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Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in New Zealand

-- 2019 --

10-12 June 2020

This report is submitted by New Zealand to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 10-12 June 2020.

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New Zealand

Introduction

1. This report presents the key competition law and policy developments in New Zealand for the calendar year 1 January to 31 December 2019, and where appropriate, significant developments since then.
2. The report relates primarily to activities concerning two areas of the Commerce Act 1986, New Zealand's competition legislation:
 - restrictive trade practices (that is, coordinated behaviour involving anticompetitive agreements and conduct involving the unilateral misuse of market power) and
 - business acquisitions and mergers.
3. The report also includes brief comments on developments affecting the sector-specific competition or regulatory regimes for the dairy, airports and telecommunications sectors.
4. **Section 1** of this report is an introduction to New Zealand's competition legislation and its enforcement by the New Zealand Commerce Commission (NZCC).
5. **Section 2** provides an update on various government reviews of competition policy and legislation. This also covers the NZCC's role in the formulation of competition-related policies. During the reporting period, the Commerce Amendment (Criminalisation of Cartels) Act 2019 was enacted, NZCC completed its first market study into retail fuel markets and the report of the Electricity Price Review was published. The review of the misuse of market power prohibition and related matters is progressing.
6. The next two sections of the report concentrate, for the reporting period, on the NZCC's key activities (**Section 3**) and the NZCC's resourcing (**Section 4**).
7. The NZCC key achievements include the release of its retail fuel market study, reviewing a number of challenging mergers involving evolving markets and its investigations into anti-competitive cartels.¹
8. **Section 5** outlines the release of research into the relationship between competition and productivity.

¹ Further reading on the NZCC's key achievements for 2019 can be found in its Annual Report which is available at https://comcom.govt.nz/_data/assets/pdf_file/0028/192268/Commerce-Commission-Annual-Report-2019.pdf.

1. New Zealand's competition regime

9. The NZCC is New Zealand's primary competition enforcement and regulatory authority.² Its vision is that New Zealanders are made better off because markets work well and consumers and businesses are confident market participants.³ The NZCC is responsible for enforcing the following Acts:

- the Commerce Act 1986;
- the Fair Trading Act 1986;
- the Credit Contracts and Consumer Finance Act 2003;
- the Telecommunications Act 2001; and
- the Dairy Industry Restructuring Act 2001.

10. The Fair Trading Act 1986 and Credit Contracts and Consumer Finance Act 2003 are consumer laws and will not be discussed in this report.

1.1. Competition law

11. New Zealand's main competition legislation is the Commerce Act 1986. The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers within New Zealand. The Act sets out New Zealand's restrictive trade practices provisions as well as a mergers and acquisitions regime. It also outlines the NZCC's market studies functions.

12. Restrictive trade practices include anticompetitive coordinated behaviour and unilateral conduct. The Act prohibits contracts, arrangements, or understandings that have the purpose, or have or are likely to have the effect, of substantially lessening competition in a market. Agreements between likely competitors that relate to price fixing, restricting outputs, and allocating customers, suppliers or territories are *per se* prohibited. Unilateral conduct includes a person or business taking advantage of their substantial degree of power in a market for an anticompetitive purpose, or specifying a minimum price at which their goods or services can be sold by another (resale price maintenance (RPM)) which is a *per se* offence. The NZCC is responsible for enforcing the provisions of the Commerce Act relating to restrictive trade practices.

13. In addition to its enforcement functions, the NZCC has some quasi-judicial functions under the Commerce Act. New Zealand has a voluntary merger notification system, under which the NZCC must approve a business acquisition or merger if it is satisfied that the transaction will not substantially lessen competition in any New Zealand market (known as a clearance).

14. There is also a clearance regime for collaborative activities. As with the merger clearance regime, this is a voluntary system. A collaborative activity is defined as two or more people carrying on an enterprise, venture or other activity in trade in cooperation. The collaboration must not be for the dominant purpose of lessening competition between the parties. For the NZCC to grant a clearance, the applicant must establish that it and other parties to the agreement are or will be involved in the collaborative activity, have ensured that every cartel provision in the agreement is reasonably necessary for the purpose of the

² The NZCC's website is: <http://www.comcom.govt.nz/>

³ Further reading on the NZCC's aims can be found in its Statement of Intent, available at <https://comcom.govt.nz/about-us/strategic-planning-and-accountability-reporting/statement-of-intent>.

collaborative activity and that entering into the agreement, or giving effect to it will not have or would not be likely to have the effect of substantially lessening competition in a market.

15. The NZCC can also authorise a business acquisition that is anticompetitive, or a restrictive trade practice that involves an agreement or RPM, if the NZCC is satisfied that it would be likely to result in such a benefit to the public that it should be permitted. The effect of clearance and authorisation determinations by the NZCC is to offer businesses protection from legal action under the Commerce Act.

1.1.1. Sectoral regulation

16. In addition to economy-wide competition law, the NZCC is also responsible for implementing several pieces of legislation aimed at regulating sector-specific services supplied in markets where competition is either not possible or limited:

- Under Part 4 of the Commerce Act, the NZCC is responsible for regulating specified services with natural monopoly characteristics. It currently regulates electricity lines services, gas pipeline services, and specified airport services supplied at the three major international airports located in the cities of Auckland, Wellington and Christchurch.
- The Telecommunications Act 2001 created an industry-specific regulatory regime for certain telecommunications services. The Act is administered by the NZCC under the stewardship of a Telecommunications Commissioner, a statutory position under the Telecommunications Act. Under the Telecommunications Act, the NZCC is primarily responsible for regulating specified fixed-line services. The NZCC can also investigate and recommend to the Minister for Communications that other wholesale telecommunications services be regulated. Both copper and fibre services are also subject to ‘equivalence of inputs’ and ‘non-discrimination’ obligations. On top of network regulation, the NZCC also plays a role in retail telecommunications – monitoring and reporting on retail service quality, with the legislated power to develop industry-wide codes.
- Finally, the Dairy Industry Restructuring Act 2001 provides for the regulation of New Zealand’s largest dairy company, Fonterra Cooperative Group, to mitigate its market power in certain domestic dairy markets. Fonterra is still subject to the provisions of the Commerce Act prohibiting restrictive trade practices, but the DIRA is designed as an ex-ante regime that regulates the activities of Fonterra to ensure that New Zealand markets for dairy goods and services are contestable.

17. The majority of this report focusses on competition law. However, key developments in sectoral regulation will be discussed briefly.

1.1.2. Institutional design

18. The NZCC is an independent government entity. Whilst it is primarily accountable to the Minister of Commerce and Consumer Affairs for its performance and outputs, it is not subject to direction from the government in carrying out its enforcement, adjudication and regulatory control activities. The NZCC is, however, required to have regard to statements of government economic policy communicated by Ministers under the Commerce Act or the Telecommunications Act. The NZCC’s independence requires it to be an impartial promoter and enforcer of the law. In New Zealand, the general courts are responsible for determining contraventions of competition law and imposing sanctions. The courts also determine appeals from NZCC determinations.

19. The role of providing government with policy advice on competition matters belongs generally to the New Zealand Ministry of Business, Innovation and Employment (MBIE). The demarcation of roles between the NZCC and MBIE ensures a clear separation and independence between the operational and policy functions within New Zealand's competition regime. That being said, whilst the primary role of the NZCC is an operational one, where relevant, the NZCC uses its experience to provide advice on policy developments and sectoral and legislative reviews, with particular focus on the operational aspects of the regime.

20. Internationally, the NZCC is actively involved with its counterpart agencies through fora such as the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network. The NZCC also has cooperation agreements under section 99F of the Commerce Act with the Australian Competition and Consumer Commission (ACCC) and the Canadian Competition Bureau. In addition, the NZCC's relationship with the ACCC is strengthened through Commissioner cross-appointments.

2. Changes to competition laws and policies, proposed or adopted

2.1. New competition law provisions and guidelines

2.1.1. Commerce (Criminalisation of Cartels) Amendment Act 2019

21. The Commerce (Criminalisation of Cartels) Amendment Bill received Royal assent on 8 April 2019, and will come into effect in April 2021 after a two-year transition period.

22. The new Amendment Act implements a criminal regime for cartel conduct that will run parallel to the current civil regime.

23. There are three main elements to the new criminal regime which are intended to promote certainty and confidence:

Criminal offence

- To commit an offence, the defendant must have entered into or given effect to an arrangement containing a cartel provision in contravention of the Act and have 'intended' to fix prices, restrict output or allocate markets. It will focus the offence on those parties that meant to engage in cartel conduct.
- A penalty for an individual would be up to seven years' imprisonment; a fine up to NZ\$500,000; or both. The penalty for bodies corporate would be the same as the civil prohibition, being up to NZ\$10 million, or more in some cases.

Defences and exceptions

- The four exceptions in the Act that currently apply to civil cartel conduct are also extended to apply to the new criminal offence. In particular, competitors that are involved in a collaborative activity (e.g. a joint venture), collective buying, vertical supply contracts or specified international shipping arrangements are not subject to the criminal offence provided that the defendant believed on reasonable grounds that one or more of the exceptions applied. However, the defence does not apply if the defendant's belief is based on ignorance, or mistake, of any matter of law. NZCC may still take civil proceedings against the defendant even if this defence applies.

The criminal prosecution process

- A criminal prosecution for cartel conduct would, as a result of the seriousness of criminal conduct, involve a higher burden of proof, requiring the prosecution to prove beyond reasonable doubt that the firm or individual entered into or gave effect to a cartel provision. The criminal prosecution would be the responsibility of a Crown prosecutor.

2.1.2. Authorisation guidelines

24. The NZCC consulted on updated drafts of its Authorisation Guidelines and the application forms for authorisations. The Authorisation Guidelines explain how the NZCC assesses public benefits and detriments in relation to authorisation applications. They were last updated in 2013. The draft guidelines propose to revise both substantive and procedural aspects applied by the NZCC to assess applications for authorisation of mergers and restrictive trade practices under sections 58 and 67 of the Commerce Act.

25. Since they were last updated, the NZCC has considered several authorisations and the courts have issued further substantive guidance. For instance, the courts have confirmed the importance of the NZCC's qualitative judgement when assessing the benefits and detriments arising from a proposed merger or agreement in an authorisation context. This means that the NZCC is required to have regard to matters that cannot be quantified, as well as those that can, in carrying out its authorisation analysis. Consequently, the draft guidelines explain how the NZCC assesses the nature and significance of unquantified benefits and detriments. The proposed revisions also recognise the Court of Appeal's recent comments in *NZME v Commerce Commission*, indicating that it is open to the NZCC to adopt a modified total welfare approach in our analysis of public benefits.

26. The NZCC has not published the final version of the guidelines yet.

2.2. Proposals for new legislation

2.2.1. Dairy Industry Restructuring Amendment Bill (No 3)

27. The Dairy Industry Restructuring Act 2001 (DIRA) is administered by the Ministry of Primary Industries (MPI). The NZCC has both an enforcement and adjudication role under the Act. The creation of Fonterra in 2001 meant that it controlled 95% of domestic milk processing at that time and regulations were required to mitigate its market power in acquiring raw milk from farmers and supplying independent processors in the wholesale domestic market.

28. The DIRA promotes contestability in the market for farmers' milk by requiring an "open entry and exit regime" that minimises barriers to farmers switching supply of raw milk to independent processors and imposes access obligations on Fonterra for supply of raw milk in certain circumstances. In 2012, the DIRA was further amended to allow Fonterra to restructure its capital base, subject to greater oversight and transparency of its milk price setting.

29. NZCC's primary role under the DIRA is to publicly report on the extent to which Fonterra's milk price setting processes and calculations provide incentives for Fonterra to operate efficiently and are consistent with contestability in the market for purchasing farmers' milk. While the DIRA has been successful in enabling entry and expansion by independent processors to compete with Fonterra, Fonterra is still largely the price setter for farmers' milk.

30. In December 2017, the government announced a comprehensive review of the DIRA and its impact on the dairy industry. The review took a strategic focus and looked at the effectiveness and impact of the DIRA across a range of areas. The review took into account Fonterra's declining market share (about 81% on a national basis) and the interface of the 2012 DIRA amendments with the "open entry and exit regime". Public consultation took place between November 2018 and February 2019.

31. As a result of the review, the Government introduced the Dairy Industry Restructuring Amendment Bill to Parliament on 22 August 2019. The Bill was referred to the Primary Production Committee for consideration, and was reported back to Parliament on 20 March 2020 with a recommendation that it be passed with some amendments.

32. The Bill changes the entry regime by removing the requirement that Fonterra buys milk from any farmer who wishes to supply it. It would also remove the right of open re-entry for farmers who have left Fonterra. The Bill retains the open exit regime to manage ongoing risks arising from Fonterra's large size and scale in New Zealand dairy markets. This enables farmers to stop supplying their milk to Fonterra without incurring penalties.

33. It also clarifies that Fonterra can price differentiate on the basis of various on-farm performance matters, and refuse milk supply from farmers in circumstances where milk is non-compliant. In addition, the Bill supports and encourages better environmental performance of the dairy industry, provides Fonterra with more flexibility to manage some aspects of its operations, and provides increased clarity on aspects of the regulatory regime for Fonterra and other dairy industry stakeholders.

2.2.2. Screen Industry Workers Bill

34. Currently, most workers in New Zealand's screen industry are contractors who cannot challenge their employment status. They are therefore not entitled to employment rights, including the right to negotiate working conditions collectively. They are also unable to access the collective bargaining exemption for employment agreements in the Commerce Act.

35. In 2018, the Government brought together industry, business and worker representatives to design a model that allows collective bargaining in the screen industry. The Government agreed to their recommendations, and on 18 February 2020 the Screen Industry Workers Bill was introduced to Parliament⁴.

36. The Bill introduces a workplace relations framework that will provide clarity about the employment status of people doing screen production work. It introduces a duty of good faith and mandatory terms for contracting relationships in the industry. It allows for collective bargaining at the occupation and enterprise levels and creates processes for resolving disputes arising from contracting relations or collective bargaining.

⁴ Progress on the bill can be found at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_94845/screen-industry-workers-bill.

2.3. Other policy reviews

2.3.1. Prohibition on misuse of market power

37. During the reporting period, the Government consulted on possible changes to section 36 of the Commerce Act which prohibits the misuse of market power.⁵ Alongside this, the Government is also considering removing exemptions from the Act that shield intellectual property (IP) arrangements from examination under competition law. The reform package also proposes to make other minor changes to the Act, including making covenants that create/facilitate a cartel *per se* illegal. This would close a loophole that was inadvertently created under the Commerce (Criminalisation of Cartels) Amendment Act.

38. The options being explored to amend the section 36 test prohibiting misuse of market power include adopting a simplified version of Australia's new prohibition:

- *A person that has a substantial degree of market power must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.*

39. The release of the options paper followed earlier analysis by MBIE which concluded that the current provision of the Act has the potential to under-capture anticompetitive conduct, is costly and complex to enforce, and may lack predictability of outcomes.⁶ In particular, the current test of misuse of market power requires a complicated hypothetical counterfactual test, rather than focusing the inquiry on the effect of the firm's conduct in the affected market. The Government is expected to announce its final policy decisions in mid-2020.

40. In its submission to MBIE on the options proposed for reforming the prohibition against market power, the NZCC supported aligning New Zealand's provision with Australia's. It also supported repeal of the IP-related provisions of the Act so that IP is subject to the same competition analysis as the use of other property. The NZCC also supported refining the interpretation section to ensure covenants were captured under the provision.

2.3.2. NZCC market study into retail fuel markets

41. The Government requested the NZCC undertake a market study into retail fuel markets. In December 2018 the NZCC commenced a market study looking into the factors that may affect competition for the supply of retail petrol and diesel used for land transport throughout New Zealand.

42. The purpose of the study was to consider and evaluate whether competition in the retail fuel market is promoting outcomes that benefit New Zealand consumers over the long-term. Over the course of the study the NZCC engaged with and gathered evidence from, a wide range of stakeholders including the fuel industry, motoring groups, consumer groups and everyday consumers.

43. The final report of the NZCC's findings was published on 5 December 2019. The report found that an active and competitive wholesale market for fuel does not exist in New Zealand, and this is weakening price competition in the retail market. The final report included recommendations for improving activity and competition primarily in the

⁵ The options paper can be found here: <https://www.mbie.govt.nz/have-your-say/review-of-section-36-of-the-commerce-act-and-other-matters/>.

⁶ The initial issues paper can be found here: <https://www.mbie.govt.nz/have-your-say/targeted-commerce-act-review/>.

wholesale market, as well as recommendations to help consumers make more informed purchasing decisions. The Government has accepted NZCC's findings and plans to implement changes in 2020 that may include:

- a more transparent wholesale pricing regime requiring fuel suppliers to publicly post the prices they sell to wholesale customers at storage terminals
- rules to ensure contracts between wholesale fuel suppliers and their customers are fair and support competition
- provision of a dispute resolution scheme for the new regime
- improvements to the monitoring of the fuel market by requiring fuel companies to collect and disclose certain information
- requiring retail fuel sites to display premium fuel prices on forecourt price boards.

44. Further discussion of the NZCC's findings from this market study can be found later in this report.

2.3.3. Electricity Price Review (EPR)

45. In 2018, the Government commissioned a review led by an independent expert advisory panel into electricity prices to investigate whether the electricity market, as it exists at present, is delivering a fair and equitable price to end-consumers.

46. The objective of the EPR was to ensure that New Zealand's electricity market delivers efficient, fair and equitable prices as technology evolves and there is a transition to a lower emissions future. The EPR also takes into account environmental sustainability and security of supply considerations.

47. In February 2019, the EPR published an options paper setting out possible solutions to strengthen the consumer voice, reduce energy hardship, increase retail competition and reinforce wholesale market competition, among other issues. The final report was delivered in May 2019.⁷ It contained 32 recommendations which included the establishment of a consumer advisory council, a requirement for distributors to offer retailers standard terms for network access and a requirement for generator-retailers to release information about the profitability of their retail activities.

48. The final report contained two recommendations that had a specific focus on competition. These proposed to ban both saves (where an electricity retailer entices a customer to cancel a switch before it happens) and win-backs (where an electricity retailer entices back a customer after a switch happens). The EPR considered that such a ban would help counter the development of a two-tier market in which consumers who actively shop around receive discounts and those who do not pay higher prices.

49. The EPR also recommended that companies vertically integrated in generation and retail should have an obligation to offer buying and selling contracts in New Zealand's wholesale electricity contracts market. The EPR considered that the current wholesale contract market is not working effectively, noting that it relies heavily on the four biggest generator-retailers voluntarily quoting buy and sell prices with spreads of no more than 5 per cent for certain contracts. The EPR considered it important to correct the fragility of the current wholesale electricity market, observing that an efficient contract market is

⁷ The final Electricity Price Review report can be found here: <https://www.mbie.govt.nz/assets/electricity-price-review-final-report.pdf>

particularly important for stand-alone retailers and generators, who are a key source of innovation and competitive pressure.

50. The Government agreed to progress twenty of the recommendations immediately, including a review of energy institutional arrangements. The other recommendations for immediate action will address energy hardship and improve market operations.

2.3.4. Review of dependent contractors

51. In New Zealand, workers can be hired as employees or contractors. Employees receive minimum standards laid out in employment law, while contractors often have greater flexibility and independence. Over five per cent of New Zealand workers are contractors and with the changing nature of work and the expansion of the ‘gig’ economy, contracting arrangements are likely to become more common.

52. Contracting arrangements can be beneficial to both firms and workers, and it is important that both firms and workers can participate in the labour market in a way that works for them. However, there are concerns that some contractors are vulnerable to poor outcomes, because they lack both the protections offered to employees by law, and the power to negotiate a better deal.

53. There are two types of contractors that the government is concerned about. Some workers are hired as contractors when they are, in substance, employees who have been misclassified, either by mistake or to keep costs down. Other workers share some characteristics with self-employed contractors, for example by running their own business. But they also share some characteristics with employees, for example being highly dependent on one firm for most of their income, or having limited control over their work.

54. In November 2019 the Government released a public consultation document on options to better protect workers in vulnerable contracting situations.⁸ One of the options consulted on involved extending the right to bargain collectively to some contractors. Submissions closed on 24 February 2020, and the Government is currently considering submissions.

2.3.5. Commerce Commission input into draft legislation

55. As discussed above, the NZCC is an independent government entity responsible for enforcing a range of legislation. In New Zealand there is a separation of policy and operational functions. The competition regime in New Zealand operates on the basis that responsibility for advising government on policy development issues is assigned to MBIE. However, the NZCC may provide advice on, or information relevant to, policy developments or legislative change when it has relevant expertise or it considers that the situation warrants public comment. Since 5 December 2018, the NZCC also has a role in conducting market studies, which is in-depth research to inform policy development.

56. Throughout 2019 the NZCC contributed to other legislative reform that could affect competition in New Zealand or otherwise impact its mandate under the Commerce Act.

⁸ The discussion document can be found here: <https://www.mbie.govt.nz/have-your-say/better-protections-for-contractors>

Civil Aviation Bill

57. The Government is progressing reform of the laws underpinning the civil aviation sector.⁹ The Ministry of Transport released a consultation document requesting comment on various aspects of the proposed changes. The NZCC reiterated its previous submission that oversight of international air agreements should be brought under the generic authorisation regime in the Commerce Act. However, the NZCC provided comments on the proposed amendments if international air agreements continue to remain subject to a separate sector-specific authorisation regime administered by the Minister of Transport as currently contemplated. The NZCC continues to engage on policy proposals in this area as the legislative reform process progresses.

Therapeutic Products Bill

58. The Government also proposed to introduce a new and comprehensive regime to regulate therapeutic products in New Zealand.¹⁰ The Ministry of Health released a consultation that proposed to establish a regulator that would have substantial influence over the availability of medicines and medical devices throughout the pharmaceutical and medical device supply chains. The NZCC submitted comments in response to the consultation document. In terms of competition matters, it recommended that competition be included as one of the principles that underpins the sector specific regulator's exercise of its regulatory powers.

3. Enforcement of competition laws and policies

3.1. Anticompetitive practices

3.1.1. Summary of activities

59. **Table 1** shows the number of investigations completed by the NZCC in relation to anticompetitive practices in the three years ended 31 December 2017, 2018 and 2019. This includes investigations closed with no or low-level enforcement actions.

Table 1. NZCC completed investigations of anticompetitive practices

	2019	2018	2017
Number of coordinated behaviour investigations	4	2	6
Number of unilateral conduct investigations	1	1	1

3.1.2. Significant cases

60. The NZCC worked on a variety of investigations in 2019. This year two significant investigations resulted in penalties for the investigated parties.

61. The High Court imposed a fine of \$825,000 on Milfos Limited, a dairy industry technology provider, in relation to price fixing. This case concerned Milfos and Dairy Automation Limited (DAL), a distribution company, that competed with Milfos in the retail

⁹ Further information on the Civil Aviation Bill can be found at <https://www.transport.govt.nz/air/civil-aviation-bill/>.

¹⁰ Further information on the Therapeutic Products Bill can be found at <https://www.health.govt.nz/our-work/regulation-health-and-disability-system/therapeutic-products-regulatory-regime>.

market for the supply of dairy industry technology. In the course of discussing a potential exclusive retailer deal (which was not subsequently entered into), Milfos and DAL agreed a pricing spreadsheet for customer quotes, which fixed prices for certain products. This judgment serves as a reminder to businesses that they must be mindful of agreeing prices with a distributor that also competes with them in the retail market and that the fact that the conduct was in anticipation of a legitimate exclusive supply arrangement was not a defence.

62. The High Court imposed a penalty of \$400,000 on Ronovations Ltd in relation to price fixing in Auckland’s residential property market. Ronovations’ business model was based on paid members competing with each other to purchase houses that they had identified for investment. To deal with this issue Ronovations developed a set of rules to ensure that its members were not competing for the same properties. Part of this business arrangement required that members notify one another of their intention to purchase a property, following which they were given priority to purchase that property. The Court found that Ronovations’ rules were deliberately anticompetitive and were designed in such a way as to suppress competition among members to the detriment of vendors. As a consequence, some properties may have sold for less than they otherwise would have. Publication of the facts of this case and penalty imposed will likely result in greater public awareness of the unlawfulness of anticompetitive buyer side conduct of this nature and the serious consequences that can result from engaging in such conduct.

3.2. Mergers and acquisitions

3.2.1. Statistics

63. Merger and authorisation work is a key part of the NZCC’s competition law activity. This work is demand driven and as a result there can be peaks in merger cases from time-to-time. New Zealand has a voluntary merger notification regime. The merger work is prioritised as it has the potential to have a significant impact on markets and the New Zealand economy. The NZCC decided 10 merger clearance applications and 0 authorisation applications during the year, and also initiated a number of section 47 investigations into merger activity which was not notified for clearance.

Table 2. Merger clearance and authorisation applications

	2019	2018	2017
Number of clearance applications processed	10 ¹¹	9	8
Number of authorisation applications processed	0	2	3
Number of market structure ¹² cases investigated	4	4	4

64. **Table 3** sets out the merger and acquisitions applications decided by the NZCC in the year ended 31 December 2019 and their outcomes.

¹¹ Note 4 of these clearance applications were notified in 2018

¹² Market structure cases are non-notified mergers.

Table 3. Outcome of merger reviews¹³

Application	Resolution
DLF Seeds A/S & PGG Wrightson Seeds Holdings Limited	Cleared
Fletcher Building Limited & Waikato Aggregates Limited	Cleared
Ixom Operations Pty Limited & Oji Fibre Solutions (NZ) Limited	Withdrawn
Gebr. Knauf KG & USG Corporation	Cleared with divestment
GlaxoSmithKline & Pfizer Consumer Health Business	Cleared
Mainland Print Limited & Inkwise Limited	Cleared
Infratil Limited & Vodafone New Zealand Limited	Cleared
Queenstown Bungy Limited & Taupo Bungy Limited	Cleared
Cardrona Alpine Resort Ltd & Treble Cone Investments Ltd	Cleared
Property Brokers Limited & Farmlands Real Estate Limited and Farmlands Real Estate Property Management Limited	Cleared
Datix Limited & RL Solutions	Cleared
David Ferrier & Cavalier Wool Holdings	Non-notified merger: No further action
Bondor NZ Limited & Long Group	Non-notified merger: No further action

Significant cases

65. The number of merger clearance applications filed dropped off in the second half of 2019. Overall in 2019 the NZCC continued to see a mix of domestic and international clearance applications being filed, including some regional mergers. The NZCC is continuing to prioritise the investigation of non-notified mergers and, as set out below, obtained penalties on one of these matters last year.

66. In April 2019 the NZCC granted clearance for GlaxoSmithCline (GSK) to acquire the consumer healthcare business of Pfizer Inc. It was satisfied that GSK and Pfizer were not in close competition in the supply of cold flu treatments, systemic pain relief or any other consumer healthcare products and that the presence of suppliers of competing products was likely to constrain the merged entity.

67. It also assessed an application by Infratil Ltd to acquire up to 50% of the shares in Vodafone New Zealand. At the time Infratil also held a 51% share of Trustpower Ltd, and submitted that Vodafone and Trustpower would continue to operate as independent companies. The NZCC's analysis was based on the assumption that the businesses could be combined in the future. Its analysis focussed on the possible impact of the proposed acquisition in the national markets for retail supply of broadband and mobile services. The NZCC was satisfied that Infratil's interests in Vodafone and Trustpower would not substantially lessen competition in any of the markets assessed. This was consistent with its mobile market study's preliminary findings that found competition in mobile markets is generally driven by three large mobile network companies. In summary, the NZCC found that the acquisition would not be likely to substantially lessen competition. This acquisition demonstrates the complexity of merger decisions that involve questions about the future state in technology markets.

68. In late 2019 the NZCC granted clearance for Cardrona Alpine Resort Ltd to acquire either the shares of Treble Cone Investment Ltd or the assets it uses to operate the Treble Cone Ski Field. This analysis considered the pricing of ski passes in the Wanaka region

¹³ Note that this table contains outcomes of merger reviews that are in the public domain. The NZCC is investigating another merger although this remains confidential.

and whether the acquisition would increase the likelihood of coordination on ski passes. The NZCC was satisfied that the acquisition was unlikely to substantially lessen competition as the merged entity would be unable to successfully charge higher prices or reduce the quality of the services offered given the high number of skiers from outside of the region with alternative options. It was also satisfied that there was unlikely to be a difference in the extent to which Treble Cone competes either with its current ownership structure or with an alternative owner.

69. The NZCC also achieved a successful result in its investigation into a non-notified merger. Its investigation into First Gas Limited found that First Gas acted anticompetitively when acquiring the gas distribution assets of Gas Net Limited. Both parties were operating in the same geographic market and First Gas adopted a concerted strategy designed to force Gas Net to leave the region in breach of sections 47 (anticompetitive acquisitions) and 27 (anticompetitive agreements) of the Commerce Act. This strategy included taking steps to duplicate pipelines that Gas Net had laid in subdivisions. This conduct resulted in Gas Net deciding its best course of action was to sell its business to First Gas and agree to a restraint of trade that would prevent it from returning to the region, resulting in a long-term structural change in the market. The penalty in this case was \$3.4 million and reflected the seriousness of the conduct.

3.3. Key findings from the NZCC's market study into retail fuel

70. As explained above, in December 2018 the NZCC commenced a market study looking into the factors that may affect competition for the supply of retail petrol and diesel used for land transport throughout New Zealand.

71. The study aimed to consider and evaluate whether competition in the retail fuel market is promoting outcomes that benefit New Zealand consumers over the long-term. The final report of the NZCC's findings was published on 5 December 2019. In summary, it found that:

- Fuel companies have been making persistently higher profits over the past decade than it would expect in a competitive market.
- Regional differences in retail fuel prices reflect variations in local competition.
- Discounts and loyalty schemes avoid direct competition on fuel prices.
- Premium petrol margins have grown faster than regular petrol and do not reflect actual cost differences.
- Competition largely occurs in retail markets and is less intense than could be expected.

72. Its fuel market study revealed that the core problem stems from the wholesale fuel market, where competition has been side-lined by a combination of vertical integration and long-term exclusive contracts between importers and distributors. Consequently:

- Wholesale supply relationships, including restrictive contract terms between the majors and resellers, limit resellers' ability to switch supplier.
- Combined with infrastructure sharing arrangements, this creates a barrier to entry for independent importers.
- Wholesale prices are higher than the NZCC would expect in a competitive market. This flows through to consumers paying higher pump prices.

73. In summary, the NZCC recommended the following to improve competition in the retail fuel market and benefit consumers:

- Introduce a Terminal Gate Pricing Regime to increase trading opportunities for importers and resellers to:
 - create the potential for a liquid wholesale spot market to develop
 - lower barriers to entry and expansion for importers and distributors
 - provide greater price transparency for wholesale customers
 - provide competitive benchmark information to industry and government.
- Regulate wholesale supply contracts to allow greater contractual freedom for resellers to compare offers and switch suppliers by:
 - requiring clear and concise language and transparent pricing
 - limiting the use of long term and exclusive supply contracts
 - assessing the use of other potentially restrictive contract terms
- Introduce an enforceable Industry Code of Conduct to give effect to Terminal Gate Pricing regime and contract recommendations.
- To help inform consumers:
 - Require retailers to display premium fuel prices on price boards.
 - Introduce a fuel cap sticker specifying the minimum fuel grade to be used in vehicles.
 - Further monitoring of the display of discount pricing on price boards.

74. The NZCC also proposed following other general recommendations:

- Improve information and record keeping about the fuel market for future analysis.
- Encourage major fuel companies with shared infrastructure arrangements to:
 - publish criteria and the process for participation in the arrangements
 - review aspects of the arrangements that may disincentivise investment in shared storage
 - review information sharing about the arrangements to reduce the potential for coordination.

75. On 27 February 2020, the Government announced a comprehensive package of reforms after accepting the NZCC's findings in its report. The reforms include the development of a new Fuel Industry Bill to ensure New Zealanders get a fairer deal at the petrol pump.

3.4. Key findings from the NZCC's mobile market study

76. The NZCC also completed a study on mobile markets in September 2019. It carried out this study under section 9A of the Telecommunications Act 2001. Section 9A empowers the NZCC to conduct studies into any matters relating to the telecommunications industry or the long-term benefit of consumers of telecommunications services. The findings of a s 9A study can lead the NZCC to consider whether regulatory changes may be appropriate.

77. The purpose of the NZCC's study was to better understand how mobile markets are developing and performing and how the competitive landscape for mobile may evolve as technology changes.¹⁴

78. Its study found that the established presence of three independent, national network-based providers has resulted in consumers benefitting from an increasingly competitive market environment. The study also concluded that there is an emerging market for 'virtual' operators to sell mobile services to consumers without having to build their own mobile network. Some of the study's other findings include:

- Prices for mobile services have been falling and compare well with other OECD countries.
- Consumers might benefit from more shopping around; while most consider it easy to find their usage, compare plans and switch provider, most rarely or never do.
- With growing data demand, future competition will depend on the upcoming 5G spectrum allocations producing reasonably balanced spectrum holdings.

4. Resources of the NZCC

4.1. Human resources

79. The NZCC's personnel have a wide range of skills and experience to ensure the organisation's effective functioning. This includes people with backgrounds in economics, finance, engineering, business and law, and with a mix of both private and public sector experience. As at 31 December 2019, the NZCC employed 45 staff who work on competition enforcement activities against anticompetitive practices, merger reviews, enforcement and advocacy efforts and market studies.

80. **Table 4** shows the numbers of staff who work on Competition enforcement activities.

Table 4. Human resources applied to competition enforcement

Competition investigators	22
Competition legal	8
Economists	9
Market Studies	3
Advocacy	2
General manager	1
Total	45

81. The NZCC had 263 staff across its various functions as at 31 December 2019.

¹⁴ The key findings of the Mobile Market Study can be found at <https://comcom.govt.nz/about-us/our-role/competition-studies/fuel-market-study>.

4.2. NZCC Annual budget

82. Table 5 shows the NZCC's annual budget for both general markets (which covers its competition enforcement activities) and for the organisation as a whole. The NZCC budget numbers are calculated on a financial year to date basis.

Table 5. NZCC Annual budget

Competition budget		
2018/19	2017/18	Change
\$13.274 million NZD	\$11.630 million NZD	+\$1.644 million NZD
\$8.952 million USD ¹⁵	\$7.803 million USD ¹⁶	+\$1.149 million USD
Commerce Commission Overall ¹⁷		
2018/19	2017/18	Change
\$49.96 million NZD	\$45.80 million NZD	+\$4.16 million NZD
\$33.69 million USD ¹⁸	\$30.72 million USD ¹⁹	+\$2.97 million USD

83. MBIE and the NZCC have jointly undertaken a baseline review of the NZCC's funding. The results of this review will be made public following the Government Budget process in May 2020.

5. New reports and studies on competition policy issues

5.1. Competition and productivity: Do commonly used metrics suggest a relationship?

84. Motu Economic and Public Policy conducted research into the relationship between competition and productivity²⁰. The research drew on a redeveloped firm-level productivity dataset and formed the basis for a web-based data visualisation tool and summary report. This work was funded by New Zealand government agencies.

85. This topic was chosen for research because New Zealand is one of a small number of OECD countries to have experienced both low levels of labour productivity and low labour productivity growth rates since 1996. There was also a slowdown in New Zealand's labour productivity growth rate since the Global Financial Crisis, which has had a negative effect on living standards and wellbeing.

¹⁵ As at 31 December 2019 exchange rates.

¹⁶ As at 31 December 2018 exchange rates.

¹⁷ The overall budget for the NZCC covers competition, consumer and regulatory functions in addition to organisational support.

¹⁸ As at 31 December 2019 exchange rates.

¹⁹ As at 31 December 2018 exchange rates.

²⁰ The research conducted by Motu Economic and Public Policy can be found at <https://www.productivity.govt.nz/research/competition-in-new-zealand/>

86. The research found that competition is difficult to measure from a single competition measure, and that different competition measures can show different and sometimes contradictory results about variations in competition across industries and across time. They thus derived composite indicators of competition using principal component analysis, which can succinctly capture the main patterns in the competition data.

87. Applying the composite measures to a 39-industry productivity dataset based off New Zealand services, the research suggested that stronger competition appears to condense markets by driving out low-productivity services. Overall however, they did not find statistically significant evidence of a relationship between productivity and competition in their data. This does not necessarily mean that competition and productivity are unrelated, but that there was a lack in changes to competition in New Zealand markets over the period studied.

88. Subsequently, the researchers turned this material into accessible content for readers without a background in competition economics.