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19 November 2004



Trans-Tasman Study
Productivity Commission
LB2 Collins Street East
Melbourne
Victoria 8003
AUSTRALIA

Motor Trade Association Incorporated (“MTA”):

Submission to Productivity Commission on the Draft Report for the Australian and New Zealand competition and consumer protection regimes

1 Introduction

- 1.1 The MTA appreciated the opportunity to meet with the Productivity Commission (“the Commission”) on 5 November 2004 in relation to the Australia New Zealand Competition and Consumer Protection Regimes Productivity Commission Draft Research Report (“the Draft Report”). The MTA now makes the following written submissions in relation to the preliminary findings and recommendations contained in the Draft Report.
- 1.2 In **summary**:
 - a The Commission should make a recommendation in relation to the unconscionable conduct provisions outlined at C.4 of the Draft Report. The Commission should **recommend** that the New Zealand government inquire into the Australian regime in Part IVA of the TPA to assess whether a similar regime is necessary in New Zealand.
 - b The Commission should **recommend** that the New Zealand government inquire into the use of Industry Based Codes, as permitted by Part IVB of the Trade Practices Act 1974 (“the TPA”), to assess whether a similar regime is necessary in New Zealand.
 - c The Commission should upgrade its note (on page 10 of the Draft Report) in relation to the substantive differences in franchise law to a **recommendation** that the New Zealand and Australian governments should inquire into the differences in this area and the impact those differences have on trade and investment.

2 Unconscionable Conduct

- 2.1 The MTA is concerned with the difference in substantive law relating to unconscionable conduct as between Australia and New Zealand as it is outlined in section C.4 of the Draft Report. There is no statutory equivalent of Part IVA in New Zealand and reliance is therefore placed on the common law doctrine of unconscionable dealing. This is an onerous and costly doctrine to enforce, and there are limited remedies available in the case of breach. This is overly burdensome for small and medium enterprises (“SMEs”) which have limited resources at their disposal and are often more likely to have been subjected to unconscionable dealing.
- 2.2 Part IVA of the TPA sets out the factors that can be considered in any determination of whether unconscionable conduct has been demonstrated. These are far broader than the common law factors meaning that a larger range of behaviour comes under scrutiny. The legislation also permits the ACCC to take action on behalf of aggrieved individuals making the scheme more accessible for SMEs while at the same time making any assessment of claims easier for Courts to determine due to the guidance provided. In addition, the remedies available under the TPA are far

broader and more applicable to small businesses than the limited remedies available under the common law doctrine of unconscionable dealings.

- 2.3 The Commission should make a recommendation in relation to unconscionable conduct. In particular, the MTA suggests that a recommendation be made that the New Zealand government inquire into the Australian regime contained in Part IVA of the TPA and assess whether a similar regime would be appropriate in New Zealand.
- 2.4 We note that the New Zealand Retailers Association also raises this as an area of concern to their members. In addition, the New Zealand Commerce Commission notes this as an area of difference in substantive law in its submission.

3. Industry Based Codes

- 3.1 The Commission should consider Part IVB of the TPA in relation to industry based codes and the current lack of an equivalent statutory provision in New Zealand. The MTA considers that this is an important aspect of competition and consumer protection law.
- 3.2 The New Zealand Commerce Commission also noted the lack of any statutory framework for industry based codes in New Zealand in its initial submission to the Commission.
- 3.3 The Commission should make a recommendation that the New Zealand government inquire into the effectiveness of Part IVB of the TPA in order to assess whether a similar statutory scheme is required and would be effective in New Zealand.

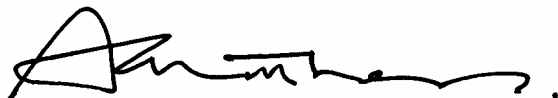
4 Franchise Law

- 4.1 The MTA acknowledges that the Commission has referred (on page 10 of the Draft Report) to the area of franchise law/agreements as being an aspect “of competition and consumer protection policy that [is] not covered by the study’s terms of reference”. However, the MTA feels that the differences in franchise law between Australia and New Zealand are significant and indeed warrant a recommendation by the Commission.
- 4.2 The Commission should make a recommendation that the New Zealand government inquire into the effectiveness of existing law in relation to franchising and determine whether specific regulation of this area is necessary.

5 Conclusion

- 5.1 The MTA is primarily concerned with areas of competition and consumer protection law and policy which impact on SMEs in New Zealand. To the extent that the issues raised by the MTA are not covered by this study’s terms of reference, the MTA looks forward to engaging with the New Zealand government on these issues in the future.
- 5.2 The MTA appreciates the opportunity to submit its views on these issues and looks forward to receiving a copy of the Final Report when it is published.

Yours faithfully



Stephen Matthews
Chief Executive Officer