

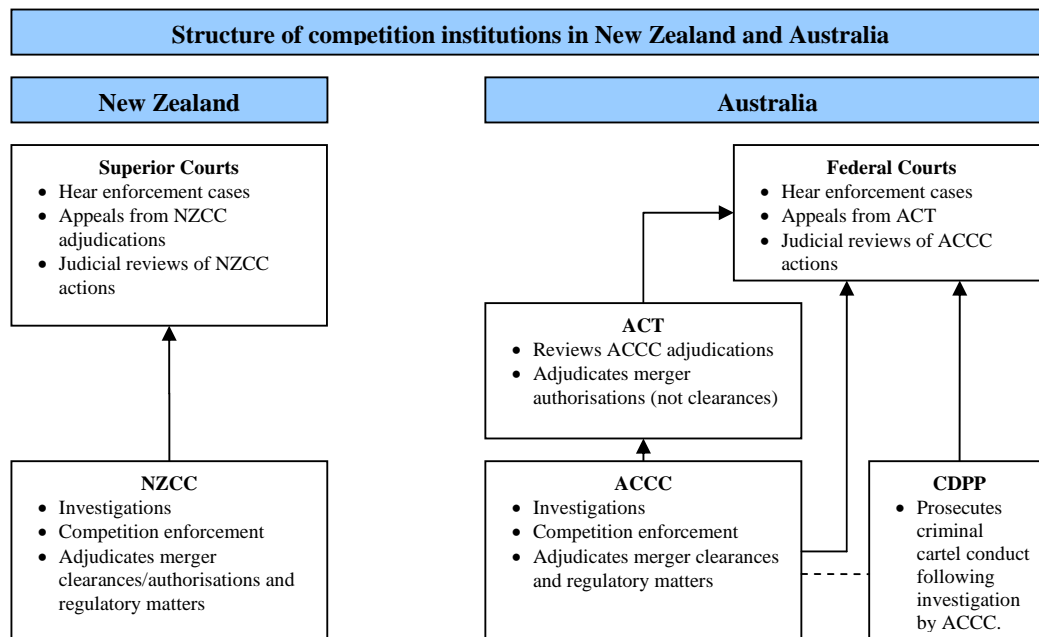
COMPETITION LAW ENFORCEMENT AND GOVERNANCE: AUSTRALIA AND NEW ZEALAND

Simon Peart

Institutional structure

The primary enforcement agencies for competition law in New Zealand and Australia are the Commerce Commission (“NZCC”) and the Australian Competition and Consumer Commission (“ACCC”), respectively. The agencies are responsible for (a) investigating breaches of competition law, (b) taking enforcement proceedings to the courts of general jurisdiction (the High Court in New Zealand and the Federal Court in Australia), and (c) undertaking first instance adjudications in merger control proceedings and a variety of regulatory matters. The NZCC and ACCC are independent agencies, empowered by statute and funded directly through Parliamentary appropriations. Though they are subject to oversight from Parliament and the relevant state ministries (the Ministry of Economic Development in NZ and the Treasury in Australia), they are not subject to any day-to-day control or influence in relation to their statutory functions.

In relation to criminal cartel prosecutions, the ACCC shares responsibility with the Commonwealth Department of Public Prosecutions (“CDPP”). The ACCC undertakes criminal cartel investigations, while the CDPP prosecutes.



In New Zealand, the courts are responsible for hearing enforcement proceedings and hearing appeals from NZCC determinations in merger control and regulatory matters. In Australia, enforcement proceedings are heard in the federal courts, but appeals from the ACCC’s merger control and regulatory determinations are heard by the Australian Competition Tribunal – a specialist tribunal that sits in divisions

comprising one federal court judge and two lay members, qualified by reason of their expertise in economics, business or public administration.

Aggrieved parties can access the courts through two jurisdictions: appeal or judicial review. Rights of appeal reflect the role of the courts in supervising the *judicial or quasi-judicial* decision-making of lower courts and tribunals, and are available only insofar as legislation provides. Judicial review, on the other hand, reflects the common law role of the courts in directly supervising the exercise of *administrative* functions and powers. Judicial review is conceptually limited to assessing whether an administrative power has been exercised lawfully and in accordance with procedural propriety. Accordingly, challenges to the substance or merits of a decision are generally reserved for appeal.

Mandate

Competition law and economic regulation are institutionally bound together in New Zealand and Australian law. The NZCC and ACCC are responsible for both traditional ex post competition law enforcement, and ex ante economic regulation. In New Zealand and Australian competition policy, economic regulation is reserved for markets structurally incapable of workable and effective competition (mainly utilities industries). Amongst their regulatory powers, the agencies are responsible for access regulation and price control, as well as a number of industry-specific regulatory regimes in industries such as telecommunications and electricity.

On the ex post competition enforcement side, both countries prohibit a range of trade practices either subject to a competition test (e.g. monopolisation and cooperation not amounting to cartelisation) or on a per se basis (price fixing, cartelisation, resale price maintenance).

Both countries also prohibit mergers and acquisitions that substantially lessen competition, and provide for a voluntary merger control regime that immunises merger parties from subsequent enforcement action by the agencies. A critical difference between New Zealand and Australia is that, until recently, Australia did not provide for clearances or authorisations in their competition legislation, and hence the mechanism for clearance was to apply informally to the ACCC for a “no action” letter. The informal mechanism has persisted even though a formal alternative was introduced in legislation in 2006, and in fact to date no applications have been made under the formal mechanism.

The main form of sanction for infringements is pecuniary penalties, to a maximum of (a) \$10,000,000, or (b) three times the commercial gain attributable to the infringement, or (c) if the commercial gain cannot be quantified, 10% of the worldwide group turnover in the preceding year. In addition, Australia has recently introduced criminal penalties, including terms of imprisonment of up to ten years, for hard core cartel conduct. So far there have been no prosecutions.

Australia and New Zealand are party to a series of bilateral treaties and agreements collectively known as Closer Economic Relations (“CER”). One of the objectives of CER is to promote harmonisation of business law between the two countries on both a

policy and institutional level. CER is responsible for the high degree of commonality in competition policy between New Zealand and Australia.

Due process norms

As competition law (with the exception of criminal cartels in Australia – a recent development) is predominantly civil in nature, issues of due process are generally framed in terms of the judicial review principles of natural justice, which require agencies exercising public powers to exercise those powers in a procedurally fair manner.

Consultation: The two natural justice principles that are most often implicated in competition law matters are the right to be heard in relation to a matter affecting one's interests, and the right to have adequate notice of reasoning and evidence relied upon by the decision-maker. As a consequence of these principles, almost all agency decision-making is attended by extremely rigorous consultation processes with affected parties. A consultation, in order to meet the legal standard, requires that the agencies (i) advise the affected parties of the proposals they are considering (for example, clearing or prohibiting a merger, or imposing regulatory controls on an industry), as well as the reasoning and evidence they have considered in formulating those proposals, (ii) provide an opportunity to comment on those proposals as well as the reasoning and evidence, and (iii) given genuine consideration, free of predetermination, to the affected parties' submissions.

The principles of natural justice are well-understood, and thus the agencies seldom fall short of the legal standard.

Investigations: In relation to investigations, parties have on occasion complained that the agencies use of their investigative powers are harsh and oppressive, imposing massive cost and unreasonable deadlines in a manner allegedly unjustified by the circumstances of the investigation. The agencies are afforded substantial latitude in their use of their investigative powers (for example, in assessing the relevance of requested documents, or imposing deadlines for response) and hence legal challenges have come to nothing. However, the present chairpersons of the agencies have acknowledged that the agencies' attitudes to investigations in the past may have been unnecessarily inconsiderate of the parties' interests, and have taken steps to promote greater efficiency and reasonableness in the investigative process.

Independence: The institutional arrangements of competition law strongly support the independence of the commissioners from political interference. With one notable exception, the agencies have also been vigilant to prevent personal conflicts of interest arising. The one exception arose in relation to a commissioner who failed to properly disclose his interest in a finance company the commission was at that time investigating. Since then, the disclosure process has been toughened.

Proportionality: The legal principles governing penalties ensure proportionality of the penalty to the conduct. Recent amendments to the legislation have enhanced proportionality by allowing courts to set penalties relative to a maximum calculated based on either the commercial gain attributable to the infringement, or to the turnover of the infringer.

Rights of review and appeal: Rights of review and appeal vary, depending on the nature of the decision. Practitioners and businesses express dissatisfaction with the constraints on appeals from regulatory determinations, which exclude challenges to the merits of the agency's decision. Accordingly, errors in economic reasoning or fact-finding underpinning regulatory decisions can be hard to contest.

Criminalisation: Finally, due process issues relating to rights of defence are bound to arise, and result in litigation, as the ACCC and CDPP begin to prosecute criminal cartels, particularly given that the ACCC's investigative powers are predicated on a civil rather than criminal regime. For example, parties are not entitled to the privilege against self-incrimination in relation to testimony compelled by the ACCC, and therefore the ACCC has had to carefully plan how it will use its power in order to preserve the admissibility of evidence in subsequent criminal proceedings. However the chairperson of the ACCC was confident that the agency would perform well given the long lead-in time that preceded criminalisation and the support the ACCC has received from the CDPP.

Institutional performance

For the most part, practitioners interviewed in New Zealand and Australia indicated that the agencies performed at a high level. They are accountable for their actions, transparent, involve the public extensively in their policy-formulation through consultations, and demonstrate an increasingly high level of expertise. The chairpersons of the agencies are also satisfied with the extent of their investigative and sanctioning powers.

Predictability: The predictability of the agencies' procedures and enforcement priorities is also improving due to greater use of guidelines. Traditionally in New Zealand and Australia administrative agencies did not outline their interpretation of the law as a supplement to court decisions. Given the relative paucity of competition litigation, it was therefore hard to know how the agencies would approach various kinds of trade practices, or economic issues in antitrust. More recently the agencies have been more forthcoming with guidelines – both substantive and procedural – which assists predictability and also aids self-assessment, which in turn results in more efficient use of resources.

Timeliness: The main area of concern remains timeliness. Historically, agency investigations and enforcement proceedings have been extremely protracted, with some investigations dragging on for years with little apparent progress. The current chairpersons of the agencies have made this a priority and so, for example, the NZCC has established a General Manager of Enforcement to ensure that investigations are either progressed to proceedings or closed within a year.

Regulatory determinations are also similarly extremely lengthy, but in this case the affected parties are themselves the culprits as the main cause of delay is consultation procedures. Complaining about consultation is a favourite litigation strategy of many industries, and hence the agencies insulate themselves by gold-plating the consultation process. This results in lengthy delays, and most practitioners (as well as the agencies) agree that the value of the additional consultation is doubtful.