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NEW ZEALAND
BusinessROUNDTABLE
PROMOTING POLICIES FOR A BETTER NEW ZEALAND

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Trans-Tasman Study
Productivity Commission
LB2 Collins Street East
Melbourne
Victoria 8003
AUSTRALIA

Australia New Zealand Competition & Consumer Protection Regimes : Submissions in Response to the Productivity Commission Draft Research Report (October 2004)

The New Zealand Business Roundtable is in general agreement with the approach taken, and the conclusions reached, in the above draft report. For this reason our submissions are brief and confined to key points of interest. Our comments are limited to (i) framework issues relating to cost-benefit analysis and (ii) the four recommendations contained in the draft report.

Cost-benefit analysis

The terms of reference of this study require the Productivity Commission ('the Commission') to consider the potential costs and benefits for both Australia and New Zealand of further harmonisation of competition and consumer protection laws, and various steps towards greater coordination in administration and decision making.

The need for such cost-benefit analysis was highlighted by certain comments made in the course of the Commission's consultation rounds. There is a concern in New Zealand that regulatory costs and impediments are commonly much higher in Australia than in New Zealand, and that these costs should not be imposed on New Zealand businesses and consumers unless a convincing net benefit is demonstrated.

We agree with the conclusion reached in section 3 of the draft report that quantitative cost-benefit analysis cannot reliably be undertaken in the context of this study. Accordingly, as the Commission notes, it is best to attempt only a qualitative assessment of the issue.

The Commission lists a series of points in Table 3.2 which identify various potential costs and benefits. These are intended to have global application to the wide range of possible outcomes (as set out in Table 1) that may eventuate from harmonisation initiatives. Tentative cost-benefit conclusions on various options are advanced in section 5. This approach is understandable, given the Commission's wide terms of reference and the limited time for this study.

However, any attempt to compare costs and benefits at an abstract level is problematic. The specific concern in New Zealand is to avoid moving to a higher cost regime for no commensurate benefits. We think that it would be helpful to explicitly state that detailed analysis will need to be undertaken in relation to any proposed changes in the future. Incentives facing regulators need to be considered as part of this analysis. Also central to any such cost-benefit analysis should be the need to identify the best alternative. Unless there is a process which ensures that any change is based upon best practice, it will be difficult to justify it on the basis of cost-benefit analysis.

Draft recommendations 5.1, 5.2 and 5.3

The Commission has put forward four recommendations. The first three state that the competition laws of Australia and New Zealand should be amended to:

- enable the ACCC and the NZCC to use their information-gathering powers for the purposes of acting on a request for investigative assistance from each other;
- allow the ACCC and NZCC to exchange information that has been obtained through their information-gathering powers; and
- build in safeguards to ensure against the unauthorised use and disclosure of confidential information.

These proposed changes are merely of a procedural rather than a substantive nature. We have no particular issues with them.

Draft Recommendation 5.4

The Commission's final recommendation is that:

> The Australian and New Zealand authorities *should* further enhance their cooperation and coordination, including operational, enforcement and research activities (emphasis added).

The scope of this recommendation is uncertain. What is actually being proposed? The text of the draft report (pages 91-92) would appear to suggest that there be cross-appointments of Commissioners between the ACCC and the NZCC. It is premature to assume that that approach should be followed, and there is inadequate analysis in the draft report to support this conclusion. Before any steps are taken along this path, there should be further consultation on the basis of a specific proposal. Issues that would require further consideration include:

- The potential for, and the consequences of, the loss of regulatory independence between the ACCC and NZCC. An allied concern is the potential loss of regulatory competition;
- The extent to which cross-fertilisation can be facilitated without the need to confer decision-making powers upon the Commissioners of the other jurisdiction; and
- Whether it is appropriate to commence the path to legal harmonisation through a merger of decision-making powers just at the tribunal level. Two potential issues arise. First, should there be prior harmonisation of the statute? To take the example of a trans-Tasman merger requiring approval on both sides of the Tasman, it seems less than ideal to require the same Tribunal to hold one hearing process and apply two separate statutes. Second, the position of tribunal members in this setting is problematic when faced with interpretative differences by appellate courts. Notwithstanding the closeness of the statutes, different judicial interpretations can and do arise in Australia and New Zealand. Should there be a move to an integrated tribunal then, at the same time, this move should presumably be matched with the emergence of an integrated judicial approach for competition and consumer law cases. These developments need to be undertaken in careful sequence; *ad hoc* moves at the tribunal level alone may lead to unpredicted difficulties.

Should you wish to discuss any of these issues further, please feel free to contact our adviser, Mark Berry (04 914 1052).

We trust these comments are of assistance, and we await the Commission's final report with interest.

Yours sincerely

R L Kerr
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