

MATTHEWS LAW

NEWSLETTER



THIS ISSUE

Key recent developments shaping competition and regulatory settings for businesses

including:

- The Commerce Commission declines the Foodstuffs merger
- Guilty pleas entered in first criminal cartel case
- The final report in the Banking market study
- Work towards a consumer data right
- The establishment of the Energy Competition Taskforce
- The Commission's first annual Grocery Report

FOREWORD



Workable and effective competition is a key driver for the economy. Over the last quarter, there have been a number of developments that showcase both competition enforcement working well and not so well. The electricity and grocery sectors have been a focus this quarter, with measures being taken by the Commerce Commission and Electricity Authority to address the perceived lack of competitiveness within these industries.

KEY TAKEAWAYS



Looking forward, our key messages for clients arising from these recent developments are:

- Demand side market power is receiving increasing scrutiny as part of merger control processes in New Zealand and internationally.
- The Commerce Commission has updated its enforcement response guidelines and has been active in enforcement activity, resulting in the first criminal conviction for cartel conduct, a \$2.47 million penalty under the CCCFA for “unreasonable fees” and a \$3.25 million fine for anti-competitive land covenants.
- The Consumer Data Right bill is progressing through the legislative process and will play a key part in implementing recommendations to make the banking and electricity sectors more competitive.

- from the Matthews Law team

MERGER CONTROL

KEY UPDATES

FOODSTUFFS MERGER - CLEARANCE DECLINED

On 1 October 2024, the Commerce Commission declined Foodstuffs North Island's application for clearance to merge with Foodstuffs South Island. This is the first merger the Commerce Commission has declined based on buyer power/demand-side concerns. In particular, the Commission was concerned the merger would:

- Lead to an increase in buyer power, negatively impacting suppliers;
- Decrease the ability of grocery retailers to compete and grow;
- Make it easier for the merged entity and Woolworths to continue to coordinate on prices.

Matthews Law supported NZFGC with its submissions successfully opposing the merger.

PROPOSED REVIEW OF THE MERGER AND ACQUISITION GUIDELINES

The Commerce Commission's Mergers and Acquisitions Guidelines (MAGs) help parties considering a proposed transaction understand the key concerns the Commerce Commission may have and how the Commission will approach a clearance or authorisation application.

The Commission is in the process of reviewing its MAGs and Matthews Law made submissions outlining areas that we would like to see considered during the review and forming part of the updated MAGs. These included:

- Seeking additional guidance on how the Commission will consider demand-side market power, given the increasing focus internationally on this issue.
- Suggesting further clarity be provided on concentration indicators, and whether the current concentration indicators are fit for purpose or if there are other measures that may be more useful.
- Suggesting the Commission adopt a de minimis threshold, consistent with international best practice.
- Providing comment on the current process issues that parties are experiencing with the Commission's processes and ways in which the process could be improved.

Our full submission is available to view on our [website](#).

AUSTRALIA - PROPOSED NOTIFICATION THRESHOLDS

On 30 August 2024 the Australian Treasury proposed new mandatory notification thresholds as part of M&A reforms. This would require an acquisition to be notified to the ACCC if

- It has a material connection to Australia (e.g. being registered or located in AU, supplying goods or services to AU customers, or generating revenue in AU); AND
- either the monetary or market concentration thresholds are met; OR
- The Treasury Minister determines it a 'high-risk' acquisition and therefore notifiable.

This is relevant to larger NZ businesses with an Australian presence. There's risk of "regulatory contagion" to NZ but such change seems unnecessary here.

CARTELS



GUILTY PLEAS

The first guilty pleas for cartel conduct were entered on 19 September 2024, following the first criminal proceedings commenced by the Commerce Commission for cartel conduct at the end of last year. This proceeding related to bid rigging in the construction sector. One company and its director entered the guilty pleas, and a trial has been set for October 2025 for the other two defendants.

ENFORCEMENT RESPONSE GUIDELINES

The Commission recently updated its [Enforcement Response Guidelines](#). These set out how the Commission “enforces the laws [it is] responsible for” and are helpful to understand how the Commission will approach enforcement issues.

The changes are generally minor updates, but interesting takeaways include:

- An increased focus on the impact of enforcement action on individuals and the need to taking into account personal/professional hardships and the circumstances of the individual. We know that investigations can be stressful for those involved (particularly now given the potential for criminal punishments) so we welcome this change to the Enforcement Response Guidelines.
- Encouragement of self-reporting, and this being a factor that the Commission will consider in deciding what enforcement action to take.
- More detail about the consideration of what will be (or will not be) published.
- Comment that payment of compensation, while a factor to be considered, will not prevent enforcement action being taken.

BANKING



BANKING MARKET STUDY

On 20 August 2024, the Commerce Commission published its final report for the market study into personal banking services.

The Commission has made the following recommendations:

- **Capitalise Kiwibank** – capitalising Kiwibank appears to have the greatest potential to constrain the major banks and disrupt the lack of competition.
- **Accelerate and co-ordinate progress on open banking** – through commitments by the Industry and Government to ensuring open banking is fully operational by June 2026 and the Government should show support with an ‘all-of-government approach’ to being an early adopter of open banking by offering open banking-enabled payment options.
- **Ensure the regulatory environment better supports competition** – the Reserve Bank should consider how it can support competition in personal banking when making assessments or new regulatory framework.
- **Empower consumers** – through industry investment in switching services, better standards for comparing home loans and other methods to benefit and reduce barriers for consumers when making an informed decision on a home loan provider.



PAYMENTS NEW ZEALAND

At the same time as releasing the banking study final report, the Commerce Commission granted authorisation to Payments NZ to further develop its open banking framework.

The authorisation is for 18 months for the joint development and (if successful) implementation of new partnering framework (a collaboration between the API Centre, API Providers and Third parties), but subject to certain conditions.

CONSUMER

CDR - CONSUMER DATA RIGHT

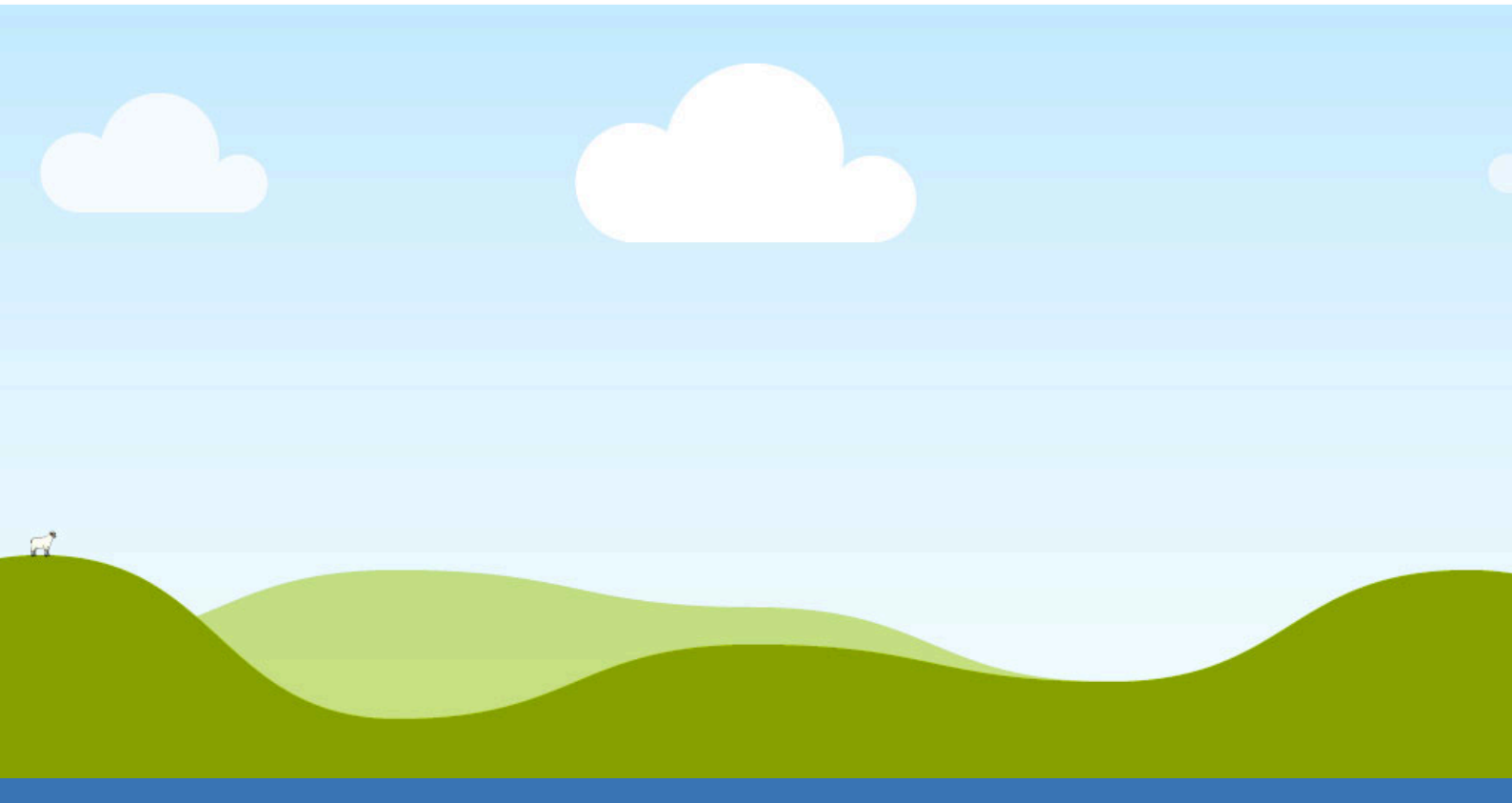
The Customer and Product Data Bill or CPD Bill aims to establish a new framework within which designated sectors that hold consumer data must operate for the “timely, secure, standardised” exchange of consumer data.

The Bill would create a ‘consumer data right’ (**CDR**) which would empower consumers the right to access their data from these designated sectors and share it with authorised third parties who offer new and innovative products and services (ultimately increasing competition across sectors in New Zealand).

The Government is considering the banking sector as the first designated sector for the CPD Bill to enable open banking (and enable new entrants to offer new ways of banking) that would address stagnant competition in the banking sector.

The CPD Bill is still at the consultation stage with feedback for the CDR Bill due on **10 October 2024**.

However, MBIE is consulting on the designation of a CDR in both the banking and electricity sectors.



REGULATORY DEVELOPMENT:

ELECTRICITY

THE ELECTRICITY COMPETITION TASK FORCE

In response to growing concerns surrounding the electricity supply crisis, New Zealand's Electricity Authority and Commerce Commission have established the Energy Competition Task Force. The task force will consider the complex factors underlying wholesale prices and implement measures to address the current issues in the broader electricity industry.

The Task Force is currently prioritising two key outcomes:

- Enabling new generators and independent retailers to enter, and better compete in the market.

This may include:

- requiring gentailers to contract with independents more and in new ways, both in relation to managing the risks of new intermittent generation and high electricity prices.
 - investigating regulatory options that could be promptly deployed if other interventions are not effective, including overseas approaches such as non-discrimination requirements for gentailers (vertical arrangements).
- Provide more options for end-users of electricity, such as:
 - requiring retailers to buy power from end-users on fair terms
 - requiring distributors to offer rebates to end-users with flexible demand when that benefits the electricity system
 - ensuring large users (industrials) are rewarded for the benefit their flexible demand provides to the system.

The task force has already met, requested further information from relevant companies, and market measures are underway.

At the same time, there may be further concentration. "Gentailer" Contact Energy has sought clearance to acquire generator Manawa (view the application [here](#)).

GROCERY

AN UPDATE ON THE MOVING FEAST



ANNUAL GROCERY REPORT

The Commerce Commission has released its first [Annual Grocery Report](#) on 4 September 2024 which follows on from the Grocery Market Study in 2022.

The Grocery Report found that despite the introduction of the Grocery Industry Competition Act and the Grocery Supply Code, there has been no meaningful improvement in the state of competition in the grocery industry.

The 3 key areas identified to drive competition in the grocery industry were identified as:

- **Improving wholesale supply** – prompting an inquiry into wholesale supply.
- **Addressing market power in the supply chain** – the Commerce Commission has brought forward its first review of the Grocery Supply Code following concerns raised that the Code is not sufficiently protecting suppliers from the major grocery retailers' market power. The Commission is currently seeking submissions on improvements to the Code as part of its consulting phase of the review process.
- **Improving market structure** – The Commerce Commission believes 3 major national supermarket networks would be more competitive and is continuing engagement with potential entrants and investors on how they can encourage this in a timely manner.

FSNI \$3.25M FINE FOR BLOCKING RIVALS

The High Court has issued a \$3.25 million penalty - the largest to date under section 28 of the Commerce Act - against Foodstuffs North Island for its anti-competitive land covenants that limited the number of sites available to competitors.

UNIT PRICING REGULATIONS

On 31 August 2024, unit pricing obligations became mandatory for certain grocery retailers. Unit pricing aims to help consumers make better informed purchasing decisions by showing the price in easily comparable units, e.g. \$/100g.

The Commerce Commission provides a helpful [Unit Pricing Regulations Guidelines](#) for grocery retailers that are looking to understand the regulations apply.

While physical stores must now display unit pricing, online stores still have until 31 August 2025 to comply. The Commerce Commission published Unit Pricing Guidelines in March 2024.

The Matthews law team will be staying across further developments.

FIRM UPDATES



MATTHEWS LAW CONTRIBUTES NEW ZEALAND CHAPTER IN GLOBAL LEGAL INSIGHTS “MERGER CONTROL 2024”

We recently contributed the New Zealand chapter of Global Legal Insights’ “Merger Control 2024”. Our chapter discusses:

- Merger control activity and statistics in the last 12 months.
- Updates in merger control procedures, including updates to the Mergers and Acquisition Guidelines (in 2022) and the Authorisation Guidelines (in 2023).
- Key policy developments, including an increased focus on the interaction between competition law and sustainability.

The article is available to read both on [our website](#) and the [Global Legal Group](#) website.

COMPETITION LAW & POLICY INSTITUTE OF NEW ZEALAND 35TH ANNUAL WORKSHOP

On 16-17 August 2024, the Competition Law & Policy Institute of New Zealand (CLPINZ) held its 35th annual workshop at the Northern Club in Auckland. We were fortunate to have 3 members from our team attend, including partner Alicia Murray, who is a CLPINZ board member. The workshop provided great insight into complex legal issues, trends and changes to competition legislation.

ANNUAL INTERNATIONAL BAR ASSOCIATION (IBA) CONFERENCE, MEXICO CITY

Partner Andrew (Andy) Matthews attended the Annual International Bar Association Conference in Mexico City earlier this month. The IBA is the foremost organisation for international legal practitioners, bar associations and law societies, and has considerable expertise in providing assistance to the global legal community.