Competition Matters Conference

20 July 2017

Dr Mark Berry: Opening Remarks

Good morning and welcome to the 2017 Competition Matters conference.

I want to firstly acknowledge our many international guests, including speakers and regulatory colleagues from across the globe. We are, indeed, most fortunate to have keynote speakers from the US, Canada, UK, Israel and Australia, and their participation will serve to make this an event with international perspectives.

Competition Law and Policy

Competition law and policy is, on the international stage, at an evolutionary stage. Following the assent of market-orientated economic policies after the fall of the Berlin Wall and the collapse of the Soviet Union in 1991, many jurisdictions have regarded the adoption of competition laws as an important economic tool.

In the late 1980s there were only 30 jurisdictions with antitrust laws. Currently the number stands at approximately 130, and this number will climb to 135 by 2020.

The importance and benefits of competition are well understood. Consumers benefit through lower prices and better quality. And the linkage of an effective competition law regime to productivity of the economy is also well understood.

Within the New Zealand context, the OECD recently highlighted the following points in its 2017 Economic Survey of New Zealand.

- "muted competition" was contributing to our poor productivity growth.
- Significant price-cost margins and the survival of less productive firms suggest that competition could be sharpened here.

- Attention should be given to refocusing competition law on the effects of potentially anti-competitive conduct, rather than its intent - this point being of particular significance to our current section 36 of the Commerce Act.
- Consideration should be given to the introduction of market study powers – a matter which has recently been addressed in our Minister's policy announcement the other week on this subject.

Notwithstanding the linkage of competition law to productivity, the formulation and implementation of such laws give rise to certain tensions; tensions which in recent times have been voiced in a way not before. I would like to highlight two particular themes. The themes relate to innovation and, in some cases, undue resultant market power.

As consumers, citizens desire – and indeed relish – competition. New, better and lower – priced goods and services are desirable. Technological advancements are life-changing for many. And in a small remote economy, such as New Zealand's, such advancements have had a dramatic impact on our ability to trade in an increasingly international environment.

Yet, in their role as workers or residents in communities, competition may be less welcome. Famously, Schumpeter once observed that competition often achieves economic progress through creative destruction. History has revealed such progress and destruction. For example, aircraft and containerised shipping impacted on the growth of railroads. More recent examples abound. Digital photos have destroyed Kodak; battery technology is about to impact on the oil industry; and email has impacted on postal delivery, to name a few.

As consumers, we all enjoy the benefits of these innovations. But they do threaten employment and communities. For many there will be personal costs. And as we are now seeing, the impact of these threats has led to a rise in nationalist rhetoric and protectionist policies.

This leads to the second of my themes relating to the attainment of undue power. In their latest edition of "Antitrust Law in Perspective", Gavil, Kovacic, Baker and Wright put it this way: "Competition can yield results that disproportionally reward people of means, afflict the less fortunate with declining incomes, and simply ignore the dispossessed."

They go on to say: "This places antitrust agencies today, and antitrust policy more generally, in a politically and socially awkward role – to be the voice for pro-competitive policies that facilitate innovation-driven upheaval and to demonstrate, by logic and policy outcomes, that antitrust serves the best interest of all citizens, and not merely the favoured few."

So we live in interesting and challenging times in the field of competition law and policy. A time in which it is harder to predict where the law and policy may be heading than has been the case for some decades.

For the remainder of my introductory remarks, I would like to describe some aspects of the current climate of our activities in not only the field of competition – but also in our other fields of activity, namely economic regulation and consumer and credit law. I will finally cover off our priorities for the year ahead.

Economic Regulation

There has, I think, been an encouraging evolution of input methodologies regime. It has reached a new point of maturity and certainty following the reset of these methodologies back in December last year.

In 2010, when the input methodologies were originally determined for the electricity and gas sectors and international airports, the stakeholder environment was much more litigious.

This was to be expected with the advent of a new regulatory regime.

As envisaged by policymakers, industry participants exercised their rights of appeal by lodging over fifty challenges against the merits of the Commission's original decisions.

The Courts ruled in favour of the Commission on the vast majority of issues, and we have now been through a successful reset in December last year without appeal on any of the decisions made.

This is not to say our IMs decisions are perfect. But we have passed through the establishment phase and the regime is now bedding in.

The increasing stability of this regime means that lines companies, for example, are better equipped to think long term about how they can best meet consumer needs.

Our December decisions have already flowed through to the price paths announced for gas distribution and transmission businesses in May this year.

They will next be put to use when we take a look at Auckland and Christchurch airports' pricing decisions later this year.

Recent consumer and credit work streams

In terms of our consumer protection work, we have seen a tangible increase in the number of cases going to court over the past two years.

Over the past two financial years we have filed 38 cases in court under the Fair Trading and Credit Contract and Consumer Finance Acts. This compares to 10 prosecutions filed in the two years prior to that.

Much of this litigation work has stemmed from our focus on mobile traders – more commonly known as truck shops.

We have now prosecuted 13 truck shop operators leading to fines totalling nearly $900,000 to date, with one individual also being imprisoned.

In our Fair Trading Act cases, we have prosecuted a breadth of behaviour ranging from misleading marketing campaigns and false labelling claims to misrepresentations about building products and the origins of bee pollen.

Of particular concern is that a number of our cases continue to involve large, prominent businesses that should have compliance processes in place that ensure they don't commit serious breaches.

The increasing size of the fines that the Court is handing down, and the resulting negative publicity, should hopefully now be sending a message that being found in breach of the Fair Trading Act isn't just a cost of doing business.

Recent Competition Developments

Cartels and mergers have been central to our competition law activities in recent times.

Two recent Commerce Act cases in the real estate and livestock markets have highlighted our ongoing concerns with the ability of cartel conduct to arise from industry gatherings.

We have even seen a recent example where a plumber left feedback on an online marketplace website that links consumers with tradespeople such as plumbers complaining that they were charging low hourly rates, and warning that this would be raised for discussion at an industry association meeting.

That anyone still thinks price-fixing is an acceptable business practice means there is still work required to educate businesses on the most basic anti-competitive behaviours.

Peaks in the flow of merger cases occur from time to time. Over the last year we have faced particularly high demands with a number of major complex merger cases. These cases – in particular Vodafone/Sky and NZME/Fairfax – have been amongst the most challenging we have had to face.

Priorities for 2017/18

Last year we released our new organisational strategy and within that we noted we would begin publishing our priorities each year.

Today marks that first such occasion.

Our first priority focus area for this year is one we are focusing on across both our consumer and regulatory work - retail telecommunications.

This sector affects nearly every New Zealander and as a result continues to be the most complained about.

We have established a project team to understand what behaviours are driving complaints and the indications are that the sector has not learned from past prosecutions.

Consumer

In our consumer area we will continue to prioritise any issues that could cause significant harm to consumers.

These include some enduring priorities such as building material representations and product safety standards.

But there are also two specific areas we will be focussing on this year in our consumer work.

Firstly, we will look at credence claims.

It is difficult for consumers to verify claims made about a product, and therefore it is easy for them to be misled.

In particular, we will be paying attention to food products and country of origin claims.

Health or ethical claims are gaining an increasing share of the food market and there are large profits to be made by claiming exaggerated health or wellness benefits or attributes, such as organic or free range.

The second area is responsible lending.

To date, much of our credit work has focused on disclosure provisions.

However, our own intel suggests that some lenders are continuing to provide finance to consumers without the necessary checks in place to ensure these borrowers are capable of meeting their repayment obligations.

Within this, we will be taking a close look at the emergence of online lenders.

Competition

Our priorities in terms of our Commerce Act responsibilities largely remain the same.

We will continue to prioritise cartel cases and other anti-competitive conduct, and explore new ways of educating businesses and industry associations on their obligations.

One change we intend to make is with regard to the transparency of our merger clearance application processes.

It is our view that we should proactively publish both Letters of Issues and Letters of Unresolved Issues for every clearance application where we send one.

Confidential information would of course be redacted, but it is important that market participants and interested observers are able to see what issues we are seeking further information on so they have an opportunity to make, and we have the opportunity to receive, any relevant submissions.

In most cases we do not consider there are legitimate reasons to withhold these letters, considering the public interest that exists in our ability to determine the effects of a merger.

Separately, we also intend to publish a record of section 47 investigations on our website as they are opened.

This would ensure that the public and market are made aware of any investigations into potential anti-competitive transactions that have not been exposed to scrutiny under the clearance regime. We may also in appropriate cases publish a Statement of Issues where we are seeking relevant information from third parties to inform such investigations.

Regulation

Lastly, in our regulation work we have some significant projects that will dominate the next year.

The most prominent of these is assessing and deciding on Powerco's proposal to invest $1.32 billion in its network under a customised price path.

This is only the second CPP we have received, after Orion required one following the Christchurch earthquakes.

Internally, we also want to improve our understanding of investment levels and associated incentives in the electricity sector.

We intend to explore how to provide the data we receive in a more useable format for stakeholders and the public, alongside more general insights about the performance of regulated suppliers, including the airports.

In many respects regulated entities do not always come under the same scrutiny as other businesses due to the technical nature of the information that is publically available on their performance.

We have already taken a first step of releasing performance summaries of the 29 electricity distributors in New Zealand and the next logical step is to do the same for gas pipeline businesses.

Shining sunlight on these key performance indicators makes them more accessible to the media and general public and raises awareness of how these important infrastructure networks are being managed. This, in turn, we believe will help improve the overall performance of these regulated businesses.

Lastly we will continue to support the review of the Telecommunications Act which is likely to introduce a new regime that we will be required to implement.

Conclusion

So, with that said please take the opportunity to discuss these priorities with Commission staff over the next two days. Your feedback is welcome.

Thank you once again for joining us. I trust you will enjoy the stimulating presentations and panel discussions to come.