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Australia and New Zealand

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Australia and New Zealand were relatively late starters in significant enforcement of competition laws. Both countries have had national competition laws since early in this century, but for nearly 60 years the laws were either unenforced or ineffective.

Australia

Australia, which is a federation with a written constitution, enacted a national competition law in 1906. The Australian Industries Preservation Act of 1906 was inspired by the Sherman Antitrust Act of 1890 (Nieuwenhuysen and Norman 1976, 15). It prohibited "monopolization" and "combinations" in restraint of trade or commerce, or that injured or destroyed Australian industries through unfair competition. However, a restrictive interpretation of the federal government's constitutional powers in 1910 substantially limited the scope of the act, so it fell into general disuse until the mid-1960s. The federal government sought unsuccessfully to remedy the limitation on constitutional interpretation by seeking authority in four separate but failed referendums between 1913 and 1944.

A number of the Australian states also had laws promoting competition, but these were not comprehensive in scope and state jurisdiction was limited. In the 1950s, increasing concern was expressed in academic

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and government circles over cartelization and excessive concentration of industry in Australia. In 1962 the government proposed a Federal Restrictive Trade Practices Act, but in the following debate the proposed legislation was seriously weakened through the lobbying of business interests. However, a Trade Practices Act became law in 1965. It required registration of certain restrictive agreements with the possibility of disallowance of such agreements if they were found to be contrary to the public interest. Initially, the act had no provisions for dealing with resale price maintenance. These were inserted in 1971. In 1971, the Trade Practices Act of 1965 was held invalid by the High Court, but in so doing the court handed down a new interpretation of the federal government's constitutional powers that allowed the government wider regulation of business conduct. So the grounds were finally established in 1971 for the enactment and enforcement of a national competition law in Australia that applied uniformly to corporations.

A New, National Approach

In 1972 the Australian Parliament legislated a replacement act, but with a new federal government elected to office in late 1972 a change in policy approach also occurred. No longer was the approach to restrictive business practices to be based on administrative investigation of behavior and authorization of conduct deemed to be in the public interest; the approach was now to be based on prohibition of restrictive activity either on a per se basis or subject to a competition test (Nieuwenhuysen and Norman 1976, 46). A new Trade Practices Act was passed in 1974 to prohibit anticompetitive conduct. Significantly, this act provided for private rights of action in most instances. This act was further amended in 1977 following a review of the 1974 act. The main changes in 1977 were the replacement with respect to mergers of the "substantially lessening competition" test with the weaker test that it "achieve or strengthen market dominance." Additionally, tougher provisions were added to deal with price-fixing agreements, special provisions were introduced dealing with collective boycotts, antimonopolization provisions were tightened, and exclusive dealing provisions were extended to cover restrictions imposed by buyers or sellers.

During the 1980s the importance of competition in building a more flexible, dynamic, and efficiently functioning economy became more embedded in the public mind and official policy in Australia. Prohibition of anticompetitive behavior and judicial enforcement have remained the basic approach to competition policy law in Australia since 1974. Some changes occurred in the 1980s—for example, in 1986 the prohibition on misuse of market power was amended, and the merger provisions were extended to certain overseas mergers. In 1992 the merger test was strengthened back to the pre-1977 criteria of “substantially lessening competition” while penalties for contravention of competition provisions were increased substantially.

In 1983, as part of its commitment to the newly agreed Prices and Incomes Accord—a 1983 agreement on certain labor and economic policies between the federal government and key union and business interests—the federal government enacted the Prices Surveillance Act of 1983. It provided for the establishment of a statutory authority to monitor and examine prices of a nominated range of goods and services. The goods and services monitored and examined would change over time and would “focus on areas where effective competitive disciplines are not present.” Also, the activities of the former Petroleum Products Pricing Authority, itself a remnant of the previous Prices Justification Tribunal, were subsumed under the new authority.

The Prices Surveillance Act of 1983 did not apply to state/territory authorities, and there were no penalties for failure to comply with the Prices Surveillance Authority’s findings, but the treasurer noted that “the force of public opinion and companies’ recognition of their public responsibilities will be powerful factors ensuring compliance with the findings of the Authority” (Paul Keating, second reading of speech, “Prices Surveillance Bill, 1983,” House of Representatives, *Hansard*, 30 November 1983). The act requires that “declared persons” supplying “declared” goods or services must give prior notice to the Prices Surveillance Authority of price increases. More generally, the authority is empowered to hold inquiries into the prices charged by any legal entity and to make recommendations to the federal government. In recent years the number of declared persons and the number of notifications of price increases has been declining as a result of the increased competitiveness of the economy.

In 1993 a major review of competition policy conducted in Australia (Hilmer 1993), inter alia, recommended the extension of competition rules to include previously exempt government instrumentalities. The accompanying report addressed both the Trade Practices Act itself and existing government policies and practices.

With regard to the act, the reviewing committee recommended, inter alia:

- removing unjustified distinctions between goods and services,
- relaxing the prohibition on third-line forcing,[1] by requiring that it “substantially lessen competition” (this would bring it into line with the rules on exclusive dealing, but this recommendation was not accepted by the government),

1. Third-line forcing occurs where a contract between two persons requires one of the parties to purchase products (which are unrelated to the contract) from a third party.

- allowing resale price maintenance to be authorized where it can be demonstrated to offer net public benefits, and
- deleting the prohibition on price discrimination and relying on the section in the act dealing with misuse of market power.

The Hilmer Report then went on to recommend application of the act to the Crown in right of the states and territories (i.e., "binding the Crown"). The act already applied to the Crown in right of the federal government to the extent it engages in business activity. The court has held in the absence of an act specifically applying to the Crown in right of a state, the Crown is not bound. In 1997 this issue is on the list before the High Court.

Another policy area giving rise to anticompetitive behavior was in the area of legally mandated business arrangements, as often happened when state parliaments provided for legislated monopolies for state-owned service providers such as power generation and distribution or for exclusive buying arrangements such as agricultural commodities boards. It was also noted that the states often extracted substantial monopoly rents from many government-owned business enterprises.

The report recommended that any new firms attempting to compete with existing GBEs would need to have a guaranteed right of access to essentials such as power and rail services.

The report also pointed out that the act, operating as it did under the existing constitutional powers of the federal government, did not cover noncorporate entities such as proprietorships and partnerships unless they were engaged in interstate or overseas trade. It was suggested that a "referral of powers" be negotiated with the states/territories for this type of business activity to be covered in future.

Finally, the committee recommended establishing a National Competition Council composed of representatives from federal, state, and territory governments, which would oversee policy aspects, and the amalgamation of the existing Trade Practices Commission and the Prices Surveillance Authority.

In February 1994 the federal, state, and territory governments agreed to the principles articulated in the Hilmer Report. Agreeing to implement most of these reforms, however, required complex negotiations between the federal, state, and territory governments. Agreement was finally reached on 11 April 1995, when the state and territory governments accepted phased payment over five years of a share of the tax gains expected as a result of the benefits from the implementation of the Hilmer reforms. The federal bill was passed on 29 June 1995, and state and territory legislation have followed. The reforms will lead to a truly uniform application of competition law and a largely borderless national market.

Two new national competition agencies have been created: the Australian Competition and Consumer Commission, which merges the Trade

Practices Commission and the Prices Surveillance Authority; and the National Competition Council, an advisory and research body. Competition laws have been extended to all businesses, including professionals, partnerships, and other unincorporated enterprises. Legislation governing government business enterprises is being reviewed to ensure that it is competition neutral or that distortions are justified on public interest grounds. As a consequence, government marketing authorities will face more competition. Effective access to essential services has been assured. The reforms, when fully implemented, will see benefits to consumers estimated at up to A$9 billion a year, with an overall gain in Australia's GDP of 5.5 percent (Industry Commission estimates).

New Zealand

First Beginnings of Competition Law

New Zealand, like Australia, has a relatively long history of legislating to enforce competition law but not exercising strong judicial or executive will to rigorously or widely enforce those laws until relatively recently (Ahdar 1991).

Unlike Australia, New Zealand has a unitary system of government, and it first enacted competition law provisions in 1908. This was the Monopolies Prevention Act of 1908, which applied only to designated agricultural implements—flour, wheat, and potatoes—and had very circumscribed but somewhat novel competition provisions, given the current debate about linkages between trade and competition policy. For example, with flour and wheat, the act protected consumers from unduly high prices by exempting these products from customs duties if prices were restrictively raised above competitive levels or were otherwise unduly high. The act became nonoperative long before its repeal in 1975.

The 1908 act was followed by the more comprehensive Commercial Trusts Act of 1910, which sought the "repression of monopolies in trade or commerce." However, the act was still of limited coverage, applying to food, coal, petroleum products, and agricultural implements.

The Board of Trade Act of 1919 also contained powers to make regulations controlling monopolies, unfair competition, and prices. Effectively, this law was repealed in 1956 as part of a move to dismantle controls.

By the 1920s New Zealand had begun to implement protective tariffs and establish government-sponsored marketing boards for agricultural products, actions that tended to cloud judicial interpretation of the public interest. Like Australia, New Zealand began a slide into a range of anticompetitive policies that was to last some 60 years.

In 1927, the *Crown Milling* case severely undermined the Commercial Trusts Act of 1910. This case dealt with an arrangement that controlled the price of flour. The Privy Council, the final court of appeal for New Zealand, determined that such arrangements must be shown to hurt the public interest, and that it was not the role of any tribunal to adjudicate conflicting theories of economics. With anticompetitive policies in ascendancy, the New Zealand government chose not to deal with the problems the Privy Council's decision raised. Although the 1910 act did not cease effect immediately, it fell into disuse and was finally repealed in 1975.

While Australia's attachment to the principles of competition declined with the impact of the Great Depression of the 1930s, New Zealand went even further into price control, stabilization arrangements, and marketing through marketing boards. After World War II, New Zealand persisted with price controls. Even by 1954, when price controls had been substantially dismantled in most industrialized countries, New Zealand still had controls in place for basic foodstuffs and gasoline. Politically, New Zealand had become locked into a false choice between continuing price controls in the public interest or instituting a comprehensive competition policy. Indeed, a draft bill establishing competition laws was prepared but dismissed by the then-prime minister in 1957 as the product of someone "socialistically inclined."

New Beginnings of Competition Law and Enforcement

In 1958, following a change of government, the Restrictive Trade Practices Act was passed into law. The thrust of the 1958 act was to control monopolistic practices through corrective orders, although price controls were also retained, as it was believed these remained necessary to deal with the effects of monopolies whose power could not be removed by orders. The 1958 act did not proscribe anticompetitive behavior as such; rather it required that certain practices be examined to determine if they met a public-interest text. While something of a threshold, the 1958 act was countered by the government's continuing attachment to extensive regulation, which included restrictions on entry to certain industries.

A Prices Commission was able to recommend that goods be put under price control. Eleven categories of agreements (e.g., boycotting, collective price-fixing, resale price maintenance) were covered by the act and had to be registered. Price discrimination was not covered.

In 1961, 1965, and 1971, further legislative changes were effected—the latter two changes amounting to tightening of provisions against anticompetitive behavior.

In 1974 the Trade Practices and Prices Commission was renamed the Commerce Commission. In 1975, the Commerce Act of 1975, which amounted to an amalgam of the Trade Practices Act of 1958 and the

Control of Prices Act of 1947 with some added monopoly and merger control provisions, was passed. As a result of changes to competition law, resale price maintenance and collective pricing arrangements required the prior approval of the commerce commissioner, services were covered in the area of unjustified refusal to supply, exemptions were tightened, and the burden of proof, which had rested upon the government examiner, was loosened slightly. An examinable approach to restrictive trade practices was continued. Prior to 1975 there had been no comprehensive scrutiny of mergers or takeovers. Under the new act, two classes of mergers became subject to prior approval: special product groups, and those with asset levels above a defined threshold. Between 1975 and 1986, a number of amendments were made that effectively widened the scope of coverage and improved enforcement.

In 1984, a new government came to office with a vision of changing the highly regulated, largely closed, and, by then, very uncompetitive New Zealand economy. Competition and consumer policies were seen to play an important role in restructuring the economy to become more open, efficient, and adaptable.

The Commerce Act of 1986 drew heavily on Australian experience and represented a sea change in New Zealand attitudes to competition law.

Finally, a Real Competition Law

The 1986 act reconstituted the Commerce Commission as a true enforcement agency. Private rights of action were established for most contraventions of the act. The act is directed at business practices that substantially reduce competition, to prevent firms in a dominant position from using that position for anticompetitive purposes. The act scrutinizes mergers and takeovers to prevent acquisition or strengthening of market dominance.

Because it represented such a major change in approach, the act was subject to review after two years' operation. This began in 1988 and was implemented largely in the Commerce Amendment Act of 1990. The main change was to drop a proposed premerger notification scheme and simply require that anticompetitive mergers be prohibited per se. This is effected through a voluntary clearance process. The amendments also extended coverage of the act to trade across the Tasman Sea between Australia and New Zealand by outlawing use of a dominant position in that market. In particular, the use of a dominant position in a market in Australia for exclusionary purposes in a New Zealand market was prohibited. Another effect was to move the focus solely away from international price discrimination to price and nonprice discrimination. The move arose from the Australian and New Zealand governments' decision to abandon the antidumping remedy on such trade from

1 July 1990 following the 1988 Review of the Australia/New Zealand Closer Economic Relations Trade Agreement (CER) (Vautier 1990).

In 1991-92 the Commerce Act of 1986 was comprehensively reviewed following expressions of concern that the act was not giving sufficient weight to such factors as economies of scale. The review addressed the following issues:

- the nature of the economic cost-benefit analysis undertaken and the scope of the "public benefit" test applied by the Commerce Commission
- application of the act to markets for primary products and to labor practices that affect markets for goods and services
- the treatment of mergers and takeovers
- arrangements for enforcement, thresholds for determining anticompetitive conduct, resale price maintenance, and harmonization issues

However, the Commerce Act of 1986 was not amended, as had been recommended, to replace "benefit to the public" with "benefit to New Zealand" in sections of the act relating to authorization of anticompetitive mergers and practices and provide that productive, allocative, and dynamic efficiency to be the principal elements of the analysis to assess applications for authorization. No general exemption for primary products was provided, and the government's consideration of the review confirmed the existing law respecting labor practices, and a range of operational amendments were implemented or identified for further consideration (Ministry of Commerce et al. 1992).

Enforcement of competition law on a comprehensive front in both Australia and New Zealand has been a contributing factor to a reversal in the competitive decline in both economies evident until the 1980s.

Trade and Competition Policy

It is ironic that Australia and New Zealand throughout this century have promoted, as a first-order preference, freer and less distorted international agricultural markets and policies while pursuing domestic policies (including often those for agriculture) that were increasingly anticompetitive—that were, in essence, the antithesis of policies to promote efficiently functioning, flexible, and open economies. However, this has not been true of either country since the mid-1980s.

Tolerance of anticompetitive behavior, which reached its pinnacle in New Zealand in the postwar period, found political justification in both New Zealand and Australia as a response to the closure of European and North American markets to efficiently produced and cheap Antipodean agricultural products. It was also a response to tariff escalation and other protectionist policies that kept Australia and New Zealand as residual suppliers of generally low-value-added commodities. In turn, in order to build employment and growth at home and then to sustain competitiveness, successive Australian and New Zealand governments adopted policies that placed a low priority on competition: import protection, import substitution, and regulatory practices including subsidies.

While Australia abandoned import licensing in 1960, New Zealand did not do so until the mid-1980s. However, both economies maintained high tariff protection until the mid-1980s, when both tariff and the relatively few nontariff barriers (NTBs) employed by Australia and New Zealand began to be liberalized or, in the case of NTBs, largely eliminated.

Trade Policy Reform and Trade Liberalization

Since the early 1980s in Australia and the mid-1980s in New Zealand, trade policy reform has been a principal instrument for substantially improving conditions of competition in both economies. In Australia, assistance to manufacturing was reduced between 1981-82 and 1995-96 from 25 percent to 5 percent of the value of manufacturing output. With only two industry sectors as exceptions (motor vehicles and textiles, and footwear and clothing)—where maximum nominal tariffs will be 15 percent and 25 percent, respectively—by 1996 tariffs for all other products imported into Australia have been 5 percent or less. Australia's average tariff in 1996 was less than 4 percent and is expected to fall to 3 percent by 2000. All border, nontariff barriers, such as "voluntary" export restraints, import quotas and the like, of which Australia had few, were eliminated by 1992. In 1997 the Australian government announced that the tariff on motor vehicles would be frozen at 15 percent from 2000 to 2005. For New Zealand, which had significantly higher border protection than Australia, similar dramatic, unilateral reductions have been implemented since the mid-1980s. New Zealand, however, did not adopt the policy-neutral setting that Australia adopted in 1991 of a maximum tariff of 5 percent (with two exceptions) and of 1996 as the date for final implementation (Industry Commission, Australia 1993, 439). However, from July 1997 New Zealand was to broadly parallel Australian tariff policy to the year 2000 and in some sectors reduce tariffs below Australian levels.

Since 1984, the New Zealand government has pursued an extensive program of regulatory reform aimed at generating sustained, noninflationary growth. The reforms included deregulation of key sectors (finance, communications, and transport) a revamp of the tax system, privatization of government business enterprises, elimination of agricultural subsidies and sharp cuts in export assistance—a very liberal approach to rules of origin—and lowering of border protection, most notably through the 1983 CER Trade Agreement with Australia. Tariffs in 1996 were 5.7 percent (simple average applied tariff rate). As with Australia, New Zealand motor vehicle and textile clothing and footwear tariffs remain high: in 1996, motor vehicle tariffs were 25 percent, and clothing and footwear, 30 percent. Post-1996 tariff reductions have been announced with a three-tier structure of 5, 10, and 15 percent to operate by the year 2000. Apparel, footwear, motor vehicles, and components will fall to 15 percent, with textiles and replacement vehicle parts falling to 10 percent. New Zealand's average tariff in 1996 will be under 6 percent, underlining the massive elimination of protection achieved by New Zealand in recent years (New Zealand Ministry of Commerce estimate).

New Zealand, closely followed by Australia, has the lowest levels of assistance (subsidies, transfers, and price-raising import barriers) to agriculture of any of the industrialized nations. In 1995 New Zealand's net percentage producer subsidy was the equivalent of 4 percent (as measured by Organization of Economic Cooperation and Development [OECD]), and Australia's was 9 percent, in comparison with the OECD average of 41 percent (OECD 1996). Overall, when assistance to agriculture, manufactures, and services is considered, Australia and New Zealand each are at the least-protected end of the OECD countries. New Zealand's transformation in moving from the position of perhaps the most closed OECD economy in 1983 is particularly impressive.

Separately taking place, but associated with this trade policy reform in both countries, has been an ongoing deregulation of a range of factor markets and promotion of competition, together with privatization of government business enterprises. Underlying all these changes, including reforms of labor markets to improve productivity and work place flexibility, has been a clear perception in both countries that their economic performance and relative standards of living had slipped significantly and that, without significant change, decline would accelerate and the effects would become more endemic and serious. Prime Minister Paul Keating of Australia summarized this thinking in a speech on 26 February 1992: "The engine which drives efficiency is free and open competition."

The policy debate and action agenda in both countries now comprehend eliminating or reducing exemptions from competition laws, such as those favoring government businesses, the professions, and agricultural marketing. Many of these exemptions have already been discontinued; others may be soon or may be changed so as to create greater competitiveness and efficiency. A key objective has been increasing the efficiency of GBEs through commercialization and introduction of competition (so ending monopoly). While these changes will deal with basic concerns over lack of competition, concerns over "competitive neutrality" remain in some areas (i.e., the advantages that GBEs can enjoy vis-à-vis private enterprises arising from cost advantages and pricing opportunities).

Moreover, because of the policies of its state governments, such as preferential purchasing, Australia until recently had never fully enjoyed the advantages of a truly national market. Throughout the 1980s, consensus grew on the importance of a national market free of market fragmentation, and reforms were made of state/territory and federal legislation to facilitate this goal—including abandonment of state and territorial government purchasing preferences and establishment of national food and other product standards. Substantial progress has been made in creating a trans-Tasman market (referred to variously as "a single market" or the "joint domestic market") either through harmonization of regulations or mutual recognition of standards.

With regard to research and development activities, Australia does not provide for any specific competition policy adjustment for this sector. The federal government currently provides a 125 percent tax deduction for eligible R&D expenditure. New Zealand's practice on R&D is similar to Australia's.

Exceptions to the Competition Policy Rules

Both the Australian Trade Practices Act and the New Zealand Commerce Act have similar exceptions to their general provisions. It is beyond the scope of this account to assess the specific advantages and disadvantages of each exception other than to note that some exceptions have an undoubted justification to secure economic efficiency while other exceptions may have less to do with competition and efficiency and more to do with political economy. By comparison to other economies, however, following on the implementation of the Hilmer reforms, Australia (and New Zealand with its own separate policy reforms) has sound competition policy exemptions. In Australia, the Trade Practices Commission can grant immunity from prosecution for an agreement or conduct that would otherwise be prohibited under the act. The act provides that this "authorization" might be granted for anticompetitive agreements, primary boycotts, secondary boycotts, anticompetitive exclusive dealing arrangements, exclusive dealing involving third-line forcing, and mergers leading to a substantial lessening of competition in a market. Authorization is not available for such activities as misuse of market power, resale price maintenance, price discrimination, or most types of price agreements. Generally, in assessing the merit of an application for authorization, the commissions must weigh the public benefit from the proposed arrangements.

More specifically, the legislation includes additional requirements for the authorization of mergers. A company's gain or strengthening of a dominant position through a proposed merger must be balanced against the broader public benefit that might flow from the merger. The commission is specifically required to take into account in its public benefit analysis a significant increase in the real value of exports and significant import substitution. Issues relating to international competitiveness are also to be considered.

Possibly of more trade-related interest are the statutory exceptions for certain restrictive trade practices under section 51 of the Trade Practices Act:

- export agreements (notification required within 14 days)
- conduct that is specifically authorized by the legislature of a state or territory
- certain arrangements relating to patents, copyrights, trademarks, and designs
- compliance with a Standards Australia standard
- conduct arising from labor agreements
- a contract for the sale of a business where the condition is for the protection of the purchaser in respect of the goodwill component of the business—that is, the seller will not attempt to poach customers from the buyer or undermine the customer base
- partnership agreements between individuals
- consumer boycotts

Both in Australia and New Zealand, the relevant acts generally bind the Crown, although no prosecution can be undertaken for breaches. Additionally, section 51(1) of the Trade Practices Act allows federal, state, and territory governments to explicitly exempt otherwise prohibited conduct.

Exemptions in both acts are also available for international shipping "conferences." In Australia, the agreement is to be registered with the federal Department of Transport and Communications. However, these exemptions only apply to specified practices that might otherwise breach anticompetitive agreements and exclusive dealing other than third-line forcing. No exemptions are available for secondary boycotts, misuse of market power, or mergers and acquisitions.

When the federal government introduced legislation exempting international liner shipping, it also stipulated that a review would be made "not later than seven years after [the exemption] enters into force." That review panel reported to the government on 23 December 1993, recommending that the provisions be retained, with some minor adjustments to strengthen the hand of importers when negotiating freight rates. In October 1994, the federal government accepted the basic thrust of the recommendations and added a few enhancements. Under part 10 of the Trade Practices Act, members of the international liner shipping conferences that operate in Australia's liner trades are allowed limited exemptions from the general competition provisions of the act. Nevertheless, the government will amend certain provisions of part 10, including penalties and civil-remedies provisions, where there are anomalies. The amendments will enable greater scrutiny of the effects of shipping accords and discussion agreements and will clarify several other provisions. The federal government would be able to grant injunctions where negotiated settlements—called undertakings—have been breached. The amendments will also provide for effective low-cost dispute resolution and conciliation (Australia 1993).

Arising essentially out of the Westinghouse and other private, treble-damage antitrust actions in the uranium industry of the 1970s, Australia enacted three pieces of legislation to thwart and contest US assertion of extraterritorial jurisdiction. The first was the Foreign Proceedings (Restriction of Certain Evidence) Act of 1976, which allows the attorney general to prohibit companies or individuals from producing Australian documents for discovery proceedings in foreign courts. The second blocking act was the Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979, which could by order make a foreign judgment unenforceable in Australia, and the third was the "Recovery Back" amendments to this act introduced in 1981. These amendments permit the attorney general to "attach" assets under Australian jurisdiction that belong to a plaintiff facing a judgment when the Australian government contests the extraterritorial effects of that judgment. Though still in effect, these statutes are dormant following settlement of the cases that gave rise to their enactment.

New Zealand also had blocking legislation—the Evidence Amendment Act (No. 2) of 1980—which provides only for the blocking of the supply of documents and records held in New Zealand.

In mid-1997 Australia had only one bilateral agreement related to competition policy. This is the "Agreement between the Government of Australia and the Government of the United States of America, Relating to the Cooperation on Antitrust Matters," which was signed and came into force on 29 June 1982. The agreement obliges US authorities to notify Australia of any US antitrust investigation that may have implications for Australia's laws, policies, or national interests. The Australian government has an option to notify US antitrust authorities of trade policies that it believes may have antitrust implications for the United States. The agreement contains provisions dealing with consultations, each party's obligations to consider the other's interests, the provision of written opinions, and the participation by the US government in private legal actions to inform the court of the substance and outcome of consultations with the Australian government.

The agreement was a landmark of its type at the time because it not only provided for cooperation in antitrust enforcement but also provided a mechanism to avoid or resolve conflicts between Australian trade policies and US enforcement of antitrust laws. Since coming into force, the agreement has formed the basis of a much-improved relationship between the parties on antitrust enforcement and extraterritoriality issues.

It is now understood that a substantially revised Antitrust Mutual Assistance Agreement is awaiting approval in the United States and Australia. The agreement by both countries to cooperate would assist the relevant authorities to gather antitrust evidence, facilitate administration or enforcement of each country's competition laws, reduce duplicaton of effort and inconsistent treatment, and notify the other authority about anticompetitive activities that may warrant enforcement activity by that authority. Legislaton in Australia (the Mutual Association in Business Regulation Act 1992 and the Mutual Assistance in Criminal Matters Act 1987) and the United States (the International Antitrust Enforcement Act 1994) provides the framework for enhanced cooperation.

There is also a memorandum of understanding between the Australian Trade Practices Commission and the New Zealand Commerce Commission that provides for cooperation in administration and enforcement matters. It was signed on 27 July 1994.

Free Trade: A Powerful Tool for Improved Competition and Change

The centerpiece of the review in 1988 of the Australia/New Zealand CER Trade Agreement was the achievement of free trade between Australia and New Zealand without exception in goods, from 1 July 1990. An agreement of treaty status—governing and substantially establishing, from the same date, free trade in services between Australia and New Zealand—was also an important outcome. New Zealand has been able also to enjoy the benefits of open and free access to the Australian market (with a population of 17.5 million), thus expanding its own domestic market beyond its small population of 3.4 million. But the price of this advantage was accepting Australian competition in the smaller New Zealand market and adjusting without assistance to that added competition. Of course, both economies gained from the removal of the remaining barriers to trade between them, particularly as the barriers then remaining were frequently aimed at preventing or limiting trade from the others.

Further, significant decisions resulting from the 1988 CER review were the elimination of the antidumping remedy for trans-Tasman trade and the decision to rely instead on protection against predatory trading practices through harmonized competition-law provisions. These were implemented beginning in mid-1990 (Thomson and Langman 1991) and have taken on added relevance with the current debate on convergence of trade and competition policy.

In making this decision to abolish antidumping within the free trade area, the Australian and New Zealand governments recognized that use of such measures was anomalous to achieving a single trans-Tasman market and would hamper their efforts to promote competitiveness. Different thresholds for establishing dumping and applying competition-law remedies between the two countries—significantly lower in the case of dumping—would have maintained protection for relatively inefficient sectors in the open trans-Tasman market and therefore hampered the efficient allocation of resources. And it would have required a bigger bureaucracy, which itself would have spawned private-sector operations to service antidumping investigations, which would be costly to both countries.

Both governments believed that the removal of trade barriers would make the resort to antidumping action increasingly redundant, as the scope for price discrimination between the domestic and export market decreased and the threat of cross-Tasman retaliation by competitors increased, with the possible occurrence of arbitrage. Moreover, maintaining antidumping remedies risked continuing prolonged disputes at an official level (as well as at the commercial level), which neither government wanted. Without exception, the whole approach—and this is what makes the CER Trade Agreement unique—has been to promote a competitive, level playing field between the two countries without creating bureaucratic, private enforcement, or adjudication processes, as has been the case in the European Union, the Canada-US Free Trade Agreement, and the North American Free Trade Agreement (NAFTA). That is why the CER also proscribes subsidies for goods and services that affect the other trade partner. These provisions are clearly a step ahead of the relatively weak subsidy provisions of both the Canada-US FTA and NAFTA. This proscription has also served to decrease the payment of more generally available industry subsidy schemes in both countries, with ensuing benefits for all.

Thus, the principle of competition promotion without bureaucratic regulation and enforcement underpinned the novel development of eliminating the antidumping remedy between Australia and New Zealand. Instead, the two countries rely upon the market as the first and main determinant, with backup enforcement action by the commercial parties directly affected to be adjudicated by the courts.

Developing the elements of the agreement was made easier by the fact that there was already a significant level of compatibility between the competition laws of Australia and New Zealand. New Zealand had closely modeled the competition-law provisions of its Commerce Act of 1986 on those of part 4 of the Australian Trade Practices Act of 1974. There were, nevertheless, differences in constitutional frameworks, drafting style, and policy objectives, which contributed to some difference between the two pieces of legislation. Representatives from business and professional countries were extensively consulted about jurisdictional aspects of the package. There was concern, especially from some in the Australian and New Zealand agricultural and manufacturing sectors, but industry and business provided a significant level of support for the governments' goals.

To a considerable extent, Australia once used antidumping actions to protect its domestic industries. This trade remedy was also used against imports from New Zealand before the 1990 package. There were 31 antidumping or countervailing actions brought against New Zealand goods that were accepted in Australia for formal investigation between 1985 and 1988. In three of these cases, antidumping duties were imposed, while eight were resolved by undertakings. New Zealand antidumping cases against imports from Australia, while fewer than Australian cases against New Zealand, increased as New Zealand phased out its extensive administered system of protection based on import licensing and high tariffs and began to liberalize its import regime.

The two governments harmonized their competition laws applicable to trans-Tasman trade in 1990 by agreeing to extend the prohibitions on the anticompetitive use of market power in section 36 of the New Zealand Commerce Act and section 46 of the Australian Trade Practices Act. This was achieved in Australia by inserting a new provision, section 46A, into the Trade Practices Act, which is based on section 46. New Zealand inserted a corresponding provision, section 36A, into its legislation.

The legislation extends the competition-law provisions to trans-Tasman trade in goods and services, but it does not extend to trade exclusively in services. As noted previously, there are slight differences between the two countries' new laws covering trans-Tasman trade. New Zealand's new provision prohibits any persons with a dominant position in a market in either Australia or New Zealand or both from using that position to restrict entry into, or to deter competition in, or to eliminate a person from, a market in New Zealand. Australia's law provides that a corporation with a "substantial degree of market power in a trans-Tasman market" must not seek to eliminate or substantially damage a competitor, or prevent the entry of a person, or deter competition, in a market in Australia.

To enable the new provisions to operate effectively, a number of further changes were made to various laws. In Australia's case, changes were made to the Trade Practices Act of 1974, the Federal Court of Australia Act, and the Evidence Act. These amendments were necessary to ensure that trans-Tasman competition-law proceedings were hampered as little as possible by national boundaries. To enforce the new trans-Tasman prohibitions on the anticompetitive use of market power, both governments agreed to give new investigatory powers to the Australian

Trade Practices Commission and the New Zealand Commerce Commission, enabling them to obtain evidence in the other country.

These changes allow the New Zealand Commerce Commission to issue a notice requiring an Australian company to provide information and any documents needed during its investigation of a complaint. A failure by a company to comply is punishable under the Australian Trade Practices Act. The relevant court in New Zealand is able to sit in Australia or to take evidence and submissions by electronic means for trans-Tasman matters. The relevant Australian court has reciprocal rights. Further, any judgments and orders, including injunctions, made by the relevant courts of each country are enforceable in the corresponding court of the other country.

The Australian and New Zealand commissions at the outset expressed their willingness to consult with business about the legislation, to keep each other informed, and to cooperate in administration and enforcement. This cooperation was extended to investigations; one commission will commence preliminary hearings on behalf of the other. The commissions can also jointly investigate a complaint.

The Australian Trade Practices Commission has adopted a similar approach in dealing with abuses under section 46A as it has under section 46. The Trade Practices Commission's guidelines distinguish between conduct which it believes does not generally restrict competition, that which may, and that which does. It further considers whether the conduct in question hurts consumers in terms of prices, quality, or availability; choice and/or convenience; impedes the competitive process; raises the cost of entry to a market, or prevents or hinders potential competitors from entering; and whether the conduct can be justified in terms of economic efficiency or the desire to engage in genuine competitive rivalry.

The New Zealand Commerce Commission takes a slightly different approach. It gives priority to enforcing the law against conduct seen as having a widely detrimental effect on competition in the market. The Commerce Commission looks first at the concentration of market power. Then it examines the practice in terms of the wording in the legislation. The Commerce Commission seeks to avoid making any a priori judgments about particular practices.

No cases have been initiated under the legislation. Most agree that the removal of antidumping remedies was important in opening the trans-Tasman market to complete free trade in goods. It has also helped secure the maximum economic efficiency and welfare gains possible from the creation of a single market. Future challenges include the complete incorporation of trade in services into the CER agreement, although there already has been further progress toward liberalization in services trade on both sides since the initial but substantial steps were undertaken in 1988 (Thomson 1989). When the CER became effective on 1 January 1989, Australia had 13 service sectors—and New Zealand 8—that were termed exceptions under the negative listing provisions of the CER Trade in Services Agreement. In mid-1997, these had been reduced to 9 for Australia and 3 for New Zealand, and further liberalization may occur soon.

Conclusion

Australia and New Zealand are interesting studies in the linkages between trade and competition policy because of the substantial steps each is taking to bring about economywide, competitive improvements through competition policy, legislation, and enforcement, and to seek greater competition in their economies through trade liberalization and subsidy elimination or reduction (Vautier, Farmer, and Baxt 1990). They have done this by adopting both the traditional approach of prohibiting anticompetitive behavior as well as adopting measures to achieve competition at the microeconomic level.

Each country still has a relatively high dependence, by industrialized-country standards, on basic commodity exports. They also have relatively large and efficient service sectors. However, they both have large degrees of foreign ownership and control of their industries and face very high levels of protection against many of their commodity and potential services exports in global markets, notwithstanding the liberalizing outcomes of the Uruguay Round and subsequent WTO sectoral negotiations. These impediments include effective import barriers, distortions caused by subsidized production and/or exports, tariff escalation in major commodities markets inhibiting value adding, significant volumes of exports subject to single purchaser arrangements in importing countries, widespread controlled or allocated conditions for import access, regulatory regimes that favor domestic producers or service providers, and export franchise restrictions of foreign-owned enterprises that limit capacity to capitalize on enhanced domestic competitiveness by accessing a wider range of markets. In these circumstances, both Australia and New Zealand have a real interest in a new and innovative international effort to inculcate principles of competition more widely into the global economy either in traditional trade policy terms or through wider and more effective application of national competition policy principles or through convergence of both trade and competition policy.

Accordingly, as discussion of trade and competition policy dialogue develops between governments and in international forums such as the OECD, the Asia Pacific Economic Cooperation forum, and the World Trade Organization, Australia and New Zealand have both the experience and commitment to be effective participants. Both countries are likely to promote a strong, all-sectors approach, comprehensively applied and enforced, that encompasses old and new policy techniques and comprehends all measures that hinder or distort competition.

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