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Submission to the Productivity Commission on its Draft Research Report

'Australia New Zealand Competition and Consumer Protection Regimes'

19 November 2004

1. Introduction

1.1 The Australia New Zealand Business Council was formed in 1978. It's objectives are:

- to represent the interests of companies that trade or otherwise conduct commercial activities, including investments, between Australia and New Zealand; and
- to seek to influence government laws and regulations to provide an environment for efficient business relations between Australia and New Zealand.

1.2 The Australia and New Zealand chapters of the Council fully support the initiative of the Australian Treasurer and New Zealand Finance Minister to *'build on the CER agreement towards a single economic market based on common regulatory frameworks'*[1] and are grateful for the opportunity to make this joint submission to the Productivity Commission to assist it in the study it has been asked to undertake.

2. Draft Recommendations too Cautious

2.1 The Council notes that the Commission's Terms of Reference dated 29 June 2004, records that '*the two governments regard deeper co-ordination of the regulatory environments for business as an essential element of a single economic market*', and that the Productivity Commission has been asked, among other things, to '*assess how the operation, administration and enforcement of Australian and New Zealand competition*

[1] Hon Peter Costello, Ministers enhance the trans-Tasman Business Environment, Joint Media Statement 006, 30 January 2004

and consumer protection law affects, impedes or fosters an integrated trans-Tasman business environment'.

2.2 The Council commends the work of the Productivity Commission in producing its Draft Research Report, and its identification of options for the greater cooperation, co-ordination and integration of the Australian and New Zealand competition and consumer protection regime. The Council agrees that a move toward a single economic market goes '*beyond CER*', and as noted by the Productivity Commission in its Issues Paper, involves '*a more ambitious agenda*' than that contemplated by CER. Taking those factors into account, the Council submits that the recommendations made in the Draft Research Report are too cautious, and that in coming to its recommendations the Commission has not given significant weight to the extent to which the options discussed may foster an integrated trans-Tasman business environment.

2.3 At xv of the Draft Report, the Commission says that *'the terms of reference require the Commission to focus on impediments to the trans-Tasman business environment'*. The Council submits that this is too narrow a focus, and does no more then reflect the approach taken since the signing of the Memorandum of Understanding on 1 July 1988 to harmonise business law as a second generation issue for CER.

2.4 Integration is quite a different concept to that of harmonisation; it involves a move from two systems working in harmony with each other to a single integrated system. The Council submits that the focus of the Productivity Commission should be on what changes to the current arrangements could, in a practical sense, foster an integrated trans-Tasman business environment.

3. A new option: Administrative Integration

3.1 While the Council supports the recommendations made in the Draft Research Report under Option 3, dealing with enhanced cooperation between the regulators, this option will not make any change to the business environment. The Council submits that there are a number of the changes which could be made to integrate the administration of procedures for mergers and authorisations with a trans-Tasman dimension which would fall between the Partial Integration Options (2(a) to 2(c)) and Option 3, and would not raise the difficult sovereignty and constitutional issues of Option 2. The benefits of these changes would, in the view of the Council, clearly outweigh the costs,

immediately deliver benefits for business, and would represent a first step toward a greater integration of the two systems.

3.2 Under this option, trans-Tasman mergers and authorisations would involve a single process, and the two Commissions would work together in a coordinated manner on those applications. The existing separate national institutions would be retained; the option simply seeks to integrate administrative processes which impact on the business community.

3.3 This process would be available to any applicant, who would need only to satisfy the respective Commissions that the application had trans-Tasman implications. The Commissions for their part should be able to evoke the process if an application is received by either of them which they determine to have trans-Tasman implications.

3.4 The adoption of this option would reduce cost for both business and regulators, and create a more efficient means of dealing with these issues. It would moreover set the foundation for further integration as the two countries progress towards a single economic market.

4. The Merger Regime

4.1 Forms of Application

New Zealand has a formal merger process. *The Trade Practices Legislation Amendment Bill,* if passed, will introduce an optional formal clearance process in Australia. A clearance application form is prescribed by regulation in New Zealand, and it can be anticipated that the ACCC will similarly adopt an application form for the formal (and perhaps informal) process. An identical clearance application form should be implemented for Australia and New Zealand.

4.2 Merger Guidelines

Both the ACCC and the NZCC have guidelines designed to assist the business community in understanding how the regulator will deal with mergers, and the relevant matters they will take into account. The Commissions should agree on a common set of guidelines, to ensure that the two regulators will take, and will be seen to be taking, the same approach in dealing with mergers.

4.3 Time Frame

The New Zealand legislation requires that (subject to agreement between the parties to extend the time) the Commerce Commission make a decision within 10 working days. *The Trade Practices Legislation Amendment Bill* proposes a 40 day period in Australia. A common time frame should be set, so that applications would be dealt with within the same time frame in both countries.

4.4 Filing of Applications

Where a merger has trans-Tasman implications, a request for clearance should be able to be made to the two Commissions in a single application. It could perhaps be filed in either jurisdiction and be deemed to have been filed in the other jurisdiction on the day the original was filed. Alternatively, it may be necessary to file a certified copy of the application in the other jurisdiction. The important point would be that only a single application would be required. In addition, given the similarities between the Official Information Act 1982 and the Freedom of Information Act 1982, a common approach to the confidentiality of applications and the treatment of commercially sensitive information contained in applications should be adopted.

4.5 Co-ordinated Procedures

The Commissions would be required to act in a coordinated way while retaining their independence. A joint team should be assigned, and where meetings with the regulator are required, there should be a combined meeting of the two regulators, so that submissions need only be made once. In this way costs for both business and the regulator would be reduced, and in addition Commission staff would get the benefit of understanding the issues in the context of the other market, as well as the impact in their domestic market.

4.6 Decision

The decisions of the respective Commissions should be contained in a single document, which would record the separate decisions of each of the Commissions.

4.7 Appeal Rights

Under this option, appeal rights would continue to lie to the High Court of New Zealand, in respect of the NNZCC decision, and to the Competition Tribunal in respect of the ACCC decision.

5. Authorisations

5.1 It is submitted that a similar approach should be taken for authorisations.

5.2 The aim would be to replicate the merger option, by adopting a standard application form and timetable, providing for a single application, and ensuring that the Commissions act in a coordinated way in dealing with that application.

6. Conclusion

6.1 This option relates solely to the administration of the current regimes. It does not involve any transfer of sovereignty, or raise the other complications which the Productivity Commission refers to in its discussion of Option 2.

6.2 The integration of the administrative aspects of the current regimes would however deal with a concern which is of importance to the business community, ensure that the Commissions act in a coordinated way in relation to trans-Tasman applications, and set the foundation for further consideration of greater integration at an appropriate time in the future.