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COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in New Zealand

-- 2022 --

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

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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 2022, 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:
 1. restrictive trade practices (that is, coordinated behaviour involving anticompetitive agreements and conduct involving the unilateral misuse of market power) and
 2. 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, some highlights were:
 1. passage of the Commerce Amendment Act 2022 updating New Zealand’s unilateral misuse of market power test and intellectual property exemption
 2. a new Retail Payment System Act 2022 conferring the NZCC with new powers to promote competition and efficiency in the retail payment system
 3. the Government adopting the recommendation of the NZCC’s market study into retail groceries through the passage of an amendment to the Commerce Act that targets anticompetitive land covenants in the retail grocery industry, and proposed new legislation designed to promote competition in the grocery industry for the long-term benefit of consumers.
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’s key achievements include conducting two market studies (one into the grocery sector which finished in March 2022, and another into residential building supplies which was completed in December 2022), 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 new research reports and studies on competition issues for 2022.

¹ Further reading on the NZCC’s key achievements for 2022 can be found in its Annual Report which is available at https://comcom.govt.nz/data/assets/pdf_file/0018/306036/Commerce-Commission-Annual-Report-2022.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:

1. the Commerce Act 1986
2. the Fair Trading Act 1986
3. the Credit Contracts and Consumer Finance Act 2003
4. the Telecommunications Act 2001
5. the Dairy Industry Restructuring Act 2001
6. the Fuel Industry Act 2020
7. most recently, the Retail Payment System Act 2022.

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. The Commerce Act prohibits the following classes of restrictive trade practices and anticompetitive mergers:

1. Contracts, arrangements, or understandings that have the purpose, or have or are likely to have the effect, of substantially lessening competition in a market.
2. Agreements between likely competitors that contain a cartel provision (relating to price fixing, restricting outputs, and allocating customers, suppliers or territories). Cartel provisions are *per se* prohibited.
3. Unilateral conduct where a person or business with substantial market power engages in conduct that has the purpose, effect, or likely effect of substantially lessening competition in a market.
4. Resale price maintenance where a supplier of goods enforces, or tries to enforce, a minimum price at which the reseller must on-sell those goods.
5. Acquisitions of assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

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>.

13. The NZCC is responsible for enforcing the prohibitions in the Commerce Act. Private parties may also take actions for damages and seek injunctions.

14. In addition to its enforcement functions, the NZCC has some quasi-judicial functions under the Commerce Act where it may make determinations in relation to particular transactions on application. The effect of these determinations once granted is to offer businesses protection for the specified practice or acquisition from legal action from the relevant prohibitions under the Commerce Act.

15. There are three classes of determinations:

1. Clearance for mergers or acquisitions – New Zealand has a voluntary merger notification system, under which the NZCC must grant clearance on application for a business acquisition or merger if it is satisfied that the transaction will not substantially lessen competition in any New Zealand market. Clearance may be subject to divestment undertakings, but not behavioural undertakings.
2. Clearance for collaborative activities (similar to joint ventures) containing a cartel provision – 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 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.
3. Authorisation of a business acquisition or restrictive trade practice – The NZCC can also authorise a business acquisition or a restrictive trade practice that may contravene the prohibitions in the Commerce Act, if the NZCC is satisfied that the acquisition or restrictive trade practice would be likely to result in such a benefit to the public that it should be permitted.

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 significantly impeded:

1. Under Part 4 of the Commerce Act, the NZCC is responsible for regulating the price and quality of specified services with natural monopoly characteristics, i.e., markets where there is little or no competition and little or no likelihood of a substantial increase in competition. The NZCC 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. Regulatory tools at NZCC disposal, in this context, include setting

revenue limits and quality standards and providing transparency on performance for regulated suppliers (price quality and information disclosure regulation). Furthermore, NZCC works to educate businesses on their legal obligations and has the ability to undertake compliance and enforcement action where breaches are made.

2. 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.
 3. Under the Fuel Industry Act 2020, the NZCC has a role in regulating the supply of engine fuel used in land transport in New Zealand. This is following a [market study](#) conducted by the NZCC, which found a number of shortcomings in the competitiveness of markets for petrol and diesel. The Fuel Industry Act promotes competition by requiring wholesale fuel suppliers to offer a spot price at which they will sell fuel to wholesale customers at storage terminals, and setting requirements of wholesale supply contracts to allow greater contractual freedom for resellers to compare offers and switch suppliers. The Fuel Industry Act also requires retail fuel outlets to display the standard retail price of all fuels on their price boards, and confers powers on the NZCC to monitor and prepare reports on the performance of fuel markets.
 4. 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 efficient and contestable. Requirements under the DIRA include an obligation on Fonterra to supply raw milk to independent dairy processors to facilitate downstream competition in dairy products.
 5. In 2022, the Retail Payment System Act was passed to promote competition and efficiency in the retail payment system for the long-term benefit of merchants and consumers in New Zealand. This is discussed in more detail in section 2 of the report below.
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, including 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 Act 2022 (**the Amendment Act**) received Royal assent on 5 April 2022 to amend the Commerce Act 1986. The substantive reforms came into force on 5 April 2023.

23. Primarily, change was the reform of New Zealand's unilateral conduct prohibition (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 in a market. Equivalent amendments were also made to the prohibition relating to Trans-Tasman conduct relating to Australian-based firms with substantial market power in New Zealand (section 36A).

24. This change to the prohibitions enables 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 previous court-required test that would only attribute liability if a firm without substantial market power could not have been expected to act in the same way. This change also aligns section 36 with the equivalent prohibition in Australia's competition law.

25. The Amendment Act also removed the provisions that shielded some conduct involving statutory intellectual property rights from parts of the Commerce Act. 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. This is consistent with the OECD Draft Recommendation on Intellectual Property Rights and Competition, which recommends “Apply[ing] the same competition principles to intellectual property rights as to other forms of property, while accounting for the unique characteristics of intellectual property rights”.⁴

26. Other agreed changes in the Amendment Act include:

1. increasing penalties for businesses engaging in anticompetitive mergers
2. treating cartel provisions in covenants the same as cartel provisions in contracts
3. clarifying how the Commerce Act applies to interests in land
4. increasing the maximum number of NZCC Commissioners from six to eight to reflect the NZCC’s growing responsibilities in recent years
5. 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.

2.1.2. New NZCC guidelines following passage of Amendment Act

27. The NZCC has released guidelines on its approach to the new Amendment Act provisions as follows:

1. Misuse of Market Power Guidelines⁵
2. The Application of Competition Law to Intellectual Property Rights⁶

2.1.3. Commerce (Grocery Sector Covenants) Amendment Act 2022

28. The NZCC completed its market study into the retail grocery sector in March 2022. One finding was that land covenants were being used by existing players as a barrier to entry and expansion by potential retail grocery competitors.

29. The NZCC found in its study that emerging competitors were unable to compete effectively with major grocery retailers on price, product range and store location. Competition in the market was found to be muted and competitors wanting to enter or expand faced significant challenges including lack of suitable sites for store development. The NZCC found that upwards of 90 restrictive covenants were being used across the country with the majority in Wellington, Auckland and Christchurch.

30. In response, the government progressed an amendment to the Commerce Act to strengthen the prohibitions relating to anticompetitive land covenants in the retail grocery sector.

31. The Commerce (Grocery Sector Covenants) Amendment Act 2022 inserts new sections (28A to 28D) into the Commerce Act. This section now prohibits the use of certain

⁴ OECD *Draft Recommendation on Intellectual Property Rights and Competition*, 21 March 2023.

⁵ <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/misuse-of-market-power>

⁶ <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/the-application-of-competition-law-to-intellectual-property-rights>

types of anti-competitive covenants relating to land in which a designated grocery retailer has a direct or indirect interest and deems such covenants unenforceable.

32. These restrictive arrangements include restrictive or positive land covenants, exclusivity covenants or leases and other associated arrangements that have the purpose, effect or likely effect of impeding another person from operating a retail grocery store or other store in competition with the designated grocery retailer.

2.1.4. New NZCC fact sheet on land covenants

33. The NZCC released a fact sheet on its approach to applying the Commerce Act to land covenants.⁷

34. Following market studies into retail fuel, retail groceries and residential building supplies sectors, the NZCC identified anti-competitive land covenants as an economy-wide issue, and has recommended to the Ministry of Business Innovation and Employment that it undertake an economy-wide review of the use of land covenants, exclusive leases and contractual provisions with similar effect.

2.1.5. Retail Payment System Act 2022

35. The Retail Payment System Act 2022 (**the RPSA**), which received Royal assent on 13 May 2022, establishes a regulatory regime to promote competition and efficiency in the retail payment system for the long-term benefit of merchants and consumers in New Zealand. The RPSA takes a flexible approach to regulating existing and emerging payment networks (using very broad definitions) by affording the NZCC a range of enduring regulatory powers and functions over the system as a whole, including:

1. empowering the NZCC to monitor the whole of the retail payment system
2. a process for designating retail payment networks in which competition or efficiency issues are identified
3. empowering the NZCC to regulate participants in those designated networks by issuing standards for information disclosure, pricing, or access
4. empowering the NZCC to give directions relating to the rules of designated networks, and
5. the ability for the NZCC to issue merchant surcharging standards to prevent surcharging above the costs to the merchant of accepting particular payment types.

36. In order to more quickly to reduce the fees paid by merchants to process debit and credit payments in the Visa and Mastercard networks (which were high by international standards), the RPSA:

1. immediately designates the Visa and Mastercard debit and credit networks, and
2. contains an initial pricing standard (**IPS**), which came into force on 13 November 2022, and sets limits on the interchange fees that issuers (i.e. the consumer's bank or finance provider) can charge the merchants acquirer to process debit or credit payments in the Visa and Mastercard networks.

37. On 25 October 2022, the NZCC issued a public notice to advise stakeholders that it had commenced a 12 to 18 month retail payment system initial monitoring programme,

⁷ <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/anti-competitive-land-covenants>

with the aim being to increase its understanding of the retail payment system and inform its efforts to deliver long-term benefits to merchants and consumers.

38. More recently, the NZCC's monitoring focus has shifted towards establishing the initial direct impacts of the interchange fee regulation on merchants.

2.1.6. Competition Assessment Guidelines

39. The NZCC along with the Ministry of Business Innovation and Employment, developed a new set of competition guidelines to assist public officials, businesses and other interested parties to consider competition at an early stage in decisions and actions that influence markets. This includes helping public officials to factor competition into their analysis of policies and initiatives that change markets. They can help to identify competition issues early on and support approaches that maintain or promote competition in the achievement of policy goals, where it is feasible. ⁸

2.1.7. Other legislative amendments

40. New sector-specific legislation or amendments over 2022 that interface with competition law are:

1. The Screen Industry Workers Act 2022 received Royal assent on 30 September 2022. It includes an exemption from section 27 (anticompetitive agreements) and 30 (cartel provisions) of the Commerce Act for collective bargaining by classes of screen industry workers
2. The Civil Aviation Act 2023 received Royal assent on 5 April 2023 to reform and modernise the law relating to the civil aviation system. Of relevance, it retains the sector-specific authorisation regime for international civil aviation alliances. Provisions relating to capacity and tariffs in international civil aviation arrangements may be authorised by the Minister of Transport, making those provisions exempt from the Commerce Act. The reformed provisions strengthen the authorisation regime, including refining the criteria for granting authorisation and explicitly allowing the Minister of Transport to set conditions on authorisations.
3. The Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Act 2022 received Royal assent on 22 November 2022. Among other things, the amendment gives the NZCC a new power to give directions to Fonterra in relation to the setting of the base milk price, which informs the price Fonterra (and, in turn, other processors) pays farmers for their milk.

2.2. Proposals for new legislation

2.2.1. Grocery Industry Competition Bill

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

⁸ <https://comcom.govt.nz/about-us/our-policies-and-guidelines/competition-assessment-guidelines>

42. Based on these findings, the NZCC made 14 recommendations, with a number of sub-recommendations, to improve the conditions for entry and expansion, improve competition for the acquisition of groceries, improve consumers' ability to make informed decisions, and to introduce new monitoring and enforcement arrangements.

43. The Government accepted the NZCC's findings and 12 of the 14 recommendations the NZCC made. The Commerce (Grocery Sector Covenants) Amendment Act 2022 was enacted (discussed above). A Grocery Industry Competition Bill is currently before Parliament to give effect to the majority of the Government response. Key features of the Grocery Industry Competition Bill include:

1. establishment of a Grocery Commissioner and grocery sector regulator function in the NZCC to provide a strong oversight and ongoing focus on this sector.
 2. regulation of wholesale grocery supply, including a regulatory backstop. The major grocery retailers will be incentivised to develop competitive wholesale offerings and required to consider requests for wholesale supply in good faith. At the same time, the regulatory backstop will also provide a toolkit of additional regulatory powers for the Grocery Commissioner and the Government to use if these wholesale offerings are not consistent with what would be expected in a competitive wholesale market.
 3. implementing supplier-focused protections such a Grocery Supply Code, broadening protections against the use of unfair contract terms in grocery supply contracts, and enabling collective bargaining between suppliers.
 4. providing for a dispute resolution scheme for suppliers and wholesale customers of the major grocery retailers.
44. The Grocery Industry Competition Bill is expected to pass through its remaining stages in Parliament by the middle of 2023.

2.2.2. Other proposed legislation

45. New proposed sector-specific legislation or amendments in 2022 that interface with competition law are:

1. Fuel Industry Amendment Bill.
 - a. This Bill is the result of a NZCC market study which found that competition in fuel markets is not working as well as it could and an active wholesale fuel market does not exist in New Zealand. At the time of the market study, the Commission recommended the development of a regulatory backstop to incentivise the wholesale suppliers to offer competitive TGPs.
 - b. The Bill before Parliament proposes to introduce a regulatory backstop to the Fuel Industry Act 2020 to promote wholesale competition in engine fuel markets which flows through to a more competitive retail market for the long-term benefit of consumers.
2. Water Services Economic Efficiency and Consumer Protection Bill.
 - a. The Water Services Economic Efficiency and Consumer Protection Bill proposes the NZCC as the independent economic and consumer protection regulator of water infrastructure services. This Bill is part of a wider set of new legislation (at various stages in the legislative process) which reform how water infrastructure is managed, and water services delivered in New Zealand. The purpose of the water services reform programme is to improve the safety,

quality, resilience, accessibility, and performance of water services, in a manner that is efficient and affordable for New Zealanders.

3. Consumer data right

- a. 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
- b. 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
- c. 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.

2.3. Other policy reviews

2.3.1. Residential building supplies market study

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

47. 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.

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

1. there were indications of competition problems in the residential building supplies market
2. the market plays a considerably important role in the economy
3. it was expected that there would be viable solutions to any competition issues found to be affecting the market that would ultimately benefit consumers.

49. The NZCC released the final report on 6 December 2022. The NZCC found that competition for the supply and acquisition of key building supplies is not working as well as it could if it was easier for building products to be introduced and for competing suppliers to expand their businesses. Recommendations were made that aim to provide tangible improvements to competition for key building supplies, without undermining the essential policy objectives of the building regulatory system.

50. The NZCC recommended that changes be made to enhance the regulatory system. These included recommendations to:

1. Introduce competition as an objective to be promoted in the building regulatory system.

2. Better serve Māori through the building regulatory system.
 3. Create more clear compliance pathways for a broader range of key building supplies.
 4. Explore ways to remove impediments to product substitutions and variations.
51. The NZCC also made recommendations to support sound decision making by critical participants in the system: builders, designers, building product specifiers and building consent authorities.
52. The NZCC also made findings and directed recommendations at addressing strategic business conduct related to quantity-forcing rebates and the use of land covenants, exclusive leases (and contractual provisions with similar effects).
53. The Government is expected to release its response to the NZCC final report before the middle of 2023.
54. As at the time of writing, the topic for the next market study has yet to be announced.

3. Enforcement of competition laws and policies

3.1. Anticompetitive practices

3.1.1. Summary of activities

55. **Table 1** shows the number of investigations completed by the NZCC in relation to anticompetitive practices in the three years to 31 December 2022. This includes investigations closed with no or low-level enforcement actions.

Table 1. NZCC completed investigations of anticompetitive practices

	2022	2021	2020
Number of coordinated behaviour investigations	19	14	4
Number of unilateral conduct investigations	5	2	1

3.1.2. Significant cases

56. In 2022, the NZCC concluded one cartel case before the courts. In that case the High Court imposed penalties totalling over \$9.7m on two international freight forwarding companies, Mondiale Freight Services Limited and Oceanbridge Shipping Limited, and on four individuals associated with the companies, for engaging in longstanding cartel agreements with their competitors.

57. The NZCC concluded an investigation into allegations that manufacturers of consumer televisions were engaging in resale price maintenance (RPM). As a result of the investigation, it issued Panasonic with a warning, and issued an open letter to businesses operating in consumer electronics wholesale and retail markets, reiterating that RPM is illegal because it prevents retailers from setting their prices independently, so that they can effectively compete to attract more customers.

58. It filed proceedings in the High Court against a hardware supplier for lodging a land covenant that allegedly has the purpose, effect or likely effect of substantially lessening

competition, by preventing a competing hardware supplier from being built on a site. A settlement has been agreed to resolve the proceedings and a penalty hearing will be heard in the High Court.

59. The NZCC granted authorisation to allow the News Publishers' Association of New Zealand Incorporated to collectively negotiate with Meta and Google regarding the terms and conditions on which participating news media companies' content is displayed on digital platforms operated by Meta and Google, for a 10 year period. This followed the granting of a provisional authorisation earlier in the year.

60. It also granted another authorisation to allow the New Zealand Tegel Growers Association Incorporated to collectively negotiate on behalf of its members the terms of its members' supply of chicken growing services to Tegel Foods Limited for a ten year period.

61. In May 2022, the NZCC decided its first collaborative activity clearance application. It declined to give clearance to gym network Anytime NZ Limited to enter into proposed agreements with its franchisees that would have contained or may have contained cartel provisions, by allowing it impose lower and upper limits on its franchisees' membership pricing.

3.2. Mergers and acquisitions

3.2.1. Statistics

62. Merger clearance 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.

63. In 2022, the NZCC supported substantially increased merger activity in New Zealand by assessing 14 new merger clearance applications and deciding 16 merger clearance applications – around twice as many as the annual average for the previous five years.

64. The NZCC continued to monitor and review merger activity to protect against the risk of a substantial lessening of competition in affected markets, and investigate acquisitions that were not notified to it. This included concluding three cases of non-notified mergers, the outcomes of which ranged from a court-imposed \$1.54 million (NZD) penalty to reminding merger parties about their obligations under the law. This work is important to maintaining the credibility of the voluntary merger clearance regime the NZCC administers.

Table 2. Merger clearance and authorisation applications

	2022	2021	2020
Number of clearance applications processed/ completed	16	13	10
Number of authorisation applications processed/completed	2	0	0
Number of market structure ⁹ cases investigated/completed	2	1	1

65. **Table 3** sets out the merger and acquisitions applications decided by the NZCC in the year ended 31 December 2022 and their outcomes.

Table 3. Outcome of merger reviews

Application	Resolution
Voyage Digital (NZ) Limited, Orcon Holdings Limited and Two Degrees Group Limited	Merger cleared
Ampol Limited and Z Energy Limited	Merger cleared
Camplify Co (NZ) Limited, Tourism Holdings Limited and TH2connect LP	Merger cleared
Cargotec Corporation, Konecranes Plc	Application withdrawn
EBOS Medical Devices Australia Pty Limited, LifeHealthcare	Merger cleared
Osmosis Buyer Ltd, Firewall Holdings S.À R.L	Merger cleared subject to divestment
Life Health Foods NZ Limited and Chalmers Organics Limited	Merger cleared
Latitude Group Holdings, Humm Group Limited	Application withdrawn
Mobil Oil New Zealand Limited, Z Energy Limited (Application 1)	Application withdrawn
Mobil Oil New Zealand Limited, Z Energy Limited (Application 2)	Application withdrawn
Lineage Logistics New Zealand, Cold Storage Nelson Limited	Merger cleared
Kinetic NZ Holdings Ltd and NZB Holdco Ltd	Merger cleared
Fletcher Distribution Limited and Tumu ITM	Merger cleared
Zoetis Inc, Betrola Pty Limited (which owns the Jurox group of companies)	Merger cleared
THL (Australia) Pty Ltd and Apollo Tourism & Leisure Ltd	Merger cleared subject to divestment
Central Healthcare Operations Limited, Aorangi Hospital Limited	Merger cleared

3.2.2. Significant cases

66. The NZCC successfully prosecuted in the High Court and secured a penalty of NZ\$1.54 million from Objective Corporation Limited (Objective) for acquiring its main competitor, Master Business Systems Limited, which resulted in a substantial lessening of competition. The two companies supplied software that assisted building consent authorities to run the building consenting system. Objective did not apply for clearance or authorisation for the acquisition. The Commission and the High Court both considered whether a divestment would be viable to restore or maintain competition in the market. However, the High Court accepted that a divestment was not appropriate in this case because it would not necessarily restore or maintain competition.

67. In March 2022, the Commission granted clearance for Ampol Limited (Ampol) to acquire 100% of the shares in Z Energy Limited in a transaction worth around \$2 billion, subject to undertakings from Ampol to sell the entirety of its Gull business as a going concern within a specified timeframe, and to a purchaser approved by the NZCC. The

⁹ Market structure cases are non-notified mergers. These two cases were both opened in 2020 and completed in 2022.

undertakings required Ampol to ensure the Gull business was preserved until it was divested. In April 2022, the NZCC approved the sale of Gull to GNZ Energy Bidco Limited (GNZ) after it was satisfied that GNZ, among other things, has the financial resources, business expertise and incentive to operate Gull in competition with Z Energy, and that its acquisition of Gull is not likely to raise competition concerns in its own right.

4. Resources of competition authorities

4.1. Human resources

68. 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 2022, the NZCC employed 64 staff who work on competition enforcement activities against anticompetitive practices, merger reviews, market studies, and engagement and operations.

69. **Table 4** shows the numbers of staff who work on competition enforcement activities as at 31 December 2022.

Table 4. Human resources applied to competition enforcement

Competition investigators	34
Competition legal	7
Economists	12
Market Studies	6
Engagement and Operations	4
General manager	1
Total	64

70. The NZCC had 366 FTE across its various functions as at 31 December 2022.

4.2. NZCC Annual budget

71. 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		
2021/22	2020/21	Change
\$16.811 million NZD	\$14.592 million NZD	+\$2.219 million NZD
\$10.480 million USD	\$9.096 million USD	+\$1.384 million USD
Organisation budget		
2021/22	2020/21	Change
\$83.903 million NZD	\$66.692 million NZD	+\$17.211 million NZD
\$52.307 million USD ¹⁰	\$41.578 million USD ¹¹	+\$10.729 million USD

5. New reports or studies on competition issues

5.1. Monopsony power in labour markets in New Zealand

72. MBIE's Chief Economist Unit is undertaking a research project to estimate the extent of monopsony power in New Zealand's private sector labour market. Current baseline results show that monopsony power is prevalent in the New Zealand labour market and that wages may be marked down by up to 25%.

73. Future work will explore differences in the extent of monopsony power across the labour market and look for insights into the source of monopsony power, with the aim to inform future policy work to improve the operation of the labour market.

¹⁰ As at 3 May 2023 exchange rates

¹¹ As at 3 May 2023 exchange rates