Submission to the Productivity Commission

Australian and New Zealand competition and consumer protection regimes Issues Paper

13 August 2004

1. Introduction

AAPT Limited (**AAPT**) welcomes the opportunity to comment in response to the Productivity Commission's (**Commission**) Issues Paper on Australian and New Zealand competition and consumer protection regimes dated July 2004 (**Issues Paper**).

AAPT is Australia's third largest telecommunications carrier. The AAPT group offers local, national and international voice, mobile, data, and internet products and services to business, corporate, government and residential customers throughout Australia. The group also offers subscription pay television services to some of its customers. AAPT's offerings are supplied using the company's voice and data networks and also through other telecommunications and communications providers' networks which are made available to AAPT through interconnection and reseller arrangements.

AAPT is a wholly-owned subsidiary of Telecom Corporation of New Zealand Limited.

2. Summary of AAPT's recommendations to the Commission

AAPT appreciates that the Commission's terms of reference are broad, encompassing an assessment of Australian and New Zealand competition and consumer protection law and policy and their administration and enforcement, and identification of the net benefits of greater cooperation, coordination and integration of these regimes for the purpose of enhancing a trans-Tasman business environment. AAPT, however, does not seek to comment on all issues that are likely to arise for the Commission's consideration. Rather, this submission focuses on the following key issues that the Commission ought to give careful consideration.

AAPT considers that:

- alignment of the overarching objects clauses in both countries' competition laws would reduce the scope for divergence in the interpretation and administration of such regimes in the future;
- harmonisation of Australia and New Zealand's competition laws should occur to eliminate the current unnecessary differences in approach. However, this should not compromise the ability of a domestic regulator to apply its laws in a manner consistent with local market factors;
- harmonisation between Australia and New Zealand's industry-specific competition laws is not warranted;
- the informal merger process that has developed in Australia should be adopted in New Zealand;
- a joint administrative body should be created to determine matters that have trans-Tasman implications; and
- harmonisation of Australia and New Zealand's consumer protection regimes would first require harmonisation to Australia's Federal, State and Territory consumer

protection regimes.

AAPT would be pleased to answer questions that the Commission has in relation to this submission or regarding AAPT's experience more generally with Australia's competition and consumer protection regimes.

3. Policy objectives

AAPT considers that although the broad policy objectives underpinning Australia and New Zealand's competition regimes are substantially similar, further alignment of the overarching objects clauses in both countries' competition laws will reduce the scope for divergence in the interpretation and administration of such regimes in the future.

The objects clauses underpinning Australia and New Zealand's competition laws currently differ slightly. Section 2 of Australia's *Trade Practices Act* 1974 (**TPA**) provides that the enhancement of the welfare of Australians through the promotion of competition is the object of Australia's competition laws. Whereas section 1A of New Zealand's *Commerce Act* 1986 (**Commerce Act**) focuses on the long-term benefit of consumers within New Zealand as being the purpose of New Zealand's competition laws. Such differences in approach may mean that over time differing principles guide administrators and adjudicators in their tasks under each competition law regime.

Alignment of the two countries' legislative objects clauses will help facilitate an integrated trans-Tasman business environment by providing greater certainty as to the application of the relevant legal and economic assumptions underpinning the application of such laws for businesses operating in both jurisdictions.

4. Substantive laws and their application and interpretation

AAPT notes that while there is broad alignment between the competition laws of Australia and New Zealand, there are significant differences in the detail of such laws. Some of the differences between the two countries' competition laws include that:

- the TPA contains specific third line forcing prohibitions (see sections 47(6) and (7)) whereas the Commerce Act deals with third line forcing behaviour under a general competition prohibition (see section 27). AAPT notes that although the Australian third line forcing provisions which are currently per se offences will be subject to a competition test if the *Trade Practices Legislation Amendment Bill* 2004 (**Dawson Bill**) becomes law, they will still remain as separate prohibitions;

- the Commerce Act contains a 'competition defence' to exclusionary provisions that shifts the burden to the defendant of proving that conduct does not breach the competition test (see section 29). The TPA does not contain such a defence; and

- the Commerce Act grants the Commerce Commission with broad cease and desist powers which have been considered unnecessary in Australia owing to the power of the Australian Competition and Consumer Commission (**ACCC**) to obtain

interlocutory orders (see the Government Senators' Report in response to the Senate Economic References Committee on 'The Effectiveness of the Trade Practices Act 1974 in protecting small business').

AAPT notes that the above sorts of differences can lead to compliance inefficiencies for trans-Tasman businesses as practices and business models deployed in both Australia and New Zealand must be vetted to ensure that they comply with two distinct regimes. Harmonisation of competition laws provides an opportunity to eliminate some of the unnecessary differences between the Australian and New Zealand regimes and reduce compliance costs. Careful consideration will need to be given to the most appropriate formulation of the competition laws for adoption by both countries.

AAPT considers that harmonised domestic competition laws should not compromise the ability of a domestic regulator to apply its laws in a manner that is consistent with local market factors.

AAPT recognises that the issue of whether there should be increased harmonisation between industry-specific competition laws, such as between the telecommunications-specific competition laws in Parts XIB and XIC of the TPA and in the *Telecommunications Act* 2001 (NZ), is beyond the scope of the Commission's study. AAPT, however, wishes to note that it does not support such harmonisation. AAPT considers that industry-specific regulation should be allowed to develop on a country-by-country basis in response to the local needs of a particular industry.

5. Institutional arrangements

AAPT's major concern in respect of non-harmonised institutional arrangements is the significant differences in the procedures in Australia and New Zealand for obtaining clearance for a proposed merger or acquisition. The differences in the approaches taken by the ACCC and the New Zealand Commerce Commission (**Commerce Commission**) can result in increased costs and delays for businesses involved in a merger or acquisition that has implications for markets on both sides of the Tasman.

AAPT suggests that the informal merger approval process that has developed in Australia, be adopted in New Zealand. This would mean that both countries would have an informal clearance procedure as well as their current formal clearance procedures.

AAPT also suggests that the ACCC (and if the Dawson Bill is passed the Australian Competition Tribunal which will play a role in formal merger approval) and Commerce Commission be required to adhere to a joint timetable when a merger requires the approval of bodies in Australia and New Zealand, either on an informal or formal basis. AAPT considers that such an approach strikes an appropriate balance of having local adjudicators reach conclusions on the competitive impact of a proposed merger on their domestic markets, while ensuring coordination between adjudicators on the timing of their decisions.

6. Policy options

AAPT supports the broad policy option 2 in the Commission's Issues Paper for the

harmonisation of Australia and New Zealand's competition laws. Importantly, AAPT considers that local regulators should continue to determine competition issues that are confined to domestic markets. Persons with knowledge of local market factors and familiarity with local policies should determine domestic issues. The imposition of a single regulator, unfamiliar with local businesses and markets could result in regulatory error and thereby increase costs for businesses that operate on both sides of the Tasman.

AAPT supports the creation of a joint administrative body, comprising of members of both domestic regulators, to determine matters that have trans-Tasman implications. The composition of the body could, when required, comprise additional industry experts from either or both sides of the Tasman, where a particular issue required local knowledge. The joint body could also initially convene to determine whether an issue required its involvement.

AAPT notes that there are many issues that would need close consideration in relation to the operation of such a joint body, including the functions, powers and procedures of the body and rights of appeal.

7. Implications within Australia of changes to State and Territory consumer protection regimes

AAPT does not see any specific costs generated from different consumer protection laws operating in Australia and New Zealand.

AAPT notes, however, that while the consumer protection provisions in the TPA and *Australian Securities and Investments Commission Act* 2001 (**ASIC Act**) and *Corporations Act* 2001 (**Corporations Act**) apply to 'corporations', the provisions in Australia's State and Territory fair trading legislation apply to 'persons'. As at law a person includes a corporation, a corporation is bound by both the TPA (or the ASIC Act and Corporations Act) and the State and Territory fair trading legislation. The TPA, ASIC Act, Corporations Act and State and Territory fair trading legislation will therefore bind corporations that carry on business on a national basis throughout Australia.

While AAPT does not advocate trans-Tasman harmonisation of consumer protection laws, AAPT wishes to highlight that if such harmonisation were to take place harmonisation between Australia's current State and Territory fair trading legislation as well as consumer protection provisions in the TPA, ASIC Act and Corporations Act would first be required. AAPT notes that while the State and Territory fair trading legislation is broadly similar to that contained in the TPA, ASIC Act and Corporations Act, there remains significant differences and scope for future variation between the various pieces of legislation. The most significant example of divergence in the relevant laws has been the introduction of Part 2B into the *Fair Trading Act* 1999 (Vic) relating to unfair terms in consumer contracts. Therefore, if there were a proposal for trans-Tasman harmonisation of consumer protection provisions it would be desirable that it first involve harmonisation of those laws within Australia.