COMMERCE COMMISSION

Written submission to the Productivity Commission– Draft Research Report: Australian and New Zealand Competition and Consumer Protection Regimes

November 2004

Introduction

The following submission is from the New Zealand Commerce Commission in response to the Draft Research Report released by the Productivity Commission dated 19 October 2004. The Commission does not intend to reiterate the views it set out in its earlier submission except to confirm its continued support for a two-stage approach that it sees as a hybrid between Option 2c and Option 3 in the Productivity Commission's draft report.

The purpose of this submission is to endorse the Productivity Commission's recommendations (refer to appendix 1) and also to highlight key differences in the analytical approach taken by the Commerce Commission compared to the Productivity Commission. On aggregation these differences lead the Commerce Commission to a different conclusion and recommendation than any of those set out in the Productivity Commission's draft report.

This submission will further explain the Commerce Commission's treatment of:

- the changing dynamics of the trans-Tasman business environment;
- the allocation of benefits and detriments;
- the weight given to the present number of competition and consumer protection issues with a trans-Tasman element; and
- the scope for further co-ordination and co-operation between Australia and New Zealand.

Further elaboration of these points will show why, in the Commerce Commission's view, it is important that the Productivity Commission go further than recommending increased co-operation and co-ordination by information sharing.

The changing dynamics of the trans-Tasman business environment

Competition and consumer protection legislation in Australia and New Zealand operates in a dynamic business environment. In the past, factors such as distance from major trading markets led to a number of highly concentrated industries in both countries. However, as trans-Tasman trade barriers and international trade barriers continue to fall and technological innovations especially in communication and transportation make global trade more of a reality, international competitive pressures are beginning to restrain concentrated markets.

In addition, the increasingly open trading environment has given both countries greater opportunities to seek gains from specialisation. As successful firms outgrow domestic demand they will attempt to break into larger trans-Tasman or international markets. Furthermore, the increasingly global nature of trade means that the Australian and New Zealand economies are likely to be affected by mergers that occur outside of either country's jurisdiction but nonetheless have competition and consumer protection concerns.

The Commerce Commission submits that the Productivity Commission's draft report does not adequately reflect the changing nature of trans-Tasman trade. Its analysis stems from a detailed assessment of the current regimes rather than taking the assessment one stage further and asking whether the status quo is likely to meet both countries' needs in the foreseeable future. A more dynamic assessment of both countries' regimes is likely to highlight probable future benefits that would accrue if a joint trans-Tasman process was implemented.

Allocation of benefits and detriments

In its draft report, the Productivity Commission identifies a number of potential costs from greater co-operation, co-ordination and integration. These include but are not limited to:

- where behaviour that benefits a country is prohibited because such behaviour would adversely affect another country;
- a situation where a country is constrained from making regulatory decisions that would benefit it (when decisions adversely affect another country);
- the duplication of enforcement action (if one country allows the laws of another to be applied extraterritorially in its jurisdiction);
- increased compliance costs (particularly when cross-country laws and processes are applied to domestic transactions, and only a small part of economic activity involves international trade or investment); and
- creating less regulatory certainty (regarding both laws and outcomes), because local considerations are no longer the only factor influencing a country's regulatory regime.

The Commerce Commission submits that these factors should not be viewed as potential costs of increased co-ordination but rather as risks. Whether these become actual costs is dependent on the institutional design and until then they should be treated as risks.

The Commerce Commission is also concerned with the Productivity Commission's assessment of the potential benefits accruing from further co-ordination and co-operation. In the Commerce Commission's view the Productivity Commission does not sufficiently consider the benefits to both agencies that can occur through greater co-ordination and co-operation in the enforcement context as opposed to adjudication. Benefits from joint processes in enforcement will be passed onto consumers in both jurisdictions.

Most of the benefits derived through having a joint approach to enforcement, such as the ability to exercise a search warrant at the same time on both sides of the Tasman or the convergence of standards and advertising claims, do not necessarily require a joint process for decision making by regulatory agencies. Nevertheless, the Commission believes that a joint process would be beneficial in terms of pursuing further convergence in enforcement matters because it requires regulatory agencies on both sides of the Tasman to increase communication.

Increased communication on adjudication matters will spur communication in the enforcement context. The Commerce Commission predicts this will lead to a convergence of standards that will reduce compliance costs to all businesses but particularly small and medium sized entities. These dynamic benefits to enforcement have not formed part of the Productivity Commission's analysis.

The present number of issues with a trans-Tasman element

In the overview to its draft report, the Productivity Commission observed that benefits of proposed changes would be modest because only a small number of trans-Tasman cases are likely to arise. The report states that the ACCC identified only 64 cases having a trans-Tasman element, out of 63,695 complaints and inquiries recorded in 2003-04.

The Commerce Commission submits that little weight should be placed on these numbers because they do not show the importance of the cases. Trans-Tasman cases often have significant implications either because they involve large companies or central industries. Furthermore, as suggested above, these numbers do not capture the benefits that can be derived by reducing compliance costs to businesses presently trying to comply with different laws in each jurisdiction.

The effect on the Productivity Commission's recommendations

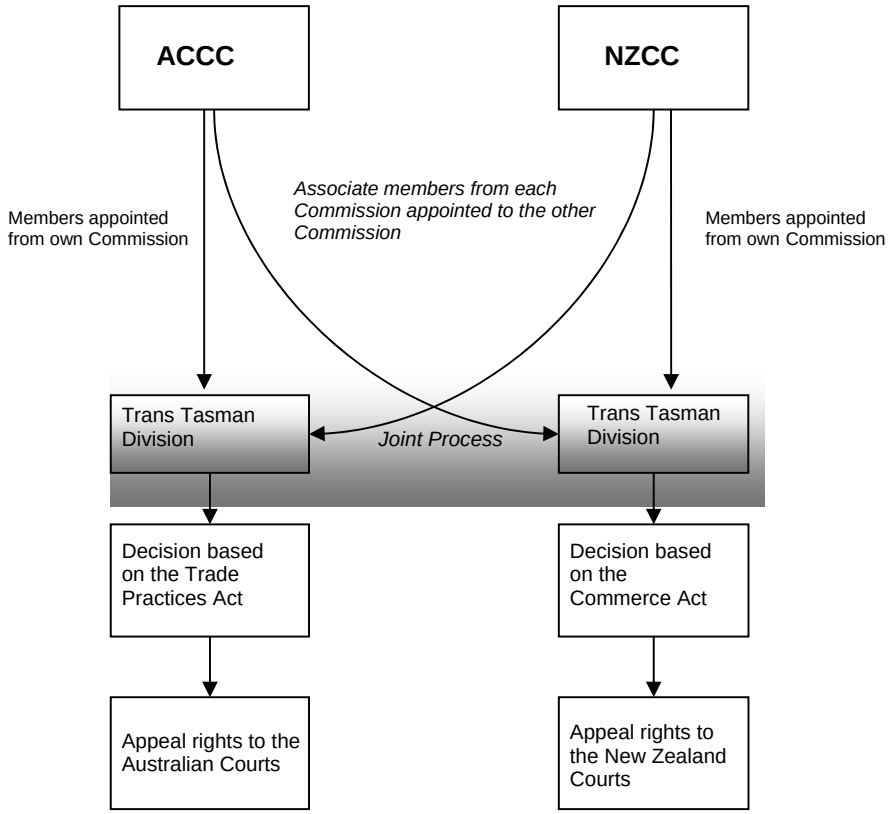
The Commerce Commission submits that if the Productivity Commission was to factor dynamic considerations into its analysis and take a different view of the costs and benefits, then it is more likely to find that there are significantly more benefits and fewer costs resulting from options for greater co-ordination and co-operation than under the analysis used in the draft report. As a result, the Productivity Commission could have identified and given serious consideration to other options for joint processes.

The advantage of the Commerce Commission's two-stage approach

The Commerce Commission believes significant strategic advantages can be achieved by adopting an option that ultimately aims to establish a joint process. The Commerce Commission believes there may be little incentive to form common guidelines and common processes without them being perceived as incremental steps in the establishment of a joint process.

The Commerce Commission envisages a joint process that resembles a hybrid of Option 2c and Option 3 in the Productivity Commission's draft report. Where the Commerce Commission and the ACCC agree that there is a trans-Tasman issue and it would be best dealt with by a joint process then a trans-Tasman division that included both Members from the ACCC and the Commerce Commission would be established to deal with the issue.

Represented diagrammatically:



The trans-Tasman processes would run in tandem so that evidence and cross-examination only occurred once. However, two different decisions would be reported based on the different statutes. The composition of both trans-Tasman divisions would be identical with the same associate members being appointed to both the ACCC and the Commerce Commission. There would be no issues with appeal rights because an appeal based on a decision would be made to the court in that jurisdiction.

The Commerce Commission recognises that there is a risk that in cases at the margin, what is effectively the same division may reach different decisions based on the different requirements of the statutes. However, it may be that these cases are not appropriate cases to be decided by the trans-Tasman division and instead should be decided by a panel made up of ordinary members in each country as is presently the case.

The Commerce Commission submits that the two-stage approach set out in its initial submission, whereby both agencies' guidelines and processes are aligned before a joint process (such as the one described above) is established, would lead to substantial benefits to both countries. A joint process would minimise any duplication costs to parties trying to comply with the laws in both jurisdictions. The ACCC and the Commerce Commission are also likely to reap gains from processes that are more closely

aligned. These benefits will be even larger if the Productivity Commission takes a dynamic approach to its analysis.

Additional issues

There are a number of other issues arising from the draft report that are not the focus of the Commerce Commission's submission for joint processes that the Commission wishes to make further comment on. These are set out below.

Quantification

The Productivity Commission in its draft decision looked at whether different approaches by the ACCC and the Commerce Commission would impede a joint process. The Commerce Commission wishes to take this opportunity to clarify its approach to authorisations of mergers and restrictive trade practices.

The Commerce Commission's approach to authorisations is grounded in an economic efficiency welfare framework. In assessing an authorisation, the Commission has regard to any allocative, productive or dynamic efficiencies arising from the transaction and balances these against any detriment from the lessening of competition. Transfer effects are generally ignored except where gains accrue to foreign shareholders.

In contrast, the ACCC seems to take more account of the impact of the transaction on consumers. Increases in market power are seen as a detriment and cost savings by firms tend to be given less weight as a benefit unless they will be passed on to consumers in the form of lower prices. The ACCC is therefore less likely to authorise than the Commerce Commission in the same circumstances.

The Commission recognises that efficiencies are difficult to quantify but, following the direction of Richardson J in the AMPS A[1] decision, it attempts to do so where feasible. Economic models are used to aid in quantification and are viewed by the Commission as a useful way of clarifying assumptions and capturing the possible effects of the assumptions made. Models are used to complement the Commission's analysis but once consideration has been given to quantitative factors, the Commission then reviews its conclusions against the qualitative evidence. In comparison the ACCC does not attempt to quantify either benefits or detriments and instead prefers to rely upon a qualitative assessment.

The difference in approach is reflected in both agencies' guidelines and processes. Assuming that both countries have adopted an optimal process given their economic and political characteristics at first glance there may not be significant benefits to be derived from harmonising those guidelines and processes. However, as suggested above, the Commerce Commission believes a more dynamic approach should be taken to the analysis and that changing processes and guidelines are unlikely to be perceived as an

[1] Telecom NZ Ltd v Commerce Commission (1991) 4 TCLR 473

issue if such changes were perceived as incremental steps required to give rise to more substantial benefits that are associated with the end point: a joint process.

Co-operation and co-ordination initiatives

The Commerce Commission supports the Productivity Commission's findings that the areas for greater co-operation and co-ordination might include:

- development of joint strategies for enforcement;
- common strategic priority setting;
- developing compliance strategies, especially those that target problematic or non-complying businesses;
- opportunities for joint studies and research;
- sharing the benefits of research across both agencies; and
- enhanced co-operation at the staff level on enforcement and compliance activities.

Other areas where the Commerce Commission sees scope for greater co-ordination include:

- joint development of guidelines and practice notes;
- common forms;
- common processes that ensure steps and timelines are broadly similar;
- amendments to the legislation that allow the competition authority in one country to hold a hearing in the other country's jurisdiction;
- the ability to hold joint hearings; and
- formalising the need to consult the equivalent body at the policy development stage.

Policy development

Presently there are no formal requirements for government policy agencies in either country to consult each other in relation to policy development. There is a danger that where both countries operate without trans-Tasman consultation, legislation could begin to diverge.

The Commission submits that greater communication between countries during the policy development stage would be a useful and necessary step to take to ensure that, as much as possible, competition and consumer protection legislation is aligned. It would also lower the risk of future divergence and where divergence was considered appropriate it would only be after an informed debate with input from both sides of the Tasman. The government agencies charged with delivering advice on competition and consumer protection issues already have informal lines of communication established. We submit that these should be formalised so as to ensure regulatory convergence where appropriate.

APPENDIX I

Response to Productivity Commission's Draft Findings, Draft Options and Draft Recommendations

Productivity Commission's Draft Findings	**Commerce Commission View**
Context of the study	
2.1 The Australian and New Zealand competition and consumer protection regimes have undergone considerable harmonisation. The laws are very similar and there is considerable co-operation and co-ordination between the relevant authorities of the two countries.	The Commission agrees that Australian and New Zealand competition and consumer protection regimes are similar in many respects. Whilst both agencies informally cooperate and coordinate activities, there is considerable scope for further co-operation and co-ordination between the two agencies. That could include: ▪ development of joint strategies for enforcement; ▪ common strategic priority setting; ▪ developing compliance strategies especially those that target problematic or non complying businesses; ▪ opportunities for joint studies and research; ▪ allocating the benefits of research across both agencies; ▪ joint development of guidelines practice notes; ▪ common forms; ▪ common processes that ensure steps and timelines are broadly similar; ▪ amendments to the legislation that allow the competition authority in one country to hold a hearing in the other country's jurisdiction; ▪ the ability to hold joint hearings; and ▪ formalising the need to consult the equivalent body at the policy development stage.

Assessment of current regimes	
4.1 For the Australian and New Zealand competition and consumer protection regimes: • the substantive laws • the application of the laws • the approval processes for acquisitions and restrictive trade practices • the sanctions and remedies • the review and appeals processes are sufficiently similar that they generally are not an impediment to an integrated trans-Tasman business environment.	Agree.
4.2 Notwithstanding draft finding 4.1, there are aspects of the Australian and New Zealand competition and consumer protection regimes that do not provide a framework for considering competition and consumer protection policy in terms of a single economic market. The particular aspects relate to: • the objectives of each country's regime are confined to the welfare of only those in the respective country • the inability to consider the impact of restrictive trade practices conduct on markets beyond each country • differences in public benefit tests • differences in guidelines, processes and decision making.	Agree.
4.3 There are several factors which can impede the abilities of the regulators in Australia and New Zealand to enforce effectively competition and consumer protection regimes in relation to cases with trans-Tasman dimensions: • Statutory restrictions prevent the ACCC	Agree.

and NZCC exercising their information requisitioning powers in each other's jurisdiction. They also face limits on the use of their investigation powers in providing assistance to each other. • Statutory restrictions limit the extent to which the ACCC and NZCC can exchange information that was obtained through their information gathering powers. • Information exchange between the ACCC and NZCC is impeded by the inability to protect confidential information against unauthorised disclosure.	
Productivity Commission's Policy Options	
5.1 Implementing and maintaining a single competition and consumer protection regime for Australia and New Zealand is unlikely to generate benefits that outweigh the associated costs. The resulting benefits would be small, given that the two countries' competition and consumer protection regimes are already very similar, there is extensive co-operation and co-ordination between Australian and New Zealand regulators, and only a small proportion of cases handled by those regulators involve trans-Tasman transactions. The costs of implementation and maintenance would be substantial, it would require agreement on many complex issues, including how each country's sovereignty would be changed.	The Commerce Commission agrees that it is not necessary to develop and legislate identical competition and consumer protection regimes and to establish a common set of institutions. However, the Commission believes that a dynamic approach to the analysis would result in greater benefits from a joint process. A joint process may be an appropriate mechanism to achieve increased co-operation and co-ordination.
5.2 Implementing and maintaining a joint competition and consumer protection regime (operating side-by-side with two separate national regimes) that would apply to selected trans-Tasman transactions is unlikely to generate net benefits at this stage. Benefits are likely to be small and the costs large. In particular, it would	Disagree Option 2c (as examined by the Productivity Commission) is likely to generate net benefits. Whilst implementing option 2c would

require agreement on many of the complex issues that arise in implementing a single regime for all transactions in the two countries.	require agreement on many of the complex issues that arise in implementing a single regime, there would be benefits in working through these complex matters. The Commission also finds that its two stage approach (a variation on option 2c) would reduce the number of complex issues that would need to be resolved. In the Commission's view, benefits would be achieved by having joint and common processes to deal with matters that have an impact on both jurisdictions.
5.1 The Trade Practices Act 1974 (Cwlth) and the Commerce Act 1986 (NZ) should be amended to enable the ACCC and NZCC to use their information gathering powers for the purposes of acting on a request for investigative assistance from each other.	Agree.
5.2 The Trade Practices Act 1974 (Cwlth) and Commerce Act 1986 (NZ) should be amended to allow the ACCC and NZCC to exchange information that has been obtained through their information gathering powers.	Agree.
5.3 For draft recommendations 5.1 and 5.2, safeguards should be built into the Trade Practices Act 1974 (Cwlth) and Commerce Act 1986 (NZ) to ensure against the unauthorised use and disclosure of confidential or protected information.	Agree.
5.4 The Australian and New Zealand authorities should further enhance their co-operation and co-ordination, including operational, enforcement and research activities.	Agree.