Review of the Competition Provisions of the Trade Practices Act

January 2003

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ISBN 0 642 74184 0

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Printed by Canprint Communications Pty Ltd

TRADE PRACTICES ACT REVIEW

31 January 2003

The Hon Peter Costello, MP
Treasurer
Parliament House
CANBERRA ACT

Dear Treasurer,

We have pleasure in submitting the Report of the Trade Practice Act Review Committee in accordance with the terms of reference announced by you on 9 May 2002.

Yours sincerely

Sir Daryl Dawson, AC KBE CB	Jillian Segal	Curt Rendall
Chairman	Member	Member

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ABBREVIATIONS AND ACRONYMS

ACCC	Australian Competition and Consumer Commission
ALRC	Australian Law Reform Commission
ASIC	Australian Securities and Investments Commission
CLERP	Corporate Law Economic Reform Program
CPRA	*Competition Policy Reform Act 1995*
DLC	Dual listed company
DoJ	United States Federal Department of Justice
DPP	Commonwealth Director of Public Prosecutions
ESAA	Electricity Supply Association of Australia
FTC	United States Federal Trade Commission
OECD	Organisation for Economic Co-operation and Development
QCMA	Queensland Co-operative Milling Association Ltd
Act	*Trade Practices Act 1974*
Tribunal	Australian Competition Tribunal

PREFACE

On 15 October 2001, the Prime Minister announced that there would be an independent review of the competition provisions of the *Trade Practices Act 1974* (the Act) and their administration.

Subsequently, on 9 May 2002, the Treasurer announced the appointment of a Committee of Inquiry to conduct the review and its terms of reference. The members appointed were the Honourable Sir Daryl Dawson AC KBE CB (Chairman), Mr Curt Rendall and Ms Jillian Segal. The terms of reference are set out in Appendix A.

On 10 November 2002, the Government announced that it had referred Recommendations 6 and 12 of the *Review of the impact of Part IV of the Trade Practices Act 1974 on the recruitment and retention of medical practitioners in rural and regional Australia* (the Wilkinson Review) to the Committee.

The date on which the Committee was to report was originally 30 November 2002. However, it required additional time to prepare its report in view of the interest shown, and the submissions made, by business groups, consumer organisations, individuals and professional bodies. On 12 November 2002, the Treasurer announced that the reporting date for the review would be 31 January 2003 rather than 30 November 2002.

Scope of the review

In announcing the terms of reference of the Committee, the Treasurer observed that, while there had been reviews of specific provisions and Parts of the Act in recent years, there had not been a comprehensive review of the competition provisions in Part IV of the Act since the Independent Committee of Inquiry into National Competition Policy in Australia reported in 1993. Accordingly, the terms of reference focus the review on Part IV (together with associated penalty provisions) and Part VII of the Act.

The terms of reference do not cover parts of the Act that have been the subject of recent consideration. These include Part IIIA (national access regime), Part X (international liner cargo shipping), Part XIB (telecommunications specific anti-competitive conduct rules), Part XIC (telecommunications access regime) and sections 51(2) and 51(3).

Section 51 provides limited statutory exceptions from the scope of Part IV for such matters as conduct arising from agreements relating to conditions of employment and certain agreements relating to intellectual property. Sections 45D to 45EB, which deal with secondary boycotts, were also excluded from the review because they were the subject of proposed legislation before the Parliament.

Within these limits, the terms of reference were broadly cast and allowed interested parties to make submissions concerning most of Part IV and related provisions elsewhere in the Act. There was one issue — the unconscionable conduct provisions in Part IVA of the Act — which gave rise to some debate about the scope of the review. The Committee concluded that these provisions were outside the terms of reference but has included some information about the issues raised in some submissions in Chapter 3. Some submissions dealt with matters which the Committee considered clearly outside the terms of reference, for example, section 52 of the Act, and these have not been discussed in the Report.

Conduct of the review

The terms of reference required the Committee, in performing its functions, to advertise nationally, consult with key interest groups and affected parties, receive public submissions, and take into account overseas experience. As the States and Territories each apply the competition provisions of the Act as their own laws, the Committee was required to seek the views of the State and Territory Governments.

The Chairman wrote to each Premier and Chief Minister in May 2002 inviting them to make submissions to the review. Subsequently, submissions were received from five jurisdictions.

A member of the Committee made a presentation about the review to the Small Business Ministerial Council on 3 July 2002.

Calls for submissions were placed in the print media beginning on 24 May 2002. This included the national daily papers and a range of other publications chosen to ensure circulation in rural and regional areas.

Information about the review, including all relevant media releases and public submissions received by the Committee, was made easily accessible through a dedicated internet website.

Submissions

The Committee received 212 submissions by December 2002, of which 198 were posted on the Committee's website as public submissions. There were a number of organisations and individuals that made more than one submission. Fourteen submissions were received by the Committee on a confidential basis. A list of those who made public submissions to the Committee is set out in Appendix B.

In addition to formal submissions, the Committee received 320 written representations from consumers requesting that the powers of the Australian Competition and Consumer Commission (ACCC) not be reduced.

Consultations

The Committee conducted consultations with a range of interested parties between July and October 2002. These involved about 50 meetings with 47 parties in Sydney, Melbourne, Canberra, Brisbane and Perth.

Two of the Committee members undertook 26 additional meetings with persons concerned with administering competition laws overseas. The meetings were in Ottawa, Washington, Paris, London and Brussels during the fortnight beginning on 23 September 2002.

The Committee also attended the annual Trade Practices Workshop of the Law Council of Australia, which was held in South Australia in August. The Committee would like to record its appreciation to the Council's Trade Practices Committee for convening last year's workshop on issues of particular interest to its review. The discussions at the workshop were of particular benefit in the Committee's subsequent deliberations.

The Committee also acknowledges the assistance it received from the ACCC and its staff throughout the course of the review. The ACCC made a formal submission to the review and participated in consultations with the Committee. The ACCC was always willing to assist the Committee through the provision of additional information when requested.

Finally, the Committee wishes to express its gratitude for the work of the review's Secretariat, which was located within the Commonwealth Treasury. The Secretariat was led by John Jepsen and included Jason McNamara, Adrian Chippindale, Matthew Bishop, Chris Lyon, Jane Benson, Belinda Robilliard, Jeremy Coghlan and Kerrin Mercer.

SUMMARY

Overview

the importance of competition

The competition provisions of the *Trade Practices Act 1974* (the Act) have helped to shape economic activity in Australia since 1974. Competitive markets make an important contribution to increasing efficiency and productivity in the economy, thereby improving the welfare of Australians. This has been evident in the contribution that more competitive markets have made to the strong performance of the Australian economy over the past decade.

The recent gains have been achieved following structural reform of the economy and have been accompanied by changes to the regulatory framework. These have included the extension of the competition provisions to apply to all business activity in Australia. Whilst the changing environment of Australian business has provided substantial opportunities for investment, it has also presented some challenges. Corporations must respond to developments in market conditions that may occur quickly and may be influenced by international, as well as domestic, competition. For some businesses, including those in industries that have experienced significant structural change, the new environment involves dealing in less regulated markets or with large businesses that have greater market power.

In accordance with its terms of reference, the Committee has reviewed the competition and authorisation provisions of the Act to establish whether they meet the needs of business in the current environment or whether improvements might be made to ensure that they are effective. The Committee has also had regard to the way in which the competition provisions and related aspects of the Act have been administered.

The Committee has drawn on a broad range of views expressed in submissions made to it, in discussions overseas and in consultations with a wide range of interested parties. Contributions were made by business, both big and small, and other parties, including the Australian Competition and Consumer Commission (ACCC), governments, consumer representatives, the professions and individuals.

Paragraph 1(c) of the terms of reference required the Committee to consider whether the competition provisions promote competitive trading which benefits consumers in terms of service and price. The Committee's conclusions and recommendations are set out at the end of each chapter of the report. Overall, the Committee considers that the competition provisions have served Australians well. The Act has sustained a competitive environment which has benefited consumers in terms of service and price. In doing so, it has achieved an appropriate balance between the prohibition of anti-competitive conduct and the encouragement of competition. The regime established by the Act compares favourably with competition regimes in other countries, allowing for the differences in the various legal systems. At the same time, the Committee has recommended changes to the competition and authorisation provisions by way of improvement and some changes to administrative arrangements to meet concerns expressed to the Committee.

The consideration of possible changes to Australia's regulatory framework should continue to have regard to international developments in the area of competition (Recommendation 1.1).

the broad application of competition law

Consistently with the recommendations of the Independent Committee of Inquiry into National Competition Policy in Australia (the Hilmer Committee), Australian Governments should continue to ensure that the competition provisions are applied as broadly as possible across the economy. Accordingly, they should apply to the commercial activities of governments

themselves. It is also fundamentally important that the competition provisions be universally applied to avoid distortion of economic activity.

Submissions were made to the Committee calling for additional regulation in certain areas, particularly where there was a high degree of market concentration. Whilst it is appropriate for the ACCC to scrutinise conduct in such areas carefully, the Committee considers that competition measures which are specific to particular industries should be avoided. The competition provisions should protect the competitive process rather than particular competitors. They should not be seen as a means of achieving social outcomes unrelated to the encouragement of competition or as a means of preserving corporations that are not able to withstand competitive forces. Competition regulation should be distinguished from industry policy.

Australian Governments should ensure that the competition provisions of the Act are applied as broadly as possible across the economy and extend to the commercial activities of governments themselves (Recommendation 1.2).

Competition provisions should be uniformly applied and measures which are specific to a particular industry should be avoided (Recommendation 1.3).

The competition provisions should not be regarded as a means of implementing an industry policy or the preservation of particular corporations that are not able to withstand competitive forces (Recommendation 1.4).

compliance

The major responsibility for compliance with the competition provisions, and with other parts of the Act, rests with business. This is recognised by many corporations that have voluntary compliance programs in place. It is clearly preferable that compliance with the Act be achieved by increasing awareness of the competition provisions among corporations and their staff rather than by proceedings taken by the ACCC to enforce the Act.

Businesses should seek to ensure that voluntary compliance programs are provided for their staff and the ACCC should review the assistance it is able to provide to business in this regard in consultation with interested parties through the reconstituted consultative committee recommended by the Committee (Recommendation 1.5).

Mergers

There is widespread support for the current arrangements under which most proposed mergers may receive informal clearance from the ACCC as not offending against section 50 of the Act. The process is relatively speedy and inexpensive and is generally perceived to be effective.

the mergers competition test

Section 50 of the Act provides that a merger must not substantially lessen competition. However, competition is not an end in itself. Section 50 serves the object of enhancing the welfare of Australians through increasing economic efficiency. The achievement of economically efficient outcomes is an important goal because it is reflected in high productivity which in turn is important in sustaining economic welfare. On this theoretical basis there is a case for the introduction of an economic efficiency test into section 50. However, the Committee does not accept submissions that a test of economic efficiency should be added to section 50 in addition to the competition test. This would add complexity to the clearance process, making it less timely and requiring the exercise of greater discretion by the ACCC. Where the competition test may not provide a suitable guide to efficiency and where other factors warrant examination, it is preferable that those matters be considered as part of the authorisation process. Public benefit is the test for authorisation and it is broad enough to embrace all relevant factors. Further, the Committee does not consider that any amendment of section 50 is necessary to address competition concerns arising from creeping acquisitions.

With the informal clearance process, insufficient reasons are given by the ACCC for its decisions. Subject to considerations of confidentiality, it should provide reasons when requested to do so by the parties and in cases where it has rejected a merger or accepted undertakings. The absence of reasons and the absence of any review process have hindered the making of consistent and predictable determinations in the informal clearance process.

an optional merger approval process

The creation of a formal, but not compulsory, clearance process, operating in parallel with the existing informal system, would retain the advantages of the current system but would overcome some of its disadvantages. There should be a time limit of 40 days for the consideration of an application by the ACCC. There should be a right of review by the Australian Competition Tribunal (the Tribunal) for an applicant who is refused a formal clearance by the ACCC, but no right of review for third parties. The review should be restricted to the material before the ACCC and be subject to a time limit of 30 days. Both the ACCC and the Tribunal should give reasons for their decisions.

The ACCC should provide adequate reasons for its decisions (taking care to protect any confidentiality) in the informal clearance process when requested to do so by the parties and in cases where it rejected a merger or accepted undertakings (Recommendation 2.1).

A voluntary formal clearance process should be introduced, parallel to the existing informal clearance process, in relation to merger applications requiring consideration under section 50. This formal clearance process should have the following features (Recommendation 2.2):

- **on application by the parties, the ACCC might grant a binding clearance upon the basis that a proposed merger would not contravene section 50. The applicant would have immunity from proceedings by any party while complying with any conditions specified by the ACCC as a condition of the**

approval of the merger. The ACCC would be required to monitor compliance with these conditions (Recommendation 2.2.1);

- **the information required for such an application, which could be set out in revisions to the ACCC's Merger Guidelines, should not be onerous but should be sufficient for the ACCC to make a reasoned assessment (Recommendation 2.2.2);**

- **the Act should require the ACCC to make a decision within 40 days which would allow the ACCC to consult with third parties. If a decision is not provided within 40 days, the clearance of the merger should be deemed to be refused. The 40 day limit should be capable of extension only at the request of the applicant (Recommendation 2.2.3); and**

- **only the applicants should be granted a right of review on the merits by the Tribunal. The application for review should be made within 14 days of the ACCC's decision. The hearing before the Tribunal should be on the material before the ACCC and not a hearing de novo. Decisions of the Tribunal should be made within 30 days. The Tribunal should be able to grant or reject a clearance or grant a clearance subject to conditions (Recommendation 2.2.4).**

the merger authorisation process

Dissatisfaction with the authorisation of mergers is largely related to the time taken by the ACCC to reach a decision and the risk of third party intervention by way of review by the Tribunal. These factors render the authorisation process commercially unrealistic for many merger proposals, especially those involving publicly listed companies. Paragraph 1(a) of the terms of reference required the Committee to consider whether the current system may inappropriately impede the ability of Australian business to compete locally and globally.

The authorisation process should be made less cumbersome for mergers. Applications for authorisation should be made directly to the Tribunal rather than the

ACCC, and the Tribunal should be required to make a decision within three months. The uncertainty caused by the possibility of review at the instance of third parties should be removed by requiring third party interests to be considered as part of the Tribunal's assessment, rather than by way of review. These changes would require a significant increase in resources for the Tribunal.

Applications for the authorisation of mergers should be made directly to the Tribunal. This process should have the following features (Recommendation 2.3):

- **applications should be considered within a statutory time limit of three months (Recommendation 2.3.1);**
- **there should be no review on the merits of the Tribunal's decision (Recommendation 2.3.2); and**
- **the Tribunal should have the power to remit an application for consideration by the ACCC if it were of the view that the application required a decision solely on competition issues under section 50 rather than a decision concerning public benefit and the ACCC had yet to formally examine the matter (Recommendation 2.3.3).**

Market conduct

A range of issues was raised with the Committee concerning the regulation of market conduct.

misuse of market power

There were many submissions dealing with the nature of the misuse of market power under section 46 of the Act, but there was a diversity of views. The existing case law on section 46 does not substantiate the commonly expressed view that the purpose test laid down by the section is an unnecessarily onerous hurdle in proving a contravention. In the Committee's view, it would not be in the interests of consumers or competition to amend the section at a time when the cases presently before the courts provide an opportunity for the section to be further clarified. The most frequent proposal for amendment was

the simple addition of an alternative effects test. The Committee concluded that to adopt this proposal would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive behaviour. Whilst the Committee considered that Part IVA (Unconscionable Conduct) of the Act lay outside its terms of reference, it suggests guidelines on the operation of that Part. The Committee declined to consider the operation of section 46 in relation to intellectual property in the absence of a final decision in litigation before the courts, but it recommends that guidelines be issued when that decision is given.

No amendment should be made to section 46 (Recommendation 3.1).

The ACCC should give consideration to issuing guidelines on its approach to Part IVA (Recommendation 3.2).

The ACCC should consult with industry and issue guidelines on the application of Part IV to intellectual property (Recommendation 3.3).

price discrimination

One amendment to section 46 which was proposed was to bring price discrimination specifically within its terms. A number of submissions to the Committee sought the reintroduction of a prohibition against price discrimination. The Committee concluded that section 46 in its present form provides an appropriate means of dealing with anti-competitive price discrimination. It considered that the principle of 'like terms for like customers' does not offer a suitable basis for regulation in the grocery industry since there are factors explaining price differences that do not involve anti-competitive practices.

No change should be made to the Act in relation to price discrimination (Recommendation 4.1).

cease and desist powers

There was a range of views put to the Committee in relation to the ACCC's proposal that it be given the power to make an order that a corporation cease and desist from engaging in anti-competitive conduct. This matter has been considered by previous reviews. Submissions in support of the proposal relied on the proposition that it is difficult for the ACCC to obtain interim injunctions speedily requiring the cessation of anti-competitive conduct. It was not demonstrated that the existing process for obtaining an interim injunction is cumbersome or overly difficult. Indeed, it is not clear that the proposed order to cease and desist would be a speedier or more efficient remedy than an interim injunction. The Committee also considered that the existing court processes for compelling the disclosure of evidence are adequate and that a case had not been made out for the continuation of the ACCC's powers of investigation under section 155 after the commencement of court proceedings. An extension of the ACCC's powers under section 155 would intrude upon the court's ability to control the pre-trial process and preserve the balance of fairness.

The Act should not be amended to introduce a power to make cease and desist orders or to extend the powers of the ACCC under section 155 of the Act so that they apply after the commencement of judicial proceedings (Recommendation 5.1).

authorisation

Paragraph 1(b) of the terms of reference refers to the provision of an appropriate balance of power between competing businesses, particularly those dealing with businesses that have larger market concentration or power. Paragraph 1(f) refers to the capacity of the competition provisions to deal with the transitional needs of industries and communities undergoing change. The effective operation of the authorisation provisions in Part VII of the Act is central to these issues.

The authorisation provisions provide scope for the ACCC to authorise conduct that offers public benefits sufficient to outweigh any detriment to competition. The Committee considers that this is an important feature of the

Australian system of competition regulation. In most circumstances, conduct that maximises competition will maximise economic efficiency. The authorisation provisions are a means of dealing with situations in which the application of the competition provisions may not facilitate the most economically efficient outcome. They provide a means of responding in a flexible manner to a particular situation, including that of industries undergoing structural change. The availability of authorisation also continues to be an important aspect of the Act in view of the broadening of the scope of the competition provisions in 1995.

There are concerns about the authorisation process that centre on the cost, time and the uncertainty involved. Some of these concerns would be met through the introduction of a time limit for the consideration of an application. Flexibility could also be provided in relation to the fee charged to recover the cost of processing authorisation applications.

Wilkinson Review

Consistently with the recommendations of the *Review of the impact of Part IV of the Trade Practices Act 1974 on the recruitment and retention of medical practitioners in rural and regional Australia* (the Wilkinson Review), it is desirable that the ACCC ensures that parties contemplating authorisation are able to seek informal guidance from the Commission prior to lodging an application.

The Act should be amended to include a time limit of six months for the consideration of non-merger applications for authorisation by the ACCC, and consideration should be given to imposing a time limit on any review by the Tribunal (Recommendation 6.1).

The ACCC should be given a discretion to waive, in whole or in part, the fee for filing a non-merger application for authorisation where it would impose an unduly onerous burden on an applicant (Recommendation 6.2).

The ACCC should develop an informal system of consultation with non-merger applicants for authorisation designed to provide those persons with guidance about the authorisation process and the requirements of the Act (Recommendation 6.3).

collective bargaining

Legislative reforms by the Commonwealth, State and Territory Governments have resulted in a wider range of industries becoming subject to Part IV of the Act. Some collective marketing arrangements that previously existed for agricultural products, which were of particular significance to rural and regional areas, have been dismantled. These developments are consistent with the universal application of the competition provisions across the economy, but raise the question whether the Act is adequate to deal with problems arising from the transition.

Collective bargaining by a number of competing small businesses may be necessary if they are to achieve bargaining power to balance that of the big businesses with which they have to deal. Collective bargaining at one level may lessen competition but, at another level, may be in the public interest, provided that the countervailing power is not excessive. Currently, collective bargaining is constrained by the Act when it takes the form of contracts, arrangements or understandings having the purpose or effect of substantially lessening competition. Any agreement between competitors to fix, control or maintain prices for goods or services is prohibited regardless of its purpose or effect on competition.

The authorisation provisions include the necessary scope to provide relief to competitors wishing to undertake collective negotiation. In addition to the changes it proposes to the authorisation provisions, the Committee favours the introduction of a notification process for small business seeking to bargain collectively. This would provide a speedy and simple means of enabling small businesses to take themselves outside the Act in order to

bargain collectively with businesses possessing a large degree of market power, in circumstances where collective bargaining would be to the benefit of the public.

The Committee considers, however, that the notification process should be available only to small business in negotiation with big business, where experience has shown that collective bargaining may do little or no harm to the competitive process and may generate public benefit. A transaction value approach is the preferable means of restricting the notification process to small business.

A notification process should be introduced, along the lines of the process provided for by section 93 of the Act, for collective bargaining by small businesses (including co-operatives that meet the definition of small business) dealing with large business (Recommendation 7.1).

A transaction value approach should be adopted to provide a definition of small business. Initially the amount of transactions should be set at $3 million but be variable by the Minister by regulation (Recommendation 7.2).

A period of 14 days should be required to elapse before a notification takes effect (Recommendation 7.3).

Provision should be made for third parties to make a collective bargaining notification on behalf of a group of small businesses (Recommendation 7.4).

exclusionary provisions

Part IV of the Act contains a number of provisions that prohibit conduct per se. These include a prohibition on price fixing that is justified because of its inherently anti-competitive nature. While this per se prohibition is justified, the Committee considered that some other provisions warranted attention. The current per se prohibition of exclusionary provisions appears to proscribe some co-operative arrangements, including joint ventures, that may not have a detrimental impact on competition and may even be pro-competitive. The Committee considered that, whilst the general prohibition

should remain, there should be a competition defence available in relation to proceedings based upon the prohibition.

third line forcing

The Committee accepted that the per se prohibition of exclusive dealing in the form of third line forcing may be prohibiting pro-competitive conduct that is of benefit to consumers. Moreover, the current provision prohibiting third line forcing was shown to be discriminatory on the basis of corporate structure.

The Act should be amended so that it is a defence in proceedings based upon the prohibition of an exclusionary provision to prove that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition (Recommendation 8.1).

The Act should also be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates, to a competitor or competitors, actual or potential, of one or more of the parties to the exclusionary provision (Recommendation 8.2).

The prohibition of third line forcing should cease to be a per se prohibition and be made subject to a substantial lessening of competition test (Recommendation 8.3).

Related companies should be treated as a single entity for the purposes of section 47 (Recommendation 8.4).

Section 93(2) should be repealed (Recommendation 8.5).

joint ventures

The current exemption for joint ventures in section 45A(2) appears to afford a degree of certainty to participants in mining and manufacturing joint ventures that are not likely to substantially lessen competition. There are concerns that the exemption does not provide for some existing practices in mining and manufacturing joint ventures and is framed too narrowly to benefit other kinds of collaborative alliances and arrangements that are now more common in areas of recent innovative growth. The authorisation process provides a means of avoiding the

per se prohibition, but the Committee concluded that a competition defence to the prohibition should be made available for joint ventures.

dual listed companies

The Committee also concluded that transactions between the corporate entities in a dual listed company (DLC) should be treated as internal transactions within a single economic entity for the purposes of the Act. It would be necessary for a DLC to be treated as a single entity in the assessment of the entity's market power for other purposes under the Act.

The Act should be amended by substituting for the current exemption to section 45A(1) provided by section 45A(2), a provision that section 45A(1) does not apply to a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition (Recommendation 9.1).

The ACCC should develop and issue guidelines outlining its approach to joint ventures (Recommendation 9.2).

The Act should be amended to allow intra-party transactions in a DLC to be treated on the same basis as related party transactions within a group of companies. Consistently with this, the aggregate size of the DLC should be recognised for the purposes of assessing the entity's market power (Recommendation 9.3).

Penalties

criminal penalties

The Committee was persuaded that, in the light of submissions made to it and growing overseas experience, criminal sanctions deter serious cartel behaviour and should be introduced for such conduct. The criminal

offences created should apply to such behaviour generally and not just the behaviour of large corporations.

There was general agreement in the submissions made to the Committee that, notwithstanding the difficulty in arriving at an appropriate definition of serious or hard-core cartel conduct, it is sufficiently reprehensible to be punishable by the imposition of a gaol sentence. The predominant reason for suggesting that there should be criminal penalties was that the threat of imprisonment would be an effective deterrent to cartel behaviour.

However, many problems remain to be solved before criminal sanctions are introduced, not the least being the need to find a satisfactory definition of the offence and a workable means of combining it with a clear and certain leniency policy. A leniency or amnesty policy that provides clear and certain incentives is a potent means of uncovering cartel behaviour.

The Government should establish a process for the further consideration of the problems requiring resolution prior to the introduction of criminal sanctions for serious cartel conduct.

The Committee is of the view that solutions must be found to the problems identified by it before criminal sanctions are introduced for serious cartel behaviour. The problems are, importantly, the development (preferably by a joint body representing the Director of Public Prosecutions (DPP), the Attorney-General's Department, the ACCC and the Treasury) of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear and certain leniency policy with a criminal regime. Subject to this proviso, the Committee recommends the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals (Recommendation 10.1).

civil penalties

All comparable jurisdictions enable a court to deter illegal corporate conduct by imposing a maximum monetary penalty upon corporations that is either a multiple of the gain or a proportion of the corporation's turnover. Recent amendments in New Zealand provide a pertinent example. The Committee considers it desirable to amend the Australian Act along the same lines.

It is appropriate for the legislation to emphasise the need to deter individuals from engaging in anti-competitive conduct. Accordingly, the Court should be given the power to prohibit implicated individuals from being directors of a company or from having any management role in a company. It should also be a serious offence for corporations to indemnify individuals for any pecuniary penalties they may incur.

The Act should be amended so that (Recommendation 10.2):

- **the maximum pecuniary penalty for corporations be raised to be the greater of $10 million or three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any) (Recommendation 10.2.1);**

- **the Court be given the option to exclude an individual implicated in a contravention from being a director of a corporation or being involved in its management (Recommendation 10.2.2); and**

- **corporations be prohibited from indemnifying, directly or indirectly, officers, employees or agents against the imposition of a pecuniary penalty upon an officer, employee or agent (Recommendation 10.2.3).**

Administration

The Committee's terms of reference required it to examine the administration as well as the policy of the competition provisions. In particular, paragraph 1(d) of the terms of reference required the Committee to consider whether the Act provides adequate protection for the commercial affairs and reputation of individuals and corporations. Paragraph 1(e) referred to the ready exercise by businesses of their rights and obligations under the Act consistent with certainty, transparency and accountability.

More submissions dealt with the ACCC's administration of the Act than with the Act itself. This reflects, in part, the ACCC's vigorous efforts to publicise and enforce the Act. In part, it also reflects concerns about the way in which the ACCC has undertaken these tasks.

accountability of the ACCC

The Committee considered various suggestions for improving the accountability of the ACCC. These included the creation of a board to oversee the performance of the ACCC's functions, the introduction of a Charter of Competition Regulation to provide guidance on the administration of the Act, and the appointment of an Inspector-General of Competition to deal with systemic complaints about the ACCC.

Fundamental change to the structure of the ACCC is not presently warranted. Concerns regarding the ACCC's accountability and its relationship with the parties with whom it deals can be most appropriately addressed within the existing framework of the ACCC. It would not be desirable to establish a board above the Commission (as opposed to a board to replace the Commission) to oversee the management of the organisation or to create an Inspector-General of Competition.

The Committee saw merit in the establishment of a dedicated Joint Parliamentary Committee to facilitate increased accountability of the ACCC's administration of the Act.

consultative committee

Accountability should also be increased through the establishment of a properly constituted consultative committee which would provide effective feedback to the ACCC regarding its administration of the Act. The effectiveness of the consultative committee would depend on the willingness of business groups to contribute to the consultative process.

handling of complaints

The handling of individual complaints is an important aspect of accountability. Complaint-handling would be improved if a dedicated associate commissioner were appointed to the ACCC to perform this function.

It is desirable that the ACCC be able to attract commissioners with recent business and legal experience. The ability of the Government to do so is significantly dependent on the availability of adequate remuneration.

The ACCC should review its service charter in the light of the issues that have been raised during the review and the recommendations of the Wilkinson Review. It would be appropriate for the ACCC to involve the proposed consultative committee in such a review.

Consideration should be given to the establishment of a single Joint Parliamentary Committee to oversee the ACCC's administration of the Act (Recommendation 11.1).

The Act should be amended to establish a consultative committee to advise the ACCC on the administration of the Act. The consultative committee should be constituted so that it is convened by an independent chairperson appointed by the Treasurer. The chairperson should appoint the members of the committee in consultation with the ACCC. The committee should report to Parliament by way of a dedicated section of the ACCC's annual report (Recommendation 11.2).

An associate commissioner should be appointed to the ACCC to receive and respond to individual

complaints about the administration of the Act and to report each year in the ACCC's annual report (Recommendation 11.3).

Consideration should be given to the manner in which the remuneration of commissioners is determined to ensure that the Government is able to attract as commissioners candidates of sufficient calibre (Recommendation 11.4).

The ACCC should consider the temporary placement of ACCC staff with other parties to develop staff resources (Recommendation 11.5).

The ACCC should review its service charter, in conjunction with the proposed consultative committee, in the light of the outcome of this review and the relevant recommendations of the Wilkinson Review (Recommendation 11.6).

use of the media

The ACCC has established a high media profile over the last decade. The ACCC has been successful in raising the community's awareness of the importance of competitive markets and in encouraging compliance with the Act. However, the Committee received many submissions which expressed concern regarding the manner in which the ACCC releases information and makes comments to the media. The Committee examined the ACCC's media processes and activities to assess whether they provide adequate protection for the commercial affairs and reputation of individuals and corporations.

There is a need for the ACCC to exercise care in publicising particular matters to ensure that there is no unfairness to the parties involved. The ACCC's relationship with business and consumers would be assisted by the development of a code of conduct governing the ACCC's use of the media. The Committee considers that the media code of conduct should be developed using the consultative committee.

A media code of conduct should be developed through the proposed restructured consultative committee (Recommendation 12.1).

The media code should be based on the following principles (Recommendation 12.2):

- **the public interest is served by the ACCC disseminating information about the aims of the Act and the ACCC's activities in encouraging and enforcing compliance with it. This extends to information about proceedings instituted by it, but an objective and balanced approach is necessary to ensure fairness to individual parties (Recommendation 12.2.1);**

- **the code should cover all formal and informal comment by ACCC representatives (Recommendation 12.2.2);**

- **whilst it may be necessary for the ACCC to confirm or deny the existence of an investigation in exceptional circumstances, the ACCC should decline to comment on investigations (Recommendation 12.2.3);**

- **with the object of preserving procedural fairness, commentary on the commencement of court proceedings by the ACCC should only be by way of a formal media release confined to stating the facts (Recommendation 12.2.4); and**

- **reporting the outcome of court proceedings should be accurate, balanced and consistent with the sole objective of ensuring public understanding of the court's decision (Recommendation 12.2.5).**

investigation powers

The ACCC's investigatory powers under section 155 of the Act attracted considerable comment during the review. There were concerns that they are too extensively used so that compliance is costly, and that they are not subject to adequate safeguards.

Requests for information, whether they are made informally or under section 155(1), may impose real financial and other costs on the businesses concerned.

The Committee considers that the function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice could be delegable to senior staff of the ACCC. Commissioners need not then be directly involved in a particular investigation once approval is given to proceed under section 155(1)(c).

Section 155(2) should be recast so that the power to enter premises and inspect documents becomes a power to search and seize information, but only under a warrant issued by a federal judicial officer.

These changes to the operation of section 155(2) would help to remove the concerns of business about its use.

legal professional privilege

The Committee was of the view that legal professional privilege should be expressly preserved to ensure that corporations and individuals are not discouraged from seeking legal advice or inhibited from giving instructions to their lawyers.

The ACCC should continue to give careful consideration to the financial implications of requests for information that are made to businesses consistent with the ACCC's guidelines on this matter (Recommendation 13.1).

The function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice should be delegable to senior staff of the ACCC (Recommendation 13.2).

Section 155(2) of the Act, which provides for the ACCC to enter premises and inspect documents, should be amended to (Recommendation 13.3):

- **require the ACCC to seek a warrant from a Federal Court Judge or Magistrate for the exercise of these powers (Recommendation 13.3.1); and**

- **provide the ACCC with the power to search for and seize information (Recommendation 13.3.2).**

Section 155 should also be amended to (Recommendation 13.4):

- **extend the availability of the ACCC's investigative powers to circumstances where the ACCC is considering the revocation of an authorisation under sections 91B and 91C (Recommendation 13.4.1); and**
- **repeal the redundant section 155(4) (Recommendation 13.4.2).**

It should be made explicit in the Act that section 155 does not require the production of documents to which legal professional privilege attaches (Recommendation 13.5).

CHAPTER 1: OVERVIEW

Competition and consumer welfare

The provisions of Part IV of the Act prohibit various trade practices that tend to prevent or lessen competition in an Australian market for goods and services. These provisions are at the heart of the Act. Since 1974, they have been instrumental in shaping the Australian economy. They lay down rules which, as interpreted by the courts from time to time, restrain anti-competitive behaviour and promote competition in the market place.

Section 2 states that the object of the Act is to:

> '… enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'

Although the Act provides no further guide to the welfare of Australians, it is apparent that the Act is concerned primarily with economic welfare. This may be shown in a variety of ways. In economic terms, welfare will be enhanced by rising living standards in the form of higher incomes in real terms and an increase in consumer choice, by sustainable high economic growth, and by a lower unemployment rate. These benefits flow when human and other resources are used more efficiently to increase productivity and to maximise returns on investment. Competitive markets are the key to economic efficiency.

In a relatively small economy like Australia, the misuse of market power can be particularly detrimental to competition. The competition rules in Part IV of the Act seek to restrain conduct that tends to lessen competition. Thus, anti-competitive agreements or arrangements amongst competitors are proscribed, as are mergers between competitors that would have the effect of substantially lessening competition in a market. Where a corporation has acquired market power, the Act protects consumers and other businesses from its misuse.

Both anti-competitive and pro-competitive conduct may result in changes in the structure of markets, notably by the exit of individual businesses. Part IV seeks to prevent conduct that may lessen competition, not to protect less competitive businesses. The distinction is an important one. However, some of the submissions made to the Committee in support of changes to Part IV appear to conflate these two objectives.

Competition is an important mechanism for achieving the advances in efficiency and productivity that are essential to enhance welfare. Competition creates an environment that provides incentives and disciplines for continuing improvement. In a competitive market, each participant seeks to constrain costs to maintain its position in the market and achieve some advantage over its competitors. Business decisions made in response to competitively determined prices direct resources within the economy to where the best opportunities lie. Ultimately, consumers benefit as increases in productivity are reflected in lower prices in the short term or through greater choice in the longer term. Their welfare is enhanced.

Greater competition in Australian markets and higher productivity have been an essential part of strong growth in the economy over the past decade. In the second half of the 1990s, productivity increased at an annual rate which was substantially higher than the average annual rate recorded since the 1960s. During the past decade economic growth has averaged around four per cent per annum and has been reflected in higher living standards, which are to be seen, in part, in falling unemployment rates and real wage growth of three and a half per cent per annum.

The increase in the rate of growth in productivity is attributable to significant structural reform of the economy over the past two decades.[1] This reform has resulted in more competitive markets. By providing a more competitive business environment, structural reform has helped to restrain inflation and has made the Australian economy more flexible, enabling it to adjust more readily to adverse developments overseas and changing export opportunities.[2]

Structural reform allowed Australia to adjust well to changes in international economic conditions during the 1990s, including the 1997 Asian financial crisis.[3] It has become clear that developing and maintaining a competitive environment is necessary if Australian businesses are to compete in markets for goods and services which increasingly cannot be distinguished as domestic or international.

Structural reform has brought greater competition to the markets for products, services and labour. This has benefited consumers through lower prices,

1 Parham, D. 2002, *Microeconomic Reforms and the revival in Australia's growth in productivity and living standards.* Productivity Commission 1999, *Microeconomic Reforms and Australian Productivity: Exploring the Links*

2 *Statement 3: Economic Policy Reform and Australia's Recent Economic Performance,* 1999-2000 Budget Paper No. 1.

3 OECD 2001, *OECD Economic Surveys Australia.*

improved quality and a wider range of choice amongst goods and services. For example:

- Competition in product markets was increased by significant reductions in barriers to international trade, including reductions in import tariffs to five per cent or less on most goods. Tariffs on passenger motor vehicles were reduced from just under 58 per cent in 1988 to 15 per cent. The Productivity Commission has found that over the last decade, the price of imported cars has fallen by an average of 10 per cent. There has been a stronger focus on customers in the car industry which is reflected in significant improvements in the quality of locally produced cars.[4]

- In the financial sector, the removal of banking regulations has allowed access to finance and the value of the currency to be determined by competitive forces. Barriers to competition between different kinds of financial service providers have been reduced. The availability of different types of financial service has increased considerably. The major banks' interest rate spread (the difference between interest rate received and interest rate paid) has narrowed, notwithstanding changes in the structure of bank fees.

- Greater competition in the Australian telecommunications market has benefited consumers, including businesses, by allowing them to choose the services best suited to their individual needs. There have been significant real price reductions — a representative 15 minute call in peak time between Melbourne and Brisbane fell from $7.25 in 1997 to $3.28 in 2002 and a 30 minute call to the United States fell from $31.73 in 1997 to $6.85 in 2002.[5]

Experience has shown how competition in one market drives improvements in a related market. For example, the need for Australia to compete internationally has required the cost of producing exports to be minimised. The competitive pressures thereby induced flow through to related markets, such as transport, communications and financial services. The need to maintain international competitiveness has been significant in driving major changes in government policy in relation to taxation and the labour market. There has also been significant reform in the regulation of the labour market

4 Productivity Commission 2002, *Review of Automotive Assistance: Position Paper.*

5 Based on data supplied by the Department of Communications, Information Technology and the Arts.

aimed at increasing its responsiveness, reducing impediments to job creation and improving productivity.

The implementation of the National Competition Policy from 1995 has involved the progressive reform, or removal, of regulations that unnecessarily restricted competition. It also saw the introduction of competition in the provision of services traditionally provided through public monopolies. The Act was amended to provide for access to essential infrastructure with a view to facilitating competition in related upstream and downstream markets.

Competitive markets and efficiency

Although the competition provisions in Part IV of the Act focus on the promotion of competition in markets, Part VII provides for the authorisation of conduct when that conduct is justified in the public interest, notwithstanding a lessening of competition. This reflects the fact that, whilst competition is an important means whereby an economy can achieve economic efficiency, competition is not an end in itself. The achievement of economic efficiency is the ultimate goal, because it results in high productivity, which in turn sustains economic welfare. Maximising competition is the means to that end.

Economic efficiency may take a number of forms. Productive efficiency is achieved when goods and services are produced at minimum cost, that is, when optimum output is achieved through the best combination of labour, capital and technology. Corporations seek economic efficiency because it means increased profitability and the scope to gain a competitive advantage in the market through lower prices. Allocative efficiency is achieved when market processes allocate society's scarce resources in accordance with their most valuable use. For example, a vertical merger between two firms may result in lower prices for the same product with the removal of one mark-up, thus allowing consumers to purchase more of another product. Dynamic efficiency is evident where the market is supplied with better quality goods and enhanced services due to technological innovation.

In most circumstances maximising competition will maximise economic efficiency. Thus a test designed to prevent the substantial lessening of competition will generally be a good test for economic efficiency. However, there may be circumstances in which, for example, a merger will offer gains in efficiency which also result in a substantial lessening of competition. This may occur when there are economies of scale, benefits or costs that are external to the market price or when transaction costs are significant.

Box 1.1: Competition versus efficiency

Competition may not be consistent with the most efficient outcome in the following examples:

- Economies of scale or scope may result in continual declines in unit costs as production expands. The most efficient outcome may be achieved when there is only a single producer in the market.
- It may not always be possible for property rights to be clearly assigned with the result that a corporation is unable to capture the full benefit of its invention in the price it charges for a product. Competitors may benefit from the invention because they can exploit it in their own products without being required to pay a fee for the property right. An efficient outcome which allows this 'externality' to be captured by the inventor may not be consistent with the same level of competition.
- Alternatively, it may not be possible for all the costs of the production of goods to be attributed to the corporation involved. In this case, the price charged in a competitive market will not reflect the real social cost of the product. For example, the price charged for goods may not reflect a negative environmental cost that has been incurred in its production. A competitive market outcome would reflect this negative 'externality' and allow excessive consumption of the product because it is essentially under-priced.
- A competitive market may not deliver the most efficient outcome when transaction costs are significant. For example, a manufacturer of a specialised product may find that consumers are unable to appreciate the full benefits of their product, resulting in less sales. The manufacturer may acquire retail outlets to maximise sales since this may be necessary to ensure consumers are well informed about the product. However, the acquisition of retail outlets may reduce competition in the market.

International context

In the course of its review, the Committee has had regard, where relevant, to the laws of other countries. International comparisons can be valuable because of the perspective they provide in assessing the utility of existing laws and

proposals for change in Australia. There may, however, be differences in context, both of an historical and legal nature, which make it inappropriate simply to translate a law from one jurisdiction to another. It is desirable, nevertheless, to be alert to developments, particularly in policy, in other countries, in the light of the growing internationalisation of trade and commerce and the increasing links between the various national regulators, including the ACCC, which have the responsibility of enforcing competition laws.

The Committee considers that, whilst there are some differences between Australia and other jurisdictions with substantially larger domestic markets, the competition provisions in Part IV have served Australia well. Subject to the changes that are proposed in this report, they should govern the regulation of market conduct in a satisfactory manner. In particular, the Committee regards the power given to the ACCC and the Tribunal to authorise, in the public interest, conduct which would otherwise be in breach of Part IV, as providing flexibility in the administration of the Act and a valuable means of ensuring that ultimately the economic welfare of consumers is enhanced.

A Memorandum of Understanding has been concluded between the Governments of New Zealand and Australia, which recognises that the harmonisation of business laws, including competition laws, can be of mutual benefit. This Memorandum of Understanding encourages consultation between the countries but does not oblige them to have identical competition laws. The Committee has drawn on the New Zealand experience in considering, in particular, the proposals concerning the prohibition per se of certain conduct and the treatment of joint ventures (see Chapters 8 and 9 respectively).

The general application of the competition provisions

Originally, the scope of the Act was limited by the extent of the Commonwealth's constitutional power. The Act relied primarily on the trade and commerce power and the corporations power and thus could not be applied generally across the country. It did not cover the activities of State or Territory governments or of their instrumentalities. Nor did it apply to the activities of unincorporated entities operating within a state. This meant that individuals, such as those in the professions, were not subject to the competition provisions unless they were within the Australian Capital Territory.

These limitations were examined by the Hilmer Committee which recommended that the competition provisions should apply uniformly to all business activity in Australia, including that undertaken by government enterprises, in order to realise fully the gains offered by a more competitive economy. These recommendations were adopted and implemented by a set of intergovernmental agreements concluded by the Commonwealth, State and Territory Governments in 1995. In particular, the Competition Principles Agreement and the Conduct Code Agreement sought to ensure that all jurisdictions achieved and maintained consistent and complementary competition laws and policies for all businesses in Australia, regardless of ownership.

To extend the coverage of Part IV and overcome the constitutional limitations, the Commonwealth amended the Act to insert Part XIA (the Competition Code). This facilitated the application of the Competition Code by the States and Territories. Part XIA introduced a Schedule version of Part IV into the Act, which is identical to the ordinary version of that Part, except that it refers to 'persons' rather than 'corporations'.

Each State and Territory enacted a Competition Policy Reform Act (CPRA), which came into force between 9 June 1995 (New South Wales) and 21 July 1996 (Western Australia). These Acts applied the Competition Code as a law of that State or Territory (section 5), which ensured that the Competition Code was administered as if it constituted a single law of the Commonwealth. Section 19 of each CPRA specifically confers on the authorities and officers of the Commonwealth, including the ACCC, the functions and powers set out in the relevant Competition Code.

To ensure that government enterprises are not immune from the competition laws, the Commonwealth amended section 2 of the Act. Sections 2A and 2B now provide that Part IV binds the Crown in right of the Commonwealth, the States and the Territories in so far as they carry on a business, either directly or through a government authority.

However, the universal coverage of Part IV is not complete. Section 51 of the Act provides for exemptions. It allows conduct, otherwise in contravention of Part IV, which is specified in, and specifically authorised by, Commonwealth, State or Territory law.

The Committee received submissions that either seek additional regulation to meet the needs of particular sectors of the economy or raise the possibility of exempting some sectors from the competition provisions. The Committee considers it important to avoid resorting to special provisions, especially

exemptions, to meet particular problems that may arise. It also notes that the benefits to be derived from competition are derived whether or not the businesses involved are publicly or privately owned.

The competition provisions should apply generally and consistently to business conduct without regard to the nature of the industry in which the conduct occurs. Efficiency, and consequently welfare, may suffer if the regulation of competition is not uniform. Differing regulatory treatment of different sectors of the economy will provide differing incentives for investment and effort by discouraging participation in particular sectors and will detract from the ability of markets to allocate resources in an efficient manner. Productivity, growth and welfare may then all suffer.

As Australian markets have become much more competitive in recent years, both domestically and by the introduction of international competition, the scope for anti-competitive conduct has been reduced. This would suggest that the need for government intervention has also been reduced. However, the Committee has noted pressure for additional regulation in some sectors, particularly those where structural change has resulted in a high degree of concentration in the relevant markets. The airline industry is one example and the grocery industry is another. Proposals to modify the regulatory framework for these sectors include the introduction of stronger general rules, including an effects test to establish the misuse of market power, or the introduction of regulation which is specific to the particular industry.

The Committee does not favour the introduction of competition measures specifically directed to particular industries to respond to perceived shortcomings in the relevant markets. Often the complaint when analysed is not about reduced competition but about the structure of the market which competition has produced. Concentrated markets can be highly competitive. It may be possible to object to the structure of such markets for reasons of policy (the disappearance of the corner store, for example), but not on the grounds of lack of competitiveness. Of course, concentrated markets should attract scrutiny to ensure that competition is maintained, but the purpose of the competition provisions of the Act is to promote and protect the competitive process rather than to protect individual competitors. The competition provisions should not be seen as a device to achieve social outcomes unrelated to the encouragement of competition. As a matter of policy those outcomes may be regarded as desirable, but the policy will not be competition policy. Nor should the competition provisions seek the preservation of particular businesses or of a particular class of business that is unable to withstand competitive forces or may fail for other reasons. Those are matters which may

legitimately be the subject of an industry policy, but that is not a policy which is to be found in the competition provisions in Part IV of the Act.

If there is to be regulation which is specific to a particular sector of the economy, especially if it is directed to competition, it should have regard to the potential for further structural change in the sector in the longer term. In particular, regard should be had to the scope for entry to the market by new suppliers and the possibility that their presence will affect the market share of incumbent suppliers. An approach that distorts prices and returns necessary to induce the entry of new suppliers to the sector should be avoided. The market should be given time to work and provide the signals necessary to induce new entrants. In the shorter term, the competition provisions, together with Parts IVA and V of the Act, should equip the ACCC with the necessary capacity to protect the interests of consumers. It is also open for the ACCC to draw issues affecting particular sectors to the attention of the Government. Where it considers that such issues should be reviewed, the Government may issue terms of reference for an inquiry or research study by a body such as the Productivity Commission.

Part VII of the Act provides a mechanism for responding to some pressures through the authorisation process. It offers exemption on a case-by-case basis from most of the competition provisions for conduct which may be anti-competitive according to the tests laid down by Part IV, but which offers public benefits sufficient to outweigh the anti-competitive detriment.

Whilst authorisation is widely available, the process should not also be seen as a means of implementing an industry policy with goals that extend beyond competition concerns. Authorisation does, however, provide a means of resolving issues that arise when the application of the competition provisions may not promote economic efficiency. Whilst competition will generally result in greater efficiency and higher productivity, as noted earlier this will not always be the case.

Fostering compliance with the Act

The role of the ACCC includes fostering compliance with the Act. This can be achieved by various means ranging from the function of detecting and taking action against those who contravene the Act to the education of business and the public about the requirements of the Act.

Submissions made to the Committee indicated that many corporations have initiated voluntary compliance programs that provide their staff with training

intended to make them aware of trade practices issues. It was also apparent to the Committee that training programs concerning trade practice matters are available on a commercial basis. The Committee understands that compliance programs are particularly effective in achieving compliance with the Act.

To a large degree, an awareness of the requirements of the Act is the result of efforts on the part of the ACCC to publicise trade practice issues. The ACCC also contributes to compliance education. For example, the ACCC has developed a basic compliance manual, *Best and Fairest*, for use by business. This manual addresses restrictive trade practices, unconscionable conduct and consumer protection and can be developed by businesses to suit their particular needs.

The major responsibility for compliance with Part IV, and with other parts of the Act, rests with corporations. It is clearly preferable that compliance be achieved through making corporations and their employees aware of the Act's requirements. The alternative is for the ACCC to take costly action to enforce the Act. The Committee considers that voluntary compliance programs should be encouraged so that they become more widespread. The ACCC might consider providing greater assistance in this regard. It would be appropriate for the ACCC's role in this regard to be discussed with interested parties, using the consultative committee which this Committee recommends.

Conclusions

- Competitive markets increase efficiency and productivity in the economy, thereby enhancing the welfare of Australians. This has been evident in the contribution that more competitive markets have made to the strong performance of the Australian economy over the past decade.

- Whilst differences in circumstances may prevent the simple translation of regulatory approaches from other jurisdictions, it is desirable that changes to Australia's regulatory framework have regard to international developments in policy.

- Governments should continue to ensure that the competition provisions of the Act are applied as broadly as possible across the economy and include the commercial activities of governments themselves.

- The competition provisions should be universally applied to avoid distortion of economic activity to the detriment of consumer welfare.

- Whilst from time to time there is pressure for additional regulation in particular sectors, measures using the Act to promote competition which are specific to a particular industry should be avoided. Competition provisions should protect the competitive process rather than particular competitors. They should not be seen as a means of achieving other social or organisational objectives, including the preservation of particular corporations that are not able to withstand competitive forces. The regulation of competition should be distinguished from industry policy.

- The authorisation by the ACCC of conduct that offers public benefits sufficient to outweigh any detriment to competition is a significant feature of the Australian system of competition regulation. Importantly, it offers a means of dealing with situations in which the application of the competition provisions may not facilitate the most economically efficient outcome.

- The regulatory framework established by the competition provisions generally remains appropriate to Australia's circumstances.

- It is preferable to secure compliance with the Act through ensuring that corporations and their employees are aware of the competition provisions.

Recommendations

1.1 The consideration of possible changes to Australia's regulatory framework should continue to have regard to international developments in the area of competition.

1.2 Australian Governments should ensure that the competition provisions of the Act are applied as broadly as possible across the economy and extend to the commercial activities of governments themselves.

1.3 Competition provisions should be uniformly applied and measures which are specific to a particular industry should be avoided.

1.4 The competition provisions should not be regarded as a means of implementing an industry policy or the preservation of particular corporations that are not able to withstand competitive forces.

1.5 Businesses should seek to ensure that voluntary compliance programs are provided for their staff and the ACCC should review the assistance it is able to provide to businesses in this regard in consultation with interested parties through the reconstituted consultative committee recommended by the Committee.

CHAPTER 2: MERGERS

Background

The Act prohibits a merger that would substantially lessen competition. A merger may, however, be authorised on the basis that it would result in such a benefit to the public that it should be allowed to take place.

Section 50(1) provides:

> 'A corporation must not directly or indirectly: (a) acquire shares in the capital of a body corporate; or (b) acquire any asset of a person; if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.'

For the purposes of section 50, 'market' is defined to mean:

> 'a substantial market for goods or services in: (a) Australia; or (b) a State; or (c) a Territory; or (d) a region of Australia.'

The competition test laid down by section 50 is not unique to mergers. Other provisions in Part IV of the Act are concerned with conduct that would have the effect, or be likely to have the effect, of substantially lessening competition.

There is no specific statement of the objects of Part IV of the Act. However, the underlying assumption that competition promotes efficiency, which in turn enhances public welfare, is to be found in section 2 of the Act:

> 'The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'

Section 50(3) provides a non-exhaustive list of matters that must be taken into account when determining whether a merger would have the effect, or be likely to have the effect, of substantially lessening competition in a market, as follows:

> '(a) the actual and potential level of import competition in the market;
>
> (b) the height of barriers to entry to the market;
>
> (c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and

(i) the nature and extent of vertical integration in the market.'

The ACCC's interpretation of these factors and the manner in which they are taken into account in the consideration of mergers is set out in merger guidelines issued by the ACCC.[1] The guidelines deal with the ACCC's approach to issues such as failing firms and efficiencies.

Mergers which are in breach of section 50 may give rise to proceedings for the enforcement of the Act. The proceedings may be brought in the Federal Court by the ACCC or, save for an application for an injunction, by a third party. The penalties which may be imposed include, in the case of a breach of section 50, an order for the divestiture of shares or assets acquired in the course of the merger.

The Act does not require the notification of a proposed merger. Apart from the option of seeking authorisation under section 88(9) of the Act, there are no formal means by which the parties proposing a merger may assure themselves that it will not be the subject of an action by the ACCC or a third party.

When the Act was introduced in 1974, it provided that those proposing a merger might request a decision from the Trade Practices Commission specifying whether the proposal was considered to be likely to have the effect of substantially lessening competition. This process was voluntary; there was no requirement that proposed mergers be notified. The provision was repealed in 1977, notwithstanding a recommendation of the Swanson Committee in favour of its retention. It was suggested to the Committee that the reason for the repeal was, in part at least, the administrative problem posed by a backlog

1 ACCC 1999, *Merger Guidelines*.

of merger notifications. The change in 1977 occurred in the context of a concurrent amendment of the Act requiring mergers to be assessed against a market dominance test rather than the test of substantial lessening of competition. This approach, which was later reversed, meant that fewer merger proposals called for clearance.

In the absence of a statutory arrangement, a voluntary system has evolved under which the ACCC provides informal clearances for proposed mergers which it considers would not be in breach of section 50 because they would not have the effect, or likely effect, of substantially lessening competition. In clearing a merger in this way, the ACCC in effect undertakes not to challenge the merger in the Federal Court. The merger is, however, not protected from action by a third party.

Merger proposals are assessed on a case-by-case basis in accordance with the merger guidelines. The guidelines set out concentration thresholds below which it is considered unlikely that a merger would give rise to a substantial lessening of competition. Accordingly, the ACCC will generally only investigate a proposed merger where the merger will result in:

- the four, or fewer, largest firms having a combined market share of 75 per cent or more and the merged firm having a market share of at least 15 per cent; or
- the merged firm having a market share of 40 per cent or more.

There is a further indication of a safe harbour included in the guidelines: where imports have accounted for at least 10 per cent of sales in the relevant market for three years, a merger is unlikely to be opposed.

If the ACCC does not informally clear a proposed merger, the parties proposing the merger may abandon the proposal or proceed with it and risk action by the ACCC or a third party. They may also seek authorisation. However, proposals that do not initially meet the competition test under section 50 may still be cleared by the ACCC if the parties provide undertakings to the ACCC under section 87B of the Act which resolve concerns about the lessening of competition. The undertakings may relate to the structural or behavioural aspects of the proposal and are enforceable in the Federal Court.

Given the informal nature of the clearance system, the ACCC is not required to provide reasons for its decision to clear or oppose a merger. However, it does provide some reasons in some cases and also provides some information about particular mergers by way of media releases. It has a register of its merger

decisions on its website. The establishment of the public register followed a recommendation of the Griffiths Committee.

Under this informal process the majority of merger proposals are simply approved by the ACCC or approved subject to the provision of section 87B undertakings. For example, in the year 2001-02 the ACCC considered 237 proposals. More than 95 per cent of these were cleared. Of the nine proposals that the ACCC opposed, four proceeded after undertakings were provided to the ACCC. One proposal was submitted for authorisation.[2] The ACCC's statistics indicate that the proportion of mergers that raise competition issues has, over time, remained at around four to five per cent.

Under section 88(9) the ACCC may grant an authorisation for a merger which does not meet the requirements of section 50. In granting an authorisation, the ACCC is required by section 90(9) to be satisfied that the proposed merger would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

The Act does not define the term 'public benefit'. However, under section 90(9A), in determining what amounts to a benefit to the public for the purposes of section 90(9):

> '(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
>
> (i) a significant increase in the real value of exports;
>
> (ii) a significant substitution of domestic products for imported goods; and
>
> (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.'

The Australian Competition Tribunal has determined that the term public benefit should be given its widest possible meaning. The ACCC's merger guidelines provide the following non-exhaustive list of matters that could constitute public benefits:

2 ACCC, *Annual Report 2001-02*, p. 72.

- economic development, for example in natural resources, through encouragement of exploration, research and capital investment;
- fostering business efficiency, especially where this results in improved international competitiveness;
- industrial rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions;
- industrial harmony;
- assistance to efficient small businesses, such as guidance on costing and pricing or marketing initiatives which promote competitiveness;
- improvement in the quality and safety of goods and services and expansion of consumer choice;
- supply of better information to consumers and businesses to permit informed choices in their dealings;
- promotion of equitable dealings in the market;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- development of import replacements;
- growth in export markets; and
- steps to protect the environment.

Under section 88(9) a formal application for authorisation must be made to the ACCC. A grant of authorisation by the ACCC may be reviewed by the Tribunal on the application of an interested party. Both the ACCC and the Tribunal are required to publish detailed reasons for their merger authorisation decisions.

The current system for the consideration of merger proposals is set out in Figure 1.

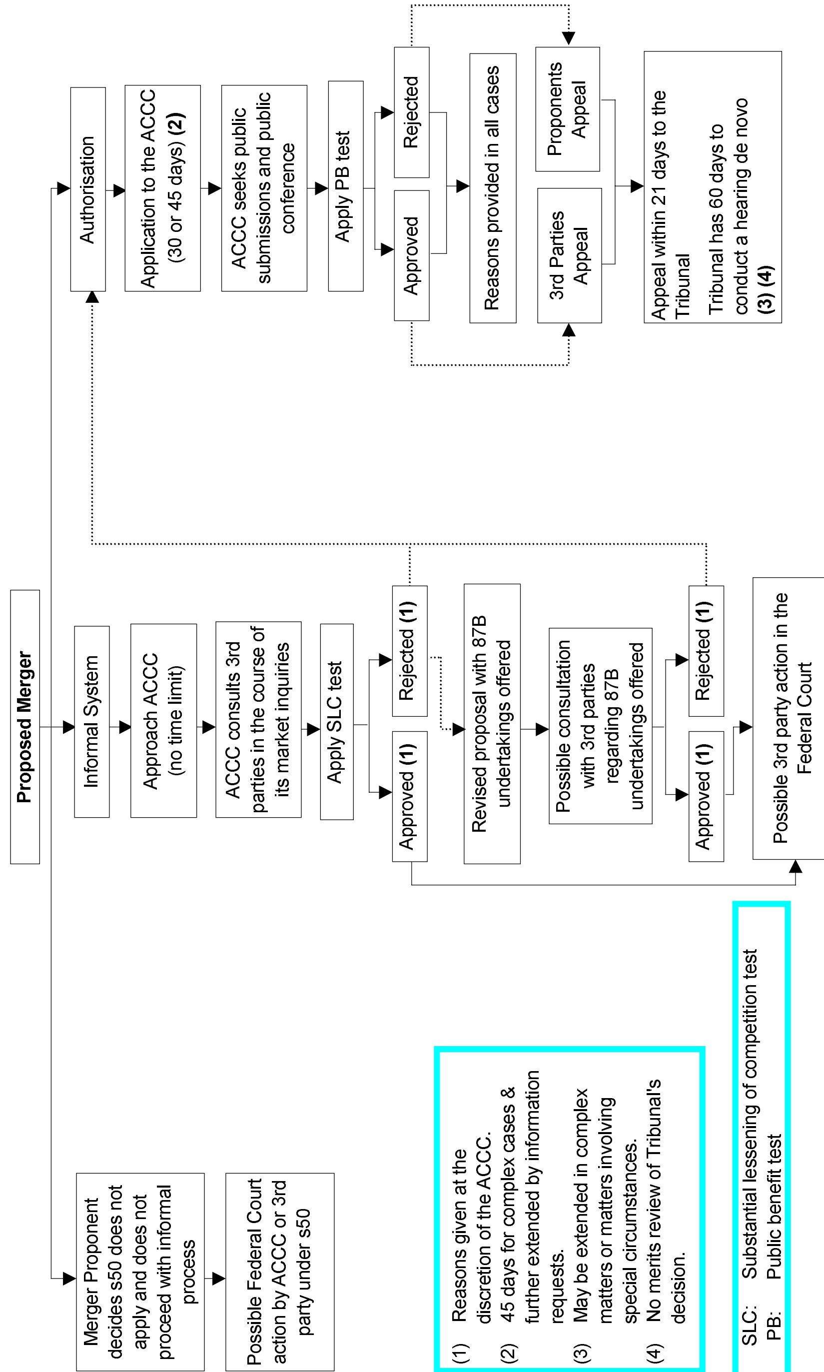

Figure 1: Current system

Issues

Submissions made to the Committee indicate that there is widespread support for the current informal system for the clearance of mergers. The process is relatively speedy and inexpensive and is generally perceived to be effective. There are, nevertheless, some criticisms of the system. Because of the availability of the clearance process there are very few applications for authorisation. If the ACCC declines to clear a proposed merger, the matter is generally resolved by the negotiation of undertakings or the proposal is abandoned. There is a lack of transparency because there is a limited body of precedent to guide parties in relation to merger decisions. For example, there is uncertainty concerning the way in which the ACCC goes about defining the market in a particular case. Accountability is also seen to be deficient because the informal clearance process does not provide an effective review mechanism.

In some submissions it was suggested that the competition test under section 50 be broadened to include the consideration of gains in economic efficiency that may accompany a merger or the wider public benefits a merger may bring to the economy. The call for these changes reflects two concerns. First, there is dissatisfaction with the authorisation process (which does require the consideration of public benefits). Secondly, there is a desire to create a test that will allow greater weight to be given to economic efficiency in the clearance process than is currently possible under the substantial lessening of competition test.

Dissatisfaction with the authorisation process is largely attributed to concerns about the time which may be taken by the ACCC to reach a decision and the risk of third party intervention by way of appeal to the Tribunal. These factors are considered to render the authorisation process commercially unrealistic for many merger proposals, especially those involving publicly listed companies.

It was also said that section 87B undertakings may be extracted, even though the parties involved do not consider them to be appropriate, because undertakings are often considered to be a more commercially realistic option than seeking to advance a proposed merger through the authorisation process. Undertakings may be inappropriate, it is said, because they go beyond the scope of competition concerns in the relevant market or, if relevant to the market, go too far because they are not necessary for the purpose of ensuring that the merger does not substantially lessen competition.

Various changes to the system were suggested, which included:

- a requirement that the ACCC should be required to give detailed reasons for its informal merger clearance decisions;
- provision allowing the ACCC's decisions on merger proposals under the informal clearance process to be reviewed by a Competition Panel composed of business, consumer and government representatives or by the Tribunal;
- the introduction of a formal, but not compulsory, process for the consideration of merger proposals that could operate alongside the informal system;
- the inclusion of additional factors in section 50(3) such as international competitiveness and rural and regional issues;
- the consideration of public benefit by the ACCC as part of the informal clearance process; and
- provision of direct access to the Tribunal, with the Tribunal operating within strict time limits, for applications for the authorisation of mergers.

Some parties also proposed that there be a wider definition of the market for the purpose of considering merger proposals. A wider definition of the market would, it was said, enable more weight to be given to international competition. This would be consistent with the claim that to compete internationally Australian firms must be able to achieve greater scale, that is, become 'national champions'.

International context

European Union

In the European Union, a merger is prohibited if it would create or strengthen a dominant position (or collective dominance) which would significantly impede effective competition in the European Union.[3]

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3 *Council Regulation (EEC) No. 4064/89* of 21 December 1989 on the control of concentrations between undertakings (published in Official Journal L 395, 30 December 1989 as last amended Official Journal L40, 13 February 1998), Article 3.

A merger falls within the European Union's jurisdiction if it affects inter-Member State trade and its size exceeds a certain threshold turnover amount (EUR5 billion worldwide and at least EUR250 million within the European Union for at least two parties) or it significantly impacts on three or more Member States (with a lower turnover test). The regime is administered by the European Commission's Directorate-General for Competition.

Pre-merger notification is compulsory. The European Commission offers informal consultation to help parties determine whether their proposed transaction may fall within the European Union's jurisdiction. The European Commission initially reviews the proposed transaction within one month and may give a clearance. A decision is published but not necessarily with a market analysis. If the European Commission has serious concerns about competition, it will issue the parties with a Statement of Objections. It will then undertake an in-depth investigation over four months, resulting in a formal decision to grant a clearance or veto the merger. This time-frame may be suspended if the European Commission issues a formal request for further information. The European Commission publishes a decision, attaching an independent hearing officer's report advising on matters of procedural integrity. Confidential data is excluded.

Clearance by the European Commission provides immunity from challenges by national European Union authorities. No authorisation on public benefit grounds is available, although the European Commission may accept undertakings, both structural and behavioural, to remove anti-competitive concerns. Judicial review is available from the European Court of First Instance within six months and ultimately from the European Court of Justice.

The European Commission may order divestiture or any other action necessary to restore effective competition. It may also impose administrative fines for failure to notify a merger proposal or to comply with its decision on a proposal or a request for information. Private actions are only available for damages in national courts under national laws.

The Commissioner for Competition has proposed a series of reforms to improve the operation of the European Union's merger review processes.[4] They include clarifying the dominance test, improving the regulator's economic analysis capabilities, enhancing the involvement of consumer

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4 See the speech by the Competition Commissioner, Mr Mario Monti, *Merger Control in the European Union: A Radical Reform*, 7 November 2002. These proposals respond to the European Commission's *Green Paper on the Review of Council Regulation (EEC) No.4064/89*, 11 December 2001.

associations in investigations, expediting court hearings for merger appeals and allowing appeals on the basis that efficiencies can be shown to benefit consumers.

United States

In the United States, a merger will be prohibited if it would be likely to substantially lessen competition or tend to create a monopoly in any market.[5]

The regime is administered by the United States Federal Department of Justice (DoJ) and the United States Federal Trade Commission (FTC), an independent administrative body. Merger guidelines indicate that they will oppose a merger if it is 'likely to create or enhance market power or facilitate its exercise'. The DoJ and the FTC jointly administer a statutory notification procedure for proposed mergers over a US$50 million threshold.

Under this procedure, there is an initial 30 day waiting period, during which the parties may not complete the transaction. During this period, the FTC or DoJ may issue a 'second request' for information. This extends the investigation for 30 days after the parties provide the requested information. These time-frames are less for cash tenders. The FTC or DoJ then may approve the merger or seek a court order to veto it. Parties may negotiate undertakings, both behavioural and structural, to gain approval in the form of a consent order. No written reasons are provided to the parties for merger decisions.

The DoJ and FTC offer second request conferences with the merger parties shortly after issuing the second request. This allows the relevant agency to identify key issues and seek an agreed plan for the investigation. It is possible to make an internal appeal against complying with a second request notice from the FTC or DoJ, on the basis that it is unduly burdensome or the information has already been provided. Within three to nine days, this appeal will be handled by a senior official within the same agency who is not involved with the particular notification. However, in most complex merger cases, second requests are issued requiring extensive information.

5 Section 7 of the *Clayton Act 1914* (United States) and Section 2 of the *Sherman Act 1890* (United States).

If an agency obtains a district court injunction to prohibit a merger, the parties may appeal to the court of appeals for the circuit and ultimately petition the Supreme Court. There is no formal authorisation process available on public benefit grounds.

Through Court orders, the authorities may seek divestiture and/or fines of up to US$10 million for corporations and US$350,000 for individuals. Fines are also possible for failure to notify (US$11,000 per day). Alternative fines are available based on twice the pecuniary gain to the contravening party or twice the pecuniary loss to parties who have suffered loss. Private parties may seek these remedies if they can demonstrate that they would be injured by the anti-competitive aspect of the merger.

Jurisprudence regarding efficiencies continues to evolve, but the United States merger guidelines discuss efficiencies in some detail. These indicate that in most cases, proven efficiencies that benefit consumers immediately through lower prices and increased output will receive the most weight, but other efficiencies will also be considered to the extent they can be proved and can be shown ultimately to benefit consumers.[6]

Canada

In Canada, a merger is prohibited if it would be likely to substantially lessen competition in a relevant market.[7] There is a statutory 'efficiency' defence available if the efficiency gains from a merger outweigh its likely anti-competitive effects. The law on how this defence applies is still evolving with the key unresolved issue being whether to take into account narrow efficiency claims only or a broader concept of efficiency.[8]

The Competition Bureau administers a compulsory pre-merger notification system for mergers that exceed a certain turnover threshold (Can$400 million combined turnover or Can$35 million in assets in Canada). The Bureau decides whether to challenge a merger after 14 days of its notification or after 42 to 60 days if the notification involves a complex proposal. During these periods,

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6 United States Department of Justice and Federal Trade Commission 1992 (as revised in 1997), *Horizontal Merger Guidelines*, footnote 37. See also William J Kolasky and Andrew R Dick, *The Merger Guidelines and the Integration of Efficiencies into Anti-trust Review of Horizontal Mergers*, pp. 30-32.

7 Section 96(1) of the *Competition Act 1985* (Canada).

8 See *Canada (Commissioner of Competition) v. Superior Propane Inc.* [2001] Vol. 3 Canada Federal Court Reports, p.185 (Court of Appeal).

the Bureau may request additional information which can extend an investigation up to five months.

Parties may seek an Advance Ruling Certificate from the Bureau stating there are no grounds to challenge the merger. No written reasons are provided to the parties for merger decisions. The Bureau is subject to a statutory requirement to observe confidentiality.[9]

There is no formal authorisation process available on public benefit grounds. Appeals from the Bureau's decision may be made to the Competition Tribunal, which is an independent quasi-judicial adjudicative body. A Tribunal decision may be reviewed on common law grounds. Statutory rights of appeal are available on questions of law and fact to the Federal Court, but appeals on questions of fact alone are at the discretion of the Court. Appeals from the Federal Court decisions are available to the Supreme Court of Canada.

Undertakings on both structural and behavioural matters may be given by way of a Competition Tribunal consent order. The Bureau may seek interim injunctions from the Tribunal on the basis that the merger would be irreversible. It may also seek final divestiture orders. Non-compliance may result in a fine up to Can$50,000. Damages may be sought only for failure to comply with a Tribunal order.

New Zealand

In New Zealand, a merger will be prohibited if it would be likely to substantially lessen competition in any market.[10]

The New Zealand Commerce Commission administers a voluntary pre-merger notification procedure. Within a statutory deadline of 10 days, the Commerce Commission publishes reasons for its merger decisions. Confidential information is excluded. Non-binding informal advice is also available. The Commerce Commission has a statutory deadline of 60 working days for authorisation decisions on public benefit grounds following a public consultation process.

Structural undertakings may be provided. Judicial review is available from New Zealand's High Court and ultimately its Court of Appeal. The Commerce Commission may issue cease and desist orders or seek injunctions or

9 Section 29 of the *Competition Act 1985* (Canada).

10 Section 47 of the *Commerce Act 1986* (New Zealand).

divestiture from the Court. Pecuniary penalties are available only by Court order (up to NZ$10 million for corporations and NZ$500,000 for individuals) and damages may be sought by private parties.

United Kingdom

The United Kingdom merger regime is in the process of being substantially revised. Under the *Enterprise Act 2002*, the Competition Commission will replace the Minister as the decision maker on mergers and the previous public interest test (including consideration of regional unemployment issues) will be replaced with a substantial lessening of competition test. The Minister will only be the decision maker on certain public interest mergers such as those in the media sector. Efficiency issues will be considered consistently with the substantial lessening of competition test at the assessment and remedy stage to the extent that they are relevant to the competition test, but in practice efficiency claims will need to be significant and established with some certainty. The *Enterprise Act 2002* directs the Office of Fair Trading not to refer a merger for further investigation to the Competition Commission if the Office of Fair Trading is satisfied that the merger would result in a 'relevant customer benefit' (for example, lower prices, higher quality, greater choice of goods) which would outweigh any substantial lessening of competition. This is similar to the consumer-focused United States approach to efficiency claims and accords with the European Union's test with regard to technical progression (for example, efficiency gains and innovation) only if it is to consumers' advantage and does not impede competition. The merger process will be transparent and include a public 'issues letter', 'remedies letter' and a final published report. The final report will be subject to judicial review.

The Competition Commission will also have the role of conducting market reviews to assess whether remedial action is required in particular sectors.

Analysis

The competition test

Section 50, together with other provisions of Part IV, focuses on the maintenance of competition in markets. However, as noted above, competition is not an end in itself. Section 50 serves the object of enhancing the welfare of Australians through increasing economic efficiency. The achievement of economic efficiency is an important goal because it is reflected in high productivity, which in turn is important in sustaining economic welfare. Maximising competition is the means to those ends.

As noted above, economic efficiency may take a number of forms. Productive efficiency is achieved where goods and services are produced at minimum cost. That is, optimum output is achieved through the best combination of labour, capital and technology. This is a major factor driving merger proposals because the most efficient combination of these resources will also mean increased profitability. Allocative efficiency is achieved when market processes allocate society's scarce resources to their most valuable use. For example, a vertical merger between two firms may result in lower prices for the same product, as one 'mark-up' is removed, and allow consumers to purchase more of another product. Dynamic efficiency is evident where the market is supplied with better quality goods and enhanced services due to technological innovation. For example, two merging firms may be able to pool their research and development expenditure to fund more effective product development.

In most circumstances maximising competition will maximise economic efficiency. Thus a test that prevents the substantial lessening of competition will generally be a good test for economic efficiency. However, there may be circumstances in which a merger will offer gains in efficiency but will also substantially lessen competition. This may occur when there are economies of scale, benefits or costs, that are external to the production process or when transaction costs are significant (see Box 1.1 in Chapter 1).

Section 50 does not address the situation that arises when a merger fails the competition test, but offers economic efficiencies with the potential to enhance overall welfare.[11] Such a merger may be authorised by the ACCC under section 90 if the efficiency gains represent public benefits that outweigh its effect on competition, but it cannot be approved at the clearance stage because the test to be applied there is the competition test under section 50.

The Committee considered the possibility of including an efficiency test in section 50. However, while economic efficiency is ultimately the more appropriate test for assessing the desirability or undesirabilty of a merger, there are important practical difficulties that arise.

An economic efficiency test would involve greater complexity than the current competition test. Such a test at the clearance stage would require more extensive economic analysis to be undertaken by the ACCC. This would require access to additional information and require more time to assess proposals. The ACCC might also need to consult more extensively with third parties than is necessary for the purpose of considering the likely effect of a

11 *Davids Holdings Pty Ltd v. Attorney-General* (1994) Vol. 121 Australian Law Reports, p. 241.

proposed merger on competition. These circumstances would be likely to extend considerably the time taken to complete the clearance process. At present, the process allows clearance to be given speedily to proposed mergers that the ACCC considers unlikely to substantially lessen competition.

The application of an efficiency test at the clearance stage would confer on the ACCC a significantly greater degree of discretion in deciding whether to clear or to oppose a merger proposal. Efficiency is already taken into account by the ACCC in applying the competition test laid down by section 50, but only to the extent that increases in efficiency contribute to the competitiveness of the market. The ACCC's merger guidelines state:

> 'If efficiencies are likely to result in lower (or not significantly higher) prices, increased output and/or higher quality goods or services, the merger may not substantially lessen competition.
>
> While recognising that precise quantification of such efficiencies is not generally possible, the Commission will require strong and credible evidence that such efficiencies are likely to accrue and that the claimed benefits for competition are likely to follow.'[12]

If a broader efficiency test were to be introduced into section 50, there would need to be a more structured approach to its application than that offered by a clearance process. Such an approach is offered by the authorisation process and, in the course of that process, efficiencies may be considered in the context of public benefit. That is consistent with the scheme of the Act, which is primarily concerned with the promotion of competition. Accordingly, a merger that is likely to substantially lessen competition is treated as prima facie undesirable and prohibited. There is, however, provision for an application to be made for authorisation on the ground that the merger would be of such benefit to the public that it should be allowed to take place. Authorisation is by way of exception to the general prohibition and is only granted after a thorough consideration of the application. The application must be made public to enable interested parties to make submissions and the decision of the ACCC is subject to review by the Tribunal.

In a similar manner, the suggestion in some submissions that section 50(3) explicitly require the consideration of additional factors such as international competitiveness and rural and regional issues raises matters which may not be

12 ACCC 1999, *Merger Guidelines*, p. 60.

relevant to the competition test. Those matters are best dealt with in the authorisation process.

The public benefit test

In determining what amounts to a benefit to the public, the ACCC is required by section 90(9A) to regard as benefits (in addition to any other benefits) a significant increase in the real value of exports, a significant substitution of domestic products for imported goods and all other matters that relate to the international competitiveness of any Australian industry. The Act does not otherwise specify what constitutes public benefit and those words can, therefore, be construed broadly.

The merger guidelines note that in *QCMA*,[13] the Tribunal considered that the term should be given its widest possible meaning:

> '... anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.'

Hence the ACCC is not constrained by the authorisation process in considering public benefit and may look at such matters as economic efficiency, international competitiveness or the benefits to Australia of developing 'national champions'. This flexible approach, which allows mergers that substantially lessen competition to proceed because of the public benefit, is not to be found in other jurisdictions.

It was suggested to the Committee that the Act should be amended to specify various matters, such as the protection of small business or rural and regional issues, as matters which might be taken into account in determining what is in the public interest. Apart from the question of the relevance of such matters, there would be no real benefit to be gained from listing them. Any matters that might properly be listed can already be considered and listing them would risk their being given undue emphasis. The relevance of any particular matter and the weight to be attached to it is likely to vary according to the circumstances of each case. Any amendment of the Act which might confine the ACCC in its consideration of what is in the public benefit is, in the view of the Committee, to be avoided. In addition, the Committee notes that the United Kingdom has removed from its test for merger review the requirement that regional matters

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13 *Re Queensland Co-operative Milling Association Ltd (1976)* Vol. 8 Australian Law Reports, p. 510.

be considered because it found that this consideration has not been a relevant factor in recent years.

Market definition

Section 4E provides that, unless a contrary intention appears, 'market' means a market in Australia and section 50(6) defines 'market' for the purposes of that section as a substantial market for goods or services in Australia, a State, a Territory or a region of Australia. Some submissions suggested that these definitions are too narrow, particularly for the purpose of considering the likely effect of a proposed merger on competition. In the case of many mergers, it was said that it is not possible to assess the likely effect on competition in Australia without regard to an international market, but to have regard to an international market is to recognise that the relevant market extends beyond Australia. However, the adoption of a wider geographic definition of a market would risk extending the relevant market beyond national borders altogether, making it more difficult to demonstrate that the merger of Australian companies would substantially lessen competition.

In practice, the statutory definitions do not create a particular problem. The merger guidelines state:

> 'Arguably, the Act does not require that the relevant market be defined as wholly within Australia, only that at least some part of it be in Australia. For practical purposes, there will generally be significant discontinuities in substitution between domestic and imported supply. In most cases the Commission will define the relevant market to be Australia or a part of Australia (including imports). However, in some circumstances it may be relevant to define the market as broader than Australia, for example, trans-Tasman, or even a world market.'[14]

The Committee regards the view taken by the ACCC as tenable and does not consider that there is any need for amendment of the statutory definitions of 'market'. Any further attempt to define that word for the purposes of the Act may confuse rather than clarify the present situation. The approach currently adopted by the ACCC allows it to have regard to foreign competition in a market. It is unlikely to oppose mergers where there is a significant and sustained level of competition from imports in the relevant market.

It was suggested that a wider definition of market would enable the ACCC, in determining the likely effect of a merger on competition, to consider whether

14 ACCC 1999, op. cit., p. 37.

the merger would enable the merged entity to compete more effectively in a global market. However, the issue raised there is whether the gains to the merged entity would warrant possible detriment to domestic consumers by the reduction of competition in the domestic market. The view was put that, in any event, vigorous competition which encourages efficiency and innovation is more important than scale for entry into international markets. These matters can, of course, be considered on an application for authorisation and in the Committee's view are best considered there. The benefits claimed for a proposed merger internationally can then be assessed alongside the impact of the proposal on domestic competition.

Merger processes

The strengths of the current informal clearance process stem from its informal nature, as do its weaknesses. The speed and efficiency of the process are generally regarded as being its greatest strengths. The voluntary nature of the process minimises the possibility of unduly delaying mergers that are unlikely to be in breach of section 50.

The weaknesses of the system are inherent in its informality. There can be no review of the ACCC's decision to refuse clearance and the ACCC cannot be required to give reasons for its decision. Where the ACCC forms the view that a merger would substantially lessen competition, the parties proposing the merger must either seek authorisation or proceed with the transaction and risk proceedings in court for penalties and divestiture. If neither option is attractive, as is likely, the parties must either withdraw their proposal or negotiate section 87B undertakings with the ACCC. The absence of an effective appeal mechanism may place the ACCC in a position to extract undertakings which go beyond competition concerns arising from a merger. The absence of reasons for the ACCC's decisions hinders the development of a body of precedent to assist in the making of consistent and predictable determinations.

The proposals for change to the informal merger process would require it to be formalised to some extent with the risk that there would be a reduction in speed and efficiency.

The Committee is not attracted to the concept of a Competition Panel based on the Takeovers Panel as a mechanism for reviewing the ACCC's decisions on merger proposals. A Competition Panel could not be the trade practices equivalent of the Takeovers Panel. The Takeovers Panel is a body involved in dispute resolution. It considers differences that arise between commercial parties. Its decisions are quite different from those of the ACCC concerning the likely effect of a merger on competition in a market, including detailed legal

and economic analyses. Moreover, it would be inappropriate for such a panel to make decisions with respect to clearance, otherwise leaving the ACCC with the responsibility of administering the Act, including responsibility for the commencement of proceedings for the enforcement of its provisions. A Competition Panel based on the Takeovers Panel would not be better equipped to decide questions of competition than the ACCC.

A new system

At a minimum, the informal process would be improved, and the potential for regulatory error reduced, if the ACCC were required (taking care to protect any confidentiality) to provide adequate reasons for its decisions when requested to do so by the parties and in cases where it rejected a merger or accepted undertakings. The provision of reasons in these instances would allow a better understanding of the ACCC's decisions and reduce uncertainty about the way in which the process operates. Confining the informal obligation to give reasons to these three instances would minimise the administrative burden on the ACCC and should not contribute to any significant delay in the process.

It is desirable, in principle, that decisions of a body such as the ACCC be subject to review on the merits. However, it is not apparent how the current informal decisions taken by the ACCC could be subjected to review without recognising the process in the Act and hence formalising it. The introduction of a review would also require the ACCC to provide more comprehensive reasons for its decisions than it currently does.

The replacement of the informal process with a compulsory, formal notification of mergers would greatly increase the regulatory burden both on corporations proposing to merge and on the ACCC.

The creation of a voluntary formal process that would operate in parallel with the existing informal system would seem to offer the best of both worlds. Such a system would be similar in concept to that which has been established in New Zealand (see Box 2.1). An optional formal system would not remove the advantages of the current system, but would provide parties proposing a merger with an optional process whereby they might gain a greater understanding of the reasons for the decision and be given the opportunity to have the Tribunal review an unfavourable decision. The availability of a review would increase the accountability of the ACCC for its decisions. The decisions of the Tribunal on review would provide guidance to the ACCC in its approach to clearance, both formal and informal, upon questions such as the definition of the relevant market or the lessening of competition.

Box 2.1: The New Zealand voluntary notification system

Parties wishing to merge in New Zealand may make application for formal approval of their proposal to the Commerce Commission but are not obliged to do so.

The Commerce Commission will then publish the application on its website and has ten working days to grant or decline clearance for the proposal. The time taken to assess the merger can only be extended with the agreement of the merging parties.

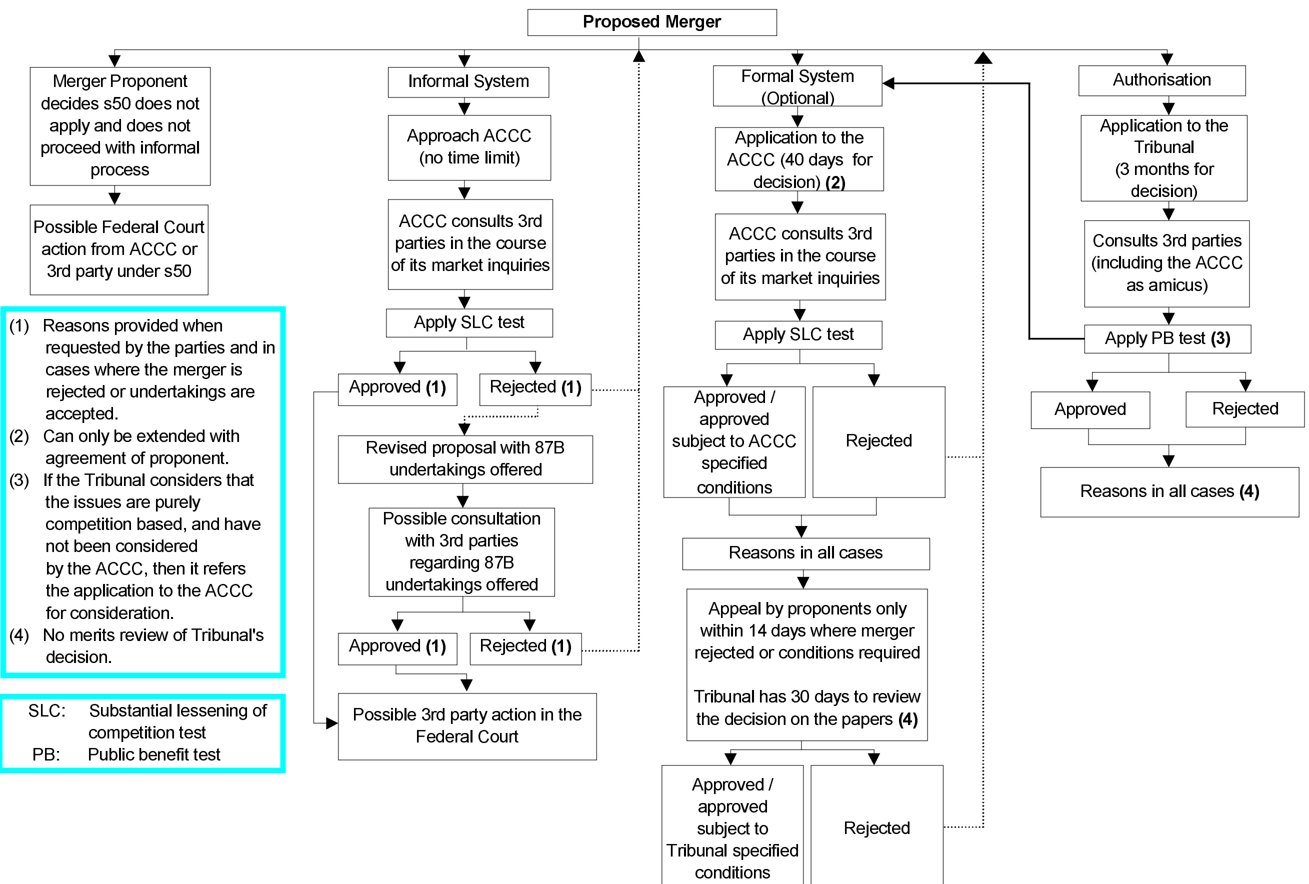
The Commerce Commission is required to publish reasons for its decisions. All confidential information is excluded from its published reasons.

Appeals on the merits of the Commerce Commission's merger determinations may be made to the New Zealand High Court and, on further questions of law, to the New Zealand Court of Appeals.

The Committee is not suggesting that there should be any requirement in the Act that all merger proposals be notified to the ACCC or be formally considered. The benefits of the informal clearance process should be retained so that most merger proposals would continue to be dealt with as expeditiously as they are now.

A scheme that would allow the parties proposing a merger the option of making a formal application for clearance to the ACCC upon the basis that the merger would not have the effect, or be likely to have the effect, of substantially lessening competition, is outlined in Figure 2. The requirements for making an application (which could be set out in revised merger guidelines) would need to be specified with a view to ensuring that the information provided to the ACCC was sufficient to enable a sound assessment to be made. The information required should not, however, be excessive. The ACCC should be required to assess the proposal within a statutory time-frame of 40 days (which should provide sufficient time for consultation with third parties). If a decision were not provided within 40 days, the clearance of the merger would be deemed to have been refused. The 40 day limit would be capable of extension only at the request of the applicant. The ACCC would be required to provide appropriate reasons for its decisions.

Figure 2: Proposed system



Under this system, formal clearance of a proposed merger would provide statutory immunity from proceedings by any party for breach of section 50. The applicant would only have statutory immunity while complying with any conditions specified by the ACCC as a condition of the approval of the merger. It would be the responsibility of the ACCC to monitor these conditions. Unsuccessful applicants would have the option of seeking a review of the ACCC's decision by the Tribunal within 14 days of the decision.

The Committee proposes that third parties not be permitted to seek a review of a clearance given by the ACCC. Currently, the ACCC is the only party able to apply for an injunction to prevent a merger from proceeding. An optional formal clearance would, therefore, offer a means of removing the element of uncertainty currently surrounding merger proposals. However, it is desirable that the views of third parties be considered and the ACCC should be required to engage in appropriate consultation with them.

The Committee also proposes that the review by the Tribunal of the ACCC's formal decisions to refuse clearance should be limited to a consideration of the material before the ACCC and should not be by way of a hearing de novo. This should reduce the workload that would otherwise be imposed on the Tribunal. It would also mean that applicants could not engage in forum shopping by reserving relevant information for consideration by the Tribunal rather than the ACCC. The Tribunal should be given 30 days to review a decision. As with the ACCC, the Tribunal would be able to grant a clearance, reject a clearance or grant a clearance subject to conditions.

Authorisation

Authorisation may be sought for proposed mergers that may be prohibited by section 50 of the Act because they would have the effect, or be likely to have the effect, of substantially lessening competition. However, it was generally accepted in submissions made to the Committee that authorisation is not, as a matter of commercial reality, a viable option in the case of most merger proposals. It was said to be too time consuming and the outcome too uncertain with the decision being open to review at the instance of interested third parties. In fact, authorisation is rarely sought. Only five authorisations of mergers have been sought from the ACCC since 1995.

The ACCC's consideration of an application for the authorisation of a proposed merger may be unavoidably lengthy in many cases because of the matters the ACCC must consider. It has 30 days to consider an application for authorisation. This time may be extended to 45 days for complex matters. It

may also be extended if the ACCC requests information from the applicant or with the agreement of the applicant.

Third parties may seek a review of the ACCC's decision. An authorisation by the ACCC may be reviewed by the Tribunal on the application of an interested party within 21 days of the date of the determination. An application for review may be made by any party that can demonstrate a sufficient interest in the matter, including competitors of the parties proposing the merger. The Tribunal has 60 days to conduct its review of a determination. The review consists of a hearing de novo and new material not before the ACCC may be relied upon. The duration of the review may be extended by the Tribunal if it considers that the matter cannot be dealt with properly within the 60 days because of the complexity of the matter or by reason of other special circumstances.

The Committee considers that the merger authorisation process would be improved if the parties applying for authorisation were required to make their application directly to the Tribunal. This procedure is also illustrated in Figure 2.

Direct application to the Tribunal would greatly reduce the time taken in considering an application for authorisation. It would also meet the perception of some parties that the ACCC is not able to look afresh at authorisation applications based upon public benefit because of its previous consideration of the effect, or likely effect, of the proposed merger on competition. There would be no review on the merits of the Tribunal's decision. Whilst that may be regarded as a shortcoming, it would be offset by the saving in time and the achievement of greater certainty of outcome.

The time taken by the authorisation process would be reduced because direct application would eliminate the current requirement that the ACCC first consider the proposal for up to 45 days and the attendant risk that the matter still could not proceed because of a review initiated by a third party. Under the proposed arrangement, authorisation would become a one step process since there would be no decision upon the public benefit of a proposed merger by the ACCC and no appeal from the Tribunal's decision other than by way of judicial review.

The Committee's proposal has significant implications for the Tribunal. A procedure would need to be devised which would enable interested third parties to present their views. The ACCC should appear to assist the Tribunal. In this capacity it would have the responsibility of using its resources to prepare and place before the Tribunal the material necessary for it to evaluate

the application and make a decision. In this way the quasi-judicial role of the Tribunal would be preserved. The resources of the Tribunal would need to be increased substantially to enable it to perform its new function.

The Tribunal should have the power to remit an application for consideration by the ACCC if it were of the view that the application required a decision solely on competition questions posed by section 50 rather than a decision concerning public benefit under section 90(9) and those questions had not previously been considered by the ACCC.

It would be reasonable to expect that, under the scheme envisaged by the Committee, the Tribunal could reach a decision on an application for authorisation within three months. The Committee believes that a time limit of this order should be imposed to make the process more predictable and more acceptable from a commercial viewpoint. It may not suit everyone, but authorisation is inevitably a public and relatively lengthy process. This is necessary, given that authorisation involves transactions that will substantially lessen competition. The public interest requires them to be thoroughly investigated.

Creeping acquisitions

Some submissions referred to creeping acquisitions in the context of mergers. The term 'creeping acquisitions' generally refers to the acquisition of a number of individual assets or businesses over time that may have a cumulative effect upon the market share of a competitor. However, no individual acquisition by itself would necessarily constitute a substantial lessening of competition in the relevant market so as to fall within the prohibition imposed by section 50.

For example, it was said that the acquisition of retail grocery outlets has allowed the major supermarket chains to increase their concentration in the market without being in breach of section 50. Measures of concentration based on the scanned grocery market, which covers only 35 per cent to 40 per cent of all products sold by the main chains,[15] indicate that the market share of the two major chains has increased from 57 per cent in 1996 to 68 per cent in 2002.[16] However, the scanned grocery measure ignores several important lines in which the two main chains compete with other retailers, such as fresh meat, fruit and vegetables, delicatessen and fresh bakery products. Broader measures

15 Woolworths Limited, Submission No. 171, p. 9.
16 ACNielsen 1999 and 2002, *Grocery Report*.

that include those items indicate that the major chains have around 50 per cent of all sales in 2002, having increased from 39 per cent in 1996.

A number of submissions proposed measures to deal with the issue of creeping acquisitions.

One proposal was that when a corporation reached a certain market share, further acquisitions would be prohibited or 'capped'. Concern was expressed that to adopt this proposal would be to stifle competition and protect the unsustainable position of inefficient competitors. This view is confirmed by the findings of the Baird Committee and the submissions of the ACCC that a market cap in the retail sector would be unworkable and would effectively regulate the consumer.[17] In a regional market the operation of a cap could deny consumers access to the products or services offered by an efficient producer.

Another proposal envisaged the declaration of highly concentrated industries by the Government. Once an industry was declared, acquisitions taking place within the industry would be required to be notified to the ACCC and examined by it. This would be consistent with the current arrangements under the Retail Grocery Code of Conduct. This proposal would affect all mergers in an industry since it would require notification by all participants, regardless of their market share. It is not clear what the focus of the ACCC's examination would be. In the absence of a cap on market share, compulsory notification might result in larger participants establishing new facilities rather than acquiring existing businesses, possibly to the detriment of those wanting to sell their businesses.

A further proposal was that section 50(3) should be amended to include a reference to creeping acquisitions as a relevant concern. However, the Committee is of the view that section 50 in its present form is adequate to enable the ACCC to consider creeping acquisitions in so far as they raise questions of competition. They are referred to in the merger guidelines. Nothing before the Committee suggests that the ACCC is not presently aware of acquisitions that raise competition concerns under section 50.

More importantly, while a genuine competitive environment exists, the preservation of the number of competitors in a market is more a matter for industry policy than for competition policy. A concentrated market may be highly competitive. Whilst there may be a desire to preserve the number of

17 Report by the Joint Select Committee on the Retailing Sector (the Baird Committee) 1999, *Fair Market or Market Failure? A Review of Australia's retailing sector,* Parliament of the Commonwealth of Australia, Canberra.

competitors in a competitive market, it will ordinarily be for policy reasons other than the promotion of competition. Part IV of the Act is concerned with the promotion of competition rather than industry policy.

Conclusions

- There is widespread support for the current informal system for the clearance of mergers. The process is relatively speedy and inexpensive and is generally perceived to be effective.

- Section 50, together with other provisions of Part IV, focuses on the maintenance of competition in markets. However, competition is not an end in itself. Section 50 serves the object of enhancing the welfare of Australians through increasing economic efficiency. The achievement of economic efficiency is an important goal because it is reflected in high productivity which in turn is important in sustaining economic welfare.

- Whilst the introduction of an economic efficiency test into section 50 may reflect ultimate concerns, practical difficulties make such a change undesirable. It would add complexity leading to the likelihood of a longer and more formal process and require the exercise of greater discretion by the ACCC. It is more appropriately considered n the authorisation process.

- There would be no benefit to be gained from listing additional specific items for consideration in the competition test as part of section 50(3).

- There would be no benefit to be gained from listing additional specific items for consideration in the application of the public benefit test. Any matters that might properly be listed can already be considered and listing them would risk their being given undue emphasis.

- Further definition of the 'market' for the purposes of the Act may confuse rather than clarify the ACCC's present, satisfactory interpretation. Issues concerning a merged entity's capacity to compete more effectively in global markets are best dealt with in the authorisation process rather than by changing the definition of 'market'.

- The speed and efficiency of the current informal clearance process are generally regarded as being its greatest strengths. The weaknesses of the system are evident in the absence of an effective mechanism for review and the absence of reasons for the ACCC's decisions, which hinders the development of a body of precedent to assist in the making of consistent and predictable determinations.

- At a minimum, the informal process would be improved, and the potential for regulatory error reduced, if the ACCC were required (taking care to protect any confidentiality) to provide adequate reasons for its decisions when requested to do so by the parties and in cases where it rejected a merger or accepted undertakings.

- The creation of a voluntary formal mergers approval process that would operate in parallel with the existing informal system would retain the advantages of the current system but overcome some of its disadvantages.

- An optional formal system could include a time limit for the assessment of merger applications against the current competition test applied by the ACCC. It could also be designed to reduce delay and uncertainty by providing for the Tribunal to consider appeals within 30 days on the basis of the information considered previously by the ACCC, and by providing that there be no third party appeal rights in relation to the merits of the application.

- Dissatisfaction with the merger authorisation process is largely attributed to concerns about the time which may be taken by the ACCC to reach a decision and the risk of third party intervention by way of appeal to the Tribunal. These factors are considered to render the authorisation process commercially unrealistic for many merger proposals, especially those involving publicly listed companies.

- The merger authorisation process could be made more attractive to business by making it more timely and reducing uncertainty. Applications for merger authorisation, which rely on public benefit grounds under section 90(9) of the Act rather than the section 50 test, could be made directly to the Tribunal rather than the ACCC, and could be resolved by the Tribunal within three months. Third party interests could be considered as part of the Tribunal's assessment rather than through an appeal process. This change will have significant implications for Tribunal processes and its resourcing. It would be desirable that the ACCC should appear in order to assist the Tribunal.

Recommendations

2.1 The ACCC should provide adequate reasons for its decisions (taking care to protect any confidentiality) in the informal clearance process when requested to do so by the parties and in cases where it has rejected a merger or accepted undertakings.

2.2 A voluntary formal clearance process should be introduced, parallel to the existing informal clearance process, in relation to merger applications requiring consideration under section 50. This formal clearance process should have the following features:

2.2.1 on application by the parties, the ACCC might grant a binding clearance upon the basis that a proposed merger would not contravene section 50. The applicant would have immunity from proceedings by any party while complying with any conditions specified by the ACCC as a condition of the approval of the merger. The ACCC would be required to monitor compliance with these conditions;

2.2.2 the information required for such an application, which could be set out in revisions to the ACCC's Merger Guidelines, should not be onerous but should be sufficient for the ACCC to make a reasoned assessment;

2.2.3 the Act should require the ACCC to make a decision within 40 days which would allow the ACCC to consult with third parties. If a decision were not provided within 40 days, the clearance of the merger should be deemed to be refused. The 40 day limit should be capable of extension only at the request of the applicant; and

2.2.4 only the applicants should be granted a right of review by the Tribunal on the merits of the ACCC's decision. The application for review should be made within 14 days of the ACCC's decision. The hearing before the Tribunal should be on the material before the ACCC and not a hearing de novo. Decisions of the Tribunal should be made within 30 days. The Tribunal should be able to grant or reject a clearance or grant a clearance subject to conditions.

2.3 Applications for the authorisation of mergers should be made directly to the Tribunal. This process should have the following features:

2.3.1 applications should be considered within a statutory time limit of three months;

2.3.2 there should be no review on the merits of the Tribunal's decision; and

2.3.3 the Tribunal should have the power to remit an application for consideration by the ACCC if it were of the view that the application required a decision solely on competition issues under section 50 rather than a decision concerning public benefit and the ACCC had yet to formally examine the matter.

CHAPTER 3: SECTION 46 — MISUSE OF MARKET POWER

Background

The legislation

Section 46 of the Act provides that:

> 'A corporation that has a substantial degree of power in a market may not take advantage of that power for the purpose of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.'

The production of direct evidence is not essential to demonstrate one of the proscribed purposes in the section. Section 46(7) makes it clear that purpose may be established by inference from the conduct of the corporation or of any other person or from any other relevant circumstances. Under section 4F of the Act, the purpose must be a substantial purpose, but it does not have to be the sole or dominant purpose.

Pecuniary penalties are provided by section 76 for breaches of Part IV of the Act, which includes section 46. Under section 77, the ACCC may institute proceedings for the recovery of pecuniary penalties. In addition, any person who suffers loss or damage by reason of a contravention of section 46 may, under section 82(1) of the Act, recover damages. Section 87(1B) also allows the ACCC to bring a representative action for damages on behalf of persons who suffer loss or damage by reason of a contravention of section 46.

History

In its original form in 1974, section 46 reflected the provisions of the *Sherman Act 1890* in the United States and the *Australian Industries Preservation Act 1906* in this country. Section 46 also reflected the interpretation

by the European Court of Justice of Article 82 of the European Community Treaty.[1] The Court held that abuse of a dominant position arising from a substantial change in the supply structure that jeopardised consumer choice in a market, such that it almost eliminated competition, would amount to abusive conduct under Article 82. With this background, section 46 was concerned with monopolistic practices and was headed 'Monopolisation'. The word monopolisation did not appear in the body of the section, but the conduct proscribed was that of a corporation in a position substantially to control a market — a reference to monopoly power in the broader sense. The section was, therefore, directed at various forms of conduct that a corporation in a position to substantially control a market might employ against existing or potential competitors. In this respect section 46 differed, and continues to differ, from other operative provisions of Part IV of the Act, namely, sections 45, 47 and 50. It is concerned with the conduct of a single corporation operating independently, whereas sections 45, 47 and 50 are concerned to prevent the anti-competitive co-ordination of business activity between two or more corporations.

As originally drafted, section 46 did not contain the phrase 'for the purpose of' and merely prefaced each of the forms of proscribed conduct with the word 'to'. In 1976, the Swanson Committee thought that it was uncertain whether the section was directed at the purpose of the corporation or the effect of its conduct. It expressed concern that the section in its then form could refer to the effect of the corporation's conduct and thus prohibit 'normal behaviour'. In 1977, the section was amended to confine its operation to the use by a monopolist of its market power with a proscribed purpose.

In 1984, a Green Paper questioned the effectiveness of section 46 on the ground that the requirement of 'substantial control' of a market was so rigorous that it applied to only a few powerful corporations.[2] Subsequently, in 1986, the Act was amended to lower the threshold, requiring a corporation to have only a 'substantial degree' of power in a market. At the same time, the heading of the section was changed from 'Monopolisation' to 'Misuse of market power'.

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1 *Europemballage Corporation and Continental Can Company Inc v. E.C. Commission* (1973) Common Market Law Reports, p. 199.

2 Evans, G.J., Willis, R., and Cohen, B. *The Trade Practices Act: Proposals for change*, Canberra, February 1984.

The main issue

The ACCC submitted that the purpose test should be retained in section 46, but that an 'effects test' should be added. The ACCC's proposal was generally supported in a number of submissions and opposed in other submissions. Many of the submissions in support were based on the assumption that an effects test would be easier to prove than purpose. With an effects test as proposed, section 46 would read:

> 'A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose, **or with the effect or likely effect,** of :
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.'

The principal reason advanced by the ACCC for its proposed amendment was that the section has a limited application because of the difficulty in proving purpose.

Analysis

Proving purpose

The difficulty in proving purpose may be doubted. Not only may purpose be inferred, but the proof that is required is on the civil standard of the balance of probabilities only, and not on the criminal standard of proof beyond reasonable doubt. The purpose does not have to be the sole or dominant purpose. An admission of purpose is not required, much less an admission in the documentary form of a 'smoking gun'.

Since the scope of the section was clarified in *Queensland Wire*,[3] a number of cases have demonstrated that proof of purpose need not be an obstacle in the application of the section (see Box 3.1).

3 *Queensland Wire Industries P/L v. BHP* (1989) Vol. 167 Commonwealth Law Reports, p. 177.

Box 3.1: Is proving purpose a problem?

Queensland Wire Industries P/L v. BHP: BHP's purpose in refusing supply to Queensland Wire was found to be to prevent Queensland Wire competing as a manufacturer and wholesaler of star pickets.

Melway Publishing P/L v. Robert Hicks P/L: the evidence of employees suggested that Melway had the requisite anti-competitive purpose. The action was unsuccessful because Melway was found to have not taken advantage of its market power.

ACCC v. Boral Ltd: Boral was found to have used its market power against a competitor for each of the three proscribed purposes in section 46. The evidence on purpose was based on internal documentation. The decision is on appeal to the High Court.

ACCC v. Universal Music Australia P/L: Hill J inferred that the refusal to supply had the purpose of preventing the entry into the wholesale market of potential competitors. The decision is on appeal, which will address the issue of whether Universal and Warner had substantial market power.

ACCC v. Australian Safeway Stores P/L: Safeway was found to have not taken advantage of its market power. Although the trial judge concluded it was unnecessary to address the issue of purpose, he found a proscribed purpose could be inferred from the conduct concerned in two of the ten alleged breaches. Otherwise, it was found that there was substantial evidence that the purpose of Safeway was pro-competitive. The decision is on appeal.

Rural Press Ltd v. ACCC: Rural Press and Bridge Printing were found to have the purpose of deterring or preventing Waikerie Printing from engaging in competitive conduct in the relevant market. The appeal to the full Federal Court turned on whether Rural Press and Bridge Printing had 'taken advantage' of their market power.

Finally, in relation to purpose, it should be observed that the ACCC has, under section 155 of the Act, extensive powers to compel the provision of information and the production of documents. These powers are not available to a private litigant but should, in the ACCC's case, afford an invaluable tool in eliciting evidence to prove the necessary purpose where it exists.

The Committee is not persuaded that proving purpose is an unnecessarily onerous hurdle for the ACCC. Whilst proving purpose may be more difficult for an individual litigant who does not have the investigative powers of the ACCC, section 83 of the Act enables an individual to rely upon the findings in an action brought by the ACCC under section 46.

Consistency

In addition to contending that the requisite purpose under section 46 is difficult to prove, a number of submissions, including that of the ACCC, suggested that to introduce an effects test would be to bring section 46 into line with those other provisions of Part IV (sections 45, 47 and 50) which are directed at conduct that has the purpose, effect or likely effect, of substantially lessening competition. Section 45 is concerned with contracts, arrangements or understandings, section 47 is concerned with exclusive dealing and section 50 is concerned with mergers and acquisitions.

However, those other provisions are, as is noted above, concerned with conduct involving competitive relationships between two or more corporations, whereas section 46 is concerned with unilateral anti-competitive behaviour on the part of a corporation with a substantial degree of market power. It is the behaviour which gives rise to the prohibition rather than its effect although, of course, the ultimate object of the section is to protect and advance a competitive environment and the competitive process rather than to protect individual competitors.[4] The section pursues that object by restraining the misuse of market power. Misuse occurs when a corporation takes advantage of the power for a proscribed purpose, regardless of the actual effect of the conduct, whether it be the achievement of a proscribed purpose or the substantial lessening of competition.

International laws

The ACCC also submits that the incorporation of an effects test in section 46 would bring the Act into line with overseas competition laws. However, save for New Zealand, there is no real counterpart to section 46 in other countries and comparison is difficult and unhelpful. Where effect is the test, as in the European Union, there is the higher threshold of market dominance. It is clear that in the United States an attempt to monopolise under the *Sherman Act 1890*

4 *Queensland Wire Industries P/L v. BHP* (1989) loc. cit.

requires a specific intent[5] and monopolisation itself requires an element of wilfulness.[6] Section 79(1) of the Canadian *Competition Act 1985* adopts an effects-based test for proscribed 'anti-competitive acts', but the Canadian Competition Tribunal has held that purpose is a necessary component of an 'anti-competitive act'.[7] In New Zealand, section 36 of the *Commerce Act 1986* is the counterpart of section 46. The introduction of an effects test to section 36 was rejected because it would unduly expand the scope of the section so as to deter efficient commercial activity and would increase the risk of error in determining whether or not conduct was in breach of the legislation.

Consistently with the Australian experience, there are relatively few cases taken overseas under the misuse of market power/monopolisation provisions. The Committee is of the view that international practice, so far as it is of assistance, does not indicate that the introduction of an effects test to section 46 would be appropriate.

Discouraging competition

Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour. The section is aimed against anti-competitive monopolistic practices, not competition, even aggressive competition. The distinction is sometimes a difficult one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency. For example, predatory pricing is prohibited under section 46. Pricing is predatory where a corporation sells at unsustainably low prices in an attempt to drive competitors from the market. However, predatory pricing may be difficult to distinguish from legitimate pro-competitive conduct, such as vigorous discounting. Vigorous competition is desirable because it is likely to deliver economically efficient outcomes. An effects test, which would disregard purpose, would make it even more difficult to draw a distinction between pro-competitive and anti-competitive behaviour than is currently the position under section 46 where purpose may be called in aid.

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5 *Spectrum Sports Inc. v. McQuillan* (1993) Vol. 113 United States Supreme Court Reports, p. 884 at pp. 890-91.

6 *United States v. Grinnell Corp* (1966) Vol. 384 United States Supreme Court Reports, p. 563 at p. 577.

7 *Director of Investigation and Research v. NutraSweet Co.* (1990) 32 Canadian Practice Reports (3d) 1 (Competition Tribunal) 35.

Under an effects test the proscribed purposes in section 46 (substantially damaging a competitor; preventing entry to the market; deterring competitive conduct) would become proscribed effects. Normal competitive behaviour by a firm with substantial market power which injured a competitor would be likely to satisfy an effects test. For example, a large firm which established a new outlet in a specific market would not necessarily be behaving in an anti-competitive manner but rather to increase competition in the market. However, it is likely that the effect would be to damage incumbent firms. An effects test would apply and capture behaviour with an adverse impact on competitors, but not necessarily on competition. The introduction of an effects test would be likely to extend the application of section 46 to legitimate business conduct and discourage competition.

It is also relevant to note that the operation of an effects test would not necessarily be confined to large corporations, but could extend to small business as well. An effects test could, in the view of the Committee, discourage legitimate competitive practices by small businesses having the effect of injuring a competitor or discouraging a potential competitor, in the same way as with larger businesses.

Taking advantage of market power

True it is that to fall within section 46 a corporation must 'take advantage' of its market power, but, as interpreted by the High Court, that means little, if anything, more than 'use' of its market power. Use of market power by a corporation occurs where the existence of market power facilitates the corporation's actions.[8] The ultimate test of the use of market power is whether the corporation's conduct was made possible by the absence of competitive conditions, but the application of that test may lead to somewhat unpredictable results and, of itself, it affords an uncertain safeguard against the capture by an effects test of legitimate business conduct.

Part XIB

Experience with an effects test in relation to the misuse of market power under Part XIB of the Act is informative.

Part XIB of the Act incorporates an effects test specifically for the telecommunications markets based on a substantial lessening of competition.

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8 *Queensland Wire Industries P/L v. BHP* (1989) loc. cit., *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001) Vol. 205 Commonwealth Law Reports, p. 1.

The inclusion of a special provision for telecommunications was considered appropriate because of the particular features of the rapidly changing telecommunications sector. The intention was that, once competition was established in the telecommunications markets, the industry would be governed by the same regulations as other industries.

The Productivity Commission has found that Part XIB has the potential negative effect of encouraging regulatory error and overreach and deterring acceptable pro-competitive conduct.[9] While the Productivity Commission recommended the retention of Part XIB, this conclusion was based on the unique circumstances in the telecommunications industry. The Productivity Commission recommended that Part XIB should only be a transitional measure, and should be further reviewed in three to five years.

It was also submitted to the Committee that the effect of Part XIB has been to discourage pro-competitive behaviour, and that an effects test has not generated superior outcomes in terms of ease of proof or greater effectiveness in distinguishing between pro-competitive and anti-competitive behaviour.

Previous proposals

Proposals for the introduction of an effects test have been examined on at least nine previous occasions (see Box 3.2). Only the 1984 Green Paper recommended the introduction of an effects test. The proposal was not taken up. Instead, section 46(7) was inserted in 1986 to affirm that purpose could be inferred. The considerations which led previous reviews to reject an effects test included the concern that such a test would capture legitimate business conduct, that there was insufficient evidence that proving purpose is overly difficult, and that such a change would generate much uncertainty. Given the number of times such proposals have been examined and rejected and given the ultimate recommendation of this Committee, it is undesirable that the introduction of an effects test should be further reconsidered in a periodic review of the Act.

9 Productivity Commission 2001, *Telecommunications Competition Regulation*.

Box 3.2: History of the effects test

In 1976, the Trade Practices Act Review Committee (the Swanson Committee) recommended that the section should only prohibit abuses by a monopolist that involve a proscribed purpose.

In 1979, the Trade Practices Consultative Committee (the Blunt Review) rejected an effects test because it would give the section too wide an application, bringing within its ambit much legitimate business conduct.

The 1984 Green Paper, *The Trade Practices Act Proposals for Change*, recommended the introduction of an effects test because of difficulty in establishing purpose.

In 1989, the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) concluded that there was insufficient evidence to justify the introduction of an effects test into section 46.

In 1991, the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) concluded that an effects test might unduly broaden the scope of conduct captured by section 46 and challenge the competitive process itself.

In 1993, the Independent Committee of Inquiry into Competition Policy in Australia (the Hilmer Committee) rejected an effects test because it would not adequately distinguish between socially detrimental and socially beneficial conduct.

In 1997, the House of Representatives Standing Committee on Industry, Science and Technology (the Reid Committee) noted the effects test and the views of the Hilmer Committee, but did not recommend its introduction.

In 1999, the Joint Select Committee on the Retailing Sector (the Baird Committee) rejected an effects test on the basis that such a far reaching change to the law may create much uncertainty in issues dealing with misuse of market power.

In 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration (the Hawker Committee) noted significant opposition to an effects test and that five inquiries since 1989 had not recommended its introduction. The Committee expressed a preference to await the outcome of further cases on section 46 before considering any change to the law.

Judicial interpretation

Since section 46 was last substantially amended in 1986, there have been a number of court cases that have contributed to the development of the jurisprudence relating to the misuse of market power. Two High Court decisions (*Queensland Wire*, *Melway*) clarified the scope of the section and there are other cases currently before the Court (*Safeway*, *Rural Press*, *Boral* and *Universal Music*). Perhaps the ACCC has been reticent in the past in initiating proceedings under section 46 because of the uncertainties which it perceived to be inherent in the section. But judicial interpretation is gradually reducing those uncertainties and it would be regrettable if amendment of the section were to re-introduce them. Cases currently before the courts should provide greater practical guidance in the application of section 46. Experience elsewhere shows that in this area of legislative endeavour, reliance is necessarily placed upon the courts to refine the broad terms in which the legislation is cast in order to achieve its object. Fundamental change that risks renewed uncertainty is to be avoided.

The introduction of an effects test would mean that at least part of the current jurisprudence surrounding section 46 would be lost. It would take time before a new jurisprudence could be developed. A number of submissions emphasised that the cost of adjusting to the change would be reflected in the uncertainty that business would face while the significance of the change was sorted out. The benefits expected from the change in terms of a better rule would need to be weighed against the dampening effect that the change would have on competition in the interim.

In the Committee's view, it would not be in the interests of competition or consumers to change section 46, given that the cases currently before the courts offer a real prospect of developing a better understanding of the true scope of section 46. The position can, of course, be reviewed when the cases have been decided and there has been an opportunity to appreciate the impact of the decisions.

Alternative proposal

An alternative to the effects test proposed by the ACCC is to be found in some of the submissions. It is the amendment of section 46 to prohibit a corporation that has a substantial degree of market power from taking advantage of that power with the effect or likely effect of substantially lessening competition in a market.

However, such an amendment would only serve to exacerbate the difficulties identified above in relation to the ACCC's proposed amendment. It would change the focus of section 46 from that of conduct with a proscribed purpose to that of conduct with a proscribed effect, the effect being the substantial lessening of competition in a market. Since the effect of legitimate competitive activities may result in the lessening of competition in a market, the section, as amended, would be likely to catch pro-competitive as well as anti-competitive conduct. Competitive behaviour would be discouraged by the prospect of proceedings under section 46.

The requirement that a corporation take advantage of its market power for its conduct to fall within section 46 would do little to alleviate the problem. As observed above, 'take advantage of' essentially means 'use' and a corporation with a substantial degree of market power can readily be seen to use that power by engaging in the competitive process. The amended section would, unlike sections 45, 47 and 50, be directed against the activity of an individual corporation rather than its relationship with another corporation or other corporations and would be likely to inhibit free engagement in competition.

If such an amendment were to be made focusing on the effect or likely effect of substantially lessening competition in a market, the entire section would need to be rewritten in order to provide a mechanism to distinguish pro-competitive from anti-competitive behaviour. As mentioned previously, that would mean losing the benefit of the courts' decisions in past and present litigation.

Reversing the onus of proof

A third proposal made to the Committee was that, in the absence of an effects test, section 46 should be amended to impose on a corporation the burden of proving that it did not take advantage of its market power for a proscribed purpose. Currently the burden of proving that purpose rests upon the complainant.

Of course, this amendment is also proposed because of the perception that proving purpose under section 46 is difficult. The Committee is not persuaded that the difficulty ordinarily exists. Nevertheless, there are other objections to the proposed amendment.

Since, under section 46, purpose can be inferred from the misuse of market power, the evidentiary burden of disproving a proscribed purpose would ordinarily fall on the corporation in any event. As was observed by the Privy

Council[10] and by the High Court,[11] use and purpose, though separate requirements, are not easily separated. However, the ultimate burden of disproving purpose would, under the proposal, rest upon the corporation. If, at the end of the day, a court were unable to reach a conclusion upon the question of purpose, it would nevertheless, the other requirements of section 46 being satisfied, be required to find a breach of the section. That, in the view of the Committee would be unfair, particularly having regard to the penalties available for breach of section 46 ($500,000 maximum for an individual and $10 million for a corporation) and potential liability for substantial damages. The burden would be unduly difficult to discharge involving, as it does, the proof of a negative in relation to what may be only one of a number of purposes. It would be a departure from the generally accepted principle that the onus of proving an allegation should rest upon the party making the allegation.

As with the introduction of an effects test, the reversal of the burden of proof would discourage corporations from engaging in competitive conduct for fear of being unable to discharge the reversed onus. It is likely that greater caution would be taken to avoid litigation under section 46, which would discourage rather than encourage competitive behaviour.

Unconscionable conduct

The Committee received a few submissions suggesting the amendment of Part IVA of the Act. In particular, it was submitted that section 51AC should be amended to prohibit various practices in relation to contracts, such as the unilateral variation of contracts or the presentation of 'take it or leave it' contracts. In addition, it was said that a new Part IVB should be added to the Act to deal with unfair contractual terms in a manner similar to the Unfair Terms in Consumer Contract Regulations in the United Kingdom. It was submitted that Part IVA was within the Committee's terms of reference because it offered remedies that might operate as an alternative to, or in addition to, the remedies provided by section 46 for misuse of market power.

The Committee's terms of reference confine it to Part IV (and associated penalty provisions) and Part VII of the Act and do not, in the Committee's view, extend to a review of the provisions relating to unconscionable conduct or possible legislation in relation to unfair contracts. Section 46 does not

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10 *Telecom Corporation of New Zealand v. Clear Communications Ltd* (1995) Vol. 1 New Zealand Law Reports, p. 385.

11 *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001), loc. cit.

purport to cover every kind of unconscionable or unfair conduct in the market place. Whilst the Committee may consider aspects of the Act other than Parts IV and VII, the Committee would only be within its terms of reference in doing so if it were acting within the context of the competition provisions. Accordingly, the Committee must reject the submission that the issues sought to be raised are within its terms of reference. The Committee did not seek or receive submissions from all parties on those issues and did not attempt to consider the operation of relevant State and Territory legislation.

The Committee would add that there may be some uncertainty about the operation of Part IVA. Section 51AC was only added in 1998 and applies only prospectively so that its scope has, perhaps, not yet been fully explored. The Committee suggests that the ACCC consider issuing guidelines concerning its approach to Part IVA.

Intellectual Property

The Committee received a number of submissions about the operation of section 46 in relation to intellectual property. One concern was that the application of section 46, particularly in relation to copyright, is uncertain. It was proposed that the section be amended to clarify and strengthen the position of owners of intellectual property.

The extent to which intellectual property confers market power on the owners for the purposes if section 46 of the Act is a question currently before the courts on appeal from the decision in *Universal Music.*[12] In that case, the question was whether it was a misuse of market power for the owners of the copyright in certain compact discs to place restrictions on businesses selling parallel imports of compact discs. The case followed the Government's decision to remove the restriction on parallel importation, which is a policy decision that is beyond the scope of this review. Even if it were inclined to do so and it was within its terms of reference, the Committee considers that it would be premature to consider this matter before a final decision in *Universal Music*.

On 28 August 2001, the Government asked the ACCC to issue guidelines on the application of Part IV to intellectual property. The Committee believes it would be desirable for these guidelines to be issued as soon as possible, but appreciates that the ACCC may be awaiting the final decision in *Universal Music*.

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12 *ACCC v. Universal Music Australia Pty Ltd* (2002) Australian Trade Practices Reports, para. 41-855.

Authorisation

Another suggestion made to the Committee was that parties should be able to seek authorisation for conduct that would otherwise breach section 46. As it stands, section 46(6) provides a collateral exemption from the operation of section 46 for conduct that has been authorised for the purposes of sections 45, 45B, 47 and 50. The Committee is not persuaded that there is a need to further extend the availability of authorisation. The economic and social consequences of misuse of market power conduct mean that it is most unlikely to be in the public interest, and hence most unlikely to be authorised.

Conclusions

- Existing case law on section 46 does not substantiate the view that purpose is an unnecessarily onerous hurdle to prove.
- The addition of an effects test would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive behaviour.
- Overseas experience, so far as it is of assistance, does not indicate that the introduction of an effects test would be appropriate.
- Cases presently before the courts provide an opportunity for the section to be further clarified and it would not be in the interests of consumers or competition to change the section at this stage.

Recommendations

3.1 No amendment should be made to section 46.

3.2 The ACCC should give consideration to issuing guidelines on its approach to Part IVA.

3.3 The ACCC should consult with industry and issue guidelines on the application of Part IV to intellectual property.

CHAPTER 4: PRICE DISCRIMINATION

Background

Price discrimination occurs when like goods or services are provided to different persons at different prices, the difference in price being unrelated to the cost of providing the goods or services. Common examples occur when discounts or concessions are given to students or pensioners for the purchase of goods or services.

From 1974 until 1995, section 49 of the Act prohibited a corporation from discriminating between purchasers of goods of like grade or quality in relation to the prices charged or by other means such as discounts, allowances, rebates or credits. Section 49 was based on the provisions of the *Robinson-Patman Act 1936* in the United States.

In 1993, the Hilmer Committee recommended that section 49 be repealed. The Hilmer Committee's recommendation echoed the concerns of previous inquiries, including the Swanson Review in 1976 and the Blunt Review in 1979. The concern was that section 49 generally discouraged competitive prices and so worked against economically efficient outcomes. The Hilmer Committee concluded that price discrimination generally enhances economic efficiency, except in cases which might be dealt with by section 45 (anti-competitive agreements) or section 46 (misuse of market power). To the extent that section 49 had any effect, the Hilmer Committee thought that it had diminished price competition. It recommended that a provision such as section 49 should form no part of a national competition policy. Section 49 was repealed in 1995. The second reading speech for the amending legislation, the *Competition Policy Reform Act 1995*, said:

> 'The prohibition against price discrimination is to be repealed as the provision is largely redundant, and the conduct it is designed to address is adequately covered by other provisions of the Act.'

Issues

A number of parties involved in the wholesale and retail grocery industry expressed concerns to the Committee about price discrimination in that industry, which they submitted was anti-competitive. Their complaint was that independent wholesalers (who sell wholesale to independent retailers) are not able to obtain goods at prices comparable to those charged by suppliers to the

two major chains, notwithstanding that their central distribution warehouses are, in comparison with the facilities of the major chains, of comparable size and capable of like performance. They submitted that this constituted a failure on the part of suppliers to provide 'like terms for like customers' at this level of the grocery distribution chain, namely, the central warehouse level. This meant, they said, that the independent wholesalers' prices to the independent retailers were such that there could be no fair competition between them and the major chains at the retail level, only the latter being able to reflect the benefit of lower wholesale prices in their retail prices.

Accordingly, they submitted that there should be an amendment of the Act to re-introduce a version of the repealed section 49, extending its reach to the provision of services as well as goods. An amendment of section 46 was also proposed to bring price discrimination specifically within its terms and to introduce an effects test.

In contrast, other parties claimed that the existing provisions of the Act are adequate to deal with anti-competitive price discrimination without jeopardising the full benefits of the competitive process. They argued that apparent price discrimination may often be explained by differences in underlying costs, due to purchases of larger volumes and superior and greater levels of marketing support. In addition, it was put that price discrimination was more often pro-competitive than anti-competitive.

International context

United States

In 1936, the United States introduced a specific law to govern price discrimination (*Robinson-Patman Act 1936*). The original aim of the legislation was to protect small businesses from powerful buyers, particularly food chain stores, who might demand price concessions.[1]

In recent decades, this legislation has been widely criticised as being too complex, deterring price competition and promoting price uniformity. Although originally directed at large retailers, in practice it has been applied mainly against small sellers who grant discounts in order to compete against large sellers and against businesses engaging in vigorous competition. The only recent litigation has been private, an incentive being provided by the

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1 Gellhorn & Kovacic 1994, *Antitrust Law and Economics*, p. 433.

prospect of treble damages.[2] The FTC now only takes action against price discrimination under the broader competition law (for example, section 2 of the *Sherman Act 1890*), and then only if the practices involved can be considered to form part of an attempt to monopolise.

Canada

Canada has a number of provisions governing price discrimination. There are criminal provisions and civil provisions. When introduced in 1935, the purpose of the criminal provisions was to protect small businesses from large buyers with market power seeking to secure unfair discounts from suppliers. As in the United States at that time, there was particular concern about the impact of such practices on the grocery industry.[3]

The criminal provisions prohibit sellers from granting price concessions to one buyer but not to competing buyers of the same article in like quality and quantity. Excluded are discounts for particular purposes and of short duration (for example, in response to a competitor's behaviour). The granting of volume discounts is permitted.

In recent years, the criminal provisions have been rarely used with only three convictions having been recorded since 1983. More often applied is the civil offence of 'price squeezing' as a form of abuse of a dominant position in a market. This offence focuses on injury to competition, rather than specific competitors.

Despite their apparent ineffectiveness, the potential application of the criminal provisions has been of concern to the business community. The Competition Bureau issued *Price Discrimination Enforcement Guidelines* in 1992 but they could not offer a binding statement about the Attorney-General's exercise of discretion in a particular situation. There remains concern that the uncertain operation of the provisions may be discouraging pricing strategies with no anti-competitive effect and that business is incurring unnecessary compliance and monitoring costs.[4] In 1995, the Competition Bureau's proposal to remove the provision was rejected as some small business sectors claimed that the provisions served as a key bargaining tool in their negotiations. Recently, a Canadian Parliamentary Committee recommended that the criminal

2 ibid., p. 434.

3 VanDuzer, J.A. 2000-01, 'Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance', *Ottawa Law Review*, Vol. 32:2, p. 195.

4 See VanDuzer at p. 196.

provisions for price discrimination be repealed and included in the existing provisions for abuse of dominant position.[5] The Committee found that price discrimination is commonplace, often not anti-competitive and current prohibitions risk chilling legitimate pricing practices.

European Union

In the European Union, the practice of applying dissimilar price conditions for equivalent transactions may constitute an abuse of dominance position, as recognised in Article 82(c) of the European Commission Treaty (the abuse of dominance provision under European Union law corresponds with a misuse of market power under the Australian Act). This would require proof that a trading party was placed at a competitive disadvantage that may have affected trade between Member States and also that there was no objective business justification for the practice. In practice, most cases of such behaviour are only brought where there is suspected predatory pricing.

The European Union also prohibits the practice of applying dissimilar price conditions where companies do not have a dominant position if the practice has the purpose or effect of distorting competition within the European Union. However, such practices may be exempt if they do not substantially eliminate competition and improve production or distribution processes or promote technical progress while allowing consumers a fair share of benefits.

United Kingdom

The United Kingdom's price discrimination provisions are based on the European Union model. In practice, the Competition Commission has not brought any recent cases. More cases may follow the recent introduction of the right of private parties to seek damages through the *Enterprise Act 2002* for contraventions of the *Competition Act 1998*.

Analysis

Price discrimination may be anti-competitive or pro-competitive. Price discrimination will be anti-competitive when it is used to create a barrier to entry to the market or to force competitors from the market. On the other hand, price cutting, even if it is in favour of a large buyer and hence discriminatory,

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5 Report of the House of Commons Standing Committee on Industry, Science and Technology April 2002, *A Plan to Modernise Canada's Competition Regime*, Recommendation 23.

may be more pro-competitive than anti-competitive. It may engender competition from rival suppliers or in the market generally. As the Swanson Committee observed in 1976, it is price flexibility which is at the heart of competitive behaviour and a general prohibition against price discrimination would substantially limit price flexibility.

The Committee heard conflicting views about pricing practices, for the most part in the grocery industry. Whilst lower prices charged by suppliers to their larger customers may indicate price discrimination, it does not follow that this is necessarily anti-competitive. The differences in price may simply reflect discounts negotiated on wholesale prices for a variety of factors including volume and promotional support of the supplier's product. Price discrimination must therefore be considered on a case-by-case basis to distinguish whether it conflicts with the aims of the Act.

Section 46 of the Act does not proscribe price discrimination as such, but its terms are apt to enable the prosecution of anti-competitive price discrimination. To contravene section 46, a corporation is required to have market power and must take advantage of its market power. A corporation needs some degree of market power for price discrimination to occur. Successful price discrimination would not otherwise be possible because it would be too easy for competitors to undermine the pricing structure. Under section 46 a corporation must also have a proscribed anti-competitive purpose. This requirement allows pro-competitive behaviour to be distinguished from anti-competitive behaviour.

The introduction of an effects test into section 46 is dealt with in Chapter 3, but it is relevant to note here that the operation of an effects test, in part to counter anti-competitive price discrimination, would not necessarily be confined to large concerns, but could extend to small business as well. An effects test could, in the view of the Committee, discourage legitimate competitive practices by small businesses having the effect of injuring a competitor or discouraging a potential competitor, in the same way as with larger businesses.

Other sections of Part IV may also be relevant in relation to price discrimination arrangements between buyers and suppliers that are anti-competitive. Arrangements between wholesalers and retailers could amount to an exclusive dealing arrangement under section 47 or an agreement that substantially lessens competition under section 45.

Part IV of the Act is concerned to protect the competitive process. By doing this it facilitates the achievement of economic efficiency and enhances the welfare of the community. However, competitors do not necessarily enter into

competition on exactly the same footing. The provisions of Part IV are not intended to handicap competitors who have an advantage in the marketplace unless that advantage is being used in an anti-competitive manner. The Act cannot protect competitors from the process of competition.

Most of the material relating to price discrimination that was put to the Committee concerned the grocery industry. In that industry there is strong competition involving both large and small participants. The Committee was told that margins are accordingly low in comparison with the retail grocery industry in other countries. It was said that consumers are benefiting from the competitive environment and have responded to the opportunity to shop in the major supermarkets that has been afforded by the deregulation of shop trading hours. In 1999, the Baird Committee found that consumers were benefiting from the competitive forces in the grocery industry. At the same time, that Committee made a number of recommendations intended to enhance competition in that industry.

There are two major supermarket chains with vertically integrated operations and a range of other wholesale and retail suppliers. Measures of concentration in the industry indicate that the two major chains account for around 68 per cent of the scanned grocery market[6] which covers 35 per cent to 40 per cent of the goods sold by the major chains.[7] The major chains have about 50 per cent of the more broadly defined 'food, liquor and grocery' market which covers more than 90 per cent of the goods they sell.[8] These measures of concentration do not, of course, reflect the position at regional and local levels. Importantly, there have been a number of recent entrants to the industry at both the wholesale and retail level. These include substantial international operators that have been attracted to the opportunities that are apparently available in the Australian market, but as yet they have only a small proportion of the market.

The main issue raised by those who put submissions to the Committee, apart from the two largest grocery chains, was the provision of 'like terms for like customers'. It appears that in the grocery industry wholesalers may not always obtain the same price from suppliers as the major chains for the supply of particular goods and services. However, a number of factors might result in unlike terms. The final price paid to suppliers will depend on many factors including the volume purchased, the advertisement of the product by the

6 Nielsen, A.C. 2002, *Grocery Report*.
7 Woolworths Limited, Submission No. 171, p. 9.
8 ibid, p. 9.

purchaser, the style of advertising used (for example, in a catalogue or by television), the placement of the product within the store (shelf space) and the supplier's desire to compete with other suppliers. Price differences arising from all but the last of these considerations result in a discernible and justifiable cost benefit for the supplier which is passed back to the buyer.

The issue of like terms for like customers and other issues related to pricing in the grocery industry have been the subject of continuing debate. Most recently, the issue of like terms has been dealt with by the ACCC in a report to the Senate on pricing practices in the grocery industry (see Box 4.1). The ACCC's report has been questioned by some because it is based upon information provided voluntarily by the industry and because only a proportion of the suppliers participated in the survey which was conducted. Nevertheless, the data which the ACCC was able to examine constituted a significant sample. The ACCC was unable to conclude that there was evidence of anti-competitive price discrimination.

The Committee notes that the ACCC's report also suggests that the principle of like terms for like customers is not clearly understood and does not offer a suitable basis for regulating prices. While the debate about grocery prices will no doubt continue, the Committee does not consider that a case has been made for changes to the competition provisions of the Act. Concerns raised with the Committee which relate to the issue of the preservation of small businesses or independent grocery wholesalers and retailers are best dealt with as a matter of industry policy. The focus of the Act should continue to be upon the regulation of competition rather than the protection of any particular class of wholesaler or retailer.

Nevertheless, the Committee recognises that the retail grocery environment is complex, concentrated and evolving and that behaviour in the sector should be carefully monitored. The Retail Grocery Industry Code of Conduct and Retail Grocery Ombudsman Scheme, which commenced in September 2000, seem to be appropriate mechanisms for dealing with practices perceived to be unfair by the independent retailers and wholesalers. In addition, Part IVA of the Act contains other provisions which are available to deal with certain practices.

Box 4.1: ACCC report into the Australian grocery industry

In September 2002 the ACCC released its Report to the Senate by the Australian Competition and Consumer Commission on Prices Paid to Suppliers by Retailers in the Australian Grocery Industry. The report contained an extensive consideration of possible anti-competitive price discrimination in the grocery sector. The ACCC offered the interim conclusion that:

> '… price differences in the sale of groceries by suppliers to the major chains and to independent wholesalers do not appear to exhibit anti-competitive conduct …'[9]

It also found that the major chains do not always get the best price from suppliers.

The report considered claims by the independent wholesalers and retailers that 'like terms for like customers' should be a principle that underlies all pricing considerations. The Report noted that there is no consensus amongst industry participants as to the meaning of like terms.

The report also noted that some suppliers expressed the view that more a relevant determinant of price was 'like terms for like performance' where the key feature of performance would be the degree to which the marketing objectives of buyers and suppliers align to meet the requirements of consumers.

Conclusions

- The effect of price discrimination on competition needs to be assessed on a case-by-case basis.
- Section 46 of the Act provides an appropriate means to tackle anti-competitive price discrimination. There is no case for the reintroduction of a prohibition against price discrimination. The principle of like terms for like customers does not of itself offer a suitable basis for regulation in the grocery industry.

9 ACCC 2002, *Report to the Senate by the Australian Competition and Consumer Commission on Prices Paid to Suppliers by Retailers in the Australian Grocery Industry*, p. 39.

- There are reasons for differences in prices in the grocery industry which do not involve anti-competitive practices. The most recent survey of suppliers does not indicate the need for further regulation of price discrimination.

Recommendation

4.1 No change should be made to the Act in relation to price discrimination.

CHAPTER 5: CEASE AND DESIST POWERS

Background

The present position

Under section 80(1) of the Act, the Federal Court may grant an injunction where it is satisfied that there is a breach or threatened breach of certain parts of the Act, including Part IV. The injunction may be granted on the application of the ACCC or any other person and may be in such terms as the Court determines to be appropriate. Under section 80(2) the Court may grant an interim injunction pending the determination of the application under subsection (1). The term interim injunction in subsection (2) includes an ex parte interim injunction as well as an interlocutory injunction upon notice. Where the ACCC is the applicant for an interim injunction, it is not required to give the normal undertaking to pay damages for any damage which the respondent may suffer as a result of the granting of the injunction.[1]

The granting of an injunction under section 80 is in accordance with equitable principles and, although it is discretionary, an injunction will ordinarily be granted if there is a serious question to be tried and the balance of convenience favours it.[2]

The powers sought

The ACCC seeks the amendment of the Act to confer upon it power to make an order that a corporation cease and desist from engaging in anti-competitive conduct. Its proposal is supported in some submissions and opposed in others. The amendment proposed by the ACCC would provide for the making of an order where it was satisfied that:

(a) a corporation has a substantial degree of power in a market;

(b) the corporation was engaging in conduct that: (i) involved a use of that power; (ii) was anti-competitive; (iii) was contrary to the public interest; and (iv) was likely to cause loss or damage; and

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1 Section 80(6) of the Act.

2 *Australian Coarse Grain Pool Pty Ltd v. Barley Marketing Board of Queensland* (1982) Vol. 46 Australian Law Reports, p. 398.

(c) there was an urgent need to prevent such loss or damage.

It would make an order only after hearing any submissions from the corporation. The order would only operate for a limited time, for example, 90 days, and would expire at the end of that time or on the institution of court proceedings by the ACCC, whichever was the sooner. The ACCC would be able to seek penalties from a court for non-compliance with the order. It is said that the order would be subject to review by a court before or at the time of the proceedings to compel compliance with the order, but it is not apparent that there would be any appeal on the merits.

Why is the proposed amendment necessary?

The ACCC claims that the power to make cease and desist orders would enable it to address more expeditiously cases of the misuse of market power and to avoid irreversible damage to competition while those cases were being investigated in order to determine whether judicial proceedings should be instituted. The process involved in obtaining an interim injunction is, it is said, cumbersome and involves a degree of proof that is difficult to achieve at an early stage. Without early intervention, the ACCC observes, competitors might be eliminated from the market and left without a remedy.

Analysis

Constitutional difficulties

The exercise of federal judicial power is, under Chapter III of the Constitution, confined to a court constituted in accordance with that Chapter. The ACCC is not a court nor is it so constituted. There is a real question whether the proposed amendment would involve the ACCC in the exercise of judicial power and hence be invalid. The power to make binding orders (albeit temporary) based on a determination by the ACCC that there was a breach of the Act, even though the orders would be enforceable only by the Court, would appear to involve the exercise of judicial power.[3] The proposed amendment seeks to overcome that by basing the proposed order on the ACCC's determination of 'anti-competitive' conduct rather than a breach of the Act, but that may only substitute one form of breach for another as the basis of

3 See *Harry Brandy v. Human Rights and Equal Opportunity Commission* (1995) Vol. 183 Commonwealth Law Reports, p. 245.

the order and, at that, an ill-defined breach described as 'anti-competitive' conduct which is not to be found elsewhere in the Act.

It is not possible for this Committee to resolve these difficulties. It is sufficient to note that they exist and would pose a real threat to the validity of the proposed amendment if it were enacted. However, the Committee is of the view that, even if the constitutional difficulties could be overcome, the proposed amendment is undesirable for other reasons as well.

The adequacy of existing powers

No material was placed before the Committee to demonstrate why the process of obtaining an interim, or temporary, injunction, particularly an ex parte injunction, is cumbersome. In appropriate cases injunctions can be obtained in hours rather than days. Elsewhere the ACCC has said that it can obtain ex parte injunctions at very short notice, its predecessor (the Trade Practices Commission) having done so, in at least one case, within 26 hours of becoming aware of conduct in contravention of the Act.[4] Nor is it apparent that it is unduly burdensome to require an applicant for an injunction to establish that there is a serious question to be tried and that the balance of convenience is in its favour, particularly where the applicant is the ACCC, which is not required to give an undertaking as to damages.

These tests have been established by the courts in the interests of justice, having regard to the potential serious interference of an interim injunction with a respondent's rights. They have been found to afford the courts a flexibility of approach in the individual case, whilst maintaining a balance between the parties. These requirements have been satisfied by others in cases where a breach of section 46 has been alleged (see Box 5.1). Of course, where the applicant is unsuccessful in obtaining an interim injunction, the ultimate remedy of an award of damages or a permanent injunction remains available.

If the proposed cease and desist order were to be made on the basis of something less than the existence of a serious question to be tried and the balance of convenience, there could be a risk of injustice if a breach of the Act were not eventually made out. The risk would be the greater in that the proposed cease and desist order would be made by the regulatory body without the independent intervention of a court.

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4 Australian Law Reform Commission (ALRC) 1994, *Compliance with the Trade Practices Act 1974*, Report No. 68, ALRC, Sydney, p. 134.

Box 5.1: Interim injunctions granted where misuse of market power was alleged

Interim injunctions have been granted where a misuse of market power has been alleged, as demonstrated by the following examples. It is noteworthy that the 'serious question to be tried' test was made out in these cases, even though the allegation of a misuse of market power was not necessarily upheld by the court.

In *Australian Rugby Union Ltd v. Hospitality Group Pty Ltd*,[5] as a part of a cross claim, an interim injunction was granted against the Australian Rugby Union, for alleged breaches of Part IV (including section 46) in threatening to dishonour Bledisloe Cup tickets sold wholesale to companies that arranged hospitality packages. The court found against Hospitality Group Pty Ltd in its final decision. The claims under Part IV were lost because Hospitality Group Pty Ltd failed to call evidence from its own ranks in support of its definition of the market.[6]

An interim injunction was granted against the Queensland TAB when, allegedly in breach of section 46, it wanted to reduce the number of bets per minute the TAB central computer accepted from punters via an on-course betting agency that also ran an on-line betting service in competition with the TAB.[7]

An interim injunction was granted against BP when, allegedly in breach of section 46, it changed its pricing for the supply of fuel to a wholesaler and retailer that was competing with BP's own retail outlets.[8] The action was eventually settled, after the Trade Practices Commission had been allowed to intervene in the court case.

A significant reason for the ACCC seeking the power to make cease and desist orders is that, upon the commencement of court proceedings, the powers of the ACCC to obtain information and documents under section 155 of the Act

5 Federal Court of Australia 1136th decision of 1999 (19 August 1999).

6 *Australian Rugby Union Ltd v. Hospitality Group Pty Ltd* (2000) Australian Trade Practices Reports, para. 41-768.

7 *Racecourse Totalizators Pty Ltd v. Totalisator Administration Board of Queensland* (1995) Vol. 58 Federal Court Reports, p. 119.

8 *O'Keeffe Nominees v. BP Australia Ltd* (1990) Australian Trade Practices Reports, para. 41-057.

cease.[9] It must then avail itself of the court processes for compelling the other party to discover relevant documents and disclose relevant information. These processes include interrogation, discovery and notices to admit or produce and subpoenas. The commencement of proceedings for an injunction is the commencement of court proceedings.

The powers of the ACCC to obtain information under section 155 are compulsive and wide reaching. They extend to authorising an officer to enter premises and inspect documents. Non-compliance is an offence punishable upon conviction by a substantial fine. Whilst these powers may be appropriate to enable the ACCC to gather evidence to determine whether a case can be made out, they are not appropriate, as has been held, once civil proceedings have been commenced. Proceedings for a breach of Part IV the Act are civil proceedings, even where a pecuniary penalty is sought.

It has been submitted that the Act could be amended to continue the ACCC's powers under section 155 after the commencement of proceedings. This could be done, but it would involve one party to civil litigation (the ACCC) having compulsive powers to extract information from its opponent, even by the entry of its premises, not subject to the supervision of the court in the action. This would be a serious inroad upon the court's ability to maintain a balance between the parties during the pre-trial stages of the action and would risk one party being placed at an unfair disadvantage to the other. Moreover, it has not been demonstrated that the court's processes for compelling the disclosure of evidence are inadequate. Parties are subject to continuous and close supervision by the court, with the aim of enabling each party to present its case speedily and fairly.

It is true that in actions for a pecuniary penalty an individual may claim privilege against exposure to a penalty, but such a claim is not available to a corporation.[10] The privilege should not, therefore, impede the effective gathering of information through interrogation, discovery and other court processes.

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9 *Brambles Holdings Ltd v. Trade Practices Commission* (1980) Vol. 32 Australian Law Reports, p. 328.

10 Section 187 of the *Evidence Act 1995* (Commonwealth).

Would a cease and desist order be speedier than an injunction?

In the view of the Committee, it is far from clear that, if the ACCC were given the power to make cease and desist orders, that process would be speedier than that of obtaining an interim injunction. It would be necessary to establish to the satisfaction of the ACCC that the conduct of the respondent was anti-competitive, involved the use of market power, was contrary to the public interest, was likely to cause loss or damage and that there was an urgent need to prevent such loss or damage. In determining those matters the ACCC would be required to afford procedural fairness to the respondent and in many cases the requisite satisfaction could only be reached after extensive investigation.

The ACCC can, of course, at present inform a respondent of its view that a breach of the Act is occurring and this may result in the voluntary cessation of the conduct complained of. It may also lead to the settlement of the matter by the respondent giving an enforceable undertaking under section 87B of the Act. Recourse to cease and desist orders is not necessary for this purpose. The advantages of cease and desist orders over injunctions as a speedier interim remedy for breaches of the Act are not evident.

Previous consideration

In 1993, the Hilmer Committee concluded that there was no need for an interim remedy in addition to interim injunctions. It expressed the view that cease and desist orders 'effectively reverse the onus of proof, which could be particularly harsh where complex economic matters are involved, as is often the case in competition cases'.[11] In 1994, the Australian Law Reform Commission (ALRC) concluded that cease and desist orders are not as quick and efficient an enforcement measure as is suggested.[12] It did not consider that the ACCC's predecessor should be given the power to make such orders. In 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration recommended against conferring such a power.[13] And, in the context of telecommunications, the Productivity Commission in 2001 considered the power to make cease and desist orders and, despite supporting competition notices under Part XIB of the Act, was not

11 Independent Committee of Inquiry into Competition Policy in Australia 1993, *National Competition Policy*, AGPS, Canberra, p. 168.

12 ALRC 1994, op. cit., p. 135.

13 House of Representatives Standing Committee on Economics, Finance and Public Administration 2001, *Competing interests: is there a balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000*, Parliament of the Commonwealth of Australia, pp. 51-53.

persuaded the power should be given to the ACCC.[14] In its submission to this Review, the Productivity Commission maintained that view and concluded that the case for a general power under Part IV to issue administratively based cease and desist orders is difficult to substantiate.[15]

Alternative proposal

Another suggestion was made to the Committee, as an alternative to cease and desist orders. It was proposed that a provision be inserted in Part IV of the Act similar to the now repealed section 75AW. This would provide that, where the ACCC considered that a breach of the Act may be occurring, it could issue a warning notice. If a breach was subsequently made out, the notice would be taken into account by a court in determining a penalty.

The Committee does not consider that this formalisation of the ACCC's existing administrative practice of sending warning letters would contribute to a better operation of the Act. A court is still likely to take an ACCC warning letter into account in determining any penalty.

International context

The ACCC points to competition regimes overseas, which it contends have provisions for cease or correct orders which are analogous to the orders which it seeks power to make. However, in other countries the judicial and administrative structures are sufficiently different to render comparisons unhelpful and in most cases they do not appear to require a lesser standard than that required for an interim injunction or provide a speedier response.

European Union

In Europe the European Commission's Directorate-General for Competition may, either on its own initiative or in response to complaints, order interim measures to bring an end to anti-competitive conduct.[16] However, interim measures may only be ordered where there is a prima facie case that the conduct in question is anti-competitive and action is urgently required, either to address a situation likely to cause serious and irreparable damage to the

14 See Productivity Commission 2001, *Telecommunications Competition Regulation: Inquiry Report*, Report No. 16, Productivity Commission, Melbourne, pp. 190-192.

15 Productivity Commission, Submission No. 125, p. 39.

16 Article 3(1) Regulation 17 and *Camera Care Limited v. E.C. Commission* (1980) Vol. 1 Common Market Law Reports, p. 334.

complainant or to address damage that would be intolerable in the public interest.[17] The measures ordered must be temporary and must be proportionate to what is necessary to conserve the status quo.[18] Decisions may be immediately appealed to the Court of First Instance and then to the European Court of Justice.

United States

In the United States, the FTC may issue a 'cease and desist' order where there is a 'reason to believe' that a corporation or individual is acting anti-competitively. However, the procedure for issuing such an order is lengthy. The party against whom the order is to be made must be given 30 days notice of a FTC hearing before orders are made. Then, if there are no appeals, the order may take effect after 60 days. Violation of a FTC order renders a party potentially liable to a civil penalty.[19] However, since 1973, the FTC has been empowered to address breaches of the law by seeking preliminary and permanent injunctions in the United States District Court[20] and this is now the preferred method of enforcement for the FTC.

Canada

The Canadian *Competition Act 1985* has been amended, with effect from June 2002, to enable the Competition Commissioner to make an ex parte application to the Competition Tribunal for an interim order preventing a corporation or individual from engaging in conduct that is alleged to be anti-competitive, for example, for abusing a dominant market position. The interim order is made for an initial period of 10 days. However, following 48 hours notice to a person affected, the order may be twice extended by up to 35 days. The Competition Tribunal may then grant a further extension of the order where the Commissioner needs more time to obtain information for the inquiry. A person affected by the order may, within the first 10 days after the order has come into effect, ask the Competition Tribunal to vary or set aside the order, but there is no appeal to other courts.[21]

17 The criteria to be applied were restated in *La Cinq SA v. E.C. Commission* (1992) Vol. 4 Common Market Law Reports, p. 449.
18 *Ford Werke AG & Ford of Europe Inc. v. E.C. Commission* (1982) Vol. 3 Common Market Law Reports, p. 673.
19 Section 5 of the *Federal Trade Commission Act 1914* (United States).
20 Section 13 of the *Federal Trade Commission Act 1914* (United States).
21 Section 103.3 of the *Competition Act 1985* (Canada).

The Competition Tribunal may make an interim order only if it considers that the conduct in question could be of the type otherwise prohibited by the Act and if, without such an order, 'injury to competition that cannot adequately be remedied by the Tribunal is likely to occur' or 'a person is likely to be eliminated as a competitor' or 'suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal'.[22] This provision has not yet been used, and a similar one applying solely to the airline industry (introduced in July 2000) has been used only once. It is unclear whether the requirements of the Canadian test are less onerous than the requirements for an interim injunction, and given its recent introduction, it provides little useful experience.

New Zealand

Perhaps the law in New Zealand is the most instructive. The New Zealand *Commerce Act 1986*, which closely parallels the Australian Act, was amended in 2001 to provide Commerce Commissioners with the power to make a cease and desist order.[23] A Commissioner may only issue a cease and desist order if, after an investigation has been conducted and a hearing has been held, the Commissioner is satisfied that a prima facie case exists and it is necessary to act urgently to prevent a person or consumers from suffering serious loss or damage and to protect the public interest. The decision of the Commissioner is subject to an appeal on the merits to the High Court of New Zealand, but the order stands until the court has made its decision, unless the Court orders to the contrary.[24] Refusal to comply with an order may result in a court-imposed pecuniary penalty.

The Commerce Commission has not exercised the power to make cease and desist orders and there is no experience upon which to draw. However, since a Commissioner is obliged to assess a case in the same manner as a court would consider an application for an injunction, two part-time dedicated cease and desist Commissioners have been appointed to discharge that function if and when the need arises. These two part-time Commissioners stand apart from the rest of the functions of the Commerce Commission so as to ensure an independent approach.

22 Section 103.3(2) of the *Competition Act 1985* (Canada).
23 Sections 74A to 74D of the *Commerce Act 1986* (New Zealand).
24 Sections 91, 93 and 95 of the *Commerce Act 1986* (New Zealand).

There is little, if anything, to suggest that the New Zealand procedure for obtaining a cease and desist order would be an improvement upon the procedure for obtaining an interim injunction.

Conclusions

- No material was placed before the Committee to demonstrate that the existing process of obtaining an interim injunction is cumbersome or overly difficult, either in the context of section 46 or generally.
- As in previous reviews, the case for giving the ACCC cease and desist powers has not been substantiated.
- Under the Constitution, the exercise of federal judicial power is confined to properly constituted courts. There is a real risk that any use of the proposed cease and desist powers, by any body other than a court, would be unconstitutional.
- It is not clear that the proposed cease and desist powers, were they to be provided to the ACCC, would be any speedier or more efficient than the existing process of obtaining an interlocutory injunction.
- No case has been made out for the Act to be amended to continue the ACCC's powers under section 155 after the commencement of court proceedings. The existing court processes for compelling the disclosure of evidence are adequate. An extension of the section 155 powers would intrude upon the court's ability to control the pre-trial process and maintain the balance of fairness.

Recommendation

5.1 The Act should not be amended to introduce a power to make cease and desist orders or to extend the powers of the ACCC under section 155 of the Act so that they apply after the commencement of judicial proceedings.

CHAPTER 6: AUTHORISATION

Background

Part VII of the Act provides that the ACCC may, in the public interest, authorise certain anti-competitive conduct which would otherwise be in breach of Part IV. The effect of authorisation is to grant an exemption from the relevant prohibitions.

Authorisation may be granted by the ACCC on the application of a party. The provision for authorisation is a statutory recognition of the fact that there may be public benefits associated with anti-competitive conduct that outweigh its detrimental effect. The authorisation process enables a broad range of matters, including efficiency gains, to be taken into account and weighed against any adverse impact on competition. Authorisation is not available for conduct that may constitute a misuse of market power under section 46 of the Act.

There are specific provisions relating to the authorisation of mergers which require certain matters to be regarded as public benefits. For other conduct that may be in breach of Part IV, the ACCC may grant an authorisation by applying one of two tests, depending on the conduct in question. For agreements that may substantially lessen competition, the applicant must satisfy the ACCC that the agreement would result in a benefit to the public that would outweigh any anti-competitive effect. For primary and secondary boycotts, third line forcing and resale price maintenance, the applicant must satisfy the ACCC that the conduct results in a benefit to the public such that it should be allowed to occur.

The Tribunal may review a determination by the ACCC in relation to an application for authorisation on the application of an interested party. Both the ACCC and the Tribunal are required to publish detailed reasons for their decisions. Authorisation will generally not take effect until any review is complete, although both the ACCC and the Tribunal may grant interim authorisation pending a decision.

To obtain authorisation, an application must be made to the ACCC. A fee of $7,500 is payable, although a fee of $15,000 applies for merger applications. Authorisation may be granted subject to conditions and for a specific period. There are no time limits imposed upon the ACCC in dealing with applications for the authorisation of conduct which does not constitute a merger.

Section 91B gives the ACCC power to revoke an authorisation. The ACCC must be satisfied that the authorisation was granted on the basis of evidence or information that was materially false or misleading, that a condition has not been complied with, or that there has been a material change of circumstances since it was granted. If, after a public review process, the ACCC is so satisfied, it may revoke the authorisation and, if appropriate, grant a substitute authorisation.

Issues

In relation to mergers, the concerns expressed about the authorisation process largely related to the time which may be taken by the ACCC to reach a decision and the risk of third party intervention by way of appeal to the Tribunal. The authorisation of mergers is examined in Chapter 2.

General dissatisfaction with the process of authorisation was expressed in a number of submissions, which went, for the most part, to the procedure rather than the eventual outcome. It was said that the process took too long and was too expensive both in the cost of preparing an application and the cost of filing it. However, some parties said that authorisation does not provide sufficient certainty because it is granted for a limited period only and is subject to appeal by third parties. In particular, it was contended that small businesses, including primary producers, should have access to a cheaper and more expeditious process for gaining statutory protection for collective bargaining.

Various suggestions were made to improve the process. Some submissions said that the authorisation process could be streamlined by reducing the filing cost for small business, by introducing limits on the time taken to determine applications and by limiting the right of third parties to appeal. Others said that a provision similar to section 45A(4) should be introduced to exempt the collective selling of goods or services from section 45A(1), leaving the relevant arrangement subject to a substantial lessening of competition test. Some said that collective bargaining by small businesses should be exempted from Part IV of the Act altogether.

The suggestion which attracted the most support, including that of the ACCC, was the creation of a notification process for collective bargaining by small businesses which would be modelled on the notification process available for exclusive dealing. This proposal is addressed in Chapter 7.

Some submissions suggested that authorisation was not a satisfactory means of dealing with collusive arrangements which may be necessary to enable

medical practitioners to provide comprehensive, high-quality health care, particularly in rural or remote communities. Concern was expressed that some common practices, such as roster arrangements, may be prohibited because they constitute price fixing or exclusionary arrangements.

The Wilkinson Review concluded that rural and regional doctors should not be excluded from Part IV and that the Act did not require amendment. However, it recommended that the authorisation process be streamlined within the current framework, with a greater emphasis on the needs of regional and rural communities to recruit and retain medical practitioners.

On 10 November 2002, the Government responded to the Wilkinson Review. It accepted most of the recommendations and, in particular, supported further action by the ACCC to ensure that it is widely understood that genuine rosters do not breach the Act. Two recommendations were referred to this Committee for consideration including Recommendation 12, which proposed the development by the ACCC of a 'pre-formal' authorisation assessment process to facilitate informal dialogue with potential applicants.

The Committee also received submissions on behalf of co-operative organisations arguing that the Act does not recognise the pro-competitive nature of co-operatives, which allow small businesses to compete with larger businesses. The co-operative federations variously argued in support of a notification process, the simplification of the authorisation process or an exemption from the competition provisions of the Act (particularly in the case of agricultural co-operatives).

Analysis

The significance of authorisation has increased in recent years. In 1995, following the report of the Hilmer Committee in 1993, Part IV was amended so that it extended to unincorporated entities, including the professions and many participants in the agricultural sector.

In addition, legislative reforms by the Commonwealth, State and Territory Governments in the context of the National Competition Policy have resulted in a wider range of industries becoming subject to Part IV of the Act. Some collective marketing arrangements which previously existed for agricultural products, including dairy products, have been dismantled. Overall, a greater proportion of the Australian economy is now subject to Part IV.

Against this background, the ACCC has granted authorisations to enable collective bargaining in a range of industries, including those of chicken, dairy

and sugar cane farmers, lorry owner-drivers and small private hospitals. In assessing these applications, the ACCC identified and examined public benefits associated with collective bargaining. Since 1 July 1995 the ACCC has denied only two applications for the authorisation of collective bargaining and has imposed conditions in less than half the cases in which it has granted authorisation. The average length of time for which authorisation has been granted has been approximately four years. Since 1 July 1995, the ACCC has not revoked any authorisation dealing with collective bargaining and there has been only one application for review before the Tribunal. In that case, the Tribunal authorised dairy farmers to collectively negotiate terms of supply with processors of raw milk.

The main concerns with the authorisation process are that it:

- is too expensive because of the costs of preparing and filing an application;
- takes too long, both in terms of the time required to prepare an application and the time taken by the ACCC to consider it; and
- does not provide sufficient certainty because an authorisation is only granted for a limited period and is subject to appeal by third parties.

Consideration should be given to the level of the fee for filing an application for authorisation. The fee is levied to recover the cost of dealing with the application, which is in accordance with general government policy on cost recovery. The Productivity Commission has recently looked at fees charged by Commonwealth Government agencies, including the ACCC.[1] It found that current charges by the ACCC have little, if any, impact on competition and economic efficiency. The fees did not appear to the Productivity Commission to unduly restrict access to the ACCC or to impose a significant burden on applicants, given the potential benefits from authorisation.

However, the Committee considers that the fee should not be set at such a high level as to discourage applications for authorisation, the granting of which would be in the public interest. While it may be appropriate to levy a fee on cost recovery grounds, the Committee suggests that the fees for the filing of applications for authorisation be reviewed from time to time to ensure that they are not deterring the submission of appropriate proposals for authorisation. The ACCC should be given a discretion to waive the fee for

1 Productivity Commission 2002, *Cost Recovery by Government Agencies.*

filing an application, in whole or in part, where it considers that it imposes an unduly onerous burden upon an applicant in all the circumstances.

The main expense involved in an application for authorisation would appear to be the legal costs associated with the preparation of the application and subsequent negotiations with the ACCC. The imposition of time limits for the consideration of applications for non-merger authorisation would, the Committee thinks, improve the process and may help to reduce these costs. Section 90 of the Act already allows the Minister to require the ACCC to make a determination on an application within four months, but the provision appears to have been little used. Recognising that an overly-tight time frame would increase the risk of regulatory error in an important area and may have an adverse impact upon those applicants with limited resources to satisfy the requirements of the ACCC, the Committee recommends that the Act be amended to impose a time limit of six months upon the consideration of non-merger applications for authorisation. Failure to observe the time limit should result in the application being deemed to be granted.

The Committee recognises that there is some uncertainty and delay engendered by the availability to third parties of a right of review by the Tribunal of a decision by the ACCC to grant authorisation. However, authorisation is an important process which involves balancing the public interest against any lessening of competition. The Committee considers that these rights of review should be retained in order that the relevant interests may be fully considered, but is of the view that consideration should be given to imposing a time limit on the review process.

The Committee sees merit in Recommendation 12 of the Wilkinson Review. That recommendation is that the ACCC establish a pre-formal authorisation assessment process to facilitate informal dialogue with professions and prospective applicants about current or proposed arrangements which potentially fall within the ambit of the Act. Such a process of consultation would enable prospective applicants to approach the ACCC without making any formal commitment. The ACCC would be able to provide guidance about the authorisation process and, where appropriate, suggest any modification of the application necessary to meet the requirements of the Act. The Committee understands that the ACCC already provides assistance to applicants, but, with the medical profession in particular, it would appear that there is scope for the use of an informal process to foster a greater understanding of the requirements of the Act and the role of the ACCC.

Conclusions

- Authorisation continues to be an important aspect of the Act, particularly given the broadening of the scope of the competition provisions in 1995.
- Concerns about the authorisation process would be alleviated by the introduction of a time limit for the consideration of non-merger applications for authorisation. The level of fee charged for filing applications should be reviewed and the ACCC should be given a discretion to waive the fee, in whole or in part, where it would impose an unduly onerous burden on an applicant.
- Third party rights of review should be retained, but consideration should be given to imposing a time limit on the review process.
- The ACCC should establish a process to enable parties contemplating an application for authorisation to seek informal guidance from the ACCC before lodging an application.

Recommendations

6.1 The Act should be amended to include a time limit of six months for the consideration of non-merger applications for authorisation by the ACCC, and consideration should be given to imposing a time limit on any review by the Tribunal.

6.2 The ACCC should be given a discretion to waive, in whole or in part, the fee for filing a non-merger application for authorisation where it would impose an unduly onerous burden on an applicant.

6.3 The ACCC should develop an informal system of consultation with non-merger applicants for authorisation designed to provide those persons with guidance about the authorisation process and the requirements of the Act.

CHAPTER 7: COLLECTIVE BARGAINING

Background

In some industries a number of competing small businesses must bargain with big business. Individually, the small businesses may lack bargaining power and so may seek to join together and bargain collectively, thereby exercising a degree of countervailing power to that of big business. Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.

However, collective bargaining is constrained by the Act. Section 45 prohibits collusive conduct in the form of contracts, arrangements or understandings having the purpose or effect of substantially lessening competition. Section 45A(1), in effect, deems a price fixing agreement to be in breach of section 45. Accordingly, any agreement between competitors to fix, control or maintain prices for goods or services is prohibited regardless of its purpose or effect on competition. Sections 45A(2) and 45A(4) provide joint ventures and joint buying groups with a limited exception from the per se prohibition imposed by section 45A(1), but section 45 continues to apply so that any pricing arrangements are still prohibited if they substantially lessen competition. Section 51(2)(a) exempts collective bargaining, for example by trade unions, in relation to remuneration, conditions of employment, hours of work or working conditions of employees.

Under sections 45 and 45A, collective bargaining might amount to a prohibited price fixing agreement. For example, a group of primary producers joining together to negotiate terms of sale for produce might be entering into a price fixing agreement in breach of section 45.

Section 45 also prohibits any contract, arrangement or understanding which contains an exclusionary provision. The aim of this provision is to prevent, inter alia, collective boycotts, which involve the deliberate exclusion of a person from participating in a market. An exclusionary provision is defined by section 4D as a provision of a contract, arrangement or understanding between at least two or more parties who are competitive with each other which prevents, limits or restricts the freedom of the parties to deal with certain persons or classes of persons.

A collective bargaining arrangement involving the possibility of a collective refusal to deal with a person or class of persons might amount to an arrangement to engage in a collective boycott and be an exclusionary provision.

Under sections 88 and 90, collective bargaining may be authorised by the ACCC where it is satisfied that the public benefit would outweigh the detriment constituted by any lessening of competition that would result or be likely to result. Authorisation takes a collective bargaining arrangement outside the provisions of sections 45 and 45A. The operation of the authorisation process is outlined in Chapter 6.

By way of contrast to authorisation, section 93 of the Act provides for the notification of exclusive dealing which, were it not for the notification, would be in breach of section 47. Once a notification has been lodged, the conduct which is the subject of the notification is deemed not to have the effect of substantially lessening competition for the purposes of section 47. The result is, except in relation to conduct falling within sections 47(6), (7), (8)(c) and (9)(d) where the lessening of competition is not relevant, that there is statutory protection for the conduct in question. The ACCC can withdraw the protection under section 93(3) by giving notice if it is satisfied that the conduct is likely to have the effect of substantially lessening competition and that in all the circumstances no public benefit has resulted or is likely to result from the conduct or any public benefit would not outweigh the detriment constituted by the lessening of competition. The ACCC must afford the opportunity for a conference amongst interested parties by preparing a draft notice. If the ACCC decides to withdraw the protection, it ceases 30 days after the ACCC gives notice of its decision. The ACCC has power to extend, but not reduce, that period.

The procedure is slightly different for third line forcing under section 47. In that case the notification does not take immediate effect, but takes effect 14 days later or on the date on which the ACCC advises the applicant that it has decided not to give notice that the public detriment of the conduct outweighs the public benefit, whichever occurs first.

Issues

Dissatisfaction was expressed in a number of submissions with the process of authorisation. These concerns are described in Chapter 6 which addresses some of the suggestions made to improve the authorisation process. This Chapter addresses the suggestion that a notification process should be created

for collective bargaining by small businesses, which would be modelled on the notification process available for exclusive dealing.

The Committee also received submissions on behalf of co-operative organisations arguing that the Act does not recognise the pro-competitive nature of the co-operative structure, in which small businesses may co-operate to compete against larger businesses. The co-operative federations variously argued in support of a notification process, the simplification of the authorisation process or an exemption from the competition provisions of the Act (particularly in the case of agricultural co-operatives).

Analysis

The Committee is of the view that there is much to be said for the retention of some kind of authorisation process for collective bargaining by small businesses. Whilst the procedure may be lengthy and expensive, any decision to allow collective bargaining constitutes an exception to the basic thrust of the Act. The Act prohibits price fixing per se because competition in prices is the primary means of competition amongst businesses and is central to economic efficiency. Differences in prices assist consumers and businesses in making choices between competing products. They also assist decisions about resource allocation by indicating where there is an incentive for new investment. The Act does allow the authorisation of conduct involving price fixing where it is in the public interest to do so, but whether such a departure from its central aim of fostering competition is justified may be thought to require careful consideration on a case-by-case basis. The authorisation process provided by the Act involves such an approach.

The current per se prohibition of price fixing is justified on the basis that the occurrence of price fixing agreements that enhance efficiency is likely to be rare, because a per se test is easier to enforce than a substantial lessening of competition test and because such clear rules generate certainty. The per se treatment is qualified by provision for the authorisation of appropriate conduct. The authorisation process allows the public benefits of behaviour that is potentially anti-competitive to be considered and evaluated on a case-by-case basis.

As noted in Chapters 1 and 6, legislative reform over the last decade designed to foster competition has resulted in a greater part of the Australian economy becoming subject to Part IV of the Act. Modification of the authorisation process to facilitate collective bargaining should not constitute a reversal of these reforms. For example, if notification were to be introduced as an

alternative to authorisation, it should not be allowed to become a de facto mechanism for the re-establishment of the statutory marketing arrangements. Notification should not be seen as an alternative form of industry policy.

A distinction has been drawn between collective bargaining and behaviour amounting to a primary boycott, or exclusionary conduct. The ACCC apparently takes the view that primary boycotts can significantly increase the anti-competitive effect of collective bargaining arrangements. The Committee is unclear whether the ACCC would view a collective bargaining agreement between buyers to refuse to buy from a supplier in the absence of a satisfactorily negotiated price as a primary boycott, but it would seem to the Committee to be an integral part of such an agreement.

The Committee does not accept the submission that collective bargaining by small business be exempted altogether from the provisions of Part IV of the Act. This would have the effect of removing a substantial part of the Australian economy from the operation of this aspect of competition law and would effectively reverse many of the reforms achieved over the last decade. There would be no assessment of the public interest in relation to activities undertaken within the exception. An unfettered ability to bargain collectively would allow anti-competitive and undesirable conduct.

The general exemption provided in the Act for collective bargaining and collective agreements on employment conditions does not provide an appropriate precedent for small business. Collective bargaining between employees and employers is subject to detailed regulation under industrial relations legislation which has developed over many years. If small business were granted a general exemption from the Act, it would operate without the checks and balances governing collective bargaining under industrial law.

Notwithstanding the advantages of authorisation, on balance, and having regard to the ACCC’s preference for it, the Committee considers that a notification process, along the lines of the process for notifying exclusive dealing, should be introduced for collective bargaining by small business in addition to the existing authorisation process. It would, in the view of the Committee, provide a speedier, simpler and less expensive mechanism.

Notification process

The purpose of a notification process of the type proposed would be to provide a speedy and simple means of enabling small businesses to take themselves outside the provisions of Part IV of the Act in order to be able to bargain collectively with businesses possessing a large degree of market power.

The process would have to be confined to small business in negotiation with big business where experience has shown that collective bargaining may do little or no harm to the competitive process and may generate public benefit. Some definition of a small business would be required.

There appear to be two main approaches to the definition of a small business. One uses the features of the business — for example, turnover, employee numbers or ownership structure — and the other makes reference to the value of the transactions involved. The latter approach is adopted in section 51AC of the Act. That section imposes a prohibition against unconscionable conduct in connection with transactions involving a price of $3 million or less. The protection is not extended to public listed companies and the amount of $3 million may be varied by regulation.

In the Committee's view the transaction value approach is the preferable one for restricting the notification process for collective bargaining to small businesses. It is administratively simple and requires no intrusive investigation as may be the case with a business features test. Notification would be restricted to an arrangement under which only businesses that supply or acquire goods or services at less than the maximum amount per annum could participate. An amount of $3 million is included in the Act to define transactions by small business under the unconscionable conduct provisions. A similar amount could be specified for this purpose but the Committee suggests that it be variable by regulation in the light of experience. The total value of the collective bargaining arrangement would be well above the maximum amount for individual businesses and would depend on the number of businesses participating. Such an approach would be consistent with the approach already adopted by the Act. A disadvantage identified by the ACCC is that a greater number of businesses that were not small businesses might be eligible to participate in a notified arrangement than would be the case under a business features test. However, the ACCC would be able to rely on its public benefit assessment to screen out inappropriate collective bargaining arrangements.

Whilst the notification of collective bargaining arrangements should be available only to small business, it should also only be available in the public interest where it is big business on the other side with whom the bargaining is to take place, that is to say, where there is a corporation with a substantial degree of market power. The ACCC submits that, rather than make the degree of market power an eligibility criterion, it should form part of that body's assessment of the notification to determine whether the notified conduct would result in a net public benefit. The Committee accepts this submission.

Such a procedure would allow the issues of market power and competition to be considered together.

The ACCC also proposes that the notification process for collective bargaining should not provide immunity from the prohibition imposed by section 45 against primary boycotts. As noted above, collective bargaining, of its nature, may involve a collective boycott and the Committee would not favour such a restriction. Whether, in the circumstances, a particular form of boycott might not be in the public interest, would be for the ACCC to assess after notification. Such an arrangement could, of course, be the subject of an application for authorisation.

There are other qualifications suggested by the ACCC. It submits that the notification should not come into effect until 30 days after the notification is lodged to ensure that it has sufficient time to assess the likely effect of the notified conduct. It also proposes that it should be able to extend the 30 day period to 90 days. The Committee is of the view that to allow such periods would be to impair the speedy and effective nature of the process. With the notification of third line forcing, there is a delay of 14 days before the notification takes effect, and the Committee believes that 14 days would be sufficient in the case of small business notifications. If the notification process were used to implement highly anti-competitive arrangements, the protection afforded could, under the proposed legislation, be withdrawn by the ACCC.

The ACCC submits that, if a fee is to be charged for notification, it should be substantially less than the fee charged for an application for authorisation. The Committee agrees with that submission. It also agrees with the submission that immunity under the notification should, in the absence of withdrawal, last for three years, after which the parties would have to lodge a new notification if they wished the immunity to continue.

It was also submitted that the utility of a notification process would be increased if provision were made for notification to be sought on behalf of a group by a third party. This might be relevant, for example, to rural producers who may wish to bargain through the structure provided by an industry body. The Committee also considers that it would be appropriate to allow a third party to apply for a notification on behalf of a group.

While the Committee has not made particular recommendations with respect to the medical profession, members of that profession would be able to avail themselves of a notification process for collective bargaining were such a process to be introduced.

Similarly, that process would be available to co-operatives in appropriate circumstances. Of course, the authorisation process would remain available and proposals for the modification of that process are dealt with in Chapter 6. The Committee would not favour the exemption of co-operatives from the competition provisions of the Act.

Conclusions

- Collective bargaining by small business should not be exempted altogether from the provisions of Part IV.
- As an alternative to authorisation, a notification process should be provided to assist small business, including co-operatives which meet the definition of small business, in dealing collectively with large businesses where the collective bargaining may generate public benefit.
- A definition of small business, based on the value of the transaction undertaken, is desirable to confine access to the notification process to small business.

Recommendations

7.1 A notification process should be introduced, along the lines of the process contained in section 93 of the Act, for collective bargaining by small businesses (including co-operatives that meet the definition of small business) dealing with large business.

7.2 A transaction value approach should be adopted to provide a definition of small business. Initially the amount of transactions should be set at $3 million but be variable by the Minister by regulation.

7.3 A period of 14 days should be required to elapse before a notification takes effect.

7.4 Provision should be made for third parties to make a collective bargaining notification on behalf of a group of small businesses.

CHAPTER 8: PER SE PROHIBITIONS

Background

In Part IV of the Act, certain conduct is of itself — per se — regarded as anti-competitive and is prohibited, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition. Other conduct is proscribed by Part IV only if it has the purpose, effect or likely effect of substantially lessening competition.

The rationale behind a per se prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.

The per se prohibitions in Part IV are those relating to price fixing (section 45A), exclusionary conduct (section 45(2)), certain kinds of exclusive dealing known as third line forcing (sections 47(6) and (7)) and resale price maintenance (section 48).

Price fixing

Sections 45(2)(a)(ii) and (2)(b)(ii) proscribe the making or giving effect to a provision in a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition. These are not per se prohibitions, but section 45A(1) deems price fixing contracts, arrangements or understandings to have the purpose, effect or likely effect of substantially lessening competition with the result that price fixing is effectively prohibited per se under section 45. Section 45A(1) does not apply to certain agreements made for the purposes of joint ventures or joint buying groups, but the test of substantial lessening of competition continues to apply.

Exclusionary conduct

Sections 45(2)(a)(i) and (2)(b)(i) proscribe the making or giving effect to an exclusionary provision in a contract, arrangement or understanding. This is a per se prohibition. An exclusionary provision is defined in section 4D as one made between competitors which has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons either altogether or in particular circumstances or on particular conditions. The section proscribes conduct which is frequently

described as a collective or primary boycott. It also may prohibit arrangements for the sharing of a market amongst competitors or for the rigging of bids amongst tenderers.

Exclusive dealing amounting to third line forcing

Section 47(1) prohibits a corporation from engaging in the practice of exclusive dealing. Section 47 then goes on to specify conduct which amounts to exclusive dealing, but provides in subsection (10) that subsection (1) does not apply to certain specified conduct unless engaging in that conduct has the purpose, effect or likely effect of substantially lessening competition. Third line forcing, which is prohibited by sections 47(6) and (7), does not fall within subsection (10) and so is prohibited per se. Third line forcing occurs when a corporation sells goods or services or gives a discount, but only on condition that the purchaser acquires other goods or services from a third person.

Authorisation

Under section 88(1) of the Act, the ACCC may authorise price fixing, but under section 90(6) may only do so where it is satisfied that the result or likely result would be a benefit to the public and that benefit would outweigh the detriment to the public constituted by any lessening of competition. The ACCC may also authorise an exclusionary provision under section 88(1) and conduct that constitutes exclusive dealing (including third line forcing) under section 88(8), but under section 90(8) may not do so unless it is satisfied in all the circumstances that there is such a benefit to the public that the authorisation should be given.

Notification

A corporation may notify the ACCC of conduct amounting to exclusive dealing (including third line forcing) under section 93(1) of the Act. In the case of third line forcing, the notice takes effect and gives exemption from section 47 after 14 days from the date on which it is given. The exemption may be withdrawn by the ACCC if it is satisfied that the likely benefit to the public will not outweigh the likely detriment. The availability of the speedier and cheaper procedure for notification means that an application for the authorisation of third line forcing is unusual. Under section 93(2), notification is not available for exclusive dealing conduct where an earlier authorisation application in respect of the conduct has been granted or dismissed.

Issues

The submissions to the Committee generally accepted that the prohibition of price fixing per se was justified because of its anti-competitive nature. There was criticism of the limited extent to which joint venture agreements are exempted from section 45A(1), but that is dealt with separately in Chapter 9.

However, many submissions to the Committee criticised the per se prohibition of exclusionary provisions. It was said that in its present form the prohibition extends to a wide range of co-operative arrangements, such as joint ventures, that are not anti-competitive and may even be pro-competitive. It was suggested that the prohibition should not apply where there was no substantial lessening of competition or that there should be a defence of no substantial lessening of competition in any proceedings in relation to an exclusionary provision. It was also said that the persons or classes of persons referred to in section 4D as the targets of an exclusionary provision have been construed to extend to anyone affected by the provision and should be confined to the competitors, actual or potential, of the parties involved in the exclusionary conduct.

The per se prohibition of exclusive dealing in the form of third line forcing was not supported in any of the submissions. It was said that third line forcing may be competitive and benefit consumers. Many customer-loyalty schemes and shopper docket discounts, such as the grocery/petrol discount schemes, were said to be in this category. Concern was also expressed that the prohibition of third line forcing is anomalous in that it applies where the third person (the supplier of the forced product) is a corporation related to the initial supplier of the goods or services, but does not apply where the initial supplier and the supplier of the forced product are the one corporate entity. It was submitted that, consistently with other provisions of Part IV, related corporations should be treated as one business unit.

International context

Exclusionary conduct is treated differently in other jurisdictions.

In the United States, there is no explicit prohibition of exclusionary conduct. The *Sherman Act 1890* prohibits '… every contract, combination …, or conspiracy, in restraint of trade' and this prohibition is regarded as extending to collective boycotts. However, under the case law as it has developed in the United States, a collective boycott is only treated as prohibited per se when it is an attempt by a business with market power to eliminate a competitor or is

designed to fix prices. In all other circumstances, a collective boycott is subject to the rule of reason analysis, which requires consideration of the competitive impact of the conduct.

The definition of an exclusionary provision in section 4D was an attempt to codify the principles of United States law. It was felt by the Swanson Committee that the phrase 'in restraint of trade or commerce' may have been a technical expression unfamiliar to the business community and it recommended a different wording as follows:

> 'We consider that a collective boycott, for example, an agreement that has the purpose or effect or is likely to have the effect of restricting the persons or class of persons who may be dealt with, or the circumstances in which, or the conditions subject to which, persons or classes of persons may be dealt with by the parties to the agreement, or any of them, or by persons under their control, should be prohibited if it has a substantial adverse effect on competition between the parties to the agreement or any of them or competition between those parties or any of them and other persons.'[1]

It is apparent that the draftsman of section 4D did not adhere to the recommendation. Nevertheless, New Zealand adopted the Australian provision. It has, however, subsequently made two amendments.

First, section 29(1)(c) was added to the *Commerce Act 1986* in 1990 making it a requirement of an exclusionary provision that:

> 'The particular person or class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or understanding in relation to the supply or acquisition of those goods or services.'

Secondly, section 29(1A) was added in 2001 providing a competition defence:

> 'A provision of a contract, an arrangement or an understanding that would, but for this subsection, be an exclusionary provision … is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.'

Australia appears to be the only country which prohibits third line forcing per se. New Zealand and Canada prohibit third line forcing, but only when it has a detrimental effect on competition. The United States and the

1 Committee to Review the Trade Practices Act 1974 (1976), *Report to the Minister for Business and Consumer Affairs*, Commonwelath of Australia, Canberra, p. 33.

European Union do not make any specific provision for third line forcing, leaving the matter to be determined by the application of general laws relating to anti-competitive arrangements.

Analysis

Exclusionary provisions

Exclusionary provisions in the form of collective boycotts are generally anti-competitive because they involve the deliberate exclusion of a competitor from a market. This restriction of competition constitutes a loss of efficiency when it results in a lesser supply of goods or services or higher prices to consumers.

It would appear that the reasons for the prohibition of exclusionary provisions per se are that exclusionary provisions are unlikely to enhance efficiency, that a breach is more easily made out without the need to prove a substantial lessening of competition and that an unqualified rule generates certainty. It should also be noted that, notwithstanding the per se prohibition, an exclusionary provision may be authorised under the Act in an appropriate case. Socially beneficial and pro-competitive conduct may be permitted on a case-by-case basis whilst anti-competitive boycotts continue to be prohibited.

However, many submissions expressed concern that the authorisation process is not a satisfactory answer to the criticism that section 4D is cast too widely. Again, the view was expressed that authorisation is too expensive, is time consuming, and is uncertain because it is provided for a limited time only and is subject to appeal by third parties. These concerns about the authorisation process are dealt with more fully in Chapters 6 and 7.

The Committee believes that, because of the cumbersome nature of the authorisation process, section 4D should be reduced in scope so that it does not extend to conduct that is not anti-competitive. There are two ways in which this could be done.

First, it might be provided that only those exclusionary provisions that result in a substantial lessening of competition were prohibited. That would mean that the prohibition would cease to be a per se prohibition. However, such a provision would make it more difficult to prosecute an anti-competitive boycott. This is undesirable, it being accepted that collective boycotts are generally harmful to competition.

Secondly, provision could be made to allow a competition defence to be raised to a prosecution under the per se prohibition. This would allow a party to an alleged collective boycott to establish by way of defence that the conduct in question did not have the purpose, effect or likely effect of substantially lessening competition. This was the solution adopted in New Zealand and it is preferable because it recognises that collective boycotts are generally anti-competitive. There would be a reversal of the onus of proof in relation to the competitive nature of the conduct in question, but that would be justified in this instance in order to facilitate the prosecution of collective boycotts, given that they are generally undesirable. Such a provision would also accord with the recognition under the Australia-New Zealand Closer Economic Relations Trade Agreement that the harmonisation of business laws, including competition laws, can be of mutual benefit.

The broad construction presently given to section 4D means that there need be little, if anything, to identify the 'particular persons or classes of persons' to which the section refers, other than the fact that they are affected by the collective boycott in question. This gives the section a wider application than is necessary to protect competition. It was submitted that the persons or particular classes of persons referred to should not extend beyond a competitor or competitors, whether potential or actual, of one or more of the parties to the collective boycott. The amendment to the *Commerce Act 1986* in New Zealand is to this effect and the Committee is of the view that a similar amendment should be made to the Australian Act. An alternative would be to provide that a class of persons does not constitute a particular class of persons for the purposes of the section unless the persons who comprise the class each share a quality or attribute and it is by virtue of that quality or attribute that they have been selected as the object of the provision. The Committee prefers the first alternative which maintains a focus on competition.

Third line forcing

Third line forcing may be beneficial and pro-competitive where efficiencies in production make it cheaper to produce and sell two or more products in combination. Consumers may also benefit when they have the opportunity to purchase a product at a discount under 'shopper docket' arrangements such as those found between supermarkets and petrol outlets. This kind of third line forcing makes the discount conditional on the purchase of a further product from another supplier but is not necessarily anti-competitive.

Third line forcing is anti-competitive where corporations are able to exploit their market power in one market to distort an unrelated market, perhaps

facilitating anti-competitive price discrimination or barriers to entry. For example, the ACCC removed the immunity sought through notification by a retirement country club that proposed to sell retirement units subject to a condition that purchasers, on resale of their units, engage a real estate agent nominated by the club.[2] The ACCC determined that there was insufficient public benefit to justify removing the choice of real estate agent from a vendor in a competitive real estate market.

In 1976, the Swanson Committee concluded that third line forcing, while it may be justifiable in certain cases, nearly always had an anti-competitive impact. At that time there were particular concerns about lending institutions insisting on borrowers using a nominated insurer which tended to charge high premiums. Extensive reforms have increased competitive pressures in Australian markets, including financial markets, since the 1970s. Accordingly, in 1993 the Hilmer Committee recommended the adoption of a competition test for third line forcing.

The ACCC opposes very few of the hundreds of third line forcing notifications it receives annually. An inspection of the ACCC's on-line notification register indicates that in 1999 there were 258 third line forcing notifications. None resulted in immunity being withdrawn.

Given that the notification process is relatively cheap and provides legal immunity after 14 days, it may be argued that the current position should be continued. The notification process has the benefit of providing certainty and clarity for the notifying parties. If litigation occurs where conduct is not notified or the notification is opposed, the per se nature of the prohibition means that the ACCC or another litigant need only to prove that the conduct amounts to third line forcing and does not have to prove that there is a substantial lessening of competition.

Notification does, however, involve expense for the party that notifies the conduct and for the ACCC in considering the application. These are mostly unnecessary expenses given that the notification of third line forcing is rarely opposed. If a competition test were introduced and third line forcing ceased to be prohibited per se, the cost of notification would be largely avoided. Notification would still be available to parties requiring assurance that a proposed course of conduct involving third line forcing did not result in a substantial lessening of competition.

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2 ACCC February 1998, *Guide to authorisation and notification for third line forcing conduct*.

It may also be observed that the per se prohibition of third line forcing is anomalous in the context of section 47. Other forms of exclusive dealing, such as full line forcing, will only be in breach of the Act where they substantially lessen competition.

Section 47(6) and (7) prohibit a corporation from forcing the product of a related company or offering a discount to achieve a similar purpose. If the same practice were undertaken by a single corporate entity, it would be subject to a substantial lessening of competition test. This inconsistent treatment of corporate groups could be overcome by their notifying conduct to the ACCC or by changing their corporate structure to avoid a breach of the third line forcing provision. For example, related companies could transfer the marketing of their separate products to the same company within the group. This reorganisation would bring the conduct within the other exclusive dealing provisions (sections 47(2), (3), (4) and (5)), but at some potential cost and inconvenience.

The Committee also considers it anomalous that, by virtue of the operation of section 93(2), conduct that was previously authorised cannot be the subject of a notification, even though identical conduct entered into by another party could be notified.

Conclusions

- The current per se prohibition of exclusionary provisions proscribes co-operative arrangements that may not have a detrimental impact on competition.
- The persons or classes of persons that may be the subject of an exclusionary provision has been construed broadly, and the prohibition therefore extends to conduct that is unlikely to be anti-competitive.
- The current per se prohibition of third line forcing proscribes conduct that may benefit consumers and may not be anti-competitive.
- The current provision prohibiting third line forcing discriminates on the basis of corporate structure.

Recommendations

8.1 The Act should be amended so that it is a defence in proceedings based upon the prohibition of an exclusionary provision to prove that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition.

8.2 The Act should also be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates, to a competitor or competitors, actual or potential, of one or more of the parties to the exclusionary provision.

8.3 The prohibition of third line forcing should cease to be a per se prohibition and be made subject to a substantial lessening of competition test.

8.4 Related companies should be treated as a single entity for the purposes of section 47.

8.5 Section 93(2) should be repealed.

CHAPTER 9: JOINT VENTURES AND DUAL LISTED COMPANIES

Background

Joint ventures

A joint venture is an association of persons formed for the purpose of pursuing a particular business objective together. It involves a level of integration between the participants which is less than would amount to a merger. The term 'joint venture' does not have a settled common law meaning in Australia,[1] reflecting the fact that joint ventures can take various forms. A joint venture may be undertaken through a partnership or some other form of unincorporated association or through an incorporated body. A joint venture is usually undertaken to pursue a single project and is often intended to last for a limited period. The relationship between the participants in a joint venture is usually governed by a joint venture agreement.

Section 4J of the Act defines a joint venture widely as:

> '… an activity in trade or commerce: … (i) carried on jointly by two or more persons, whether or not in partnership; or (ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate …'

Section 45A(2) provides an exemption for joint ventures from the per se prohibition against price fixing under section 45A of the Act, but they remain subject to the substantial lessening of competition test under sections 45(2)(a)(ii) and (2)(b)(ii). The exemption extends, however, to a limited range of conduct. Section 45A(2) provides:

> 'Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract of arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:

1 *United Dominions Corporations Limited v. Brian Pty Ltd* (1985) Vol. 157 Commonwealth Law Reports, p. 1 at p. 10.

(a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

(b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:

(A) a person who is the owner of shares in the capital of the body corporate; or

(B) a body corporate that is related to such a person.'

A joint venture agreement may thus be in breach of the prohibition under section 45 against arrangements, including price fixing, which have the purpose, effect or likely effect of substantially lessening competition, although the prohibition will not be per se in the case of price fixing arrangements falling within section 45A(2). It would be common for joint venture agreements to contain pricing arrangements between the parties to the joint venture. The parties to a joint venture may also be in breach of the per se prohibition against exclusionary provisions under sections 45(2)(a)(i) and (2)(b)(i) of the Act.

Parties seeking to establish a joint venture may seek authorisation under section 88(1) of the Act for price fixing arrangements or exclusionary provisions. If the public benefits flowing from the joint venture outweigh the anti-competitive detriment, or, in the case of an exclusionary provision, the public benefit is such that it should be allowed, the joint venture will be authorised pursuant to section 90 of the Act.

Dual listed companies

A DLC may operate in a fashion similar to that of a body produced through a merger or a highly integrated joint venture. Whilst this form of corporate structure is yet to be recognised in Australian legislation, the financial reporting requirements for three DLCs have been modified by the Australian Securities and Investments Commission (ASIC) pursuant to section 340 of the Commonwealth *Corporations Act 2001* to allow them to produce consolidated accounts.[2] These DLCs are Rio Tinto Limited, BHP Billiton Limited and Brambles Industries Limited.

In general, a DLC involves two corporations, one listed on a domestic stock exchange and the other listed on a foreign stock exchange, contracting to operate their businesses as a unified enterprise and sharing the attendant risks and rewards. Each corporation maintains its separate legal status and assets are generally only transferred between the two corporations for fair value. The shareholdings of each corporation remain unchanged, but shareholders vote on the resolutions of both corporations as if they were a single group. The boards of the two corporations have common directors, although those directors are appointed separately to each corporation. 'Equalised' dividends are declared for the DLC.

A DLC may be formed without any acquisition of shares or assets taking place, so that its formation may not be subject to the merger provisions of the Act. The contractual arrangements entered into by the two companies in forming and running the DLC could, however, be in breach of section 45. This is in contrast to agreements between related companies within the same corporate group, which are exempt from the prohibition imposed by section 45 against arrangements that have the purpose, effect or likely effect of substantially lessening competition.[3]

As with joint ventures, an agreement establishing a DLC may contain price fixing provisions and other provisions that have the effect of substantially lessening competition in contravention of, respectively, section 45A and section 45. The parties seeking to establish a DLC may seek authorisation under section 88(1), or section 88(9) if the arrangement involves the acquisition of assets. If the public benefits flowing from the formation of the DLC

2 ASIC 2001, *Practice Note 71: Financial reporting by Australian entities in dual-listed company arrangements*.

3 See section 45(8) of the Act.

outweigh any anti-competitive detriment it will be authorised pursuant to section 90.

Issues

The current exemption for joint ventures provided by section 45A(2) appears to afford a degree of certainty to participants in some mining and manufacturing joint ventures. Where such joint ventures are not likely to substantially lessen competition, they can be carried on with some confidence that any pricing decisions by the participants in relation to output are exempted from the per se price fixing prohibition and do not otherwise fall foul of section 45.

There are, however, some concerns that the exemption does not provide for existing practices in mining and manufacturing joint ventures. In particular, some submissions suggest that the exemption does not extend to the joint marketing of output produced by a separately constituted mineral exploration, development and production joint venture.

In addition, in some submissions it is argued that the existing joint venture exemption is too restrictive, and is framed too narrowly, to benefit the 'looser' collaborative arrangements that are now more common in areas of recent innovative growth. This is said to be particularly important in 'network joint ventures' in the areas of both financial services and communications.

Two proposals were put to the Committee to address these concerns. The first is a proposal for a statutory defence, similar to that found in section 29(1A) of the New Zealand *Commerce Act 1986*. The proposed provision is as follows:

> 'Subsection 45A(1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, to the extent that the provision facilitates and is for the purposes of a joint venture that does not have the purpose, effect or likely effect of substantially lessening competition.'

The second proposal is for a parallel exemption from both the per se exclusionary provisions found in sections 45(2)(a)(i) and (2)(b)(i) and the per se price fixing provisions:

> 'Section 45(2)(a)(i) and section 45(2)(b)(i) and section 45A do not apply to conduct undertaken in connection with the formation or operation, or proposed formation or operation, of a joint venture if the joint venture is not or is unlikely to prevent or

> lessen competition except to the extent reasonably required to undertake or facilitate the formation or operation of the joint venture.'

Finally, it was submitted that the ACCC should be required to issue guidelines outlining the treatment of joint ventures under the Act to provide business with a greater understanding of the ACCC's approach.

As DLCs are not considered a single economic entity for the purpose of section 45, an agreement entered into by the two companies to form and run the DLC may be in breach of section 45. This situation may be contrasted with the exemption for all intra-group transactions between related companies in a corporate group. While those proposing a DLC may seek authorisation under Part VII of the Act, this option is not favoured in the submissions made to the Committee.

International context

European Union

The European Commission considers 'non-full function' joint ventures[4] under the prohibition of anti-competitive agreements in Article 81(1) of the European Community Treaty.

Block exemptions from Article 81(1) have been established under Article 81(3) covering, for example, research and development joint ventures, 'specialisation' (covering joint production and related exclusive purchasing or supply obligations), technology transfer and vertical agreements. A joint venture can lose the protection offered by the block exemption where the European Commission is of the view that the joint venture is failing, without objective explanation, to produce the desired results or where there is a lack of effective competition in a relevant market.

Where a joint venture is unable to benefit from one of the block exemptions, the venture proponents may seek an individual exemption under Article 81(3). The European Commission may grant the exemption, subject to conditions, if the economic and other benefits flowing from the venture outweigh the detriment flowing from reduced competition in the relevant market.

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4 A full function joint venture is one that performs, on a lasting basis, all the functions of an autonomous economic entity. Joint ventures of this type are considered under the merger regulations.

United Kingdom

In the United Kingdom, if, as a result of a joint venture, the venture's parents are deemed to 'cease to be distinct' the venture will be considered under the new merger provisions in the *Enterprise Act 2002*. Under that Act, if the Office of Fair Trading is satisfied that there is sufficient 'relevant customer benefit' to outweigh any substantial lessening of competition, the venture will be allowed to proceed.

Other joint ventures may be considered under the United Kingdom's *Competition Act 1998*. Under that Act, the prohibition of anti-competitive agreements is in terms identical to that found in Article 81(1) of the European Community Treaty. Similarly, block exemptions granted under the Treaty can be incorporated into United Kingdom law, to complement the exemptions that may otherwise be granted under the *Competition Act 1998*.[5]

United States

Section 1 of the *Sherman Act 1890* says that every 'contract, combination … or conspiracy, in restraint of trade or commerce … is declared to be illegal'. The United States Supreme Court has decided that agreements to fix prices are so likely to damage competition, and have such little pro-competitive benefit, that they should be prosecuted as per se illegal. Such agreements do not warrant the time required for an extensive 'rule of reason' inquiry into their impact on competition.[6]

There is, however, effectively an exemption from this per se treatment for joint ventures. Agreements may be examined under a rule of reason test if they are 'reasonably related to, and reasonably necessary to achieve pro-competitive benefits from, an efficiency-enhancing integration of economic activity.'[7] The United States Congress has also provided that certain contracts established to carry out a range of research and development and production joint ventures can only be examined under the rule of reason.[8]

Under a rule of reason analysis, if the nature of the agreement and the absence of market power demonstrate an absence of anti-competitive harm then no

5 See Office of Fair Trading, *The Competition Act 1998: The Chapter 1 Prohibition*, OFT401.

6 See *Federal Trade Commission v. Superior Court Trial Lawyers Association* (1990) Vol. 493 United States Supreme Court Reports, p. 411 at pp. 432-36.

7 Federal Trade Commission and Department of Justice 2000, *Antitrust guidelines for collaborations among competitors*, p. 4.

8 See the *National Cooperative Research and Production Act 1993* (United States).

further analysis is undertaken. Alternatively, if there is no evidence of overriding offsetting benefits and anti-competitive detriment is evident then the collaboration may be challenged without further analysis.

Where further investigation is warranted, the relevant markets are defined, market share and concentration considered, and the specific features of the agreement analysed. This process provides an understanding of the extent and depth of risk to competition. The next consideration is whether the agreement causing such harm is reasonably necessary to achieve the 'cognizable efficiencies' flowing from the collaboration. Those 'cognizable efficiencies' must be verifiable and potentially pro-competitive, they must be reasonably necessary and they must not be used where there are less restrictive alternatives to achieving substantially the same end.

If, at the completion of the rule of reason analysis, the agreements are deemed reasonably necessary to produce the 'cognizable efficiencies' flowing from the collaboration, any challenge to the agreement will be withdrawn.

Canada

It is an offence under section 45 of the Canadian *Competition Act 1985* to conspire, combine, agree or arrange with another to unduly restrain or injure competition. However, activities commonly associated with joint ventures are excepted from the prohibition, including cooperation in research and development, exchanging statistics, defining product standards, establishing environmental protection measures and solely export oriented ventures. In addition, specialization agreements between corporations that result in production efficiencies can be registered, protecting such arrangements from prosecution under section 45 or the (civil) prohibition of exclusive dealing that substantially lessens competition.

Research and development joint ventures escape scrutiny under the merger laws only if they: are not structured as corporations; are project specific; would generally not have taken place without the venture; do not result in any change in control over a venture parent; are established by written agreement; and do not substantially lessen competition any more than is reasonably necessary.[9]

9 Section 95 of the *Competition Act 1985* (Canada).

Analysis

Joint ventures

Joint ventures may be pro-competitive, particularly when they are employed as a means of developing new products or services or producing existing products or services more efficiently. However, a joint venture may have anti-competitive aspects. A joint venture may prevent competition between the joint venture and one or more of its participants or between the participants themselves. The co-operation necessary to make a joint venture work may spread into other areas of the venture participants' businesses, leading to direct collusion on prices.

The public benefits of a joint venture may outweigh the detriment constituted by any lessening of competition. This is particularly the case where, but for the joint venture, an activity would not have taken place at all. Joint ventures may provide a means of producing efficient economic outcomes where they are able, for example, to achieve economies of scale or scope. These gains may occur in such areas as the exploration for minerals or the extraction and processing of minerals or share farming where the venture partners pool their skill, knowledge and assets. Gains in efficiency also accrue from the use of joint ventures in the financial services sector, particularly in relation to payment systems. Where these gains are at the expense of competition, it is open to the participants to seek authorisation of the joint venture.

It was submitted that the exemption from section 45A(1) of certain agreements for the purposes of joint ventures was too narrow. This exemption, it was said, was introduced into the Act in recognition of the potential pro-competitive benefits of joint ventures and with the intention of avoiding competition laws that unduly restrict the activities of joint ventures. At the same time, it was recognised that it was necessary to guard against joint venture agreements designed as a cover for anti-competitive arrangements. The Swanson Committee, in recommending the introduction of a means of exempting legitimate joint ventures from the section 45A(1) prohibition, expressed the view that it:[10]

> '… would not wish the law to frustrate the formation of joint ventures which provide the ability to embark on a project of development which may be desirable in the public interest and which would not otherwise be undertaken.'

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10 Committee to Review the Trade Practices Act 1974 (1976), *Report to the Minister for Business and Consumer Affairs*, Commonwealth of Australia, Canberra, p. 26.

It was pointed out in submissions made to the Committee that the kind of joint ventures that the Swanson Committee had in mind involved the pooling of resources by the participants to produce and supply a product jointly. Accordingly, the exception made by section 45A(2) is available only to that type of joint venture. In the current economy, particularly in areas of innovative growth such as e-commerce, there are joint ventures that do not involve the pooling of resources for the joint production or supply of a product. These may not derive any advantage from section 45A(2). It was said by way of example that it is unclear whether the exception would apply where production joint venturers take product separately, but sell product jointly through a marketing joint venture or marketing company.

The Committee accepts that the exemption in section 45A(2) may operate too narrowly to fully achieve its object, but is conscious of the fact that the definition of joint venture in section 4J of the Act is wide enough to extend to practically any joint activity in trade or commerce. It would be difficult to suggest a more restricted definition having regard to the many kinds of joint venture that are evolving. However, a blanket exemption from section 45A(1) for joint venture agreements as currently defined would be too wide and be likely to exempt price fixing conduct that ought to be prohibited per se. On the other hand, the current section 45A(2) is unduly prescriptive.

The Committee believes that the problem could be overcome by substituting for section 45A(2) a provision similar to that suggested to the effect that:

> 'Section 45A(1) does not apply to a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition.'

Such a provision would provide a statutory defence for joint ventures against the per se prohibition of price fixing, which would operate in much the same way as the provision which is recommended as a statutory defence against the per se prohibition of exclusionary provisions. Again, the reversal of the onus of proof would be justified by the prima facie illegality of price fixing arrangements. It merely requires a party seeking to take advantage of an exception to bring itself within it. Of course, the effect of the statutory defence would be to remove, in the case of competitive joint ventures, the per se prohibition imposed by section 45A(1), but not the prohibition under section 45 of arrangements having the purpose, effect or likely effect of substantially lessening competition. Where there was any uncertainty, authorisation would remain available.

At the same time as the Committee recommends in Chapter 8 that the Act be amended to introduce a statutory defence in relation to an exclusionary provision, it also recommends that the Act be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates to a competitor, actual or potential, of one or more of the parties to the exclusionary provision. The Committee believes that these recommendations, if adopted, should meet the concerns expressed about the effect upon joint ventures of the current prohibition per se of exclusionary provisions as defined by section 4D of the Act.

The Committee accepts the submission that the ACCC should develop and issue guidelines outlining its approach to joint ventures. Guidelines would, the Committee believes, assist both the ACCC and business in achieving the object of the Act in relation to a constantly changing area of trade and commerce.

Dual listed companies

It was submitted that transactions between the different legal entities in a DLC should be treated as internal transactions within a single economic entity for the purposes of the Act. Transactions between the entities in a dual listed company are said to be analogous to transactions between related bodies corporate in a corporate group.

The Committee accepts that it would be appropriate, as proposed by the ACCC, to treat intra-party transactions in a DLC as the equivalent of related party transactions within a group of companies. A related party transaction is exempted from sections 45 and 47 by virtue of subsections 45(8) and 47(12), respectively. Section 4A of the Act deems certain bodies corporate to be related to one another. There would need to be a definition, perhaps in that section, of a DLC.

Of course, if DLCs are treated like a corporate group for the purposes of sections 45 and 47, the aggregate power of the economic entity should also be recognised in assessing market power for the purposes of the other provisions in Part IV. This would mean that, in the case of section 46, a DLC should be treated equivalently to corporate groups. Similarly, when considering the impact of vertical anti-competitive conduct, the conduct of the entire economic entity needs to be taken into account. This currently occurs with corporate groups and should also be the case with DLCs.

Finally, whilst the formation of a DLC may escape scrutiny under section 50(1) because it does not involve the acquisition of assets or shares, the assessment of an acquisition by an entity that forms part of the DLC must take into

account the entire market share of the DLC. Whilst this concern may already be covered because section 50(1) applies to an 'indirect' acquisition by a corporation, an appropriate amendment would help to clarify the position.

Conclusions

- Joint ventures make an important contribution to the economy. However, they may involve agreements between the participants in the venture about the price of the goods or services made available as a result of the joint venture. Consequently, a provision in a joint venture agreement with respect to prices should not be prohibited per se where the joint venture does not have the effect or likely effect of substantially lessening competition.

- The current exemption for joint ventures may not accommodate newer kinds of joint ventures that involve alliances between corporations. These newer joint ventures may fall outside the existing exemption because they include agreed action by joint venture partners, but may not involve the joint production of goods or services. Failing a tighter definition of joint venture than that currently provided by section 4J of the Act, a competition defence to the per se prohibition should be substituted for section 45A(2). The authorisation process already provides a means of avoiding the per se prohibition.

- It is desirable that transactions between the corporate entities in a DLC be treated as internal transactions within a single economic entity for the purposes of the Act. It is also desirable that a DLC should be treated as a single entity in market power for other purposes under the Act.

Recommendations

9.1 The Act should be amended by substituting for the current exemption from section 45A(1) provided by section 45A(2), a provision that section 45A(1) does not apply to a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition.

9.2 The ACCC should develop and issue guidelines outlining its approach to joint ventures.

9.3 The Act should be amended to allow intra-party transactions in a DLC to be treated on the same basis as related party transactions within a group of companies. Consistently with this, the aggregate size of the DLC should be recognised for the purposes of assessing market power.

CHAPTER 10: PENALTIES AND OTHER REMEDIES

Background

The legislation

Under section 78 of the Act, criminal penalties cannot be imposed upon a person for the contravention of any of the provisions of Part IV. So far as penalties are concerned, the enforcement of Part IV is by way of civil proceedings. For breach of a provision of Part IV, the Federal Court may impose such pecuniary penalty as it deems to be appropriate. The power to impose a pecuniary penalty extends to secondary participants in the contravention, such as directors or employees of a corporation that commits a breach of a provision of Part IV. The maximum penalty payable is, for a corporation, $10 million and, for an individual, $500,000.

If a person has suffered loss or damage as a result of a contravention of Part IV, the Court may make an order that the defendant pay compensation.[1] Where a pecuniary penalty may also be imposed and the defendant does not have the financial resources to pay both the penalty and the compensation, the Court must give preference to making an order for compensation.

The Court may also, on the application of the ACCC, make a community service order, a probation order (requiring, for example, that a defendant attend a trade practices awareness program or that compliance programs be implemented), an order requiring the disclosure of information and an order requiring the publication of an advertisement in specified terms. The advertisement may be by way of adverse publicity containing information about the anti-competitive conduct where it is in addition to a pecuniary penalty.

The Court may only order divestiture where an acquisition of shares or other assets leads to a substantial lessening of competition. Court-ordered divestiture forces the sale of some or all of the shares or other assets unlawfully acquired. Alternatively, an acquisition may be declared to be void.[2]

1 Section 87 of the Act. In addition, a person who suffers loss or damage due to a breach of Part IV can seek damages under section 82.

2 Section 81 of the Act.

Since proceedings for breach of Part IV are civil proceedings, the standard of proof is lower than for criminal offences. It is proof on the balance of probabilities rather than proof beyond reasonable doubt, although where the balance lies in a particular case will depend on the gravity of the breach alleged.[3]

Issues

The ACCC's proposal

The ACCC in its submission proposes the creation of criminal offences for conduct falling within the description of 'hard-core cartels'. These offences would carry a penalty of up to seven years imprisonment. The ACCC adopts the Organisation for Economic Co-operation and Development (OECD) definition of hard–core cartel conduct:[4]

> '… an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.'

Sections 45, 46 and 47 of the Act (together with sections 4D and 45A) already prohibit conduct of the kind described in that definition, but do not create separate offences for such activities as price fixing, bid rigging, collusive tendering or market sharing. And, of course, the contravention of those sections carries only a civil penalty. However, it is apparent that the ACCC's proposal is that criminal offences should be created outside the Act (for example, by inclusion in the Commonwealth *Crimes Act 1914*) and that those offences should not extend to all the conduct prohibited by sections 45, 46 and 47. Only cartel conduct which may be described as 'hard-core' would be criminalised.

The OECD definition does not differentiate between conduct of the kind described, which is serious or hard-core, and that which is not. As will appear later, the ACCC has difficulty in formulating such a differentiation but it

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3 See *Heating Centre Pty Ltd v. Trade Practices Commission* (1986) Vol. 65 Australian Law Reports, p. 429 at p. 435.

4 OECD Council 1998, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*. Adopted by the Council at its 921st session on 25 March 1998 and reprinted in OECD 2002, *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Publications, Paris, pp. 105-107.

nevertheless maintains its view that only really serious cases of cartel conduct should attract criminal sanctions.

In its submission, the ACCC describes the type of conduct it seeks to criminalise as:

> 'Agreements (contracts, arrangements or understandings) between competitors that would directly or indirectly:
>
> - fix a price of a product or service;
> - limit or prevent supply or production of a product or service;
> - restrict the ability of the parties to the agreement to freely supply specified goods or services or to freely supply goods or services to specified customers;
> - in response to a request for tenders, restrict the freedom of one or more of the parties to the agreement to put in independent tenders.'

Initially the ACCC submitted that criminal sanctions should only be applied to large corporations, because only large corporations were likely to be involved in international cartels. However, this met with opposition from those who would otherwise support criminal sanctions but who could not accept that the same behaviour should be criminal for some persons, namely, large corporations and their directors and employees and not for others, namely, smaller corporations and their directors and employees. It was pointed out by way of example that proceedings arising out of a price-fixing agreement between a large and a small corporation could, under the ACCC's proposal, result in the imposition of a term of imprisonment upon the directors and employees of the large corporation but not upon those of the small corporation, although the moral culpability was the same.

In response to these views, the ACCC accepted that a crime for one should be a crime for all and proposed the criminalisation of hard-core cartel behaviour for all, and not just large, corporations. In doing so, it remarked that there would be a judicial discretion to impose lesser penalties where the impact of the cartel was limited and this was likely to ensure appropriate penalties for offences by smaller corporations.

Divestiture

Some submissions proposed that divestiture should be made available to address a wider range of anti-competitive conduct, primarily on the basis that divestiture would provide a strong deterrent to such conduct. The proposals put to the Committee were that divestiture should be available as a remedy for breaches of section 46 and that it should be available as a remedy for a concentration of ownership that has the effect of substantially lessening competition.

Cy-pres orders

In a small number of submissions it was proposed that the Court's power to order the payment of compensation or damages be extended to incorporate orders in the nature of cy-pres orders. Such orders might be used in circumstances where aggregate detriment is identifiable and quantifiable, but those affected are either insufficiently defined or too dispersed to allow an appropriate distribution of compensation or damages. A cy-pres order would require the payment of compensation or damages into a trust fund to be spent in a manner directed by the Court, for example, for the promotion of consumer or other affected interests.

International context

The enforcement of competition regulation is supported by the imposition of penalties in many countries, either civil as in the case of Australia, or civil and criminal.

The OECD has recently undertaken a comprehensive review of penalties applicable to breaches of competition laws, especially price fixing, bid rigging, horizontal market sharing and the imposition of output restrictions.[5] The survey of the OECD's 30 member countries revealed that 23 countries provided for fines or monetary penalties against firms, 13 countries provided for fines or monetary penalties against individuals, and nine countries provided for terms of imprisonment.

Of the 23 countries that provide for monetary penalties to be imposed on firms, 13 set the maximum penalty as the greater of different amounts, being either a

5 OECD 2002, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, Report Number 7.

fixed maximum or a maximum expressed as a proportion of turnover, revenue or illegal gain. Australia was one of only three countries that provided for a fixed maximum fine or penalty. The maximum penalty was set at 10 per cent of the firm's annual domestic turnover in many countries.

Of the 23 countries that allow monetary penalties to be imposed on firms, four countries (the United States, Germany, Canada, and South Korea) have imposed penalties in excess of US$10 million on at least one firm. A further five countries (including Australia) have imposed penalties in excess of US$1 million on at least one firm.

There are 13 member countries of the OECD that provide for fines or monetary penalties against individuals. Of these, eight countries (including Australia) set a fixed maximum, with the remainder setting either a proportional fine, a combination, or leaving the maximum unspecified.

Of the 13 countries that may impose monetary penalties on individuals, only four countries (Australia, Canada, Germany, and the United States) have done so. However, unlike Canada, Germany and the United States, Australia is yet to impose a monetary penalty on an individual in excess of US$100,000.

There are nine member countries of the OECD that provide for terms of imprisonment, with maximum terms ranging from two to six years.

In the United States criminal offences have been on the statute book for anti-trust offences since the introduction of the Sherman Act in 1890. The maximum penalty for individuals is imprisonment for three years, with fines of US$350,000 or twice the illegally gained amount, or twice the amount lost by the victims. For corporations, the fine is US$10 million, or twice the amount illegally gained or lost.[6] These penalties are complemented by third-party suits for treble damages or restitution.[7]

In recent years in the United States, there has been a significant increase in the number of criminal prosecutions and in the size of fines and gaol terms. Ten years ago the largest corporate fine was US$2 million. Recently, six anti-trust offenders were each fined US$100 million or more, including a US$500 million fine in relation to an international vitamin cartel.[8] An increase in the detection of cartels and successful prosecutions (although most cases are settled under a

6 See Sections 1 and 2 of the *Sherman Act 1890* (United States) and the *Criminal Fine Improvements Act 1987* (United States).

7 Section 4 of the *Clayton Act 1914* (United States).

8 Department of Justice 2002, *Status Report: Criminal Fines*.

well-developed system of plea bargaining) have been attributed to a new clear and certain leniency policy backed up by the threat of criminal sanctions.[9]

Other non-European countries which have criminal sanctions against individuals include Canada and Japan. In Canada bid rigging is an offence per se and conspiracies to unduly prevent, limit or lessen competition are also criminal offences. Conspiracies carry fines of up to Can$10 million and imprisonment for up to five years, whereas bid-rigging and conspiracies with an international aspect carry unlimited fines and sentences of the same length.[10] Canada also has in place a leniency policy similar to that in the United States.[11]

Within Europe, France, Ireland and Norway all have criminal sanctions for cartel behavior and in Germany and Austria bid rigging is a criminal offence.[12] With the proposed modernisation of the European Community competition regime, additional powers will be transferred to both national competition authorities and national courts to apply European Community competition law. Member states will be free to adopt measures, including criminal sanctions, deemed appropriate.

The United Kingdom has recently undertaken a wide ranging review of its competition regime and has provided for criminal penalties of imprisonment for up to five years in its *Enterprise Act 2002*.[13] It has a leniency policy in place.[14]

The OECD survey revealed that only the United States and Canada have actually imprisoned individuals for anti-competitive conduct. The United States, for example, imprisoned 18 individuals (for an average term of eight months) in the year 2000. In Canada three individuals have been sentenced to prison for anti-competitive conduct (with two of those people being ordered to serve their sentences in the community).

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9 See the United States Department of Justice Antitrust Division's corporate and individual leniency policies in OECD 2002, *Fighting Hard-Core Cartels*, op. cit., Annex A.

10 Sections 45, 46 and 47 of the *Competition Act 1985* (Canada).

11 See the Canadian Competition Bureau's immunity program in OECD 2002, *Fighting Hard-Core Cartels*, op. cit., Annex C.

12 OECD 2002, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, op. cit., pp. 24-26. For Austria see Roniger, R. and Hemetsberger, W. 2002, *Austrian Competition Law: Overview and Recent Developments*.

13 Section 188 of the *Enterprise Act 2002* (United Kindom).

14 See the Office of Fair Trading's guidelines on the appropriate amount of a penalty in OECD 2002 *Fighting Hard-Core Cartels*, op. cit., Annex B.

Analysis

Should there be criminal sanctions here?

There was general agreement in the submissions made to the Committee that, notwithstanding the difficulty in arriving at a satisfactory definition, serious or hard-core cartel activity may be sufficiently reprehensible to be punishable by the imposition of a gaol sentence. There was, however, disagreement as to whether a strong enough case had yet been made out for the introduction of criminal sanctions in this country or, at all events, for their introduction at this time. This disagreement stemmed from a number of considerations, some practical and others based upon a wariness about extending the criminal law into the area of economic regulation. In that area the law tends to be aspirational rather than prescriptive, something that is reflected in the object of the Act which is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. The difficulty in defining the requisite degree of criminality to justify the imposition of criminal sanctions was a matter of real concern.

The predominant reason for suggesting that there should be criminal penalties was that the threat of imprisonment would be an effective deterrent to cartel behaviour. A number of submissions pointed out, however, that it had not been shown that the large pecuniary penalties already provided by the Act were not a sufficient deterrent. Indeed, it was observed that the maximum penalties had not yet been imposed so that it was not possible to gauge their deterrent effect. Moreover, the ACCC does not seem to have sought the highest penalties or the other remedies, such as probation, which have been recently introduced.

It was said that the higher standard of proof — proof beyond reasonable doubt — in a criminal prosecution would, particularly in complex cases, make it difficult to obtain convictions before a jury. Under section 80 of the Constitution, the unanimous verdict of a jury would be necessary for the kind of crime proposed by the ACCC. Proof of a civil breach of the Act on the balance of probabilities before a single judge was, it was said, far easier.

It was pointed out that civil proceedings could be settled and offered a great deal more flexibility to the ACCC in the conduct of litigation arising from breaches of the Act than would criminal prosecutions involving, as they would, the intervention of the Commonwealth Director of Public Prosecutions (DPP). It was also felt that there would be difficulties in the implementation of a leniency policy in the context of a criminal prosecution. In this country, plea

bargaining, where it is used at all, is used with caution and indemnities against prosecution are rarely given and then only by the prosecuting authority.

There were also problems, it was said, with the provision of civil and criminal proceedings for the same conduct. Not only did some consider it wrong that a regulatory agency, such as the ACCC, should initially have the option of deciding whether to prosecute a breach of the Act in criminal proceedings or commence a civil action, but it was also pointed out the permissible methods of investigating a breach would depend upon whether the eventual proceedings were civil or criminal and this would introduce undesirable complications.

Under section 88 of the Act, the ACCC may authorise conduct that would otherwise be in breach of sections 45 and 47. That conduct could constitute cartel conduct and it was submitted that it was anomalous that conduct attracting a criminal sanction could be authorised. This consideration served to emphasise the necessity of finding some means of differentiating serious cartel behaviour which, presumably, would not be authorised, and other cartel behaviour which might be the subject of authorisation.

Hard-core cartel conduct

There are undeniable difficulties in defining a criminal offence which covers only serious cartel behaviour. It was not suggested that the offence should be an offence requiring no specific intent, but none has been identified. Nor have the acts required to constitute the offence been defined with any precision. The ACCC's initial proposal to confine the offence to large corporations was eventually recognised by it to be unacceptable. In other countries various solutions have been adopted.

In the United Kingdom a 'cartel offence' has recently been created by the *Enterprise Act 2002*. An individual is guilty of this offence if he or she dishonestly agrees with one or more persons to make or implement arrangements of a specified kind relating to at least two businesses. The arrangements specified are price fixing, limiting or preventing supply, limiting or preventing production, dividing supply or customers and bid-rigging.

In the United Kingdom, the test of dishonesty is used to identify serious cartel behaviour. The United Kingdom test of dishonesty is whether the acts in question were dishonest according to current standards of ordinary decent

people and, if so, whether the defendant must have realised that they were dishonest by those standards.[15]

Misgivings have been expressed about using the test of dishonesty in Australia[16] to identify serious cartel behaviour. It is thought that its application in the context of cartel behaviour is likely to cause difficulty to a jury, particularly where the proscribed activities are merely referred to by name — for example, price fixing or bid-rigging — and not by description. In its initial submission the ACCC did not support a requirement of dishonesty, but in a later submission did so, saying that it would be necessary to ensure that arrangements such as those entered into by the banks that set credit charge interchange fees (which the ACCC argues amount to price fixing) are not treated as criminal offences.

In the United States, criminal proceedings under the *Sherman Act 1890* are possible in respect of agreements in restraint of trade but they are confined to cases where there was a specific intent to restrain trade and are unlikely if there is a genuine dispute as to the existence of the agreement or there is an innocent reason for it.[17] Criminal proceedings are also less likely if the amount of commerce affected is small.

In Canada bid-rigging is an offence per se, but price fixing and market sharing conspiracies to unduly prevent or lessen competition must be proved according to the criminal standard of proof. Proving the prevention or lessening of competition to the criminal standard is difficult due to the technical nature of the economic arguments that are inevitably put before the jury. Out of 22 contested prosecutions, only three have resulted in conviction, mainly because of lack of evidence of undue lessening of competition or of the parties' intention that the agreement has that effect.[18] Canada is currently considering making price fixing and market sharing criminal offences per se.

Another issue that has been raised with the Committee is whether or not the relevant behaviour would need to have an adverse effect or likely adverse effect on competition, in addition to any other requirements, before it is considered 'hard-core cartel' conduct. The ACCC considered the suggestion that the criminal offence should be defined by reference to the consequences or

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15 *R v. Ghosh* [1982] Law Reports (Queen's Bench), p. 1053 at p. 1064.

16 See *Peters v. The Queen* (1998) Vol. 192 Commonwealth Law Reports, p. 493.

17 See Sullivan, L.A and Grimes, W.S. 2000, *The Law of Antitrust: An Integrated Handbook*, West Group, St Paul, p. 892.

18 See House of Commons Standing Committee on Industry Science and Technology 2002, *Report 8, A Plan to Modernise Canada's Competition Regime*, Chapter 4.

effect of the conduct, but concluded that complex issues concerning the definition of the relevant market, unsuitable for submission to a jury, would arise. It did not support this proposal.

The ACCC suggested that, as a feasible alternative, cartel behaviour should only be a criminal offence where the accused knew that the conduct was in breach of, or was likely to be in breach of, the law. However, that suggestion would seem to cut across the principle that ignorance of the law is no excuse.

Concurrent civil and criminal penalty regimes

Even if there were an additional element in a criminal cartel offence to distinguish it from a breach attracting a civil penalty and that element were present, the ACCC submitted that it should have the option of commencing civil proceedings where, for example, there was insufficient evidence to satisfy the DPP that there was a reasonable prospect of proving a case beyond reasonable doubt. That leaves the possibility that the ACCC might use criminal prosecution as a threat in circumstances where it had no intention of prosecuting. The ACCC recognised this to be undesirable and suggested the development of internal guidelines to overcome the situation.

There is a view that the same conduct should not be subject to civil and criminal sanctions: criminal conduct should be prosecuted as such, leaving civil proceedings for conduct appropriately dealt with by the imposition of pecuniary penalties. Many see a conceptual coherence in such a view, which maintains that civil penalties should not allow the criminal law to be by-passed when serious misconduct belongs there. However, the practice has grown up with other regulatory agencies, such as ASIC, of making use of concurrent civil and criminal penalty regimes for the same conduct. This practice is consistent with the approach of the DPP. If an appropriate civil remedy is available for certain behaviour, the DPP will give serious consideration to that fact in considering any criminal prosecution.

In 2000, the ALRC had referred to it a number of questions relating to civil and administrative penalties. In a discussion paper issued by it, the ALRC points to a number of risks associated with more than one type of sanction for the same conduct. The ALRC’s concern appears to be more that fault elements and

procedural requirements for both types of sanction should be clearly spelt out, rather than the inherent desirability or undesirability of such an approach.[19]

The decision to pursue civil or criminal proceedings cannot easily be made at an early stage, but an early decision is called for because the investigative path will differ according to the choice made. For example, under section 155 of the Act, the ACCC may obtain evidence from a prospective defendant under compulsion. Self-incrimination is not an excuse, but the evidence is not admissible in criminal proceedings against the defendant. On the other hand, information obtained by search warrant under section 3E of the Commonwealth *Crimes Act 1914* would not be admissible in proceedings for a civil penalty.[20]

The ACCC indicated that it had consulted with the DPP and had formulated an outline of a proposed Memorandum of Understanding. The memorandum would be of the kind that exists between the DPP and other regulatory agencies and would provide for the investigation of offences by the ACCC and prosecution by the DPP. The ultimate decision whether to prosecute would lie with the DPP, but the decision to refer a matter to the DPP would rest with the ACCC. Many of the problems already referred to would, nevertheless, remain.

It is beyond the scope of this inquiry to suggest an answer to these problems. It is, however, apparent to the Committee that they need to be addressed and answered before the introduction of criminal sanctions. In the United Kingdom, after the decision to introduce criminal penalties had been made by the Government, a lengthy study of the problems surrounding implementation was undertaken.[21] The Committee considers a similar, focused implementation exercise should be undertaken here.

Criminal liability for corporations?

It has been assumed in the foregoing discussion that a corporation guilty of serious cartel conduct would be criminally liable along with individuals, who may be secondary participants, such as directors or employees of a corporation. A corporation cannot, of course, be imprisoned, but that does not mean that it cannot suffer the opprobrium of criminal conviction and be fined. The ACCC originally saw 'administrative' advantages in investigating and

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19 See ALRC 2002, *Securing compliance: civil and administrative penalties in Australian Federal regulation*, Discussion Paper 65, ALRC, Sydney, pp. 267-300.

20 See *Williams v. Keelty* (2001), Vol. 184 Australian Law Reports, p. 411 at pp. 456-458.

21 See Hammond, A. and Henrose, R. 2001, *Proposed Criminalisation of Cartels in the UK*, Office of Fair Trading, London.

prosecuting corporations and individuals together, but in the end sought criminal sanctions only against individuals. The shift in view was, apparently, prompted by recognition of the fact that the burden of proof in criminal proceedings is more onerous than in civil proceedings and is not worth bearing if there is not a gaol sentence in prospect at the end. This is illustrative of the conceptual difficulties inherent in the co-existence of civil and criminal penalties for the same conduct.

A criminal conviction represents the condemnation of society in a way that the imposition of a civil penalty cannot and there is every reason why a corporation should suffer a conviction for the same conduct as an individual if a conviction is warranted. Moreover, there may be constitutional difficulties in the creation of a Commonwealth offence for individuals but not for corporations if the corporations power is relied on to support the provision. The matter warrants further consideration, but the Committee is not inclined in principle to favour the criminal prosecution of individuals on the one hand, and civil proceedings against the corporation on the other, for the same conduct.

Leniency policy

It appears to be generally accepted, particularly in overseas jurisdictions with experience in leniency policies, that a leniency or amnesty policy which provides clear and certain incentives to provide evidence is a potent means of uncovering cartel behaviour. Of course, certainty of detection is a better deterrent than severity of punishment for most criminal offences. The United States in 1993 introduced a dramatically expanded amnesty policy which provides automatic amnesty for violators of the anti-trust laws who are the first to come forward with evidence in specified circumstances. There is no prosecutorial discretion in those circumstances. This amnesty policy has been found to be the most effective investigative tool for detecting cartel behaviour. It has been suggested that the policy is particularly effective in the United States because of the existence of criminal sanctions, but the view has been expressed that an amnesty program can still succeed if the threat of heavy fines is significant enough.[22] Clearly individual liability is an important factor whether the liability be criminal or civil.

22 Griffin, J.M. 2002, *Key elements of an effective antitrust leniency policy and criminal penalties and deterrence — the American experience*, p. 7. Paper presented to the Australian Competition and Consumer Commission Conference, Competition and Consumer Protection Law Enforcement, 4-5 July 2002, Sydney.

The Canadian leniency policy is in similar terms, as is the United Kingdom leniency policy, which will continue to apply once the new criminal penalty regime is introduced.

The ACCC has for some time had a Co-operation Policy, but has recently released a draft cartel leniency policy with a view to providing greater certainty in its application for leniency so that the ACCC is better able to detect and break up hard core cartels operating in Australia. The policy promises immunity from proceedings (at the moment civil proceedings), subject to certain conditions, for corporations and individuals who are the first to disclose a cartel to the ACCC. Immunity from a pecuniary penalty would be available to corporations and individuals that come forward after the ACCC is aware of cartel conduct, but before the ACCC has sufficient evidence to institute proceedings.

Immediate difficulties would arise if criminal sanctions were introduced and the immunity offered by the draft policy were extended to them. Presumably immunity would have to be offered at an early stage to encourage disclosure, but the sole authority to grant immunity from prosecution lies within the discretion of the DPP[23], who at present is not involved in the early stages of an investigation. And as has already been noted, the DPP's discretion is sparingly exercised and would not, in accordance with present practice, easily accommodate the leniency policy proposed by the ACCC. Changes would be necessary to accommodate that policy. The difficulties that would arise have not been sufficiently addressed in the material provided to the Committee. However, similar difficulties existed in Canada, the United Kingdom and Ireland and they have been resolved in different ways. In Canada, the prosecutor (the Attorney-General) has established a special exception to the normally restrictive prosecutorial approach, in favour of an antitrust leniency policy.[24] In the United Kingdom, there is no present experience by which to assess the approach, but the Serious Fraud Office (the prosecutor) has agreed to allow the Office of Fair Trading (the investigating agency) to give 'no action letters'.[25] In Ireland, while discretion to grant immunity remains with the DPP, the DPP co-operates in the grant of immunity in cartel cases as recommended by the Competition Authority.[26]

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23 See sections 9(6) and 9(6D) of the *Director of Public Prosecutions Act 1983* (Commonwealth).

24 See Crampton, P. 2001, *Canada's New Competition Law Immunity Policy — Warts And All*, p. 7. Paper presented to The Competition Authority Conference, Using Immunity to Fight Criminal Cartels, 17 November 2000.

25 See Explanatory Notes, *Enterprise Act 2002* (United Kingdom) at paras. 403 and 413.

26 Competition Authority 2001, *Cartel Immunity Programme*.

Intimidation

Section 162A of the Act makes it an offence to threaten, intimidate or coerce persons, or cause or procure loss or damage to them, because they have provided, or are intending to provide, information or documents to the ACCC or the Tribunal. The penalty is a fine or imprisonment for 12 months. The ACCC suggested that section 162A needed strengthening to protect persons coming forward with evidence from the revelation of their identity or persecution by their employers. The Committee has not had any material put before it to show that the section is inadequate to achieve its purpose. However, the Committee notes the Government's stated intention in its CLERP 9 discussion paper to strengthen protection to whistleblowers.[27] The Committee is of the view that to the extent it is reasonable to do so, protection for whistleblowers for breaches of the Act should be kept in line with protection for whistleblowers under the *Corporations Act 2001*.

Pecuniary penalties

The pecuniary penalties currently provided by the Act for breach of Part IV are, for a corporation, for each act or omission, a maximum of $10 million and for an individual (including secondary participants), for each act or omission, a maximum of $500,000.

It is generally accepted that an effective sanction for cartel activity should take into account the expected gains from the cartel. In a recent study in Norway it was remarked that:

> 'The most important principle for levying fines is the expected loss for violating the law should exceed the gain.'[28]

A similar study in New Zealand drew the same conclusion.[29] Accordingly, the New Zealand Act now provides for an increased pecuniary penalty for breaches of the equivalent of Part IV of our Act. It is, in the case of a corporation, the greater of — (I) NZ$10 million; or (II) either — (A) if it can be

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27 Commonwealth of Australia 2002, *Corporate disclosure: strengthening the financial reporting framework*, Corporate Law Economic Reform Program (CLERP) Paper No. 9: Proposals for Reform, Commonwealth of Australia, pp. 178-179.

28 Norwegian Competition Authority 2001, *Sanctioning pursuant to the Norwegian Competition Act* cited in OECD 2002. *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, op.cit., p. 13.

29 Office of the Minister for Enterprise and Commerce 1998, *Review of the penalties, remedies and court processes under the Commerce Act* cited in OECD 200). *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, ibid.

readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, three times the gain resulting from the contravention; or (B) if the commercial gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any).[30] The Committee considers this to be a desirable provision and for that reason, and because it is in the interests of closer economic relations between the two countries, is of the view that the Australian Act should be amended along the same lines.

The New Zealand legislation also prohibits a corporation from indemnifying a director, servant or agent of the corporation against liability for payment of a pecuniary penalty imposed for price fixing.[31] The Committee considers that there should be a similar provision in our Act, but that it should extend to indirect as well as direct indemnification and should apply generally to pecuniary penalties imposed for breaches of Part IV.

A further provision in the New Zealand Act provides that a court may make an order that a person who is in breach of the equivalent of Part IV be excluded from the management of a corporation.[32] The Committee considers that such a provision would have considerable deterrent effect and should be included in our Act to prevent persons being directors or (as applicable) involved in the management of corporations. Such a provision was supported by the ALRC in its 1994 report on the consumer protection provisions of the Act[33] and has already been established in the *Corporations Act 2001*.[34]

Criminal sanctions for serious cartel behaviour

Despite the problems associated with the introduction of criminal sanctions, the Committee is persuaded by the submissions made to it, particularly in relation to the growing experience overseas, that there should be criminal sanctions for serious cartel behaviour. The problems associated with the introduction of criminal sanctions, which are referred to above, have, however, not been sufficiently addressed and answers must be found before criminal offences are created. Most importantly, a satisfactory definition of serious cartel behaviour needs to be developed and there needs to be a workable method of combining a clear and certain leniency policy with a criminal

30 Section 80 of the *Commerce Act 1986* (New Zealand).
31 Section 80A of the *Commerce Act 1986* (New Zealand).
32 Section 80C of the *Commerce Act 1986* (New Zealand).
33 See ALRC 1994, *Compliance with the Trade Practices Act 1974*, ALRC Report No. 68, ALRC, Sydney, pp. 80-82 and Rec. 24.
34 Section 206C of the *Corporations Act 2001* (Commonwealth).

regime. It is desirable that Australia should remain abreast of international developments with regard to sanctions, particularly in areas, such as extradition, where reciprocity is necessary.

Divestiture

In Australia, the remedy of divestiture is, under the Act, restricted to circumstances where an acquisition of shares or other assets leads to a substantial lessening of competition. Thus, the remedy is only available in the context of mergers. Divestiture may be appropriate in this context because it deals with recent conduct (the acquisition of identifiable shares or assets) that has given rise to a breach of the Act.

By contrast, section 46 of the Act prohibits the taking advantage of substantial market power for a proscribed purpose. A corporation with substantial market power does nothing illegal through the simple possession of shares and other assets. The prohibited conduct is the taking advantage, for a proscribed purpose, of that market power. Conceptually, divestiture is inappropriate in this context because there is no clear nexus between the assets to be divested and the contravening conduct. For example, identifying the specific assets to be divested to preclude a corporation from taking advantage of its market power for a proscribed purpose would be difficult at best and arbitrary at worst.

In the United States, divestiture is available to redress a broader array of anti-competitive conduct than in Australia. The experience there is that divestiture is a remedy which is much more suited to dealing with anti-competitive mergers than to dealing with the conduct of unified enterprises, as would be the case if it were applied to a misuse of market power. A corporation that has expanded by acquisition often has pre-existing lines of division along which it may more easily be split than a corporation that has expanded through organic growth. Courts have, in the United States, referred to the logistical difficulty of 'unscrambling' the latter without greatly harming the efficiency of a viable market participant.[35]

The alternative option of applying divestiture orders to a concentration of ownership that substantially lessens competition, is inappropriate. The proposal is very broad and would make a corporation with market power susceptible to court-ordered divestiture. This would create an uncertain

35 See *United States of America v. Microsoft Corporation*, United States Court of Appeal, 28 June 2001.

business environment. In particular, given that ownership of assets is a passive state, it is difficult to know what the divestiture would be aimed at, whether it be the substantial lessening of competition or the degree of concentration in the market.

It is thus inappropriate and, in the light of other remedies, unnecessary to recommend the extension of the remedy of divestiture.

Cy-pres orders

The proposal that the Court's power under the Act to order the payment of compensation or damages for breaches of Part IV be extended to incorporate orders in the nature of cy-pres orders also gives rise to problems. Such orders would involve the payment of compensation or damages into a trust fund to be directed toward purposes that are identified by the Court. For example, money from the trust might be used for the promotion of consumer or other affected interests. Acceptance of such a proposal would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance. At present, pecuniary penalties are paid into the Commonwealth's Consolidated Revenue Fund, the expenditure of which is a matter of policy for the Government.

Conclusions

- The Committee endorses an effective leniency policy. A leniency or amnesty policy that provides clear and certain incentives to give evidence is a potent means of uncovering cartel behaviour.

- The Committee is persuaded, in the light of submissions made to it and growing overseas experience, that criminal sanctions deter serious cartel behaviour and should be introduced. However a number of problems remain to be solved before the introduction of criminal sanctions, not the least being the need to find a satisfactory definition of serious, or hard-core, cartel behaviour and a workable way of combining criminal sanctions with a clear and certain leniency policy.

- The Committee is of the view that any criminal sanctions that are created should apply to all who engage in the cartel conduct and not just to large corporations.

- Comparable jurisdictions enable a court to deter illegal trade practices by imposing a maximum monetary penalty upon corporations that is either a multiple of the gain or a proportion of the corporation's turnover. Recent amendments in New Zealand provide a pertinent example. The Committee considers it desirable to amend the Australian law along the same lines.

- It should be an offence for corporations to indemnify individuals for pecuniary penalties which they may incur. Courts should be given the power to exclude individuals found to have contravened the Act from being directors of a corporation or from having any management role in a corporation.

- The Committee is of the view that to the extent it is reasonable to do so, protection to whistleblowers for breaches of the Act should be kept in line with protection for whistleblowers under the *Corporations Act 2001*.

- The Committee does not favour the proposal to expand the remedy of divestiture beyond the context of unlawful mergers. Likewise, the Committee does not consider it appropriate for the Court to be given the power under the Act to make orders in the nature of cy-pres orders.

Recommendations

10.1 The Committee is of the view that solutions must be found to the problems identified by it before criminal sanctions are introduced for serious cartel behaviour. The problems are, importantly, the development (preferably by a joint body representing the DPP, the Attorney-General's Department, the ACCC and the Treasury) of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear and certain leniency policy with a criminal regime. Subject to this proviso, the Committee recommends the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.

10.2 The Act should be amended so that:

10.2.1 the maximum pecuniary penalty for corporations be raised to be the greater of $10 million or three times the gain from the contravention or, where gain cannot be readily ascertained,

10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any);

10.2.2 the Court be given the option to exclude an individual implicated in a contravention from being a director of a corporation or being involved in its management; and

10.2.3 corporations be prohibited from indemnifying, directly or indirectly, officers, employees or agents against the imposition of a pecuniary penalty upon an officer, employee or agent.

CHAPTER 11: ADMINISTRATION OF THE ACT

Background

The ACCC is an independent statutory authority established in 1995 by the merger of the former Trade Practices Commission and the Prices Surveillance Authority. It exercises significant powers under the Act, the object of which is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. It has an annual budget of approximately $62 million and staff of approximately 450 persons spread throughout Australia. It has offices in each capital city and in Townsville and Tamworth.

The ACCC comprises a chairperson and such number of other commissioners as are appointed from time to time. Associate commissioners may be appointed. Commissioners are appointed for a term not exceeding five years, but are eligible for re-appointment. A person who is, or is to be, a commissioner may be appointed as deputy chairperson. The ACCC currently has five full-time commissioners, five part-time associate commissioners and ten ex officio associate commissioners. The chairperson, or the deputy chairperson in the chairperson's absence, presides at a meeting of the ACCC. Three commissioners of the ACCC form a quorum.

The ACCC has established committees in relation to enforcement, mergers, energy, and transport to facilitate its decision-making process. The enforcement and mergers committees meet weekly. The ACCC also has a number of consultative committees to maintain contact with industry, consumers and government.

The ACCC produces an annual report which is tabled in the Parliament and is subject to review by the House of Representatives Standing Committee on Economics, Finance and Public Administration. The ACCC's financial operations are audited by the Auditor-General and it is subjected to scrutiny by other parliamentary committees from time to time. Various determinations of the ACCC are subject to merit review by the Tribunal. Enforcement of the Act is by way of proceedings in the Federal Court.

Issues

The Committee received a number of submissions concerning the corporate governance of the ACCC.

Some submissions advocated the creation of a board to oversee the ACCC's performance of its functions. An alternative proposal was the establishment of a Board of Competition, similar to the recently created Board of Taxation. The Board of Competition would not be involved in decisions by the ACCC, but would provide advice to the Government on the development of competition regulation and to the ACCC on its administration. The Board of Competition would, it was suggested, monitor the ACCC's performance against a charter for the administration of competition regulation and help to increase the ACCC's understanding of consumer and business perspectives.

The appointment of an Inspector-General of Competition to complement the Board of Competition was also proposed. Some saw the role of this office as the handling of complaints in a fashion similar to that of the Ombudsman, but confined to matters of competition. Others saw the Inspector-General as dealing with systemic issues in the area of competition and making recommendations to the Treasurer or the ACCC.

It was also submitted that a dedicated Joint Parliamentary Committee should undertake parliamentary scrutiny of the ACCC.

Wilkinson Review

The Government has referred some of the recommendations of *The Review of the Impact of Part IV of the Trade Practices Act 1974 on the recruitment and retention of medial practitioners in rural and regional Australia* to the Committee for consideration.

Of relevance to the administration of the Act is Recommendation 6 of the Wilkinson Review which recommends that:

> '(a) to increase public confidence, the ACCC review its internal administrative, investigative and review processes to ensure that they are transparent and accessible to parties affected by ACCC action; and
>
> (b) the ACCC establish appropriate processes to ensure that the medical profession is explicitly aware of the internal and external avenues available for lodging complaints about the ACCC's conduct of investigations, and for seeking the review of ACCC decisions.'

The report recognises that these recommendations may require a changed emphasis in regard to staff training and organisational structure within the ACCC.

In Recommendation 12, the Wilkinson Review recommended that the ACCC establish a pre-formal authorisation assessment process to facilitate informal dialogue with professions and potential applicants about current or proposed arrangements, which potentially fall within the ambit of the Act and therefore may require authorisation.[1]

Analysis

The Committee notes the announcement by the Prime Minister of a review of the corporate governance of Commonwealth statutory authorities and office holders. Such a review may conclude that fundamental change is needed as a matter of general policy, such as the substitution of boards without executive functions for commissions, which currently execute their own decisions. Such a change would, in the case of the ACCC, mean replacing the ACCC with a board structure rather than placing a board above the existing structure as proposed in submissions to the Committee. However, confining its attention to the ACCC, the Committee concluded that such a fundamental change is not warranted although the Committee is not opposed to a board — as opposed to a commission — if it is ultimately recommended as a matter of general policy. The Committee has directed its attention to the problems identified in this review and the way in which they might be solved by changes within the existing general framework of the ACCC.

The way in which the ACCC administers the Act claimed the attention of many of those who made submissions to the Committee to a greater degree than the provisions of the Act itself. Perhaps this is not surprising because the powers of the ACCC as a regulator are considerable and, in the exercise of those powers, the ACCC has made a significant impact on the conduct of business in this country and upon the economy. The ACCC has been commendably vigorous in discharging its responsibilities under the Act, particularly with regard to the dissemination of information to interested persons for their guidance upon the carrying out of its functions and the exercise of its powers. Nevertheless, there are some concerns as indicated in the Wilkinson report and submissions made to the Committee. The ACCC's use of the media and the manner in which it exercises its powers under section 155 are dealt with in Chapters 12 and 13 respectively. There remains the general question of the accountability of the ACCC and its relationship with the parties with whom it must deal.

1 See Chapter 6: Authorisation.

Corporate governance

The Committee sees merit in the proposal that a dedicated Joint Parliamentary Committee should undertake parliamentary scrutiny of the ACCC. The Joint Committee would develop a special understanding of the responsibilities of the ACCC and of the concerns of the parties with whom it deals. This may allow some rationalisation of the number of appearances of the ACCC before other Parliamentary Committees without decreasing scrutiny of its administration of the Act. This proposal is, of course, a matter for the Parliament to consider.

The Committee does not support the creation of a board or the appointment of an Inspector-General to oversee the performance by the ACCC of its functions. The creation of a supervisory board would introduce an additional and uncertain layer of control over the management of the ACCC and the Committee is not persuaded that this would increase the ACCC's efficiency, or accountability, or offer the best means of responding to the questions raised in relation to the ACCC's administration. If more fundamental reform of the ACCC's governance arrangements were to be undertaken, the Committee would prefer to see the ACCC replaced by a board, as opposed to a commission, rather than see a board installed above it.

The introduction of a Board of Competition to advise the Government on competition regulation would not require a fundamental change to the corporate governance of the ACCC. If it were to operate in the manner of the Board of Taxation, it would essentially be an adviser to the Treasurer on policy matters. Such a role is warranted in the case of the Board of Taxation because there is a considerable volume of taxation legislation annually in relation to which the Government can gain valuable input from a broad range of perspectives. There is not, however, such a volume of amendments to competition law as to warrant a permanent advisory body to the Treasurer on policy matters. The greater need is for feedback to the ACCC on its administration of the Act.

Similarly, the Committee rejects the proposal to appoint an Inspector-General. The objectives of such an appointment can, it believes, be achieved without the creation of another layer of administration.

Improved consultation

The ACCC has established a number of committees through which it consults business, consumers and other interests. These include:

- a comprehensive consultative committee which meets bi-annually and comprises representatives from business, consumers, government departments and the professions;
- a consumer committee which meets quarterly;
- a small business advisory committee which meets every six months;
- a utility regulators forum which meets three times a year; and
- a recently established regional consultative committee.

The Committee is unable to comment generally on the extent to which the special purpose committees successfully perform their functions. However, it was apparent from the submissions made to the Committee that the comprehensive consultative committee is an ineffective body which serves largely to enable the ACCC to report on its current activities. It appears to offer little, if anything, by way of criticism or suggestion. It is chaired by the chairperson of the ACCC. The representatives that are sent to its meetings are not at the highest level, especially those from business, and some attend only irregularly. It makes no report on its activities.

The Committee believes that the consultative committee could provide the means to make the ACCC more immediately accountable, to enable useful discussion of problems encountered in the administration of the Act and to provide a source of informed advice to the ACCC where appropriate. However, the nature of the consultative committee would need to be radically changed before it could do these things.

The consultative committee should be given statutory footing. The chairperson of the committee should be appointed by the Treasurer and should be someone who is impartial and is not limited to any particular group or interest. The members of the committee should be selected by the chairperson of the committee in consultation with the ACCC and might represent large and small business, consumers, the professions and government. However, the committee membership should be kept to a minimum so that the committee does not become unwieldy. It would be incumbent upon the various groups, especially business, to ensure that their representatives were of the highest order. The chairperson of the committee would set the agenda and the committee would be required to report to Parliament each year by way of a dedicated separate chapter in the ACCC's annual report.

The function of the committee would be to advise the ACCC on the administration of the Act rather than advise government on the policy of the Act. Accordingly, the ACCC should provide secretariat services to the committee. The existence of the committee and its functions should be publicised. The representation on the committee should facilitate dialogue between the ACCC and interested parties. The success of such a consultative committee would rest with its chairperson and its members. It would therefore be important for senior business representatives to be prepared to join the committee and participate in discharging its agenda. The committee would meet as necessary, but at least quarterly.

A reconstituted consultative committee would further enhance communication between the ACCC and small business. The Committee notes the current constructive consultation arrangements between small business and the ACCC through the Small Business Advisory Committee. There is also a commissioner appointed with specific responsibilities for small business. The Committee does not believe the appointment of an additional small business commissioner is necessary.

Charter of competition regulation

A number of submissions also suggested the introduction of a Charter of Competition Regulation which would set out the framework and processes within which competition regulation should be administered. In addition, some submissions also suggested specific guidance should be included on the broad principles to be followed by the ACCC in the administration of the Act. The Committee does not see any value in complicating the existing section 2 of the Act by adding additional objectives. Further, the Committee does not support, in general terms, a charter of competition regulation. However, guidelines on administration in specific areas already exist and will need to be amplified in certain areas if any changes are made to the Act. The consultative committee could play an important role in any amendments to such guidelines. In addition, as noted later in this chapter, the Committee supports a review of the ACCC service charter.

Resolution of individual complaints

The consultative committee would deal with matters of administrative policy rather than individual complaints. For example, it is suggested that the consultative committee should play a large part in the development of codes of conduct, such as a media code of conduct, and the various guidelines, such as the mergers guidelines. Individual complaints would have to be dealt with

separately. Currently, they are resolved through informal internal processes or through the Commonwealth Ombudsman. Many submissions were to the effect that the Ombudsman's wide range of responsibilities made that office seem an inaccessible mechanism for dealing with trade practices complaints. In 2001-02, the Ombudsman finalised 32 complaints regarding the ACCC of which 13 were investigated. Of this 13, one was found to involve an arguable agency defect.

The Committee is of the view that the ACCC's informal processes for dealing with complaints should be given a degree of formality by the appointment of an associate commissioner to deal with them. That role is now undertaken by the Chief Executive Officer. The appointment of an Associate Commissioner for Complaints and the procedure for making and dealing with complaints should be made known and would provide some assurance that complaints would be handled with a degree of independence from executive management. This would also address issues raised in the recommendations of the Wilkinson Review. The Associate Commissioner for Complaints should also report to Parliament through the ACCC's annual report. It would be appropriate for systemic administrative issues observed by the Associate Commissioner for Complaints to be considered by the consultative committee.

Consultation with consumers

Another way in which consultation might be enhanced is by the introduction of a process similar to the 'super-complaints' procedure that is being established in the United Kingdom in relation to its competition law regime. Under this process, designated consumer bodies in the United Kingdom will be able to make a 'super-complaint' where they consider that certain features of the market, such as market structure or the anti-competitive conduct of firms operating within it, may be significantly harming consumers.[2]

The market in question may be regional, national or supranational (which includes the United Kingdom). The United Kingdom Office of Fair Trading will be obliged to respond publicly within 90 days as to whether it intends to take action. The response by the Office of Fair Trading must state reasons for its response and the proposed action it may take. Guidelines will be published to assist consumer bodies in framing a reasoned case in connection with a complaint.

2 Clause 11 of the *Enterprise Act 2002* (United Kingdom).

At present, there are a number of ways in which the Australian Act is administered with regard to consumers. The Act requires that there be a designated commissioner for consumer matters. A consumer committee meets quarterly to provide a forum in which consumer issues can be raised with the ACCC. The Committee was advised that the consumer committee is working effectively. In its submission, the Australian Consumers Association praised the ACCC for transparency and making consumers 'far more' aware of their rights. However, the Government may care to observe the operation of the new 'super-complaints' procedure in the United Kingdom to see if there would be benefit in introducing such a mechanism in Australia.

Sustaining the ACCC's capacity

The quality of the ACCC's management and staff is critical to its performance and the effective administration of the Act. The Committee notes that the appointment of persons at commissioner level for two terms appears now to be a standard approach for public authorities in the United Kingdom. The limitation of two terms in the United Kingdom is thought to safeguard against complacency while providing an opportunity for greater ongoing review of the organisation and the board.[3] The Committee considers that commissioners of the ACCC, particularly the chairperson, should not ordinarily be appointed beyond a maximum of two terms.

The quality of the Commissioners and staff of the ACCC appears to the Committee to have been and to remain high. However, achieving this has not been without difficulty. For example, there has been a vacancy in the position of deputy chairperson for over two years.

It is desirable that the ACCC be able to draw on persons with recent business and legal experience gained from outside the ACCC. The Government's ability to attract suitable new candidates for appointment to the position of commissioner depends to a large extent on the level of remuneration it is able to offer. At present that is set by the Remuneration Tribunal and offers little enticement to suitable persons from the private sector to join the ACCC, even for a limited period. The Committee believes that consideration should be given to an improved means of attracting candidates of the requisite quality. There are, of course, many advantages in the form of learning and experience to be gained by persons from the private sector during even a limited period with the ACCC.

3 Committee on Standards in Public Life (United Kingdom) 1996, *Second Report,* Chairman Lord Nolan, p. 53 and p. 103.

The ACCC could assist the development of its professional staff by seeking to expose them to experience outside the ACCC. This would build on existing arrangements for exchanges with other regulators and might be encouraged by the development of staff exchanges with key groups with which it interacts. This would be consistent with the practice of United States regulators. The appointment of visiting academic experts for temporary periods, as is done in Canada, may also assist staff development.

Review of service charter

The ACCC should also review its service charter in the light of the issues that have been raised before the Committee concerning administration and corporate governance, and the relevant recommendations of the Wilkinson Review. It would be appropriate for the consultative committee to contribute to such a review in order that the concerns of interested parties might be taken into account.

Use of ACCC resources

Given the competing demands upon the ACCC it must seek to make the best use of its resources. This includes making decisions about the enforcement of, and compliance with, the Act. The ACCC takes the following factors into account in considering whether to take action to enforce the Act:

- apparent blatant disregard of the law;
- any history of previous contraventions of the law, including overseas contraventions;
- significant public detriment and/or a significant number of complaints;
- potential for action to have a worthwhile educative or deterrent effect;
- whether the matter involves a significant new market issue; and
- whether the likely outcome justifies the use of resources.

In addition, the ACCC has specific priorities in relation to anti-competitive conduct. Irrespective of the industry or market involved, the ACCC is likely to be most concerned with the following forms of anti-competitive conduct:

- anti-competitive agreements, particularly in relation to price-fixing and primary boycotts;

- mergers which would, or would be likely to, substantially lessen competition in a substantial market;
- misuse of market power (especially conduct that inhibits structural reform, focuses on emerging markets/competition or that may stifle the development of innovation and small business);
- resale price maintenance imposed by major suppliers or induced by major customers;
- exclusive dealing that significantly affects consumers or business; and
- secondary boycott conduct that has a major detrimental community impact.

In its submission the ACCC states in relation to small business:

> '… the Commission's enforcement priorities are focused on establishing relevant legal precedent and matters involving relationships with marked disparity in bargaining power or market power (for example, landlord and tenant or franchisor and franchisee relationships). These issues may be considered under section 46 (misuse of market power), or in some cases Part IVA (unconscionable conduct). The Franchising Code under Part IVB is also relevant.'

The Committee has already expressed the view that the establishment of legal precedent is important at this relatively early stage in the interpretation of the Act. It is inevitable that some parties will question the priority the ACCC accords to its various functions. A number of small business interests expressed concern about the ACCC's failure to investigate particular matters of relevance to them. In part, this underlines the confidence of small business in the capacity of the ACCC to assist it. The mere fact that the ACCC is making inquiries may help to resolve some problems and encourage compliance with the Act.

Conclusions

- Consideration should be given to the establishment of a single Joint Parliamentary Committee to scrutinise the ACCC's administration of the Act.
- It would not be desirable to establish a board above the ACCC to oversee the functioning of the ACCC or to appoint an Inspector-General of Competition.

- Reform to meet the problems identified in the review can be most appropriately implemented within the existing framework of the ACCC, although this Committee is not opposed to a board structure, if thought desirable as a matter of general policy in lieu of a commission.

- Accountability of the ACCC should be increased by the appointment of a properly constituted consultative committee to provide effective feedback to the ACCC on its administration of the Act. The effectiveness of the consultative committee will depend on the willingness of business groups to contribute to the consultative process.

- The handling of individual complaints is an important aspect of accountability. Complaint handling would be improved if an associate commissioner were appointed to the ACCC to perform this function.

- It is desirable that the ACCC be able to attract commissioners with recent business and legal experience. The ability of the Government to do so is significantly dependent on the availability of adequate remuneration.

- Exchanges of ACCC personnel with key groups that the ACCC interacts with may help to develop staff resources.

Recommendations

11.1 Consideration should be given to the establishment of a single Joint Parliamentary Committee to oversee the ACCC's administration of the Act.

11.2 The Act should be amended to establish a consultative committee to advise the ACCC on the administration of the Act. The consultative committee should be constituted so that it is convened by an independent chairperson appointed by the Treasurer. The chairperson should appoint the members of the committee in consultation with the ACCC. The committee should report to Parliament by way of a dedicated section of the ACCC's annual report.

11.3 An associate commissioner should be appointed to the ACCC to receive and respond to individual complaints about the administration of the Act and to report each year in the ACCC's annual report.

11.4 Consideration should be given to the manner in which the remuneration of commissioners is determined to ensure that the

Government is able to attract as commissioners candidates of sufficient calibre.

11.5 The ACCC should consider the temporary placement of ACCC staff with other parties to develop staff resources.

11.6 The ACCC should review its service charter, in conjunction with the proposed consultative committee, in the light of the outcome of this review and the relevant recommendations of the Wilkinson Review.

CHAPTER 12: USE OF THE MEDIA

Background

The ACCC has established a high media profile over the past decade. In particular, that profile increased when, with the introduction of the goods and services tax, the ACCC was given legislative responsibility for monitoring price exploitation for a three year period.

The ACCC typically makes over 300 media releases a year and frequently holds media conferences in conjunction with these releases. The chairperson of the ACCC and commissioners appear in news and current affairs programs on radio and television. The chairperson, commissioners, or representatives of the ACCC are often quoted in the print media or have information attributed to them.

Considerable use is made of other means of communication to publicise trade practices and consumer protection issues. In 2001, Commissioners presented over 54 speeches and attended a variety of forums on competition and consumer issues. The ACCC has issued over 300 publications, which are produced in print, electronic and audiovisual form. Two regular publications are produced. The bi-monthly *ACCC Journal* is distributed to around 800 organisations and is designed to provide up-to-date information on competition and consumer matters. The *ACCC Update* has a circulation of around 10,000 and concentrates on ACCC issues. The ACCC has an extensive internet website where media releases, publications, information on competition policy and links to other related websites can be found.

The news media plays a significant role in contributing to the effectiveness of various ACCC special programs. For example, the ACCC's small business unit operates a Small Business and Rural and Regional Services Program that aims to educate and inform consumers about the Act. This program has established a network of over 300 agencies to assist it in disseminating its message. The ACCC uses media such as press columns, advertisements and radio interviews to supplement the regular field trips and seminar programs it undertakes in this program.

Issues

The ACCC's use of the media was one of the issues most frequently raised with the Committee. Concern was expressed to the Committee about the manner in which the ACCC:

- publicised investigations before they were concluded and before proceedings were instituted;
- publicised prosecutions when no decision had been reached by the court;
- made statements that lacked balance and objectivity, sometimes by reporting a court outcome in a manner that misrepresented the court's decision; and
- linked new and unrelated investigations or prosecutions to other actions in which an adverse finding had been made by the court against another corporation.

The common theme underlying these complaints was that the manner in which the ACCC released information and made comments to the media was neither balanced nor impartial and carried with it the danger that the corporation or individual involved might be denied procedural fairness in proceedings yet to be determined. In short, the suggestion was that the ACCC engaged in trial by media. Whilst conceding the need to release information to educate the public about trade practices matters, it was said that the ACCC on occasions exceeded the proper boundaries, thereby risking damage to the reputation of corporations or individuals, despite the fact that a court had not made findings against them.

On the other hand, it was put to the Committee that the ACCC's use of the media was a cost-effective means of promoting compliance with the Act and of educating business and consumers on competition issues. The general presence and high profile of the regulator was said, particularly by consumer organisations, to enhance consumer confidence in the operation of the Act.

There was widespread support in the submissions made to the Committee for the introduction of a media code to govern the ACCC's use of the media. The ACCC was conscious of the concerns expressed and supported the introduction of such a code in order to address them. There was less agreement on the content of the code. The controversial aspects were the possible effect of the code on the ACCC's enforcement and educative functions, the appropriate

timing of public comments and how the code might be developed and enforced.

Analysis

Section 28 of the Act establishes functions for the ACCC that could not be fulfilled without use of the media. Section 28(1) provides:

> 'In addition to any other functions conferred on the Commission, the Commission has the following functions:
>
> (a) to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission under this Act; …
>
> (d) to make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws; and
>
> (e) to make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers.'

It is appropriate and cost-effective for the ACCC to use the media to educate both business and consumers about their rights and obligations under trade practices law. Increasing community awareness of these rights and obligations can assist in increasing compliance with the Act. The ACCC has been singularly successful in promoting awareness of trade practices matters, their implications for consumers, and the role of the ACCC in relation to them. The Committee was told by trade practices authorities overseas that they regarded the range and quality of the publications issued by the ACCC as exceptional.

The use of publicity in relation to contraventions of the Act may contribute to an understanding of the enforcement process. It is appropriate to report the outcome of proceedings in the courts because this may also contribute to the community's understanding of behaviour that is not consistent with the requirements of the Act. Although such reporting will involve publicising the practices of particular corporations, and may harm their reputation in the market, it may also provide a significant deterrent against anti-competitive behaviour by others.

At the same time, public statements by the ACCC about particular corporations require caution to ensure that no unfairness is involved. It is clear from the submissions made to the Committee that there are widespread misgivings about the ACCC's media practices. The ACCC has stated on a number of occasions that the disquiet caused to some business interests by its activities may simply reflect its effectiveness as a regulatory agency. This is, however, not a sufficient response. It is the responsibility of the ACCC to ensure that its provision of information to the media is consistent with due process and that there is confidence in the way in which it conducts itself. This extends beyond information supplied through formal printed media releases and includes informal commentary. It also involves information relating to proposals from corporations, for example in relation to mergers, which may not involve the contravention of the Act but are commercially sensitive.

The use of adverse publicity by the ACCC for enforcement purposes was recently considered in a paper by Yeung[1] (see Box 12.1). The paper recognised the positive contribution of publicity to the enforcement of the Act, but noted problems associated with media use, particularly at the investigative stage of the enforcement process. However, the analysis showed that in its formal media releases, the ACCC referred to investigations infrequently. It was found that there was a reference to an investigation in only 1.5 per cent of the media releases issued in the year 2001. The paper acknowledged a limitation of the analysis was that it was confined only to media releases, thus ignoring a significant volume of other media activity.

The ACCC acknowledged in its submission to the Committee that public comment in the course of the enforcement process may have an impact in the minds of some on the reputation of the party being investigated, but submitted that most members of the public know the difference between an investigation, an allegation and a court finding of unlawful behaviour. The Committee doubts whether the public always maintains those distinctions, particularly where the comment emanates from a regulatory body such as the ACCC. The ACCC itself, in its submission, says that its practice is not to publicise an investigation 'subject to some exceptions where a public policy purpose is involved'.[2] The exceptions identified by the ACCC are where the investigation is made known by the complainant, the firm under investigation or some other person.

1 Yueng, K. 2002, *Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?* Paper presented to the Australian Institute of Criminology Conference, Current Issues in Regulation: Enforcement and Compliance, Melbourne, 3 September 2002.

2 ACCC, Submission No. 56, p. 177.

The Committee notes that, while the risk of damage to a corporate name from the publicising of an investigation is high, the likely educational benefit to the public is low. The risk of damage is underlined by the fact that the public perception of the implications of an investigation will be influenced by the manner in which it is reported. That is not, of course, within the control of the ACCC. In the Committee's view, whilst there may be circumstances in which it may be necessary for the ACCC to confirm or deny the existence of an investigation, the ACCC should avoid any comment on investigations it may be undertaking, even when the media has learnt of the investigation from another source.

Box 12.1: An analysis of ACCC media processes

Dr Yeung's recent research paper sought to explore the question — *Is the use of informal adverse publicity a legitimate regulatory compliance technique?* The study was based on the ACCC's 2001 media releases and did not consider the ACCC's other means of conveying information through the media.

The paper considered that media releases describing investigations and proceedings relating to alleged contraventions of the Act have the most potential to call the integrity of the trial process into question. It was found that around 1.5 per cent of the ACCC's 2001 media releases concerned the investigation stage of the process while 40 per cent concerned the litigation stage. Around three-quarters of these releases reported either a court judgment on matters or a settlement negotiated between the parties. The paper found that while claims of trial by media might have been overstated, there was clearly some scope for improvement.

Analyses of the balance and tone of the ACCC's media releases found that very few of the ACCC's pre-trial litigation press releases emphasised that the allegations were unproven and did not equate to judicial findings of guilt. It was also noted that the views of the defendant were represented in only one-quarter of the releases on litigation cases. On the other hand, where formal court proceedings were announced, it was found that the ACCC took a cautious approach in generally not offering an opinion on the matter in question.

Box 12.1: An analysis of ACCC media processes (continued)

It was also found that the ACCC has a tendency to '… provide a rather one sided view of individual cases, rather than providing an objective, factual account.'[3] For example, it was reported that 95 per cent of the 2001 media releases announcing court outcomes declared the ACCC the 'winner', even where the case had been won on technical grounds.

The study concluded that while the ACCC actively used media releases to promote its enforcement activities, '… its pursuit of publicity may have a tendency to undermine its credibility as an even-handed law enforcement agency committed to ensuring that those at risk of violating the Act are fairly treated.'[4]

It may be desirable for the ACCC to inform the public when court proceedings are commenced and when the court has determined a matter. This is consistent with the public nature of the court process and the desirability of informing and educating the community about trade practices matters. However, the ACCC must exercise careful judgment in determining what it should say at each stage of the enforcement process. This is particularly so in relation to the commencement of court actions when the fairness of court procedures must not be impaired.

The ACCC's media commentary on proceedings has been the subject of judicial comments. For example, Justice Hill in the Federal Court recently declined to make orders against a party for corrective advertising because the ACCC had publicised the alleged contravention before the Court had finished dealing with the matter. Justice Hill noted that the contravention was not deliberate and observed:

> 'It might be said that while the Commission is entitled to tell the public that proceedings have been brought and the general nature of those proceedings, there is a danger that wide dissemination of the fact before a hearing might in a particular case injure, perhaps irreparably, the person against whom the proceedings are brought.'[5]

3 Yueng, K, op. cit., p. 52.
4 Yueng, K, op. cit., p. 53
5 *Cassidy v. Medical Benefits Fund of Australia (No. 2)* [2002] Federal Court of Australia 1097th decision at para. 94, 9 September 2002.

The nature of the problem had previously been outlined by Justice Smithers, who criticised the then Trade Practices Commission in 1977 for the early publicising of a matter:

> 'Adverse publicity is often one of the inevitable consequences of wrongdoing … But adverse publicity initiated by the prosecuting authority itself requires special consideration. If the matter is publicised ahead of trial, and widely, and in terms likely to induce public censure of the parties concerned and those parties are in day-to-day business relationships with the public, then there is obvious danger of injury to the lawful business of the parties which from a practical point of view may have the effect of effectuating a cumulative punishment.'[6]

On both occasions the court noted that, in the particular circumstances, adverse publicity generated by the ACCC or its predecessor had caused harm to reputation and that the court's orders were accordingly less extensive.

The need to ensure procedural fairness requires that a balance be maintained between keeping the public informed and protecting the rights of those against whom proceedings have been brought. It is therefore desirable that, if there is comment about a matter before it is resolved, it should acknowledge that the allegations against the defendant have yet to be proved. The best way to achieve an appropriate balance is for the ACCC to ensure that any announcement of the commencement of proceedings is no more than factual. In addition, the ACCC should establish a strict policy of not providing any commentary beyond the terms of its formal media release and avoid commenting on a case once court proceedings have commenced.

This approach would remove the potential for the ACCC to be seen as contributing to unfair adverse publicity either through its own comments or through the use made of information it provides to the media. The Committee was made aware of some media reports from which the reader might reach a conclusion adverse to a party against whom proceedings had been commenced, but where the ACCC's media releases were merely factual and did not convey any such impression.

Some submissions have questioned the tone and balance of the ACCC's statements on the outcome of some court cases. They suggest that media releases in relation to a particular corporation should be cleared by that corporation prior to release. The Committee considers such a course would be

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6 *Eva v. Southern Motors Box Hill Pty Ltd* (1977) Vol. 15 Australian Law Reports, p. 428 at p. 437.

impractical — it would be difficult to reach agreement on what was acceptable in a particular case. In considering the terms of its media releases the ACCC should, nevertheless, ensure that they accurately convey the outcome of proceedings. In particular, the ACCC should acknowledge all aspects of a judgment, including those parts that may not have favoured the ACCC. It should also avoid the reporting of judgments in terms of winners and losers. The analysis of the ACCC's 2001 press releases, referred to above, confirms the tendency for some media releases to present cases in this way. The focus of the ACCC in publicising a court judgment should not be to score points but to inform the public of the issues resolved in order to improve their understanding of the requirements of the Act. Unbalanced reporting of results will only serve to colour the message at the risk of clouding its educative and informative value.

For example, in a recent judgment Justice Finn was critical of public comments made by the ACCC about legal advice that was relied on by the defendants. Justice Finn concluded that he was unable to make certain orders restraining the ACCC, but commented that the ACCC's past statements:

> '… may constitute good public theatre. Whether they represent good public administration is another matter. There is a very real prospect that the view the ACCC has taken of [the relevant provision of the Act] will be found to be incorrect … there can be respectable opinions on both sides of the argument.'[7]

The ACCC's media release after the judgment made no reference to Justice Finn's concerns about the ACCC's conduct or his decision that both the ACCC and the Electricity Supply Association of Australia (ESAA) were entitled to their own views of the legal questions in dispute. Instead it claimed that the judgment:

> '… endorse[s] the ACCC's ability to make public its views as to the rights and obligations of consumers and electricity suppliers under the Act … [and] vindicates the position taken by the ACCC in defending the proceedings taken by the ESAA.'[8]

The Committee considers that the ACCC's relationship with business and consumers would be assisted by the development of a code of conduct governing the ACCC's use of the media. Whilst recognising the benefits to the ACCC and to the community from the publicising of the objectives of the Act

7 *Electricity Supply Association of Australia Limited v. ACCC* [2001] Vol. 189 Australian Law Reports, p. 109 at p. 143.

8 ACCC Media Release No. 225/01, 14 September 2001.

and the way in which they might be achieved, a media code would provide a standard to be applied by the ACCC in individual instances. In particular, the adoption of clear rules to govern public comment should engender a fair and balanced approach in all cases. The observance of a media code of conduct would, the Committee considers, work to the ACCC's advantage, particularly if its terms were agreed with interested parties. The Committee suggests that assisting the ACCC with the development of the media code be a priority for the consultative committee which it has proposed in Chapter 11. Adherence to the media code could be reviewed by the consultative committee but would no doubt also be considered by the relevant Parliamentary Committees.

The Committee also notes that these principles regarding the use of the media could be considered for inclusion in the Legal Services Directions issued by the Attorney General relating to Commonwealth Legal Services which include the Model Litigant obligations.

Conclusions

- The ACCC's high media profile reflects, in part, the success of the ACCC in increasing community awareness of the importance of competitive markets and of the role of the ACCC in enforcing the Act and encouraging compliance with it.
- There is at the same time considerable concern on the part of business about the use made by the ACCC of the media.
- The ACCC needs to exercise care in publicising individual matters to ensure that there is no unfairness to the parties involved.
- The ACCC should develop a media code of conduct in consultation with interested parties to govern its use of the media, particularly in relation to enforcement proceedings.
- The media code of conduct should be developed through the consultative committee structure that is being proposed by the Committee.

Recommendations

12.1 A media code of conduct should be developed through the proposed restructured consultative committee.

12.2 The media code should be based on the following principles:

12.2.1 the public interest is served by the ACCC disseminating information about the aims of the Act and the ACCC's activities in encouraging and enforcing compliance with it. This extends to information about proceedings instituted by it, but an objective and balanced approach is necessary to ensure fairness to individual parties;

12.2.2 the code should cover all formal and informal comment by ACCC representatives;

12.2.3 whilst it may be necessary for the ACCC to confirm or deny the existence of an investigation in exceptional circumstances, the ACCC should decline to comment on investigations;

12.2.4 with the object of preserving procedural fairness, commentary on the commencement of court proceedings by the ACCC should only be by way of a formal media release confined to stating the facts; and

12.2.5 reporting the outcome of court proceedings should be accurate, balanced and consistent with the sole objective of ensuring public understanding of the court's decision.

CHAPTER 13: USE AND SCOPE OF SECTION 155

Background

Section 155 of the Act provides the ACCC with powers to obtain information, documents and evidence in the course of investigating possible contraventions of the Act and for use in proceedings under the Act. Section 155 has been included in the Act since its inception in 1974 and is consistent with the need for the enforcement of the Act to be supported by the availability of strong investigative powers.

Section 155(1) provides that where the ACCC, the chairperson or the deputy chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence in relation to a matter that may involve a contravention of the Act, that person may be required to provide such information, documents or evidence. A member of the ACCC may give notice in writing requiring the person:

> '(a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time frame and in the manner specified in the notice, any such information;
>
> (b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or
>
> (c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.'

Section 155(2) provides that if the ACCC, the chairperson or the deputy chairperson has reason to believe that a person has engaged in or is engaging in conduct that constitutes, or may constitute, a contravention of the Act, a commissioner of the ACCC may in writing authorise a member of the staff of the ACCC to enter any premises, and to inspect any documents in the possession or under the control of the person and make copies of, or take extracts from, those documents. The power may only be exercised for the purpose of ascertaining by the examination of the documents in the possession or control of the person whether the person has engaged in or is engaging in such conduct.

Under section 155(3) the ACCC may require the evidence referred to in paragraph (1)(c) of the section to be given on oath or affirmation and under section 155(6) the member of staff entering the premises under subsection (2) must be provided by the occupier or person in charge of the premises with all reasonable facilities for the effective exercise of his or her powers under that subsection.

It is an offence for a person not to comply with a notice under section 155(1) to the extent that he or she is capable of complying with it. It is also an offence to obstruct or hinder a member of staff acting pursuant to subsection (2) or to fail to render assistance under subsection (6).

A person is not excused from furnishing information or producing or permitting inspection of a document on the ground that the information or document may tend to incriminate the person. The evidence is not admissible in criminal proceedings other than proceedings under section 155 or, in the case of a corporation, proceedings under the Act.

Use of section 155

Figures produced by the ACCC (see Table 1) indicate that the use of section 155 notices has increased over the last four years. In 1998-99, there were 84 notices served under section 155(1) and no authorities were given under section 155(2). In 2001-02, there were 438 notices served under section 155(1) and eight authorities given under section 155(2). However, those figures treat each section 155(1)(a) and (1)(b) notice as a separate notice when in most cases only one notice was served which included a request for documents and information under both (1)(a) and (1)(b). Thus, although the total number of section 155(1)(a) and (1)(b) notices for 2001-02 was 343, in fact the actual number of notices issued (which in many cases contained a section 155(1)(a) and (1)(b) request) was 196.

The ACCC attributed the increased use of section 155 to an increased workload driven by increased complaints and the reluctance of parties to provide information voluntarily. The introduction of the new privacy legislation, in particular, has led some parties to believe that they cannot provide information requested unless section 155 is used.

The ACCC has used its powers under section 155(2) on 16 occasions only and, in determining whether to use those powers, considers whether it would be sufficient to use its section 155(1) powers. It says that it will generally only issue an authority to enter premises, inspect and copy material under section 155(2) where it believes that documents may be destroyed, where

documents are held over a number of sites and it is necessary to act simultaneously or where there has been a failure to comply with voluntary requests or a section 155(1) notice. The ACCC has also used its section 155(2) powers where it would be more disruptive to require the production of documents or objects.

Table 1: Use of section 155 notices

Year	Section 155(1)(a) & (b)	Section 155(1)(c)	Section 155(2)
1998-99	51	33	N/A
1999-00	129	47	N/A
2000-01	189	88	1
2001-02	343*	95	8

* From 1998-99 to 2000-01 the number of notices were calculated on the basis of one notice per alleged conduct. In 2001-02 notices issued under more than one conduct are counted once.

Source: ACCC

International context

The position regarding search powers overseas is varied.

European Union

Consistently with its extensive administrative powers, the European Commission has power to demand written information, enter premises and demand company information ('dawn raids') and seek oral explanations, all without the need to obtain a warrant. The European Commission's decision to conduct inspections can be reviewed by the Court of Justice. Recently the European Commission's powers to enter have been extended to include non-business premises.

United States

In the United States, the DoJ and the FTC may use court enforceable subpoenas to obtain the production of documents and the testimony of witnesses. Subpoenas are available for on-site access to documents. The DoJ, which

enforces the criminal provisions of the anti-trust law, only enters premises without notice in criminal investigations and pursuant to a search warrant.

Canada

In Canada, the Competition Bureau generally obtains warrants from a court to search for, and seize, documents, but may do so without a warrant in circumstances where delay might result in the evidence being lost.

United Kingdom

In the United Kingdom, the Office of Fair Trading has extensive powers both under the *Competition Act 1998* and the new *Enterprise Act 2002*. It may enter premises without a warrant (in most cases having given written notice, although notice is not required in all cases), require documents to be produced and take copies and ask for explanations of documents. It may also seek a warrant to enter (with force if necessary) and seize copies of the actual documents. The Office of Fair Trading has also been granted extensive surveillance powers under the *Regulation of Investigation Powers Act 2000*. Some surveillance is at the agency's own discretion, whereas more intrusive surveillance, for example, wire taps is only with a warrant.

The Canadian and United Kingdom laws expressly preserve legal professional privilege.

Analysis

A common complaint in the submissions to the Committee relates to the cost of compliance with a section 155(1) notice where the information or documents sought are extensive. However, the purpose of such a notice is investigative and it is inevitable that compliance will, in many cases, involve cost. The cost, however, should ordinarily be regarded as an incident of carrying on business activities. The Committee does not favour a suggestion that costs be recoverable from the ACCC, even where the recipient of the notice is a person other than the person thought to be involved in a contravention of the Act. The ACCC needs broad investigative powers for the purpose of detecting and prosecuting contraventions of the Act and the powers that it is given under section 155(1) are, in the Committee's view, not excessive. They are admittedly extensive. The ACCC need not, for example, satisfy itself that the information which it seeks will demonstrate that the Act has been contravened, but the detection and prosecution of breaches of the Act is in the interests of both business and consumers. Consistently with the objectives of the Act and the

powers of other regulators, such as ASIC, it is important that the power given to the ACCC under section 155(1) to require the production of information, if necessary, on a forthwith basis, and the power to interview persons continue without further restriction.

That does not mean that the ACCC should be unconcerned about the effect upon the recipient of a notice under section 155(1). The ACCC has issued guidelines for the use of its section 155 powers. These guidelines point out that the power to issue a notice should be exercised in good faith and that the notice should not be unreasonably burdensome.[1] However, the mere fact that a notice may impose a substantial burden does not invalidate it, provided that it is reasonable to seek the information or documents sought.[2] In practice, the ACCC will entertain an application for an extension of time for compliance with a notice if the time allotted proves too short. The ACCC maintains that it adheres to its guidelines. The Committee is in no position to reach a contrary conclusion. However, adherence to the guidelines is not established by pointing out, as the ACCC does, that there have been few challenges to the use of its powers. A challenge would be expensive and time-consuming and, more importantly, might give the appearance that there was something to hide. The view was put to the Committee that a person with grounds for doing so will be reluctant to mount a challenge for these reasons. Complaints about the failure to observe the guidelines should be able to be dealt with by the Associate Commissioner of Complaints and the consultative committee as recommended in Chapter 11.

Section 25 of the Act allows the ACCC to delegate to a commissioner of the ACCC the function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice. The Committee considers it would be appropriate if this function were able to be delegated to senior staff of the ACCC. Commissioners would not then be directly involved in the detail of particular investigations once approval had been given to proceed under section 155(1)(c). The delegation of this function would be consistent with the delegation of similar functions by other agencies including ASIC.[3]

A search warrant is issued by a judicial officer if the officer is satisfied by information on oath, supplied by the person applying for the warrant, that there are reasonable grounds for its issue.[4] An authorisation under

1 ACCC October 2000, *Section 155 of the Trade Practices Act*, p. 9.
2 *Pyneboard Pty Ltd v. Trade Practices Commission and Bannerman* (1982) Vol. 39 Australian Law Reports, p. 565.
3 Section 102 of the *ASIC Act 2001*.
4 See, for example, section 3E of the *Crimes Act 1914* (Commonwealth).

section 155(2) is given if the ACCC, the chairperson or the deputy chairperson has reason to believe that a person has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of the Act. Whilst the ACCC has set up a procedure to ensure that the requirements of the Act are met before an authorisation is given, no assessment is made independently of the ACCC. This is not unique. The Commissioner of Taxation has power under section 263 of the *Income Tax Assessment Act 1936* to authorise an officer to enter premises and inspect documents and take extracts or copies. The Director of Australian Transaction Reports and Analysis Centre has similar powers to enter premises without a warrant.

Under the *ASIC Act 2001*, ASIC has powers similar to those under section 155 of the Act which may be exercised in the performance of its functions or to ensure compliance with the corporations legislation or in relation to a suspected contravention. ASIC can require production of specified books at a specified place and time (including forthwith if required) relating to a financial body or relating to the affairs of another such body. ASIC is also able to enter premises without a warrant to inspect those books required to be kept by the corporations legislation. If a party fails to comply with a notice to produce, ASIC may apply for a warrant to enter premises to search for such books. ASIC also uses search warrants pursuant to section 3E of the Commonwealth *Crimes Act 1914* if it has concerns about evidence being destroyed or for the purposes of criminal investigations.

It was submitted to the Committee that the power to enter and inspect under section 155(2) should be recast so that it is exercisable only under a warrant issued by a judicial officer, such as a Federal Court Judge or Magistrate. The Committee sees merit in this suggestion. Having regard to the present internal procedures of the ACCC for the granting of an authorisation, such a requirement should impose no more onerous a burden on the ACCC and would not inhibit its ability to gain access to documents speedily and effectively. It would ensure that there was no question of lack of impartiality or unreasonableness in relation to the process. This would, the Committee thinks, be of benefit generally and to the ACCC in particular.

The powers of the ACCC under section 155(2) of the Act are considerable but less extensive than the powers given by a search warrant issued under section 3E of the Commonwealth *Crimes Act 1914*. There is no power to effect a forcible entry as with a search warrant, but it appears that the practice is to seek entry in the presence of members of the Australian Federal Police so that in most cases there is no practical difference. There is no power to seize documents, but the power to inspect them and make copies or take extracts is little different in scope, particularly in the case of data which is electronically

stored. To clarify the position, the Committee proposes that the ACCC's powers be extended to allow it to search for and seize documents. The elements of these powers are generally well known. Providing the ACCC with a search and seizure power, which is subject to judicial approval, would be consistent with the search and seizure powers provided by the competition enforcement regimes of New Zealand, the United Kingdom, Canada and the United States. Although the regimes in the United Kingdom and Canada also allow their agencies to enter and take copies of documents without a warrant, the Committee considers, on balance, that it would be preferable if the ACCC only had power to enter premises with a warrant.

Whilst it is outside its terms of reference, the Committee would point out that it is desirable that there be some consistency in the powers of different regulatory agencies in this country to gather evidence by the use of invasive procedures such as entry without a warrant.

In addition to clarifying the powers available under section 155(2) notices, consideration might also be given to changing the application of the section. As is the case already with notifications under section 93, it may be appropriate to extend the availability of the ACCC's investigative powers to circumstances where the ACCC is considering the revocation of an authorisation under sections 91B and 91C. The now redundant section 155(4) should be repealed.

Legal professional privilege

In *ACCC v. Daniels Corporation International* [5] the Full Court of the Federal Court held that the ACCC had power under section 155 to compel the production of documents and the provision of information covered by legal professional privilege. That decision was reversed on appeal to the High Court.[6] It was submitted to the Committee that, notwithstanding the High Court decision, the Act should specifically provide that the section does not override the privilege and so make explicit the intention of the legislature. The Committee agrees with this submission.

Legal professional privilege applies to confidential communications between a client and the client's legal adviser for the dominant purpose of giving or receiving legal advice or for use in existing or anticipated litigation. It does not

5 (2001) Vol. 182 Australian Law Reports, p. 114.

6 *Daniels Corporation International v. ACCC* [2002] High Court of Australia, 49th decision.

attach to legal advice to facilitate the commission of a crime, fraud or civil offence, whether or not the legal adviser knows of that purpose.

The privilege is in the public interest because it facilitates the obtaining of legal advice and promotes the observance of the law. This is particularly desirable in the area of competition law, which is often complex. Corporations and individuals should not be discouraged from seeking legal advice for fear that their communications might subsequently be used against them by the ACCC. Nor should clients be inhibited in giving instructions to their lawyer in order to obtain legal advice or be confined to oral communications. The Committee believes that legal professional privilege should be preserved under the Act.

Conclusions

- The ACCC's investigatory powers are essential for the proper administration of the Act. The powers provided to the ACCC under both section 155(1) and section 155(2) are integral to its enforcement function.
- The function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice should be delegable to senior staff of the ACCC. Commissioners would not then be directly involved in a particular investigation once approval had been given to proceed under section 155(1)(c).
- It is essential for the ACCC to keep in mind the potential for requests made for information, whether they are made informally or under section 155(1), to impose real financial and other costs on the businesses concerned. The need for such requests and the scope of the information sought should be carefully considered with this in mind.
- The future operation of section 155 would be improved by amendments to provide for the issuing of a warrant under section 155(2) by a Federal Court Judge or Magistrate.
- Other changes to the section should be considered to clarify the nature of the ACCC's powers under a section 155(2) notice.
- Taken together these changes to the operation of section 155(2) should help to remove the concerns of business about the use of section 155(2) powers whilst not inhibiting effective investigation by the ACCC.

- Legal professional privilege should be specifically preserved under the Act to ensure that corporations and individuals are not discouraged from seeking legal advice or are inhibited in giving instructions to their lawyers.

Recommendations

13.1 The ACCC should continue to give careful consideration to the financial implications of requests for information that are made to businesses consistent with the ACCC's guidelines on this matter.

13.2 The function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice should be delegable to senior staff of the ACCC.

13.3 Section 155(2) of the Act, which provides for the ACCC to enter premises and inspect documents, should be amended to:

13.3.1 require the ACCC to seek a warrant from a Federal Court Judge or Magistrate for the exercise of these powers; and

13.3.2 provide the ACCC with the power to search for and seize information.

13.4 Section 155 should also be amended to:

13.4.1 extend the availability of the ACCC's investigative powers to circumstances where the ACCC is considering the revocation of an authorisation under sections 91B and 91C; and

13.4.2 repeal the redundant section 155(4).

13.5 It should be made explicit in the Act that section 155 does not require the production of documents to which legal professional privilege attaches.

APPENDIX A: TERMS OF REFERENCE

Effective competition laws contribute to the productivity, efficiency and growth of an open, integrated Australian economy.

The Government considers it is timely to review some key provisions of the *Trade Practices Act 1974* (the Act) in view of the significant structural and regulatory changes that are occurring in Australia that impact on the competitiveness of Australian businesses, economic development and affect consumer interests.

In establishing a review, the Government is aware of concerns, among other things:

- that Australian businesses increasingly face global competition and need to compete locally and internationally;
- that excessive market concentration and power can be used by businesses to damage competitors; and
- the need for businesses to have reasonable certainty about the requirements for compliance with, or authorisation under, the Act.

1. The Committee is to review the operation of the competition and authorisation provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII, to determine whether they:

   (a) inappropriately impede the ability of Australian industry to compete locally and internationally;

   (b) provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;

   (c) promote competitive trading which benefits consumers in terms of services and price;

   (d) provide adequate protection for the commercial affairs and reputation of individuals and corporations (in this regard, the Committee may examine the processes followed by the ACCC and

the laws under which the ACCC operates, but is not to reconsider the merits of past individual cases);

(e) allow businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances; and

(f) are flexible and responsive to the transitional needs of industries undergoing, or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas.

2. The Committee is to identify, where justified, improvements to the Act, its administration and/or additional measures to achieve a more efficient, fair, timely and accessible framework for competition law.

3. The Committee may consider other aspects of the Act and the recommendations of reviews currently underway or previously completed where relevant; but is not to include in this review a direct consideration of sections 45D-45EB, sections 51(2) and (3) of Part IV, or Parts IIIA, X, XIB or XIC.

4. In performing its functions, the Committee is to advertise nationally, consult with key interest groups and affected parties, receive public submissions, and take into account overseas experience. As the States and Territories each apply the competition provisions of the Act as their own laws, the Committee should seek the views of the State and Territory Governments.

5. The Committee is to protect the confidentiality of the affairs of individuals and companies during the course of its deliberations.

APPENDIX B: SUBMISSIONS

Organisation	Submission No.
AAMI Ltd	69
AAPT Ltd	160
Adsteam Marine Ltd	130
Algie, M I	135
Allens Arthur Robinson	162
Amoco Chemicals Pty Ltd	28
AOL Time Warner	27
APCO Service Stations Pty Ltd	9
Armitage, Peter	128
Australia and New Zealand Banking Group Ltd	91
Australian Bankers' Association	118
Australian Business Ltd	112
Australian Chamber of Commerce and Industry	104, 205
Australian College of Midwives Incorporated (Victoria Branch)	16
Australian Competition and Consumer Commission	56
Australian Consumers' Association	105
Australian Council for Infrastructure Development	29
Australian Council of Trade Unions	149
Australian Democrats	66
Australian Doctors' Fund	144
Australian Information Industry Association Ltd	81
Australian Institute of Company Directors	122
Australian Institute of Petroleum	74
Australian Justice and Reform Incorporated	22
Australian Law Reform Commission	7
Australian Medical Association Ltd	132
Australian Pipeline Industry Association	106
Australian Publishers Association	73

Organisation	Submission No.
Australian Retailers Association	67
Australian Service Station and Convenience Store Association	175
Australian Stock Exchange	76
Australian Toy Association	54
Australian Video Retailers Association Ltd	155
Australian Visual Software Distributors Association	115
Barnett, Guy, Senator for Tasmania	192
Boswell, The Hon. Ronald, Senator for Queensland	129
Boxall, T C	1
BP Australia Pty Ltd	47
Brebner, Julie	123
Brownscombe, Peter	85
Brunt, Dr Maureen	183
Business Council of Australia	71, 197
Caltex Australia Ltd	65
Canberra Consumers	184
Centre for Competition and Consumer Policy	10
Chapman Tripp	164
Chartered Secretaries Australia Ltd	88
Civil Contractors Federation	68
Clayton Utz Lawyers	168
Coles Myer Ltd	13
Comindico Pty Ltd	204
Commerce Queensland	108
Commonwealth Bank of Australia	96
Commonwealth Consumer Affairs Advisory Council	111
Communications Law Centre	177
Consumer Credit Legal Centre (New South Wales) Incorporated	137
Consumer Law Centre Victoria	31

Organisation	Submission No.
Co-operative Federation of New South Wales Ltd	139
Co-operative Federation of Victoria Ltd	39, 107
Corones, Professor Stephen	11
Council of Small Business Organisations of Australia Ltd	89
Council on the Ageing	181
CSR Ltd	97, 114
Cunningham, Liz, MP for Gladstone	113
Davy, D R & S J	78
Department of Agriculture, Fisheries & Forestry – Australia	120
Department of Transport and Regional Services	189
Duke Energy Australia Pty Ltd	26
Dwyer Partners	61
Ecinya Consultants Pty Ltd	102
Energex Ltd	46
Enertrade	151
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