

11 March 2019

NZ COMPETITION LAW – WHAT’S HAPPENED & WHAT’S HAPPENING

1. 2018 saw continued law change and Commerce Commission (**Commission**) activity. The changes span across the competition, regulatory and consumer protection fields.
2. The Commission’s Consumer Issues Report for 2017/2018 outlined issues of concern for New Zealand consumers and reiterated its strategy for 2017 to 2022 that it will “*seize opportunities to have the greatest impact*”. In relation to consumer law, the Commission reported industries that generated the most Fair Trading Act (**FTA**) complaints were telecommunications retail service providers, motor vehicle retail, domestic appliance retail, online ticket reselling, construction, supermarkets and grocery.
3. In relation to competition law, in 2017/2018 the Commission:
 - received 9 merger clearance and authorisation applications (the Commission noted that the complexity of applications continued to increase);
 - undertook 6 investigations into non-notified mergers;
 - identified an increase in mergers involving digital platforms or markets that are experiencing technological change;
 - received 7 Commerce Act complaints about alleged anticompetitive conduct by ports; and
 - received 3 leniency applications.
4. The Commission’s full report is found [here](#).
5. In this note we provide an overview of these developments, and highlight key:
 - developments in legislation (including competition, regulatory and consumer protection);
 - enforcement of consumer protection laws under the FTA and the Consumer Guarantees Act (**CGA**);
 - competition and regulation activity; and
 - current Commission and Ministry of Business, Innovation and Employment (**MBIE**) consultation on legislative and regulatory changes.

Legislative developments

KEY INSIGHTS

Consumers’ Right to know (Country of Origin of Food) Act

- The Act received Royal Assent on 3 December 2018.
- The Act requires the Minister to issue a consumer information standard setting country-of-origin labelling requirements.
- See the Act [here](#).

<p>Telecommunications (New Regulatory Framework) Amendment Act 2018</p>	<ul style="list-style-type: none"> • The Act received Royal Assent on 12 November 2018. • The Act’s purpose is to establish a regulatory framework for fibre fixed line access services; remove unnecessary copper fixed line access services; remove unnecessary copper fixed line access service regulation; streamline regulatory processes; and provide more regulatory oversight of retail service quality. • Read the new framework here.
<p>Commerce Amendment Act 2018</p>	<ul style="list-style-type: none"> • The Act received Royal Assent on 25 October 2018 • The Act empowered the Commission to undertake market studies and accept enforceable undertakings in relation to enforcement matters; repealed the little-used cease and desist regime; and strengthened the regulatory regime for airports. • Read more here.
<p>Commerce (Criminalisation of Cartels) Amendment Bill</p>	<ul style="list-style-type: none"> • The Bill passed its Second Reading on 25 October 2018 and is intended to be enacted by April 2019. The Bill aims to: <ul style="list-style-type: none"> ○ promote detection and deterrence of cartels; and ○ improve cartel enforcement by the Commission and facilitate NZ’s contribution to enforcement efforts against global cartels. • Penalties: <ul style="list-style-type: none"> ○ individuals: criminal offence punishable by up to 7 years’ imprisonment or fines of \$500,000. ○ companies: fines of up to \$10 million, three times the commercial gain resulting from the offence or 10% of the turnover of the company and any related companies. • Read more here.
<p>Privacy Bill</p>	<ul style="list-style-type: none"> • The Privacy Bill is currently before the Select Committee, having passed its First Reading on 11 April 2018. • Reform proposals include stronger powers for the Privacy Commissioner, mandatory reporting of privacy breaches, new offences and increased fines for a serious breach of personal information. • Read more here.
<p>Commerce Amendment (Cartels and other matters) Act 2017</p>	<ul style="list-style-type: none"> • The Act amended the Commerce Act 1986 (Commerce Act)’s cartel conduct prohibition and introduced 3 exceptions: collaborative activity, vertical supply contracts and joint buying and promotion. • The Act received Royal Assent in August 2017, however there was a 9 month transitional period before the Commission could bring proceedings for giving effect to existing arrangements which breach the new cartel conduct prohibition. This transitional period ended in May 2018.

Consumer protection law

KEY INSIGHTS

<p>High Court dismissed Budget Loans appeal</p>	<ul style="list-style-type: none"> • The High Court dismissed Budget Loans Ltd’s appeal against the sentence of \$720,000 imposed on it and Evolution Finance Ltd (together, Budget Loans) for 125 charges under the FTA. • In dismissing Budget Loans’ appeal Justice Moore said the offending was <i>“among the most serious of its kind. There is no comparable case involving such damaging, prolonged, focused, cynical, personal and economic conduct.”</i> • Read more here.
<p>Commission commenced proceedings against Viagogo</p>	<ul style="list-style-type: none"> • The Commission commenced proceedings against Switzerland-based ticket resale website Viagogo under the FTA for false or misleading representations. • The Commission’s application for an interim injunction was declined by the Court following arguments regarding jurisdiction.

	<ul style="list-style-type: none"> • Read more here.
Taieri Motor Court Ltd warned over sales claims	<ul style="list-style-type: none"> • The Commission issued a warning to Mosgiel-based motor vehicle trader Taieri Motor Court Ltd for likely breaching the FTA during its sale of two motor vehicles. • The Commission claimed Taieri Motor Court made misleading representations about vehicles offered for sale and that it had failed to comply with Consumer Information Standards (Used Motor Vehicles) Regulations. • Read more here.
2 Cheap Cars charged over ad claims and “warranty waivers”	<ul style="list-style-type: none"> • Vehicle retailer 2 Cheap Cars Ltd faced 10 charges under the FTA over its “must liquidate” and “84% off” advertising claims and its use of “warranty waiver” documents. • The Commission claimed that 2 Cheap Cars misled consumers through its advertising claims and that the warranty waiver misrepresented consumers’ rights under the CGA. • Read more here.
GO Healthy charged for misleading “NZ Made” supplements claim	<ul style="list-style-type: none"> • Health supplements seller GO Healthy NZ Ltd was charged, following a Commission investigation. It claimed that its supplements were “made in NZ” when the key ingredients in the majority of its products were imported. • Read more here.
Noel Leeming fined \$200,000 for misleading customers	<ul style="list-style-type: none"> • Noel Leeming was fined \$200,000 for 8 charges of misleading customers about their rights under the CGA. • Read more here.
Michael Hill fined under the FTA in extended warranty case	<ul style="list-style-type: none"> • Michael Hill Jeweller Ltd was fined \$169,000 after pleading guilty to 12 charges under the FTA in relation to its Professional Care plan which failed to comply with the extended warranty disclosure requirements of the FTA. • Read more here.
WORLD entered into enforceable undertakings with the Commission	<ul style="list-style-type: none"> • Designer and retailer WORLD entered into enforceable undertakings with the Commission after it accepted the Commission’s view that labelling on some imported clothing was likely to mislead consumers about the clothing’s place of origin. • Read more here.
Steel mesh representations	<ul style="list-style-type: none"> • On 24 April 2018 Timber King was fined \$400,950 under the FTA for making false and misleading representations relating to their steel mesh products. Timber King has not appealed that sentence. • On 16 August 2018 Brilliance was fined \$540,000 under the FTA in relation to false and misleading representations relating to its steel mesh products. Brilliance has not appealed that sentence. • On 23 October 2018 Steel & Tube was fined \$1.885M under the FTA in relation to misrepresentations about its steel mesh products. Both the Commission and Steel & Tube have filed appeals against that fine, to be heard in March 2019. • Euro Corporation Ltd is also being prosecuted by the Commission for similar offending, and is defending the charges. [A hearing date has not been set].
Cavan Forde fined \$85,000 in concrete panel case	<ul style="list-style-type: none"> • Dunedin businessman Cavan Forde was fined \$85,000 for misrepresentations he made about the brand, origin and engineering endorsements attributed to Chinese concrete panels he was supplying to NZ’s building market. • Mr Forde pleaded guilty to three representative charges under the FTA for the conduct, which occurred between May 2009 and December 2012. • Read more here.
HRV Clean Water fined over water filter credence claims	<ul style="list-style-type: none"> • HRV Clean Water Ltd was fined \$440,000 after pleading guilty to making unsubstantiated claims about the benefits of its water filters and for making misleading claims about the quality of NZ’s home water supply.

	<ul style="list-style-type: none"> • The decision reiterates the Commission’s position that businesses can not make a claim they “can’t back up” at the time it was made. • Read more here.
Car dealership and owner fined for CGA representations	<ul style="list-style-type: none"> • An Auckland car dealership and its owner were fined a total of \$12,000 on 16 charges under the FTA. • 6 of the charges were for misrepresenting consumers’ rights under the CGA and 10 charges were for failing to display or provide access to Consumer Information Notices. • Read more here.
PB Tech fined under the FTA for selling non-compliant extended warranties	<ul style="list-style-type: none"> • PB Tech was fined \$77,000 after pleading guilty to 14 charges brought by the Commission for selling non-compliant extended warranties. • This highlights the fact that the CGA provides statutory guarantees and it’s a breach of the FTA to mislead consumers about their rights under law. • Read more here.
<p>FTA product safety:</p> <ul style="list-style-type: none"> • Mega Import and Export Ltd • Argyle Performance Workwear Ltd • NZSALE • Goodwear Ltd 	<ul style="list-style-type: none"> • Toy importer Mega Import and Export Ltd was fined \$65,000 for selling toys which did not comply with a mandatory standard. Read more here. • Argyle was sentenced and fined \$52,000 on one charge under the FTA for selling a safety jacket that did not have the claimed protection against electrical burns. Read more here. • NZSALE was fined \$74,000 after pleading guilty to four charges for selling nightwear that failed to meet the applicable safety standard. Read more here. • Goodwear was fined \$50,000 for supplying children’s clothing which didn’t meet product safety or consumer information standards. Read more here. • The decisions reinforce that product safety is an enduring priority for the Commission.
Commission sought first declaration that consumer contract terms were unfair	<ul style="list-style-type: none"> • The Commission sought a declaration that mobile trader Home Direct Ltd’s consumer contracts contained unfair terms relating to its “voucher entitlement scheme”. • Customers were invited to opt-in to a “voucher entitlement scheme” when they signed up to purchase goods. Under the scheme, direct debit payments did not stop after the goods were paid off. Instead they were converted every week into “voucher entitlements” which could be used towards purchasing more goods from Home Direct. • The Commission alleged that terms of the scheme were unfair as “vouchers” could not be refunded or exchanged for cash, and expired after 12 or 24 months, with proceeds forfeited to Home Direct. • This is the first time that the Commission has sought such a declaration. The law applies to standard form consumer contracts. • Read more here.
Commission warned Apple for misleading customers	<ul style="list-style-type: none"> • The Commission warned Apple Sales NZ after it likely misled consumers about their CGA rights. • In the Commission’s view, Apple was likely to have breached the FTA by telling customers that products are only covered by a guarantee for 2 years and referring consumers exclusively to the manufacturer of non-Apple branded products and excluding Apple’s liability for those products. • Read more here.

6. Further guidance on FTA compliance can be found on our [website](#).

Competition law and regulation

KEY INSIGHTS

CSK seeks clearance to acquire Pfizer’s consumer healthcare business	<ul style="list-style-type: none"> • The Commission received a clearance application from GlaxoSmithKline plc seeking clearance to acquire the consumer healthcare business of Pfizer Inc. • In NZ, both parties supply non-prescription cold and flu treatments and medicines for systemic pain relief. • Read more here.
Commission opened investigation into Bondor’s acquisition of Long Group	<ul style="list-style-type: none"> • The Commission opened an investigation into Bondor NZ Ltd’s acquisition of the business and assets of Long Holdings Ltd, the Insulation & Door Co Ltd and Long Panel Ltd (together, the Long Group). • Read more here.
First Gas fined \$3.4 million for anti-competitive merger	<ul style="list-style-type: none"> • First Gas was ordered to pay \$3.4 million in relation to its acquisition of the Bay of Plenty gas distribution assets of GasNet Ltd. • The High Court found that the acquisition breached sections 47 and 27 of the Commerce Act. • Read more here.
Commission granted clearance for Fletcher Building to acquire Waikato Aggregates	<ul style="list-style-type: none"> • The Commission granted clearance for Fletcher Building Ltd to acquire the business of Waikato Aggregates, except for the land at Tamahere quarry. • In making its decision, the Commission primarily focused on the impact of the acquisition on the markets for the supply of concrete sand, ready-mix concrete and concrete masonry products in the Waikato region. • Read more here.
Ixom withdrew merger application for Oji’s Tasman chemical plant	<ul style="list-style-type: none"> • Ixom Operations Pty formally withdrew its application to acquire chemical manufacturing assets in Kawerau (the Tasman chemical plant) from Oji Fibre Solutions (NZ) Ltd.
Commission granted clearance to DLF Seeds to acquire PGG Wrightson Seeds	<ul style="list-style-type: none"> • The Commission granted clearance to global seed producer DLF Seeds A/S to acquire the NZ market leader in forage and turf seeds, PGG Wrightson Seeds. • Read more here.
Commission warned Alpine Energy over excessive network outages	<ul style="list-style-type: none"> • The Commission issued South Canterbury electricity lines company Alpine Energy with a formal warning for breaching its regulated quality standard in 2016. • Read more here.
Statement of Preliminary Issues released for Knauf/USG	<ul style="list-style-type: none"> • The Commission published a Statement of Preliminary Issues relating to an application by Gebr. Knauf KG and USG Corporation seeking clearance to merge. • Read more here.
Home fibre broadband performing below potential	<ul style="list-style-type: none"> • The Commission’s first report from its enhanced broadband monitoring programme revealed fibre broadband services are consistently delivering less than 75% of the maximum speeds available. • Read more here.
Commission authorised Tennex’s acquisition of San-i-pak	<ul style="list-style-type: none"> • The Commission granted authorisation to Tennex to acquire the assets of competing Canterbury-based waste firm San-i-Pak. The Commission found that the public benefit outweighed any substantial lessening of competition. • The Commission’s preliminary view that it should grant authorisation remained unchanged after taking into account submissions received on the Draft Determination. • Read more here.
Commission released final decision on telecommunications development levy	<ul style="list-style-type: none"> • The Commission released its final determinations on how much 17 telecommunications providers will each pay towards the Government’s \$50 million Telecommunications Development Levy (TDL) for 2017/2018. • Spark, Vodafone, Chorus, and 2degrees will collectively pay more than 90% of the \$50 million levy. Voyager and MyRepublic will be liable for the TDL for the first time this year due to their growing revenues. • Read more here.

<p>Annual Telecommunications Monitoring Report showed fibre broadband hot on the heels of copper</p>	<ul style="list-style-type: none"> • The Commission released its 12th Annual Telecommunications Monitoring Report, which revealed that fibre is poised to overtake copper as the main way kiwi households access the internet. • Read more here.
<p>Commission granted clearance for Siemens to combine its rail industry supply business with Alstom</p>	<ul style="list-style-type: none"> • The Commission granted clearance for Siemens AG to combine its rail industry supply business with Alstom SA as it relates to NZ. • Read more here.
<p>Commission released final report on Fonterra’s 2018/2019 Milk Price Manual</p>	<ul style="list-style-type: none"> • The Commission released its final report on its annual review of Fonterra’s Milk Price Manual for the 2018/2019 dairy season. • Find the final report and read more here.
<p>Commission declined Vector’s request to relax reliability standards</p>	<ul style="list-style-type: none"> • The Commission declined Vector’s request to relax the reliability standards that apply to its electricity network. Vector claimed that changes to health and safety legislation required it to change its policies so that network maintenance and repairs could in most cases only be undertaken on de-energised lines. • Read more here.
<p>Commission granted clearance to Thales S.A to acquire Gemalto NV</p>	<ul style="list-style-type: none"> • The Commission granted clearance for Thales SA to acquire Gemalto NV, subject to a divestment undertaking which required Thales to divest its entire general-purpose hardware security module business. • Read more here.
<p>Hamilton Real Estate appeal¹</p>	<ul style="list-style-type: none"> • On appeal, the CA found Hamilton-based Lodge Real Estate and Monarch Real Estate and its directors engaged in price-fixing. • The CA confirmed that Lodge Real Estate and Monarch Real Estate (and its directors) acted unlawfully in collectively agreeing to pass Trade Me listings cost increases onto consumers, rather than competing on the listing fees charged to vendors. • Read more here.
<p>Ingenico granted clearance to acquire Paymark</p>	<ul style="list-style-type: none"> • The Commission granted clearance to Ingenico Group SA to acquire 100% of the shares of Paymark Ltd. • Read more here.
<p>Commission opened investigation into wool scouring acquisition</p>	<ul style="list-style-type: none"> • The Commission opened an investigation into David Ferrier’s acquisition through a holding company of a 70% equity interest wool scourer Cavalier Wool Holdings Ltd. • Read more here.
<p>NZME-Stuff merger²</p>	<ul style="list-style-type: none"> • The CA dismissed NZME and Fairfax’s (now Stuff) long-running appeal against the Commission’s decision to decline their media merger. • The Commission considered that the merger would concentrate NZ news media ownership and influence to an unprecedented extent for a well-established modern liberal democracy. • Read more here.
<p>Commission closed its investigation into Fulton Hogan’s acquisition of Stevenson’s Construction Materials business</p>	<ul style="list-style-type: none"> • The Commission closed its investigation into Fulton Hogan’s acquisition of the Stevenson Construction Materials business as its concerns with the transaction were addressed. • Read more here.

¹ [2018] NZCA 523.

² [2018] NZCA 389.

<p>Commission proposed to authorise extending the restrictions on the marketing of infant formula</p>	<ul style="list-style-type: none"> • The Commission reached a preliminary view that it should allow members of the Infant Nutrition Council to restrict their advertising and marketing of infant formula for children up to 12 months of age, for a period of 5 years. • The Commission’s preliminary view is that, while the amendment to the Code of Practice may lessen competition, the reduction in competition is likely to be outweighed by the public benefits. • Read more here.
<p>Clearance granted for OMV to acquire Shell’s gas and liquids portfolio</p>	<ul style="list-style-type: none"> • The Commission granted clearance for OMV to acquire Shell’s gas and liquids portfolio. • The acquisition will see OMV take ownership of Shell’s full NZ portfolio, including its stake in the Maui and Pohokura gas field joint ventures with Todd Energy and the associated production, pipeline and tank assets. • Read more here.
<p>Clearance granted for Goodman Fielder to acquire Lion’s yoghurt business</p>	<ul style="list-style-type: none"> • The Commission granted clearance for Goodman Fielder to acquire the assets related to the manufacture and distribution of ‘Yoplait’ branded yoghurt in NZ from Lion. • In making its decision, the Commission focussed on the competition issues in the national market for ‘mainstream’ yoghurt – mass produced plain or flavoured yoghurts and Greek or Greek-style yoghurts. • The Commission was satisfied that the merger would not substantially lessen competition in the mainstream yoghurt market. • Read more here.
<p>Commission declined clearance for Trade Me to acquire Motorcentral</p>	<ul style="list-style-type: none"> • The Commission declined clearance for Trade Me to acquire Motorcentral. It found that on the evidence available, it could “not exclude the real chance that, absent the merger, Trade Me could become a stronger competitor to Motorcentral”. • In addition, the Commission found that vertical integration resulting from Trade Me’s acquisition of Motorcentral would be likely to substantially lessen competition in both the advertising and Dealer management system (DMS) markets. Trade Me’s ownership of Motorcentral would likely provide it with the ability and incentive to foreclose its actual and potential competitors in both the advertising and DMS markets. • Read more here.

7. The Commission also introduced their [Anonymous whistleblowing tool](#) to enable anonymous reporting of cartels.

Legislative and regulatory consultation

KEY INSIGHTS

<p>MBIE is seeking submissions on its Discussion paper on the review of s 36 of the Commerce Act</p>	<ul style="list-style-type: none"> • The review considers three issues under the Commerce Act – the section 36 prohibition against anti-competitive unilateral conduct, the provisions in the Act relating to intellectual property and the treatment of covenants under Part 2 of the Act. • Submissions are due on Monday 1 April 2019. • Read more here.
<p>MBIE is seeking submissions on Ticket reselling in NZ</p>	<ul style="list-style-type: none"> • Following recent complaints from consumers about ticket reselling practices, MBIE have initiated a review into ticket reselling in NZ. • Submissions are due on 18 April 2019. • A copy of the Discussion Document can be found here.

<p>Commission opened study of mobile markets in NZ</p>	<ul style="list-style-type: none"> • The Commission opened a study of mobile markets in NZ. • Preliminary findings will be published on 30 April 2019. • Submissions on preliminary findings are due on 11 June 2019. • Cross-submissions on preliminary findings are due on 2 July 2019. • Read more here.
<p>Commission opened first market study into retail fuel sector</p>	<ul style="list-style-type: none"> • The Commission commenced a market study into factors that may affect competition for the supply of retail petrol and diesel used for land transport throughout NZ. • The Commission’s final report will be published on 5 December 2019. • A copy of the issues paper can be found here.
<p>MBIE review of unfair commercial practices</p>	<ul style="list-style-type: none"> • MBIE commenced a review on whether there is a need for additional protections for businesses and consumers against unfair commercial practice. Capturing ‘unfair’ will broadly fall into two categories (unfair contract terms and unfair conduct). • Read more here.
<p>Commission sought feedback on the Telecommunications (New Regulatory Framework) Amendment Act 2018</p>	<ul style="list-style-type: none"> • The Commission is developing Fibre input methodologies (rules, requirements and processes). • The Act requires the Commission to determine the initial geographic areas of NZ where fibre services are available to consumers. The Commission sought feedback on the consumer protections and the proposed process. • Read more here.
<p>Commission review of its merger guidelines and clearance application form</p>	<ul style="list-style-type: none"> • The Commission released updated draft guidance on the process it will follow in investigating merger clearance applications and non-notified mergers under the Commerce Act. It also released an updated clearance application form. • Read more, here.
<p>Commission review of Transpower’s proposed price-quality path</p>	<ul style="list-style-type: none"> • The Commission sought submissions on its consultation paper which outlined key issues it will consider when resetting Transpower’s individual price-quality path. • Issues included Transpower’s forecast maximum allowance revenue, expenditure allowances, and required quality standards. • Read more here.

Contact the team

For further information on competition, regulatory, consumer law and compliance, please get in touch with one of the team at Matthews Law or visit our website: www.matthewslaw.co.nz.