1. Introduction

1.1 This submission sets out Bell Gully's preliminary views on the Productivity Commission's Issues Paper *Australian and New Zealand Competition and Consumer Protection Regimes* issued in July 2004 (**Issues Paper**). Bell Gully wishes to receive the Productivity Commission's draft report and to participate in the consultation process that the Commission intends to undertake prior to issuing its final report. Bell Gully is a leading supplier of competition law services and advises many major New Zealand and Australian businesses on competition and consumer protection law issues many of which affect the same product markets in both New Zealand and Australia (details of our experience is contained on our website http://www.bellgully.com/areas/competition.html).

1.2 In summary, Bell Gully considers there may be benefits in harmonising aspects of New Zealand and Australia's competition and consumer protection regimes. However, there is a real danger that the concepts of *harmonisation*[1] and *integration*[2] will become confused. We consider that there are:

- fundamental issues in relation to access to justice and the ability of the governments for each of New Zealand and Australia to act in the best interests of New Zealanders and Australians respectively; and

- practical issues,

that mean that integration to the extent of having one trans-Tasman regulator is undesirable.

1.3 The areas in which we consider benefits and efficiencies can be achieved without undesirable consequences, relate to the procedures followed by the New Zealand Commerce Commission and the ACCC. While we consider that the current dual system works efficiently in the vast majority of cases, there is no doubt that the current process could be improved and made more efficient in a number of ways. We address these in section 2 below. In summary, these benefits can be achieved by introducing a mechanism for better co-ordination and/or joint consideration by the Commerce Commission and the ACCC of mergers, restrictive trade practices and consumer protection issues that have trans-Tasman implications.

1.4 Often, and the Air New Zealand / Qantas authorisation proceedings were a case in point, there would be an investigation in one country which impacts on markets which are not the subject of the investigation. In the Air New Zealand / Qantas case, the New Zealand – United States market, as one example, was an issue for the New Zealand regulator but not for the Australian regulator.

2. Harmonising the investigation process

2.1 While co-operation already exists between the Commerce Commission and the ACCC that assists both regulators in achieving their objectives, we believe that there is considerable scope for increased co-operation between the two bodies. This co-operation could extend into such areas as:

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[1] In this context harmonisation means greater co-operation and moves to implement complimentary regimes.

[2] In this context integration means moves towards a single jurisdiction.

(a) The ability for each regulator to gather and share evidence and analysis with the other as of right. Perhaps even with the power to sub-contract investigations and analyses where appropriate to avoid dual inquiries.

(b) The ability to hold joint authorisation conferences in the context of a restrictive trade practice or merger application provided that the separate interests of New Zealand and Australia are recognised.

(c) The further sharing of internal and external resources, expertise and intellectual capital.

(d) The co-ordination or harmonisation of regulatory timeframes and procedures (including the format of applications for clearance and authorisations).

(e) The co-ordination or harmonisation of merger guidelines subject to each country's economic differences continuing to be recognised. In this regard, we note that the safe harbour tests currently recognise this limitation by providing for different market concentration tests.

Please note that this list is not intended to be extensive.

3. Harmonising substantive laws

3.1 There is already a great degree of harmonisation between New Zealand and Australia in competition and consumer protection legislation. However, even while seeking to harmonise the substantive laws of the two countries, the governments of New Zealand and Australia have made specific policy decisions *not* to adopt totally parallel laws based on the special circumstances of each economy.

3.2 We consider that this approach to harmonisation should continue. From New Zealand's perspective, each proposal for legislative harmonisation should question whether reform would increase the welfare of New Zealanders both today and over time. (And vice versa for Australia.) The ability for New Zealand to make its own decisions on law reform that reflect the special circumstances of the New Zealand economy and world best practice should be maintained.

3.3 Harmonisation legislation should seek to adopt world best practice varied only to the extent that each country's economic circumstances require a different approach. In this respect, the New Zealand economy is different to the Australian economy – it is small, very open relative to Australia and with many highly concentrated markets.

4. Integration of trans-Tasman authorities would be unworkable

4.1 The potential exists for significant benefits to be obtained from better co-ordination and/or joint consideration by the Commerce Commission and the ACCC of mergers, restrictive trade practices and consumer protection issues in *appropriate* cases. As noted in 1.3, our experience is that the current dual system works efficiently in the vast majority of cases. Furthermore, while we recognise that there are benefits from a joint procedure in some trans-Tasman cases, a joint process will not be appropriate or beneficial in every single case.

4.2 In any event, for trans-Tasman cases there are likely to be a number of fundamental obstacles to joint decision making. These obstacles, which are briefly explained below, and the additional cost to businesses and consumers who wish to participate in the

regulatory process that these would impose, are likely to outweigh the benefits of establishing a single trans-Tasman competition authority.

4.3 Those obstacles are:

- There would be insurmountable problems in relation to the rights of appeal if harmonisation resulted in the creation of a single trans-Tasman regulator. Access to domestic courts is a fundamental right for the consumers and businesses in each jurisdiction. We believe that retention of that fundamental right for both applicants and objectors will require the retention of full appeal rights in both countries giving rise to conflicts between the two jurisdictions. A single specialist appellate body sitting in either Australia or New Zealand will not resolve this issue. Particularly in the case of objectors, it will increase the cost of raising an objection if an objector is deprived of an opportunity to raise an objection before a domestic court or tribunal. Secondly, a specialist appellate body will not resolve the issue of subsequent appeals (and the need for a second level of appeal from a decision of the Commerce Commission or the ACCC in our view cannot be doubted).

- A trans-Tasman merger or restrictive trade practice that requires authorisation is likely to require the joint decision maker to consider the conflicting interests of Australian and New Zealand consumers. This is because the merger or restrictive trade practice authorisation tests involve a country specific assessment of the effect of the merger or restrictive trade practice on the long term interests of consumers in each country. The gains or losses from any merger or restrictive trade practices are unlikely to be distributed evenly between both countries and, in fact, the joint decision maker may be faced with a situation where there are overall benefits from the merger or restrictive trade practice in one country and overall detriments arising in the other country. This requires a separate assessment of the transaction in each jurisdiction.

Bell Gully