



COMMUNIQUE

THE YEAR IN REVIEW 2009/10

NOVEMBER 2010

AT A GLANCE

- Achieved a record consumer compensation payout of \$45 million for ANZN/ING investors
- Secured benefits for consumers and retailers through credit card interchange fee settlement
- Completed a record number of cartel investigations
- Progressed input methodologies to be applied to electricity lines businesses, gas pipeline services and airports
- Achieved \$1.6 million in compensation for wholesale competitors affected by Telecom's wholesale discount 'loyalty offers' for certain broadband services
- Received around 11,500 complaints and enquiries into our contact centre
- Published guidelines on failing firms, mergers and acquisitions, divestment remedies, and revised draft guidelines on credit fees
- Launched a new, more user-friendly website
- Received a record low number of merger clearance applications
- Surveyed consumers and businesses to find out what they think of us
- Restructured the organisation to better reflect our core areas of activity
- Spent approximately \$4.6 million less than budget

COMPETITIVE MARKETS

The Commission continued to prioritise work on cartels this year, completing a record number of coordinated behaviour investigations and bringing to a close some longstanding cases.

Successes included reaching an out-of-court settlement in the Visa and MasterCard credit card interchange fees case, which was a world first on this issue. Another success was our investigation into exclusive royalty arrangements between owners of music copyright and Phonographic Performance NZ Limited. It resulted in Sony, Warner, EMI and Universal all agreeing to amend the royalty agreements that had previously restricted direct negotiations between buyers and the owners of copyright music.

As anticipated, we experienced a downturn in merger activity during the year, which was only starting to pick up again by financial year end. This enabled us to transfer resource to progress work in other areas, particularly cartel investigations and some Fair Trading Act cases. We were also able to focus on developing guidelines on merger divestment and failing firms and an updated cartel leniency policy.

Communique has changed. The Commission will now produce this publication twice a year to coincide with the release of our Annual Report and Statement of Intent, providing an easily digestible overview of the Commission's work.

CASE STUDY

SETTLEMENTS USHER IN NEW COMPETITIVE LANDSCAPE FOR CREDIT CARD INDUSTRY



Savings to retailers in the order of \$70 to \$80 million over the next three years are expected as a result of settlements achieved as part of our ground-breaking settlement on credit card interchange fees.

We reached out of court agreements with Visa, Mastercard and seven financial institutions settling claims that the parties breached the Commerce Act by agreeing and implementing the Visa and MasterCard credit card scheme rules in New Zealand. We alleged that the rules substantially lessened competition by artificially inflating the cost to retailers of accepting credit cards and ultimately raising prices paid by all consumers.

The settlements represent an important spur to competition in credit card payment services, ensuring interchange fees remain transparent and open to competitive forces. Immediate downward pressure on those fees should ultimately be passed on to consumers through lower retail prices.

"Visa Inc. today commended the New Zealand Commerce Commission on its agreement to step back from litigation in favour of a cooperative settlement agreement that is based on market dynamics." Visa media statement

SOUND REGULATORY REGIMES

TELECOMMUNICATIONS

The Commission plays an active role in ensuring barriers to competition in telecommunication markets are reduced, and consumers benefit from better service, prices and choice. Each year we analyse the state of New Zealand telecommunications markets through our annual monitoring report. Our report for 2009 showed that competition in all telecommunications markets has increased since 2006 with broadband uptake doubling and total sector investment increasing from \$0.9 billion in 2005/06 to \$1.7 billion in 2008/09.

In our view, regulatory intervention should be scaled back in areas where it is no longer necessary to promote competition, and regulation should not impose or maintain burdens that are unnecessary. To that end, we commenced an investigation into whether resale services could be deregulated and also commenced reviews of the competition conditions for the Unbundled Bitstream Access (UBA) service, and the Unbundled Copper Local Loop and UBA backhaul services.

We completed a number of other significant pieces of work during the year including an investigation into Mobile Termination Access Services, an analysis of Telecom's first set of regulatory accounts, and the backlog of telecommunications service obligation (TSO) determinations. We also provided advice and input into a number of government initiatives.

Following an investigation into the wholesale discount 'loyalty offers' for certain broadband services, we negotiated an out of court settlement with Telecom, which involved the payment of \$1.6 million compensation to affected competitors. We considered that the breaches had the potential to seriously harm competition in telecommunications markets and undermine or deter efficient investment in telecommunications infrastructure.

ELECTRICITY, GAS AND AIRPORTS

Part 4 of the Commerce Act regulates suppliers of electricity lines services, gas pipeline services and certain services supplied at Auckland, Wellington and Christchurch international airports, promoting outcomes consistent with those in workably competitive markets. Implementing the new requirements introduced in 2008 remains an area of priority.

We achieved some key milestones during the year, including publication of the draft decisions and reasons on both the input methodologies and the application of individual price-quality regulation to Transpower. We also released the Information Disclosure (Airport Services) draft reasons paper and draft disclosure determination.

In November 2009 we met our first statutory deadline under Part 4 when we reset the default price-quality path to apply to electricity distribution businesses from 1 April 2010.

We are on track to implement the new regime in accordance with the statutory deadlines.

CASE STUDY

A MORE CONSULTATIVE APPROACH TO REGULATION

The requirement to develop input methodologies is one of the key changes to the Commission's regulatory responsibilities under the Commerce Amendment Act 2008. Input methodologies promote certainty for suppliers and consumers of regulated services in relation to the rules, requirements and processes applying under the regulation.

Over the last year, our work on input methodologies has been enhanced by taking a much more consultative approach to their development. We've held a number of conferences and workshops on proposals for input methodologies specific to each regulated service and encouraged interested parties to present their views.

These forums have enabled more in-depth engagement on detailed technical issues and will result in a more robust outcome for the sectors and ultimately consumers.

"...on behalf of the industry, we've certainly appreciated this conference and the way it's been conducted. I think it's been incredibly open and people have felt free to express their views relatively uninhibited, and (it) actually goes a huge way to providing confidence and credibility in the regime, so we thank you for that."

Nathan Strong, (then) Manager, Regulatory Affairs for Vector speaking at the September 2009 Input Methodologies Conference

DAIRY



The Commission plays a key role in facilitating workably competitive dairy markets in New Zealand through administering the Dairy Industry Restructuring Act 2001.

Alongside our regular monitoring and screening activity and submissions to government on upcoming legislative changes, we have been progressing two separate applications to determine the level of compensation payable to The Grate Kiwi Cheese Company Limited and Kaimai Cheese Company Limited in relation to our 2009 determination that Fonterra had been in breach of its supply obligation under the Dairy Industry Restructuring (Raw Milk) Regulations 2001.

Parallel to this, in February 2010 the High Court issued its decision in Fonterra's appeal of this determination, agreeing that Grate Kiwi and Kaimai were independent processors for the purposes of the Regulations, and Fonterra was obliged to supply them with raw milk. Fonterra has appealed this decision.

I love the complexity of the work at the Commission.

ENHANCING ORGANISATIONAL CAPABILITY AND PERFORMANCE

Organisation structure is an important foundation of effective organisation performance and in 2009/10 we reorganised our business around our core areas of activity: enforcement and regulation. Our legal and economic expertise now lies within each of these functional branches. We are still recruiting for the new Chief Economists in Regulation and Enforcement. However, we can introduce the two new General Counsels.



MARY-ANNE BORROWDALE

GENERAL COUNSEL, ENFORCEMENT

Mary-Anne joined the Commission as senior legal counsel in 2005 having worked in commercial litigation for private law firms for around a decade.

What attracted you to the job?

I've taken the chance to progress to the new General Counsel role because I love the complexity of the work at the Commission; the collegiality of working across disciplines; the challenges of persuading within the organisation, as well as externally with the courts; and the chance to work alongside – and against – some of New Zealand's best lawyers.

What has been your career highlight so far?

One case stands out: the Woolworths/Foodstuffs v Commerce Commission 2007/08 merger appeal. It had it all: tough issues, complex economic evidence, great urgency, multiple parties opposing us, strong public interest, novel legal arguments and working opposite leading competition law counsel. We lost the case in the High Court, then had to change counsel and begin almost afresh with our legal arguments for the Supreme Court. The final result, in our favour, was a real triumph of teamwork, and a great example of how the Commission can accomplish good results on a slenderer budget than its opposition.

What are the challenges ahead in your area of work?

In the short term, it is integrating the enforcement lawyers into the wider Enforcement Branch. In the slightly longer term, continuing, where appropriate, to pursue alternatives to litigation to achieve the best possible outcomes for New Zealanders.



ROB BERNAU

GENERAL COUNSEL, REGULATION

Rob Bernau has recently joined the Commission after almost a decade at New Zealand Post, most recently as Manager, Network Access and Regulatory.

What attracted you to the job?

This role contains some of the things I really care about in a job – working in industries that make a real difference to New Zealanders, on challenging issues, and with really good people. I've also seen change in the Commission's approach in recent times, with a real effort to engage more deeply with industry. That approach really appeals to me.

What has been your career highlight so far?

The work I enjoyed most recently was proposing a new decision making framework for access to New Zealand Post's postal network. It was really interesting to build a practical framework from scratch and then incorporate a range of industry feedback. While I'm no longer working in that industry, I'll remain a very interested observer.

What are the challenges ahead in your area of work?

In telecommunications, the challenge is keeping up with changing technology and investments, particularly in light of the ultra-fast broadband initiative. We need to be open-minded and nimble when faced with that level of change.

For the electricity, gas and airports work, the challenge is creating certainty within a new regulatory framework, balancing the need to encourage efficient investment with good pricing and service outcomes for consumers.



SUE BEGG

THE COMMISSION'S NEW DEPUTY CHAIR

In July this year, the Minister of Commerce announced the appointment of Sue Begg as Deputy Chair of the Commission. Sue has been with the Commission as a Member since June 2009.

In announcing the appointment Minister Power commented that since her appointment to the Commission Sue had "proven herself with her leadership and analytical skills".

Sue is an economist, and was no stranger to the Commerce Commission, having previously provided advice to the Commission as a consultant from 2002 until 2005 on the development of the Part 4A threshold regime and the Gas Control Inquiry. You can read more of Sue's biography at:

www.comcom.govt.nz/commission-members

Having had a few months now to settle into the Deputy Chair role, Communicate catches up with Sue.

What attracted you to the role at the Commerce Commission?

The opportunity to work on the new Part 4 (Commerce Act) regime was the main attraction. The work is very interesting, important and intellectually challenging. It was a good match with my skills, given that I have previously worked as a consultant to the Commission in the regulatory area, and subsequently for some of the businesses that were previously regulated under Part 4A. It presented an opportunity to be fully involved in the development of the regime.

What progress have you made since you started in the role?

The Commission has achieved an enormous amount so far, in progressing what has been the difficult and complex process of developing the Part 4 regime. We are now on the home straight in terms of completing the first tranche of work.

What are your top priorities for 2010/2011?

Completing the input methodologies final determinations by Christmas has my total focus at this time. Then into early next year we have a lot of work to do setting the starting price adjustments for the regulated electricity and gas businesses, and refining aspects of the regime. We will also need to set the capital expenditure input methodology for Transpower, and take over the job of approving Transpower's grid upgrade plans.

What has been the highlight of your career so far?

Early in my career at Treasury I was involved in the floating of the exchange rate – that was a landmark moment. Setting up my economic consulting business was both a challenging and satisfying step for me.

What do you do to maintain work/life balance?

Over the years I have been fortunate to be able to juggle part-time work and running my own business with raising children. Since joining the Commission I have put my consulting business on hold, so there is still time to enjoy life outside work. In my personal time you will find me at the movies, spending time outdoors, or consuming the wonderful coffee that's so abundant in Wellington's cafes.

INFORMED CONSUMERS

We continue to focus on achieving the best possible outcomes for consumers and this year returned almost \$64 million dollars in compensation to consumers for proven or likely breaches of the Fair Trading Act and the Credit Contracts and Consumer Finance Act (CCCF Act).

Consumers benefited from a number of actions, including a record consumer compensation settlement with ANZN and ING, a \$500,000 fine against Telecom for misleading customers about its Go Large broadband plan, and a settlement securing \$9.5 million in refunds for Telecom and Xtra's broadband customers in relation to misleading representations.

We also acted to protect the \$500,000 paid by consumers for tickets to the failed Wings and Wheels over Waikato airshow, and cooperated with the Police to achieve both Fair Trading and Crimes Act convictions against the airshow's organiser.

Our low level inquiry unit enabled us to achieve quick results in numerous straightforward Fair Trading Act matters, while also educating businesses about compliance.

To help improve compliance with the Fair Trading Act, we produced a training DVD, provided guidelines to businesses via our new website, and further developed our outreach programme holding face-to-face industry meetings including in the telecommunications and financial services sectors. Following industry consultation, we also published revised draft Guidelines for Credit Fees under the CCCF Act, aimed at providing creditors with guidance on complying with the legislation.

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CASE STUDY

RECORD CONSUMER COMPENSATION ACHIEVED IN ANZ/ING CASE

Thousands of New Zealanders who invested in funds marketed by ING (NZ) Limited and ANZ National Bank Limited are being compensated for their losses as a result of our largest monetary settlement to date.

The Commission secured \$45 million from ING and ANZN following an investigation into alleged breaches of the Fair Trading Act relating to the marketing and promotion of ING's Diversified Yield Fund and the Regular Income Fund. The funds were frozen in March 2008 affecting around 15,000 investors.

While there was sufficient evidence to commence proceedings under the Fair Trading Act, we believed a settlement served the best interests of New Zealand consumers, avoiding the significant delay, cost and risk that a court case would represent.

Under the terms of the settlement, ANZN is distributing the \$45 million to eligible investors. Just under 80 per cent of eligible investors will receive an additional payment ranging from \$100 to as high as \$247,600. Through these payments, and other remedies investors may already have received, investors will receive approximately 96 per cent of their capital back.



"The Frozen Funds Group wholeheartedly commends the Commerce Commission for the dedicated and courageous work. The Commission revealed the truth."

Frozen Funds Group newsletter

INCREASING AWARENESS

An important aspect of our role is to promote awareness and understanding of the legislation we enforce. During the year, we undertook research to gain a greater understanding of perceptions about the Commission and our work. The research involved a telephone survey of 350 businesses and 500 members of the general public and an analysis of three months of media coverage.

The Commission enjoys a very high profile. The general public and businesses know who we are – 83 per cent of the general public and 94 per cent of businesses have heard of the Commission – in large part due to our high media profile.

But there are a lot of misconceptions about our role. Around half the general public surveyed and a third of businesses think we vet and approve advertising and one in two members of the public believes we regulate retail pricing, both well beyond the scope of our role.

Regardless of this, around 60 per cent of both public and business surveyed think we are doing a good job and have full trust and confidence in us. Only five per cent of media coverage was unfavourable.

Perhaps more concerning in terms of our effectiveness is the business sector's lack of understanding of how our work applies to them. Of those businesses who are aware of the Commerce Commission, 83 per cent believe that the Fair Trading Act applies to their business, but only 58 per cent believe the Commerce Act applies to them. (Tip – both Acts apply to ALL businesses.) This results in low levels of compliance programmes and staff training in organisations – something we want to change.

The research provides a reality check for us and, importantly, a baseline for improvement.

WEBSITE

Responding to the needs of our stakeholders, who told us our old website was difficult to navigate and cluttered, we launched a new website in April 2010. The new site has an easier to follow structure, a search function that works, and a lot of new user-friendly content that replaces out of date publications. We also now have RSS feeds for some areas, and a better online complaints form. Feedback from users of the site has been resoundingly positive.

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FINANCIAL PERFORMANCE

The Commission carefully managed its costs this year, with total operating expenditure approximately \$4.6 million below budget, and \$1.1 million below expenditure for last year. Cost savings were achieved largely due to a downturn in merger applications, with savings also in our litigation approach. We finished the year repaying a surplus to the Crown of \$3.7 million, and transferring \$3.6 million into reserves to manage future risks. This is important in a time of fiscal constraint.

STOP PRESS

COMMERCE COMMISSION ANNOUNCES NEW CEO

The Commerce Commission is very pleased to announce the appointment of Brent Alderton as the new CEO from 1 January 2011. He replaces Nicholas Hill who is leaving the Commission at the end of this year to pursue a new opportunity in Auckland.

Brent Alderton is currently the Commission's General Manager, Regulation, leading our work on developing the Part 4 (Commerce Act) regime and delivering the telecommunications work programme.

His bio can be read on the Commission's website at www.comcom.govt.nz/senior-leadership-team

Brent will be profiled in a future edition of *Communique*.