ATTACHMENT C

AUSTRALIA-NEW ZEALAND- COMPETITION LAW AND ADMINISTRATION-

WHAT NEXT ACROSS THE TASMAN?

The Australia /New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) were designed to bring about a free trans-Tasman market.

The objectives of ANZCERTA have been largely achieved, but in some areas of law the progress has stopped short of complete harmonisation or integration. Competition law is one such area where, while there have been dramatic advances, the current state of regulation still falls somewhat short what would be ideal in a free market context.

There is no doubt that significant benefits[1] have accrued to both Australia and New Zealand as a result of ANZCERTA There is also no doubt that the extensive harmonisation between the Australian Trade Practices Act 1974 and the New Zealand Commerce Act 1986 is important to both countries.

However, there reaches a point where it is insufficient (and inefficient and impractical) for these laws merely to be similar and the final step to completely harmonise them should be taken and to seriously look at a rationalisation of administration and form a regulatory 'partnership.'

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[1] A number of articles have discussed the extent of the benefits accrued as a result of CER. It seems generally accepted that CER reforms, including the removal of regulatory inconsistencies between Australia and New Zealand, is beneficial. (They lead to greater business certainty, open Australian and New Zealand markets up to increased competition and reduce compliance costs.) This article will not cover this same ground again and attempt to justify the basic utility of harmonisation – it will instead discuss the present situation and will highlight ways to move forward.

Australia and New Zealand have largely moved their competition laws into alignment and should now look towards making other efforts towards joint competition law enforcement.

Unfortunately, there are now clouds on the horizon from Australia. It is possible that its law may change again, just as NZ has moved closer to harmonisation. Not that all the clouds are bad but if there is to be change in Australia the relationship with NZ should not be overlooked.

Changes have recently been made by NZ to harmonise Australia and New Zealand's respective treatment of misuse of market power and mergers.

In relations to merger and acquisitions .New Zealand still used the dominance test, rather than the substantial lessening of competition test used in Australia. The result of this is that it was easier for a merger to 'get through' in New Zealand.

These differences were significant. Businesses in the trans-Tasman marketplace had to comply with two different sets of domestic regulation even though they are competing in what is in a single trans-Tasman market to a large extent. This has now been largely remedied.

What happens next?

Before we look at the future a brief outline of the history of ANCERTA.

NAFTA

In August 1963 the New Zealand-Australia Free Trade Area Agreement (NAFTA) was signed. The agreement came into effect on 1 January 1966. It was aimed at facilitating the reduction of protection for a small number of commodities.

In the context of creating a free trans-Tasman market, there were a number of problems with NAFTA. The major problems were that:

(i) it only applied to a very narrow range of goods;

(ii) many goods were specifically excluded from the agreement – including many goods that would have benefited from having a wider market;
(iii) there was no set timetable for the reduction of tariffs;
(iv) there was a policy determination by both countries that the agreement was to be carried out so as to avoid any serious injury to existing industry;
(v) 'consultative committees' were often set up when the trade of either nation became threatened – usually in areas where competition between the countries was actually increasing; and
(vi) the agreement was not actually committed to eliminating barriers to trade.

CER

To a certain extent the shortcomings of NAFTA were overcome when, on 1 January 1983, the Australia New Zealand Closer Economic Relations Trade Agreement (CER) came into effect.

CER was designed:

"(a) to strengthen the broader relationship between Australia and New Zealand;
(b) to develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;
(c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and
(d) to develop trade between New Zealand and Australia under conditions of fair competition."[2]

The fact that CER was designed to reduce barriers to trade set it apart from NAFTA.

[2] Australian New Zealand Closer Economic Relations Trade Agreement, Article 1.

In addition, the CER agreement set down a timetable of when its objectives were to be achieved. Initially, the CER reforms were to be implemented by 1995, but in November 1987 it was agreed to implement CER fully by 1993.

However, it is important to note that the obligations imposed by CER to harmonise business laws were quite limited. The agreement required that Australia and New Zealand:

> "(a) examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labelling and restrictive trade practices; and
> (b) where appropriate, encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements."[3]

1988 Review of CER

In 1988 a review of CER was conducted. This review resulted in a Memorandum of Understanding on the Harmonisation of Business Law being executed by the Australian and New Zealand governments. This Memorandum committed Australia and New Zealand to examining possible harmonisation of their business laws and regulatory practices in the areas of company and securities law, intellectual property, competition policy and consumer protection. This harmonisation was perceived to be necessary to bring the economies of Australia and New Zealand closer together.

Further, Article 4 of the 1988 Protocol to CER on the Acceleration of Free-trade in Goods recognised that the maintenance of anti-dumping provisions in respect of goods originating in Australia and New Zealand would be inappropriate upon the achievement of full free trade.

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[3] Australian New Zealand Closer Economic Relations Trade Agreement, Article 12.

As a result of these developments, both Australia and New Zealand undertook ground breaking and significant legislative reform in 1990.

Australia enacted section 46A of the Trade Practices Act and the Custom Tariff (Anti-dumping) Act 1975 was changed to exclude goods originating from New Zealand from its scope. New Zealand enacted similar legislation.[4]

As a result of these changes the provisions against misuse of market power extend to businesses involved in Trans Tasman trade, whether based in Australia or New Zealand irrespective of where the conduct takes place. The Federal Court of Australia may sit in New Zealand and the equivalent New Zealand court may sit in Australia to deal with any action under these provisions.

Another aspect of these amendments is that the respective competition agencies are empowered to act on behalf of each other in relation to statutory demands for information as part of investigations.

Changes were also made to the Federal Court Act and the Evidence Act to accommodate the introduction of s 46A. New Zealand made similar changes to its legislative scheme.

SOME SUGGESTED FURTHER, AND PERHAPS, FINAL, STEPS.

Expanding Court powers to apply to all the competition law provisions.

The respective Australian and New Zealand Courts are only able to use the Trans Tasman powers with respect to matters relating to s 36A/46A, 155A/98A of the Trade Practices Act and Commerce Act respectively.

[4] Trade Practices (Misuse of Trans – Tasman Market Power) Act 1990-commenced 1 July 1990.

i.e. misuse of market power and related evidence collection and Court procedures.

However, there is no reason why these provisions should not be extended to apply to all competition matters. Such an extension of the existing law would facilitate investigation in all trans-Tasman competition cases. In addition, this change would be quite simple to achieve – the necessary extensions could be made through some fairly minor changes to the existing legislation.

In fact one could go further and give the courts on each side of the Tasman full jurisdiction under either Act or evidence can be obtained in either jurisdiction and be admissible in respective Courts.

It would follow that either regulator can obtain evidence in either country, although some protocol of keeping each other informed would be necessary.

A regime of this kind was agreed to by both countries, in principle, some years ago but interest waned and it was not proceeded with.

Interest is now likely to be revived as the two countries get closer and closer in economic relations and business expects a seamless regime.

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Trans-Tasman Court/Tribunal/Commission

Several commentators have suggested that a trans-Tasman Court, Tribunal or Commission could be established to deal with trans-Tasman competition matters. However, these suggestions have usually met with opposition – usually on the grounds that such a body would cause Constitutional problem in Australia.[5] This article will not engage in an in-depth discussion on this issue.

However, it is suggested that government consider the establishment of a trans-Tasman competition agency, by either legislation or treaty.

Closer links between the New Zealand Commerce Commission (NZCC) and the Australian Competition and Consumer Commission (ACCC).

The ACCC and the Commerce Commission have long had a very a close working relationship. both formal and informal. This could be closer. One-way of facilitating this could be for a New Zealand Commissioner to become an Associate ex-officio member of the ACCC and vice versa.

Another possibility is that the ACCC and Commerce Commission could merge their 'back office' operations. Both Commissions could maintain their separate identities while pooling their administrative, enforcement and operational staff. Such an arrangement would benefit both the ACCC and Commerce Commission.

It would allow them to access a wider range of skills and experience; it would encourage closer relations between the two agencies and coordinated enforcement activities and could provide significant synergies, efficiencies and cost savings. Significantly, such an arrangement could stop a great deal of work being duplicated by both agencies.

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[5] All courts and tribunals created by Australian legislation are subject to prerogative review by the High Court of Australia. This creates problems for a trans-Tasman Competition Court. Also, it is not constitutionally possible to create a trans-Tasman Competition Court that could be appealed to from the High Court.

THE P0SSIBLE NZCC/ACCCC 'PARTNERSHIP' MODEL

I would suggest initially a European Union type model but allowing for future integration and in any case integration at the staff level is quite possible now. In future additional jurisdictions such as Fiji and PNG could join.

The following is suggested,

- the two legislative schemes on each side of the Tasman stay as separate Acts but there may need to be some changes to meet some on the issues discussed in this note. Any changes to either Act to be the subject of consultation or if the Governments differ on changes this is to be put to both Parliaments for advice. In Australia under NCP changes have to be agreed with States and Territories in any case.

- The partnership process to apply to most of Trade Practices Act but not initially, at least, to the regulatory provisions of either country's legislation.

- The two Commissions continue as is but that each only considers intra – national issues. Any cross border issues to be considered by a joint sitting of 3 members from each, jointly chaired. If there is a deadlock then the matter goes back to each individual Commission for decision based on the local circumstances.

- The alternative would be that there is only one body to consider all but this seems premature. Even if you provide that if there is disagreement on any issue a default mechanism is needed.

- Courts and tribunals of each country will have jurisdiction over the respective legislation.

- The legislation will need to be amended define' markets as any market in Australia, in New Zealand or in Australia and New Zealand.'

- The same to apply to' public benefit. It will need to be expanded to cover both countries.

- Each agency will be able to issue statutory demands for information in either country and can be enforced in either country.

- Court or tribunal judgements in one country will need to be enforceable in the other and have precedent value in both.

- All publications, guidelines etc to be joint but the default mechanism to apply where agreement cannot be reached.

- Each agency to report to its Parliament but part of such reports to be joint, if not all,

- At the staff level there is full integration so far as respective work place relations laws allow. There is to be one CEO with Deputy CEOs for each country.

- In relation to information exchange the will need to be supporting legislative changes to make a seamless information regime between the two.

This regime to be reviewed in three years time with a view to total integration of law and administration.

As a first step cross member ship at the Chairman level should be considered and acted upon.

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