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## **Can Australian and US Competition Policy Be Harmonised?**

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**Comments of**

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**An Australian/U.S. Free Trade Agreement-Opportunities and Challenges**

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**INTRODUCTION**

Thank you for the opportunity to participate at this forum on the opportunities and challenges presented by an Australian and U.S. Free Trade Agreement. It is my pleasure to share the developments of the ACCC in the international area of enforcement of competition laws, as well as offer my perspective on the possibility of movement towards harmonisation of competition laws between our two jurisdictions in the context of a Free Trade Agreement.

In my view, while desirable, it can be extremely difficult to achieve total harmonisation of competition legislation between countries, even in the context of a Free Trade Agreement. However, I would argue that in the context of a Free Trade Agreement, and in light of other developments, it may not be necessary to seek complete harmonisation of competition legislation flowing from so-called globalisation of business between our two countries.

It is important to note that in any general free trade environment, and specifically between the U.S. and Australia, there must be effective competition legislation in place. Further both legislative environments do not necessarily require identical provisions although there must be a harmonised purpose and approach to combating key aspects of anti-competitive activity in the domestic market as a starting point. Greater harmonisation offers benefits and a considerable degree of effectiveness can be achieved short of total harmonisation by the use of informal working arrangements and bilateral agreements.

I will discuss the globalisation of commerce and what this has meant for the enforcement of competition laws both within and between countries. In this context, I will discuss Australia's existing relationships with the U.S., and will discuss the New Zealand-

Australia Free Trade Area Agreement and the subsequent Australian-New Zealand Closer Economic Relations Trade Agreement, which provides an example of how effective cooperation can be achieved without the need for total harmonisation of competition legislation.

## TREND TOWARD GLOBALISATION

We have witnessed the rapid globalisation of the world, as many firms that traditionally operated on a national level, are adopting global business strategies. This leads to an increasing interdependence between markets, and is changing the paradigm of how traditional markets are viewed.

Profound changes continue to occur through the rapid growth in international trade and increasing globalisation of commerce. These changes are driven by dramatic improvements in computer technology, communications and transportation. At the same time, there is a global trend towards reducing regulatory barriers to trade and commerce and increasing internationalisation of capital and financial markets. The Australian economy has reflected these changes, and in some areas Australia has been at the forefront, particularly in the area of reducing trade restrictions in the forms of tariffs and quotas.

This globalisation of markets opens Australia to the prospect of foreign competition as well as the influence of foreign policy and enforcement decisions in a number of areas, including that of competition policy and enforcement. While an efficient competition law regime exists for dealing with solely domestic situations, the trend to globalisation highlights the limitations that arise for effectively combating multi-national anti-competitive situations.

In light of this changing global marketplace, the Australian Competition and Consumer Commission (ACCC) is facing a number of challenges in its role as the statutory authority responsible for ensuring compliance with the Trade Practices Act.

From a competition law perspective, there are benefits to be gained from cooperating with and coordinating the work of different competition authorities in preventing the distorting effects of anti-competitive practices. However, secondary benefits can be gained from a trade and competition policy perspective, since competition agencies can contribute to trade policy goals by coordinating and cooperating in achieving competition policy objectives. Arguably, trade policy and competition policy both have the same fundamental objective of enhancing consumer welfare through the provision of a more efficient allocation of resources, whether it be by lowering governmental barriers to trade or through promoting competition.

There is a clear interaction between trade policy and competition policy. Any movement towards trade policy liberalization can be restricted by deficiencies in the enforcement of competition policy. For example one country may move to allow potential import competition by the reduction or elimination of existing import trade barriers in an attempt to liberalise trade. However, the potential benefits from import competition could be

negated by anti-competitive conduct by firms in the liberalised market, such as establishing agreements to undermine the growth of this potential competition. Thus, this example shows how trade policy can be undermined in the absence of effective domestic competition legislation to address domestic anti-competitive responses to liberalised trade policy, or by the domestic competition authority not taking action to combat such anti-competitive conduct.

Conversely, it is important to recognise that trade policy can also lead to anti-competitive situations. The establishment of forms of import protection for the domestic market through tariffs or quotas, for example, can limit competition and the viability of domestic markets. Therefore, it is important to balance the potential impact on trade from ineffective competition policy or enforcement, with the potential impact on competition in markets from the existence of trade policy restrictions.

In addition to this link between trade and competition, I would like to highlight a number of other important reasons why greater harmonisation of competition laws and increased cooperation between competition agencies is necessary and desirable and why it has been developing in recent years.

First, with globalisation, there are many competition problems that transcend national boundaries. This is demonstrated in the increase of global cartel activity, which may be a result of trade liberalisation. Liberalisation is typically beneficial, however it tends to place pressure on firms that may have traditionally dominated particular local markets without international competitive pressure. Faced with the prospect of competition, some of these firms have reacted cooperatively, rather than competitively, and entered into multi-jurisdictional arrangements to allocate markets and agree on prices and output.

Clearly, in a situation where domestic competition policy is focussed on internal market impact, negative externalities can occur. Competition authorities in various jurisdictions clearly have a prime interest in fostering inter-agency cooperation to overcome these impediments to efficiently functioning markets through enhancing effective enforcement of their respective domestic competition laws. Greater harmonisation of competition law may alleviate some of these distortions.

Second, the effective and efficient enforcement of competition law flows from access to adequate and correct information to determine if conduct is in conflict with the competition legislation. In a global economy, often the essential information to properly analyse the matter is outside the domestic jurisdiction. In certain situations the information may be available from another enforcement agency, which has had previous involvement with the relevant parties.

Third, a clear cost of non-harmonisation is the duplicity of transaction costs. Firms that operate in several countries may be subject to different national competition rules. Procedures, time limits and the criteria for assessing the competition impact may vary considerably. These differences can increase the costs faced by firms and increase the uncertainties, which may distort trade flows and international investment.

There have been a number of recent international merger examples where the merging entity faced merger review in several jurisdictions, each requiring different burdens of compliance, and each with different potential outcomes at the end of the process. Multi-national activity can thus lead to extremely high transaction costs for the affected party or parties. In certain cases, we may see a merger that has pro-competitive implications in one jurisdiction, being blocked by the authorities in another. The uncertainty, duplication, differing legislative requirements, and cost may lead to some beneficial transactions not occurring, that may have occurred otherwise.

Fourth, in some jurisdictions, actions against anti-competitive practices can be less rigorous than others and result in distortions, such as some markets becoming targets for anti-competitive activity. In addition, anti-competitive practices tolerated in one country may result in reduced access opportunities to that market, even though foreign firms could provide additional competition, which would be beneficial to the consumers of that country.

The above point emphasises the value of greater harmonisation given that many transactions today have international dimensions fundamental to the transaction, and being held up by the highest common denominator of national scrutiny, may lead to a dilution of the overall global benefits. Establishing a more level or harmonised approach would tend to eliminate or reduce this exportation of national standards to the international environment and would make for a more transparent and predictable environment for both regulators and market participants.

A discussion of greater harmonisation would not be complete without consideration of potential limitations or negative effects. It is arguable, if not doubtful that there can ever be one right competition law that can address the competing national and international contradictions of globalised competitive activity.

There can be concern of asymmetric strength between nations in any bilateral discussions. This could lead to the stronger or larger entity being able to influence harmonisation more closely to their standards than the smaller entity, regardless of whether the new harmonised standards are superior in comparison to the existing national regimes.

Discussions of greater harmonisation will typically follow other international policy efforts. Bilateral negotiations while difficult, pale in degree of difficulty to multi-lateral negotiations, particularly if no common understanding exists on which the new standards may be based. While efforts to discuss the value of such proposals may lead to more balanced competition policy approaches on an informal level, any specific harmonisation will require considerable time and effort to negotiate and implement even between two countries with close commercial and cultural ties such as the US and Australia.

## INTERNATIONAL DIMENSIONS OF COMPETITION POLICY

In recognition of the evolving global marketplace, which raises new regulatory and enforcement challenges the ACCC is actively working in conjunction with international antitrust and consumer protection agencies to address these challenges.

With an economy influenced by heightened economic interdependence between countries and an increasing level of activity on the part of multi-national firms involved in mergers and acquisitions, global cartels and engaged in global marketing strategies towards consumers, international effort is needed to deal with emerging problems. Domestic competition organisations cannot deal with these problems in isolation.

Clearly there exists a need to further both bilateral as well as multilateral efforts between competition authorities in the area of competition law and enforcement.

There are a number of methods of international cooperation between competition agencies, which have been developed over the years. The spectrum of cooperation offers a number of possibilities, which may include provision of technical assistance, exchange of confidential information, notification between agencies of cases of interest, and finally, a mechanism, whereby authorities can agree on the allocation of a case.

The ACCC has been involved in numerous technical assistance programs whereby it makes available its resources and expertise in competition law and consumer protection to countries with less developed competition and consumer protection regimes. These programs consist of hosting visiting competition policy officials, and providing workshops or seminars on relevant issues.

The development and maintenance of informal links with competition agencies is another very important way of keeping informed of developments in competition policy and law in other jurisdictions, as is exchanging views. The ACCC regularly hosts visits of competition policy officials from all over the world, and most particularly from the Asia-Pacific region. The ACCC exchanges senior staff on a regular basis with New Zealand's Commerce Commission and Canada's Competition Bureau and is hoping to begin doing so shortly with the US Federal Trade Commission.

The ACCC has developed an arrangement with the European Commission for the exchange of non-confidential information on competition and consumer protection issues. The ACCC has similar informal arrangements with many other agencies all over the world, including the UK, the USA, New Zealand, Canada and Japan.

However, there exists a limit to the usefulness of such informal or general arrangements, particularly when an enforcement agency requires enforcement assistance in a particular matter, or requires confidential information held by another enforcement agency. In an effort to overcome these specific impediments to effective law enforcement, bilateral cooperation agreements in competition law enforcement are being more frequently developed.

This demonstrates that some degree of international cooperation between competition law enforcement agencies is beneficial and greater harmonisation of competition laws can lead to resolution of a number of problems. International competition policy has been the subject of active discussion at the international level such as GATT, OECD and the WTO.

The issue is, in the absence of an international antitrust regime, what should and can be done to address the issues raised previously in this paper. There seem to be several options:

- ❑ Extraterritorial application of laws.
- ❑ Enhanced voluntary convergence in competition laws and enforcement practices.
- ❑ Enhanced bilateral voluntary cooperation between competition agencies.
- ❑ Regional agreements containing competition provisions.
- ❑ Plurilateral agreements.
- ❑ Multilateral competition policy agreements.

To date the main focus has been on the negotiation of bilateral cooperation agreements between governments and the law enforcement agencies of various countries. There are number of forms of bilateral cooperation agreements. They are:

- ❑ Non-binding, voluntary exchange of non-confidential information and of technical expertise.
- ❑ Traditional comity.
- ❑ Positive comity.
- ❑ Bilateral agreements or treaties permitting exchange of confidential information on a case by case basis.
- ❑ Mutual legal assistance treaties.

As I indicated at the outset, to achieve any effective cooperation in enforcement of competition laws between countries, it is paramount that there is consistency between the intent and purpose of the respective competition legislation. Any inconsistencies can lead to a hindering of any potential gains from cooperation arrangements. In this regard, it is essential that there is a certain level of convergence or harmonisation of competition legislation in order to achieve any degree of effective cooperative between competition authorities.

The ACCC has in place bilateral cooperation arrangements with its counterpart agencies the Canadian Competition Bureau, the New Zealand Commerce Commission, the Taiwan Fair Trade Commission and the Papua New Guinea Consumers Affairs Council.

Negotiations are currently ongoing with other competition and consumer protection agencies around the world, including Japan's Fair Trade Commission and Korea's Fair Trade Commission. These negotiations are to establish an increased global network of formal cooperation arrangements that the ACCC will have in place to facilitate information exchange, cooperation and assistance in enforcement situations.

Amongst the various bilateral cooperation agreements that Australia has in place, the arrangements between Australia and the US are the closest and most formalised.

With respect to the current legislation environments in Australia and the United States, under Australia's Trade Practices Act and the United States's Clayton Act and Sherman Act, there exists a fundamental similarity of objectives in dealing with anti-competitive situations. In the area of merger and acquisition assessment, cartel and other forms of horizontal and vertical restraints and in the area of consumer protection our countries have legislation of similar purpose. This similarity of approach and philosophy has enabled our two countries to make significant progress in developing a far reaching cooperation agreement in competition matters.

In April 1999 the Australian and United States Governments signed a Treaty which allows the ACCC and the United States Department of Justice and Federal Trade Commission to assist each other, and perhaps most importantly, to be able to exchange confidential information on a reciprocal basis for use in anti-trust enforcement. It also provides for assistance in obtaining evidence located in the other's jurisdiction.

Further, in July 2000 the ACCC signed agreements with the US Federal Trade Commission to facilitate law enforcement cooperation in the consumer protection area between the US and Australia. The agreements relate to notification of enforcement activities, cooperation, coordination and exchange of information and will enable the ACCC and FTC to better combat fraudulent, misleading and unfair commercial conduct in each other's jurisdiction.

The trend toward globalisation of business has thus seen much greater cooperation on a bilateral basis between countries and competition agencies in the enforcement of competition laws both domestically and internationally. This cooperation is arguably as great between the US and Australia as it is between any other two countries. Not unrelated to this the US and Australia have two competition laws that are very similar in their design and basic purpose.

#### AUSTRALIA/NEW ZEALAND ARRANGEMENTS

I would now like to turn my comments to the New Zealand-Australia Free Trade Area Agreement, which provides a good case study of an effective working agreement between two jurisdictions allowing for an effective competition law enforcement interchange, while allowing for preservation of respective independent competition legislation.

By way of background, 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. 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. The CER has been referred to as a good template for free trade agreements, given its openness, comprehensive nature, and that it functions simply.

The 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.”

The fact that the CER was designed to reduce barriers to trade set it apart from NAFTA. However, it is important to note that the obligations imposed by the 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.”

In 1988 a review of the 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 the 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.

As a result of these developments, both Australia and New Zealand undertook significant legislative reform and new provisions covering the misuse of market power in trans-Tasman trade came into force on 1 July 1990. The new provisions - s.46A of the Australian Trade Practices Act (TPA) and s.36A of the New Zealand Commerce Act - expand the coverage of competition laws. They took effect as anti-dumping controls on trade between Australia and New Zealand were removed. The provisions cover trade in goods, and goods and services, but not in services alone.

A key part of the reforms were amendments to the legislation in both countries to allow the development of symmetric jurisdictional, procedural and evidentiary provisions in relation to trans-Tasman proceedings under the new prohibitions.

Section 46A of the TPA prohibits a corporation with a substantial degree of market power in a trans-Tasman market from taking advantage of that power for any purpose prohibited in s 46. A trans-Tasman market is defined as a market for goods or services in Australia, New Zealand or Australia and New Zealand. New Zealand enacted legislation that is of similar effect.<sup>1</sup>

Section 5(1) of the TPA was also amended at the same time s 46A was introduced. This amendment extended the extraterritorial scope of the TPA. As a result of this amendment, section 46A applies to conduct outside Australia engaged in by New Zealand, New Zealand Crown corporations, bodies corporate carrying on business in New Zealand or persons ordinarily resident within New Zealand.

The enforcement mechanisms were also amended to give access to documents or other information that may reside in NZ that is related to a possible TPA breach. Section 155 of the TPA generally empowers the ACCC to require persons to furnish information, produce documents or give evidence in relation to possible breaches of the *Trade Practices Act*. Section 155A was introduced to extend the powers granted under s 155 to apply to people in New Zealand. However, s 155A is not as broad in scope as s 155. Section 155A allows the ACCC to serve written notice on a person in New Zealand to require that person to provide documents or information in relation to a possible breach of s 46A. It is an offence in NZ not to comply with a reasonable request for information from the ACCC. A request for information by the ACCC can be complied with by giving the required information to the NZ Commerce Commission, who can forward that information to the ACCC.

However, it is important to note that s 155A does not give the ACCC the power to require a person in New Zealand to give evidence before the Commission, nor does it grant the ACCC power of entry in New Zealand.

The Federal Court of Australia Act has had amendments that have added to the powers that it can use in respect of sections 46A, 155A and 155B matters. For example, if the Federal Court considers that a proceeding can be more conveniently or fairly held in New Zealand then it can direct that the proceeding be conducted or continued in New Zealand. In addition, the Federal Court is able to administer an oath or affirmation in New Zealand. Breaking an oath or affirmation given to the Federal Court sitting in New Zealand is considered perjury under the *Crimes Act (NZ)* (as a result of the enactment of s

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<sup>1</sup> It is important to note that while these provisions are similar, s 36A of the *Commerce Act (NZ)* is not the same as s 46A of the *Trade Practices Act*. An inconsistency exists because the *Trade Practices Act* uses a 'substantial degree of market power' threshold while the *Commerce Act* uses a 'dominance' threshold.

56M(2) of the *Judicature Act (NZ)*). In addition, it is possible for the Federal Court to hand down the judgement for an Australian proceeding while in New Zealand.

Alternatively, the Federal Court is empowered to take evidence or receive submissions from a person in New Zealand via video link or telephone. In addition to the powers discussed above, the Federal Court may, in an Australian proceeding, make an order or grant an injunction when sitting in New Zealand, or make an order or injunction to be served in New Zealand. The Federal Court also has the ability to issue a subpoena requiring a person in New Zealand to appear before the Federal Court sitting in either Australia or New Zealand.

Notwithstanding the existence of the CER, the Memorandum of Understanding under it to, inter alia, harmonise competition policy and the existence of a unique legislative arrangement for dealing with the abuse of market power in trans-Tasman trade, Australia's and New Zealand's competition laws are not completely harmonised. For example New Zealand competition law uses the concept of market dominance while Australian competition law uses concepts of market power and a substantial lessening of competition and New Zealand uses different market concentration ratios than Australia in assessing proposed mergers and acquisitions.

#### CONCLUSION:

As can be seen from the foregoing discussion, the evolution of global commerce has raised the necessity of greater cooperation and coordination between anti-trust authorities, as much of the current economic and corresponding anti-competitive activity, transcends national boundaries.

To achieve advances in greater cooperation and coordination, it is paramount that there is consistency between the intent and purpose of the respective competition legislation. Any inconsistencies can lead to a hindering of any potential gains from cooperation arrangements. In this regard is essential that there is a certain level of convergence or harmonisation of competition legislation in order to achieve any degree of effective cooperation between competition authorities.

While there are clear benefits from a movement to complete harmonisation of competition laws between jurisdictions, the costs and timelines to achieve this state may not justify the effort. It is arguable that an environment of increased informal cooperation and the development of strong bilateral working agreements can go a long way to achieving the benefits of legislative harmonisation, in a more effective and timely manner.

In this respect there is a high degree of consistency in the intent, purpose and even basic structure of US and Australian competition law. In addition there is already a high degree of cooperation between the US and Australia in the enforcement of our respective competition laws which extends to the exchanging of confidential information and obtaining evidence located in the other's jurisdiction.

Clearly, in the context of any Free Trade Agreement between the US and Australia, there would desirably be mechanisms, to deal with the issue of extraterritoriality, in particular situations where conduct may be occurring in one party's jurisdiction but having anticompetitive impact in the others jurisdiction. Such mechanisms could involve an enhancement of existing cooperation arrangements between the US and Australian competition authorities or perhaps, legislative arrangements similar to those that exist between Australia and New Zealand in relation to the misuse of market power. Whether it would require full harmonisation of Australia and US competition law is, in my view, debatable.