger filings. The Process Guidelines are intended to help achieve robust and timely decisions by providing information about the application process, the kind of information the Commission requires and indicative timelines.

The Process Guidelines suggest applicants engage in pre-notification discussions (PNDs). PNDs are informal and confidential discussions between the applicant and Commission staff before an application is submitted and affords applicants the opportunity to discuss the draft clearance application with the Commission prior to filing. The main purpose of a PND and the provision of a draft clearance application is to expedite the consideration of an application for clearance, if and when it is filed, by informing the Commission of any complex or unfamiliar markets, clarifying what information and evidence the Commission is likely to require, and reducing the need for further information requests and extensions.

See question 11 for a summary of the usual time for determinations if a clearance application is filed and question 17 for the timing of the different phases of the investigation.

17 What are the typical steps and different phases of the investigation?

In considering an application for clearance, the Commission will conduct a detailed investigation and seek information from competitors, suppliers, customers and any other relevant parties. It will 'test' all information provided and then it will make its decision. The decision is valid for 12 months from the decision date. If the acquisition is not made within that 12-month period, then the parties lose the benefit of the clearance decision.

Once an application has been made on the prescribed form it may take up to five days for the Commission to check that an application for clearance is compliant and for the Commission to record the application in the register. Once an application for clearance has been registered, and confidential information has been identified and confirmed, the public version omitting any sensitive and confidential information will be published on the Commission's website. Approximately 10 days after an application for clearance is registered, the Commission will provide a draft timeline for the assessment of the application based on likely complexity and resources. The Commission aims to publish a 'statement of preliminary issues' within 15 working days of the application being made and will usually place a public version of this document on its website. The 'statement of preliminary issues' is a document that outlines the Commission's initial view of the competition issues that could arise if the proposed transaction were to occur. Its purpose is to allow interested parties the opportunity to consider the issues identified and submit further information that might assist the Commission's analysis. By around day 25, the Commission will give clearance for straightforward applications or will send a 'letter of issues' to highlight initial concerns. The Commission may issue a subsequent 'letter of unresolved issues' giving merger parties a final opportunity to provide further information or evidence to allay the Commission's concerns. By around day 40 the Commission will aim to give a final decision, however, if the application is more complex the Commission may seek an extension.

In considering an application for authorisation, the Commission investigates the application, publishes a draft determination, interested parties make submissions on the draft determination, submissions are circulated to all interested parties and a 'conference' is usually held. The Commission draws together the information from its investigation, the submissions and the conference to make its final decision. The Commission's current goal is to determine authorisations within 60 working days of the application, although in practice difficult applications have taken twice as long. Because of the significant time, complexity and costs involved in the authorisation process, authorisations for mergers or acquisitions that potentially breach the Act but are nevertheless likely to have significant public benefits have not often been sought.

The Commission has, however, released the Streamlined Authorisation Process Guidelines (May 2009) (Streamlined Guidelines), intended to apply to transactions that have clear public benefits and a relatively limited impact on competition. Under the Streamlined Guidelines, the Commission aims to arrive at its determination within 40 working days of the application being registered, with an extension to 60 working days if a conference is required. While the Streamlined Guidelines set an impressive target for the Commission, the guidelines are clear that there are a number of issues that could derail the target time frames. Under the Streamlined Guidelines the Commission can withdraw an application from the streamlined process at any time, at which time the Commission's current time frames for authorisations will apply. During 2011, the Commission considered the first, and to date only, application under this new regime reaching a decision to authorise the transaction within 45 working days, just over the prescribed 40-working-day time frame.

If no application for clearance or authorisation is made, the Commission will assess the information it has identified or received and determine whether it should investigate. After an investigation, the Commission can decide at its discretion either to take court action, accept a settlement or take no further action.

Substantive assessment

18 What is the substantive test for clearance?

A 'person' may not acquire business assets or shares if the acquisition will have, or is likely to have, the effect of 'substantially lessening competition in a market'. The Act defines the terms 'substantial', 'competition' and 'lessening of competition' separately. Notwithstanding the individual definitions provided in the Act, the Commission considers the meaning of the phrase in its entirety, which it has described as equivalent to the 'creation, enhancement or facilitation of the exercise of market power'.

In light of difficult market conditions since 2008, the Commission introduced its Supplementary Guidelines on Failing Firms (the Failing Firms Guidelines) in October 2009. The Failing Firms Guidelines outline the Commission's approach when assessing applications for mergers and acquisitions where one party (usually the target) is 'failing' or under financial stress. These guidelines suggest that parties are to provide robust evidence that a firm is actually failing in order for the Commission to make an appropriate and timely determination. However, despite the introduction of these guidelines it is not expected that the Commission will relax its approach, as the Commission must still be satisfied that the merger will not result in a substantial lessening of competition.

The Commission's clearance of PMP Print Limited to acquire certain heat set printing assets from APN Print NZ Limited (Decision No. 708, 16 December 2010) is the most recent example where the Commission has cleared a transaction on the basis that there was no real prospect of a third party acquiring the assets as a going concern, or using them to compete in the relevant markets, and was the first decision to refer to the Failing Firm Guidelines.

19 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. An acquisition of business assets or shares in forming a joint venture will be assessed in the same way as any other merger. However, other aspects of a joint venture relationship, such as ongoing collaboration through the joint venture, are analysed pursuant to part II of the Act, which deals with restrictive trade practices generally. The part II provisions can be highly technical in their application to joint ventures so legal advice is recommended in cases of a non-structural joint venture. For example, in 2012, the Commission completed a market screening investigation into the acquisition of a 49 per cent stake by New Zealand's largest free-to-air television broadcaster (TVNZ) in a new joint venture company formed by New Zealand's largest pay-television broadcaster (SKY) (under the merger control provisions) and the ongoing collaboration between SKY and TVNZ in operating that joint venture (under the restrictive trade practices provisions). The Commission concluded that no further action was necessary in respect of the formation or operation of that joint venture (but opened a separate investigation into content arrangements).

20 What are the 'theories of harm' that the authorities will investigate?

The Commission will investigate whether a merger has the effect or likely effect of substantially lessening competition. This test was introduced in 2001 to replace the market dominance test, which the previous New Zealand government considered too permissive.

When investigating a merger, the Commission considers the potential for a merged entity to exercise unilateral or non-coordinated market power. The Commission generally considers that unilateral market power is only likely to be exercised when the market is unconstrained by potential entry. The Commission has not historically formally modelled possible unilateral effects arising

from a US-style upward pricing pressure analysis but may do so in suitable cases.

The Commission will also consider the potential for the exercise of coordinated market power when assessing the competitive effects of a merger. Where an acquisition materially enhances the prospects of any form of coordination, the Commission may consider that a substantial lessening of competition is likely. The Commission tests the scope for coordination by reference to the potential for collusion, detection and retaliation in the relevant markets.

Generally, the Commission takes the view that vertical integration is unlikely to result in a substantial lessening of competition unless the merged entity has market power in one of the relevant functional markets, in which case the Commission will consider whether the acquisition would strengthen market power in that market, or in upstream or downstream markets, by foreclosing market entry.

The Commission will consider conglomerate effects if either the target or acquiring business was a likely potential entrant into the other's market and competition is otherwise limited.

21 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

The Commission is an independent Crown entity and is not subject to direction from the government in carrying out its enforcement activities (except to the extent that the Commission must 'have regard' to the economic policies of the government where such policies are provided to the Commission in writing and laid before Parliament, however, this does not occur frequently).

For a clearance, the Commission has no authority to consider anything but competition issues. For authorisations, the Commission will consider public benefits to New Zealand, which could potentially cover any matter in the public interest, but are typically 'economic efficiencies', and the High Court has recently confirmed that the Commission is not required to 'overlay some kind of social policy judgment' in evaluating efficiencies (*Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396). During 2011, two applications for authorisations on public benefit grounds were filed. The first, under the standard process, was granted by the Commission following submissions on its draft determination and a 'conference' with interested parties, the process taking 83 working days in total. As noted at question 17, the second was the first authorisation application to be accepted under the Streamlined Process Guidelines, with the decision to authorise the transaction being given within 45 working days.

22 To what extent does the authority take into account economic efficiencies in the review process?

When considering an application for clearance, the only question is whether the merger has the effect of substantially lessening competition in a market. That test implies some consideration of efficiencies, as the substantial lessening of competition is a net effects test, although the Commission will not consider economic efficiencies in detail. When considering public benefits in an application for authorisation, the Commission will consider all claimed economic efficiencies in detail.

Remedies and ancillary restraints

23 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission cannot make a determination that the Act has been breached nor can it impose penalties or other sanctions. The Commission can, however, make 'cease and desist' orders, provided it follows a prescribed process involving consultation with the parties concerned. The Commission can also bring an action in the High Court seeking remedies such as:

- an injunction preventing a proposed merger;
- a declaration that a merger breaches (or that a proposed merger would breach) the Act;
- an order for divestiture of assets or shares; or
- financial penalties of up to NZ$5 million per offence for bodies corporate and NZ$500,000 per offence for individuals.

The Act also gives the Commission broad powers of investigation to fulfil its statutory role and failure to comply with any Commission request can render companies and individuals liable on summary conviction to penalties of up to NZ$30,000 for a company and NZ$10,000 for an individual. The Commerce Amendment Bill proposes increasing these penalties to NZ$300,000 for a company and NZ$100,000 for an individual.

24 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Commission may accept structural undertakings to divest assets or shares offered in writing to it in relation to a clearance or authorisation, although it will not propose such undertakings itself. If such an undertaking is accepted, it is deemed to form part of the application for clearance. The Commission cannot accept behavioural undertakings (eg undertakings relating to prices, output, quality and access). Any divestment proposal will be assessed by the Commission according to how much it would alleviate any substantial lessening of competition which would otherwise result from the merger. In June 2010, the Commission released its Mergers and Acquisitions Divestment Remedies Guidelines (Divestment Guidelines), which are aimed at ensuring that applicants are fully informed of the Commission's approach to the assessment of structural divestment undertakings.

These Divestment Guidelines outline the Commission's current approach to assessing structural undertakings, which is based on that used by the UK Competition Commission, to assess whether the assets to be divested will help to provide effective constraint on the post-merger entity. This includes examining the scope and configuration of the divested assets (composition risks), the availability of possible purchasers who can provide effective competition (purchaser risks) and whether the process of divestment might cause the assets to deteriorate, for example, through erosion of market share (asset risks). The entity must fulfil the divestment undertaking within the period negotiated with the Commission, and in any event must divest and complete the acquisition within 12 months of the clearance being given. Scandinavian Tobacco Group A/S's application for clearance to merge its cigar, pipe tobacco and accessories businesses with that of Swedish Match AB (Decision No. 699, 22 September 2010) was the first application made subject to a divestment undertaking since the release of the Divestment Guidelines. Pact Group Pty Limited's successful application for clearance to acquire the plastic pails business of Viscount Plastics (NZ) Limited (Decision NZCC 11, 10 May 2012) is the most recent to be given pursuant to a divestment undertaking.

25 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestment undertakings must be in writing and be given by the person, or on behalf of the person, who gave notice of the application for clearance or authorisation. A divestment undertaking can be proposed as part of the initial application for clearance, or may be offered as an amendment to an application. A divestment condition forms part of the clearance or authorisation given by the Commission, however it must be offered before the Commission's final determination is issued. The Commission itself does not suggest remedies that might assist a party in gaining clearance of authorisation, but it does endeavour to bring to the attention of the

applicant issues giving rise to concern, at the earliest opportunity, to enable the applicant to make further submissions or to offer another remedy. Any divestment proposal will be assessed by the Commission according to how much it would alleviate any 'substantial lessening of competition' that would otherwise result from the merger.

If an acquirer of assets or shares does not fulfil a divestment undertaking by the specified date (which is negotiated with the Commission), or if the acquisition is not completed within 12 months, the parties lose the benefit of the clearance decision. If the Commission is satisfied that there is a contravention of an undertaking, it can apply to the court under section 85B of the Act for a divestment order. Under section 85B, the Commission is not required to establish a substantial lessening of competition in a market. Rather, the Commission must show that the terms of the divestment undertaking have not been met by the applicant. The Commission may also apply to the court under section 85A of Act for pecuniary penalties for a contravention of an undertaking.

26 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The same remedies as are available for purely domestic mergers (including penalties, injunctions and divestment orders) are available in respect of foreign-to-foreign mergers (subject of course to the difficulties of enforcement of penalties against companies located outside New Zealand). The Commission has only commenced court action in relation to one foreign to foreign merger. In 2001 the Commission commenced court action against British Tobacco Holdings (New Zealand) Limited (BTH) alleging that its acquisition of WD & HO Wills (New Zealand) Limited contravened the merger provisions of the Act. In February 2003, these proceedings were settled out of court, with BTH agreeing to divest certain cigarette brands and, if required, the right to manufacture the divested brands on normal commercial terms for a period not exceeding five years. In addition, BTH paid the Commission a contribution to its costs of approximately NZ$350,000.

Enforcement difficulties in respect of Australian entities have been alleviated by the enactment of the Trans-Tasman Proceedings Act 2010 and enforcement difficulties in respect of entities from other countries are expected to be alleviated by the changes proposed in the Commerce Amendment Bill (both discussed in question 7).

27 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Part II of the Act, which deals with restrictive trade practices, does not apply to contracts, arrangements or undertakings insofar as they provide for the acquisition or disposal of assets or shares, or any act done to give effect to such provision. Ancillary restraints in such contracts, arrangements or understandings are therefore included in the analysis of the competitive effects of the business acquisition, however, any additional or ongoing arrangements beyond the sale and purchase arrangements will be analysed under part II.

Involvement of other parties or authorities

28 Are customers and competitors involved in the review process and what rights do complainants have?

As part of its investigation, the Commission seeks information from interested parties, including competitors, suppliers and customers, which it uses to 'test' the information provided by the applicant. The Commission publishes a public version of the clearance application on its website in order to inform the public of the proposed merger and to enable third parties to make submissions to the Commission. In addition, as mentioned in question 17, during the preliminary stages of the clearance consideration process the Commission publishes a Statement of Preliminary Issues on its website to increase the transparency of the process and to allow interested parties the opportunity to consider the competition issues initially identified and submit further information to assist the Commission's analysis. The Commission respects confidentiality and, on request, generally treats complainants' identities as confidential. Otherwise, complainants have the same rights as all other interested parties.

During the assessment of an application for clearance, the majority of information and evidence will be gathered voluntarily from the merger parties and market participants. Under the Act, however, the Commission may require any person to supply information or give evidence by issuing a statutory notice.

If an acquisition occurs in the absence of a clearance or authorisation, then both the Commission and interested parties have the ability to apply to the Court for relief. At that stage, the usual court rules relating to disclosure of information and documents apply.

29 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The fact of the application, the identities of the parties, the application document and the subsequent determination by the Commission are all public documents. Confidential and commercially sensitive information, including the parties' estimates of market share, is excluded from the version of the application published on the Commission's website, and from the final decision issued by the Commission. It is strict Commission policy to observe confidentiality in all aspects of its operation. A press release is issued by the Commission upon receipt of the application, followed by the public release of a statement of preliminary issues (if issued), and then in due course, the issue of its final decision. Where conferences are held, they are generally open to the public, but may also involve confidential sessions.

The Commission publishes the public version of the application on the Commission's website within five working days of an application being lodged. The Commission aims to publish the Statement of Preliminary Issues on its website within 15 working days of receiving the application outlining its initial view of the competition issues that could arise if the proposed transaction were to proceed. Other submissions, particularly economic reports submitted by the parties, may also be published, but the Commission's practice is to consult the parties before taking that step.

The Commission can make section 100 confidentiality orders, which prohibit the publication or communication of certain information. However, the Commission will not ordinarily issue a section 100 order to protect information provided in the context of a merger clearance, because the Commission considers that the common law obligations of confidence, together with the provisions of the Official Information Act 1982, provide sufficient protections for that information.

30 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission has cooperation arrangements with the ACCC, the Canadian Competition Bureau, the Taiwan Fair Trade Commission and the Office of Fair Trading in the United Kingdom. These arrangements provide for cooperation between authorities on enforcement activities, information exchange and personnel exchanges. The Commission is also a member of the International Competition Network and is also in contact with other countries' authorities where appropriate.

The Commission and the ACCC have also concluded a Cooperation Protocol for Merger Review (Cooperation Protocol). Through this formal framework, the two regulators can share information, evidence and documentation in respect of their

investigations, prosecutions and enforcement decisions when both or either of them is reviewing mergers with a trans-Tasman dimension. This trans-Tasman dimension is interpreted broadly and does not require all parties to be active in the supply of goods in Australia and New Zealand. The degree of cooperation between the Commission and the ACCC was enhanced in 2010 with the formal cross-appointment of commissioners between the two regulators; Dr Jill Walker, Chair of the ACCC's Mergers Review Committee, has been appointed as an Associate Commissioner to New Zealand's Commission, and Dr Mark Berry, the New Zealand Commission chairman, has been appointed to the ACCC as an associate commissioner. While staff secondments have occurred in the past, the formal cross-appointment of commissioners is expected to better facilitate information sharing and regulatory alignment between the two commissions. The first Commission merger clearance application that Dr Walker participated in was Pact Group's application for clearance to acquire the plastic pails business of Viscount, which was cleared in May 2012 (subject to a divestment undertaking) (Decision NZCC 11, 10 May 2012). Dr Berry participated in the equivalent ACCC process for that transaction in Australia.

The protocol, cooperation agreements, secondments and cross-appointments do not override domestic confidentiality and privacy laws, and in New Zealand legislation has not been enacted permitting confidential or private information to be provided to a foreign government body (unlike in Australia, see Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act 2007 (Cth)). The Commerce Commission (International Cooperation and Fees) Bill (Cooperation Bill), currently before Parliament, aims to provide the Commission with the discretion to share information with other regulators in certain circumstances. More specifically, the Cooperation Bill enables the Commission to provide investigative assistance and compulsorily acquired information to overseas regulators, subject to specified safeguards and the principle of reciprocity. Until the Cooperation Bill is passed, overriding the domestic confidentiality and privacy laws in New Zealand, confidential information will continue to be protected from being shared with the ACCC and other international regulators. This results in undesirable outcomes where, for example, in parallel Australia-New Zealand merger clearance decisions the commissioners sitting on both divisions will be making the clearance decisions in both countries but may be subject to judicial review if they refer to information they have learned in one country when informing their decision in the other country. The passing of the Cooperation Bill to allow information sharing will be beneficial in streamlining parallel merger clearance processes. The government has announced that it intends the Cooperation Bill to be passed by the end of 2012.

As noted in question 7, the Australian and New Zealand governments have also signed a treaty on Trans-Tasman Court Proceedings and Regulatory Enforcement, which has resulted in the Trans-Tasman Proceedings Act 2010. This Act will assist the harmonisation of Australasian competition law and will increase the reach and effectiveness of Australian and New Zealand competition regulators.

Judicial review

31 What are the opportunities for appeal or judicial review?

The Act provides a right of appeal in respect of any decision made by the Commission under the Act and is available to a broad range of parties. A challenge may also take the form of a judicial review proceeding. Appeals may be made to the High Court by giving notice of appeal within 20 working days after the date of the Commission's determination, or within such further time as the court allows. Such appeals proceed by way of rehearing.

Persons entitled to bring an appeal are:

- the applicant;
- the target; and
- if a conference was held (in authorisations or complex clearances), any person, including any competitor who participated in the conference.

There is no general right of appeal for competitors or other affected parties. However, the Commerce Amendment Bill proposes granting appeal rights in respect of authorisations to any person that has participated in the Commission's decision processes (which is broader than the current regime that restricts appeal rights to those have participated in the authorisation conference).

The court on appeal can confirm, modify or reverse the Commission's determination, or any part of it, or exercise any of the powers that could have been exercised by the Commission. The court can also direct the Commission to reconsider, either generally or in respect of specified matters, the whole or a specified part of the matter to which the appeal relates. Parties can subsequently appeal a High Court decision to the Court of Appeal and, if leave to appeal is granted, the Supreme Court.

32 What is the usual time frame for appeal or judicial review?

Notices of appeal must be filed in the High Court within 20 working days of the date of the Commission's determination or within further time if allowed by the Court.

It is difficult to assess the 'usual' time frame for appeals against the Commission's merger determinations as there have been very few. The most recent appeal to be heard in the High Court was an appeal, by an affected customer – Godfrey Hirst NZ Ltd, against the Commission's decision (Decision No. 725, 9 June 2011) to authorise Cavalier Wool Holdings Ltd to acquire the wool scouring assets of its sole New Zealand competitor, New Zealand Wool Services International Ltd. This appeal was filed in the High Court on 29 June 2011, with the High Court hearing on 22 to 26 August 2011 and the judgment delivered on 23 November 2011. The High Court dismissed the appeal on the basis that, while the margin between public benefits and detriments was closer than calculated by the Commission, the public benefits still outweighed the detriments of the acquisition.

The most recent appeal against a clearance decision of the Commission was the appeal against the Commission's decision to decline the separate clearance applications of Foodstuffs and Woolworths to purchase The Warehouse Group (Decision No. 606 and 607, 8 June 2007). This appeal was filed in the High Court on 15 June 2007 and the judgment was delivered on 29 November 2007. The Commission appealed against the High Court's decision to the Court of Appeal and the appeal was heard in April 2008. The Court of Appeal upheld the Commission's appeal in a decision delivered on 31 July 2008 setting aside the clearance granted by the High Court.

These appeals were dealt with under urgency due to relevant commercial considerations. Where such urgent commercial considerations do not apply, appeals against the Commission's merger determinations can take in excess of one or two years.

Enforcement practice and future developments

33 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

The Commission is rarely required to undertake enforcement actions in relation to mergers, as the parties to a proposed merger typically apply for clearance or authorisation before the merger takes place. In the 2010-2011 period, the Commission completed one market structure screening investigation, which was concluded on the basis that no further investigation was necessary.

In relation to the most recent foreign-to-foreign merger clearance application, being Seagate Technology Plc's application for clearance

Update and trends

Of particular interest during the year was the appeal in the High Court by Godfrey Hirst, an affected customer, against the Commission's decision to authorise Cavalier Wool to acquire the wool scouring assets of its sole New Zealand competitor, New Zealand Wool Services (*Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396) (see questions 21 and 32). The High Court (consisting of a judge and a lay member economist) dismissed the appeal, allowing the merger to proceed on the basis that while the margin of benefits to detriments was closer than the Commission had determined, the benefits of the merger were still likely to outweigh the detriments. Of particular note the High Court confirmed:

- the importance of using quantitative analysis in considering public benefits and detriments as such quantitative analysis avoids the speculation and intuition that might otherwise come into play in that judgment;
- the word 'monopoly' adds nothing to the factual assessment that the Commission has to make. This was in response to the appellants' argument that a merger-to-monopoly situation requires different analytical standards. The High Court considered that any concern relating to the level of discretionary market power of the sole remaining competitor is something which should be accounted for in the usual factual/counterfactual comparison and related quantitative analysis; and
- the Commission is not required to 'overlay some kind of social policy judgment' which would enable an authorisation to be declined even if accepted efficiencies outweigh efficiencies likely to be lost.

The Commission is currently considering whether to update its Merger and Acquisition Guidelines, which were published in 2003. Although these Guidelines are not binding on the Commission, they provide important guidance as to the Commission's approach to the clearance and authorisation processes. The Commission has indicated that any updated guidelines will reflect recent court judgments, developments in its own practices, and will have regard to recent updates to merger guidelines in other jurisdictions. Revision of the guidelines is welcomed to improve clarity and certainty, particularly in light of several court decisions that have identified gaps and ambiguities in the current guidelines, and to reflect the most up-to-date approaches to merger analysis.

On 13 October 2011, the Commerce (Cartels and Other Matters) Amendment Bill was introduced to Parliament. This Bill proposes a number of significant reforms to the restrictive trade practices provisions of Commerce Act, such as the criminalisation of cartel conduct, and some more minor reforms in the merger control context. We expect this Bill to be enacted during 2013. See question 35.

On 2 May 2012, the Commerce Commission (International Co-operation, and Fees) Bill had its second reading in Parliament. The Cooperation Bill will provide the Commission with the ability to provide investigative assistance and compulsorily acquired information to overseas regulators (primarily the ACCC initially), subject to specified safeguards and the principle of reciprocity (see question 30). In light of recent criticism that the Cooperation Bill has been languishing on the Parliamentary Order Paper for nearly four years without being passed (in particular, from the Trans-Tasman Outcomes Implementation Group, set up by the New Zealand and Australian prime ministers to monitor progress towards business law harmonization between the two countries), the government has announced that it intends the Bill to be passed by the end of 2012.

Finally, several decisions of the Commission during the year have contained interesting features. For example, during the year we have seen:

- the first authorisation decision under the Commission's Streamlined Authorisation Process Guidelines in July 2011 (Decision No. 729, 28 July 2011). The Commission reached a decision within 45 working days, which is comparable to the timing of a standard clearance application, to grant authorisation for the only two private hospital operators in a particular city, Palmerston North, to combine their operations, on the basis that both were experiencing declining revenues and returns in their operations there, and that prevented either from undertaking the necessary capital investment to maintain their facilities at an optimal level. See question 17;
- the Commission, in Seagate Technology's application for clearance to acquire certain assets of the hard disk drive business of Samsung Electronics, demonstrate an unwillingness to conduct market enquiries or reach a decision in respect of an international foreign-to-foreign merger until American and European authorities completed their competition assessment so that it could coordinate its decision with the decisions of those regulators (Decision No.741, 15 December 2011). See question 11;
- the quickest clearance decision in recent times (15 working days), which was granted in March 2012 for Southern Community Laboratories to acquire the Medlab South pathology business from Sonic Healthcare. The application followed the destruction of Medlab South's Christchurch laboratory as a result of the February 2011 Christchurch earthquake. The Commission's short decision time frame was in part influenced by the commercial deadlines of the parties (Decision NZCC 8, 22 March 2012). See question 11;
- the longest ever clearance decision (137 working days), which was granted in May 2012 for Pact Group to acquire the plastic pails business of Viscount Plastics (Decision NZCC 11, 10 May 2012). This was also the first New Zealand merger clearance application that involved the participation of a Commissioner from the ACCC through the formal cross-appointment of commissioners between the two regulators. The Commission's chair, Dr Berry, participated in the equivalent ACCC process for the same transaction in Australia. See questions 11 and 30; and
- the first declined clearance application since October 2008 (Decision NZCC 13, 15 June 2012), which was decided in June 2012. The Commission declined epay New Zealand Ltd's application to acquire Ezi-Pay Ltd (a competing distributor-agent of pre-paid products such as mobile phone top-ups, calling cards, gift cards and pre-paid electricity) on the basis that the Commission was not convinced that the merged entity would face sufficient competitive constraints in one of the five relevant markets assessed – namely the market for the distribution and in-store payment processing of pre-paid mobile phone top-ups.

to acquire certain assets of the hard disk drive business of Samsung Electronics Co. Limited, the Commission delayed its clearance decision until American and European authorities had completed their competition assessment (Decision No. 741, 15 December 2011).

34 What are the current enforcement concerns of the authorities?

The length of time that it takes the Commission to reach decisions on clearance and authorisation applications is one of its key output measures and the Commission has stated in its annual report that it is '[m]indful that delays to our clearance of mergers and acquisitions can be detrimental to the parties involved, and the economy.' Accordingly, the Commission is currently placing an increased emphasis on efficiency in this area, including in meeting the commercial deadlines of the applicants.

The Commission has made it clear that it will take decisive action where applicants apply for clearance, then withdraw the application and proceed with the acquisition without clearance where it considers that the acquisition is detrimental to competition. The Commission will also investigate non-notified mergers or acquisitions. The Commission's stance, and its ability to bring proceedings against both the vendor and purchaser in such cases, encourages a conservative approach by both parties in considering whether to file a clearance application for a transaction that could potentially raise competition issues.

The Commission has focused, and continues to focus on, prosecuting obstruction of its investigations, which has resulted in summary criminal convictions against persons under investigation.

35 Are there current proposals to change the legislation?

On 13 October 2011 the Commerce Amendment Bill was introduced to Parliament. The Commerce Amendment Bill proposes a number of significant reforms to the Commerce Act, including the criminalisation of cartel conduct. In the merger control context the Commerce Amendment Bill proposes the following changes:

- an additional process for the Commission to seek remedies in respect of business acquisitions by 'overseas persons' that affect competition in a New Zealand market (see question 7);
- extension of the statutory time frame for the Commission to decide on a clearance application before it needs to request an extension from the current 10 working days to 40 working days, which will better reflect the Commission's usual time frames (see question 11);
- granting appeal rights to any person that participates in the Commission's authorisation process, not just those who participated in a conference (see question 31); and
- increasing the penalties for failing to comply with any Commission compulsory information request from NZ$30,000 for a company and NZ$10,000 for an individual to NZ$300,000 for a company and NZ$100,000 for an individual (see question 23).

We expect the Commerce Amendment Bill to be enacted during 2013.

The Commission has announced that it is considering updating its Mergers and Acquisitions Guidelines (which were published in 2003). The Commission has invited submissions on potential changes and on the possible inclusion of its Divestment Guidelines and Failing Firms Guidelines in the updated guidelines. The Commission intends to reflect recent court judgments and its own current practices in the updated guidelines. It will also have regard to recent overseas updates to merger guidelines, for example in Australia, the UK and the US.

As noted in question 30, the Cooperation Bill is currently before Parliament, which will enable the Commission to provide investigative assistance and compulsorily acquired information to overseas regulators (including the ACCC), subject to specified safeguards and the principle of reciprocity.

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