

Extract from Weekly Report to the Minister, week ending 2 February 2024

Commerce Commission's application to intervene in the Winton litigation

In our Briefing for the Incoming Minister (BIM), we informed you about our litigation with Winton Land Limited. We are providing this further briefing on a recent development – we expect the Commerce Commission will apply to the Court to intervene, and Kāinga Ora will consent to this.

Neither the Crown nor Ministers are party to the proceedings. The litigation is being managed by Kāinga Ora as an operational matter.

Background

In October 2022, Winton Land Limited, and its subsidiary, brought legal proceedings against Kāinga Ora, alleging that our organisation is engaging in anti-competitive behaviour in breach of section 36 of the Commerce Act 1986 (misuse of market power). Kāinga Ora is alleged to have done this by restricting access to the Specified Development Project (SDP) process – allegedly only selecting greenfield developments that advantage Kāinga Ora; by

- outbidding private sector developers like Winton for suitable land; and
- forcing private sector developers like Winton to participate only in particular aspects of a development (for example, by purchasing already consented land from Kāinga Ora, constructing houses and on-selling them).

Kāinga Ora strongly rejects the claims of anti-competitive behaviour and is defending the proceedings. We continue our urban development work in increasing housing availability for all New Zealanders, providing a range of housing options to enable more people to own their own homes in locations close to jobs, transportation, education, and other amenities. The focus is on creating thriving communities to benefit all New Zealanders, generally achieving over and above what the private market is able, or willing, to do.

Recent development

The Commerce Commission has advised the parties that it wishes to intervene in the litigation. This means it asks the Court if it can provide submissions at the hearing (set to commence on 1 September 2025) in relation to legal and economic principles to assist the Court. It is not the role of an intervenor to express a view on the merits of a party's case. The Commerce Commission is doing so given its role as the independent agency that administers and enforces the Commerce Act and because this proceeding is likely to be the first proceeding under section 36 of the Commerce Act since its recent amendment. Section 36 is the provision under which Winton is suing Kāinga Ora (alleging misuse of market power).

The Commerce Commission's request to intervene is understandable given its position as the expert regulator and interest in section 36 generally. We expect that the Commerce Commission will file its application seeking leave of the Court to intervene shortly, given that there is a case management conference set for 20 February 2024.

Kāinga Ora intends to consent to the application, so it is very likely the Court will allow the Commerce Commission to intervene. Following such a decision (on or around 20 February 2024), we expect the Commerce Commission, and possibly also Winton, will issue a media statement.

Kāinga Ora will respond to any media enquiries it receives noting:

- Kāinga Ora welcomes the expert assistance the Commerce Commission can provide to the Court with legal and economic advice in respect of the recently amended section 36 of the Commerce Act.
- We understand the importance of correctly interpreting legislation, particularly when that legislation is fairly new.
- As the independent agency that administers and enforces the Commerce Act, the Commerce Commission is well placed to explain the recent changes to section 36 of the Act.

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