unlawful collusion of a major kind is not practiced by most Australian businesses. Most regard price fixing as abhorrent. When it occurs, however, it is harmful, and business is usually the first victim of collusion. I will continue to push strongly for the introduction of criminal sanctions to fight this insidious and highly damaging conduct.

Building a modern Trade Practices Act: a trans-Tasman analysis

Following is the edited text of the first part of a speech given by Commission Chairman, Professor Allan Fels, to the New Zealand Institute of Economic Research on 18 September 2002.

The second part was an outline of the Commission's views on the review of the Trade Practices Act and on relations between the Commission and the media. These can be read in the previous article in this journal and in ones in ACCC Journal *no. 40.*

In examining our competition experience it seems clear that each of our countries has gained from the experience of the other. Our respective law has progressed, if not in perfect harmony, then in the same general direction and with the same general intent.

The key message, I think, is that competition law in both Australia and New Zealand should not be thought immutable.

Competition law in Australia and New Zealand

Economic and commercial ties between our two countries reach back to the days of colonial settlement. Formal relationships, however, and a more integrated approach to market development were given impetus in 1965 with the signing of the New Zealand/Australia Free Trade Agreement and the Australia–New Zealand Closer Economic Relations Free Trade Agreement of 1983.[2]

Since 1983 the legislative paths of competition law in New Zealand and Australia have been similar but not identical. As well, as Maureen Brunt has commented, a distinctive New Zealand–Australia case law has also been evolving.[3]

Before 1970 formal trade practices legislation based on a model imported from the United Kingdom was enacted in both countries. New Zealand led the way with the *Trade Practices Act 1958*, and Australia followed with the *Trade Practices Act 1965*.

Australia then introduced the *Trade Practices Act 1974*, which marked a substantial departure from the existing legislation.

New Zealand followed less radically with the *Commerce Act 1975*, only to introduce its major body of competition law, the Commerce Act, in 1986. Framed on the Trade Practices Act, the *Commerce Act 1986* benefited from 12 years of Australian experience and improved on the original Australian legislation.

It is a general principle that where markets and competition policy lead competition law tends to follow.

New Zealand acted to deregulate and privatise industries and utilities in advance of both the Commonwealth and state governments in Australia. This is the unitary structure of the New Zealand polity. Australia is a federation with the Australian Constitution conferring substantial but not comprehensive powers over economic behaviour on the federal government. This means that federal and state governments must cooperate on national policies such as competition policy.

In moving to implement a comprehensive competition policy in the 1990s, which culminated in the so-called Hilmer reforms, Australian policymakers and legislators addressed issues dealing with:

- the extension of competition law to non-incorporated entities and the professions
- the development, between federal and state governments, of a competition principles agreement by which public monopolies were to be reformed, and access regimes to services were to be established.

In part, we observed and benefited from the competition experience of New Zealand, and the application of court-based remedies that resulted from the s. 36 framework. For example, in 1995, the Australian Parliament introduced a specific and formal legislative regime that provides for access to network industries and natural monopoly infrastructure in Part IIIA.

[2] D. White, 'Cross Tasman trade in competition law: convergence or divergence', in: *Trade Practices Act—A Twenty Five Year Stocktake*, F. Hanks, and P. Williams, (eds), The Federation Press, 2001.

[3] M. Brunt, 'Australia and New Zealand competition Law and policy', in: *International Antitrust Law and Policy*, B. Hawk, (ed.), Annual Proceedings of the Fordham Corporate Law Institute (New York, Transnational Juris Publications, Inc., p. 135, 1993).

Our experience with Part IIIA is that it has worked, if not perfectly, then relatively well. Action by the Commission under Part IIIA has enhanced competition and benefited consumers in concentrated and important national industries, such as telecommunications, gas and electricity.

The history of infrastructure regulation in New Zealand has been different. Until recently, it adopted a 'light-handed' approach to utility regulation, and in this has relied upon prohibitions contained in the Commerce Act. The Australian approach, in part, has been more prescriptive.

In telecommunications, however, regulation of New Zealand's market changed significantly with the introduction of the Telecommunications Act of 2001. The Act empowered New Zealand's Commerce Commission to:

- resolve disputes between service providers over price and non-price terms and conditions for access to designated services
- make recommendations on any other services that should be subject to its dispute resolution powers
- undertake costing and monitoring activities relating to the Telecommunications service obligations and determine how costs will be allocated to industry players
- propose and approve industry codes of conduct.

Current designated services include interconnection with Telecom's fixed network, wholesaling of Telecom's fixed line services, number portability, roaming on cellular networks, and co-location of cellular transmission facilities.

In Australia, 1997 legislation provided for the Commission to, among other things, regulate access within and enforce competitive safeguards in our telecommunications industry. The legislation included specific amendments to the Trade Practices Act, provision for transitional arrangements, a revised *Telecommunications Act 1997*, and amendments to the *Radiocommunications Act 1992*.

The legislation was intended to establish open market access to both telecommunications infrastructure and service provision.

Amendments to the Trade Practices Act introduced two new parts (Part XIB and Part XIC): one dealt with anti-competitive conduct, and the other set out the rules and procedures for guaranteeing access to network services.

Further to this, in April 2002 the Australian Government announced several changes to the Act.

These essentially tighten the regime and are designed to make Telstra's costs more transparent, regulatory outcomes more timely and discourage gaming behaviour by incumbents.

These apply in addition to the parts of the Act that, more generally, regulate restrictive and unfair trade practices.

In Australia, the regulatory regime that applies to the electricity supply industry is neither perfect nor complete. The regulatory regime is a product of our federal system, and reflects the history, complexity and a number of interests involved in generations, transmission and distribution.

At present, in eastern Australia (excluding Tasmania) there is a single wholesale market for electricity, and an access regime for the transmission and distribution networks in participating jurisdictions. The arrangements for the operation of the national electricity market are set out in the National Electricity Code.

Electricity reform has generally aimed to expose the contestable parts of the industry to competition. However, those elements of the electricity industry that are not currently susceptible to competitive pressures, such as elements of transmission and distribution network service provision, are instead subject to regulatory supervision. This regulatory supervision aims to facilitate competition in upstream and downstream markets, partly by eliminating monopoly rent-taking by transmission network service providers (TNSPs).

After initially relying on general competition law, through s. 36 of the Commerce Act, and information disclosure requirements, there have been various reforms that have seen self-regulatory arrangements evolve further.[4]

As part of these reforms, Part 4A of the Commerce Act was introduced, which provides for a special statutory scheme to regulate large electricity line (transmission and distribution) businesses. Other reforms have included the creation of the Electricity Governance Establishment Project, which represents a rationalisation of existing governance structures, and to determine the rules governing wholesale, retail, security, transmission and distribution

[4] Section 36 of the Commerce Act states that a company in a dominant market position is prohibited from using that position for the purpose of limiting competition.

companies. Finally, the government also introduced the *Electricity Amendment Act 2001*, to allow for regulation of the industry if the government determines that the industry rules established by the electricity governance project are inappropriate.

The New Zealand approach to the regulation of the monopoly gas pipelines differed from that for electricity, reflecting the requirements of managing a system dominated by the Maui field and contracts. In this the New Zealand gas experience also diverges from that of Australia, where extensive networks linking different resources in different locations operated by different companies are regulated.

In contrast with the more formal Australian approach, we may characterise the New Zealand model as providing a 'loose' regulatory cover, based on information disclosure regulations to help determine if pipeline owners are exploiting market power. In such circumstances, recourse is then had by way of the relevant anti-competitive provisions of the Commerce Act. The third element of this approach is a system of industry self-regulation, that is, a voluntary code of conduct.

As in Australia, I understand the New Zealand Government is now reviewing the regulatory regime for gas, including access issues, industry governance, and improving the regulation of natural monopoly gas pipelines.

All this suggests to me that there has been a process of trans-Tasman enhancement, whereby we have learnt from, and improved upon, the legislation of the other. This has been important in developing our competition laws and worked to our mutual benefit.

For example, the Australian merger test changed from substantial lessening of competition to dominance in 1978 and reverted back to an SLC test in 1992.

In NZ amendments in 2001 to the Commerce Act resulted in changes to s. 47 to strengthen the control of business acquisitions by replacing a dominance test with a 'better targeted and stronger SLC test'.

Simultaneously, New Zealand changes to its s. 36 had the effect of bringing the provision closer to Australia's s. 46 (which aims to prevent firms with substantial market power from engaging in illegitimate anti-competitive conduct). That is, NZ changed s. 36 so the threshold of substantial degree of market power was brought into line with Australia's s. 46.

In our submission to the committee reviewing the Trade Practices Act, the Commission advocated an introduction of criminal sanctions for hard-core collusion and the addition of an effects test to s. 46.

There are other areas where the law differs between our two countries.

First, in the context of the review of the Act, we have strongly argued that cease and desist powers to quickly stop incidents of misuse of market power should be introduced. Relief to damaged parties should not take the five to seven years Australian courts have taken to reach a final decision in several cases. Were Australia to make such a change, we would be following the example set by New Zealand. While cease and desist powers have yet to be tested here, they should allow for faster action than through the usual court processes.

Second, civil penalties for price fixing (or hard-core collusion) are calculated differently. The sanction in New Zealand provides for a penalty that is the greater of:

- $NZ10 million
- three times the value of any commercial gain or expected commercial gain
- if the gain is not known, 10 per cent of the turnover of the body corporate.

In Australia, there is a fixed upper penalty of $10 million dollars.

Now, although I believe that for hard-core collusion pecuniary penalties alone provide an insufficient and inappropriate deterrent to the wrong-doer, the existing New Zealand civil penalties are in advance of Australian law.

Third, New Zealand's Commerce Act provides a voluntary notification regime for business acquisitions, under which parties contemplating acquisitions may apply for clearance to the New Zealand Commerce Commission. I note that this replaced a compulsory system of pre-merger notification.

The current system requires that the Commerce Commission give clearance if it is satisfied an acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market.

If clearance is granted, then s. 47 (dealing with acquisitions and whether or not there is the effect of a substantial lessening of competition) does not apply to the proposed acquisition, provided it is made in accordance with the terms of the clearance. Incidentally, I am not aware that there has been a call in New Zealand for changes to be made to the way clearances are handled.

However, the circumstances in Australia do differ somewhat and this makes the adoption of a voluntary notification system unlikely.

Ninety-five per cent of mergers investigated by us do not raise significant competition concerns. We have an informal system that works efficiently and well. Given this, it is uncertain that a move to a more formal clearance system would improve certainty for parties seeking approval for a merger or acquisition.

I note that some New Zealand practitioners argue that Australia's system would be more transparent if we provided reasons such as those set out in clearance decisions. It is sometimes claimed that, while parties generally have a reasonable understanding of the position of the Commission, third parties find it hard to fully understand the reasoning behind some decisions. Without necessarily agreeing with this, I accept that there may be some scope for greater transparency in Commission reasoning.

The fourth area of difference is in the treatment of parallel imports of copyright works and subject matter. This is a practice allowed in New Zealand since 1998.[5] The New Zealand Government has, however, recently announced a limited reintroduction of bans on parallel imports for some copyright matter.

The newly elected New Zealand Government undertook in 2000 to review the parallel importation arrangements with a particular focus on how these affect New Zealand's creative industries. The review, which involved public consultation, did not find substantial evidence that reintroducing bans on parallel imports would stimulate investment in, and the promotion overseas of New Zealand's creative talent.

In December 2001, the New Zealand Government announced its response to the review. It decided that parallel import bans would not be reintroduced for sound recordings, books or computer software. However, the government will continue to review the impact of parallel imports on those copyright products for the next three years.

In Australia, legislation to enable the parallel importation of books and computer software is currently before the House of Representatives.

As a final comment in this brief, positive study of the law, a feature of the Australia–New Zealand model is the dual system of adjudication.

5 *Copyright (Removal of Parallel Importation) Amendment Act 1998* (NZ).

Courts decide whether or not 'a practice lessens competition (per se or subject to some statutorily specified competition test) and administrative bodies must decide if, exceptionally, a proposed practice would likely result in a benefit to the public that would outweigh any likely anti-competitive benefit'.[6]

Future cooperation on competition law and administration

The development of closer economic relations between Australia and New Zealand is a process analogous to globalisation, and necessitates a regulatory response that transcends national boundaries. The benefits of a deep market integration between Australia and New Zealand would be increased by the further harmonisation of our respective competition regimes.

Following from this is that respective courts are only able to use trans-Tasman powers in matters associated with ss. 36A/46A (misuse of market power), 155A/98A (evidentiary and court processes) of the Commerce Act and Trade Practices Act respectively.

There is no reason why these powers should not be extended to apply to all competition issues. This is more important as trans-Tasman competition is relied upon to allow consumers choice. Such an extension would facilitate investigation in all trans-Tasman competition cases and could be made through some fairly minor changes to existing legislation.

One could go further and give the courts on either side of the Tasman full jurisdiction under either Act.[7]

I believe that we create a better competitive environment by creating better competition law. Harmonisation should therefore be considered seriously by the public and the legislature.

My final point is that we would benefit from closer administrative links between our respective competition commissions. There is existing cooperation, for example in the areas of staff and technical exchange, which I believe provides a solid basis for further development.

That said, a more formal arrangement could take the form of:

6 M. Brunt, loc. cit.

7 For a full discussion see H. Spier, 'Australia–New Zealand—competition law and administration—what next from across the Tasman and beyond?', Speech to IIR—New Zealand Competition Law Mastercourse, February 2002.

- a New Zealand commissioner becoming an ex-officio member of the ACCC, and similarly, an Australian sitting, ex-officio, on the New Zealand Commission
- increased staff transfer
- an enhanced exchange of information.

A formal 'second generation' arrangement, such as that between Australia and the United States, would also be well worth considering.

This could be especially valuable in the regulatory areas of both Acts (that is, for access and pricing matters) where direct experience of others' laws and practices would be very useful.

Conclusion

Clearly, there is a strong similarity between our respective competition laws. By disposition and history, we have bodies of law that are developing an almost perfect congruence. This is something I welcome.

However, there are ways to make our law work better. And on this I would welcome closer links and closer cooperation.

The health of franchising in 2002: an ACCC viewpoint

Following is the edited text of a speech by Commissioner John Martin to the Franchise Council of Australia Annual Conference, 10 September 2002.

Commissioner Martin acknowledged that the Commission's level of interest in and support for the franchising industry is reflected not just in his involvement but by the participation of the following ACCC colleagues:

- *Rose Webb, Regional Director for New South Wales and Aggie Marek, Small Business Manager, both based in Sydney.*
- *Brendan Bailey known to many in the franchising industry as the Commission's national manager overseeing franchising matters from Canberra.*

A question and answer session on enforcement under the Trade Practices Act, with Commission staff and senior representatives of the Franchise Council of Australia participating, also provided information for the delegates.

The franchising industry continues to grow in Australia. The Franchise Council of Australia's (FCA's) submission to the Independent Review of the Trade Practices Act—the Dawson Committee—reminds us that more than 98 per cent of the participants in franchising are small businesses. Australia has some 747 franchise systems with, collectively, 49 400 franchise outlets nationwide. More importantly, the franchising industry employs 700 000 people.

My overall assessment is that franchising in Australia is professional in its operations, optimistic in outlook and, collectively, a significant driving force in the Australian economy.

Administration of the Franchising Code of Conduct

The Commission has statutory responsibilities under the Trade Practices Act to administer the mandatory Franchising Code of Conduct.

On average, during the year ended June 2002, the Commission received 240 inquiries and complaints per quarter on franchising. This is an increase above the 150 per quarter that I reported on last year. The bulk of the increased contacts were clarifications connected with the introduction of a series of amendments to the code effective from 1 October 2001. There were also the continuing difficulties encountered by travel agent franchisees because of the substantial disruptions in the airline industry. Many of those inquiries overlap procedural areas of administration under the Commonwealth's Corporations Act, the province of our colleagues in the separate regulatory area of company law.

The Commission is also receiving more requests for our publications. We are concerned about a recent increase in allegations about misleading and deceptive conduct and these tend to be about anticipated earnings and territorial issues.

The Commission has defined functions including that of a law enforcement agency and a disseminator of information, particularly on compliance with the law. The Commission does not make the law. It does not have responsibility for legislative changes to the Trade Practices Act and the Franchising Code of Conduct. The regular reviews of the Commission's functions and activities