Australian and New Zealand Competition and Consumer Protection Regimes

Response to the Productivity Commission Issues Paper

August 2004

A. Introduction

1. The Ministry of Consumer Affairs (MCA) welcomes the opportunity to provide its initial comments in response to the Issues Paper released by the Productivity Commission in July 2004 entitled "Australian and New Zealand Competition and Consumer Protection Regimes". We note that at our meeting with Productivity Commission members on 12 July 2004, we were encouraged to make a submission to assist with the assessment of potential barriers to a single economic market associated with the Australian and New Zealand consumer protection regimes.

2. MCA considers that the subject of the study being conducted by the Productivity Commission - the potential for greater cooperation, coordination and integration of the general competition and consumer protection regimes in Australia and New Zealand – is of major importance. Placed against the background of the:

   - Australia New Zealand Closer Economic Relations Trade Agreement; and

   - Trans-Tasman Mutual Recognition Arrangement,

   the study provides an opportunity to explore options to increase further the co-operative and co-ordinated efforts that have characterised the relationship between New Zealand and Australia to date in the area of consumer protection law (in particular, the area of product safety). MCA notes that the output of the Commission's study will be used to inform governments on both sides of the Tasman as to possible future arrangements to better align respective legislation and practices in the area of consumer protection law so as to remove barriers to trans-Tasman business.

3. MCA also notes that, for present purposes, consumer protection law is defined to include the consumer protection provisions of the Fair Trading Act 1986. MCA further notes that the Commission is required to recognise and take into account the consumer protection provisions applying in New Zealand to consumer rights and redress in the Consumer Guarantees Act 1993, as well as the differing treatment of product liability in Australia and New Zealand.

4. MCA's initial response to the Issues Paper sets out:

   - some brief background material about MCA and its approach to dealing with consumer protection issues. This approach informs the comments provided;

- some general issues that cut across individual sections of the Issues Paper; and, finally,

- briefly discusses the more specific questions raised in the Issues Paper.

5. MCA welcomes the opportunity to further discuss with the Commission, not only the specific comments raised in this paper, but also to assist the Commission with a more detailed understanding of MCA's perspectives and experience as the Commission progresses its study.

B. MCA: Its role and high-level outcome

6. MCA was established in 1986 and is an operating branch of the Ministry of Economic Development (MED).

7. MCA has responsibility for administering a range of consumer protection legislation, including for present purposes, the Fair Trading Act 1986 (FTA) and the Consumer Guarantees Act 1993 (CGA). It is important to note that MCA does not enforce either of these pieces of legislation. The CGA is self-enforcing (that is, it relies on consumers to take enforcement action), while the FTA is enforced by the New Zealand Commerce Commission. MCA does conduct product safety investigations where there is no specific product law (similarly to the responsibilities undertaken by State fair trading agencies in Australia). MCA also enforces New Zealand's weights and measures legislation.

8. In 2002-2003, MCA undertook a comprehensive review of its functions and role. The review determined that MCA's primary role is to create an environment that promotes good and accurate information flows between suppliers and consumers so that consumers can transact with confidence. This role, as described further below, informs the comments made in this paper.

9. MCA's high-level outcome - that "consumers transact with confidence" - recognises three factors:

- consumer expectations are influenced by the quality of information available to them about a transaction – when consumers' expectations are met, transactions are successful and, collectively, successful transactions generate confidence;

- market rules and institutions influence the confidence of consumers; and

- consumers have a reasonable expectation that effective redress is available.

10. MCA's high-level outcome contributes to MED's economic development outcome (which is focused on promoting a higher rate of sustainable income growth) through, in part, the promotion of competitive and dynamic markets. Consumers have a vital role to play in the development of such markets through:

- making decisions between products, services and suppliers;
- demanding new and better products and services, better choice, clear information and value for money; and
- challenging unethical business practices.

Competition and innovation are vital to the growth of the New Zealand economy and the success of New Zealand businesses at home and abroad, leading ultimately to higher living standards for all New Zealanders. For markets to be efficacious at any point in time depends on confident consumers. The primary focus of MCA's outcomes framework is to contribute to the attainment of these conditions.

11. MCA's view is that confidence in transacting is important. When consumers are not confident:

- they may avoid transacting in future, so that they do not have to face the possibility of a bad deal and its consequences;
- consumer inertia may result - consumers may opt for an existing supply arrangement because of the perception that they will face risk or costs by switching to another supplier or means of supply, even though another supplier or means of supply may offer a better deal; or
- they may spend considerable time and effort investigating, or will accept higher costs attempting to avoid, a bad deal.

In other words, consumers may incur additional costs, or competition may be adversely affected, through consumers transacting less and suffering from inertia.

12. In MCA's view, consumer confidence comes from:

- having the skills and knowledge to be able to transact effectively;
- having ready access to information about the characteristics of the products and services consumers intend to purchase;

- not being subjected to concealed risks, either from hazardous goods or from "rogue" suppliers;
- having effective access to redress when the market fails; and
- having robust market rules and institutions that govern consumer transactions.

13. In undertaking its policy development and implementation work, MCA seeks to balance consumer and business interests in order to achieve MED's high level aim.

C. General comments

14. As noted in the introduction, MCA has a number of general comments with respect to the Issues Paper that cut across individual sections of that paper. MCA's comments in this regard relate to:

- MCA's experience with respect to the Trans-Tasman Mutual Recognition Arrangement;
- the relevance of intra-Australian harmonisation;
- the various terminology utilised in the Issues Paper; and
- the business and consumer aspects of the "business environment".

Each of these is dealt with in turn.

C.1 Trans-Tasman Mutual Recognition Arrangement

15. MCA notes that the mutual recognition principle of the Trans-Tasman Mutual Recognition Arrangement (TTMRA) currently provides a platform for an integrated market for general consumer products.

16. The Commission's study will explore how the underlying objectives of TTMRA may need to be pushed further in order to facilitate trans-Tasman business. MCA notes that, in its experience, there is some suggestion that retailers, in practice, are reluctant to take up the flexibility conferred by the TTMRA. Instead, retailers will often continue to insist on compliance with local standards where these have been mandated in Australia. There are also issues associated with restrictions on the use of products that were highlighted in the Productivity Commission's recent review of the TTMRA.

17. Unless these matters are dealt with expeditiously, they may well hinder the achievement of the goals of greater cooperation, coordination and integration of the general competition and consumer protection regimes in Australia and New Zealand.

C.2 Intra-Australian harmonisation

18. Australian consumer protection legislation is reflected, not only in the Trade Practices Act 1974 (Cth) (TPA), but also in State-based fair trading legislation. With regard to consumer protection law and issues, therefore, New Zealand interacts at:

- a federal level with the Australian Government on many issues (this project being one example); and
- a State/Territory level [for example, New Zealand's involvement in Australia's Ministerial Council on Consumer Affairs (MCCA) and SCOCA].

19. MCA's experience at these two levels of government in Australia suggests that, in certain areas at least (such as product safety), intra-Australian harmonisation may be of as much relevance and importance to trans-Tasman business as trans-Tasman harmonisation. Harmonisation at both levels has the potential to benefit the trans-Tasman business (including consumer) environment.

C.3 Terminology

20. MCA notes that a variety of terminology is used in the Issues Paper, such as "harmonisation", "cooperation, coordination and integration", "combined or coordinated" and "greater alignment".

21. There is, in effect, a regulatory continuum between two countries having no contact whatsoever regarding their competition and consumer protection environments and two countries having identical legislation and combined policy/enforcement institutions. Australia and New Zealand presently fall somewhere between these two end points and it is MCA's understanding that this stage of the Commission's study involves identifying if any shift along this continuum is necessary to further facilitate trans-Tasman business and whether such a shift would be beneficial (in terms of the relevant costs and benefits).

22. MCA recognises that the scope of the Commission's Terms of Reference make more precise terminology difficult. However, MCA also notes the consequence that it is similarly difficult to comment with precision on such matters as costs and benefits at this stage of the study, when dealing with a range of possible

outcomes that could address any hindrance to trans-Tasman business and where the costs and benefits of each such outcome may well differ.

23. As such, MCA has avoided discussion of the various implications and merits of the differing terminology used and instead focused, in its comments in Section D below, on noting possible hindrances to a movement along the continuum.

C.4 Business and consumer aspects of the "business environment"

24. MCA notes that the Commission poses questions under each heading in Section Two of the Issues Paper concerning whether there is any element related to that heading that would "hinder an integrated trans-Tasman business environment". MCA notes that the concept of the "trans-Tasman business environment" includes both business and consumer aspects. Any goal of ensuring an unhindered business environment (promoting free trade and so forth) would, in our view, equally need to address the issue of ensuring "unhindered" (effective) access to justice for consumers and business on both sides of the Tasman. As described above in Section B, ensuring that consumers transact with confidence is critical to achieving competitive and dynamic markets. A fundamental aspect of achieving such confidence is ensuring that there are effective means of redress available.

D. Specific comments

25. In its Issues Paper, the Commission has posed a number of specific questions. In responding to these questions, MCA notes its comments above that:

- a consequence of the broad scope of the Terms of Reference is that it is difficult to comment with precision on such matters as costs and benefits at this stage of the study, when dealing with a range of possible outcomes where the costs and benefits of each may well differ; and
- as such, MCA has focused on noting possible hindrances to a movement along the regulatory continuum.

26. The following sections are dealt with by reference to the headings as they appear in the Issues Paper.

D.1 Policy objectives

27. Both the TPA and the New Zealand Commerce Act 1986 (Commerce Act) contain specific purpose sections ("... to enhance the welfare of Australians

through the promotion of competition and fair trading and provision for consumer protection" and "... to promote competition in markets for the long-term benefit of consumers within New Zealand" respectively).

28. The FTA and the CGA do not contain, by contrast, purpose statements as such. However, each Act does contain a preamble which outlines the purposes of the legislation. MCA notes that, with regard to the New Zealand product safety provisions (standards), the purpose statement is "to prevent or reduce the risk of injury".

29. MCA does not have any evidence as to whether the different stated policy objectives, *per se*, hinder or do not hinder an integrated trans-Tasman business environment.

D.2 Substantive laws

30. MCA notes that the Commission is using the term "substantive laws" to refer to "the rules (including legislation, subordinate regulations and other instruments) governing specific business practices and arrangements"[1] and that the Commission's focus is in identifying instances where there are differences between the substantive laws that impact on trans-Tasman economic activity.

31. In this sub-section, MCA briefly addresses one major difference in substantive laws that may act as a hindrance to an integrated trans-Tasman business environment, namely product liability laws involving injury. Other differences in legislation (including legislation relating to product safety) are then outlined.[2] Comments on any likely hindrance to the trans-Tasman business environment are considered under each heading.

D.2.1 Product liability involving injury

32. Redress, in terms of compensation for injuries associated with an unsafe product, is dealt with differently in New Zealand and Australia.

33. Under New Zealand product liability arrangements, the Accident Compensation Corporation (ACC) administers New Zealand's accident compensation scheme. That scheme provides accident insurance for all New Zealand citizens,

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1 Issues Paper, 14.

2 Refer Australian Consumer Sales and Credit Law Reporter, 18,022-023 for a comparative table of the provisions and coverage of the FTA, the TPA and the fair trading legislation of the States of Australia.

residents and temporary visitors to New Zealand. The Injury Prevention, Rehabilitation, and Compensation Act 2001 is the principal Act under which ACC operates.

34. Briefly, the scheme provides cover for injuries regardless of fault. The scheme is funded in part through both employer and employee levies. The cover includes payment for medical services, rehabilitation and compensation (both weekly earnings compensation paid to injured people who are off work and for loss of earnings/capability to earn through injury). In return, the right to sue for personal injury, other than for exemplary damages, has been removed. Criminal liability is not affected by the scheme.

35. By comparison, under the product liability provisions of Part VA of the TPA, any person who suffers loss or damage because of a defective product is able to take legal action for compensation against the manufacturer of that product.

36. It is not suggested that this difference impacts adversely on the free flow of trade between the two countries. However, under a single economic market, where issues of redress and standing in each other's courts may arise, the fundamentally different approach to injury-associated compensation would need close scrutiny.

D.2.2 Other differences in legislation

37. Both the FTA and CGA draw heavily on the TPA and thus share a good degree of commonality in wording. Indeed, the similarities are such that Australian case law may be drawn upon in New Zealand in some instances.

38. However, there are differences in legislation, for example:

- Unconscionable conduct

  Part IVA of the TPA prohibits "unconscionable conduct". The lack of equivalent provisions in New Zealand may mean that behaviour that is considered unconscionable in Australia (and thus prohibited) may be legal in New Zealand.

- Substantiation orders

  Substantiation orders allow Australian authorities to require a company to produce evidence that their claims (for example, claims about the fat content of foods) are true, rather than the burden of proof being on the enforcement agency. Such orders do not exist in New Zealand.

- Concept of "unfair conduct"

Section 23 of the FTA prohibits the use of harassment or coercion in connection with the supply of goods and services. The TPA has a similar provision, but also bans "unfair conduct" which has a lower behavioural threshold, thus allowing a wider range of detrimental behaviour to be addressed.

- Cease and desist orders

  Section 74A of the Commerce Act provides for the Commerce Commission to make "cease and desist" orders (there is no equivalent power under the FTA). The purpose of the order is to terminate conduct that is, *prima facie*, in breach of the Commerce Act. Orders can only be made if it is necessary to act urgently to prevent a particular person or consumers from suffering serious loss or damage, and it is in the interests of the public to do so. There is currently no equivalent power for the Australian Competition and Consumer Commission (ACCC) in the TPA.[3]

- Product safety

  There are minor differences in Australian and New Zealand laws relating to product safety.[4] For example:

  - under the CGA, the inclusion as a subset of the meaning of "acceptable quality", that a good be safe. This places a general obligation on New Zealand suppliers to provide safe products, which the Australian legislation does not; and

  - under the FTA, the ability to adopt either New Zealand or international standards as product safety standards, with the same statutory process (approval by Order in Council) applied to both. By contrast, MCA understands that the TPA allows for Australian standards to be made by Gazette Notice, while the adoption of international standards must be approved by the full Executive.

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3 MCA notes that the Federal Government accepted the recent recommendation 5.1 of the Dawson Committee that the TPA not be amended to include such a power.

4 MCA notes that, under the guidance of MCCA, SCOCA is undertaking a substantial review of the product safety system in Australia. Differences in Commonwealth/State and New Zealand product safety systems will be addressed, as well as an exploration of what other international systems may provide in terms of alternative approaches.

These differences, which on their own are not significant, have had an impact on the approach of suppliers and regulatory agencies on either side of the Tasman. In New Zealand, the result has been a regime that is both less prescriptive[5] and more globally-focussed in terms of safety standards.

It will be important from New Zealand's perspective in any further move towards a single economic market that, whilst delivering adequate consumer protection and business efficiencies for both Australians and New Zealanders, the focus remains outward looking.

39. MCA considers it important to note that, in some instances, differences between laws can simply reflect a taking advantage of lessons learned in the other jurisdiction. An example of this is arguably New Zealand's new consumer credit regime (to become effective on 1 April 2005), which shares a good deal of commonality with, but is not identical to, Australia's Consumer Credit Code.

40. In terms of the differences that do exist, MCA does not have any evidence as to whether such differences hinder the trans–Tasman business environment or not. MCA notes that other agencies are likely to be in a better position to provide such evidence if it exists.

D.3 Interpretation and application of substantive laws

41. As the Commission notes, similarity of legislation does not necessarily entail the same business (including consumer protection) environment. The same wording in one jurisdiction may, in the other, give rise to a different interpretation that will influence the way the legislation is applied.

42. New Zealand and Australia do appear to have a different approach to the level of prescription necessary in legislation. For example, in 1998 provisions were inserted into the TPA that define a set of defences, or safe harbours, to proceedings brought under certain provisions of the TPA in relation to 'country of origin' representations. New Zealand's view was that the FTA adequately covered these issues without further elaboration. There are currently similar concerns in product safety legislation, where there are differing interpretations as to what constitutes 'injury', and how broadly 'injury' can be defined – for example, does it encompass psychological harm?

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5 There are only six product safety standards under the FTA, while under the TPA there are some twenty-seven.

43. Differences of interpretation do create confusion for consumers and business. In some instances, such differences can encourage business to forum shop for the most advantageous interpretation. However, MCA also notes that Australian case law, while not binding on New Zealand courts, can be influential in New Zealand in some instances. In moving towards a more integrated market, close thought will need to be given to the issue of achieving a consistent approach with regard to prescriptive and outcomes- or performance-based legislation.

D.4 Institutional arrangements and enforcement processes

44. MCA notes that there are similarities to the questions posed in the Issues Paper under the headings "Institutional arrangements" and "Enforcement processes". In particular, information is sought regarding any lack of cooperation, coordination and integration between equivalent trans-Tasman bodies.

45. In terms of those institutional arrangements directly affecting MCA, it is noted that the MCCA/SCOCA arena affords MCA regular formalised opportunities to discuss policy issues and developments in consumer protection law with its Australian counterparts. However, the constraints existing under the Australian federal system can, as noted in Section C.2 above, lead to difficulties in achieving closer integration on policy issues.

46. As explained in Section B, MCA does not have an enforcement role with respect to the consumer protection law that is the subject of this study. As such, MCA leaves the issue of substantive comment on enforcement processes to those bodies with direct responsibility for such matters. However, it does note that:

- the New Zealand Commerce Commission currently has four formal co-operation agreements that involve the ACCC. These agreements are generally "soft" in nature. They provide for one country to share information with the other country, where the agencies agree it is in their mutual interests and subject to domestic law constraints. These agreements do not extend to providing investigative assistance in taking enforcement action. Closer information sharing arrangements may facilitate joint enforcement action and increased agency efficiencies. However, the implications of removing the current domestic law constraints will require close scrutiny;

- through its participation in the MCCA/SCOCA arena, MCA is familiar with the differing enforcement styles of the various Australian jurisdictions. Clearly, where these differences are significant, this has created additional compliance costs for business, and confusion for both suppliers and consumers. Such differences in approach, MCA

notes, are generally being addressed through the MCCA/SCOCA arena; and

- the existence of different enforcement priorities of the ACCC and the Commerce Commission can mean that, in practice, some business activities may be scrutinised more closely in one country than another.

D.5 Sanctions and Remedies

47. At present, there exist numerous variations between New Zealand and Australia in terms of the sanctions and remedies available under consumer protection law. For example, in most cases the maximum financial penalties available under the TPA are A$10 million for a corporation and A$500,000 for a person. Under the FTA, the equivalent figures are NZ$200,000 and NZ$60,000. MCA is not aware, however, of any evidence as to whether such variations hinder the trans-Tasman business environment or not. However, it could be argued that such differences may affect business practices on either side of the Tasman.

48. Of arguably greater relevance, in the context of further economic integration, is the issue of ensuring ***effective*** access to justice. This is discussed in the next section.

D.6 Extraterritorial application

49. MCA views the possible integration of trans-Tasman consumer protection regimes as an opportunity to explore the broader issue of the provision of effective access to justice within the trans-Tasman environment for both consumers and businesses. There would appear, to MCA, to be a logical underlying principle in the context of a single economic market of there being means of redress available regardless of the nationality of the complainant (consumer or business), location of company registration or the country in which the transaction is made. Further policy work would be required to ascertain the extent and exact nature of the policy options available.

50. Questions of international and domestic law with respect to extraterritorial jurisdiction are beyond the scope of MCA's mandate. MCA would encourage the Commission to explore this issue with the relevant agencies or organisations. In the interim, however, MCA offers some preliminary comments on this issue.

51. Section 3 of the FTA states that:

> "[t]his Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand".

52. Section 5(1) of the TPA provides, in respect of certain consumer protection provisions of that legislation, that the Act:

> "… extend[s] to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia."[6]

53. Thus both Acts have extraterritorial application to conduct engaged in by companies and persons that affects the home market. That is, the FTA can still be breached in New Zealand, regardless of whether a company is registered in New Zealand or not.

54. However, there are practical limitations to using the FTA to obtain redress. For example, if there is no one on whom to serve papers within New Zealand, action will, in practice, be stymied. In an integrated consumer protection environment, the ideal in this case would be that action could be pursued if an offending company was located in Australia (and *vice versa*).

55. Examples where this type of practical problem has arisen to date include internet-based companies and those operating solely via telephone across the Tasman.

56. More complicated scenarios can be imagined – an Australian may travel to New Zealand and transact with an Australian-based company before returning to Australia. If the transaction is unsatisfactory, it is unclear whether redress could be obtained. This scenario raises questions regarding the coverage of existing laws, as well as the standing rights of consumers from either side of the Tasman in using, for example, non-court-based dispute resolution mechanisms (such as the New Zealand Disputes Tribunals).

57. This issue does not axiomatically imply any necessity for identical legislation. However, it does point to the need for enforcement options to be available to consumers on either side of the Tasman. Without such options, consumers (and business) may not be able to transact with confidence, in turn hindering an integrated trans-Tasman business environment. Such issues become increasingly important with the rise in e-trading and the easing of international trade generally.

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6 See, also, section 6 of the TPA.

D.7 Policy options

58. MCA is unable to make detailed comment on the policy options outlined in Table 1 of the Issues Paper (refer page 25). As discussed above, the options span a large continuum and would require considerable and detailed policy analysis, making use of the information gathered by the Commission via its study.

59. First, MCA suggests that an additional stage be worked into the Commission's reporting schedule that involves the release of a summary of the evidence gathered from responses to section two of the Issues Paper. This evidence could then be used by respondents such as MCA to provide a more useful and detailed response to the questions posed in section three of the Issues Paper.

60. Secondly, MCA does not consider that there are additional broad categories of cooperation, coordination and integration that the Commission should consider. However, it may be useful to present the policy options in Table 1 as different levels of integration along a continuum. We agree with the Commission that there is a degree of overlap between aspects of the broad categories. Such overlap is indicative of the complexity of the area and suggests it will be necessary to explore the best mixture of two or more of these categories, rather than limit the focus to just one category.

61. Finally, MCA has not formed a view as to where on the regulatory continuum it is necessary for Australia and New Zealand to move in order to facilitate trans-Tasman business; rather, it reiterates that proposed changes will need to be considered in terms of whether:

- they will foster an environment in which consumers transact with confidence; and
- the relevant costs are outweighed by the relevant benefits.

62. MCA awaits with interest the conclusions of the Commission when it delivers its final report.