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13 August 2004

Dr John Salerian
Assistant Commissioner
TransTasman Study
Productivity Commission
Locked Bag
2 Collins Street East
MELBOURNE VIC 8003

Attention: Carole Gardner, TransTasman study: email – transtasman@pc.gov.au

Dear Dr Salerian,

Re: Written submission by the Australian Competition and Consume Commission

Attached is the submission by the Australian Competition and Consumer Commission t Productivity Commission's study of the Australian and New Zealand competition and consumer protection regimes.

The contact officer in this matter is Vanessa Holliday of our Policy and Liaison Branch. contact details are on the attached cover sheet. In her absence, the contact officer is Bre Bailey whose details are above.

Yours sincerely

Vanessa Holliday

Brian Cassidy
Chief Executive Officer

SUBMISSION TO THE PRODUCTIVITY COMMISSION STUDY: AUSTRALIAN AND NEW ZEALAND COMPETITION AND CONSUMER PROTECTION REGIMES

August 2004

Introduction

The Productivity Commission has been asked to undertake a study examining the potential for greater cooperation, coordination and integration in relation to general competition and consumer protection regimes in Australia and New Zealand.

In July 2004, the Productivity Commission released an Issues Paper, *Australian and New Zealand competition and consumer protection regimes*, inviting comments on to the extent to which the current operation, administration and enforcement of competition and consumer laws affects the trans-Tasman business environment, and to identify options for greater cooperation, coordination and integration of the regulatory environment.

This submission outlines the Australian Competition and Consumer Commission's (the ACCC's) views in relation to the issues raised by the Productivity Commission Issues Paper. In particular, to assist the Productivity Commission in its consideration of this matter, this submission provides information regarding the ACCC's experience in dealing with trans-Tasman issues in administering the *Trade Practices Act 1974* (Cth) (the TPA)), and potential areas for improvement in administering consumer protection and competition laws in the trans-Tasman environment.

In this regard, the ACCC notes the Productivity Commission has stated that this study is not intended to be a benchmarking or, or a general review of, competition and consumer protection laws of New Zealand and Australia, or to duplicate previous reviews of the Australian and New Zealand legislation. Accordingly, for the purposes of this submission, the ACCC does not intend to comment on this issue.

Background

Role of the ACCC

The ACCC is a statutory authority responsible for administering the TPA. The TPA is the primary legislation regulating competitive conduct and consumer protection in Australia. The main functions of the ACCC are to ensure compliance with the law by: investigating complaints and taking appropriate action (either administratively or through the courts), adjudicating on matters brought before it pursuant to the authorisation and notification provisions contained in Part VII of the Act, and providing information to consumers and businesses about the operation of the TPA.

The ACCC investigates matters using a combination of information obtained voluntarily, or obtained through formal investigation powers pursuant to section 155 of the TPA. Its activities are subject to scrutiny by the courts, tribunals, the Parliament and the Commonwealth Ombudsman.

The ACCC has primary responsibility for administering both consumer protection and competition laws under the TPA. The enforcement of consumer protection laws is closely associated with, and complementary to competition laws. It is fundamental to the efficient operation of markets that consumers are informed about prices and characteristics of products and services in order to make their choices. Accordingly, the ACCC takes the view that it is appropriate that it has responsibilities in relation to

both consumer protection and competition issues. The dual role also has practical advantages as it enhances economies of scale in operations, which is particularly important in a small economy such as Australia.

Importance of operation, administration and enforcement of Australian and New Zealand competition and consumer protection laws in fostering an integrated trans-Tasman business environment

The ACCC recognises the importance of cooperation, coordination and integration in trans-Tasman issues to ensure the protection of consumers and competition in both Australia and New Zealand, and encourage trans-Tasman trade and investment.

It is important to ensure that in an increasingly globalised business environment laws are sufficiently robust to protect consumers and competitive processes in matters involving cross-border activities. It is equally important to minimise duplication of investigations, and encourage consistency in approach between jurisdictions in order to encourage the development of cross border trade and investment.

Accordingly, as a general principle, the ACCC supports measures designed to enhance cooperation and coordination between jurisdictions, particular between jurisdictions in close proximity such as Australia and New Zealand.

However, the ACCC also recognises that where markets and the impact of particular conduct differs between jurisdictions, national or regional interests need to be considered in applying competition and consumer protection laws.

Existing levels of cooperation, coordination and integration

Australia and New Zealand have five main methods for sharing information on competition and consumer protection issues. These are:

Cooperative agreements (MOUs) between the ACCC and the Commerce Commission

The ACCC has entered into 4 cooperation agreements which also involve the Commerce Commission. Pursuant to the *Trade Practices Commission/New Zealand Commerce Commission Co-operation and Coordination Agreement 1994*, the agencies have agreed to share information where possible to facilitate effective application for their respective competition and consumer laws and avoid unnecessary duplication of investigations. This includes agreement to request information or assistance from each other (subject to compliance with their respective domestic laws) and notify each other of investigations that may affect important interests of the other agency, particularly when making enquiries of persons located in the other's country. The agreement also provides for a staff exchange program. Both the ACCC and the Commerce Commission are parties to 3 other multi-lateral cooperation arrangements also involving Canada, the UK Secretary of State for Trade and Industry, the UK Office of Fair Trading and Taiwan[1].

[1] *Cooperation Arrangement between the Australian Competition and Consumer Commission, the Commerce Commission in New Zealand and Her Majesty's Secretary of State for Trade and Industry and the Office of Fair Trading in the United Kingdom regarding the application of their competition and consumer laws*, October 2003; *Cooperation Arrangement between the Commissioner of*

Australia is mindful of the need to protect confidential information. These obligations arise under statute and under common law principles. Within the limitations that apply to confidential information, it is possible for the regulators to assist each other by providing generalised indications of matters of mutual interest pursuant to these MOUs.

For the year ended June 2004 there were 43 exchanges between Australian and New Zealand under cooperative agreements. These comprised:

	Australia	*New Zealand*
Requests	21	16
Notifications	4	2

About half of the contacts made could be classified as basic 'information requests' that are encountered in any routine inter-agency dealings. This does not lessen their importance but it reveals the flexibility of the arrangements that exist between the Australian and New Zealand regulators.

Ad hoc but fairly regular meetings between the ACCC and the Commerce Commission

Apart from Commission to Commission informal briefings, there has developed relatively close relations between the officers of each regulator in terms of informal contacts and sharing of information. For example, the ACCC Infocentre ('call centre') and the Commerce Commission Contact Centre swap statistical reports on contacts (emails and telephone calls) received from consumers and others. The ongoing staff exchange program also facilitates contact between the Agencies.

Misuse of trans-Tasman market power including statutory powers for the regulators to receive information and documents on behalf of each other relating to trans-Tasman markets (e.g. section 155B of the Trade Practices Act 1974 and section 99A of the NZ Commerce Act 1986.)

Introduced in 1990, section 46A of the *Trade Practices Act 1974* provides a misuse of market power provision to a corporation with substantial market power in a trans-Tasman market. New Zealand has an equivalent statutory provision.

The section applies to a trans-Tasman market, which is broadly defined as a market in Australia, New Zealand or Australia and New Zealand for goods or services. However, while the trans-Tasman market definition is broad, section 46A only applies when the market affected by the conduct is a market in Australia that is not a market exclusively for services. This trans-Tasman remedy is assisted by statutory powers

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Competition (Canada), the Australian Competition and Consumer Commission and the New Zealand Commerce Commission regarding the application of their competition and consumer laws, October 2000; *Cooperation Arrangement between the Australian Competition and Consumer Commission, the New Zealand Commerce Commission, and the Taiwan Fair Trade Commission regarding the application of competition and fair trading laws*, July 2002.

for the regulators to receive information and documents on behalf of each other relating to trans-Tasman markets (e.g. section 155B of the *Trade Practices Act 1974* and section 99A of the NZ *Commerce Act 1986*).

A private action was taken in *Re: Berlaz Pty Ltd; Bruce Richard Trevena and Margaret Rose Fry and: Fine Leather Care Products Limited* (1991)[2] in the Federal Court of Australia and the case involved allegations under section 46 and 46A of the *Trade Practices Act 1974*. The complaint was that the New Zealand firm, Fine Leather Care Products, had misused its market power in denying further supply of its products to the Australian business, Berlaz Pty Ltd. The New Zealand firm had terminated the distributorship on 26 February 1991. The hearing involved an application for an interlocutory injunction requiring continuation of supply. The application was rejected by the court. This is the only case under s 46A the ACCC is aware of.

Statutory mutual assistance to the courts of each country (and other countries) under reciprocal laws such as Mutual Assistance in Criminal Matters Act (for both countries) and the Mutual Assistance in Business Regulation Act 1992 for Australia

The statutory mutual schemes to provide assistance to the courts of each country (and other countries) under reciprocal laws such as *Mutual Assistance in Criminal Matters Act* (for both countries) (MACMA) and the *Mutual Assistance in Business Regulation Act 1992* (MABRA) for Australia are administered by the Attorney-General and the Attorney-General's Department. The Attorney-General's *Annual Report 2002-03* states that one request was received from New Zealand in that year for mutual assistance in business regulation.[3]

The Ministerial Council on Consumer Affairs (MCCA) and the Standing Committee of Officials of Consumer Affairs (SCOCA)

New Zealand is a member of MCCA and SCOCA. This provides a forum for participating with the Australian States and Commonwealth on developing consumer protection policy, and therefore encouraging a coordinated approach on these issues, discussing consumer-specific regulation (eg product safety, care labelling) occurring in different jurisdictions and resolution of regulatory changes that could affect New Zealand (eg product safety, trade measurement). It also provides a further opportunity for exchange of information in relation to rogue traders and coordinating enforcement/compliance activities on trans-Tasman conduct.

Examples of cross-Tasman coordination by MCCA/SCOCA to protect consumers include participation of New Zealand in the Auzshare Complaints and Alerts database relating to e-commerce and product safety matters.

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[2] *Re: Berlaz Pty Ltd; Bruce Richard Trevena and Margaret Rose Fry and: Fine Leather Care Products Limited* (1991) 13 ATPR 41-118.

[3] *Annual Report 2002-03*, Attorney-General's Department, Canberra, Appendix 11.

Trans-Tasman issues arising in the administration and enforcement of the Trade Practices Act

Overview of areas where trans-Tasman issues can arise

In the ACCC's experience, trans-Tasman issues generally arise in three main instances.

First, where a business is operating in both Australia and New Zealand and its conduct raises issues under the TPA. For example, if two businesses operating in both Australia and New Zealand decide to merge, or undertake a misleading advertising campaign in both jurisdictions. In those cases, the conduct in question may be subject to scrutiny in both Australia and New Zealand.

In some cases, this can raise issues as to whether a business is subject to different standards of conduct, duplication of procedures, and potentially different compliance solutions in each jurisdiction. Nevertheless, it is important to note that the issues to be determined in each jurisdiction may be different – for example, in a merger matter, if the market in question is not a fully integrated trans-Tasman market, the impact of the conduct may differ between jurisdictions, and may need to be assessed separately.

The second situation involves matters where a business operates in one jurisdiction, but its conduct impacts on the other jurisdiction. For example, an internet scam operated from New Zealand that targets Australian consumers, but not New Zealand consumers. In those cases, the conduct in question may only attract investigation in Australia, as no breach has occurred against New Zealand consumers. The potential issue that arises in relation to this type of matter is not so much concerned with whether the Australian and New Zealand laws are different, but rather, whether the domestic agency where the impact is felt is frustrated from investigating and enforcing a judgement against a person who is located in the other jurisdiction.

The third main situation arises where the parties are located in one jurisdiction, but it is necessary to make inquiries with related entities or third parties in New Zealand. For example, a merger matter where customers or competitors of the parties to a transaction which is examined by the ACCC are located in New Zealand, or the Head Office which will be replying on behalf of an Australian subsidiary is located in New Zealand. In those cases, the ACCC may need to contact and obtain information and evidence from New Zealand businesses or consumers.

Extent to which trans-Tasman Issues affect ACCC investigations

The ACCC does not collect specific statistics regarding the number of complaints, inquiries or investigations that involve a trans-Tasman element.

However, the ACCC has identified that for the year 2003/4 approximately 64 complaints and inquiries were recorded in its complaints database which revealed a trans-Tasman element. This is an extremely small figure in comparison to the total number of complaints and inquiries recorded during that period (63, 695).

About 48% of those matters related to complaints from New Zealand consumers or businesses in relation to consumer protection issues. A significant number related to general inquiries regarding the operation of Australian consumer and competition laws, and a small number of queries came from New Zealand traders seeking further information about Australian laws – particularly in relation to labelling of goods and country of origin claims.

In terms of matters that have moved beyond the stage of complaint to an investigation stage, the ACCC has identified that only a very small number of significant investigations involving a trans-Tasman element. The ACCC has identified approximately 21 matters under investigation or completed during the period 1 July 2003 – 30 June 2004 containing a significant trans-Tasman association, comprising 5 competition or cartel matters, 10 consumer protection matters and 5 mergers and 1 authorisation matter. A confidential attachment (Attachment A) outlines these matters and the nature of the trans-Tasman element.

While this information provides a useful indication of the level of overlap between competition and consumer protection enforcement activities in Australia and New Zealand, it does not necessary provide a full picture of the level of activity. This is because the ACCC is not always aware when it investigates certain businesses to what extent their activities in New Zealand may be affected by an ACCC investigation, as the emphasis of the investigation will be on Australian markets and consumers, unless of course it is apparent from the nature of the conduct, or complaints from parties, or there has been some contact with the Commerce Commission. Furthermore, the ACCC is not able to judge the degree to which potential overlap has created a disincentive for businesses to integrate Australian and New Zealand activities.

Part V and VA (Consumer Protection and Product Safety) Matters

Overview of TPA

Part V of the TPA contains a general prohibition (section 52) against misleading or deceptive conduct in trade and commerce. Other provisions include false or misleading representations (section 53), bait advertising (section 56), pyramid schemes (section 61), sending unsolicited goods or services (section 64) and prohibitions against supply of goods that do not conform with product safety standards (ss 65B-65T). Part VC of the TPA consists of criminal provisions which largely mirror the civil provisions in Part V.

Remedies available for breaches of Part V are damages, injunctions, publication orders and other remedial orders. The ACCC may also settle a matter through administrative settlement, or court enforceable undertakings pursuant to s 87B of the TPA. Private actions may be taken under Part V by businesses and, in some cases by consumers, as well as the ACCC. Criminal penalties may by applied for breaches of Part VC.

The TPA also contains a number of statutory conditions and warranties in consumer transactions, and liability of manufacturers and importers for defective goods.

Part V does not apply to financial services[4] or to 'services' which involve work under a contract of service (i.e. employer/employee relationships[5]). Separate Fair Trading Acts also apply in the States and Territories of Australia.

Comparison with New Zealand Law

New Zealand has a national *Fair Trading Act 1986* which is very similar in content and approach to the Australian laws on consumer protection. Some differences do exist, for example the New Zealand legislation does not have specific defences for certain country of origin labelling as is the case under the TPA[6].

In the area of investigations and remedies, the Commerce Commission has greater powers for search and seizure (the Australian law is scheduled to be amended by the Trade Practices Legislation Amendment Bill 2004 now before the Parliament). The New Zealand courts may award damages[7] to consumers that have been adversely affected but who are not parties to the litigation, whereas the ACCC's ability to obtain compensatory orders for persons affected by conduct is limited to those persons named in proceedings. The level of criminal penalties applicable for breaches of the Fair Trading Act are significantly lower than criminal penalties applicable under Part VC of the TPA.

In the area of product safety, while enforcement regimes are similar, some differences exist between safety standards. In Australia, some standards are mandatory whereas the New Zealand equivalent is voluntary. However, the Trans-Tasman Mutual Recognition Agreement (TTMR) provides that where a product was produced in or imported into one jurisdiction and meets the mandatory requirements of that jurisdiction, this will be a defence against failure to meet the standard mandated in the other jurisdiction, subject to certain exemptions, for example, child car seat standards. To date, the ACCC is not aware of any cases where this defence has been used.

Matters involving a trans-Tasman element

Consumer protection issues with a trans-Tasman element can occur where businesses operate in both jurisdictions, particularly in areas of activity where common standards apply. For example, moves towards harmonisation of product safety and food labelling standards and the development of e-commerce trading is likely to result in a higher level of cross-border activity between Australia and New Zealand.

To date, the ACCC has found that the number of trans-Tasman matters referred to it are still relatively small when compared to the overall number of complaints received

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[4] Financial services are regulated by the Australian Securities and Investments Commission (ASIC) but the CEO of the ACCC has a specific delegation to act on breaches of the equivalent provisions in the ASIC legislation.

[5] But note section 53B concerning misleading conduct in relation to the nature or terms and conditions of employment (e.g. a person may be mislead as to whether the employment is on a salary or commission basis).

[6] Note that this area is not part of the Terms of Reference for this study.

[7] Subsection 43 (1) of the NZ *Fair Trading Act 1986* expressly states: Where, in any proceedings under this Part of this Act, or on the application of any **person**, the **Court** finds that a person, ***whether or not that person is a party to the proceedings***, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute— (*emphasis added*).

by the ACCC. For example, in the area of e-commerce, for the period January 2002 to June 2004 the ACCC has identified only 62 trans-Tasman e-commerce related complaints and 5 inquiries. A small number of court actions in matters with an e-commerce component and involving New Zealand consumers have been taken in recent years in relation to pyramid schemes and betting software. These included Greenstar, World Netsafe, Giraffe World, and Offtrack/Acepark. For example, in the Offtrack/Acepark matter, the ACCC obtained injunctions and an order requiring the publication of corrective advertisements in Australian and New Zealand newspapers[8]. In this case, while no joint action was taken with a New Zealand regulator the Commerce Commission was actively involved in providing information to the ACCC.

Part IVA (Unconscionable Conduct) Matters and Mandatory Codes

Overview of TPA

Part IVA of the TPA deals with unconscionable conduct. These provisions operate in conjunction with common law principles of unconscionability developed by the Courts. An important element of Part IVA is that it extends the concept of unconscionability to dealings between larger and smaller businesses (section 51AC) where the transaction in question falls within specified thresholds. The unconscionable conduct provisions include a statutory test which sets out a range of matters for the courts to consider in determining whether a business has acted unconscionably towards its consumers, or a business has acted unconscionably towards another business[9].

Mirror provisions dealing with financial services are found in the *Australian Securities and Investments Commission Act 2001* which is administered by the financial sector regulator, the Australian Securities and Investments Commission.

So far, five Australian States and Territories have 'drawn-down' similar legislative principles to those contained in section 51AC to use in their State-based laws, especially those dealing with retail tenancy.

Australia also has a mandatory Franchising Code of Conduct prescribed under Part IVB of the TPA. The Code applies generically to all franchising in Australia. Key elements of the Code include mandatory disclosure of information, a cooling-off period, termination procedures and mandatory dispute resolution requirements. A breach of a mandatory code is a breach of the TPA.

[8] See ACCC, *'ACCC trifecta against Gold Coast punting software promoters'* Media Release MR 215/02, September 2002.

[9] Minor modifications to section 51AC have been proposed by the Government in its response to the Senate Economics Reference Committee Report. The Government's response accepts that the $3 million threshold can be raised to $10 million but it does not accept the need to remove the threshold all together. The Government accepts that the courts may need to have regard to contracts that allow for unilateral variation but that the presence of such clauses in a contract does not always indicate unconscionable conduct.

Comparison with New Zealand Law

The ACCC understands that there is no specific equivalent to Part IVA or mandatory franchising Code in New Zealand. However, actions for unconscionable conduct under common law (including restatement in certain statutes) can be taken in the courts. A voluntary franchising Code operates in New Zealand rather than a mandatory Code.

Matters involving a trans-Tasman element

The ACCC is not aware of a significant number of investigations relating to unconscionable conduct that contain a trans-Tasman element.

The *Franchising Australia 2002 Survey*[10] revealed that 29 percent of Australian franchises that operate overseas have operations in New Zealand. The survey identified 264 franchise outlets in New Zealand. In the year ended June 2004, there have been five allegations of dubious franchise offerings by what are allegedly Australian-based promoters operating in New Zealand and which have been brought to the attention of the ACCC. These matters are being investigated predominantly under the general misleading and deceptive conduct provisions of the TPA rather than as breaches of the Franchising Code.

Part IV (Anti-Competitive Conduct) Matters

Overview of TPA

Part IV of the TPA contains the main prohibitions against anti-competitive conduct in Australia. In particular, Part IV prohibits: agreements that have the purpose, effect or likely effect of substantially lessening competition in a market, exclusionary provisions, price fixing and primary or secondary boycotts (s 45, 45A, 45D, 45DA, 45DB and 4D), misuse of substantial market power for a prescribed purpose (s 46), exclusive dealing arrangements which have the purpose, effect or likely effect of substantially lessens competition in a market (s 47), and resale price maintenance (ss 48, 96-100). Mergers that have the purpose, effect or likely effect of substantially lessening competition in a market are also prohibited under s 50 of Part IV. Merger issues are dealt with under a separate heading within this submission.

The ACCC may take enforcement action, seek statutory undertakings pursuant to section 87B, or settle a matter administratively. Private parties may also take action in response to an alleged breach of Part IV (limits apply to the ability of private parties to take action in relation to merger matters). Various penalties and remedies are available in the Federal Court of Australia for breaches of Part IV. These include monetary penalties[11], injunctions, damages, ancillary orders in favour of persons who have suffered loss or damage, probation orders, community service orders and

[10] Lorelle Frazer and Scott Weaven, *Franchising Australia 2002 Survey*, Griffith University, Queensland, 2002: p. 51.

[11] Monetary penalties of up to $10 M for companies (with the exception of secondary boycotts, for which penalties of up to $750,000 apply) and up to $500,000 for individuals (with the exception of secondary boycotts, for which no penalties apply).

corrective advertising and adverse publicity orders. The ACCC has the power to take representative actions for most breaches of Part IV.

The *Trade Practices Legislation Amendment Bill 2004* (Dawson Bill) which is currently before Parliament provides for a number of significant changes to the anti-competitive conduct provisions of the TPA. Key proposed amendments include the introduction of a defence against *per se* offences of price fixing and exclusionary provisions in relation a provision that is for the purposes of a joint venture. Where a provision is for the purposes of a joint venture, a substantial lessening of competition test will apply. Other major amendments proposed are to replace the per se offence of third line forcing with a substantial lessening of competition test for such conduct and to amend the maximum monetary penalties for breaches of Part IV (with the exception of secondary boycotts) to the greatest of $10 M, 3 times the value of the benefit attributable to the breach, or 10% of the annual turnover of the offender.

Other proposals for amendment of the Australia competition laws under consideration include the criminalisation of certain types of cartel conduct and some clarificatory amendments to s 46 of the TPA to ensure that leveraging issues can be examined under misuse of market power provisions, that in determining predatory pricing matters courts may consider below cost pricing and whether a corporation has a reasonable prospect/expectation of recoupment, and that market power assessments takes account of acting in concert.

Comparison with New Zealand Law

Generally, the anti-competitive provisions of the TPA are very similar to those contained in the *Commerce Act 1986* (NZ). Notably, both Australia and New Zealand have adopted a substantial degree of market power test in relation to misuse of market power.

There are some differences between the legislative approaches taken. In particular, the New Zealand legislation provides for a substantial lessening of competition defence in relation to exclusionary provisions and does not have express secondary boycott provisions. The TPA prohibits secondary boycotts, that is, action by one person in concert with a second person which hinders or prevents a third person from supplying or acquiring goods or services to or from a business, or engaging in trade or commerce involving the movement of goods between Australia and places outside Australia. Where the first and second persons are members of the same organisation of employees, the organisation itself is taken to have engaged in secondary boycott conduct. The TPA also prohibits a person making an agreement with a union for the purpose of preventing or hindering trade between that person and a target person. Consumer boycotts are not caught by the secondary boycott provisions.

Enforcement mechanisms for anti-competitive conduct are also very similar between the two jurisdictions. Both legislative frameworks empower judicial bodies to arbitrate on breaches of the law, rather than administrative bodies. In both jurisdictions, remedies include civil pecuniary penalties, injunctions, and actions for damages. With the introduction of the Dawson Bill, there be an increased level of harmonisation in the range of penalties available, and both courts would be able make orders to exclude certain persons from management of a body corporate. The New

Zealand legislation provides the Commerce Commission with an additional power to make cease and desist orders, but does not provide the Commerce Commission with the power to take court-enforceable undertakings as the ACCC is able to pursuant to s 87B of the TPA.

Matters involving a trans-Tasman element

In the ACCC's experience, it only deals with a small number of trans-Tasman Part IV matters, however, this may constitute a growing element in the ACCC's work, particularly in the area of cartel investigations. This will depend largely on the structure of the cartel, and the facts in each case.

In several recent cartel investigations the ACCC has found that the strategy in global cartels is to "regionalise" cartel activities into various geographic regions, in which Australia and New Zealand are grouped together in what may be loosely called the "oceanic" region. Nevertheless, although both Australia and New Zealand may feel the impact of a global cartel, the cartel may have been put into effect via separate Australian and New Zealand subsidies or in fact from overseas players, and therefore, does not really contain a trans-Tasman aspect, although the ACCC may seek to cooperate with the Commerce Commission as it would other Competition Agencies involved in examining a global cartel operation. An example of this is the Vitamin A and E matter, a global cartel action involving price fixing and market sharing which led to proceedings in a number of jurisdictions worldwide where both Australia and New Zealand investigated the matter. As each agency was investigating the activities of subsidiaries located in their respective jurisdictions, there was minimal overlap between their investigations.

The ACCC has discovered evidence of few cartel matters that are solely trans-Tasman in nature to date. One such case arose in the course of a merger investigation, where it was found that one of the parties had entered into a non-compete clause with another competitor that provided that one competitor would not enter the Australian market as long as the other did not enter the New Zealand market[12]. Another example of this is the proceedings brought against ABB Transmission and Distribution Limited, Wilson Transformer Company, Schneider Electric (Australia), AW Tyree Transformers, and Alstom Australia. In that matter, parties were alleged to have entered into an agreement to share demand for power transformers in Australia and New Zealand amongst themselves. In cases such as this, it is possible that the ACCC may be investigating what can effectively be described as "trans-Tasman" cartel behaviour.

In respect to other forms of anti-competitive conduct, trans-Tasman issues have arisen, but again this appears rare.

[12] See ACCC News Release, "*No intervention in cables acquisition*", MR 032/99, March 1999.

Mergers and Merger Authorisations

Overview of TPA

Section 50 of the TPA prohibits acquisitions of assets that have the effect, or likely effect of substantially lessening competition in a market in Australia. The TPA also enables the ACCC to deal with some acquisitions which occur off shore. If a merger occurs off shore, but the acquirer is a corporation incorporated in, or carrying on a business within Australia, an Australian citizen or a person ordinarily resident in Australia or an individual carrying on a business in Australia, section 50 may apply. Section 50A of the TPA extends the jurisdiction of the TPA to foreign acquisitions in which the acquirer may not be considered to be carrying on a business in Australia in certain circumstances.

Where a breach section 50 has occurred, the ACCC may take court action to seek injunctions, divestiture and/or civil pecuniary penalties. The ACCC may accept s 87B undertakings or an informal undertaking to resolve matters where the proposed transaction is, in the ACCC's view likely to contravene section 50. Private parties may take court action for a breach of s 50, but cannot seek an injunction to prevent the merger from occurring.

Currently, the ACCC assesses proposed mergers on an informal basis, whereby parties may approach the ACCC on a voluntary, informal basis to obtain a view as to whether the transaction is, in the ACCC's view, likely to contravene the TPA.

Parties also have the option of applying to the ACCC for authorisation of a proposed merger. The ACCC will grant authorisation if it is satisfied that the proposed acquisition would result, or be likely to result, in such a benefit to the public that it should be allowed to take place. The ACCC must make a decision within 30 days (or 45 days in complex matters), including provision for "clock stoppers". If the ACCC does not make a determination within the time period, the authorisation is deemed to be granted.

The Dawson Bill provides for a number of significant changes to the mergers provisions of the TPA. In particular, it is proposes to introduce a formal voluntary notification regime. Under the voluntary notification system, the ACCC will have 40 business days to determine whether a proposed transaction will have the effect or likely effect of substantially lessening competition in a market. No clock stopping provisions will apply, unless the parties agree to extend the time period. If the determination is not made within 40 days, clearance will be deemed to be refused. Clearance may be granted subject to conditions. Parties may appeal a determination of the ACCC to the Australian Competition Tribunal.

Parties may, as an alternative to seeking clearance from the ACCC, apply directly to the Australian Competition Tribunal to authorise the proposed transaction. The Tribunal must not grant authorisation unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result in such a benefit to the public that it should be allowed to occur. The Tribunal must determine the matter within 3 months, with the option of extending a further 3 months where the matter is

complex or special circumstances arise. Authorisation may be granted subject to conditions.

It is uncertain at this time how these proposed amendments will operate in practice.

Comparison with New Zealand Laws

The ACCC understands that a similar regime for regulation of mergers applies in under the Commerce Act in New Zealand. In particular, both Australia and New Zealand now apply a substantial lessening of competition test to merger matters.

While the substantive test is the same, there are some differences between the procedures and institutional framework applied in assessing merger matters. Currently, the Australian system differs from New Zealand in that an informal process rather than a voluntary clearance system applies. With the introduction of the Dawson Bill, the Australian procedures will be closer aligned to New Zealand, in that both jurisdictions will have a voluntary clearance system. However, differences will still exist due to differences in time periods for consideration of clearances and authorisations. Also, it is notable that under New Zealand law, applications for authorisation will be assessed by the Commerce Commission, but in Australia, the responsibility lies with the Australian Competition Tribunal. Further, while authorisation decisions of the Commerce Commission may be appealed to the High Court, there is no appeal from decisions of the Australian Competition Tribunal (other than administrative law appeals).

Matters involving a trans-Tasman element

In theory, merger matters may involve a trans-Tasman element where both parties to the transaction, or one of the parties is active in both Australia and New Zealand. In such cases, the ACCC (or the Australian Competition Tribunal if it obtains powers to hear merger authorisation applications in the first instance) and the Commerce Commission may both be assessing the transaction. Even where only one agency is assessing the matter, that decision may impact on businesses in both jurisdictions.

In practice, the ACCC has only found itself in the position of assessing a proposed merger at the same time as the Commerce Commission in a small number of cases. Examples of such cases include MYOB/Solution 6, Burns Philip/Goodman Fielder, and CSIRO and NZ Forest Research Institute. Generally, these cases were ones where the parties had a presence in both jurisdictions, but the markets in question were not fully integrated "trans-Tasman" markets, rather, the same organisations operated in separate Australian and New Zealand markets. In those cases, the ACCC has liaised with the Commerce Commission with a view to discussing and identifying common issues in market definition, barriers to entry and other economic issues.

Where parties to a proposed transaction are not based in New Zealand, there can still be an impact on New Zealand business where a competitor or customer is located in New Zealand. For example, in 1999 when the ACCC examined the proposed merger between Southcorp and Email in the whitegoods area, it was necessary to consider the New Zealand company, Fischer and Paykel, in assessing the transaction. In such cases, the ACCC has no difficulty in contacting third parties who may be located in

New Zealand to obtain their views about a particular merger. However, procedural difficulties could arise if the ACCC sought to obtain information from parties located in New Zealand through its formal investigation powers as it is questionable whether these powers would have extra-territorial reach, or be practically enforceable in New Zealand.

The ACCC has not received any complaints from businesses regarding potential duplication or overlap between its processes and the Commerce Commission.

Authorisations and Notifications (Non-merger Applications)

Overview of Australian Law

Pursuant to the authorisation and notification provisions contained in Part VII of the TPA, the ACCC has power to grant immunity from legal proceedings for some arrangements or conduct that might otherwise breach the anti-competitive provisions of the TPA. The ACCC does not have the power to authorise misuse of market power.

The statutory test applied by the ACCC depends on the conduct in question. For agreements that may substantially lessen competition, the applicant must satisfy the ACCC that the agreement results in a benefit to the public that outweighs any anti-competitive effect. For primary and secondary boycotts, resale price maintenance and mergers, the applicant must satisfy the ACCC that the conduct results in a benefit to the public such that it should be allowed to occur.

With the exception of mergers, the ACCC must publish a draft determination and provide the opportunity for a conference of interested parties before making a final decision whether to grant authorisation. Applicants granted authorisation may apply for minor variations, revocation or substitution of an authorisation. The ACCC can also initiate revocation and substitution of authorisations. Review of an authorisation determination by the ACCC may be sought by applying to the Australian Competition Tribunal.

The ACCC deals with approximately 80 -90 authorisation applications each year. Very few merger authorisations are considered by the ACCC (on average about one a year). Approximately 50% of non-merger authorisations relate to regulated energy market issues, and the majority of the remaining applications relate to section 45 conduct.

Immunity from the exclusive dealing provisions can also be obtained by lodging a notification with the ACCC. Immunity from the prohibition is obtained automatically from the time the notification is lodged. That immunity remains unless the ACCC revokes it on the grounds that it finds that the conduct will substantially lessen competition and any public benefit flowing from the conduct is outweighed by the lessening of competition. In 2003/4 the ACCC decided 493 notifications for exclusive dealing.

The Dawson Bill provides for a number of significant changes to the authorisation and notification system. If adopted, major changes would include: a requirement that

the ACCC consult and issue authorisation determinations within 6 months which only allows for extensions if the ACCC has issued a draft determination and the applicant agrees to the extension, ACCC would not be allowed to "stop the clock", if the ACCC doesn't make its decision within 6 months (or as extended) the authorisation would be deemed to be granted, introduction of a notification regime for collective bargaining in relation to arrangements that do not exceed certain monetary threshold requirements. Collective bargaining negotiations would receive immunity after 14 days.

It is uncertain at this time how these proposed amendments will operate in practice.

Comparison with New Zealand Law

Generally speaking, the ACCC believes that the Commerce Act provides for a similar authorisation system to the Australian regime. Both jurisdictions apply a public benefit test. However, appeals from decisions of the Commerce Commission on an authorisation application will go to the High Court, for an appeal based on the record of the proceedings of the NZCC, which is not a de novo hearing, whereas in Australia, appeals go to the Australian Competition Tribunal for a de novo review, from which there is no review on the merits of the decision. Public benefits differ in that the ACCC looks at benefits to the Australian public, while the NZCC of course examines benefits to the New Zealand public.

Matters involving a trans-Tasman element

In practice, the ACCC has found that there has been very few authorisation and notification matters it has considered which involve a significant trans-Tasman aspect or overlap with a matter under consideration by the Commerce Commission.

The only authorisation matter in recent years in which there was a significant trans-Tasman element has been the Qantas/Air New Zealand matter, where applications for authorisation were lodged in both Australia and New Zealand. In that case, Qantas and Air New Zealand applied to both the ACCC and the Commerce Commission for authorisation of arrangements which would see the two airlines enter into a strategic alliance featuring coordination of activities such as scheduling and pricing for all passenger and freight services on all Air New Zealand and Qantas flights into, within and from New Zealand, and Qantas purchase up to 22.5% of the equity in Air New Zealand. Both Commissions received authorisation applications on the same day, 9 December 2002, and issued Draft Determinations on 10 April 2003 proposing to deny the authorisation. Both Commissions ultimately issued Final Determinations denying authorisation, the ACCC on 9 September 2003 and the Commerce Commission on 23 October 2003. Both decisions were appealed by the Applicants. In Australia, a decision for the Australian Competition Tribunal is pending following the completion of hearings in early June 2004. An appeal against the Commerce Commission decision commenced in the High Court of New Zealand on 5 July 2004.

Comments have been made that this process of seeking authorisation in both jurisdictions is cumbersome, lengthy and expensive; it increases transaction costs and reduces predictability and certainty by having to deal with two different authorities that may reach different decisions.

During the Qantas/Air New Zealand matter, staff within the ACCC and the Commerce Commission cooperated closely on an informal basis, within the scope allowed by their respective legislative frameworks. In particular, staff discussed general issues such as market definition, the impact of the transaction, and ideas about public benefits. This assisted both agencies in developing their thinking on common issues, and reduced the likelihood of inconsistency in approach. However, in all discussions, care was taken to ensure that each agency was not influenced by the other in reaching its decision.

The two agencies also coordinated their processes to the extent possible, in recognition of potential logistical issues for the applicants. Both agencies sought confidentiality waivers from the applicants to allow each to disclose confidential information provided by the parties to the other agency. This was a key element in enabling cooperation, and reducing duplication. Both agencies issued draft Determinations on the same day. It was planned that conferences could then be staggered to assist in the parties' preparations, although as it transpired, no pre-determination conference was actually called for in Australia. The applicants requested a Conference in New Zealand, and subsequently submitted the transcript of that Conference to the ACCC for consideration in making its final Determination.

While there was a certain degree of overlap in the issues considered by the ACCC and the Commerce Commission in the Qantas/Air New Zealand case, it is important to note that there were many aspects of the authorisation assessment that were matters of relevance to one or the other jurisdiction individually. In particular, while both jurisdictions needed to assess the impact of the proposed transaction on trans-Tasman airline services, each had to individually consider the impact in terms of Australian and New Zealand consumers individually. In addition, each had to assess the impact of the transaction in terms of markets other than those involving trans-Tasman elements. For example, the ACCC also looked at the transaction in terms of its impact on the domestic Australian, and the Australia- North-America markets for passenger transport.

Summary

Generally, anti-competitive conduct and consumer protection laws in Australia and New Zealand are similar. Although there are some differences, and even where laws are the same there is some potential for laws to be interpreted differently, at present the ACCC has not found this to be a significant problem for either enforcement agency, business or consumers. In practice, the ACCC has not had to deal with a significantly large number of cases where it appears that there is duplication of enforcement activity between the ACCC and the Commerce Commission, or where persons involved in conduct affecting Australia are located in New Zealand. Even where cases do involve parties who have a presence in both jurisdictions, in many cases the fact situation to be considered will differ between jurisdictions, depending on the level of integration between Australian and New Zealand markets.

There are however, a small number of cases where it is useful for the ACCC and the Commerce Commission to cooperate because the parties have a presence in both jurisdictions. As markets become more integrated, it is anticipated that the level of

cooperation required between the ACCC and Commerce Commission will increase, and this is becoming increasing apparent in consumer protection areas such as e-commerce, and food and labelling issues where significant steps have already been taken towards harmonisation of standards.

Potential areas for improvement

The ACCC considers that to deal with matters that have a trans-Tasman element efficiently and effectively, both in terms of ensuring the protection of competition and consumers and minimising duplication of investigations and inconsistency in approach between regulators, several measures could be taken to enhance trans-Tasman investigation and enforcement powers. These include: greater information sharing between the ACCC and the Commerce Commission, greater ability to assist in each other's investigations, extension of jurisdiction and investigatory powers in trans-Tasman matters, ability to engage in joint investigations, ex officio appointments, and ability to recognise judgements obtained in each other's jurisdictions.

Information sharing between ACCC and Commerce Commission

Given that matters do arise which have a trans-Tasman aspect, the ACCC believes that it is important that it has the ability to cooperate closely with the Commerce Commission in relation to appropriate competition and consumer protection enforcement matters, as well as mergers and authorisations. Key forms of cooperation include the ability to exchange information about respondents and potential respondents, and more generally views about particular issues arising from a matter such as approach to market definition, existence of market power, etc.

The prompt sharing of information and cooperation between the regulators is particularly important in combating cross-border commercial practices that harm consumers.

Currently, the ACCC is significantly restricted from exchanging such information with the Commerce Commission in two ways. First, the provisions of the TPA do not allow it to provide information obtained pursuant to s 155 powers to the Commerce Commission. This may be contrasted to the powers available to the Australian Securities and Investments Commission (ASIC) which, pursuant to s 127 of the ASIC Act, may disclose similar information obtained under its formal investigation powers to an agency of a foreign government to assist it in carrying out its functions. Second, the ACCC must seek waivers from the parties in order to share confidential information with another agency, for example, in the Qantas/Air New Zealand matter, the ACCC had to seek such waivers in order to discuss the matter with the Commerce Commission.

Accordingly, the ACCC believes that its ability to cooperate effectively with the Commerce Commission would be greatly enhanced if these restrictions were removed, such that it had a similar power to s 127 of the ASIC Act, at least in relation to matters involving Australia and New Zealand.

Powers to assist

Another area where cooperation between the ACCC and the Commerce Commission could be enhanced to strengthen the ability of each agency to protect competition and consumers in trans-Tasman matters would be to enable each agency to assist in the others investigations. For example, in the investigation of a cartel matter, one jurisdiction may have knowledge of important information in the other jurisdiction, but may not have extra-territorial jurisdiction to obtain that information. If the other agency does not itself have sufficient information to launch an investigation, it will not be able to obtain that information either. In those circumstances, it would assist both jurisdictions if agencies had statutory power to investigate, and use their formal investigations powers to assist in another's investigation.

Trans-Tasman Extra-territorial Jurisdiction

In some trans-Tasman matters, the ACCC has found that the issue is not whether there is duplication of activities between the ACCC and the Commerce Commission, but that a person residing in New Zealand is engaged in conduct which is affecting Australian consumers or competition, but its conduct does not have that effect in New Zealand. In those cases, it may be more appropriate for the ACCC to take action, rather than the Commerce Commission.

Currently, the TPA provides the ACCC the ability to deal with breaches of the TPA which occur outside Australia that nevertheless affect consumers and competition in Australia when the conduct is engaged in by bodies corporate incorporated in, or carrying on business within Australia, or by Australian citizens or persons ordinarily resident in Australia. This provides some basis for taking action against a person currently located within New Zealand, but this is not always the case. Furthermore, even where the ACCC does have jurisdictional scope to take action against such persons located outside its jurisdiction, it faces considerable practical difficulties in investigating such matters.

Accordingly, it would greatly enhance the ability of the ACCC to protect consumers and competition in trans-Tasman matters if it was given extra-territorial scope and had the ability to utilise its s 155 powers within the trans-Tasman region to investigate the wrongdoing in trans-Tasman matters. Notably, such powers already exist in relation to trans-Tasman misuse of market power, which could be extended to all other provisions of Parts V (with the exception of Div 1AA), IVA, IV, mergers and authorisation matters.

This would provide flexibility for the ACCC to take effective action individually in matters involving persons located in New Zealand where New Zealand law is not effected by their conduct. Similar powers should also be provided to the Commerce Commission in matters involving Australian persons whose conduct may breach New Zealand competition and consumer protection laws, but does not affect Australian competition and consumers.

Joint Investigations

In addition to information sharing, assisting in each other's investigations, and extending jurisdictional reach to provide for individual trans-Tasman investigations, the ACCC believes it would also enhance the efficiency and effectiveness of investigations if it were able to conduct joint investigations with the Commerce Commission in appropriate circumstances.

This would enable the ACCC and the Commerce Commission to share investigations, utilising resources in both jurisdictions while still retaining independent ability to determine whether to take action within each jurisdiction.

The ability to undertake joint investigations would require careful consideration, and may involve significant legislative amendment, particularly in areas such as mergers and authorisation, where the ACCC has an obligation to make a determination and could be exposed to judicial appeal if it was felt that it took into consideration improper factors by relying on the Commerce Commission on certain aspects of an investigation.

Reciprocal enforcement of judgements

In matters where consumers and/or businesses are affected by conduct in both Australia and New Zealand, for example, consumer protection action taken in relation to betting software, it is not always possible to conduct joint investigations, or have one agency take action to seek redress for consumers in both Australia and New Zealand. The ACCC is particularly restricted in this, as it cannot obtain compensation in relation to non-parties in proceedings. Further, in the recent case of *ACCC v Chen* (2003) FCA 897 the Federal Court of Australia indicated that obtaining judgements against parties in other jurisdictions can be futile due to difficulties in enforcing those judgements. In assessing whether the grant of injunctive relief is futile, courts may take into account formal enforcement mechanisms and the likely response of administrative agencies in the foreign country.

Accordingly, it would enhance consistency and reduce duplication to allow reciprocal enforcement of judgements. That is, in the case of Australian consumers, allow them to have a New Zealand judgement recognised by an Australian court in order to obtain relief rather than re-hearing the entire matter in Australia.

There are currently reciprocal enforcement of foreign judgments arrangements in Australia that utilise both common law and statutes (e.g. *Foreign Judgments Act 1991* and *Foreign Proceedings (Excess of Jurisdiction) Act 1984*). The *Foreign Judgments Act 1991* and common law procedures apply to money judgments. The recognition of a foreign jurisdiction by Australia depends on substantial reciprocity of treatment in relation to Australia's enforcement in that other country. Australia and New Zealand have reciprocal arrangements.

The ACCC believes that consideration should be given to expanding Australian recognition of foreign judgements to penalties and non-monetary orders. Similar consideration could also be given to the potential for persons affected by conduct in New Zealand to rely on Australian judgements. The ACCC understands that Australia and New Zealand have formed a trans-Tasman working group to examine ways in which reciprocal arrangements can be expanded to address non-money

judgment issues in a border context. This study is coordinated by the Attorney-General's Department.

Ex officio Commissioners

In the ACCC's experience, a significant element of cooperation between Australia and New Zealand relates to exchanging ideas and experiences in relation to economic issues and policy issues, rather than direct involvement in a particular investigation involving both the ACCC and the CC.

Another method of developing greater levels of cooperation between the ACCC and the Commerce Commission to assist in this area would be to have ex officio Commissioners from each agency appointed. This may assist in the cross fertilisation of views and approaches to applying the laws in each jurisdiction, and therefore encourage a greater degree of consistency in approach. The ACCC also believes that enhanced cooperation at the staff level on an ongoing basis through enforcement and compliance activities will also provide a valuable mechanism for the development of common views and approaches.

Other Options

Further harmonisation of laws

As outlined above, the ACCC considers that the Australian and New Zealand laws are very similar. Given the relatively small number of matters involving a trans-Tasman aspect that it currently deals with, it does not consider there to be a sufficiently strong case to advocate complete harmonisation or mutual recognition of laws at this time. Possibly, this could be revisited in the future if a higher degree of integration between markets develops.

If further harmonisation of laws was to be considered in the short term, the ACCC believes it would be more useful to focus on harmonisation of enforcement remedies in order to assist the process of developing closer cooperation and coordination of investigations.

Agreement on which country's laws apply in specific circumstances

In the ACCC's experience, there is no clear cut criteria or formula that dictates which country's laws should apply in any particular matter involving cross-border aspects. This will depend on a range of matters that need to be assessed on a case by case basis. Where the laws are substantially the same, the impact appears to be more significant in another jurisdiction, and/or another jurisdiction has a better likelihood of investigating and obtaining an enforceable order, one jurisdiction may decide that it is preferable to leave a particular matter for investigation by another jurisdiction. In practice, the ACCC already considers these factors at an administrative level when the ACCC is determining whether to pursue an enforcement matter or not. However, it cannot do this in relation to authorisations and mergers matters. In authorisation matters, it must consider an application for authorisation, and similarly in mergers matters, where parties ask for the ACCC's views on an informal basis, or, under the system proposed by the Dawson Bill request clearance or authorisation, the ACCC or

the Australian Competition Tribunal cannot refuse to examine a matter on the basis that another jurisdiction is better placed to assess the matter.

The ACCC considers that little would be achieved in practice by putting into place a formal system of allocation of matters between Australia and New Zealand at this time. First, such allocation already occurs on an informal basis in relation to Part IV and V matters. Second, in relation to mergers and authorisations, there do not appear to be a sufficient number of matters involving a trans-Tasman aspect to justify the need for a formal allocation process.

If such a process were adopted, it would be important that each jurisdiction would have the ability to determine on a case by case basis whether it would be appropriate to have the other jurisdiction's laws apply.

Mutual recognition of compliance with the other country's laws

Mutual recognition involves the concept, for example, that where a business complies with the competition and consumer protection laws in one jurisdiction, this could provide a defence against proceedings in another jurisdiction. While this would reduce compliance costs for businesses in the relatively small number of areas where the laws are not harmonised, it does not deal with the issue of differing interpretations of a law. In addition, such an approach can raise problems including:

- Competitive disadvantage can occur where one business is held to one standard of law, whereas its competitors, by virtue of geographic location, are held to another;
- Global businesses can take advantage of a lower standard in one jurisdiction to evade the requirements of the other jurisdiction, which may be their main trading location; and
- Difficulties associated with one agency having to determine whether the laws of another jurisdiction have been adhered to.

Given these issues, and the relatively small number of trans-Tasman matters at present, the ACCC does not believe that such measures are necessary at this time.

Joint decision-making on trans-Tasman issues

Another option for dealing with trans-Tasman issues is to develop a legislative procedure for joint-decision making in matters involving trans-Tasman issues. Such a power would only be useful in matters where:

- The conduct in question affects both Australia and New Zealand to a significant extent;
- The conduct is the same in both jurisdictions;
- The impact is the same in both jurisdictions; and
- Both agencies believe that separate decision-making will result in significant duplication of resources and an undue burden on industry.

At present, very few matters would fall within this category, and in most cases, developing a cooperative approach in investigations as suggested above would minimise problems of duplication and inconsistency in approach in trans-Tasman

matters. Nevertheless, such measures could be further considered if the level of trans-Tasman activity increases in the future.

Single trans-Tasman regulator

The establishment of a trans-Tasman regulator would foster consistency in application of laws, and overcome jurisdictional issues in trans-Tasman investigations.

While the ACCC believes that such a proposal may be examined further if the need arises, based on the current level of trans-Tasman matters, it does not consider it to be necessary at this time.

Conclusion

Businesses in Australia and New Zealand will encounter laws and regulatory regimes that are very similar in content and approach at the Commonwealth level.

As outlined above, the ACCC deals with a small number of consumer and competition investigations, authorisations and mergers which involve a trans-Tasman aspect. It cooperates with the Commerce Commission on these matters on an informal basis to the extent it is permitted to do so under the existing legislative framework. It's commitment to cooperation is reflected in its international cooperative agreements with New Zealand.

The ACCC believes that such cooperation is an important element in dealing with these matters, and the effectiveness of both agencies would be assisted by an enhancement of cooperative investigation powers, information sharing and trans-Tasman recognition of remedies. Further levels of coordination such as joint decision making on trans-Tasman matters, or the establishment of a trans-Tasman agency could be considered further if a significant level of trans-Tasman issues were to develop.