DIVESTITURE IN THE NEW ZEALAND GROCERY SECTOR? AN ANALYSIS AND APPLICATION OF THE PRINCIPLES OF DIVESTITURE IN THE CONTEXT OF THE NEW ZEALAND GROCERY SECTOR

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There is considerable concern about the state of competition in the New Zealand grocery sector. Recent responses from the Government have not helped to quell this. Many believe that only structural separation in the form of divestiture will restore competition to the grocery sector. This article examines the findings of the Commerce Commission's market study of the grocery sector and the Government's response to those findings. It then sets out the principles of divestiture as applied by New Zealand and United States courts. Finally, it applies these principles to the New Zealand grocery sector. Overall, it argues that courts must consider three key elements when analysing divestiture as an anti-competitive remedy: first, causation; secondly, the effect of the divestiture; and thirdly, the applicability of alternative remedies. Applying each of these elements to the grocery sector reveals that, whilst there would be some difficulty in implementation, the grocery sector is one where divestiture would likely be favoured by a court.

I INTRODUCTION

In 2022, the New Zealand Commerce Commission (the Commission) concluded that competition in the grocery sector was not working for consumers.[1] This was the key finding of the Commission's

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1 Commerce Commission *Market study into the retail grocery sector: Final report – Executive summary* (8 March 2022) [Commerce Commission *Executive summary*] at 3.

final report on its one-and-a-half-year market study into the retail grocery sector.[2] This market study aimed to "examine whether competition in the grocery sector is working well [for consumers] and, if not, what can be done to improve it".[3] The Commission attributed the failure of competition in the grocery sector to the duopoly of major grocery retailers (MGRs).[4]

MGRs are New Zealand's largest group of grocery retailers. The Commission defines grocery retailers as "businesses which sell grocery products directly to final consumers in New Zealand".[5] MGRs are grocery retailers who operate many supermarkets across New Zealand and offer consumers a wide range of grocery needs.[6] Other grocery retailers offer a more specialised selection of goods.[7] Examples include international food stores or specialist produce retailers.

In New Zealand, the MGRs maintain a duopoly over the grocery sector. A duopoly is "a situation in which only two companies control all the business in a particular industry".[8] In the grocery sector, these two groups are Foodstuffs and Woolworths NZ Ltd.[9] Foodstuffs is two separate companies, Foodstuffs North Island Ltd (NI) and Foodstuffs South Island Ltd (SI).[10] Each company only operates on its respective island, meaning that they do not compete against each other.[11] Across both islands, Foodstuffs have a 58 per cent share in chain supermarkets and grocery stores.[12] This share is comprised of PAK'nSAVE (34 per cent), New World (20 per cent) and Four Square (4 per cent).[13]

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2 Commerce Commission *Market study into the retail grocery sector: Final report* (8 March 2022) [Commerce Commission *Final report*].

3 Commerce Commission *Executive summary*, above n 1, at 3.

4 At 5.

5 Commerce Commission *Final report*, above n 2, at 10.

6 At [2.10].

7 At [2.10].

8 Cambridge Dictionary "duopoly" <www.dictionary.cambridge.org>.

9 Coriolis *Supporting material on the New Zealand supermarket situation and context* (4 October 2022) (obtained under Official Information Act 1982 request to Ministry of Business, Innovation and Employment) at 28.

10 Commerce Commission *Final report*, above n 2, at [2.17]. The Commerce Commission recently rejected a proposed merger of Foodstuffs NI and Foodstuff SI as they were "not satisfied that the proposed merger would not have the effect of substantially lessening competition in multiple acquisition and retail markets": see Commerce Commission "Commerce Commission declines clearance for the proposed Foodstuffs merger" (press release, 1 October 2024).

11 At [2.17].

12 Coriolis, above n 9, at 28.

13 At 28.

Woolworths has a 42 per cent share in chain supermarkets and grocery stores.[14] This share is comprised of Countdown (35 per cent), SuperValue (4 per cent) and Fresh Choice (3 per cent).[15]

The Commission's conclusion led to a series of recommendations to restore competition to the sector.[16] These recommendations resulted in government action in the form of the Grocery Industry Competition Act 2023 and the Commerce (Grocery Sector Covenants) Amendment Act 2022. This legislation aims to increase competition in the grocery sector to benefit consumers.[17] Numerous parties doubt that this legislation will restore competition to the sector.[18] As such, other remedies have been touted. The previous New Zealand Labour Government was considering the option of divestiture in the grocery sector.[19] Divestiture is a remedy which compels a firm to sell off illegally held or acquired assets.[20] The objective of the remedy is to restore market competition by creating a new competitor or by strengthening an existing competitor.[21]

This article examines the principles of New Zealand and United States divestiture jurisprudence and applies them to the New Zealand grocery sector. The article concludes that divestiture would likely be an effective remedy for the New Zealand grocery sector.

Part II discusses the Commission's report and the Labour Government's response. Part III analyses how Courts have applied divestiture in New Zealand and the USA, extracting principles of each court's application of the remedy. Part IV applies these principles to the New Zealand Grocery Sector and discusses whether a case for divestiture exists in the sector. Part V concludes.

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14 At 28.

15 At 28.

16 Commerce Commission *Executive summary*, above n 1, at 11–15.

17 Grocery Industry Competition Act 2023, s 3.

18 See Coriolis, Sense Partners and Cognitus *Supermarket divestment options and cost benefit analysis: Summary report* (Ministry of Business, Innovation and Employment, 4 October 2022); and Monopoly Watch NZ "Submission to the Economic Development, Science and Innovation Committee on the Grocery Industry Competition Bill 2022".

19 Coriolis, Sense Partners and Cognitus, above n 18, at 1.

20 Phillip Areeda and Herbert Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed, Wolters Kluwer, New York, 2015) vol IVA at 128.

21 Daniel Lumer "Divestiture: Doctrinal Development and Modern Application" (2022) 67 Antitrust Bull 146 at 147.

II THE STATE OF THE NEW ZEALAND GROCERY SECTOR

A The Commission's Findings and Recommendations

The Commission's report found that competition was not working for consumers in the grocery sector.[22] The reasons for this were:[23]

(a) A market duopoly exists.
(b) The intensity of competition between the major competitors is muted.
(c) Entry and expansion in the sector is difficult.
(d) The profitability of major retailers is higher than expected.
(e) Prices are high compared to international standards.
(f) Innovation in the sector is low.
(g) Pricing and promotional practices are limiting customers' ability to make informed decisions.
(h) Competition is not working for suppliers due to an imbalance in bargaining power.

For this article, three findings are key. First, the Commission observed that the MGRs achieved higher profits than would be expected in a competitive market.[24] Levels of high-profit returns can occur in a competitive market, but are usually confined to those firms that innovate to lower costs or improve offerings.[25] When profits in a sector are persistently high for more than one firm, competition is not working for consumers.[26] The Commission estimated a normal rate of return of 5.5 per cent (ROACE) for MGRs between 2015 and 2019.[27] The actual figures were 12.8 per cent for Foodstuffs SI, 13.1 per cent for Foodstuffs NI, and 12.7 per cent for Woolworths NZ.[28] These figures show that persistently high profits have occurred, indicative of competition not working for consumers.

Secondly, the Commission observed that prices in the sector were high. When competition in a sector is limited, incentives for firms to compete on price are weaker.[29] This leads to higher prices in the long term.[30] The Commission found New Zealand was the fifth most expensive grocery market

22 Commerce Commission *Executive summary*, above n 1, at 5.

23 At 5.

24 Commerce Commission *Final report*, above n 2, at [3.6].

25 At [3.15].

26 At [3.17].

27 At [3.7].

28 At [3.7].

29 At [3.83].

30 At [3.83].

in the OECD in 2017.[31] At the request of NERA (an economic consulting group representing Woolworths), the Commission removed alcohol and tobacco from this analysis; but New Zealand still ranked seventh.[32] The Commission concluded that despite the high prices of alcohol and tobacco, they are not significant factors in New Zealand's high price ranking.[33] Another finding was that New Zealand's per capita spending was at least the fifth highest amongst the OECD in 2017.[34] Together, these factors show that grocery prices are high and consumer spending on groceries is higher than in a competitive market.

Thirdly, the Commission concluded that the grocery sector's scale and pace of innovation are less than would be expected in a competitive market, despite significant investment in innovation.[35] In competitive markets, firms invest in innovation to create greater profits derived from meeting consumer demands.[36] There have been numerous innovations aimed at improving customers' convenient shopping experience, such as implementing SHOP'nGO at PAK'nSAVE stores and creating New World Metro stores.[37] However, the Commission observed that consumers prefer innovations that enhance price competition over those that increase convenience.[38] Price is the key measure by which consumers select stores. Since innovation has not been aimed at price, the Commission concluded that innovation has failed in this sector.[39] The Commission's other key findings were that innovations in supply chain improvements were not flowing down to consumers, and an imbalance in negotiating power between suppliers and retailers has stifled innovation in new products and ranges.[40] Whilst there have been innovations in the online shopping sphere, it is unlikely that these innovations have increased competition with physical retailers.[41]

The Commission then issued 14 recommendations. These are summarised as follows:[42]

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31 At [3.113].

32 At [3.124].

33 At [3.113].

34 At [3.115].

35 At [3.209].

36 At [3.152].

37 At [3.161]–[3.162].

38 At [3.163].

39 At [3.164].

40 At [3.167]–[3.181].

41 At [3.201].

42 At 378.

Recommendations to improve conditions for entry and expansion:

(1) Improve planning laws to increase the availability of sites for grocery stores.
(2) Prohibit restrictive and exclusive covenants that inhibit retail grocery development.
(3) Require MGRs to consider wholesale supply requests in good faith.
(4) Future reviews of the Overseas Investment Act 2005 and the Sale and Supply of Alcohol Act 2012 should consider whether these laws impede entry and expansion for grocery retailers.
(5) Monitor strategic conduct that threatens conditions of entry and expansion.

Recommendations to improve competition for the acquisition of groceries:

(6) Introduce a mandatory grocery code of conduct for relationships between MGRs and suppliers.
(7) Consider exceptions for collective bargaining by grocery suppliers.
(8) Amend the Fair Trading Act 1986 to strengthen the business-to-business unfair contract terms regime.

Recommendations 9 through 12 focused on improving consumers' decision-making regarding price and promotional programs.[43] These will not be discussed in this article.

Other recommendations were to:

(13) Establish a grocery regulator and dispute resolution framework.
(14) Review the state of the sector every three years after implementing these recommendations.

The Commission recommended improving conditions for entry and expansion. The threat of a new entrant into the sector could constrain a firm's behaviour within a sector.[44] However, the sector must have a low cost of entry and expansion.[45] If a sector has limitations on entry, then prices are likely to remain high in the long term and adversely affect consumers.[46] The Commission found that, under the current conditions, new competitors will not be able to reach the scale required to compete with current MGRs.[47] This is because:[48]

(a) population size impacts the profitability of establishing new supermarkets;
(b) planning laws prevent sufficient sites for the development of grocery stores;

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43 At 378.

44 At [6.3].

45 At [6.3].

46 At [6.4].

47 At 189.

48 At 189.

(c) MGRs have implemented restrictive covenants preventing rival supermarkets in certain areas; and

(d) a lack of access to wholesale grocery suppliers for competitive prices, preventing smaller grocery retailers from expanding their range to compete with MGRs effectively.

The Commission's recommendations are therefore aimed at freeing up spaces for new development and increasing the availability of supply of groceries. Increasing the availability of grocery supply should reduce the cost of entering the sector.[49] This means it would be cheaper for new companies to enter the sector and for existing companies to expand.

The Commission next made recommendations to improve competition for the acquisition of groceries. The Commission found an imbalance of bargaining power between suppliers and the MGRs.[50] Imbalances in supplier bargaining power can lead to suppliers accepting weaker terms than they would in a balanced negotiation.[51] Suppliers then invest less in innovation, adversely affecting the range and price to consumers.[52] The Commission found that suppliers are limited to whom they can sell their products because MGRs control such a high percentage of the market.[53] MGRs have few constraints on the demands they can impose on suppliers, leading to unfavourable negotiations for suppliers.[54] Therefore, these recommendations aim to decrease this power imbalance with a code of conduct for MGRs and give suppliers powerful negotiating tools such as collective bargaining.[55]

Two further recommendations were made. First was the establishment of a grocery sector regulator.[56] The grocery regulator's purpose would be to give effect to the recommendations in this report and to oversee the sector generally.[57] Secondly, the Commission recommended that a review be undertaken three years after implementing its recommendations.[58] The Commission believes that the recommendations in this report will be effective and result in a material improvement in the sector.

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49 At [9.37].

50 At 324.

51 At [8.5].

52 At [8.5].

53 At [8.2].

54 At [8.2].

55 At 378.

56 At [9.266].

57 At [9.267]–[9.268].

58 At [9.272].

However, they cannot determine how significant this effect will be. A review, therefore, is necessary.[59]

B Government Response

In response to the Commission's findings, the Government introduced the Commerce (Grocery Sector Covenants) Amendment Bill and the Grocery Industry Competition Bill, which passed into law in 2022 and 2023 respectively.

The purpose of the Grocery Industry Competition Act is to "promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand".[60] To achieve this purpose, the Act:

(a) Establishes a wholesale supply regime that requires MGRs to set up wholesale supply to other grocery retailers, making it easier for new businesses to enter the sector.[61]
(b) Sets up a grocery supply code that provides rules of engagement for MGRs and suppliers.[62]
(c) Empowers the Commission to observe and report on competition in the sector each year, creating the role of the Grocery Commissioner who will oversee changes made by the Act.[63]
(d) Establishes the framework for a new dispute resolution body in the sector.[64]
(e) Enables collective bargaining for suppliers.[65]

The Commerce (Grocery Sector Covenants) Amendment Act amends the Commerce Act 1986 to prevent restrictive or exclusivity covenants that impede the development of land that could be used by new or existing competitors to compete with grocery retailers.[66]

There is doubt that these bills effectively restore competition to the sector. In a submission to the Economic Development, Science and Innovation Committee on the Grocery Industry Competition Bill, Monopoly Watch NZ (MWNZ) argued that the only way competition could be restored was through forced divestiture of supermarket assets.[67] MWNZ submitted "only structural separation, and

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59 At [9.273].

60 Grocery Industry Competition Act, s 3.

61 Letter from Pierre van Heerden (Grocery Commissioner) to the grocery sector regarding the commencement of the Grocery Industry Competition Act (13 July 2023) at [12.1].

62 At [12.2].

63 At [12.3].

64 At [12.4].

65 At [12.6].

66 Commerce Act 1986, s 28A, inserted by Commerce (Grocery Sector Covenants) Amendment Act 2022, s 4.

67 Monopoly Watch NZ, above n 18, at 1.

a forced retail divestment will give the distribution power to a [third or fourth operator], to commence proper price and innovation competition".[68] MWNZ made several other arguments to support this recommendation. They argued that consumers would face increased costs, as the Bill would increase costs for the MGRs, and MGRs are in a position where the costs can be passed to consumers.[69] MWNZ submitted that the Commission report showed there was an overbuild of supermarkets. Therefore, any rules implemented to increase the number of areas available for supermarkets would not incentivise new entrants.[70] MNWZ pointed out that the MGRs will see the Act as a success, as they can claim they are being regulated whilst barriers to entry are closed.[71]

The Labour Government was also investigating the possibility of divestiture in the sector, and was in the process of running a cost/benefit analysis of divestiture before their loss in the 2023 election.[72]

This poses the question of whether the New Zealand grocery sector is in a situation where divestiture would be an appropriate remedy. To answer this question, this article will now analyse the principles applied by New Zealand and United States courts when reviewing divestiture as a competitive remedy.

III DIVESTITURE

A Divestiture

Divestiture is a court-ordered remedy which compels a firm to sell off illegally held or acquired assets.[73] The objective of the remedy is to restore market competition by creating a new competitor or strengthening an existing competitor.[74] Divestiture is a structural remedy as it directly alters the market structure into which it is deployed.[75] The theoretical justification for structural remedies is that they only need to be deployed once.[76] Once divested assets are sold to the new or existing company, the market can be left in a competitive state without ongoing intervention or monitoring.[77] This is why divestiture is considered one of the strongest remedies for anti-competitive conduct, as it

68 At 1.

69 At 3.

70 At 3.

71 At 3.

72 See Coriolis, Sense Partners and Cognitus, above n 18.

73 Areeda and Hovenkamp, above n 20, at 128.

74 Lumer, above n 21, at 147.

75 Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for Competition Lawyers* (Oxford University Press, New York, 2011) at 445.

76 At 445.

77 At 446.

prevents future anti-competitive acts by a firm by rendering the firm unable to engage in them altogether.[78]

Divestiture exists as a remedy in New Zealand through the Commerce Act. Section 85 of the Act allows the Court, by application of the Commission, to order divestiture where there has been a breach of s 47. Section 47 applies when an acquisition has the effect of "substantially lessening competition in a market".[79]

Each MGR has a long history of mergers and acquisitions to reach the dominant market position that it holds today. These mergers were approved either through the courts or by the Commission.[80] Foodstuffs' most recent merger occurred in 2013 when Foodstuffs NI was created, merging Foodstuffs Auckland and Foodstuffs Wellington.[81] Woolworths' most recent merger was in 2002, when Progressive Enterprises acquired Woolworths NZ.[82]

Foodstuffs' and Woolworths' mergers are outside the two-year limit imposed by the Commerce Act.[83] However, the New Zealand government has other means of implementing a divestiture.

B New Zealand Cases

There are limited examples of divestiture being applied to a completed merger in New Zealand. As such, few principles can be derived from case law.

The principles of timeliness, improper conduct and practicability can be derived from *Commerce Commission v Fletcher Challenge Ltd* (*Fletcher*).[84] In this case, the Commission sought divestment and injunctive orders against Fletcher (a concrete user) after it acquired Golden Bay (a concrete manufacturer) and Winstone (another concrete user).[85] The Commission argued that this was an undisclosed agreement and violated the Commerce Act.[86]

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78 Phillip Areeda and Herbert Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed, Wolters Kluwer, New York, 2015) vol III at 150.

79 Commerce Act, s 47(1).

80 Coriolis, above n 9, at 30.

81 At 30.

82 At 30.

83 Commerce Act, s 85(2).

84 *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC).

85 At 554.

86 At 556.

The High Court found a breach had occurred but did not order divestiture as a remedy.[87] McGechan J expressed reluctance to "unscramble the egg".[88] The Court gave weight to harm done to competition but concluded that the delay by the Commission in preventing the contravention (it was close to 12 months from the integration to the case being heard), the lack of improper motives and the practicability of the remedies meant it was unwise to grant such severe remedies.[89] McGechan J further stated: "While there must always be a firm concern to uphold the law, that must be tempered with a sense of proportion and realism".[90] McGechan J's quote demonstrates that even where the law is violated, divestiture may not be an appropriate remedy when practicalities make its implementation unrealistic.

The lack of New Zealand case law means that the principles of divestiture must be further derived from overseas jurisprudence.

C United States Cases

The United States of America has the longest and largest history of using divestiture as a competitive remedy. Therefore, it is a logical place to review the principles of divestiture. The Court's power to order divestiture derives from § 2 of the Sherman Antitrust Act 1890 (the Sherman Act)[91] and § 7 of the Clayton Antitrust Act 1914 (the Clayton Act).[92]

In the United States, divestiture is considered the most effective remedy for restoring competition to a market. The Supreme Court in *United States v EI du Pont de Nemours & Co* (*du Pont*) regarded divestiture as "the most important of antitrust remedies. It is simple, relatively easy to administer, and sure".[93] The reasoning behind this is that other, less harsh remedies carry a greater risk to the consumer that competition will not be restored.[94] In particular, behavioural remedies are more costly and intrusive.[95]

Despite its effectiveness as an anti-completive remedy, divestiture may not always be the most appropriate remedy. The focus of § 7 of the Clayton Act is to restore competition. The court, therefore,

87 At 633.

88 At 600.

89 At 630.

90 At 630.

91 Sherman Antitrust Act 15 USC § 2.

92 Clayton Antitrust Act 15 USC § 18.

93 *United States v EI du Pont de Nemours & Co* 366 US 316 (1961) at 331.

94 Lumer, above n 21, at 159.

95 At 159.

must look to see if divestiture will "effectively do so under the facts of each case".[96] In *Federal Trade Commission v PepsiCo Inc*, the Federal Court of Appeals expanded on this by saying: "A primary concern [of divestiture] is whether the offending line of commerce, if disassociated from the merged entities, can survive as a viable, independent entity".[97] This means that whether or not divestiture is the correct remedy will depend on the facts of the case and whether or not the entity formed by the divestiture is likely to survive without government supervision. Therefore, in unusual circumstances, the courts may be willing to consider other remedies.[98] In these unusual circumstances, the onus is on the respondent to show that other remedies sufficiently redress the violation.[99]

A key difference between United States and New Zealand divestiture law is the period of time in which enforcement action can be taken. *Federal Trade Commission v Facebook Inc* (*Facebook*) involved acquisitions by Facebook in 2012 and 2014.[100] The FTC did not file the case until 2020. Facebook attempted to dismiss the case because the FTC's complaint was not timely.[101] The District Court dismissed this argument:[102]

> The rule under Section 7 is thus that so long as an acquiring company continues to hold acquired assets, the Government may 'at any time' argue that such company is violating Section 7.

Therefore, there is no time limit on enforcement actions under § 7 in the United States. This is in contrast with New Zealand's two-year time limit for enforcement actions.[103]

Although time does not prevent a case from being brought for a violation of § 7, it can be a matter the court considers when selecting an appropriate remedy. In *Re Evanston Northwestern Healthcare Corp Antitrust Litigation*, seven years had passed from the acquisition to the proceedings.[104] The FTC found that a § 7 violation had occurred but did not order divestiture.[105] This was because the passing of time had led to Evanston integrating the operations of its facilities and that ordering a divestiture

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96 *Saint Alphonsus Medical Center-Nampa Inc v St Luke's Health System Ltd* 778 F 3d 775 (9th Cir 2015) at 792.

97 *Federal Trade Commission v PepsiCo Inc* 477 F 2d 24 (2d Cir 1973) at 29.

98 Lumer, above n 21, at 160.

99 *Fruehauf Corp (interlocutory order)* 90 FTC 891 (1977) at 123.

100 *Federal Trade Commission v Facebook Inc* 560 F Supp 3d 1 (DC Cir 2021).

101 At 31.

102 At 32.

103 Commerce Act, s 85(2).

104 *Re Evanston Northwestern Healthcare Corp Antitrust Litigation* No 07 C 04446 (ND Ill 2016).

105 At 3.

would be difficult, with a greater risk of "unforeseen costs and failure".[106] This case demonstrates that the greater the time from acquisition to enforcement, the greater the integration and the more complex divestiture would be.

These general principles guide the application of divestiture. Further assisting this article's analysis are the unitary firm divestiture cases. These are cases where singular businesses control an entire sector.[107] Singular firm monopolies pose a unique set of difficulties to divestiture orders, and as such, courts have been required to conduct in-depth analyses of divestiture.

The first of these cases is *United States v Aluminum Co of America* (*Alcoa*).[108] *Alcoa* established that divestiture must be in the public interest, avoid a loss of efficiency and avoid a loss in innovation. In the 1940s, Alcoa breached § 2 of the Sherman Act.[109] Alcoa owned patents, which allowed it to accrue 90 per cent of the aluminium ingot market.[110] Despite Alcoa's controlling position, the District Court did not order a complete divestiture.[111] Knox J gave several reasons for this. First, the judge regarded a strong aluminium industry as necessary for national security and "the peacetime welfare of the general public".[112] Secondly, the judge expressed concern that divestiture would lead to "a marked loss in efficiency".[113] Alcoa had been designed to operate as one entity and could not easily be separated. Doing so would be a "highly speculative—and even hazardous—venture".[114] Thirdly, a new corporation would require experienced management.[115] Alcoa had been the sole firm for so long that any experienced management would need to come from its own staff. A divestiture in these circumstances would breach the purpose of creating a new entity with severed ties to Alcoa.[116] Fourthly, there would be a "disservice to the public" by the loss of innovation caused by divestiture.[117]

106 At 79.

107 Lumer, above n 21, at 162.

108 *United States v Aluminum Co of America* 91 F Supp 333 (SD NY 1950).

109 At 339.

110 At 345.

111 At 416.

112 At 416.

113 At 417.

114 At 416.

115 At 417.

116 At 417.

117 At 417.

United States v American Tel and Tel Co (*AT&T*) concerned the monopolisation of the telephone market by AT&T.[118] Over 100 years, AT&T used an aggressive acquisition strategy to acquire a monopoly over long-distance and local services and equipment markets. The parties settled the case out of court in 1982, but the District Court was obligated to review the agreement to see if it was in the public interest.[119] The fundamental principles for determining whether the agreement was in the public interest were causation, concentration of power, other remedies and consumer welfare.[120]

Causation was analysed by examining AT&T's conduct in establishing its dominant market position.[121] Although the Court was not required to make any findings as to conduct, it observed that AT&T had demonstrated several anti-competitive behaviours and policies. The Court noted AT&T had used its local monopoly to implement tariffs to deter new entrants, refused to provide services to specialised carriers until it was ordered to do so by the FTC, and had made attempts to prevent competitors from entering the long-distance service market where they would compete with AT&T.[122] AT&T was able to implement these policies due to its control over the local exchange facilities.[123] Another key piece of anti-competitive conduct was AT&T only connecting competitors' equipment through an overpriced protective contracting arrangement.[124]

Next, the Court analysed the concentration of power in the sector by discussing the purpose of anti-trust laws. Anti-trust laws aim to prevent power from moving away from elected representatives and falling into the hands of industrial oligarchs.[125] If an essential part of the economy is controlled by one group, they can make key economic decisions alone. Theoretically, this would give the monopolist group strong political powers, taking the power away from representative democracy.[126] The Court regarded the telecommunications industry as key to modern life.[127] Since AT&T had a commanding position that could have potentially been exploited in the future, the Court regarded divestiture as strongly in the public interest.[128]

118 *United States v American Tel and Tel Co* 552 F Supp 131 (DC Cir 1983).

119 At 135.

120 At 160.

121 At 161.

122 At 161–162.

123 At 162.

124 At 162.

125 At 164.

126 At 164.

127 At 165.

128 At 165–166.

The Court then analysed other available remedies based on the evidence put before it. It considered divestiture of the operating companies as the appropriate remedy:[129]

> The remedy in an antitrust action … is measured both by how well it halts the objectionable practices and by its prospects for minimizing the likelihood that such practices will occur in the future.

Most of AT&T's anti-competitive conduct stemmed from its control of the local operating companies.[130] By removing these companies from its control, these objectionable practices should have been halted, as AT&T no longer had the control required to implement the policies.[131]

The Court looked at alternative remedies but concluded that "[n]one of these … would be as efficacious as the divestiture of the [operating companies]".[132] The Court was concerned that other divestitures would not have the same effect on anti-competitive behaviours and would lead to decreased innovation.[133] An injunction would have been exceedingly difficult to implement due to the number of behaviours it would need to restrain, the size of the geographic area it would cover and the scope required to prevent future anti-competitive behaviour.[134]

Lastly, the Court considered other impacts the divestiture may have on the consumer. AT&T argued that it had provided cheap and excellent services to consumers. Therefore, divestiture could not be in the public interest.[135] The Court disagreed, finding that costs would remain similar, and the quality of services was unlikely to decline, because of the divestiture.[136] Therefore, the public interest in divesting the operating companies due to anti-competitive behaviour outweighed the interest to preserve them.[137]

United States v Microsoft Corp (*Microsoft*) sets out the principles of integration and causation, but only in dictum.[138] The case involved Microsoft breaching § 2 of the Sherman Act by attempting to monopolise the operating system (OS) and internet browser markets through anti-competitive

129 At 165.

130 At 165.

131 At 166.

132 At 166.

133 At 167.

134 At 167.

135 At 169.

136 At 169.

137 At 170.

138 *United States v Microsoft Corp* 253 F 3d 34 (DC Cir 2001).

licensing terms.[139] Before the Court could decide on a remedy, the Department of Justice and Microsoft settled with an agreement featuring only behavioural remedies.[140] The District Court, however, still provided guidance on divestiture. The Court stressed Microsoft's position as a unitary company and the logistical difficulties of divesting such a company:[141]

> A corporation that has expanded by acquiring its competitors often has preexisting internal lines of division along which it may more easily be split than a corporation that has expanded from natural growth. Although time and corporate modifications and developments may eventually fade those lines, at least the identifiable entities preexisted to create a template for such division as the court might later decree.

Microsoft proved it was a unitary company, not the result of mergers or acquisitions, nor was it organised along production lines.[142] Therefore, there would be logistical difficulties in any divestment order.

The Court determined that when looking at the remedy, consideration should be given to whether a "sufficient causal connection" could be found between Microsoft's dominant OS market position and its anti-competitive conduct.[143] Without such causation, the appropriate remedy is an injunction against that behaviour.[144] The Court did not opine on whether Microsoft's conduct reached this threshold.[145]

These three cases show that a relationship between conduct and dominant market position is key, the public interest is paramount and divestiture is a difficult remedy to apply when companies are significantly integrated.

D Principles of Divestiture

From reviewing the jurisprudence from across New Zealand and the United States, several principles emerge. These principles create a structure for applying divestiture as an anti-trust remedy. The starting point is that divestiture must be in the public interest. The principles of causation are applied and the effect of divestiture is examined to determine whether divestiture is in the public interest. Causation asks whether there are sufficient connections between anti-competitive conduct or practice and the resulting market position. The effect of divestiture asks whether divestiture would

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139 At 46.

140 Lumer, above n 21, at 170.

141 *United States v Microsoft Corp*, above n 138, at 107.

142 At 106.

143 At 106.

144 At 106.

145 At 107.

restore competition in the sector. The relevant considerations are integration, effects on consumers and the effect on the concentration of power.

If these elements are found to exist, then divestiture is likely to be in the public interest and be the most effective remedy. However, in unusual circumstances where the defendant company can show that a remedy other than divestiture would sufficiently redress the violation, the courts may permit another remedy.

IV APPLICATION TO THE NEW ZEALAND GROCERY SECTOR

A Causation

Causation asks whether there is a "sufficient causal connection" between a firm's market position and its anti-competitive conduct.[146] The United States District Court in *Microsoft*, and the Federal Court of Appeals in *AT&T*, emphasised this element in their analyses. New Zealand's High Court also discussed lack of improper conduct as a reason for not ordering divestiture in *Fletcher*.

Restrictive covenants used by MGRs arguably reveal a causal connection between MGRs' conduct and their resulting market position. Restrictive covenants are covenants that restrict future development of supermarkets or other retailers.[147] These covenants run with the land, binding third parties who lease or purchase the land.[148] Restrictive covenants are a barrier to entry as sites that could have been used for supermarket development are barred from development.[149]

The Commission found that the key rationale for lodging these covenants is to prevent supermarket competition from entering the area.[150] These restrictive covenants harm competition by creating barriers to entry and reducing competition in areas where they are in place.[151] The Commission identified at least 90 restrictive covenants entered by MGRs. Sixty of these covenants had no time limit or 20-plus year terms.[152] The Commission observed that several sites had been purchased and sold once a restrictive covenant was lodged,[153] noting that, on balance, the anti-competitive effects of these covenants outweigh the benefits.[154] The Commission has recently

146 *United States v Microsoft Corp*, above n 138, at 106.

147 Commerce Commission *Executive summary*, above n 1, at 6.

148 Commerce Commission *Final report*, above n 2, at [6.78].

149 At [6.89].

150 Commerce Commission *Final report*, above n 2, at [6.92.1].

151 At 189.

152 At [6.77].

153 At [6.92.2].

154 At [6.90].

investigated the three MGRs for lodging land or lease covenants which "may have had the purpose or effect of impeding competitive entry or expansion in the retail grocery sector",[155] issuing proceedings against one.[156]

An example of the legal difficulties that these covenants can cause between MGRs occurred in 2019. Foodstuffs NI began proceedings in the High Court against Woolworths. The proceedings concerned a restrictive covenant that would have prevented a PAK'nSAVE from operating in a mall. Foodstuffs argued that the covenant was anti-competitive and not legally enforceable.[157] The MGRs entered arbitration following the hearing.[158] Foodstuffs representatives expressed disappointment that the case would not be heard in public.[159] In 2022, Woolworths confirmed that the covenant on the site had been removed.[160]

Historically, ss 27 and 28 of the Commerce Act may have applied to these covenants. Section 27 applies when an agreement is made which has the effect or likely effect of substantially lessening competition in a market.[161] Section 28 is substantially the same but applies to covenants and prevents the enforcement of such a covenant. Recently, s 28A was added to the Commerce Act by the Commerce (Grocery Sector Covenants) Amendment Act. This provision treats any restrictive or exclusivity covenant that impedes the development of a grocery store, or stores likely to compete with a grocery store, as substantially lessening competition.[162] The Act only applies to designated grocery retailers, which includes the current MGRs.[163] Existing covenants which meet this standard are rendered unenforceable.[164]

It can be argued that a "sufficient causal connection" exists between MGRs' market position and their anti-competitive conduct, as most of these covenants would meet the new 28A requirements,

155 Commerce Commission "Case register: Foodstuffs North Island Limited" (31 May 2022) <www.comcom.govt.nz>; Commerce Commission "Case register: Foodstuffs South Island Limited" (18 June 2024) <www.comcom.govt.nz>; and Commerce Commission "Case register: Woolworths New Zealand Limited" (18 June 2024) <www.comcom.govt.nz>.

156 Commerce Commission "Case register: Foodstuffs North Island Limited" (18 June 2024) <www.comcom.govt.nz>.

157 Commerce Commission *Final report*, above n 2, at [6.83.2].

158 FMCG Business "Battle at Highland Park" (15 August 2019) <www.fmcgbusiness.co.nz>.

159 FMCG Business, above n 158.

160 Nick Krause "Pak'n'Save Highland Park in the pipeline" (2 August 2022) Times <www.times.co.nz>.

161 Section 27(1).

162 Section 28A(1).

163 Section 28A(4).

164 Section 14(1).

and some may even breach s 28. Without these covenants, other retailers may have been able to establish supermarkets in these areas. This would have meant that the MGRs would have had more competition in an area and would likely have seen a reduction in market share. Therefore, the strong market position that the MGRs currently occupy could be a product of these restrictive covenants.

A counterargument in favour of the MGRs is that these agreements have not yet been found to be illegal. If these agreements are not anti-competitive, it cannot be said that the MGRs' conduct in making these agreements was anti-competitive. Therefore, it cannot be argued that there is a causal connection between the market position and anti-competitive conduct, as no anti-competitive conduct exists.

On balance, at least some of these agreements would likely be found to be anti-competitive. Therefore, there would likely be a causative link between the MGRs' market position and their anti-competitive conduct in the form of restrictive covenants.

B Effect of Divestiture

1 Level of integration

When determining whether divestiture is the appropriate remedy, courts in each country have asked whether it was practicable to order divestiture; or, as McGechan J asked in *Fletcher*, whether it would be possible to "unscramble the egg".[165]

Timeliness is essential to any application of divestiture. As time passes from the merger to the enforcement action, the companies involved become more integrated. Integrated firms are harder to separate, with a greater risk of higher costs and failure.[166]

Even small periods of time can render divestiture being an inappropriate remedy if significant integration occurs throughout. In *Fletcher*, the High Court did not order divestiture as its view was that the companies involved in the merger had become significantly integrated after just one year. The Commerce Act places a two-year limit on divestiture.[167] In *Re Evanston*, the Court refused to order divestiture as the integration between the merged companies would have been too great after seven years. This finding shows that even the United States, where the preferred remedy is divestiture, is not willing to order divestiture when firms are sufficiently integrated.

There is a strong argument that divestiture in the grocery sector would not be practicable as it is significantly integrated. In this case, the time between the mergers and any enforcement action would be very long. Foodstuffs' most recent merger occurred in 2012, and Woolworths' most recent merger occurred in 2002. This means that a minimum of 10 years will have passed from merger to action.

165 *Commerce Commission v Fletcher Challenge Ltd*, above n 84, at 600.

166 *Re Evanston Northwestern Healthcare Corp Antitrust Litigation*, above n 104, at 79.

167 Section 85(2).

Such a period of time is likely to have led to significant integration. However, as observed by the Federal Court of Appeals in *Facebook*, timeliness is not a reason to immediately dismiss a case. The United States government can bring an action for an order at any time if there are offending assets.

There may also be difficulties in divestiture due to the different structuring of the MGRs.

The Ministry of Business and Education (MBIE), in their cost-benefit analysis of divestiture of the grocery sector, noted that the complex ownership structure and interconnectedness meant that it would be difficult to split these systems without any drop in performance.[168]

Foodstuffs NI is comprised of owner-operated franchise stores. These stores receive 75 per cent of their stock directly from suppliers and 25 per cent from Foodstuffs-owned distribution centres.[169] All freight is transported by Foodstuffs-owned trucks and other partner suppliers.[170] Foodstuffs SI is similar but receives 51 per cent of its stock from Foodstuffs-owned distribution centres.[171]

Woolworths' structure is different; they own their retail stores. Stock is received from third-party suppliers and their distribution centres.[172] Distribution centres are owned or leased and separated into ambient, produce and frozen categories.[173] All transport of stock is done through partner freight providers.[174]

Divestiture is often a matter of how easily an asset can be integrated into a purchasing company.[175] MBIE suggested that a clearly staged process and timeline would mitigate the risks of any divestiture failing.[176] This would help to integrate a new company into the sector as it would have time to develop the required footing to remain in the market through a controlled integration.

Overall, the level of integration is likely to pose a significant risk to a successful divestiture. The previously merged companies are likely to be fully integrated, and the structures of the companies make them hard to separate. However, significant integration should not be a complete excuse when there are offending assets, and a controlled divestiture process would mitigate some of these issues.

168 Coriolis, Sense Partners and Cognitus, above n 18, at 86.

169 Coriolis, above n 9, at 52.

170 At 52.

171 At 67.

172 At 89.

173 At 89.

174 At 89.

175 Niels, Jenkins and Kavanagh, above n 75, at 446.

176 Coriolis, Sense Partners and Cognitus, above n 18, at 52.

2 Effect on consumers

Consumers may be impacted if divestiture were to be ordered. Effects on price and innovation are the key areas where harm could come to consumers and to market efficiency.

In *Alcoa,* the Court found the effects of divestiture on innovation must be considered when looking at the impact on consumers. The Court reasoned that significant damage would occur to innovation in the aluminium industry if a divestiture were ordered,[177] further stating that it would be a "disservice to the public" if Alcoa's research were impaired by divestiture.[178]

As discussed in Part II, the Commission found that innovation in the grocery sector was lower than expected in a workably competitive market.[179] Whilst there had been significant investment in innovation in the sector, innovations to improve customers' shopping experiences were favoured rather than those affecting price. However, consumers are more concerned with innovations impacting price than those improving convenience.

A counterargument exists that innovation is already strong enough in the sector, such that a divestiture would not improve innovation. Foodstuffs argued that due to New Zealand's comparatively small population, innovation and adoption of products would be slower than in larger countries.[180] They also argued that New Zealand has a lower household disposable income, meaning there is reduced consumer demand for innovation.[181] Woolworths argued that it is a world leader in supermarket innovation. Woolworths referred to the speed at which it responded to consumer demands at the start of the COVID-19 pandemic. Woolworths increased its online shopping capacity by 60 per cent in just a few weeks at the pandemic's beginning and processed over 120,000 applications for priority access.[182] Woolworths also referred to its supply chain improvements, such as a $100 million new purpose-built distribution centre and partnerships with meat and frozen food warehousing.[183] They argued that these will create enhanced efficiencies, leading to price reductions and improved services for consumers.[184] In addition, the Commission acknowledged that evidence

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177 *United States v Aluminum Co of America*, above n 108, at 417.

178 At 417.

179 Coriolis, Sense Partners and Cognitus, above n 18, at 1.

180 Foodstuffs North Island *Foodstuffs North Island's submission on grocery market study draft report* (10 September 2021) at 8.

181 Commerce Commission *Final report*, above n 2, at [3.213.2].

182 Woolworths New Zealand *Woolworths New Zealand Limited's submission on the New Zealand Commerce Commission's draft report regarding the market study into the retail grocery sector* (10 September 2021) at 113.

183 At 114.

184 At 114.

about the extent of the scope, scale and pace of innovations in the sector was contradictory.[185] Taken together, these submissions argue that due to New Zealand's smaller size and population, the sector's innovation level is already as high as is possible. Therefore, it would not be improved by divestiture.

The Commission highlighted three key points in response to the MGRs' submissions. First, New Zealand's size should not be a reason for a lack of innovation.[186] Secondly, when competition is working, innovation tends to lead to short-term higher profits, as rivals must compete to catch up. In this case, the MGRs' pace of innovation has differed greatly, but profits have remained high.[187] An example is Foodstuff SI's slow rolling out of online shopping compared to Woolworths, which had a limited effect on profits.[188] Thirdly, the Commission highlighted that when smaller grocery retailers have innovated in sectors such as online or dietary products, the MGRs have quickly been able to enter these sectors, suggesting that the MGRs have used innovation to stifle competition and maintain market position.[189] The New Zealand Grocery Council took this argument a step further, arguing that MGRs can withhold innovations that may increase competition due to their strong market positions.[190]

Although both Foodstuffs and Woolworths have made significant investments into the sector, the Commission's findings that the MGRs can quickly counter any innovations by other competitors and can withhold significant innovation (such as online shopping) without facing any consequences suggest that there is more innovation which could occur in the sector.

On balance, innovation is likely to improve with divestiture. In theory, greater competition should push supermarkets to innovate and improve productivity to get ahead of their competitors.[191] Divestiture should create more competition as it introduces new competitors to the market. Therefore, the MGRs will have to compete with one or more other supermarkets and to do this, they will need to innovate in areas such as price, supply and quality of service. This means divestiture should improve innovation in the sector.

Cost to consumers is the second factor that must be discussed concerning the divestiture's effect on consumers. In *AT&T*, the Court looked at the cost to consumers when assessing the divestiture

185 Commerce Commission *Final report*, above n 2, at [3.213.2].

186 At [3.219].

187 At [3.223].

188 At [3.224].

189 At [3.221].

190 At [3.225].

191 Coriolis, Sense Partners and Cognitus, above n 18, at 34.

order, and determined that an order was in the public interest as consumers were unlikely to see an increase in prices or a decline in the quality of service due to divestiture.[192]

Recent analysis shows that there are likely consumer benefits in the price of groceries if a divestiture were to be ordered. A 2022 Cabinet paper looked at several divestment options and concluded that the cost to consumers could range from a $9.2 billion benefit to a $1.4 billion deficit.[193] This translates to a per-household benefit of $4,800 over 20 years, or a deficit of $740 per household.[194] Analysis attributed the risk of the deficit occurring to price benefits being exceeded by costs from a reduction in variety.[195] The same paper concluded that the loss to supermarkets over 20 years would range from $4.5 billion to $7.4 billion.[196] However, Sense Partners provided MBIE with an analysis indicating that the costs to supermarkets of divestiture would be unlikely to exceed their excess profits. They suggested that divestiture leading to stronger competition could "benefit consumers by lowering retail prices and increasing choice, while still allowing supermarkets to remain viable".[197] Overall, the potential benefits to consumers over 20 years are very high and analysis indicates that supermarkets should remain viable.

On the other hand, there are risks of negative outcomes. Some outcomes predicted losses to consumers,[198] and there are doubts about how evenly consumers would benefit. Those in urban areas with several supermarkets would be more likely to benefit from increased competition. Those in rural areas with fewer supermarkets could see increased prices if higher supplier prices are passed on to them.[199] Lower-income households spend a higher proportion on groceries than those with higher incomes. This means that any reductions in grocery prices will have a greater effect on them.[200]

On balance, the benefits to consumers are likely to outweigh the risk of cost to consumers and the uneven spread of the benefit. This is because the overall potential size of the benefit is significant, and even if some consumers benefit more than others, the net gain to consumers is high.

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192 *United States v American Tel and Tel Co*, above n 118, at 170.

193 Cabinet paper "Provisional supermarket divestment cost benefit analysis and proposed next steps" (7 December 2022) CAB-22-MIN-0564 at [32].

194 At [33].

195 At [32].

196 At [38].

197 At [38].

198 At [32].

199 At [43].

200 At [41].

3 *Concentration of power*

Concentration of market power was a subject of discussion in *AT&T* and was used to support the argument of divestiture being in the public interest. Where fewer individuals control one sector, there is a risk that they can make key economic decisions independently. This takes power away from the representative democracy upon which the government is founded. Therefore, it is in the public interest to reduce the concentration of power in various sectors. In *AT&T*, the Court recognised the importance of the telecommunications industry, finding it to be key to facilitating information and modern life.

Supermarkets, particularly MGRs, are also key to modern life, as they significantly impact the average consumer's everyday life. Supermarkets are New Zealand's largest retail sales sector, generating $23.8 billion in revenue in 2022.[201] This was 21 per cent of New Zealand's retail sales value for 2022.[202] New Zealand consumers spend 14 per cent of their income on retail food and beverages,[203] with supermarkets selling 78 per cent of retail food.[204] Supermarkets are also the leading source of non-food products such as pet food, baby, cleaning and laundry items.[205] This demonstrates that New Zealanders spend a significant amount of their income on food, most of which goes to MGRs.

With the grocery sector being so key to modern life, and currently in a duopoly, there is an argument that these two firms could make key economic decisions which have the potential to undermine the power of representative government. Therefore, divestiture would be in the public interest as it would introduce further competition to the sector and reduce the possibility of such outcomes.

Overall, divestiture is likely to be an effective remedy. Although it appears to be impractical with the differing ownership structures of the two MGRs, there are ways that it could be implemented, such as with a clear plan and controlled integration. The cost to consumers involves some risk but would be outweighed by it likely leading to reduced prices over 20 years, along with improved innovation. The concentration of power would be reduced in an important consumer sector, which supports the goals of competition law.

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201 Coriolis, above n 9, at 25.

202 At 25.

203 At 22.

204 At 23.

205 At 24.

C Another Remedy

In the United States, divestiture is generally considered to be the most effective way to restore competition.[206] The reasoning is that other, less harsh remedies carry a greater risk to the consumer that competition will not be restored.[207] In unusual circumstances, however, courts may be willing to consider other remedies.[208] The respondent must show that a remedy other than divestiture would sufficiently redress the violation.[209]

To recap, the reasons the Commission found that competition in the grocery sector was not working well for consumers was because:[210]

(a) A market duopoly exists.
(b) The intensity of competition between the major competitors is muted.
(c) Entry and expansion in the sector is difficult.
(d) The profitability of major retailers is higher than expected.
(e) Prices are high compared to international standards.
(f) Innovation in the sector is low.
(g) Pricing and promotional practices are limiting customers' ability to make informed decisions.
(h) Competition is not working for suppliers due to an imbalance in bargaining power.

Divestiture would address all these issues by introducing one or more additional supermarkets into the market. This would break up the duopoly and increase the intensity of competition between major competitors. Issues of entry and expansion would temporarily cease to be an issue, as a purchase of divested property would have the required infrastructure to start competing quickly. Prices should decrease as a new competitor would bring more price competition. Innovation should increase as more pressure would be placed on the MGRs to innovate to get ahead of the competition. Supplier imbalances in bargaining power would reduce as there would be additional buyers for the MGRs to compete with.

Therefore, the question is whether the MGRs could argue that this is an unusual situation where another remedy is more in the public interest. In support of preventing divestiture, the MGRs could point to the Commission's report. The Commission did not recommend divestiture as they could not

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206 *United States v EI du Pont de Nemours & Co*, above n 93, at 331.

207 Lumer, above n 21, at 159.

208 At 160.

209 *Fruehauf Corp*, above n 99, at 123.

210 Commerce Commission *Executive summary*, above n 1, at 5.

conclude that the benefits would outweigh the costs.[211] The Commission thought it was not worth the risk when their recommendations could achieve some benefits with other interventions, being the Grocery Industry Competition Act and the Commerce (Grocery Sector Covenants) Amendment Act.[212]

The Grocery Industry Competition Act implements several interventions. Notably, it aims to address the inequality of bargaining power between MGRs and suppliers by introducing a grocery supply code and a dispute resolution scheme.[213] The Commerce (Grocery Sector Covenants) Amendment Act amends the Commerce Act to prevent restrictive or exclusivity covenants that impede land development that could be used to compete with grocery retailers.[214]

The MGRs could argue that these measures provide enough of a remedy to the sector so that divestiture is not warranted, as competition will be restored anyway. These enactments help to promote entry and expansion; it may take time, but newly entering competitors could break up the duopoly. Removal of restrictive covenants opens up new land for new competitors to purchase and begin development. The grocery supply code requires MGRs to supply wholesale groceries, so any new entrant would have a more available supply than before. Over time, the Commission's key points of concern would reduce as competition is slowly and naturally restored.

Another argument for favouring the current set of remedies is that the divestiture process has significant risks. Former Minister of Commerce and Consumer Affairs, Hon David Clark MP, described the key risks as a complex implementation, adverse impacts on some consumers, the possibility of legal challenges and the risk of failure of an incumbent or new entrant. He also noted that continuing to work on divestiture strategies could lead to a short-term reduction in investment in the supermarket industry.[215]

These points combined create a strong case that the remedies put in place by government action sufficiently redress the violations of competition and reduce the risk of the adverse impacts of divestiture. Therefore, this could constitute an unusual set of circumstances where divestiture should not be ordered, as other remedies have already been implemented to redress the violation.

Nevertheless, there is significant doubt that the current measures will restore competition. Analysing on behalf of MBIE, Sense Partners concluded that the recent measures are likely to have a

211 Commerce Commission *Final report*, above n 2, at [9.256].

212 At [9.256].

213 van Heerden, above n 61, at [12.2]–[12.4] and [12.6].

214 Commerce Act, s 28A, inserted by Commerce (Grocery Sector Covenants) Amendment Act, s 4.

215 Cabinet paper, above n 193, at [9].

modest positive impact but are unlikely to result in "material change" to competition.[216] Sense Partners found that smaller retailers will have better access to wholesale groceries at a lower price due to the grocery supply code. This will help them to increase their market share.[217] They also found that it would be slightly easier for new stores to find land as the restrictive covenants are removed.[218] Neither of these measures will shift the duopoly structure. Sense Partners submitted that the only way to shift this structure is with a competitive threat to entry to challenge the current MGRs.[219] They concluded that the current measures would lead to a 20-year forecast for the New Zealand grocery sector that was similar to that of the past 20 years.[220] Therefore, structural change is necessary to restore the market to a competitive level.

Some further support for divestiture also came from the former Minister. Despite the significant risks of divestiture, Mr Clark concluded that the cost-benefit analysis made a case for further investigation.[221] He went as far as to advise the Labour Government to have a divestiture remedy ready to deploy by 2024.[222] This indicates that the potential net benefits to society may outweigh the risks.

On balance, there is enough doubt in the current measures to conclude that this is not likely to be a situation where other remedies should be preferred. The measures taken by the Labour Government are unlikely to redress the violations sufficiently. The set of circumstances that the New Zealand grocery market finds itself in are not unusual.

V CONCLUSION

The Commission's report established that competition in the New Zealand grocery sector was not working well for consumers. They attributed this to the duopoly of MGRs. The Government's response has included legislation to reduce barriers to entry by making land for development more available and increasing the availability of grocery supplies. However, it is likely that the Government's responses did not go far enough and that divestiture may be the only suitable remedy.

This article analysed how courts have applied divestiture overseas, in order to establish how a New Zealand court may analyse a divestiture order. It concluded that divestiture must only be conducted in the public interest. To establish whether divestiture is in the public interest, a court must

216 Coriolis, Sense Partners and Cognitus, above n 18, at 8.

217 At 7.

218 At 8.

219 At 8.

220 At 8.

221 Cabinet paper, above n 193, at [10].

222 At [11].

examine causation, the effect of divestiture on consumers and the effectiveness of alternative remedies.

The article then applied these principles to the New Zealand grocery sector and concluded that a divestiture order would effectively remedy the grocery sector. However, there may be difficulties with the level of integration and risk of potential costs to consumers. Finally, the article reviewed the evidence and concluded that the current set of remedies introduced by the previous Government is unlikely to restore competition to a workable level. Therefore, divestiture is the most appropriate remedy.