Forum

Harmonising competition law in Australia and NZ

This article by Hank Spier and Trent Gillam outlines future directions for trans-Tasman competition law in the context of the Closer Economic Relations (CER) Agreement. Hank Spier is the Chief Executive Officer of the ACCC and Trent Gillam is a final year law student at the Australian National University who works as a researcher and general assistant to the CEO and Commissioners of the ACCC. The views expressed here are those of the authors only.

The Australia–New Zealand Closer Economic Relations Trade Agreement (CER) was designed to bring about a free trans-Tasman market. But while its objectives have been largely achieved in some areas of law, such as competition law, the progress of CER has stopped short of complete harmonisation.

Significant benefits have certainly accrued to both Australia and New Zealand as a result of CER.[1] There is also no doubt that some consider the current inconsistencies between the Australian *Trade Practices Act 1974* and the New Zealand *Commerce Act 1986* to be inconsequential. However, for these laws merely to be similar is now insufficient, inefficient and impractical, and the final logical step to completely harmonise them should be taken.

Once they have completely aligned their competition laws, Australia and New Zealand can then move towards joint competition law enforcement.

In this context, it is useful to examine the background to CER and the current situation.

NAFTA

In August 1963 the New Zealand–Australia Free Trade Area Agreement (NAFTA) was signed. The agreement came into effect on 1 January 1966. It aimed to reduce the protection for a small number of commodities.

However, in creating a free trans-Tasman market, there were several problems with NAFTA, such as:

- it only applied to a very narrow range of goods;
- many goods were specifically excluded from the agreement — including those that would have benefited from having a wider market;

1 A number of articles have discussed the extent of the benefits accrued as a result of CER. It seems generally accepted that CER reforms, including the removal of regulatory inconsistencies between Australia and New Zealand, are beneficial. (They lead to greater business certainty, open Australian and New Zealand markets up to increased competition and reduce compliance costs.) This article will not cover the same ground and attempt to justify the basic utility of harmonisation — it will instead discuss the present situation and will highlight ways to move forward.

- there was no set timetable for the reduction of tariffs;
- there was a policy determination by both countries to avoid any serious injury to existing industry;
- 'consultative committees' were often set up when the trade of either nation became threatened — usually in areas where competition between the countries was actually increasing; and
- the agreement was not actually committed to eliminating barriers to trade.

CER

The shortcomings of NAFTA were partially overcome when, on 1 January 1983, the Australia–New Zealand Closer Economic Relations Trade Agreement (CER) came into effect.

CER was designed to:

- strengthen the broader relationship between Australia and New Zealand;
- develop closer economic relations between the member states through a mutually beneficial expansion of free trade between New Zealand and Australia;
- eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and
- develop trade between New Zealand and Australia under conditions of fair competition.[2]

CER's goal to reduce barriers to trade set it apart from NAFTA. The CER agreement initially set 1995 as the implementation date for its reforms, but in November 1987 it was agreed to implement CER fully by 1993.

However, the obligations imposed by CER to harmonise business laws were quite limited. The agreement required that Australia and New Zealand:

> a) examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labelling and restrictive trade practices; and
>
> b) where appropriate, encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements.[3]

1988 review of CER

In 1988 CER was reviewed, resulting in a memorandum of understanding on the harmonisation of business law by the Australian and New Zealand governments. It committed them to examining possible harmonisation of their business laws and regulatory practices in the areas of company and securities law, intellectual property, competition policy and consumer protection. Ultimately, it would bring the economies of Australia and New Zealand closer together.

Further, Article 4 of the 1988 Protocol to CER on the Acceleration of Free-trade in Goods recognised that the anti-dumping provisions covering goods originating in Australia and New Zealand could not be maintained once full free trade was achieved.

As a result, both Australia and New Zealand undertook significant legislative reform in 1990. Australia enacted s. 46A of the Trade Practices Act and the *Custom Tariff (Anti-dumping) Act 1975* was changed to exclude goods originating from New Zealand. Changes were also made to the Federal Court Act and the Evidence Act to accommodate the introduction of s. 46A. New Zealand made similar changes to its legislation.

Trans-Tasman legislation

Section 46A

Section 46A prohibits a corporation with a substantial degree of market power in a

2 Australia–New Zealand Closer Economic Relations Trade Agreement, Article 1.

3 Australia–New Zealand Closer Economic Relations Trade Agreement, Article 12.

trans-Tasman market from taking advantage of that power. A trans-Tasman market is defined as a market for goods or services in Australia, New Zealand or Australia and New Zealand. New Zealand enacted similar legislation.[4]

Section 5(1)

Section 5(1) of the Trade Practices Act was amended at the same time s. 46A was introduced to extend its extraterritorial scope. As a result, s. 46A applies to conduct outside Australia engaged in by New Zealand, New Zealand Crown corporations, bodies corporate carrying on business in New Zealand or persons ordinarily resident within New Zealand.

Section 155A

Section 155 of the Trade Practices Act empowers the ACCC to require persons to provide information, documents or evidence regarding possible breaches of the Trade Practices Act. Section 155A was introduced to extend the powers granted under s. 155 to apply to people in New Zealand. However, s. 155A is not as broad in scope as s. 155. Section 155A allows the ACCC to serve written notice on a person in New Zealand to provide documents or information about a possible breach of s. 46A. It is an offence in New Zealand not to comply with a reasonable request for information from the ACCC by first giving it to the NZ Commerce Commission, who can then forward the information on to the ACCC.[5]

However, s. 155A does not give the ACCC the power to require a person in New Zealand to give evidence before the Commerce Commission, nor does it grant the ACCC power of entry in New Zealand.

Federal Court of Australia Act 1976

The Federal Court has several powers that it can use in respect of ss 46A, 155A and 155B matters.

Conducting proceedings in NZ

The Federal Court can direct that a proceeding be conducted or continued in New Zealand if it considers it more convenient or fairer.[6] It is also able to administer an oath or affirmation in New Zealand.[7] Breaking an oath or affirmation given to the Federal Court sitting in New Zealand is considered perjury under the Crimes Act (NZ) (as a result of the enactment of s. 56M(2) of the Judicature Act (NZ)). The Federal Court can also hand down the judgment for an Australian proceeding while in New Zealand.[8]

Alternatively, the Federal Court can take evidence or receive submissions from a person in New Zealand via video link or telephone.[9]

Orders and injunctions

The Federal Court may, in an Australian proceeding, make an order or grant an injunction when sitting in New Zealand, or make an order or injunction to be served in New Zealand.[10]

Subpoenas

The Federal Court can issue a subpoena requiring a person in New Zealand to appear before the Federal Court sitting in either Australia or New Zealand.[11]

The current situation

If CER is to reduce transaction costs and promote trade between Australia and New Zealand then other changes still need to be made, for example in their respective treatment of misuse of market power. Australia and New Zealand still do not treat this area of competition law consistently. The Commerce Commission must show that a person has a 'dominant position in a market', while in Australia all that needs be shown is that the company has a 'substantial degree of market power'. The dominance test is the higher test.[12]

4 While these provisions are similar, s. 36A of the Commerce Act (NZ) is not the same as s. 46A of the Trade Practices Act because the Trade Practices Act uses a 'substantial degree of market power' threshold while the Commerce Act uses a 'dominance' threshold.

5 Section 99A Judicature Act (NZ).

6 Section 32C(1) *Federal Court of Australia Act 1976.*

7 Section 56M(1) Judicature Act (NZ).

8 Section 32C(3) *Federal Court of Australia Act 1976.*

9 Section 36C(4) *Federal Court of Australia Act 1976.*

10 Section 32E *Federal Court of Australia Act 1976.*

11 Section 32E(2) *Federal Court of Australia Act 1976.*

12 *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 3 NZBLC 102,340.

The Trade Practices Act and the Commerce Act are also not consistent in the regulation of mergers and acquisitions. First, New Zealand still uses the dominance test, which means it is easier for a merger to 'get through' there.

Second, New Zealand has a rigid approach to merger investigations, whereas Australia is more flexible. The ACCC will usually not investigate if the merged entity will have a market share of less than 40 per cent if the combined market share of the four largest firms in the market is less than 75 per cent. However, in a more concentrated market, a merger that will create an entity with a 15 per cent share may result in action being taken.[13]

In New Zealand, the Commerce Commission is not likely to investigate if the merged entity has a market share of less than 40 per cent — or up to 60 per cent if at least one other market player has a share of at least 15 per cent.[14]

However, relatively small mergers in concentrated markets can have severe anti-competitive effects. Under the Australian guidelines these smaller mergers are examined because they are likely to result in anti-competitive detriment. The New Zealand system allows them to proceed without examination — the focus of their guidelines is on unilateral market power, and does not consider the potential for collusive market power in concentrated markets.

These differences are significant. Businesses in the trans-Tasman marketplace must comply with two different sets of domestic regulation even though they are competing in what is increasingly becoming a single market. For a totally free trans-Tasman market to develop, the proposals of the Memorandum of Understanding of the Future Harmonisation of Business Law between Australia and New Zealand will have to be embraced and these laws reconciled.

13 *Merger Guidelines*, ACCC, June 1999 at 44.

14 *Business Acquisition Guidelines*, Commerce Commission, October 1996 at 17.

Some suggested next steps

Further harmonisation

Threshold for anti-competitive use of market power ss 46A/36A

Because the threshold tests applied in Australia and New Zealand are inconsistent, some abuses of market power would be permissible in New Zealand (because the firm is not dominant) that are prohibited in Australia. For the sake of business certainty and consistency it would be prudent to bring these tests into closer alignment.

Mergers

Given that many companies trade in both Australia and New Zealand, and given that many Australian companies look for merger partners in New Zealand (and vice versa), it would be sensible for both jurisdictions to regulate mergers in the same way with aligned threshold tests. This would create greater certainty and reduce compliance costs for business.

Integrated capital market

If barriers to capital movement between Australia and New Zealand were eliminated, capital would move freely between the countries to where it will earn the highest rate of return. This would lead to increased economic efficiency.[15]

It would result in more takeovers, mergers and joint ventures between Australian and New Zealand companies. This should, in turn, lead to significant rationalisation in many industries.

Expanding Federal Court powers to apply to all of Part IV

The Federal Court is only able to use the powers granted to it under s. 32 of the Federal Court of Australia Act on matters relating to

15 See generally, Lloyd PJ, *The Future of CER — A Single Market for Australia and New Zealand*, Committee for Economic Development of Australia Monograph No. 96, Victoria University Press for Institute of Policy Studies, Wellington, 1991 at 30–31.

ss 46A, 155A or 155B of the Trade Practices Act. However, there is no reason why these powers should not be extended to all cases involving Part IV matters. This would facilitate investigation in all trans-Tasman competition cases and would be quite simple to achieve through some fairly minor changes to the existing legislation.

Joint judicial or administrative proceedings

Trans-Tasman court or tribunal

A trans-Tasman court or tribunal could be established to examine trans-Tasman competition matters. The rationale for such a body is clear — while it is beneficial for Australia and New Zealand to have consistent competition laws, it is also important for that law to be interpreted and enforced in a consistent manner.

However, opposition to the suggestion has often arisen, usually on the rounds that such a body would cause constitutional problems.[16]

This article will not engage in an in-depth discussion on this issue. However, it suggests that the establishment of a trans-Tasman competition agency, by either legislation or treaty, be studied more formally by government.

Trans-Tasman cases heard by the High Court of Australia

It has also been suggested that it may be possible to confer jurisdiction upon the High Court of Australia to hear trans-Tasman competition disputes.[17] This could be done if New Zealand enacted legislation to submit to the jurisdiction of the High Court in these matters. The structure of the Australian Constitution makes it unlikely that Australia could enact legislation conferring similar jurisdiction upon a New Zealand court.

Further, there is some precedent to show that the High Court can accept jurisdiction in matters coming from a uperior court of another independent nation.[18]

Closer links between the two Commissions

The ACCC and the Commerce Commission could foster a closer working relationship. One way could be for a New Zealand Commissioner to become an associate (ex-officio) member of the ACCC and vice versa.

Another possibility is that the ACCC and Commerce Commission could merge their 'back office' operations. Both Commissions would maintain their separate identities while pooling their administrative, enforcement and operational staff. Such an arrangement would benefit both the ACCC and Commerce Commission. It would allow them to access a wider range of skills and experience; it would encourage closer relations between the two agencies and coordinated enforcement activities; and it could provide substantial synergies, efficiencies and cost savings.

New Zealand reforms[19]

Early in 1999 the New Zealand Government announced that it was considering changes to the Commerce Act. The New Zealand Ministry of Commerce was asked to investigate possible changes to the threshold tests contained in s. 36 (Abuse of market power) and s. 47 (Mergers) of the Commerce Act. One option was that the Commerce Act could be amended to bring ss 36 and 47 largely into line with the corresponding provisions of the Trade Practices Act.[20]

The then National Party Government did not support this option and instead introduced a Commerce Amendment Bill to introduce a 'high degree of market power' threshold test.

16 All courts and tribunals created by Australian legislation are subject to prerogative review by the High Court of Australia. This creates problems for a trans-Tasman Competition Court. Also, it is not constitutionally possible to create a trans-Tasman Competition Court that could be appealed to from the High Court.

17 See generally, Kirby M, *Integration of Judicial Systems*, CER and Business Competition — Australia and New Zealand in a Global Economy, Commerce Clearing House New Zealand Limited, Auckland, 1990 at 26–28.

18 See *Nauru (High Court Appeals) Act 1976 (Cth)*.

19 The authors acknowledge Karen Chant of the Competition Policy Team at the Ministry of Commerce for supplying most of the factual information in this section. However, the opinions expressed are those of the authors.

20 A copy of the Ministry of Commerce's report can be accessed at http://www.moc.govt.nz/gbl/bus_pol/thresholds/thresholds.doc (current as of 18 January 2000).

However, the progress of this Bill was interrupted with the change of government late last year.

At present it is unclear what legislative changes will be made by the new Labour/Alliance Coalition Government although the Labour Party indicated in its pre-election policy statements that it would bring s. 36 and s. 47 of the Commerce Act into line with the Trade Practices Act.

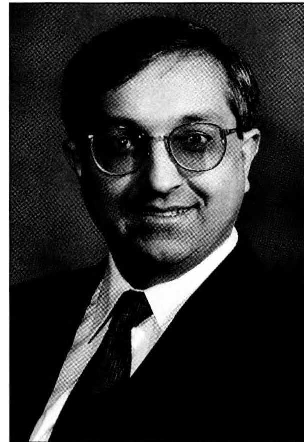
The way ahead

It looks promising that further harmonisation of the competition laws of New Zealand and Australia could occur in the near future. If the new New Zealand Government delivers on its election policy then the most fundamental differences between the Trade Practices Act and the Commerce Act will be reconciled.

If this is achieved, other advances can be considered. A trans-Tasman court or tribunal could be enormously beneficial in ensuring the consistent regulation of trans-Tasman competition laws and would have the potential to considerably add to business certainty while reducing compliance costs. Similarly, it would be beneficial for the ACCC and Commerce Commission to work together more closely.

Most importantly, the harmonisation of competition laws between Australia and New Zealand would be a huge symbolic step. The stage would be set for further developments that could further improve trans-Tasman competition regulation and bring benefit to the businesses and consumers of both countries.

The professions and whistleblower protections



Are whistleblowers encouraged within the professions? If not, should they be and how can this be done, given the professions are largely self-regulated?

These questions and many more were raised in a speech by Commissioner Sitesh Bhojani at the Australian Institute of Criminology conference, Crime in the Professions. *A summary of his speech follows.*

Because the community regards law and order as fundamental, compliance with the law is of great public interest. This extends beyond just the criminal law to include, for example, compliance with Australia's competition and consumer protection laws.

Given their elevated public standing, the professions have an obligation to encourage compliance within their occupations.

Generally, a profession can be regarded as a disciplined group of individuals with high ethical standards and with an understanding that the responsibility for the welfare, health and safety of the community should take precedence over other considerations.

Therefore, ideally the aims of the community and the professions are complementary.

Many of the relationships between professional and client can be seen as either fiduciary relationships or with fiduciary duties superimposed on them. (Fiduciary duties arise from a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other.)

But realistically, the professions are made up of human beings and therefore it is inevitable that a small percentage may engage in illegal conduct.