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IDEASROOM

Getting consumer rights out from under the rug

New Minister of Commerce Kris Faafoi recently announced that the Commerce Commission should have the independence to investigate the competitiveness of particular markets without seeking prior political approval. Compared with the position of the previous government, his commitment is a massive step forward, and should be welcomed by all New Zealanders.

Giving the Commerce Commission the power to initiate market studies on its own account without prior permission from the Minister of Commerce might seem a no-brainer. Indeed, it is surprising it was not part of reforms from the

start, when changes to the Commerce Act 1986 were going through the select committee process under the previous government.

A central weakness of New Zealand's approach to industry regulation since the Act came into effect is that key decisions are being made at a political rather than judicial level. Converting decisions of this kind from judicial ones to political ones opens the door for big businesses with vested interests to capture the regulatory process via the simple but non-transparent route of using their monopoly resources to lobby politicians.

A series of landmark court cases have made clear that the old common-law right to sue predatory monopolies was, in the words of the Appeal Court, "swept under the carpet" by the Commerce Act 1986. Instead, our common law rights were replaced by political decisions to be made by the Minister of Commerce under the Act.

Any hope that the Act, notionally restraining anti-competitive conduct, might provide a non-political route to control practices such as predatory pricing and bundled discounting has been eliminated by a series of Privy Council decisions.

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In terms of the law's current ability to restrain anti-competitive conduct, former Commerce Commission member Donal Curtin commented at a national economics conference last year that the Act "comes close to giving firms with market power a free pass on pretty much anything that isn't the most obvious of rorts". Curtin emphasised "how out of step New Zealand is internationally, with its 'take advantage'/'purpose' regime [i.e. one where the plaintiff has to show the firm has taken advantage of their market power and where they have done so for an anticompetitive purpose — a high bar to prove] shared only with Australia". Since Curtin spoke, reforms in Australian competition law mean New Zealand is now alone in this space.

We agree with Curtin. Indeed, given the small nature of the New Zealand market, and the effect of our geographical isolation in limiting competition, we suggest New Zealand may require smarter and more active pro-competitive market intervention than larger, less geographically isolated countries.

And while we believe giving this new market studies power to the Commerce Commission is necessary, it is insufficient by itself to protect New Zealand consumers.

So what else needs to be done?

For a start, the Commission's budget will certainly need a boost to enable significant numbers of properly resourced, quality studies of particular markets that may be anti-competitive.

In addition, if a Commission study leads to a prosecution, government should commit to an uncapped litigation budget for pursuit of prosecution. In other words, the deep pockets of big business, filled by excess profits, are confronted with a credible, equally deep-pocketed deterrent, to prevent them from simply spending whatever it takes to grind the Commission to a halt in the courts. It is also essential that, like the market studies, this commitment is not subject to political interference.

The Commerce Act 1986 needs further fundamental changes in several other directions. Provisions on anti-competitive conduct are feeble, and there is a lack of any means to deal with tacit (as distinct from explicit) collusion in areas such as petrol pricing and bank interest rates. And even after being amended in 2001 to bring "the long-term benefit of consumers" into view, the Act still allows free play to profiteering monopolists who extort money from captive customers. The Act implicitly treats this as an acceptable transfer of resources from poorer consumers to wealthy owners of corporations that leaves New Zealand's overall welfare untouched. This view is both logically wrong and morally unsustainable.

After three decades in which the Commission has taken heavy punishment, Minister Faafoi has the chance to get serious about promoting the welfare of consumers. He has started in the right direction and we wish him well.