International developments

From New Zealand

New Zealand's Commerce Commission enforces both the Commerce Act 1986, which contains restrictive trade practices provisions, and the Fair Trading Act 1986, which deals with consumer protection matters.

The following are extracts from the Commerce Commission's newsletters Compliance *(December 1997) and* Fair's Fair *(January 1998), and from Commerce Commission media releases.*

Chairman appointed to Treasury post

Commission Chairman Dr Alan Bollard has resigned from the Commission to take up the position of Secretary of the Treasury.

Deputy Chairman Peter Allport is Acting Chairman from 1 February 1998. The appointment of a new Chairman will be made by the Governor General on advice from the Minister of Commerce.

Competition in the electricity industry

The following are extracts from a speech given by Dr Bollard to an electricity industry conference in Wellington on 19 November 1997.

New Zealand's approach to the regulation of electricity utilities is called 'light handed' regulation. This means an amalgam of the enactment of the Commerce Act, information disclosure and the threat of price control. To some familiar with the costs of the heavier forms of regulation by industry-specific bodies and with the compliance costs visited upon regulated firms, light handed regulation may seem to offer an attractive, less economically distortionary, alternative. However, others may believe that the approach involves regulation that is too light handed, with the result that firms with market power operate without sufficient restraint, to the detriment of consumers and efficient production. The Commission's view is that although there are some unresolved difficulties in light handed regulation which could be addressed, the policy, nevertheless, has had important successes for the economy.

The Commission believes that deregulation of the industry has resulted in important advances for the economy. It further believes that there is a broad degree of understanding and compliance with the Commerce Act, and that the efforts the Commission and others are putting into promoting competition in the electricity retail markets will bring desirable incentives to power companies to reduce costs and lower prices to consumers. However, I should point out that, even given the success of these efforts, there remains the obvious point that the distribution of electricity is a natural monopoly. The owner of the lines will remain in a monopolistic position even if, for example, the retail side of its business is split off or ring fenced in some way. I consider that it is the lack of competition in the line business which has created greatest potential for consumer harm in the past, and that future reforms which might be introduced, will only ameliorate that situation to an extent, not cure it. Given the natural monopoly, there can never be a perfect competitive outcome. However, the real issue is the comparison between the competitive process and efficiencies obtained under the Commerce Act and those under the heavy

handed regimes existing in other countries with similar economies.

Court action in the health sector

The Commerce Commission instituted court action on 18 December 1997 against the Ophthalmological Society of New Zealand and five ophthalmologists, alleging anti-competitive collusion.

In 1996 Southern Health CHE received extra government funding for an additional 225 cataract operations to be performed. It sought to have Australian ophthalmologists perform the operations.

The Commission alleges that the Society and the New Zealand ophthalmologists colluded to ensure that the Australian ophthalmologists did not carry out the operations. It also alleges that one of the New Zealand ophthalmologists, aided and abetted by others, used his dominant position in a market to prevent the Australian ophthalmologists from performing the operations.

This is the first time since the health sector was deregulated in 1993 that the Commission has taken court action against a medical group.

Interest free offers

In recent settlements, two companies agreed to change their advertising of interest free offers.

Agmark offered '0% interest' and 'no interest' on some lines of farming equipment in advertisements in farming magazines and its own brochure. The advertisements also invited cash buyers to discuss cash deals, in effect offering a lower cash price.

When Geoff's Furniture World advertised an 'interest free' hire purchase offer, customers who asked the cash price of three items were told that the total would be 20 per cent less than the interest free price.

Courts have ruled in several cases that it is a breach of the Fair Trading Act to describe an offer as 'interest free' if a lower cash price is offered, and that such offers constitute a false or misleading claim in breach of the Act. The Commission considers that the difference between the cash price and the offered interest free price is, in effect, the interest. In the Commission's view, the interest free price must be the same as the cash price.

Government Purchasing Index

The Commission has warned GPI Press Limited that it risks breaching the Fair Trading Act by making misleading claims that the Government Purchasing Index has government approval.

In the Commission's opinion, forms sent out for registration with the index were misleading because they gave the impression that the index was either a government publication or that it had government approval.

Government Purchasing Index is a privately established business, similar to the yellow pages. The Commission has warned businesses that registering with the index will not increase their chances of winning work from government organisations.

Trade associations warned not to discuss pricing

The Commerce Commission has warned all trade associations not to discuss pricing issues, following an investigation into an arrangement between the Retail Merchants Association (RMA), Foodstuffs (NZ) Ltd and the National Association of Retail Grocers and Supermarkets of New Zealand (NARGON) concerning a price moratorium over the Christmas period.

The arrangement gave rise to the expectation that during the Christmas period suppliers to the retail grocery trade would not change wholesale prices or launch new products.

The Commission has no concern with such arrangements being discussed independently between a retailer and a supplier. Its concern is with arrangements reached jointly by retailers who compete with each other, which is prohibited by the Commerce Act.

The members of the RMA and NARGON and Foodstuffs cooperated fully with the

Commission and gave an assurance that similar arrangements would not occur in the future. The Commission does not intend to take court action against any members of the associations or Foodstuffs.

Although this arrangement may have had no effect on consumers it highlighted a concern that the Commission has about all trade associations. They are a venue for competitors to meet and discuss industry issues — the Commission is concerned that they do not become a venue for price fixing or any other anti-competitive behaviour.

The Commission warned that if an association enters into such an arrangement, under the Act all the members are considered to have entered into the arrangement.

Southpower electricity

On 5 March 1997 the Commerce Commission filed a statement of claim in the High Court alleging that Southpower, a Christchurch-based power company, had breached the Commerce Act by impeding competition for electricity consumers in its region.

Southpower challenged the statement of claim in the Court of Appeal, applying to have some allegations struck out and seeking more detail in others. The Court of Appeal rejected Southpower's arguments and dismissed its application.

The trial is due to start on 22 June 1998 in the Christchurch High Court and is allocated six weeks.

From the USA

The following is based on a Federal Trade Commission (FTC) media release dated 1 December 1997.

Review of 'Made in USA' claims in advertising and labelling

The FTC has decided to retain the 'all or virtually all' standard in assessing whether US origin claims are deceptive. The FTC's conclusion follows a two-year review of the use of 'Made in USA' and other US origin claims in product advertising and labelling.

In May 1997 the FTC offered for public comment a new 'substantially all' standard for evaluating 'Made in USA' claims. The majority of responses supported the continued use of the 'all or virtually all' standard.

The FTC had questioned whether in the global economy consumers would expect a product labelled 'Made in USA' to contain more than a small amount of foreign content. Jodie Bernstein, Director of the Bureau of Consumer Protection, commented:

> The record, in particular the overwhelming response to our request for public comment on the proposed 'substantially all' standard, convinced us that when consumers see a 'Made in USA' label, they expect and want it to mean just that ... We believe the Commission's review is an example of how public process does inform and determine good public policy.

The FTC also issued an Enforcement Policy Statement which outlines the factors the FTC will consider in determining whether a US origin claim is deceptive. It elaborates on principles set out in specific examples and advisory opinions previously issued. For example:

> When a marketer makes an unqualified claim that a product is 'Made in USA', it should, at the time the representation is made, possess and rely upon a reasonable basis that the product is in fact all or virtually all made in the United States.

> Product that is all or virtually all made in the United States will ordinarily be one in which all significant parts and processing that go into the product are of US origin. In other words, where a product is labelled with an unqualified 'Made in USA' claim, it should contain only a *de minimis*, or negligible, amount of foreign content.

Marketers will be able to continue to make qualified US origin claims such as 'Made in USA of US and imported parts' and '80% Made in USA'.

The FTC's 'Made in USA' policy applies to all products advertised or sold in the United States except for those governed by specific legislation. For example, country of origin labelling of clothing is generally governed by the Textile Act.

Commissioner Roscoe B. Starek commented:

> This policy statement ... wisely confines the Commission's guidance to general principles and ... leaves for case-by-case resolution more complex issues that may turn on variations in claims and products.

From Canada

The following items are extracts from media releases of the Competition Bureau in Canada.

Canada–US working group on telemarketing fraud

Telemarketing fraud has become one of the most pervasive forms of white collar crime in Canada and the United States, with billions of dollars of losses annually in both countries. Fraudulent telemarketers often target the elderly, although all age groups have fallen victim to their practices.

Telemarketing fraud is the use of telephones to deprive consumers dishonestly of money or property or to misrepresent the value of goods or services.

On 20 November 1997 the Canada–US working group on telemarketing fraud submitted its report to the Canadian Prime Minister and the US President. The report examined a number of areas in which legislative changes or administrative arrangements could be used to control the problem in both countries.

The report noted that the long distances and multiple jurisdictions involved in many cases highlighted the need for effective cooperation among the governments and agencies involved, as well as the private sector.

Some of the concerns expressed included the need for effective powers of investigation, the need for federal coordination when an offence involves many provinces or states, and the need for powers to deprive fraudulent telemarketers of the tools they need to commit offences.

The key recommendations of the working group were that:

- the governments of both countries clearly identify telemarketing fraud as a serious crime;
- both countries explore the use of remote testimony in criminal proceedings, by video-conferencing or similar means, to reduce costs;
- the legal and technical potential and limits of electronic surveillance as a tool against telemarketing fraud be examined further;
- both governments examine the regulation of telephone services and options for denying telephone services to telemarketing offenders;
- the scope of the existing mutual legal assistance arrangements be considered to determine whether they might be expanded to deal more effectively with telemarketing fraud cases;
- both governments clarify the circumstances under which mutual legal assistance requests are needed, by providing information and advice to the agencies involved;

- extradition arrangements be examined, and if possible modified, to facilitate and accelerate extradition in telemarketing fraud cases;
- federal deportation laws which might apply to foreign nationals engaging in telemarketing fraud be reviewed, and that enforcement agencies be given information about when deportation may be an option;
- research be conducted into offenders, victims and other aspects of telemarketing fraud to create effective educational materials and strategies to prevent it;
- governments and agencies cooperate as closely as possible in developing, maintaining and disseminating educational materials, and in coordinating education and prevention efforts;
- strategies to control telemarketing fraud be coordinated between Canada and the United States at the agency, regional and national levels;
- an ongoing binational working group serve as an overall coordinator and deal with national and binational telemarketing fraud issues as they arise;
- regional task forces be encouraged to cooperate across the international border to the maximum extent possible; and
- to further coordination, governments and agencies examine privacy and other laws relevant to cross-border shared access information systems with a view to expanding access to such systems to the maximum extent possible.

Amendments to the Competition Act

On 20 November 1997 Industry Minister John Manley introduced several amendments to the Competition Act to Parliament, to better protect consumers from telemarketing fraud. The amendments will provide more effective tools for competition law enforcement and help address the concerns of Canada and the United States about the growing problem of cross-border telemarketing fraud.

The proposed amendments would:

- provide for a new criminal offence for deceptive telemarketing;
- provide for stricter disclosure requirements to help consumers distinguish between legitimate telemarketers and scams;
- provide quicker and more effective resolution of misleading advertising and deceptive marketing practices through the use of civil rather than criminal law provisions;
- revise and clarify the law regarding ordinary price claims by retailers;
- allow judicially authorised interception, without consent, of private communications as an investigative tool, to tackle the most serious cases involving price fixing, bid rigging and deceptive telemarketing;
- improve the administration of the merger prenotification process, while reducing the regulatory burden on business; and
- expand the tools available to the courts to address criminal conduct through consent resolutions and directive orders following convictions.

Electrical contractors to pay $2.55 million for bid rigging

On 19 December 1997 in the General Division of the Ontario Court, Toronto, four Toronto electrical contractors pleaded guilty to bid rigging and were fined $2.55 million. The four companies have also taken steps to implement internal compliance programs.

The charges follow an extensive criminal investigation by the Competition Bureau into a scheme designed to create the illusion of competitive pricing. The scheme was conducted by 948099 Ontario Inc. (trading as Plan Electric Co.), Ainsworth Inc., Guild Electric Limited and The State Group Limited between 1988 and 1993.

The tenders which the companies were convicted of rigging affected electrical contracts for the renovation of commercial space, including certain leasehold improvements at Pearson Airport's Terminal III, as well as major construction projects.

The Bureau's investigation into allegations of bid rigging by other electrical contractors, and related conduct by a general contractor, in the metropolitan Toronto area continues.

The Competition Bureau offers an education program to assist companies that use the tendering process to detect and prevent bid rigging, and also to educate bidders to ensure that they comply with the Act.

From the OECD

The OECD will shortly publish a free newsletter which will describe recent events involving the Competition Policy Committee and its working parties, such as mini round tables and conferences, as well as the outreach work of the secretariat.

Competition Law and Policy Newsletter is relevant to lawyers, economists, academics, members of the judiciary and journalists interested in competition matters.

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