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**Working Party No. 3 on Co-operation and Enforcement**

**Optimal Design, Organisation and Powers of Competition Authorities – Note by New Zealand**

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More documents related to this discussion can be found at  
<https://www.oecd.org/competition/optimal-design-organisation-and-powers-of-competition-authorities.htm>.

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## *New Zealand*

### **An increase in roles and responsibilities and changing markets and technologies: how the New Zealand Commerce Commission has addressed these challenges\***

#### **1. Introduction**

1. This paper is a contribution to Working Party 3's call for country contributions to the co-operation and enforcement roundtable on 'The Optimal Design, Organisation and Powers of Competition Authorities' to be held on 4 December 2023.
2. The New Zealand Commerce Commission (NZCC) is an Independent Crown Entity with a Commission structure. Commissioners are the Commission's governance board under the Crown Entities Act 2004. Together with Associate Commissioners, they are also the decision-makers who exercise functions, powers and duties of the Commission under the Commerce Act 1986 and other Acts.
3. 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. There have been recent substantive reforms to the Act such as expansion of the Commission's information gathering and authorisation powers and the introduction of criminal sanctions for cartels.
4. The Commerce Act prohibits certain classes of restrictive trade practices and anticompetitive mergers. The NZCC is responsible for enforcing the prohibitions in the Commerce Act using a prosecutorial model. Private parties may also take actions for damages and seek injunctions. 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 an application covering particular activities. The effect of these determinations is to offer businesses protection for the specified practice or acquisition from legal action from the relevant prohibitions under the Commerce Act if the Commission is satisfied that there will be a net public benefit.
5. Two key challenges recently faced by the NZCC have been:
  1. An increase in the scope of our roles and responsibilities. New legislation has increased the range of our functions, powers and duties, particularly since 2018, including a new market studies function and new sectoral regulation regimes being assigned to us.
  2. Addressing changing markets and technologies. In particular, maintaining an up-to-date understanding of competition in digital markets and the latest enforcement best practices in these markets.
6. In this paper we firstly outline these challenges. We then explain how we have addressed these challenges, including by utilising intra-organisation knowledge amongst

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our different teams, seeking to ensure that our enforcement powers are adequate, and keeping our agency expertise and understanding of digital markets up to date.

## 2. Challenge of accommodating an increase in our roles and responsibilities

7. In recent years, the NZCC has been assigned new roles and functions, bringing with it the challenge of accommodating these through acquiring additional resource and needing to expand our agency knowledge and expertise, while at the same time continuing to aim for top quality work and analysis.

8. A major new function recently assigned to the NZCC has been market studies. Since 2018, the NZCC has been 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.

9. At the conclusion of a study, the Commission 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. ‘Shining a light’ on a sector in this way allows analysis of whether perceived issues actually exist and, if so, what can be done to enhance market performance.

10. The Commission has undertaken market studies into three sectors: retail fuel, retail grocery, and residential building supplies, which were all initiated by the Government. The retail fuel and retail grocery studies resulted in the Government assigning new regulatory functions in these sectors to the NZCC:

1. The Fuel Industry Act 2020 assigned the NZCC the role of regulating the supply of engine fuel used in land transport in New Zealand. This legislation was enacted as a result of our findings in the retail fuel market study which found a number of shortcomings in the competitiveness of markets for petrol and diesel. This legislation 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.
2. The Grocery Industry Competition Act 2023 provides for the establishment of a new Grocery Commissioner and grocery sector regulatory function in the NZCC to provide a strong oversight and ongoing focus on this sector. This legislation was in response to the NZCC’s market study into the grocery sector. It introduces a regulatory regime for designated grocery retailers for the purpose of promoting competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand. The NZCC can seek significant penalties against regulated grocery retailers and individuals who breach the Grocery Supply Code of Conduct.

11. The NZCC being assigned new roles and functions is not a new concept. Since the mid-1980s, we have been assigned a range of new sector-specific roles in specific sectors where competition is either not possible or significantly impeded. However, there has been a recent trend towards us being assigned more regulatory roles, particularly as a result of our market studies findings.

12. Other sectors we have regulatory functions in addition to the above include electricity lines, gas pipelines, airports, telecommunications and dairy. Most recently, in 2022, we were assigned a new regulatory regime to govern New Zealand's retail payment system and entities involved in the retail payment system (such as merchants, banks, non-

bank merchant acquirers and card schemes) and, in 2023, we were assigned a new regulatory and consumer protection regime for New Zealand's reformed water services sector. See the Annexure for further information on our regulation of these sectors.

## 2.1. Challenges of increasing functions at scale

13. Taking on a market studies function, and additional sectoral regulation functions, has stretched us, requiring significant expansion during a pandemically-challenged period. To cope with these extra responsibilities, our organisation has grown from 180 staff six years ago to a projected headcount of over 500 staff in 2023/24. For each new function, the NZCC has also added a dedicated governance/decision-making body and an operational team to support that area of work.

14. These additional functions, particularly the market studies function, have resulted in increased public expectation and scrutiny on our organisation and our work product. This is because the sectors initiated by the Government for market studies have been sectors of high public interest, with the recent sectors being areas in which the cost-of-living crisis has been particularly felt by consumers. This has resulted in a lot of media attention and scrutiny on our market studies, and the subsequent fuel and grocery sectoral functions that have arisen as a result of these.

15. These new functions required us to establish new regimes and new regulatory teams from scratch, and we have become adept at establishing new regulatory regimes, largely through encouraging a symbiotic relationship amongst our teams. We found that a market study being the vanguard into the fuel and grocery sectors aided our staff, particularly staff in the new regulatory teams, by allowing them to draw on the findings of our market studies team, and better understand the sector and focus their enforcement priorities.

16. Furthermore, our market studies have enabled us to identify competition issues that we might otherwise not be aware of, providing the new regulatory teams with a 'head start' on developing their knowledge of competition concerns in their sectors. For example, anti-competitive covenants preventing competitors utilising land has been identified as an issue in all three studies, meaning our new regulatory fuel and grocery teams had a decent understanding of this issue in these sectors from the moment the teams were established.

17. This outcome has also been assisted by our market studies team and the regulatory teams being in the same organisation, so staff can quickly and easily share knowledge, liaise closely with each other, and have more conversations about competition issues than they would have if they were in separate organisations.

## 2.2. Changing the governance model to respond to new functions

18. As the NZCC continues to grow into a larger multi-functional regulator, significant change is being implemented within the organisation to help us equip for the future. New organisational responsibilities have meant the establishment of new teams within a branch structure. Divisions of the Board are the key organising mechanism for the Board (in their role as Commissioners). A Division is essentially a Board committee that has delegated authority in one or more regulatory systems. This structure enables smaller numbers of Commissioners (usually 3-5) to focus on specific work areas within the Commission's overall functions. The expansion of organisational mandate and growing pressure on Commissioner workload has been the catalyst to review the operation of Divisions and to explore different ways of working, and division of labour within the organisation through greater clarity of roles and responsibilities.

19. The NZCC is currently transitioning to a “Convenor model” for Divisions, whereby a single Commissioner works with Commission staff to lead the Division and oversees reporting to the Board about the Division’s activities. The main rationale for transitioning to this model is to ensure that Commissioner effort is on the work that only they can do as governors, commissioners and decision makers. This new model, when combined with other innovations, has the potential to provide several advantages including a greater focus on Division-level strategy, additional development opportunities for Commissioners, improved confidence and assurance mechanisms, and an extra layer of governance oversight.

### 3. Challenge of understanding changing markets and technologies

20. Many factors have contributed to changing markets in recent times, but here we will focus on digitalisation. As has been recognised by the OECD, digitalisation has reshaped competitive dynamics in the economy, creating new markets and transforming existing ones. This presents a multifaceted challenge for competition authorities, who must grapple with uncertainty in rapidly evolving markets, address new forms of misconduct, and examine markets whose precise boundaries are unclear.<sup>1</sup> It also presents opportunities for agencies in utilising new technologies to understand economies, to better enforce, and to bring in a wider diversity of skillsets.

21. This challenge is especially relevant for smaller agencies, like the NZCC, which has around 50-60 enforcement staff in our Competition Branch who must assess non-discretionary merger control, authorisation and leniency applications, while at the same time being expected to conduct other discretionary assessments. Maintaining an up-to-date understanding of market realities and the latest enforcement best practices on top of this, particularly for complex and evolving markets like digital markets, is challenging.

22. We have found that to adequately address competition issues in digital markets, three factors are essential:

- A legislative enforcement framework that is adequate and suitable for competition enforcement in digital markets;
- Flexibility on how to engage new skillsets;
- Collaboration with other agencies and organisations to develop agency knowledge.

#### 3.1. A legislative enforcement framework that is adequate and suitable for competition enforcement in digital markets

23. To ensure adequate enforcement in new and emerging markets like digital, it is important that the legislative framework the agency is operating in is adequate and suitable. The NZCC has pushed for legislative change over previous years where this has not been the case in New Zealand.

24. We had a significant law change in April this year when Parliament amended section 36 of the Commerce Act which relates to the abuse of market power. Previously, to breach the law a firm would need to (a) have substantial market power (SMP) and (b) take advantage of that SMP for an anti-competitive purpose. The courts interpreted the second limb of that test in a way that created an exemption for any conduct that a firm

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<sup>1</sup> <https://www.oecd.org/daf/competition/digital-economy-innovation-and-competition.htm>

without SMP might reasonably undertake. This focused analysis on a hypothetical world in which a firm existed that looked just like the subject firm apart from lacking SMP. So, for example, to consider conduct by the owner of a natural monopoly one might start by assuming that firm had several direct rivals, and then consider how it might behave. Analysis was explicitly focused on hypothetical scenarios rather than the real-world conduct.

25. The NZCC made it clear through submissions and other avenues that it considered this law unworkable, and we took no cases under it during the last decade. There are many reasons why we considered a change is necessary. The most compelling is that the previous test failed to capture all anti-competitive conduct, and it was complex and difficult to apply and enforce, resulting in little private or public enforcement.

26. In a small country like New Zealand, there is likely to be a greater number of dominant players in markets. It is therefore vital to have effective law on unilateral conduct by firms with substantial market power to deter anti-competitive conduct. Dominant players are also a feature of many digital markets, so an effective law is also vital for enforcement in these markets.

27. Also in April this year, provisions that exempted some conduct involving statutory intellectual property rights from parts of the Commerce Act were removed. The NZCC supported the removal of these exemptions as we considered them to be unclear and not reflecting current views that competition law and intellectual property law are largely complementary. We considered there is no strong rationale for treating intellectual property rights differently to any other form of property or assets under competition law. 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 Recommendation of the Council on Intellectual Property Rights and Competition, which recommends “Apply[ing] the same competition principles to IP rights as to other forms of property, while accounting for the unique characteristics of IP rights”.<sup>2</sup>

28. In addition to the legislative framework being adequate and suitable for the current environment, we consider it is important to have a regime that is sufficiently flexible to be effective in new markets and environments that agencies may face in the future. A good example of this is seen in New Zealand’s authorisation regime for anti-competitive mergers or conduct.<sup>3</sup>

### 3.2. Collaboration with other competition agencies and organisations

29. As investigatory work becomes more complex due to digitalisation of markets and expectations around economic analysis, we are finding that competition and legal expertise in specialist areas is necessary to the management of cases.

30. Collaboration with our counterpart overseas competition agencies enables us to learn from and share best practice with each other. For work such as changes to approach in merger analysis, digital theories of harm, evidence handling in criminal cartel cases, these interactions are critical to us continuing to be able to deliver at internationally recognised standards despite our small size. It provides us with opportunities to utilise the

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<sup>2</sup> OECD *Recommendation of the Council on Intellectual Property Rights and Competition*, 8 June 2023.

<sup>3</sup> For further information see Directorate for Financial and Enterprise Affairs Competition Committee, OECD, *Advantages and Disadvantages of Competition Welfare Standards – Note by New Zealand* (DAF/COMP/WD(2023)23, 15 June 2023).

greater resources of larger agencies, as seen recently where we have utilised the experience of larger agencies for our guidelines on our reformed abuse of market power test.<sup>4</sup>

31. Such collaboration also encompasses the sharing of best practices, to ensure our investigatory staff are well trained in evidence handling, engagement with parties, and are able to identify where specialist expertise may be required.

### ***3.2.1. Collaboration with domestic authorities on matters outside of the NZCC's skillset***

32. The NZCC has collaborated with a number of other domestic investigatory agencies to jointly procure the services of a forensic capture expert. This enables us to obtain the benefits of this highly technical skillset when we are carrying out a search warrant or analysing data, but does not require us to solely fund that skillset.

33. We have also worked with external experts, including universities, to carry out analysis where we do not hold the skillsets in-house. For example, as part of our recent market study into the grocery sector, we commissioned the University of Waikato to undertake a behavioural economic research experiment which was conducted by university researchers. This research tested how complexity around promotional mechanisms affects consumer decision making, using laboratory experiment data from 180 participants. This research enabled us to formally test what was our intuitive speculation, and to further support our overall finding that competition in the grocery sector was not working well.<sup>5</sup>

34. However, to enable effective collaboration, it is also important to have suitable powers to provide and receive assistance, and share information with other agencies and organisations. The NZCC has information gateway provisions in the Commerce Act enabling us to provide investigative assistance and share information with our overseas counterparts.<sup>6</sup>

35. In 2022, new sections were added to the Commerce Act explicitly allowing us to share information and documents with other New Zealand government agencies.<sup>7</sup> Prior to this, we relied on common law principles to support this activity. We welcomed the formalising of our ability to share information with other domestic government agencies. We work with a number of New Zealand regulatory agencies with overlapping and/or complementary functions to us. The exchange of information with these agencies is important to ensure the efficient exercise of our functions, powers and duties.

## **4. Conclusion**

36. The challenge of accommodating our new roles and responsibilities, and ensuring our agency expertise and understanding of changing markets and technologies is up to date

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<sup>4</sup> Available here: [https://comcom.govt.nz/\\_\\_data/assets/pdf\\_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf](https://comcom.govt.nz/__data/assets/pdf_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf)

<sup>5</sup> For further information see Directorate for Financial and Enterprise Affairs Competition Committee, OECD, *Integrating Consumer Behaviour Insights in Competition Enforcement – Note by New Zealand*. (DAF/COMP/WD(2022)51, 24 June 2022)

<sup>6</sup> Commerce Act 1986, sections 99A to 99P.

<sup>7</sup> Commerce Act 1986, sections 99AA and 99AB.

and our enforcement powers are adequate, are challenges that the NZCC will continue to face.

37. However, despite our relatively small size, we are confident that if we continue to utilise intra-organisation knowledge amongst our different teams, and collaborate with our international counterparts and domestic agencies, we will be well placed to face these challenges.

## Annex A. Sectoral regulation by the NZCC

In addition to the fuel and grocery sectors as outlined in the paper, here are some other sectors the NZCC has regulatory functions in:

1. 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 retail service quality, and can also investigate and recommend to the Minister for Communications that other wholesale telecommunications services be regulated.
2. 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 provides transparency in relation to the activities of Fonterra to ensure that New Zealand markets for dairy goods and services are efficient and contestable.
3. The Retail Payment System Act 2022 established a new regulatory regime to govern New Zealand's retail payment system and entities involved in the retail payment system (such as merchants, banks, non-bank merchant acquirers and card schemes). The Act seeks to reduce merchant service fees on credit and debit transactions by capping interchange fees. Under the Act, the NZCC has broad regulatory, monitoring and enforcement powers.
4. In 2023, the Water Services Economic Efficiency and Consumer Protection Act was enacted. It provides for an economic regulation and consumer protection regime for the reformed water services sector to be overseen by the NZCC. The economic regulation provisions require the water services entities to disclose certain information, directly govern service quality, and set a strong efficiency challenge to drive lower prices. The Commission will have the power to impose a price ceiling or revenue cap, allowing it to drive efficient expenditure and smooth any price shocks over time for the benefit of consumers. Further, the NZCC is empowered to adapt the use of its regulatory tools to influence the different water entities and the various water services they provide. The Commission will also be required to set and enforce a service quality code by 1 July 2027 to improve the quality of water services. A new Water Services Commissioner (like the Telecommunications Commissioner and the Groceries Commissioner) will also be incorporated into the Commission's governance structure for decision making and outward facing purposes.

Under Part 4 of the Commerce Act, the NZCC is also 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.