COMMERCE COMMISSION

Written submission to the Productivity Commission– Issues Paper: Australian and New Zealand Competition and Consumer Protection Regimes

August 2004

Introduction

This submission is from the Commerce Commission in response to the Issues Paper released by the Productivity Commission dated 16 July 2004. This submission discusses the Commerce Commission's views of the potential benefits available to Australia and New Zealand through closer co-operation and harmonisation of each jurisdiction's competition and fair trading environments.

In order to identify the benefits available, it is necessary to define the desired policy option. The Commerce Commission considers that the desired policy option is a model of joint processes with similar legislative and analytical frameworks for those matters that are trans-Tasman. Each jurisdiction would separately deal with domestic matters, although occasionally requiring assistance from the other jurisdiction in terms of information sharing and gathering.

The Commerce Commission was established under the Commerce Act 1986. It is a Crown entity under Schedule Four of the Public Finance Act 1989.

The purpose of the Commerce Commission is to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice.

The Commerce Commission is an independent quasi-judicial body and is not subject to direction in its enforcement and regulatory control activities. It has responsibility for enforcement and regulatory control under a number of general and specific regulatory regimes set out in the Commerce Act 1986, Fair Trading Act 1986, Electricity Industry Reform Act 1998, Telecommunications Act 2001, Dairy Industry Restructuring Act 2001 and Credit Contracts and Consumer Finance Act 2003.

Submission Overview

The Commerce Commission can see significant benefits for both jurisdictions by having closer co-operation and joint processes between the Commerce Commission and the Australian Competition and Consumer Commission (ACCC) across competition and fair trading regimes.

The Commerce Commission considers that benefits would be achieved by having joint and common processes to deal with matters that have an impact on both jurisdictions. These joint processes can be implemented at minimal cost, although legislative changes in both jurisdictions will be required. However, in order for these benefits to be realised, some of the differences in the substantive legislation, processes and analytical frameworks would need to be reduced.

In respect of adjudication processes, any joint processes would have to deliver benefits in each jurisdiction. Significant benefits would be available to consumers in both jurisdictions if enforcement processes and investigations were enhanced by improving the information gathering and sharing ability between both jurisdictions.

In developing the concept of joint processes and common legislative and analytical frameworks and processes, it will be important that best practice methodologies are adopted rather than the approach of one jurisdiction simply being accepted.

The Commerce Commission has identified two stages of development to progress towards greater co-operation through joint enforcement and adjudication investigations and processes. These stages are summarised in the following table.

Stage	**Process**	**Implications**	**Timing**
Stage One	▪ Common guidelines ▪ Common process ▪ Information gathering/sharing	▪ Some legislative change required to extend information gathering and sharing ability.	▪ 1-2 years
Stage Two	Joint process to include: ▪ Information gathering ▪ Joint hearing by both agencies ▪ One determination addressing issues market by market ▪ Rules need to be the same ▪ Consumer benefits recognised in each jurisdiction	▪ Appeal rights need to be clarified. ▪ Legislative change required to establish processes	▪ Two to three years depending on speed of legislative change.

Stage One

Significant benefits can be achieved in the short term by developing common guidelines, common processes and the ability to gather and share information. Businesses would gain from having one set of guidelines and consumers would benefit from misleading behaviour being effectively dealt with. There is real benefit in having the ability to share information as there will often be information available in the jurisdiction in which the behaviour originated, that will be of assistance to the investigating agency.

Transaction costs for the parties involved would be reduced and there would be greater certainty for the parties involved if common guidelines and processes were in place. Immediate benefits can be obtained by joint development of best practice approaches that would lead to more effective enforcement environments.

Joint approaches would assist addressing more effectively behaviour or structural changes that originates in one jurisdiction. The behaviour can either have no impact in the other jurisdiction, or it has no impact in the jurisdiction in which it originates but has impact in the other jurisdiction. An example of such behaviour could be a Fair Trading

contravention where the person generating misleading behaviour is located in one jurisdiction, but the impact is felt in the other jurisdiction.
In such a case, the relevant agency (that in which the impact occurs) would undertake any investigation and subsequently resolve it, with some form of assistance from the other jurisdiction, through the provision of information with or without investigative assistance.

Under these circumstances, there would be value in both jurisdictions having clear legislative support for mutual information gathering and enforcement and for the joint development of guidelines across competition and fair trading regimes.

Stage Two

Stage Two involves the development of joint adjudication and enforcement processes from time to time as required. This stage would allow for joint consideration of structural changes or behaviours that occur in one or both jurisdictions that has an impact in both jurisdictions. In this case, the two commissions could sit jointly on any adjudication matter with members from both agencies

The agencies could also work towards joint enforcement initiatives to more effectively address conduct that involves cross border activity. This is a stage further than developing joint guidelines and information gathering and sharing. An example is developing joint arrangements for applications for leniency for hard cartel conduct. Ultimately a more effective enforcement regime could eventually include developing court processes that would enable each agency to take action in a trans-Tasman court process.

This joint process would involve information gathering occurring in both jurisdictions by both agencies. With an adjudication application a single hearing could be held when necessary and one decision could be issued that would address any competition issues market by market including New Zealand, Australian and trans-Tasman markets.

Any joint process would have to consider all the relevant markets including those that do involve trans-Tasman commerce. This is no different in concept than what each agency does now when considering an adjudication application. Currently, many adjudication decisions involve consideration of markets that are smaller in geographic terms, than a national market. This process of defining markets according to the factual situation would not change with a joint process.

To achieve Stage Two, it would be necessary for the relevant parts of each country's legislation to be the same as well as the analytical frameworks and processes. The reason for this is that if there is to be benefit by a reduction in transaction costs, any hearing that is conducted would have to deal with one set of evidence. If the analytical frameworks were different between the jurisdictions, the hearing would have to consider all the evidence relevant to each jurisdiction in order to deal with the two frameworks which would increase the transaction costs.

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 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 benefit analysis for each country. It would be necessary to establish clear appeal rights from any joint processes.

It is important to have the initial application dealt with by the two competition agencies. The Commerce Commission does not favour having a tribunal that is separate from the agencies with, say, limited rights of appeal on questions of law. It is important to have the agencies consider the issues first as they have the relevant expertise, skills, and information gathering powers. It is important to ensure that the agencies with expertise in competition issues are not by-passed. The appellate forum would then have the benefit of the expert tribunal defining and analysing the issues. The rights of business would be safeguarded by appeal based on a rehearing.

The benefits and risks in these proposals are detailed in the following table.

Audience	**Benefits**	**Risks**
Businesses	▪ Lower transaction costs for businesses ▪ Lower risk of inconsistent decisions particularly for overlapping trans-Tasman markets ▪ Increased certainty ▪ Lower regulatory costs by having joint processes which removes duplication ▪ Lower regulatory costs by having joint approaches to formulation of guidelines for goods and services	▪ Bypass of the competition agencies with direct applications to a separate stand alone tribunal negating the agencies' primary role of competition regulators ▪ Legislation is not appropriately aligned ▪ Best practice is not appropriately identified and implemented by both agencies
Consumers	▪ Increased certainty ▪ Lower regulatory costs for businesses may lead to price reductions ▪ More effective enforcement of cross border behaviour or structural changes.	

Institutional	▪ Lower risk of inconsistent decisions particularly for overlapping trans-Tasman markets ▪ More effective enforcement through mutual information gathering and sharing ▪ Sharing of resources and economies of scale ▪ Overall development of best practice for both jurisdictions leading to long term benefits for both jurisdictions ▪ Common guidelines developed providing a common approach to analysis and what constitutes unlawful conduct	

Competition and consumer protection legislation

The objectives of Australian and New Zealand competition and fair trading regimes are substantially similar. Any differences are likely to be found in the interpretation of the purpose statements of the legislation. This can give rise to a different approach to the calculation of consumer benefit.

It should not be difficult for agreement to be reached between the Commerce Commission and the ACCC about the best practice approach to be adopted for joint processes. The current objectives are unlikely to prevent such joint approaches.

Description of Difference	**New Zealand**	**Australia**
Purpose/Object Statements	The purpose statement of the Commerce Act 1986 is: The purpose of this Act is to promote competition in markets for the long-term benefits of consumers within New Zealand. The long title of the Fair Trading Act 1986 is: 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 and also to repeal the Consumer Information Act 1969 and certain other enactments.	The object of the Trade Practices Act 1974 is: The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. As Australia's fair trading provisions are part of the Trade Practices Act, and not part of a separate statute (except in relation to the Australian Securities and Investments Commission Act 2001), there is no separate object or long title applying to these fair trading provisions.
Consideration of Economic Policy	In the exercise of powers under the Commerce Act, the Commerce Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commerce Commission by the Minister (section 26(1) of the Commerce Act). The Commerce Act does not prohibit the Minister from issuing a statement in relation to particular provisions of the Act.	Section 29(1) of the Trade Practices Act provides that the ACCC must comply with directions of the Minister and requirements of the Parliament. In contrast to section 26(1) of the Commerce Act, the Minister cannot give directions in relation to specific parts and provisions of the Trade Practices Act, such as Parts IV (Restrictive Trade Practices) or Parts VII (Authorisations and Notifications in respect to Restrictive Trade Practices).

New Zealand does not have an equivalent to Australia's National Competition Policy. There is a mechanism under section 26 of the Commerce Act which provides for the Commerce Commission to have regard to economic policies of Government. This is a very transparent process and would usually include the issuing of a Government Policy Statement.
The Commerce Commission is not bound to follow economic policies of Government. In contrast, the ACCC must comply with directions of the Minister pursuant to section 29 of the Trade Practices Act. The potential scope of Ministerial directions in Australia is much more limited than statements of economic policy issued by the Minister in New Zealand.

The Act states that in the exercise of its power under the Commerce Act, the Commerce Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commerce Commission by the Minister. The Minister shall cause every statement of economic policy transmitted to the Commerce Commission to be published in the Gazette and laid before Parliament as soon as practicable after transmitting it.

Substantive Laws

New Zealand and Australia competition and consumer protection laws do not differ substantively. Hence, greater co-operation and a long term goal of establishing common processes are unlikely to be costly. This makes the achievement of significant benefits more likely.

Part of the benefit of having joint processes would involve the reduction of transaction costs. These costs would not be reduced if parties to a process had to present evidence related to two different thresholds or precedents during the same process.

In the event that matters were dealt with jointly under the Stage Two approach, the significant benefits available from joint processes would only be achieved if substantive laws and court precedent were applied uniformly across the jurisdictions.

Competition Laws

The substantive competition laws are very similar although differences lie more in process. Australia has more "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. For example, price discrimination and third line forcing (sections 47 and 49 of the Trade Practices Act) are expressly prohibited in Australia but are dealt with more generally under New Zealand's prohibitions for anti-competitive contracts, arrangements and understandings and market power provisions (sections 27 and 36 of the Commerce Act). Other differences are detailed in the following table.

Issue	New Zealand	Australia
Purpose/object statement	The purpose statement of the Commerce Act 1986 is: The purpose of this Act is to promote competition in markets for the long-term benefits of consumers within New Zealand.	The object of the Trade Practices Act 1974 is: The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.
Formal statutory approval process for mergers and acquisitions in New Zealand	New Zealand has a voluntary and formal notification scheme for mergers and acquisitions. The Commerce Commission has a statutory process of parties making formal applications to the Commerce Commission for approval of mergers and acquisitions. If a clearance is granted, the acquisition is protected from legal challenge. The Commerce Commission cannot accept behavioural undertakings and can only accept structural undertakings (such as divesting assets or shares). There is no equivalent to section 50(3) in the Commerce Act. A Commerce Commission clearance endures for twelve months from the date on which it was given.	Australia has no statutory equivalent to New Zealand's formal approval process for mergers and acquisitions. In practice, parties considering acquisitions often approach the ACCC and get a written statement that the ACCC will not take action, but this provides no legal protection from a claim by a third party. ACCC can accept behavioural and structural undertakings. Section 50(3) of the Trade Practices Act provides for an express list of factors which must be taken into account to determine whether the merger or acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market. If the ACCC receives further information, or circumstances change, it may subsequently revoke its informal approval.
Authorisations	Section 3A of the Commerce Act requires that in determining whether, or to what extent, conduct will result in a public benefit, the Commerce Commission must have regard to any efficiencies that may arise from that conduct. The Commerce Act does not allow the Commerce Commission to issue interim authorisations.	There is no equivalent to section 3A in the Trade Practices Act. In contrast, the Trade Practices Act allows the ACCC to issue interim authorisations where appropriate.

Collective boycotts	The Commerce Act bans collective boycotts but in contrast requires that at least two of the boycotting parties must be actual or potential competitors and the target must also be a competitor of one or more of the boycotting parties (section 29 of the Commerce Act).	The Trade Practices Act bans collective boycotts but does not require that the target of the restriction or limitation also be a competitor, actual or potential, of the parties to the agreement (sections 4D and 45 of the Trade Practices Act).
Cease and Desist Powers	The Commerce Commission has cease and desist powers to quickly stop any misuse of market power.	The ACCC does not have cease and desist powers.
Both jurisdictions have limited extra-territorial reach	Section 4 of the Commerce Act enables the Act to apply to conduct outside New Zealand by any person resident or carrying on business in New Zealand, but only to the extent that this conduct affects a market in New Zealand. New Zealand has no statutory equivalent to section 50A of the Trade Practices Act which prohibits all anti-competitive acquisitions within Australia and any anti-competitive acquisitions of property outside Australia if the acquirer is resident or carrying on business in Australia. Whilst the Commerce Act gives New Zealand jurisdiction in relation to offshore mergers, there are difficulties in enforcing any judgment.	Section 5 of the Trade Practices Act provides that its competition and fair trading laws (Parts IV and V of the Trade Practices Act) extend to engaging in conduct outside Australia by (a) bodies corporate and (b) citizens or persons ordinarily resident within Australia. In relation to exclusive dealing and resale price maintenance, the Trade Practices Act applies to engaging in conduct outside Australia in relation to the supply by those persons of goods or services within Australia. The Trade Practices Act also provides for extraterritorial mergers and acquisitions (section 50A).
Section 36	New Zealand's market power provision (section 36(3)) provides that a person does not take advantage of a substantial degree of market power in a market by seeking to enforce a statutory intellectual property right.	There is no equivalent to section 36(3) of the Commerce Act in the Trade Practices Act.

Resale price maintenance	Sections 38 and 41 of the Commerce Act specifically address resale price maintenance by third parties. There is no statutory equivalent in New Zealand to the loss leader defence for resale price maintenance as provided for under section 98(2) of the Trade Practices Act.	There is no equivalent to section 38 of the Commerce Act in the Trade Practices Act. The Trade Practices Act has a loss leader defence for resale price maintenance provisions (section 98(2) of the Trade Practices Act). 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.
"Essential facilities" regime	New Zealand has no statutory equivalent to Part IIIA but has dealt with specific issues regarding access to essential facilities in other legislative initiatives, such as under the Telecommunications Act 2001 and the Electricity Industry Reform Act 1998.	Part IIIA of the Trade Practices Act sets up a scheme dealing with access to "essential services" of national significance.
Rights of appeal	There is a right of appeal from decisions of the Commerce Commission (including authorisations and clearances) to the High Court of New Zealand, and provision for further appeal to the Court of Appeal and the Supreme Court.	In Australia, applications for review of the ACCC decisions on authorisation are currently made to the Australian Competition Tribunal, either by the applicant or other interested person. The hearing by the tribunal is a rehearing of the matter. Other determinations of the ACCC are subject to merits review by the Tribunal. Appeals of ACCC determinations are available to the Federal Court and special leave is required before appeals may proceed to the High Court of Australia.
Confidentiality Orders	New Zealand has a statutory power to restrict or prohibit the publication of confidential information (section 100 of the Commerce Act 1986).	The Trade Practices Act does not have an equivalent to section 100 of the Commerce Act.

Search warrants	The Commerce Commission has the power under a search warrant to enter premises and search as well as the power to seize documents (section 98A of the Commerce Act). In New Zealand, a District Court Judge, Justice, or Community Magistrate, or a Court Registrar (not being a constable) may issue a warrant if a warrant is necessary to establish the contravention.	Section 155(2) of the Trade Practices Act only confers the power to enter and inspect. These search powers may be exercised without the need for a warrant. The assessment of whether the requirements under section 155(2) are met remains with the ACCC and is not subject to any judicial examination or approval.

The Commerce Commission recognises that though the substantive thresholds and thresholds are very similar, there are different approaches to process.

Fair Trading Laws

Part V of the Trade Practices Act is more prescriptive in terms of prohibited conduct than New Zealand's equivalent, the Fair Trading Act 1986. There are overlapping fair trading laws for both jurisdictions, particularly regarding fair trading type prohibitions in the securities field.

The Fair Trading Act has not followed recent developments in Australian consumer law at both federal, state and territory level arising from changing marketplace conduct and judicial interpretation. In particular, New Zealand's remedies and enforcement regime departs from the Australian equivalent on a number of fronts. Such differences can be addressed as part of an overall development of best practice for both jurisdictions.

Differences in substantive laws are included in the following table.

Issue	**New Zealand**	**Australia**
Purpose statement	The long title of the Fair Trading Act 1986 is: 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 and also to repeal the Consumer Information Act 1969 and certain other enactments.	There is no separate object or long title applying to Part V of the Trade Practices Act. This is because Australia's fair trading provisions are part of the Trade Practices Act, and are not part of a separate statute. (Note that the Australian Securities and Investments Commission Act 2001 provides specific fair trading laws for the financial services sector).
Industry based codes	New Zealand has no statutory framework for industry based codes.	Australian has a statutory framework for industry based codes (Part IVB of the Trade Practices Act). Corporations are required to follow the codes.

Statutory unconscionable conduct regime	New Zealand has no statutory equivalent to Australia's statutory unconscionable conduct regime. The Fair Trading Act deals with most forms of conduct that are recognised as being detrimental to a fair and competitive marketplace. It does not explicitly deal with the behaviour of a business which has the effect of unlawfully placing the other party to a transaction at a serious disadvantage.	Australia has a statutory unconscionable conduct regime generally and in connection with business transactions (Part IVA of the Trade Practices Act and Part II of the Australian Securities and Investments Commission Act 2001). Contraventions of this regime attract a range of civil remedies.
Liability of manufacturers and resellers of defective goods	There is no statutory equivalent to Part VA of the Trade Practices Act in New Zealand. A range of statutes relate to the liability of manufacturers and resellers of defective goods, including the Fair Trading Act and the Consumer Guarantees Act. Liability in New Zealand is affected by the Injury, Prevention, Rehabilitation and Compensation Act 2001.	Part VA of the Trade Practices Act covers the liability of manufacturers and resellers of defective goods. The Australian law relies on private remedies in tort in many areas.
No prohibition on false or misleading statements as to future matters in New Zealand	The Fair Trading Act does not have an equivalent to section 51A of the Trade Practices Act. This Act does not explicitly outlaw false or misleading statements or representations and predictions about future matters. A person's promise or prediction as to the performance or profitability of a business opportunity is not caught by the Fair Trading Act unless it is based on existing or past facts.	Australia explicitly outlaws false or misleading statements or representation and predictions about future matters (section 51A of the Trade Practices Act).
Representative actions for breaches of Part V of the Trade Practices Act	The Commerce Commission is unable to pursue representative action for breaches of the Fair Trading Act. In general, there are no provisions in New Zealand comparable to the Australian class action provisions.	The ACCC may pursue representative action for breaches of Part V of the Trade Practices Act on behalf of identified customers who have suffered loss and who consent to the ACCC proceeding on their behalf. Representative actions (or class actions) may also be instituted in the Federal Court.

Search warrants	The Commerce Commission has the power under a search warrant to enter premises and search as well as the power to seize documents (section 47A of the Fair Trading Act). In New Zealand, a District Court Judge, Justice, Community Magistrate, or Court Registrar (not being a constable) may issue a warrant if the warrant is necessary to establish the contravention.	Section 155(2) of the Trade Practices Act only confers the power to enter and inspect. These search powers may be exercised without the need for a warrant. The assessment of whether the requirements under section 155(2) are met remains with the ACCC and is not subject to any judicial examination or approval.
Other	The Fair Trading Act has no statutory equivalents to the following provisions of the Trade Practices Act: section 53A (ea), section 53c and section 63A.	Other provisions in the Trade Practices Act without a New Zealand equivalent include: ▪ section 53A (ea) deals with false representations as to the availability of either facilities for the repair of goods or spare parts for goods; ▪ section 53c provides that when goods or services are advertised and part of the consideration is stated, the full cash price must also be stated; and ▪ section 63A prohibits the distribution of unsolicited debit or credit cards.

Interpretation and application of substantive laws

Although the laws and thresholds are similar, different systems and processes can lead to differences in substantive interpretation issues. In some cases, the differences may arise from the approaches taken by the two agencies, or in other cases the differences may arise from court established precedent.

If joint approaches are to be established, common analytical approaches and frameworks will need to be adopted. In some cases, establishing common approaches and guidelines would be low cost and simply require consultation and agreement between the two agencies with a focus on achieving best practice. In other cases, existing court precedent may need to be addressed by amending legislation.

As an example, both agencies currently have separate Merger and Acquisition Guidelines. These Guidelines are not too dissimilar. Some aspects of the ACCC Guidelines are set out in legislation (eg there are mandatory considerations which must be taken into account in determining whether an acquisition substantially lessens competition in a market, section 50(3) of the Trade Practices Act). In the Commerce

Commission Guidelines, similar factors are taken into account, although they are not embedded in the legislation. Consequently, developing similar guidelines should not be a difficult task.

It is important that whatever framework or process is adopted, it is established as being best practice. An objective approach to this issue, including consultation with industry, should result in agreement between the agencies about what frameworks and processes should be adopted

Differences in the analysis of key economic principles relating to competition law are of most concern where markets are trans-Tasman.

The processes of both jurisdictions involve hearings for adjudication matters. If the proposed public benefits of joint processes are to be achieved, it will be essential that parties involved are able to make a single application and present evidence against a single analytical framework.

The differences between analytical approach are set out in the table below.

Issue	**New Zealand**	**Australia**
Benefits and detriments	Required by case law to quantify benefits and detriments in applying the public benefit test for authorisations.	Historically apply a qualitative analysis only.
Benefits and detriments continued	The Commerce Commission would not consider these as benefits.	ACCC has considered the following as benefits in authorisations: ▪ expansion of employment; ▪ regional development; ▪ assistance to efficient small businesses; and ▪ promotion of equitable dealings in markets.
Transfers	The Commerce Commission generally treats transfers between consumers and producers as neutral. However, transfers of functionless monopoly rents overseas are considered as a detriment.	ACCC gives less weight to cost savings when not passed on to consumers, especially when retained as higher profits by shareholders.
Imports	The Commerce Commission may consider imports, but do not accept it as a bright line rule.	ACCC finds no substantial lessening of competition where imports have had at least ten percent of the market for at least three years.

Safe harbours	Three firm concentration below 70 percent, market share combined entity greater than 40 percent. Three firm concentration above 70 percent market share combined entity greater than 20 percent.	Four firm concentration above 75 percent market share combined entity greater than 15 percent. In all cases where combined entity has share over 40 percent.
Models	Increasing use of computer simulation models for merger analysis.	No use of computer simulation models observed.

The Commerce Commission has wider safe harbours than the ACCC. This is largely due to the nature of Australian markets which are generally characterised by a larger number of firms. However, the Commerce Commission notes that without harmonisation the difference in the safe harbour thresholds may be argued to result in confusion relating to the trigger point for voluntary notification and when/if it is necessary to file notification in one or both jurisdictions. The Commerce Commission's view, however, is that the safe harbour provisions are only screening criteria but it would be helpful to have a common approach.

When imported goods or services form part of the factual matrix, both agencies currently take the competitive constraints of the imports into account when undertaking the competition analysis. With the suggestion of joint processes, it is possible that imports would become part of the product market definition analysis. More trans-Tasman product markets could become apparent as the geographic boundaries become of less significance. However, the final result of adjudication decisions would be unlikely to change as the same constraints are being considered.

The provisions of the Fair Trading Act and Trade Practices Act are sufficiently similar that there is a high degree of consistency in the way that both pieces of legislation are interpreted.

In terms of analysis, the Commerce Commission may use different analytical tools or procedures or have different legislation but that does not mean its conclusions are necessarily different. For example, Australia has unconscionability provisions in the Trade Practices Act – but there are no similar provisions in the Fair Trading Act. This difference does not prevent closer co-operation overall.

The same applies in respect of mechanisms of enforcement – there are differences in each agency's respective powers in terms of tools available for enforcement, for example, the Commerce Commission has notice and search warrant powers, but the ACCC cannot seize documents during the exercise of a search warrant; the ACCC has infringement and substantiation notices, which the Commerce Commission does not. Overtime, the two jurisdictions could seek to achieve common processes.

Institutional arrangements

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.

Issue	New Zealand	Australia
Decisions do not bind each other	The Commerce Commission is not bound by the decisions of the ACCC or the Australian Competition Tribunal or Australian Courts.	The ACCC is not bound by the decisions of the Commerce Commission or the New Zealand Courts.
Rights of appeal are different	In the first instance, appeals are made to the High Court based on the record available to the Commerce Commission for clearances and authorisations (albeit largely the case law of each jurisdiction is relied upon by the other).	Various determinations of the ACCC are subject to merits review by the Australian Competition Tribunal including authorisations determinations.
Formal statutory approval process for mergers and acquisitions in New Zealand	New Zealand has a voluntary and formal notification scheme for mergers and acquisitions. The Commerce Commission has a statutory process of parties making formal applications to the Commerce Commission for approval of mergers and acquisitions. If a clearance is granted, the acquisition is protected from legal challenge.	Australia has no statutory equivalent to New Zealand's formal approval process for mergers and acquisitions. In practice, parties considering acquisitions often approach the ACCC and get a written statement that the ACCC will not take action, but this provides no legal protection from a claim by a third party.
Practical processes for authorisations diverge despite similarity in substantive process rules	The Commerce Commission does not enter into negotiations with commercial players seeking authorisation and takes a more process orientated role. The Commerce Commission's draft determinations are considered "work in progress" often including detailed questions for submitters to answer in their submissions on the draft report.	The ACCC enters into negotiations with applicants before receiving a formal application in order to facilitate a negotiated solution. ACCC's drafts are considered closer to a final decision and it is uncommon for its decisions to be reversed.

	In New Zealand a formal conference is an expected step in the process. Anyone sent a draft determination or who have initial submissions can request that a conference be held. If no such request is made the Commerce Commission may decide whether to hold a public conference (section 62 of the Commerce Act).	In contrast, the ACCC invites applicants or other persons to notify the ACCC if a conference is required (section 90A of the Trade Practices Act).

Part of the reason for the different analytical frameworks arising from different precedents is that the institutions are not bound by the decisions of the other. For example, although the Commerce Commission might take note of decisions of the Australian Competition Tribunal, it is not bound by them, in the same way that the ACCC is not bound by decisions of the Commerce Commission. The development of closer co-operation could envisage a time when each agency will pay greater attention to the other in the same way that courts of first instance respect the decisions of the each other. As stated earlier, the key differences between the regimes is not the law, as much as the interpretation and analysis conducted under the law. That said, in many areas there is significant reliance placed on the case law of each jurisdiction. In many areas the underlying case authorities are the same. The courts have recognised the need to achieve common positions where possible.

During concurrent adjudication processes being conducted by the ACCC and the Commerce Commission in relation to a merger that has a trans-Tasman impact, the two organisations are able to exchange information provided to them by third parties, with the permission of the information provider.

The appeal processes are divergent with an appeal in authorisation cases to the Australian Competition Tribunal being a *de novo* hearing and the New Zealand process being an appeal before the High Court based on the record available to the Commerce Commission. These differences in adjudication process can result in companies involved in both processes at the same time having to take different approaches during the same process. 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.

As discussed earlier, another substantive difference is that the ACCC currently has no equivalent to the formal clearance process for mergers in New Zealand.

Specific Issues Arising in the Context of Authorisations

In respect of both jurisdictions, authorisation of any otherwise prohibited acquisition or trade practice will be granted upon application if the public benefit of the acquisition/trade practice is likely to outweigh the anti-competitive detriment. By contrast to New Zealand, the ACCC may adopt an interim authorisation process.

In broad terms, both agencies follow the same process:

- an application for authorisation is received;
- the commission calls for submissions on the application from the public and interested parties;
- the commission releases a draft determination;
- further submissions can be made to the commission;
- a public conference may be held to allow all interested parties (including the applicant) to present their cases and for the commission to ask direct questions; and
- a final decision is released.

Although in substance the process followed by the Commerce Commission and ACCC is similar, both jurisdictions diverge in terms of the practical implementation of the process. The ACCC enters into negotiations with applicants before receiving a formal application in order to facilitate a negotiated solution. In contrast, the Commerce Commission does not enter into such negotiations with commercial players seeking authorisation and takes a more process orientated role.

Further, whilst both the Commerce Commission and ACCC issue draft determinations, the ACCC's drafts are considered closer to a final decision and it is uncommon for their decisions to be reversed. In contrast, the Commerce Commission's draft determinations are considered "work in progress" often including detailed questions for submitters to answer in their submissions on the draft report.
Both commissions may have conferences after the draft report is released. In New Zealand a formal conference is an expected step in the process often lasting a week or more with the presentation of formal submissions by lawyers and economists. Anyone sent a draft determination or who has initial submissions can request that a conference be held. If no such request is made within 10 days of the Commerce Commission's release of its draft the Commerce Commission may, at its own discretion, decide whether to hold a public conference (section 62 of the Commerce Act). In contrast, the ACCC invites applicants or other persons to notify the ACCC if a conference is required (section 90A of the Trade Practices Act).

Where a trans-Tasman transaction results in applications to both jurisdictions in relation to the same transaction (eg the application by Qantas and Air New Zealand for authorisation of a proposed alliance between the two), these differences will impact on the applicant's compliance and transaction costs. It is also necessary for both agencies to consider and determine the same or similar issues leading to duplication of the regulatory costs.

The statutory test for authorisation of a merger is broadly the same. However, instead of the specific section 90(9A) factors of the Trade Practices Act, section 3A of the Commerce Act requires that in determining whether or not conduct will result in "a benefit to the public", the Commerce Commission must have regard to any efficiencies that will result from that conduct.

Applications for review of an ACCC authorisation may be made to the Australian Competition Tribunal. In New Zealand however, the applicant, target company and any other person who attended the conference are entitled to appeal to the court.

Further details on the nature of both jurisdiction's information sharing obligations are outlined in the "extraterritorial application" section of this submission.

Actions for contravention are brought in the court system. In Australia, exclusive jurisdiction has been given to the Federal Court subject to appeals by special leave to the High Court, (section 86 of the Trade Practices Act). In New Zealand, jurisdiction has been given to the High Court with appeal rights available to higher courts. The most obvious difference between the Australian and New Zealand legislation is the requirement that at least one or more lay members sit on the High Court when it is hearing appeals from decisions of the Commerce Commission. Lay members are appointed on the motion of the judge or on the application of any party to the proceeding. The Commerce Commission understands that in part, this difference in approach is due to restrictions imposed in the Australian Constitution.

When transactions impact only in one jurisdiction these different processes may not matter unless the processes are seen to diverge from best practice. The differences do matter for trans-Tasman issues. Such differences can readily be avoided through the establishment of a joint tribunal and joint processes and analytical approach.

Enforcement Processes

The mechanisms of enforcement do not differ substantively. Each agency undertakes investigations, exercises requisition powers and takes action through the courts.

Issue	**New Zealand**	**Australia**
Confidentiality Orders	New Zealand has a statutory power to restrict or prohibit the publication of confidential information (section 100 of the Commerce Act 1986).	The Trade Practices Act does not have an equivalent to section 100 of the Commerce Act. The ACCC is not bound by section 100 confidentiality orders issued by the Commerce Commission.
Exercise of information requisitioning powers	New Zealand does not have an equivalent to Australia's Mutual Assistance in Business Regulation Act 1992. The Commerce Commission cannot requisition in Australian except in relation to trans-Tasman goods. New Zealand cannot use its powers for the ACCC.	The ACCC may exercise powers under Australia's Mutual Assistance in Business Regulation Act 1992. The ACCC cannot requisition information in New Zealand except in relation to trans-Tasman goods. The ACCC cannot use its powers for the Commerce Commission.

However, there is some doubt as to whether the Commerce Commission and the ACCC are able to share information obtained through their requisitioning powers without the permission of the owner of that information. Issues arise also in the context of the lack of any obligation of confidentiality for commercially sensitive information once it has been handed over to the other jurisdiction. 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.

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 (section 155A of the Trade Practices Act), apply. These powers may only be exercised in relation to taking advantage of market power in trans-Tasman markets (section 36A of the Commerce Act, and its equivalent section 46A of the Trade Practices Act).

However, the ACCC is able to exercise powers under Australia's Mutual Assistance in Business Regulation Act 1992. Under this Act, the ACCC may compel private persons to provide evidence to assist foreign business regulators in their administration and enforcement of foreign business law.

Before considering any request, the ACCC must receive an undertaking by the foreign regulator that the information and evidence obtained will not be used for the purpose of criminal proceedings against the person who provided the information. The ACCC can then either authorise or refuse a foreign request and if the Attorney-General accepts the request, the ACCC may use its powers to gather evidence and require a person to give information or evidence or produce documents to which the request relates.

Legislative change would be required in order to enable each agency to assist the other in requisitioning information including search and seizure powers. Examples exist in other jurisdictions (for example Canada and the United States).

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.

A necessary adjunct to information sharing is the need for the development of certain rules surrounding confidentiality, such as, waivers of confidentiality, and possibly a joint policy statement outlining what safeguards have been established to protect information and the interests of participating parties during a trans-Tasman merger or authorisation investigation. The Commerce Commission is able to make confidentiality orders under section 100 of the Commerce Act. The ACCC does not have similar powers.

Sanctions and remedies

Competition Laws

In broad terms, both jurisdictions provide for remedies to be sought by both private and public entities. However, there are differences between jurisdictions in terms of remedies available for certain breaches of the law and the remedies that particular parties can seek. Again these differences should not by themselves inhibit joint co-operation between the agencies.

Issue	New Zealand	Australia
Divestiture of assets or shares	The Commerce Act restricts an application for divesture of assets or shares to the Commerce Commission (section 85) but any person can seek an injunction to stop a proposed acquisition (section 84).	Any person can seek divestiture of assets or shares, but only the ACCC can seek an injunction to prevent an acquisition.
Penalties for price fixing and other cartel like conduct	The penalty provisions for price fixing and cartel like conduct against corporations is the greater of $10 million, three times the illegal gain, or if the illegal gain is not known 10 percent of the enterprise's annual turnover.	The penalty provisions for price fixing and other cartel like conduct against corporations are up to AUD 10 million.
Exemplary damages	Victims in New Zealand can recover exemplary damages in the course of enforcement proceeding by the competition authority or separately in a civil action (section 82A).	Victims cannot recover damages for monetary loss in the course of enforcement proceeding by the competition authority or separately in a civil action.
Order for exclusion from management of a body corporate	The Commerce Act specifically provides that a court may order certain persons to be excluded from management of body corporate (section 80C). It is an offence to act in contravention of an order made under section 80C (section 80E of the Commerce Act).	The Trade Practices Act does not allow the court to order that a person who is in breach of the equivalent of Part IV be excluded from the management of a corporation.
Indemnification of directors etc against pecuniary penalties	The Commerce Act prohibits a corporation from indemnifying a director, servant or agent of the corporation against liability for payment of a pecuniary penalty imposed for price fixing (section 80A of the Commerce Act). The court may order pecuniary penalties for contravention of section 80A (section 80B of the Commerce Act).	The Trade Practices Act does not prohibit a corporation from indemnifying a director, servant or agent of the corporation against liability for payment of a pecuniary penalty imposed for price fixing. Neither can the courts order pecuniary penalties for such a contravention.

Cease and desist powers	The Commerce Act has cease and desist powers to quickly stop any misuse of market power	The ACCC does not have cease and desist powers. There is a proposal for reform to provide new cease and desist orders to restrain firms from engaging in specific anti-competitive conduct.

Fair Trading Laws

There are a number of differences in the remedies available across both jurisdictions.

Issue	**New Zealand**	**Australia**
Substantiation notices	New Zealand has no statutory power to issue substantiation notices requiring a trader to substantiate claims (express or implied) promoting goods or services or the sale or grant of interests in land.	The ACCC has a statutory power to issue substantiation notices requiring a trader to substantiate claims (express or implied) promoting goods or services or the sale or grant of interests in land. The alleged offender can elect to pay the fine or dispute the matter in court.
Infringement notices	The Commerce Commission has no such statutory power to issue infringement notices as an alternative to prosecution.	The ACCC can issue infringement notices as an alternative to prosecution.
Enforcement of undertakings	New Zealand does not have an equivalent statutory provision to section 87B of the Trade Practices Act. Any undertakings obtained from the Commission would form part of a settlement contract and are enforceable through the courts.	Section 87B allows the ACCC to accept a written undertaking given by a person in connection with a matter in relation to which the ACCC has a power or function (other than Part X). The undertaking may include compensating consumers who suffered from the wrongful conduct, corrective advertising and implementing a compliance program. If the court is satisfied that the person has breached a term of the undertaking, the court may make a range of orders.

Trans-Tasman Trade in Goods

Section 36A of the Commerce Act extends New Zealand's market power provisions (section 36) by prohibiting parties with a substantial degree of market power in a market in either New Zealand, Australia or both countries from taking advantage of that position for one of the proscribed anti-competitive purposes in a market in New Zealand. There is a reciprocal provision in Australia, section 46A of the Trade Practices Act.

These laws demonstrate an integrated approach to control the misuse of trans-Tasman market power in relation to transaction in goods. A reciprocal evidentiary, procedural and enforcement framework has been established to implement these laws. It extends to allow the relevant Australian and New Zealand courts to sit in the foreign jurisdiction. The reciprocal nature of these provisions and, in particular, where a company is operating in a market in both countries, means that a party is liable for a contravention in both countries.

These provisions demonstrate what is possible for future joint co-operation. Little legislative change is necessary to extend these provisions to trans-Tasman services and other reciprocal enforcement measures.

Exemptions

Many activities which are exempt from Australia's competition laws are also exempt under the Commerce Act.

An authorisation for a merger or acquisition or a Restrictive Trade Practice granted in one jurisdiction does not apply to the same behaviour in the other jurisdiction. This limit on the extent of any authorisation is appropriate given that the basis of an authorisation is that the welfare and efficiency benefits resulting from the behaviour outweigh any likely detriment in that jurisdiction. This aspect of net public benefits being identified in each jurisdiction for authorisations would continue in the event that joint processes were undertaken.

However, there are differences in the exemptions under Australian and New Zealand competition and fair trading laws**.**

Issue	**New Zealand**	**Australia**
Price Recommendations by Associations	Section 32 of the Commerce Act affords relief from section 30 (the per se price fixing rule) by exempting price recommendations by associations which have 50 or more members. Section 32 is concerned with recommended prices promulgated by groups of 50 or more persons. The Commerce Act contains a deeming provision (section 2(8)(b)), providing that any recommendation which an association or body of persons issues to its members shall be deemed to be an arrangement between those members and between the association and those members.	The Trade Practices Act does not have an equivalent to sections 32 or 2(8)(b)of the Commerce Act.

Statutory Exemptions in relation to Intellectual Property Rights	The Commerce Act contains specific exceptions in relation to intellectual property rights (section 45).	The Trade Practices Act contains no specific exemptions relating to intellectual property rights.
Statutory Savings in respect of Business Acquisitions	Section 46 of the Commerce Act provides for certain savings in respect of business acquisitions.	The Trade Practices Act has no equivalent to section 46
Statutory exemption in relation to carriage of goods by sea	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 Trade Practices Act has no equivalent to section 44(2).
Practices subject to Authorisation	New Zealand list of practices subject to authorisation are more limited than Australia. For example, New Zealand's list does not include third line forcing.	Australia has a longer list of practices that are not able to be authorised than has New Zealand. The Australian list includes price fixing for goods (not services); resale price maintenance (both individual and collective); and "third line forcing" by one corporation of another's products.

To promote trans-Tasman trade, these differences can be minimised over time. Each jurisdiction may still perceive the need for different approaches for their national interest. In principle, however, consistency is preferred.

Extraterritorial application

The laws of both countries have limited extra-territorial reach. This is an area where changes in the laws could facilitate trans-Tasman business. An integrated business environment would benefit from consistent extra-territorial approaches. Effective competition enforcement for mergers and acquisitions can be facilitated. However, the differences are detailed in the table below.

Issue	**New Zealand**	**Australia**
Both jurisdictions have limited extra-territorial reach but there are differences	Section 4 of the Commerce Act applies to conduct outside New Zealand by any person resident or carrying on business in New Zealand, but only to the extent that this conduct affects a market in New Zealand. Section 3 of the Fair Trading Act provides that the Act extends to the engaging in conduct outside New	Section 5 of the Trade Practices Act provides that its competition and fair trading laws (Parts IV and V of the Trade Practices Act) extend to engaging in conduct outside Australia by (a) bodies corporate and (b) citizens or persons ordinarily resident within Australia. In relation to exclusive dealing and resale price maintenance, the Trade Practices Act applies to engaging in conduct outside Australia in

	Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct *relates to* the supply of goods or services, or the granting of interests in land, within New Zealand. Section 3 has wide coverage in New Zealand and to be covered by the Act, conduct need only "relate" to the supply of goods or services.	relation to the supply by those persons of goods or services within Australia.
	New Zealand has no statutory equivalent so section 50A of the Trade Practices Act which prohibits all anti-competitive acquisitions within Australia and any anti-competitive acquisitions of property outside Australia if the acquirer is resident or carrying on business in Australia. Whilst the Commerce Act gives New Zealand jurisdiction in relation to offshore mergers, there are difficulties in enforcing any judgment.	The Trade Practices Act also provides for extraterritorial mergers and acquisitions, (section 50A).

The application of the section 47 prohibition to offshore transactions

Recent case law[1] in New Zealand has raised questions relating to the ability of the New Zealand courts to grant effective relief in the case of offshore mergers or acquisitions that affect markets within New Zealand, where the person contravening the Act is not present in New Zealand. The ability of the Commerce Commission to enforce remedies against offshore mergers having anti-competitive effects in New Zealand is questionable. It raises issues concerning the enforceability of judgments against overseas parties and the scope of section 4.

Section 47 of the Commerce Act prohibits acquisitions of assets of a business or shares if the "acquisition would have, or be likely to have, the effect of substantially lessening competition in a market in New Zealand". Section 4 extends the application of the Act (including section 47) to conduct outside New Zealand to the extent that such conduct affects a market in New Zealand. Whilst the New Zealand courts have jurisdiction in relation to offshore mergers or acquisitions and proceedings could be filed in the New Zealand court[2], questions arise in enforcing a judgment for payment of any pecuniary penalty or divestiture or even injunctive relief. There is some concern that the Commerce Commission could only proceed against offshore parties by seeking a declaration of

[1] *Commerce Commission v British American Tobacco Holdings (New Zealand) Limited* (2001) 10 TCLR 320.

[2] Proceedings may be able to be served on the overseas company in its place of incorporation without leave, in reliance on rule 219(a) of New Zealand's High Court Rules, as the acquisition would cause loss or damage in New Zealand. But, the New Zealand court would grant leave to serve the proceedings out of New Zealand under rule 220, as New Zealand will invariably be the forum in which the case can most suitably be tried for the interests of all the parties and for the ends of justice.

contravention of the Act where the relevant parties are resident in a jurisdiction that does not recognise administrative penalties imposed by another jurisdiction.

The Commerce Commission is currently considering options for supplementary or alternative remedy mechanisms to address these potential issues. The Commerce Commission is also considering options for amending the scope of section 4 based on international law principles which otherwise could limit the prohibition in section 47.

Australia addresses this issue through section 50A of the Trade Practices Act. Action can be taken against subsidiaries resident in Australia. With an increasing trans-Tasman business environment this is an important area for development.

Trans-Tasman Trade in Goods

The trans-Tasman reach of the two national laws has not been extended beyond the section 36A of the Commerce Act and section 46A of the Trade Practices Act provisions which were designed solely for the purpose of effecting the removal of the trans-Tasman anti-dumping remedy – at the same time as free trade in goods was achieved – and were never intended to give rise to wider extra-territorial reach. The legislation in each country, therefore, requires the court in the nation where competition is allegedly deterred to determine the degree of market power held by a firm in the other nation. Each legal system is dependent on the other for the goodwill and resources required to conduct an investigation in the other jurisdiction. There is potential for process problems to eventuate which could be alleviated through a trans-Tasman treaty or other mutual agreement.

Related to this is whether the extra-territorial reach of both the Commerce Act and the Trade Practices Act should extend to other aspects of the domestic competition law regimes in relation to Stage Two. For example, 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.

Information Sharing

Co-operation between enforcement agencies is becoming increasingly desirable given the international nature of transactions. The Commerce Commission and the ACCC are subject to legislative constraints on sharing information with each other and those constraints are recognised in a co-operation and co-ordination agreement, which was concluded in July 1994.

The Co-operation and Co-ordination Agreement relates to all activities of the agencies including enforcement, adjudication, compliance education, research, human resource development and corporate services. Each agency to which a request for information or assistance is made must provide all information and grant assistance required unless the requested agency would be prevented from doing so by law. The requested agency is not required to release information to the other if disclosure is prohibited by the law or the information provider has requested that the information is withheld.

The Agreement permits the exchange of public information and internal information (such as, agency confidential information).

As transactions (mergers or acquisitions) relating to cross-border conduct are relatively rare and case specific, the most common arrangements for information sharing overseas are through waiver agreements by the parties, often including safeguards to ensure confidentiality. In the absence of a waiver agreement, there are no constraints on the agencies sharing agency-confidential information. However, the agreement does not facilitate the exchange of a party's confidential information between the agencies for cross-border transactions in the absence of a waiver agreement between the parties.

Joint or co-operative enforcement work between agencies requires the exchange of confidential information. However, certain commercially sensitive information should only be exchanged pursuant to a formal agreement containing appropriate safeguards.

Provision of investigative assistance

The ability of the Commerce Commission to gather information from overseas sources is constrained. Also the Commerce Commission is constrained as to the action it can take for overseas agencies. Currently the Commerce Commission may exercise its functions and powers under the Commerce Act only for the purposes of the administration or enforcement of that Act.
Requests for information or enforcement assistance may relate to matters that may contravene competition law outside New Zealand but such activity may not contravene the Commerce Act. Hence the Commerce Commission has no jurisdiction to use its powers to assist.

In terms of requisitioning powers, the Commerce Act allows the Commerce Commission to issue information requisitioning notices to persons within the jurisdiction of the Commerce Act (section 98). Hence, the Commerce Commission is unable to exercise its powers outside its jurisdiction. The only caveat to this is where section 36A applies which prohibits the taking advantage of market power in relation to trans-Tasman trade in goods. In that case the Commerce Commission may requisition information from an Australian resident under section 98A of the Commerce Act.

The Commerce Commission is unable to use its section 98 powers to obtain information from New Zealand residents who are subject to the Act, on behalf of the ACCC. Requisitioning orders may only be issued where it is necessary or desirable to do so for the purpose of carrying out the Commerce Commission's functions and powers. Gathering information for the ACCC would not be considered to be carrying out a function or exercising a power. 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.

Once again, little legislative change is required to address these issues. Greater enforcement co-operation and effectiveness resulting which will result in significant benefits to consumers and businesses can be achieved through little cost.

Current forms of co-operation, coordination and integration

The Commerce Commission co-operates with the ACCC in a number of ways to the extent allowable. This highlights that both agencies are partly satisfying key features of Stage One. Currently, co-operation includes:

- 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, eg GM-free labelling and feather/down content labelling;
- sharing information on strategic priorities, issue and policies, management systems, litigation outcomes, research, general experience/lessons learnt; and
- participating in Australian regulatory/enforcement fora, including the Regulators Forum, Standing Committee of Officials from Consumer Agencies (SCOCA), Fair Trading Organisations Advisory Committee (FTOAC), and Consumer Protection Advisory Committee (CPAC).

There may be scope for further co-operation, co-ordination and integration between the two agencies. That could include:

- development of joint strategies for enforcement;
- common strategic priority setting;
- developing compliance strategies especially those that target problematic or non complying businesses;
- opportunities for joint studies and research; and
- allocating the benefits of research across both agencies.

Policy options

The Commerce Commission considers that broadly there should be an objective of establishing joint processes to address behavioural or structural change that has an impact in both jurisdictions. In addition, improving the ability of the ACCC and the Commerce Commission to gather and share information for the purpose of assisting each other would have significant benefits to consumers through the increased effectiveness of competition and fair trading law.

Immediate steps can be taken towards a joint approach with both agencies able to work towards joint guidelines and agreed approaches to process (including enforcement). For example, there is currently no legislative barrier to ACCC Commissioners being appointed as Associate Commissioners with the Commerce Commission.

Whatever policy option is adopted, it will be important that best practice is adopted in both jurisdictions, and that authorisations are granted on the basis of the net public benefits in each jurisdiction.