

MATTHEWS LAW

>>> NEWSLETTER <<<

Celebrating 11 years of Matthews Law



THIS ISSUE

NEW YEAR NEW TEAM NEW DEVELOPMENTS

- >>> Welcome our new members to the team
- >>> Key Competition and Consumer Law Developments Recap
 - >> The 2024 OECD report;
 - >> Mergers (including proposed Australian merger reforms);
 - >> Cartels (the first criminal prosecution);
 - >> Consumer (Viagogo case re unfair contract terms); and
 - >> Grocery (including the Foodstuffs merger and international updates).
- >>> Celebrate Matthews Law's highlights and recognition

WELCOME TO OUR **NEW** TEAM

**MICHAEL (KISEOB)
LIM**



**MARIAM
RASHEED**



**EMMA
WESTBROOKE**



>>> OUR LAWYERS MICHAEL LIM, MARIAM RASHEED AND EMMA WESTBROOKE

We welcome Michael (Kiseob) Lim who joins us from the Intellectual property Office of New Zealand, Mariam Rasheed who joins us from the Ministry of Business, Innovation and Employment, and Emma Westbrooke who joins from Russell McVeagh.

>>> OUR NEW PARTNER ALICIA MURRAY

We welcome our new partner Alicia Murray who joined us at the start of the year from DLA Piper. She brings a wealth of experience and knowledge with over 20 years' experience in competition and consumer law, commercial litigation, and dispute resolution.



RECENT COMPETITION & CONSUMER LAW DEVELOPMENTS

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»»» OECD ECONOMIC SURVEY 2024

In May 2024, the OECD released its Economic Surveys for New Zealand. The report included specific reference to competition policy and key industries including electricity and grocery. Its findings identified that:

- **NZ markets are concentrated** and a more comprehensive approach to competition policy is required.
- **Low regulatory barriers to entry** will not be sufficient to ensure rigorous competition in New Zealand's small and distant market.
- **NZ is falling behind** other OECD economies in tackling competition issues arising from digitalisation / digital markets.
- **High state-ownership** in several key sectors carries risks for competition.
- **The Commerce Commission**, unlike competition authorities in many other jurisdictions does not have the power to accept or enforce behavioural remedies.
- **Too much standardisation** (e.g. retail electricity offers until recently) is present in NZ.
- **Industry indicators** suggest competition is weak, and further analysis of barriers to competition should be made in:



RETAIL ELECTRICITY



PORTS, AIRPORTS, AIRLINES
(DOMESTIC AND TRANS-TASMAN)



DAIRY



RETAIL FINANCIAL SERVICES

TWO KEY RECOMMENDATIONS

- »» **Overall state of competition/regulation:** The OECD recommends retaining market studies and adopting a strategy of gradual escalation of intervention, from reducing barriers to entry to light-handed regulatory approaches, and structural solutions such as break-up of dominant players.
- »» **Revisiting the law and jurisprudence around competition:** NZCC should ensure it has the tools and capability to address digital platforms' market power and the associated risks to competition. In particular, New Zealand should:
 - »» Consider alignment of laws with Australia to promote a single digital market.
 - »» Introduce a consumer data rights regime in different sectors.

MERGERS

KEY **UPDATES** IN AUSTRALIA AND NEW ZEALAND

>>> AUSTRALIAN MERGER REFORMS

The Australian Government published a Merger Reform Paper in April 2024, proposing a mandatory and suspensory merger control regime to replace the current voluntary “informal clearance” regime and merger authorisation process.

The paper proposed a change to the substantive test for mergers. Under the proposed test, the ACCC must permit a merger unless it reasonably believes that the merger would have the effect, or likely effect, of substantially lessening competition in any market, including (but not exclusively) if the merger “creates, strengthens or entrenches a position of substantial power in any market”.

While some elements of the proposed system are yet to be finalised and subject to further consultation, the new merger control system is intended to have effect from 1 January 2026.

This is a significant change to the Australian merger regime. Competition law policy and developments in New Zealand often follow Australia and we will therefore be watching closely. It remains to be seen whether New Zealand will follow Australia’s lead.

>>> COMMERCE COMMISSION

The Commerce Commission is reviewing its merger and acquisition guidelines and is calling for submissions on issues that it should consider by **12th of July 2024**. This will be the first substantive update to the core guidelines since 2013.

HAVE ANY COMMENTS?

We will be making submissions on the Commerce Commission’s guidelines.

Please let us know if you have any comments you wish to make on the guidelines or the Commission’s merger process.



CARTELS

THE **FIRST** CRIMINAL PROSECUTION IN NZ



WHAT HAPPENED?

In December 2023, the Commerce Commission filed criminal charges against two construction companies and two directors for alleged bid rigging of publicly funded construction contracts for infrastructure projects in Auckland.

In February this year, one of the construction companies' directors pleaded not guilty at the Auckland District Court. Not guilty pleas were also entered for their company. The second company and director were granted extra time to enter a plea. Both companies and their directors have been granted interim name suppression.

THE SIGNIFICANCE?

The criminalisation of cartel conduct in 2021 was an important change in competition policy, bringing NZ into line with many of its major trading partners, including Australia, the UK, the US and Canada.

The outcome of this proceeding will set a precedent for subsequent criminal cartel cases and we will therefore continue to monitor its progress through the courts.

CONSUMER

COMMERCE COMMISSION V VIAGOGO

[2024] NZHC 713

The Commerce Commission has succeeded in its legal proceedings against global ticket reseller, Viagogo, with the Court finding that the company made a series of misrepresentations to its customers in breach of sections 9, 11 and 13 of the Fair Trading Act 1986.

The Commission brought 6 causes of action against Viagogo including seeking a declaration that the governing law and jurisdiction clause was an unfair contract term.

The High Court found that the provision deeming Swiss law as the governing law was not unfair, and there was nothing materially different about Swiss law so as to give rise to an imbalance between the parties.

“ **viagogo can defend itself as well here as in Geneva** ”

However, the court considered that Viagogo's exclusive jurisdiction clause requiring a consumer to sue Viagogo in Geneva was an unfair contract term. The term gave rise to significant imbalance in the parties' rights and obligations under the contract as a party wishing to bring proceedings against Viagogo could only bring proceedings in Geneva, but Viagogo could pursue a consumer either in Geneva or the consumer's place of domicile. The Court found that there was no reason why Viagogo, a worldwide business which operates solely online, could not participate in or attend any hearing in New Zealand, whether remotely or by an appointed representative on its behalf.

Viagogo has appealed the judgment.

A GOOD REMINDER...

International companies need to be mindful of the unfair contract terms prohibition and should review any exclusive jurisdiction clauses in light of this decision.



ADMIT ONE

GROCERY

STATEMENT OF UNRESOLVED ISSUES & EXTENSION FOR FOODSTUFFS MERGER



On 14 December 2023 Foodstuffs North Island and Foodstuffs South Island (2 of the 3 “regulated grocery retailers”) applied for the NZCC clearance to merge.

On 21 June 2024 the Commission announced that it will issue a Statement of Unresolved Issues (following a large number of submissions on its Statement of Preliminary Issues and Statement of Issues).

The timeline for a decision has now been extended to 1 October 2024.

AUSTRALIAN SUPERMARKET INQUIRY



Earlier this year, the Australian government announced it will direct ACCC to conduct an inquiry into Australia’s supermarket sector. The inquiry will examine the pricing practices of the supermarkets and the relationship between wholesale, including farmgate, and retail prices. The ACCC released an Issues Paper in February 2024 and is currently taking submissions.

UNITED STATES SUPERMARKET MERGER



In the United States, the Federal Trade Commission (FTC) has sued Kroger, the biggest grocer in the US by revenue, to block its proposed acquisition of supermarket rival Albertsons for \$24.6 billion. Kroger is the second largest player in the US grocery market behind Walmart and has proposed to divest 413 stores and eight distribution centres to C&S Wholesale Grocers. The FTC called that proposal inadequate.

CANADIAN INVESTIGATION INTO ANTICOMPETITIVE PROPERTY CONTROLS



Canada’s Competition Bureau has launched an investigation into the country’s largest supermarket chains, Sobeys and Loblaw. The Bureau is concerned about the use of exclusivity clauses and restrictive covenants in the real estate sector to undermine competing food retailers. This action follows the Retail Grocery Market Study, which was launched in October 2022 due to public outcry over food prices. The Bureau has obtained court orders requiring Loblaws and Sobeys to provide records for its investigation.

FIRM HIGHLIGHTS AND RECOGNITION

Since our founding in 2013 we have been recognised for our excellence as a specialist in our field:

GCR
Highly Recommended

Chambers
Band 2

Legal 500
Band 2

Our partners Andrew (Andy) Matthews and Alicia Murray have also been recognised individually:

Chambers

Andy listed as a Band 1 Lawyer since 2006; Alicia listed as Band 3 since 2021

Legal 500

Andy listed as being in the Hall of Fame;
Alicia recognised in dispute resolution and described as a “gutsy litigator”

Who's Who's Legal

Andy recognised as a Thought Leader (first recognised in 2014/2015)

Best Lawyers

Andy recognised for high calibre work in Competition & Consumer Law, and Regulatory Practice