

Supreme Court Guidance on Commerce Commission Information Requests

September 2009

Like many regulators, the New Zealand Commerce Commission can require people and firms to provide information and documents. In September 2009, the highest Court provided guidance on the extent of these powers. The ability of the Commission to go on “fishing trips”, in potential breach situations, is limited. In others, it’s to be encouraged.

The Commerce Commission (and also the Telecommunications Commissioner)¹ can require people and firms to provide information, documents, and give evidence.

Questions arise as to when they can exercise those powers. The Supreme Court provided some guidance in *AstraZeneca v Commerce Commission and Another*.²

Information, documents or evidence can be required, when “the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under...” the Commerce Act and the Telecommunications Act.

So the first point, which is not controversial, is that the Commission can only take this action where it considers it necessary or desirable, relative to some other part of the legislation (for example, to investigate whether there is a breach of the monopolisation provision (s36 Commerce Act)).

In that example (where the Commission issues a notice seeking information as to a possible s36 breach):

The Commission cannot resort to [the provision allowing it to issue a notice] in the hope that a response to its notice may reveal some unsuspected anti-competitive conduct outside the

¹ Section 98 Commerce Act; Section 15 Telecommunications Act (by which a number of Commerce Act provisions apply to telecoms).

² [2009] NZSC 92. The Supreme Court dealt with a specific exemption in the Commerce Act relating to pharmaceuticals which we don’t address in this note.

*scope of the investigation to which the notice relates. There must be a reasonable basis for the Commission to believe that there may be undiscovered facts that could give rise to a contravention.*³

*A notice of this kind must be justified on the basis of the Commission’s knowledge of the matter it is investigating...at the time of the notice. The Commission is certainly not entitled to proceed on the basis that it can issue a notice first and then have its power to do so judged retrospectively by what it might find concerning some other conduct of the ... company.*⁴

To use the commonly-used analogy in litigation, the Commission’s ability to go on a “fishing trip”, where there is a suspected breach, is limited.

The power to obtain information, documents and evidence, however, is situation-specific. For example, under Section 9A of the Telecommunications Act, there are wide powers (and some obligations) in relation to sector monitoring, inquiries, reviews and studies. This enables the Telecommunications Commissioner to take a more proactive approach in using this regime. In many instances, a broader approach is to be encouraged, and fits within this regime.

In some instances, this broader approach may even be required to enable the Commission to

³ *AstraZeneca* Para 30

⁴ *AstraZeneca* Para 40

undertake its monitoring obligations. No doubt the Commission will generally seek voluntary disclosure, but its ability to require disclosure, if needed, is clear.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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