

INTERNATIONAL REGULATORY COOPERATION: the case of Australia's and New Zealand's competition law

Executive summary

This brief case study discusses the increasing cooperation on competition law between the Australia and New Zealand over the last 25 years. New Zealand and Australia have deliberately stopped short of full policy or administrative harmonisation so the two countries have different competition policy regimes and separate competition authorities for enforcement.

The initial focus of trans-Tasman competition cooperation was on trade remedies and competition policy but the main focus has now shifted to the regulatory practices of the competition authorities: the Australian Competition and Consumer Commission (ACCC) and the Commerce Commission (CC) in New Zealand. The cooperation is selective, particularly focused on enforcement including investigation and remedies for mergers and cartels. There is limited cooperation in other areas (restrictive trade practices, organisational governance).

The story has no heroes but is the culmination of hard work by a wide range of officials who worked issues through to an actionable practical agenda. It is a story of incremental change rather than step change. Making progress required working through technically complex issues involving evidence, sharing of information and enforcement of judgements. Cooperation focused on areas of practice that benefited both competition authorities while contributing to a wider agenda of deepening economic integration.

The Australasian experience with cooperation on competition policy IRC is not something that can be forced along. Key lessons from this case study include:

- *IRC is a long game*: it requires investment of time and effort to build up trust and networks and this soft stuff is the hard stuff
- *Trust is crucial*: it is critically important to choose partners where there is mutual confidence in the two sets of institutions, or at least good prospects for building it
- *Start small*: cooperation is costly, and costs markedly increase with the intensity of IRC while the marginal benefits diminish
- *Focus IRC where the mutual gains are greatest*: IRC on regulatory practices does not require full policy harmonisation
- *Keep moving*: the initial focus was on policy with the regime to bypass anti-dumping but moved onto regulatory practices
- *Mandate*: A central organising concept lends legitimacy and keeps up the momentum on IRC.

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How it worked – shifting emphasis from policy to practice

Cooperation occurred in two overlapping phases. In the first 'big policy' phase the policy challenge was to achieve a single economic market and the imperative was to ensure that competition policy and trade remedies enabled rather than got in the way of closer economic integration.

BOX 1 Competition policy and trade remedies

1983: Closer Economic Relations (CER) comes into force: comprehensive bilateral free trade agreement; covers substantially all trans-Tasman trade in goods and services.

1986: New Zealand's Commerce Act introduced; largely modelled on the Australian Competition and Consumer Act (CCA). Many similarities in the structure of the CCA and the Commerce Act (mergers and agreements that substantially lessen competition, taking advantage of market power for an anti-competitive purpose, authorisation on public benefit grounds).

1988: MOU on the Harmonisation of business law between Australia and New Zealand.

1990: Introduction of section 46A of the Competition and Consumer Act (CCA) and section 36A of the Commerce Act in New Zealand on the misuse of substantial market power in a trans-Tasman market (which precluded trade remedies such as anti-dumping actions).

2004: Australian Productivity Commission (APC) release a report on trans-Tasman competition policy. It does not support full harmonisation of policy regimes or creation of a single trans-Tasman competition regulator but does recommend closer cooperation between the two competition authorities. The New Zealand Government had limited formal involvement in the report but is informally kept in the loop at key phases.

2008: Agreement on Trans-Tasman Court Proceeding and Regulatory Enforcement which included:

- Powers for the collection of information and documents by a competition authority on behalf of the other in relation to trans-Tasman markets
- Providing for mutual recognition and enforcement of judgments of each jurisdiction.

2009: Single Economic Market Outcomes Framework including three competition policy streams:

- Firms operating in both markets face the same consequences for the same anti-competitive conduct
- Businesses can have certain approvals considered on a 'single track' (but with separate decisions)
- Competition and consumer law regulators in both jurisdictions can share confidential information for enforcement purposes
- Cross-appointment of associate members on the ACCC and CC.

2010: Enactment of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement (reflected in Trans-Tasman Proceedings Act 2010).

2015: Australia announced the results of a major review of competition policy and these are enacted in changes to the CCA. New Zealand has not undertaken a similar competition policy review.

The big policy phase

The first big policy phase was the province of policy analysts. In particular, the New Zealand lead department for competition policy (now called the Ministry of Business, Innovation and Employment) went to some lengths to foster links with their Australian counterparts in the Treasury (the lead on competition policy) and the ACCC.

Box 1 above highlights the role of key events in the first phase since the introduction of CER in 1983.

Three features of the brief chronology above particularly deserve comment. The first was the 2004 APC report which *examined and rejected the case for full harmonisation*.

Box 2 Australian and New Zealand competition and consumer protection regimes, APC 2004

The report considered three options: full integration of laws and procedures and a single institutional framework; partial integration which retained the two national regimes, but established a single system to handle matters that had Australasian dimensions; and a package of measures to achieve greater coordination including:

- Retaining, but further harmonising, the two sets of laws in relation to competition and consumer including formalising the policy dialogue between the two Governments on competition policy
- Providing for businesses to have certain approvals considered on a 'single track' (but with separate decisions)
- Enhancing cooperation between the ACCC and the CC including in relation to enforcement and research
- Providing for the investigative powers of the regulators to be used to assist the regulator in the other country
- Enhancing the information sharing powers between regulators (safeguards should be included to ensure that confidential information shared between regulators can remain protected from disclosure).

Commenting on full integration the report concluded (Finding 5.1 P XXVT):

Implementing and maintaining a single competition and consumer protection regime for Australia and New Zealand (full integration) would not generate benefits that outweigh the associated costs. The resulting benefits would be moderate, given that the two countries' competition and consumer protection regimes are already similar, there is extensive cooperation and coordination between Australian and New Zealand regulators, and only a small number of cases handled by those regulators have Australasian dimensions. The costs of implementation and maintenance would be substantial. It would require agreement on many complex issues, including how each country's sovereignty would be affected.

The report rejected the other full and partial integration options. Since then legislative changes have been enacted and the ACCC and the CC have worked together on the package of measures proposed in the APC report.

This **highlighted how the law of diminishing returns also applies to IRC**. It found that increasing cooperation imposed increased costs while the benefits were marginal.

Second it highlights that **coordination need not inevitably lead to full harmonisation**. Despite the closer cooperation between the two competition authorities on enforcement practice, recent changes in the Australian competition policy regime have not been reflected in New Zealand. Indeed, the Australasian experience highlights the potential role for regulatory competition as well as coordination. For example, New Zealand could act as the trail blazer on parallel imports, and Australia was able to overcome domestic opposition to the move based on New Zealand's experience. More generally the experiences highlight how cooperation on regulatory practices does not necessitate policy harmonisation: these are separate decisions.

Third it is **a testament to the degree of trust that New Zealand's government officials had in the Australian public institutions** such as the APC and the ACCC, and the people leading them that the APC was able to undertake a review of trans-Tasman competition policy.¹ Formal input from the New Zealand Government into the review was very limited although a New Zealand Government principal policy analyst was seconded to the APC to be part of the project team. Mutual trust was crucial: it is critically important to choose partners where there is mutual confidence in the institutions and the people in them. For example, it is now the practice for Australian expert lay members to sit with New Zealand High Court judges on Commerce Act cases.

The little policy phase – focus on selected regulatory practices

In the second phase, the focus was on regulatory practices and the application of competition policy shown in Box 3.

Box 3 Little policy phase focused on legal policy and administrative practice

2000s: Regular meeting between Commissioners of the ACCC and CC.

2006: Cooperation Protocol covering merger reviews.

2007: Cooperation Agreement: allowing the competition authorities to use their investigative powers to assist the regulator in the other country.

Late 2000s: extensive practical co-operation in merger reviews and competition investigations, e.g. case teams discussing theories of harm and investigation plans, joint consideration and information requests to leniency applicants, joint market inquiries in relation to mergers.

2013: Cooperation Agreement – enhancing the information sharing powers between regulators including coverage of compulsorily acquired information and investigative assistance (safeguards should be included to ensure that confidential information shared between regulators can remain protected from disclosure).

This involved addressing a range of technical challenges for the legal infrastructure around evidence, sharing of information, and enforcement of judgements. It required sustained technical spade work to provide remedies to a range of intensively practical operational problems. The APC report had provided a broad road map but making progress required a practical actionable agenda.

¹ A subsequent review of the Single Economic Market was jointly undertaken by the Productivity Commissions of the two countries in 2012.

The focus of cooperation was selective with an emphasis on enforcement including investigation and remedies of mergers and cartels, where there was a win-win for both authorities. There is limited cooperation in other areas (restrictive trade practices, organisational governance). Key achievements included:

- Scope for businesses to have certain approvals considered on a '*single track*' (but with separate decisions)
- Enabling the competition authorities in one country to *use their investigative powers to assist the authority* in the other country
- Deepening the cooperation between the two authorities at multiple levels *including cross-appointment of associate members*.

The initial cross-appointment process led to New Zealand subsequently appointing an Australian, Dr Jill Walker formerly of the ACCC, as a full time Commissioner of the CC from 2015. Dr Walker now represents New Zealand at the OECD Competition Committee.

Understanding the context for cooperation

The gradual deepening in cooperation between the ACCC and CC over the last 25 years did not occur in isolation. There were four conditions that supported increased trans-Tasman cooperation on competition policy:

- First, Australia and New Zealand have a *shared history, language and values*, and similar cultural, political, legal and economic institutions. To the extent there is conflict it is mainly on the sports field
- Second, there was *political commitment* to greater economic integration following the Australia-New Zealand CER Agreement signed in 1983 and the Single Economic Market Outcomes Framework agreed between the Australian and New Zealand Prime Ministers in August 2009
- Third with *close geographic and economic links* many companies operate in and/or trade between both countries. Business was concerned the practices of the respective competition authorities didn't hinder deepening economic integration. The business community, while not driving the agenda, was generally supportive of greater integration
- Fourth, *New Zealand unilaterally adopted a competition policy framework* largely modelled on the Australian CCA. The Commerce Act established the CC in New Zealand, which while it has a slightly different mix of functions it is very similar to its Australian counterpart, the ACCC.

Australasian exceptionalism?

Across the globe – cooperation between competition authorities has been increasing through multilateral networks such as the International Competition Network and the OECD Committee on Competition.² Indeed, Slaughter (2004) highlights the growing role of international government networks in a wide range of policy domains. Staff in competition authorities in advanced countries tend to have similar analytical frameworks and a shared understanding about the role and procedures of competition authorities. There is significant movement in staff between the authorities and OECD countries. Interestingly although between one-quarter and one-third of CC staff have come from other jurisdictions at any one time. There are currently no ACCC personal on staff at the CC other than some short-term secondments.

² The OECD inventory has identified around 140 MoUs and the OECD has developed recommendations for competition enforcement <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>

Where New Zealand and Australia stand out is the depth of cooperation on enforcement reflected in the cross appointment of Commissioners to consider trans-Tasman mergers and expert lay members from one country sitting with judges from the other. These formal cross appointments reinforce the more informal relationships and cooperative practices underway at multiple levels across the two authorities.

Lessons learnt

This case suggests IRC is not something that can be forced along. The increased cooperation between the two competition authorities has been a long march – the relationship has gradually deepened in selected areas where working closer was a win-win for both. IRC is a long game: it requires investment of time and effort to build up trust and networks. *The general lesson is the crucial role of building and sustaining relationships as the soft stuff is the hard stuff.*

Cooperation is costly and as the intensity of IRC increases costs while the benefits diminish. The APC report rejected both full and partial harmonisation in favour of greater cooperation. The implication for IRC generally is to firstly identify the initial sweet spot at the lowest level of cooperation and then look to deepen cooperation over time once trust has developed and additional mutual benefit can be identified. *The simple lesson learnt is start small rather than shooting for the moon.*

IRC can occur across a range of functions – policy, regulatory practices such as enforcement, as well as research and governance. The initial focus was on policy with the regime to bypass anti-dumping. However, policy harmonisation does not require adoption of identical regimes. (Indeed, the opposite is the case – there may be benefits in regulatory competition.) Another lesson for IRC from this case study *is to keep focus on where the gains are greatest and cooperate 'where it makes the job easier'.*

A political mandate helps but is not enough on its own. A central organising concept based on the drive for greater integration into a Single Economic Market *lends legitimacy to efforts by agencies to cooperate more deeply.* This help keeping up the momentum on IRC.

Conclusion – implications for IRC generally

This case study is the story of a gradual deepening of cooperation on competition policy between the ACCC and the CC in New Zealand over the last 25 years. The story has no heroes but is the culmination of hard work by a wide range of officials who worked issues through to an actionable practical agenda. It is a story of incremental change rather than step change. Making progress required working through technically complex issues involving evidence, sharing of information and enforcement of judgements. This required detailed technical spade work and intensively practical work on solving operational problems.

So, what are the lessons emerging from this case study that are relevant for IRC initiatives in other jurisdictions? It is important to bear in mind the unique factors that may limit generalisability of the lessons learnt from this case study and how broadly the lessons can be applied. Most importantly is to understand the context of the cooperation. *The first of these is the spirit of ANZAC.* New Zealand and Australia have their differences but share a common cultural and historic heritage. This enables an ease of cross-country working that is rare in other parts of the world.

Second this issue had *low political salience.* Closer integration with Australia was a policy goal that almost all political parties could subscribe to. The highly technical nature of the subject matter meant involvement of Ministers was minimal. Having a technocratic imperative with low political salience

helps make the boat go faster. Having the right people in the room and keeping the group at an expert regulator to expert regulator level meant the parties could cut through the technical issues.

These caveats aside the key lessons from this case include:

- *IRC is a long game*: it requires investment of time and effort to build up trust and networks
- *Trust is crucial*: it is critically important to choose partners where there is mutual confidence in the two sets of institutions, or at least good prospects for building it
- *Start small*: cooperation is costly, and costs markedly increase with the intensity of IRC while the marginal benefits diminish
- *Focus IRC where the mutual gains are greatest*: IRC on regulatory practices does not require full policy harmonisation
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- *Mandate*: A central organising concept lends legitimacy and keeps up the momentum on IRC.

Key references

Australian Productivity Commission. 2004. *Australian and New Zealand Competition and Consumer Protection Regimes*.

Slaughter, Mary Anne. 2004. *A New World Order: Government Networks and the Disaggregated State*. Princeton: Princeton University Press.

Walker, Jill. 2014. *Australia-New Zealand Enhanced Co-operation: ACCC-NZCC cross-appointment*. Presentation to the OECD roundtable on enhanced enforcement co-operation.