

***ACCC/PURC TRAINING PROGRAM
ON UTILITY REGULATION
Melbourne Business School
10- 14 November 1997***

**A BRIEF SUMMARY OF COMPETITION POLICY
IN NEW ZEALAND**

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Until 1984 the New Zealand economy was relatively closed with high levels of trade protection, considerable regulation of the production sector, a major role for government in the provision of services, price control, many legislative monopolies, and considerable intersectoral distortions. In the 1970s and early 1980s, New Zealand productivity rates were poor compared to OECD averages and growth rates were significantly below trading partners.

As the economic reality of this situation dawned, there was widespread acceptance of the need for major change. Following the election of a Labour Government in 1984, New Zealand commenced a programme of rapid and widespread economic liberalisation. This liberalisation programme was unusually comprehensive and consistent, the result of its basis on a consistent theoretical microeconomic framework.

The reforms relied heavily on new schools of microeconomic thinking, particularly originating from the US. For example, public choice theory superseded traditional market failure theories on public funding, principal agency theory led to the view that public ownership of state trading activities was likely to be inefficient, and contestability and transaction cost theories contributed to a new view of lighthanded regulation.

Contestability theory appeared particularly attractive to New Zealand policy-makers because it seemed to offer them a way through their ongoing problems of small numbers of local competitors, pointing to the importance of removing import protection to allow foreigners to act as potential entrants and hence help regulate local producers in the interests of domestic consumers. The Coasian view that, given the chance, firms will act to minimise their transactions costs through various forms of internal/external reorganisation also underlines the New Zealand competition policy tolerance for a wide range of intra-firm and trade practices, to be judged on their behavioural outcomes rather than by any pre-set structural thresholds.

New Zealand competition policy, at this time, proved much interested in these theories than did Australia. This was partly because the New Zealand economy had structured underperformance, and consequently way more in need of structural reform than its neighbour. It was also partly because New Zealand's thinner political system meant such reform was easier to carry out.

The principal statutory expression of this new competition policy was the New Zealand Commerce Act 1986. It was designed as the key statute, representing the new rules of the game for New Zealand businesses facing an open competitive economy, guiding the behaviour of firms that had recently been exposed to market forces by the removal of import protection, price control and other regulations. The implication was that such firms should move towards efficient competitive operation or else exit.

The Act was passed into law with the objective "to promote competition in markets within New Zealand". It was designed to regulate mergers and acquisitions that go beyond the threshold of dominance, to impose special restrictions on the behaviour of dominant firms with regard to others, and to prevent agreements between firms that substantially lessen competition.

Part III of the Act regulates mergers and takeovers. The essence of the merger regime is that companies seeking to merge or acquire assets were subjected to an asset test, above which they were required to notify the Commerce Commission of their intentions and proceed through a two stage test to gain clearance or authorisation. The test involved assessing whether the merger would lead to the acquiring or strengthening of a dominant position in a market, and if so, whether it would be likely to result in a benefit to the public which would outweigh any detriment resulting from that increased dominance. Part II of the Act governs trade practices. In this part the Act prohibits arrangements between competitors that substantially lessen competition in the market (s 27), arrangements between competitors that restrict the operations of other firms (s 29), arrangements that lead to prices being fixed amongst competitors (s 30) and prohibitions against a company abusing its dominance in a market by trying to restrict entry, prevent competitive conduct or eliminate any player (s 36).

Part IV of the Act allows for price controls (currently there are none in place). Consumer trading issues are covered in a separate statute, the Fair Trading Act, 1986.

The Commerce Commission was established as a combined regulatory and quasi-judicial authority to administer the Act. There are no comparable industry-specific statutory regulatory authorities, and the Commerce Commission has broad sectoral powers including coverage of all utilities. Its decisions may be appealed to the High Court and then to the Court of Appeal. Private rights of action are available for most contraventions and may be appealed, sometimes as far as the Privy Council in London. The Commission is an independent statutory authority but the government can publicly direct it to “have regard to” the latter’s economic policies.

While the Commerce Act looked to the US for its underlying microeconomic principles, for its statutory framework it relied heavily on the Australian Trade Practices Act 1974. The attraction of the Australian Act was clear : it was felt that the Australian approach was broad enough to incorporate New Zealand requirements for the regulation of a liberalised Western economy within the Westminster judicial system tradition, which New Zealand could draw on for institutional design and legal precedence. The evolving closer economic relations between the countries was another argument for harmonising competition law.

Consequently, the Commerce Act was structured in a similar way to the Australian legislation, except that the consumer rights sections constituted a separate piece of legislation. The Australian section 45 on contracts, arrangements or understandings restricting dealings or affecting competition broadly covers the same ground as sections 27 - 30 of the New Zealand Commerce Act. Section 36 of the Commerce Act closely parallels section 46 of the Trade Practices Act on the misuse of market power, with similar wording being used.

However, the New Zealand legislation departs from the Australian model in several significant ways: firstly, (with the exception of price fixing, and resale price maintenance) the Commerce Act does not single out particular trade practices for attention in the way that the Trade Practices Act does. Consequently, issues like exclusive dealing and secondary boycotts are treated under

general trade practice provisions. Resale price maintenance, third line forcing, territorial and customer restrictions, are all treated as part of general competition provisions, rather than being *per se* illegal or specifically prohibited but authorisable under certain circumstances.

The institutional arrangements to administer the Acts are similar in the two countries. In New Zealand the Commerce Commission performs similar roles to the Australian Trade Practices Commission (now the Australian Consumer and Competition Commission) in policing and authorising trade practices. Appeals are heard by the High Court of New Zealand with the assistance of lay members, in contrast to the specialist Australian Trade Practices Tribunal, with its federal court judge and lay assessors.

New Zealand had relied heavily on UK precedent for its interpretation of earlier anti-trust legislation. However, in interpreting the Commerce Act, recourse has been made principally to New Zealand and Australian legal precedent, although also to the US. Table 4 shows an assessment of the various jurisdictional influences by quantifying use of legal precedent under the Commerce Act from three sources - guide books to the Act, Commerce Commission decisions and High Court cases.

The guidebooks, mainly compiled before the 1986 Act was introduced, predicted major recourse to Australian cases for guidance as to likely interpretation. The Commerce Commission has been more strongly anchored in New Zealand precedent, most of it being its own. The High Court of New Zealand has recognised that, like the Australian Trade Practices Act, the Commerce Act has prohibitions based on the Sherman Act and it has been willing to look abroad for appropriate legal precedent. It has observed:

“... there is a wealth of Australian precedent on which New Zealand Courts have drawn and should continue to draw. The close relationship between the New Zealand Act and the Australian Trade Practices Act 1974, the goal of harmonisation of commercial statutes and an increasingly shared interpretation of commercial law in both common law and statutory areas, makes reliance on Australian precedent almost inevitable. ... Despite the

common ancestry which both the New Zealand and Australian statutes derive from United States anti-trust statutes, caution has to be exhibited before adopting uncritically, developments in law and economics from that country. Not only are there different statutory regimes, but there are vast differences in the markets.”

A further analysis of the major early high court cases heard under the Commerce Act shows that while the body of New Zealand precedent is now building up, the seminal cases have drawn heavily on some key Australian judgments, particularly with regard to market definition, the lessening of competition, the definition of market power and the interpretation of anti-competitive purpose and effect, Bollard (1994). There have been some differences in interpretation of similar concepts and thresholds in the two countries but these are at least partially explicable as stemming from the smaller size of the New Zealand economy (see Brunt, 1990). On the issue of pricing or access problems with bottleneck or “essential facilities”, New Zealand courts have turned more directly to US precedent, though without importing the essential facilities doctrine.

Further New Zealand Competition Law Reform

After four years of operation, an Amendment to the Commerce Act was passed in 1990 making a number of changes. The Commerce Commission is now required to include in its assessment of public benefits any efficiencies resulting from the conduct under examination. Merger pre-notification became voluntary, resale price maintenance became authorisable, and certain other restrictive trade practices could also be authorised provided they were new and were not being used for anti-competitive purposes. More importantly from the point of view of harmonisation, the Amendment extended the application of the Act to any dominant firms resident in Australia to the extent that their actions have the purpose of affecting markets in New Zealand, hence the amended Act established the concept of a trans-Tasman market for certain competition practices. From New Zealand’s viewpoint, this has effectively extended use of the dominance test to an Australasian market.

A further review of the Act was carried out in 1993, focusing on a number of issues. The Government decided that the Act would be amended in a number of ways, however, these changes have never been put into statute. In 1996 a minor Amendment was passed. One of its provisions extended the jurisdiction of the merger regime to cover mergers carried out anywhere overseas if they affect markets within New Zealand.

The Trade Practices Commission and the Commerce Commission reached an inter-agency agreement in 1994 to share information that will:

- facilitate effective application of their respective competition laws
- avoid unnecessary duplication
- facilitate the co-ordination of investigations
- promote a better market understanding of enforcement activities
- keep each other informed of developments.

In 1986, the New Zealand Government commenced a further review of the Commerce Act, focusing on vertically-integrated natural monopolies. By 1987, work was continuing reviewing the effectiveness of regulation particularly in the telecommunications and electricity industries, and also reviewing penalties, remedies and court processes.

¹ Drawn from A Bollard and K Vautier, *The Convergence of Competition Law within APEC and CER, PAFTAD 23 Conference, Taipei, 1996.*

TABLE 1**COMPETITION LAWS IN AUSTRALIA AND NEW ZEALAND (1996)**

	Australia	New Zealand
Introduction		
The Statute	Trade Practices Act 1974 and amendments	Commerce Act 1986 and amendments
Objective	Enhance welfare of Australians through promotion of competition and fair trading	Promotion of competition in markets in New Zealand.
Mergers		
Threshold	Substantial lessening of competition	Dominance
Prohibition	Acquiring or strengthening	Acquiring or strengthening
Authorisable?	If public benefits outweigh detriments	If public benefits outweigh detriment (must have regard to efficiency)
Procedure	Voluntary application for authorisation	Voluntary application for clearance, authorisation
Market Power		
Threshold	Substantial degree of power	Dominance
Prohibition	Preventing entry Preventing/deterring competitive conduct Eliminating or damaging competitor	Restricting entry Preventing/deterring competitive conduct Eliminating any person
Authorisable?	No	No
Vertical Arrangements		
Threshold	Substantial lessening of competition, exclusionary arrangements	Substantial lessening of competition, exclusionary arrangements
Prohibition	Contracts, arrangements, understandings	Contracts, arrangements, understandings
Authorisable?	If resulting public benefit	If resulting public benefit
Special Provisions:	Presumed illegal	Presumed illegal, but authorisable
- RPM	Some illegal	Substantial lessening of competition test, authorisable
- Price discrimination	Presumed illegal	Substantial lessening of competition test, authorisable
- Third line forcing	Subject to competition test	Substantial lessening of competition test, authorisable
- Exclusive dealing, ties, etc		

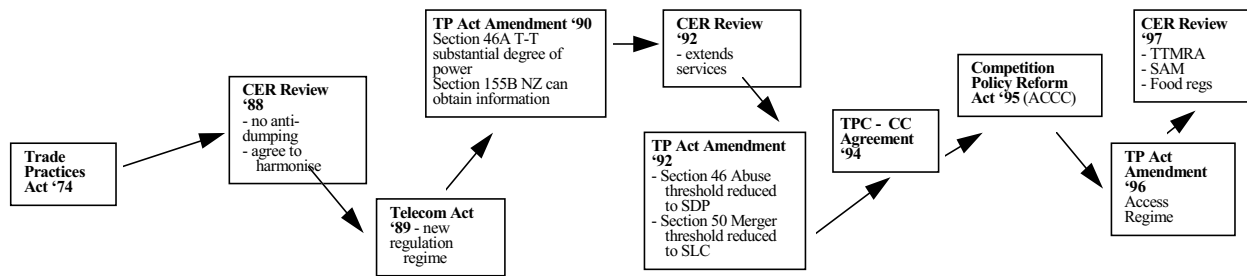
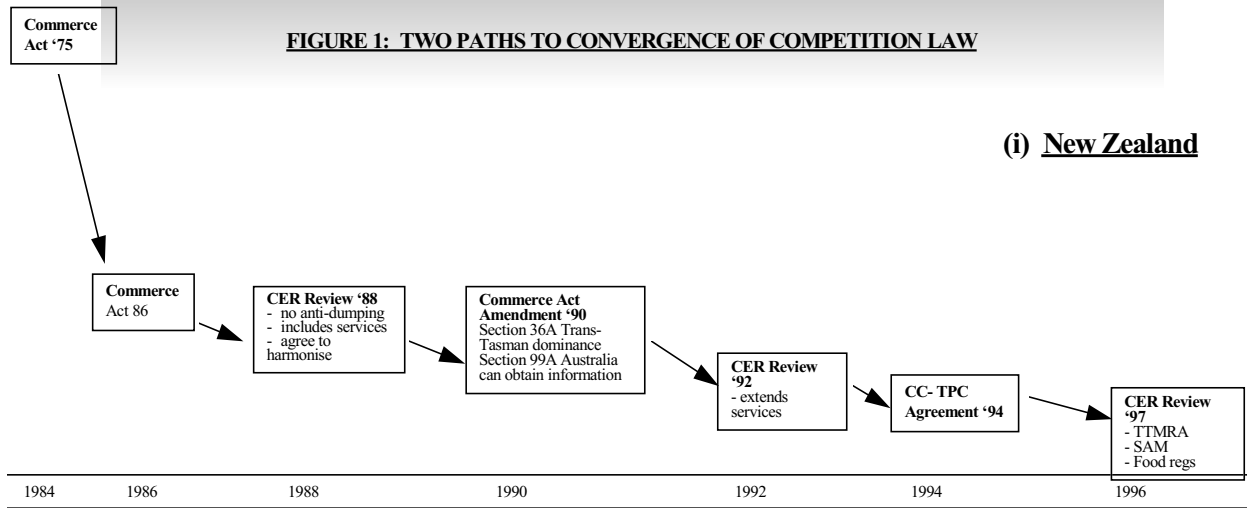
	Australia	New Zealand
Horizontal Agreements		
Threshold	Substantial lessening of competition	Substantial lessening of competition
Prohibition	Contracts, arrangements understandings	Contracts, arrangements, understandings
Authorisable?	If resulting public benefit	If resulting public benefit
Special provisions: Price fixing Boycotts, other market arrangements	Presumed illegal Presumed illegal	Presumed illegal but authorisable Substantial lessening of competition test, authorisable
Price Control		
Legislation	Prices Surveillance Act	Part IV, Commerce Act
Procedure	Price surveillance	Price control (currently unused)
Consumer Rights		
Legislation	Part V, Trade Practices Act	Fair Trading Act
Prohibition	Misleading/deceptive conduct False representations Certain practices Unconscionable conduct	Misleading/deceptive conduct False representations Certain practices
Requirements	Certain product safety & consumer information requirements	Certain product safety & consumer information requirements
Enforcement		
Competition Agencies	Australian Competition and Consumer Commission National Competition Council Austel (transitional)	New Zealand Commerce Commission
Role	Enforcement, authorisation, adjudication	Enforcement, authorisation, adjudication
Appeals re agencies	Australian Competition Tribunal	High Court (+ lay members)
Contraventions determined by	Federal Court	High Court (+ lay members)
Private action	Available	Available
Sanctions, penalties	Fines, injunctions, damages, divestitures, court orders, enforceable undertakings	Fines, injunctions, damages, divestitures, court orders
Jurisdiction/Exemptions		
Overseas activities of citizens	Yes	Yes if affects NZ market
Domestic activities of foreigners	Yes	Yes if affects NZ market
Activities beyond borders	Yes, if affects Australian market	Yes if affects NZ market
Export cartels	Some exempted	Some exempted
Specific industries	International shipping, telecommunications, some state activities exempted	International shipping and civil aviation, state pharmaceuticals largely exempted
Intellectual property	Exempt unless misuse market power	Generally exempt
Labour markets	Exempt	Generally exempt

TABLE 2**SUMMARY OF MAJOR CHANGES TO NEW ZEALAND
ANTITRUST LEGISLATION**

	1986 Commerce Act	1990 Amendment	1993 Review
Merger notification	Mandatory prenotification	Voluntary prenotification. Clearance and authorisation options	Fast track and slow track application procedures
Merger authorisation	Market dominance and public benefit tests	Bare transfer of dominance excluded	-
Public benefit test	Public benefit not defined	To have regard to resulting efficiencies	Defined as 'benefit to NZ'. No account to be taken of who benefits, consumers or producers.
Market dominance	Illegal to restrict entry, prevent or eliminate competition	Dominance test extended to Australasia	-
Trans-Tasman issues	No focus	Extension to certain anti-competitive trans-Tasman behaviour. Anti-dumping regime superseded by antitrust	No further harmonisation
Price-fixing	Per se illegal	-	Presumed to lessen competition unless otherwise established
Resale price maintenance	RPM prohibited	RPM authorisable	-
Other trade practices	Arrangements lessening competition prohibited	-	-
Labour market	Applies if anti-competitive effect in product markets (unless relates to pay/work practices).		

FIGURE 1: TWO PATHS TO CONVERGENCE OF COMPETITION LAW

(i) New Zealand



Note: Progress towards the central time line represents convergence of laws.

Key: ACCC - Australian Competition and Consumer Commission; CER - Australia-New Zealand Closer Economic Relationship; C Act - Commerce Act 1996, NZ; CC - New Zealand Commerce Commission; SAM - Trans Tasman Single Aviation Market; SDP - Substantial degree of power in a market; SLC - substantial lessening of competition; TP/A - Trade Practices Act 1974, Australia; TPC - Trade Practices Commission; TT - Trans Tasman TTMRA - Trans Tasman Mutual Recognition Arrangement

(ii) Australia