

New Zealand competition and regulatory developments

A reflection and view to the future | September 2022

This resource highlights key recent competition and regulatory developments relevant to businesses operating (or considering operating) in New Zealand.

Increased merger activity

← Looking back

- In the past year, the Commission has received a record number of applications for merger approvals. Over 20 clearance applications were received in the 2021/22 financial year, more than twice that of the previous year.
- The increased level of merger activity has been affecting timeframes, but the Commission is bolstering resources to cope with demand.

→ Looking forward

- Expect an increased focus by the Commission on discussions between trade competitors in the context of deals, including due diligence (with an eye on potential cartel breaches and/or gun-jumping), and the role of information sharing protocols.
- Expect continued focus by the Commission on post-completion investigations where clearance or authorisation has not been sought. This emphasises the importance of obtaining advice early.
- Anti-competitive merger penalties are set to increase for businesses. In future cases, penalties have been increased from NZ\$5m to the greater of: NZ\$10m, three times the commercial gain or 10% of turnover.

A more resourced and vigilant regulator

- The Commission's funding and staff numbers are growing, and the maximum number of Commissioners has been increased from six to eight.
- A new chairperson is expected in 2022, which could signal a change in direction, or intensification of specific regulation and enforcement activity.
- Recent reforms to the Commerce Act have expanded the Commission's information gathering and authorisation powers.

Cartel criminalisation

← Looking back

- Cartels now attract criminal sanctions, effective April 2021. Individuals can face up to seven years' imprisonment.
- Expansion of cartel provisions to cover land covenants (i.e. restrictions on land titles to prevent the land from being used to compete with the landowner's business) have also been enacted – to take effect April 2023.

→ Looking forward

- We can expect ongoing enforcement priority to be given to cartel conduct, with the Commission looking for opportunities to bring criminal cases where appropriate.



Market studies

← Looking back

- There has been a Government preference to use market studies as a tool to scrutinise industry, examine competitive settings, and explore policy reform. Market studies require significant cost and resource by industry, and involve high levels of public scrutiny.
- The first market study focused on opening up wholesale fuel supply to facilitate increased retail competition. The creation of legislation to regulate the fuel industry has commenced following the study's final report.
- The Commission's market study into supermarkets concluded in March 2022, with the Government moving quickly to regulate aspects of the industry (already, the use of restrictive and exclusive covenants over land and leases by grocery retailers has been prohibited).

→ Looking forward

- Regulation of particular aspects of the grocery sector is to be introduced and progressed this year (e.g. code of conduct, a new Grocery Commissioner and dispute resolution scheme, and wholesale supply regulation).
- It remains to be seen whether the Government will go further to push for broader regulatory changes to the supermarket sector, in response to New Zealand's cost of living pressures.
- The residential building supplies market study is ongoing. The Commission's draft report expressed a preliminary view that competition for the supply and acquisition of key building supplies is not working as well as it could. Areas of concern are the difficulty of introducing new building products and the ability of competing suppliers to expand their businesses.



Latest OIO reforms complete

- The reform programme of recent years, largely aimed at reducing screening of low-risk transactions and simplifying the benefit to New Zealand test, is now complete (although tweaks are upcoming in relation to forestry investment pathways).
- The COVID-19 emergency notification requirement has been suspended, and the new National Security and Public Order regime is in place.
- In terms of process, a review of application fees has resulted in very significant increases. Timeframes for decisions have also now been introduced.



Market power – a new paradigm

← Looking back

- Changes to section 36 of the Commerce Act have been enacted, and most will take effect in April 2023. New Zealand's position is now aligned with that of Australia, with potential to penalise a broader range of conduct.
- The new section 36 test focuses on "effects" in addition to "purpose". Companies with substantial market power will now be prohibited from engaging in conduct that has – or is likely to have – the effect of substantially lessening competition.
- At the same time, "safe harbour" exceptions in the Commerce Act for the granting or enforcement of IP rights have been repealed as part of the same suite of reforms. There is an increased risk particularly for businesses that may have market power and IP licenses.

→ Looking forward

- We can expect guidance from the Commission on the new section 36 test, as well as an increased enforcement focus on entities with market power.



Consumer

← Looking back

- Changes to the Fair Trading Act to expand the unfair contract terms regime (to cover small businesses) and unconscionable conduct have come into effect.

→ Looking forward

- The Government intends to introduce legislation to implement a consumer data right (a mechanism for consumers to securely share data that is held about them with trusted third parties) in 2022, and consider which sectors should be assessed first for potential application.



Broader regulatory trends

← Looking back

- Regulators and Government agencies are busy, with a number of significant and complex reforms underway. There is a renewed focus on trade, economics and regional security.
- In domestic matters, there is a tendency towards major change over incremental “tinkering” (e.g. widespread national health reforms).
- Key reforms redefining the central/local government relationship have increased weighting towards centralisation solutions and a nationally consistent approach (e.g. Three Waters, Resource Management Act reform).
- Increased intersectionality of reform programmes with Government balancing a number of competing policy objectives, including economic development and climate change commitments.
- New Zealand’s first “Emissions Reduction Plan” was released in May 2022, signalling major policy and funding proposals to support emissions reduction.

→ Looking forward

- Expect sunset dates and/or the repeal of COVID-19 legislation and emergency response measures.
- Government and regulators are seeking to manage and respond to cost of living pressures, global supply chain issues, labour market constraints and inflation.
- Key growth areas to watch include: infrastructure, housing and education, telecommunications and IT.



Regulatory investigations and enforcement activity

- The Commission has been closely monitoring compliance with Part 4 regulation. A full range of enforcement options will be considered, depending on the facts and severity of alleged contraventions.
- The Commission is tending towards a hard line approach to enforcement, particularly around regulated asset base issues.



Utility sector reforms

← Looking back

- An open letter to industry sought views on emerging issues for electricity networks, gas networks and airports in the context of Part 4 regulation. Key themes included the impact of decarbonisation on electricity lines services.
- The Electricity Industry Amendment Bill is progressing through Parliament. It features some significant changes to the electricity industry regulatory framework, including the shift of a number of key provisions from the Act to the Code and within the Electricity Authority’s jurisdiction.
- The Electricity Authority approved a new transmission pricing methodology (TPM) in April 2022, concluding a complex 10+ year reform process. Key changes include a shift to a “benefits based” methodology, removal of the current HVDC and RCPD charges, addressing the first mover disadvantage issues associated with new connection investments, and a new prudent discount policy.

→ Looking forward

- The 2023 input methodologies review is underway with the Commission reviewing the rules and processes that underpin its regulation of electricity lines services, gas pipeline services and specified airport services. It is scheduled for completion by December 2023.
- A default price-quality reset for gas distribution and transmission is due to take effect from 1 October 2022. The final decision is due 31 May 2023. Complex interplay with climate change policy and uncertainty, including potential phase out of gas connections.
- New TPM prices will come into effect from April 2023. In the meantime, the Authority intends to consult industry on additional Code changes to support the implementation of the new TPM.
- Three Waters Reforms will continue despite opposition from local councils. The long-term objective is that key water services are provided by a small number of publically-owned water service entities from July 2024.



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