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).