

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES**

**Contribution from Australia with New Zealand**

**- Session III -**

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This contribution is submitted by Australia jointly with New Zealand under Session III of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: [oe.cd/rca](http://oe.cd/rca).

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## *Regional Competition Agreements: Benefits and Challenges*

### **-- Joint submission by Australia and New Zealand --**

#### **1. Introduction and background**

1. The Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) have forged a particularly close working relationship with each other. This has developed over many years against the background of the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or the CER Agreement), considerable convergence in the competition law regimes of the two countries and supported by a range of formal and informal arrangements.

2. While the ACCC and NZCC are both established agencies, some newer competition agencies across the Indo Pacific are beginning to take enforcement action for the first time. This includes South East Asia, where all ASEAN Member States (AMS) committed to introduce competition law and policy by 2015 in support of building an ASEAN Economic Community. Under the auspices of the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), the ACCC and the NZCC are using their combined experience and expertise to assist their AMS regional neighbours in the practical implementation of this commitment.

#### **2. Trans-Tasman Co-operation in Competition Law Enforcement**

3. Australia and New Zealand are geographically proximate, share a common language and have many close economic, cultural and political links. New Zealand's Commerce Act 1986 was substantially based on Australia's Trade Practices Act 1974 (now the Competition and Consumer Act). In 1983 the two countries had signed the CER Agreement, a comprehensive bilateral free trade agreement, and following a review of its first few years of operation, a Memorandum of Understanding (MOU) on the Harmonisation of Business Law was signed between the two countries in 1988 (which has subsequently been updated several times). The main implication of the 1988 MOU for competition law was the introduction of provisions in the respective legislation relating to "taking advantage of market power in trans-Tasman markets".

4. In 2004 the governments of Australia and New Zealand requested the Australian Productivity Commission to examine the potential for greater co-operation, coordination and integration of their respective competition and consumer protection regimes. While the review considered that full integration would be too costly, the report recommended further measures that could be taken to deepen the already high level of convergence and co-operation. These measures were largely adopted in the competition chapter of the Single Economic Market Outcomes Framework agreed between the two countries in 2009. Three specific outcomes were proposed: firms operating in each jurisdiction should face the same consequences for the same anti-competitive conduct; competition agencies in the two jurisdictions should be able to share confidential information for enforcement purposes; and that Associate Members should be cross-appointed between the ACCC and the NZCC. While there are some remaining differences between the two countries' competition laws,

they are substantially similar; the laws provide for the exchange of confidential information and the provision of investigatory assistance between the agencies; and there have been cross-appointments since 2010. Also relevant for competition law enforcement is the 2008 Agreement on trans-Tasman Court and Regulatory Proceedings, implemented in each jurisdiction through their respective Trans-Tasman Proceedings Acts.

5. These formal arrangements between the two countries have provided a favourable environment for the two competition agencies to build a very close working relationship that provides for more efficient and effective trans-Tasman enforcement of competition law. While there are formal powers and MOUs between the agencies, much of this co-operation rests on the informal arrangements which have developed from years of practical, informal co-operation and the development of mutual trust between the two agencies and their staff. Co-operation operates at multiple levels of both agencies. Commissioners of the two agencies meet regularly and the cross-appointed Commissioners take part in formal decision making in both agencies, particularly with respect to the review of mergers with a trans-Tasman element. Staff at all levels work together in relation to both merger reviews and the investigation and enforcement of anti-competitive conduct, particularly cartels. Co-operation on the ground can include discussions around case theories, sources of information and co-ordinated or occasionally joint interviews; as well as coordination in relation to leniency applicants for cartels; and coordination of remedies for mergers. There have also been joint staff training initiatives in relation to both cartels and mergers.

6. This close working relationship between the ACCC and the NZCC has provided a solid base for the two agencies to work together on a broader regional basis.

### 3. ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)

7. Under the AANZFTA closer economic ties are being forged between Australia, New Zealand and ASEAN Member States (AMS). The agreement to establish the AANZFTA came into force in 2010 and includes a Chapter on Competition. Article 1, Chapter 14 (Competition) of the Agreement acknowledges “the importance of co-operation in the promotion of competition, economic efficiency, consumer welfare and the curtailment of anti-competitive practices”. Chapter 14 also establishes a framework for co-operation to assist AMS with implementation of the competition chapter.

8. The AANZFTA agreement also includes a Chapter on Economic Co-operation, implementation of which occurs under the “AANZFTA Economic Co-operation Support Program” (AECSP). The AECSP funds economic co-operation in respect of a number of components of the AANZFTA. The component on competition identifies as a key objective support for “implementation of the AANZFTA Chapter on Competition, by helping to support the development of competition policies, laws and institutions in the Parties, and to encourage the exchange of related information”.

9. With funding under the AECSP, and oversight by the AANZFTA Competition Committee, Australia and New Zealand have provided assistance to AMS to implement national competition law, create an enforcement body and/or strengthen the capacity of the competition enforcement body. Australia and New Zealand provide this assistance through the Competition Law Implementation Program (CLIP), which is managed by the ACCC.

## 4. CLIP

10. CLIP is one of the main conduits through which ASEAN competition agencies co-operate with the ACCC and NZCC, and is coordinated under the umbrella of the AANZFTA Competition Committee which comprised the 12 AANZFTA parties. CLIP, in partnership with the ASEAN Secretariat and the AMS, provides capacity building and technical assistance to ASEAN competition law agencies through a range of activities. These include:

- Practical regulator to regulator capacity building workshops (regional, sub-regional, or bilateral) that focus on topics such as interview, investigation or evidence skills, competition economics or a focus on enforcing competition laws with respect to a specific industry;
- Providing e-learning materials, and guidance on tools, processes or frameworks to assist the AMS in enforcing their competition law or advocating for/educating the public in competition law; and
- Staff exchanges, secondments and placements to and from AMS organisations. For example, each year since 2016, staff from various AMS have been embedded in ACCC teams for a ten-week period, while simultaneously completing a unit of graduate study in competition law and economics. The NZCC and New Zealand's Ministry of Business, Innovation & Employment (MBIE) have also hosted secondees from AMS. Within the NZCC, secondees have spent between six and ten weeks embedded in investigation teams, such as mergers or restrictive trade practices investigation teams, and obtained an overview of the work of the Competition Branch.

11. Through the AANZFTA agreement and CLIP, the ASEAN, Australia and New Zealand competition agencies have developed strong connections and goodwill. CLIP has allowed for deep staff level connections and, more recently, among the leadership of each AANZFTA competition agency.

12. When CLIP commenced in 2014, 5 of 10 AMS had an existing national competition law. Now 9 of 10 have national competition law; two of 10 AMS have undergone significant law reform; and several AMS have created new enforcement agencies. Against the backdrop of the formation of the AEC, and the ASEAN Competition Action Plan (ACAP 2025), the intensive engagement lead by Australia's and New Zealand's well-established competition agencies has significantly bolstered progress in implementing competition law in ASEAN.

## 5. ASEAN Regional Co-operation Framework and proposed Agreement

13. One of the goals of CLIP is to support ASEAN putting in place regional co-operation arrangements. This reflects the ACAP 2025 goal for the establishment of an ASEAN Regional Co-operation Agreement (ARCA) on Competition – a binding agreement between ASEAN competition agencies to facilitate co-operation between them.

14. While this agreement is yet to be drafted, it is envisaged that the ARCA will be ratified by each AMS government in line with the principles of the ASEAN Economic Community – a single market and production base – and will lead to the harmonisation of investigation practices and, at some stage, may include the harmonisation of the laws. The

ARCA may be a tool to be used against cross border anti-competitive practices and allow for information sharing to enhance enforcement activities within ASEAN.

15. As a precursor to the ARCA, CLIP has provided assistance for the development of a non-binding ASEAN Regional Co-operation Framework on Competition (ARCF) – a document that provides principles in which the AMS may voluntarily co-operate before the signing of the ARCA. During the process of developing the ARCF, a number of potential obstacles and barriers were raised and considered by the AMS. These included:

- The differing experience levels of the enforcement agencies who are party to the framework;
- The level of trust between agencies, particularly in relation to confidential and commercial in confidence information; and
- The resources required to engage in co-operation.

16. Nevertheless, ultimately the AANZFTA Committee on Competition adopted an ARCF which provided for co-operation in five areas:

- i. sharing resources;
- ii. exchange of information;
- iii. technical assistance and capacity building;
- iv. enforcement cooperation; and
- v. co-operation on merger investigations.

17. The ASEAN Experts Group on Competition Annual Report (2017) noted that the Framework “will serve as the basis for further discussions to strengthened regional co-operation amongst AMS on competition law and policy.”

18. The ARCF was endorsed by the ASEAN Economic Ministers on 29 August 2018. While AMS continue to develop their competition laws, it is anticipated that the ARCF will further fuel closer relationships among agencies at varying stages of development. Supporting the development of the ARCF was a significant milestone for ASEAN, for CLIP, and for economic co-operation under the AANZFTA.