# Increased penalties for anti-competitive mergers

*17 March 2021*

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# What we said we would cover

*– lost in translation*

In June 2020 (between lockdowns) MBIE announced that the Government had decided to change New Zealand's law relating to the misuse of market power (section 36 of the Commerce Act), and at the same time make "other minor changes" to the Act. One of those other changes is to increase penalties for businesses engaging in anti-competitive mergers, aligning them with the maximum penalties for other breaches of the Act (including cartel conduct). In this session we explore:

- the "business case" for increasing merger penalties;
- how this could (really) affect risk and strategy for merging parties;
- engagement with the regulator; and
- the elephant in the room…

# What we want to cover

*– not as advertised*

- Broader costs and risks around NZ merger control
- Commercial options – dealing with the CC and counterparts
- What we are seeing – in practice and topical issues
- Some of the cases and matters

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# Roadmap

*– for the next 45 minutes*

1. Merger control options
   - Clearance process
   - Courtesy letters
   - Merger investigations
2. Our experience
3. Enforcement trends
4. Substantive issues
5. Cases
6. Maximum penalties & risk allocation
7. The “business case” for increased penalties

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# Merger control options

*– table of options*

| Option | Some pros | Some cons |
|---|---|---|
| 1. Apply for clearance | - Certainty (if right outcome)<br>- No risk of penalties<br>- Immunity from challenge if granted<br>- May be less onerous than investigation (possibly quicker)<br>- Good for relationship with CC | - Potential delay (but cf. investigation)<br>- CC must be satisfied not a "real chance" a more competitive counterfactual<br>- Increased public exposure (OIA/confidentiality)<br>- Scope creep (but cf. investigation)<br>- Can be expensive (but cf. investigation / litigation) |
| 2. Courtesy letter / fuller briefing | - Chance to pro-actively explain<br>- Possibly less delay / greater certainty<br>- Might get a "no action" letter | - Unclear process<br>- CC could "encourage" parties to seek clearance<br>- Might suggest interim injunction<br>- OIA/confidentiality? |
| 3. Do nothing (don't apply) | - Could be quicker & cheaper<br>- Reverses onus of proof<br>- Not public (unless investigation) | - Risk of investigation (could be public)<br>- Risk of interim / final injunction<br>- Reputational risk if merger is challenged<br>- Uncertainty, risk of penalties<br>- Should still have self-assessed & be "prepared" |

# "Phase 1"

*– clearance process*

6.28 We aim to reach a decision on a clearance application or decide to issue a statement of issues within 40 working days.

| | |
|---|---|
| **Pre-notification** | Draft clearance application provided to Mergers Manager. Pre-notification meeting held, we provide feedback on draft clearance application and may make initial information requests. |
| **By day 0** | Clearance application registered. Initial information requests sent to merging parties (if not already sent). |
| **By day 5** | We publish a Statement of Preliminary Issues on our website (discussed at paragraphs 6.105–6.106 below). We provide a draft investigation timeline. |
| **Day 15** | Submissions due on Statement of Preliminary Issues. |
| **By day 30** | Initial interviews and information gathering are completed. |
| **By day 40** | We give clearance to the proposed merger or decide to send a Statement of Issues (discussed at paragraphs 6.107–6.109 below). |

# "Phase 2"

*– clearance process*

6.29 For complex clearance applications (ie, clearance applications that will likely take longer than 40 working days) the process is likely to progress as indicated below. Further interviews and information gathering may be required during this period.

| | |
|---|---|
| **By day 50** | Statement of Issues sent and published. |
| **By day 60** | Submissions due on the Statement of Issues. |
| **By day 65** | Cross-submissions due on the Statement of Issues. |
| **By day 70** | We meet with the applicant to discuss their response to the Statement of Issues. |
| **By day 90** | We give clearance to the proposed merger or decide to send a Statement of Unresolved Issues (discussed at paragraph 6.110 below). |
| **By day 100** | Statement of Unresolved Issues sent and published. |
| **By day 110** | Submissions due on the Statement of Unresolved Issues. |
| **By day 115** | Cross-submissions due on the Statement of Unresolved Issues. |
| **By day 120** | We meet with the applicant to discuss their response to the Statement of Unresolved Issues. |
| **Day 130+** | We make our final decision. |

# Courtesy letters

*– informal notification*

158. The Commission sometimes receives 'Courtesy Letters' from an acquirer advising the Commission about a proposed merger but explaining why the acquirer considers no competition concerns arise from the proposed merger. These letters allow parties to pre-empt any queries that the Commission might have about the merger. The Commission may need to contact third parties to determine whether any competition concerns arise from the proposed merger. Where the Commission considers that a merger raises potential competition concerns, we encourage parties to apply for clearance. We cannot provide comfort or indemnity against liability for a potential breach of section 47 to an acquirer that sends us a courtesy letter.

- Informal, unofficial
- No action letters
- Confidential?

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# Merger investigations

*– CC detection process*

7.3 Through our merger surveillance programme, we identify mergers that have not already been brought to the Commission's attention. As part of this programme, Commission staff gather information from various sources, including public sources, to identify mergers that could give rise to competition concerns in a market or markets in New Zealand.

7.4 Merging firms can proceed with a merger without seeking clearance or authorisation. However, if we identify through our merger surveillance programme, or other sources, that a non-notified merger may have the effect or likely effect of substantially lessening competition, we may open an investigation under section 47 of the Act.[158]

7.5 In order to prevent an anti-competitive effect from the merger while we are investigating, we may ask the acquirer to give to the Commission an undertaking not to complete the proposed merger until we have completed our investigation (or some other form of undertaking, eg, to dispose of assets or shares).[159] Alternatively, we may seek to injunct the proposed merger (discussed below at paragraphs 7.15-7.16).

7.6 As soon as we are reasonably able to do so in the context of an investigation, a staff member will contact an investigated party to let them know that we have opened an investigation. The case register on our website lists the Commission's section 47 merger investigations.[160]

# Our experience

*– what we are seeing*

- CPs
  - Vendor vs purchaser
  - Risk profiles – lawyers / clients
  - Publicity
  - Substantive analysis
  - More info: ML IPBA slides on CPs in SPAs
- Complex mergers
  - Multiple markets
  - Non-horizontal factors: vertical, portfolio, adjacent markets

# CC enforcement trends

*– what the CC have been up to*

- More aggressive
  - Alignment with Australia
  - Experienced staff from overseas
- No clearance declines in 2019 & 2020, but more investigations
  - 14 merger investigations since 2008 – 11 since 2018
- 2020/21 enforcement priorities: Reviewing mergers and acquisitions that occur in response to changing circumstances
- OIA/confidentiality

# Substantive issues

*– what's topical*

- Gun jumping
  - Sony NZDG
  - Cryosite
- Vertical/conglomerate
  - Sky/Vodafone
- Nascent competition & tech
  - The Warehouse
  - Trade Me
  - Facebook/Instagram

# Cases

*– penalties and costs*

| Penalty cases | Settled (Courts) | Clearance appeals | Other settled |
|---|---|---|---|
| • NZ Bus (CA) $500K & $600K in costs<br>• First Gas (HC) $2.74M ($3.4M total) | • Wilson Parking<br>• Hoyts Cinema<br>• British American Tobacco | • Southern Cross (CA)<br>• Warehouse (CA) | • Fulton Hogan<br>• Datix<br>• David Ferrier /Cavalier<br>• Platinum/ OfficeMax<br>• Vero/Tower |

# Maximum penalties & risk allocation

*– deal risk and related costs*

- Individuals $500K
- Non-individuals $5M -> $10M / 3x commercial gain / 10% turnover
- Vendor accessorial liability (or not)
  - NZ Bus (CA)
- Client risk profile
  - Publicity?
  - Costs
  - Interim injunction risk
  - Penalties / unwind risk
- Investigation costs

# The "business case" for increased penalties

*– deal risk and related costs*

- Consistency (& proportionality) with RTP penalties
- Consistency with Australia
- Deterrence – must beat the cost benefit analysis
- Punishment for permanent damage to market
- First Gas:

> [51] Standing back and assessing the end penalty overall, I am satisfied that the recommended penalty of $3.4 million meets the objectives of the Act in this case. It exceeds the purchase price paid by First Gas. That purchase price, which included a mark-up on the assets, provides some indication of what First Gas was prepared to pay to remove GasNet from the market (even though it does not necessarily reflect the expected gain to First Gas from removing GasNet). The penalty together with the purchase price mean that the assets acquired will not be profitable over their life time. In the context of a business which is almost entirely regulated, this means First Gas will incur a material loss from the acquisition. The general and specific deterrent objective is therefore met by the penalty. There is also the stigma associated with the imposition of a pecuniary penalty.

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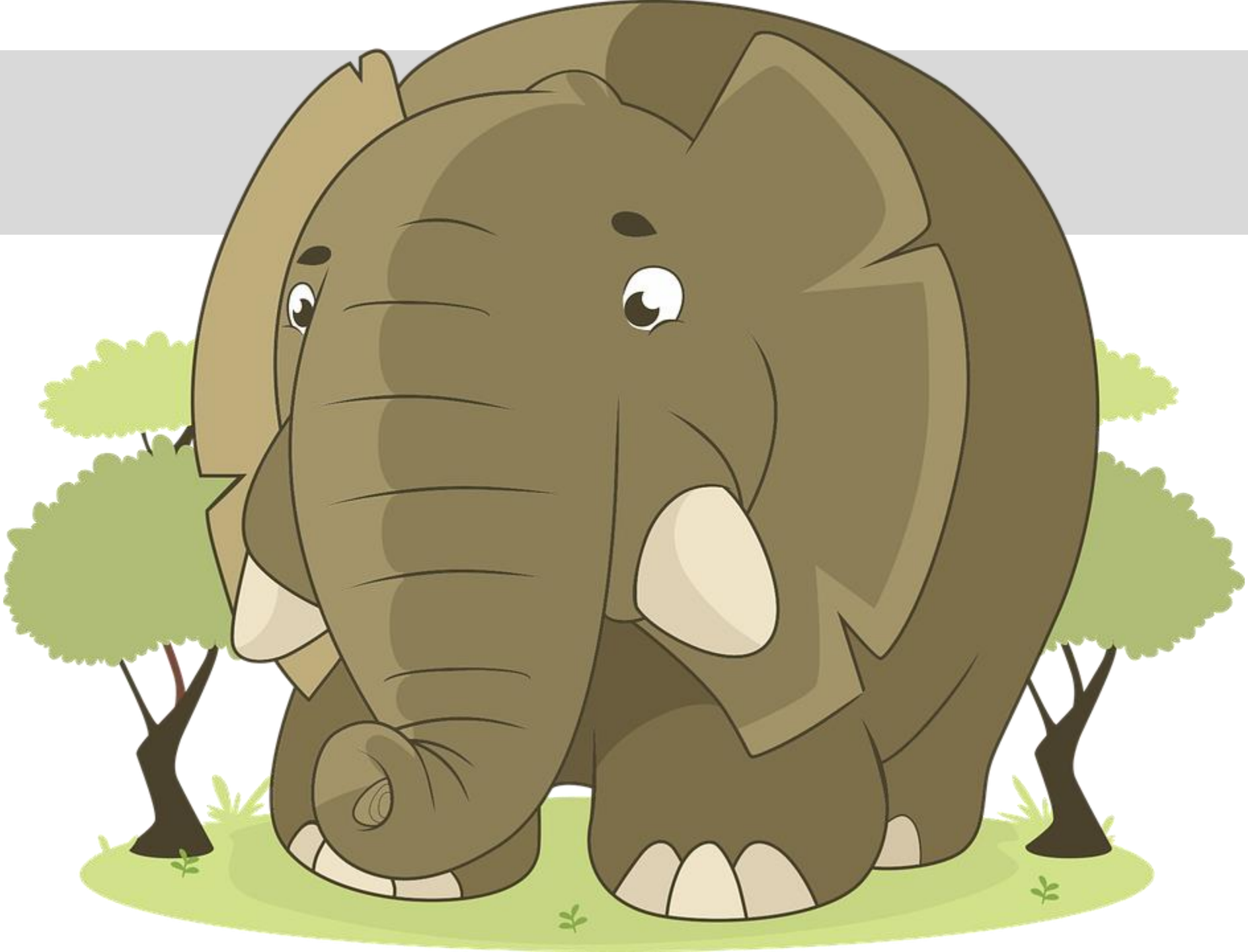

# Useful materials – give these a go or get in touch!

- Matthews Law presentation on SPA clauses: http://www.matthewslaw.co.nz/wp-content/uploads/2017/12/IPBA-Competition-law-issues-in-MA-transactions-%E2%80%93-Merger-Control-drafting-SPA-clauses-Powerpoint-Matthews-April-2017.pdf
- CC merger guidelines: https://comcom.govt.nz/__data/assets/pdf_file/0020/91019/Mergers-and-acquisitions-guidelines-July-2019.PDF
- CC merger presentation: https://comcom.govt.nz/__data/assets/pdf_file/0028/105697/Mergers-discussion-presentation-October-2018.pdf
- CC merger investigations register: https://comcom.govt.nz/case-register?query=&meta_M_and=&meta_N_and=85090&meta_P_and=&meta_R_and=&datefrom=&dateto=15+Aug+2018&datetovalue=&meta_V_and=&meta_U_or=

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