New Zealand❖

New Zealand[2] is a small nation, made up of two main islands, and some smaller islands in the South Pacific Ocean.

It is situated to the Southeast of Australia. While there is no certainty about the date the Polynesian Maori first reached New Zealand, it appears that the major migration was in the second half of the 13th century. 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. Over recent decades, the Government has sought to address longstanding Maori grievances.

PROFILE	
Population:	4.4 million (2012)
GDP (Current US$):	126.7 billion (2009)
Per Capita Income: (Current US$)	29,050 (Atlas method)*** 28,050 (at PPP.)**
Surface Area:	270.5 thousand sq. km
Life Expectancy:	81 years (2010)
Literacy (%):	99 (of ages 15 and above)
HDI Rank:	5 (2011)

Sources:
- World Development Indicators Database, World Bank, 2012
- Human Development Report Statistics, UNDP, 2011
- Statistics New Zealand

Economy
New Zealand has one of the most open economies of all the members of the OECD. 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 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 a limited form of competition legislation was put in place by the Government in the early 1900s, legislation enforcement prior to the 1980s was not strong. In 1958, the Trade Practices Act was passed, which established a Prices Commission to decide about goods to be put under price control. In 1974, the Trade Practices and Prices Commission was renamed the Commerce Commission. The following year, the Commerce Act 1975

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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.

In 1984, the new Labour Government viewed competition and consumer policies as an important tool in bringing 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 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.

When first passed, the Act prohibited the use of a dominant position in a market for an anticompetitive purpose, but this provision was amended in 2001 to prohibit a taking advantage of a substantial degree of market power for an anticompetitive purpose.

In addition, the Act covers taking advantage of market power in any trans-Tasman market – between Australia and New Zealand.

The Commissioners are appointed by the Minister from those having appropriate qualifications and experience. The Commissioners, who are led by a Chairman, must number no fewer than four, and no more than six. Associate Commissioners may also be appointed. The Commerce Act requires the Commission to act independently in performing its statutory functions and duties.

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 to combat 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. This resulted in a strong incentive through this period for the harmonisation of both countries' competition policies, and this incentive remains today.

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 May 26, 2001. Its purpose was to strengthen the core provisions of the Commerce Act and the enforcement powers and resources, of the Commerce Commission.

The 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 amendments in 2001 included the following new measures:

- amending the prohibition against use of a dominant position for an anticompetitive purpose to taking advantage of a substantial degree of market power. This amendment is intended to address previous narrow interpretation of dominance and abuses and harmonises New Zealand's legislation with the Australian equivalent.
- amending the prohibition against anticompetitive business acquisitions to prohibit acquisitions that substantially lessen competition. This amendment gave the Commerce Commission power to consider a wider range of potentially anticompetitive mergers and acquisitions. It also imported an analytical test applied in other jurisdictions.

The amendments further strengthened the penalties and other remedies for sanctioning restrictive trade practices, by:

- extending the statutory limitation period, to increase the likelihood that offences will be detected;
- making offences unprofitable for corporate bodies and their agents, by increasing the amount and range of sanctions that may be imposed;
- removing the requirement for the Commission to give undertakings as to damages when seeking an injunction, enhancing the Commission's ability to intervene in anti-competitive conduct; and
- granting the Commission powers to issue 'cease and desist' orders.

Finally, the amendments updated and strengthened the generic price control regime in the Commerce Act. The new provisions gave the Commission power 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 is New Zealand's competition enforcement and regulatory agency. Its purpose is to achieve the best possible outcomes in competitive and

regulated markets for the long-term benefit of New Zealanders. The Commission is responsible for enforcing laws relating to competition, fair trading, and consumer credit, and has regulatory responsibilities in the electricity, gas, telecommunications, dairy and airport sectors.

The Commission is an independent Crown entity, with some quasi-judicial functions established under the Commerce Act. It is primarily accountable to the Minister of Commerce for its performance but is not subject to direction from the government in carrying out its enforcement and regulatory control activities.

The Commission's aim is to find a balance between preventing anticompetitive business practices while retaining incentives for efficiency and investment, including that from overseas; determining what, in fact, constitutes the best interests of the New Zealand public.

Box 1: 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 anti-competitive behaviour). This decision was appealed, and on September 20, 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

Sector Regulation

Initially under the Commerce Act 1986, a light-handed approach was adopted towards sector regulation. It was assumed that the Act would be sufficient to deal with competition problems in all sectors. However, it was later recognised that additional provisions were needed to deal with certain major sectors in which there could be significant impediments to competition. The Commerce Act was amended to add provisions for sector-specific regulation of some sectors, and some other legislation was introduced in relation to certain sectors.

The Commerce Commission has jurisdiction in relation to competition law across all industries. However there are industry specific regulators that have the objective of promoting competition in their specific markets.

The Commission acts as an industry specific regulator with functions that are intended to either promote competition (Telecommunications) or outcomes consistent with competition (Electricity Lines, Gas Pipelines, Airports).

Other industry specific regulators include the Electricity Authority, the Gas Industry Authority, and the Financial Markets Authority.

These industry regulators have a mix of functions some of which may include promoting competition in specific markets, and/or supporting the effective operation of specific markets. They do not, however, have general competition law powers in these areas.

Part 4 of the Commerce Act

Part 4 of the Commerce Act provides for the Commerce Commission to regulate industries where there is no competition or little or no likelihood of effective competition. Businesses currently regulated under Part 4 include suppliers of electricity lines, gas pipelines and specified airport services (such as aircraft and freight activities, airfield activities and specified passenger terminal activities).

In the electricity lines and gas pipelines sectors, the focus of the regulatory regime is on providing certainty, setting price-quality paths (where required), monitoring the performance of regulated services (through information disclosure), and ensuring compliance with regulatory requirements.

The Commission monitors Auckland, Wellington and Christchurch International Airports on their delivery of aircraft and freight services, airfield activities, and specified passenger terminal services.

The Telecommunications Act 2001

The Telecommunications Act 2001 regulates the supply of certain telecommunications services in New Zealand. The regulatory regime focuses on promoting competition for the benefit of end consumers. This is administered by the Office of the Telecommunications Commissioner within the Commerce Commission. The Commission has a range of functions under the Telecommunications Act. The main functions include:

- setting access determinations;
- calculating the cost of providing service related to Telecommunications Service Obligations (TSOs);
- enforcing its determinations and Telecom New Zealand's undertakings; and
- approving industry codes.

Another function is to review competitive conditions in telecommunications markets and, in areas where competition is effective, recommend regulation be removed.

In 2006, the New Zealand Government passed a number of amendments to the Telecommunications Act 2001. The key component of the changes was the operational separation of Telecom New Zealand, to promote competition and facilitate efficient investment in telecommunications services. Telecom has since had to establish a number of business units that are required to supply certain services to both external and internal customers on the same terms and conditions.

The Telecommunications (TSO, Broadband, and other Matters) Amendment Act 2011 built on the 2006 model replacing operational separation with structural separation, and relying on enforceable undertakings as the primary regulatory instrument for the fibre network.

Electricity Industry Reform Act 1998/Electricity Industry Act 2010

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 aimed to protect consumers from the natural monopoly powers of the local electricity distribution networks, by encouraging greater efficiency through effective competition.

The Commerce Commission had both an enforcement and adjudication role under the EIR Act. It allowed the Commission to exempt parties from the application of the Act which prohibited the involvement in both an electricity lines business and an electricity supply business.

The Electricity Industry Reform Act 1998 was superseded by the Electricity Industry Act 2010 which is enforced by the Electricity Authority. This Authority now oversees the governance and operation of New Zealand's electricity market, promoting competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.

The Dairy Industry Restructuring Act 2001

The Dairy Industry Restructuring Act 2001 was enacted to facilitate the 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 sought 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 Commission was domestic competition, not the structure of large exporters, such as the dairy industry, which exports 95 percent of its output.[4]

The Commission currently has both enforcement and adjudication roles in the dairy industry, resolving disputes between Fonterra and other parties.

Consumer Protection

The Fair Trading Act 1986

The Commerce Commission is also responsible for enforcing the Fair Trading Act which 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 goods and services;
- 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's primary focus is on anyone in trade but it also applies to certain activities whether or not the parties are 'in trade' – such as employment advertising, pyramid selling, and the supply of products covered by product safety and consumer information standards regulations. There are currently six product safety standards regulations covering:

- baby walkers
- pedal bicycles
- flammability of children's night clothes
- cigarette lighters
- household cots
- toys for children aged up to three years

There are currently five consumer information standards regulations. These are for:

- Care labelling
- Clothing and footwear country of origin labelling
- Fibre content labelling
- Used motor vehicles
- Water Efficiency Labelling Scheme (WELS)

The consumer information and product safety standards are regulations made on the recommendation of the Minister of Consumer Affairs.

Box 2: 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.

The Credit Contracts and Consumer Finance Act 2003

The Credit Contracts and Consumer Finance Act regulates consumer lending, consumer leases and buy-back transactions. It was introduced in 2003 to better protect the interests of consumers and enable them to make informed choices about using credit. The Commerce Commission is responsible for enforcing the Act.

The Consumer Guarantees Act 1993

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. The Act is self-regulating.

Concluding Observations and Future Scenario

The Commerce Commission's role continues to evolve as it juggles its enforcement, adjudication, regulation and advocacy activities. The financial and resource constraints mean that the need to prioritise and focus its work remains critical.

In the competition area, market intelligence and advocacy about the law have become central to how the Commission operates, with a focus on lifting levels of compliance across all industries.

In future, the Commission anticipates a number of legislative reforms that have the potential to impact its work over the medium term. This includes increased regulatory responsibilities under the Dairy Industry Restructuring Bill and the proposed criminalisation of cartels under the Commerce Act. Amendments to strengthen both the Fair Trading and Credit Contracts and Consumer Finance Acts will also have important implications for the outcomes the Commission seeks to achieve.