

**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE****Annual Report on Competition Policy Developments in New Zealand****-- 2021 --**

This report is submitted by New Zealand to the Competition Committee FOR INFORMATION.

JT03495858

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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 2021, and where appropriate, significant developments since then.
2. The report relates primarily to activities concerning recent competition law reform initiatives. As well as commenting on broader competition reform, this report also covers developments affecting sector-specific competition and regulatory regimes.
3. The report further details 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.
4. **Section 1** 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, including the NZCC's involvement in the formulation of competition-related policies. During this reporting period, the Commerce Amendment Act 2022 was passed updating New Zealand's misuse of market power test and other areas, the provisions of the Fuel Industry Act began implementation, cartel conduct became a criminal offence, ending a two-year transitional period under the Commerce (Criminalisation of Cartels) Amendment Act, and legislative action on retail payment systems commenced.
6. The next two sections of the report concentrate on the NZCC's key activities (**Section 3**) and the NZCC's resourcing (**Section 4**) during the reporting period.
7. The NZCC key achievements include conducting two market studies, one into the grocery sector which finished in March 2022, and another into Building supplies which is still ongoing, reviewing a number of challenging mergers involving evolving markets, and investigations into anti-competitive cartels.¹ The NZCC also prepared to implement several important law reforms.
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 2021 can be found in its Annual Report which is available at https://comcom.govt.nz/_data/assets/pdf_file/0033/277476/Commerce-Commission-Annual-Report-2021.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
- the Dairy Industry Restructuring Act 2001
- the Fuel Industry Act 2020.

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 provisions covering restrictive trade practices as well as a mergers and acquisitions regime. It also outlines the NZCC's market studies functions.

12. Restrictive trade practices include anticompetitive behaviour, 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 market power that has the purpose, effect, or likely effect of substantially lessening competition in markets. 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 voluntary clearance regime for collaborative activities. 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,

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>.

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 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 from the relevant prohibitions under the Commerce Act.

16. Since 2018, the NZCC is empowered to conduct market studies into any factors that may affect competition for the supply or acquisition of goods or services. A market study may be initiated by the Government or the NZCC if it is in the public interest to do so. The NZCC may, if necessary or desirable, use its mandatory information gathering powers when conducting a market study. At the conclusion of a study, the NZCC must publish its final report, which may include recommendations on how to improve competition in the markets studied. A report is non-binding on the Government, but the Government must respond to it within a reasonable time.

1.2. Sectoral regulation

17. 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 Telecommunications Act is administered by the NZCC under the stewardship of the Telecommunications Commissioner, a statutory position under the Telecommunications Act. The NZCC is primarily responsible for regulating specified fixed-line services, and 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. From 1 January 2022, fibre services provided by Chorus are subject to a maximum allowable revenue cap and quality of service standards. In addition, information disclosure regulation applies to all fibre service businesses. 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.
- Under the Fuel Industry Act 2020, the NZCC has a role in regulating the fuel industry. This is following a market study conducted by the NZCC, which found a number of shortcomings in the competitiveness of fuel markets in New Zealand. The new regime is discussed in more detail in Section 2. Finally, the Dairy Industry Restructuring Act (DIRA) 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.

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

1.3. Institutional design

19. The NZCC is an independent Crown 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 and the Telecommunications Act. The NZCC's independence requires it to be an impartial promoter and enforcer of the law. In New Zealand, the courts of general jurisdiction are responsible for determining contraventions of competition law and imposing sanctions. The courts also determine appeals from NZCC determinations.

20. 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 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 implementation and operational aspects of the regime.

21. 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 (ICN). 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. In September 2020 the NZCC signed the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities, joining other international competition agencies to enhance cooperation on competition enforcement.

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

2.1. New competition law provisions and guidelines

2.1.1. Commerce Amendment Act 2022

22. The Commerce Amendment Bill was introduced into Parliament on 16 March 2021, implementing previous Cabinet decisions regarding a targeted review of the Commerce Act. On 5 April 2022, the Amendment Bill received Royal assent and became New Zealand law. The substantive reforms will come into force in April 2023.

23. The main change was the reform of section 36 to provide that a person with a substantial degree of market power must not act with the purpose, effect or likely effect of substantially lessening competition. This change will enable the NZCC to consider the actual or likely effect of the firm's conduct on competition in markets, regardless of the

firm's purpose. It also removes the court-required test that attributes liability only if a firm without substantial market power could not have been expected to act in the same way. This ignored that such conduct when carried out by a firm with substantial market power may harm competition when it would not by a smaller market participant. This change will align section 36 with the equivalent prohibition in Australia's competition law.

24. The Amendment Act also removed the provisions that shield some conduct involving intellectual property rights from parts of the Commerce Act. The removed provisions provided that:

- The mere enforcement of a statutory intellectual property right does not contravene section 36.
- Intellectual property arrangements that authorise certain acts do not contravene the prohibitions against cartels or other anticompetitive arrangements.
- Nothing in the Commerce Act limits or affects any rule of law relating to breaches of confidence.

25. The New Zealand position is that these exemptions were unclear and did not reflect current views that competition law and intellectual property law are largely complementary. The repeal of these provisions will enable intellectual property rights to be treated the same as other forms of property in so far as they impact on competition in markets.

26. Other agreed changes that the Amendment Act progressed include:

- increasing penalties for businesses engaging in anticompetitive mergers
- treating cartel provisions in covenants the same as cartel provisions in contracts
- clarifying how the Commerce Act applies to interests in land
- increasing the maximum number of NZCC Commissioners from six to eight to reflect the NZCC's growing responsibilities in recent years
- making it easier for the NZCC to share information with other New Zealand agencies, subject to safeguards, if that is desirable to assist them to carry out their functions.

27. Many of the provisions, including the new section 36, have their commencement delayed by one year from anniversary of Royal Assent. This means they will not be applicable under New Zealand law until April 2023.

2.1.2. Commerce (Criminalisation of Cartels) Act 2019

28. In April 2021, cartel conduct became a criminal offence, with companies engaging in cartel conduct now subject to criminal fines and individuals liable for up to seven years imprisonment. As part of the law change, the NZCC worked on several areas to prepare itself and New Zealand for the changes that occurred.

29. One area was the NZCC's Cartel Leniency Programme, which is important to the detection of cartel conduct. If certain conditions are met, a participant in cartel conduct can receive immunity from civil proceedings or criminal prosecution if they are the first to inform the Commission about the cartel and cooperate with its investigation. Before the law change, the NZCC worked with the Crown Law Office, law firms and international agencies to ensure that the revised Leniency and Immunity Programme remained fit for purpose in light of the criminalisation of cartel conduct.

30. In preparation for the change to criminalisation, the NZCC also ran advocacy campaigns to make businesses and consumers more aware of what cartel conduct is. It ran a media campaign to assist businesses and consumers in identifying, avoiding and reporting cartel conduct, and to understand the consequences of cartel conduct. It also undertook training internally and updated internal processes to ensure that its staff were ready to undertake criminal cartel investigations. It worked closely with both domestic agencies and counterpart international agencies, in particular, the US DOJ, the ACCC and the Canadian Competition Bureau.

31. The NZCC also updated a number of other guidelines to take account of the change to criminalisation, including its investigation guidelines.

2.1.3. Fuel Industry Act 2020

32. In response to recommendations from the NZCC in their 2019 study into retail fuel markets, the Government passed the Fuel Industry Act 2020 in August 2020. The final report of the NZCC's findings was published on 5 December 2019 and 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.

33. The Fuel Industry Act is a first step to implementing changes to address these issues. The changes include:

- a requirement for fuel suppliers to publicise the wholesale prices of fuel at storage terminals **to promote wholesale competition**
- rules to ensure contracts between wholesale fuel suppliers and their wholesale fuel industry customers are fair and support competition
- providing a dispute resolution scheme for the new wholesale pricing regime and wholesale contract rules
- improvements to the monitoring of the fuel market by requiring fuel companies to collect and disclose certain information
- requirements to display information on the price of fuel at petrol stations including displaying premium fuel prices on forecourt price boards.

34. The substantive provisions have commenced, with the support of the Fuel Industry Regulations 2021 which set out the detail of the regime.

35. The Government expects that over time the Fuel Industry Act and the associated regulations will increase competition to make fuel markets operate more efficiently for the benefit of consumers.

2.1.4. Regulation of retail payment systems

- The Government is currently taking the final steps of legislative action to begin the regulation of Retail Payment systems in New Zealand.

- Merchant service fees, including interchange fees, are unregulated in New Zealand. Over the years a complex pricing system has evolved, with multiple fees depending on the payment product and merchant. Other than for debit cards (swiped or inserted), weighted average merchant service fees are high relative to international comparisons. This remains the case even after changes by the schemes and participating banks to restructure their merchant service fees and increase transparency to provide better deals.⁴
- In December 2020, the Government released a discussion paper exploring issues and options for regulating merchant service fees. Following this process, Cabinet agreed to policies for the regulation of the retail payment system to reduce merchant service fees.
- The new regulatory regime is intended to reduce costs for merchants and deliver long-term benefits to both businesses and consumers. The regime will enable the NZCC to intervene using a broad suite of powers to regulate different participants in the retail payment system. It will also introduce disclosure and reporting requirements to enable the NZCC to monitor the retail payment system.
- Cabinet agreed the Bill will include an initial pricing standard for the VISA and Mastercard debit and credit networks that will come into force within six months of enactment. This will cap interchange fees (which commonly make up a large component of merchant service fees) in those networks, which is estimated to produce savings for merchants in the order of \$74 million a year. Once the full regulatory regime is in place, other payment networks can be designated in the interests of merchants and consumers.
- The Government introduced the Retail Payment System Bill to the House in October 2021. It was reported back by the Economic Development, Science and Innovation Committee on 8 March 2022. It is currently in its second reading and anticipated that it will progress through the remaining stages by mid-2022

2.2. Proposals for new legislation

2.2.1. *Three waters reform*

36. The Government is committed to significantly improving the safety, quality, resilience, accessibility, and performance of water services in a manner that is efficient and affordable for New Zealanders. As such, it is undertaking a reform of the three waters system (drinking water, wastewater and stormwater).

37. The reform process has brought to light issues in the water sector that are often associated with natural monopolies. This includes quality of service failing to meet consumer demand, long-term under-investment in infrastructure, inefficient pricing practices, a lack of transparency around the costs of delivering services, and an inability of the current system to respond to community expectations.

38. As a result of this, the Government is progressing reforms so that from 1 July 2024, three waters services will be provided by four publicly owned water services entities. While these entities will have the scale to improve some of the issues identified during the reform process, there is also a risk that, in the absence of economic regulation, they will act

⁴ See Table 1 of the MBIE Retail Payment systems Issues paper <https://www.mbie.govt.nz/dmsdocument/12383-issues-paper-regulating-to-reduce-merchant-service-fees-pdf>

inefficiently. In addition, there is a risk that, in the absence of consumer protection mechanisms, these entities will not be responsive to the consumers and communities they serve.

39. As part of the reform process, in October 2021 the Government released a discussion document for public feedback. A range of submissions were received on the design of an economic regulation and consumer protection regime for three waters.

40. The next step will be for the Minister of Commerce and Consumer Affairs to seek Cabinet decisions to allow drafting to begin on a new piece of legislation setting this economic regulation and consumer protection regime for three waters. The aim is to have this legislation in place by mid-late 2023 to allow the regulator to commence work before the new water services entities ‘go live’ on 1 July 2024.

2.2.2. Consumer data right

41. On 6 July 2021 it was publicly announced that the Government agreed to establish a legislative framework for a consumer data right (**CDR**). The CDR will require businesses that hold data (**data holders**) to share prescribed consumer data with approved third parties (**data recipients**) with the consumer’s consent. Consumers may be individuals, companies or other entities, and data will have to be shared using standardised data formats and interfaces. To protect consumers, data recipients will be required to be accredited and there will be a range of other safeguards.

42. The CDR is intended to be rolled out on a sector-by-sector basis, with the Minister of Commerce and Consumer Affairs designating individual markets, industries and sectors to which the CDR applies. The designation itself will be a legislative instrument that will set out details of how the CDR will apply to the sector. The designation will specify the types of data and functionality that is covered. It will be accompanied by rules and standards that govern the transfer of the data.

43. The CDR is aiming to support competition, productivity and innovation in the economy and increase consumer welfare. Giving consumers more control over their data will make it easier for them to shop for services, such as banking, electricity and telecommunications, and give them access to new and innovative products and services. If implemented, the CDR will also allow consumers to have greater trust that their data is shared safely and for their benefit, with their knowledge and consent.

44. Work is currently progressing on outstanding policy issues, including identifying a potential pipeline of sectors for designation, institutional arrangements for administering and enforcing the CDR, cost recovery, and compliance and enforcement. It is expected that an exposure draft of the CDR Bill will be released for public consultation later in 2022, with formal legislation introduced into Parliament before the end of 2022.

2.2.3. Screen Industry Workers Bill

45. The Screen Industry Workers Bill (SIWB) will create a new workplace relations regime for contractors working in New Zealand’s screen industry. A key part of this regime is a framework allowing collective bargaining at both the enterprise and occupation levels.

46. At present, only employees can bargain collectively in New Zealand in relation to their employment terms and conditions. This form of collective bargaining is regulated by the Employment Relations Act 2000 and exempt from the Commerce Act’s prohibition on restrictive trade practices. If contractors (as opposed to employees) sought to bargain collectively, this would require specific authorisation from the NZCC.

47. The SIWB will change this for contractors working in the screen industry. It will allow them to bargain collectively without requiring authorisation from the NZCC. The SIWB proposes to exempt, from sections 27 and 30 of the Commerce Act (which prohibit cartels and arrangements that substantially lessen competition in a market), collective bargaining carried out under the SIWB, and giving effect to collective contracts negotiated under the SIWB.⁵

48. The SIWB gives effect to the unanimous recommendations from the Film Industry Working Group (FIWG), which were largely accepted by the Government. The FIWG was set up in 2018 to recommend a way forward for the industry in light of 2010 changes to the Employment Relations Act (referred to colloquially as the “Hobbit Law”).⁶ A key recommendation from the FIWG was to allow contractors in the screen industry to bargain collectively, at both the enterprise and occupation levels, which would ordinarily be prohibited by the Commerce Act.⁷

49. The SIWB was introduced to Parliament in February 2020 and is currently awaiting second reading. It is anticipated that it will progress through all remaining legislative stages by the end of 2022. When passed, the law will be administered by the MBIE, and form part of the employment relations and employment standards regulatory landscape in New Zealand. Existing employment institutions will also perform certain roles in the SIWB’s collective bargaining framework, such as giving parties a mandate to bargain on behalf of workers/production companies and mediating and arbitrating disputes.

2.3. Other policy reviews

2.3.1. Retail grocery sector

50. Following increasing public concerns about the high level of concentration in the market for groceries, and a weakening of competition, the Government initiated a market study into the retail grocery sector in November 2020. The Government directed the NZCC to investigate any factors that may affect competition for the supply or acquisition of groceries by retailers in New Zealand.

51. On 8 March 2022 the NZCC released its final report into competition in New Zealand’s retail grocery sector. The key finding of the final report was that competition is not working well for consumers in the retail grocery sector. If competition was more effective, the major grocery retailers would face stronger pressures to deliver the lower prices, quality, range and service to satisfy a diverse range of consumer preferences.

52. Based on these findings, the NZCC made 14 recommendations, with a number of sub-recommendations, to improve the conditions for entry and expansion, improve

⁵ See clause 7 of the SIWB: <https://legislation.govt.nz/bill/government/2020/0219/latest/LMS377215.html>.

⁶ The 2010 amendment changed how film production workers’ employment status is determined. Instead of being subject to a test about the real nature of the working relationship, film production workers are deemed to be contractors unless they are party to a written employment agreement that explicitly says they are employees. This means they cannot access employment rights (e.g., the minimum wage, and the right to bargain collectively) by challenging their employment status, the way other contractors in New Zealand generally can.

⁷ See the FIWG’s recommendations, specifically Part D (starting at page 10): <https://www.mbie.govt.nz/assets/4c8ac9afb6/recommendations-of-film-industry-working-group-to-government.pdf>.

competition for the acquisition of groceries, improve consumers' ability to make informed decisions, and to introduce new monitoring and enforcement arrangements.

53. The Government has accepted the NZCC's findings and is looking into the recommendations the NZCC made. As part of considering the final recommendations, the Government announced it is commencing work on:

- Making it easier for grocery retailers to enter the market by improving availability of sites for new supermarkets. This may involve both removing barriers under the Resource Management Act 1991 and/or prohibiting retailers from using restrictive covenants over land titles to limit competition.
- Developing a mandatory code of conduct to govern relationships between the major grocery retailers and their suppliers and to address imbalances in bargaining power.
- Looking into how to establish a new regulator and dispute resolution scheme that would provide oversight of the retail grocery market, including the monitoring and enforcement of the code of conduct.
- Designing a new regime to ensure retailers have better access to wholesale supply.

54. Further action was also pursued, including engaging with major grocery retailers asking they adopt certain recommendations targeted to them. The major grocery retailers are currently progressing these recommendations, which include.

- ensuring that pricing and promotional practises are simple and easy to understand
- ensuring information on loyalty programmes and data collection is clear and transparent
- cooperation with price comparison services

2.3.2. Building supplies market study

55. On 22 November 2021, the Minister of Commerce and Consumer Affairs asked NZCC to carry out a market study into whether competition for residential building supplies in New Zealand is working well and, if not, what can be done to improve it.

56. Building supplies was chosen for the third market study because of the importance of affordable housing to the wellbeing of New Zealanders, and indications of potential competition concerns in the sector.

57. The Government considered a market study into residential building supplies is in the public interest, and therefore warranted because:

- there are indications of competition problems in the residential building supplies market
- the market plays a considerably important role in the economy
- it is expected that there are viable solutions to competition issues in the market that will ultimately benefit consumers.

58. The NZCC will undertake a full and thorough analysis into competition issues in this sector and will publish its final report by 6 December 2022.

2.3.3. Establishment of a consumer advocacy council

59. In 2019, the Electricity Price Review (EPR) published a report that recommended improvements to the sector. The review considered the fairness and affordability of

electricity pricing as well as their efficiency and competitiveness. It took a consumer-focused lens to its investigation and of how the sector could be future-proofed. One finding was that individual consumers and small businesses struggle to make their voice heard and influence the electricity sector. The EPR found that obstacles to influence include the sector's complexity, consumers' lack of resources, and cultural differences and language barriers.

60. Its response, the Government accepted a majority of the EPR's recommendations and is progressing a number of work streams that deliver on the recommendations in the EPR.⁸ One of these includes establishing the Consumer Advocacy Council (Council) to be the trusted, credible, authoritative and independent advocate for residential and small business electricity consumers. Its role will be to advocate on behalf of these consumers by providing evidence-based advocacy on policy and regulatory consultations, and in decision-making processes.

61. The Government allocated approximately \$17m over 2020/21 to 2023/24 to reduce energy hardship and strengthen the consumer voice for electricity consumers. Of this, \$1.6m was allocated to the Consumer Advocacy Council ('Council') per year from 2020/21 to establish and operate the independent Council and supporting secretariat.

62. In June 2021, Cabinet agreed to appoint Deborah Hart as the inaugural Chairperson of the Council for a three-year term.⁹ The Secretariat to support the Council has also been established, with the recruitment of Council members underway.

3. Enforcement of competition laws and policies

3.1. Anticompetitive practices

3.1.1. Summary of activities

63. **Table 1** shows the number of investigations completed by the NZCC in relation to anticompetitive practices in the three years to 31 December 2021. This includes investigations closed with no or low-level enforcement actions.

Table 1. NZCC completed investigations of anticompetitive practices

	2021	2020	2019
Number of coordinated behaviour investigations	14	4	4
Number of unilateral conduct investigations	2	1	1

3.1.2. Significant cases

64. In 2021, the NZCC concluded three cartel cases before the courts across a range of different types of conduct which fall within its cartel prohibition provisions, and it initiated proceedings in another.

65. The High Court imposed a penalty of \$62,500 against Specialised Container Services (Christchurch) Limited and \$24,000 against its director for attempting to reach an

⁸ The EPR dashboard can be found here: <https://www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-consultations-and-reviews/electricity-price/>

⁹ <https://www.beehive.govt.nz/release/deborah-hart-appointed-inaugural-chair-consumer-advocacy-council>

agreement with a competitor to charge the same or similar “vehicle booking system” fee to customers of its container depot.

66. Separately, in proceedings currently before the courts, the NZCC alleges that two large freight companies agreed not to compete for one another’s customers, with those proceedings also involving four individuals associated with the companies. Being confident about shipping goods to and from New Zealand is important for businesses and consumers, and for this reason it prioritised both the cases mentioned above.

67. The High Court made a declaration that agreements reached by Moola.co.nz Limited and other consumer credit or loan providers to not bid on each other’s brand names on Google Ads and to also ‘negatively match’ certain keywords, so that their advertisements would not show when those keywords were used, amounted to cartel conduct in breach of the Commerce Act. The NZCC considers it is likely this conduct inhibited consumers’ ability to compare prices and quality.

68. The High Court ordered Hutt and City Taxis Limited (Hutt & City) to pay a penalty of \$150,000 for agreeing with two competing taxi companies to implement a minimum charge for pick-up taxi trips from the on-demand taxi rank at Wellington Airport.

69. In addition to the above, the NZCC also granted an authorisation to HP New Zealand Limited (HP) to engage in resale price maintenance in relation to its proposed HP online stores and HP online marketplace stores. The authorised conduct involves HP specifying the prices for which a third-party distributor will sell HP products to consumers on the HP Stores.

3.2. Mergers and acquisitions

3.2.1. Statistics

70. Merger clearance and authorisation work is a key part of the NZCC’s competition law activity.

71. 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.

72. In 2021, the NZCC experienced an increase in merger review activity, and the number of clearance applications processed in 2021 was higher than in 2020. The NZCC continues to monitor and review merger activity to protect against the risk of a substantial lessening of competition in affected markets. The NZCC decided 13 merger clearance applications during 2021, and also concluded one section 47 investigation into merger activity which was not notified for clearance.

73. The NZCC also continued its merger surveillance work and investigated acquisitions that were not notified to it, including in relation to building consent software and animal rendering. This work is important to maintaining the credibility of the voluntary clearance regime the NZCC administers.

Table 2. Merger clearance and authorisation applications

	2021	2020	2019
Number of clearance applications processed/ completed	13	10	10
Number of authorisation applications processed/completed	0	0	2
Number of market structure ¹⁰ cases investigated/completed	1	1	4

74. **Table 3** sets out the merger and acquisitions applications decided by the NZCC in the year ended 31 December 2021 and their outcomes.

Table 3. Outcome of merger reviews

NEP Broadcast Services NZ Limited, Sky Network Television Limited	Cleared
Dunlop Drymix Limited, Drymix NZ Limited, Drymix Cement Limited, Drymix Bitumen Limited, Drymix Imports Limited, XNP Limited and Romex N.Z. Limited	Cleared
IKO Industries Ltd, Ross Roof Group Limited	Cleared
Assa Abloy New Zealand Limited, NZ Fire Doors Limited	Cleared
Aon plc, Willis Towers Watson Public Limited Company	Application withdrawn
TradeMe Limited, PropertyNZ Limited	Cleared
Are Media Limited, Ovato Retail Distribution NZ Limited	Cleared
Can Plan Nelson Limited, Nelmac Limited	Application withdrawn
Mercury NZ Limited, Trustpower Limited	Cleared
Allied Foods (N.Z.) Limited, Dad's Pies Limited	Cleared
EROAD Limited, Coretex Limited	Cleared
Pacific BidCo 2021 NZ Limited, Healthe Care Australia Pty Limited	Cleared with divestment
Taranaki By-Products Limited, Lowe Corporation Limited	Application withdrawn

3.2.2. Significant cases

75. The NZCC gave clearance to three acquisitions in 2021 on the basis that the counterfactual for the target was exit. These three cases were Dunlop Drymix Limited, NEP Broadcast Services NZ Limited and Are Media Limited.

- The Dunlop Drymix Limited case related to the proposed acquisition of a business in receivership which manufactures and supplies bagged concrete and mortar products. Central to the NZCC's decision was its assessment of what would happen to the target if it was not sold to the applicant. In particular, the NZCC considered and tested whether there was a realistic prospect that the target would be sold to an alternative purchaser who would supply bagged concrete and mortar products in competition with the applicant. The NZCC was satisfied that the target would not be sold as a going concern and that the receiver would close the target down and sell its assets individually and would not be used to complete against the applicant.
- NEP Broadcast Services NZ Limited (NEP), related to the proposed acquisition of an outside broadcasting services (OBS) business by NEP from Sky. Central to the NZCC's decision was its assessment of what Sky would otherwise do if the proposed acquisition did not proceed. In particular, the NZCC considered and

¹⁰ Market structure cases are non-notified mergers. Three cases were closed in 2020 and two were on-going at the end of 2020.

tested whether there was a realistic prospect that the OBS business would otherwise continue providing outside broadcasting services in competition with NEP. The NZCC was satisfied that there is no realistic prospect that OBS business would continue to provide outside broadcasting services if the proposed transaction did not proceed.

- Are Media, related to the proposed acquisition of a retail distributor of magazines. The NZCC was satisfied that the proposed acquisition is unlikely to substantially lessen competition when compared with the situation if the proposed acquisition does not proceed.

76. During 2021, three clearance applications before the NZCC were withdrawn after the NZCC raised competition concerns. These three cases were Aon plc and Willis Towers Watson Public Limited Company, Can Plan Nelson Limited and Nelmac Limited, and Taranaki By-Products Limited and Lowe Corporation Limited.

77. In August 2021 the NZCC granted clearance to Trade Me Limited (Trade Me) to acquire PropertyNZ Limited (PropertyNZ), Trade Me Property is the largest online residential listings platform in New Zealand, while PropertyNZ Limited owns and operates the homes.co.nz website (Homes). While PropertyNZ also displays listings on its website, its primary focus is providing property data/information to consumers, such as estimated house values. In its Statement of Unresolved Issues, the NZCC raised potential concerns that the acquisition might prevent Homes developing into a significant competitor to Trade Me for property listings. The NZCC also had potential concerns that the acquisition could make it harder for other property platforms to set up or grow by combining the respective strengths of Trade Me and Homes (i.e., listings and property data/information) into a single entity. However, the NZCC thoroughly tested whether Homes would develop into a significant competitor and was satisfied that the proposed acquisition is unlikely to substantially lessen competition in any New Zealand market. Evidence the NZCC received subsequent to its Statement of Unresolved Issues satisfied it that Homes is unlikely to become a significant competitor for real estate listings. The NZCC was also satisfied that any benefits that Trade Me may obtain from combining its listings offering with Homes' information/data offering would not substantially affect the ability of rival platforms to compete in the market.

78. In September 2021 the NZCC granted clearance to a merger of Mercury NZ Limited and Trustpower Limited. Both Mercury NZ Limited and Trustpower Limited generate and sell electricity. Both parties also sell gas to residential customers. The NZCC analysed the competitive impact of the proposed acquisition on the retail supply of electricity, and separately the retail supply of reticulated natural gas, to residential and small-to-medium enterprise customers. Central to the NZCC's decision was its assessment of the extent to which Mercury, Trustpower and other electricity and gas retailers compete with one another in different regions of New Zealand. Its investigation indicated that there are no regions in New Zealand where Mercury and Trustpower are each other's closest competitors. Further, the merged entity would face competition from other electricity and gas retailers, including both large gentailers and smaller retailers. The NZCC's investigation therefore found that the proposed acquisition would not have a significant detrimental effect on competition when compared with what would likely happen if the merger did not proceed.

79. The NZCC also achieved a successful result in its investigation into a non-notified merger. The NZCC reached the view that Objective Corporation Limited's (Objective) acquisition of Master Business Systems Limited likely substantially lessened competition in the New Zealand market for the supply of software to building consent authorities for the digitisation of building consent processes. The NZCC announced in January 2022 that

it had filed proceedings in the High Court against Objective, but that it had also agreed a settlement with Objective to resolve the proceedings.

4. Resources of the NZCC

4.1. Human resources

80. 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 7 December 2021, the NZCC employed 59 staff who work on competition enforcement activities against anticompetitive practices, merger reviews, enforcement and advocacy efforts and market studies.

81. **Table 4** shows the numbers of staff who work on competition enforcement activities as at 7 December 2021.

Table 4. Human resources applied to competition enforcement

Competition investigators	27
Competition legal	8
Economists	12
Market Studies	8
Advocacy	3
General manager	1
Total	59

82. The NZCC had 311 FTE across its various functions as at 31 December 2021.

4.2. NZCC Annual budget

83. 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		
2020/21	2019/20	Change
\$14.592 million NZD	\$10.333 million NZD	+\$4.259 million NZD
\$10.316 million USD	\$7.426 million USD	+\$2.890 million USD
Organisation budget		
2020/21	2019/20	Change
\$66.692 million NZD	\$59.505 million NZD	+\$7.187 million NZD
\$47.148 million USD ¹¹	\$42.766 million USD ¹²	+\$4.382 million USD

5. New reports and studies on competition policy issues

5.1. Competition report: Estimating Demand for Competition Analysis

84. The New Zealand Institute for Economic Research (NZIER) conducted research into estimating consumer demand to aid competition analysis.¹³ The report was commissioned by the Productivity Hub (a partnership of agencies consisting of NZCC, MBIE, the Productivity Commission, Statistics NZ, and the Treasury) as part of its ongoing effort to better understand New Zealand's productivity performance.

85. The research was conducted by NZIER, with the assistance of Cognitus Economic Insight (Torshizian and Meade, 2020). It seeks to estimate sensitivity of consumer demand to changes in price and household expenditure in four separate markets: accommodation, electricity, motor fuels, and a range of 'pleasure purchases'. NZIER used Statistics NZ's Integrated Data Infrastructure (a research database that holds microdata about people and households) to estimate own and cross-product price elasticities for the major consumer groups that were studied, broken down by geographical area.

86. Although the findings are preliminary in nature, NZIER concludes that it is feasible to estimate demand in New Zealand using the Almost Ideal Demand Systems (AIDS) modelling approach. The report also makes recommendations about data collection and the applicability of the AIDS model for future competition and wider policy analyses. In particular, it notes that estimates of demand elasticities can be used to inform the following issues in competition analyses:

- whether a merger is likely to cause consumer-harming price increases
- to define the relevant market for competition analysis
- excess profitability and hence otherwise unobservable marginal production costs.

¹¹ As at 31 December 2021 exchange rates.

¹² As at 31 December 2020 exchange rates.

¹³ The NZIER report can be found at <https://www.mbie.govt.nz/dmsdocument/11109-estimating-demand-for-competition-analysis>.