



17 February 2010

Divestment Guidelines Feedback
Commerce Commission
PO Box 2351
WELLINGTON 6140

By email: DivestmentGuidelines@comcom.govt.nz

Draft Mergers and Acquisitions Divestment Remedies Guidelines

The New Zealand Law Society (the Society) welcomes the opportunity to comment on the draft guidelines referred to above.

1. The Society supports the publication of the guidelines as these will assist lawyers and their clients in preparing clearance applications that contemplate divestments.
2. We raise one legal issue that the Commission may wish to consider further before finalising the guidelines. Section 69A(1) of the Commerce Act 1986 provides that:

“the Commission may accept a written undertaking ... to dispose of assets or shares specified in the undertaking”.

The discussion paper notes at paragraph 2.05 that the effect of s69A(2) is to limit the Commission to accepting structural undertakings and to prohibit the acceptance of any other kind of undertaking (namely behavioural undertakings).

This continues to appear problematic in that many undertakings sought in order to ensure that a divestment undertaking is achieved to the satisfaction of the Commission are likely to be considered as behavioural undertakings, not structural, and therefore not permitted by section 69A. While a court may interpret undertakings associated with divestment to fall within section 69A(1), this does not sit comfortably with a literal interpretation of the relevant sections. The Stafix example provided in the discussion paper includes a series of subsidiary matters undertaken by the applicant that seem, by their nature, to be behavioural and of significance to the Commission.

The Commission may, therefore, wish to revisit the question of prohibiting the acceptance of all behavioural undertakings.

3. Paragraph 3.12 of the guidelines covers the possibility of the Commission having to consider the impact a divestment might have on markets overseas. This is likely to be a factor beyond the powers of the Commission to consider and could be open to legal challenge if implemented. The Society believes the impact on an overseas market is not

relevant to the Commission's analysis of the divestment and this paragraph should be amended accordingly.

4. Other minor comments are as follows:
- (a) footnote 4 appears to be misplaced at paragraph 2.05;
 - (b) in paragraph 3.04 the final words should read: "... for clearance, including those that may include divestments."
 - (c) the fourth bullet in paragraph 4.09 should read "ensuring the divestment undertaking is not limited to a declining product..."

This submission has been prepared by the Society's Commercial and Business Law Committee, the Convener of which is John Horner. If you have any queries regarding this submission please contact Diana Brown, the Committee Secretary, by telephone (04) 463 2967 or email diana.brown@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Marshall". The signature is written in a cursive style with a large initial 'J'.

John Marshall QC
President