Redirecting CER and the Harmonisation of Competition Law

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I: INTRODUCTION

The Australia-New Zealand Closer Economic Relations Trade Agreement ("ANZCERTA") has progressed a long way from its modest beginnings in 1983. The initial objectives of dismantling tariff and import quota barriers to trade were achieved with surprising ease, given the heavily regulated state of the two economies.

As the trade relations of the two nations advanced beyond the basic structure of a free trade area, deeper forms of economic integration came within reach. Australia and New Zealand decided to take some of the steps towards creating a single market. This involved removing administrative restrictions on the free movement of labour and capital, in addition to those on goods and services trade.

The harmonisation of competition law, and commercial law in general, has been an important aspect of the Closer Economic Relations ("CER") agenda. As the idea of a single market developed, compatibility between trade practices regimes was perceived to be increasingly important for the growth of trans-Tasman trade. If the competition laws in one country are significantly different from those foreign firms have experienced in their home markets, the costs of doing business may be increased and trade growth retarded. Therefore, the harmonisation of competition laws becomes a legitimate objective of the free trade

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area. The objective of this article is to assess the goal of the harmonisation of competition laws, and to examine the continued role of CER in New Zealand's competition regulatory scheme in the 1990s.

II: EVALUATING DEVELOPMENTS TO DATE

1. History and Background

The close economic relationship between New Zealand and Australia was formally recognised in 1965 with the signing of the New Zealand Australia Free Trade Agreement ("NAFTA"). Although trans-Tasman trade enjoyed some increase, NAFTA suffered from limited ambitions in terms of free trade advancement. It was beneficial to the few markets where tariff reductions took place, but by the late 1970s the momentum had waned.

Negotiations began for a new and more comprehensive trading relationship. ANZCERTA came into force on 1 January 1983, heralding a new beginning to trans-Tasman business. The objectives set out were:[1]

(a) to strengthen the broader relationship between Australia and New Zealand;

(b) to develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;

(c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and

(d) to develop trade between New Zealand and Australia under conditions of fair competition.

ANZCERTA was initially a trade liberalisation schedule designed to remove tariff and import quota or licensing barriers. The harmonisation of competition laws was not immediately contemplated, although objective (d) of ANZCERTA foreshadowed later developments.

Article 12 of ANZCERTA specifically addressed the way in which differences

1 New Zealand-Australia Closer Economic Relations Trade Agreement (With Exchange of Letters) 1983, Article 1.

between the two legal systems could disrupt the attempt to create an effective free trade zone. It required the two governments to:[2]

(a) examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labelling and *restrictive trade practices*; and

(b) where appropriate, encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements.

Both governments were also obliged to consult when regulatory differences impeded or distorted trade.

The election of the Fourth Labour government in 1984 led to economic reforms under "Rogernomics".[3] The deregulation of many New Zealand markets, with reliance on a modern competition law regime to repel unscrupulous traders, complemented CER goals. The Commerce Act 1986 had the policy objective of promoting competition, and thereby improving the economic efficiency and welfare of New Zealand. ANZCERTA shared that objective by promoting international trade as one important form of competition.

The Commerce Act was a dramatic break with New Zealand's previous attempts at anti-trust regulation. It featured the reform of the Commerce Commission, the creation of a new mergers and takeovers regulatory scheme, and the prohibition of a range of restrictive trade practices. The Commerce Act was modelled on the Australian Trade Practices Act 1974 (Cth), rather than the earlier British model. Although there were differences in detail, the structure and general focus of the New Zealand Act brought our competition law largely into alignment with Australia's. With the introduction of the Fair Trading Act 1986, the Australian approach to unacceptable commercial practices was largely adopted in New Zealand.

Unilateral trade liberalisation in both economies quickened the pace of tariff and non-tariff barrier reductions, especially in New Zealand. A major review of ANZCERTA in 1988 resulted in a significant commitment to accelerating, deepening, and widening the economic integration. This success enabled an acceleration of free trade in goods to July 1990. Additionally, it was decided to extend the agreement to the trans-Tasman services markets and to investigate any laws or regulations that might impede free trade.

The Memorandum of Understanding on the Harmonisation of Business Law ("MOU") was one of several agreements signed after the 1988 review. Both governments were required to "examine the scope for the harmonisation of busi-

2 Ibid, Article 12. Emphasis added.

3 The term was coined after the then Minister of Finance, Roger Douglas.

ness laws and regulatory practices"[4] and upon identifying problematic areas of law, they were required to "consult with a view to resolving the impediment".[5]

A Steering Committee of Officials was commissioned to report back to both governments with proposals for harmonisation. The Committee recognised that differences between the laws of the two countries were not a positive barrier to trade. Laws which are substantially different may raise transaction and compliance costs of businesses exporting to, or operating in, a foreign nation. The removal of such impediments may facilitate trade, even if it does not directly boost trade by altering prices of products, as a tariff reduction might.

Harmonisation only becomes viable when two or more close trading partners have substantially liberated their trade from the major forms of trade barriers. As New Zealand and Australia moved towards free trade, subtle barriers became more imposing and were brought onto the CER agenda. The two countries were better suited to the harmonisation exercise than perhaps any other area in the world, given their close historical, legal, and socio-cultural ties. However, it was still a serious step; the harmonisation process necessarily involves relinquishing some degree of national sovereignty over policy areas.

2. Trans-Tasman Provisions

The MOU listed areas of commercial law to which particular attention should be given. One of those areas was:[6]

> [C]ompetition law, including in particular reliance on competition law to redress predatory trade between both countries.

This ensured that trade practices and competition laws were closely examined by the Steering Committee. It was this research that helped to bring about the 1990 amendments to the Commerce Act 1986. The most significant amendment in the CER context was the implementation of the 1988 agreement to rely on competition law provisions instead of anti-dumping legislation. The two governments agreed that:[7]

> [A]nti-dumping measures in respect of goods originating in the territory of the other Member State are not appropriate from the time of achievement of free trade in goods between the Member States on 1 July 1990.

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4 Memorandum of Understanding Between the Government of Australia and the Government of New Zealand on Harmonisation of Business Law, 1988, Article 5.

5 Ibid, Article 7.

6 Ibid, Article 5(b).

7 The Protocol on Acceleration of Free Trade in Goods, 1988, Article 4.

These changes involved removing Australia from the scope of New Zealand's Dumping and Countervailing Duties Act 1988,[8] and creating new trans-Tasman provisions on anti-competitive use of monopoly power.[9]

Section 36A of the Commerce Act 1986, and s 46A of the Trade Practices Act 1974 (Cth) closely follow the wording of their respective parent provisions (s 36 and s 46), though they apply to trans-Tasman markets:

> **36A Use of dominant position in trans-Tasman markets**
>
> (1) No person who has--
>
> (a) A dominant position in a market; or
>
> (b) A dominant position in a market in Australia; or
>
> (c) A dominant position in a market in New Zealand and Australia-
>
> shall use that person's dominant position for the purpose of--
>
> (d) Restricting the entry of any person into any market, not being a market exclusively for services; or
>
> (e) Preventing or deterring any person from engaging in competitive conduct in any market, not being a market exclusively for services; or
>
> (f) Eliminating any person from any market, not being a market exclusively for services.

> **46A Misuse of market power – Corporation with substantial degree of power in trans-Tasman market**
>
> (2) A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:
>
> (a) Eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation, in an impact market; or
>
> (b) Preventing the entry of a person into an impact market; or

8 Dumping and Countervailing Duties Amendment Act 1990.

9 Section 15 of the Commerce Amendment Act 1990. The equivalent Australian amendments are in the Trade Practices (Misuse of Trans-Tasman Market Power) Amendment Act 1990 (Cth).

> (c) Deterring or preventing a person from engaging in competitive conduct in an impact market.

The move from using an anti-dumping approach to relying on the market power provisions in the Commerce Act should not be seen as a straightforward swap of one enforcement tool for another. Anti-dumping duties and competition law remedies work in different ways. Each is aimed at an altogether different mischief.[10] Anti-dumping duties focus on the effect that dumping has in the market place; the usual test is that of material injury to producers in the importing country. The market power provisions in s 36 and s 36A of the Commerce Act, on the other hand, focus on the purpose for which the foreign firm is acting. The market power provisions are breached only if one of the three proscribed purposes is established. Further, these provisions are only concerned with injury to competition in the whole of a market, while anti-dumping remedies take into account damage to individual domestic competitors.

The trans-Tasman provisions draw a strong distinction between the "source market", for determining market power, and the "impact market", where that power is utilised in an anti-competitive manner.[11] The source market is to be a trans-Tasman market. A firm must have market power either in Australia or New Zealand, or in both Australia and New Zealand. This feature gives the provisions their extra-territorial operation. Section 36A of the Commerce Act applies to firms in the Australian market not in business in New Zealand, and vice versa for the Trade Practices Act. This definition of source market provides the first legislative recognition of a single market concept for Australia and New Zealand. The impact market, on the other hand, remains limited to the geographical area of the relevant country. The proscribed conduct must take place in New Zealand for the Commerce Act to apply.

To extend the reach of the Commerce Act into Australia, s 4 now includes:[12]

> **(2)** Without limiting subsection (1) of this section, section 36A of this Act extends to the engaging in conduct outside New Zealand by any person *resident or carrying on business in Australia* to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand.

This reform necessarily involves some loss of sovereignty for each nation, since its citizens and corporations are now directly subject to a part of the laws of a foreign

10 See Vautier, "Trans-Tasman Trade and Competition Law" in Vautier, Farmer, Baxt (eds), *CER and Business Competition* (1990) 89-90.

11 The Trade Practices Act 1974 (Cth) specifically uses the term "impact market" in s 46A, while the Commerce Act 1986 does not.

12 Emphasis added.

country. It should also help overcome the market definitional problems previously encountered in New Zealand.[13]

A particularly important feature of the provisions is that the market must involve, at least to some extent, physical trade in goods. The section excludes activities where the purpose is to create an anti-competitive interference in a purely service-based market. However, because many service industries are ancillary markets to goods industries, it may be possible that restrictive trade activities by a service business influence competition in a market for goods. Some types of vertical restraints by dominant service firms impacting on related goods markets, or mixed goods and services markets, can still be caught.

3. The Impact of CER on Competition Law

New Zealand's competition regime relies on the same basic ideology as Australia's trade practices laws.[14] The similarity of the substantive rules and prohibitions set out in the respective statutes has provided a strong base from which to make the laws more compatible.

Both countries use a regulatory model which relies on general prohibitions of restrictive trade practices and anti-competitive mergers, with judicial enforcement rather than administrative regulation. The model reflects a "rule of reason" approach to competition law, through the weighing of competitive detriments and benefits. Both systems recognise that some prohibited acts may generate certain efficiencies or public benefits such that the net result is in fact pro-competitive. Authorisation procedures are available to allow such activities to continue in these exceptional cases. In both countries independent commissions oversee competitive behaviour.

The drive for harmonisation has led to reforms not only of competition law, but of commercial law generally. It is suggested that the main effects of the CER initiative on competition law in New Zealand are that:

(i) harmonisation has become an important policy factor in New Zealand judicial decisions and statutory interpretation;
(ii) court precedents and commission procedures from Australia have been recognised and adopted in New Zealand;
(iii) a new prohibition and remedy has been created to prevent abuse of trans-Tasman market dominance;
(iv) a new range of extra-territorial investigatory and enforcement powers has been made available to the Commerce Commission and the High Court;

13 See *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 (HC).

14 Farmer, "CER and Competition Law: A Lawyer's Perspective" in James (ed), *Regulating For Competition?* (1989) 171.

(v) harmonisation was one factor in the 1990 decision to adopt a voluntary pre-notification and strike-down system for mergers; and

(vi) policy makers are forced at regular intervals to examine competition law in comparison with Australian laws and adjust or upgrade our law where necessary. This has led to regular observance and assessment of current international innovations and regulatory policies, particularly those of the United States.

There is a danger of attributing too many of these recent developments solely to CER. The Commerce Act is based on the equivalent Australian Act. It is, therefore, only natural that interpretative guidance should be sought from Australia. Further, competition law is a field of law and economics which is not strictly limited to national boundaries. Consequently, advances are made as policies are adopted and shared internationally. The goal of harmonisation has helped to sharpen the focus on overseas initiatives.

The directive to seek ways to bring our trade practice laws closer together is gradually working its way into the mindset of competition regulators. As competition law develops, CER harmonisation becomes one of a "checklist" of items that need to be taken into account. The real achievement of the harmonisation programme has been a growing awareness that competition policy can help or hinder trans-Tasman business, and that all policy developments should be scrutinised for their effects on the costs of such transactions.

Despite the harmonisation goal, each country has recently made decisions which create differences between the two systems.[15] It is inevitable that CER concerns may be overridden by factors such as domestic policy objectives. Only when the impact of a decision on CER harmonisation is ignored altogether is there cause for concern.

Further, when reforming the Trade Practices Act, or developing their case law, Australian decision-makers do not seem to pay the same level of attention to CER as their New Zealand counterparts do. It is fair to say that CER has had less impact on the competition law of Australia, perhaps reflecting Australia's generally lower awareness and enthusiasm for CER.

III: UNDERSTANDING THE HARMONISATION PROCESS

1. What Does Harmonisation Involve?

Harmonisation is not an end in itself, but simply one way of furthering the economic goals of CER. Laws should only be changed to improve competition and productive efficiency. These efficiency gains may be lost if the harmonisation process increases costs and difficulties in commerce for wholly domestic transac-

15 See text, infra at Part IV, for further discussion of mergers and acquisitions.

tions. The largest proportion of business operations in New Zealand and Australia are domestic.[16] Further, the drive for harmonisation should not complicate business with other trading partners.

The MOU did not demand the replication of the laws of one country in the other.[17] Rather, the highest quality of law should be aimed for and applied where local conditions permit. The Ministry of Commerce, during its 1992 review of the Commerce Act, suggested that the basic harmonisation principle should be:[18]

> [T]hat the business laws of Australia and New Zealand should act as an incentive to investment and should promote international competitiveness. This means that harmonisation is not a process of assimilation or acceptance of the lowest common denominator.

There is a tension between the concept of harmonisation and that of exact convergence of laws. For compatibility of laws to be effective, some minimum competition standards need to be shared. This is becoming important as thoughts turn towards harmonisation with the wider Asia-Pacific region.

Each country must be free to make unilateral reforms if they are appropriate for national conditions. *Fisher & Paykel Ltd v Commerce Commission*[19] illustrated that harmonisation should not tie one country to outdated precedents and rules. If overseas developments are efficiency-creating, they should be adopted domestically, perhaps pressuring the other CER partner to re-assess its own laws.

Given the longer history of the Trade Practices Act, New Zealand will tend to adopt Australian trade practices policies, though Australia should not be reluctant to incorporate valuable developments from New Zealand. The recent deregulation of the utilities industries, and the work done on natural monopolies and access to essential facilities exemplify this.[20]

Harmonisation is an ongoing process rather than a one-off task. If harmonisation is to be kept as a policy goal, New Zealand should not only make its competition laws compatible with Australia, but try to maintain this compatibility. Now that the fundamental provisions have been put in place, the major task is to monitor developments in competition law to ensure consistency with the objectives of CER. This involves examining both legislative reforms and judicial decisions with important competition implications.

16 Farmer, "The Harmonisation of Australian and New Zealand Business Laws" in Vautier, Farmer, Baxt (eds), supra at note 10, at 45.

17 Memorandum of Understanding, supra at note 4, at Article 2.

18 *Review of the Commerce Act 1986 - Discussion Document*, Ministry of Commerce, December 1991, 40.

19 [1990] 2 NZLR 731.

20 See *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429; *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1992) 5 TCLR 166 (HC), (1993) 5 TCLR 413 (CA); *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641 (CA).

Having attained a considerable degree of similarity after the 1990 amendments, the two countries appear to be moving away from this level of harmonisation. Understandably, the harmonisation goal will have to give way to national interests in some cases. To argue otherwise would amount to advocating harmonisation for its own sake. However, at least the courts and legislature should make it explicit that the conflict with CER was recognised.

The degree of judicial restraint, or activism, in furthering the CER goals will have an important impact on the practical success of the harmonisation programme. It is unclear exactly what the role of judges should be. Any major policy redirection must be left to Parliament, the appropriate forum. The judiciary should not try to harmonise laws where Parliament has not, but nor should they subvert the process by drawing distinctions where there are none. It is suggested that where several possible interpretations are available, judges should attempt to follow the line of reasoning which best complements the furthering of trans-Tasman competition laws.[21]

Sir Robin Cooke, President of the Court of Appeal, has indicated a desire to see the business laws of New Zealand develop alongside Australia's.[22] In *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd* his Honour stated that:[23]

> Australasian uniformity and reciprocity in commercial law are goals to be pursued by the Courts as well as the Legislature.

The judiciary must become fully aware of the objectives of CER, and how its decisions on competition law may have harmonisation implications. If harmonisation considerations are outweighed by other factors, this should not be left to be inferred from the judgment. It is questionable whether New Zealand judges give sufficient consideration to CER policy, or whether they merely pay lip-service to such goals. New Zealand's continued right of appeal to the Privy Council complicates this issue further. The Privy Council in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*[24] has recently effected a redirection of New Zealand's market dominance law without any apparent thought given to Australasian interpretations.

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21 *ARA v Mutual Rental (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC), 669-670 per Barker J.

22 See *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd* [1987] 2 NZLR 395, 407; *Vicom NZ Ltd v Vicomm Systems Ltd* [1987] 2 NZLR 600, 605; *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, 39.

23 [1989] 3 NZLR 158, 164 (CA).

24 [1995] 1 NZLR 385.

2. A Test For Harmonisation

Although it is difficult to assess when harmonisation is required, certain common principles emerge such that criteria can be set to evaluate differences between the jurisdictions. From a macro-economic view, the goal of government is to achieve the most efficient and internationally competitive economy possible. In doing so, a government has to consider the micro-economic view of a trading firm seeking to carry out trans-Tasman business at the least possible cost. In the writer's opinion, the tentative criteria to be applied by policy-makers are:

(i) harmonisation should reduce or remove the transaction costs of doing business with a firm in the other Member country;
(ii) harmonisation should reduce or remove the compliance costs of having to satisfy the competition law of the other Member country;
(iii) harmonisation should reduce or remove the incentives of operating under the competition law of one Member country rather than the other;
(iv) harmonisation should not create any new costs or inhibit efficiency gains from other domestic policies, or trade relationships with third countries; and
(v) the administrative and enforcement costs of harmonisation should not offset the efficiency gains.

These criteria incorporate the elements used by the Steering Committee as a test for the differences in the two pieces of legislation:[25]

> Do the differences inhibit the creation of an environment conducive to the growth of trade between the two countries and the efficiency and competitiveness of both economies?

Both countries should be wary of the general risk of "opting for systems that do not necessarily represent best international practice".[26] One commentator questions whether enough thought goes into calculating whether the desirability of harmonisation is outweighed by the unintended side effects it has for other domestic consumers of the legal system.[27] Criterion (iv) is particularly important in this sense. It recognises that harmonisation may have to give way to the particular competition law objectives of each country.

25 Memorandum of Understanding on Harmonisation of Business Law - Report to Governments by Steering Committee of Officials (1992). The wording is itself derived from the statement in Article 2 of the 1988 MOU.

26 Vautier, "CER, Competition Law and Economics" in James (ed), supra at note 14, at 166.

27 See Farmer in Vautier, Farmer, Baxt (eds), supra at note 16, at 46.

IV: APPRAISING FUTURE DIRECTIONS

1. The Market Power Provisions

The major point of divergence between the trans-Tasman provisions of s 36A of the Commerce Act, and s 46A of the Trade Practices Act, is the threshold market power tests. New Zealand uses a test of "dominant position" in a market, while the Australian Act has a standard of "a substantial degree of power". The dominant position threshold represents a higher level of market power. Therefore, more firms would be caught by the Australian Act than its New Zealand counterpart.

These differences may not be significant. As long as case law developments are monitored to ensure that dramatic changes to the market power thresholds do not take place, it seems there is no real need to bring the statutory wording into closer conformity. The Steering Committee investigated the divergence of approach in their 1992 Report and concluded that:[28]

> [A]t present there is no evidence that trans-Tasman trade has been impeded or that the competitiveness or efficiency of the respective economies has been affected.

It may seem strange that the opportunity to make these reciprocal provisions identical was not taken when they were inserted. Any amendment, however, would require the respective parent provisions, s 36 and s 46, to be altered.[29] Failure to do so would result in intra-country and international trade being regulated according to different monopolisation standards. This is contrary to the ideal of a single trans-Tasman market. To amend the parent provisions, which have purely domestic application, would be politically problematic in either country. Each government appears satisfied that its respective market threshold test is appropriate for its market conditions. If each threshold is considered to be the correct test for the relevant domestic market, an amendment for the sake of CER would breach objective (iv) of the harmonisation criteria.

Telecom Corporation of New Zealand Ltd v Commerce Commission[30] could indicate a change in the interpretation of s 36. Telecom sought to acquire from the government one of four available radio communications frequencies for use in a cellular telephone network. The conditions of tender required authorisation by the Commerce Commission as if the matter were a business acquisition to which the Commerce Act applied. The Commission declined to authorise Telecom's bid. The High Court agreed with the Commission, but Telecom's appeal to the Court of Appeal succeeded.

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28 Steering Committee Report 1992, supra at note 25.

29 See Vautier, supra at note 10, at 85.

30 Supra at note 20.

The Court of Appeal considered the meaning of "dominant position" in s 50 of the Commerce Act 1986, which applies the same standard of dominance as s 36. Rather than relying on the existing dicta regarding dominance,[31] Cooke P simply preferred to interpret "dominant" by comparison with "words such as 'a prevailing, commanding, ascendant, governing, primary, principal or leading influence'".[32] On this basis, his Honour found the appellant company to be dominant, without any real analysis of the economic factors laid down in s 3(8) of the Commerce Act. Similarly, Richardson J relied on synonyms for the meaning of dominance, but discussed the economic elements as well. This approach by the Court seems to have raised the de facto standard of dominance.

The effect of the decision is not a radical revision of New Zealand's market power test. If Richardson J's analysis is preferred, then the established legal understanding of dominance, with an economic test as its basis, will be used alongside the new higher level of market power. The Court of Appeal's more stringent view that dominance encapsulates something more than "high market power" suggests that only very powerful firms will be caught by s 36. The New Zealand Act may need to be changed, perhaps incorporating a test similar to "substantial degree of market power", if this interpretation raises the threshold too high to be of any practical value.

The decision illustrates the importance of keeping the case law under review in the CER context; new interpretations may lead the two countries in different directions. The judges did not contemplate the effect of the judgment on trans-Tasman interpretations of "dominance", nor did they examine Australian decisions on the issue.

Telecom v Commerce Commission also cast doubt upon the proposition that more than one firm could be considered dominant at any particular time in any one facet of the market.[33] It seems likely, however, that the change of the Australian s 46 test in 1986 to "substantial degree of market power" was designed to cover oligopolistic industries, where several firms may each have substantial market power. This illustrates one area where the concepts of dominance and substantial power are clearly not the same. The Trade Practices Act may, therefore, impact on a greater range of markets than the New Zealand equivalent.

The Ministry of Commerce concluded in 1991 that the differences between the market power thresholds were not significant because "it is the effect of the sections as a whole that determines whether the substantive law is harmonised."[34] The proscribed purposes for which the market power is used are the most important and substantive part of the provisions. These purposes seem closely matched.

Both Acts prohibit the purpose of "deterring or preventing" competitive conduct, although the Commerce Act refers to "restricting" the entry of new competitors, while the Trade Practices Act refers to "preventing" their entry. "Restricting"

31 See *Proposal by Broadcast Communications Ltd* (1990) 8 NZAR 433, 448.

32 Supra at note 20, at 434.

33 Ibid, 442 per Richardson J.

34 *Review of the Commerce Act 1986 - Discussion Document*, supra at note 18, at 43.

entry could be construed as less absolute than "preventing" the new entrant from establishing itself. However, this seems a rather strained distinction.

The Commerce Act's third proscribed purpose is "eliminating" a person from the market. The Australian equivalent includes not only eliminating but "substantially damaging" a competitor. This would seem to be a lesser offence. It is arguable that vigorous competitive conduct, which is legitimate, could be taken to be an attempt to substantially damage frail competitors. This increases the scope of the Australian Act beyond that of the Commerce Act, especially if "substantial" in this sense is simply interpreted as "real or of substance".[35] Although little practical difficulty may arise from this issue, it is suggested that further monitoring is required to ensure that the Australian provisions do not end up regulating market conduct permitted by the New Zealand test.

Further, the market power provisions are potentially divergent in that they require mere "use" of a dominant position in New Zealand, but "taking advantage of" that position in Australia. The Australian wording could be taken to imply that only actions with some sinister intent would be prohibited. Judicial interpretation of these words has avoided this problem. New Zealand courts have made it clear that "use" does not mean misuse and is not used pejoratively.[36] A similar interpretation of the Australian equivalent was confirmed by the High Court of Australia.[37] The High Court's interpretation of s 46 effectively reduced it to the simple "use" requirement of the Commerce Act. The courts in both countries, even without real consideration of CER, have brought the tests closer together than their strict wording would suggest.

Another difference between the provisions is the reference to use "of that position" in s 36 of the Commerce Act and use "of that power" in s 46 of the Trade Practices Act. In *Electricity Corporation v Geotherm,*[38] the New Zealand Court of Appeal, while accepting that the harmonisation of commercial laws is desirable, immediately rejected that "use of a dominant position" should be construed as "use of the market power flowing from that position". The Court stated that "market position" is a wider term than the Australian equivalent and could embrace a situation where the market position was used to merely threaten predatory conduct without actually using the market power. In drawing this distinction between market position and market power the Court suggested that:[39]

> In many cases there will be little difference between the position under the Australian provision and under the New Zealand s 36. However ... we are not convinced that they will be the same in all cases.

35 See Vautier, supra at note 10, at 85.

36 See *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC).

37 *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Co Ltd* (1988) 83 ALR 577, 584 per Mason CJ and Wilson J.

38 Supra at note 20.

39 Ibid, 649 per Gault J.

However, in practice there may be no real problems created by this interpretation. Threatening to engage in conduct for a proscribed purpose will often be taken to be a "use" of that position. It is another example of the courts insisting on academic distinctions, rather than taking a view which would harmonise the two statutes.

An application for an interlocutory injunction, under ss 46 and 46A of the Trade Practices Act, is the only case to consider these provisions to date.[40] The defendant, a New Zealand manufacturer, supplied leather products to the plaintiff company for distribution throughout Australia. A dispute between them resulted in the defendant terminating the distributorship contract. There were suggestions that the defendant was preparing to set up its own distributorship operation in Australia. The plaintiff failed in an attempt to get an injunction requiring supply to be continued. The defendant was neither resident nor carrying on business in Australia, though it seemed to have a substantial degree of market power in Australia. The decision turned on the proscribed purposes in ss 46 and 46A. Justice Pincus found that although the purpose of the termination was to remove the plaintiff as an unsatisfactory distributor, this did not amount to a purpose of eliminating or substantially damaging a competitor. The termination was due to poor business relations and not an attempt to suppress competition. Consequently, there was no serious question to be tried as to a breach of ss 46 or 46A.

The lack of litigation brings into question the practical relevance of s 36A and s 46A. It could be taken to mean that trans-Tasman trade is not presenting any competition law problems, or that the issues are being dealt with in some other way. Further, it may be that the high threshold of proof required to show an anti-competitive "purpose" deters predatory pricing litigation.

A more likely explanation for the lack of use of the 1990 provisions is that s 36A has a substantial overlap with its parent provision. Many competition disputes with a trans-Tasman dimension involve Australian firms having some business presence in a New Zealand market, such that a s 36 remedy is available in the normal way. It has been recognised that the provisions were necessary only to ensure complete coverage of all trans-Tasman trade by catching the small proportion of cases which involve non-resident firms.[41]

These factors cannot exclude the possibility of cases under these provisions coming to light in the future as trans-Tasman trade and investment continues to grow. Although s 36A has not proven to be a key part of Commerce Act litigation, it is still a necessary part if competition law is to have complete coverage of Australasian trading relationships.

40 *Berlaz Pty Ltd v Fine Leather Care Products Ltd* (1991) 13 ATPR 41-118.

41 See *Review of the Commerce Act 1986 - Reports and Decisions*, Ministry of Commerce, 1989.

2. The Clear v Telecom Litigation

Telecom Corporation of New Zealand Ltd v Clear Communications Ltd[42] has created further difficulties concerning the interpretation of s 36 of the Commerce Act. Clear was seeking interconnection to Telecom's Public Switched Telephone Network in order to enter the market for local telephone calling services. Negotiations over the terms of interconnection had failed. The litigation essentially concerned the pricing terms which Telecom, in a dominant position, could legally demand from the prospective new entrant.

In the Court of Appeal, Gault J criticised the established test for the meaning of "use" in s 36. That test asked whether the conduct in question would still have been open to Telecom were it not for its dominant position. Instead, his Honour suggested a new interpretation which would inquire whether Telecom had acted "reasonably or with justification".[43] The insertion of a reasonableness requirement is at odds with established authority in both New Zealand and Australia. On appeal, the Privy Council rejected this misplaced attempt to introduce a reasonableness standard. However, their Lordships' interpretation also left New Zealand law somewhat distanced from the Australian interpretation.

The Privy Council in its first real opportunity to examine s 36, considered two of the elements of that section: that there be a "use" of a dominant position and that it be for a proscribed "purpose". The judgment effectively makes the "use" element, rather than the "purpose" element, the critical question to pursue in a claim under s 36. This represents a major break from the Australasian jurisprudence. The Privy Council stated that Telecom's purpose could simply be inferred from the fact that it had used its dominant position and produced an anti-competitive result. Their Lordships' interpretation dismissed the relevance of "purpose" in a s 36 claim.

It was established in both countries that the words "use" or "taking advantage of" market power were neutral. They were not intended to serve as the test for distinguishing legitimate fierce competitive conduct from anti-competitive misuse of monopoly power. The purpose requirement fulfilled this function in ss 36 and 36A, and ss 46 and 46A. The particular purpose was the key to determining liability by supplying the pivotal element of intent or anti-competitive design. The judges in *Queensland Wire Industries* were quite clear on this point:[44]

> It is these purpose provisions which define what uses of market power constitute misuses.

42 Supra at note 24 (PC).

43 Supra at note 20, at 430.

44 *Queensland Wire Industries Pty Ltd*, supra at note 37, at 584 per Mason CJ and Wilson J.

And further :[45]

> [Section] 46, read as a whole, imports the notion of misuse of power. But ... that notion is not to be derived just from the words 'take advantage of'. The element of misuse is supplied by the requirement in s 46(1), after the amendments of 1977, that the taking advantage of power must be for a proscribed purpose.

This reasoning was adopted by the New Zealand Court of Appeal in *Electricity Corporation v Geotherm* in relation to s 36:[46]

> The distinction between vigorous legitimate competition by a corporation with substantial market power and conduct that contravenes the section is in the purpose of the conduct.

The Privy Council has effectively overruled the Australasian interpretation in holding that the emphasis is on the "use" of the position.

The Privy Council adopted the same test for "use" as earlier cases, namely whether the conduct could only have occurred because of the dominant position.[47] The Privy Council has elevated this test to a level of greater importance than simple causation. It now determines intent as well as causation. This is diametrically opposed to an earlier view that if a firm acts in a particular way for a particular purpose it is "almost axiomatic" that they have used their dominant position.[48]

It is submitted that the better view is that the "purpose" requirement in s 36 is the crucial factor, and the "use" element is secondary. It is suggested that, while a purpose can be inferred from conduct and surrounding circumstances, there must be some independent evidence of this apart from the *effect* in the marketplace. The section concentrates on the purposes the courts must look for. It pays little attention to explaining use or misuse. The result of the Privy Council decision is that s 36 now focuses on a different line of inquiry from the Australian cases. It may be that it is easier to prove a s 36 claim now that an anti-competitive purpose can be virtually implied, and the test of "use" is simply whether a firm in a perfectly contestable market would act in the same manner. The effect of this and other aspects of the Privy Council decision has caused concern within the Ministry of Commerce. As a result, we may soon see legislative changes to the Commerce Act.

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45 Ibid, 601 per Toohey J.

46 Supra at note 20, at 649.

47 Supra at note 24.

48 *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* , supra at note 13, at 761.

3. Incorporating Services in Competition Law

The trans-Tasman market power provisions inserted into the Commerce Act and Trade Practices Act apply only to a market "not being exclusively a market for services". Although the services sector makes up over sixty percent of New Zealand's Gross Domestic Product ("GDP") and about twenty percent of export earnings,[49] it is excluded from the operation of the most substantive result yet achieved by CER on competition law. Far from being an oversight, this was a deliberate policy decision at the time of the 1990 Amendments.

There seem to be two reasons for the decision to exclude the trans-Tasman services markets. Most importantly, s 36A and s 46A were enacted to replace anti-dumping duties. Anti-dumping duties were only applicable to imported goods. This approach is evidenced in Article 4 of the CER Protocol on the Acceleration of Free Trade in Goods, which only envisaged applying competition law to anti-competitive conduct in traded goods.

The second reason is that in 1988 the CER negotiators were just beginning to grapple with the task of bringing services trade within the fold of the agreement. The Protocol on Trade in Services of that year was a cautious step in that direction. Seven years on, some important industries excluded from the CER agreement, such as telecommunications, broadcasting, and aviation, are still politically controversial. If free trade in these exempted services cannot be achieved at a basic level, there is little chance of succeeding with "second-phase" issues such as the extension of competition laws to those services.

However, it may be possible to begin bringing politically acceptable services markets under the trans-Tasman market power provisions. The existing services agreement has started to dismantle barriers to services trade in some industries. These service industries could initially be put under an amended s 36A and s 46A scheme. Work could then continue on freeing up those exempted industries where nationalistic concerns still seem paramount.

This proposal would result in the piecemeal incorporation of services into competition law. Industries which are perhaps most in need of international competition would continue to be outside competition regulation and inside the realm of political regulation. However, it is submitted that this approach is preferable, as it is consistent with the general CER agreement and would generate impetus for future negotiations.

In 1992 the Steering Committee advocated the removal of the restriction in scope of the s 36A and s 46A provisions.[50] The restriction was considered inconsistent with the concept of the single market. However, political willpower has not kept pace with good economic sense. Recently, the significance of this gap

49 *New Zealand and Australia: Closer Economic Relations*, Ministry of External Relations and Trade, Information Bulletin No. 42, May 1993, 11.

50 Steering Committee Report 1992, supra at note 25, at 4.

in the trans-Tasman competition provisions has become more apparent with the deregulation of the telecommunications, electricity generation, and shipping industries in New Zealand.

The recent debacle, involving the proposed Single Aviation Market, which had been signed, sealed, and (almost) delivered, illustrates how subject the issue is to political capriciousness. The conclusion of the 1994 General Agreement on Tariffs and Trade ("GATT") arrangements to incorporate services trade should give renewed impetus to the two governments. Unfortunately, in the current political climate it seems the differences over some markets are almost intractable.

4. The Essential Facilities Doctrine

The "essential facilities" doctrine is becoming increasingly popular among litigants in New Zealand. The doctrine has application when one player controls a facility, access to which is essential to all participants in the market if they are to compete effectively in a related secondary market. The "gateway" facility is often a natural monopoly in resources or infrastructure, such as a nationwide telephone communications network or a city water reservoir. The costs of duplicating the facility are generally prohibitive to aspiring competitors, and economically wasteful to society. The control of the facility may give rise to a dominant position in the market. If this position is used for the purpose of denying access to an existing or potential competitor, a form of non-price predation prohibited by s 36 occurs.

The New Zealand courts have been hesitant to apply the essential facilities doctrine. *Auckland Regional Authority v Mutual Rental Cars*[51] was the first case to discuss the theory and utilise it, while in *Union Shipping NZ Ltd v Port Nelson Ltd*[52] and *Fisher & Paykel Ltd v Commerce Commission*[53] it has been regarded with suspicion. The latter cases were influenced by the High Court of Australia's decision in *Queensland Wire Industries*.[54] The Australian Court stressed the unique lineage of the essential facilities doctrine from the interpretation of the Sherman Act, and the difficulties in making it fit with the purpose requirement of s 46.

Despite this, there are indications that the theory has gained a toe-hold in New Zealand. The High Court in *Union Shipping* recognised that, while caution will be required, the theory can assist regulators in analysing behaviour in monopolistic markets. More recently, Gault J in the Court of Appeal suggested the doctrine was not moribund. The test he was relying on:[55]

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51 Supra at note 21, at 679.

52 Supra at note 36, at 704.

53 *Fisher & Paykel Ltd v Commerce Commission*, supra at note 17, at 756.

54 Supra at note 20.

55 *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd*, supra at note 20, at 430.

> [C]omes close to the so-called essential facilities doctrine which, although invoked well beyond its usefulness in some cases, is not totally discredited.

This suggests that some variant of the essential facilities theory may arise in the future in cases involving access to a monopolistic market.

In Australia, the Competition Policy Reform Act 1995 (Cth),[56] implementing the recommendations of the Hilmer Report,[57] has signalled a different approach to the American doctrine. The Hilmer Report found that s 46 was inappropriate for ensuring access to natural monopolies where firms cannot compete without using certain essential services. The new Act establishes an administrative body, the National Competition Council ("NCC"), to deal with rights of access for potential competitors in certain service markets. The NCC can recommend the "declaration" of service facilities, which then provides a framework for negotiation of access, and compulsory arbitration if there is no agreement. Alternatively, voluntary undertakings as to access from service providers can be accepted and enforced.

This raises harmonisation issues in that a growing part of Australasian competition law is now subject to different methods of regulation. If local differences or policy goals make the changes appropriate for Australia, then Australians should not persevere with the s 46 approach for the sake of similarity. Nevertheless, it is worrying that the Australian public debate on the issue took very little notice of the goal of harmonisation with New Zealand's competition regime.

New Zealand has taken the deregulation of natural monopolies and public utilities sectors to much greater lengths than Australia. In New Zealand's present policy outlook, the centralised governmental oversight of market access issues is less palatable than in Australia. In 1990 the Ministry of Commerce rejected a central mechanism to deal with essential facilities.[58] However, in the wake of the Privy Council's decision in *Telecom v Clear*, and under pressure from lobbyists such as the Major Uses of Monopoly Services group, the Government may reverse that view. New Zealand seems poised to introduce some form of compulsory access negotiations or arbitration, especially in the contentious telecommunications and gas industries. If this takes place, New Zealand will move closer towards convergence with the new Australian policy.

If the court-centred essential facilities doctrine continues to hold sway in New Zealand then it will become imperative to include service markets in the s 36A and s 46A provisions. Services markets, such as energy generation, telecommunications, and aviation, which have expensive and monopolistic infrastructure, are likely to be the main industries where disputes over essential facilities arise. This would have particular trans-Tasman significance given the increasing investment in infrastructure between the two countries.

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56 The Act was passed on 30 June 1995.

57 Report of the Independent Committee of Inquiry into National Competition Policy (Hilmer Report) PR13.

58 Supra at note 41.

5. Joint Provisions for Other Trade Practices

Other substantive prohibitions contained in the Commerce Act and Trade Practices Act could be extended to apply to trans-Tasman markets. A report prepared for the Steering Committee stated that there were theoretically some situations where anti-competitive conduct by a firm against an enterprise in the other country could escape the provisions of both competition statutes.[59] However, no examples of this had been brought to light and there may be little chance of the problem arising. The Steering Committee concluded that there was no need to extend other restrictive trade practices to a trans-Tasman basis.

Apart from s 36, the most important provision in the Commerce Act is the catch-all s 27 prohibition on contracts, arrangements, and understandings which substantially lessen competition in a market. This is mirrored by s 45(2) of the Trade Practices Act. Section 27 has extra-territorial application to the extent set out in s 4(1) of the Commerce Act – only to conduct overseas by New Zealand residents, or persons carrying on business in New Zealand, and only if that conduct affects a market in New Zealand. The section does not catch Australians whose anti-competitive agreements affect a market in New Zealand. Thus collusive agreements between non-New Zealand firms would not be caught by s 27. Agreements between an Australian firm and a New Zealand firm would only be partially caught.

This was described by the Steering Committee as "an aberration in the context of a single trans-Tasman market."[60] It is equally anomalous that s 36 and s 46 are extended to the whole Australasian market, but that the equally important provisions of s 27 and s 45(2) are not. Although predatory pricing conduct had to be specifically extended in 1990 to compensate for the loss of anti-dumping remedies, in 1995 it would be equally useful to cover anti-competitive contractual behaviour in the same way.

The wording of the key phrase "substantially lessening competition in a market" in s 27 could be expanded to include a market in Australia and a market in both Australia and New Zealand. This potential restriction on acceptable business practices led the Australian Business Consultative Group in 1992 to reject such an extension as "an unwarranted and burdensome layer of regulation upon industry". In turn, the Steering Committee decided not to recommend reform, despite the enthusiasm of New Zealand business groups.[61] Australian firms, however, are already required under s 45 to refrain from conducting collusive arrangements in the Australian domestic economy. If they had to refrain from such conduct in New Zealand markets as well, the increase in costs would probably be slight.

59 Steering Committee Report 1992, "Filling the Gaps in Trans-Tasman Competition Law", supra at note 25, at 3.

60 Ibid, 4.

61 Ibid, 7.

Further, the extra-territorial jurisdiction would be extended to Australia alone. This reform would not raise the costs of dealing with other nations, as their position with respect to s 27 would remain unchanged. Although no problems with these provisions have yet come to light, any new transaction or compliance costs would be negligible, and it is submitted that this would be a beneficial development for trans-Tasman competition law.

It may be possible to extend other provisions in Part II of the Commerce Act, and Part IV of the Trade Practices Act to trans-Tasman markets. The Steering Committee identified three areas which could benefit from extra-territorial treatment: exclusionary provisions, exclusive dealing, and resale price maintenance. The Competition Law Reform Act 1995 has brought some of these areas into better alignment with New Zealand's Commerce Act, but they would still require harmonisation of their basic substantive operation before they could be given extra-territorial effect.

6. Trans-Tasman Mergers and Acquisitions

One of the most valuable economic benefits from freeing up business between Australia and New Zealand is that the increased competition may lead firms to increase in size and utilise economies of scale. The rationalisation, and perhaps relocation, of some productive industries is an objective of CER. Mergers and acquisitions between Australian and New Zealand businesses are, therefore, an important tool of industry rationalisation.

At present New Zealand and Australia operate separate investigative systems for mergers and takeovers through their respective competition agencies: the Commerce Commission and the Trade Practices Commission.[62] Until 1992, the two systems operated around the same fundamental standard of "dominant position in a market" of the merged entity. However, in that year the Australian Government amended s 50 to prohibit the acquisition of shares or assets which would have the effect of "substantially lessening competition" in a market. The previous test of dominance in a market was jettisoned in favour of this lesser standard. The implications for harmonisation are obvious.

The unilateral decision to adopt a different merger test is not in keeping with the goal of CER harmonisation. One Australian commentator suggests that:[63]

> New Zealand ... abolished its compulsory notification provisions, both because they had proved cumbersome and because that would bring it into closer harmonisation with Australia. The Cooney Committee and the Australian Government appear to have ignored the compliment, as well as the spirit of CER, in reverting to the previous test.

62 The latter will be changed to the "Australian Competition and Consumer Commission" when the Competition Policy Reform Act 1995 (Cth) comes into force.

63 *Australian Trade Practices Reporter*, CCH, para 8-015.

However, the Australian amendment was a reasoned policy decision to bring merger controls into line with the stricter provisions on anti-competitive conduct in Part IV of the Trade Practices Act. If the new test better regulates business acquisitions in the Australian domestic market, then it is justified. Nevertheless, insufficient attention appears to have been given to the balancing of domestic and international policy goals at the time of the change. There were talks between inter-governmental groups on the effects of the Cooney Report,[64] but it seems there was little public debate on the consequences for competition law harmonisation.

The result is that the two merger regimes are no longer in harmony and the differences are not merely procedural. The lesser test is intended to cover more merger activity in the Australian market. A proposed merger with effects in both nations may not be a breach of s 47 of the Commerce Act because it does not create or strengthen a dominant position in New Zealand. It may, however, be prohibited by s 50 of the Trade Practices Act because it has the effect of substantially lessening competition in the Australian market. Under the old provisions, it was possible for such a merger to be acceptable in one country and illegal in the other, because the effects on competition would rarely be symmetrical in both markets.[65] However, now the likelihood of this is exacerbated by the different statutory standards. The effects could be problematic for future trans-Tasman mergers; any merger could be defeated by breaching just one of the competition statutes.

The results of this disharmony may be increased transaction and compliance costs for trans-Tasman business acquisitions, and the prospect that some beneficial Australasian rationalisations may be prevented. The sort of trans-Tasman mergers which occurred in the 1980s are likely to be deterred by the increased difficulties and chances of failure. Clearly, a return to the same regulatory standard would reduce these transaction, compliance, and incentive costs. However, if this is at the expense of Australia's domestic mergers regime, CER harmonisation does not warrant it. It may be more appropriate for New Zealand to reconsider the value of the "dominance test" for domestic mergers. That would be a controversial move, and the smaller and more concentrated nature of the New Zealand market may make merger regulation one area of competition law where the harmonisation goal is outweighed by local considerations.

If competition law is to recognise a single market, there is some merit in having a process which allows joint examination of those mergers with competitive effects in both countries. If abuses of market dominance in a trans-Tasman market are now able to be challenged, it is logical that company mergers creating or strengthening dominance in that same market should also be open to investigation. The current systems require each Commission to look solely at the impact on competition in its own national market. This would include analysis of import penetration, but it may not give a full picture of the competitive detriments and benefits in the combined Australia and New Zealand market.

64 See the Steering Committee Report 1992, supra at note 25, at 2.

65 For example, *Re Amcor Ltd-NZ Forest Products Ltd* (1987) 1 NZBLC (Com) 104,233.

Although the two Commissions presently co-operate on these applications, there are problems when each Commission separately considers the proposed merger in terms of its own competition statute. Obviously there are increased compliance costs to the company attempting the takeover, since it must duplicate its efforts in applying for authorisation. Additionally, if a takeover is approved by one commission only, it is likely the bid will fail. This may deter firms from applying for authorisation or from attempting mergers in the first place. If fewer firms decide to voluntarily seek authorisation, then higher costs of enforcement associated with prosecution and divestiture are involved. Further, the benefits of efficiencies and economies of scale which result in one market may outweigh any loss of competition in the other market. There is no mechanism for these effects to be evaluated.

The intractable difficulty with this issue is that the distribution of the benefits and detriments of a merger are often unequal. The two Commissions must evaluate "public benefits" in terms of their own national markets, and cannot consider the overall economic welfare of the region. This raises the problem of just how far we are prepared to put aside nationalism in favour of trans-Tasman co-operation. Possible reforms could include instituting a trans-national body to oversee certain mergers, or simply providing the machinery for joint consideration of those mergers by the two existing Commissions. The major jurisdiction and sovereignty questions involved mean that this development is still a long way off. In any event, the divergence in the substantive merger tests would have to be "re-harmonised" before a proposal for joint examination of mergers could be workable.

V: THE INTERNATIONAL CONTEXT

CER has increasingly come to be viewed as a stepping stone to economic integration with the Asia-Pacific region. This trend has been affirmed with the announcement in November 1994 of a long-term plan to develop a free trade area around the Asia Pacific Economic Co-operation ("APEC") structure. As politicians look hungrily towards increased trade with the booming South-East Asian economies, there is some feeling that CER has "run out of steam".[66]

It is to be expected that the attention of Australia and New Zealand will turn to trade with Asia. The immediate returns, both economic and political, from creating a wide liberalised trading sphere are far greater than integration with one nation. It may be more profitable to investigate ways to align basic competition policies with our Asian trading partners, than continuing to fine-tune the trans-Tasman system. However, in the rush towards Asia, it should be noted that there are still aspects of CER harmonisation which require attention.

66 See Holmes, "CER Past, Present and Future", Australia-New Zealand Business Council Joint Councils' Conference paper, September 1994, 5.

Although it is unrealistic to suggest that CER should still command a higher priority than APEC, it is submitted that the two free trade areas are complementary. The bilateral progress should be continued alongside the new multilateral plans for Asia and the Pacific. Harmonisation should not be entirely abandoned, even though it may sometimes take second place to developments in Asia.

As the APEC free trade area develops, the experience gained in harmonisation by Australia and New Zealand will prove invaluable. Competition law is becoming recognised as an international trade issue. The two countries have a modern, largely-harmonised attitude to trade practices which could well form a model for Asian countries. The competitive efficiencies achieved will help provide a springboard for New Zealand businesses into those markets.

The "first phase" development of a new free trade area will be aimed at removing tariff and non-tariff barriers to trade. These issues look set to consume both governments' trade negotiators in Asia for some time yet. When these basic steps of trade integration are in place, the "second-phase" task of facilitating trade, including harmonising business law, can begin. In the meantime, it is in the hands of the two governments whether progress on Australasian competition law continues.

VI: CONCLUSION

The objective of harmonising business laws under CER has had an important impact on competition law in New Zealand. In particular, it has influenced the threshold tests and interpretation of restrictive trade practices legislation. CER has brought trans-Tasman business transactions within the scope of the market dominance provisions. Development has been so rapid and effective, that after the 1990 reforms, the competition regimes were substantially compatible with each other.

However, recently Australia and New Zealand appear to be moving farther away from a harmonised set of competition laws. This is particularly evident in the area of mergers and acquisitions, where Australia has adopted a different substantive test from New Zealand. Further, the courts seem intent on finding differences in the statutory wording of the market power provisions. The recent Privy Council case of *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* raises problematic implications for the interpretation of s 36 of the Commerce Act.

These divergences may be justified by domestic policy goals. The clash between the demands of a single Australasian market, and the retention of national sovereignty, is becoming more marked. If domestic policy continually takes priority, the goal of harmonisation may be reduced to a hollow statement of intention. It is suggested that harmonisation in the CER context has not sunk this far.

Several gaps still remain in the extra-territorial provisions of the Commerce and Trade Practices Acts. The most notable is the exclusion of services from the s 36A and s 46A market power provisions. The s 27 and s 45 prohibitions on anti-competitive collusive arrangements could also be extended to the trans-Tasman markets. However, these harmonisation problems may be more theoretical than real, given the limited use made of the trans-Tasman market power sections.

The future of CER as a whole looks unsettled at the present time. The recent collapse of a single aviation market is a disturbing setback for development in that market. Far more ominous is the underlying attitude of Australian politicians who are prepared to unilaterally reject a trade agreement at the eleventh hour. There seems to be a perception in Australia that they are not benefiting from CER. However, the fundamental benefit derived from free trade areas, and from a robust competition regulatory scheme, is increased efficiency in production due to the rigours of foreign competition. Australia's competitiveness on the world stage has been enhanced by CER as much as New Zealand's has been.

As trading volumes with our other Asian and Pacific neighbours continue to grow, further harmonisation under CER is gradually becoming less relevant. While the harmonisation of competition law has helped both countries to achieve efficiencies and international competitiveness over the last decade, it may be nearing the limit of its economic usefulness. Harmonisation is being redirected from an Australian focus to a broader perspective. However, bilateral goals should at least be complementary to our competitive response to the new era of world trade.