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NEW ZEALAND
BusinessROUNDTABLE
PROMOTING POLICIES FOR A BETTER NEW ZEALAND

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Trans Tasman Study
Productivity Commission
LB2 Collins Street East
Melbourne
Victoria 8003
AUSTRALIA

Australian and New Zealand Competition and Consumer Protection Regimes: Issues Paper (16 July 2004)

The New Zealand Business Roundtable welcomes this opportunity to comment on the Productivity Commission's (the Commission) Issues Paper. Our comments are in two main parts. First, we have overview comments which provide our preliminary perspectives on some of the issues. Second, we have some specific comments relating to various sections of the Issues Paper.

Our comments are brief as, overall, we think that the Issues Paper appropriately addresses the matters which are to be canvassed in this review.

Overview comments

A central focus of this study is on whether there are any impediments to trade and investment caused by differences in the competition and consumer protection regimes of Australia and New Zealand. In a narrow CER context, this is the right question to ask, and the short answer is that there are no impediments of any magnitude. Those entities that engage in trade or in acquisitions involving trans-Tasman compliance issues will need to seek advice on both sides of the Tasman. This is not unduly problematical or costly and there are no major barriers to trade and investment created by this process. (In a broader context, a better question to ask is whether the competition and consumer protection regimes of both countries are 'best of breed'.)

Will greater conformity of laws and processes result in a net benefit to both countries? In the assessment of this issue, the Treasurer and the Minister of Commerce have put "all options on the table, including having common laws and a single trans-Tasman enforcement agency".

The New Zealand legislation was, from the outset, modelled upon the Australian precedents. The differences, such as they have been, are not all that significant and have not created impediments of the kind that the Commission seeks to identify. There will always be scope for increased legislative harmony but this is not necessarily desirable. Competition between regulatory jurisdictions can be desirable (the federal-state system in Australia allows such competition in some areas) and the circumstances of different economic areas may warrant

different regimes. For example, a higher level of industry concentration is to be expected in a small country such as New Zealand. Moreover, the analysis of competition law issues often involves a complex range of considerations, and it does not necessarily follow that legislation can be fashioned to achieve conformity of decision-making on both sides of the Tasman. The decision-making process will inevitably be affected by new economic learning, and the speed at which new insights are assimilated by decision-makers. For example, in recent times, different judicial trends in Australia and New Zealand in the area of predatory pricing can, to some extent, be explained by the contrasting focus upon recoupment theories: see, for example, *Carter Holt Harvey* v *Commerce Commission* (Privy Council Appeal No 6, 14 July 2004).

The issues surrounding adjudication are essentially two-fold: either the current dual role of the respective regulatory agencies is to remain, or there will be a move to common decision-making processes.

If current arrangements remain, then the question of greater cooperation between the Australian Competition and Consumer Commission (ACCC) and the Commerce Commission (NZCC) is on the agenda. There is the potential for greater cooperation and coordination between these agencies and this can be achieved in several ways. The current cooperation arrangements can be made more expansive and, where necessary and appropriate, legislation may be contemplated to expressly sanction cooperative assistance between the agencies and the sharing of information (including confidential information). Beyond these framework issues, and perhaps most significantly, the benefits of cooperation will largely result from the relationship that may exist from time to time between the Commissioners and staff of the ACCC and NZCC. Against such benefits, the possibility of regulatory capture of the two bodies and of misguided 'groupthink' should be noted.

The issue of a common enforcement agency (which presumably includes a common court or tribunal for appeals) raises a more complex range of issues, and these are largely identified in the Issues Paper. We note that the Commission has highlighted that there are significant difficulties in quantifying the costs and benefits of further coordination, and that it does not propose to attempt quantification in the course of this study.

It may, nonetheless, be informative to undertake a case study of the proposed Qantas/Air New Zealand strategic alliance. It is difficult to imagine a better case study for current purposes. A comparison of the current processes with the processes that may have been followed by a common agency and appeal body (under a common statute which, for example, accepted that markets may be defined as Australasian) may serve to inform the extent to which cost savings and overall net benefits occur. The comparison would also need to make some adjustment for the fact that decision-makers in Australia (unlike in New Zealand) do not attempt to quantify costs and benefits when considering authorisation applications. We note that a focus on Australasian welfare rather than the economic welfare of each country as a goal would be a major step and not one that would be easy for sovereign nations to justify.

Finally, we would note that competition law and practice is problematical in that the economic basis of it is shaky, special interest influence is commonplace (producer rather than consumer interests are often dominant), and the issues are such that regulators can easily do more harm than good. In open markets, serious monopoly problems are rare. Too much weight should not be put on the potential of this exercise in the single economic market context.

Specific comments

The above general comments are relevant to a number of the specific sections of the Issues Paper. We have several additional comments on these sections.

The Commission has raised the question of whether the objectives of the Australian and New Zealand regimes differ. There is a case for further clarification of the objectives of the

competition statutes. The most recent amendment to section 1A of the Commerce Act has resulted in some confusion about the goals of the New Zealand legislation. In particular, this amendment may be seen to call into question whether efficiency (the maximisation of producer and consumer surplus) is the goal of the Act. It is also not apparent to us that section 2 of the Trade Practices Act provides sufficient legislative guidance on this issue either. Accordingly, legislative clarification of this issue would serve to give certainty on the role of efficiencies, and such clarification would assist the trans-Tasman business environment. This is the most important point we wish to make in this submission.

We think the differences in the substantive laws of both jurisdictions are not such as to be a major handicap to an integrated trans-Tasman business environment. From time to time, there may be differences in the interpretation of these laws. As noted above, the recent example of the differing approach taken by the Australian and New Zealand courts in relation to predatory pricing (as evident from the judgment of the Privy Council in *Carter Holt Harvey*) is a case in point.

There may also be problems in coordinating decision dates for merger approvals, and appropriate comments about this are noted in the Issues Paper. This is not just a legislative issue as the competition issues arising out of a merger proposal may be materially more difficult in one of the jurisdictions. A review of the proposed Qantas/Air New Zealand strategic alliance serves to inform the debate on this issue. From an Australian perspective, this proposed alliance impacts only upon trans-Tasman markets. In contrast, the potential impact on New Zealand is much greater. The inquiry extends beyond trans-Tasman markets, to include other markets such as the domestic New Zealand market and other city-pairs, such as Auckland-Los Angeles. Accordingly, there is inevitably the potential for different timetables to apply where separate decision-making processes apply. Ways to further enhance coordination should, nonetheless, be explored. It will also be relevant to inquire whether the issue of delay may be mitigated by a common decision-making body. Again, it would be informative here to predict how the Qantas/Air New Zealand authorisation application may have been handled differently by common decision-making institutions.

Further comments

We trust that these preliminary comments are of assistance, and we hope to be able to comment in more detail on the Commission's Draft Report.

Yours sincerely

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