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DATE: Wed 27 Oct 04 09:50 AM    PROGRAMME: Nine to Noon

ITEM Id: NINE3238270            PRESENTER: Linda Clark

STATION: 1YA

RECORD: It's time now

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LINDA CLARK: It's time now to talk to one of our legal commentators Mai Chen from the public law firm Chen, Palmer & Partners joins me, good morning.

MAI CHEN: Good morning Linda.

CLARK: This morning Mai you're interested in the draft report of the Australian Productivity Commission which I have to say what is it is the first question.

CHEN: The Productivity Commission is an independent agency which is the major advisor to the Australian Government on Microeconomic policy issues and regulation. But it was jointly commissioned by both the Australian and the New Zealand Governments to determine whether or not the competition and consumer protection laws in the two countries was a barrier to the creation of a single economic market. And of course that is an outcome which both Governments have signed up to and particularly with a return of John Howard for a fourth amazing term ah the question is whether or not what we need to move towards is a single law and a single agency. So everything was on the table and if you looked at the press release that said to the Product Commission, Productivity Commission go for it it looked very scary because it said canvass all the options nothing is off the table and ah so the lion roared. But the

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report has turned out to be a bit of a mouse at the end of the day.

CLARK: Well this is all harder than it sounds isn't it.

CHEN: Well I think the key reason I was interested was to ascertain what it all means ah because at the end of the day what the Productivity Commission has actually concluded is that the best thing to do is just for there to be greater coordination and cooperation and we should have more information gathering and information sharing and we should be able to investigate over there and they should be able to investigate over here and that does require some changes in the law. Ah but nevertheless they didn't go either down the road of the option of full integration, single law, single agency or partial integration, ie they still have their competition body, we still have ours but for truly trans-Tasman Australasian type matters we have a single body and a single set of laws that governs those. Even that was a step too far.

CLARK: Which is very intriguing because I mean all of this is in the context of CER, 20 years this year I think CER and at the time of the 20th um kind of birthday celebrations..

CHEN: Yes, yes.

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CLARK: They brought business leaders together.

CHEN: Yes that's right.

CLARK: And, and they were all very gung ho.

CHEN: Well they were and it was interesting because I was reading a Herald mood of the boardroom, ah if anyone ever wanted to know how moody the boardroom is they found that 85% of CEOs were all fully in support of some sort of combined competition regime. But actually when the rubber hits the road what you find is that there were 27 submissions, they break down on country lines and this is what's so interesting. You, you get a few Australian submissions not many and not surprisingly you've got Telstra and Qantas saying single law, single regulator, ah not necessarily always Australian laws and the interesting thing seems to be that the Australians are keen on trans-Tasman harmonisation of competition laws because they actually think our competition laws are better than their competition laws and they would actually like some adoption of New Zealand's competition laws in Australia because they're more business friendly or perceived to be so. You compare that with the New Zealand submissions and some of them are a bit coy and some of them are very anti but essentially what they portray or reflect is a fear and the fear is that the lowest

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common denominator particularly with Australia saying yeah we're happy for New Zealand to harmonise with Australia, come over to Canberra. If Australia isn't going to move very much then the bottom line is New Zealand's law will probably get worse and doing business in Australia will probably be no better.

CLARK: So is there, is there fear based genuinely on a belief that the New Zealand law is better than the Australian law or is part of it a kind of big verses small thing. They just fear they are going to be subsumed.

CHEN: If we form one economic market then New Zealand will be 20% and so for example in a situation where you get a merger acquisition or a restricted trade practice which can be authorised if the public benefit overrides the detriment then the concern is that if the test is the Australasian public benefit then there may be a net benefit to Australia and a net loss to New Zealand and that is still in the Australasian public benefit and so the concern is really an adequate protection for New Zealand interests and the concern that when you are in a negotiation, Linda, as we all know the person with the most power, the most resources and the most critical mass of expertise and grunt wins and ah Lloyd Morrison in particular put in a submission on behalf of his company Morrison & Co of course, a powerful advisory ah consultancy

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body, major owner of Infratil, major infrastructure company and they rejected all of the options fairly much. They said that their concern was that if you look at comparable types of arrangements such as the EU and NAFTA there are much stronger structures put in place to make sure that big countries can't bully small countries and what he's concerned about here is that we may end up with all of the disadvantages and none of the advantages.

CLARK: Well Lloyd Morrison is a great sort of um New Zealander.

CHEN: New Zealander. Flag campaigner.

CLARK: I mean he's the flag campaigner, sovereignty is a big issue for him.

CHEN: True, it's true but..

CLARK: And in a way, so I kind of put him into a, his own little box.

CHEN: Yes, yes.

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CLARK: But for the others and if we really have CER, if the idea is to have the single market then this kind of Australasian public benefit you talk about should still be a benefit to New Zealand companies shouldn't it because we are talking about the bigger market.

CHEN: Well that's true and one could argue that you can't make an omelette unless you break some eggs. The question is where will the eggs be broken and I think the concern is that because we're smaller then we are more vulnerable and it may well be a net benefit but it may well be mainly a net benefit to Australia and that is a concern. Look I don't..

CLARK: Is that a lack of confidence do you think in the New Zealand business community.

CHEN: No I think it's partly um with, with, with a great deal of respect to the business community experience in dealing in Australia they are hard nosed operators and you've heard various CEOs speak in various coloured languaged phrases about how difficult it is to do business in Australia and I guess if you want to put it at its basis, if we move right away from policy and public law speak they're concerned that we might open ourselves up and end up being cleaned out. Um I think that there needs to be a balance here and I think that what you're seeing in this review is that there are limits. I mean

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there's no doubt that we have moved towards a single law and a single body in some areas. FSA, the Food Standards Authority, yep we got a single council there, we only have um three people on a twelve person council. There is an opt out which says in exceptional circumstances and it goes on cultural and health and various other issues then you can opt out. Ah but it's a pretty tortured opt out clause. We've, we are in the process of setting up a joint therapeutics agency which will be up and running by ah I think it's ah July of next year and once again we're going to have a, a single council and a single law that will apply. So it's not that it's not happening in some areas but all I'm saying is that there are limits to which I think the culture and history of the two countries will allow us to go in some areas towards harmonising our laws and our regulatory bodies. Remember it's not just about law, it's not just about public policy and structures, it's also about culture and approach.

**CLARK**: It explains to me very clearly why the politicians have never been leading this debate.

**CHEN**: No, no.

**CLARK**: Because there was this tension at the 20th celebrations.

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CHEN: Very much so yes.

CLARK: The politicians were there but they weren't there and the business people were really mixing it up.

CHEN: Well yeah and it's kind of interesting because you can see that business people can see some benefits from this and certainly in terms of what I sometimes call the nitty gritty you can understand it. I mean for example there are mutual recognition exercises going on, there are areas where we're seeking to harmonise. They generally have to do with technical requirements. For example, you know, mutual offerings of security, you shouldn't need different securities documents or offer documents and different office structures if you are trying to raise capital in New Zealand and trying to raise capital in Australia. So certainly in terms of those technical ah requirements you can understand that there are cost savings particularly as more and more companies really do business trans-Tasman. I think the real concern though is and those areas where you're talking about protecting different interests for New Zealanders verses differing interests for Australians and what this report shows me is that the Productivity Commission is actually incredibly politically savvy because it's probably come down in the right place. In fact our New Zealand Commerce Commission even suggested that we might have partial integration, you know, a set of laws for

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those truly Australasian type things but actually the Productivity Commission decided not to go there and there's a wonderful phrase in the report where it says with respect of full um integration in particular that if you wanted to go down that route there would be pretty serious sovereignty issues and pretty serious issues concerning the cost and major regulatory upheaval. Now it, it sort of, it's sort of a euphemism for let's not go there because it's really, really quite difficult. But I think ultimately ah what this tells me is that we will see some progress in some areas. I presume that they will mainly be technical but at the end of the day ah you may find that it's New Zealanders for New Zealand and Australians for Australians.

CLARK: Nice talking to you Mai Chen.

Ends