The International Comparative Legal Guide to:

Competition Litigation 2019

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A practical cross-border insight into competition litigation work

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New Zealand

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

New Zealand's principal competition legislation is the Commerce Act 1986 (the Act). The competition provisions are contained in Parts 2 and 3 of the Act, and prohibit anti-competitive conduct affecting trade and commerce in New Zealand.

Claims can be made under any of the following provisions:

(a) General prohibition (section 27) – The Act prohibits the entering into, and giving effect to, contracts, arrangements or understandings containing provisions that have the purpose, effect or likely effect, of substantially lessening competition in a market.

(b) Covenants (section 28) – In relation to land, which substantially lessen competition.

(c) Cartels prohibition (section 30) – The Act prohibits a person from entering into a contract or arrangement, or arriving at an understanding, that contains a cartel provision, and prohibits giving effect to a cartel provision. A cartel provision means a provision in a contract, arrangement or understanding that has the purpose, effect or likely effect of price fixing, restricting output and/or market allocating. The form of conduct prohibited by those specific terms is now, following amendments to the Act that came into force in August 2017, more prescriptively defined.

(d) Misuse of market power (section 36) – The Act prohibits a person with a substantial degree of power in a market from taking advantage of that power for the purpose of:

(i) restricting the entry of a person into a market;

(ii) preventing or deterring competitive conduct; or

(iii) eliminating a person from a market.

(e) Mergers (section 47) – The Act prohibits the acquisition of the assets of a business or shares if the acquisition would have the effect, or likely effect, of substantially lessening competition in a New Zealand market.

(f) Resale price maintenance (sections 37–42) – The Act prohibits suppliers from specifying or enforcing a minimum resale price or restricting the ability of their customers to sell below a specified price.

There are also provisions allowing proceedings in respect of breaches of the regulated goods and services provisions in Part 4 of the Act.

1.2 What is the legal basis for bringing an action for breach of competition law?

The Act confers statutory jurisdiction on the national competition authority, the New Zealand Commerce Commission (NZCC), to bring claims for civil pecuniary penalties and a variety of other remedies, and statutory rights of action for affected parties to sue for damages and other remedies (see question 3.1 below).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

It is derived from national law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

No. There is no specialist competition law tribunal in New Zealand. Claims under the Act are brought predominantly in the High Court. It is common in competition law cases for the presiding High Court judge to sit with a lay member of the court – frequently an economist (section 78).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Standing

The NZCC has standing to bring penalty proceedings for breach of any of the competition provisions of the Act (sections 80, 83 and 85).

Private parties who have suffered loss or damage caused by a breach of the competition provisions of the Act have standing to bring claims for compensatory and exemplary damages against any party involved in the breach (sections 82, 82A, and 84A).

Private parties and the NZCC also have standing to apply for injunctions (sections 81 and 84). Alternatively, the NZCC can apply to designated Cease and Desist Commissioners for 'cease and desist' orders (sections 74AA–74C), although this latter power has very seldom been used and repeal of the 'cease and desist' regime has been proposed.

Representative actions

New Zealand does not have a codified 'class actions' regime. Collective claims via representative actions (brought by a named representative plaintiff or plaintiffs on behalf of, and for the benefit of, others with the "same interest" in the subject matter of the proceeding) are possible under the High Court Rules. Representative actions have featured in certain securities and consumer law litigation, though less in competition litigation to date. Such cases are typically brought on an 'opt in' basis.

A draft Class Actions Bill and proposed implementing amendments to the High Court Rules were presented to the Minister of Justice in 2009 but have seen little priority or progress. The New Zealand Law Commission has announced a project to examine class actions and litigation funding in New Zealand, as part of which it would review whether a formal 'class actions' framework is now merited.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The New Zealand courts have subject-matter jurisdiction over, and the Act applies to, conduct engaged in within New Zealand.

Section 4(1) extends the Act to conduct engaged in outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

Section 4(1AA) extends the Act to deem an overseas person (A) to have engaged in conduct in New Zealand (and therefore to be subject to the jurisdictional reach of the Act and the New Zealand courts), where the conduct of someone else (B) in New Zealand is deemed to be A's conduct. That is, the conduct of one person could be deemed to be the conduct of another up the chain of command, in certain circumstances. The conduct of an actor could be attributed to either a specific individual or to an entity.

Section 4(2) extends section 36A (which prohibits taking advantage of market power in a trans-Tasman markets) to conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that the conduct affects a market in New Zealand, not being a market exclusively for services.

Sections 47A and 47B provide the NZCC with the ability to seek declarations and orders (including cessation of business and divestment orders from the High Court) if an overseas person acquires a controlling interest in a New Zealand body corporate through the acquisition of a business outside New Zealand and the acquisition has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.

In recent years, there have been a number of challenges to the NZCC's jurisdiction to bring competition law cases against overseas defendants (individuals and companies). There is now a complex body of case law on the jurisdictional reach of the Act, which has established that section 4 is an exhaustive statement of the Act's intended scope in relation to overseas conduct. That said:

- The courts have tended to give broad meaning to what constitutes conduct within New Zealand, including certain conduct by overseas parties.
- The courts have similarly tended to give broad meaning to what constitutes "carrying on business" in New Zealand for the purposes of section 4(1). The direction and operation of a local subsidiary could amount to the carrying on of business (by the overseas parent company) in New Zealand.
- Conduct engaged in within New Zealand can in some circumstances be attributed back to the overseas parent company (under section 90 of the Act). This provision has been utilised by the NZCC to bring proceedings directly against an overseas parent company despite the presence of a local subsidiary company.

Recent reforms to the Act (such as through amendments to section 4) in respect of jurisdictional reach and attributing conduct provisions of the Act have responded in part to such challenges.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The vast majority of competition law cases to date have been NZCC-initiated penalty proceedings. Few private damages claims have proceeded to trial. Some have gone through early interlocutory stages but settled prior to a hearing. The terms of those out-of-court settlements are not publicly available.

1.8 Is the judicial process adversarial or inquisitorial?

It is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, they are.

2.2 What interim remedies are available and under what conditions will a court grant them?

Both the NZCC and private parties can seek interim injunctions in circumstances where a permanent final injunction is also sought as part of the claim.

For the court to grant an interim injunction, it must be satisfied that:

- there is 'a serious question to be tried'; and
- if so, that the 'balance of convenience' favours the granting rather than the refusal of the injunction, pending trial.

The Act also requires the court to consider and give any weight it considers appropriate to the interests of consumers or, as the case may be, acquirers (section 88(3A)).

The NZCC also has the power to seek 'cease and desist' orders from independent designated Cease and Desist Commissioners appointed under the Act, though the power has been very seldom used and is to be repealed.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Remedies will depend on whether the proceedings are brought by the NZCC or a private party. All remedies and relief in New Zealand are awarded at the direction of the High Court.

The remedies that are available only on the application of the NZCC are:

- pecuniary penalties (civil fines) in relation to breach of the restrictive trade practices provisions (section 80);
- pecuniary penalties in relation to breach of the merger provision (section 83);

- divestiture orders in relation to breach of the merger provision (section 85); and
- management banning orders (section 80C).

The maximum pecuniary penalties per breach are:

- for an individual – NZ$500,000 for breach of either the restrictive trade practices or merger provision; and
- for a corporation:
  - (i) for breach of the restrictive trade practices provisions, the greater of:
    - (a) NZ$10 million; or
    - (b) three times the value of any commercial gain resulting from the breach if it can be readily ascertained; or
    - (c) if the commercial gain cannot be readily ascertained, 10 per cent of the annual turnover of the corporation and its related bodies corporate; and
  - (ii) for breach of the merger provisions – NZ$5 million.

Remedies available to both private parties and the NZCC are:

- injunctions in relation to mergers (section 84);
- injunctions in relation to breach of the restrictive trade practices provisions (section 81);
- exemplary damages in relation to breach of the restrictive trade practices provisions (section 82A);
- declarations that the Crown has breached the Act (section 5);
- declarations that conduct breaches (or proposed conduct would breach) the Act; and
- orders cancelling a contract, varying a contract, requiring restitution or compensation be paid or such other orders as the court thinks appropriate to compensate a person who has suffered, or is likely to suffer loss or damage by a contravention of the Act (section 89).

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Any person who has suffered loss or damage by reason of a breach of the competition provisions of the Act may bring a claim for damages against a party involved in the breach.

Damages for breach of the Act are compensatory in nature: a claimant can only recover the amount of loss or damage suffered by them by reason of the offending conduct. The relevant measure is likely to be the tort measure: damages to restore the plaintiff to the position in which it would have been had the conduct not occurred.

There is jurisdiction to award exemplary damages (section 82A), although to date we are not aware of exemplary damages having been awarded for a breach of the Act.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The NZCC does not have the power to determine, in its own right, whether or not the Act has been breached or to impose penalties. Where the NZCC considers that there has been a breach of the Act, and that the case is suitable for prosecution, it must bring civil proceedings before the courts seeking pecuniary penalties and other appropriate remedies. The NZCC can, and frequently does, negotiate settlements of these cases on the basis of recommended penalties. However, the High Court must ultimately endorse and impose any penalty.

In private damages claims, the court looks at the actual loss or damage suffered by reason of the contravention of the Act. The level of any pecuniary penalty imposed by the court is not relevant to the assessment of compensatory damages.

4 Evidence

4.1 What is the standard of proof?

The jurisdiction is civil only and the standard of proof for civil proceedings, whether initiated by the NZCC or by private parties, is 'on the balance of probabilities'.

4.2 Who bears the evidential burden of proof?

The party (the NZCC, or a private party) initiating the legal action usually bears the evidential burden of proof. This requires that party to present sufficient evidence as to the existence or non-existence of a fact in issue.

The burden of proof may switch to the defendant in certain circumstances; for example, if a party wishes to rely on a particular exception (under sections 31–33) for entering into, or the giving effect to, a contract, arrangement or understanding containing a cartel provision.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

There is no statutory presumption of loss in cartel cases. To obtain compensatory damages, a plaintiff would be required to establish a breach of the Act and that the breach had caused it loss or damage.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Proceedings in the High Court are governed by the rules of evidence set out in the Evidence Act 2006. The fundamental principle of the Evidence Act is that all relevant evidence is admissible unless there is good reason to exclude it.

The Evidence Act defines relevance and contains detailed rules on the admissibility of:

(a) hearsay evidence;

(b) statements of opinion and expert evidence;

(c) defendants' statements, including admissions in civil proceedings; and

(d) privilege and confidentiality, including 'without prejudice' settlement discussions.

Relevantly, for present purposes:

- section 50 of the Evidence Act provides that evidence of a judgment or finding of fact in a civil proceeding is not admissible in another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given (although this expressly does not affect the operation of law in relation to *res judicata* or issue estoppel);

- section 34 of the Evidence Act provides that the provisions regarding hearsay evidence, opinion and expert evidence, and the previous consistent statements rule, do not apply to evidence of an admission offered in a civil proceeding that is contained in a document; and
- section 79 of the Commerce Act allows the courts to receive in evidence any statement, document, or information that would not be otherwise admissible that may, in the court's opinion, assist it to deal effectively with the matter. This provision does not apply in pecuniary penalty proceedings.

The interrelationship of these provisions in a damages claim following on from successful NZCC pecuniary penalty proceedings or an administrative settlement is yet to be tested.

Expert evidence is an accepted form of opinion evidence in New Zealand. To give evidence as an 'expert', persons must have the requisite specialised knowledge or skill based on training, study, or experience. Economists and other experts from New Zealand and overseas are commonly engaged by New Zealand litigants (including the NZCC) to give expert evidence in competition law cases.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

(a) Before proceedings have begun

Pre-action discovery is available in New Zealand:

- to a prospective plaintiff who is, or may be, entitled to claim relief against another party, but it is impossible or impracticable for them to formulate the claim without reference to one or more documents or a group of documents; and
- where there are grounds to believe that any person (who may, or may not, be the intended defendant) may be or may have been in control of those documents.

Pre-action discovery is typically only used by private parties, as the NZCC has extensive powers of investigation under the Act (section 98) to compel a party to provide information, produce documents or attend before the NZCC to give evidence, and typically exercises those powers before taking proceedings.

(b) During proceedings from the other party

During proceedings, parties come under obligations under the High Court Rules to provide initial disclosure (of the documents relied on in preparing the pleadings) and either standard or tailored discovery of documents relevant to the matters in issue in the case. Documents subject to legal advice, litigation or other legal privileges need not be discovered. Commercial sensitivity is not a reason for resisting the production of documents, though typically confidentiality regimes are put in place to limit disclosure to solicitors, counsel and experts.

Typically, the NZCC, as the plaintiff in pecuniary penalty proceedings, will discover the documents that were requisitioned from parties in its investigation phase. As a matter of practice, it does not discover leniency proffers and claims privilege or public interest immunity as reasons for non-disclosure.

Plaintiffs and defendants in private damages claims are subject to the normal discovery rules in litigation.

(c) From third parties (including competition authorities)

Non-party discovery is available, but to date has not been successfully used in New Zealand to access either primary documents or leniency materials held by the NZCC.

In *Schenker AG v Commerce Commission* [2013] NZCA 114 in relation to the Air Cargo litigation, the High Court declined the request of a third party potential follow-on claimant, Schenker, to access documents that had been held on the court file. The documents Schenker sought access to include an agreed statement of facts and source documents from the airlines including details of interviews with the NZCC. The Court did not dismiss the possibility of a non-party request. However, in declining Schenker access to the court file, the court placed weight on the fact that allowing access would undermine a party's incentive to co-operate with, and provide commercially sensitive information to, the NZCC.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, witnesses may be forced to appear at a hearing if a party obtains leave of the High Court to issue a subpoena on a party which will compel them to attend court and answer questions.

During the hearing of the proceedings, a party is entitled to cross-examine all witnesses of the other parties to the proceedings, including those subpoenaed by another party. Cross-examination of a party's own witness is not available unless permission is granted by the court. There are no depositions as such. Interrogatories can be issued, requiring that sworn answers be given to specified questions.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The NZCC has no power to make an infringement decision; only a court may make a finding of a breach of the Act (see question 3.3 above).

There is no statutory presumption of loss or damage, nor is there any statutory provision enabling a claimant for damages to rely on a judgment or settlement in a pecuniary penalty case as *prima facie* evidence of a breach. Plaintiffs in a follow-on case must therefore establish both a breach of the Act and loss or damaged caused to them.

If a party admits a breach during a settlement with the NZCC, this will not necessarily be probative evidence of liability. The courts recognise the reality that parties can decide to settle litigation for various reasons, and not all settlements are made with admissions of liability.

An infringement decision of an overseas competition authority or court would, for similar reasons, not necessarily be probative evidence of conduct affecting a market in New Zealand.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Courts in competition proceedings are mindful of the need to protect confidential and commercially sensitive information of parties, especially where the proceedings involve competitors. However, confidentiality is not a basis for refusing to provide discovery, produce documents or give evidence in New Zealand.

Typically, confidentiality orders or inter-party confidentiality undertakings are put in place to restrict disclosure of commercially sensitive and confidential information to certain classes of persons involved in the proceedings, such as external counsel and expert witnesses.

In addition to any confidentiality regime ordered by the High Court or agreed between the parties, a party that obtains a document through discovery and inspection is subject to express obligations by operation of the Court's Rules to use the document only for the purpose of the proceeding, and not to make it available to any other person except for the purpose of the proceeding (and once the document has been read in court).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The NZCC has a right to intervene in private competition law proceedings, with the High Court's leave and subject to any conditions imposed by the court. The NZCC's Enforcement Response Guidelines state that it may seek to intervene in private litigation if it considers that its involvement will assist the court and otherwise promote the public interest.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no general defence of justification or public interest available in competition law proceedings in New Zealand, as we understand it has been applied in other jurisdictions.

Within the framework of the Act, there are various exceptions to the application of certain provisions. This includes the new exceptions to the new form of the cartel prohibition. The new exceptions are for:

(a) collaborative activities;

(b) vertical supply contracts; and

(c) joint buying and promotion agreements.

In addition, there are other exceptions to restrictive trade practices provisions that deal with, for example:

(a) employment contracts or contracts of service (section 44(1)(f));

(b) provisions obliging compliance with certain prescribed standards (section 44(1)(e)); and

(c) provisions relating solely to goods for export (section 44(1)(g)).

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The availability of a 'passing-on defence' has not been tested in New Zealand. The requirement that a claimant show loss as part of its cause of action tends to suggest that a passing on defence would have a good prospect of success.

A corollary is that indirect purchasers would likely have standing to bring damages claims under the Act if they could prove they had suffered loss or damage caused by the breach of the competition provisions.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

A defendant can, under the High Court Rules (rule 4.4), issue a third party notice to bring a third party into the proceeding.

Grounds for issuing third party notices include: (i) whether the named defendant is entitled to contribution or indemnity from the third party (where a right to contribution can exist between joint tortfeasors); and (ii) that a question or issue in the proceeding ought to be determined as between the plaintiff, the defendant and the third party.

The High Court Rules prescribe a timeframe for filing third party notices (10 working days after the expiry of time for filing the defendant's statement of defence), which may be extended by leave of the court.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Proceedings for alleged breaches of the:

- restrictive trade practices provisions must be commenced 'within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered' with a 'long-stop' limitation of 10 years; and
- business acquisition provision must be commenced 'within 3 years after the matter giving rise to the contravention arose'. Proceedings seeking a divestiture can be commenced within two years from the date on which the contravention occurred.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

NZCC-initiated pecuniary penalty proceedings have generally taken between 18 months and three years from commencement (post-investigation phase) to bring to hearing and judgment or settlement. Some cartel claims may take much longer. Expedition is available for urgent cases, usually where injunctions are sought.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Generally, the permission of the court is not required for a discontinuance or settlement of a private damages action. Where, however, the NZCC seeks pecuniary penalties as part of a settlement, the court's endorsement to any 'recommended' penalty or penalty range is required.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

As mentioned in question 1.5 above, New Zealand does not have a codified 'class actions' regime. Representative actions are possible but have been rare in competition litigation to date. The question posed has yet to be tested.

The draft Class Actions Bill and proposed implementing amendments to the High Court Rules, which have not progressed but which have on occasion been referred to by the courts in

developing principles for the case management of representative actions, would require the court's approval for the settlement or discontinuance of a class action.

The draft Class Actions Bill would also empower the NZCC to bring proceedings for damages as the lead plaintiff in a class action (even though it has not itself suffered loss or damage).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

A court has the power to award costs at its discretion. The general principle is that the unsuccessful party should contribute to the successful party's costs. Costs awards are typically on a 'scale' calculation under the High Court Rules and will be significantly less than the successful party's actual legal costs. The courts are able to consider applications for increased and/or indemnity costs. There is case law on the recoverability of expert witnesses' fees as disbursements.

8.2 Are lawyers permitted to act on a contingency fee basis?

Lawyers may enter into a 'conditional fee agreement' with a client which is payable on the basis of a successful outcome, but the fee arrangement cannot be calculated on a proportion of any amount recovered.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Yes, third party funding of competition law claims is permitted. Several commercial litigation funders are active in New Zealand; however, there have been no instances of third party funding of competition law claims to date.

9 Appeal

9.1 Can decisions of the court be appealed?

Only the High Court may determine whether the competition provisions have been contravened and impose pecuniary penalties. Decisions of the High Court can be appealed to the Court of Appeal and, finally (with leave), to the Supreme Court.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, the NZCC operates a Leniency Policy for cartel conduct. Full immunity from NZCC-initiated proceedings is available to the first party (whether an individual or a company) to approach the NZCC and secure conditional leniency. Leniency is conditional on the holder continuing to meet the prescribed conditions. Conditions include full continuing co-operation with the NZCC until any relevant NZCC proceedings have been finalised. If full immunity is not available (e.g. because another party has applied for leniency), co-operation with the NZCC's investigations can still result in significantly reduced fines.

Immunity from NZCC-initiated proceedings does not grant the holder (or unsuccessful applicant) immunity from third party damages claims.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

An applicant for conditional leniency, whether successful or not, cannot withhold documents from discovery in private damages proceedings solely on the basis that they were provided to the NZCC for the purposes of an immunity or leniency application. The standard rules for discovery will apply – see question 4.5 above. It is likely that the party would be obliged to discover the contemporaneous (non-privileged) documents relating to the alleged conduct, but there would be a basis for asserting privilege and/or public interest immunity grounds for withholding discovery of leniency proffers and similar information provided to the NZCC. This has yet to be tested in a follow-on damages case against a leniency holder.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

Competition studies power

On 28 March 2018, the Minister of Commerce and Consumer Affairs re-introduced (following a change to a new Labour-led coalition government) the Commerce Amendment Bill (the Bill).

The Bill proposes to:

(a) introduce a competition studies regime;

(b) repeal the cease and desist regime;

(c) update the regulatory regime for airports to improve its effectiveness; and

(d) introduce an enforceable undertakings regime into the Commerce Act.

In relation to competition studies, the Bill would insert a new Part 3A into the Act, enabling the NZCC to initiate market studies, either where directed to by the Minister or if it chooses to conduct one of its own accord. In either case, the threshold to initiate a study is that the Minister or the NZCC must consider it in the public interest to carry out a competition study.

The Minister has asked officials to fast track the Bill so that it is in place by the end of 2018, likely giving the NZCC competition studies powers from the start of 2019.

As of July 2018, the Bill is before the Select Committee with a report due in early November 2018.

Criminalisation of cartels

The Commerce (Criminalisation of Cartels) Amendment Bill is also before the Select Committee as of July 2018, with a report due on 20 August 2018.

Criminalisation was initially proposed by the former National Government in 2010, but abandoned for fear that it would have a chilling effect on pro-competitive collaborations and due to high costs to businesses and the State. The new Labour-led coalition Government has re-introduced the proposal to criminalise intentional cartel conduct.

As drafted, the Bill targets individual decision-makers for cartels and their corporations, with the key element of the offence being intention to engage in cartel conduct. The Bill proposes the same maximum fines as the maximum pecuniary penalties that may be imposed under the civil cartels regime, with the additional sanction of up to seven years' imprisonment in the case of individuals. The existing exceptions and exemptions to the civil prohibition for cartel conduct in the Act will apply to the new criminal offence and there are new defences in circumstances where a defendant believes that the impugned conduct was reasonably necessary as provided for in one of the exceptions and exemptions. If enacted, the Bill provides for a two-year transitional period before the criminal offences would apply (in addition to the civil prohibitions).

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Oliver is a Partner in the MinterEllisonRuddWatts Dispute Resolution team, and is one of New Zealand's recognised competition law practitioners. He is an experienced general litigator and specialises in handling complex commercial litigation, and competition, regulatory and consumer law matters.

Oliver regularly advises on mergers and acquisitions, restrictive trade practices, unilateral conduct and regulation. He has provided advice to clients in Commerce and Fair Trading Act investigations and with regard to their interactions with the commercial regulators. Oliver advises on front-end compliance and, in the consumer law area, has represented clients before the courts and before the Advertising Standards Complaints Board.

Chambers Asia-Pacific 2018 describes Oliver as "a well-reputed competition and consumer law specialist, with one client praising his '*expert strategic advice on engagement with competition and consumer regulators*'".

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April is a Senior Solicitor in the MinterEllisonRuddWatts Dispute Resolution team. She joined the firm in 2012 before moving to London, where she worked for the Competition and Markets Authority on a number of competition law regulatory investigations and market studies. April returned to the firm in 2016.

April has wide-ranging experience in dealing with regulatory enquiries from New Zealand regulators. This includes assisting with Commerce Commission and Financial Markets Authority matters, as well as WorkSafe investigations and prosecutions. Recent regulatory investigations she has worked on include Fair Trading Act and Commerce Act matters.

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