23 November 2004

Australian Productivity Commission
Locked Bag 2, Collins St East
Melbourne VIC 8003
Australia

Dear Sir/Madam

Australian and New Zealand Competition and Consumer Protection Regimes

Thank you for the opportunity to comment on the Productivity Commission's review "Australian and New Zealand Competition and Consumer Protection Regimes", released 20 October 2004.

Introduction

The Institute of Chartered Accountants of New Zealand (the Institute) has over 28,000 members and has branches throughout New Zealand as well as in Melbourne, Sydney, London and Fiji.

The Institute has been given a strong public interest mandate by its council in all advice it provides to government. As well as its government relations function, the Institute promotes quality assurance with regard to its members and contributes to the development of financial reporting standards.

Comment

The Institute has for some years followed with interest initiatives to bring the Australian and New Zealand regulatory settings into closer alignment. Our position has consistently been one of support for greater alignment where to do so is demonstrably in the national interest. This, we believe, can only be determined following careful analysis of the New Zealand policy issues, consideration of competing options and a rigorous analysis of the expected costs and benefits (refer attached brief article on the proposed Australia/New Zealand single market).

Within this context, the Institute enthusiastically supports the Productivity Commission's review process and welcomes its findings with respect to the Australian and New Zealand Competition and Consumer Protection Regimes. The findings appear robust and considered.

While much can be done to improve co-ordination and integration of the Aust-NZ regimes, the Institute agrees with the Commission's key finding that, in the absence of evidence that the two regimes are imposing material impediments to trans-Tasman business there can be little reason to incur the substantive costs of moving to a single regulator enforcing an Australasian law. To this end, the Commission demonstrates well that the costs of options one and two would be excessively high, without delivering the necessary benefits.

The Commission makes well the case for option three (enhanced cooperation under the existing regimes), and the Institute trusts that the specific recommendations under this option will find favour with both governments.

Yours sincerely

David Pickens
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AUSTRALIA NEW ZEALAND SINGLE MARKET AND THE COST OF BEING DIFFERENT

A Single Market

1. On 30 January 2004, Finance Minister, Hon Dr Michael Cullen and Australian Treasurer Hon Peter Costello announced progress towards a single economic market based on common regulatory frameworks.

2. Good news for New Zealand business? Well, maybe.

3. Subsection 88B(2) of the Australian Corporations Act 2001, as amended this year, provides for members of overseas accounting bodies to be qualified accountants for the purposes of the Act provided, among other things, they are:

> "(ii) providing a certificate for the purposes of paragraph 708(8)(c) or paragraph 761G(7)(c) of the Act to a person who is resident in the same country (being a country other than Australia) as that member."

4. The Institute of Chartered Accountants reads the provision as only allowing our members living in New Zealand to provide services under the Australian Act to someone also living in New Zealand. If a single market means the removal of laws such as this that discriminate against a New Zealand business or person operating in Australia, and vice versa, this can only be good for the two economies.

5. If moving to a single market means extending the current mutual recognition arrangements between New Zealand and Australia, the outcome will be positive. Greater competition and choice can only be good for the collective interests of the two countries. The move to recognise offers of securities and managed investment scheme interests, for example, is a positive example that can be expected to reduce transaction costs and improve access to a larger capital market.

6. If a single market means greater co-operation between the two business law regimes this, too, is supported. For example, adopting the United Nations Commission on International Trade Law (UNCITRAL), providing for co-ordination of insolvency procedures for cross-border insolvencies, should see a more orderly and efficient process for dealing with insolvent trans Tasman businesses.

7. If a single market means the two countries harmonising or adopting the same business law, as commented below, the Institute's support is more qualified.

The Cost of Being Different

8. Typically, the costs of New Zealand and Australia having different business laws include:

- higher transactions costs for trans-Tasman business;
- higher transactions costs on, and lower confidence for, overseas investors with an interest in New Zealand as an investment destination; and
- higher administration costs, ie, through having two regulatory bodies rather than a joint body.

9. But how important are these factors[1]? That is, how bad does the Australian law need to be before the "cost of being different" would be outweighed by the benefits of having better regulation? This issue does not arise, of course, when the Australian regulation is the "best fit", in its own right, for New Zealand.

Trans Tasman Business Costs

10. A number of New Zealand businesses operate in Australia. For them, it is an advantage to have to comply with one regime only. To what extent is it sensible to sacrifice the best possible regulation New Zealand could have for the sake of reducing trans Tasman compliance costs?

11. The vast majority of New Zealand businesses, however, are not trans Tasman – they operate only in New Zealand, or in overseas markets other than Australia. The benefits to trans Tasman corporates from lower compliance costs must, therefore, not only outweigh the greater costs of poorer legislation for trans Tasman businesses, but also the costs that fall on the bigger population of businesses that do not operate in Australia.

12. Also, by adopting the same regulation as Australia we may achieve harmonisation in theory, but in practice it will be illusory. In the absence of the same legal institutions, having the same law does not mean that that law will be interpreted and applied in the same way. And then there are the different state and local government laws to contend with. Even under the most ambitious single market scenario, legal advice will still be needed.

Investor Transaction Costs

13. Why should investors spend time and money in learning about the business law in a small distant country that will never make up a significant part of a global investment portfolio?

14. The question is worth asking, but it needs to be asked in a wider context. Why should investors spend the time to familiarise themselves with New Zealand's unique investment environment? That environment includes not only our business law, but the multitude of other regulations such as environmental, employment, health and safety, planning, and tax regulation, to name a few.

[1] This question can only be answered through a case-by-case assessment of each regulatory proposal. This article explores the nature of the factors that need to be considered in making those decisions.

15. Beyond business law, overseas investors will be interested in the quality of our courts, liquidity of our markets, exchange rate risk and what drives that risk (monetary and fiscal settings, and the commodity cycle, for example), the quality of our labour and corporate management, the state of our infrastructure and its ability to accommodate future economic growth (electricity and roads are topical examples), distance from markets, investment options and their prospects and so on and so forth.

16. Within this context, business law is but one consideration for investors, and a consideration any prudent investor would be expected to take legal advice from a professional resident in the country in which they are to invest.

Investor Confidence

17. How much weight should be given to the argument that only by having regimes broadly similar to those within which the overseas investor is familiar, will that investor have confidence to invest in New Zealand?

18. The Institute is not aware of any evidence that overseas investors have, as a consequence of concerns over our business law, lost confidence in New Zealand as a destination for investment.

19. Nor is it our experience that overseas investors are seeking more regulation to encourage them to invest here. In fact investment sites listing New Zealand as a destination for investment are more likely to identify the absence of the often excessive bureaucracy and red tape found elsewhere as a comparative advantage to investing here.

20. And in terms of the quality of government, New Zealand is a good place to do business – the political environment is relatively stable, property rights are well protected, contracts enforced, and corruption in government is not an issue investors need be concerned with. In this regard, New Zealand keeps company with countries such as Australia, Canada and the United Kingdom, not Zimbabwe or Laos, which must pay investors a significant premium for investment.

Tackling Real Problems with Real Solutions

21. In a speech last year[2], the then Minister of Commerce identified the following as central to developing good government policy: identification of the problem that needs to be addressed, and assessing whether the benefits of the regulatory regime proposed are likely to outweigh the costs.

22. This is sensible. Cosmetic reforms with little regard for actual problems are a recipe for disaster. Perceptions (confidence) can be difficult to accurately target, and inaccurate targeting could make the situation worse.

[2] Hon Lianne Dalziel, Government's Vision for Securities Law Reform Legislation, March 2003.

23. Further, perceptions can be fickle and investors are unlikely to remain fooled by cosmetic regulation. David Lange, New Zealand's Prime Minister in the mid to late 1980s, once compared financial markets to reef fish – easily startled by the shadow of a boat, but quickly returning to normal once the "disruption" has passed. Targeting perceptions while the shadow is passing could result in the market being stifled by inappropriate and costly regulation once that disruption has ceased. While an over-reaction by the market can be quickly corrected, this is not the case with regulation, which is difficult to remove once on the statute books.

24. Systemic overconfidence and complacency contributed to the drop in US corporate governance standards witnessed in recent years. It follows that the role of government is not merely to promote confidence, but to promote confidence commensurate with the level of market risk. This is an important difference. Only market reforms that are real, that promote an actual reduction in risk should be pursued (having regard to consequential costs).

Lower Administration Costs

25. A joint body would be expected, through economies of scale, to cost less than two separate bodies, for example, two Commerce Commissions. This result can not, however, be taken for granted. A rough back of the envelope calculation shows that a joint Commerce Commission may cost New Zealand tax payers more. The Australian Competition and Consumer Commission (ACCC) is expected to cost approximately $122 million in 2004/05, compared with approximately $20 million for the New Zealand Commerce Commission. If the cost of the merged entity is shared between the two countries on the basis of population, approximately $20 million in savings would need to be found for New Zealand tax payers to be no worse off. This is unlikely.

Conclusion

26. It is important that the objective of reducing the "cost of being different" not be allowed to substitute for hard policy analysis. Rather, it is important that we remain focussed on assessing the nature and magnitude of the problem, identifying and assessing the options to address that problem and amending the final option where necessary for best effect. This is particularly important for a small country like New Zealand, which cannot as easily as large economies afford the cost of poorly conceived and designed regulation. Within the context of all the factors that influence investors, developing sound regulation appropriate to New Zealand is, in our view, the best way for government to attract overseas investment and promote the objective of sustainable business growth.

27. While some overseas reforms will be appropriate to the New Zealand environment, others will not. It is important that New Zealand not passively adopt a herd mentality to the most recent regulatory trend to grip the collective imaginations of overseas regulators. Agricultural subsidies and barriers to trade in the 1970s, for example, proved destructive, even to the economies that employed these policies against their neighbours.

28. There is no guarantee that overseas regulatory regimes serve their own countries' interests, and there will be even less of a guarantee that it will serve ours. New Zealand must be an astute consumer of overseas regulation if its interests are to be best served.

29. New Zealand's competitors are advantaged by the small New Zealand market from which our firms launch themselves, and our distance from the main markets. It is all the more important that we not allow our regulatory environment to also advantage our competitors.