ACCC'S SECOND SUBMISSION TO THE PRODUCTIVITY COMMISSION'S TRANS-TASMAN STUDY: AUSTRALIAN AND NEW ZEALAND COMPETITION AND CONSUMER PROTECTION REGIMES

November 2004

The ACCC's submission

The ACCC's second submission is to further assist the Productivity Commission's study of *Australia New Zealand Competition & Consumer Protection Regimes*. The Treasurer requested the Productivity Commission to undertake the study, and in particular, to examine the potential for greater cooperation, coordination and integration in relation to general competition and consumer protection regimes in Australia and New Zealand.

This submission first comments on the Productivity Commission's draft report issued on 20 October 2004 and secondly deals with other issues arising from the report and the Productivity Commission roundtable attended by the ACCC on 9 November 2004.

ACCC comments on 20 October draft report

On 20 October 2004, the Productivity Commission released its draft report on *Australia New Zealand Competition & Consumer Protection Regimes*.

As noted in the Productivity Commission's draft report, the similar legal, political and commercial environments for Australia and New Zealand underpin a high degree of harmonisation in competition and consumer protection. The draft report also notes that there is international recognition of the closeness and similarity in Australian and New Zealand laws in this area of statutory regulation.[1]

The ACCC agrees with the Productivity Commission's assessment that what marginal differences exist between the Australian and New Zealand competition and consumer protection regimes largely gives rise to a consideration of *potential* impediments rather than actual impediments for businesses seeking to operate in both jurisdictions. Further, the ACCC accepts the view that the marginal differences that currently exist are unlikely to produce any significant distortion in trans-Tasman economic activity at this time. Nevertheless, differences between the regimes should continue to be monitored to ensure that significant impediments do not develop with the further integration of trans-Tasman commercial activity.

The ACCC considers that the key priority at this time is to utilise the significant harmonisation that already exists between Australia and New Zealand to create a model environment that facilitates prompt but appropriate information sharing and cooperation to enhance coordination of operational, enforcement and research activities. In turn, this model of cooperation between the two nations could encourage other countries to more readily provide reciprocity to the Australian and New Zealand regulators for combined enforcement measures that will protect the interests of consumers and business in a time of increasing globalisation.

Overall the ACCC supports the findings and recommendations in the Productivity Commission's draft report, particularly draft recommendations 5.1, 5.2, 5.3 and 5.4 which

[1] The ACCC's initial submission to the Productivity Commission was placed on the web site of the Productivity Commission on 16 August 2004 and the ACCC's views on its role and the key issues of this trans-Tasman study by the Productivity Commission can be accessed at http://www.pc.gov.au .

recommend enhancing information sharing powers between the ACCC and the New Zealand Commerce Commission (the NZCC) based on the example of section 127 of the *Australian Securities and Investments Commission Act 2001*, the introduction of associated confidentiality protections and the further enhancement of cooperation and coordination between the two regulators.

Adopting such measures will greatly assist in developing effective and efficient trans-Tasman law enforcement on competition and consumer protection issues, and develop closer ties between the ACCC and the NZCC.

Further issues arising from the report

The ACCC's additional comments address:

- extraterritoriality;
- reciprocal recognition and enforcement of judgments;
- information gathering and information sharing and confidentiality safeguards; and
- transitional integration.

1. Extraterritoriality

In the ACCC's initial submission it advocated for an extension of extraterritorial jurisdiction, and extension of its powers under section 155 of the Trade Practices Act (the TPA) within the trans-Tasman region to investigate trans-Tasman matters.

In its draft report, the Productivity Commission indicated the provision of enforcement *assistance* powers would be a less costly and less complicated alternative to extending extraterritorial reach.

The introduction of trans-Tasman information gathering powers would assist both regulators in investigating matters where important witnesses or parties are located in the other jurisdiction but the conduct is not directed at that other jurisdiction. However, this will not overcome the fundamental issue that in some cases, the location of the parties in other jurisdiction will make it difficult to establish a legal basis for initiating an investigation. That is, the ability to make any investigation at all depends on where the relevant conduct occurs, and the extraterritorial reach of the legislation.

Currently, the jurisdiction of the TPA is limited to conduct which occurs within Australia or to conduct by a person who is a body corporate incorporated in Australia, a body corporate carrying on business in Australia, an Australian citizen, or a person ordinarily resident in Australia.

Determining whether conduct has occurred in Australia can be problematic. Examples of situations where it is uncertain if the conduct which directly concerns Australia would be considered to have occurred within the jurisdiction include:

- Cases where a foreign corporation refuses to supply to businesses in Australia.

- Cases where a foreign corporation enters into a cartel agreement offshore, and directs subsidiaries to sell at a certain price in Australia but its conduct in entering the agreement may not be occurring in Australia[2].

The requirement to show that a foreign corporation is "carrying on a business" test to extend jurisdictional reach pursuant to section 5 is also problematic. The current jurisprudence on this test indicates that the term "carrying on a business" connotes an element of continuity. Given that the TPA applies to isolated incidents of prohibited conduct, there is thus a tension between the thresholds for establishing a contravention as such and showing that the foreign entity alleged to have engaged in the contravention is carrying on business in Australia[3].

Further, extra-territorial reach does not apply to Part VI or extend to the miscellaneous provisions outlined in Part XII. Accordingly, a person "knowingly concerned" does not fall within the scope of the TPA unless the conduct in question occurred in Australia.

To ensure that the extra-territorial reach of the Act is sufficient to enable the ACCC to take action on its own behalf against parties engaged in anti-competitive conduct that affects Australian markets in trans-Tasman matters, the ACCC submits that there should be an amendment to section 5 of the TPA to extend extraterritorial reach to conduct in New Zealand if/where that conduct would have been conduct to which the TPA would have applied, had the conduct been engaged in Australia. Associated amendments may also be necessary to ensure that investigative powers are sufficient to enable the ACCC to enforce the TPA when extra-territorial reach applies. A similar power should also be given to New Zealand in respect of conduct occurring in Australia.

Such a test would ensure that there is still a strong nexus between the conduct and the jurisdiction investigating the matter, while avoiding the technical difficulties associated with the current wording of the extraterritorial reach provisions. That is, it would not be necessary to show that the offender is necessarily carrying on business in Australia or enter into complex technical arguments about where a breach has occurred. Rather, the test would focus on whether the conduct has an impact in the jurisdiction in question.

This would provide greater certainty for both businesses and the regulators regarding which jurisdictions apply to their conduct.

In addition, there is scope to consider extending the existing provisions of the reciprocal jurisdictional arrangements for a superior court of either jurisdiction to convene in the other jurisdiction to hear specific matters (see, for example, Part IIIA – *Trans-Tasman market proceedings* of the *Federal Court of Australia Act 1976*.) The Federal Court of Australia and the High Court of New Zealand are already empowered to conduct or continue proceedings in each other's country in relation to trans-Tasman market proceedings (e.g. section 46A of the TPA).[4] This would overcome some of the costs associated with investigating and taking proceedings in relation to a matter with extraterritorial dimension. The advantage to the "host" country is that unlawful cross-border conduct is likely to be challenged before it develops or even fully impacts within the host country's jurisdiction.

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[2] It could be argued that in some circumstances, the overseas parent could be considered to be "giving effect to" a cartel arrangement in Australia by implementing it via Australian subsidiaries: *Bray v F.Hoffman-La Roche Ltd* [2002] FCA 243. However, it is uncertain to what extent this could be applied.

[3] *Bray V F.Hoffman-La Roche Ltd* [2002] FCA 243.

[4] There are some restrictions on the NZ High Court's powers when in Australia (certain orders are enforced through the Federal Court of Australia).

2. Reciprocal recognition and enforcement of judgments

The ACCC agrees with the Productivity Commission's assessment that, even if Australia and New Zealand adopted identical legislative sanctions and remedies, problems may still arise in the area of the enforcement of judgments in each other's jurisdictions. There are procedures and statutes that enable the registration of judgments on a reciprocal basis but these arrangements are largely confined to final money orders.

The ACCC would like to take this opportunity to reiterate its view that consideration be given to expanding Australian recognition of foreign judgements to penalties and non-monetary orders made in New Zealand, and similar recognition be provided to Australian judgements in New Zealand. In a time of increasing use of electronic commerce and globalisation, regulators in closely comparable jurisdictions should be allowed to utilise court-sanctioned remedies quickly to counter scams in both jurisdictions.

At the international level, the ACCC's views align with those of the United States Federal Trade Commission (FTC) in the context of the close working relationship the FTC has developed with Canadian authorities on combating cross-border Internet fraud and telemarketing boiler rooms based in Canada. In evidence to the United States Senate, the FTC said:

> We also need to explore how to make our civil remedies more effective across borders. For example, to prevent fraud from being profitable, we need better tools to be able to pursue ill-gotten gains. Thus, we should consider how US and foreign courts, subject to appropriate procedural safeguards, might better enforce preliminary and permanent monetary relief issued by courts of another nation against cross-border consumer scams.[5]

The ACCC is somewhat disappointed that the Productivity Commission has not considered this issue in more detail, and submits that both the Productivity Commission and the trans-Tasman working group on Court Proceedings and Regulatory Enforcement assess this issue as a matter of priority.

3. Information gathering and information sharing and confidentiality safeguards

The ACCC welcomes the Productivity Commission's draft recommendations 5.1, 5.2 and 5.3 which deal with proposals for legislative amendments in both countries that would allow greater disclosure and sharing of information between the regulators.

The ACCC also concurs in the qualifications mentioned by the Productivity Commission in its draft report that any enhancement of information sharing powers must be accompanied by appropriate safeguards that protect certain categories of information from inappropriate disclosure. Also, each regulator must have the authority to "opt out" of an information requisitioning process in certain circumstances without challenge. An obvious example is when a regulator is looking to utilise a leniency policy and it considers that its investigation will be hampered unless it can "quarantine" critical admissions. Any legislative amendments must address these important safeguards.

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[5] 'Cross-Border Fraud', United States Federal Trade Commission, evidence to the Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, Washington D.C., 15 June 2001.

The ACCC also emphasises the importance of the insertion of a confidentiality provision in the TPA equivalent to sections 100 and 106 of the NZ *Commerce Act 1986*. In particular, s 106(7) provides that no court or other person shall be entitled to require any member or officer of the NZ Commerce Commission to divulge or communicate any information furnished or obtained, documents produced, obtained or tendered, or evidence given, in connection with the operations of the Commission, except in very limited circumstances. Unless the ACCC also has those statutory powers it will be unable to provide reciprocal assurances to the NZ Commerce Commission that it will protect critical information received.

4. Transitional integration

Following the release of the Productivity Commission's draft report, a new option was formulated in roundtable feedback sessions conducted by the Productivity Commission during early November 2004. The detail of the new option, which is called "transitional integration", was progressively outlined orally at the roundtable sessions. The ACCC's understanding of transitional integration is:

- The ACCC and the NZCC remain as separate entities and administer their respective national statutes.
- An applicant with a merger or authorisation matter that has Australasian implications, for example, a merger by a business in one country with a business in the other country may seek a "single track process" – that is, a single application that is placed before both regulators who then assess the application by reference to common guidelines, a common timetable and common hearings.
- Each regulator makes its own decision on the application but the timing of the decisions is then coordinated.
- Even though an applicant may apply for a single track assessment, each regulator retains the right to decide that separate applications and consideration in both countries are more appropriate.

The ACCC understands that this concept is based on the view that the process would offer some benefits in terms of a more simplified, streamlined approach for business, while minimising the administrative costs associated with developing an integrated institutional model and maintaining independent sovereignty in decision-making.

However, it is not readily apparent that the potential benefits associated with this concept are significant enough to outweigh the potential costs, or in fact that the result would differ significantly from the current arrangements.

Potential costs and issues include:

- Further consideration would need to be given as to whether the legislative frameworks of each jurisdiction would enable the two Commissions to sit jointly to consider matters.

- Even if the Commissions could sit jointly, their decisions may be subject to appeal for taking into account irrelevant considerations if they are present when issues relevant only to the other jurisdiction are being heard.

- Inevitably, conduct with an Australasian dimension would also have an Australian and/or New Zealand dimension. There will always be some markets which are irrelevant to one agency and for which common investigation would serve no purpose.

- There will be a significantly higher administrative costs and practical difficulties associated with dealing with single track matters, including coordination between investigating teams, developing coordinated requests for information from parties and third parties and coordinating deadlines. Examples of issues that may arise include:

    - The ACCC has set timeframe to consult with interested parties. These are particular tight in relation to merger proposals. The time it would take the two agencies to organise common consultations would inevitably greatly reduce the actual consultation time.
    - The investigation and analysis of merger proposals and authorisation applications is guided by the particular market definition adopted. The two agencies may not agree on market definition, which would make common investigation and analysis difficult.
    - The greater emphasis by the NZCC on quantification of benefit and detriment, which flows from a decision of the New Zealand Court of Appeal, has led to different forms of investigation and analysis conducted by the NZCC and the ACCC even though these can lead to the same outcome. For instance, the NZCC makes greater use of econometric modelling and econometric expertise which the ACCC would not generally require to the same extent. This would raise practical issues in having a common investigation and analysis.
    - Coordination of deadlines for decisions will be difficult when the issues in each jurisdiction are different. While a matter may have a trans-Tasman element, it may involve a number of regional markets. The considerations of one jurisdiction may be much more complex than that in the other jurisdiction, resulting in tensions in establishing deadlines. There may be occasions when one regulator seeks further information while the other regulator may be in a position to move to the separate draft determination stage.

- A common conference/hearing raises particular issues. It would increase the costs to the one agency whose staff and Commissioners would have to attend the hearing/conference in the other country. It would impact on the ability of interested parties in one of the countries to attend. Pre-decision conferences are conducted differently by the two agencies. It would greatly increase the cost to the ACCC to conduct a hearing pursuant to the New Zealand format.

- Where different legislative timetables are imposed, it will not always be possible to coordinate matters. For example, under the proposed formal clearance process for mergers, the ACCC will have 5 days to determine whether a notification is valid.[6] If it is not valid, what happens to the application in New Zealand under the New Zealand legislation?

- The transitional integration concept adds a further formal step at the start of the process in that either regulator may decide that the matter is not appropriate for the single track process. If that threshold decision is challengeable and reviewable by a

[6] See Trade Practices Legislation Amendment Bill 2004 ("Dawson Bill").

court or tribunal then that will add delay and costs while the matter is resolved. Any savings to business may prove illusory.

- Merger applications taken directly to the Australian Competition Tribunal rather than the ACCC under the proposed Dawson amendments[7] would not be capable of assessment under the single track process.

- It would still be necessary for each agency to examine the markets relevant to it and assess the benefits to either Australia or New Zealand, rather than the benefits to both countries. The parties would still be subject to uncertainty because separate decisions and appeals processes would remain.

- Although legislation in each jurisdiction is similar, the public benefit test applied is different, due to different judicial interpretation in each country. This could not be overcome by common application and investigation of matters.

- The concept of common guidelines would seriously undermine the ability of each agency to interpret legislation in a way they consider appropriate. Over time, as a result of different jurisprudence and different views espoused by different Commissions, guidelines on approaches to what might be very similarly worded legislation will differ. Common guidelines could lead to the two agencies compromising what they think is the appropriate approach for their jurisdiction. Common guidelines would remove the sovereignty of each agency to decide on the best approach to interpreting their own legislation.

- The transitional integration concept largely formalises what can be achieved administratively as a result of the unique and close cooperation that already exists between the regulators of both countries. For example, as the Productivity Commission noted that in the case of the recent Qantas-Air New Zealand proposed collaborative alliance, the ACCC and the New Zealand Commerce Commission were aware of the timelines that attach to the process of clearance/authorisations and both endeavoured to coordinate their processes where possible. Administratively, both regulators cooperated where they could while still observing the important legal requirement of separate decision processes.

The ACCC notes that the transitional integration concept would allow each regulator to refuse to accept a single track application where it considered that in the circumstances it would not be practical or appropriate to accept the application. Nevertheless, the ACCC considers that for the reasons outlined above, it would not be sufficiently robust to work in practice, nor would it deliver significant benefits to business over and above those which would be derived by previously recommended increased cooperation.

Conclusion

The ACCC supports the findings and recommendations of the Productivity Commission's draft October report. Apart from the minor suggestions made above, the Productivity

[7] Ibid.

Commission's final report to the Australian and New Zealand Governments should be based on the draft report.

However, the ACCC does not support formalising the single track process under the new transitional integration concept for the reasons outlined above. The ACCC believes that in the future, the level of integration of markets may point to a need to develop a more integrated approach. If the need arises for a more integrated institutional approach in relation to competition and consumer protection regimes between Australia and New Zealand, then this should be examined carefully to develop a model that is practical and efficient. Introducing a "half way" model for a very small number of cases in circumstances where it is unlikely to work well for either businesses or the Regulators, could in fact discourage future initiatives.

The ACCC supports continuing to look for ways to enhance cooperation between the ACCC and the New Zealand Commerce Commission (NZCC). In particular, to build on our experiences with matters involving trans-Tasman elements by further developing our cooperation arrangements with the NZCC in relation to information sharing, coordinating deadlines and submissions, and holding regular meetings to discuss particular enforcement matters to the extent possible under our respective legislations.