Australian Government
Productivity Commission

Australian and New Zealand Competition and Consumer Protection Regimes

Productivity Commission Research Report

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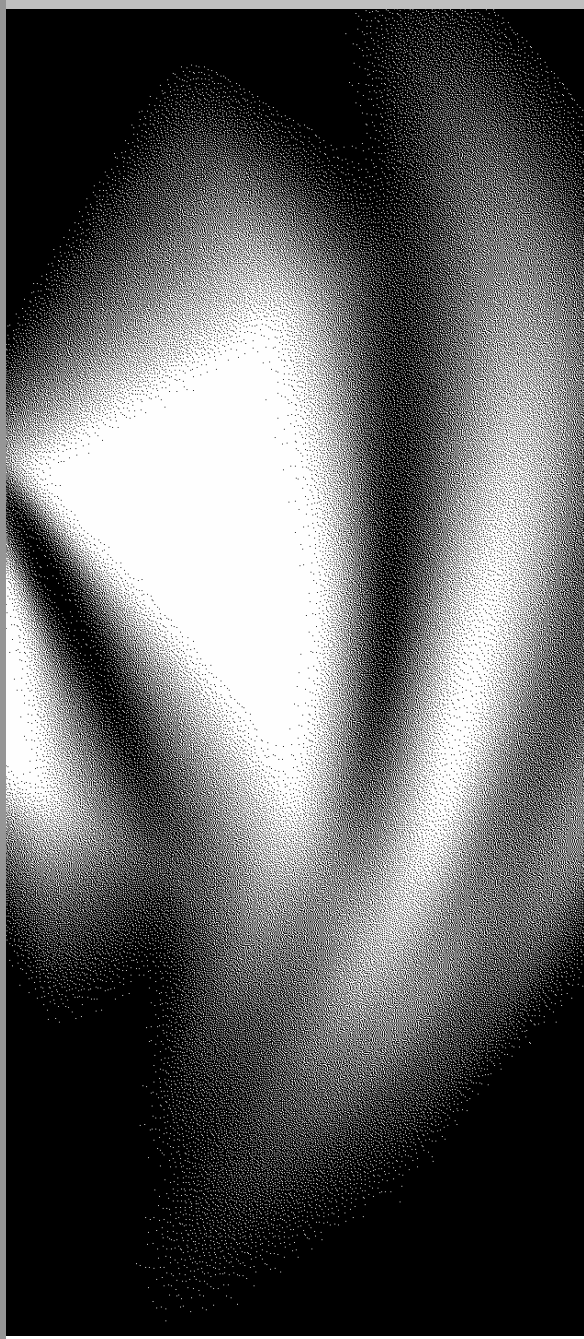

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The Productivity Commission

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Foreword

This research report has been prepared by the Commission in response to a request by the Treasurer, on behalf of the Australian and New Zealand Governments.

The objective of the study has been to examine the potential to improve the trans-Tasman business environment through greater coordination, cooperation and integration of the Australian and New Zealand consumer protection and competition policy regimes. The two Governments regard deeper coordination of regulatory environments for business as an essential element of their long-term goal of establishing a single economic market.

The study was overseen by Commissioners Tony Hinton and Michael Woods, with a staff research team led by John Salerian.

The Commission has drawn on information and views from a wide range of sources in Australia and New Zealand, including consumer and business interests, large and small, and government agencies. The Commission benefited from round table discussions and submissions from interested parties in response to a draft of this research report. The Commission thanks all those who contributed to the study.

Gary Banks
Chairman
December 2004

Terms of reference

AUSTRALIAN AND NEW ZEALAND COMPETITION AND CONSUMER PROTECTION REGIMES

PRODUCTIVITY COMMISSION ACT 1998

The Productivity Commission is requested to undertake a study examining the potential for greater cooperation, coordination and integration of the general competition and consumer protection regimes in Australia and New Zealand, and to furnish a report to the Treasurer within six months of receiving this reference.

The context of this study is the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and associated agreements, in particular the Memorandum of Understanding on Business Law Co-ordination. These have fostered an increasingly integrated business community and, through the progressive removal of barriers to economic activity, have set the scene for a single economic market. The two governments regard deeper co-ordination of the regulatory environments for business as an essential element of a single economic market.

For the purpose of this study, competition and consumer protection law for Australia is defined to include the core restrictive trade practices and consumer protection provisions of the *Trade Practices Act 1974* — restrictive trade practices (Part IV), unconscionable conduct (Part IVA), consumer protection (Part V) (with the exception of Division 1AA (country of origin representations)), product liability (Part VA), authorisations and notifications (Part VII), resale price maintenance (Part VIII) and any associated provisions. The Commission should recognise and take into account the mirror consumer protection provisions applying to financial services in the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*.

For New Zealand, competition and consumer protection law is defined to include the core restrictive trade practices, business acquisitions, and consumer protection provisions of the *New Zealand Commerce Act 1986*, and the *New Zealand Fair Trading Act 1986.* The Commission should recognise and take into account the mirror consumer protection provisions applying in New Zealand to consumer rights and redress in the *Consumer Guarantees Act 1993* and the differing treatment of product liability.

The study should:

- Assess how the operation, administration and enforcement of Australian and New Zealand competition and consumer protection law affects, impedes or fosters an integrated trans-Tasman business environment.
- Identify options for achieving greater cooperation, coordination and integration of Australian and New Zealand competition and consumer protection policy and law, its administration and enforcement, for the purpose of fostering and enhancing a trans-Tasman business environment. Options identified should be practically achievable and should encompass, but not be limited to:
  - further harmonization of competition and consumer protection laws;
  - greater coordination of authorisation, administrative and enforcement processes;
  - joint decision making on trans-Tasman issues by competition authorities; and
  - combined or coordinated institutional frameworks.
- Examine each option to identify whether the expected benefits (including any public benefit) will outweigh the costs (including any public cost) for Australia and for New Zealand.

The study should consider the potential implications of each option in regard to existing cooperation, coordination and integration of competition and consumer protection policy and law between the Commonwealth, the States and Territories.

The study should take account of best practice and draw on international experience in achieving greater cooperation, coordination and integration in the area of competition and consumer protection policy and law. The Commission should take account of any recent substantive studies undertaken elsewhere. The Commission should take into account any other current trans-Tasman initiatives toward further co-ordination of the regulatory environment.

The Commission should have regard to current international agreements, or other international obligations, of Australia and/or New Zealand relating to competition and consumer protection policy and law, and the established economic, social and regional development objectives of the Australian and New Zealand Governments.

The study should not seek to duplicate the 2003 Review of the Competition Provisions of the Trade Practices Act (the Dawson Review). The study should take into account such policy and legislative changes in Australia as the Government's response to the Dawson Review and the forthcoming Government response to the Senate Economic References Committee Report on *The effectiveness of the Trade Practices Act 1974 in protecting small business*. The study should not seek to

duplicate the work undertaken in the 2001 review of the New Zealand Commerce Act.

The Commission should consult widely with Australian and New Zealand business (including small business), interest groups and affected parties and receive submissions.

The Commission shall present the Treasurer and the New Zealand Minister of Commerce with a final report within six months of the date of commissioning. The final report will be published.

PETER COSTELLO

[Reference received 29 June 2004]

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Abbreviations and explanations

Abbreviations

ACCC	Australian Competition and Consumer Commission
APEC	Asia Pacific Economic Cooperation
ASIC	Australian Securities and Investments Commission
ASIC Act	Australian Securities and Investments Commission Act 2001 (Cwlth)
CER Agreement	Australia New Zealand Closer Economic Relations Trade Agreement
CGA	Consumer Guarantees Act 1993 (NZ)
FTA	Fair Trading Act 1986 (NZ)
MABRA	Mutual Assistance in Business Regulation Act 1992 (Cwlth)
MACMA	Mutual Assistance in Criminal Matters Act 1987 (Cwlth)
MCA	New Zealand Ministry of Consumer Affairs
MCCA	Ministerial Council on Consumer Affairs
MOU	Memorandum of Understanding
NCC	National Competition Council
NECG	Network Economics Consulting Group
NZCC	New Zealand Commerce Commission
NZS Act	New Zealand Securities Act 1978 (NZ)
NZSC	New Zealand Securities Commission
OECD	Organisation for Economic Cooperation and Development
SCOCA	Standing Committee of Officials of Consumer Affairs
SSNIP	Small but significant and non-transitory increase in price
TPA	Trade Practices Act 1974 (Cwlth)

TPLA Bill	Trade Practices Act Legislative Amendment Bill 2004 (Cwlth)
Tribunal	Australian Competition Tribunal
TTMRA	Trans-Tasman Mutual Recognition Arrangement
WTO	World Trade Organisation

Explanations

Billion	The convention used for a billion is a thousand million (10^9).
Findings	*Findings in the body of the report are paragraphs highlighted using italics, as this is.*
Recommendations	***Recommendations in the body of the report are highlighted using bold italics, as this is.***

Glossary

Australasian	Australia and New Zealand. When used to describe markets (Australasian markets), it means all the markets geographically located within Australia and New Zealand, including those which span the two countries. Similarly, when used to describe welfare (Australasian welfare), it reflects an assessment of the aggregate welfare of persons in Australia and New Zealand.
Competition law	Competition law prohibits forms of anticompetitive conduct by businesses.
Consumer protection law	Consumer protection law prohibits unfair market practices, confers rights, specifies standards and mandates information disclosure.
Judicial review	The determination by a court of the legality of an administrative decision.
Merits review	A review of a decision on its merits.
Single economic market	A single economic market is a geographic area comprising two or more countries in which there is no significant discrimination in the markets of each country arising from differences in the policies and regulations adopted by each country.
Impact market	In competition law, an impact market is the market (defined geographically, functionally and by product or service (including, for example, substitutes)) within which relevant conduct (for example exclusive dealing) is assessed for its effect on competition.
Trans-Tasman	Cross-border activity between Australia and New Zealand. For example, trans-Tasman investment means investment from Australia to New Zealand and vice versa. Similarly, a trans-Tasman market is one where demand and supply involves the movement of goods, services, labour or capital between Australia and New Zealand.

OVERVIEW

Key points

- There has already been significant convergence of Australia's and New Zealand's competition and consumer protection regimes, particularly by international standards.
- Consequently, the regimes are not significantly impeding businesses operating in Australasian markets.
- Major changes to the two regimes are not warranted at this stage.
- Full integration, requiring identical laws and procedures and a single institutional framework, would have high implementation and ongoing costs, change the operation of the existing national regimes and achieve only moderate benefits.
- Partial integration, involving retaining the two national regimes, but establishing a single system to handle certain matters having Australasian dimensions, also would be unlikely to achieve net benefits.
- However, the long-term objective of a single economic market for Australia and New Zealand would be assisted by a package of measures involving a transitional approach to integration of the two regimes.
- This package would improve the effectiveness and efficiency of the regimes in dealing with present day competition and consumer protection matters having Australasian dimensions.
- The transitional integration package, while retaining national sovereignty for each jurisdiction, would include:
- retaining, but further harmonising, the two sets of laws in relation to competition and consumer protection policy
- making more formal the policy dialogue between the two Governments on competition policy
- providing scope for businesses to have certain approvals considered on a 'single track' (but with separate decisions)
- enhancing cooperation between the two regulatory institutions (the Australian Competition and Consumer Commission and the New Zealand Commerce Commission), including in relation to enforcement and research
- providing for the investigative powers of the regulators to be used to assist the regulator in the other country
- enhancing the information sharing powers between regulators (safeguards should be included to ensure that confidential information shared between regulators can remain protected from disclosure)
- adding consideration of impediments to a single economic market to the scope of the proposed review of Australian consumer protection.
- Implementation of the recommendations would provide a framework in which the competition and consumer protection regimes of Australia and New Zealand evolve as:
- the Australasian business environment integrates further
- the broader policy environment develops further as the two Governments make progress towards the goal of establishing a single economic market.

Overview

The Australian and New Zealand economies are becoming increasingly integrated. This has arisen because of shared legal and political heritage, geographical proximity and similarity of policy measures adopted by Governments in both countries. Convergence of consumer protection and competition regimes between Australia and New Zealand is particularly high by international standards, and is regarded internationally as a good example of what is achievable.

Recently, the two Governments articulated a long-term goal of achieving a single economic market and they regard deeper coordination of the regulatory environments for business as an essential element in achieving this goal. Measures, such as the Australia New Zealand Closer Economic Relations Trade Agreement and the Memorandum of Understanding on Business Law Coordination, have provided a framework for removing obstacles to trade and investment.

Although many policy measures have been adopted to remove such obstacles (box 1), there are concerns about whether the existing competition and consumer protection regimes of the two countries might be an impediment to the development of a single economic market. The two Governments have asked the Commission to examine the potential benefits from greater cooperation, coordination and integration in relation to the core components of the competition and consumer protection regimes of Australia and New Zealand (briefly summarised in box 2).

The terms of reference require a focus on impediments to the trans-Tasman business environment, rather than on the more general issue of improvements to each country's regime. In this respect, the Commission has been asked not to duplicate the work undertaken in recent reviews of the Australian and New Zealand legislation.

Box 1 **Factors driving convergence of competition and consumer protection regimes**

The similarity of the regimes has been influenced by a number of factors, such as:

- the similar legal and political systems in Australia and New Zealand
- convergence of Australian and New Zealand law towards international standards through participation in multilateral fora
- the Australia New Zealand Closer Economic Relations Trade Agreement and related agreements, such as:
  - the 1988 Memorandum of Understanding on Harmonisation of Business Law and the 2000 Memorandum of Understanding on Business Law Coordination
  - the 1990 package of legislative amendments to competition law in each country
  - the Trans-Tasman Mutual Recognition Arrangement, the Joint Food Standards Setting Treaty, and the Treaty for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products committing the two national governments to mutual recognition of standards or uniform product standards
- institutional cooperation through:
  - the Ministerial Council on Consumer Affairs comprising the Australian, State, Territory and New Zealand Ministers, supported by the Standing Committee of Officials of Consumer Affairs
  - an agreement between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to promote cooperation and coordination and lessen the possibility of differences in the application of competition and consumer protection laws (including information sharing and staff exchange)
  - tripartite agreements between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission and agencies responsible for competition and consumer protection in Canada, Taiwan and the United Kingdom.

Various options for greater integration of the competition and consumer protection regimes have been examined for how they might affect economic activity in Australia and New Zealand and assessed for the resulting net benefits. The assessment was undertaken in two steps.

First, the Commission sought to determine the extent to which the existing regimes in Australia and New Zealand are impeding Australasian economic activity by:

- increasing the compliance costs of businesses operating in Australasian markets
- increasing the administration costs of institutions responsible for administering the regimes of the two countries in competition and consumer protection cases with Australasian considerations

- being ineffective in protecting the competitive processes and consumers in Australasian markets.

Box 2 **Australian and New Zealand regimes**

Legislation

For Australia, the principal competition and consumer protection legislation is the *Trade Practices Act 1974*. Also relevant are the mirror consumer protection provisions in the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*, and consumer protection legislation of the States and Territories.

For New Zealand, the principal legislation is the *Commerce Act 1986* and *Fair Trading Act 1986*. Also relevant is the *Consumer Guarantees Act 1993*.

At the national level, the Australian Treasury and New Zealand Ministries of Economic Development and Consumer Affairs have policy advising roles. Relevant State and Territory agencies also have a policy role.

Administration and enforcement agencies

The Australian Competition and Consumer Commission is responsible for administration and enforcement of the Trade Practices Act. The Australian Securities and Investments Commission also has a role in enforcing consumer protection in relation to financial services. In addition, the consumer affairs agencies of the States and Territories administer and enforce the State and Territory legislation. The Commerce Commission is responsible for administering and enforcing the Commerce and Fair Trading Acts in New Zealand.

The Australian Treasury, the New Zealand Ministry of Consumer Affairs and their Ministers also have consumer protection roles in their respective countries.

Courts and tribunals

In Australia, the Federal, State and Territory courts hear matters in relation to competition and consumer protection. The Australian Competition Tribunal can also review certain decisions made by the Australian Competition and Consumer Commission.

In New Zealand, the High Court has jurisdiction with respect to the Commerce Act. The High Court, District Court and various Tribunals have jurisdiction in relation to consumer protection.

This part of the assessment was undertaken by systematically comparing the regimes and drawing upon evidence presented in submissions. The comparison is based on an examination of all aspects of the regimes, from their policy objectives and laws, to approval processes and through to reviews of decisions.

A narrow and literal identification of differences between the regimes has not been undertaken. Rather, impediments were identified where an issue associated with an aspect of the regimes is likely to distort materially the operation of Australasian markets.

The second step in the assessment involved the articulation and evaluation of several options to overcome the identified impediments to improving the Australasian business environment.

Impediments?

The Commission's assessment of the existing competition and consumer protection regimes is that they are unlikely to be having a significant distortionary impact on Australasian economic activity generally, because the regimes and their operation in each country are sufficiently similar.

However, there are some differences in the laws and how they operate. Further, each country retains domestic legislative direction and national jurisdiction, as well as discretion to independently modify their own laws. Essentially, each regime has an inherent focus on its own national economy. The regimes do not provide a framework for considering competition and consumer protection in terms of Australasian markets.

These differences have the *potential* to impede the Australasian business environment. For example, a consumer located in Australia buying a good from a supplier in New Zealand might wish to complain about their treatment, raising questions about which jurisdiction's laws and institutions will apply. Another example is the regulatory approach to a merger involving two businesses where each provides services in Australia and New Zealand and between the two countries.

Aspects of the regimes that could impede their application to Australasian economic activity include:

- the objectives of each regime allow consideration of the welfare of only those in their particular country
- the impact markets in which certain restrictive trade practices and mergers are assessed for their effect on competition, cannot geographically extend beyond the border of each country
- there are differences in the application of the public benefits test, which could give rise to conflicting assessments in Australasian cases concerned with authorisations

- businesses are required (for example, in Australasian merger cases) to submit separate applications to the two jurisdictions, duplicating some information
- there are differences in the approval processes and practices for authorisations and clearances, including timelines and argument construction, which could raise the compliance costs of businesses involved in certain Australasian cases
- there are differences in the appeal and review arrangements, which could give rise to inconsistent decisions in certain Australasian cases
- there are limitations on the extent that the regulator in one country can use its investigative powers to assist the regulator in the other country and share information with the other regulator.

The identification of potential weaknesses in the existing regimes to deal with Australasian competition and consumer protection matters does not, by itself, form a basis for proposing change. It is necessary to consider the size of the benefits that would arise for Australia and for New Zealand in being able to regulate Australasian competition and consumer protection more effectively and efficiently. Those benefits then need to be offset against the costs of change.

The evidence presented to the Commission suggests that the benefits would be moderate in size. The principal reason is the relatively small number of Australasian cases that are likely to arise. For example, the Australian Competition and Consumer Commission identified only 64 cases having a trans-Tasman element, out of 63 695 complaints and inquiries recorded in 2003–04. For clearances for mergers between 1997 and 2004, the Australian Competition and Consumer Commission and the New Zealand Commerce Commission made decisions on 25 cases requiring application to both regulators (table 1). For authorisations of mergers and restrictive trade practices, over the same period, there was only one case for which both regulators made a decision.

Table 1 **Clearances and authorisations requiring decisions by both the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, 1997–2004**

Type of approval process	*Type of conduct*	*Number of decisions*
Clearances	Mergers	25
Authorisations	Mergers	1
	Restrictive trade practices	1

Although the Australian and New Zealand economies are highly integrated, from a competitive process viewpoint, most impact markets are likely to be considered to be geographically separate. As has been the case in the past, there are likely to be

few instances where a competition matter has significant Australasian dimensions (for example, the recent proposal by Qantas-Air New Zealand to form an alliance).

The costs of policy options to achieve greater integration of the regimes also need to be considered when determining whether and what policy changes are warranted. That is, the policy test is not just whether there are benefits from the policy options, but whether there are *net* benefits for Australia and for New Zealand after taking into account the costs of implementation. The costs of the various options vary significantly.

Options

Six options (table 2) were identified for achieving greater cooperation, coordination and integration of the Australian and New Zealand competition and consumer protection regimes. These options are representative of the main options described in the terms of reference for this study. They are classified into three broad groups — full integration, partial integration and transitional integration.

Full integration

Full integration (options 1a and 1b) would require the Australian and New Zealand Governments to develop, legislate and maintain identical competition and consumer protection regimes. The regimes would need to be modified so that they could be applied to both domestic and Australasian matters.

Significant changes would be required to many parts of each regime, including: objectives; specification of prohibitions; and criteria for assessing matters such as definition of market, substantially lessening competition and public benefits. Significant changes would also be required to the institutional arrangements, including powers and functions of the regulator(s) and the operation of the appeals mechanisms. These changes would incur substantial costs.

Implementing full integration would also have consequences for the domestic operation of the regimes in each country, as the existing laws in each country would need to be changed to the agreed uniform standard. Importantly, it would require judgements on whether a net Australasian public benefit would encompass a net benefit for one country that exceeded a net cost for the other country.

Table 2 **Policy options examined by the Commission**

	Substantive laws	*Institutions*
Full integration		
Option 1a	Each country legislates identical laws that provide a framework for considering competition and consumer protection policy in terms of Australasian markets	Single, common set of institutions established by the two countries
Option 1b	Same as option 1a	Separate national institutions retained by each country
Partial integration		
Option 2a	Each country legislates identical laws that provide a framework for considering competition and consumer protection policy in terms of Australasian markets for *selected* transactions (Australasian regime)[a] *and* Separate laws retained for all other matters (national regimes)	Single, common set of institutions established by the two countries to administer the Australasian regime and national regimes
Option 2b	Same as option 2a	Single, common set of institutions established *on a permanent basis* by the two countries to administer the Australasian regime *and* Separate national institutions retained by each country to administer national regimes
Option 2c	Same as option 2a	Single, common set of institutions established *on a needs basis* by the two countries to administer the Australasian regime *and* Separate national institutions retained by each country to administer national regimes
Transitional integration		
Option 3	Separate laws retained for all matters, with enhanced policy dialogue and harmonisation	Separate national institutions retained by each country, with enhanced cooperation and coordination for assessment of certain Australasian cases

[a] The Australasian regime would only be used when the net benefit would be greater than under national regimes.

Many matters might also arise between the intersection of the Australasian regime and those of the States and Territories. There could also be tensions between this generic regime and those of industry-specific regimes, which are outside the terms of reference for this study.

Issues relating to full integration are complex, involve substantial matters of sovereignty and extend into the economic and judicial heartlands of the two countries. In light of the small number of cases with substantive Australasian considerations and the substantial costs involved, options 1a and 1b would not generate a net benefit and are not supported.

Partial integration

Partial integration could be designed such that regulation and regulatory decision making would be applied nationally, but with provision for action to be taken at an Australasian level in circumstances where it would generate greater net benefits.

Under options 2a to 2c, each country would have its own laws covering the operation of the respective economy, but with a separate set of laws to cover certain Australasian cases. This would have the advantage that purely national matters would be unaffected by integration, while bringing better coherence to cases where Australasian competition or consumer protection issues arise.

It might not be necessary to replicate the whole of the competition and consumer protection law, but rather to focus an Australasian regime on those issues that were most likely to arise. For example, it might only be necessary to have an Australasian regime for misuse of market power, mergers, or possibly some other restrictive trade practices.

The institutional arrangements considered in options 2a to 2c cover options for sharing institutions (for all cases or limited to cases brought under an Australasian regime). This could result in moderate savings in the administration costs of operating the competition and consumer protection regimes and in compliance costs to businesses and consumers.

However, it remains the case that establishing a framework to deal with Australasian competition and consumer protection matters would still be a demanding task, although less so than for full integration. The narrower the focus of the Australasian regimes (for example mergers only), the less complex would be the task.

The Commission's assessment is that, although there could be variations across these three options, the costs of implementing each of these options are likely to outweigh the resulting benefits at the present time. The options could be reconsidered in the light of significant progress in other policy areas that are substantive to the creation of a single economic market.

Transitional integration

Option 3 comprises a package of measures that, in aggregate, would be a discrete step towards integration of the two regimes (that is, 'transitional integration'). The package would improve the effectiveness and efficiency of the regimes in dealing with consumer protection and competition matters having Australasian dimensions.

Importantly, option 3 would not incur the large costs inherent in options 1 and 2. National sovereignty would be retained by each country and the complex task of implementing and maintaining a single set of comprehensive laws would be avoided.

Enhanced competition policy dialogue

At present there is regular contact between the Australian and New Zealand Governments on competition policy matters. However, a more formal structure to this dialogue would assist moves toward further harmonisation of the competition regimes of the two countries in the context of the long-term objective of a single economic market for Australia and New Zealand.

Enhanced consumer protection policy dialogue

The Ministerial Council on Consumer Affairs already provides a forum for regular dialogue between the Australian, New Zealand and State and Territory Governments. This Council is supported by the Standing Committee of Officials of Consumer Affairs. The Commission has proposed, in its discussion draft on the Review of National Competition Policy Reforms, a national review of consumer protection policy and its administration in Australia. That review could provide the Council and officials with an agenda not only for enhanced dialogue and harmonisation of consumer protection policy in Australia, but also in relation to removing possible impediments to the long-term goal of a single economic market for Australia and New Zealand.

'Single track' approval processes

To reduce compliance costs to business, the two competition regulators (the Australian Competition and Consumer Commission and the New Zealand Commerce Commission) should put in place arrangements to enable businesses, if they wish, to have applications (such as for a merger) to both regulators considered, as far as possible, on a 'single track'. The two Governments should also consider legislative changes to the practices and processes concerning approvals, with the

aim of increasing the scope for regulatory agencies to extend the 'single track' treatment of dual approvals.

Extending information gathering and exchange powers

Enhanced information gathering and exchange powers would improve the effectiveness of the two regimes in dealing with matters having an Australasian dimension. This would include:

- empowering the regulators in each country to use their information gathering powers to act on a request for investigative assistance from the regulator in the other country
- empowering the regulators in each country to share information obtained from the exercising of their information gathering powers
- building safeguards into the regimes of each country to ensure that confidential information obtained and shared by the regulators is protected from disclosure and unauthorised use.

Cross appointments

Cross appointments of Commissioners to the Australian Competition and Consumer Commission and the New Zealand Commerce Commission would be a further way to encourage and facilitate cooperation and coordination between the two competition regulatory authorities, such as when considering 'single track' approvals and information requests exercised under the proposed new powers.

Conclusion

The Commission has not proposed major changes to the Australian and New Zealand competition and consumer protection regimes. These would not be worthwhile given the moderate benefits such changes would deliver and the large implementation and ongoing costs associated with a single regime for both countries. However, a transitional integration option has been developed that would foster and enhance the Australasian business environment and provide a further building block for an eventual single economic market. Its implementation would provide a framework in which the regimes of the two countries evolve as the Australasian business environment integrates further, and the broader policy environment develops further as the two Governments make progress towards the goal of establishing a single economic market.

Findings and recommendations

Context of this study

FINDING 2.1

The Australian and New Zealand competition and consumer protection regimes have undergone significant convergence. The laws are similar and there is considerable cooperation and coordination between the relevant authorities of the two countries.

Assessment of current regimes

FINDING 4.1

For the Australian and New Zealand competition and consumer protection regimes:

- *the substantive laws*
- *the application of the laws*
- *the approval processes for acquisitions and restrictive trade practices*
- *the sanctions and remedies*
- *the review and appeals processes*

are sufficiently similar that they generally are not an impediment to an integrated trans-Tasman business environment.

FINDING 4.2

Notwithstanding finding 4.1, there are aspects of the Australian and New Zealand competition and consumer protection regimes that are not consistent with a single economic market. The particular aspects relate to:

- *the objectives of each country's regime being confined to the welfare of only those in the respective country, as are the competition public benefits tests*
- *the impact of relevant conduct only being considered within national boundaries*
- *differences in guidelines, timelines, and decision making and duplication of processes, for cases where approval is required in both countries.*

FINDING 4.3

There are several factors that can impede the ability of regulators in Australia and New Zealand to enforce effectively competition and consumer protection regimes in relation to cases with Australasian dimensions:

- *Statutory restrictions prevent the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) exercising their information requisitioning powers in each other's jurisdiction. They also face limits on the use of their investigation powers in providing assistance to each other.*
- *Statutory restrictions limit the extent to which the ACCC and the NZCC can exchange information that was obtained through their information gathering powers.*
- *Information exchange between the ACCC and the NZCC is impeded by the inability to protect confidential information against unauthorised disclosure.*

Policy options (full and partial integration)

FINDING 5.1

Implementing and maintaining a single competition and consumer protection regime for Australia and New Zealand (full integration) would not generate benefits that outweigh the associated costs. The resulting benefits would be moderate, given that the two countries' competition and consumer protection regimes are already similar, there is extensive cooperation and coordination between Australian and New Zealand regulators, and only a small number of cases handled by those regulators have Australasian dimensions. The costs of implementation and maintenance would be substantial. It would require agreement on many complex issues, including how each country's sovereignty would be affected.

FINDING 5.2

Implementing and maintaining a joint competition and consumer protection regime (operating side-by-side with two separate national regimes) that would apply to certain cases having Australasian dimensions is unlikely to generate net benefits at this stage. Benefits are likely to be moderate and the costs large. In particular, it would require agreement on many of the complex issues that arise in implementing a single regime for the two countries (full integration).

Transitional integration

RECOMMENDATION 6.1

The Australian and New Zealand Governments should agree to hold regular formal discussions, at both the Ministerial and officials levels, on competition policy matters, with a particular focus on greater harmonisation in the context of the long-term objective of a single economic market for Australia and New Zealand.

RECOMMENDATION 6.2

The issue of possible impediments to the long-term objective of a single economic market for Australia and New Zealand should be included in the review of consumer protection policy and its administration in Australia recommended by the Productivity Commission in its discussion draft Review of National Competition Policy Reforms.

RECOMMENDATION 6.3

The Trade Practices Act 1974 (Cwlth) and the Commerce Act 1986 (NZ) should be amended to enable the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to use their information gathering powers for the purposes of acting on a request for investigative assistance from each other.

RECOMMENDATION 6.4

The Trade Practices Act 1974 (Cwlth) and the Commerce Act 1986 (NZ) should be amended to allow the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to exchange information that has been obtained through their information gathering powers.

RECOMMENDATION 6.5

For recommendations 6.3 and 6.4, safeguards should be built into the Trade Practices Act 1974 (Cwlth) and the Commerce Act 1986 (NZ) to ensure against the unauthorised use and disclosure of confidential or protected information.

RECOMMENDATION 6.6

The Australian Competition and Consumer Commission and the New Zealand Commerce Commission should enhance further their cooperation and coordination, including in relation to operational, enforcement and research activities. In particular, the agencies should endeavour, where beneficial, to conduct joint investigations and harmonise their guidelines and work practices.

RECOMMENDATION 6.7

The Australian and New Zealand Governments should agree that a 'single track' procedure be made available to those businesses requiring approval in both countries. A coordination protocol should be agreed between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to operationalise the 'single track' procedures.

RECOMMENDATION 6.8

The Governments of Australia and New Zealand should make cross country appointments to the Australian Competition and Consumer Commission and the New Zealand Commerce Commission. This would be at the Commissioner level, as well as others (such as exchanging experts).

FINDING 6.1

The transitional integration package recommended in this report would generate net benefits for Australia and for New Zealand:

- *it would be a discrete step in moving towards the long-term goal of establishing a single economic market*
- *it would also improve the effectiveness and efficiency of the Australian and New Zealand competition and consumer protection regimes in dealing with competition and consumer protection matters having Australasian dimensions.*

1 Introduction

The Australian and New Zealand economies are increasingly integrated. Factors contributing to integration include policy initiatives, such as the Australia New Zealand Closer Economic Relations Trade Agreement (CER Agreement) and more recently a Memorandum of Understanding on Business Law Coordination.

In January 2004, the Australian Treasurer and New Zealand Minister of Finance jointly announced the goal of building on the CER Agreement towards a single economic market based on common regulatory frameworks (Costello and Cullen 2004).

Two such regulatory frameworks are the competition and consumer protection regimes of each country. Competition policy aims to improve economic efficiency through the promotion of competition. Competition law prohibits certain anticompetitive conduct. The focus of consumer protection policy is to address market failure by improving the position of household and business consumers in market dealings. Consumer protection laws prohibit unfair market practices, specify standards and mandate information disclosure.

1.1 What has the Commission been asked to do?

On 29 June 2004, the Australian Treasurer asked the Productivity Commission, on behalf of the Governments of Australia and New Zealand, to:

- assess how the operation, administration and enforcement of Australian and New Zealand competition and consumer protection law affect, impede or foster an integrated trans-Tasman business environment
- identify and assess the expected net benefits for Australia and for New Zealand of options for greater cooperation, coordination and integration of their competition and consumer protection policy and law, and its administration and enforcement, for the purpose of fostering and enhancing a trans-Tasman business environment.

The study's terms of reference are reprinted in full at the beginning of this report.

Some interested parties saw this research study as an opportunity to re-open policy debates about the adequacy of each jurisdiction's competition and consumer protection regimes. However, these matters are outside the terms of reference for this study. Further, the Commission has been instructed not to duplicate:

- the 2003 Review of the Competition Provisions of the Trade Practices Act (the Dawson Review) (Dawson, Segal and Rendall 2003)
- the 2001 review of the New Zealand Commerce Act.

The Commission is to have regard to the Australian Government's response to the Dawson Review and to the Australian Senate Economic References Committee Report (Australian Government 2004a, 2004b).

1.2 The Commission's approach

The Commission has assessed whether the existing competition and consumer protection regimes in Australia and New Zealand have the potential to:

- impede the effectiveness of the competition and consumer protection policies in one or both countries
- impose costs on businesses and consumers in Australia and New Zealand, such as additional compliance costs and costs associated with regulatory uncertainty
- impose additional administration costs on the institutions responsible for administering and enforcing the regimes in each country.

To this end, the Commission has examined the legislative provisions, guidelines and practices in both countries. The Commission, in comparing the regimes, has not sought to take a narrow and literal identification of differences. Rather, impediments are identified where they are likely to materially distort the operation of Australasian markets. The examination is not limited to whether there are differences, since it is possible that both countries may adopt similar legislative provisions that can still impede the further integration of a trans-Tasman business environment.

1.3 Conduct of this study

Public consultation and transparency are important features of the Commission's approach. The Commission has taken a variety of steps to ensure that the views and interests of parties in both Australia and New Zealand are taken into account for this research study.

On receipt of the terms of reference, the Commission informed interested parties of the study by a circular and advertisements in major newspapers in Australia and New Zealand and released an issues paper in mid-July seeking written submissions. The Commission received 27 submissions before the release of a draft report in October 2004.

After the release of the draft report, roundtable discussions were held with interested parties in Auckland, Wellington, Sydney, Canberra and Melbourne to assist the production of the final report. The Commission received a further 17 submissions in response to the draft report.

The Commission met with a range of people representing groups that have an interest in competition and consumer protection regimes. These groups included consumer, small business and large business organisations in both countries, as well as individual businesses and government agencies in each country.

Appendix A provides details of the individuals and organisations that participated in the study through submissions, meetings and/or roundtable discussions. The Commission thanks interested parties for their participation and in particular for their written submissions.

1.4 Structure of the report

The remainder of the report is as follows:

- The nature of the Australasian economic relationship is outlined in chapter 2, with a description of what is meant by a 'single economic market'. A summary of the current arrangements for cooperation between the Australian and New Zealand governments and relevant institutions in relation to competition and consumer protection regimes is also provided.
- The analytical framework used by the Commission to assess whether the Australian and New Zealand competition and consumer protection regimes are impeding the further integration of the Australian and New Zealand economies is set out in chapter 3. Criteria for assessing further policy options are also provided.
- In chapter 4, the analytical framework of chapter 3 is applied to present findings on whether there are material impediments in the existing regimes to further integration of the trans-Tasman business environment.
- In chapters 5 and 6, the Commission draws on the findings of chapter 4 to propose and assess various policy options that might address the identified

impediments, and makes recommendations on ways to overcome the impediments.

In appendix B, detailed descriptions and comparisons of the competition regimes in each country are set out. Similarly, in appendices C and D, descriptions and comparisons of the consumer protection regimes in general and for financial services in particular are set out. In appendix E, the relationship between the competition and consumer protection regimes of the Australian Government and the State and Territory Governments is described.

2 Context of this study

Over a significant period of time, the trend has been for the Australian and New Zealand economies to become increasingly integrated. This has arisen because of shared legal and political heritage, geographical proximity and policy measures adopted by governments in both countries. The principal policy measures relevant to this study are the Australia New Zealand Closer Economic Relations Trade Agreement (CER Agreement) and associated agreements. The CER Agreement and other arrangements have fostered an increasingly integrated business community and, through the progressive removal of barriers to economic activity, have set the scene for the development of a single economic market.

In section 2.1, the Australasian economic relationship is discussed briefly, including the recent shift towards the goal of creating a single economic market. A description of the legislation and institutions within the scope of this study are outlined in section 2.2. In the final section (2.3), information on the existing cooperation, coordination and integration arrangements for the two competition and consumer protection regimes is provided.

2.1 The Australasian economic relationship

The 1983 CER Agreement is the principal instrument governing economic relations between Australia and New Zealand. The preamble to the CER Agreement indicates that Australian and New Zealand Governments expect a closer economic relationship to bring economic and social benefits and improve standards of living, provide a secure trading framework to give industry the confidence to make investment and planning decisions, and lead to the more effective use of resources.

The CER Agreement was originally viewed as an agreement providing for free trade in goods. However, it has been extended over time to encompass other elements of economic integration and the harmonisation of a range of regulations and business laws. A series of agreements and arrangements has been developed to ensure that different standards, procedures and other regulations between Australia and New Zealand are not impeding Australasian economic activity by raising transaction costs associated with the movement of goods, services, labour and capital between the two countries.

The CER-related agreements cover many areas of government policy, such as customs and quarantine policies and procedures, company and securities legislation, taxation, mutual recognition of securities and managed investment scheme interests, mutual recognition of goods and professional qualifications, and uniform food standards. Some of the agreements that are particularly relevant to competition and consumer protection regimes are discussed in some detail in section 2.3. There are also arrangements outside the CER Agreement context that relate to the movement of people, such as the 1973 Trans-Tasman Travel Arrangements, supplemented by agreements on social security, reciprocal health benefits and child support.

Statistics illustrating the extent of integration of the Australian and New Zealand economies are presented in table 2.1. The economic relationship is relatively more significant for New Zealand than for Australia.

Table 2.1 **Statistics illustrating Australia–New Zealand economic integration**

Flow/stock	*Percentage of Australian (total to/from New Zealand)*	*Percentage of New Zealand (total to/from Australia)*
	%	%
Trade in goods[a]		
Exports	7.5	19.7
Imports	3.9	22.6
Trade in services[b]		
Exports	7.3	22.0
Imports	5.5	33.7
Foreign investment[c]		
Abroad	6.4	20.8
Within	2.1	23.3
Labour movement[d]		
Labour exports	17.1	43.3
Labour imports	12.9	17.4

a Trade in goods are annual figures for Australia for the year ending December 2003 and for New Zealand for the year ending June 2003. **b** Trade in services are annual figures for Australia for the year ending December 2003. For New Zealand, statistics for trade in services are not publicly reported by Statistics New Zealand. The figure shown is the most recently available data (for 2000) (taken from Lloyd 2003). **c** Foreign investment figures are based on the total stock of foreign investment at 30 June 2002 for Australia and 31 March 2003 for New Zealand. For example, 6.4 per cent of total Australian investment abroad as at 30 June 2002 was in New Zealand. **d** Labour movement figures are annual flows for the year ending June 2003 for Australian labour exports, June 2004 for Australian labour imports and July 2004 for New Zealand.

Sources: ABS 2003, 2004a, 2004b, 2004c, 2004d; DIMIA 2004; Lloyd 2003; Statistics New Zealand 2003a, 2003b, 2003c, 2004.

Single economic market

In January 2004, the Governments of Australia and New Zealand articulated a long-term goal of achieving a single economic market based on common regulatory frameworks (Costello and Cullen 2004). Prime Ministers Howard and Clark reaffirmed this agenda in March 2004. Prime Minister Howard noted 'we are particularly keen at a prime ministerial level to maintain the momentum towards the development of a single economic market' (Howard 2004). Prime Minister Clark noted 'it is clear that our relationship has now gone way beyond a free trade agreement into single economic market issues' (Clark 2004).

The two governments regard deeper coordination of the regulatory environments for business as an essential element to achieving a single economic market.

What is a single economic market?

A single economic market is a geographic area comprising two or more countries in which there is no significant discrimination in the markets of each country arising from differences in the policies and regulations adopted by each country. A single economic market represents the highest level of economic integration of two or more countries, falling short of political integration (box 2.1). Moving along the path of economic integration for Australia and New Zealand is considered a desirable goal because differences in economic policies and regulations can distort the efficient operation of transnational markets, leading to lower levels of real income in both countries than would otherwise be possible.

There are two broad categories of policies that can distort the operation of markets in and between countries:

- One category is *border policies* relating to:
  - explicit trade measures such as tariffs, quotas, subsidies, and foreign exchange market controls
  - implicit measures that differentiate between foreign and domestic suppliers (and which are prohibited in free trade agreements under the principle of national treatment)
  - explicit border measures that affect movement of capital and labour between countries, such as immigration policy.
- The second category is *other domestic policies* where there is no violation of national treatment, yet the existence of differences can distort the operation of markets. For example, different capital tax rates in different countries can result

in a misallocation of capital between countries. Similarly, Lloyd and Smith (2004) drew on the example of different labelling requirements:

> A simple case is one in which one member uses metric standards for goods sold within its jurisdiction and another uses non-metric, say imperial standards … there is no question of a violation of national treatment yet there is a barrier to trade. (Lloyd and Smith 2004, p. 11)

Box 2.1 **Degrees of economic integration**

Economic integration involves the lowering of barriers to trade in goods, services, capital and labour. There are various degrees of economic integration ranging from lowering border restrictions in one type of market, to removal of all barriers in all markets:

- A **free trade area** is a geographic area comprising of two or more countries in which there is a lowering of barriers to trade in goods between member countries. It might also involve the lowering of other barriers, such as barriers to trade in services. A **customs union** is a free trade area where members also adopt a common set of external tariffs and other border trade measures.
- A **common market** is a geographic area comprising two or more countries in which there is a lowering or removal of barriers to trade in goods and services and freedom of movement of the factors of production (labour and capital).
- A **single economic market** is a geographic area comprising two or more countries in which there is no significant discrimination in the markets of each country arising from differences in the policies and regulations adopted by each country.
- A **single economy** involves political integration in which member countries combine into one jurisdiction, with some loss of sovereignty in economic policy formulation. Monetary, fiscal and welfare policies are unified, including related legislation, executive instruments and institutions.

The stylised features of each of these arrangements are summarised below.

Features of different degrees of economic integration

Type of economic integration	*Free trade among members*	*Free movement of factors*	*Harmonisation of economic policies*	*Unification of economic policies*
Free trade area	✓			
Common market	✓	✓		
Single economic market	✓	✓	✓	
Single economy	✓	✓	✓	✓

Source: adapted from Lindert and Pugel (1996, p. 202)

The CER Agreement and other agreements have largely removed the barriers in border policies to economic integration for Australia and New Zealand, the significant exception being barriers to capital market integration. Development of

an implementation pathway for a single economic market for the two countries would require harmonisation of their *other domestic policies*. The pathway could be achieved through a prioritised review of those domestic policies that may have the potential to distort the operation of Australasian markets, including:

- regulatory policies (for example, health and environmental standards, banking regulations, licensing and certification requirements, business laws and labour regulations)
- tax regimes, to remove discrimination caused by different tax rates in Australia and New Zealand
- a single currency, to remove differences in exchange rate risk.

Forming a single economic market would require resolution of many important policy issues. Harmonisation of *competition and consumer protection policy* is one such policy area that would need to be examined. Removing all impediments to a single economic market for Australia and New Zealand would require a much wider agenda for action. The various current and recent studies and taskforces (examining, for example, trans-Tasman accounting standards, mutual recognition of securities offerings, and the administration of trans-Tasman insolvencies) provide foundation stones upon which a single economic market implementation plan could be built.

2.2 Competition and consumer protection regimes

For the purpose of this study (as prescribed by the terms of reference), Australian competition and consumer protection law is defined as including the following restrictive trade practices and consumer protection provisions of the *Trade Practices Act 1974* (Cwlth) (TPA):

- restrictive trade practices (part IV)
- unconscionable conduct (part IVA)
- consumer protection (part V) (with the exception of division 1AA (country of origin representations))
- product liability (part VA)
- authorisations and notifications (part VII)
- resale price maintenance (part VIII)
- any associated provisions.

The terms of reference ask the Commission to recognise and take into account:

- the mirror consumer protection provisions applying to financial services in the *Australian Securities and Investments Commission Act 2001* (Cwlth) (ASIC Act) and the *Corporations Act 2001* (Cwlth)
- existing cooperation, coordination and integration of competition and consumer protection policy and law between the Australian, State and Territory Governments. The relevant State and Territory legislation and some of the cooperation, coordination and integration efforts are outlined in appendix E.

For New Zealand, competition and consumer protection law is defined for the purpose of this study to include the core restrictive trade practices, business acquisitions, and consumer protection provisions of the New Zealand *Commerce Act 1986* (NZ) and *Fair Trading Act 1986* (NZ) (FTA). The Commission is required to recognise and take into account the mirror consumer protection provisions applying in New Zealand to consumer rights and redress in the *Consumer Guarantees Act 1993* (NZ) and the differing treatment of product liability.

Responses to prior reviews

The Commission has been asked to be cognisant of the Australian Government's responses to the 2003 Review of the Competition Provisions of the Trade Practices Act (the Dawson Review) and the Senate Economics Reference Committee Report (Australian Government 2004a, 2004b). Prior to the announcement of the 2004 Australian election, the Government's response to the Dawson Review was before the Australian Parliament in the form of the *Trade Practices Legislation Amendment Bill 2004* (Cwlth). In this report, the Commission takes into account both responses in its comparison of Australian and New Zealand regimes in appendices B, C and D and in its analysis in chapter 4.

Other aspects of competition and consumer protection policy

In the course of this study, several participants commented on other aspects of competition and consumer protection policy that are not covered by the study's terms of reference:

- Telecom New Zealand (sub. 15, pp. 12–13) noted the different approach to competition regulation of telecommunications facilities in Australia and New Zealand.
- The Captive Ports Customer Group (sub. 7 and sub. DR31), the NZCC (sub. 16, p. 11) and Telstra (sub. 11, pp. 12–13; sub. DR35, pp. 2–3) noted that New Zealand does not have a generic access regime like part IIIA of the Australian TPA.

- The Captive Ports Customer Group (sub. 7) commented on differences in the regulatory regimes for port companies in Australia and New Zealand.
- The New Zealand Retailers Association (sub. 9) commented on increases in freight rates by the main shipping companies serving the New Zealand market.
- The New Zealand Motor Trade Association drew attention to the differences in substantive law on franchise agreements (sub. 8, pp. 1–2; sub. DR40, p. 3) and the different treatment of industry based codes in Australia and New Zealand (sub. DR40, p. 3).
- The Real Estate Institute of Australia (sub. 5, p. 2) noted work that is proceeding on developing 'guidelines for the real estate industry to facilitate the development of industry standards that are consistent with the requirements of the [TPA]'.
- The Australian Bankers' Association (sub. 21, pp. 2–3) drew attention to differences in the restrictions on customer marketing arising from Australia's *Financial Services Reform Act 2001* (Cwlth).
- Business New Zealand (sub. 4, pp. 2–3) reiterated its view, submitted to the Productivity Commission's study on Rules of Origin under the CER Agreement, that rules of origin are one area where there are impediments to an integrated Australasian business environment.

These areas of competition and consumer protection policy would probably be relevant considerations in moving further towards a single economic market. However, the net benefits of harmonisation in each area would have to be considered. As the above issues are outside the terms of reference for this study, they are not examined in this report.

Institutional arrangements

There are several institutions involved in policy advising, administration and enforcement of the competition and consumer protection regimes in Australia and New Zealand.

Policy advising responsibilities

At the national level, the Australian Treasury has a policy advising role regarding competition and consumer protection policy in Australia. Relevant State and Territory agencies also have a policy role. In New Zealand, the Ministries of Economic Development and Consumer Affairs have policy roles regarding competition policy and consumer protection policy respectively.

Administration and enforcement agencies

The main Australian agency responsible for administering and enforcing the competition and consumer protection regime is the Australian Competition and Consumer Commission (ACCC). In New Zealand, the New Zealand Commerce Commission (NZCC), established under the Commerce Act, is responsible for enforcing various provisions in the Commerce Act and the FTA. In Australia, the Consumer Affairs agencies of the States and Territories also perform a similar role as the ACCC in relation to the State and Territory Fair Trading legislation, as outlined in appendix E.

Regarding competition policy, the relevant Acts confer both enforcement and adjudicative roles on the ACCC and the NZCC. The enforcement role includes communication, consultation and investigation, as well as instigating actions in the courts for alleged breaches of the legislation. The adjudicative role involves making determinations, where enabled in the legislation, on applications for clearance, authorisation and/or notification. The ACCC and the NZCC can institute court action seeking injunctions, fines and corrective advertising. The ACCC can also seek publication orders (ss. 86C–D TPA) and enforce undertakings given in writing by persons (s. 87B TPA). In Australia, the TPA also confers on the ACCC a number of functions in relation to education, the dissemination of information and research (s. 28). In New Zealand, s. 25 of the Commerce Act confers a similar, but less defined, role on the NZCC.

In Australia, the Australian and Securities and Investments Commission (ASIC) has a role under the ASIC Act in enforcing consumer protection policy in relation to financial services. The TPA specifically excludes application of parts IVA, V and VC to financial services, which are covered by the ASIC Act (appendix D). There are arrangements in place for ASIC to delegate certain functions or powers to the ACCC, and the ACCC can do the same to ASIC (appendix D).

The Australian Treasury, the New Zealand Ministry of Consumer Affairs and their Ministers also have operational roles under consumer protection policy in their respective countries. Various divisions and units within the Australian Treasury have responsibility for competition and consumer protection policy. For example, the Competition and Consumer Policy Division is responsible, *inter alia*, for product safety and product information standards (Australian Treasury 2002). The Consumer Safety Unit has responsibility for monitoring the conduct and outcomes of consumer goods safety recalls in Australia. The Parliamentary Secretary to the Treasurer is the Minister empowered to order the compulsory recall of a product (Product Recalls Australia 2000).

The New Zealand Ministry of Consumer Affairs administers the FTA, which includes, *inter alia*, the provision of information, education and advice on consumer laws and issues, and investigation of unsafe consumer products. The Minister can ban and/or order a compulsory recall of an unsafe product (MCA 2004).

Courts and tribunals

In Australia, jurisdiction is conferred on the Federal Court with respect to restrictive trade practices matters. The Federal, State and Territory courts share jurisdiction in relation to parts IVA, VA, and most of part V. The Federal Magistrates Court also has the power to hear and determine some matters relating to part V of the TPA. The Australian Competition Tribunal is constituted under the TPA to review ACCC decisions in relation to authorisations and notifications. It is presided over by a Federal Court judge and its members are appointed from a wide variety of backgrounds with knowledge or experience in industry, commerce, economics, law or public administration.

In New Zealand, the Commerce Act confers jurisdiction on the High Court to hear and determine actions taken by the NZCC alleging contraventions of the Commerce Act and the FTA. The High Court also has a role reviewing NZCC decisions. Decisions by the High Court can be appealed to the Court of Appeal. Section 78 of the Commerce Act provides for lay members of the High Court to hear and determine certain proceedings. The courts in New Zealand also hear private rights of action, which are available for most alleged contraventions of the Commerce Act and the FTA. Decisions by New Zealand courts can be appealed in the usual way, with the recently established Supreme Court being the court of final appeal in most instances.

Small claims courts and tribunals play an important role in both Australian and New Zealand consumer protection policy. New Zealand and each State and Territory in Australia have a small claims court or tribunal. They are designed to be easily accessible to consumers and provide a hearing and determination for claims by consumers that arise from contracts they have made with traders for the purchase of goods or services. There is typically a maximum dollar limit to the award that can be made.

2.3 Cooperation, coordination and integration of competition and consumer protection regimes

The similar legal and political heritage and commercial environments for Australia and New Zealand underpin a high degree of convergence in the competition and

consumer protection regimes of the two countries. Although some variations continue to exist, there has been in recent years a significant degree of further coordination and cooperation in a number of areas relevant to competition and consumer protection regimes.

Substantive laws

The Australian and New Zealand legislation being examined in this study are similar. The New Zealand Commerce Act and the FTA were initially modelled on the Australian TPA. The then Chairman of the NZCC, Alan Bollard, noted the attraction of the Australian approach:

> … 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. (Bollard 1997)

The similarity of Australian and New Zealand competition law is supported by the indices of competition law similarity developed by Bollard and Vautier (1998). The authors constructed a 'convergence index' in their paper on the convergence of competition law within APEC to assess the similarity of competition laws between country-pairs. The index captures the characteristics of each country's competition law with respect to their treatment of various anticompetitive behaviours, and the judicial and enforcement characteristics. The authors concluded that the Australian and New Zealand laws were then more similar than the laws of any other two countries in the APEC region (Bollard and Vautier 1998, p. 141).

Telstra endorsed this view:

> The pre-existing harmonisation between the competition laws of Australia and New Zealand ranks among the closest of any two nations in the world outside the supra-national competition law adopted by the European Community. (Telstra, sub. 11, p. 6)

The CER Agreement and related arrangements have been important to the convergence process. The 1988 Memorandum of Understanding on Harmonisation of Business Law, arising from the 1988 review of the CER Agreement, provided the platform for enhancing the Australasian relationship in this area and demonstrated the two Governments' commitment to harmonising the laws of the two countries. This understanding was replaced in 2000 by the Memorandum of Understanding on Business Law Coordination, which reaffirmed the Governments' objectives.

Over the past 15 years, actions by the two governments have both reduced and increased convergence. One example of convergence is the 1990 package of

legislative amendments to replace anti-dumping actions under the CER Agreement. The key amendments introduced trans-Tasman competition provisions into the restrictive trade practices legislation of both countries. The new provisions — s. 46A of the TPA and s. 36A of the Commerce Act — are extraterritorial extensions of the pre-existing provisions that prohibit businesses from taking advantage of market power (discussed in more detail in chapter 4).

Another part of the amendment provided for the development of jurisdictional, procedural and evidentiary provisions in relation to the trans-Tasman competition provisions. The TPA was amended, for example, to enable the ACCC to receive information and documents on behalf of the NZCC relating to trans-Tasman markets (s. 155A). Section 98H is the equivalent provision in the Commerce Act. Amendments were made in both jurisdictions to other related statutes dealing with evidence, procedure and enforcement of judgements.

The 1992 amendments to the TPA took the statutes somewhat apart, with Australia adopting a 'substantial degree of power' test for s. 46 abuses of market power and a 'substantially lessening of competition' threshold for mergers under s. 50. However, the 2001 Review of the Commerce Act and subsequent amendments realigned the New Zealand competition legislation with its Australian counterpart in these respects. Changes proposed in the Australian *Trade Practices Legislative Amendment Bill 2004* (Cwlth) would have moved the countries laws still closer, particularly in the provisions dealing with formal statutory clearance for proposed mergers, treatment of third-line forcing and penalties (appendix B and chapter 4).

The convergence of laws also has an international element in that both Australia and New Zealand take an outward-looking approach to competition and consumer protection policy. The 2000 Memorandum of Understanding provides for this outward focus, noting that both Governments 'acknowledge the importance of a global approach to business law issues … and the significance of the trans-Tasman relationship in that approach'. Australia and New Zealand are both members of various OECD committees, including the Competition Committee and the Committee on Consumer Protection, and their associated working groups, such as the Joint Group on Trade and Competition. Australia and New Zealand are also involved in the OECD work program on hard core cartel arrangements provided for under the 1998 agreement. Both the ACCC and NZCC participate in the Global Forum on Competition that meets once a year. Australia and New Zealand are also parties to two multilateral organisations, APEC and the WTO, both of which consider issues of competition and consumer protection policy and international trade and technical cooperation among member economies.

Mutual recognition and uniform standards

In addition to convergence of substantive laws, a significant degree of coordination and cooperation has taken place through mutual recognition and adoption of uniform standards. The Trans-Tasman Mutual Recognition Arrangement (TTMRA) between the New Zealand and Australian Governments provides that if goods meet the regulatory requirements for sale in their home jurisdiction, they can be lawfully sold in the other jurisdiction. The TTMRA constitutes a high degree of coordination and cooperation in consumer protection policy and reduces regulatory impediments to goods' mobility across jurisdictions. The TTMRA is not comprehensive, however, as it only applies to the sale of goods and does not extend to the manner of sale, transport, storage, handling, inspection, or the usage or manner of delivery of goods. The Productivity Commission made findings in its 2003 Evaluation of Mutual Recognition Schemes regarding the expansion of the scope of the TTMRA to cover regulations governing the use of goods (PC 2003). The TTMRA also enhances labour mobility through recognition of qualifications for registered services.

Another example of cooperation in consumer protection policy is the joint set of food labelling and composition standards for Australia and New Zealand under the 1995 Joint Food Standards Setting Treaty. The Treaty committed both countries to the development and implementation of a single set of food standards (the Food Standards Code). The uniform Code is implemented through legislation in each participating jurisdiction and can only be amended with Ministerial approval. There is a single regulatory body to administer and enforce the Code, Food Standards Australia New Zealand. The Arrangement on Food Inspection Measures supplements the uniform food standards arrangements, reducing border inspection requirements for food products originating in either Australia or New Zealand.

The Governments of Australia and New Zealand have signed an agreement for the establishment of a joint scheme for the regulation of therapeutic products. Subject to the passage of implementing legislation in both countries, a joint agency should commence operation in mid-2005.

Institutional and Ministerial cooperation

At an institutional level, there is a high degree of cooperation and coordination. The ACCC and NZCC have a 1994 Cooperation and Coordination Agreement to promote cooperation and coordination between the agencies and lessen the possibility of differences between the agencies in the application of competition and consumer protection laws. Key aspects of the agreement are information sharing and staff exchange. The agencies agree to share information where possible, for

example, to avoid unnecessary duplication and facilitate coordinated investigations, research and education (1994 agreement, s. 5.1.1). The ACCC and NZCC are also parties to three tripartite cooperation arrangements with agencies responsible for competition and consumer protection in Canada, Taiwan and the United Kingdom.[1]

The ACCC (sub. 13, p. 5) drew attention to 'ad hoc but fairly regular meetings' with the NZCC, noting that 'there has developed relatively close relations between the officers of each regulator in terms of informal contacts'.

There is cooperation and coordination at the Ministerial level in the area of fair trading, consumer protection and credit laws, through the Ministerial Council on Consumer Affairs (MCCA), which consists of Australian, State, Territory and New Zealand Ministers. The MCCA meets once a year to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues (MCCA 2000a). The MCCA is supported by the Standing Committee of Officials of Consumer Affairs (SCOCA). The New Zealand Ministry of Consumer Affairs (sub. 14) noted that, under the guidance of MCCA, SCOCA is currently undertaking a substantial review of the product safety system in Australia and New Zealand:

> Differences in Commonwealth/State and New Zealand product safety systems will be addressed, as well as exploration of what other international systems may provide in terms of alternative approaches. (sub. 14, p. 10)

There is considerable interaction between ASIC and its regulatory counterpart in New Zealand, the New Zealand Securities Commission. The ASIC submission outlined recent cases where ASIC has worked with the New Zealand Securities Commission in combating investment scams that have an Australian and New Zealand element (sub. 12, pp. 1–2). Each agency can share information and provide investigative assistance in gathering information on behalf of the other.

The ACCC and NZCC are members of two international networks:

- the International Competition Network, which focuses on improving collaboration between competition law enforcement bodies to improve competition law enforcement and administration in the global marketplace to benefit consumers and businesses

[1] The 2000 Cooperation Arrangement between the Canadian Commissioner of Competition, the ACCC, and the NZCC regarding the application of their competition and consumer laws; the 2002 Cooperation Arrangement between the ACCC, the NZCC, and the Taiwan Fair Trade Commission regarding the application of competition and fair trading laws; and the 2003 Cooperation Arrangement between the ACCC, the NZCC, and the United Kingdom's Secretary of State for Trade and Industry and the Office of Fair Trading regarding the application of their competition and consumer laws.

- the International Consumer Protection and Enforcement Network, an informal network of national fair trading law enforcement agencies from more than 30 countries, whose mandate is to share information about cross-border commercial activities that might affect consumer interests, and to encourage international cooperation among law enforcement agencies. The New Zealand Ministry for Consumer Affairs is also a member of this network.

Involvement in these networks can facilitate greater cooperation and integration between Australia and New Zealand.

Coordination is also enhanced through the New Zealand Commerce Act arrangements that allow Australians to be appointed as lay members to the New Zealand High Court. Currently, three of the eight lay members of the New Zealand High Court are Australian (Wilson 2003).

Conclusion

It is clear that there is a history of convergence and integration of Australia's and New Zealand's competition and consumer protection regimes. Significant progress has been made in terms of convergence of substantive laws, mutual recognition and uniform standards. There is also a significant degree of institutional coordination. Convergence, integration and coordination have occurred in a bilateral setting, as well as through the involvement of the Australian and New Zealand Governments and regulatory agencies in international fora.

FINDING 2.1

The Australian and New Zealand competition and consumer protection regimes have undergone significant convergence. The laws are similar and there is considerable cooperation and coordination between the relevant authorities of the two countries.

Although similar, the substantive provisions in Australian and New Zealand competition and consumer protection laws are not identical. There are also differences in the way their provisions are applied and administered. Further, each country retains domestic legislative direction and national jurisdiction, with discretion to diverge from the other's laws. The extent to which these matters are impeding the trans-Tasman business environment is assessed in chapter 4.

3 Analytical approach

The Commission has used a two step process to conduct this study's analysis.

The first step — undertaken in chapter 4 — assesses how the operation, administration and enforcement of Australian and New Zealand competition and consumer protection laws affect, impede or foster an integrated trans-Tasman business environment. The Commission's framework for doing this is set out in section 3.1 below.

The second step — undertaken in chapters 5 and 6 — identifies and assesses options for achieving greater cooperation, coordination and integration of Australian and New Zealand competition and consumer protection policy and law, and its administration and enforcement, for the purpose of fostering and enhancing a trans-Tasman business environment. The framework for this part of the analysis is outlined in sections 3.2 and 3.3 below.

3.1 Assessing the current regulatory regimes

The Commission has sought to determine the extent to which the existing competition and consumer protection regimes in Australia and New Zealand impede an integrated trans-Tasman business environment through:

- raising the compliance costs of businesses that operate in the two countries and undertake trans-Tasman transactions
- raising the administrative costs of institutions that administer the regimes in the two countries
- being ineffective in protecting the competitive process and consumers in an Australasian market.

The Commission has undertaken this assessment by systematically comparing the regimes and by drawing upon information provided in submissions and meetings with interested parties. The comparison of regimes involved an examination of the following nine elements of the competition and consumer protection regimes:

1. specification of policy objectives
2. substantive laws

3. exemptions from laws
4. extraterritorial provisions
5. application of laws
6. approval processes
7. monitoring and enforcement
8. sanctions and remedies
9. reviews and appeals.

The detailed analysis is provided in appendix B for competition policy and in appendix C for consumer protection policy. Chapter 4 draws on the results of those appendices to identify what aspects, prima facie, might warrant changing.

The initial step in comparing the Australian and New Zealand regimes is to identify differences that could result in substantially higher compliance and administrative costs than under a uniform regime for the two countries, and/or lead to inconsistent regulatory decisions. The Commission has not sought to take a narrow and literal identification of differences between the regimes. Rather, impediments are identified where an issue associated with each of the above aspects of the regimes is likely to materially distort the operation of an Australasian market.

However, differences between regimes are not the only potential source of problems. Consideration also needs to be given to the ability of the regimes to efficiently and effectively deal with trans-Tasman matters. In particular, the ACCC point to three general instances where administration and enforcements issues arise between Australia and New Zealand regulatory authorities and coordination and cooperation is necessary (sub. 13, p. 7):

- First, where a business is operating in both Australia and New Zealand and its conduct raises issues under the TPA or Commerce Act. For example, two businesses operating in both Australia and New Zealand decide to merge, or undertake misleading campaigns in both jurisdictions, thereby requiring scrutiny in both Australia and New Zealand.
- Second, where a business operates in one jurisdiction, but its conduct impacts on the other jurisdiction. For example, an internet scam operated from New Zealand that targets Australian consumers, but not New Zealand consumers. Here, conduct in question may only attract investigation in Australia as no breach has occurred against New Zealand consumers.
- Third, where parties are located in one jurisdiction, but it is necessary to make inquiries with related entities or third parties in the other. For example, a merger

where customers or competitors of the parties to a transaction in Australia, which is examined by the ACCC, are located in New Zealand.

In handling these matters, problems might arise because the regimes:

- do not extend to, or are difficult to apply to, trans-Tasman transactions — this limits the ability to protect the trans-Tasman competitive process and consumers
- enable Australia and New Zealand to regulate separately the same transaction — such regulatory duplication (even if substantive laws are identical) could be inefficient and might lead to jurisdictional conflicts that impede trans-Tasman transactions
- ignore the welfare of parties in the other country — this opens the possibility of decisions that hinder the development of Australasian markets, because each country's laws only provide for consideration of the net benefit to parties in its country.

As noted in chapter 2, Australia and New Zealand are already addressing the abovementioned potential impediments to trans-Tasman transactions in various ways. One example is the Memorandum of Understanding on Coordination of Business Law, which lists three issues to consider in assessing the suitability of areas for further development of business law coordination:

> (a) The desirability of ensuring for each particular situation, that a firm, ideally, will only have to comply with one set of rules, and have certainty as to the application of those rules in the other jurisdiction, and with which regulator (ie Australian or New Zealand) it needs to deal;
>
> (b) Whether the situation should be regulated solely through domestic rules or whether a bilateral, or multilateral solution would be more appropriate; and
>
> (c) Whether a good reason exists for the law in this area to be different between Australia and New Zealand. (Memorandum of Understanding on Coordination of Business Law, s. 8)

3.2 Formulating policy options

Policy options are formulated in chapter 5 to address the aspects of the current competition and consumer protection regimes that are found to be potentially impeding an integrated trans-Tasman business environment.

Range of policy options

The terms of reference for this study allow for a broad range of policy options to be considered, as noted by the Australian Treasurer and New Zealand Minister of Commerce in announcing this study:

> This is a forward looking research study to inform both governments on possible future arrangements to better align our respective legislation and practices to remove barriers to trans-Tasman business. All options are on the table, including having common laws and a single trans-Tasman enforcement agency. (Costello 2004 and Wilson 2004)

There can be many ways to address particular deficiencies with existing competition and consumer protection regimes, and it does not necessarily require identical laws or a single regulator. This has been explicitly recognised by the Australian and New Zealand Governments in their Memorandum of Understanding on Coordination of Business Law.

Reflecting the wide range of potential policy options, the terms of reference require the policy proposals examined in this study to include, but not be limited to:

- further harmonisation of competition and consumer protection laws
- greater coordination of authorisation, administrative and enforcement processes
- joint decision making on trans-Tasman issues by competition authorities
- combined or coordinated institutional frameworks.

There is a degree of overlap between these options. The second option — greater coordination — could involve either of the latter two options. Similarly, joint decision making is an example of a combined or coordinated institutional framework.

The Commission's interpretation of the four broad policy options in the terms of reference, and potential examples for each option, are outlined in table 3.1.

Table 3.1 **Broad policy options in the terms of reference**

Broad policy option	*Commission's interpretation*	*Potential examples*
1. Further harmonisation of competition and consumer protection laws	Australian and New Zealand competition and consumer protection laws are changed so as to reduce potential discord between those laws	• Mutual recognition of compliance with the other country's laws • Identical laws for both countries (could be administered locally by the national regulator or by a single trans-Tasman regulator) • Agreement on which country's laws apply in specific circumstances
2. Greater coordination of authorisation, administrative and enforcement processes	Changes that increase the ability to coordinate the implementation of Australian and New Zealand competition and consumer protection laws	• Increased coordination in conducting investigations and gathering evidence in the other country • Referral of functions and powers • Recognition of decisions made in another jurisdiction
3. Joint decision making on trans-Tasman issues by competition and consumer protection authorities	Australian and New Zealand competition authorities would be able to make joint decisions where the competition and consumer protection laws of both countries are relevant to a particular case	• Joint decisions on trans-Tasman breaches of competition and consumer protection laws • Joint assessment of trans-Tasman mergers • Single trans-Tasman regulator and/or court system
4. Combined or coordinated institutional frameworks	The agencies involved in developing, updating and/or administering Australian and New Zealand competition and consumer protection laws are combined, or their actions are coordinated when cross-jurisdictional issues arise	• Coordinated processes for developing, updating and reforming laws • Single trans-Tasman regulator and/or court system

3.3 Assessing policy options

The identification of potential weaknesses in the existing regimes to deal with Australasian competition and consumer protection matters does not, by itself, form a basis for recommending change. It is necessary to consider the size of the benefits and costs that would arise for Australia and for New Zealand from each policy option.

The criterion to be used to identify whether an option is likely to warrant adoption is a key issue in assessing policy options. The terms of reference for this study require the Commission to:

> Examine each option to identify whether the expected benefits (including any public benefit) will outweigh the costs (including any public cost) for Australia and for New Zealand.

That is, the Commission in considering options to foster and enhance a trans-Tasman business environment is to assess whether each country would receive a net benefit from each option, after taking account of all public benefits and costs.

The Commission has also been asked to consider the potential implications of each policy option for existing cooperation between the Australian, State and Territory Governments of Australia.

Benefits and costs

Reflecting the complexity of the competition policy and consumer protection regimes, there are many possible benefits and costs associated with greater cooperation, coordination and integration. There could be changes in:

- effectiveness in protecting the competitive process and consumers, and in limiting barriers to trade and investment
- costs incurred by government agencies in administering regulation and by businesses in complying with regulation
- consequent impacts on international trade and investment
- responsiveness of law making processes and institutions to the concerns of citizens (sovereignty and accountability).

The terms of reference for this study prescribe a broad definition of the benefits and costs that are to be considered by the Commission in assessing policy options. In particular, the Commission's assessment is to include public benefits and costs. Public benefits and costs in this context can differ from the definitions that have been specified in competition policy and legislation and/or adopted by the regulators (chapter 4).

From a conceptual perspective, the terms 'public benefit' and 'public cost' capture all of the effects that might occur under a policy option. They include more than the readily quantifiable gains (or losses) from greater (or lower) efficiency. Public benefits and costs include effects that cannot be quantified readily in financial terms because there is no associated market, and where the beneficiaries or losers could be diffuse, possibly including a whole community.

Examples of public benefits and costs are those associated with changes to the social, cultural, or environmental aspects of a community. A relevant example for this study might be the value placed by citizens of a country on being able to act independently of other countries in deciding what is in their interest.

Some examples of the benefits and costs that might result from greater cooperation, coordination and integration of competition and consumer protection policies are listed in table 3.2.

As noted in chapter 2, there is already a high degree of cooperation and coordination between the Australian and New Zealand competition and consumer protection regimes. Thus, the net benefits of the policy options examined in this study are incremental in the sense that they would add to (or possibly subtract from) the net benefit already achieved under current forms of cooperation and coordination.

The expected benefits and costs of policy options are assessed in this report in qualitative, rather than quantitative, terms. There are several reasons for this:

- The task of comparing current competition policy and consumer protection regimes does not lend itself to precise quantification. In particular, it is debatable whether it is possible to disentangle the effects of Australian and New Zealand competition policy and consumer protection regimes from the many other factors that can hinder or foster an integrated trans-Tasman business environment.
- It is also questionable whether the impacts of possible policy changes can be quantified precisely (thus compounding the likely errors made in estimating the effects of current policies).
- Public benefits and costs are difficult to quantify, usually requiring (often very debatable) assumptions.

Another drawback for quantification is the limited time available to conduct this study.

Table 3.2 **Potential benefits and costs of greater cooperation, coordination and integration**

Potential benefits	*Potential costs*
• Increased likelihood of constraining behaviour of a party in another country that adversely affects the domestic market	• Behaviour that benefits a country is prohibited because such behaviour would adversely affect another country
• Less potential for regulatory decisions of another country to adversely affect the domestic market (fewer negative 'externalities')	• A country is constrained from making some regulatory decisions that would benefit it (when decisions adversely affect another country)
• Ability to design the most effective regime for two or more integrated economies is enhanced	• Ability to design the most effective regime for a particular country's circumstances is constrained
• Less scope for countries to engage in a 'race to the bottom' that leads to less effective regimes	• Reduced competition between regulatory regimes that would have encouraged the pursuit of more effective policies
• Economies of scale in law making and/or enforcement (such as from having identical laws and a combined regulator)	• Diseconomies of scale in law making and/or enforcement (such as longer delays and extra financial costs of formulating and updating laws in coordination with other jurisdictions)
• Less likely to duplicate enforcement (if there is coordinated enforcement in cases that affect another country)	• More likely to duplicate enforcement (if one country allows the laws of another to be applied extraterritorially in its jurisdiction)
• Lower compliance costs (particularly when a large proportion of a country's economic activity relies on international trade or investment)	• Increased compliance costs (particularly when cross-country laws and processes are applied to domestic transactions, and only a small part of economic activity involves international trade or investment)
• Increased regulatory certainty (regarding both laws and outcomes), because one country is less likely to unilaterally change its laws without consulting another country	• Less regulatory certainty (regarding both laws and outcomes), because local considerations are no longer the only factor influencing a country's regulatory regime
• Lower regulatory costs for cross-country transactions lead to greater international trade and investment	• Increased 'red tape' and bureaucracy for cross-country transactions that impede international trade and investment
• Citizens of one country are able to mould the policies of another country to suit their interests	• Law making processes and institutions become more remote and less responsive to the concerns of a country's citizens

4 Assessing the competition and consumer protection regimes

The Commission has compared the competition and consumer protection regimes for the purpose of identifying factors that might be impeding an integrated trans-Tasman business environment. Detailed descriptions of these regimes are given in appendices B, C and D. The Commission also sought the views of interested parties. Those elements of the regimes that were identified by the Commission or by interested parties to be potentially significant impediments are examined in more detail in this chapter.

In assessing whether an element is substantially impeding the goal of an integrated trans-Tasman business environment, the Commission considered the possible effects that the element would have on:

- the compliance costs of businesses operating in Australasian markets
- the costs to the institutions responsible for administering and enforcing the regimes of the two countries in cases with Australasian dimensions
- the effectiveness of the regimes in protecting the competitive process and consumers in Australasian markets.

4.1 Legislative frameworks

The legislative frameworks of the competition and consumer protection regimes of Australia and New Zealand, for the purposes of this section, include the substantive laws that describe the objectives, prohibitions and exemptions. The legislative provisions that describe the application of the law, processes for granting approvals, reviews and appeals, and enforcement are discussed in sections 4.2 to 4.5.

The principal legislation governing competition law in Australia and New Zealand are the *Trade Practices Act 1974* (Cwlth) (TPA) and the *Commerce Act 1986* (NZ). The principal Australian legislation governing consumer protection relevant to this study is the TPA. The consumer protection provisions for financial transactions are described in the *Australian Securities and Investments Commission Act 2001* (Cwlth) (ASIC Act) and the *Corporations Act 2001* (Cwlth). The Australian States

and Territories also have consumer protection legislation. The principal New Zealand legislation governing consumer protection relevant to this study is described in the *Fair Trading Act 1986* (NZ) (FTA) and the *Consumer Guarantees Act 1993* (NZ) (CGA).

Objectives

The objectives of the competition and consumer protection laws of Australia and New Zealand are similar — particularly by international standards (appendices B and C). The underlying objective of both the TPA and the Commerce Act is to protect the competitive process, rather than to promote competition for its own sake. Similarly, the TPA and the FTA are designed to promote the interests of consumers in Australia and New Zealand respectively.

In terms of detail, the TPA seeks to enhance the *welfare of Australians*, whereas the Commerce Act seeks to promote competition for the *long-term benefit of consumers* within New Zealand. It would seem, *prima facie*, that the Australian legislation is concerned with the interests of both consumers and owners of businesses, whereas the New Zealand legislation relates to the consumer interest component of national welfare. However, the 2001 Review of the Commerce Act noted that the New Zealand objects clause does have a national welfare standard (Commerce Committee 2001 and Swain 2001a). This is in part because the reference to 'long-term' implies that the interests of businesses are also acknowledged. A failure to do so would jeopardise future consumption and welfare. Further, the courts of both countries have been willing to read national welfare into the legislative objectives of the respective Acts.[1]

The national focus of the objectives of the TPA and Commerce Act could impact on the business environment for selected trans-Tasman transactions. The objectives require the competition regulators and courts of each country to act in their *respective* national interest. This can be inconsistent with the objective of fostering a single economic market and does not provide for the long-term interests of consumers in the other country to be taken into account.

Changes to the objectives clauses would have implications for other aspects of competition and consumer protection law, such as the definition of impact markets and the assessment of public benefits, which are discussed later.

[1] See for example, the New Zealand High Court decision, *Giltrap City Ltd v Commerce Commission (2003)* Court of Appeal 236/01, 40/02, 41/02 and the Australian judicial decision *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co. Ltd (1989)* 167 CLR 177 at 191, 194.

Prohibitions

The circumstances under which mergers and acquisitions, and unilateral and joint market conduct, are deemed anticompetitive and therefore prohibited are specified in the TPA and the Commerce Act. Some changes to provisions in the TPA were proposed under the previously tabled *Trade Practices Legislation Amendment Bill 2004* (Cwlth) (TPLA Bill). The prohibitions and requirements to protect consumers from certain business conduct are generally specified in the TPA, FTA and CGA.

Competition laws

The general view of participants is that the competition laws of Australia and New Zealand are fairly well-harmonised. The Australian Competition and Consumer Commission (ACCC), for example, stated that the substantive provisions of the competition laws in Australia and New Zealand are similar and 'at present the ACCC has not found this to be a significant problem for either enforcement agency [ACCC or New Zealand Commerce Commission (NZCC)], businesses or consumers' (sub. 13, p. 18).

Similarly, the New Zealand Business Roundtable stated:

> The New Zealand legislation was, from the outset, modelled upon the Australian precedents. The differences, such as they have been, are not at all significant and have not created impediments of the kind the Commission seeks to identify. (sub. 2, p. 1)
>
> We think the differences in the substantive laws of both jurisdictions are not such as to be a major handicap to an integrated trans-Tasman business environment. (sub. 2, p. 3)

Other participants said:

> … there has been a fundamental commonality of approach … between the Australian and New Zealand [competition policy] regimes. That is unsurprising, given the significant adoption of the (then) Trade Practices Act ('TPA') provisions into the Commerce Act … (Telecom New Zealand, sub. 15, p. 5)
>
> There is already a great degree of harmonisation between New Zealand and Australia in competition and consumer protection legislation. (Bell Gully, sub. 19, p. 2)
>
> Our businesses have found that the regulatory regimes are now virtually the same, particularly after the alignment of the merger test in (2001), and they remain largely unaffected by the subtle differences. (Fletcher Building Limited, sub. 20, p. 1)

Some interested parties, however, noted the higher number of provisions for *per se* offences in the TPA, particularly in relation to third-line forcing (ss. 47(6)–(7)) and secondary boycotts (ss. 45D–E). In comparison, the Commerce Act uses the general anticompetitive 'rule of reason' provisions (s. 27) to deal with similar restrictive trade practices. The NZCC noted that:

> The substantive competition laws are very similar although differences lie more in process. Australia has more [*per se*] 'prohibitions' (conduct that will breach the law if not granted authorisation) than New Zealand. This is largely due to New Zealand achieving much the same coverage by adopting a more general drafting style [using general anticompetitive rule of reason provisions]. For example, … third-line forcing … [is] … dealt with more generally under New Zealand's prohibitions for anti-competitive contracts, arrangements and understandings and market power provisions. (sub. 16, p. 8)

AAPT made a similar observation in relation to the potential impact of such provisions on business practices and models (sub. 6, p. 4).

Fletcher Building also noted that:

> If anything, these relatively minor differences mean that there might need to be different business models on either side of the Tasman, which could prevent the standardisation of distribution and supply agreements across Australian/New Zealand businesses. (sub. 20, p. 2)

Fletcher Building went on to say that:

> Experience in our particular business, however, is that this is not a particular concern for Fletcher Building. (sub. 20, p. 2)

Although the differences between Australia and New Zealand could, in principle, distort the operations of businesses operating in, and between, both countries, the Commission has not been presented with evidence suggesting that this is a material problem impeding the trans-Tasman business environment.

Another point of difference between the TPA and the Commerce Act, raised by Telstra, relates to the explicit provision in the TPA for the prohibition of exclusive dealing (Telstra, sub. 11, p. 11). Telstra considered s. 47 of the TPA to be a complex provision that should be repealed (sub. 11, p. 11).

Exclusive dealing (apart from third-line forcing) is based on a substantial lessening of competition test, similar to the general anticompetitive conduct provisions in the TPA (s. 45). In comparison, exclusive dealing in New Zealand is dealt with through the general anticompetitive conduct provisions (s. 27 Commerce Act). In the context of this study, there appears to be little evidence that this difference in approach is an impediment to the trans-Tasman business environment, and the Commission has reached this conclusion.

In the Commission's view, the competition laws of both countries are sufficiently similar such that they are not impeding the development of an integrated trans-Tasman business environment generally. This is consistent with the

Commission's finding that the competition laws have already converged considerably (chapter 2).

Consumer protection law

The Commission has compared the consumer protection regimes of Australia and New Zealand in appendices C and D.

A number of participants expressed the view that the consumer protection regimes were sufficiently similar that they are unlikely to be impeding the development of a trans-Tasman business environment:

> AAPT does not see any specific costs generated from different consumer protection laws operating in Australia and New Zealand. (AAPT Limited, sub. 6, p. 5)
>
> Very few issues of concern have been raised with us in recent years resulting from impediments in the current … consumer laws applying in each country. (New Zealand Retailers Association, sub. 9, p. 3)
>
> Consumer protection law is very similar in New Zealand and Australia. The New Zealand Fair Trading Act 1986 ('FTA') is based on the Australian Trade Practices Act 1974 ('TPA'). (Telecom New Zealand, sub. 15, p. 20)

However, some participants commented on the differences in consumer protection regimes at the Australian State and Territory level (appendix E) and that these differences impose costs on businesses, including New Zealand businesses, that operate in more than one jurisdiction within Australia.

> [The Ministry of Consumer Affairs'] experience at these two levels of government in Australia [Federal and State/Territory] suggests that, in certain areas at least (such as product safety), intra-Australian harmonisation may be of as much relevance and importance to trans-Tasman business as trans-Tasman harmonisation. Harmonisation at both levels has the potential to benefit the trans-Tasman business (including consumer) environment. (Ministry of Consumer Affairs, sub. 14, p. 7)
>
> AAPT notes that while the State and Territory fair trading legislation is broadly similar to that contained in the TPA, ASIC Act and Corporations Act, there remains significant differences and scope for future variation between the various pieces of legislation. The most significant example of divergence in the relevant laws has been the introduction of Part 2B into the Fair Trading Act 1999 (Vic) relating to unfair terms in consumer contracts. (AAPT Limited, sub. 6, p. 5)

The potential for Australian State and Territory consumer protection regulation and administration to impede a competitive market environment within Australia, and in turn, international trade, has been identified as an issue by the Commission in its recent discussion draft for the Review of National Competition Policy Reforms (PC 2004). In that discussion draft, the Commission noted that current arrangements have led to '… duplication of effort and inconsistencies in approaches across

jurisdictions that increase compliance costs and impede the development of national markets'. In addition, current regulation:

> … sometimes focused unduly on impacts in the domestic market. Clearly, standards which are incompatible with those applying in other countries can reduce the scope for Australian firms to realise economies of scale, or to source inputs more cost effectively from overseas. (PC 2004, pp. 216–7)

Exemptions and exceptions

The competition and consumer protection regimes in both countries have a number of specific exemptions and exceptions. Both competition and consumer protection laws provide for the application of the laws to the business activities of all levels of government (including their trading enterprises). In general, various employment conditions, arrangements for partnerships, collective bargaining by consumers, certain intellectual property rights arrangements, and arrangements obliging a person to comply with or apply standards set by the national standard setting agency, are exempt from the competition laws. Market conduct that is specifically authorised by any other enactment is also exempt.

Other activities are exempt from the consumer protection laws:

- *Statutory restrictions to consumers' rights* — for example, consumer rights to compensation have been limited under the *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ). Various statutes in both countries also restrict supplier liability for the carriage of goods.
- *Contracting out provisions* — there is an ability to contract out of specified provisions in specific circumstances.
- *Defences available under the Acts* — defences are available for various consumer protection prohibitions, which in effect provide suppliers with exemptions from those obligations.

Participants and the Commission have not identified any of these exemptions or exceptions to be impeding the development of an integrated trans-Tasman business environment.

Export cartels

In both countries, the prohibitions on restrictive trade practices do not apply to notified arrangements for the export of goods and services (s. 51(2)(g) TPA; s. 44(1)(g) Commerce Act). To be exempt, a business must fully disclose the relevant provisions of its arrangements with the respective competition regulator.

An example would be export contract negotiations between a group of Australian coal mining companies and overseas buyers.

Exemptions for export arrangements affecting trade are common among member countries of the OECD. Exemptions for export arrangements are inconsistent with the goal of a single economic market as exemptions allow anticompetitive conduct to occur in the other country that would not be allowed in the home country. However, export arrangements can be subject to the competition laws of the importing country (OECD 1984).

That said, export arrangements between Australia and New Zealand covered by this exemption are relatively rare. The ACCC advised that it receives up to six notifications of export arrangements per year, but ordinarily it would receive many less than this. The NZCC advised it has only received one notification in recent times, which in any case did not relate to Australia as a target market. To the Commission's knowledge, there is no evidence that notified export arrangements in Australia or New Zealand are being used as an export cartel to the detriment of consumers in the other country.

Market definition and extraterritoriality

The TPA and the Commerce Act require the effect of anticompetitive conduct to be assessed against a relevant 'impact market' for goods and services that are supplied within Australia or New Zealand respectively (s. 4E TPA; s. 3(1A) Commerce Act).

Several participants argued that the geographic limit on the relevant impact market is impeding the business environment for selected trans-Tasman transactions. Qantas argued that international carriers view Australia and New Zealand as a single market for airline services because:

> Both Australia and New Zealand are destinations at the end of 'long haul' routes, many of which cannot be served non-stop. In addition, neither Australian or New Zealand have natural geographic 'hub' airports … Instead, the Australasian routes contain many short haul services with a significant proportion of point-to-point traffic. (sub. 23, p. 2)

Air New Zealand was also critical of the failure of the TPA and the Commerce Act to recognise the possibility that an impact market might span Australia and New Zealand:

> A major criticism of the legislation in both countries is the required restricted view of the effects of competition on domestic markets … This is evident in respect of any application involving international trade and has long since been outdated as business has become increasingly 'global'. It is nowhere more evident than in networks businesses. (sub. 24, p. 2)

Another participant argued that the only other industries that could be regarded as operating in a trans-Tasman impact market would be international shipping, freight and telecommunications (HRL Morrison and Company Limited, sub. 17, p. 9).

Brunt (1990) considers that the geographic limits on the impact market that can be considered by each regulator do not preclude an analysis of overseas competitors and an appreciation of international factors:

> In principle one would think that the present statutory definitions do not preclude, indeed positively require, account to be taken of international competitive pressures, whether arising from import substitution or export opportunity. While it may be that the phrases 'market in Australia' or 'market in New Zealand' direct attention to transactions that occur wholly within the physical bounds of each country, these transactions are subject to the potential constraints that might emanate from international trade. (p. 142)

In the Commission's view, the geographic limit placed on the impact market could *conceptually* constrain the effectiveness of each country's competition regime in cases where the appropriate impact market spans Australia and New Zealand. That said, there is little, if any, evidence to suggest that the current geographic limit placed on impact markets is encumbering the Australian and New Zealand competition regimes or impeding an integrated trans-Tasman business environment. This is reinforced by the actions of the regulators and courts in considering a variety of factors, such as international trade, that influence domestic impact markets.

The geographic limit might be incompatible with a future single economic market between Australia and New Zealand, particularly in the presence of a single competition regulator for the two countries. Of course, expanding the geographic limit to enable consideration of an Australasian impact market (encompassing both Australia and New Zealand) would not prevent the relevant impact market in a particular case being factually confined to either Australia or New Zealand, or part thereof.

As such, the ACCC and the NZCC might still consider airline services, for example, to relate to a market in Australia, in New Zealand or between Australia and New Zealand.

Broadening the boundary to be Australasia would also have implications for other aspects of competition law, such as the tests and processes used by the regulators and the powers of review bodies.

Extraterritoriality issues

The TPA, the Commerce Act and the FTA have limited extraterritorial jurisdiction. These Acts can apply to conduct by certain classes of persons outside national boundaries if that conduct adversely affects competition (or, if relevant, violates consumer protection provisions) in domestic markets. However, this extraterritorial reach applies only in circumstances, where the corporation (or person as relevant) is incorporated, carries on business or is ordinarily resident in Australia (or New Zealand) or is an Australian (or New Zealand) citizen.

The TPA and the Commerce Act also enable specific extraterritorial powers in particular trans-Tasman cases, under s. 46A of the TPA and a mirror provision under the Commerce Act (s. 36A), which are discussed below.

The ACCC raised concerns that, as an evidentiary requirement, determining whether conduct has occurred in Australia for the purposes of s. 5 of the TPA can be difficult in certain circumstances:

> Examples of situations where it is uncertain if the conduct which directly concerns Australia would be considered to have occurred within the jurisdiction include:
>
> - Cases where a foreign corporation refuses to supply to businesses in Australia.
> - Cases where a foreign corporation enters into a cartel agreement offshore, and directs subsidiaries to sell at a certain price in Australia but its conduct in entering the agreement may not be occurring in Australia. (sub. DR34, pp. 3–4)

To the extent that the conduct described in the first example represents a misuse of market power, s. 46A of the TPA and s. 36A of the Commerce Act (discussed below) may apply. That said, the example as described may relate to anticompetitive conduct not covered by these provisions (such as exclusive dealing).

The second example of an offshore cartel agreement affecting competition in Australia might not be covered by s. 46A and s. 36A. As was also noted by the NZCC:

> … neither regime provides a remedy for predatory conduct which is the result of collusion between producers in one country (none of whom has a substantial market power) against one of their competitors in the other country. (NZCC, sub. 16, p. 27)

As such, there remains a requirement to show that foreign corporations (acting as a cartel or under some form of agreement) are ‘carrying on business’ in Australia, which can be difficult to prove:

> The current jurisprudence on this test indicates that the term ‘carrying on a business’ connotes an element of continuity. Given that the TPA applies to isolated incidents of prohibited conduct, there is thus a tension between the thresholds for establishing a

> contravention as such and showing that the foreign entity alleged to have engaged in the contravention is carrying on business in Australia. (ACCC, sub. DR34, p. 4)

The ACCC also noted that extraterritorial reach is limited and does not apply to other parts of the TPA:

> Further, extra-territorial reach does not apply to Part VI or extend to the miscellaneous provisions outlined in Part XII. Accordingly, a person 'knowingly concerned' does not fall within the scope of the TPA unless the conduct in question occurred in Australia. (ACCC, sub. DR34, p. 4)

These limitations on the general extraterritoriality provisions of the TPA, Commerce Act and the FTA do not predominantly relate to trans-Tasman matters and should be considered in terms of the effectiveness of these Acts generally. However, the present extraterritoriality arrangements might prove inconsistent with a future single economic market between Australia and New Zealand.

Trans-Tasman markets and sections 46A and 36A

As alluded to above, under s. 46A of the TPA and its mirror provision (s. 36A) in the Commerce Act, a business with power in a 'trans-Tasman market' (defined explicitly in these sections to be 'a market in Australia, New Zealand or Australia and New Zealand'), is prohibited from taking advantage of that power for the purpose of preventing, deterring or eliminating a competitor in the Australian or New Zealand domestic markets respectively. It should be noted that these sections are limited to impact markets not exclusively for services (being goods markets):

> The section applies to a trans-Tasman market, which is broadly defined as a market in Australia, New Zealand or Australia and New Zealand for goods or services. However, while the trans-Tasman market definition is broad, section 46A only applies when the market affected by the conduct is a market in Australia that is not a market exclusively for services. (ACCC, sub. 13, p. 5)

The definition of a 'trans-Tasman market' applies only in assessing the market power of a corporation, it does not permit either competition regulator to assess the impact of anticompetitive conduct in markets outside its own country or to consider an impact market that is Australasian. In other words, the impact market is still limited by the country's borders.

Apart from an unsuccessful interlocutory application in Australia, there have been no court cases mounted by private litigants or prosecution actions mounted by the two enforcement agencies under s. 36A or s. 46A. This is not to say, however, that the provisions have not been successful, as their presence might act as a deterrent to the misuse of market power in a trans-Tasman market.

In the Commission's view, limitations on the operation of s. 46A of the TPA and s. 36A of the Commerce Act are not likely to be impeding the development of a trans-Tasman business environment.

4.2 Applying the laws

The substantive provisions of the competition laws of both Australia and New Zealand are articulated in legislation, case law and guidelines. Even where the laws are similar, differences can still emerge from the application of those laws by the regulator and their interpretation by the courts.

Substantial lessening of competition

Both the ACCC and the NZCC consider whether there is a substantial lessening of competition when determining clearances for mergers and acquisitions, and when investigating contraventions of the competition laws. The ACCC is also required to consider whether there is a substantial lessening of competition in relation to a notification of exclusive dealing (appendix B).

The ACCC and the NZCC have published guidelines on how they test for a substantial lessening of competition for mergers and acquisitions. Both regulators define the relevant market, apply a safe harbour threshold, and identify the various factors that might affect competition in the relevant market. The substantial lessening of competition test is a forward looking analysis based on a comparison of competition under a factual scenario (what is likely to occur should the conduct be approved) and a counterfactual (what is likely to occur should the conduct not be approved) (ACCC 1999, NZCC 2003a).

The guidelines adopted by the ACCC and NZCC are broadly similar, though there are some differences. There are differences, for example, in the safe harbour thresholds used for mergers and acquisitions. The ACCC is likely to further examine an acquisition if:

- the post-merger combined market share of the four largest businesses is above 75 per cent and the merged entity's market share is at least 15 per cent, or
- the post-merger combined market share of the four largest businesses is less than 75 per cent and the merged entity's market share is 40 per cent or more (appendix B).

The NZCC is likely to further examine an acquisition if:

- the post-merger combined market share of the three largest businesses is above 70 per cent and the market share of the combined entity is more than in the order of 20 per cent, or
- the post-merger combined market share of the three largest businesses is less than 70 per cent and the merged entity's market share is more than in the order of 40 per cent (NZCC 2003a).

In addition, the ACCC has developed a guideline in respect of the extent of imports in the impact market. This guideline provides that the ACCC is unlikely to oppose a merger where comparable and competitive imports have held a sustained market share of 10 percent or more for at least three years. The NZCC does not have an equivalent guideline (ACCC 1999, p. 47).

Qantas argued that differences in guidelines were important and led to differences in decisions for substantially similar matters. This in turn, they argued, would 'create real commercial uncertainty and regulatory risk when the economic policy approaches of the ACCC and NZCC substantially differ' (sub. 23, p. 8). Qantas' summary of the differences in decisions between the ACCC and the NZCC in relation to the Qantas–Air New Zealand case are outlined in box 4.1.

The NZCC recognised that there were differences in the guidelines of the two regulators, and saw opportunities to further harmonise them. Common guidelines were seen as an opportunity to reduce the costs to businesses (NZCC, sub. 16, p. 3).

That said, there can be a tradeoff with further harmonising guidelines. Some interested parties indicated that it was good policy to allow for some differences to reflect the different market conditions and policies in each country (HRL Morrison and Company Limited, sub. 17, pp. 2–3). Telecom New Zealand saw merit in allowing a:

> … regulator to apply a particular rule in a manner consistent with localised market factors. This is particularly important in New Zealand where markets are more concentrated than those in Australia. (sub. 15, p. 11)

There might be circumstances where differences in guidelines might lead to different decisions on the same facts. For example, in matters concerning trans-Tasman markets. However, this problem should not be overstated. Adopting identical guidelines still would not mean that the regulatory decisions, when the relevant impact markets are separate and have different characteristics, would or should be the same.

Box 4.1 **Differences in decisions: Qantas–Air New Zealand case**

Qantas commented on the decisions by the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) in relation to the Qantas–Air New Zealand case. Qantas stated that these decisions were in respect of affected markets in Australia and New Zealand in which both Air New Zealand and Qantas operate, and/or which both regulators have jurisdiction.

Qantas' view was:

1. in relation to the effect of the transaction on travel distribution services, the ACCC considered that a broad market existed for all 'travel distribution services', conversely the NZCC did not find that there were any issues in retail distribution and only considered a narrow market for 'wholesale travel distribution services';
2. the ACCC essentially found that the transaction might result in a restriction in the practice of undercutting travel agents through sale of tickets on the internet, conversely, the NZCC considered that the transaction could drive travel wholesalers out of business, in part due to direct selling;
3. in relation to the effect of the transaction on freight markets, the ACCC found a broad product market for air freight services existed, including dedicated freighter aircraft, conversely the NZCC found a narrow market existed for 'belly-hold freight services';
4. the ACCC did not consider that there were issues in relation to international freight services, while conversely the NZCC considered that the transaction would give rise to a substantial lessening of competition in the international belly-hold freight market. (sub. 23, pp. 7-8)

The Commission is not convinced that in themselves differences in guidelines, such as for substantial lessening of competition, are likely to be impeding the development of an integrated trans-Tasman business environment. The safe harbour rules, for example, chiefly serve to act as a screening test and offer a degree of comfort for merging parties, but are not conclusive and they do not preclude the regulator from reconsidering a matter.

The impact of differences in guidelines on the costs of dual-approval processes is discussed in section 4.3.

Public benefits tests

Each country's competition regulator can authorise mergers, acquisitions and certain restrictive trade practices if the public benefit of the transaction exceeds the detriment.

In Australia, public benefits and detriments are not expressly defined in legislation. Instead, they are elucidated through case law. Currently, public benefit has the widest possible meaning:

> … anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.[2]

In granting an authorisation for mergers and acquisitions, the TPA requires the ACCC to have regard to the following as public benefits:

- a significant increase in the real value of exports
- a significant substitution of domestic products for imported goods
- all other relevant matters that relate to the international competitiveness of any Australian industry (s. 90(9A) TPA).

'Benefit to the public' is similarly not defined in the Commerce Act. The Act requires the NZCC to have regard to the concept of economic efficiency:

> Where the Commission is required … to determine … a benefit to the public, the Commission shall have regard to any efficiencies that … result from that conduct. (s. 3A Commerce Act)

The NZCC also takes into account international competitiveness of any New Zealand industry. However, consistent with the objectives of the Commerce Act, the NZCC takes a national perspective in its analysis and may distinguish between foreign and domestic producers, shareholders and consumers.

For example, in Amcor Limited and New Zealand Forest Products Limited (Decision 208, 21 August 1987), the NZCC said:

> … the Commission in looking at the public benefits in terms of CER must focus upon issues consistent with the central CER theme of efficient rationalisation of resources and an extended export base to third countries. Some issues which might become relevant in the examination of the public benefit vis-à-vis CER could be the following:
>
> - Rationalisation of production between or within Australia and New Zealand industries creating efficiencies of resource use.
> - Cost cutting moves in response to the lowering of frontier barriers, for example, would enhance international competitiveness and use of local resources.
> - Improved off-shore links would enhance opportunities for the export of New Zealand made goods.
>
> It should be noted that these benefits must be assessed in the context of their flow-through effects to the New Zealand public. (pp. 28–29)

The courts of both jurisdictions have determined net public benefits must be taken to include:

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[2] *Re: Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976), ATPR 40–012, at 17,245.

- economic efficiency — arising from greater allocative, productive and dynamic efficiency (such as taking advantage of economies of scale and scope, better utilisation of capacity, greater specialisation and reduced working capital, improved research and development capacity)
- externalities — arising from addressing environmental, health, safety and other benefits and costs external to the parties.

In Australian case law, public benefits can also include a range of economic growth and development, structural adjustment, equity and consumer protection factors, such as:

- expansion (or prevention of unemployment) in efficient industries or in particular regions
- promotion of equitable dealings in the market
- development of import replacements and growth in export markets
- facilitating the transition to deregulation (appendix B).

In addition, the NZCC is required to have regard to economic policies of the New Zealand Government when requested (s. 26 Commerce Act). However, the New Zealand Government cannot direct the NZCC to act in accordance with those policies.

The Network Economic Consulting Group (NECG) argued that compared to the New Zealand test, the Australian test of public benefits is unclear:

> In the decisions it has taken to date, the ACCC rejects a 'total surplus' test but fails to articulate any clear test in its place … it certainly differs markedly from the approach adopted to an essentially similar test in the New Zealand *Commerce Act 1986.* (sub. 18, p. 14)

Qantas stated that the ACCC employed a form of the consumer welfare standard in its draft determination for the proposed Qantas–Air New Zealand merger:

> Instead of a total welfare test, the ACCC applies a form of the consumer welfare standard. That is, benefits to consumers (in the form of lower prices) are included in an assessment of public benefits, while the benefits to the Applicants, such as lower costs or economies of scale, are largely discounted as private benefits. (sub. 23, p. 6)

Round (2004) argued that, although there has been some enunciation of what is considered a public benefit in Australia:

> The Australian jury is still formally out — the position has not yet been ruled upon judicially in any final determinative sense. (2004, p. 17)

Once again the Commission can conceive of circumstances where differences in the way public benefits are assessed, and what is considered to be a public benefit, might lead to different decisions based on the same facts. However, in the Commission's view, the different formulations of the public benefits tests are not impeding the development of an integrated trans-Tasman business environment. The impact of differences in these tests on the costs of dual-approval processes is discussed later in section 4.3.

That said, the Commission considers that the national focus of the public benefits tests, particularly in relation to the different treatment of costs and gains to the other country's producers and shareholders, might be inconsistent with the goals of a single economic market.

Approaches used in measuring public benefits

The Commission is interested in whether the different approaches used by regulators and courts to measure public benefits and costs are potentially impeding the development of an integrated trans-Tasman business environment. Participants reported to the Commission that there are differences between the ACCC and the NZCC in the way in which the public benefits and costs are calculated and reported.

NECG stated the NZCC 'has generally considered it to be its responsibility to rely on quantification of claimed benefits and detriments to the greatest extent reasonable' (sub. 18, p. 5). This is because the New Zealand Court of Appeal ruled the NZCC had 'a responsibility … to attempt so far as possible to quantify detriments and benefits …'[3]

In contrast, some participants considered the ACCC puts less emphasis on quantification. The New Zealand Business Roundtable stated:

> … decision-makers in Australia (unlike New Zealand) do not attempt to quantify the costs and benefits when considering authorisation applications. (sub. 2, p. 2)

According to NECG, different approaches to quantifying public benefits lead to differences in the transparency, consistency and cost-effectiveness of decision making between regulators. This is because quantification makes transparent the assumed deadweight losses, wealth transfers and efficiency gains (NECG, sub. 18, p. 7).

According to Air New Zealand, the New Zealand High Court cautioned that a 'pure quantitative approach needs to take into account the inherent inaccuracy of

3 *Telecom Corporation of New Zealand Ltd v. Commerce Commission* (1992) 3 NZLR 429 at 447.

economic modelling of future outcomes and consider whether they properly reflect the true or likely effect on competition' (sub. 24, p. 1). In other words, quantification tools inappropriately used can give a false sense of reliability and accuracy to uncertain facts and conclusions.

That said, there is no legislative provision preventing the ACCC from using quantitative techniques when potentially useful. The ACCC has also demonstrated a willingness to use quantitative techniques in the past. The ACCC's decision to selectively use quantification methods might reflect in part its workload, the costs of modelling and the nature of the authorisations it undertakes. As stated by the ACCC:

> The ACCC deals with approximately 80–90 authorisation applications each year. Very few merger authorisations are considered by the ACCC (on average about one a year). Approximately 50 per cent of non-merger authorisations relate to regulated energy market issues, and the majority of the remaining applications relate to section 45 conduct [exclusionary contracts or agreements and price fixing]. (ACCC, sub. 13, p. 16)

Detailed quantitative assessments might not be necessary in many of these authorisation cases.

In the Commission's view, differences between the ACCC and the NZCC to the extent to which quantification methods are used, by themselves, are not likely to lead to inconsistent decisions and, as a result, are not likely to be impeding the development of a trans-Tasman business environment. The impact of differences in the approaches used to measure public benefits on the costs of dual-approval processes is discussed in section 4.3.

Consistency of judicial interpretation

Judicial interpretation of competition and consumer protection matters is undertaken by the courts in the two countries. An issue is whether differences in judicial interpretation of the prohibitions in competition and consumer protection law by the courts in Australia and New Zealand could lead to inconsistent decisions and, therefore, result in regulatory uncertainty for business and consumers. The distinction between anticompetitive conduct and aggressive competitive conduct is often a fine one. Similarly, what is misleading or deceptive can involve matters of judgment. Uncertainty as to the application of laws, particularly in cases where the consequences for contravention might be severe sanctions, might lessen the vigour of competition in markets and impose costs on businesses.

Several participants argued that having separate appellate bodies in Australia and New Zealand could result in inappropriate differences in interpretation of similar laws. As Telecom New Zealand outlines in its submission:

> The risk of trans-Tasman judicial inconsistency to interpreting a similar rule is illustrated by the NZ Court of Appeal's approach to market power (section 36 of the Commerce Act) in *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2001) 10 TCLR 247 (recently overturned by the Privy Council, 14 July 2004, PC6/2004). In the Court of Appeal, Gault J demonstrated a reluctance to utilise the 'counter-factual' approach to the market power question — an approach established as fundamental by a line of recent cases in Australia, and by the Privy Council in *Telecom New Zealand v Clear* [1995] 1 NZLR 385.
>
> While the Privy Council decision in Carter Holt has realigned the interpretation of section 36 in New Zealand with Australian market power jurisprudence, the risk of future divergence remains; the new Supreme Court (comprising 2 of the 3 members of the Court of Appeal in Carter Holt) is not bound by the Privy Council decision and may have another opportunity to revert to its former interpretation. This sort of interpretative divergence would result in uncertainty for trans-Tasman businesses, and is to be avoided to the extent possible. (Telecom New Zealand, sub. 15, pp. 13–14)

However, in respect of consumer protection law, Telecom New Zealand stated:

> Consumer protection legislation in the two countries (and the body of case law in each country) is now well established (and, in relation to case law, is transferable as necessary). In the area of consumer protection, harmonisation would itself involve a 'reinvention of the wheel'. (sub. 15, p. 23)

Although the current situation might give rise to inconsistent outcomes on appeal, there is no evidence available to the Commission that this is a significant issue. The body of case law in the two countries exhibits an overwhelming similarity in the interpretation of competition law matters and judges have expressed the desirability of such equivalence. For instance, New Zealand courts routinely cite Australian cases as authorities in competition and consumer protection matters.

Overall, there is a great deal of informal and formal cooperation between Australian and New Zealand courts and legal communities generally. Presently, joint-Australian and New Zealand law conferences are held on competition matters. Furthermore, the New Zealand High Court has benefited from the contributions made by Australian lay members. The Commission notes that the enactment of a formal clearance procedure in the TPLA Bill would have enabled appeals of ACCC informal determinations for mergers and this would have provided a forum to further facilitate alignment of interpretations at the judicial level.

4.3 Approvals

Regulatory approval under Australian and New Zealand competition law can be granted in a variety of ways — clearances, authorisations and notifications. An issue is whether the use of different types of approvals in Australia and New Zealand in similar circumstances is impeding the development of an integrated trans-Tasman business environment.

Regulatory approval, for example, may be sought in one or both countries and different approaches could lead to inconsistent outcomes, and increased administration and compliance costs.

Types of approvals

There are currently three types of regulatory approval in Australia and New Zealand:[4]

- *Authorisation* — A business undertaking a merger or acquisition can request an authorisation if the acquisition will result in such public benefits that it should be allowed and, in the case of the Commerce Act, the NZCC is also satisfied that the acquisition is unlikely to substantially lessen competition. A business can obtain an authorisation for a restrictive trade practice (except for misuse of market power) from the ACCC and the NZCC if the public benefits outweigh the associated detriments. Had the TPLA Bill been implemented, the Australian Competition Tribunal (Tribunal) would have been responsible for granting authorisations for mergers and acquisitions.
- *Clearances* — A business undertaking an acquisition in Australia and New Zealand can request a clearance informally from the ACCC and formally from the NZCC if the acquisition is unlikely to substantially lessen competition. Had the TPLA Bill been implemented, the ACCC would have been responsible for managing both informal and formal clearance procedures.
- *Notifications* — Businesses operating in Australia can lodge notifications for exclusive dealing with the ACCC. The implementation of the TPLA Bill would have allowed small business collective bargaining agreements to be lodged with the ACCC through a notification process.

[4] Excluding court declarations in Australia (appendix B).

Authorisations

At a general level, authorisations in both countries employ largely the same tests and are employed for largely the same range of matters (to approve restrictive trade practices and acquisitions). As a result, it is unlikely that the use of authorisations, in themselves, is impeding the development of an integrated trans-Tasman business environment. A more detailed discussion covering the role of guidelines, public benefit tests and quantification procedures used in authorisations is described in section 4.2. The difference in the treatment of undertakings is discussed in clearances below.

Clearances

No statutory guidance is given in the TPA regarding the clearance of mergers and acquisitions in Australia. As a result, 'a voluntary system has evolved under which the ACCC provides informal clearances for proposed mergers that it considers would not be in breach of s. 50 because they would not have the effect, or likely effect, of substantially lessening competition' (Dawson, Segal and Rendall 2003, p. 45). In New Zealand, statutory provisions are given in the Commerce Act for the clearance of mergers and acquisitions.

These different approaches to clearances have differing effects on businesses. Informal clearance procedures do not involve the same degree of community consultation and are not as transparent as formal clearance procedures. Informal clearance procedures can provide for quicker decisions, but at the risk of increased regulatory error (Dawson, Segal and Rendall 2003).

In granting an informal clearance, the ACCC gives a letter of comfort to the parties that it is unlikely to take enforcement action against the acquisition. But the ACCC can reverse its decision, including during the course of an acquisition, as new information becomes available. The granting of a formal clearance by the NZCC provides immunity (under certain conditions) against proceedings, provided the merger is implemented within a 12 month period (s. 66(5) Commerce Act).

It is likely that some differences would be diminished had the TPLA Bill been implemented. The ACCC would then have been able to formally clear acquisitions and grant immunity against future proceedings (appendix B). The ACCC stated:

> With the introduction of the Dawson Bill, the Australian procedures will be closer aligned to New Zealand, in that both jurisdictions will have a voluntary [formal] clearance system. (sub. 13, p. 15)

Even if this change were implemented, there would have remained some differences. The absence of an informal clearance system in New Zealand precludes a low cost alternative to the existing system. Telecom New Zealand said the advantage of the informal procedure is:

> … the ability for businesses to 'test' a proposed merger with the regulator on a confidential basis. (sub. 15, p. 11)

Telecom also advises that 'five out of the total of 13 merger applications received by the NZCC in 2004 (as at September) have been from Australian-owned companies' (sub. DR33, p. 34). Telecom advises that the lack of an informal clearance procedure creates uncertainty for business and, given the number of acquisitions in New Zealand by Australian companies, the impact on Australian investment in New Zealand may not be insignificant.

For these reasons, AAPT recommended:

> … the informal merger approval process that has developed in Australia, be adopted in New Zealand. This would mean that both countries would have an informal clearance procedure as well as their current formal clearance procedures. (sub. 6, p. 4)

Telecom New Zealand also considers that the inability of the NZCC to accept behavioural undertakings in merger matters may act to impede trans-Tasman business to the extent that it results in otherwise efficient Australian investment in New Zealand being declined or conditions attached in a more costly manner (sub. DR33, pp. 36–9).

Notifications

In Australia, notification procedures are available for businesses wishing to engage in exclusive dealing (including third-line forcing). If the TPLA Bill had been implemented, notifications would have been permitted for small businesses seeking to enter into collective bargaining agreements. In New Zealand, there is no separate notification procedure. However, authorisations for exclusive dealing are available in both countries.

According to Telstra, many businesses find it easier to obtain regulatory approval under a notification process than under an authorisation process (sub. 11, p. 10). This is because once a notification is lodged, the onus shifts to the ACCC to prove that the notified arrangement substantially lessens competition and the public benefits are outweighed by the associated costs from the lessening of competition.

Telstra argued that the greater use of notification procedures in Australia:

> … will create disharmony between Australian and New Zealand competition laws. (sub. 11, p. 10)

The Commission is not convinced that the lack of harmony in the use of clearances, behavioural undertakings and notifications alone is sufficient to affect the day-to-day operations of business and therefore impede the trans-Tasman business environment generally. The impact of differences in approvals procedures on the costs of dual-approval processes is discussed below.

Dual applications for approvals

In cases where regulatory approval is sought in both countries, such as for a merger and acquisition, each national competition regulator undertakes separate regulatory approval processes. An issue is whether duplicate procedures, different timelines and different decision makers are impeding the development of a trans-Tasman business environment.

Number of dual applications

An examination of the public registers of the ACCC and NZCC for the period 1997 to 2004 shows that the Qantas/Air New Zealand application for the strategic alliance and acquisition of shares was the only arrangement where authorisation was sought from both competition agencies. In the case of the ACCC, this one is out of a total of 118 applications for authorisation for restrictive trade practices (excluding mergers and gas and electricity authorisations) and one of only two merger authorisations determined under s. 89 of the TPA. In the case of the NZCC, the Qantas/Air New Zealand application was one out of a total of 12 authorisations for restrictive trade practices (excluding mergers) and one of only 2 authorisations for mergers determined by the NZCC over that period.

Table 4.1 outlines the number of decisions for clearance of a merger or acquisition made to both the ACCC and NZCC for the period 1997 to 2004 as a proportion of the total number of clearance approvals decided by each agency.

Of the 25 trans-Tasman acquisitions seeking clearance in both countries, four related to global mergers originating outside Australia and New Zealand. In four of the 25 cases, one of the agencies initially reached a different decision from the other regulator. But in each of these cases, the agency with objections was able to resolve its competition concerns through accepting undertakings.

Table 4.1 **Trans-Tasman merger and acquisition clearance decisions as proportion of total[a]**

Year	*ACCC: total number of acquisitions determined*	*Commerce Commission total number of acquisitions determined*	*Number of trans-Tasman acquisitions determined[c]*	*% of ACCC*	*% of NZCC*
	no.	no.	no.	%	%
2004[b]	51	16	1	1.9	6.2
2003	80	20	5	6.3	25.0
2002	112	25	5	4.4	20.0
2001	150	35	6	4.0	17.1
2000	125	32	3	2.4	9.3
1999	133	24	1	0.7	4.1
1998	85	21	2	2.3	9.5
1997	124	33	2	1.6	6.0
Total	860	206	25	2.9	12.1

a Trans-Tasman acquisitions have been identified by a simple comparison of the registered names of the parties to the acquisition and identifying similarities. It may therefore be subject to error and omissions. **b** This is the number of decisions for the calendar year to 2 December 2004. **c** If decisions on the same trans-Tasman acquisition are made by the agencies in different calendar years, that decision is treated as occurring at the later date for the purposes of counting the number of trans-Tasman acquisitions decided in each calendar year.

Source: ACCC and NZCC public registers.

The Commission notes that these figures do not include those trans-Tasman mergers or acquisitions that might have been investigated by both the ACCC and NZCC, but for which dual approvals were not sought.

Duplication of procedures in dual approvals

Several participants noted that the current approval processes in Australia and New Zealand duplicate the effort of businesses and competition regulators. This duplication may generally arise from the need to submit two applications and respond to requests for similar information from both the ACCC and NZCC. In the case of authorisations, duplication may also arise from the possibility of participating in two pre-decision conferences covering similar matters and the need to measure the public benefits in different ways.

The Australian and New Zealand Banking Group Limited (ANZ Bank) said a 'one-stop-shop' for clearance of trans-Tasman mergers, acquisitions and joint ventures would offer a 'more efficient, streamlined regulatory structure' (sub. 26, p. 1). Similar views were expressed by the Australian Bankers' Association (sub. 21, p. 2).

Qantas stated that the existing separate authorisation processes greatly increased its costs of obtaining regulatory approval for its proposed strategic alliance with Air New Zealand:

> The duplication required in running two similar but distinct authorisation and appeal processes not only increases the scale, and attendant costs, of the authorisation process. It also extends the time frame necessary for regulators to make decisions in relation to transactions that are, in general, already complex in relation to often dynamic industries. (sub. 23, p. 4)

There would have been components of their costs that reflected the need to make a case on the same matters (such as the dynamics of international aviation markets) to two separate regulators in two different jurisdictions. However, the Commission understands that Qantas and Air New Zealand also pooled some of their resources and shared some of the costs.

Different timelines in dual-approvals processes

Different timelines for the competition regulators to arrive at a determination are set out in the TPA and Commerce Act. In addition, implementation of the TPLA Bill would have allowed the ACCC significantly more time to consider an application for a formal clearance than the NZCC. However, generally both competition regulators can seek extensions with the agreement of the applicants to improve the coordination of timelines (table 4.2).

Some interested parties were concerned about the differences in the timelines for clearances and authorisations. The New Zealand Business Roundtable was concerned there:

> … may also be problems in coordinating decision dates for merger approvals. (sub. 2, p. 3)

According to the ACCC:

> … differences will still exist due to differences in time periods for consideration of clearances and authorisations. (sub. 13, p. 15)

That said, the ACCC and NZCC have endeavoured to coordinate the timing of their processes where possible. In the recent Qantas–Air New Zealand case, for example, both regulators released their draft determinations on the same day (box 4.2).

Bell Gully also considered there was scope to extend cooperation into areas such as coordination or harmonisation of regulatory timelines and procedures (sub. 19, p. 2).

Table 4.2 **Timeliness of merger and acquisition approvals**

	Australia	*New Zealand*
Current arrangements		
Informal clearances	No statutory time limits	**na**
Matters not breaching merger thresholds	10 to 15 days	**na**
Matters appearing to breach thresholds	About one month	**na**
Major cases with substantial issues	6 to 8 months	**na**
Formal clearances	**na**	10 working days[b]
Authorisation of mergers	30 days, plus 15 days in complex matters[a, b]	60 working days to make a determination[b]
Authorisation of arrangements (excluding mergers)	No statutory time limits (unless set by Minister)	No statutory time limits
Proposed arrangements under Trade Practices Legislation Amendment Bill 2004		
Informal clearances	No statutory time limits	**na**
Matters not breaching merger thresholds	10 to 15 days	**na**
Matters appearing to breach thresholds	About 1 month	**na**
Major cases with substantial issues	6 to 8 months	**na**
Formal clearances	40 business days[b]	10 working days[b]
Authorisation of mergers	Tribunal must take 3 months, plus up to a further 3 months for complex matters[c]	60 working days to make a determination[b]
Authorisation of arrangements (excluding mergers)	6 months, plus up to a further 6 months (if the ACCC has released its draft determination and the applicant agrees to the extension).	No statutory time limits

[a] A request for information by the ACCC (clock stoppers) may extend time limits. [b] Time limits may be extended with the agreement of the applicants. [c] Tribunal is the Australian Competition Tribunal. **na** not applicable.

Source: appendix B.

Circumstances are conceivable where diverging or conflicting timelines may impose costs on the parties. For example, where pre-decision conference times conflict or where the resulting immunity periods for approved transactions do not match and the period for the parties to give effect to the transaction is unduly truncated.

Different decision makers

Another issue arising for businesses seeking regulatory approval in both countries for essentially the same proposal is the possibility of different decisions from the two national regulators. The ACCC and the NZCC might assess a proposed merger at the same time, for example, Burns Philp–Goodman Fielder. The ACCC and

NZCC frequently liaise with each to discuss and identify 'common issues in market definition, barriers to entry and other economic issues' (ACCC, sub. 13, p. 15).

In regard to the Qantas–Air New Zealand case, the ACCC stated it cooperated with the NZCC on issues of common interest such as the definition of the markets for each country:

> [S]taff within the ACCC and the Commerce Commission cooperated closely on an informal basis, within the scope allowed by the respective legislative frameworks. In particular, staff discussed general issues such as market definition, the impact of the transaction, and ideas about public benefits. This assisted both agencies in developing their thinking on common issues, and reduced the likelihood of inconsistency in approach. (sub. 13, p. 18)

As noted, Qantas reported that, despite this cooperation, there were noticeable differences in the reasoning for the decisions by the ACCC and the NZCC in the recent Qantas/Air New Zealand case (box 4.1).

Box 4.2 **Timelines for the Qantas–Air New Zealand case**

The proposed Qantas–Air New Zealand alliance was a matter that needed consideration by regulators in Australia and New Zealand.

Applications were lodged with the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) by Qantas and Air New Zealand, for authorisation to enter into an alliance for the purpose of coordinating a range of activities, including scheduling and pricing of passenger and freight services for all Qantas and Air New Zealand flights to, within and from New Zealand.

The application also related to the acquisition of 22.5 per cent of the equity of Air New Zealand by Qantas.

Both regulators received the authorisation applications on 9 December 2002 and both regulators issued draft determinations on 10 April 2003. Thereafter the processes diverged significantly. The NZCC held a 6 day conference, while the parties did not request a conference with the ACCC. The ACCC issued its final decision (*rejection*) on 9 September 2003 and the NZCC issued its final decision (*rejection*) on 23 October 2003.

Both applicants appealed the final decisions. Qantas appealed the ACCC decision to the Australian Competition Tribunal (Tribunal), and Air New Zealand appealed the NZCC decision to the High Court of New Zealand.

The Tribunal began its hearings in early May 2004 and the New Zealand High Court began hearings in early July 2004. The New Zealand High Court handed down its decision on 20 September 2004 (*denying the appeal*). The Tribunal handed down its decision on 12 October 2004 (*upholding the appeal*) but is still to release its reasons.

Source: ACCC (sub. 13, p. 17).

Circumstances could be conceived where the combined effect of the undertakings accepted, or conditions imposed on, one or both of the approvals might result in over-regulation of the transaction. The likelihood of this occurring is reduced where the parties to the transaction give the required undertakings or are consulted on the conditions.

In the Commission's view, for transactions requiring dual approval, the differences and duplications in approval mechanisms, timelines and decision making have the potential to increase administration and business compliance costs — although such increases might not be large.

These differences also raise the possibility of different decisions or over-regulation. But, as noted previously, having a single decision maker and process does not necessarily mean that different decisions for Australia and New Zealand would not or should not be possible given differences in circumstances. For example, if the impact markets are judged to be separate and the characteristics of those markets differ, or the public benefits differ between Australia and New Zealand, different decisions might be warranted.

4.4 Sanctions and remedies

In competition and consumer protection regimes, the types and severity of sanctions and the types of remedies available vary considerably, according to the particular category of competition and consumer protection measure. Sanctions can range from education and warning notices to court ordered injunctions, cease and desist orders, through to pecuniary penalties (appendices B and C).

Differences in sanctions and remedies

There are some differences in the sanctions and remedies available in the two countries' regimes (appendices B to D). Several interested parties recognised these differences. For instance, the New Zealand Ministry of Consumer Affairs (MCA) noted:

> At present, there exist numerous variations between New Zealand and Australia in terms of the sanctions and remedies available under consumer protection law. (sub. 14, p. 14)

However, the MCA went on to say that it:

> … is not aware, however, of any evidence as to whether such variations hinder the trans-Tasman business environment or not. However, it could be argued that such differences may affect business practices on either side of the Tasman. (sub. 14, p. 14)

There are some differences in the level of pecuniary penalties for breaches of competition laws in Australia and New Zealand. However, the TPLA Bill would have set maximum civil penalties in the TPA in line with maximum penalties in the Commerce Act (with the exception of penalties for anticompetitive mergers.)

Some disparity exists in the level of penalties for breaches of the consumer protection provisions of the TPA and their counterpart provisions in the FTA and CGA. Under the TPA, the maximum penalty for breaches of the Act's consumer protection provisions is A$1.1 million for companies and A$220 000 for individuals. In comparison, maximum penalties in New Zealand are significantly smaller, at NZ$200 000 for companies and NZ$60 000 for individuals.

Several participants considered the powers of the NZCC to issue cease and desist orders and the absence of such powers for the ACCC to be a point of difference. Qantas, for example, said:

> Under section 74A of the CA [Commerce Act], if the NZCC assesses that it is necessary to act urgently to prevent a particular person or consumers from suffering further serious loss or damage, or in the general interests of the public, it may seek a 'Cease and Desist Order', or apply to the High Court for an injunction. A person or business that breaches a Cease and Desist Order is liable to a penalty of up to $500,000.
>
> While the ACCC can apply to the Federal Court of Australia for an injunction preventing a corporation or individual from engaging in anti-competitive conduct, it has no similar power to that conferred on the NZCC by s74A of the CA [Commerce Act]. (sub. 23, p. 12)

The practical implications of this difference are likely to be small. No participant indicated how this difference impedes the development of an integrated trans-Tasman business environment. As noted by Qantas, although the ACCC does not have cease and desist orders, it can seek court injunctions, which have a similar effect. Furthermore, Telecom New Zealand pointed out that the NZCC has never used its cease and desist powers, mitigating the practical implications of the difference in regulator powers. Telecom New Zealand said:

> It would certainly be inappropriate for Australia to adopt similar powers simply because they exist here [in New Zealand] — especially given their historic lack of use. (sub. 15, p. 15)

Systems for obtaining damages for injuries caused in product liability incidents are very different in Australia and New Zealand. Under Australian law, a person who suffers damages because of a defective product is entitled to take legal action against the manufacturer of that good under the consumer protection provisions of the TPA (part V), or under the product liability regime (part VC), or they can pursue their rights at common law. This is entirely different to the no-fault New Zealand System. As the MCA noted:

> Under New Zealand product liability arrangements, the Accident Compensation Corporation (ACC) administers New Zealand's accident compensation scheme. That scheme provides accident insurance for all New Zealand citizens, residents and temporary visitors to New Zealand. … the scheme provides cover for injuries regardless of fault. (sub. 14, pp. 9–10)

As a result, injured parties face quite different proceedings and potential outcomes when seeking compensation in Australia and New Zealand. This difference would not appear to be impeding the development of an integrated trans-Tasman business environment or to be affecting consumer confidence.

Other differences

Other differences in the types of sanctions and remedies available under the regimes of the two countries include:

- *Representative actions* — the ACCC is able to undertake representative actions on behalf of a particular class of consumers for breaches of consumer protection provisions, but the NZCC cannot (NZCC, sub. 16, p. 13).
- *Exemplary damages* — exemplary damages can be awarded for breaches of the Commerce Act, the FTA and the CGA, but might not be available for breaches of the TPA. To date, no exemplary damages have been awarded in Commerce Act proceedings.
- *Related proceedings* — the findings of proceedings undertaken by the ACCC can be used as evidence in subsequent actions taken by consumers. The use of findings as evidence reduces the cost and increases the certainty for individual litigants. This is not possible in New Zealand.
- *Enforceable undertakings* — the ACCC may accept enforceable undertakings. This power is not available to the NZCC. For the NZCC to enforce out of court settlements, it must enter into contractual arrangements with the party.
- *Remedies available for unconscionable conduct* — in New Zealand, remedies for unconscionable conduct are only available under common law. In Australia, the TPA sets out the sanctions and remedies for unconscionable conduct. These include injunctions, damages and compensatory orders. Remedies at common law are also available.

These differences illustrate that the two countries have taken similar, but not identical, approaches to sanctions and remedies for competition and consumer protection law. The disparities do not appear to represent substantial inconsistencies between the two countries.

In the Commission's view, there are few substantial differences in the level or type of sanctions and remedies that are available under the two regimes generally. Furthermore, where differences do exist they do not appear to be impeding the development of a trans-Tasman business environment or consumer confidence.

Reciprocal recognition and enforcement of judgments

Even if Australia and New Zealand adopted identical sanctions and remedies for their respective competition and consumer protection law regimes, problems might arise from an inability to enforce judgments in the other jurisdiction. To overcome this, Australia and New Zealand have enacted legislation that enables their courts to recognise and enforce foreign judgments. Special provisions have also been enacted in respect of trans-Tasman abuses of market power to enable the High Court and Federal Court to sit in the other's jurisdiction (part IIIA *Federal Court of Australia Act 1976* (Cwlth); part 1A *Judicature Act 1908* (NZ)).

In recent years, Australian courts have enforced orders against Australian companies that have breached the New Zealand FTA (*Starworks v NZCC*). In commenting on the first such case, the NZCC highlight the importance of the cross-border enforcement of judgments:

> A company in Australia could simply refuse to cooperate with the [NZCC] and New Zealand courts because it is outside their jurisdiction. However, when a New Zealand court order is registered through the *Reciprocal Judgments Act* in Australia, then the Australian courts have jurisdiction to enforce the [New Zealand] courts judgment. (NZCC 1999)

However, in both countries, reciprocal judgments legislation applies only to money orders. Foreign judgments involving non-monetary orders are not recognised in either country. In its submission, the ACCC argued the legislation should be extended to cover 'penalties and non-monetary orders' (sub. 13, p. 21).

> In a time of increasing use of electronic commerce and globalisation, regulators in closely comparable jurisdictions should be allowed to utilise court-sanctioned remedies quickly to counter scams in both jurisdictions. (ACCC, sub. DR34, p. 5)

The Australian Attorney–General's Department and the New Zealand Ministry of Justice are co-chairing a trans-Tasman working group on Court Proceedings and Regulatory Enforcement to explore improvements in these areas. The goal is to try to reduce barriers to trans-Tasman commercial activity by enhancing legal cooperation in such areas as service of process, the taking of evidence, the recognition of judgments in civil and regulatory matters and regulatory enforcement. The Commission considers this working group is better placed to assess this matter and any remaining impediments that might exist in this area,

particularly as the issue is broader than the consumer protection and competition issues considered in this study.

4.5 Reviews and appeals

In both Australia and New Zealand, the public bodies responsible for administering and enforcing the competition and consumer protection regimes are subject to oversight by their respective Parliaments. For example, regulations for product safety standards and application fees may be disallowed, complaints may be made to an Ombudsman for certain matters and persons have a right to access information about themselves. In both countries, these accountability arrangements for the institutions have a domestic focus.

In both Australia and New Zealand, enforcement proceedings relating to competition and consumer protection law are generally heard by an independent court or, in case of consumer protection, also by a small claims tribunal or other specialist tribunal. These bodies are generally subject to at least one right of appeal.

In competition law, there is also a right of appeal or review from determinations of the ACCC and NZCC as part of the approvals process (relating to authorisations, clearances (NZCC only), and notifications (ACCC only)). In both Australia and New Zealand, separate appeals bodies may hear appeals from these determinations. There is no equivalent approvals role in the consumer protection regimes that are the subject of this study.

There are several differences between the Australian and New Zealand merit review frameworks in the competition regimes (appendices B and C). In Australia, the primary review body on competition law matters is the Australian Competition Tribunal (Tribunal). For the purpose of proceedings, the Tribunal is constituted by a presidential member, being a Judge of the Federal Court, and two members having knowledge or experience in industry, commerce, economics, law or public administration. There are currently five presidential members and eight nonpresidential members on the Tribunal.

The primary review body in New Zealand is the High Court. In Commerce Act appeals, lay members — with knowledge or experience in industry, commerce, economics, law or accountancy — may supplement the High Court. Of the eight lay members currently appointed, three are Australia-based.

A major difference, highlighted by participants, in the nature of appeals and judicial review on competition law matters in Australia and New Zealand, is that the Tribunal can review ACCC decisions *de novo* — that is, look at a case afresh:

> The appeals processes are very different, although the structure and nature of the forums are similar. The New Zealand appeal lies to the High Court and requires a review of the NZCC decision based on the updated, formal record of that decision. The Australian Competition Tribunal, which includes a senior judge, rehears the case afresh and reaches its own decision. (Air New Zealand, sub. 24, pp. 1–2)

A further difference is in the standing of interested parties to appeal under the Acts. As outlined in appendix B, although there is generally a right of appeal to the parties to the transaction, standing to appeal for third parties differs between the TPA and Commerce Act and between types of approvals.

The TPLA Bill would have further amended the standing to appeal. The Commission notes that the implementation of the TPLA Bill would have removed much of the disparity in the nature of merits review and the standing to appeal for merger clearances. The Tribunal would only have been able to consider reviews of merger clearances based on the record of the ACCC decision. In addition, standing to appeal would have been conferred to the applicants for the formal clearance. In both cases, these changes would have brought the two regimes closer together.

In the Commission's view, differences in review and appeal processes are not likely to be impeding the development of a trans-Tasman business environment.

Appeals from dual determinations

The ACCC and NZCC may both make determinations relating to the same restrictive trade practice or acquisition, which may give rise to appeal. (The potential for this to occur would have increased if the formal clearance procedure that was outlined in the TPLA Bill had come into effect.)

If the appeal proceeds in one country only, this is likely to increase the likelihood that timelines will diverge, but should not otherwise impede the trans-Tasman business environment.

If appeals arise in both countries for the same transaction, for similar reasons as those outlined for dual-approvals processes, this could impose additional costs on the parties to the transaction. That is, differences in standards, duplication of processes and a lack of coordination of timelines might impose additional costs on the parties to the dual proceedings.

To the Commission's knowledge, the recent Qantas–Air New Zealand case is the only instance of a dual appeal occurring to date. The NZCC said:

> A joint process, including one appeal process, could have resulted in significant cost savings in that case.

> […] Having said that, the likelihood that one applicant would be involved in a duplicate process in respect of one matter at the same time is not high. (sub. 16, pp. 17–18)

In the Commission's view, dual determinations that are appealed in both countries might increase business compliance costs and administration costs.

FINDING 4.1

For the Australian and New Zealand competition and consumer protection regimes:

- *the substantive laws*
- *the application of the laws*
- *the approval processes for acquisitions and restrictive trade practices*
- *the sanctions and remedies*
- *the review and appeals processes*

are sufficiently similar that they generally are not an impediment to an integrated trans-Tasman business environment.

FINDING 4.2

Notwithstanding finding 4.1, there are aspects of the Australian and New Zealand competition and consumer protection regimes that are not consistent with a single economic market. The particular aspects relate to:

- *the objectives of each country's regime being confined to the welfare of only those in the respective country, as are the competition public benefits tests*
- *the impact of relevant conduct only being considered within national boundaries*
- *differences in guidelines, timelines, and decision making and duplication of processes, for cases where approval is required in both countries.*

4.6 Investigations

Investigations of possible contraventions of the competition and consumer protection legislation can involve the competition regulators gathering information from persons in other jurisdictions. It can also involve sharing information with regulators in other jurisdictions.

The ACCC advises that, in 2003–2004, it identified five investigations on competition matters and ten investigations on consumer protection matters that had a significant trans-Tasman connection. The ACCC states that this level of trans-Tasman connection in its investigations is likely to increase with 'moves towards harmonisation of product safety and food labelling standards and the

development of e-commerce trading'. In addition, in cartel investigations 'the strategy in global cartels is to regionalise cartel activities into various geographic regions, in which Australia and New Zealand are grouped together in what may be loosely called the oceanic region.'(ACCC, sub. 16, pp. 8, 13)

Examples of ACCC enforcement actions having a trans-Tasman connection include proceedings regarding misleading conduct by Gold Coast punting software promoters (2002), price fixing and market sharing between power transformer manufacturers (2002), and misleading belt labels (2001).

To facilitate effective enforcement, the ACCC and the NZCC have a bilateral cooperation and coordination agreement and several tripartite agreements with the competition regulators of Canada, Taiwan and the United Kingdom.[5] Each agreement provides guidelines on: notifying enforcement proceedings in each country, exchanging information (subject to domestic confidentiality laws), assisting access to information in another country and avoiding conflicts in an enforcement action.

Under these agreements, there have been 43 exchanges between Australia and New Zealand for the year ending June 2004 (table 4.3). About half of the exchanges made could be classified as basic 'information requests'.

Table 4.3 **Cooperation agreement exchanges, year ending June 2004**

Types of information exchange	*Australia*	*New Zealand*
Requests	21	16
Notifications	4	2

Source: ACCC (sub 13, p. 5).

The NZCC noted that the information gathering powers of the ACCC and NZCC do not differ substantially. However, the ACCC and NZCC did identify possible areas where the enforcement of competition and consumer protection is potentially hindered. These include limits on the regulators to use their information gathering powers to assist the regulator in another country, constraints on sharing information obtained using the regulators' information requisitioning powers and difficulties in ensuring confidentiality of such exchanged information (table 4.4).

Information gathering

The ACCC and NZCC gather information through both the voluntary cooperation of private parties and the use of their statutory investigative powers. Though both

[5] Footnote 1, chapter 2.

regulators prefer to obtain information from persons voluntarily, they can use their formal powers where:

- voluntary disclosure is not forthcoming
- voluntary disclosures are attached with conditions that constrain the regulators from exercising their functions
- sanctions can be imposed for noncompliance, or
- it is appropriate to protect the information provided (ACCC 2000).

The ACCC and the NZCC have the power to serve notice upon an individual to furnish information to the ACCC and the NZCC, or to appear before them. The ACCC and the NZCC can enter premises and inspect any documents. Failure to comply with the notice constitutes a criminal offence (s. 155 TPA; ss. 98–98A, 103 Commerce Act; ss. 47G and 47J FTA).

Table 4.4 **Selected issues in investigation processes**

Issue	*New Zealand*	*Australia*
Exercise of information requisitioning powers	There is no equivalent to the *Mutual Assistance in Business Regulation Act 1992* (Cwlth) in New Zealand.	The ACCC may exercise powers under the *Mutual Assistance in Business Regulation Act 1992* (Cwlth).
	The NZCC cannot requisition information from Australia, except in relation to goods covered under the *Commerce Act 1986* (s. 36A). New Zealand cannot use its powers to assist the ACCC.	The ACCC cannot requisition information from New Zealand, except in relation to goods covered under the *Trade Practices Act 1974* (s. 46A). The ACCC cannot use its powers to assist the NZCC.
Confidentiality orders	The NZCC has a statutory power to restrict or prohibit the publication of confidential information for competition proceedings (*Commerce Act 1986*, s. 100).	The *Trade Practices Act 1974* does not have an equivalent to ss. 100 or 106 of the Commerce Act. The ACCC is not bound by s. 100 confidentiality orders issued by the NZCC.
	The NZCC is not required to divulge information received in its operations on competition matters (*Commerce Act 1986*, s. 106(7)).	

Source: NZCC (sub. 16, p. 20).

The powers ordinarily extend to persons in the country. In some circumstances, the ACCC and the NZCC can also serve notices to persons in New Zealand and Australia respectively to furnish information (s. 155A TPA; s. 98H Commerce Act).

Two issues have been identified by interested parties that could potentially limit the ability of the ACCC and the NZCC to enforce their competition and consumer protection laws when dealing with cases involving trans-Tasman transactions. First, regulators are limited in their ability to requisition information from persons residing outside the country for practices other than misuse of market power in a trans-Tasman market (s. 46A TPA; s. 36A Commerce Act). As noted by the NZCC:

> There is a significant hindrance to the enforcement of competition and consumer law due to the inability of either the Commerce Commission or the ACCC to exercise information requisitioning powers in each other's jurisdiction, except where the limited requisitioning powers of section 98H of the Commerce Act, and its equivalent in Australia (s. 155A of the TPA) apply. These powers may only be exercised in relation to taking advantage of market power in trans-Tasman markets. (sub. 16, p. 21)

The ACCC expressed similar concerns:

> … even where the ACCC does have jurisdictional scope to take action against … persons located outside its jurisdiction, it faces considerable practical difficulties in investigating such matters. … Accordingly, it would greatly enhance the ability of the ACCC to protect consumers and competition in trans-Tasman matters if it was given extra-territorial scope and had the ability to utilise its s155 [information requisitioning] powers within the trans-Tasman region to investigate the wrongdoing in trans-Tasman matters. (sub. 13, p. 20)

Second, the NZCC said it does not have jurisdiction to use its powers to requisition information in New Zealand on behalf of an overseas competition regulator (sub. 16, p. 28). An exception is that the NZCC might provide assistance on criminal matters relating to consumer protection under the *Mutual Assistance in Criminal Matters Act 1992* (NZ) (MACMA). However, generally the NZCC can only exercise its powers under the Commerce Act and the FTA for the purposes of the administration and enforcement of those Acts. Requests for information or enforcement assistance might relate to matters that contravene competition and consumer laws outside New Zealand but not contravene the Commerce Act or FTA. For example:

> … if a person resident in New Zealand was involved in an arrangement with a person that resulted in prices being fixed in Australia, that behaviour would not be a breach of the Commerce Act as the behaviour does not fix prices in markets in New Zealand. Hence the Commerce Commission could not use its powers to assist the ACCC. (NZCC, sub. 16, p. 28)

The ACCC has greater capacity to use its requisitioning powers to assist the NZCC. Under the *Mutual Assistance in Criminal Matters Act 1992* (Cwlth) and the *Mutual Assistance in Business Regulation Act 1992* (Cwlth) (MABRA), the ACCC can obtain information, documents, or evidence in Australia on behalf of the NZCC.

There is some doubt as to how well this statute has worked in gathering information. The NZCC noted:

> Notwithstanding the existence of the Mutual Assistance in Business Regulation Act 1992, there have been specific instances where the inability of the Commission to exercise any information gathering powers in Australia has prevented access to information that might have demonstrated a contravention of the Commerce Act. (sub. 16, p. 21)

In the Commission's view, limits placed on regulators to exercise their powers to undertake investigations into possible cross-border contraventions of the TPA and Commerce Act could raise the enforcement costs to regulators and diminish the effectiveness of competition laws in such trans-Tasman cases.

In regard to the consumer protection provisions applying to financial services in the ASIC Act, the Australian Securities Investment Commission (ASIC) raised a concern that it is restricted in using its information gathering powers in responding to a request from a foreign regulator for investigative assistance (ASIC, sub. 12, p. 4). However, ASIC pointed out that it can use the information requisitioning powers under the MABRA and MACMA to respond to a request from a foreign regulator for investigative assistance. That said, ASIC noted:

> Although MABRA and MACMA provide a mechanism by which assistance can be provided to foreign regulators, it can be a very cumbersome process, due to the need to obtain approval from the Attorney-General. (sub. 12, p. 4)

The Commission does not consider the requirement on ASIC for approval from the Australian Attorney-General as overly burdensome. Indeed, Ministerial oversight provides an important element of accountability in exercising such coercive powers on behalf of a foreign regulator. Further, New Zealand participants have not raised any issues with respect to the efficacy of MABRA and MACMA.

Exchange of information

The exchange of information between regulators is important both to the regulatory approval process, as well as to investigations of possible cross-border contraventions of competition and consumer protection laws.

The various cooperation and coordination agreements provide the framework for the ACCC and NZCC to share information as part of their enforcement and approval activities. Information might include business or individual confidential information (which can include private material or commercially sensitive information relating to company marketing and product strategies) and regulator confidential information (which can include information relevant to a specific case(s) being investigated or which has been concluded).

The cooperation and coordination agreements are subject to the laws of both countries that limit the exchange of information. The restrictions include:

- *statutory restrictions* — the information collected under the TPA (s. 155) and the Commerce Act (s. 98) can only be used for purposes linked to the TPA or the Commerce Act respectively
- *administrative law* — information obtained can only be used for the purposes for which it was acquired
- *privacy laws* — domestic privacy laws restrain the use of information held in regard to natural persons and place obligations on parties to protect the privacy and liberties of individuals
- *confidentiality requests* — place real limits on the extent that information is shared between competition regulators, particularly where the information is provided voluntarily as part of an approvals process, or by a whistleblower in an application for leniency.

The ACCC confirmed it is constrained in its ability to exchange information in regard to enforcement matters:

> Currently the ACCC is significantly restricted from exchanging such information with the Commerce Commission … the provisions of the TPA do not allow it to provide information obtained pursuant to s. 155 powers to the Commerce Commission. (sub. 13, p. 19)

The NZCC concurred:

> This inability to share and control information is a major impediment to having co-operative and integrated enforcement and adjudication investigations. This is significant for trans-Tasman business activity. Unlawful activity in one jurisdiction can impact on the other. It is important to be able to adequately investigate that behaviour. (sub. 16, p. 21)

The constraints on the regulators in the exchange of information obtained using their own information requisitioning powers have the potential to limit the effectiveness of the competition and consumer protection regimes in dealing with cases having trans-Tasman dimensions.

A related issue is whether the confidential information shared between regulators can be protected from unauthorised disclosure. If the confidentiality of information can not be assured, it is likely that a regulator would not share such information with the regulator in the other country. A lack of such assurance can also influence the approach adopted by business in providing information. Bell Gully note:

> For businesses with interest outside New Zealand, the risk that information voluntarily provided to the Commission on a confidential basis could be passed to overseas

> regulators, would influence how and the extent to which they would choose to respond to information requests from the Commission …
>
> Businesses are often prepared to adopt a cooperative and open approach with the Commission as they have confidence that the Commission has the appropriate incentives to protect the confidentiality of information supplied to it. (sub. DR29, p. 2)

The NZCC has a statutory power to restrict or prohibit the publication of confidential information that is the subject of competition proceedings (s. 100 Commerce Act). In addition, the NZCC can not be required to divulge any information it holds in connection with its operations under the Commerce Act (s. 106(7)). Similar provisions do not exist under the FTA.

However, the ACCC is not bound by any NZCC confidentiality orders and there are no similar provisions in the TPA. There is, therefore, no guarantee that information provided in confidence to the NZCC by private parties, and then passed on to the ACCC, can not be protected from being made public by the ACCC. This is because the NZCC is unable to insist its confidentiality order be enforced and there is no obligation on, or statutory protection, for the ACCC to comply. As a result, confidential information passed on to the ACCC might be made public, such as through a Freedom of Information request or a discovery in a private litigation.

Similar issues can also arise when the NZCC receives information from various parties on the condition that it is kept confidential, such as from whistleblowers or applications for approvals. In such circumstances, the NZCC would have to obtain the person's consent (or waiver) that the information be passed to the ACCC, if appropriate.

In the Commission's view, in the absence of confidentiality assurances, the ACCC and NZCC are less likely to share information. This has the potential to limit the effectiveness of the competition and consumer protection regimes in dealing with cases with trans-Tasman dimensions.

FINDING 4.3

There are several factors that can impede the ability of regulators in Australia and New Zealand to enforce effectively competition and consumer protection regimes in relation to cases with Australasian dimensions:

- *Statutory restrictions prevent the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) exercising their information requisitioning powers in each other's jurisdiction. They also face limits on the use of their investigation powers in providing assistance to each other.*

- *Statutory restrictions limit the extent to which the ACCC and the NZCC can exchange information that was obtained through their information gathering powers.*
- *Information exchange between the ACCC and the NZCC is impeded by the inability to protect confidential information against unauthorised disclosure.*

5 Policy options (full and partial integration)

In chapter 4, the Commission identified aspects of the Australian and New Zealand competition and consumer protection regimes that do not provide a framework for considering competition and consumer protection policy in terms of a single economic market. In addition, some aspects of the regimes were found to be impeding the effectiveness of regimes in certain enforcement and assessment matters having trans-Tasman dimensions. In light of the findings in chapter 4, this chapter and chapter 6 assess the benefits and costs of six policy options to achieve greater cooperation, coordination and integration of the Australian and New Zealand competition and consumer protection regimes, for the purpose of fostering the development of a single economic market. The options, with varying degrees of harmonisation and integration, are summarised in table 5.1.

The policy options considered are intended to encompass the options described in the terms of reference for this study and are divided into three broad groups:

- full integration
- partial integration
- transitional integration.

Options involving full and partial integration of the regimes are outlined and assessed in this chapter. Transitional integration is discussed in chapter 6.

The approach used to assess whether a policy option warrants adoption is outlined in chapter 3. In summary, for a policy option to be recommended it would need to foster and enhance the trans-Tasman business environment and generate an expected net benefit. The consideration of net benefits has to take account of public benefits and costs, which might include matters that cannot be quantified readily in financial terms because there is no associated market.

Table 5.1 **Policy options examined by the Commission**

	Substantive laws	*Institutions*
Full integration		
Option 1a	Each country legislates identical laws that provide a framework for considering competition and consumer protection policy in terms of Australasian markets	Single, common set of institutions established by the two countries
Option 1b	Same as option 1a	Separate national institutions retained by each country
Partial integration		
Option 2a	Each country legislates identical laws that provide a framework for considering competition and consumer protection policy in terms of Australasian markets for *selected* transactions (Australasian regime)[a] *and* Separate laws retained for all other matters (national regimes)	Single, common set of institutions established by the two countries to administer the Australasian regime and national regimes
Option 2b	Same as option 2a	Single, common set of institutions established *on a permanent basis* by the two countries to administer the Australasian regime *and* Separate national institutions retained by each country to administer national regimes
Option 2c	Same as option 2a	Single, common set of institutions established *on a needs basis* by the two countries to administer the Australasian regime *and* Separate national institutions retained by each country to administer national regimes
Transitional integration		
Option 3	Separate laws retained for all matters, with enhanced policy dialogue and harmonisation	Separate national institutions retained by each country, with enhanced cooperation and coordination for assessment of certain Australasian cases

a The Australasian regime would only be used when the net benefit would be greater than under national regimes.

5.1 Full integration

Under options 1a and 1b, Australia and New Zealand would adopt identical laws that provide a framework for considering competition and consumer protection policy in an Australasian context. This would require steps to:

- eliminate any remaining differences in substantive laws and their application between the Australian and New Zealand competition and consumer protection regimes
- prevent future differences that would otherwise arise if each country was able to independently amend its laws.

To achieve this, a wide range of changes would have to be made to the existing regimes, including with respect to:

- an objects clause that recognises the welfare of parties in both countries
- an Australasian welfare test for assessing conduct
- an impact market definition that allows for the possibility a market encompassing both Australia and New Zealand (an Australasian impact market)
- identical specification of prohibitions
- identical analytical approaches, including:
  - market definition
  - substantial lessening of competition test
  - application of public benefits tests
- identical regulatory procedures, including:
  - investigation procedures
  - timelines
  - appeals mechanisms
- mutual recognition of court decisions in the other country.

The difference between options 1a and 1b is that the former would involve common institutions and the latter would involve the retention of separate national institutions. The following assessment concentrates initially on option 1a. Differences in expected benefits and costs under option 1b, relative to option 1a, are then discussed.

Identical laws and institutions (option 1a)

In addition to the changes outlined above, option 1a would involve the establishment of a common set of institutions. This would require agreement on a wide range of matters, some of which are listed in box 5.1.

Option 1a is broadly similar to the approach advocated by Qantas (sub. 23, pp. 9–10). Qantas also noted that precedents exist for the establishment of a joint Australian and New Zealand regulator:

> The existence of 'Food Standards Australia New Zealand' (and the implementation of one joint food standard setting system) and the development of the 'Joint Therapeutic Good Agency' illustrates that integrated trans-Tasman entities are a viable proposition … (sub. 23, p. 10)

The Commission is aware of at least three joint Australian–New Zealand institutions:

- Food Safety Australia and New Zealand — a statutory authority that has responsibility for standards for all foods produced or imported for sale in Australia and New Zealand. It was established under Australian legislation (the *Food Standards Australia New Zealand Act 1991* (Cwlth)) following agreement between the Australian and New Zealand Governments (under a treaty) and the Australian, State and Territory Governments (through the *Intergovernmental Food Regulation Agreement 2000*).
- Joint Accreditation System of Australia and New Zealand — a not for profit, self funding international organisation established under a treaty between the two countries in 1991 to act as a joint accreditation body for the certification of management systems, products and personnel.
- Proposed joint therapeutic goods agency — an international organisation to be established in accordance with a treaty between the two countries (signed in December 2003) that will have responsibility for standards in relation to the manufacture, supply, import, export and promotion of therapeutic products.

These agencies are (or will be) primarily involved in setting, implementing, and enforcing standards. This is a different task to that of administering competition and consumer protection law, which often requires a case-by-case assessment of whether conduct would harm consumers or adversely affect competition in a particular market. The Commission therefore considers that the precedents for joint Australian and New Zealand institutions do not imply that there is a case for adopting the same approach in competition and consumer protection regulation. The net benefits of such approaches should be assessed for each policy proposal.

Box 5.1 **Institutions in multi-jurisdiction regimes**

The following is a list of the key elements of institutions, with examples of the implementation of these features in a multi-jurisdiction environment:

- establishment mechanism — Government to Government Treaty; agreement between single-jurisdiction institutions; the law of one jurisdiction; or the law in multiple-jurisdictions
- the functions of the entity — making rules; developing guidelines that interpret rules; adjudicating on rules in specific cases and resolving disputes; monitoring and enforcing rules; administering to give effect to rules (for example, licensing of participants or maintaining registers); research; or education
- internal governance arrangements:
  - appointment of entity's members — joint appointment; consultation before appointment; or dual appointment
  - composition of Board — total number fixed with allocated number of representatives for each jurisdiction; co-Chairpersons or alternating Chairpersons; establishment of sub-Committees of the Board having specialist responsibilities
  - decision-rules of Board — quorums at meetings to include presence of particular directors; decisions to be carried unanimously or by a majority that must include votes cast by particular directors
- accountability to governments — reporting or answerable to a lead government or multiple governments; ability to direct the Board or a requirement of the Board to have regard to policies of a lead government or multiple governments; oversight function carried out by lead government or multiple governments; and ability of either government to opt-out of particular policies or Board decision making
- accountability to third parties — availability of appeal or judicial review in one or more jurisdictions' courts; standing of all jurisdictions' citizens to request information held by the entity
- funding arrangements — contributions by respective governments on a fixed or project basis.

Expected benefits of option 1a

Increased effectiveness and efficiency of regulation

Full integration would enable trans-Tasman cases to be regulated as effectively and efficiently as domestic cases within Australia and New Zealand by, for example, providing for the consideration of competition and consumer protection matters at the Australasian level.

However, it appears that only a small proportion of cases handled by Australian and New Zealand regulators involve the application of competition and consumer protection laws to trans-Tasman matters.

The Australian Competition and Consumer Commission (ACCC) noted that only 0.1 per cent of the complaints and inquiries it recorded in 2003–04 had a trans-Tasman element (64 out of a total of 63 695):

> … the ACCC has identified that for the year 2003–04 approximately 64 complaints and inquiries were recorded in its complaints database which revealed a trans-Tasman element. This is an extremely small figure in comparison to the total number of complaints and inquiries recorded during that period (63 695).
>
> About 48 per cent of those matters related to complaints from New Zealand consumers or businesses in relation to consumer protection issues. A significant number related to general inquiries regarding the operation of Australian consumer and competition laws, and a small number of queries came from New Zealand traders seeking further information about Australian laws — particularly in relation to labelling of goods and country of origin claims. (sub. 13, pp. 7–8)

The ACCC also noted that very few trans-Tasman matters progress to the investigation stage:

> In terms of matters that have moved beyond the stage of complaint to an investigation stage, the ACCC has identified … only a very small number of significant investigations involving a trans-Tasman element. The ACCC has identified approximately 21 matters under investigation or completed during the period 1 July 2003 to 30 June 2004 containing a significant trans-Tasman association, comprising 5 competition or cartel matters, 10 consumer protection matters and 5 mergers and 1 authorisation matter. (sub. 13, p. 8)

The ACCC concluded that a common regulator is not necessary, given the relatively few trans-Tasman matters that currently arise:

> The establishment of a [single] trans-Tasman regulator would foster consistency in application of laws, and overcome jurisdictional issues in trans-Tasman investigations.
>
> While the ACCC believes that such a proposal may be examined further if the need arises, based on the current level of trans-Tasman matters, it does not consider it to be necessary at this time. (sub. 13, p. 24)

The lack of trans-Tasman cases is further highlighted by the few applications for determinations for clearance of a merger or acquisition made to both the ACCC and New Zealand Commerce Commission (NZCC) for the period 1997 to 2004 (chapter 4, table 4.1).

Other groups also expressed doubts about whether there were problems with the existing regimes (for example, Business New Zealand (sub. 4, p. 2); New Zealand Business Roundtable (sub. 2, p. 1); and Fletcher Building (sub. 20, pp. 1–2)).

Fewer 'negative externalities'

Option 1a would limit the potential for regulatory processes in either Australia or New Zealand to adversely affect a party in the other country. This would be due in large part to the adoption of a common objects clause that recognises the welfare of parties in both Australia and New Zealand, and an associated Australasian welfare test for assessing conduct. There might also be greater regulatory certainty because each country would agree not to unilaterally change its laws without agreement from the other country (which would also implement the change).

Australia and New Zealand would have to reach an agreement on the specifics of how regulatory decisions would take account of the welfare of parties in both countries. One approach would be to permit conduct if it generates a net benefit for Australasia as a whole. This would allow conduct that imposes a net cost on one country if it was outweighed by a net benefit for the other country. Qantas advocated such an approach for assessing the public benefits of authorisations and merger clearances:

> The competition laws in both Australia and New Zealand should be amended so that, in the context of a trans-Tasman authorisation or merger clearance, the term 'public benefit' is defined as a net benefit to Australasia in aggregate. This will allow the public benefits associated with any proposed trans-Tasman conduct to be assessed more accurately and completely. After all, if the ultimate goal is to have a 'single economic market', if the region is better off, as represented by the combination of both countries, then why shouldn't such transactions be authorised? (sub. 23, p. 9, emphasis added)

Air New Zealand argued that, at the very least, equal credit should be given for benefits to Australia and benefits to New Zealand:

> When a business in New Zealand may point only to public benefits to New Zealand, it will be unduly constrained in pursuing its growth as an international business. In the CER [Australia New Zealand Closer Economic Relations Trade Agreement] context there should at the very least be equal 'credit' for benefits to Australia (and vice versa) to facilitate Australasian growth. (sub. 24, p. 3)

Air New Zealand, in responding to the draft report, reiterated this view:

> Where there is overall public benefit [to Australasia], approval should be granted despite there being a detriment in one country if it is outweighed by benefit in the other. (sub. DR44, p. 4)

In the absence of an effective cross-country compensation mechanism, a decision rule based solely on Australasian welfare might be inconsistent with the role of governments to protect their respective national interests. It is conceivable that cases will arise where there is a net benefit to Australasia collectively, but one country experiences a net cost. It is difficult to forecast whether the costs borne by

either Australia or New Zealand in particular cases under an Australasian welfare criterion would be outweighed over the long term by the benefits gained in other cases.

An alternative approach would be to adopt a welfare test that takes account of the distribution of benefits and costs between Australia and New Zealand. However, difficult issues are also likely to arise in adopting such an approach, such as the weight attached to the benefits and costs incurred by each country. One method would be to permit conduct only if it does not impose a net cost on either Australia or New Zealand, regardless of whether there is a net benefit for Australasia as a whole.

On distributional issues, Telecom New Zealand commented that harmonised rules would need to benefit both countries:

> … it will be important to ensure that unified rules applied by a joint body do not unfairly prejudice New Zealand businesses. For example, the procedure for authorisations in each jurisdiction are broadly similar: public benefits are weighed against detriments (despite a difference in methodology between the regimes). However, if a joint body determined that Australian net benefits (or detriments) consistently outweighed New Zealand net detriments (or benefits), then harmonisation could result in consistently detrimental consequences to New Zealand. The cost to New Zealand of this approach would outweigh the relative gains from harmonisation: Telecom New Zealand's view is that if harmonisation of competition rules cannot be effected in a manner that benefits both parties it is to be avoided. (sub. 15, p. 18)

Lower compliance costs

Under option 1a, businesses operating in both Australia and New Zealand would only have to comply with one set of laws. In addition, those businesses would no longer face the prospect of regulatory duplication (having the same matter assessed and enforced by both Australian and New Zealand institutions).

The issue of regulatory duplication gained prominence recently due to the separate assessments of the recent Qantas-Air New Zealand proposed alliance by Australian and New Zealand regulators. Qantas outlined its view as to why the regulatory duplication in that case was costly:

> The ongoing application of two distinct competition regimes has had the following practical consequences:
>
> 1. a duplication of legal advisers …
> 2. a duplication or in some cases a significant increase in the number of economic, econometric and accounting experts …
> 3. a duplication of legal applications and economic submissions …

4. a duplication, or in many cases a doubling, of the requests for information from and meetings with the regulators
5. on rejection, the necessity of running two appeals in relation to the same matter — requiring the briefing of separate counsel and expert witnesses and the preparation of two sets of witness statements and reports for the [Australian Competition] Tribunal and New Zealand High Court respectively (arising from the different procedures in each jurisdiction) …
6. a doubling of the management time and costs involved in progressing the authorisation and appeal processes. …

The duplication … not only increases the scale, and attendant costs, of the authorisation process. It also extends the time frame necessary for regulators to make decisions in relation to transactions that are, in general, already complex in relation to often dynamic industries.

The use of two processes also improves the prospect that third parties can successfully escalate the cost and time involved in seeking authorisations. (sub. 23, p. 4)

The NZCC used the Qantas-Air New Zealand case to support its argument that joint regulatory processes between Australia and New Zealand would generate substantial benefits for businesses, including a lower probability of inconsistent decisions:

Substantial benefits for trans-Tasman business could be achieved through having joint processes, although appeal rights would need to be made clear. The recent Qantas-Air New Zealand authorisation application highlighted the extent that needing to proceed through both jurisdictions on a common issue matters. In addition to the significant transaction costs in that case there are real concerns raised by the risk of inconsistent outcomes over the common issue of competition in the trans-Tasman aviation market.

The significant transaction costs and risk of inconsistent decisions for overlapping markets could easily be mitigated by both agencies establishing a joint process for considering such applications. A joint process including one appeal process could have resulted in significant cost savings in that case. (sub. 16, p. 17)

Qantas outlined its expectation of how full integration would reduce compliance costs:

A single regulator will help reduce problems associated with differences in interpretation of the law, such as in relation to the notion of 'public benefits'. A single regulator will also mean consistent regulatory guidelines and publications will be issued across Australia and New Zealand, increasing certainty and facilitating trans-Tasman business. …

A single regulator will mean one authorisation process in relation to trans-Tasman conduct or mergers. As a result, parties will be able to significantly reduce duplication in compliance and legal costs, which are often attributable to issues of form rather than substance. It may also lead to the facilitation of trans-Tasman business between

> companies that would otherwise decide against such investment given the current regulatory inefficiencies. …
>
> A single regulator will be able to ensure undertakings given by businesses are equally recognised in both jurisdictions … (sub. 23, p. 10)

In addition, Qantas (sub. 23, p. 3) claimed that it 'is one of the few Australian companies which has a true trans-Tasman operation (as compared to Australian and/or New Zealand operations)', and by implication the dual regulatory assessments of its proposed alliance with Air New Zealand were not only costly but also unnecessary because the relevant impact market for the purpose of competition law should have been an Australasian market.

Current legislative constraints prevent Australian and New Zealand regulators from assessing the impact of conduct in a market that extends beyond their respective national boundaries (chapter 4). However, it should be noted that scope for a broader definition of an impact market, as provided for in option 1, does not mean that the impact market would necessarily encompass Australia and New Zealand (an Australasian impact market). Rather, the relevant impact market would be determined case-by-case.

The ACCC claimed that, where a proposed merger has been examined at the same time by Australian and New Zealand regulators, separate regulatory assessments have generally been appropriate because the relevant impact market is not an Australasian market:

> Generally, these cases were ones where the parties had a presence in both jurisdictions, but the markets in question were not fully integrated 'trans-Tasman' markets, rather, the same organisations operated in separate Australian and New Zealand markets. (sub. 13, p. 15)

If there are few cases where, for the purpose of competition law, an impact market should be defined as an Australasian market, then the benefits resulting from full integration (options 1a and 1b) could be similar to those possible under transitional integration (option 3).

With respect to the assessment of the recent Qantas-Air New Zealand proposed alliance, the ACCC (sub. 13, p. 18) commented that it cooperated closely with the NZCC on an informal basis. It also implied that the benefits of even greater cooperation were constrained by the need to consider the different circumstances of Australia and New Zealand, and the legislative requirement that regulators only consider the welfare of parties within their national boundaries.

More generally, the ACCC noted that it is rare for it to assess a merger or acquisition that is also examined by the NZCC:

> In practice, the ACCC has only found itself in the position of assessing a proposed merger at the same time as the [New Zealand] Commerce Commission in a small number of cases. Examples of such cases include MYOB/Solution 6, Burns Philp/Goodman Fielder, and CSIRO and NZ Forest Research Institute. (sub. 13, p. 15)

Economies of scale and scope

Having identical laws and common institutions might enable Australia and New Zealand to realise economies of scale and scope in law making and enforcement. That is, the average cost of making and administering laws might decline because a single set of institutions would deal with a greater number and variety of cases.

Comments by Telstra suggest that combined institutions would improve the quality, as well as reduce the cost of regulation, and a large proportion of the economies of scale and scope would be captured by New Zealand:

> Greater institutional coordination and integration … is likely to realise material efficiency gains … particularly economies of scope and scale. …
>
> Telstra believes that the resourcing of the NZCC could be improved by greater sharing of expertise and resources with the ACCC. Such pooling of expertise and resources would help reduce the corresponding risk of regulatory error and increase the speed, quality and consistency [of] regulatory decisions. …
>
> In recent years it has been well documented that the NZCC has operated under significant resource constraints. These resource constraints can have a direct impact on decision-making, particularly in specialist areas such as telecommunications. (sub. 11, p. 14)

In response to the Commission's draft report, the Institute of Chartered Accountants New Zealand noted:

> A joint body would be expected, through economies of scale, to cost less than two separate bodies, for example, two Commerce Commissions. This result can not, however, be taken for granted. A rough back of the envelope calculation shows that a joint Commerce Commission may cost New Zealand tax payers more. The Australian Competition and Consumer Commission (ACCC) is expected to cost approximately $122 million in 2004/05, compared with approximately $20 million for the New Zealand Commerce Commission. If the cost of the merged entity is shared between the two countries on the basis of population, approximately $20 million in savings would need to be found for New Zealand tax payers to be no worse off. This is unlikely. (sub. DR42, p. 6)

Prevent a 'race to the bottom'

A potential benefit of full integration is that it prevents a 'race to the bottom' in which countries compete to attract businesses by having competition and consumer protection policies that favour businesses at the expense of overall welfare. However, the Commission considers that this is not an issue for the Australian and New Zealand competition and consumer protection regimes. Rather, the two countries have devoted considerable resources, both on an independent and cooperative basis, to ensure that their regimes are effective and efficient.

Limit lobbying

A common set of institutions for Australia and New Zealand could reduce the potential for lobby groups to get a regime changed in a way that benefits their interests but not Australasia as a whole. Such changes could include the introduction of additional objectives, such as income redistribution and protecting certain types of businesses, which conflict with the objective of economic efficiency. The barriers to successful lobbying might increase because lobby groups are more likely to need to form coalitions with other groups, possibly in the other country, in order to get a regime changed. Further, having to reach agreement between the two countries makes it more difficult for a jurisdiction to respond to such pressures.

Expected costs of option 1a

In addition to consideration of the benefits accruing from improving the effectiveness of competition and consumer protection regimes in dealing with trans-Tasman matters, consideration also needs to be given to the costs of policy options that are capable of addressing the weaknesses in the regimes. An option should only be recommended if it is expected to generate net benefits, after taking into account the costs of implementation.

Negotiation and implementation costs

Negotiating and implementing the numerous changes required for full integration would be costly for both countries. As noted previously, full integration would require agreement on a wide range of issues, including an Australasian welfare test, a definition of impact market that allows for the possibility that the market spans Australia and New Zealand (an Australasian impact market), and identical regulatory procedures. In addition, option 1a would require resolution of the complex issues involved in establishing a common set of institutions (box 5.1).

Many matters might also arise between the operations of an Australasian regime and those of the Australian States and Territories. This could be most evident in the area of consumer protection, which some participants noted would need to be harmonised further within Australia before considering harmonisation with New Zealand (AAPT, sub. 6, p. 2; Telecom New Zealand, sub. 15, p. 23). There could also be tensions between a generic Australasian regime and the industry-specific regimes implemented in Australia and New Zealand, which are outside this study's terms of reference.

One-size-fits-all approach

A potentially significant cost of full integration is that a 'one-size-fits-all' approach would be applied to the different circumstances of Australia and New Zealand, including for the majority of cases where common laws and institutions are unnecessary because a trans-Tasman transaction is not being regulated.

Various participants expressed concerns about how full integration would hinder the ability of each country to tailor a regime to its different circumstances:

> The issues paper [for this study] asks whether 'a single entity responsible for administering and/or enforcing competition … regimes in Australia and New Zealand' would be preferable to current arrangements … While such a body would solve the problem of interpretative divergence, it would inevitably be a 'blunt instrument'. The risk is that such a body would fail to understand the nuances of local markets when deciding domestic issues. (Telecom New Zealand, sub. 15, p. 14)
>
> Achieving a prosperous and mutually beneficial trans-Tasman market is not dependent on common competition or consumer protection laws or institutions.
>
> The primary focus of such laws and regimes is to create the greatest economic wealth for New Zealand, balanced against appropriate protections for consumers. This is best achieved by adopting laws and institutions that have international respect, but which are tailored to New Zealand's relatively unique environment. (HRL Morrison & Co, sub. 17, pp. 9–10)
>
> The New Zealand market has its own specific characteristics, structures and market dynamics which have been built around existing laws and which are understood by the market and the regulators. If there were a move towards a single regulator, such that the Australian regulatory approach were to be adopted in relation to New Zealand, we would be concerned that such an approach might seek to apply an Australian model to the New Zealand market without having regard to its particular characteristics. (Fletcher Building, sub. 20, p. 2)
>
> … the circumstances of different economic areas may warrant different regimes. For example, a higher level of industry concentration is to be expected in a small country such as New Zealand. (New Zealand Business Roundtable, sub. 2, pp. 1–2)

> … the ACCC … recognises that where markets and the impact of particular conduct differs between jurisdictions, national or regional interests need to be considered in applying competition and consumer protection laws. (ACCC, sub. 13, p. 4)
>
> In reality investment from Australia comprises 21 per cent of total foreign investment in New Zealand. By contrast New Zealand investment comprised just 2 per cent of foreign investment in Australia. Against this backdrop the likelihood of Australia adopting New Zealand's regulatory practices — even if they are 'best in class' in some areas — appears questionable. Consequently the practical policy decision is not likely to be 'what are the best elements we can draw from each regime' but rather 'should New Zealand adopt Australian regulation and if so how much? (Vodafone, sub. 27, p. 2)

HRL Morrison & Co was concerned that a joint regime would inevitability lead to a loss of intellectual capital on regulatory matters in New Zealand, and hence diminish the ability for New Zealand to tailor a regime to its different circumstances:

> [Combined or coordinated institutional frameworks] … would cause a hollowing out of New Zealand resident intellectual capital. Most of the [New Zealand] Commerce Commission's work involves consideration by New Zealand resident professionals of domestic New Zealand transactions. An Australian based combined agency would deplete New Zealand of that know how. If the solution to this is the maintenance of a New Zealand division to consider solely New Zealand domestic transactions, then that begs the question of why a combined agency is needed in the first place.
>
> The loss of resident intellectual capital would adversely affect New Zealand's ability to improve its laws, develop new policies, to be pro-active in advancing New Zealand's interests and responsive to issues affecting New Zealand citizens. (sub. 17, p. 9)

Diseconomies of scale and scope

Rather than leading to economies of scale and scope, full integration might increase the average cost of making and administering laws. For example, law makers might find that the additional consultation and bureaucracy associated with maintaining and updating a common set of laws for Australia and New Zealand is costly.

This problem could be most evident for New Zealand, which might find that there are significant diseconomies of scale associated with having to make and update laws in coordination with nine governments in Australia (national, six states and two territories).

The administration of laws might become more costly if full integration, due to the broader scope of issues that have to be addressed for two countries rather than one, requires the adoption of a more complex set of laws. In addition, the compromises

made between the two countries in order to reach agreement on a single regime could lead to laws that are more costly to administer than separate regimes.

Higher compliance costs

Full integration has the potential to lead to more complex or onerous laws and hence higher compliance costs.

One possible scenario is that the country with the most comprehensive and detailed laws becomes the benchmark for a single regime. This could increase compliance costs for businesses that operate wholly within the country that previously had simpler laws. In this regard, Telecom New Zealand was concerned that harmonisation of laws could lead to a 'ratcheting up' of enforcement to that of the country with the highest standards, without due regard for the associated costs:

> Any alignment of enforcement tools and remedies will need to be carefully considered in a harmonised world. As with other provisions, increased penalties and/or enforcement tools should not be adopted simply because they exist in one or other jurisdiction. This 'high-water mark' approach would effectively 'ratchet-up' enforcement mechanisms, which could result in unnecessary costs for businesses on both sides of the Tasman. (sub. 15, p. 15)

Telecom New Zealand nominated the following recent developments in Australia as examples of why a joint approach could increase compliance costs for New Zealand businesses:

> … there are a number of recent proposals in Australia relating to enforcement and penalties that may not suit the New Zealand business environment, including:

- a recent drive by the small business lobby towards the criminalisation of anticompetitive conduct by 'cartels' — currently being considered by the Federal Government
- the Federal Government's proposal to introduce a prohibition on indemnifying officers, employees and agents for the cost of defending proceedings for breach (in New Zealand this prohibition is limited to price fixing)
- the ACCC's recent drive for tougher merger laws and enforcement provisions to combat energy mergers. (sub. 15, p. 15)

Another possible scenario is that the compromises made between the two countries in order to reach agreement on a single regime would result in a set of laws that are more costly for businesses in both Australia and New Zealand to comply with.

Lack of regulatory competition

The New Zealand Business Roundtable (sub. 2, p. 1) noted that 'competition between regulatory jurisdictions can be desirable'.

Although economic theory provides broad guidance on how to design an effective and efficient competition and consumer protection regime, there is still considerable potential for policy experimentation to lead to the identification of worthwhile innovations. Such beneficial experimentation would be hindered under full integration, because fewer jurisdictions would be able to engage in 'regulatory competition' to find better ways to regulate.

Exacerbate information asymmetries

A common set of institutions could involve a degree of centralisation that makes regulators less well informed about local conditions. This could in turn exacerbate the information asymmetries that exist between regulators and the businesses they regulate, making it easier for businesses to conceal or misrepresent information.

Commission's assessment of option 1a

The benefits of option 1a are likely to be moderate because:

- the current Australian and New Zealand competition and consumer protection regimes are already relatively similar (chapter 4)
- only a small number of cases handled by Australian and New Zealand regulators involve the application of competition and consumer protection laws to trans-Tasman matters
- there are very few cases where the appropriate impact market definition for the enforcement of competition law is an Australasian market.

It could be argued that more cases of an Australasian nature would have been recorded in recent years if identical laws and institutions had been in operation. However, the Commission considers this to be unlikely, given that the two countries' laws are already similar and existing cooperation on competition and consumer protection matters is extensive.

In contrast, the cost of implementing and maintaining identical laws and institutions would be high because, among other things:

- the matters needing resolution and agreement are complex and involve substantial matters of sovereignty

- a ‘one-size-fits-all’ approach would be applied to the different circumstances of Australia and New Zealand, including in the majority of cases where trans-Tasman matters are not an issue.

The cost of implementing and maintaining a system of identical laws would be lower if one country decided unilaterally to adopt the other country’s laws. However, it would still be necessary for both countries to implement a framework for considering competition and consumer protection policy in an Australasian context. Such a framework requires, among other things, an objects clause that recognises the welfare of parties in both countries and Australasian public benefits.

Many matters might also arise between the operation of an Australasian regime, those of the Australian States and Territories, and the industry-specific regimes implemented in Australia and New Zealand.

Therefore, the Commission considers that option 1a would not be an appropriate means of addressing the impediments identified in chapter 4. The costs associated with this option are likely to be large and far outweigh the moderate benefits that would be generated.

Identical laws but separate national institutions (option 1b)

An alternative approach would be to implement and maintain identical laws, but retain separate national institutions (option 1b). The high cost of changing laws would be similar to option 1a, but the cost of establishing and maintaining common institutions would be avoided.

Whether option 1b would result in more effective and efficient regimes than option 1a would depend on the cooperation and coordination arrangements between the two countries’ institutions, including rules and guidance on when each institution had jurisdiction. One approach would be to strengthen existing cooperation and coordination arrangements. For example, constraints on cross-country information gathering and investigative powers could be addressed. On this basis, having identical laws but separate institutions (option 1b) could have the following advantages relative to common institutions (option 1a):

- avoid the costs associated with implementing joint institutional arrangements
- the two countries would retain jurisdictional responsibility for how the identical laws were applied to their different circumstances
- each regulator could give greater weight to its national interest.

On the other hand, the disadvantages might include:

- smaller benefits from having identical laws because those laws are applied differently by the two countries
- institutions would not be able to achieve the economies of scale possible under a combined set of Australasian institutions
- different decisions could arise for the same case
- unnecessary regulatory duplication could occur in cases involving trans-Tasman matters
- no formal mechanism to deal with trans-Tasman matters in a unified way.

It is difficult to judge whether the overall result would be that option 1b has a greater net benefit than option 1a. However, the Commission considers that the costs of option 1b are also likely to be large and far outweigh the benefits that could be achieved by addressing the potential deficiencies identified in chapter 4.

Overall assessment of full integration (options 1a and 1b)

In its draft report, the Commission concluded that full integration was not warranted. All participants, who responded to this aspect of the draft report, agreed with this assessment:

> … like the Commission, we consider that there are constitutional and other issues that would impede any move towards either full integration (option 1) or partial integration (option 2). These issues would outweigh the potential benefits of integration absent a true single economic and fully harmonised Australasian market. In effect, we consider that (at this stage) integration would:
>
> - increase the regulatory, transactional, and general business costs for New Zealand businesses;
> - increase the costs for New Zealand consumers associated with raising concerns with the relevant competition authority, which would decrease consumers' ability to fully participate in the regulatory process; and
> - impede New Zealand's ability to make regulatory decisions that enhance the welfare and efficiency of the New Zealand economy as a whole. (Bell Gully, sub. DR29, p. 1)

> The Commerce Commission agrees that it is not necessary to develop and legislate identical competition and consumer protection regimes and to establish a common set of institutions. (NZCC, sub. DR39, p. 11)

> … the Institute agrees with the Commission's key finding that, in the absence of evidence that the two regimes are imposing material impediments to trans-Tasman business there can be little reason to incur the substantive costs of moving to a single regulator enforcing an Australasian law. (Institute of Chartered Accountants of New Zealand, sub. DR42, p. 2)

> The [Securities Institute of Australia] supports the key finding of the draft report that indicates that radical change (such as full integration or a single regulator model) is not warranted due to the high implementation costs and consequences for existing national regimes. (Securities Institute of Australia, sub. DR36, p. 1)

The Commission considers that full integration (options 1a or 1b) is not warranted.

FINDING 5.1

Implementing and maintaining a single competition and consumer protection regime for Australia and New Zealand (full integration) would not generate benefits that outweigh the associated costs. The resulting benefits would be moderate, given that the two countries' competition and consumer protection regimes are already similar, there is extensive cooperation and coordination between Australian and New Zealand regulators, and only a small number of cases handled by those regulators have Australasian dimensions. The costs of implementation and maintenance would be substantial. It would require agreement on many complex issues, including how each country's sovereignty would be affected.

5.2 Partial integration

It might be possible to achieve most of the benefits of full integration at a lower cost by having a form of partial integration in which a joint regime is maintained only for the few cases where it is warranted. This partial integration approach is examined in options 2a, 2b and 2c, which have two components:

1. An Australasian regime of separate, but identical, laws that apply only when a joint Australian and New Zealand approach (involving common institutions) is considered appropriate. The identical laws would provide a framework for considering competition and consumer protection policy in an Australasian context.
2. National regimes, comprising separate and potentially different laws, retained by Australia and New Zealand for all other cases.

A number of participants, including the NZCC (sub. 16, p. 2) and AAPT (sub. 6, p. 5), advocated a form of partial integration.

Substantive law changes for options 2a–2c

Screening test

Options 2a, 2b and 2c would require a screening process to identify whether particular cases were regulated under the Australasian regime or national regimes. The screening process would be based on the principle that an Australasian regime would be used only when the net benefit is greater than under national regimes. Such an approach recognises that there can be disadvantages as well as advantages in having a joint regulatory regime, and these will vary from case to case.

To minimise the cost of the screening process, Australia and New Zealand could agree that, by default, all conduct would be regulated under national regimes unless a regulator or regulated party sought to use the Australasian regime. Given the small number of cases where Australasian issues arise, it is unlikely that the screening process would be invoked often.

Nevertheless, there would be costs involved in implementing a sound screening process, including possibly an appeals mechanism. Agreement would have to be reached on which institutions would be responsible for making screening decisions and this would have to be specified in legislation.

The ACCC specified the conditions under which it considered a joint regime for trans-Tasman matters would be useful, and noted that very few cases would satisfy those conditions:

> … a legislative procedure for joint-decision making in matters involving trans-Tasman issues … would only be useful in matters where:
>
> - the conduct in question affects both Australia and New Zealand to a significant extent
> - the conduct is the same in both jurisdictions
> - the impact is the same in both jurisdictions
> - both agencies believe that separate decision-making will result in significant duplication of resources and an undue burden on industry.
>
> At present, very few matters would fall within this category, and in most cases, developing a cooperative approach in investigations … would minimise problems of duplication and inconsistency in approach in trans-Tasman matters. (sub. 13, pp. 23–4)

Range of laws in the Australasian regime

It might not be necessary to replicate all competition and consumer protection laws at an Australasian level under options 2a, 2b and 2c. Rather, an Australasian regime could be focused on where cross-border issues were most likely to arise. For

example, it might only be necessary to have an Australasian regime for misuse of market power, mergers, or possibly some other restrictive trade practices. This could reduce the cost of options 2a, 2b and 2c, relative to a system of identical laws for all competition and consumer protection matters (options 1a and 1b). Telecom New Zealand advocated an assessment of harmonisation options on a part-by-part basis:

> Rather than asking whether it is desirable to harmonise competition laws on a collective basis, we submit that each specific area of competition law be independently assessed. This approach allows for the harmonisation of specific areas of law yielding net benefits even where the aggregate benefits of full integration and/or partial harmonisation are outweighed by the costs. (sub. DR33, p. 28)

The NZCC claimed that a joint regime for matters that have an impact on both countries could be implemented at 'minimal cost', but acknowledged that many issues would still have to be addressed:

> … joint and common processes to deal with matters that have an impact on both jurisdictions … can be implemented at minimal cost, although legislative changes in both jurisdictions will be required. … in order for … benefits to be realised, some of the differences in the substantive legislation, processes and analytical frameworks would need to be reduced. (sub. 16, p. 2)

In contrast, Bell Gully commented that a joint regulatory regime for trans-Tasman cases would be difficult to implement because of major obstacles regarding appeals and the conflicting interests of the two countries:

> … for trans-Tasman cases there are likely to be a number of fundamental obstacles to joint decision making. These obstacles … and the additional cost to businesses and consumers … that these would impose, are likely to outweigh the benefits of establishing a single trans-Tasman competition authority.
>
> Those obstacles are:

- … insurmountable problems in relation to the rights of appeal … Access to domestic courts is a fundamental right for the consumers and businesses in each jurisdiction. We believe that retention of that fundamental right for both applicants and objectors will require the retention of full appeal rights in both countries giving rise to conflicts between the two jurisdictions. A single specialist appellate body sitting in either Australia or New Zealand will not resolve this issue. Particularly in the case of objectors, it will increase the cost of raising an objection if an objector is deprived of an opportunity to raise an objection before a domestic court or tribunal. Secondly, a specialist appellate body will not resolve the issue of subsequent appeals (and the need for a second level of appeal from a decision of the [New Zealand] Commerce Commission or the ACCC in our view cannot be doubted).
- A trans-Tasman merger or restrictive trade practice that requires authorisation is likely to require the joint decision maker to consider the conflicting interests of Australian and New Zealand consumers. This is because the merger or restrictive trade practice authorisation tests involve a country-specific assessment of the effect of the merger or

> restrictive trade practice on the long-term interests of consumers in each country. The gains or losses from any merger or restrictive trade practices are unlikely to be distributed evenly between both countries and, in fact, the joint decision maker may be faced with a situation where there are overall benefits from the merger or restrictive trade practice in one country and overall detriments arising in the other country. This requires a separate assessment of the transaction in each jurisdiction. (sub. 19, pp. 2–3)

The NZCC suggested that the net public benefit test under an Australasian regime for authorisations could calculate the net public benefit separately for each jurisdiction, thus enabling authorisation in one country but not the other:

> It would be important that any joint authorisation process would be required to calculate the net public benefits of any proposed behaviour or structural change separately for each jurisdiction as well as the aggregate benefits. A framework would be required to determine how the net [public] benefit analysis is applied for each economy and how the benefits and detriments in each jurisdiction are to be addressed in any decision. The laws would need to allow for authorisation in one country but not in the other if there were differences in the net [public] benefit analysis for each country. (sub. 16, p. 5)

Institutional arrangements for options 2a–2c

Common institutions for all matters (option 2a)

Under option 2a, Australia and New Zealand would establish a common set of institutions to implement the national regimes as well as the Australasian regime.

There is a risk that this approach would have the unintended consequence of leading to a one-size-fits-all approach to how national regimes are applied. For example, the use of common institutions could over time lead to one country's approaches to enforcement driving the way that the other country's laws are enforced, even where a different approach is justified for the latter country's different circumstances.

If different approaches were maintained for national regimes, then one of the key benefits of having common institutions — economies of scale and scope — would be smaller under partial integration than under full integration with identical laws (option 1a). This is because the common institutions could not apply identical laws to all transactions. Most transactions would continue to be subject to the distinct national laws of either country under partial integration because, as noted previously, there are few cases where an Australasian regime is likely to be required.

Common institutions only for the Australasian regime (options 2b and 2c)

The net benefit from partial integration might be higher if common institutions were only constituted for administration of the Australasian regime because:

- retaining national institutions to implement the national regimes increases the likelihood that those regimes would be tailored to each country's different circumstances
- any loss in institutional economies of scale, relative to having common institutions for all three regimes (Australian, New Zealand and Australasian), would probably be small, since common institutions could not apply identical laws to all transactions.

Two variations on this approach are considered — permanent institutions for trans-Tasman matters (option 2b) and trans-Tasman institutions that are formed only on a needs basis (option 2c).

Permanent institutions for Australasian matters (option 2b)

It is difficult to justify the establishment of separate permanent institutions for the few cases where an Australasian approach would be appropriate. The cost of creating a third competition and consumer protection bureaucracy would far outweigh the benefits. Therefore, option 2b is not favoured.

Australasian institutions formed on a needs basis (option 2c)

A better approach would be to form Australasian institutions on a needs basis when required. Such institutions could draw on the resources of existing national agencies, and so be relatively low cost.

It is anticipated that Australasian institutions would be formed only occasionally, given the small number of cases where a joint regulatory approach between Australia and New Zealand seems to be warranted.

To ensure that the interests of both countries are considered in Australasian cases, Australia and New Zealand might wish to reach an agreement on the extent to which each country would contribute to the staffing of joint institutions.

Telecom New Zealand noted that joint institutions would not need to meet often and could draw on the resources of existing national institutions:

> A new ad hoc joint body should be limited to determining those few matters principally involving truly trans-Tasman matters. Such a body would not need to meet often and could comprise members from both domestic regulators. (sub. 15, p. 17)

However, Telecom New Zealand also noted that difficult issues would still need to be resolved in establishing an Australasian regime, such as appeals mechanisms:

> There will be some initial costs associated with the adoption of a joint body. Considerable amendment would be required to the current competition laws of each jurisdiction. For a start, the functions, powers and procedures (such as applications and timetables for decisions) of the joint body would need to be adopted in both Acts.
>
> There are also difficult questions around the operation of a joint body … In particular, the right to appeal decisions from the joint regulator would give rise to special problems. For example, should it be restricted to a joint appellate body, whose decisions would be binding? (sub. 15, pp. 17–18)

Participants' views on partial integration (options 2a–2c)

In responding to the Commission's draft report, several participants considered that partial integration of the competition and consumer protection regimes (as described in options 2a–2c) was not warranted at this stage. They considered that the costs of implementing these options would not be outweighed by commensurate benefits (Business NZ, sub. DR38, p. 1; ACCC, sub. DR34, p. 2; Bell Gully, sub. DR29, p. 1; Institute of Chartered Accountants of New Zealand, sub. DR42, p. 2).

On the other hand, the NZCC considered:

> Option 2c (as examined by the Productivity Commission) is likely to generate net benefits.
>
> Whilst implementing option 2c would require agreement on many of the complex issues that arise in implementing a single regime, there would be benefits in working through these complex matters. (NZCC, sub. DR39, p. 11–12)

Commission's assessment of partial integration (options 2a–2c)

Partial integration — involving an Australasian regime of identical laws that applied only when a joint approach was considered appropriate — would be challenging to implement and maintain. For example, as with option 1, matters that would need resolution and agreement are complex and involve issues of sovereignty. Also, an unsatisfactory 'one-size-fits-all' approach would be applied to the different

circumstances of Australia and New Zealand. However, it would be less costly than full integration because:

- not all competition and consumer protection laws would need to be replicated at an Australasian level
- the two countries could maintain national regimes tailored to their different circumstances for the majority of cases where a joint approach between Australia and New Zealand is not warranted
- current Australian and New Zealand competition and consumer protection laws are already similar.

In addition, there might be fewer concerns about national sovereignty and the ability to tailor regimes to national circumstances if a joint regime was maintained only for a small number of matters (such as mergers). This could make it far easier for Australia and New Zealand to reach an agreement on the substantive law changes for partial integration than for full integration (options 1a and 1b).

A disadvantage of partial integration, relative to full integration, is that having three different systems of laws could be distortionary. In particular, it could:

- lead to wasteful efforts by parties to be regulated under the regime they perceive as being most favourable to their interests
- increase regulatory uncertainty in cases where it is unclear whether national or Australasian laws apply
- increase compliance costs for some businesses because they are subject to all three regimes (Australian, New Zealand, and Australasian) due to having activities that are wholly domestic in Australia and New Zealand, as well as trans-Tasman activities.

However, the distortion resulting from the introduction of a third system of laws would be small because:

- there is already a high degree of convergence of competition and consumer protection laws between Australia and New Zealand (chapter 2)
- few cases are likely to satisfy the screening test for an Australasian regime
- the cost of the distortion would be outweighed by the benefit of maintaining national regimes that can be tailored to each country's different circumstances.

The least costly institutional arrangements under partial integration would involve the formation of Australasian institutions on a needs basis. This would occur only occasionally, given the small number of cases likely to require an Australasian regime, and could draw on the resources of existing national institutions.

However, the problem remains that the benefits of greater cooperation, coordination and integration would be moderate. Even if the identical laws in an Australasian regime were limited to a small range of matters (such as mergers), it is questionable whether the cost of establishing and maintaining a distinct regime for selected transactions would be justified, given that few cases are likely to be subject to such a regime and the resulting benefits would probably be moderate. The Commission's assessment is that at present the cost of implementing partial integration is likely to outweigh the resulting benefits.

The option of partial integration could be reconsidered in the future in the light of substantial progress in other policy areas that are substantive to the creation of a single economic market (as outlined in chapter 2).

FINDING 5.2

Implementing and maintaining a joint competition and consumer protection regime (operating side-by-side with two separate national regimes) that would apply to certain cases having Australasian dimensions is unlikely to generate net benefits at this stage. Benefits are likely to be moderate and the costs large. In particular, it would require agreement on many of the complex issues that arise in implementing a single regime for the two countries (full integration).

6 Policy options (transitional integration)

Option 3, transitional integration, aims to achieve progress in fostering and enhancing a trans-Tasman business environment through deeper cooperation and coordination of the Australian and New Zealand competition and consumer protection regimes. It does this while retaining the separate national regimes of Australia and New Zealand and therefore does not incur the high costs of adopting single laws and single institutions inherent in the more substantive proposals of options 1 and 2.

Specifically, option 3 provides scope to:

- improve the effectiveness of the Australian and New Zealand regimes in protecting the competitive process and consumers in Australasian markets
- increase the depth and breadth of cooperation and coordination between the Australian and New Zealand policy makers and regulatory authorities
- improve the effectiveness of the two national regimes in dealing with specific Australasian cases
- reduce the compliance cost for business and consumers operating in both Australia and New Zealand.

The Commission has identified the following priority areas for action within this transitional integration framework:

- competition and consumer protection matters
  - enhanced policy dialogue (section 6.1)
  - improved information gathering, sharing and protection (section 6.2)
  - other cooperation and coordination initiatives (section 6.3)
- competition specific matters
  - process coordination (section 6.4)
  - cross country appointments (section 6.5).

These initiatives would not operate in isolation. That is, they have a self-reinforcing aspect to them. Enhanced policy dialogue and cross country appointments, for example, would likely provide momentum over time for greater harmonisation of the New Zealand and Australian regimes. Similarly, greater coordination of processes for regulatory approvals (for example, mergers) would increase convergence.

Section 6.6 provides an overall assessment of option 3.

6.1 Enhanced policy dialogue

Several participants drew attention to the need for a more formalised approach to policy coordination for pursuing harmonisation of competition and consumer protection policies for Australia and New Zealand:

> The Commission submits that greater communication between countries during the policy development stage would be a useful and necessary step to take to ensure that, as much as possible, competition and consumer protection legislation is aligned. … The government agencies charged with delivering advice on competition and consumer protection issues already have informal lines of communication established. We submit that these should be formalised so as to ensure regulatory convergence where appropriate. (NZCC, sub. DR39, p. 9)

> In [the Ministry of Consumer Affairs'] view, there is scope within option 3 of the report to explicitly recognise the importance of the role of administration bodies [policy agencies] in helping to ensure that the benefits of coordinated enforcement bodies are realised as legislation continues to evolve. Indeed, coordination and cooperation between administration bodies [policy agencies] has the potential to provide benefits independent of their effect on enforcement bodies, by way of sharing expertise on areas of mutual interest and challenging policy thinking at an early stage. (MCA, sub. DR37, p. 4)

Qantas submitted that a trans-Tasman working group could be established, consisting of 'in-house counsel, expert competition lawyers, economists and business representatives involved in industries with a trans-Tasman presence', to 'identify, and make recommendations for, practical options for change, with a view to the ultimate goal of a single competition regime'(sub. 23, p. 10).

Competition policy coordination

Currently there are several arrangements in place to facilitate cooperation and coordination on competition policy:

- The Australian Treasurer and the New Zealand Minister of Finance have an informal arrangement to meet annually to discuss a wide ranging policy agenda, with potential to consider competition policy (Costello and Cullen 2004).
- The 2000 Memorandum of Understanding on Coordination of Business Law (MOU) records the view of both Governments that further coordination of significant areas of business law can facilitate the goal of accelerating, deepening and widening the relationship that has developed through the growth of trans-Tasman trade. The MOU work program identifies as a candidate for coordination, *inter alia*, exploring the potential for greater consistency in trans-Tasman application and enforcement of competition law.
- Within this framework, there have been numerous ministerial statements, including announcements on specific initiatives. For example:
  - the Joint Statement by the Hon Lianne Dalziel (the then New Zealand Minister of Commerce) and the Hon Helen Coonan (the then Australian Minister for Revenue and Assistant Treasurer) signalling that competition policy officials will meet on a regular basis to discuss issues of common interest and will implement a work program (Dalziel and Coonan 2003).
  - the Joint Statement on Closer Economic Relations (CER) by the CER 20th Anniversary Ministerial Forum noting that Ministers have discussed a process for identifying immediate, medium-term and longer-term issues designed to lower business costs and increase the attractiveness of the trans-Tasman market for domestic and international business and investment.
- Such commitments have resulted in an endorsed work program looking at options for the greater coordination of competition policy and law.

Notwithstanding these existing arrangements, it is possible that the Australia–New Zealand relationship could be further enhanced in regard to the coordination of competition policy development between the two countries.

The Governments could consider formalising meetings at both the Ministerial and officials levels on competition policy matters. Such a step would provide a basis for continued regular dialogue between Australia and New Zealand on competition policy matters and the coordination of policy development. The focus would be on greater harmonisation of the two regimes, in the context of the long-term objective of a single economic market for Australia and New Zealand. In line with this focus, formalised meetings could ensure consideration of the other jurisdiction when undertaking unilateral policy changes, while maintaining jurisdictional independence.

The two Governments could formalise this enhanced policy dialogue through a joint policy statement.

The Commission envisages that the enhanced policy dialogue could tackle some of the issues identified in chapter 4. This strengthening of cooperation and coordination between the two Governments would be consistent with transition to a single economic market.

RECOMMENDATION 6.1

The Australian and New Zealand Governments should agree to hold regular formal discussions, at both the Ministerial and officials levels, on competition policy matters, with a particular focus on greater harmonisation in the context of the long-term objective of a single economic market for Australia and New Zealand.

Consumer protection policy coordination

Formal arrangements exist for consumer protection policy coordination in Australia and New Zealand through the Ministerial Council on Consumer Affairs (MCCA), supported by a Standing Committee of Officials of Consumer Affairs (SCOCA) (appendix E). The MCCA has been in place for 12 years and has a wide ranging set of objectives (appendix E, box E.1). MCCA is currently undertaking several reviews, including a review of the current product safety regulatory framework and a review of the Uniform Consumer Credit Code.

Nevertheless, as noted in chapter 4, the current arrangements are complicated by the fact that the Australian and State and Territory Governments all have policy responsibilities for consumer protection. The Commission, in its discussion draft of the Review of National Competition Policy Reforms (PC 2004) made a suggestion to address the complexity of the Australian arrangements. It proposed there be a national review of Australian consumer protection policy and administration that considers, *inter alia*:

> … the effectiveness of existing measures in protecting consumers in the more competitive market environment; mechanisms for coordinating policy development and application across jurisdictions and for avoiding regulatory duplication … (PC 2004, p. 218)

Such a review would provide an opportunity to reduce the complexity of the current arrangements in Australia. The issue of possible impediments to the long-term objective of a single economic market for Australia and New Zealand should be included in the review of consumer protection policy and its administration proposed by the Commission.

The issue of possible impediments to the long-term objective of a single economic market for Australia and New Zealand should be included in the review of consumer protection policy and its administration in Australia recommended by the Productivity Commission in its discussion draft Review of National Competition Policy Reforms.

6.2 Improved information gathering, exchange and protection

In chapter 4, it was found that trans-Tasman enforcement can be impeded by statutory restrictions which limit the extent to which the Australian Competition and Consumer Commission (ACCC) and New Zealand Commerce Commission (NZCC) can gather and share information. Information exchange between the Australian and New Zealand regulatory authorities is also impeded by the inability to safely protect confidential information against unauthorised disclosure once that information is shared.

The Commission proposed a number of measures to address these limitations in its draft report. There was broad endorsement from interested parties for these proposals (for example, Telecom New Zealand, sub. DR33, p. 33; ACCC, sub. DR34, p. 5; NZCC, sub. DR39, p. 12; New Zealand Law Society, sub. DR43, p.2; Bell Gully, sub. DR29, p. 1; Telstra Corporation and Telstra Clear Ltd, sub. DR35, pp. 4–5).

The current cross-jurisdiction impediments to enforcement cooperation between the ACCC and the NZCC could be addressed as follows.

- For information gathering:
  - providing a local regulator with the powers to obtain information from a person in another jurisdiction directly, or
  - providing a local regulator with the powers to act on a request from a foreign regulator for investigative assistance in gathering information.
- For information sharing:
  - providing power for a local regulator to share information that it would ordinarily obtain in the course of its own business through its information requisitioning powers to a foreign regulator upon request.
- For confidentiality:

– building in safeguards to protect against the unauthorised use and disclosure of confidential or protected information.

Information gathering

There are different information requisitioning approaches. Box 6.1 sets out two models with examples. The key difference between model 1 and model 2 is that model 1 seeks to achieve its objective by expanding the enforcement powers and reach of the local regulator who can directly requisition information from a person in another jurisdiction. In contrast, under model 2, the foreign regulator makes a request to a local regulator to use their own powers, or powers assigned to them, to requisition information on the foreign regulator's behalf, and the local regulator accepts or rejects such a request.

Expanded enforcement reach

One approach to information requisitioning from a person or business in another jurisdiction is an expanded version of model 1 (box 6.1). The current s. 155A of the *Trade Practices Act 1974* (Cwlth) (TPA) and s. 98H of the *Commerce Act 1986* (NZ) could therefore be extended to capture conduct beyond misuse of trans-Tasman market power to all other conduct under part IV of the TPA and equivalent provisions in the Commerce Act. The ACCC (sub. 13, p. 20) was in favour of this approach to gathering information. This would mean the ACCC (NZCC) would be permitted to issue a notice to a person in New Zealand (Australia) requiring that person to provide information or documents.

To date, the information gathering provisions of the current s. 155A (TPA) and s. 98H (Commerce Act) have not been applied. This raises a number of uncertainties as to how the extension of these provisions would operate in practice and the potential benefits of such an extension.

An expanded model 1 also raises a number of important governance issues that would need to be resolved. These derive from the capacity of a local regulator to have powers to reach across and require information directly from a person in another jurisdiction. For example, how would the respective trans-Tasman regulators be held accountable for the exercise of their information gathering powers? Who would they be accountable to? What right of appeal would there be for decisions by the ACCC and NZCC in exercising their information gathering powers? What would be the appropriate forum for any such appeal? How would judicial review procedures operate?

Box 6.1 **Examples of information gathering models**

Model 1

Section 155A of the Trade Practices Act 1974 (Cwlth) and s. 98H of the Commerce Act 1986 (NZ)

Section 46A of the TPA prohibits the 'misuse of market power in a trans-Tasman market'. The Commerce Act contains a mirror provision (s. 36A). To facilitate information gathering relating to these provisions, the TPA (s. 155A) and the Commerce Act (s. 98H) provide expanded information gathering powers. These provisions essentially allow a local regulator to reach across and require information directly from a person in another jurisdiction.

Model 2

New Zealand Securities Act 1978 (NZ) (NZS Act)

A foreign regulator can request the New Zealand Securities Commission (NZSC) to inquire into any matter related to the functions of the foreign regulator (s. 69F(1)). The NZSC can use its existing powers of inspection or powers to receive evidence and transmit the information to the foreign regulator (s. 69F(2)(3)). The NZSC can comply with a request only if it is satisfied of a number of matters (s. 69G), such as the cost of complying with a request not being excessive and whether the NZSC is likely to be able to obtain the requested information. Any compliance with an overseas request for information must also have approval from the relevant Minister.

Australian Mutual Assistance in Business Regulation Act 1992 (Cwlth) (MABRA)

The MABRA provides a mechanism by which assistance can be provided to a foreign regulator upon request. A foreign regulator can make a request under the MABRA to obtain information, documents, or evidence for the purposes of the administration or enforcement of a business law (s. 6(1)). The overseas request is made to the Australian regulatory agency who then makes a recommendation to the Attorney-General. The Attorney-General may authorise the obtaining of the information or refuse the request. Notably, the information gathering powers prescribed by the MABRA are independent from the receiving agency's statutory powers, once a request is received.

The above issues are significant and would require agreement between Australia and New Zealand. As such, an approach based on expanded enforcement reach would be relatively costly to implement and operate compared with alternatives. There is also an element of uncertainty as to how an expanded enforcement reach approach would work in practice and whether it could effectively deal with the information gathering constraints identified in chapter 4.

Investigative assistance

This approach to information gathering involves the obtaining and transmitting of information by a local regulator at the request of a foreign regulator (model 2, box 6.1). Accordingly, such assistance measures contain a number of desirable design features.

First, the local regulator has discretion and can choose not to comply with a request for assistance from a foreign regulator if determined inappropriate. Relevant considerations could include an assessment as to whether:

- compliance with the request would substantially affect the performance of the local regulator's functions
- the local regulator would not be able to obtain the requested information
- the costs to the local regulator of complying with the request would be excessive
- the foreign regulator would not comply with a similar request made by the local regulator and whether any arrangements with the foreign regulator to that effect exist
- agreeing to the request would not be in the national interest and be consistent with international law and comity.

Second, the local regulator uses their own information gathering powers, or powers assigned to them, to obtain the requested information. The foreign regulator therefore does not reach across and obtain information directly from persons in another jurisdiction. This leaves intact the accountability arrangements for each regulatory authority and the procedural safeguards which govern the exercise of investigative powers.

Third, conditions may be imposed relating to maintaining confidentiality of the information obtained and transmitted to a foreign (requesting) regulator. For example:

- maintaining the confidentiality of any information provided
- the storing of, use of, or access to any information provided.

Fourth, a degree of ministerial oversight would be provided by a requirement that ministerial approval be given before the regulator complies with any request from a foreign regulator.

The Commission favours an investigative assistance approach which contains these design features. The ability to voluntarily 'opt out' of a request for assistance from a foreign regulator, on a case-by-case basis, introduces an element of flexibility into

cooperative arrangements and therefore strengthens incentives on regulatory authorities to engage in constructive cooperation. Ministerial oversight would strengthen the accountability arrangements currently applying to New Zealand and Australian authorities in exercising their regulatory powers as would the domestic procedural safeguards that currently apply to both jurisdictions.

Model 2, box 6.1 identifies two examples of investigative assistance. These examples differ in one key respect. While the *New Zealand Securities Act 1978* (NZ) (NZS Act) relies on the New Zealand Securities Commission (the receiving agency) using their existing powers to gather information in response to a request from a foreign regulator, the *Mutual Assistance in Business Regulation Act 1992* (Cwlth) (MABRA) assigns separate powers to the receiving agency to respond to a request, in addition to its own powers. The Commission prefers the NZS Act model as it could be implemented at relatively low cost without the need for a new accountability and governance arrangement to support it.

An approach to investigative assistance based on the NZS Act (model 2, box 6.1) would also ease potential concerns often directed at measures which add to the coercive powers of regulators. The local regulator, in responding to a request for assistance from a foreign regulator, would instead use their existing powers to requisition information from persons in their jurisdiction. In any case, the Commission considers there to be no compelling reason why the ACCC and NZCC should have less statutory capacity to cooperate with overseas counterparts, in carrying out their role and function, than other regulatory authorities.

The Commission therefore favours an approach to information gathering from overseas persons (Australia–New Zealand) which is based on investigative assistance. In particular, the investigative assistance measures contained in the NZS Act (model 2, box 6.1). This approach to investigative assistance would also be relatively easy to implement and require less legislative amendment compared with expanding enforcement reach.

RECOMMENDATION 6.3

The Trade Practices Act 1974 (Cwlth) and the Commerce Act 1986 (NZ) should be amended to enable the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to use their information gathering powers for the purposes of acting on a request for investigative assistance from each other.

Exchange of Information

Broad scope for information exchange between regulatory agencies is necessary for the effective working of the trans-Tasman cooperation and coordination arrangements. However, as noted in chapter 4, the ACCC and NZCC are restricted in their ability to share information that was obtained through the use of their information requisitioning powers in respect to carrying out their functions.

One model identified by the ACCC (sub. 13, p. 19) to address this impediment to dealing with trans-Tasman matters is based on the information exchange provisions contained in the *Australian Securities and Investments Commission Act 2001* (Cwlth) (ASIC Act). These provisions allow the Australian Securities and Investments Commission (ASIC) to disclose or share information that has been obtained through its formal investigation powers to an agency of a foreign government in order to assist that foreign agency in carrying out its legitimate functions (s. 127(4)(c)). The Commission understands that this model has worked well to date.

The ASIC Act model imposes an obligation on ASIC to take all reasonable measures to protect the unauthorised use and disclosure of confidential or protected information given to it in connection with the exercise of its duties (s. 127(1)). The Commission considers this to be an important element of any exchange arrangement and that without such assurances confidential information would not be shared. The requesting authority must be able to confirm that confidentiality of information will be maintained.

The ASIC Act model contains a number of design elements that the Commission considers desirable. For example, ASIC:

- has the capacity to opt out of any request for information. There is no obligation on ASIC to share any information which it holds and discretion resides with the Chairperson of ASIC as to whether or not to approve any request to share information held by ASIC
- may not disclose information unless specific minimum requirements are satisfied (s. 127(4))
- is able to impose conditions to be complied with as part of any disclosure of information (s. 127(4A)).

The information exchange model contained in the ASIC Act would be relatively easy to implement in the trans-Tasman competition and consumer protection context. Low level legislative amendment would be necessary to the TPA and Commerce Act to permit the ACCC and NZCC to share information that has been obtained through their information gathering powers.

RECOMMENDATION 6.4

The Trade Practices Act 1974 (Cwlth) and the Commerce Act 1986 (NZ) should be amended to allow the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to exchange information that has been obtained through their information gathering powers.

RECOMMENDATION 6.5

For recommendations 6.3 and 6.4, safeguards should be built into the Trade Practices Act 1974 (Cwlth) and the Commerce Act 1986 (NZ) to ensure against the unauthorised use and disclosure of confidential or protected information.

6.3 Other cooperation and coordination initiatives

There is currently significant cooperation and coordination between competition and consumer protection regulators in Australia and New Zealand. The NZCC noted that it currently cooperates with the ACCC on a number of levels, including:

- sharing information on enforcement actions taken or decisions made
- using investigators from both agencies to gather publicly available or volunteered information on behalf of the other (where this does not require an exercise of powers)
- discussing process and timing in common cases being considered
- where appropriate, discussing opportunities for developing joint guidelines
- sharing information on strategic priorities, issue and policies, management systems, litigation outcomes, research, general experience/lessons learnt
- participating in Australian regulatory/enforcement fora, including the Regulators Forum, Standing Committee of Officials of Consumer Affairs (SCOCA), Fair Trading Organisations Advisory Committee (FTOAC), and Consumer Protection Advisory Committee (CPAC). (sub. 16, p. 29)

Although acknowledging current cooperative efforts, both the ACCC and the NZCC have expressed support for initiatives to enhance their cooperation and coordination endeavours. The ACCC has stated that it supports efforts to enhance cooperation with the NZCC in order:

> … to build on our experiences with matters involving trans-Tasman elements by further developing our cooperation arrangements with the NZCC in relation to information sharing, coordinating deadlines and submissions, and holding regular meetings to discuss particular enforcement matters to the extent possible under our respective legislations. (sub. DR34, p. 9)

There would seem to be scope for further cooperation and coordination between the New Zealand and Australian authorities which could be progressed on an ongoing, informal basis and would be relatively easy to implement. The areas for greater cooperation and coordination might include:

- development of joint strategies for enforcement
- common strategic priority setting
- developing compliance strategies, especially those that target problematic or noncomplying businesses
- opportunities for joint studies and research
- sharing the benefits of research across both agencies
- enhanced cooperation at the staff level on enforcement and compliance activities (NZCC, sub. 16, p. 29; ACCC, sub. 13, p. 22).

Discretion to implement this improved cooperation would reside with the ACCC and NZCC. However, to the extent that statutory impediments arise, consideration of legislative changes could be part of the enhanced policy dialogue discussed in section 6.1 above.

Joint investigations

Several participants highlighted to the Commission the growing international dimension to competition and consumer protection issues. Increasingly, regulatory authorities are having to conduct cross-border investigations and cooperate with their overseas counterparts to counter anticompetitive behaviour and protect consumers. As the Australian Department of Foreign Affairs and Trade observed:

> Competition law enforcement is taking on more and more of an international dimension. Globalisation means that a higher percentage of competition cases have significant international components and to the extent that trade and investment liberalisation reduces entry barriers, it could provide businesses with greater incentives to engage in anti-competitive conduct and mergers.
>
> Likewise, as a consequence of advances in technology, competition and consumer protection regimes operate in a rapidly changing global marketplace. While consumers have increased access to information and goods, unconscionable operators have greater potential to propagate scams, frauds and other detrimental activities. Legislation is a cornerstone of the regulatory framework to achieve this and consumers in Australia are protected by legislation and common law remedies for unconscionable or deceptive practices. Commonwealth, State and Territory governments also engage in licensing and registration; compliance monitoring; provision of information and community education; and dispute resolution. (sub 25, pp. 2–3)

There might therefore be potential benefits, in terms of increasing capacity and cost savings, in allowing the ACCC and NZCC to carry out joint investigations:

> [the] … ACCC believes it would … enhance the efficiency and effectiveness of investigations if it were able to conduct joint investigations with the Commerce Commission in appropriate circumstances. (sub 13, p. 21)

More specifically:

> [joint investigations …] would enable the ACCC and the Commerce Commission to share investigations, utilising resources in both jurisdictions while still retaining independent ability to determine whether to take action within each jurisdiction. (sub. 13, p. 21)

Joint investigations would be assisted through staff exchanges, joint research into emerging competition and consumer protection issues and through the sharing of technical knowledge and experience. Joint investigations would also be assisted by the joint development of guidelines.

Joint development of guidelines

There is also scope for coordination of administrative requirements by the ACCC and NZCC, such as progress toward the harmonisation of guidelines and approaches in determining public benefit.

As noted in chapter 4, there are differences in the guidelines used by the ACCC and NZCC to determine, among other things, when a merger will be opposed and how public benefits will be assessed. It has been suggested by some participants that harmonisation, where appropriate, of these guidelines might create greater certainty for businesses and improve the efficacy of the two regimes in handling trans-Tasman matters:

> Both the ACCC and the NZCC have guidelines designed to assist the business community in understanding how the regulator will deal with mergers, and the relevant matters they will take into account. The Commissions should agree on a common set of guidelines, to ensure that the two regulators will take, and will be seen to be taking, the same approach in dealing with mergers. (Australia and New Zealand Business Council, sub. DR41, pp. 2–3)

Other participants have cautioned against the harmonisation of guidelines and polices at the expense of taking local market conditions into account:

> Each regulator has carefully considered the application of the substantial lessening of competition test in the context of the domestic markets to determine the most appropriate safe harbour thresholds for those markets. The ability to respond to localised market factors should not be hindered in a harmonised world, as this could

result in an increase costs for domestic businesses. (Telecom New Zealand, sub. 15, p. 12)

In harmonising guidelines, it is important that this be focused on achieving 'world best practices', rather than harmonising for the sake of harmonisation (for example, by moving to one or the other national approach).

RECOMMENDATION 6.6

The Australian Competition and Consumer Commission and the New Zealand Commerce Commission should enhance further their cooperation and coordination, including in relation to operational, enforcement and research activities. In particular, the agencies should endeavour, where beneficial, to conduct joint investigations and harmonise their guidelines and work practices.

6.4 Process coordination

In cases where regulatory approval is sought in both Australia and New Zealand, such as for a merger, acquisition, or restrictive trade practice, the national competition regulators undertake separate regulatory approval processes. In chapter 4, it was found that differences in the approval mechanisms, timelines, and decision making may, for certain trans-Tasman cases, have the potential to increase compliance costs for applicants and administration costs for government.

As noted in chapter 4, there are two types of regulatory approval procedures in Australia and New Zealand for mergers and acquisitions. Generally, a business undertaking a merger or acquisition in Australia and New Zealand can request a clearance informally from the ACCC and formally from the NZCC, if the merger or acquisition is unlikely to substantially lessen competition. Similarly, a business contemplating a merger or acquisition can request an authorisation if the merger or acquisition is likely to substantially lessen competition, but will result in the public benefit outweighing the associated detriments. A business can also obtain an authorisation for a restrictive trade practice (except misuse of market power) from the ACCC and the NZCC if the benefits outweigh the associated detriments.

The issue of possible approaches to better aligning approval processes for transactions requiring approval in both Australia and New Zealand was raised by interested parties in submissions and at roundtable discussions in New Zealand and Australia. The NZCC considered there would be significant benefits from establishing a joint process for certain matters:

> The [NZCC] believes significant strategic advantages can be achieved by adopting an option that ultimately aims to establish a joint process …

> The [NZCC] submits that the two-stage processes set out in its initial submission, whereby both agencies' guidelines and processes are aligned before a joint process is established, would lead to substantial benefits to both countries. A joint process would minimise any duplication costs to parties trying to comply with the laws in both countries. (sub. DR39, pp. 5–6)

Other interested parties also noted potential benefits from aligning the Australian and New Zealand approval processes:

> [… a single regulator] will mean one authorisation process in relation to trans-Tasman conduct or mergers. As a result, parties will be able to significantly reduce duplication in compliance and legal costs, which are often attributable to issues of form rather than substance. It may also lead to the facilitation of trans-Tasman business between companies that would otherwise decide against such investment given the current regulatory inefficiencies. (Qantas Airways Limited, sub. 23, p. 10)

> Where a merger has trans-Tasman implications, a request should be able to be made to the two Commissions in a single application … [The] important point would be that only a single application would be required …
>
> The Commissions would be required to act in a coordinated way while retaining their independence. A joint team should be assigned, and where meetings with the regulator are required, there should be a combined meeting of the two regulators, so that submissions need only be made once. In this way costs for both business and the regulator would be reduced, and in addition Commission staff would get the benefit of understanding the issues in the context of the other market, as well as the impact in their domestic market. (Australia New Zealand Business Council, sub. DR41, p. 5)

> Although it has not had a negative impact on us to date, Fletcher Building believes that an alignment of the merger/clearance process would be well received … [Our] view is that the alignment of such processes has a potential advantage when considering the acquisition or divestment of trans-Tasman businesses as it provides greater certainty around timing, and security of decision. (Fletcher Building Limited, sub. 20, p. 3)

> The benefits [of a joint process for clearances and/or authorisations] … would include the ability to apply a structured investigatory approach without duplication, sharing of resources and, to the extent appropriate, a joint approach to issues which will arise in the course of each regulator making its own independent determination. (New Zealand Law Society, sub. DR43, p. 2)

On the other hand, the ACCC considered that there would not be a net benefit in a formalised joint approach to approval processes for trans-Tasman matters:

> [It] is not readily apparent that the potential benefits associated with [a joint process for merger or authorisations] are significant enough to outweigh the potential costs, or in fact that the result would differ significantly from the current arrangements. (sub. DR34, p. 6)

> [a joint approval process] … largely formalises what can be achieved administratively as a result of the unique and close cooperation that already exists between regulators of both countries [Australia-New Zealand]. (sub. DR34, p. 8)

The ACCC went on to emphasise the risk of moving to a more integrated institutional approach given the current level of market activity between Australia and New Zealand:

> Introducing a 'half way' model for a very small number of cases in circumstances where it is unlikely to work well for either business or the regulators, could in fact discourage future initiatives. (sub. DR34, p. 9)

Joint Australian New Zealand approval process — benefits and costs

Broadly, the New Zealand and Australian approval processes for mergers and acquisitions, and restrictive trade practices comprise the following parts:

- the application form and filing requirements
- information requests
- timelines
- hearing or conference process
- decision announcements.

Importantly, the approval process differs for a *clearance* procedure compared with an *authorisation* procedure. The former is relatively quick, low cost, uncontroversial (in that there is no attempt to justify anticompetitive detriments in terms of wider public benefits), streamlined, and does not require a hearing or conference process (although s. 69B of the Commerce Act permits one, should the regulator choose). Notably, the clearance procedure is a formal process in New Zealand and informal process in Australia (see chapter 4).

The volume of applications for a clearance of a merger or acquisition requiring approval in both Australia and New Zealand is substantially more than applications for an authorisation. As noted in chapter 4, for the period 1997–2004, the ACCC and NZCC made 25 decisions on applications seeking clearance in the two countries. This was out of a total of 1066 clearance approvals determined by both agencies (12 per cent of total determined by the NZCC and 3 per cent of total determined by the ACCC). For authorisations over the same period there was only one case requiring approval in both Australia and New Zealand.

Expected benefits

A joint approval process could reduce the compliance costs for those parties requiring regulatory approval in both Australia and New Zealand. Savings could accrue from a reduction in the duplication of effort, such as the need to prepare and

submit only one application, respond to only a single information request, and prepare submissions and experts evidence only once. Joint announcements of key decisions might also increase the level of certainty for applicants. At the same time, a coordinated single approval process might increase the speed of regulatory decision making, thereby providing greater certainty for applicants.

It could be expected that a joint approval procedure would also increase communication between Australian and New Zealand agencies. There might also be economies of scale and scope for both the ACCC and NZCC. That is, there is the possibility that the regulatory authorities when coordinating could produce decisions at a lower cost than if they were producing their decisions separately. Cost savings might accrue in preparing witness statements, conducting formal interviews and obtaining information.

The NZCC noted that a joint approval process would spur communication in the enforcement context:

> [… the NZCC] believes that a joint process would be beneficial in terms of pursuing further convergence in enforcement matters because it requires regulatory agencies on both sides of the Tasman to increase communication. (NZCC, sub. DR39, p. 4)

The NZCC also predicts that such communication would reduce compliance cost to all businesses, but particularly small and medium sized entities (NZCC, sub. DR39, p. 5).

Potential costs

Any joint procedure for approvals would not be costless. The greater the complexity and formality of any procedure, the greater the cost and likelihood that potential benefits will diminish, particularly when such a procedure is legislated for. The ACCC identified a number of potential costs and risks associated with a formal joint approval process — a single application that is placed before both regulators who then assess that application by reference to common guidelines, common timetable, and common hearing (sub. DR34, pp. 6–8):

- legislative and regulatory:
  - legislation to allow two Commissions to sit jointly to consider matters
  - legislation to align review and decision timetables between the ACCC and NZCC
  - legislation to enable a single or joint application
- judicial:

– regulator decision relating to rejecting or forcing a single track application challengeable and reviewable by a court or tribunal

– increased risk that regulatory decisions are subject to review

- compliance costs:

  – costs imposed on interested third parties wishing to participate and attend hearing/conference in another country

- administrative costs:

  – significantly higher administrative costs and practical difficulties; including, coordination between investigating teams, developing coordinated requests for information from applying parties and third parties, coordinating deadlines

  – breadth of common investigation and market analysis means aspect of review process irrelevant to one agency

  – common conference/hearing imposes costs, that is, costs to one agency (Commissioners, staff, consultants) having to attend conference/hearing in the other country

  – costs associated with ACCC conducting a hearing pursuant to the New Zealand format (for example, pre-decision conferences)

- timeliness:

  – issues relevant in each jurisdiction might be different, more complex, or require different information potentially creating tensions and delays in establishing deadlines and resulting in one regulator being satisfied and able to move to next stage of the investigation and review while the other is not

  – potentially time consuming step at the beginning of approval process regulator decisions in rejecting or forcing a single track approval process challenged and reviewed.

The ACCC considers that for these reasons, a formal joint approval process:

> … would not be sufficiently robust to work in practice, nor would it deliver significant benefits to business over and above those which would be derived by previously recommended [in the Productivity Commission's Draft Report] increased cooperation. (sub. DR34, p. 8)

Australian New Zealand approval processes — 'single track' approach

Two different approaches could be adopted to better align approval processes for those transactions requiring approval in both Australia and New Zealand. One approach would involve a joint procedure that would be prescribed in the respective

New Zealand and Australian competition policy statutes. This would be in addition to the current statutory arrangements for processes involving a single jurisdiction. A second, less formal, approach would involve increased flexibility for the NZCC and ACCC to coordinate, on a case-by-case basis, on all aspects of the approval process (such as application form and filing requirements, approval timelines, decision announcements).

Under both approaches, decisions would be made separately by the ACCC and NZCC, according to the respective Australian and New Zealand laws, and appeals to decisions would remain in the Australian and New Zealand jurisdictions.

Any move to legislate for a joint procedure for those transactions requiring approval in both Australia and New Zealand would have to demonstrate an incremental net benefit to the current arrangements. The expected gains would also have to take account of the potential frequency of trans-Tasman clearance and authorisations applications. Given the potential costs and benefits of a formal joint procedure for trans-Tasman approvals — appended to the current statutory arrangements — it is not clear that such a scheme would deliver an incremental net benefit to the current arrangements.

A less formal approach is therefore endorsed. At the request of businesses seeking approval in both Australia and New Zealand, the ACCC and NZCC could, on a case-by-case basis, adopt a ‘single track’ approach for those applications. This approach could be operationalised through the ACCC and NZCC agreeing on a coordination protocol that would outline procedures for the coordination of application forms and requirements, guidelines, timelines for approval process, and the collection and evaluation of evidence.

Currently, the Commerce Act and the TPA provide the NZCC and ACCC with a reasonable level of flexibility to implement ‘single track’ procedures. However, it is likely that impediments for the ‘single track’ process, some of which will be statutory requirements, will arise. In those circumstances the procedures would need to default to the established dual-track process (albeit, still with coordination between the ACCC and the NZCC). In those circumstances, the statutory impediments could be referred to the two Governments for consideration under the proposed enhanced policy dialogue (recommendation 6.1) with a view to removing them, in the longer term.

A key theme of a ‘single track’ approach to interagency cooperation would be a heightened level of communication between the ACCC and NZCC when cases arise. It would also be underpinned by active consultation with applicants and flexibility in coordination, where this makes sense and benefits would be expected.

There would seem to be greater capacity to simultaneously coordinate key aspects of the Australian New Zealand *clearance* processes within the current arrangements, given that:

- the clearance procedures in New Zealand and Australia are relatively simple and straightforward (for example, do not require a hearing)
- there is a reasonable level of flexibility currently available to the NZCC and the ACCC, with many of the timing and review formalities being largely administrative.

The Commission considers that it is in the area of clearances approvals where potential benefits are more likely to be achieved, given that this is where most of the trans-Tasman approval activity occurs.

The International Competition Network, of which the ACCC and the NZCC are members, has developed a set of principles for guiding merger review — Recommended Practices For Merger Notification Procedures (ICN 2002). The International Competition Network recommends that, where competition agencies 'engage in coordinated merger reviews on a recurring basis, they should develop formal agreement, memorandum of understanding, or other protocols for coordinating merger reviews' (ICN 2002, p. 29).

An interagency protocol for the simultaneous review of merger applications has, for example, been formulated by the United States and the European Union competition agencies. The US-EU statement of Best Practice on Cooperation in Merger Investigations (US-EU Merger Working Party 2002) set out the conditions under which trans-Atlantic inter agency cooperation in merger investigations should be conducted, while at the same time confirming and building upon current good practice. Specifically, the statement of best practices aims to enhance cooperation between agencies, minimise the risk of divergent outcomes, and reduce burdens on parties participating in merger investigations.

An important aspect of the US-EU framework for inter-agency cooperation is that the respective US and EU agencies reserve full discretion in the implementation of the best practices. Further, while many of the best practices between the US and EU have been in place informally for a long time, it was considered that the formal adoption of such best practices would increase transparency and provide important guidance to all participants in the merger process (Federal Trade Commission 2002). Box 6.2 details the key features of the US-EU statement of best practice on cooperation in merger investigations.

Box 6.2 US-EU Merger Working Group — Best Practice on Cooperation in Merger Investigations

Objectives — These best practices are designed to further enhance cooperation in merger review between the US and EU. They are intended to promote fully informed decision making on the part of both sides' authorities, to minimise the risk of divergent outcomes on both sides of the Atlantic, to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce the burdens on merging parties and third parties, and to increase the overall transparency of the merger review process.

Coordination of timing — Cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel. In appropriate cases the reviewing agencies should offer the merging parties an opportunity to confer with relevant US and EU staffs jointly to discuss timing issues. Such a conference will be most beneficial if held as soon as feasible after the transaction has been announced, and before filing in either jurisdiction. Topics addressed might include the appropriate times to file in the US and EU, suggested timeframes for submission of documents or other information and, where appropriate, the prospect of timing agreement.

Collection and evaluation of evidence — In significant matters under review by both jurisdictions, the agencies should seek to coordinate with one another throughout the course of their investigations. This might include sharing publicly available information and, consistent with their confidentiality obligations, discussing tentative market definitions, assessment of competitive effects, efficiencies, theories of competitive harm, economic theories, and the empirical evidence needed to test those theories. Views on necessary remedial measures, and similar past investigations and cases, might also be discussed. The reviewing agencies should, where appropriate and feasible, also encourage the merging parties to allow joint US–EU agency interviews with party executives and joint conferences with parties.

Communication between the reviewing agencies — At the start of any investigation in which it appears that substantial cooperation between the US and EU might be beneficial, each agency should designate a contact person who will be responsible for: setting up a schedule of conferences between the relevant investigative staff of each agency; discussing with the merging parties the possibility of coordinating investigation timetables; and coordinating information gathering or discovery efforts, including seeking waivers from merging parties and from third parties. Officials from the US and EU authorities might attend and observe specific key events in the other's proceedings prior to a review proceeding.

Remedies and settlements — A remedy accepted in one jurisdiction might have an impact on the other. To the extent consistent with their respective law responsibilities, the reviewing agencies should strive to ensure that the remedies they accept do not impose inconsistent obligations upon merging parties.

Source: US-EU Merger Working Group 2002.

The Commission considers that the development of a 'single track' process which is underpinned by an inter-agency coordination protocol for Australasian approvals, along similar lines to the US-EU best practice guidelines, would be relatively easy to formulate and implement.

RECOMMENDATION 6.7

The Australian and New Zealand Governments should agree that a 'single track' procedure be made available to those businesses requiring approval in both countries. A coordination protocol should be agreed between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to operationalise the 'single track' procedures.

6.5 Cross country appointments

A further way to build on the current level of cooperation and coordination between Australian and New Zealand regulatory authorities would be to have cross country appointments to the ACCC and NZCC. The ACCC could for example have a NZCC Commissioner representative and vice versa. The ACCC saw benefits from the possibility of *ex officio* appointments between the NZCC and ACCC (ACCC, sub. 13, p. 22). The NZCC noted that currently there is no legislative barrier to ACCC Commissioners being appointed as associate members of the NZCC (Rebstock 2004).

Cross country appointments can facilitate the cross fertilisation of views and approaches in applying competition and consumer protection laws and might lead to greater consistency between jurisdictions.

There are several ways to design and implement a cross country appointment scheme. Some models result in members having an active part in the decision making and participating fully in all aspects of any determination. Other models involve members operating in an observing and advising role only, without active participation in the decision making.

Regarding cross appointments of Commissioners to the ACCC and NZCC, the New Zealand Business Roundtable cautioned that 'before any steps are taken along this path, there should be further consultation on the basis of a specific proposal' (sub. DR30, p. 2). It noted several issues that would require consideration, including:

- the potential for, and the consequences of, a loss of regulatory independence and regulatory competition between the ACCC and NZCC

- the extent to which cross fertilisation can be facilitated without the need to confer decision making powers upon cross appointees.

There are several different appointment arrangements that could form a cross appointment scheme between the Australian and New Zealand competition authorities:

- One example is cross appointments of members on the Australian and New Zealand Takeovers Panels. This reciprocal arrangement provides for a member of the New Zealand Takeovers Panel to sit on the Australian Takeovers Panel and vice versa. These trans-Tasman appointments were seen as a 'means of cementing the relationship of closer cooperation in the area of takeovers law' (Swain 2001b). In its 2001–02 Annual Report, the Australian Takeovers Panel noted cross appointment:

  > … reflects an agreement between the relevant Ministers in Australia and New Zealand to bring further harmonisation and understanding in securities and markets regulation between the two countries. (Australian Takeovers Panel 2002, p. 3)

- The ACCC has associate and *ex officio* Commissioners. This model could form the basis for appointing a New Zealand Commissioner to the ACCC and vice versa. The ACCC model is a useful example because the existing *ex officio* members (who hold office on the ACCC because they head up State regulatory agencies) are members of committees that streamline decision making that occurs at the 'Commission level'. That is, decision making at a 'Commission level' is informed by committees comprising *ex officio* and other appointees with expertise on particular matters (ACCC 2003c).

- Australian experts have been appointed as lay members of New Zealand's High Court. The appointment of lay members is provided for under the Commerce Act, whilst the decision to appoint Australian experts was part of the work program approved by Ministers in August 2003. A lay member of the Court has an adjudication role, to the extent that their decision contributes to forming a majority decision.[1]

- There are also examples of merits review arrangements that provide for the reviewing body to have representation from both Australia and New Zealand. The Australian Administrative Appeals Tribunal and the Trans-Tasman Occupations Tribunal of New Zealand provide for members of the Tribunal, hearing merits review of certain decisions in relation to the Trans-Tasman Mutual Recognition Arrangement (TTMRA), to be drawn from a pool of people

[1] Note, however, that the adjudication role of lay members is qualified by s. 77(10) requiring that the majority must include a Judge (or the majority of Judges) in order for its decision to be that of the Court. Further, if members of the Court are equally divided in opinion, the decision of the Judge (or the majority of Judges) is the decision of the Court (s. 77(11)).

consisting of both Australians and New Zealanders. It is noted in the TTMRA that the rationale for this arrangement is to promote consistency between decisions in Australia and New Zealand (TTMRA, para. 5.7.4). Similar schemes are being suggested for merits review under the proposed trans-Tasman joint therapeutic agency (JTA Project 2003).

The Commission considers that cross country appointments would be relatively easy to implement. Some legislative change might be required, for example, to address issues such as access to confidential information of the other agency, immunity, liability and remuneration. However, such change could be accommodated within the existing legislative framework. The design and implementation of cross country appointments could be part of the enhanced policy dialogue for Ministers and officials (recommendation 6.1).

RECOMMENDATION 6.8

The Governments of Australia and New Zealand should make cross country appointments to the Australian Competition and Consumer Commission and the New Zealand Commerce Commission. This would be at the Commissioner level, as well as others (such as exchanging experts).

6.6 Overall assessment

The transitional integration option (that is, option 3) would comprise a package of measures that, in aggregate, would deepen the level of coordination and integration of the New Zealand and Australian regimes and, as such, would provide a discrete step in moving toward the long-term goal of establishing a single economic market. This transitional framework would also provide a basis for possibly moving to increased integration (to option 2 or option 1) in the future, should the benefits of such a move outweigh the costs. This might occur as the Australasian business environment further integrates and the broader policy environment evolves.

The package of initiatives contained in option 3 would improve the effectiveness and operation of the Australian and New Zealand competition and consumer protection regimes in dealing with the current competition and consumer protection matters having Australasian dimensions. These measures would also help reduce compliance costs for business operating in both Australia and New Zealand.

The cost of implementing the initiatives in option 3 are assessed as not being very large. The potential cost are significantly less than inherent in the more substantive proposals of options 1 and 2.

Overall, option 3 is assessed as involving net benefits, with costs well short of the potential benefits.

FINDING 6.1

The transitional integration package recommended in this report would generate net benefits for Australia and for New Zealand:

- *it would be a discrete step in moving towards the long-term goal of establishing a single economic market*
- *it would also improve the effectiveness and efficiency of the Australian and New Zealand competition and consumer protection regimes in dealing with competition and consumer protection matters having Australasian dimensions.*

A Submissions, visits and roundtable attendees

Table A.1 **List of submissions**

Individual or organisation [a]	*Submission number*
AAPT Limited	6
Abbe Hutchins	1
Advertising Standards Authority Inc	22, DR32
Air New Zealand	24, DR44
Australia New Zealand Business Council	DR41
Australian and New Zealand Banking Group Limited	26
Australian Bankers' Association	21
Australian Competition and Consumer Commission *	13, DR34
Australian Securities and Investments Commission	12
Bather, Andrea	DR28
Bell Gully	19, DR29
Business New Zealand	4, DR38
Captive Port Customers Group	7, DR31
Commerce Commission (New Zealand)	16, DR39
Department of Foreign Affairs and Trade (Australia)	25
Fletcher Building Limited	20
HRL Morrison & Co Limited	17
Institute of Chartered Accountants of NZ	DR42
Ministry of Consumer Affairs (New Zealand)	14, DR37
Motor Trade Association Incorporated	8, DR40
Network Economic Consulting Group Pty Ltd	18
New Zealand Business Roundtable	2, DR30
New Zealand Law Society	DR43
New Zealand Retailers Association	9
Qantas Airways Limited *	23
Real Estate Institute of Australia	5
Securities Institute of Australia	DR36
Simon Z. Smith	3
Telecom Corporation of New Zealand Limited	15, DR33
Telstra Corporation Limited	11, DR35
Transpower New Zealand Limited	10
Vodafone New Zealand	27

[a] An asterisk (*) indicates that the submission contains confidential material not available to the public.

Table A.2 **List of visits**

Location/Interested parties
Melbourne
Australian Securities and Investments Commission
Consumer Affairs Victoria
Sydney
Australian Bankers' Association
Australian Competition and Consumer Commission
Australian Consumers' Association
Australian Law Reform Commission
Gilbert and Tobin
New South Wales Office of Fair Trading
Qantas Airways Limited
Canberra
Australian Competition and Consumer Commission
Attorney General's Department
Australian Chamber of Commerce and Industry
Australian Government Treasury
Department of Foreign Affairs and Trade
Auckland
Air New Zealand
Fisher and Paykel Appliances Limited
Fletcher Building Limited
Fonterra Cooperative Group Ltd
Wellington
Business New Zealand
Commerce Commission
Consumers Institute of New Zealand
Ministry of Consumer Affairs (New Zealand)
Ministry of Economic Development
New Zealand Business Roundtable

Table A.3 **Attendees at the roundtables**

Auckland

Bather, Andrea
Bell Gully
Chen Palmer and Partners
Fisher and Paykel Appliances Limited
MGF Webb & Co
Ministry of Economic Development

Wellington

Barristers.com
Business New Zealand
Captive Port Customer Group
Commerce Commission (New Zealand)
HRL Morrison & Co Limited
Kensington Swan
Ministry of Consumer Affairs
Ministry of Economic Development
Motor Trade Association Incorporated
New Zealand Retailers Association
Telecom Corporation of New Zealand Limited
Thorndon Chambers
Vector Networks

Sydney

AAPT Limited
Australian Bankers' Association
Australian Consumers' Association
Department of Tourism, Fair Trading and Wine Industry Development (Queensland)
Gilbert and Tobin
Johnson Winter and Slattery
Law Council of Australia
New South Wales Office of Fair Trading

Canberra

Australian Chamber of Commerce and Industry
Australian Competition and Consumer Commission
Department of Foreign Affairs and Trade
Menezes, Flavio
New Zealand High Commission
Real Estate Institute of Australia
Telstra Corporation Limited

Melbourne

Australia and New Zealand Banking Group Limited
Australian Securities and Investments Commission
Consumer Affairs Victoria

B Competition law

Australian legislation is the *Trade Practices Act 1974* (Cwlth) (TPA). Reference is also made to the Trade Practices Legislation Amendment Bill 2004 (Cwlth) (TPLA Bill) and the Australian Government response to the Senate Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business (Australian Government 2004a). New Zealand legislation is the *Commerce Act 1986* (NZ).

B.1 Legislative framework

Objectives

The objective of the TPA is:

> … to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. (s. 2 TPA)

The objective of the Commerce Act is:

> … to promote competition in markets for the long-term benefit of consumers within New Zealand. (s. 1A Commerce Act)

These provisions are largely similar in intent, when allowances are made for the wider scope of the TPA, which also takes into account consumer protection. Both objective clauses focus on promoting the competitive process, recognising that competition is not an end in itself, but a means to enhance welfare. The focus in the TPA is on the welfare of Australians. The focus in the Commerce Act is on the long-term welfare of consumers within New Zealand.

Prohibitions

Comparisons of the key prohibitions in the legislation are undertaken to identify where differences might by impeding trade and investment in Australasian markets.

The substantive prohibitions of the TPA drew heavily on many concepts from European and US antitrust jurisprudence. The Commerce Act was initially based on

the TPA. As both Acts have been reviewed and updated they continue to draw on international experience.

Generally both Acts prohibit a similar range of anticompetitive conduct. They generally fall into the following categories:

- anticompetitive agreements
- misuse of market power
- exclusive dealing
- resale price maintenance
- anticompetitive mergers and acquisitions.

A difference between the Acts is in the formulation of the prohibitions, of which there are generally two types:

- a prohibition based on a 'rule of reason' assessment — requiring an assessment of whether the conduct will have an adverse impact on competition in the relevant markets
- a *per se* prohibition — where conduct is prohibited outright.

There are limited exemptions specified from these prohibitions. In general, relief from the prohibitions is available to businesses on a case-by-case basis by application or notification to the Australian Competition and Consumer Commission (ACCC) or the New Zealand Commerce Commission (NZCC). The classes of relief available, and the processes for granting that relief, are discussed later in this appendix.

Anticompetitive agreements

Under both the TPA and the Commerce Act, businesses are prohibited from entering into, or giving effect to, arrangements that have the purpose, effect or likely effect of substantially lessening competition in a market (s. 45 TPA; s. 27 Commerce Act). The anticompetitive agreements covered by these prohibitions range from legally enforceable contracts to less formal arrangements and understandings. In the Commerce Act, an agreement entered into by an association or body of persons is deemed to have been entered into by the members of that association or body.

This prohibition applies generally to horizontal arrangements (between competitors) and vertical arrangements (between suppliers and purchasers), but excludes arrangements between interconnected or related bodies corporate. Under the TPA, exclusive dealing arrangements (a specific class of vertical arrangement) are

regulated by s. 47 of the TPA. The TPLA Bill would have specifically provided for arrangements between companies forming a dual-listed company.

In addition to this generic prohibition, a number of specific classes of anticompetitive arrangements are also proscribed relating to price fixing, exclusionary provisions and secondary boycotts (discussed in more detail below). A further prohibition with a similar formulation to the generic prohibition relates to anticompetitive covenants in relation to land (s. 45B TPA; s. 28 Commerce Act).

The ACCC and NZCC can authorise anticompetitive arrangements if the public benefits from the arrangement outweigh the associated detriments. The public benefit test to be applied is discussed in section B.2 below.

Price fixing

Price fixing between competitors is a *per se* prohibition in both Acts (s. 45A TPA; s. 30 Commerce Act). A price fixing agreement is any agreement between competitors in a market for a good or service that contains a provision that has the purpose, effect or likely effect of fixing, maintaining or controlling prices for those goods or services. Particular classes of price fixing agreements, however, are excluded from the *per se* prohibition provision, including:

- certain joint venture arrangements — the TPA and Commerce Act currently have similar exemptions for specific classes of joint ventures (s. 45A(2) TPA; s. 31 Commerce Act). The TPLA Bill would have amended this exemption by expanding the classes of joint venture that may be exempt, whilst placing the onus on the parties to the joint venture to demonstrate that the joint venture did not have the purpose, effect or likely effect of substantially lessening competition in order to gain relief from the prohibition
- joint buying and advertising (s. 45A(4) TPA; s. 33 Commerce Act)
- recommended prices (although each Act has a different formulation) (s. 45A(6) TPA; s. 32 Commerce Act).

Exclusionary provisions

Both Acts prohibit agreements between competitors in a market for a good or service containing an exclusionary provision (often referred to as collective boycotts) (s. 45(2) TPA; s. 29 Commerce Act). An exclusionary provision is an agreement between competitors to refuse to deal or limit dealings with a particular supplier or acquirer or class of suppliers or acquirers.

An exclusionary provision may cover a range of conduct including market sharing arrangements, distributor or dealer termination provisions, admission and disciplining within trade associations, and denial of access to joint venture facilities. In the Commerce Act, an exclusionary provision is defined more precisely such that the target of the refusal to deal or limit on dealings must be a competitor of one of the parties to the agreement.

A further difference is that an exclusionary provision is a *per se* prohibition in the TPA, whereas in the Commerce Act there is no contravention if the defendant can show that the exclusionary provision does not have the purpose or effect of substantially lessening competition. The TPLA Bill would have inserted a similar defence to the exclusionary provisions prohibition, but it would have also required the defendant to show that the provision was for the purposes of a joint venture.

The different formulations mean that some types of exclusionary conduct covered by s. 45(2) of the TPA are not covered by the equivalent prohibition in s. 29 of the Commerce Act. These arrangements, however, can still be considered on a rule of reason basis under the generic prohibition against anticompetitive arrangements in s. 27 of the Commerce Act.

Secondary boycotts

A further specific prohibition is included in the TPA relating to secondary boycotts (ss. 45D–45EA). A secondary boycott is:

> … action by one person in concert with a second person which hinders or prevents a third person from supplying or acquiring goods or services to or from a business, or engaging in trade or commerce involving the movement of goods between Australia and places outside Australia. Where the first and second persons are members of the same organisation of employees, the organisation itself is taken to have engaged in secondary boycott conduct. The TPA also prohibits a person making an agreement with a union for the purpose of preventing or hindering trade between that person and a target person. (ACCC, sub. 13, p. 12)

Some types of secondary boycott are *per se* prohibited and others require a partial competition assessment — if the provision has the purpose, effect or likely effect of causing substantial loss or damage to the business of the target.

There is no specific prohibition for secondary boycotts in the Commerce Act but some forms of secondary boycott might fall within the general prohibition against anticompetitive arrangements in s. 27.

Misuse of market power

Under both the TPA and the Commerce Act, a corporation with a substantial degree of market power is prohibited from taking advantage of that power for proscribed anticompetitive purposes (s. 46 TPA; s. 36 Commerce Act). The Acts do not prohibit the existence of monopolists or monopsonists. Rather the prohibitions target conduct where the substantial market power is used for the purpose of harming competition.

The prohibitions in the TPA and the Commerce Act are very similar. The type of conduct that may be covered by these prohibitions include predatory pricing, price discrimination, refusal to deal, raising rivals' costs and tying arrangements.

The Australian Government response to the Senate Economic References Committee Report (Australian Government 2004a), recommended three changes:

- *predatory pricing* — the section should clarify that the courts may consider pricing by the corporation below variable costs and whether the corporation has a reasonable prospect of recoupment as relevant factors when assessing whether a breach has occurred
- *impact markets* — the section should clarify that the impact market may be a market other than that in which the corporation has a substantial degree of market power
- *source of market power* — the section should clarify that when assessing a corporation's market power, a court may take account of any market power the corporation has that results from contracts, arrangements or understandings with others.

It is not possible to compare these proposals with the Commerce Act in the absence of draft legislation.

Both the TPA and the Commerce Act also include a specific prohibition relating to trans-Tasman abuses of market power (s. 46A TPA; s. 36A Commerce Act). These prohibitions are similar to the primary prohibitions in each of the Acts. They prohibit the use of trans-Tasman market power to harm competition in a national market. The prohibition only applies to national markets not exclusively for services.

Authorisation is not available for misuse of market power in either the TPA or the Commerce Act.

Exclusive dealing

Exclusive dealing is a vertical arrangement that occurs when a supplier restricts a purchaser's freedom to deal with goods or services or to deal with a supplier of the purchaser's choice. This could include tying arrangements, restricting the purchaser from dealing with a competitor of the supplier, or restrictions on resupply to classes of customers or territories. Third-line forcing is a special case of exclusive dealing, in which the supplier forces the purchaser to deal with a third-party supplier.

The TPA has a specific prohibition relating to exclusive dealing (s. 47). This prohibition (with the exception of third-line forcing) requires a rule of reason assessment. Third-line forcing is prohibited *per se*. Authorisation and notification are available for exclusive dealing.

In the Commerce Act, exclusive dealing is dealt with under the generic prohibitions against misuse of market power and anticompetitive arrangements (ss. 27, 36). The leading case on exclusive dealing under the Commerce Act is *Fisher & Paykel v Commerce Commission* [1990] 2 NZLR 731; (1990) 3 NZBLC 102,655.

The TPLA Bill would have amended the prohibition for third-line forcing so that the substantial lessening of competition test would have applied like all other forms of exclusive dealing. The notification procedures would also have been consequentially amended. This change would have brought the treatment of this conduct closer to the rule of reason approach in the Commerce Act.

Resale price maintenance

In both the TPA and the Commerce Act, corporations are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale (ss. 48, 96–100 TPA; ss. 37–42 Commerce Act). This type of vertical arrangement is called resale price maintenance.

Resale price maintenance is a *per se* prohibition in both Acts. The effect of the prohibitions in both Acts is generally similar. One difference worth noting is:

> The [TPA] has a loss leader defence for resale price maintenance provisions (s. 98(2) of the TPA). It provides that a supplier may withhold the supply of goods if, within the preceding year, the supplied party has sold goods obtained from the supplier at less than their cost for the purpose of attracting business to the reseller's premises or otherwise for the purpose of promoting the supplier's business. (NZCC, sub. 16, p. 11)

Authorisation is available for resale price maintenance in both Acts.

Anticompetitive mergers and acquisitions

The prohibition against anticompetitive acquisitions is outlined in s. 50 of the TPA and s. 47 of the Commerce Act. Both sections prohibit acquisitions that would have, or would be likely to have, the effect of substantially lessening competition.

The TPA includes a non-exhaustive list of considerations for assessing this competition threshold, whereas the Commerce Act does not. However, as outlined in the explanatory memorandum to the Commerce Amendment Bill (No 2) (NZ), there is a clear policy intention in New Zealand that the threshold should be interpreted in the same manner as s. 50 of the TPA.

There are some technical differences between the two prohibitions, such as with the definition of the acquirer, whether the market must be substantial, and the treatment of legal and equitable interests. In general the prohibitions cover the same transactions, including partial acquisitions of assets in businesses or shares.

Authorisation and forms of clearance are available from the competition agencies for mergers and acquisitions.

Extraterritorial application

The TPA and the Commerce Act have limited extraterritorial jurisdiction. Both the TPA and the Commerce Act can apply to conduct by certain classes of persons outside national boundaries if that conduct adversely affects competition in domestic markets (s. 5 TPA; s. 4 Commerce Act).

Under the TPA, this extraterritorial reach applies only in circumstances, where the corporation (or person as relevant) is incorporated, carries on business or is ordinarily resident in Australia or is an Australian citizen.

Similarly, the Commerce Act applies to conduct outside New Zealand by any person resident or carrying on business within New Zealand to the extent that such conduct affects a market in New Zealand. The prohibition against anticompetitive mergers and acquisitions also applies to acquirers (whether or not resident or carrying on business in New Zealand) to the extent that the acquisition affects a market in New Zealand.

In the TPA, Ministerial approval must be obtained to initiate proceedings relying on this extraterritorial application (except for proceedings initiated by the ACCC).

The TPA also includes a separate prohibition in s. 50A for a class of extraterritorial acquisitions that are not covered by s. 50 of the Act. This section relates to offshore

acquisitions of a controlling interest in a body corporate where that body corporate has a controlling interest in an Australian corporation. In such a case, the ACCC, the Treasurer or any other person may make an application to the Australian Competition Tribunal to make a declaration on the merger. If the Tribunal is satisfied that the acquisition would substantially lessen competition in an Australian market (and there are no countervailing public benefits), the corporation can be required to cease carrying on business in the affected Australian market. An equivalent provision does not exist in the Commerce Act.

Exemptions and exceptions

The TPA and the Commerce Act apply to all sectors of the economy, including public sector trading activities. A difference is that constitutional constraints define the application of the TPA and this is discussed further in appendix E.

The three classes of exceptions to the Acts include:

- specific authorisation by law, regulations and tertiary legislation — the Acts will apply except where other legislation specifically authorises otherwise (s. 51(1) TPA; s. 43 Commerce Act)
- exemptions from and constraints on the scope of the legislation — legislators may also specifically exempt certain classes of conduct from competition law (for example, various employment conditions, partnerships, and collective bargaining by consumers) (ss. 51(2)–(3) TPA; ss. 44–45 Commerce Act)
- authorisations, notifications, and clearances by the competition authority, or by declaratory judgement, on a case-by-case basis (these are discussed separately below in section B.3).

The exemptions specified in the Acts are very similar. The TPA places greater legislative constraints on specific authorisations under s. 51(1). These constraints include that the other enactment must specifically refer to this authority in the TPA and that the other enactment may only authorise conduct up to two years after it has been enacted. The equivalent provision in s. 43 of the Commerce Act has been limited through judicial interpretation.

One difference noted by the NZCC is:

> Section 44(2) of the Commerce Act exempts contracts, arrangements or understandings relating to the carriage of goods by sea from a place in New Zealand to a place outside New Zealand or from a place outside New Zealand to a place in New Zealand. The [TPA] has no equivalent to s. 44(2). (sub. 16, p. 25)

B.2 Applying the laws

The competition laws of both countries are articulated in guidelines and interpreted through case law. Even if the substantive laws are substantially similar, impediments to trade and investment can still emerge from the application of those laws. Two areas in which there is potential difference include the test for substantially lessening competition and the test for public benefits.

Substantially lessening competition

In the TPA and the Commerce Act, some of the key prohibitions apply a 'substantially lessening competition' test. The ACCC and NZCC also apply this test when assessing applications for clearance of mergers and acquisitions.

The legislative provisions governing the meaning of substantially lessening competition are similar. For example in both jurisdictions, lessening of competition includes preventing or hindering competition and has been equated to strengthening or acquiring market power (s. 4G TPA; s. 3(2) Commerce Act). In the TPA, a non-exhaustive list of factors that must be evaluated when considering whether an acquisition is likely to have the effect of substantially lessening competition is specified (s. 50(3) TPA).

Both competition authorities have adopted guidelines for the application of the substantial lessening of competition test as part of their merger procedures. Both authorities:

- define the relevant impact market to which the test will apply
- apply a safe harbour threshold
- assess whether the acquisition leads to a substantial lessening of competition (ACCC 1999; NZCC 2003a).

Defining the market

The TPA and the Commerce Act require that markets be defined in terms of the goods and services that are the subject of the proceedings and other goods and services that are substitutable for them (s. 4E TPA; s. 3(1A) Commerce Act).

Both the ACCC and the NZCC use internationally recognised methods to define a market in a particular case. In both countries, a common method to define a market is the **s**mall yet **s**ignificant and **n**on-transitory **i**ncrease in **p**rice (SSNIP) *test*. In this test, an impact market is defined as the smallest space within which a hypothetical,

profit maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose at least a *small yet significant and non-transitory increase in price*, assuming all other terms of sale remain constant. The NZCC has stated that it generally applies a SSNIP test of a five to ten per cent increase in price that is sustained for a period of one year.

It should be noted that the SSNIP test used by the ACCC and NZCC is not required under either Act. As noted, the SSNIP test is not necessarily the most appropriate method of determining a market in every case and commercial reality has also been applied (for example *Brambles New Zealand v Commerce Commission* (High Court, Auckland, CIV2115–03)).

In defining the relevant market, the ACCC and NZCC have regard to the product, geographic, functional, and temporal dimensions of the market. The NZCC guidelines also include specifying a customer dimension, where relevant (NZCC 2003a). New Zealand courts have referred to Australian judgements on defining a market.

Safe harbours for mergers and acquisitions

In terms of safe harbour thresholds in a merger and acquisition clearance or authorisation, the ACCC is likely to further examine a merger and acquisition if:

- the post-merger combined market share of the four largest firms is above 75 per cent and the merged entity's market share is at least 15 per cent, or
- the post-merger combined market share of the four largest firms is less than 75 per cent and the merged entity's market share is 40 per cent or more (ACCC 1999).

The NZCC is likely to further examine an acquisition if:

- the post-merger combined market share of the three largest firms is above 70 per cent and the market share of the combined entity is at least 20 per cent, or
- the post-merger combined market share of the three largest firms is less than 70 per cent and the merged entity's market share is 40 per cent or more (NZCC 2003a).

Substantial lessening competition test

There appear to be some differences in the guidelines relating to the implementation of the substantial lessening of competition test in the two countries. For example, the NZCC outlines differences in the treatment of imports:

> [The] ACCC finds no substantial lessening of competition where imports have had at least ten per cent of the market for at least three years. The Commerce Commission may consider imports, but does not accept it as a bright line rule. (sub. 16, p. 15)

Public benefit

Under the TPA and the Commerce Act, a public benefits test may be required as part of an assessment of an authorisation of a restrictive trade practice and notification of exclusive dealing. Public benefits tests are also used in the authorisation of mergers and acquisitions.

Both the TPA and the Commerce Act include two formulations of the public benefits test. The first is where the applicant must satisfy the competition agency that the arrangement results in a benefit to the public that outweighs the costs of any lessening of competition. In the second, the applicant must satisfy the competition agency that the conduct results in a benefit to the public such that it should be allowed (or permitted) to occur (s. 90 TPA; ss. 61, 67 Commerce Act).

Under the TPA, the ACCC is also required to have regard to the following when applying the public benefits test for mergers and acquisitions:

- a significant increase in the real value of exports
- a significant substitution of domestic products for imported goods
- all other relevant matters related to the international competitiveness of any Australian industry (s. 90(9A) TPA).

In practice, the ACCC essentially applies the same test in all cases (Fels 2001).

Both the TPA and the Commerce Act do not include a definition of what constitutes a public benefit or detriment. That said, s. 3A of the Commerce Act requires the NZCC to 'have regard to any efficiencies'. In this regard, the NZCC commented:

> In general, a public benefit is any gain which is of benefit to the public of New Zealand, with a particular emphasis on efficiency gains. (NZCC 1994, p. 12)

Public benefit under the TPA has been interpreted as being:

> … anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.[1]

[1] *Re: Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976), ATPR 40–012, at 17,245.

Selected key elements of the public benefit tests in New Zealand and Australia are summarised in boxes B.1 and B.2.

Box B.1 **Key elements of assessing public benefits in New Zealand**

1. The *Commerce Act 1986* (NZ) is based on the principle of promoting and protecting competition, not (at least directly) on protecting competitors or consumers.
2. Detriments from a lessening of competition or the acquisition of dominance include the loss of:

– allocative efficiency
– incentives to avoid waste (productive inefficiency)
– product quality
– incentives to innovate (dynamic inefficiency).

3. The efficiency gains might arise from:

– economies of scale
– economies of scope
– better utilisation of existing capacity
– cost reductions due to reduced labour costs, greater specialisation of production, lower working capital and reduced transaction costs
– intangible benefits, such as environmental and health improvements.

4. Public benefits must be net gains in economic and/or social terms. Transfers of wealth *per se* are not net gains.
5. The 'public' is the public of New Zealand. Benefits to foreigners are only counted to the extent that they also benefit New Zealanders.

Source: NZCC (1994).

In practice, both agencies must include in their definition of public benefits:

- economic efficiency — that arises from greater allocative, productive and dynamic efficiency (such as taking advantage of economies of scale and scope, better utilisation of capacity, greater specialisation and reduced working capital, improved research and development capacity)
- externalities — such as those that result from addressing environmental, health, safety and others.

Box B.2 **Key elements of assessing public benefits in Australia**

According to Fels (2001), over the years, the Australian Competition and Consumer Commission (ACCC) and the Australian Competition Tribunal (Tribunal) have recognised a range of public benefits of an economic nature including:

- economic development (for example the encouragement of the exploration, research and capital investment)
- fostering business efficiency, especially when this improves international competitiveness
- industry rationalisation resulting in more efficient allocation of resources
- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions
- industrial harmony
- assistance to efficient small business, for example, guidance on costing and pricing or marketing initiatives that promote competitiveness
- improvement in the quality and safety of goods and services, and the expansion of consumer choice
- supply of better information to consumers and business to permit informed choices in their dealings
- promotion of equitable dealings in the market
- promotion of industry cost savings resulting in contained or lower prices at all levels in the chain
- development of import replacements and growth in export markets.

The ACCC and the Tribunal have granted authorisations taking into account the following non-economic public benefits:

- likely reduction in carbon, nitrous oxide and other greenhouse gas emissions
- encouraging the provision of information on formula feeding from public health professionals that is accurate and balanced and not undermining the decision of women to breastfeed
- promoting public safety by, for example, ensuring the safe use of farm chemicals
- fostering fitness and recreation
- reducing the risks of conflicts of interest, such as prohibiting solicitors from acting for both vendor and purchaser in matters concerning the sale of land
- facilitating the transition to deregulation, such as allowing farmers to negotiate collectively
- maintaining the viability of efficient firms.

Source: Fels (2001).

There appear to be some differences, however, in the way the two agencies have applied the public benefits test. The NZCC advises that these differences include:

- the NZCC will quantify benefits and detriments where feasible, whereas the ACCC generally undertakes a qualitative analysis
- the ACCC has considered a wider range of matters as public benefits than the NZCC (as outlined in boxes B.1 and B.2)
- the NZCC generally adopts a total welfare standard, whereas the ACCC gives less weight to cost savings when not passed on to consumers, especially when retained as higher profits by shareholders (sub. 16, p. 15).

B.3 Approval processes

Regulatory approval can be granted by the competition authorities in certain circumstances:

- Clearances can be granted by the ACCC (informally) and the NZCC (formally) for mergers and acquisitions.
- Authorisations can be granted by the ACCC and the NZCC for anticompetitive practices (except for misuse of market power) and for mergers and acquisitions.
- Notifications can be accepted by the ACCC for exclusive dealing. Under the TPLA Bill, small business collective bargaining agreements would also have been accepted. In both countries, exclusive dealing and collective bargaining agreements can also be authorised.

Clearances

The ACCC operates an informal clearance procedure in relation to proposed mergers and acquisitions. If the ACCC is satisfied that a proposed acquisition would not have the effect of substantially lessening competition, the ACCC may give a letter of comfort to the parties stating that based on available information, it is unlikely to take enforcement action against the acquisition. Parties may apply for a declaration from the court under s. 163A of the TPA.

In comparison, the NZCC operates a formal clearance procedure to give rulings on mergers and acquisitions (s. 66 Commerce Act). If the NZCC is satisfied that a proposed acquisition would not have the effect of substantially lessening competition, the NZCC may give a clearance for the acquisition. The NZCC does not give letters of comfort. Clearance by the NZCC grants the business immunity from proceedings for the acquisition for a period of 12 months (s. 66(5) Commerce

Act). In either case, a failure to obtain a clearance from the NZCC, or a letter of comfort from the ACCC, does not prevent the acquisition from proceeding.

The difference in formality of the process is the key difference between the two regimes:

- The NZCC is reluctant to give confidentiality as to the fact of the acquisition, but the ACCC will also qualify its letters of comfort in such situations.
- The NZCC has a statutory timeframe of ten working days, or such longer period as agreed with the applicants, to determine the matter (s. 66(3) Commerce Act).
- The NZCC may, although it is rare, hold a conference in relation to a clearance application, as it does with authorisation applications.
- As a matter of practice, the NZCC issues detailed written reasons for its determinations, which are publicly available (excluding confidential information). The ACCC has stated that it will also provide a competition assessment to the public where the ACCC declines or attaches conditions to a merger, or the release of the information is in the public interest or is requested by the parties (ACCC 2004).

There are several other key differences between the two regimes. The ACCC has more extensive information gathering powers. The NZCC may only use its powers under ss. 68(1) and 98 of the Commerce Act to gather information during consideration of an application. If insufficient information is provided to satisfy the NZCC of the relevant matters, clearance is declined. In comparison, the ACCC may use its enforcement powers if it has reason to believe that the acquisition may constitute a contravention (s. 155 TPA).

The degree of protection afforded to the acquisition by the clearance differs between the TPA and the Commerce Act. Under the Commerce Act, once immunity is given, it cannot be amended or revoked, other than by the High Court on appeal (section B.5). A letter of comfort from the ACCC does not provide immunity to the acquisition from third-party proceedings. In addition, the ACCC may revisit its position on the acquisition if market conditions change.

Another difference is the treatment of undertakings. Both the NZCC and the ACCC may accept structural undertakings, for example to dispose of assets or shares, to mitigate competition concerns (s. 87B TPA; s. 69A Commerce Act). Under the Commerce Act, these undertakings form part of the clearance, and noncompliance with an undertaking removes the immunity for the acquisition, but the undertaking is not of itself enforceable. In the TPA, noncompliance with an undertaking is separately enforceable (s. 87B TPA). The ACCC can accept behavioural

undertakings, although it has expressed a reluctance to use them. The NZCC cannot accept such undertakings.

Proposed legislative amendments to the TPA

The TPLA Bill provided for a formal clearance procedure to operate alongside the informal clearance procedure. Parties would have been able to apply for either a formal or informal clearance. It was proposed that, if the ACCC was satisfied that an acquisition would not contravene s. 50, the ACCC may have granted formal clearance for the acquisition. A formal clearance would grant immunity to the acquisition for a specified period. Clearance would not be available for acquisitions of controlling interests under s. 50A (clauses 95AC, 95AN TPLA Bill).

There were some key differences between the proposed formal regime in the TPLA Bill and the Commerce Act regime. First, the time given for regulatory approval would have been different. The ACCC would have had 40 business days to determine the matter, or such longer period as may have been agreed with the parties (clause 95AO TPLA Bill). There would have been scope for this period to be extended.

Second, information disclosure would have differed between the TPLA Bill and the Commerce Act regimes. In the TPLA Bill, the proposed information disclosure provisions were to be the same as those for authorisations (discussed below). Regarding public consultation, the ACCC would have been required to call for submissions (clause 95AG TPLA Bill), in contrast the NZCC has discretion as to the extent to which it seeks information from third-parties and it is not required to post this information on its public register.

Third, the procedures for information gathering would have continued to differ between the TPLA Bill and the Commerce Act. The ACCC would have been able to issue a notice to the applicants requesting information. If the ACCC became aware that a clearance was granted on false or misleading information, the ACCC may have taken a range of enforcement actions (discussed below). The NZCC has formal powers to obtain information from the applicant or any other person by issuing a notice under s. 98 of the Commerce Act. Failure to comply with a notice is an offence. If the NZCC becomes aware that a clearance was based on false or misleading information, the enforcement actions available to the NZCC are more limited (discussed below).

Fourth, the ACCC would have had the ability to impose conditions on a clearance (clause 95AP TPLA Bill). For example, the ACCC would have had discretion to set

the term of the clearance as a condition. The NZCC is not able to impose conditions on a clearance and the term of the clearance is fixed at 12 months.

Fifth, the TPLA Bill provided that a clearance may be varied or revoked at the request of the parties or at the initiative of the ACCC (clauses 95AR–AS). Revocations generally would have occurred where there had been a material change in circumstances, where information on which the clearance was based was found to be false or misleading or a condition of a clearance had not been complied with.

Authorisations

The ACCC and the NZCC can authorise any restrictive trade practice (except for misuse of market power). The public benefit test is discussed above in section B.2.

Authorisations grant legal immunity against possible action brought by the competition authority and others with respect to the anticompetitive arrangement or acquisition (ACCC 1995).

There are some differences between the Acts in terms of the scope for granting authorisations:

- The ACCC may grant authorisation where there is no lessening of competition. In comparison, the NZCC must find a lessening of competition before it has jurisdiction to consider granting an authorisation for an anticompetitive practice (excluding mergers and acquisitions). In the case of mergers and acquisitions, if the NZCC does not find a substantial lessening of competition, it will grant a clearance and not proceed to a public benefit analysis (s. 90 TPA; ss. 61, 67 Commerce Act).
- The NZCC may grant authorisation for an anticompetitive practice (excluding mergers and acquisitions) that is already in effect in certain circumstances (s. 59A Commerce Act).
- The ACCC may grant interim authorisations in certain circumstances (s. 91 TPA).

Timelines

Regarding timelines, the TPA and the Commerce Act outline two different processes depending on whether the authorisation application is for an anticompetitive merger or acquisition, or another anticompetitive practice.

In the case of mergers and acquisitions, the timeliness of the decision making is an important factor. The ACCC has a period of 30 days to consider an authorisation

application for mergers and acquisitions, which may be extended by a further 15 days for complex matters, or otherwise extended if the ACCC requests further information or with the agreement of the parties (s. 90 TPA). If the ACCC has not made a determination in the relevant period the authorisation is deemed to have been granted (s. 90(11) TPA).

In comparison, the NZCC has 60 working days to make its determination on a merger or acquisition, or such longer period as may be agreed with the parties. If the specified time period expires without the NZCC making a determination, the application is deemed to have been declined (ss. 67(3)–(4) Commerce Act).

In the case of authorisation of other anticompetitive practices, there are no statutory timelines specified in the TPA or the Commerce Act, although under the TPA, the Minister may, by notice in the gazette, trigger a four month timeline for the authorisation to be determined. Also, in both Acts, once a draft determination is released there are time limits specified for holding a conference, if required. The TPLA Bill would have imposed a six month time limit on the ACCC to determine authorisations for anticompetitive practices. There was scope for the six month period to be extended by up to six months. If the period had expired without the Commission issuing a determination, the application would have been deemed to have been granted.

Consultation

In both the TPA and the Commerce Act, interested parties may indicate their interest in an application for authorisation and make submissions on the application to the competition agencies.

As a rule, both competition agencies will generally release a draft determination to specified interested parties and call (or invite requests) for a conference. An exception exists in the case of the ACCC's mergers and acquisitions authorisation process, where instead the ACCC may hold an informal discussion with interested parties and provide them with a list of issues to be addressed prior to the meeting.

If a conference is scheduled, the only persons entitled to be present at the conference are representatives of the authority, the applicant, interested parties and their representatives (s. 90A(7) TPA; s. 64 Commerce Act). In the case of the Commerce Act, attendance at a conference determines eligibility for third party appeal rights (section B.5 below).

The conferences are conducted with as little formality or technical requirements as possible. There are some differences in the procedures that have been adopted by the ACCC and NZCC, which in some cases reflect different statutory requirements.

Information disclosure

A difference between the TPA and the Commerce Act is the requirement regarding public disclosure of information relevant to the authorisation decision. There is a requirement for the ACCC to maintain all relevant information on the public register, unless the ACCC is satisfied that the information should be excluded due to confidentiality (s. 89 TPA). As a matter of practice, the NZCC also discloses nonconfidential information to which it has regard in its determination. The NZCC may also issue confidentiality orders to enable it to test confidential information with third-parties (s. 100 Commerce Act). As a matter of practice, both competition agencies will release written reasons for their decisions.

Terms and conditions of authorisations

In both jurisdictions, the agencies can make a final determination that denies or grants an authorisation, or grants an authorisation with conditions or undertakings. The conditions or undertakings are those necessary to ensure a net public benefit (ACCC 1995).

In general, the ACCC and NZCC can impose conditions (which may be behavioural or structural) on authorisations. An exception is in the case of authorisations for mergers and acquisitions under the Commerce Act, where the NZCC may only accept structural undertakings. Under the Commerce Act any conditions or undertakings form part of the authorisation. In contrast, the ACCC can accept enforceable undertakings from the responsible party, which are independently enforceable (s. 87B TPA).

In general, an authorisation has effect for the period specified as a condition of the authorisation. An exception is in the case of authorisations for mergers and acquisitions under the Commerce Act, where the term of the authorisation is fixed at 12 months. The ACCC may specify the date on which an authorisation commences.

In general, authorisations may be varied, revoked or revoked and replaced, in certain circumstances (ss. 91A–C TPA; s. 65 Commerce Act). An exception is in respect of authorisations for mergers and acquisitions under the Commerce Act, where authorisations cannot be amended or revoked other than by the High Court on appeal (section B.5 below).

Proposed legislative amendments to the TPA

The TPLA Bill would have amended the Australian regime for authorising mergers and acquisitions. The Australian Competition Tribunal (the Tribunal) would have been empowered to grant authorisations for mergers and acquisitions rather than the ACCC (excluding extraterritorial acquisitions under s. 50A TPA). Appeal rights would have also changed as a result of the Tribunal taking over this function (section B.5 below).

The Tribunal would have had a statutory timeframe of three months to determine the application, plus a further three months if required for complex applications. The Tribunal would determine its own procedure. This is different from the NZCC procedures discussed earlier.

No change was proposed to the public benefits test. Existing differences between the TPA and the Commerce Act in relation to competition thresholds, conditions, confidentiality, variations and revocations would have continued.

Notifications

Under the TPA, there is provision for parties to an exclusive dealing arrangement to notify the ACCC. There is no equivalent notification procedure under the Commerce Act.

In the case of exclusive dealing (other than third-line forcing), notification provides immediate protection for the arrangement. In the case of third-line forcing, protection only comes into force after 14 days and if the ACCC has not lodged a draft revocation notice.

Protection for exclusive dealing (other than third-line forcing) can be revoked by the ACCC if it finds that the conduct substantially lessens competition and that the public benefits of the arrangement are outweighed by the associated lessening of competition (ACCC 1995). Protection for third-line forcing can be revoked if the ACCC finds that the public benefits associated with the conduct (which is a *per se* offence) are outweighed by the public detriments from the conduct (ACCC 1995).

Under the TPLA Bill, the provisions for notification of third-line forcing would have been the same as for other forms of exclusive dealing. In addition, a new notification procedure would have been introduced for collective bargaining by small business with big business. It also would have provided for the notification protections to expire after three years.

B.4 Enforcement

Public enforcement of the TPA and Commerce Act is primarily the responsibility of the ACCC and NZCC respectively. The agencies have the power to investigate possible contraventions of the Acts, and initiate enforcement proceedings. Private parties may also take proceedings for alleged contraventions under the TPA and Commerce Act.

Investigations

In both countries, the public is encouraged to report potential breaches of the substantive provisions of the Acts, and to report breaches of the terms and conditions of authorisations. During an investigation, the ACCC and NZCC may exercise their general powers of investigation in several ways:

- A person can be required to provide information or documents, or to appear before the ACCC or NZCC to give evidence (s. 155(1) TPA; s. 98 Commerce Act).
- The ACCC and NZCC can enter any premises to inspect and make copies of any documents. In Australia, the ACCC does not require authorisation (s. 155(2) TPA). Under the TPLA Bill, the ACCC would have been required to obtain a warrant from a Magistrate's Court to search and seize documents. In New Zealand, the NZCC must obtain a warrant from a District Court to search and seize documents (s. 98A–G Commerce Act).
- In cases related to trans-Tasman abuses of market power, the ACCC and NZCC can serve a written notice on a person resident or carrying on a business in the other country to furnish information and documents (s. 155A TPA; s. 98H Commerce Act). Both agencies have the power to receive that information on behalf of the other authority.
- Under s. 100 of the Commerce Act, individuals or businesses can be ordered not to publish or talk about any evidence relating to a proceeding before the NZCC until after that proceeding has concluded.

In Australia, information obtained by the ACCC from an applicant during the process of authorising or notifying anticompetitive conduct (including renewing or revoking and substituting an authorisation, initiation of proceedings for injunctions or other court orders) must be provided to the applicant on request. The court can order the ACCC to provide this information (s. 157 TPA).

The ACCC, however, must not disclose information obtained under its formal information gathering powers except in 'performing its official duties' or if required

by law to provide that information (s. 155AA(1) TPA). Although the NZCC has the power to collect information from applicants and other parties, there are no explicit provisions regarding the limits to which information can be shared. Instead, the NZCC can only collect information for the purpose of its functions under the Commerce Act. The limits to sharing information are given by other statutes and common law.

Leniency policy

Both competition authorities have leniency policies. The NZCC will grant immunity (from NZCC initiated proceedings) to the first person involved in a cartel to come forward with information about the cartel and cooperate fully with its investigation and prosecution of that cartel. More generally, the NZCC encourages persons to cooperate with the NZCC's enforcement activities. Under its cooperation policy, the NZCC may decide to take a lower level of enforcement action, or no action, in exchange for information on possible breaches of the Commerce Act and full cooperation. These policies do not prevent third-party action (NZCC 2004).

In the case of cartels, the ACCC will not seek a pecuniary penalty against the first corporation that gives full and frank disclosure of a cartel's activities. Individuals applying for leniency may be granted immunity from proceedings and pecuniary penalties (ACCC 2003d). The policy for enforcement is similar to that for cartels, but there is no requirement that the person or corporation seeking leniency be the first (ACCC 2002b). The ACCC does not have power under part V of the TPA to grant immunity for criminal action.

Sanctions and remedies

There are several sanctions and remedies available in both Australia and New Zealand. In general, sanctions and remedies include powers to apply to a court for:

- pecuniary penalties
- damages
- injunctions
- ancillary court orders.

In New Zealand, parties can also apply to a dedicated Commissioner of the NZCC for cease and desist orders.

Penalties

In both jurisdictions, the competition authority may apply to a court for pecuniary penalties for any contravention of the relevant parts of the Acts (s. 76 TPA; ss. 80, 80B, 83 Commerce Act). Pecuniary penalties are civil penalties, and the standard of proof is a civil standard (Miller 2002, p. 628).

Under the Commerce Act, in the case of anticompetitive mergers and acquisitions, pecuniary penalties may be imposed up to NZ$500 000 on an individual and NZ$5 million for a body corporate (s. 83 Commerce Act). In the case of other anticompetitive practices, pecuniary penalties may be imposed not exceeding NZ$500 000 on an individual, and for bodies corporate, the greater of:

- NZ$10 million, or
- three times the value of any commercial gain resulting from the breach, or if the gain is not known, 10 per cent of the turnover of the business (s. 80 Commerce Act).

Individuals who have contravened the Acts can also be personally liable for pecuniary penalties (s. 76(1) TPA; s. 80(2) Commerce Act). There is also a prohibition on firms indemnifying their directors and employees from pecuniary penalties and associated costs in price fixing cases (s. 80A Commerce Act).

Under the TPA, pecuniary penalties may be imposed not exceeding A$500 000 on an individual, and A$750 000 for secondary boycotts and related offences and A$10 million for other offences by businesses (s. 76 TPA).

In both Acts, a refusal to provide information or willingness to cooperate with the NZCC or the ACCC constitutes an offence. Under the Commerce Act, the penalty is NZ$10 000 for an individual and NZ$30 000 for a body corporate (ss. 99A, 103 Commerce Act). In Australia, the penalty is equal to 20 penalty units or imprisonment for 12 months (s. 155(6A) TPA). Where a person or corporation does not comply with s. 98H of the Commerce Act, to provide the ACCC with information for transmittal to the NZCC, the offence incurs 20 penalty units (s. 155B TPA).

Damages

In both jurisdictions, a person can be awarded damages for the loss or damage from the conduct of another (s. 82 TPA; ss. 82, 84A Commerce Act). In Australia, an action for damages can be commenced six years after the cause of action occurred. In New Zealand, an action for damages can be commenced three years from when the alleged anticompetitive merger occurred or three years from when the

anticompetitive practice was discovered or ought reasonably to have been discovered (but not later than 10 years from when the cause of action occurred) (s. 82 TPA; s. 82, 84A Commerce Act).

Under the TPA, the ACCC or a third-party may each apply to the court for an order to compensate the affected party to prevent or reduce the loss or damage suffered by the person (s. 87 TPA). This provision may be compared to s. 89 of the Commerce Act.

In addition, in the Commerce Act in the case of anticompetitive practices (excluding acquisitions), the court can order an individual to pay exemplary damages (s. 82A Commerce Act). Exemplary damages may not be available under the TPA (ss. 82 and 87) because the matter is not yet settled under s. 22 of the *Federal Court of Australia Act 1976* (Cwlth).

Injunctions and orders

Under both the TPA and the Commerce Act, the competition authority and third-parties can apply to a court to obtain a temporary or permanent injunction against any person or corporation contravening, being associated with a contravention, or conspiring to contravene a prohibition in the Act (s. 80 TPA; ss. 81, 84 Commerce Act). An exception is in the case of mergers and acquisitions under the TPA, where only the ACCC may seek an injunction (s. 80(1A) TPA).

Under both Acts, the court may order divestiture of assets or shares as a sanction for contraventions of the prohibition against anticompetitive mergers and acquisitions. Under the Commerce Act, only the NZCC may apply for divestiture orders and such orders must be sought within two years of when the alleged contravention occurred (s. 85 Commerce Act).

A Cease and Desist Commissioner of the NZCC may issue a cease and desist order when there is some evidence of a contravention of the Commerce Act and there is a need to act urgently to prevent serious loss or in the public interest (s. 74A Commerce Act). Persons against whom the order is given can request the Cease and Desist Commissioner to hold a cease and desist hearing.

Under both Acts, there is also a range of other orders that can be imposed by the courts. For example, the court may vary or cancel contracts, or make orders to pay compensation to any party of a contract (s. 87 TPA; s. 89 Commerce Act; NZCC 2002b, p. 20). Under the Commerce Act, the court may ban certain persons from being involved in the management of a business for up to five years for contraventions of the price fixing and exclusionary conduct prohibitions (s. 80C Commerce Act). Under the TPA, court orders can include nonpunitive (remedial)

orders such as community service orders, probation orders for no longer than three years, disclosure orders, and adverse publicity orders.

The ACCC can also apply to a court to enforce an undertaking. Enforceable undertakings may be accepted by the ACCC instead of seeking injunctions (s. 87B TPA).[2] The court hearing the matter may make a range of orders, including enforcing the undertaking, penalties, and compensation (s. 87B TPA).

In the case of offshore acquisitions likely to contravene s. 50A of the TPA, any person (including the ACCC) may apply to the Tribunal for a declaration and to the court for an injunction. The effect of a declaration is that the relevant Australian corporation must cease to carry on business in the relevant market to which the declaration relates. The Commerce Act does not have an equivalent provision.

Proposed legislative amendments to the TPA

Under the TPLA Bill, pecuniary penalties would have increased (in line with the New Zealand practice) to the maximum of A$10 million or three times the value of the illegal benefit (or if the illegal benefit is unknown, 10 per cent of the annual turnover of the corporate group). The TPLA Bill would have also introduced banning orders and prohibitions against immunity for contraventions of the Act. Under the Commerce Act, such sanctions are only available for specified contraventions of the anticompetitive practice prohibitions.

In addition, the TPLA Bill would have introduced new sanctions on parties if it was found that a clearance or authorisation for a merger or acquisition was granted on the basis of false or misleading information. The ACCC (or the Tribunal in the case of authorisations) may have revoked a clearance (authorisation) or revoked and substituted a clearance (authorisation), or the ACCC may have sought an injunction, divestiture or declared the acquisition void (clauses 80AC, 81A TPLA Bill). In the Commerce Act, providing false or misleading information is an offence but does not invalidate the clearance or authorisation or give grounds for its revocation (s. 103 Commerce Act).

B.5 Reviews and appeals

In general, enforcement proceedings under the TPA and the Commerce Act are in the first instance heard in the Australian Federal Court and the New Zealand High

2 *Thompson Australian Holdings Pty Ltd v. Trade Practices Commission* (1981), 148 CLR 150 at 162.

Court (respectively). In general there are rights of appeal from these courts (or the Cease and Desist Commissioner) to higher courts.

There are also rights of review and appeal from ACCC and NZCC determinations as part of these agencies' approvals role. There are two forms of review available and these are discussed below.

Merits review

In Australia, the TPA provides a right to merits review of ACCC decisions in regard to authorisations and notifications. An application for a merits review must be made within 21 days (r. 20, *TPA Regulations 1974*) to the Tribunal. Applications to the Tribunal can be made by the applicant to an authorisation or by any person the Tribunal is satisfied has a sufficient interest in the matter (s. 101(1AA) TPA).

A merits review by the Tribunal is a *de novo* review where the Tribunal has a duty to reach its own independent findings and decision on the evidence which it hears or admits. The Tribunal may perform all the functions and exercise all the powers of the ACCC, including affirming, setting aside or varying the original decision. It is not bound by the same rules of evidence as courts (s. 103(1)(c) TPA).

In New Zealand, decisions by the NZCC regarding clearances and authorisations are subject to a qualified merits review in the High Court (s. 75 Commerce Act). This appeal is by way of rehearing, where the court considers the material which was before the NZCC, and any additional material the court admits, and makes up its own mind on the facts. The court gives deference to the NZCC and will only reverse the NZCC's decision if the appellant can show that the NZCC decision was wrong. In general, those persons who applied for the approval and any person who attended a NZCC conference are entitled to appeal (s. 92 Commerce Act).

Whilst the application for appeal must be made within 20 working days of the date of determination, timelines for appeal proceedings are at the discretion of the Court. Similar to the Tribunal, the High Court may:

- confirm, modify or reverse the determination, and exercise any of the powers that the NZCC could have exercised (s. 93 Commerce Act)
- refer the matter back to the NZCC to reconsider its decision (s. 94 Commerce Act).

The High Court may order that the proceedings be undertaken in private (s. 96 Commerce Act) and the High Court may be supplemented by a lay member (generally with expertise in economics) (s. 77 Commerce Act). There is a further

right of appeal from the High Court, with leave, to the Court of Appeal and, with leave, to the Supreme Court (s. 97 Commerce Act).

Judicial review

In Australia, decisions by both the ACCC and the Tribunal can be subject to judicial review on questions of law under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth). Similarly, in New Zealand, decisions by the NZCC are subject to judicial review by the High Court. Decisions of the High Court can be appealed to the Court of Appeal and, in turn, the Court of Appeal's decision may be appealed, if leave is granted, to the Supreme Court.

Proposed legislative amendments to the TPA

Under the TPLA Bill, new provisions would have been inserted relating to appeals from decisions by the ACCC for formal clearances. The Bill would have included a right of the applicant for the clearance to apply to the Tribunal for a review of the ACCC's decision (clause 111 TPLA Bill). Third-parties would have had a right of judicial review only. The Tribunal's consideration of the appeal would have been limited to a rehearing of matters on record. The ACCC would have had to give the Tribunal all information related to the appeal and may have been required to assist the Tribunal in its consideration (clauses 113, 115 TPLA Bill). Time limits for the Tribunal to determine the matter would also have been imposed.

In addition, as a consequence of the Tribunal having responsibility for considering applications for authorisation of mergers and acquisitions, the TPLA Bill would have provided for appeals from these decisions of the Tribunal on questions of law only.

C Consumer protection

Australia and New Zealand have introduced consumer protection legislation to overcome deficiencies in relying upon the common law to protect consumers in modern economies. The second reading speech of the Australian *Trade Practices Act 1974* (Cwlth) (TPA) is informative of the overriding concerns that led to the consumer protection frameworks found in Australia and New Zealand:

> The existing law is still founded on the principle known as *caveat emptor* … that principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule … The untrained customer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions that are suitable to the vendor. (Murphy 1974, pp. 540–1)

In Australia and New Zealand, consumer protection is enforced through several legislative instruments. At the national level in Australia, the TPA — more specifically parts IVA and V — is the primary legislative instrument. In New Zealand, the *Fair Trading Act 1986* (NZ) (FTA) and the *Consumer Guarantees Act 1993* (NZ) (CGA) are the principal pieces of consumer protection legislation. Other acts, such as the *Australian Securities and Investments Commission Act 2001* (Cwlth) (ASIC Act), and the New Zealand *Credit Contracts Act 1981* (NZ)[1], deal with industry-specific consumer protection matters. In Australia, a further layer of consumer protection law covers matters at the State and Territory level (appendix E).

In this appendix, the key differences in the objectives, substantive prohibitions, interpretation, enforcement, sanctions and remedies, and extraterritoriality provisions are outlined. In the context of this study, differences could, but not necessarily, be a potential impediment to the efficient operation and integration of the Australian and New Zealand economies.

Legislative provisions in each country dealing with misleading, deceptive and unfair conduct and false representations are compared in section C.1; product safety, quality and product information in section C.2; warranties and consumer guarantees in C.3; and unconscionable conduct in C.4.

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[1] In April 2005, the *Credit Contracts and Consumer Finance Act 2003* (NZ) will repeal the Credit Contracts Act. The NZCC will enforce this new Act.

Consumer protection issues relating to financial services are examined in appendix D. Implications of the interrelationship between Australian, State and Territory consumer protection regimes are discussed in appendix E.

C.1 Misleading, deceptive and unfair conduct and false representations

The FTA and part V division 1 of the TPA contain the legislative prohibitions against misleading, deceptive and unfair conduct and false representations for New Zealand and Australia respectively. The objectives of the FTA and part V are largely similar in intent. For the FTA, this is encapsulated in the long title:

> An Act to prohibit certain conduct and practices in trade, to provide for the disclosure of consumer information relating to the supply of goods and services and to promote product safety.

The similarity of objectives in the FTA and the TPA reflect their historical connections, with the Australian Act forming the basis of the FTA. This ensured more effective and closer economic ties with Australia, as Lysonski and Duffy (1992) explain:

> The Fair Trading Act was modelled after the [TPA], which in turn was modelled after similar American, British and Canadian legislation … Incompatible consumer protection measures were viewed as a potential hindrance to free trade between the two countries. (Lysonski and Duffy 1992, p. 3)

Legislative framework

The FTA's historical connection to part V of the TPA has ensured few substantive differences in either the legislative standards for prohibitions or the interpretation of those standards.

In New Zealand, the standards and prohibitions for misleading and deceptive conduct, false representations and unfair practices are contained within part I of the FTA. In Australia, these standards are contained within part V division 1 of the TPA. The TPA and the FTA contain general prohibitions on conduct that is actually misleading or likely to mislead or deceive (s. 52 TPA; s. 9 FTA). In each Act, a long list of specific prohibited practices follows the general prohibitions. In both countries, these specific prohibitions differ from the general prohibition by giving rise to criminal offences.

Whilst not restricting the very wide application of s. 52 of the TPA and s. 9 of the FTA, these specific provisions expressly prohibit particular types of misleading or deceptive conduct and unfair practices. For example:

- false representations in relation to goods, services, employment and land (s. 53 TPA; ss. 10–12, 14 FTA)
- falsely offering prizes (s. 54 TPA; s. 17 FTA)
- misleading the public as to the nature and characteristics of goods and services (s. 55 TPA; ss. 10–11 FTA)
- bait advertising (s. 56 TPA; s. 19 FTA)
- false and misleading statements about referral selling (s. 57 TPA; s. 20 FTA)
- misleading representations about work from home schemes (s. 59 TPA; s. 22 FTA)
- pyramid selling schemes (s. 65 TPA; s. 24 FTA).

There are few substantive differences in the misleading, deceptive and unfair conduct and false representations prohibitions between the Acts. There are no provisions in the FTA that are not in some way covered by the TPA or other Australian legislation.[2] That said, some provisions in the FTA may apply more broadly than their TPA counterparts. For example, in regard to false representations there are two broader provisions:

- Section 13(b) of the FTA covers, amongst other things, false representations that a service will be provided by a person 'of a particular trade, qualification or skill'. The equivalent TPA provision does not extend to this type of representation.
- Section 13(d) of the FTA extends to false representations that items were 'manufactured, produced, processed, or reconditioned at a particular time'. The equivalent TPA provision does not extend to representations regarding reconditioned goods.

In general, these matters do not reflect fundamental differences in the standard or type of prohibited behaviour in either country.

Another point of difference is the onus of proof on persons making representations as to future matters. Section 51A of the TPA imposes an onus on persons making representations as to future matters to prove the reasonableness of that representation. This is quite different to the law in New Zealand where the onus is

[2] In some cases, matters covered by the FTA are covered in State or Territory law rather than the TPA. In other instances, prohibitions on specific matters (such as trade marks) are not covered in the TPA, but rather in specific legislation (such as the *Trade Marks Act 1995* (Cwlth)).

on the person who received the representation to show that it was unreasonable at the time it was given.

Although s. 51A of the TPA reflects a difference between Australia and New Zealand, it does not appear to be an important issue in the context of this study. There have been very few actions taken on this section in Australia and a substantial body of case law and several commentators consider that in the absence of s. 51A, representations with respect to future matters may still be 'caught' by s. 52 (Steinwall 2004, p. 222).

Interpretation

Courts in Australia and New Zealand have interpreted the substantive prohibitions in each country in a similar manner, reflecting the similarity of the two statutes and the historical connections. Finn (2000) noted that the New Zealand courts have repeatedly sought guidance in cases decided in Australia, under the TPA provisions. Furthermore, New Zealand judges have, in general, aimed for consistency with Australian decisions (for example, *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1).

Exemptions

The provisions of the TPA and FTA do not apply universally. Neither Act applies to private sales by individuals. Further, part V of the TPA does not apply to financial services (s. 51AF) or to unincorporated traders who operate entirely within a single State. However, mirror provisions exist in the ASIC Act for financial services (appendix D) and in State and Territory consumer protection legislation for unincorporated traders (appendix E).

Extraterritorial application

The FTA and TPA have similar provisions for extraterritorial operation. The FTA applies to conduct outside New Zealand by any person resident or carrying on business in New Zealand, to the extent that the conduct relates to the supply of goods or services, or land, within New Zealand (s. 3). Similarly, part V of the TPA extends to unfair practices, false and misleading representations taking place outside Australia by bodies incorporated in Australia or carrying on business within Australia or where they are Australian citizens or persons ordinarily resident within Australia (s. 5).

Courts have interpreted the extraterritorial application provisions quite broadly. For instance, 'relate' has been broadly defined by the New Zealand courts to include (among other instances) packaging goods in New Zealand for sale in overseas markets (*Marlborough Perna Ltd v United Fisheries Ltd* (NZHC, CP 145/93)); labelling in New Zealand for sales overseas (*Douglas Pharmaceuticals v Nutripharm NZ Ltd* (NZHC, CP 515 515/97)) and telephone calls from New Zealand to Australia. Similarly, courts and commentators in Australia have also interpreted these provisions in a broad manner. As Miller (2004) states:

> Part V [of the TPA] should not be read down so as to exclude its application to conduct that might injure overseas consumers … Whether or not the act applies to … Part V conduct affecting persons overseas will depend on the terms of the particular provision. (Miller 2004, p. 128)

Furthermore, Australian courts have granted injunctions against misleading advertising found on an internet website based in the United States. The Federal Court ruled that the site was intended to be accessed by consumers in Australia and other parts of the world (*ACCC v Hughes* (2004, Federal Court of Australia, 519)). In the case of *ACCC v IT&T AG* (Federal Court of Australia, July 2004) the court ordered that customers of a misleading international fax directory provider did not have to pay invoices sent to them by the company.

Enforcement

The Australian Competition and Consumer Commission (ACCC) undertakes public enforcement of part V of the TPA. The New Zealand Commerce Commission (NZCC) undertakes public enforcement of the FTA. Both agencies undertake a wide range of activities in order to enforce their respective Acts. For instance, the NZCC considers that its role is to:

> … bring about awareness and acceptance of, and compliance with [the FTA] so that producers and consumers benefit from healthy competition. The Commission does this by providing information about the provisions of [the FTA], receiving information about alleged breaches of [the FTA] and, where necessary, taking action against traders who break the law. (NZCC 2002a, p. 43)

The ACCC and NZCC can take court action seeking injunctions, fines, corrective advertising, and to enforce undertakings by persons they believe to have breached legislative prohibitions against misleading, deceptive and unfair conduct and false representations. Aside from initiating court proceedings, these agencies:

- provide education through letters, brochures, media publicity and public speaking
- give warnings to traders whose behaviour appears to be at risk in terms of the [FTA]

- Enter into settlements with traders whom the [NZCC] believes have breached the [FTA]. A settlement will involve the trader changing the way they operate and may include a variety of other things, such as compensation or publicity. (NZCC 2002a, pp. 43–4)

Each agency may take criminal or civil action on behalf of an affected party. The NZCC favours taking criminal actions against businesses it considers to have breached the FTA as it considers criminal prosecutions to be more effective and time efficient than civil actions.

In investigating alleged breaches, both the ACCC and the NZCC have certain powers. Under the current arrangements, the NZCC must seek a warrant to search the premises of, and acquire information from, parties it believes might have contravened the FTA. The ACCC, under s. 155(2) of the TPA, does not have to seek a warrant. Had the *Trade Practices Legislation Amendment Bill 2004* (Cwlth) been enacted, the ACCC would have had to obtain a warrant to enter and search premises.

Persons may also bring private civil actions under each Act. The TPA allows private actions for injunctions (s. 80) and damages (s. 82) for contravention of unfair practices in part V division 1. The FTA allows private actions for injunctions (s. 41), or a variety of other orders (s. 43) to rectify any loss suffered by a party due to a contravention of part II of the Act.

In both countries, parties other than the ACCC and NZCC initiate the majority of cases. The ability for private actions enables other companies to instigate action where false advertising or other misleading conduct harms their business.

In enforcing the consumer protection provisions of the TPA, the ACCC's objectives are to prevent conduct from recurring, seek compensation for victims and punish offenders. The ACCC selects its consumer protection priorities according to whether or not:

- the conduct in question is multi-state, national or international
- significant consumer detriment is involved
- ACCC involvement has the potential to have a worthwhile national educational or deterrent effect
- a significant new market issue, for example resulting from economic or technological change, has arisen.

These objectives are slightly different to the NZCC's, mainly reflecting the situation in Australia where State and Territory Government consumer affairs agencies handle the majority of consumer protection matters. As such, the ACCC's

involvement is somewhat narrower, concentrating on significant matters that cross state boundaries, involve corporations or require a national approach.

Sanctions and remedies

As noted above, breaches of the FTA and TPA can give rise to both civil and criminal sanctions. In both countries, breaches of the general prohibitions of the TPA and the FTA enable an injured party (or the enforcement agency on a party's behalf) to undertake civil proceedings. However, breaches of these general prohibitions do not give rise to criminal sanctions (part VC TPA; s. 40(1) FTA).

For breaches of the general prohibitions, the ACCC or any other party, may seek an injunction to restrain breaches (s. 80(1) TPA). Injured parties may also seek damages and relief. The ACCC can seek community service orders, probationary orders, disclosures, and publication orders.

In Australia, part VC of the TPA came into operation in 2001 to give effect to the requirements of the Commonwealth Criminal Code. The amendment separated the civil and criminal elements of part V of the TPA. Part VC establishes a separate criminal consumer protection regime by mirroring many of the part V consumer protection provisions. Part V retains the civil consumer protection provisions, as they previously operated. According to the ACCC:

> The consumer protection prohibitions should remain substantially the same and the introduction of Part VC is unlikely to have a significant practical impact on the consumer protection regime under the Act. (ACCC 2002a, p. 8)

There are differences between the TPA and FTA in the level of monetary fines that can be imposed for misleading, deceptive and unfair conduct and false representations. A breach by a corporation of any specific provision of part V of the TPA or part I of the FTA, can result in a fine of up to A$1.1 million (A$220 000 for individuals) in Australia and NZ$200 000 (NZ$60 000 for individuals) in New Zealand. In New Zealand, a person convicted of promoting or operating a pyramid selling scheme may have to pay an additional penalty not exceeding the value of any commercial gain resulting from the scheme.

Jurisdiction of courts

In New Zealand, the High Court hears appeals from criminal proceedings under ss. 40, 40A and 47J of the FTA, as well as applications for injunctions under s. 41 and applications for orders issued under ss. 42 and 43. District Courts hear and determine proceedings for offences under ss. 40 and 47J and applications for orders under ss. 40A, 42 and 43 of the FTA. The Disputes Tribunal has jurisdiction to hear

and determine an application for orders under ss. 43(2)c–f, except for s. 9 contraventions.

In civil matters, the District Courts in New Zealand are restricted to hearing cases where the value of the remedy sought does not exceed NZ$200 000. The High Court hears matters that are of a more serious nature.

In Australia, the Federal Court has jurisdiction to hear matters under part VC of the TPA. That said, under cross-vesting rules, Supreme Courts in each State may hear certain criminal matters, depending on the particulars of a given case. Lower courts, such as State or Territory District Courts or Small Claims Tribunals, may hear civil matters depending on the amount of damages involved.

In general, there is little difference in the approach of New Zealand and Australian courts in ordering sanctions and remedies for breaches under the FTA and part V division 1 of the TPA, respectively.

New Zealand judges have followed the sentencing principles of their Australian counterparts. Greig J in the New Zealand High Court case *Commerce Commission v L D Nathan & Co Ltd* (1990) considered that New Zealand courts could benefit from following Australian authorities with regard to sentencing principles. Similarly, in *Commerce Commission v ANZ Banking Group* (1996), Ongley J accepted the sentencing criteria of Smithers J in *Hartnell v. Sharp Corporation* (1975 5 ALR 493).

C.2 Consumer information and product safety

Statutory consumer information and product safety standards seek to mitigate information asymmetries that consumers face when purchasing products. By imposing statutory requirements on manufacturers and suppliers of goods to impart certain information to consumers and to ensure that their products meet certain minimum standards, these legislative provisions help to improve consumer confidence and fair competition.

Legislative framework

Section 65C of the TPA and part II of the FTA allow for certain standards of product safety and consumer information to be prescribed by regulation. In each jurisdiction, the relevant Minister can declare standards prepared by prescribed bodies (such as Standards Australia and the Standards Council (NZ)), as either a

consumer product safety standard or a consumer information standard (s. 65E TPA; ss. 27, 28 FTA).

Under s. 65D(1) (TPA) and s. 28 (FTA) it is an offence to supply goods that are intended or are likely to be used by a consumer that breach consumer product information standards. This prohibition does not apply to goods intended to be used outside Australia. In New Zealand, goods intended for use outside New Zealand are excluded if a statement to that effect is directly attached to them.

In both jurisdictions, products that breach compulsory product safety standards may be recalled.

There are currently 26 compulsory product safety and information standards in Australia, covering the safety of goods ranging from baby walkers to balloon-blowing kits and disposable cigarette lighters. In New Zealand, the FTA has only six compulsory product safety standards, each of which have equivalent standards under the TPA regulations. In New Zealand, however, the product safety provisions of the FTA are supplemented by the CGA which, under the requirements that goods be of 'acceptable quality', requires that the goods must be safe (s. 7(1)(d) CGA). The TPA does not contain a similar provision.

In Australia, the setting and enforcement of product standards are complicated by the shared responsibilities of the Australian and State Governments. As noted by the Ministerial Council on Consumer Affairs:

> … it is not necessarily the case that a Commonwealth standard must be adopted by the States and Territories as they have powers to issue and enforce their own mandatory standards. There are various examples of a mandatory standard applying in one State but not elsewhere.
>
> While all State and Territory legislation allows for the issue of mandatory standards applying to goods, Victoria, Queensland and South Australia have legislation allowing mandatory standards to also be issued for services.
>
> While standards can be mandated, they may also be voluntary. Underlining this, in Australia there are around 6,400 voluntary standards. (MCCA 2004).

The Trans-Tasman Mutual Recognition Arrangement

The Trans-Tasman Mutual Recognition Arrangement (TTMRA) is an agreement between the Australian, State and Territory Governments and the Government of New Zealand. It allows (among other things) goods to be traded freely between New Zealand and Australia. In essence, if a good can be sold in New Zealand it can be sold in Australia and vice versa. The TTMRA does not override customs arrangements.

The legislation implementing the TTMRA allows certain existing regulations to be granted 'special temporary exemptions'. Goods covered under these regulations remain subject to domestic product standards. Currently, only one Australian safety standard — for child car seat restraints — has a continuing temporary 'special exemption' from the TTMRA. The TTMRA makes provision for any jurisdiction to apply for a temporary exemption where there may be differences in legislative approach.

Product liability and compensation claims

There are differences between the personal injury compensation mechanisms in Australia and New Zealand. New Zealand has a 'no-fault, no-blame' system that compensates the victim when defective goods cause injury or death to a consumer. In comparison, in Australia, an injured consumer has the right to sue a manufacturer of a faulty product, either under the provisions of part VA of the TPA or at common law. If the manufacturer is found to be liable, the court may award damages to the injured consumer to compensate for their loss.

In New Zealand, compensation for injury is provided regardless of whether the manufacturer, consumer, or any other party is at fault. The Accident Compensation Corporation administers the scheme.

The New Zealand scheme provides accident cover for all New Zealand citizens, residents and temporary visitors to New Zealand. In return, individuals do not have the right to sue for personal injury, other than for exemplary damages, at common law. That said, compensation for consequential loss can be sought under the CGA.

In July 2004, the Australian Government introduced amendments to the TPA, which placed limitations on applicants seeking damages for personal injuries through parts IVA (unconscionable conduct), V or VA. The amendments place time limitations on parties seeking compensation and constrain the amount of damages that may be awarded in certain circumstances.

Public enforcement

The ACCC and NZCC have roles in relation to public enforcement of the consumer information and product safety provisions of the TPA and the FTA, respectively. Specifically, each agency investigates business practices and behaviours that appear to breach regulations, and pursues sanctions and remedies against those businesses.

In both countries, other government bodies undertake the role of declaring product standards, recalling certain goods and issuing bans against goods deemed unsafe.

The Australian Treasury is responsible for product safety policy and product recalls under the TPA (with State and Territory authorities having responsibility under their own legislation). In New Zealand, the Ministry of Consumer Affairs carries out this role.

The ACCC and NZCC have an important role in monitoring businesses and products in the market to ensure compliance. As noted by the ACCC:

> Because injury prevention is always better than cure, the ACCC attaches great importance to promoting compliance with mandatory standards and bans and will take enforcement action when necessary. (ACCC 2003b, p. 5)

Both agencies undertake random surveys of retail outlets, investigate allegations by consumers and suppliers about non-complying goods, and check goods sold by direct marketing and on the internet (ACCC 2003b, NZCC 2003b).

Sanctions and remedies

As with prohibitions for misleading and deceptive conduct, false representations and unfair practices, the TPA and FTA allow for both civil and criminal proceedings against breaches of consumer information or product safety standards.

In both countries, suppliers — including manufacturers, importers, distributors, hirers and retailers — can face fines (that are significantly larger in Australia), injunctions, corrective advertising orders and other court imposed orders if found guilty of a breach.

Compulsory product recalls

In both Australia and New Zealand, where goods do not comply with particular safety standards or are of a kind that might cause injury, the Minister may issue a compulsory product recall order (s. 65F TPA; s. 32 FTA). In Australia, unless the Minister considers that any delay in the recall could endanger the public, he or she must first hold a conference with the affected suppliers of the good. In New Zealand, no conference is required.

When a good is deemed ‘unsafe’ in Australia or New Zealand, it is banned for an interim period. At the end of this interim ban, the product may be allowed back on the market (revoking the ban) or banned permanently.

C.3 Conditions and warranties

In Australia and New Zealand, Governments have enacted legislation to imply certain nonexcludable conditions and warranties into consumer contracts for the supply of goods and services. The purpose of this legislation is to entitle the consumer to certain standards with regard to their purchase contracts, which cannot be excluded by agreement.

Legislative framework

Australia has implemented legislation to make certain conditions and warranties implicit in all consumer contracts (part V, divisions 2 and 2A of the TPA). New Zealand has enacted similar provisions in the CGA. The TPA and the CGA require that:

- the supplier of the good has the right to sell the good, the good is free from any undisclosed security and the consumer has the right to quiet enjoyment (or undisturbed possession) of the good (s. 69(1) TPA; s. 5 CGA)
- goods will comply with their description or, if provided, their sample (ss. 70, 72 TPA; ss. 9, 10 CGA)
- where the good's purpose is made known, those goods will be of merchantable (or acceptable) quality and reasonably fit for that purpose (s. 71 TPA; ss. 6–8 CGA)
- manufacturers will take reasonable action to ensure that a good can be repaired and that spare parts are available (s. 74F TPA; s. 12 CGA).

The CGA also requires that goods will be of an acceptable quality and, where the price of the good is not determined, the price will be reasonable.

Interpretation

The CGA was based on Canadian legislation rather than the equivalent provisions of the TPA. As such, cases determined under the CGA tend to follow Canadian or previous New Zealand decisions rather than Australian case law. That said, there is little substantive difference — given the considerations of this study — in the approach of the Australian and New Zealand courts.

Both the TPA and the CGA treat goods as being supplied when the consumer acquires the right to possession. Services are treated as being supplied once they are provided, granted or conferred. 'Supplied' is interpreted broadly and includes 'give-aways' as well as sales, leases, exchanges, hires and hire-purchases.

Although the TPA and CGA provide similar implicit warranty protections, the TPA's provisions apply more broadly. The TPA's statutory warranties apply to any person (including a corporation) who, as an end user, acquires goods or services:

- with a value of up A$40 000 (other than those bought for use in trade or for re-supply)
- goods or services of a type normally bought for personal use (whatever the cost)
- any commercial vehicle primarily for use on a public road.

In contrast, the provisions of the CGA apply to goods supplied to a 'consumer', which is defined as a person who acquires goods or services of a kind ordinarily acquired for personal, domestic or household use. It is debatable whether the provisions of the CGA, in effect, cover a narrower body of transactions than their TPA counterparts.

The CGA and TPA do not apply to goods purchased through auctions or by competitive tender or commercial goods and services. Similarly, neither Act applies to donations of goods by persons or organisations not acting 'in trade', such as charitable organisations.

Sanctions and remedies

The sanctions and remedies available in a particular case will depend on whether a condition or warranty of the contract was breached. Conditions are essential elements of the contract. If a condition is breached, the consumer is entitled to rescind the contract and receive a refund. If a warranty is breached, the contract is still valid. However, the affected party may seek relief for the breach of that warranty, such as damages representing the cost of replacement.

Enforcement

The conditions implied by the TPA and CGA operate as if the parties to the contract had inserted them into the agreement themselves. As such, a breach of one of these conditions operates like any other breach of contract. If a breach occurs, consumers can enforce their statutory rights by undertaking civil proceedings. Government agencies do not bring actions on behalf of consumers.

The ACCC and the Ministry of Consumer Affairs undertake education programs to ensure consumers are aware of their statutory rights under the conditions and warranties provisions of the TPA and CGA, respectively.

C.4 Unconscionable conduct

Australia has statutory provisions prohibiting unconscionable conduct (part IVA TPA). The statutory provisions were first introduced in 1986. The 1986 provisions are potentially a more generous regime for consumers than that available at common law. In 1992, a new provision was added (s. 51AA TPA), prohibiting unconscionable conduct within the meaning of the unwritten law of the States and Territories. In 1998, the provisions were again strengthened to provide a more generous regime for small businesses in their dealings with big business.

Legislative framework

There is no statutory equivalent to part IVA of the TPA in New Zealand. Rather, unconscionable conduct is governed by the common law doctrine of unconscionable dealings.

Objectives

In Australia, part IVA of the TPA is governed by the overarching TPA objective (s. 2).

In terms of the specific part IVA provisions, the major objective of the 1986 amendments was as follows:

> … the section is directed at conduct which while it may not be misleading or deceptive, is none the less unfair or unreasonable … The new provisions will supplement existing provisions of Part V and strengthen the protection afforded to consumers against unscrupulous trading practices. (Bowen 1986, p. 1624)

The 1986 second reading speech also noted that where a contravention is proved, the remedies under s. 87 of the TPA could be enforced by the Trade Practices Commission (now the ACCC) (Bowen 1986).

The 1992 amendment added a prohibition 'within the meaning of the unwritten law'. The second reading speech for this amendment made it clear that the new provision did 'not extend the equitable principles of unconscionability beyond their current limits'. However, the Attorney-General noted there are three advantages of prohibiting in the Act what is already addressed by the equitable doctrine:

- the availability of remedies under the Act
- the potential involvement of the Trade Practices Commission (now the ACCC) including representative actions by the Commission
- the educational and deterrent effect (Duffy 1992).

The 1998 amendment followed from the 1996 House of Representatives report 'Finding a Balance — Towards Fair Trading in Australia' and the Australian Government's response 'New Deal: Fair Deal — Giving Small Business a Fair Go'. The provision was introduced to:

> … strengthen the substantive legal rights available to small business against unfair business conduct and, as well, improve enforcement of rights and access to remedies for small business. (Reith 1997, p. 8799)

The second reading speech notes that the provision extends the common law doctrine of unconscionability because of the additional factors the court can have regard to in determining if unconscionable conduct has taken place (Reith 1997).

Prohibitions

The Australian TPA contains three prohibitions on unconscionable conduct:

- General prohibition on unconscionable conduct, recognised as part of the common law of Australia (s. 51AA).
- Unconscionable conduct in consumer transactions (s. 51AB) —consumer transactions for goods or services ordinarily acquired for personal, domestic or household use or consumption (s. 51AB(5)).
- Unconscionable conduct in business transactions (s. 51AC) — this section specifically prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.

Factors to take into account

The law sets out the factors that the courts may have regard to in determining if unconscionable conduct has taken place. The court may have regard to all or none of the factors when making a determination, and may also consider any other factors that they deem relevant.

In consumer transactions, the factors listed are:

- the relative strengths of the bargaining positions
- whether the consumer was required to comply with conditions that were not reasonably necessary
- whether the consumer was able to understand any documents
- whether any undue influence, pressure or unfair tactics were used
- the circumstances under which the consumer could have acquired identical or equivalent goods or services from another.

In business transactions, the above factors plus the following additional factors can be taken into account:

- whether the supplier's conduct was consistent with conduct in similar transactions
- requirements of any applicable industry code
- requirements of any other industry code, if the consumer reasonably believed that the supplier would comply with that code
- the extent to which the supplier failed to disclose certain information
- the extent to which the supplier was willing to negotiate
- the extent to which the supplier and business consumer acted in good faith.

Brown (2004) noted that some of the business transaction factors go beyond what traditionally constitutes unconscionability. For example, the factor directing attention to whether a supplier was willing to negotiate the terms and conditions of a contract.

The scope of the part IVA of the TPA prohibitions is constrained by some factors:

- Sections 51AA and 51AB do not apply to conduct engaged in relation to financial services (appendix D).
- Section 51AC does not apply to conduct before 1 July 1998 or where the supply or possible supply is in excess of A$3 million.
- Section 51AC does not apply to publicly listed companies.

New Zealand

There is no statutory provision in New Zealand prohibiting unconscionable conduct. Rather, in New Zealand, the doctrine of equity may be used in respect of unconscionable bargains 'when unfair advantage is taken of persons who are poor and ignorant or who for some other reason are in need of special protection' (Burrows, Finn and Todd 2000, p. 85).[3]

[3] There are provisions contained in the *Credit Contracts Act 1981* (NZ), which give the court the power to reopen credit contracts where the contract is oppressive, rights or powers under the contract are exercised oppressively, or one party has acted oppressively in entering into the contract. This specific legislation does not apply to consumer contracts generally and is outside of the terms of reference for this study. In April 2005, the *Credit Contracts and Consumer Finance Act 2003* (NZ) will repeal the Credit Contracts Act. The NZCC will enforce this new Act.

Interpretation

In Australia, the term 'unconscionable' is not defined in the TPA. Thus, the court must determine what constitutes unconscionable conduct. Similarly, in New Zealand, the court must determine what constitutes an 'unconscionable dealing'.

In making such determinations, judges regularly, particularly in the High Court, take account of decisions in other jurisdictions. This is possible, despite the Australian law being enacted through statute, due to its common law origins. As such, New Zealand courts may also take account of Australian determinations, as both jurisdictions have a shared common law.

Case law in both Australia and New Zealand reveals that unconscionable conduct or unconscionable dealings have come to refer to circumstances that have the following elements:

- one party to a transaction suffered from a special disability or disadvantage in dealing with the other party
- the disability was sufficiently evident to the stronger party
- the stronger party took unfair or unconscionable advantage of its superior position or bargaining power to obtain a beneficial bargain.

The circumstances giving rise to the position of disadvantage are many and various. They can include poverty, need of any kind, sickness, age, gender, infirmity of mind or body, drunkenness, illiteracy, lack of education, lack of assistances or explanation (*Blomley v Ryan* (1956) 99 CLR 362 at 405 and cited in Burrows, Finn and Todd 2000, p. 85).

There have been a number of court cases since the introduction of s. 51AC of the TPA in 1998. This was in response to a Ministerial direction given to the ACCC on 28 August 1998 to:

- initiate actions based on alleged contraventions of the Act to establish legal precedent under s. 51AC on matters of specific relevance to small business
- give preference to initiating proceedings as representative proceedings on behalf of small business (Miller 2004, p. 437).

Extraterritorial application

The extraterritorial provisions of the TPA (s. 5) apply to part IVA of the Act. This provision extends application of part IVA to conduct engaged-in outside Australia

by bodies incorporated or carrying on business in Australia or Australian citizens or persons ordinarily resident in Australia.

Sanctions and remedies

Sanctions and remedies are a key consideration in the comparison of Australian and New Zealand law. Because New Zealand does not have a statutory provision for unconscionable conduct, the remedies available are those prescribed by the common law — such as estoppel, rescission and equitable damages.

Conversely, sanctions and remedies for breaches of the Australian statutory provisions are set out in the TPA. Sanctions are civil only. The available remedies include:

- injunctions (s. 80 TPA)
- monetary compensation (under ss. 87 or 82 of the TPA) for a business consumer who suffers loss or damage by the actions of another in breach of s. 51AC
- rescission or variation of a contract (s. 87 TPA)
- refund (s. 87 TPA)
- specific performance (s. 87 TPA)
- nonpunitive orders — such as probation orders, community service orders and corrective advertising orders — on application by the ACCC (s. 86C TPA).

Enforcement

The ACCC or individuals can apply to the Federal Court for relief from a breach of the unconscionable conduct provisions of the TPA. This contrasts to the common law action in both Australia and New Zealand, where only individuals who have suffered as a result of the unconscionable conduct or dealing can apply to a court for relief. This is a key difference between Australia and New Zealand because the ACCC can apply on behalf of people who have suffered, or are likely to suffer, loss as a result of unconscionable conduct (s. 87(1B) TPA). The 1998 Ministerial direction explicitly asks the ACCC to do so.

Under these powers, the ACCC has received complaints, and pursued investigations and enforcement actions for unconscionable conduct. This has been primarily in four main areas:

- franchising
- retail tenancy

- primary producers in dealings with businesses further down the supply chain
- mortgage contracts and guarantees (Brown 2004, p. 6).

ACCC guidelines on unconscionable conduct

In addition to the actions taken by the ACCC where potential breaches have taken place, the ACCC facilitates public awareness of unconscionable conduct. The ACCC has released several documents on the unconscionable conduct provisions of the TPA, including:

- *Fair Game or Fair Go? Avoiding and Dealing with a Hard Bargain* (June 1999) — a small business operator's guide to the unconscionable conduct provisions of the TPA.
- *A Guide to Unconscionable Conduct in Business Transactions* (October 1998) — designed for large and medium businesses that have commercial dealings with small businesses. It promotes awareness of the law, helps to avoid breaches of the law and encourages effective compliance programs to reduce the risk of court action.

New Zealand

In New Zealand, under the Credit Contracts Act, where:

- the contract is oppressive
- a right or power under a contract is exercised oppressively, or
- one party has acted oppressively in entering into the contract, the court has the power to reopen the credit contract. When the court reopens the contract, it can make certain orders including alteration, extinguishment, revision or setting aside of all, or parts of, the transaction.

The only people who can apply to the court to reopen the contract alleged to be oppressive are parties to the contract in question who can bring themselves within the provisions of the Credit Contracts Act. In April 2005, the *Credit Contracts and Consumer Finance Act 2003* (NZ) will repeal the Credit Contracts Act. Under this new legislation, the NZCC will be able to apply to the court to reopen a contract.

D Consumer protection: financial services

This appendix identifies which elements of the Australian and New Zealand consumer protection regimes for financial services are relevant to this study. In essence, an element of consumer protection falls within this study's terms of reference if it is based on general consumer protection legislation, rather than being a unique industry-specific arrangement (Costello 2004 and Wilson 2004).

Consumer protection for financial services in New Zealand is largely within the scope of this study because much of it is based on general consumer protection legislation. The relevant legislation — the *Fair Trading Act 1986* (NZ) and *Consumer Guarantees Act 1993* (NZ) — is examined in detail in other parts of this report.

In contrast, Australia's general consumer protection legislation — the *Trade Practices Act 1974* (Cwlth) (TPA) — specifically excludes financial services. In particular, ss. 51AAB, 51AF and 75AZA of the TPA rule out application of the following provisions to financial services:

- part IVA (unconscionable conduct)
- part V (consumer protection, including conditions and warranties)
- part VC (offences).

However, many of the general consumer protection provisions in the TPA are 'mirrored' in industry-specific legislation for financial services. In particular, there are similarities between the consumer protection provisions in the TPA and the *Australian Securities and Investments Commission Act 2001* (Cwlth) (ASIC Act).

Given that some elements of Australia's general consumer protection regime are applied to financial services via industry-specific legislation, the terms of reference require the Commission to take account of that industry-specific legislation. Specifically, the Commission is required to take account of the consumer protection provisions for financial services in the ASIC Act and the *Corporations Act 2001* (Cwlth), where they mirror those in the TPA. The relevant mirror provisions are listed in table D.1.

Table D.1 **Similar consumer protection elements of the TPA, ASIC Act and Corporations Act[a]**

Element	*TPA*	*ASIC Act*	*Corporations Act*
Unconscionable conduct	**Part IVA** (ss. 51AAB–51ACAA)	**Part 2 (division 2, subdivision C)** (ss. 12CA–12CC)	s. 991A
Consumer protection	**Part V (divisions 1 and 1AAA)**	**Part 2 (division 2, subdivision D)**	**Chapter 7**
Representations about future matters made without reasonable grounds	s. 51A	s. 12BB	s. 769C
Misleading or deceptive conduct	s. 52	s. 12DA	s. 1041H
False or misleading representations	s. 53	s. 12DB	–
False representations and other misleading or offensive conduct in relation to land	s. 53A	s. 12DC	–
Cash price to be stated in certain circumstances	s. 53C	s. 12DD	–
Offering gifts and prizes	s. 54	s. 12DE	–
Certain misleading conduct in relation to services	s. 55A	s. 12DF	–
Bait advertising	s. 56	s. 12DG	–
Referral selling	s. 57	s. 12DH	–
Accepting payment without intending or being able to supply as ordered	s. 58	s. 12DI	–
Harassment and coercion	s. 60	s. 12DJ	–
Pyramid selling	Part V, division 1AAA (ss. 65AAA–65AAE)	s. 12DK	–
Unsolicited credit and debit cards	s. 63A	s. 12DL	–
Assertion of right to payment for unsolicited goods or services	s. 64	s. 12DM	–
Application of provisions to prescribed information providers	s. 65A	s. 12DN	–

(Continued next page)

Table D.1 (continued)

Element	*TPA*	*ASIC Act*	*Corporations Act*
Conditions and warranties	**Part V (division 2)**	**Part 2 (division 2, subdivision E)**	–
Conflict of laws	s. 67	s. 12EA	–
Application of provisions on conditions and warranties in consumer transactions not to be excluded or modified	s. 68	s. 12EB	–
Limitation of liability for breach of certain conditions or warranties	s. 68A	s. 12EC	–
Warranties in relation to the supply of services	s. 74	s. 12ED	–
Offences, enforcement & remedies	**Part VI (enforcement & remedies)**	**Part 2 (division 2, subdivision G)**	–
Interpretation	s. 75B	s. 12GA	–
Offences against consumer protection provisions	s. 79	s. 12GB	–
Enforcement and recovery of certain fines	s. 79A	s. 12GC	–
Preference must be given to compensation for victims	s. 79B	s. 12GCA	–
Injunctions	s. 80	s. 12GD	–
Actions for damages	s. 82	s. 12GF	s. 1041I
Finding in proceedings to be evidence	s. 83	s. 12GG	–
Conduct by directors, servants or agents	s. 84	s. 12GH	–
Defences to a prosecution	s. 85	s. 12GI	–
Jurisdiction of courts	s. 86	s. 12GJ	–
Transfer of matters	s. 86A	s. 12GK	–
Transfer of certain proceedings to Family Court	s. 86B	s. 12GL	–

(Continued next page)

Table D.1 (continued)

Element	*TPA*	*ASIC Act*	*Corporations Act*
Non-punitive orders	s. 86C	s. 12GLA	–
Punitive orders requiring adverse publicity	s. 86D	s. 12GLB	–
Other orders (including rewriting of contracts)	s. 87	s. 12GM	–
Power of Court to prohibit payment or transfer of moneys or other property	s. 87A	s. 12GN	–
Intervention by Commission[b]	s. 87CA	s. 12GO	–

a TPA refers to the *Trade Practices Act 1974* (Cwlth). ASIC Act refers to the *Australian Securities and Investments Commission Act 2001* (Cwlth). Corporations Act refers to the *Corporations Act 2001* (Cwlth). **b** Commission refers to the Australian Competition and Consumer Commission (ACCC) in the case of the TPA and the Australian Securities and Investments Commission (ASIC) in the case of the ASIC Act. However, s. 102 of the ASIC Act enables ASIC to delegate a function or power to a member of staff of the ACCC, if the Chairperson of the ACCC consents to the delegation in writing. Similarly, s. 26 of the TPA enables the ACCC to delegate a function or power in relation to unconscionable conduct and consumer protection to a staff member of ASIC, if the Chairperson of ASIC has agreed to the delegation in writing.

D.1 What are financial services?

Financial services are defined in the ASIC Act (box D.1). In essence, the provision of a financial service involves advising, dealing or selling a financial product (ASIC 2003b). Financial products include general insurance (car, home, boat, and travel), life insurance, banking, superannuation, managed investments, and shares.

D.2 Relevant Australian regulator

Various government agencies have responsibility for oversight of the Australian financial system:

- The Reserve Bank of Australia is responsible for monetary policy, maintaining financial system stability and promoting the safety and efficiency of the payments system.
- The Australian Prudential Regulation Authority is responsible for prudential supervision of deposit taking institutions, insurance companies and larger superannuation funds (to ensure that, under all reasonable circumstances, supervised bodies meet their financial promises).

Box D.1 **Definition of financial services and products**

Section 12BAB of the *Australian Securities and Investments Commission Act 2001* (Cwlth) (ASIC Act) defines financial services as follows:

> … a person provides a ***financial service*** if they:
>
> (a) provide financial product advice (see subsection (5)); or
>
> (b) deal in a financial product (see subsection (7)); or
>
> (c) make a market for a financial product (see subsection (11)); or
>
> (d) operate a registered scheme; or
>
> (e) provide a custodial or depository service (see subsection (12)); or
>
> (f) operate a financial market (see subsection (15)) or clearing and settlement facility (see subsection (17)); or
>
> (g) provide a service that is otherwise supplied in relation to a financial product; or
>
> (h) engage in conduct of a kind prescribed in regulations made for the purposes of this paragraph.

Financial services are similarly defined in s. 766A of the *Corporations Act 2001* (Cwlth), except that the above clauses (f) and (g) are not included.

A financial product is defined in s. 12BAA of the ASIC Act:

> … a ***financial product*** is a facility through which, or through the acquisition of which, a person does one or more of the following:
>
> (a) makes a financial investment (see subsection (4));
>
> (b) manages financial risk (see subsection (5));
>
> (c) makes non cash payments (see subsection (6)).

- The Australian Securities and Investments Commission (ASIC) enforces company and financial services laws to protect consumers, investors and creditors (ASIC 2003a).
- State and Territory fair trading or consumer affairs agencies administer fair trading legislation that mirrors the consumer protection provisions in the TPA and can be applied to the financial sector. They also regulate consumer credit under the Uniform Consumer Credit Code.
- The Australian Competition and Consumer Commission (ACCC) administers the general competition provisions of the TPA, which can be applied to the financial sector. The ACCC also administers the general consumer protection provisions of the TPA, but those provisions do not apply to financial services.

The division of consumer protection responsibilities between these bodies is not always clear-cut, as noted by FASC (2004) in a review of the financial system for the Australian Government:

> The overlapping consumer protection roles between ASIC and APRA [Australian Prudential Regulation Authority] and between ASIC and the ACCC have been a source

> of confusion to industry. Recent regulatory changes, while underlining the primary role of ASIC for consumer protection in the financial system, may have led to the roles of the other agencies becoming superseded to some extent. This issue requires further clarification. (FASC 2004, p. 10)

Nevertheless, there is a Council of Financial Regulators — comprising representatives from the Reserve Bank of Australia, Australian Prudential Regulation Authority, ASIC and Treasury — that acts as a coordinating body for financial sector regulation.

For this study, the relevant Australian regulator for consumer protection of financial services is ASIC, since it has primary responsibility for administering the ASIC Act and the Corporations Act. However, it should be noted that s. 102 of the ASIC Act enables ASIC to delegate a function or power to a member of staff of the ACCC, if the Chairperson of the ACCC consents to the delegation in writing. Similarly, s. 26 of the TPA enables the ACCC to delegate a function or power in relation to unconscionable conduct, consumer protection, offences and remedies to a staff member of ASIC, if the Chairperson of ASIC consents to the delegation in writing. To reduce regulatory duplication, ASIC has a Memorandum of Understanding with the ACCC. The role and functions of the ACCC are considered in other parts of this report in the context of the general consumer protection provisions of the TPA.

ASIC administers the regulatory system of consumer protection for:

- deposit-taking activities
- general insurance
- life insurance
- superannuation
- retirement savings accounts
- managed investments
- securities
- derivatives
- foreign exchange contracts
- credit.

Consumer protection for these products includes:

- requirements about the information that must be disclosed to consumers
- general prohibition against misleading or deceptive conduct and other unfair practices

- licensing of people who give advice on or are dealing in financial products
- requirements for conduct of financial services providers
- approval of alternative dispute resolution schemes and industry codes.

The only important exception applies to businesses that offer only lending products, such as credit cards, loans, and hire purchase agreements. They operate under State and Territory laws (box D.2). However, ASIC does make sure that businesses do not give misleading information about loans when they advertise.

Box D.2 **Australian Uniform Consumer Credit Code**

The Uniform Consumer Credit Code was developed in response to business and consumer concerns as a national initiative to standardise credit practice in Australia.

A credit provider is defined as any business that provides finance to purchase goods, services or land, or to lease goods. The Consumer Credit Code applies to these credit providers if they charge for the credit and if their customers are individuals or residential strata corporations who use it mostly for personal, household or domestic purposes.

The legislative structure of the Code is based on a template scheme, with the template legislation having been passed in Queensland (*Consumer Credit (Qld) Act 1994* and the *Consumer Credit Regulation (Qld) 1995*).

All States and Territories have passed enabling legislation that adopts the template legislation and applies it in the State or Territory as 'in force from time to time'. By doing this, any amendments to the Code or Regulations only need to be made to the template legislation. They will then automatically apply in other States or Territories without amendment to their enabling acts.

Under the *Uniform Consumer Credit Laws Agreement 1993* (AUCLA) the Ministerial Council for Uniform Credit Laws (an offshoot of the Ministerial Council on Consumer Affairs) has to agree to amendments to the Code by a two-thirds majority.

All States and Territories are required by the AUCLA not to introduce legislation into their parliaments that conflicts with or negates the Code.

D.3 Relevant New Zealand regulator

Various government agencies have responsibility for financial matters in New Zealand:

- the Commerce Commission (NZCC) enforces general fair-trading legislation (and, from 1 April 2005, the *Credit Contracts and Consumer Finance Act 2003*)

- the Securities Commission (NZSC) is responsible for regulating securities markets
- the Ministry of Economic Development administers insurance, superannuation, insolvency and corporation law
- the Reserve Bank of New Zealand is responsible for monetary policy and the supervision of financial institutions
- the Ministry of Consumer Affairs is responsible for administering general consumer protection law.

For this study, the most relevant New Zealand regulator for consumer protection of financial services is the NZCC, since it administers the Fair Trading Act. The role and functions of the NZCC are considered in other parts of this report in the context of the general consumer protection provisions in New Zealand legislation.

D.4 Interjurisdictional issues

Cooperation between Australian jurisdictions

Within Australia, ASIC generally deals with matters that have a cross-border element and/or have national implications. State and Territory regulators tend to focus on matters that occur primarily within their jurisdiction. To facilitate cooperation with other regulators, ASIC has entered into a memorandum of understanding with each of its State and Territory counterparts. ASIC is also a member of the Standing Committee of Officials of Consumer Affairs and its responsible Minister is represented on the Ministerial Council on Consumer Affairs.

Extraterritorial application of laws

ASIC noted that certain provisions of the Corporations Act apply extraterritorially, but ASIC's investigative powers do not have extraterritorial operation:

> … ASIC's investigative powers do not have extraterritorial operation. Subsection 5(4) of the Corporations Act provides that each provision of the Act applies outside this jurisdiction, according to its tenor. The tenor of the investigative powers makes it quite clear that they are to operate only within Australia.
>
> However, there are certain provisions that apply extraterritorially in recognition of the increasing number of cross border regulatory issues. Section 911D of the Corporations Act provides that a financial services business is taken to be carried on in this jurisdiction if the conduct is intended to or likely to have the effect of inducing people in Australia to use the financial service. This means that an international cold calling

> scam targeting Australian investors is breaching the requirement to hold an Australian Financial Services business, even though the boiler room making the phone calls is located outside Australia. (sub. 12, p. 6)

Hence, cooperation with jurisdictions outside Australia could be important for the effective enforcement of Australian consumer protection laws for financial services.

Trans-Tasman cooperation

ASIC (sub. 12, p. 1) noted that 'there is considerable interaction between ASIC and its regulatory counterparts in New Zealand.' This has included recent cooperation on investment scams.

ASIC and the NZSC have signed a Memorandum of Understanding to facilitate cooperation. ASIC has also given a class exemption for New Zealand mutual fund operators from its securities and financial services requirements. ASIC can give such exemptions to foreign parties on a unilateral basis without requiring a cooperation agreement with the relevant country.

The NZSC has wider powers to cooperate with international regulators than does ASIC. Under the *Securities Act 1978* (NZ), the NZSC can investigate on another regulator's behalf, subject to having an agreement with that agency on matters including obligations relating to the downstream confidentiality and the use of information. The New Zealand Minister of Commerce has given a class order approving ASIC as an international regulator with whom the NZSC can exchange information:

> The NZSC is empowered by section 69F of the Securities Act to conduct investigations on request from foreign regulators where the conditions in section 69G of the Act are met. These conditions include the Minister having consented to the assistance being provided. In the case of ASIC the Minister has given class order consent, which means that NZSC does not have to refer any ASIC requests for assistance to the Minister for individual approval. (ASIC, sub. 12, pp. 4–5)

There are at least two other areas of trans-Tasman cooperation relevant to financial services:

- Trans-Tasman Mutual Recognition of Offers of Securities and Managed Investment Schemes Interests — the Australian Treasury and New Zealand Ministry of Economic Development are considering ways to facilitate trans-Tasman issues of securities to the public.
- Trans-Tasman court proceedings and regulatory enforcement — an Australian-New Zealand working group exists to evaluate options for enhancing cooperation in areas such as service of process, taking of evidence, the

recognition of judgments in civil and regulatory matters and regulatory enforcement.

Information sharing

Section 127 of the ASIC Act allows ASIC to sort through information that it holds in the course of its ongoing work and provide that information to another regulator, on request or on its own initiative. ASIC holds a large amount of information through ongoing reporting requirements for licensed financial service providers. The provision of this information is mandatory, and therefore the exchange of information is unlikely to deter the provision of information in the future.

There is no statutory obligation on ASIC to notify the person to whom the information relates before exchange, but as a matter of administrative law, ASIC is required to notify that person unless that notification would compromise an investigation. There has been an administrative ruling on this point.

> ASIC's ability to share confidential information and information that it has obtained in the course of carrying on its functions is governed by section 127 of the ASIC Act. In relation to foreign law enforcement bodies, the relevant subsection 127(4)(c), provides that the Chairman (or a delegate of the Chairman) can release confidential information or information obtained in the course of carrying on its functions if satisfied that:
>
> > 'The release of information would enable or assist a Government or agency of a foreign country to perform a function or exercise a power, conferred on it by a law in force in that foreign country'.
>
> ASIC can also use the provisions of section 127(3) of the ASIC Act to release confidential information to a foreign regulator as part of the process of enabling that foreign regulator to assist ASIC with its investigations. Section 127(3) of the ASIC Act enables an ASIC staff member to disclose information for the purposes of performing their function as an ASIC staff member or delegate.
>
> It should be noted that the ability for ASIC to disclose information under section 127 of the ASIC Act is subject to the common law doctrine of procedural fairness or natural justice. This obligation is described in ASIC Policy Statement PS 103 Confidentiality and the release of information. This policy statement provides that ASIC is to consider providing procedural fairness where a person would be directly and materially adversely affected by the decision to release information under section 127 of the ASIC Act. (ASIC, sub. 12, p. 3)

Section 127 of the ASIC Act does not allow ASIC to use its investigative powers to obtain new information exclusively for a regulator in another country. To do this, the foreign regulator would need to apply to ASIC under the *Mutual Assistance in Business Regulation Act 1992* (Cwlth) or *Mutual Assistance in Criminal Matters Act 1987* (Cwlth). This requires a two step process, including obtaining the Minister's approval:

ASIC … cannot use its investigative powers at the request of a foreign regulator if ASIC does not itself have an independent interest in the matter (eg: if the conduct complained of by the foreign regulator is not also a suspected breach of the Corporations Act). It is not clear whether the suspected breach has also to be a matter that ASIC would otherwise be investigating.

In circumstances where ASIC has not already obtained the required information for its own purposes, a request for assistance by a foreign regulator can be made under the provisions of the Mutual Assistance in Business Regulation Act (MABRA) or the Mutual Assistance in Criminal Matters Act (MACMA), depending on whether the request relates to an administrative/civil or a criminal matter.

A foreign regulator can make a request under MABRA to obtain information, documents or evidence for the purposes of the administration or enforcement of a business law (section 6 MABRA). The request is made to ASIC, who makes recommendations to the Attorney General in relation to the request (section 7 MABRA). It is for the Attorney General to make a decision about the request, to authorise ASIC to obtain the information/evidence or to reject the request (section 8 MABRA). Where the request relates to a criminal investigation or proceeding, the request for assistance is made directly to the Attorney General under the MACMA Act (section 13 MACMA).

Although MABRA and MACMA provide a mechanism by which assistance can be provided to foreign regulators, it can be a very cumbersome process, due to the need to obtain approval from the Attorney-General. This is apparent when compared to the arrangements in place in New Zealand. (ASIC, sub. 12, p. 4)

E State and Territory regimes

In Australia, State and Territory Governments also have legislation covering competition and consumer protection policy. The terms of reference for this study require the Commission to recognise and take into account existing cooperation, coordination and integration of these laws between Australia, the States and Territories.

The *Trade Practices Act 1974* (Cwlth) (TPA) does not apply to all businesses operating in Australia for constitutional reasons. It applies to business and commercial activities of most *corporations*, and sole traders or partnerships whose activities cross State boundaries (or take place within a Territory). However, generally, the TPA does not apply to unincorporated traders that do not operate across state boundaries. The activities of these businesses are regulated through State and Territory legislation.

It is important for the Productivity Commission to consider these issues, for two reasons. First, in practice, efforts at harmonisation between Australia and New Zealand could potentially be ineffective if harmonisation does not also include relevant State and Territory legislation. In the course of the study, several participants commented on the need to work towards greater harmonisation of Australian law before considering greater cooperation, coordination and integration with New Zealand (chapter 4).

Second, the situation in Australia is an example of a multi-jurisdiction approach to a competition and consumer protection regime. The example could be relevant in considering the options for further cooperation, coordination and integration of Australian and New Zealand regimes. There is some similarity between the European Union and Australia for when competition and consumer protection issues are handled at the local level versus the national (or supra-national) level. In Australia, anything that crosses state borders is covered under Australian law, whereas in the European Union a transaction is dealt with by the European Union's supra-national competition law body where it passes a screening test which requires that two or more member states are involved.

The relationship between the Australian, State and Territory Governments' competition and consumer protection legislation is outlined in the next section of this appendix. The relevant State and Territory agencies responsible for

administering State and Territory legislation and comments on the existing approaches to cooperate and coordinate Australian and State and Territory regulation are set out in section E.2.

E.1 State and Territory legislation

Competition legislation

The anticompetitive conduct laws in part IV of the TPA apply to virtually all public and private sector businesses in Australia, albeit indirectly. This is as a result of the National Competition Policy reforms implemented in the 1990s, whereby the States and Territories passed application laws that mirror provisions to part IV, in what is known as a Competition Code of each State and Territory:

> In 1995, each of the Australian State and Territory Parliaments passed legislation known as Competition Policy Reform Acts, which achieved the goal of extending part IV of the Act to unincorporated businesses. This was done by including, as a schedule to that state's or territory's Competition Policy Reform Act a 'Competition Code' which mirrored the provisions in part IV of the Act but changed the reference in those provisions from 'a corporation' to 'a person'. (ACCC 2003a)

One of the rationales for having a single competition policy was the recognition that 'Australia is increasingly operating as a single market rather than a series of State and Territory markets' (NCC 1999, p. 45).

Notwithstanding the coordination on competition policy, it is still possible for the States and Territories to enact additional regulations in relation to competition matters. Section 51AAA of the TPA makes it clear that a State or Territory law can operate concurrently with part IV unless it is directly inconsistent with part IV.

Consumer protection legislation

Each State and Territory has fair trading legislation that mirrors the provisions of division 1 of part V of the TPA.[1] The Australian and State and Territory Governments agreed to uniform consumer protection policy in a 1983 Governmental agreement. The most important State and Territory Acts are the Fair Trading Acts, which apply generally to business and commercial activities of any 'person' (which includes sole traders, partners and corporations).

[1] Tables of the mirror provisions of the TPA can be found in Steinwall (2004, p. xiv) and Miller (2004, pp. lxi–lxx).

In addition to the mirrored provisions of division 1 of part V of the TPA, each jurisdiction has enacted 'enforcement and remedy' provisions that mirror part VI of the TPA. Each jurisdiction also has enacted unconscionable conduct provisions. Some jurisdictions have enacted mirror provisions of other parts of part V, such as product safety and product information provisions and conditions and warranties in consumer transactions.

In addition to mirroring the TPA, some States and Territories have consumer protection provisions that go beyond those described in part V. There are also many other laws that apply to business and consumer transactions, such as State and Territory Residential Tenancies Acts, Credit Acts, and Motor Dealers Acts.

There is a potential for overlap between the TPA (applying to corporations and sole traders or partnerships whose activities cross State boundaries) and the State and Territory laws, because the State and Territory laws apply to any 'person'. A corporation carrying on business in New South Wales, for example, could be subjected to an action for an alleged breach of both the TPA and the relevant State legislation. Any differences in the laws, enforcement provisions and remedies give private instigators the choice to pursue the breach under Australian and/or State and Territory laws. Where a consumer protection agency is instigating an action, there is likely to be coordination between agencies (section E.2).

E.2 State and Territory agencies

There are several agencies involved in administering and enforcing consumer protection policy at the State and Territory level (table E.1).

Table E.1 **State and Territory consumer affairs agencies**

State/Territory	*Consumer Affairs agency*
New South Wales	New South Wales Department of Fair Trading
Victoria	Consumer Affairs Victoria
Queensland	Queensland Office of Fair Trading
South Australia	Office of Consumer and Business Affairs
Western Australia	Department of Consumer and Employment Protection
Tasmania	Tasmanian Office of Consumer Affairs and Fair Trading
Australian Capital Territory	Australian Capital Territory Office of Fair Trading
Northern Territory	Northern Territory Office of Consumer and Business Affairs

Source: Australian Treasury 2004.

There is a Minster responsible for consumer affairs in each State and Territory. A degree of coordination exists among Ministers, through the Ministerial Council on Consumer Affairs, which consists of all Australian, State, Territory and

New Zealand Ministers responsible for fair trading, consumer protection laws and credit laws. The role of the Ministerial Council on Consumer Affairs is to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues. It's mission statement is set out in box E.1. The Ministers meet once a year, and there are also several sub-committees that meet throughout the year to discuss specific aspects of consumer protection.

Box E.1 **Ministerial Council on Consumer Affairs mission statement**

The Ministerial Council will advance consumer affairs and fair trading matters of strategic national significance, and where appropriate, will facilitate and encourage:

- the coordination of policy development and implementation by all Jurisdictions to provide the best and most consistent protection for consumers
- consistency of policy and enforcement decisions for the suppliers of goods and services within a national marketplace
- national legislative consistency of major elements of consumer protection policy
- access to education and information for all consumers
- cooperation and consultation on consumer policy development and implementation between Australia and New Zealand
- proactive research and development strategies to ensure the readiness of fair trading agencies, consumers and business for the challenges beyond 2000
- consultation with government departments, the consumer movement, industry groups and interested parties, to ensure and maintain currency of the work of the Council (MCCA 2000b).

In addition, there is formal and informal liaison between Australian, State and Territory consumer protection agencies. The Standing Committee of Officials of Consumer Affairs meets regularly to promote coordination of the activities of consumer affairs agencies. A bulletin keeps the Standing Committee of Officials of Consumer Affairs members informed of important agency issues between meetings and minimises duplication of work.

The Australian Competition and Consumer Commission has signed a Memorandum of Understanding with each State and Territory agency. Generally, the purpose of each agreement is to reduce the duplication of effort, and to promote cooperation and coordination. Each agreement covers a range of matters that can include processes for handling consumer issues and complaints, the establishment of regular meetings, research cooperation and coordination, and procedures for information sharing (ACCC, pers. comm., 14 September 2004).

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