International developments

ACCC's approach to international cooperation

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As cross-border commercial activity becomes more commonplace, the Commission is finding it increasingly important to establish links with other competition agencies abroad. The Commission maintains links of both a formal and informal nature with numerous countries, including NZ, Canada, Japan, the UK and the USA. In addition, ties with regional organisations, namely the EU and APEC, are also on the Commission's agenda. The Commission's links range from informal consultations with staff from agencies abroad to the establishment of formal cooperative mechanisms through government-to-government treaties.

It is useful to examine some recent examples of international cooperation that the Commission has been involved in as an indication of the future direction that it is likely to take in competition law cooperation at the international level.

Recent informal links

Most recently, the Commission has acted to improve its ties with:

- *South Africa* — The Competition Board at the House of Trade and Industry is being kept abreast of the Hilmer reforms and changes to the Trade Practices Act, and the Commission has received two visits this year by one of the Board's members, Adv. Willem Pretorius, for consultations on the drafting of a Competition Act for South Africa; and

- *Malaysia* — Malaysia's Ministry of Domestic Trade and Consumer Affairs (Planning and Development Division) has incorporated the Commission's suggestions in its draft Trade Practices Act (1996), particularly it seems in Part VI on enforcement, remedies and appeals. Of note is the apparently wider incorporation of sections from New Zealand's Commerce Act and Consumer Act.

International agreements

New Zealand

On 29 July 1994, the Trade Practices Commission signed a Cooperation and Coordination Agreement[1] with New Zealand's Commerce Commission (NZCC), that was loosely based on the USA/EC Agreement on Antitrust Cooperation and Coordination (1991,

1 See also Trade Practices Commission *Bulletin* 78, September 1994, pp. 12–14.

annulled in August 1994, but revived in April 1995 with a few minor amendments).[2]

The TPC/NZCC agreement is comprehensive in its approach to cooperation and coordination between agencies in the application of competition laws, as well as consumer laws.

With the objective of using this agreement as a benchmark, it is useful at this point to mention certain provisions:

- recognition that the purpose of the agreement is to promote cooperation and coordination between the agencies and the lessening of the possibilities of differences arising in the application of their competition and consumer laws (where the differences are not the result of legislation);
- a provision recognising that differences may occur in the application of laws that implicate a significant interest of either country or agency (a 'traditional comity' clause);
- provision for the request by one agency for assistance from the other (a 'positive comity' clause), subject to certain limitations; and
- the agreement notes that it operates concurrently with the Mutual Assistance in Business Regulation and Mutual Assistance in Criminal Matters legislation. (This legislation is considered not particularly helpful as far as general exchange of information goes, and certain requests for information from other agencies under the legislation can be met only with the approval of the Attorney-General.) The agreement also operates concurrently with the 1986 OECD Recommendation on Restrictive Business Practices Affecting International Trade.

United States of America

In 1982 Australia entered into a Memorandum of Understanding with the USA, namely the Agreement Relating to Cooperation on Antitrust Matters. The extent to which international cooperation is possible under this agreement is limited by, among other things, the strict confidentiality requirements that legislation (particularly in the USA) places on sharing anti-trust evidence. This agreement has also been criticised as being too one-sided. While accommodating active USA anti-trust enforcement, it is not a prominent feature that the agreement be used to facilitate Australian competition law enforcement.

Following the promulgation of the USA's International Anti-trust Enforcement Assistance Act 1994 (IAEA),[3] problems in concluding competition cooperation agreements with the USA created by confidentiality requirements could be overcome through the conclusion of Mutual Anti-trust Assistance Agreements that provide for reciprocity, among other detailed terms and conditions.

The Commission is currently discussing the conclusion of such an anti-trust assistance agreement with the USA. There are a few points that should be made about the substance of an agreement that is concluded under the IAEA. It is useful to use the TPC/NZCC and USA/EC cooperation agreements as comparisons.

- There is no scope for such an agreement to extend cooperation and coordination to consumer laws as the TPC/NZCC agreement did.
- The purpose of an IAEA agreement is cooperation and mutual legal assistance that aims to render more effective the enforcement of the parties' anti-trust laws, and to facilitate the administration and enforcement of those laws. There appears to be no widening of such agreements to incorporate elements of 'coordination' or 'lessening the differences in the application'

2 See also Trade Practices Commission *Bulletin* 62, September–October 1991, p. 18.

3 See also *Bulletin* 80, February 1995, pp. 22–23.

of those laws (as in the TPC/NZCC or USA/EC Agreements).

- The IAEA allows for the inclusion of a broad positive comity clause, permitting each party to request that the other act to protect the important interests of the requesting party, whether or not the conduct underlying the request would constitute a violation of the anti-trust laws of the requested party. This clause makes for quicker imparting of evidence, as neither agency will be required to analyse the evidence to determine whether there has been a breach of any particular anti-trust law.

- Any IAEA agreement with Australia will likely have to operate concurrently with, or under, Australia's mutual assistance legislation, as well as with the 1986 OECD Recommendation.

European Union

The Commission is keen to formalise its links with the EU Directorate-General responsible for competition policy (DGIV) and hopes to one day conclude an inter-agency agreement. This would permit more sophisticated forms of cooperation, extending beyond the current policy development issues and exchange of non-confidential information to include the exchange of confidential information and the taking of evidence on each other's behalf.

APEC

The latest developments in APEC still seem to exclude any specific cooperation agreements that may concern the Commission in or with that region in the near future.

On 19 November 1995, an Action Agenda was adopted at Osaka, under which the leaders called upon their Ministers and officials to begin the preparation of 'concrete and substantive Action Plans' (to be submitted at the 1996 Ministerial Meeting in the Philippines for assessment), and instructed them to engage in consultation to facilitate the exchange of information.

Nevertheless, member countries of APEC have used this forum to exchange views on competition matters. Most recently, there was an APEC conference on Competition Policy and Law in Auckland on 24–26 July 1995.

Cooperation with other countries

Cooperation with other countries is of a far less developed nature, although the 1986 OECD Recommendation is of some significance to the extent that it facilitates the exchange of information between the OECD member countries. The regular meetings of the OECD's Committee on Competition Law and Policy and the Committee on Consumer Policy provide for a regular exchange of views on a range of competition and consumer issues.

International Standards Organisation

Development of international standards for environmental claims

The ISO sub-committee covering the development of standards for environmental claims met in Seoul from 24 November to 2 December 1995. Bill Dee, an officer of the ACCC and a member of the sub-committee, chaired the Plenary Session at the sub-committee meeting. Below is a summary of the standards discussed at the meeting.

The Commission has an active interest in environmental marketing claims. It is in the process of reviewing a guide to environmental claims for marketing, published in February 1992, to take into account developments at the ISO level.

The ISO sub-committee responsible for developing standards for environmental claims has three working groups which will write and develop the documents that, after many drafts,

revisions and ballots, will become the ISO standards.

The standard being developed by Work Group 1 will provide a model for administering programs that award eco-seals or labels to products. These are called third party programs because these programs are separate from the buyer and seller of the product. The third party certifies environmental aspects of the product. Today, many of these programs exist at the national or regional level. Examples are the German Blue Angel, Canada's Environmental Choice, and Scandinavia's Nordic Swan. These programs differ in how they select product categories, what criteria they use to evaluate products, and how they arrive at a decision to award a label.

The standard provides an opportunity to set guidelines for principles and procedures that ensure that third party practitioners operate their programs based on rigorous science and involve all stakeholders in the development process. The first committee draft for this standard was defeated at ballot. A major reorganisation of the document began at the meeting in Oslo in June 1995 and continued at the meeting in Korea.

Work Group 2 is developing a standard for self-declaration environmental claims. These are the claims that manufacturers make on product labels and in advertising and promoting their products. The objective of Work Group 2 is to develop guidelines that will lead to accurate, non-deceptive, verifiable and relevant environmental claims. The document will provide the qualifications surrounding the use of many specific environmental terms such as 'recyclable'. In addition, the standard will set qualifications for at least some symbols that imply environmental claims, such as the chasing arrows symbol or mobius loop which is associated with recycling.

The first committee draft for comments was reviewed at Oslo. A revised document has been distributed for a committee ballot due by 31 December 1995.

The objective of Work Group 3 is to develop general principles that apply to all environmental claims, declarations and eco-seals or eco-labels.

A committee draft document for comment has been developed, which sets out nine principles.

1. Environmental labels/declarations shall be accurate, verifiable, relevant and non-deceptive.

2. Information on the relevant environmental attributes shall be available to purchasers from the party making the declaration.

3. Environmental labels/declarations shall be based on sufficiently thorough scientific methodology.

4. Information concerning the procedure and methodology shall be available to all interested parties.

5. The development of environmental labels/declarations should, wherever appropriate, take into consideration the life cycle of the product or service.

6. Information demands related to environmental labels/declarations shall be limited to those necessary to establish conformance.

7. Procedures and criteria for environmental labels/declarations shall not create unfair trade restrictions nor discriminate in the treatment of domestic and foreign products and services.

8. Environmental labels/declarations shall not inhibit innovation which maintains, or has the potential to improve, the environment.

9. Standards and/or criteria applicable to environmental labels/declarations should be developed through a consensus process.

This standard is moving forward as a committee draft for comment.

International standards that promote truthful, accurate, relevant and non-deceptive claims will benefit international producers. Furthermore, the standardisation of environmental claims will

help consumers by simplifying valid comparisons.

These documents could move to balloting at the Draft International Standard phase in early 1996 and become international standards in 1997.

For further information, contact Bill Dee on (06) 264 2853.

From Canada

Abuse of dominant position — Interac

On 14 December 1995, the Director of Investigation and Research, Canada filed an application with the Competition Tribunal for a consent order against the nine charter members of the Interac Association (Interac) and Interac Inc. The Interac charter members are Bank of Montreal, The Bank of Nova Scotia, Canada Trust, Canadian Imperial Bank of Commerce, La Confederation des Caisses Populaires et d'Economie Desjardins du Quebec, Credit Union Central of Canada, National Bank of Canada, Royal Bank of Canada and the Toronto-Dominion Bank. This matter was pursued by the Director as a case of 'joint dominance' under the abuse of dominant position provisions (ss 78 and 79) of the Competition Act.

Interac provides a shared cash dispensing service whereby cards issued by one Interac member can be used to obtain cash from an automated banking machine (ABM) owned by another Interac member. Interac also provides a service for electronic funds transfer at point of sale, or EFTPOS, which allows consumers to make purchases at participating retail outlets using Interac trademarked debit cards.

It is alleged that Interac's charter members substantially or completely control the market for the supply of shared electronic network services in Canada by leveraging their control of demand deposits and ABMs in Canada. They are alleged to have engaged in a practice of anti-competitive acts which has had, and is continuing to have, the effect of preventing or substantially lessening competition in Canada in two markets: the 'intermediate' market for the supply of shared electronic network services to financial institutions, retailers, third party processors and other service providers; and the 'retail' market for the supply of shared electronic financial services to consumers or cardholders.

The Competition Act and abuse of dominant position

The current Competition Act is designed to supplement market forces, rather than replace them, through the prevention of business practices that impede efficient competitive processes.

The Act contains substantive criminal and non-criminal (civil) provisions to deal with anti-competitive practices. The latter deal with anti-competitive mergers and abuses of dominant market positions, refusal to deal, tied selling, delivered pricing and specialisation agreements.

The fact that a company is large or possesses a dominant or monopoly position in a market does not in itself raise an issue under the Competition Act. The Act is concerned with situations in which a firm has substantial control or market power and abuses its position of dominance with an anti-competitive effect in the market. Coverage of the Act includes joint conduct whereby 'one or more persons' substantially or completely control a class or species of business.

Where the Director believes that the criteria of the abuse of dominance provisions are satisfied, he may file an application with the Competition Tribunal seeking an order to rectify the situation.

As with other civil reviewable matters under the Act, the Competition Tribunal, which is made up of judges of the Federal Court and lay persons, has broad discretion to issue such orders as are provided under the Act to remedy the effects of the conduct in question. With respect to an abuse of dominant position, the Tribunal may issue an order prohibiting any

person subject to it from engaging in the practice of anti-competitive acts found to exist, and/or, in certain circumstances, order it to take such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice in the market.

In determining the effect of such a practice on competition, the Tribunal must take into consideration whether the practice is a result of a firm's superior competitive performance.

Anti-competitive acts

The charter members of Interac are alleged to have enacted and enforced by-laws which, among other things, have:

- restricted Interac membership to Canadian deposit-taking financial institutions that are members of the Canadian Payments Association, thereby excluding retailers, third party processors and others;
- restricted certain network privileges to Interac charter members and effectively closed this class of membership to new members;
- established excessively high new member or initiation fees for both its ABM and EFTPOS services;
- prohibited members from charging cardholders of other members for the use of ABMs; and
- imposed strict account eligibility criteria and limitations on the use of the network software and thereby precluded or impeded the introduction of new services or innovative products on the network.

Relevant market

The Director determined that the relevant market in which Interac operates is the supply of shared electronic network services in Canada. These services ultimately enable Interac members to offer consumers widespread electronic on-line access to demand accounts, including lines of credit, attached to a deposit account or a credit or charge card. This is achieved by cardholders of one Interac member being able, by virtue of the Interac network, to utilise ABMs and EFTPOS terminals of other Interac members.

Individual financial institutions' proprietary and small or shared electronic networks are, by comparison to Interac, inadequate substitutes. Therefore, it has become essential for financial institutions, and increasingly essential for non-financial institutions, to connect to the Interac network in order to effectively compete in Canada in markets such as retail banking and credit/charge cards.

Consent order

The filing of the application for the consent order followed more than a year of in-depth discussions with Interac. The charter members of Interac have consented to the Director's request for the order.

The consent order would require Interac to open its network to potential participants on a non-discriminatory basis, except that Interac would be allowed to stipulate that only regulated financial institutions will be entitled to issue cards which access the network.

It would also prohibit Interac from continuing its current practice of levying new member entry fees based on card issuance. Rather, fees will be collected on a user or transaction basis payable by all members.

The consent order also requires Interac to discontinue its prohibition of surcharging, which currently prevents ABM deployers from levying a charge to a cardholder of another Interac member. Accordingly ABM deployers will be able to determine and charge a competitive price for ABM services.

It would also alter the composition of the Interac Board of Directors, remove Interac's prohibition of pass-through accounts, and make the Interac network software available for new services that require on-line access to demand accounts.

Through the consent order the Director aims to not only bring about an end to the practice of anti-competitive acts but also put in place

changes necessary to restore competition in this market.

The consent order is now open to public scrutiny and, in accordance with Tribunal rules, will not be finalised until any such interested parties have an opportunity to comment and the Tribunal is satisfied that the order accomplishes the aims of the Act.

From New Zealand

These items were extracted from the October–November 1995 issue of the New Zealand Commerce Commission's newsletter Fair's Fair.

The Commerce Commission enforces both the Commerce Act 1986, which contains restrictive trade practices provisions, and the Fair Trading Act 1986, which deals with consumer protection matters.

Trade and competition policies in New Zealand

The following are extracts from a speech by Commerce Commission Chairman Dr Alan Bollard to the 1995 Conference of Economists hosted by the South Australian Department of Treasury and Finance.

Synopsis

This paper discusses the major regulatory changes in New Zealand, and examines the roles of competition policy (the Commerce Act) and trade liberalisation in stimulating competition and improving competitiveness. It also looks at the very real effects this has had on the economy today.

Conclusions

In the last ten years, economic policy in New Zealand has witnessed a major shift from one based on protectionism and import substitution to one aimed at promoting competition and international competitiveness. Competition and trade policies have been important components in the new free market approach, and interact in a mutually enforcing way. The transformation is now almost complete. Internationally, CER helped New Zealand firms overcome the disadvantages of operating in a small, geographically isolated, economy. The main external focus now is on opening trading opportunities with the fast-growing countries in South-East Asia as they deregulate and increasingly open their economies to foreign competition. Internally, the main competition policy concern is the dominant firm, especially in the utility sector.

New Zealand has, over the last two years, experienced very strong growth in the economy. The indices show that this has come about partly as a consequence of improving international competitiveness during the early 1990s. This has survived unhelpful terms of trade movements and a rising New Zealand exchange rate over the last few years (increasing from 70 Australian cents to over 90 cents). Both imports and exports continue to grow strongly. The GDP growth is now expected to slow from 6 per cent to around 3 per cent for the next few years, with the price and wage projections remaining competitive.

Clearance granted for the purchase of Taupo Electricity

The Commerce Commission has granted individual clearances for Power NZ, TrustPower, Bay of Plenty Electricity and Hawke's Bay Power to purchase all the shares of Taupo Electricity (and its associated company, Taupo Generation). The clearance applications resulted from the Taupo District Council's decision to sell its electricity venture by way of competitive tender.

The Commission concluded that cross-border competition for line function services was not likely to be feasible between Taupo Electricity and its neighbouring power companies, given the sparsely settled nature of the boundaries of the relevant companies.

As regards the national wholesaling and retailing markets, the Commission considered that any minor aggregation resulting from the proposed acquisitions was not likely to be material.

The largest (37 per cent) shareholder in Bay of Plenty Electricity is Power Supply Corporation Ltd, a wholly owned subsidiary of Fletcher Challenge Ltd.

The Commission also considered the effect of the proposed acquisition on competition between gas and electricity because of Fletcher Challenge's one-third stake shareholding in Natural Gas Corporation, the Taupo area gas distributor/retailer.

The Commission was already examining the effect on competition of Fletcher Challenge being associated with both a gas and an electricity distributor/retailer. As a result of the Commission's concerns, Fletcher Challenge entered into a deed of settlement with the Commission which satisfactorily addressed any lessening of inter-fuel competition in the Taupo area.

In granting the clearances, the Commission concluded that the proposed acquisitions would not lead to any of the companies concerned acquiring or strengthening a dominant position in any market.

Taupo Electricity was subsequently acquired by TrustPower Ltd.

Court action follows food labelling investigation

As a result of its investigation of food labelling, the Commerce Commission is prosecuting two companies, is discussing guidelines with the Fruit Juice Association and has held seminars for the food industry.

The Pacific Brands Food Group Ltd has pleaded not guilty to making allegedly misleading representations about the fat content of Plumrose ham. The case should be heard in the Christchurch District Court on 7–8 December 1995.

Another company will be prosecuted for allegedly misleading conduct as to the characteristics of a snack food product. This case will be filed in the Auckland District Court.

In its food labelling investigations, the Commission has been focusing on claims about fat content such as 'light', 'lean', '% fat free', and that products are healthier than those produced by competitors.

The Commission has also assessed many claims made about fruit juices available from retailers throughout the country, and is discussing the issues raised in the assessment with the Fruit Juice Association.

Guidelines explaining how country of origin should be described and how terms like 'fresh', 'squeezed' and 'pure' should be used are being prepared.

When the guidelines are completed, the Commission will contact all juice manufacturers whose labels have been examined and will discuss the relevant issues with them to promote widespread compliance with the Fair Trading Act.

Lawyer and company fined $20 000 for misleading land buyers

A Christchurch lawyer, John Rutherford, and a company of which he is a director, Rural Management Limited, have been fined $20 000 for misleading people about land being sub-divided.

Charges were brought by the Commerce Commission.

Mr Rutherford's company advertised 'fully serviced titled sections' at Wainui near Christchurch. However, stage 1 of the sub-division was not fully serviced as there were no arrangements in place for disposal of sewage. Titles were not available for sections in stage 2 of the sub-division.

Mr Rutherford and Rural Management were found guilty of two charges each under the Fair

Trading Act. Judge Holderness imposed fines of $7500 on each charge against Rural Management, $2500 on each charge against Mr Rutherford, and court costs and witness costs to be paid by the company.

Commission Deputy Chairman Mr Peter Allport said that Mr Rutherford and his company knew that they were misleading people about the sections and that they had paid the penalty for that. The sections were promoted in the way most likely to sell them and the false claims related to information vital to the promotion — that buyers could build immediately and that they could get titles.

Mr Rutherford and Rural Management have appealed against their convictions and sentences.

Vietnamese delegation

A Vietnamese Government Price Committee delegation recently visited the Commission's offices to discuss Australian experiences of State regulation of market prices and the implementation of the Trade Practices Act and the Prices Surveillance Act.

Their visit to Australia, from 16 November to 2 December 1995, was coordinated by the Commission and the Asia-Pacific Institute at Macquarie University.

The delegation consisted of:

- Mr Nguyen Khanh Long, Chief of Cabinet of SRV Government Price Committee (leader of the delegation);
- Mr Khuc Van Anh, Chief of Department;
- Mr Cao Chon Hung, Chief of Department in Ho Chi Minh City;
- Mr Vu Trong Chat, Director of the Financing-Pricing Department in Thanh Hoa province;
- Mr Huynh Ngoc Tuan, Chief of Department in Hanoi; and
- Mr Nguyen Quang Vinh, interpreter.