SUBMISSION

Submission to the Productivity Commission Study of Australian and New Zealand Competition and Consumer Protection Regimes

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1 This Submission focuses on two issues: the role of quantification in the authorisation test; and the relevant welfare standard to be used in that test.

Background

2 By way of background, section 90 of the Trade Practices Act 1974 ("TPA" or "the Act") empowers the Australian Competition and Consumer ACCC ("ACCC") to exempt conduct that may otherwise contravene part IV. That section and its supporting provisions acknowledge that competition will not necessarily provide the optimal outcome for society in every case. Provision is therefore made for authorisation of conduct that would otherwise breach the Act in situations where doing so advances the Act's wider objectives and, more specifically, meets the statutory test for authorisation.

3 The statutory test that the ACCC applies under section 90[1] is: Will the conduct, although it could otherwise breach the Act, provide a net benefit to society? Essentially, will the public benefits arising from the conduct outweigh the public detriments the conduct will cause? The test asks the ACCC to take a balance sheet approach and weigh up the pros and cons of the particular conduct[2].

4 What can constitute a public benefit or a public detriment has been given a wide interpretation by the Tribunal and the ACCC. In the light of that interpretation, it is clear that ***any*** beneficial or detrimental effect that is caused by the conduct and is sufficiently broad in its effect to be considered 'public' is within the ambit of section 90. Thus, although economic efficiency is a primary focus of the legislation, the ACCC will also consider other 'qualitative' factors[3] to the extent to which they are relevant to an assessment of the conduct's effects.

5 Although the ACCC's authorisation decisions vary greatly from case to case, there are instances in which they provide extensive quantitative information, for example about the nature and workings of the market or markets at issue, the likely detriments from the conduct and the benefits which the conduct might or might not give rise to. However, the "balance sheet" which the ACCC is required to have in its mind is not explicitly set out in

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1 While the section provides two separate authorisation tests, they are in practice treated as being the same.

2 Re Queensland Co-operative Milling Association and Defiance Holdings (1976) ATPR 40-012 at 17,243.

3 RE 7-Eleven Stores (1994) ATPR 41-357 (extracted at Miller's Annotated Trade Practices Act, 23rd Edition at page 756) .

a way that allows a direct numerical comparison of the quantum of the benefits on the one hand and of the detriments on the other.

6 Two issues arise here that are relevant to the question of trans-Tasman harmonisation:

(a) what role quantification should play in the methodology used to assess and report on authorisation decisions; and

(b) to the extent to which the assessment of authorisation applications relies on a welfare test, what the nature of that welfare test ought to be.

7 There are significant trans-Tasman differences in each of these respects:

(a) the New Zealand Commerce Commission ("NZCC") has generally considered it to be its responsibility to rely on quantification of claimed benefits and detriments to the greatest extent reasonable; and

(b) while New Zealand has relied on a "social surplus" welfare test (so that welfare is defined as the sum of consumer and producer surplus accruing in New Zealand or to New Zealanders), Australian practice has been less sharply defined.

Each of these issues is considered below.

Quantification

8 Authorisation decisions involve balancing a competitive detriment against potential public benefits.

9 It is assumed here that the extent of the competitive detriment is capable of being quantified and translated into monetary terms. For example, oligopoly models can and often are used, at least in other jurisdictions, to evaluate the likely impact of mergers on prices and through them on allocative efficiency, as measured by the change the merger is likely to induce in consumer and producer surplus.[4]

10 Techniques are also well established for quantifying the extent of potential benefits. Given the vast range of policy effects economists routinely quantify, it is difficult to conceive of

[4] Consumer surplus refers to the difference between the total willingness to pay of a consumer for a good or service and the amount the consumer has actually had to pay for that good or service. It is, in other words, the net benefit that accrues to the consumer from the exchange. Equally, producer surplus refers to the difference between the total payment a supplier obtains for a good or service and the minimum amount the supplier would need to receive to be willing to supply that good or service. It is, in other words, the net benefit the supplier obtains by making the good or service available. The sum of the consumer and producer surplus is therefore the total net benefit accruing to the two sides of the market as a result of the exchange. An allocatively efficient situation is one in which the sum of consumer and producer surplus is maximised.

benefits that are relevant to authorisation that would not be capable of valuation in economic terms. For example, cost savings, say those arising from the fuller exploitation of scale and scope economies made possible by a merger, are generally carefully valued in the process leading up to the merger. Wider public benefits, such as increases in the extent or nature of employment, improvements in public health and enhancements in environmental quality, can all be valued through methods that are widely used in the relevant policy areas.[5] Equally, changes in bargaining power, as might be effected by allowing collective bargaining between small businesses and a larger firm, presumably give rise to changes in the distribution of income as between those entities (and have impacts on final consumers) that can be valued and compared to any detriments associated with the monopsony power collective bargaining can provide and with any unwinding of otherwise efficient price discrimination.

11 As a result, although quantification of benefits inevitably involves a degree of technical difficulty, it seems reasonable to suppose that these difficulties could and would be addressed in the course of the authorisation process. The benefits thus quantified could then be compared to the detriments, allowing an evaluation of the net gains from the conduct for which authorisation is being sought.

12 By analogy to the extensive literature on the role of rules in public administration, the set of advantages that would arise from carrying out such an assessment can be classified into two broad types.

13 The first are the intrinsic benefits of using a decision rule that seems sensible in terms of the axioms of rational choice. Authorisation decisions rarely involve fundamental ethical considerations, and hence would normally be capable of a consequentialist valuation – that is, they should be taken on the basis of whether the gains outweigh the costs. Adopting a practice of providing for authorisation when this condition is shown to be met, through the rigorous and credible quantification of benefits and costs, would seem likely to lead to better decisions than would occur when the decision criterion is less carefully specified.

14 The second set of advantages goes more broadly to the effect greater reliance on systematic quantification would have on the quality of the authorisation process, and more

[5] Although cost-benefit analysis is widely used in public health, improvements in health outcomes are frequently measured using Quality Adjusted Life Years, rather than in terms of total monetary value. This allows for the implementation of cost-effectiveness studies, but does not translate into a valuation of the overall gain. An important reason for using Quality Adjusted Life Years, rather than attempting to measure overall gain, is that the provision of health services often has large income effects – that is, they substantially change the consumers' income position. This can create difficulties when improvements in health outcomes need to be valued in a way that allows the benefits associated with that effect to be added to benefits of other kinds (say, reductions in costs).

generally on the administration of the ACCC's statutory powers. More specifically, it would contribute to enhancing the transparency, consistency, predictability, accountability, cost-effectiveness and overall legitimacy of ACCC decisions.

15 Greater quantification of benefits would make the basis on which decisions were being taken more **transparent**. The recent API-Sigma merger determination highlights the issues involved.[6] In that decision, the ACCC decided that, on balance, the competitive detriments flowing from the proposed merger outweighed the efficiency gains. However, the basis on which this conclusion was reached was not set out. For example, the ACCC found that the wealth transfer that would (in its view) be induced by the merger had an adverse distributive effect; but it provided no indication of the amount of the transfer that it classified as a detriment or of the weight that it assigned to this amount. Similarly, the ACCC decided that the applicants' estimate of the efficiency gains was too large and indicated that the actual amount was considerably lower. However, it did not set out a revised estimate of these gains or explain how such an estimate had been derived. In a similar fashion, the ACCC cast doubt upon the applicants' estimates of the deadweight loss, without itself publishing a revised estimate of that loss, or explaining how it related to factors such as the extent of the assumed cost savings, the degree to which these savings would be passed through, the elasticity of market demand and so on. Thus, in API-Sigma, the deadweight loss, the 'wealth transfer' and the efficiency gains – all critical elements in the decision – were left unidentified by the ACCC and hence could not be known either to the applicants or to other parties.

16 Closely associated with greater transparency would be increased pressure for **consistency**. The ACCC has, for example, recently cited issues associated with income distribution both in the API-Sigma decision and in its Draft Determination for the Qantas/Air New Zealand proposed alliance, where it states (at p. 109):

> "Finally it should be noted that the cost savings accrue to the Applicants and their shareholders. While the ACCC is of the view that benefits to a particular group or segment of the Community may be regarded as benefits to the public, consideration needs to be given as to whether that benefit is at the expense of others – for, example, consumers through higher prices. Where benefits are not passed on to consumers they are likely to be accorded a lower weight by the ACCC."

17 However, because the ACCC provides no information on the weight it applies, applicants and other parties cannot assess whether those differential weights are comparable to the weights applied by the ACCC in discounting the benefits associated with the proposed merger between Sigma and API.

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[6] API and Sigma final determination (September 2002) at pages 66-71, see http://www.accc.gov.au/adjudication/fs-adjudicate.htm

18 Were the ACCC's treatment of benefits more transparent and consistent, the outcomes of the authorisation process would be more **predictable**. This, in turn, would provide a better signal to parties examining conduct that could require authorisation, allowing them to more accurately assess their prospects in the event of an authorisation application. One important consequence of this is that greater resources would be devoted to projects which, because they in fact yielded benefits that exceeded their costs, had good prospects of authorisation. By the same token, fewer resources would be wasted in pursuing projects whose costs exceeded their benefits, and which hence had less chance of being authorised. Such a redirection of effort would not only reduce the inefficient use of resources in seeking authorisation, but would also divert scarce managerial talent from projects that, from a social perspective, are less highly valued to those that are more highly valued.

19 Greater transparency would also yield benefits in terms of increased **accountability**. Even were the ACCC to disregard the outcomes of the cost-benefit assessments it carried out, the availability of those analyses would allow better testing of the social impact of the authorisation process. In particular, third parties could examine whether the estimates involved in these assessments were reasonable, both in the circumstances of the time and in the light of eventual outcomes. Additionally, systematic quantification would provide a more natural focal point for the exercise of rights of review, as it would allow the parties and the appellate body to concentrate on the estimates used in the assessment of costs and benefits and importantly, on the methodology the ACCC employed in coming to an overall assessment.

20 Systematic quantification could also make the authorisation process more **cost-effective**. To begin with, it would provide applicants with a clear framework for preparing authorisation applications, especially if the ACCC set out a guide to the manner in which quantification should be carried out. Additionally, it should allow the ACCC itself to improve its assessment of applications, for example because it could select staff trained in (or train staff to) apply the quantitative analysis framework. An element of routine, or at least predictable methodology, would be introduced into the authorisation process, allowing for the more efficient use of resources in the course of that process.

21 Last but not least, systematic quantification would enhance the **legitimacy** of ACCC authorisation decisions. Understanding the basis on which decisions have been taken would make it more likely that applicants, third parties and the wider community could recognise the authoritative nature of the ACCC's deliberation. Perhaps most importantly, for so long as the "balance sheet" on which the ACCC relies is not plainly set out, there must be the suspicion that it is the ACCC's essentially subjective preference for some outcomes over others, rather than an informed and testable assessment of costs and benefits, that explains the decisions being taken. The scope the ACCC has to seek and secure enforceable undertakings, that is to negotiate outcomes it would like to see, makes

the risk of ACCC subjectivity or partiality all the greater. By demonstrating that its decisions were based on careful, transparent and testable assessments of costs and benefits, the ACCC would more effectively address concerns about its decision-making processes.

22 Ultimately, these effects all go to improving the process by which the community, both directly and through the institutions of government, better monitors its agent in the form of the ACCC. As with other principal-agent relations, improving the efficiency of monitoring creates scope to enhance the welfare of **both** the principal and of the agent. More specifically, were the ACCC more effectively monitored, the community's willingness over the longer term to allow the ACCC to exercise wide powers would be enhanced. The transparency secured by the publication of carefully quantified estimates could replace other, less efficient, forms of control over the ACCC's use of its powers.

23 That said, it is also fair to note the limitations and costs of greater reliance on systematic quantification.

24 The resource costs of quantifying the impact of proposed authorisations (in the sense of the cost involved in generating, testing and ultimately determining valuations) would not be especially high, all the more so as there is so much experience with conducting such studies in other areas of public decision-making. As a result, it seems unlikely that reliance on quantification would impose undue resource burdens on applicants, the ACCC or third parties.

25 As with any other decision-making method, placing greater weight on systematic cost-benefit analysis could displace effort (by the ACCC, applicants and third parties) from other forms of persuasion to investment in the quantification process. Effort that previously went into essentially qualitative arguments would go into 'fudging' quantitative assessments. In this view, as vague qualitative arguments were merely replaced by 'fudged' quantitative arguments, the overall quality of the decisional process would not increase nor would the extent of ACCC discretion be reduced. Rather, the ACCC's lee-way, previously exercised under the cover of imprecisely set out valuations, would be displaced into another form.

26 Whether this is plausible is open to doubt. Of course, all quantification of the kind at issue here is open to debate and hence offers some scope for 'fudging.' However, exposing estimates to testing does impose a substantial discipline, and it is difficult to believe that such testing would not lead to improved application of the methodology over time. What studies there are of the impact of reliance on cost-benefit analysis on the quality of the policy process suggests that though economically inefficient decisions continue to be

made, there are reasons to believe that fewer very poor decisions are made.[7] Additionally, and importantly, the cost-benefit analyses have allowed poor decisions to be identified, stimulating efforts to secure greater emphasis on efficiency in the agencies concerned.[8] As a result, the record seems consistent with reliance on cost-benefit analysis making some contribution to the quality of the policy process.

27 Additionally, it might be argued that the ACCC, were it to rely solely on systematic quantification, could over-look or under-value the 'intangible' or ultimately non-commensurable effects of the proposed conduct. However, this implies a more mechanical and ultimately slavish obeisance to quantification than could reasonably be proposed. Rather, where genuinely 'intangible' or non-commensurable effects are relevant, it is obvious that they should be taken into account in the ultimate assessment.

28 Finally, some might regard relatively unconstrained discretion and vagueness surrounding decisions as virtues rather than vices in administrative processes. For example, in some versions of pluralist or 'neo-corporatist' political philosophies, the administrative process is seen as providing a forum for negotiating bargains between interest groups. These bargains, though they may seem inefficient in economic terms, permit a desirable degree of social consensus and, in any event, form part of the 'muddling through' which is a strength of policy-making in democratic societies. Viewed from this perspective, imposing constraints on the methodology of public decision-making merely inhibits a valuable step in the policy process.

29 Whatever popularity these views may have had in the past, they command less respect today. Additionally, though the concept of the public interest is inherently vague and ambulatory (in the sense of having different meanings in different contexts), it seems difficult to believe that the authorisation provisions are intended to provide a forum for interest-group bargaining. Rather, the wider goals of the Act were well summarised in the Second Reading speech when the Trade Practices Revision Bill was introduced in 1986[9] where it was said that:

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7 See for example, Coglianese, Cary (2002) "Empirical analysis and administrative law" mimeo, John F Kennedy School of Government, Harvard University, at page 16.

8 For example, there is evidence that decisions taken by different US government agencies imply very different valuations of the cost of saving lives – see Tengs, Tammy and John D. Graham (1996) "The opportunity costs of haphazard social investments in life saving" in Robert W. Hahn *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* at 167, 177. This has naturally focussed attention on the scope for improving outcomes by shifting outlays from less cost-effective to more cost-effective life saving programs.

9 Trade Practices Revision Bill, 1986, Second Reading Speech.

> The Trade Practices Act plays an important role in ensuring that the maximum benefits are obtained through an efficient allocation of our national resources, as well as protecting the interests of the consuming public and reputable businesses.

30 Achieving "an efficient allocation of our national resources" suggests an approach far more naturally consistent with systematic quantification of costs and benefits than with pluralist bargains struck behind closed doors.

31 In short, the arguments against relying on systematic quantification of costs and benefits of authorisation decisions seem weak in their substance, their relevance or both. Rather, the gains from cost-benefit analysis, in terms of improved decision-making processes, seem significant.

32 As a result, it is submitted that the ACCC ought to be required to quantify benefits and costs where it is reasonable to do so, much in the spirit (but not necessarily in the same manner) as does its counterpart in New Zealand.

The welfare test

33 Where the benefits claimed in an authorisation application are economic, it is natural to assess them, and to conduct any balancing relative to costs, in terms of a welfare test. However, this raises the issue of what welfare standard should be adopted.

The New Zealand situation

34 It is clear that in New Zealand a "total surplus" standard is applied in assessing authorisation applications.

35 Thus, the NZCC *Guidelines to the analysis of Public Benefits and Detriments* ("Guidelines") state that "the distribution of the benefits (or detriments) is not relevant to the balancing process" undertaken by the NZCC when considering whether to grant an authorisation (Guideline 10). The Guidelines state that:

> … the Commission's approach is not to apply differential weights to benefits (or to costs) according to the extent or nature of the population affected. In other words, no attempt is made to define who is "public" and who is "private" in assessing public benefits.

36 Those Guidelines have temporarily been withdrawn following the 2001 amendments to the Commerce Act, and notably the introduction of a purpose statement. However, it seems clear that the view set out in the Guidelines continues to reflect NZ Government policy.

37 This can be seen by considering the comments made at the time the purpose statement was introduced by the Acting Minister of Commerce, the Hon Trevor Mallard, in recommendations to the Cabinet Finance, Infrastructure and Environment Committee ("the recommendations"). The recommendations deal solely with the proposed purpose statement.

38 To begin with, when explaining the background to the recommendations, the Acting Minister commented that "it is critical that the Act is clearly focused on promoting:

1. the competitive process rather than particular competitors … ; and
2. economic efficiency." (Recommendations, p 2, para 11).

He explained that economic efficiency is seen as desirable because it increases "community welfare", which:

> …can be enhanced by increasing real incomes or by distributing income better. The Commerce Act focuses on increasing real incomes **and is neutral on the distribution of incomes other than to require that the benefit should accrue to New Zealand.** This does not mean that these other goals, such as the equitable distribution of resources, are less important. Rather, it means that if the Act is to effectively contribute to the goal of having an adaptable economy that delivers increased incomes for all New Zealanders, it must be focused on enhancing efficiency. [Emphasis added. Recommendations, p 3, para 12].

39 The Acting Minister made it clear that the addition of the purpose statement should not be interpreted as Parliament "taking positive action to fundamentally change the interpretation of the Act." He noted that:

> This creates the risk that the Act could be interpreted in a new and different way. Clearly this is not what it intended as the purpose statement is simply meant to clarify that competition is not an end in itself, but the means to achieving greater prosperity and economic development. **However, this risk will be managed by careful drafting of my speeches as the legislation passes through Parliament.** [Emphasis added. Recommendations, p 3, para 17].
>
> …
>
> The "public benefit test" suggests that the critical factor is to focus on the Act's goal on the total gain to New Zealand that accrues from promoting effective competition, **rather than the gain that accrues to any sub-group of the economy. This takes account of the fact that in the short to medium term the potential to earn supernormal profits is the key motivator for firms to innovate and supply the kinds of goods and services desirable to consumers. Over time the ultimate beneficiaries of increased innovation and efficiency are consumers.** This suggests

that the Act needs to be flexible enough to consider and balance the short term benefits and losses against the long term gains and losses to all groups in society. [emphasis added. Recommendations, p4, para 18]

40 The views of the Acting Minister are reflected in the Commerce Committee's commentary to the Commerce Amendment Bill. The Committee noted that:

> …we consider that the addition of the purpose statement will not fundamentally change the interpretation of the Act. It is clear that the statement will confirm the existing approach that competition is a means to an end, not an end in itself." (p 7).

41 These consistent themes were also carried through to speeches in Parliament. For example:

> …
>
> I want now to discuss a few provisions of the Bill as reported back. The Committee has recommended that a new purpose statement be adopted in the Act. It proposes that the purpose of the Act be 'to promote competition in markets for the long-term benefit of consumers within New Zealand'. **It makes it clear that competition is not an end in itself, but a means to promote the welfare of New Zealanders. Consumers are given special mention as they are the ultimate beneficiaries of competition. However, the welfare of all New Zealanders will continue to be important.** This was an important aspect of the change, and it brings us a lot more in line with the equivalent legislation in Australia.
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> The focus on competition in the purpose statement also does not preclude wider public benefit issues being taken into account where appropriate. It simply clarifies that there should be a presumption in favour of competition, and competition must prevail unless the efficiencies of other public benefits are shown to exceed the detriments from the lessening of competition. This approach is necessary for a small economy like New Zealand's. The Committee has taken into account the fact that while there are some similarities between here and Australia, there are economies of size, and the size of the New Zealand economy has to be taken into account when making decisions and considering whether an action is anti-competitive. [emphasis added]
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> *Minister of Commerce, Paul Swain, 27 February 2001*
>
> The final issue is the rather self-evident issue of the purpose statement. Of course the original Act talks about competition in markets, but one would assume that it was self-evident that, ultimately, the beneficiaries should be the consumers, who could be anyone – producers, domestic consumers etc. One of the things we were trying to do in the legislation was bring ourselves more into line with Australian legislation … the purpose statement in the Australian Trade Practices Act promotes competition in markets in Australia not just for consumers but for Australians. That is how patriotic the Australians are. We have avoided that patriotism by broadening our purpose

> statement to include consumers – and probably because it would not be appropriate to mention Australians in New Zealand legislation! [emphasis added]
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> *Minister of Commerce, Paul Swain, 10 May 2001*

42 There is consequently no reason to believe that the 2001 Amendments have altered the efficiency test for authorisation in New Zealand.

The Australian situation

43 In the decisions it has taken to date, the ACCC rejects a 'total surplus' test but fails to articulate any clear test in its place. There are reasons for believing that the ACCC's rejection of the 'total surplus' test is inconsistent with the approach adopted by the Tribunal;[10] it certainly differs markedly from the approach adopted to an essentially similar test in the New Zealand **Commerce Act 1986**.

44 It is submitted that legislative guidance should be provided making it apparent that in considering public benefit, attention must be given to efficiencies. Such a change, which would merely make clear what has already been determined by the Tribunal, could parallel the section (3A) inserted into the **Commerce Act** in 1990. That section states that:

> Where the Commission is required under this Act to determine whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct.

45 Additionally, legislative guidance should be given to ensure that when efficiencies are considered as an element of public benefits, the focus should be on efficiency in the aggregate rather than on the distribution within society of the gains from those efficiencies. In other words, what is at issue in the consideration of public benefit is not the impact on any one element in, or component part of, society. This approach is consistent with section 2 of the TPA which refers to "the welfare of Australians" and is seemingly agnostic as between producer surplus and consumer surplus. Rather, the focus must be on Australian society as a whole, netting out what are transfers between its component parts. Just as competition policy is not concerned with protecting individual competitors, so a

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[10] See for example *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357 at 42,677. The ACCC's rejection of a total surplus test is also inconsistent with the ACCC Merger Guidelines, see particularly para.6.43, and the position which has been stated in other ACCC authorisation decisions (e.g. Davids-CBL, RJSA). Other Tribunal statements endorsing a total surplus test are also quoted in the Merger Guidelines, at paras 6.42-6.45: Howard Smith, QCMA and Rural Traders. A more extensive quote from QCMA to the same effect can be found at ATPR 40-012, p.17,242.

consideration of public benefits looks to promote not individual interests within society but rather efficiency and the process of economic growth overall.

46 This focus on the overall impact (the 'size of the pie'), rather than the consequences for particular individuals or groups (that is, the pie's allocation among alternative claimants), reflects the fact that competition policy is not an efficient or even effective means of securing goals of income distribution. Important though these goals are, they are not well pursued by tinkering with the structure of markets, as the implications of different market structures for income distribution are at best highly uncertain.

47 Additionally and importantly, the reality is that there are few efficiency-enhancing proposals, if any, which do not in some way alter the distribution of income, with adverse implications for at least some. Were distributional considerations relevant to the assessment of overall benefit, issues about the distributional consequences of proposed transactions would encroach on all applications for authorisation. Those responsible for the administration of the authorisation process would then bear the burden of having to adjudicate as between the merits of competing claimants, without any basis for making the inherently political decisions that this involves. The overall result would be to make the administration of that policy more uncertain and discretionary, without any real prospect of a better income distribution actually being secured.

48 For these reasons, the Act should state clearly that when the claimed public benefits relate to efficiencies, the relevant test is **whether there will be an enhancement of the efficiency of the Australian economy as a whole**, rather than of any particular component of or beneficiary from, that economy. This test should apply to all conduct that is capable of authorisation, and not merely to mergers.

Conclusions

49 This submission focuses on two Trans-Tasman differences in the application of the authorisation mechanism for anti-competitive conduct. These relate to the role of quantification and to the assessment of net public benefit.

50 With respect to the role of quantification, it is submitted that the ACCC should make greater use of quantification in its assessment of authorisation applications. While there are obvious limits to the extent to which quantification is reasonable, where it is reasonable it should be used. This would enhance the transparency, consistency, predictability, accountability, cost-effectiveness and overall legitimacy of ACCC decisions. A requirement to rely, where it is reasonable to do so, on quantification of benefits and detriments, and to report on that quantification (subject of course to

confidentiality concerns), would be desirable in and of itself, as well as bringing the practice of competition policy into greater alignment on the two sides of the Tasman.

51 With respect to the assessment of net public benefit, it is clear that the New Zealand test abstracts from distributional considerations. In practice, that adopted by the ACCC does not.

52 It is submitted that it would be desirable for a requirement to be inserted into the Australian legislation that

(a) requires consideration of efficiency in the assessment of net public benefit. This could be modelled on section (3A) inserted in 1990 in the New Zealand **Commerce Act 1986**; and

(b) makes it clear that it is benefits to the community, rather than any individual section of the community, that are to be considered in taking account of efficiency impacts.