

# Competition & Consumer Law Update

Legalwise – 10 CPD Hours in One Day

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# Recent competition law developments

*What we will cover today*

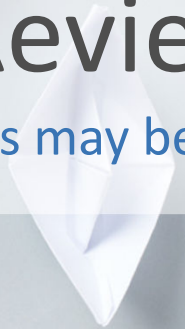
- MBIE review of the Commerce Act and Commerce Commission
- Recent merger decisions (Foodstuffs and Serato) and what you can learn from these
- Enforcement trends
  - Commerce Commission's updated enforcement guidelines;
  - Recent proceedings regarding anti-competitive land covenants; and
  - Court findings of unfair contract terms in the Viagogo case.
- The Personal Banking Market study and key takeaways
- Progress towards a Consumer Data Right
- The Commerce Commission's annual grocery report, wholesale review and pricing regulation





# The MBIE Review

Significant competition law changes may be on the horizon



# Review of the Commerce Act

*A “targeted” review of the Commerce Act 1986*

- On 5 December 2025, the Government (MBIE) announced its review of the Commerce Act to ensure it remains fit for purpose to boost productivity and elevate the state of competition in New Zealand
- The review is “targeted” towards addressing:
  - Market concentration concerns;
  - Issues identified in market studies and by the OECD; and
  - Follows the current Australian competition policy review
- The Discussion Paper currently picks up potential issues (and changes) in:
  - The current merger control regime (SLC test, assets, voluntary regime, behavioural undertakings etc)
  - Anticompetitive conduct (carve outs for collaboration, concerted practices prohibition)
  - Code for rule-making powers and other technical matters (Industry Codes, injunctions, OIA etc)





# Review of the Commerce Commission's governance

*The review will examine the “organisational capability and performance” of the Commission*

- The Government is also looking to review the Commission's governance structure and performance given its expanding oversight in a number of industries
- This review aims to ensure that the Commission (and its Board) has:
  - The commercial know-how needed to carry out engagements, investigations and decision making
  - The correct structural approach – whether operating in Divisions achieves best outcomes
  - Accountability – through an overarching strategy (informed by a clear mission statement) which flows through to how it prioritises resources
  - Operational efficiency – could the Commission operate more efficiently and effectively?
- The review is led by respected economist and former Commission Chair, Dame Paula Rebstock with Professor Allan Fels (previous ACCC Chair) and David Hunt (leading economist and Deputy Chair of ACC)
- The review is expected to be completed by 30 May 2025





# Recent merger decisions

What can we learn from them?

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# Recent merger decisions: Foodstuffs merger

*Foodstuffs North Island and South Island merger declined*

- First merger to be declined based on demand side market power concerns (potential 3 to 2)
- Commission's buyer power concerns included:
  - Remaining competing buyers would not be sufficient to constrain the exercise of buyer power
  - Suppliers unlikely to exert countervailing power to constrain the buyer power
  - Further entrenching the bargaining imbalance already faced by suppliers – allowing the merged entity to extract lower prices and terms more favourable than what would be expected in a competitive market
  - Significant effects on suppliers' profitability would ↓ incentives to invest (which would ↓ quality and innovation)
  - In turn, ↓ innovation would lead to ↓ in consumer choice or quality
- The Commission distinguished between cost savings from merger efficiencies (pro competitive) and wealth transfers from weaker competition (anti-competitive). Noting that a large proportion of the alleged cost savings would be from imposing “better terms” (ie exploiting increased buyer power) on suppliers

# Recent merger decisions: Serato

*AlphaTheta acquisition of Serato declined*

- First merger to be declined since 2018 – acquisition of #1 DJ software Serato by #1 DJ hardware AlphaTheta
- **OIO forcing compulsory notification** – OIO only granted consent for acquisition subject to Commission clearance effectively making the voluntary notification regime compulsory
- **No de minimis threshold** for Serato?
- **Competitors** – remaining competitors too small and unlikely to constrain the merged entity or capable of expanding to replace lost competition. New entry considered unlikely
- **Mobile apps not a constraint** – Commission was not satisfied that mobile DJ apps imposed (or would impose in the future) a sufficient constraint on the parties
- **Unilateral effects** – merged entity could raise prices or reduce quality/innovation of DJ software
- **Vertical effects** – merging the #1 DJ hardware with #1 DJ software
- **Foreclosure risks** – ability and incentive to foreclose rival DJ hardware providers by refusing to supply software (or supplying on worse terms)







# Enforcement trends

What is the Commission focused on?

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# Commission's Enforcement Guidelines for 2024 & 2025

*What will the Commission be prioritising for enforcement and compliance action?*

**Enduring** Priorities (ongoing long term priorities) include:

- **Cartels** – prioritising general cartel conduct (price fixing, bid rigging, market allocation)
- **Anti-competitive conduct** – prioritising action against misuse of market power or anti-competitive agreements (especially where there is an **opportunity to test areas of the Commerce Act** and judicial guidance would be valuable)
- **Actions to support Commission's market and economic regulation** – eg grocery, fuel, teleco, electricity, airports, dairy etc
- **Product safety**
- **Vulnerable consumers** – prioritise enforcement to protect vulnerable consumer groups.



# Commission's Enforcement Guidelines for 2024 & 2025

*What will the Commission be prioritising for enforcement and compliance action?*

**Specific** Priorities include:

- **Cartels** – specifically prioritising cartel conduct concerning **procurement of public services and infrastructure contracts**
- **Non-compete agreements**
- **Illegal online sales conduct** – protect consumers from eg fake reviews, misleading scarcity, drip pricing, subscription traps etc
- **Breaches in the Groceries and Telecommunications sectors**
- **Motor vehicle finance** – action against finance lenders who do not meet CCCFA obligations (incl responsible lending practices)
- **Unconscionable conduct**

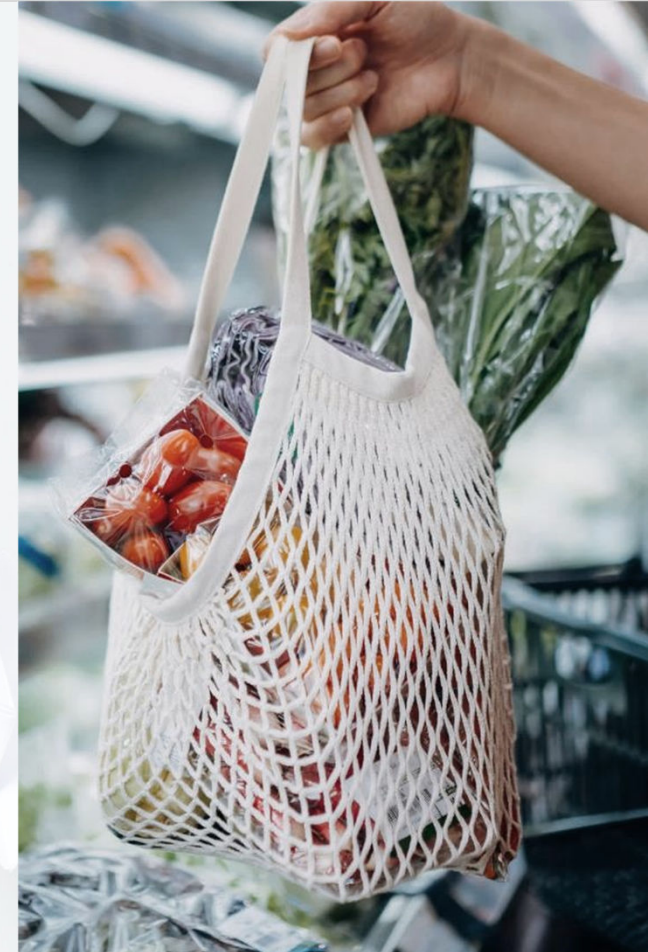
**It will be important that businesses invest in compliance programs and understand their customer base (especially if “vulnerable”)**



# Proceedings for anticompetitive land covenants

*Foodstuffs North Island fined \$3.25 million*

- Foodstuffs' historical anticompetitive conduct was uncovered following the Commission's market study into the Grocery sector (which found retailers had been using land covenants to limit sites)
- Foodstuffs was fined \$3.25 million (the largest penalty to date under s 28 of CA)
- Land covenants (up to 99 years in duration) lodged with the purpose of preventing other competitors from opening or expanding stores at three locations in the Lower North Island (Wellington and South Napier)





# Viagogo

*Court finds unfair contract term in Viagogo's T&Cs for ticket sales*

- Viagogo found to have made a series of misrepresentations to consumers in breach of FTA ss 9, 11 and 13, including:
  - Viagogo's headlines representing Viagogo as an "official" site ( when in fact it was a ticket resale platform)
  - The level of demand and number of tickets left for an event ("only a few tickets left" etc)
  - Drip pricing on ticket prices
- Governing law clause was **not** unfair as Swiss law was not materially different to NZ law so as to give rise to an imbalance between parties
- However, the exclusive jurisdiction clause (requiring consumers to sue Viagogo in Geneva) was found to be an unfair contract term given the significant imbalance in rights and obligations
- Consumers would have to bring proceedings against Viagogo in Geneva but Viagogo could pursue the consumer either in Geneva or the consumer's jurisdiction. The Court found no reason why Viagogo, an international online business, could not participate in NZ proceedings





# Open banking & Consumer Data Right

What are the recent developments following the market study?

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# Personal Banking Market Study

*What were the key takeaways?*

The Commission released its Final Report on 20 August 2024 which found the major banks:

- have a stable oligopoly with limited competition and no maverick option
- sustained high profitability
- have limited their investment in innovation (cf innovation from Fintechs currently delayed eg open banking)
- enjoy structural advantages (scale, scope and funding)
- are disproportionately less affected by regulatory burdens
- enjoy customer stickiness



# Personal Banking Market Study cont'd

*What were the key takeaways?*

The Commission made 4 key recommendations which focused on:

- **Capitalising Kiwibank** – govt should invest to create a maverick
- **Accelerating progress on open banking** – govt should implement by June 2026 and be an early adopter
- **Promoting competition via regulatory environment** – improve legislation and incoming regulation to ensure it does not unintentionally favour the major banks
- **Empowering consumers** – improving and encouraging switching providers





# Consumer Data Right

*What developments are we seeing now?*

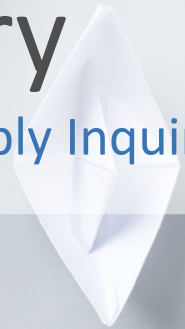
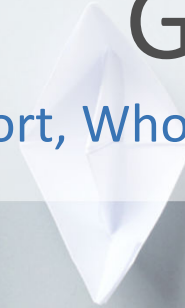
- The Customer and Product Data Bill (**CPD Bill**) aims to establish an overarching CDR framework which will in turn allow separate secondary regulation to be established on a sector-by-sector basis.
- CPD Bill will establish a way (a “Consumer Data Right”) in which customers can control their data (including access and sharing) to create a system where “data holders” and “accredited requestors” interact safely on behalf of customers (including giving access to third parties)
- The Government has already announced that the CDR regime will be applied first to the banking sector.
- Payment standards for the banking sector are currently underway with Payments NZ already receiving Commission authorisation (August 2024) to develop an open banking framework within an 18 month period.
- CPD Bill is currently before the whole House of Representatives following the passing of its second reading recently on 6 March 2025.





# Grocery

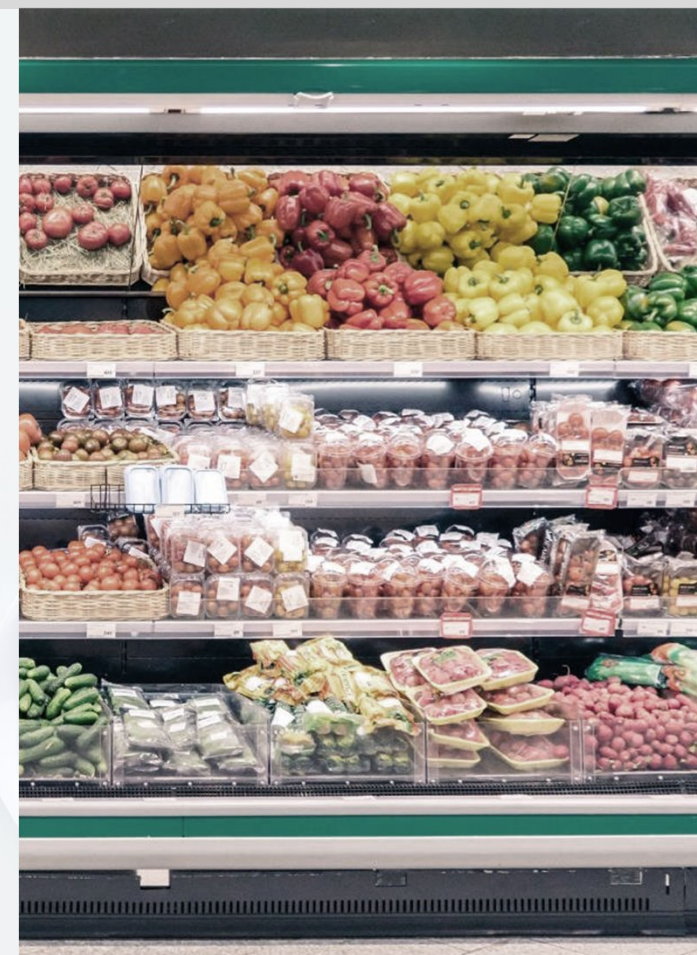
The Annual Grocery Report, Wholesale Supply Inquiry and pricing regulations



# Annual Grocery Report

*What did the Commission's recent findings say?*

- Released in September 2024, the Grocery Report follows on from the findings in the Grocery Market Study in 2022.
- Despite the GICA and Code, the Grocery Report found there has been **no meaningful improvement** in the state of competition in the grocery industry.
- The Grocery Report identified 3 key areas of improvement to change things:
  - **Improving wholesale supply** – prompting the wholesale supply inquiry
  - **Addressing market power in grocery acquisition** – the Code is not sufficiently protecting suppliers from the RGRs' market power. A Draft report on the Code Review is expected by 31 March 2025
  - **Market structure improvements** – The Commission is looking to encourage a 3<sup>rd</sup> national supermarket network to compete. [Economic Growth and Finance Minister Nicola Willis has recently indicated](#) that the government is working on getting a new entrant in, offering “VIP treatment”.





# Wholesale Supply Inquiry

*What did the Commission's recent findings say?*

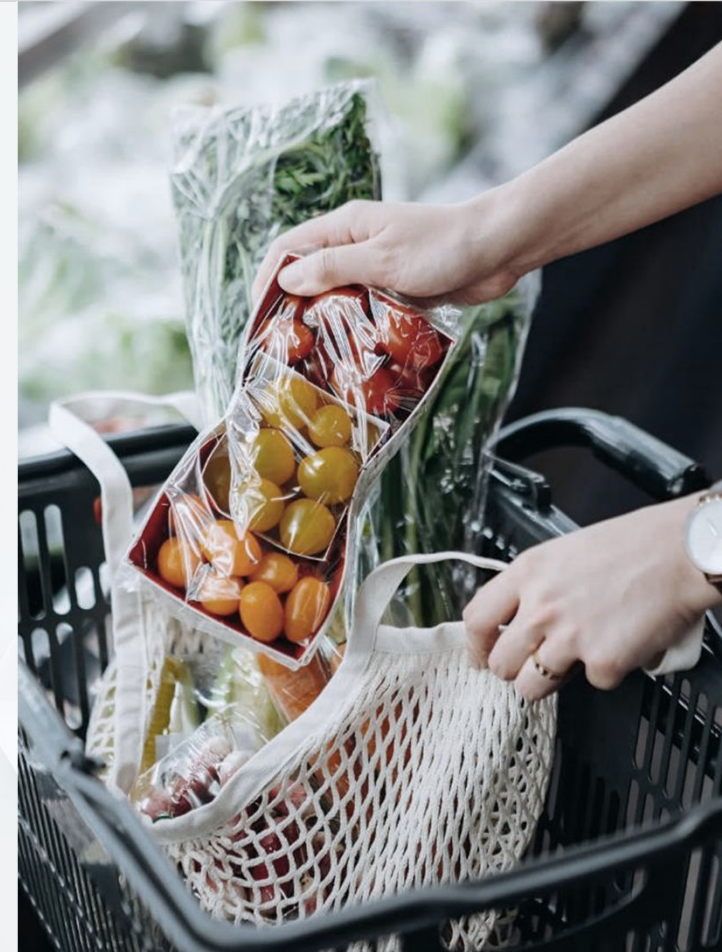
- The Commission released its Preliminary Issues Paper on its Wholesale Supply Inquiry in tandem with the Annual Grocery Report
- The Commission identified issues with the current voluntary wholesale regime (which has had limited impact):
  - **low sales volume** (ie not much offering and uptake of wholesale)
  - **pricing not being competitive** (access to RGRs' scale and efficiency benefits is limited) and
  - **the range of products is narrow** (top-selling retail and private label products are not available)
- The Commission is considering whether stronger regulation is necessary. Regulation options include:
  - **Wholesale Framework** – require RGRs to establish and implement their own guidelines of supply. This would increase decision making transparency and have the least regulatory interference and costs
  - **Wholesale Code** – Commission could establish an industry code requiring certain conduct (eg around range and price)
  - **Non-discriminatory terms** – Minister could seek an Order in Council requiring supply on a like-for-like basis
  - **Specific access terms** – Minister could seek an Order in Council requiring supply on specific conditions



# Pricing regulation

*A crackdown on prices*

- On 31 August 2024, Unit Pricing obligations became mandatory for RGRs (pricing labels must now show price in easily comparable units (eg \$ / 100g))
- Online stores have until 31 August 2025 to comply with these obligations
- The Commission has also shown its desire to crack down on incorrect and misleading prices and specials. On [4 March 2025](#) criminal charges were filed against Two Pak'n Save supermarkets under the FTA.



# Questions?



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