



## New Zealand\*<sup>1</sup>

– Emily Woodroffe<sup>†</sup>

New Zealand<sup>2</sup> is a small nation, made up of two main islands, and some islands in the South Pacific Ocean. It is situated to the Southeast of Australia. The Polynesian Maori reached New Zealand around AD 800. In 1840, their chieftains entered into a pact with Britain, the Treaty of Waitangi, in which they ceded sovereignty to Queen Victoria whilst retaining territorial rights.

In the same year, the British began the first organised colonial settlement of New Zealand. A series of land wars between 1843 and 1872 ended with the defeat of the native people. The British colony of New Zealand became an independent dominion in 1907, and supported the UK militarily in both World Wars. New Zealand's full participation in a number of defence alliances lapsed by the 1980s. In recent years, the Government has sought to address longstanding Maori grievances.

### Economy

New Zealand has one of the most open economies of all the members of the OECD, the rich country's group based in Paris. However, the openness of the New Zealand economy is a more recent result of policy changes. As an agriculture-based economy, the country historically had very close trade links with Britain until the 1970s, when the UK joined the European Community. New Zealand, like Australia, found itself facing closed doors to the UK markets.

Through the 1970s, the New Zealand Government pursued increasingly protectionist policies, including import substitution, heavy subsidisation of the agricultural industry and high tariffs. Price control had been a policy tool for much longer than that.

By the mid 1980s, however, following an economic foreign exchange crisis and a change of government, a serious undertaking of structural reforms and market liberalisation

PROFILE	
Population:	4.0 million***
GDP (Current US\$):	76.3 billion***
Per Capita Income: (Current US\$)	15,780 (Atlas method)*** 21,740 (at PPP)**
Surface Area:	270.5 thousand sq. km
Life Expectancy:	78.2 years**
Literacy (%):	99 (of ages 15 and above)
HDI Rank:	18***
Sources: - World Development Indicators Database, World Bank, 2004 - Human Development Report Statistics, UNDP, 2004 (**) For the year 2002 (***) For the year 2003	

was pursued by the Government. Competition policy was then seen as fundamental to achieving greater competitiveness and efficiency. Commitment to the liberalisation effort and belief in the need for healthy competition legislation was particularly reflected in the large-scale privatisation of several State-owned assets, two notable examples being the power and telecommunications sectors.

### Competition Evolution and Environment

New Zealand competition policy prior to the mid 1980s was dominated by 'protectionist' government policies for almost 60 years, favouring price controls, protection and stabilisation arrangements, particularly through the 1970s and early 1980s.

Although competition legislation was put in place by the Government as early as the 1900s, such as the Monopolies Prevention Act 1908, legislation enforcement prior to the 1980s was not strong. In 1958, the RTPs Act was passed, which established a Prices Commission to decide about

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1 Comments received from Glenn Boyle, Executive Director, ISCR and John Preston, Competition Policy Consultant, DFID, UK

2 <http://cia.gov/cia/publications/factbook/geos/nz.html>

goods to be put under price control; and in 1974, the Trade Practices and Prices Commission was renamed the Commerce Commission. The following year, the Commerce Act 1975 was passed, which effectively merged the existing Trade Practices Act with a 1947 Control of Prices Act, adding in some provisions regarding monopoly and merger controls. This period was marked by the lack of interest of the Government to enforce the Law.

In 1984, when the new Labour Government came into power, they viewed competition and consumer policies as an important tool to bring about the restructuring that was seen as vital to turn the economy into a much more competitive and open place.

### **Competition Policy**

The Commerce Act 1986 regulates the competitive process in New Zealand. Its purpose is to promote competition in the markets within New Zealand. The Act covers anticompetitive conducts in markets within New Zealand, and also overseas business activities in so far as New Zealand markets are affected. In addition, the Act covers abuses of market dominance in any trans-Tasman market, i.e. between Australia and New Zealand.

The Commerce Act 1986 set out “...to promote competition in markets for the long-term benefit of consumers within New Zealand”. It established the Commerce Commission as an enforcement agency with actual powers and drew from the Australian experience, with much greater intent of combating anticompetitive practices, including anticompetitive mergers, price fixing and collusion. A review was set for 1988, which took two years, and from this, amendments were made in the Commerce Amendment Act 1990.

The first of a series of agreements introducing free trade in goods and services between New Zealand and Australia [Closer Economic Relations (CER) Trade agreement] was signed in 1983. By 1990, free trade in goods and services was almost completely achieved.<sup>3</sup> This resulted in a strong incentive through this period for the harmonisation of both countries’ competition policies.

The amendments also included restricting abuses of a dominant position in the market to exclude new businesses starting as a result of the new trade agreement. In the early 1990s, however, it was reviewed again due to criticism that gains from economies of scale were not sufficiently taken into account in decisions taken.

The Commerce Amendment Act 2001 was passed on 26 May 2001. Its purpose was to strengthen the core provisions of the Commerce Act and the enforcement powers and resources, of the competition enforcement agency (the Commerce Commission) of New Zealand.

A new purpose statement in the statute clarifies that competition is not an end in itself but a means to promote the long-term benefit of consumers within New Zealand. Two key prohibitions in the Act were strengthened.

- The prohibition against abuses of a dominant position is amended to prohibit persons with a substantial degree of power in a market from taking advantage of that power for anticompetitive purposes. The amendment is intended to address previous narrow interpretation of dominance and abuses by harmonising local legislation with the Australian equivalent.
- The prohibition against anticompetitive business acquisitions is amended to prohibit acquisitions that substantially lessen competition. This amendment will allow the Commerce Commission to consider a wider range of potentially anticompetitive mergers and acquisitions. It also imports an analytical test applied in other jurisdictions. The amendments further strengthen the penalties and other remedies for sanctioning restrictive trade practices.

The new measures include extending the statutory limitation period, to increase the likelihood that offences will be detected; and making offences unprofitable for corporate bodies and their agents, by increasing the amount and range of sanctions that may be imposed. The ability of the Commerce Commission to intervene in anticompetitive conduct was enhanced by removing the requirement for the Commission to give undertakings as to damages when seeking an injunction, and granting the Commission powers to issue ‘cease and desist’ orders.

Finally, the amendments update and strengthen the generic price control regime in the Commerce Act. The new provisions will allow the Commission to impose such control and to use a range of instruments for that purpose, including incentive-based controls on firms in markets where competition is limited.

### **Institutions and Anticompetitive Business Practices**

#### ***Commerce Commission***

The Commerce Commission recently released its new business acquisition guidelines following the passage of the Commerce Amendment Act 2001. These guidelines outline how the Commerce Commission intends to administer the new ‘substantially lessening competition’ threshold in considering business acquisition applications.

Under the amendment, the Commission will have to look both at what market power the merged entity would have in its own right; and also at the implications to competition, amongst the remaining firms, if a competitor was removed. Under the previous Law, the Commission could

<sup>3</sup> <http://www.mfat.govt.nz/foreign/regions/australia/cer2003/cerbackgrounder.html>

### Box 24.1 Allowing Dairy Merger

The Dairy Industry Restructuring Act 2001 was enacted to facilitate the recent formation of the farming co-operative 'Fonterra Cooperative Group Ltd', following an amalgamation of the two previous Co-operative boards. The result of this merger was that the new Group owned all the shares of the New Zealand Dairy Board. The legislation seeks to limit risks of the misuse of market power.

The Commerce Commission originally advised against the merger, but on application to the Government, the merger was allowed to go ahead on the grounds that they were an exporting company, and it allowed them greater power to compete in the global markets. The Government argued that the scope of the Commerce Commission was domestic competition, not the structure of large exporters, such as the dairy industry, which exports 95 percent of its output.<sup>4</sup>

only consider if a merged entity would, on its own, be dominant in a market.

The most recent amendments to Part II of the Commerce Act in 2000, particularly regarding anticompetitive practices, have generally been intended to enhance the effectiveness of the legislation, such as broadening the scope for misuse of dominant position, as well as definitions of the threshold scrutiny level in the area of mergers and acquisitions; and strengthening the penalties, remedies and enforcement tools of the Commission.

The amendments have reflected that the spirit of the Act is still to enhance competitiveness, bringing about the best outcome for New Zealand public interest, for example, where mergers may now come under scrutiny, with the new threshold levels, they might be allowed to proceed if expected efficiency gains would outweigh the anticompetitive costs.

Where companies have not agreed with the rulings, they have the option of court appeal, such as the case of a merger between two health insurance companies, Southern Cross and Aetna, who won their court appeal against the Commission's decision. In the case of the Dairy Farm Co-op merger (see Dairy Industry Restructuring Act 2001 below), they also exercised their right to appeal to the Government. Companies, or the Government, usually bring cases to the Commission.

The Commission's aim is to find a balance between preventing anticompetitive business practices and not

stifling the incentives for efficiency and investment, including that from overseas; determining what, in fact, constitutes the best interests of the NZ public. The New Zealand Government Ministry of Economic Development provides Commerce Act policy advice; their website states:

"We want to encourage FDI and for this, an effective competition law is needed to ensure that foreign firms compete against local firms, rather than misuse their market power to eliminate or deter aggressive local competitors. We do not want to encourage foreign investment simply attracted by the opportunity to exploit market power".<sup>5</sup>

### Box 24.2: Two Merger Rulings

In 2003, Air New Zealand, New Zealand's only major airline, and Australia's dominant airline, Qantas, made a bid to form an alliance. The case was brought to the Commerce Commission, which ruled against the bid, stating that it would not be in the interests of the NZ public (due to the threat of price control and anticompetitive behaviour). This decision was appealed, and on 20 September 2004, the High Court rejected the appeal.

In contrast to this, two of the largest banks in New Zealand were allowed to merge in 2003. ANZ Bank bought National Bank NZ, owned then by Lloyds TSB, and the decision by the Commerce Commission stated:

"The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the relevant markets due to the competition provided by the other major banks".

Source: [www.comcom.govt.nz/publications](http://www.comcom.govt.nz/publications)

## Sectoral Regulation

### *The Telecommunications Act 2001*<sup>6</sup>

- makes determinations on disputes between the access seeker and the access provider over access obligations of designated and specified services, and also prices, in accordance with the processes set out within the Act;
- undertakes costing and monitoring activities relating to the Telecommunications Service Obligations and determines how these costs will be allocated to other industry players;
- recommends to the Minister the desirability of regulating additional services, or amending the regulation of services, where considered necessary; and
- proposes and approves codes of conduct applicable to the industry.

4 <http://www.consumer.org.nz/topic.asp?docid=777&category=Public%20Issues&subcategory=Government%20services&topic=Commerce%20Act7>

5 [http://www.med.govt.nz/buslt/bus\\_pol/comref/backgrounder.html#P1\\_40](http://www.med.govt.nz/buslt/bus_pol/comref/backgrounder.html#P1_40)

6 <http://www.comcom.govt.nz/telecommunications/index.cfm>

**Box 24.3: The Case of Telecom NZ – A Telecommunications Monopoly....**

Telecom was a SoE, privatised and sold by the Government in September 1990 for US\$2,981,843,677. As a natural monopoly, there have been questions in the last few years, as Telecom has become much more efficient and successful in business, regarding whether the profits that they earn are actually monopoly profits, and whether they have used their position to exclude competitors.

In certain areas of the industry, such as international calls and mobile communications, competition has been introduced and consumers have seen prices fall, but there has been a steady stream of litigation on anti-competitive behaviour. Currently, there is some discussion around Internet and broadband access, which the Commission ruled should be open to competition. National and local calls, however, are still dominated by Telecom, where it has retained complete control over the national networks.

Earlier this year, when the Australian telecom giant, Telstra, appealed to the Commerce Commission for 'local loop unbundling', to enable New Zealand domestic call services to be opened to competition, the Commerce Commission ruled against it; perhaps in view of the possibility of the larger Australian firm engaging in anticompetitive behaviour, where the profits of which would go to another country.

In other countries, the telecommunications industry is often regulated by a separate institution. However, in New Zealand, the industry is regulated by the Commerce Commission, with a specific Telecommunications Commissioner, who was put in place in 2001 when the above legislation came into force after a government review of the industry was completed in the same year.

***Electricity Industry Reform Act 1998***

In the 1990s, the Government restructured the Electricity Corporation of New Zealand, the Government-owned organisation that dominated the electricity generation sector, into four separate companies: Contact, Genesis, Mighty River Power and Meridian. The Act aims to protect consumers from the natural monopoly powers of the local electricity distribution networks, by encouraging greater efficiency through effective competition.

**Consumer Protection**

Consumer information regimes in New Zealand are generally promulgated as mandatory regulations pursuant to the *Fair Trading Act*. There are significant differences

in the number and scope of the mandatory standards affecting different types of consumer goods in each country. There are differences in some product information standards. For example, country of origin labelling for apparel and footwear is a product information standard enforced by the Commerce Commission in New Zealand.

***The Fair Trading Act 1986***<sup>7</sup>

The Fair Trading Act was developed together with the Commerce Act to encourage competition and protect the public from misleading and deceptive conduct and unfair trading practices. The Act applies to all aspects of the promotion of goods and services – from advertising and price, to sales techniques and finance agreements. The Act prohibits:

- generally misleading or deceptive conduct;
- false or misleading representations about employment and goods and services, generally;
- false claims about the price, standard, quality, history or origin of particular goods and services;
- false claims about particular uses or benefits or particular endorsements or approvals; and
- unfair trading practices.

The Act also provides for consumer information and safety standards.

The Fair Trading Act applies to all conduct relating to trade in New Zealand, and is probably the most widely used legislation in commercial and consumer disputes. It prohibits conduct in trade, which is misleading or deceptive. It also prohibits a number of specific activities, in particular misleading or deceptive representations in trade.

The Fair Trading Act provides for mandatory consumer information standards and product safety standards. The consumer information standards are regulations made on the recommendation of the Minister of Consumer Affairs. Consumer information standards must relate to all or any of the following matters:

- The disclosure of information relating to the kind, grade, quantity, origin, performance, care, composition, contents, design, construction, use, price, finish, packaging, promotion, or supply of the goods or services;
- The form and manner in which that information must be disclosed on or in relation to, or in connection with, the supply or re-supply, or possible supply or re-supply, or promotion of the supply of the goods or services.

The legislation provides for the regulation of the sale of goods and services, relating to misleading and deceptive conduct, unfair trading practices and consumer information:

- prohibits people in trade from engaging in misleading or deceptive conduct generally (Section 9);

<sup>7</sup> <http://www.nz-immigration.co.nz/business/forms-of-business.html> & <http://www.comcom.govt.nz/publications>

- prohibits certain types of false or misleading representations about employment (Section 12), goods or services, including false claims that goods or services are of a particular price, standard, quality, origin or history; or that they have particular uses or benefits; or that they have any particular endorsement or approval (Section 13);
- prohibits certain unfair trading practices (Sections 17 to 24); and
- provides for consumer information and product safety standards (Sections 27-33).

**Box 24.4: Fair Trading Act – Two Examples of Cases Brought by the Commission**

The first example of a case of criminal proceedings, brought by the Commission in 2002, was an investigation into pricing practices of Air New Zealand and Qantas, where Air New Zealand was accused of failing to disclose additional insurance and levies applicable to advertised flight prices.

The second case was an investigation of two companies in the juice industry, regarding misrepresentation of claims of freshness, content and origin of some of their products; particularly claims, which implied that certain products were 100 percent freshly squeezed New Zealand orange juice, when they contained quantities of imported concentrate.

Source: Commerce Commission Annual Report 2002

**The Consumer Guarantees Act 1993<sup>8</sup>**

The Consumer Guarantees Act, 1993 makes traders responsible for guaranteeing the quality of the goods and services they provide. The Act describes certain standards and obligations manufacturers and retailers must meet to protect customers against poor quality. It also covers such issues as prices, parts and representations.

**Concluding Observations and Future Scenario**

The Commerce Commission will continue to juggle its adjudication, investigation, litigation, enforcement, reporting, monitoring and screening activities. The financial and resource constraints mean that the need to prioritise and focus their work is important, as the following quote suggests:

“...The Commission will continue to review its processes and reprioritise its activities in this area improving compliance and facilitating enforcement to respond to the increasing resource pressures arising from adjudication work, which may see a reduction of enforcement activity in some areas”.<sup>9</sup>

From April 2005, the Commerce Commission has also taken over the enforcement of the *Credit Contracts and Consumer Finance Act*, which will largely cover the disclosure obligations for creditors, fee charging, charges and interest and oppressive conduct. As well as this, they will look at proposed information on gathering powers under the Fair Trading Act.

8 <http://www.nz-immigration.co.nz/business/forms-of-business.html>

9 Global Competition Review (Vol7 Issue 3 April 2004), “Rating Enforcement”

**Suggested Readings**

G. Thompson – ‘Global Competition Policy’  
 Commerce Commission Annual Plan 2004-2005, [www.comcom.govt.nz](http://www.comcom.govt.nz)  
 OECD, 2001

◆ **Telecom will 'work with' Operational Separation**

Telecom said that the recommendation on its operational separation by a powerful Parliamentary Committee is not ideal, but it will do its best to work with it.

The Finance and Expenditure Select Committee report on the ‘Telecommunications Amendment Bill’ recommended operational as well as accounting separation for Telecom's retail and wholesale businesses.

Wayne Boyd, chairman, Telecom Corporation, New Zealand said that they preferred a simpler form of operational separation which was better suited to New Zealand. The Committee has gone for a more complex, three-way separation.

Telecom shares, which lost a third of their value after the announcement by the Government to legislate to force Telecom to open up its network to rivals in May 2006, were little moved by the news.

They were already down 5 cents ahead of the announcement and remained there on US\$4.25 soon after.

Boyd said that telecom had already made progress down the path outlined with a major reorganisation, including voluntary separation into retail and wholesale units, but the Committee had recommended a split into at least three divisions, including a network access division.

The Government will consider the recommendations before deciding on the next step in the progress of this Bill. The Committee, which reported back on November 28, 2006, stopped short of recommending separate ownership of Telecom's wholesale and retail divisions.

(Source: NZ Herald, 28.11.06)

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