John Eccles

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.

LLB (HONOURS)
LAWS489

FACULTY OF LAW

2023

Abstract

There is considerable concern about the state of competition in the New Zealand grocery sector. Recent Government responses have not helped to quell this concern. Many believe that only structural separation in the form of divestiture will restore competition to the grocery sector. This paper examines findings of the Commerce Commission's market study of the grocery sector and the Governments response to those findings. It then seeks 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 submits that the Courts have three key elements when analysing divestiture as an anticompetitive remedy. Firstly, causation. Secondly, the effect of the divestiture. Thirdly, the applicability of alternate remedies. Applying each of these elements to the grocery sector reveals that, whilst there would be some difficulty in implementation, the grocery sector is a situation where divestiture would be favoured by a Court.

Keywords
"Competition Law", "Remedy", "Divestiture", "Divestment" "Grocery Sector".

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I Introduction

In 2020, the New Zealand Commerce Commission (the Commission) published its final report on its Market Study into the retail grocery sector.[1] The 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."[2] The Commission's key finding was that competition was not working for consumers in the grocery sector.[3] This was attributed to the existence of a duopoly of Major Grocery Retailers.[4]

The commission defines grocery retailers as "businesses which sell grocery products directly to final consumers in New Zealand."[5] Within this definition are Major Grocery Retailers (MGRs), grocery retailers operating many supermarkets.[6] MGRs offer a wide range of grocery needs to consumers.[7] There are also other grocery retailers; these retailers offer a more specialised selection of goods.[8] Examples include international food stores or specialist produce retailers.

A duopoly is a "situation in which only two companies control all the business in a particular industry."[9] In the grocery sector, these two companies are Foodstuffs and Woolworths NZ Limited.[10] Foodstuffs have a 58% share in chain supermarkets and grocery stores.[11] This share is comprised of Pak'n'Save (34%), New World (20%) and Four Square (4%).[12] Foodstuffs is two separate companies, Foodstuffs North Island Limited (NI) and Foodstuffs South Island Limited (SI) .[13] Each company only operates on its respective

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[1] Commerce Commission *Market Study in the retail grocery sector: Final report* (March 2022) (*Commerce Commission Final Report*).

[2] Commerce Commission *Market Study in the retail grocery sector: Executive summary* (March 2022) at 3. (*Commerce Commission Executive Summary)*

[3] At 3.

[4] At 6.

[5] Commerce Commission Final report above n 1, at 10.

[6] At 10.

[7] At 2.10.

[8] At 2.10.

[9] "Duopoly" Cambridge Dictionary <www.dictionary.cambridge.org/dictionary/english/dupoly>.

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

[11] At 28.

[12] At 28.

[13] Commerce Commission Final report above n 1, at 2.17.

island. This means that they do not compete against each other, and each island has two MGRs.[14]
Woolworths has a 42% share in chain supermarkets and grocery stores.[15] This is comprised of Countdown (35%), SuperValue (4%) and Fresh Choice (3%).[16]

The Commission's recommendations led to the Grocery Supply Industry Competition Act 2023 and the Commerce (Grocery Sector) Amendment Act 2022. This legislation aims to increase competition in the grocery sector to benefit consumers.[17] However, there is significant doubt that this legislation will restore competition to the sector.[18] The New Zealand Government has been looking at the option of divestiture in the grocery sector, although this is still in its early stages.[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 reviews the principles of divestiture in New Zealand. It concludes that we must look to the United States of America for jurisprudence due to a lack of divestiture action in New Zealand. It reviews the United States jurisprudence and extracts principles of divestiture from the relevant cases. The essay then applies these principles to the New Zealand grocery sector and looks at arguments that each side could advance. Concluding that divestiture will likely be an effective remedy for the New Zealand Grocery Sector.

Part II discusses the Commission's report and the Governments response. Part III analyses how Courts have applied divestiture in New Zealand and the USA. It draws out 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.

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[14] At 2.17.

[15] Coriolis, above n 10, at 28

[16] At 28.

[17] Grocery Industry Competition Act 2023, s3.

[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); Monopoly Watch NZ *"Submission to Select Committee on Grocery Industry Competition Bill".*

[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 Grocery Sector

A The Commission's Findings and Recommendations

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

(a) The existence of a market duopoly.
(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 essay, three findings are key.

Firstly, the Commission observed that the MGRs achieved higher profits than expected in a competitive market.[23] Levels of high-profit returns can occur in a competitive market. High profits, however, are generally particular to some firms due to innovation in lowering costs or improving offerings.[24] When profits in a sector are persistently high for more than one firm, competition is not working for consumers.[25] The Commission estimated a normal rate of return of 5.5% (ROACE) for MGRs between 2015 and 2019.[26] The actual figures were 12.8% for Foodstuffs SI, 13.1% for Foodstuffs NI, and 12.7% for Woolworths NZ.[27] This shows 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.[28] This leads to higher prices in the long term.[29] The commission found that New Zealand was the fifth

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[22] Commerce Commission Executive Summary, above n 2, at 6.
[23] Commerce Commission Final Report, above n 1, at 3.6.
[24] At 3.15.
[25] At 3.17.
[26] At 3.7.
[27] At 3.7.
[28] At 3.83.
[29] At 3.83.

most expensive grocery market in the OECD in 2017.[30] At the request of NERA (an economic consulting group representing Woolworths), the Commission removed alcohol and tobacco from this analysis, New Zealand still ranked seventh.[31] The Commission concluded that despite alcohol and tobacco prices being high, they are not a significant factor in New Zealand's high price ranking.[32] An additional finding was that New Zealand's per capita spending was at least the fifth highest amongst the OECD in 2017.[33] Together, these factors show that grocery prices are high and consumer spending on groceries is higher than in a competitive market.

Thirdly, in competitive markets, firms invest in innovation to create greater profits derived from meeting consumer demands.[34] The Commission concluded that the grocery sector's scale and pace of innovation are less than expected in a competitive market despite significant investment in innovation.[35] Innovations aimed at improving customers' convenient shopping experience were numerous, such as implementing SHOP'n'GO at Pak'n'Save stores and creating New World Metro stores.[36] The Commission, however, observed that consumers prefer innovations that enhance price competition rather than those that increase convenience.[37] Price is the key measure by which consumers select stores. Since innovation is not aimed at price, it can be argued that innovation has failed in this aspect.[38] 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.[39] Whilst there have been innovations in the online shopping sphere, it is unlikely that these innovations have increased competition with physical retailers.[40]

The Commission then issued 14 recommendations. These are summarised as follows:[41]

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[30] At 3.113.
[31] At 3.124.
[32] At 3.113.
[33] At 3.115.
[34] At 3.152.
[35] At 3.209.
[36] At 3.161; 3.162.
[37] At 3.163.
[38] At 3.164.
[39] At 3.167; 3.181.
[40] At 3.201
[41] 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 and the Sale and Supply of Alcohol Act should consider whether they 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 to strengthen the business-to-business unfair contract terms regime.

Recommendations nine through twelve focused on improving consumers' decision-making regarding price and promotional programs.[42] These will not be discussed in this essay.

Other Recommendations

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 first made recommendations to improve conditions for entry and expansion. The threat of a new entrant into the sector can constrain a firm's behaviour within a sector.[43] However, the sector must have a low cost of entry and expansion.[44] If a sector has limitations on entry, then prices are likely to remain high in the long term and adversely affect consumers.[45] The Commission found that in current conditions, new competitors will not be able to reach the scale required to compete with current MGRs.[46] The reasons for this are: Population size impacts the profitability of establishing new supermarkets, planning laws prevent sufficient sites for the development of grocery stores, MGRs have implemented restrictive covenants preventing rival supermarkets in certain

[42] At 378.
[43] At 6.3.
[44] At 6.3.
[45] At 6.4.
[46] At 189.

areas, and a lack of access to wholesale grocery suppliers for competitive prices preventing smaller grocery retailers from expanding their range to compete with MGRs effectively.[47] Therefore, these recommendations are aimed at freeing up spaces for new development and increasing the availability of supply of groceries. This should reduce the cost of entering the sector.[48] 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.[49] Imbalances in supplier bargaining power can lead to suppliers accepting weaker terms than they would in a balanced negotiation.[50] Suppliers then invest less in innovation, adversely affecting the range and price to consumers.[51] The Commission found that suppliers are limited to whom they can sell their products because MGRs control such a high percentage of the market.[52] MGRs have few constraints on the demands they can impose on suppliers, leading to unfavourable negotiations for suppliers.[53] 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.[54]

The Commission also made two other recommendations. It recommended, firstly, establishing a grocery sector regulator.[55] The grocery regulator's purpose would be to give effect to the recommendations in this report and to oversee the sector generally.[56] Secondly, the commission recommended that a review be undertaken three years after implementing its recommendations.[57] The Commission believes that the recommendations in this report will be effective and result in a material improvement in the sector. Still, they cannot determine how significant this effect will be. A review, therefore, is necessary.[58]

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[47] At 189.
[48] At 9.37
[49] At 324.
[50] At 8.5.
[51] At 8.5.
[52] At 8.2.
[53] At 8.2.
[54] At 378.
[55] At 9.266.
[56] At 9.267; 9.268.
[57] At 9.272.
[58] At 9.273.

B Government Response

In response to the Commission's findings, the Government introduced the Grocery Industry Competition Act 2023 and the Commerce (Grocery Sector) Amendment Act 2022.

The Grocery Industry Competition Act's Purpose is to "promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand."[59] To achieve this purpose, the act establishes a wholesale supply regime that obligates MGRs to set up wholesale supply to other grocery retailers, making it easier for new businesses to enter the sector.[60] Sets up a grocery supply code that provides rules of engagement for MGR and suppliers.[61] It 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.[62] Establishes the framework for a new dispute resolution body in the sector.[63] And enables collective bargaining for suppliers.[64]
The Commerce (Grocery Sector) Amendment Bill amends the Commerce Act 1986 to prevent restrictive or exclusivity covenants that impede the development of land that could be used to compete with grocery retailers.[65]

However, there is doubt that these bills effectively restore competition to the sector. In a select committee submission for the now Grocery Industry Competition Act 2023, Monopoly Watch NZ (MWNZ) argued that the only way that competition could be restored was through forced divestiture of supermarket assets.[66] MWNZ submitted "only structural separation, and a forced retail divestment will give the distribution power to a 3rd or 4th operator, to commence proper price and innovation competition."[67] MWNZ made several other arguments to support this recommendation. MWNZ argued that consumers would face increased costs as the Bill would increase costs for the MGRs, and these MGRs are in a position where the costs can be passed to consumers.[68] MWNZ submitted that the

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[59] Section 3.
[60] Letter from Pierre van Heerden (Grocery Commissioner) to the grocery sector regarding the commencement of the Grocery Industry Competition Act 2023 (13 July 2023) at 12.1.
[61] At 12.2.
[62] At 12.3.
[63] At 12.4.
[64] At 12.6.
[65] Section 28A.
[66] Monopoly Watch NZ, above n 18, at 1.
[67]At 1.
[68] At 3.

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.[69] MNWZ made a point that the MGR will see this act as a success, they can claim they are being regulated whilst barriers to entry are closed.[70]

The New Zealand government has also been investigating the possibility of divestment in the sector, running a cost/benefit analysis.[71]

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

III Divestiture

A Divestiture

Divestiture is a court-ordered remedy which compels a firm to sell off illegally held or acquired assets.[72] The objective of the remedy is to restore market competition by creating a new competitor or strengthening an existing competitor.[73] It is a structural remedy. This means it directly alters the market structure into which it is deployed.[74] The theoretical justification for structural remedies is that they only need to be deployed once.[75] 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.[76] This is why divestiture is considered one of the strongest remedies for anti-competitive conduct, as it prevents future anti-competitive acts by a firm by rendering the firm unable to engage in them altogether.[77]

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[69] At 3.

[70] At 3.

[71] See Coriolis, Sense Partners and Cognitus, above n 18.

[72] Areeda and Hovenkamp, above n 20, at 128.

[73] Lumer, above n 21, at 147.

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

[75] At 445.

[76] At 446.

[77] 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.

Divestiture exists as a remedy in New Zealand through the Commerce Act 1985. Section 85 of the Commerce Act 1986 allows the Court, by application of the Commission, to order divestment where there has been a breach of s47. Section 47 applies when an acquisition has the effect of "substantially lessening competition in a market."[78]

As discussed in Part II, New Zealand's grocery sector is a duopoly comprising Foodstuffs and Woolworths. Each MGR has a long history of mergers and acquisitions to reach the dominant market position that it exists in today, these mergers were approved either through the courts or by the Commission.[79] Foodstuffs most recent merger occurred in 2013 when Foodstuffs NI was created when Foodstuffs Auckland and Foodstuffs Wellington merged into one entity.[80] Woolworths' most recent merger was in 2002, when Progressive Enterprises acquired Woolworths NZ.[81] This means that any divestment action taken would be on a completed merger. Both mergers are outside the two-year limit imposed by the Commerce Act, but the New Zealand government has other means to implement divestiture.[82]

B New Zealand Cases

There are limited examples of divestiture being applied on a completed merger in New Zealand. As such, few principles can be derived from case law.
Some principles are in *Commerce Commission v Fletcher Challenge Ltd (Fletcher).*[83] 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).[84] The commission argued that this was an undisclosed agreement and violated the Commerce Act.[85] The High Court found a breach had occurred but did not order divestment as a remedy.[86] McGechan J expressed reluctance to "unscramble the egg."[87] The Court gave weight to harm done to competition but argued that on balance 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

[78] Section 47(1).

[79] Coriolis, above n 10, at 30.

[80] At 30.

[81] At 30.

[82] Section 85(2).

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

[84] At 554.

[85] At 556.

[86] At 633.

[87] At 600.

of the remedies meant it was unwise to grant such severe remedies.[88] 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".[89] This shows that even where the law is violated, divestiture may not be an appropriate remedy when practicalities make its implementation unrealistic.

From this case, we can derive principles of timeliness, improper conduct and practicability/realism when ordering divestment or unscrambling the egg.[90]
The lack of New Zealand case law means that overseas jurisprudence is crucial in establishing principles of divestiture.

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 s2 of the Sherman Act 1890 and s7 of the Clayton Act 1914.

United States v E.I. du Pont de Nemours & Co (Du Pont) is an essential case that supports the principle that divestiture is generally the most effective way to restore competition. The Supreme Court regarded divestiture as the "most important of antitrust remedies. It is simple, relatively easy to administer, and sure."[91] The reasoning is that other, less harsh, remedies carry a greater risk to the consumer that competition will not be restored.[92] In addition, behavioural remedies are more costly and intrusive.[93]

In unusual circumstances, however, the court may be willing to consider other remedies.[94] The respondent must show that a remedy other than divestiture would sufficiently redress the violation.[95] The Clayton Act s7 focus is to restore competition. The court, therefore, must look to see if divestiture will "effectively do so under the facts of each case."[96] In *FTC v PepsiCo Inc*, the Federal Court expanded on this by saying, "A primary concern (of

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[88] At 630.
[89] At 630.
[90] At 600.
[91] *United States v E.I. du Pont de Nemours & Co* 366 US 316 (1961) at 331
[92] Lumer, above n 21, at 159.
[93] At 159.
[94] At 160.
[95] *Fruehauf Corporation (Interlocutory Order)* 90 FTC 891 (1977) at 123.
[96] *Saint Alphonsus Med Center-Nampa Inc v St Luke's Health Sys Ltd* 778 F 3d 775 (9th Cir 2015) at 792.

divestiture) is whether the offending line of commerce, if disassociated from the merged entities, can survive as a viable, independent entity."[97] This means whether divestiture is the correct remedy will depend on the facts of the case and whether the entity formed by the divestiture is likely to survive without government supervision.

A contrast to New Zealand's law comes from the principle of time before enforcement action is taken. *Federal Trade Commission v Facebook (Facebook)* involved acquisitions by Facebook in 2012 and 2014. The case was not filed until 2020.[98] Facebook attempted to dismiss the case because the FTC's complaint was not timely.[99] The District Court dismissed this argument:[100]

> 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.

This illustrates a critical difference between New Zealand and USA. New Zealand imposes a two-year limit on divestiture orders, whilst the USA has no limit.
Although time does not prevent a case from being brought for a violation of s7, it can be a matter the court considers when selecting an appropriate remedy. Seven years had passed in *Evanston Northwestern Healthcare Corporation Antitrust Litigation* from the acquisition to the proceedings.[101] The FTC found that a s7 violation had occurred but did not order divestiture.[102] This was because the passing of time had led to Evanston integrating the operations of its facilities and that ordering a divestiture would be difficult, with a greater risk of "unforeseen costs and failure."[103] This demonstrates that the greater the time from acquisition to enforcement, the greater the integration and the more complex the divestiture.

These general principles provide good guidance for the application of divestiture. However, a set of cases that offer significant value to this analysis are the unitary firm divestiture cases. These are cases where singular businesses control an entire sector.[104]

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[97] *FTC v PepsiCo Inc* 477 F 2d 24 (2d Cir 1973) at 29.
[98] *FTC v Facebook Inc* 560 F Supp 3d 1 (DC Cir 2021).
[99] At 31.
[100] At 32.
[101] *Evanston Northwestern Healthcare Corporation Antitrust Litigation* No. 07 C 04446 (ND Ill 2016)
[102] At 3
[103] At 79
[104] Lumer, above n 21, at 162.

Singular firm monopolies pose a unique set of difficulties to divestiture orders, and as such, the court has been required to conduct an in-depth analysis of divestiture.

The first of these cases is *United States v. Aluminum Co. of America (Alcoa).*[105] In the 1940s, Alcoa breached s2 of the Sherman Act.[106] Alcoa owned patents, which allowed it to accrue 90% of the aluminium ingot market.[107] Despite Alcoa's controlling position, the District Court did not order a complete divestiture.[108] Knox J gave several reasons for this. Firstly, the judge regarded a strong aluminium industry as necessary for national security and "the peacetime welfare of the general public".[109] Secondly, the judge expressed concern that divestiture would lead to a "marked loss in efficiency."[110] 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".[111] Thirdly, a new corporation would require experienced management.[112] Alcoa has been the sole firm for so long that any experienced management would come from its staff. This would breach the purpose of creating a new entity with severed ties to Alcoa.[113] Fourthly, there would be a "disservice to the public" by the loss of innovation caused by divestiture.[114]

United States v American Tel and Tel Co (*AT&T)* involved the monopolisation of the telephone market by AT&T.[115] Over 100 years, AT&T used an aggressive acquisition strategy to acquire a monopoly over long-distance and local services and equipment markets. The case was settled out of court in 1982, but the District Court was obligated to review the agreement to see if it was in the public interest.[116] The fundamental principles for determining whether the agreement was in the public interest were causation, concentration of power, remedies, and consumer welfare.[117]

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[105] *United States v. Aluminum Co of America* 91 F Supp 333 (SD NY 1950).
[106] At 339.
[107] At 345.
[108] At 416.
[109] At 416.
[110] At 417.
[111] At 416.
[112] At 417.
[113] At 417.
[114] At 417.
[115] *United States v American Tel and Tel Co* 552 F Supp 131 (DC Cir 1983).
[116] At 135.
[117] At 160.

Causation was analysed by examining AT&T's conduct in establishing its dominant market position.[118] While 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.[119] AT&T was able to implement these policies due to its control over the local exchange facilities.[120] Another key piece of anti-competitive conduct was AT&T only connecting competitor's equipment through an overpriced protective contracting arrangement.[121]

The Court looked at the benefits of divestiture and how it would reduce the concentration of power in the sector. The court discussed 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.[122] If an essential part of the economy is controlled by one group, they can make key economic decisions alone. This, in theory, would give them strong political powers, taking the power away from representative democracy.[123] The court regarded the telecommunications industry as key to modern life.[124] Since AT&T have a commanding position that could have potentially been exploited in the future, the court regarded divestment as strongly in the public interest.[125]

The Court then analysed other available remedies based on the evidence put before it. The court considered divestiture of the Operating Companies as the appropriate remedy:[126]

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

[118] At 161.
[119] At 161; 162.
[120] At 162.
[121] At 162.
[122] At 164.
[123] At 164.
[124] At 165.
[125] At 165; 166.
[126] At 165.

Most of AT&T's anti-competitive conduct stemmed from its control of the local operating companies.[127] By removing these companies from its control, the objectionable practice should be halted as AT&T no longer has the control required to implement the policies.[128] The Court looked at alternative remedies but concluded that none were as "efficacious" as the divestment of the operating companies.[129] The Court worried that other divestitures would not have the same effect on anti-competitive behaviours and would lead to decreased innovation.[130] 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.[131]

Lastly, the Court considered other impacts the divestment may have on the consumer. It was argued that AT&T had provided cheap and excellent services to consumers. Therefore, divestment could not be in the public interest.[132] The court disagreed, finding that costs should remain similar and the quality of services was unlikely to decline because of the divestment.[133] Therefore, the public interest in divesting the operating companies due to anti-competitive behaviour outweighed the interest to preserve them.[134]

United States v Microsoft Corp (Microsoft) provides guidance on divestiture, but, only in dictum.[135] The case involved Microsoft breaching s2 of the Sherman Act by attempting to monopolise the operating system (OS) and internet browser markets through anti-competitive licensing terms.[136] Before a remedy could be decided, the Department of Justice and Microsoft would settle with an agreement featuring only behavioural remedies.[137] 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:[138]

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[127] At 165.
[128] At 166.
[129] At 166.
[130] At 167.
[131] At 167.
[132] At 169.
[133] At 169.
[134] At 170.
[135] *United States v Microsoft Corp* 253 F.3d 34 (DC Cir 2001).
[136] At 46.
[137] Lumer, above n 21, at 170.
[138] *United States v Microsoft Corp,* above n 135, at 107.

> 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 pre-existed 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.[139] 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" can be found between Microsoft's dominant OS market position and its anticompetitive conduct.[140] Without such causation, the appropriate remedy is an injunction against that behaviour.[141] The Court did not opine on whether Microsoft's conduct reached this threshold.[142]

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

Reviewing all the jurisprudence from across Australia, New Zealand, and the United States some fundamental principles emerge when the court considers applying divestiture as a remedy.

The starting point is divestiture must be in the public interest. To determine whether divestiture is in the public interest the relevant principles are causation and effect of divestiture. Causation examines whether there are sufficient connections between anti-competitive conduct or practice and the resulting market position. The effect of divestiture asks whether divestiture would restore competition in the sector. Considerations such as integration, effects on consumers and effect on the concentration of power are relevant.

If these elements are found to exist, then it is likely that divestiture would be the most effective remedy. However, in unusual circumstances where the defendant company can

[139] At 106.
[140] At 106.
[141] At 106.
[142] At 107.

show a remedy other than divestiture would sufficiently redress the violation the Court may permit another remedy.

IV Application to the Grocery Sector

A Causation

Causation looks to whether there is a “sufficient causal connection” between the firm's market position and the anti-competitive conduct of the firm.[143] The District Court in *Microsoft* and the Federal Court in *AT&T* emphasised this element in their analysis. New Zealand’s High Court also discusses a lack of improper conduct as a reason for not ordering divestiture in *Flecther.*

One area where it is arguable there is a causal connection between the MGR’s conduct and the resulting market position is that of restrictive covenants. Restrictive covenants are covenants that restrict future development of supermarkets or other retailers.[144] These covenants run with the land, binding third parties who lease or purchase the land.[145] Restrictive covenants are a barrier to entry as sites that could have been used for supermarket development are barred from development.[146] The Commission is investigating 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.”[147]

Historically, s27 and s28 of the Commerce Act may apply to these leases. Section 27 applies when an agreement is made which has the effect or likely effect of substantially lessening competition in a market.[148] Section 28 prevents the enforcement of such an agreement. The Commerce (Grocery Sector Covenants) Amendment Act 2022 was enacted recently. This act adds s28A, which treats any restrictive or exclusivity covenant that

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[143] *United States v Microsoft Corp,* above n 135, at 106.

[144] Commerce Commission Executive Summary, above n 2, at 6.

[145] Commerce Commission Final Report, above n 1, at 6.78.

[146] At 6.89.

[147] See Commerce Commission New Zealand “Case Register: Foodstuffs North Island Limited” (31 May 2022)<https://comcom.govt.nz/case-register/case-register-entries/foodstuffs-north-island-limited>; Commerce Commission New Zealand “Case Register: Foodstuffs South Island Limited” (31 May 2022) <https://comcom.govt.nz/case-register/case-register-entries/foodstuffs-south-island-limited>; Commerce Commission New Zealand “Case Register: Woolworths New Zealand Limited” (31 May 2022) < https://comcom.govt.nz/case-register/case-register-entries/woolworths-new-zealand-limited>

[148] Section 27(1).

impedes the development of a grocery store or stores likely to compete with a grocery store as substantially lessening competition.[149] The act only applies to designated grocery retailers, including the current MGRs.[150] Existing covenants which meet this test are unenforceable.[151]

The Commission found that the key rationale for lodging these covenants is to prevent supermarket competition from entering the area.[152] It also observed that several sites had been purchased and sold once a restrictive covenant was lodged.[153] The Commission identified at least 90 restrictive covenants entered by MGRs. Sixty of which had no time limit or had 20-plus year terms.[154] The commission found that restrictive covenants harm competition by creating barriers to entry and reducing competition in areas where they are in place.[155] Noting that, on balance the anticompetitive effects of these covenants outweigh benefits.[156]

An example of legal difficulties with these covenants occurred in 2019. Foodstuffs NI began proceeding in the High Court against Woolworths. The proceedings were around a restrictive covenant that would have prevented a Pak'n'Save 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]

Most of these covenants would likely meet the new lower threshold of s28A. Some may even breach the higher threshold of s27. Therefore, it could be argued that a "sufficient causal connection" exists between the MGR's market position and their anticompetitive conduct. Without these covenants, other retailers may have been able to establish

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[149] Section 28A(1).
[150] Section 28A(4).
[151] Section14(1).
[152] Commerce Commission Final Report, above n 1, at 6.92.1.
[153] At 6.92.2.
[154] At 6.77.
[155] At 189.
[156] At 6.90.
[157] At 6.83.2.
[158] FMCG Business "Battle at Highland Park" FMCG Business (online ed, New Zealand, 15 August 2019).
[159] FMCG Business "Battle at Highland Park" FMCG Business (online ed, New Zealand, 15 August 2019).
[160] Nick Krause "Pak'n'Save Highland Park in the pipeline" Times (online ed, New Zealand, 2 August 2022).

supermarkets in these areas. This would mean the MGRs would have more competition in an area and would likely see 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 for the MGRs is that these agreements have not been found to be illegal yet. If these agreements are not anti-competitive, it cannot be said that their conduct in making these agreements was anti-competitive. Therefore, it cannot be argued that there is a causal connection between the market position and anticompetitive conduct as no anticompetitive conduct exists.

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

B Effect of Divestiture

1 Level of Integration

When determining if divestiture is the appropriate remedy, the Courts in each country asked whether it was practicable to order divestiture. Or, as McGechan J asked in *Fletcher,* is it possible to "unscramble the egg".[161]

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.[162]

There is a strong argument that divestiture in the grocery sector would not be practicable. The time between the mergers and enforcement action is very long. Foodstuffs most recent merger occurred in 2012, and Woolworth's most recent merger occurred in 2003. This means that a minimum of ten years has passed from merger to action. Therefore, significant integration is likely to have occurred.

In *Fletcher*, the High Court did not order divestiture as its view was the companies involved in the merger had become significantly integrated after just one year. In *Evanston,* the Court refused to order divestiture as the integration between the merged companies would have been too great. This was a period of seven years between the merger and the action. The Commerce Act places a two-year limit on divestiture.[163] These examples show that even small lengths of time can lead to significant integration and divestiture being inappropriate.

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[161] Commerce Commission v Fletcher Challenge ltd, above n 83, at 600.

[162] Evanston Northwestern Healthcare Corporation Antitrust Litigation, above n 101, at 79.

[163] Section 85(2)

Even the United States, where the preferred remedy is divestiture, was not willing to order divestiture after seven years.

There may also be difficulties with the different structuring of the MGRs. Foodstuffs NI is comprised of owner-operated franchise stores. These stores receive 75% of their stock directly from suppliers and 25% from Foodstuffs-owned distribution centres.[164] All freight is transported by Foodstuff's owned trucks and other partner suppliers.[165] Foodstuffs SI is similar but receives 51% of its stock from Foodstuff's owned distribution centres.[166] Woolworth's structure is different, they own their retail stores. Stock is received from third-party suppliers and their distribution centres.[167] Distribution centres are owned or leased and separated into ambient, produce and frozen categories.[168] All transport of stock is done through partner freight providers.[169]

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.[170]

The level of integration is likely to pose a significant risk to a successful divestiture, but it is possible.
As observed by the Federal Court in *Facebook,* timeliness is not a reason to immediately dismiss the case. The United States government can bring an action for an order if there are offending assets.
Divestiture is often a matter of how easily an asset can be integrated into a purchasing company.[171] MBIE suggested that a clearly staged process and timeline would mitigate the risks of any divestiture failing.[172] 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.

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[164] Coriolis, above n 10, at 52.
[165] At 52.
[166] At 67.
[167] At 89.
[168] At 89.
[169] At 89.
[170] At 86.
[171] Niels, Jenkins and Kavanagh, above n 74, at 446.
[172] Coriolis, Sense Partners and Cognitus, above n 18, at 52.

2 Effect on Consumers

Effects on consumers look at the impacts on consumers that could occur if divestment were ordered. Effects on price and innovation are the key areas where harm could come to consumers and market efficiency.

In *Alcoa,* the Court reasoned that significant damage would occur to innovation in the aluminium industry if a divestiture were ordered.[173] Stating that it would be a "disservice to the public" if Alcoa's research were impaired by divestiture.[174] This shows that the effects of divestiture on innovation must be considered when looking at the impact on consumers.

As discussed in Part II, the Commission found that 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. This led the Commission to conclude that innovation is lower than expected in a workably competitive market.[175]
A counterargument exists that innovation is already strong enough in the sector, such that a divestiture would not improve innovation. The Commission acknowledged that evidence about the extent of the scope, scale and pace of innovations in the sector was contradictory.[176] Foodstuffs argued that due to New Zealand's comparatively small population, innovation and adoption of products would be slower than in larger countries.[177] They also argued that New Zealand has a lower household disposable income, meaning there is reduced consumer demand for innovation.[178] Woolworths argued that they are 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% in just a few weeks at the pandemic's beginning and processed over 120,000 applications for priority access.[179] Woolworths also referred to its supply chain improvements, such as a $100 million new purpose-built

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[173] *United States v Aluminum Co of America,* above n 105, at 417.
[174] At 417.
[175] Coriolis, Sense Partner and Cognitus, above n 18, at 1.
[176] Commerce Commission Final Report, above n 1, at 3.213.2.
[177] Foodstuffs North Island *FOODSTUFFS NORTH ISLAND'S SUBMISSION ON GROCERY MARKET STUDY DRAFT REPORT* (10 September 2021) at 8.
[178] Commerce Commission Final Report, above n 1, at 3.213.2.
[179] Woolworths New Zealand Limited 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.

distribution centre and partnerships with meat and frozen food warehousing.[180] They argued that these will create enhanced efficiencies, leading to price reductions and improved services for consumers.[181] 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 possible. Therefore, it would not be improved by divestiture as it cannot be improved.

The Commission highlighted three key points in response to the MGR's submissions. Firstly, Woolworths is part of a large multination corporation and can leverage innovation from its overseas branch. Therefore, New Zealand's size should not be a reason for a lack of innovation.[182] Secondly, when competition is working innovation tends to lead to short-term higher profits as rivals must compete to catch up. However, whilst the MGR's pace of innovation has differed profits have remained high.[183] An example is Foodstuff SI's slow rolling out of online shopping compared to Woolworths, which has a limited effect on profits.[184] The New Zealand Grocery Council further argued that the MGRs can withhold innovations, which may increase competition due to their strong positions. Thirdly, 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.[185]

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.[186] 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 of price, supply, and quality of service. This means divestiture should improve innovation in the sector.
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 without facing any consequences (such as online shopping) suggest that there is more innovation which could occur in the sector.

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[180] At 114.
[181] At 114.
[182] Commerce Commission Final Report, above n 1, at 3.219.
[183] At 3.223.
[184] At 3.224.
[185] At 3.221.
[186] Coriolis, Sense Partners and Cognitus, above n 18, at 34.

In *AT&T,* the court looked at the cost to consumers when assessing the divestiture order. Determining that the order was in the public interest as consumers were unlikely to see an increase in prices or decline in the quality of service due to divestiture.[187]

A recent Cabinet paper looked at several divestment options and concluded that the cost to consumers could range from a 9.2 billion benefit to a 1.2 billion deficit.[188] This translates to a per-household benefit of $4,800 over 20 years or a deficit of $740 per household.[189] Analysis attributed the risk of the deficit occurring due to price benefits being exceeded by costs from a reduction in variety.[190]

The same paper concluded that the loss to supermarkets over 20 years would range from 4.5 billion to 7.4 billion.[191] However, Sense Partners provided MBIE with an analysis indicating that the costs to supermarkets of divestiture would unlikely 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."[192]

These analyses show that there are likely consumer benefits in the price of groceries if a divestiture were ordered. 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. There are doubts about how evenly consumers would benefit. Those in urban areas with several supermarkets are more likely to benefit from the increased competition. Those in rural areas with fewer supermarkets could see increased prices if higher supplier prices are passed on to them.[193]

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.[194]

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[187] *United States v American Tel and Tel co*, above n 115, at 170.

[188] Cabinet Paper "Provisional Supermarket Divestment Cost Benefit Analysis and Proposed Next Steps" (December 2022) CAB (Cabinet Paper) at [32].

[189] At [33].

[190] At [32].

[191] At [38].

[192] At [38].

[193] At [43].

[194] At [41].

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

3 Concentration of Power

The concentration of market power was subject to discussion in *AT&T*. Where fewer individuals control one sector, there is a risk 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 information and modern life. This factor supported the case that divestment was in the public interest.

Supermarkets are New Zealand's largest retail sales sector, generating 23.8 billion in revenue in 2022.[195] This was 21% of New Zealand’s retail sales value.[196] New Zealand consumers spend 14% of their income on retail food and beverages.[197] Supermarkets sell 78% of retail food.[198] Supermarkets are also the leading source of non-food products such as: pet food, baby, cleaning, and laundry.[199] These figures illustrate that supermarkets, particularly MGRs, significantly impact the average consumer's everyday life. New Zealanders spend a significant amount of their income on food, most of which goes to MGR’s. Therefore, the grocery sector is key to modern life.

An argument for divestiture could be that the grocery sector is key to modern life. The sector is currently in a state of duopoly, this runs the risk that these two firms could make key economic decisions which have the potential to undermine representative government. Divestiture would be in the public interest as it would introduce further competition to the sector and remove the possibility of such events.

Overall, divestiture is likely to be an effective remedy. Although it appears to be impractical with the differing ownership structures of the two firms there are ways that it could be implemented, such as with a clear plan and controlled integration. The cost to

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[195] Coriolis, above n 10, at 25.

[196] At 25.

[197] At 22.

[198] At 23.

[199] At 24.

consumers involves some risk but is outweighed by likely leading to reduced prices over 20 years and improved innovation. The concentration of power would be reduced in an important public sector which supports the goals of competition law.

C Another Remedy

In the United States, divestiture is generally considered the most effective way to restore competition.[200] The reasoning is that other, less harsh, remedies carry a greater risk to the consumer that competition will not be restored.[201] In unusual circumstances, however, the court may be willing to consider other remedies.[202] The respondent must show that a remedy other than divestiture would sufficiently redress the violation.[203]

The Commission's key finding was that competition in the grocery was not working well for consumers.[204] The reasons for this are, the existence of a market duopoly, the intensity of competition between the major competitors is muted, entry and expansion in the sector is difficult, the profitability of major retailers is higher than expected, prices are high compared to international standards, innovation in the sector is low, and competition is not working for suppliers due to an imbalance in bargaining power.[205]

Divestiture addresses all these issues by introducing one or more additional supermarkets into the market. This breaks up the duopoly. Increases the intensity of competition between major competitors as there is new competition. Issues of entry and expansion are temporarily not an issue as a purchase of divested property would have the required infrastructure to start competing quickly. Prices should decrease as a new competitor brings more price competition; innovation should increase as more pressure is placed on the MGRs to innovate to get ahead of the competition. Supplier imbalances in bargaining power would reduce as there are additional buyers for the MGRs to compete with.

Therefore, the question is whether the MGRs can argue this is unusual situation where another remedy is more in the public interest.

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[200] *United States v E.I. du Pont de Nemours & Co,* above n 91, at 331.
[201] Lumer, above n 21, at 159.
[202] At 160.
[203] *Fruehauf Corp*, above n 95, at 123.
[204] Commerce Commission Executive Summary, above n 2, at 3.
[205] At 6.

In support of preventing divestiture, the MGRs could point to the Commission's report. The Commission did not recommend divestiture as they could not conclude that the benefits would outweigh the costs.[206] The Commission thought it was not worth the risk when their recommendations could achieve some benefits with other interventions.[207]
The Grocery Supply Act 2023 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.[208]

Another intervention is the Commerce (Grocery Sector Covenants) Amendment Act 2022. This amends the Commerce Act 1986 to prevent restrictive or exclusivity covenants that impede land development that could be used to compete with grocery retailers.[209]

The MGRs could argue that these measures provide enough of a remedy to the sector so that divestment is not warranted as competition will be restored anyway. It may take time, but the duopoly could be broken up as entry and expansion is now more accessible due to these Acts. Removal of restrictive covenants opens up new land for a competitor 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 in support of sticking with the current remedies is that the divestiture process has significant risks. 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.[210]

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 circumstance where

[206] Commerce Commission Final Report, above n 1, at 9.256.
[207] At 9.256.
[208] Van Heerden, above n 60, at 12.2; 12.3; 12.4; 12.6.
[209] Commerce (Grocery Amendment) act 2022 s28A.
[210] Cabinet Paper, above n 188, at [9].

divestiture should not be ordered, as other remedies have already been implemented to redress the violation.

Analyzing on behalf of MBIE, Sense partners concluded that the recent measures are likely to have a modest positive impact but are unlikely to result in “material change” to competition.[211] 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.[212] They also found that it would be slightly easier for new stores to find land as the restrictive covenants are removed.[213] Neither of these measures will shift the duopoly structure. Sense Partners submitted that the only way to shift this structure is with competitive threat to entry to challenge the current MGRs.[214] Finally, Sense Partners concluded that the current measures would lead to a similar 20-year forecast to that of the past 20 years for the New Zealand grocery sector.[215] This shows that there is significant doubt that the current measures would restore competition, and structural division may be required to restore the market to a competitive level.

Despite the significant risks of divestiture, Mr. Clark concluded that the cost-benefit analysis made a case for further investigation.[216] Going as far as advising the government to have a divestiture remedy ready to deploy by 2024.[217] Indicating that the potential net benefits to society likely 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 government are unlikely to redress the violations sufficiently. This is not an unusual circumstance.

V Conclusion

The Commission’s report proved that competition in the grocery sector was not working well for consumers. They attributed this to a duopoly of the MGRs. The government's

[211] Coriolis, Sense Partners and Cognitus, above n 18, at 8.
[212] At 7.
[213] At 8.
[214] At 8.
[215] At 8.
[216] Cabinet Paper, above n 188, at [10].
[217] At [11].

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 response did not go far enough and that divestiture may be the only suitable remedy.

This essay analysed how Courts have applied divestiture overseas 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, the court must examine causation, the effect, and the effectiveness of alternative remedies. The essay 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 essay reviewed evidence and concluded that the current set of remedies by the government is unlikely to restore competition to a workable level. Therefore, divestiture is the most appropriate remedy.

Word Count

The text of this paper (excluding footnotes, cover page, abstract, contents and bibliography consists of 7990 words.

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