New Zealand
Global merger control handbook – update

APRIL 2020

Merger control legislation updates since 1 July 2018

No merger control legislation updates have taken place in New Zealand since 1 July 2018.

Landmark merger control cases since 1 July 2018

Since 1 July 2018, New Zealand has had the following landmark merger control cases:

- ***NZME Limited and Ors v Commerce Commission [2018] NZCA 389*** – The Court of Appeal upheld the decision of the Commerce Commission (the "**Commission**") to block the proposed merger of media firms NZME Limited and Stuff Limited (formerly Fairfax New Zealand Limited). Between them the two companies were responsible for publishing New Zealand's major newspapers and news websites.
  - The merger was proposed to help navigate the changing landscape of the publishing sector following major disruption from digital media. In May 2017 the Commission declined to grant authorisation of the proposed merger (under s 67 of the Commerce Act 1986 (the **"Act"**) on the grounds that competition would be substantially lessened in markets for the supply of national news websites, Sunday newspapers, community newspapers in 10 centres and advertising in such newspapers. Whilst the Commission found that the merger would result in efficiency gains for the merged company with ultimate public benefits, these benefits were not sufficient to outweigh the losses in quality and diversity of the media available to the public (so-called unquantifiable detriments), which are integral to a healthy democracy. The Commission's finding that the merger would result in a substantial lessening of competition in the relevant markets was not challenged in the Court of Appeal.
  - The Court of Appeal reaffirmed the longstanding position of the Commission that when considering whether to grant an authorisation under s 67, the Commission is entitled to, and should, take into account the wider benefits and detriments to the public if the proposed merger was to occur, not just the economic impact of the merger on consumers. Any

other principle would have been difficult to implement given the blurred boundaries between economic and non-economic impacts in a counterfactual scenario.

- Despite previous Commission decisions to the contrary, the Court of Appeal held that the ability to precisely quantify the benefit of increased economic efficiency should not mean that such benefits are considered exclusively or given more value when looking at s 67 authorisations.

- ***Commerce Commission v First Gas Limited [2019] NZHC 231*** – First Gas Limited ("First Gas") was ordered to pay $3.4 million as a penalty for entering into an anti-competitive acquisition of GasNet Limited's ("**GasNet**") assets in breach of s 47 (the purchase included a Restraint of Trade clause which was also found to breach s 27 of the Act).

First Gas purchased GasNet's distribution network in a new Bay of Plenty subdivision in 2016 without first seeking clearance from the Commission under s 67 of the Act and First Gas did not take legal advice about any competition issues. Before the agreement went unconditional the Commerce Commission enquired about the purchase so it could consider whether there was a breach of s 47 of the Act but First Gas pushed forward with the acquisition despite this. The final penalty imposed was in excess of the purchase price for the acquisition.

Web link to the national competition authority

The New Zealand national competition authority is the Commerce Commission, the website for which is https://comcom.govt.nz/

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