PricewaterhouseCoopers

Submission to the Dawson Inquiry into the competition provisions of the *Trade Practices Act* 1974 and its administration

July 2002

Contents

Section 1 – Introduction

This submission is provided by PricewaterhouseCoopers (PwC) in response to an invitation by the Committee for all interested parties to make submissions regarding the content, operation and administration of the competition provisions of the *Trade Practices Act* 1974 (the TPA). PwC is the world's largest professional advisory firm, operating in 150 countries and employing over 150,000 people worldwide. PwC has regular dealings with the Australian Competition and Consumer Commission (the ACCC) on behalf of its clients nationwide.

This submission seeks to identify improvements to the administration of the TPA and additional measures to achieve a more effective, fair, timely and accessible framework within which competition law may operate. More particularly, it considers:

1. the apparently limited effect increased penalties have had in deterring anticompetitive behaviour;

2. whether it is practical or necessary for the ACCC to undertake Court proceedings against Australian subsidiaries where overseas parents have been found to have contravened antitrust laws in other jurisdictions;

3. the scope for the ACCC to foster a company's transition to an internal culture of compliance, rather than resorting to enforcement;

4. the creation of a public register listing those companies which have undertaken to comply with all relevant trade practices legislation, and seek to have a consultative relationship with the ACCC, similar to the ACCC's New Tax System (NTS) concept of Public Compliance Commitments (PCCs);

5. the removal of entities and related details from ACCC maintained public registers when activities (eg. Corrective advertising) under S. 87B TPA undertakings have been completed; and

6. possible improvements to the ACCC authorization procedures, specifically in relation to industry codes and TPA contraventions;

Section 2 – Summary of issues discussed and conclusions

Over the last decade, there has been a remarkable increase in pecuniary penalties and a broadening of ACCC enforcement powers under the TPA. Whether this has provided a greater deterrent from activity in contravention of the TPA is debatable. Statistics suggest there has been an increase in TPA contravention during this period. PwC queries the effectiveness or otherwise of the existing penalty regimes in encouraging voluntary compliance with the law, as a step prior to enforcement and penalty.

It is arguable that, given the higher incidence of TPA enforcement cases, publicizing such action has *not* been effective in delivering greater compliance by business. Several practical examples are provided to illustrate this, thus leaving it open whether the Australian community has reason to be confident that increased enforcement is reducing the incidence of TPA contravention. Case studies are provided below to support the contention that, armed with greater funding, the ACCC has become somewhat over-zealous in its enforcement role, when perhaps an approach more focused on immediate remedial action and ongoing compliance would have provided greater consumer and community benefits at lesser cost.

More funding and activity by the ACCC has produced a greater number of prosecutions. The ACCC is seeking more powers through the introduction of criminal penalties, cease and desist orders, compulsory divestiture and a reversal of the onus of proof. There is a clear bias toward deterrence rather than measures which are primarily designed to encourage compliance.

We believe the ACCC should more actively promote compliance, providing incentives to business to develop, implement and manage their own programs. Perhaps those monies received from Court ordered penalties (current placed in Consolidated Revenue) may be employed to fund education or compliance programs. Business confidence in the ACCC could most likely increase through this process. If the ACCC can emphasize the benefits of compliance, rather than continually highlighting the detriments of contravention and being caught, then we may see a

transition to a more consultative process, and an improved relationship between Australian businesses and the regulator. As the Organisation for Economic Co-operation and Development has found[1], if regulatees feel that regulators treat them as untrustworthy, then defiance and resistance build up so that inefficiency and non-compliance both increase. Undoubtedly the converse applies through better consultation between the ACCC and business.

A practical aspect of this shift is discussed below, and would require amendments to section 28 of the TPA to include a specific reference to the ACCC's role including assisting businesses in achieving their own trade practices compliance. Taking this further, to encourage widespread compliance program development and maintenance, the ACCC should consider establishing a Public Compliance Register. A business which could demonstrate a particular level of TPA compliance would be permitted to seek to be listed on the register, and required to regularly meet key performance indicators to maintain its status. Benefits to a business could lie in a less adversarial approach being taken by the ACCC in the event that a TPA related complaint arose regarding the business.

Finally, this submission briefly touches upon industry codes, and specifically that compliance by a business with an industry code which is covered by Part IVB of the TPA, doesn't amount to a defence of a TPA contravention. We feel this situation could be improved to encourage businesses to sign up to industry codes, but would require some concessions by the ACCC. In essence, we believe the ACCC should strive to ensure each and every code which may come under its control through Part IVB is as strict and tight as possible. Amendments to the TPA should provide that businesses which sign up to such codes can do so with the expectation that proper adherence will amount to effective compliance with the TPA. A practical effect may be to provide a defence to any action alleging TPA contravention by the business, or at the very least a mandatory mitigating factor in determining penalties for any established TPA contravention by the business.

[1] OECD (2000) "Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance"

Section 3 – Administration of the TPA

(i) Background

Since the previous reviews of the TPA by the Hilmer Committee in 1993, and also the Australian Law Reform Commission in 1994 (ALRC 68 – *Compliance with the Trade Practices Act*) the legislation has been strengthened with the introduction of increased pecuniary penalties for contravention of Part IV, and additional orders under section 86C. It was the recommendation of the ALRC that the range of civil penalties available against individuals who have contravened the TPA include corporate probation, community service orders and adverse publicity orders. These were recently inserted into the TPA as section 86C, to provide the ACCC with broader powers of enforcement. Theoretically, the increase in the limits on pecuniary penalties, together with the introduction of these additional orders, should have provided a greater deterrent to those corporations considering engaging in conduct which may contravene the TPA.

(ii) Penalties & enforcement

ACCC statistics indicate a marked increase in the institution of Court proceedings for contraventions of the TPA. Despite penalties increasing 40-fold on 1 January 1993, to $10 million per offence for corporations and $500,000 for individuals, the ACCC has instituted more Part IV proceedings in the past 2 years than any other previous period[2]. The statistics also evidence greater frequency in usage of the powers granted to the ACCC under sections 87B[3]. We also understand that there has been a 5-fold increase over the past 4 years in the use of information gathering powers under section 155. This would lead one to conclude there has been an increase in the incidence of corporate contravention of the law over the past 10 years.

Regarding penalties, Justice Goldberg in *ACCC –v- George Weston Foods*[4] noted that:

[2] See Table 1 in Appendix A
[3] See Table 2 in Appendix A
[4] [2000] FCA 690

> "A common thread running through cases dealing with the imposition of a penalty under s 76 of the Act is that the penalty must have a deterrent quality….Two further observations should be made in relation to the deterrent quality of a penalty. First, the penalty should not be so great as to be oppressive. Secondly, there are two aspects to the deterrent quality of a penalty, namely a specific aspect and a general aspect. A penalty should be calculated to deter not only repetition by the contravening party but also to serve as a signal or warning to the general community… It is a significant matter to be taken into account in this case that George Weston had incurred a penalty under the Act a short time earlier in somewhat similar circumstances. By similar circumstances I refer to the issues of price fixing and resale price maintenance which were considered in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd*.[5]"

If businesses are incurring these penalties, and still offending thereafter, there is reason to question the effectiveness of the penalty regime in convincing them it is in their interests to comply with the TPA.

(iii) Re-offending businesses

The above comments of Goldberg J lead into a discussion on dealing with businesses which re-offend under the TPA. Given that one aim of a penalty should be to deter recidivist conduct, it would be reasonable to expect that those businesses which do contravene the TPA, when met with enforcement action and penalised, would learn from their behavioural errors, and avoid re-offending. It is arguable that, given the higher incidence of TPA enforcement cases, such action has not been effective in delivering greater compliance by business. Consider the following examples:

[5] [2000] FCA 690 at page 693

1. TNT

Penalties of $5 million (under the old penalty regime) were handed down in January 1995 against TNT[6]. The ACCC subsequently instituted proceedings (under the new penalty regime) against McPhee Transport[7], a related corporation of TNT, for similar conduct that occurred May/June 1995. McPhee obviously took no heed of the action taken less than six months previously against TNT nor the 40 fold increase in penalties.

2. Simsmetal

On 9 November 1994, again under the old penalty regime, the Federal Court[8] held that Simsmetal and two of its employees engaged in price fixing and collective boycott arrangements with a competitor in Victoria. The Court ordered Simsmetal to pay penalties totalling $352,500. Six years later, Simsmetal[9] was ordered to pay a penalty of $2 million and $100,000 for the ACCC's costs. This second penalty arose after Simsmetal admitted that in 1995, less than one year after the original penalty was ordered penalised, it attempted to reach a market sharing arrangement with another scrap metal merchant in South Australia.

3. Boral

The Federal Court[10] found in late 1995 that, between 1989 and 1994, Boral's Queensland operations had engaged in price fixing conduct and market sharing in breach of section 45 of the TPA. Meanwhile, after $6.6 million in penalties was awarded against Boral itself, it continued to engage in further anti-competitive conduct in contravention of the TPA in Melbourne, where it was price cutting to attempt to squeeze out competitors from the concrete masonry industry. This conduct

[6] *Trade Practices Commission v. TNT Australia Pty Limited and Ors* (1995) ATPR 41-375
[7] *ACCC v J McPhee & Son (Australia) Pty Ltd (No. 5)* [1998] 310 FCA
[8] *Trade Practices Commission v Simsmetal Limited and Ors* (1996) ATPR 41-449
[9] *ACCC v Simsmetal Ltd* [2000] 818 FCA
[10] *ACCC v Pioneer Concrete (Qld) Pty Ltd* (1996) ATPR 41-457

was found by the Federal Court last year[11], to have occurred between 1994 and 1998, clearly after the initial penalty had been determined against the company.

4. George Weston Foods

In 1997[12], GWF had made admissions in its defence and incurred a penalty of $1.25 million for a number of price fixing and resale price maintenance incidents in Victoria which involved the supply of bread. No more than a couple of weeks had passed before, on 3 June 1997 in a case mentioned previously[13], GWF attempted to intervene in a price war between competing retailers in Tasmania, and was subsequently found guilty of attempting to induce a price-fixing arrangement, and fined a further $900,000.

Such instances of repetitive corporate failure to adhere to trade practices law show that business is either not deterred by penalties, or not learning from their experiences to avoid re-offending, or both. Whilst this may result in more Consolidated Revenue through penalties, it may not provide the Australian business community, or the community at large, with sufficient confidence that TPA enforcement is working to reduce the number of contraventions, and most importantly delivering the benefits of a competitive marketplace.

(iv) A 'trigger happy' ACCC?

In 2001, the ACCC received a 27 per cent boost in funding. In many respects, this may have been in recognition of the ACCC's role of protection of the public against "profiteering" under the New Tax System. Enforcement of the TPA is a cornerstone but routine activity of the ACCC. According to Professor Allan Fels, the increased funding would include the following:

"A litigation reserve fund, of initially $10 million, has been created to assist the ACCC in its Court activities. The fund will build to a reserve of $20 million. This

[11] *ACCC v Boral Ltd [2001] FCA 30*
[12] *ACCC v Australian Safeway Stores Pty Ltd (1997) 75 FCR 238*.
[13] *ACCC v George Weston Foods* [2000] FCA 690

will strengthen our capacity to deal with major litigation. A further $3 million has been allocated through the conversion of a $3 million loan into equity." [14]

As the funds available for litigation have swelled, there have been cases when the ACCC has been over-zealous in its enforcement role, when perhaps a more consultative approach would have sufficed. Consider the following:

1. 'Abtronic' Promoters[15]

On 5 May 2002 the Federal Trade Commission in the United States of America instituted proceedings against the promoters of the "Abtronic" for misleading and deceptive conduct. Rather than point to the existence of Court action in the US as a reason for discontinuing claims which may amount to a contravention of the TPA, the ACCC, on 9 May 2002 instituted Court proceedings against Danoz Direct Pty Ltd the Australian promoters of the 'Abtronic'. We have not seen or heard any evidence of an attempt by the ACCC to reconcile this conduct with Danoz Direct in a practical and non-litigious manner. Rather, it would appear they saw the existence of action in the USA, and felt justified in duplicating such enforcement action in Australia.

2. The Vitamins Case

In March last year, the ACCC obtained orders imposing $26 million in fines (a record in Australia for TPA contravention) against 3 animal vitamin suppliers for alleged market sharing and price fixing. This followed success in the US in fining those companies US$725 million for similar offences. The ACCC, at the time the US case came to light, noted[16] that it had taken advantage of a recently signed antitrust cooperation treaty to obtain further information to further its considerations. Whilst we do not wish to criticise the ACCC for obtaining the ordered fines, we query the practical value of extracting a further $26 million from businesses who would have already paid approximately $1.5 billion for the US contraventions, and placing it in Consolidated Revenue.

It could be argued that this money would have been better spent on the conducting of Australia-wide seminars on TPA compliance, funded by the vitamin companies. This

[14] ACCC Media Release MR 118/01
[15] ACCC Media Release MR 113/02
[16] ACCC Media Release MR 37/01

would be a more practical result, tracking a change in the culture of our domestic businesses, than seeking penalties. Alternatively, given that some consumers of animal vitamins were farmers participating as “price takers” in export markets, perhaps consideration could have been given to providing some benefits to those most affected.

It should be noted that in July 2000[17], the respective regulators arrived at the FTC-ACCC Cooperation Agreement ("cooperation agreement" and referred to above) which provided for enhanced cooperation and information sharing between the FTC and ACCC. The cooperation agreement would strengthen ties between the two nations on consumer protection matters, enhance cross-border cooperation in the consumer protection area and increase law enforcement assistance between the U.S. and Australia.

The cooperation agreement includes three key provisions:

- **Notification of Enforcement Activities**: The FTC and ACCC will use their best efforts to notify each other of consumer protection enforcement activities that might affect the agencies' mutual interests.
- **Cooperation and Coordination**: The agencies will use their best efforts, where appropriate, to assist each other in gathering information and coordinating law enforcement activities.
- **Exchange of Information**: The agreement encourages the exchange of consumer protection information for law enforcement purposes consistent with each country's statutes and rules.

Whilst the cooperation agreement does not stipulate that either country will avoid commencing proceedings against a domestic distributor of similar products in similar circumstances, such duplication of regulatory action comes at a cost to the public. For instance, taking action against two companies is a more responsible and efficient use of limited resources (taxpayer's funds) than taking action against the same company twice. We question whether it would have been a more efficient allocation of resources for the ACCC to advise companies of the cooperation agreement, the fact that US action had already been taken, and that the Australian operators/promoters

would be well advised to cease their conduct and contribute to educating both business and the Australian public.

3. Labrador Children's Playschool[18]

When a Mr Balson, the owner/operator of this child care centre, telephoned the ACCC's Brisbane office to discuss his concerns with increasing costs to his industry, and the possibility of establishing a 'minimum fee charging practice' with other operators in his area, the ACCC took action against him for an alleged attempt to fix prices in relation to child care services on the Gold Coast. It was Mr Balson's call which alerted ACCC staff to the likelihood that he had already attempted to induce a price-fixing agreement, yet, rather than seek to remedy the problem with a business which was not aware of the implications of his conduct, the ACCC took it to Court. This is hardly an example of a regulator which is keen to facilitate effective competition in Australia, but rather keen to score an 'easy win' in Court. A preferable course would be for the ACCC to do more to encourage business to approach the ACCC to voluntarily disclose behaviour and seek guidance on whether such behaviour needs correction prior to enforcement. A further alternative course of action may have involved the negotiation and procurement of a Court enforceable undertaking under section 87B of the TPA, a practice which has been regularly adopted by the ACCC in other instances.

(v) Why is there more enforcement than previously?

Returning to the issue of an increase in litigation, it may be interesting to detect whether more money for enforcement allows for the self-fulfilling prophecy that there are more (and not less) offences being committed. In other words, are transgressions identifiable and directly in proportion to the funding and other resources made available to the ACCC?

Another conclusion is that the competitive nature of modern business in Australia, including the increased influence of global factors, has resulted in businesses 'skating closer to the line' of TPA contraventions than previously. Hence, the ACCC has been

[17] ACCC Media Release MR 190/00
[18] ACCC Media Release MR 229/01

required to establish the boundaries of the law in an increasingly complex business environment. Enforcement proceedings are the direct outcome of behaviour which is closer to non-compliance than previously. The deterrence value of increased ACCC powers and penalties for contravention appears to have been minimal. If the deterrence effect were high, then the argument is that the ACCC would not have felt compelled to enforce the TPA as often as it has in recent years.

(vi) Penalties or compliance?

We note that the ACCC is advocating[19], *inter alia*, criminal penalties (ie. imprisonment), cease and desist orders and divestiture powers. What is the likelihood that these changes to existing provisions will result in greater compliance? To date there is little from the ACCC to indicate the success of its existing enforcement activities in this regard. The effectiveness of existing enforcement tools should be measured and concluded upon before additional powers are sought. There is a danger that additional powers may be excess of what is needed to address non-complying behaviour and minimise public detriment.

One answer to this dilemma lies in an increased ACCC responsibility for educating the corporate sector, raising business awareness of the Australian Standard on Compliance (AS 3806-1998), and the benefits of an individual organization recognizing the need to create its own 'culture of compliance'. AS 3806-1998 defines organizational standards as any codes of ethics, codes of conduct, good practices and charters that an organization may deem appropriate standards for its day-to-day operations. The Chairman of the ACCC, Professor Allan Fels (1999:7)[20] comments that effective compliance can be achieved by the appointment of managers who intuitively support a compliance culture and who have lateral capacity to seamlessly link compliance with bottom line initiatives.

[19] ACCC submission to the Trade Practices Act review June 2002
[20] Fels, A. H. M (1999) "Compliance Programs – The Benefits for Companies and Their Stakeholders" ACCC Journal, Issue 24

The Australian Law Reform Commission's report ALRC 68[21] noted that, in the early 1990's, the Trade Practices Commission (as it then was) recognised the important role compliance programs can play in enhancing the level of compliance with the Act. The development of compliance programs was an important element of the ACCC's strategy to secure compliance with the TPA. Whilst it is commonplace for the ACCC to require businesses to undertake compliance programs, particularly when negotiating undertakings under section 87B of the TPA, we believe this should be taken a step further in that the ACCC should actively promote compliance, providing incentives to business to develop, implement and manage their own programs.

When the ALRC's report was released, it was felt that the level of recognition by the ACCC of business' compliance efforts was insufficient[22], particularly when the ACCC was considering whether to take Court action in relation to an alleged contravention of the Act. As yet, it is difficult to firstly support the notion that a balance has been struck between the ACCC encouraging and acknowledging the significant efforts made by businesses to comply with the TPA, and secondly also the ACCC meeting its statutory obligation to enforce the Act.

It is timely for funding to be increased in the area of public education and awareness, focusing primarily on large businesses and small/medium enterprises (SMEs). This could be achieved by allowing the ACCC to use some of the monies received from Court ordered penalties to fund compliance program education. Program effectiveness could be improved through co-ordination with, and the direct funding of peak industry bodies (e.g. the Australian Industry Group, Australian Chamber of Commerce and Industry and the Business Council of Australia) or academic institutions. This would assist in re-emphasising the role of the ACCC as a facilitator of effective competition within Australian business, rather than an watchdog/opponent/adversary of Australian business.

An example of government facilitation at state level exists in the approach adopted by both the Victorian Transport Accident Commission and the Victorian WorkCover Authority. Both entities have increased public awareness of road and workplace

[21] ALRC 68 "Compliance with the *Trade Practices Act* 1974", 1994

safety through a combination of hard-hitting advertising, and clever marketing. The benefits of adhering to their messages can be seen by the public, and is often delivered in a non-confrontational manner. We see no reason why the ACCC should not seek to improve its image within the business community through the launching of a similar promotional activities focusing on the need for adherence to trade practices laws, and the long term benefits which should arise from such behaviour. We have observed Commission members appearing publicly to deliver messages that they have sought to cure a trade practices problem. Perhaps they should adopt a similar approach to preventing trade practices contraventions, in a more facilitative and constructive manner. Business confidence in the ACCC will most likely increase through this process. If the ACCC can emphasize the benefits, rather than continually highlighting the detriments of contravention and being caught, then we may see a transition to a more consultative process, and an improved relationship between Australian businesses and the regulator.

(vii) Section 28 and a Public Compliance Register

An effective approach to facilitating a pro-compliance trade practices regime would commence with legislative amendment. We believe section 28 of the TPA, relating to the functions of the ACCC, should be amended to include a specific reference to assisting businesses in achieving their own trade practices compliance. This would place a positive obligation on the ACCC to establish an environment which permits or encourages businesses to voluntarily develop compliance programs, through regular consultation with the ACCC. Whilst we acknowledge the terms of reference have limited the scope of this review to the competition provisions contained within Part IV of the TPA, the concept of trade practices compliance may extend to all parts of the TPA relevant to an individual business' operations.

One means of encouraging widespread compliance program development and maintenance would involve establishing a Public Compliance Register (PCR), similar to the Section 75 GST Public Compliance Register[23] process which occurred immediately before the introduction of the New Tax System on 1 July 2000. Those

[22]ALRC 68, para 3.8

reputable businesses which could demonstrate a particular level of TPA compliance would be permitted to be listed on the register. In order to remain on the PCR as a business which was demonstrating effective TPA compliance, it would need to regularly (perhaps every 3 or 6 months) meet key performance indicators. In the event that a business was listed on the PCR, and a complaint to the ACCC was made, ordinarily triggering an investigation, the ACCC could adopt a more consultative approach, more befitting the status of the business as a highly compliant organisation. Whether determination of eligibility for PCR status was to fall within the scope of the ACCC, or developed through a broader market certification program is a matter that would need to be considered further.

We believe the benefits of goodwill generated through public acknowledgement of a business' compliant nature, together with an understanding that any complaint regarding the business would be dealt with on a consultative, rather than adversarial basis, would be sufficient incentive for many Australian businesses to improve their TPA compliance programs. Perhaps an additional incentive for businesses to demonstrate compliance and achieve PCR status could be created through, within reason, permitting only those businesses on the PCR to tender for Federal government contracts, similar to the offsets programme which was established in the 1980's.

(viii) S. 87B undertakings

The ACCC maintains a public register which records entities and other details in relation to S. 87B undertakings. These undertakings may require certain activities to be performed, such as corrective advertising. When activities have been completed, all identifiers should be required to be removed from public registers. To keep showing details may constitute continuing detriment to the entities involved. A suspicion of non-completion of S. 87B requirements could be seen as damaging corporate reputation. There should be no on-going stigma once the requirements of a S. 87B undertaking have been met.

(ix) Codes of conduct

[23] http://www.accc.gov.au//pubreg/pubreg.htm

At present, compliance by a business with an industry code which is covered by Part IVB of the TPA, doesn't amount to a defence to TPA contravention. Given the ACCC is responsible for authorizing these codes, it is arguable that the faulty nature of the codes (i.e. that they do not provide a warrant against the occurrence of anti-competitive behaviour) should be addressed. In order to achieve this, an amendment is necessary to the TPA to provide that evidence of strict adherence to a code under Part IVB may be tendered by a defendant to mitigate a penalty order for a proven contravention of the TPA. Whilst we concede that adherence to mandatory or voluntary codes alone cannot prevent all transgressions, they can play a role in addressing these problems if there is both an incentive and a commitment to making a code work. The ACCC should strive to ensure each and every code which may come under its control through Part IVB is as strict and tight as possible, so that those business which sign up to such codes can do so with the expectation that proper adherence will either amount to effective compliance with the TPA, or at the very least, provide a mandatory mitigating factor in determining penalties for any established TPA contravention by the business.

Section 4 – Conclusions

To summarise this submission, we wish to draw the review Committee's attention to the following key points:

I. The past decade has seen an increase in the severity of penalties and breadth of powers the ACCC may exercise to achieve TPA enforcement.
II. More Court actions have been taken than ever before, yet businesses appear to continue to breach the TPA and compliance levels are less than they could be.
III. Certain cases may prompt Australian business to query the effectiveness of the enforcement and penalty regimes
IV. Recent increases in funding for enforcement appear to have coincided with the emergence of more Court proceedings being issued where an approach more focused on immediate and ongoing compliance would be more cost effective in the short term.
V. The higher instance of enforcement may be attributable to the ACCC's need to establish the boundaries of the law in an increasingly complex business environment.
VI. Perhaps a more effective approach to lessening trade practices contraventions, in a more facilitative and constructive manner, would focus on promoting the benefits of compliance, rather than advocating punishment through penalty.
VII. An incentive for businesses to achieve high standards of internal and external TPA compliance could lie in the creation of a Public Compliance Register or mandatory recognition of an effective compliance program in assessment of penalties. The benefits of gaining registered status could include receipt of a more consultative ACCC approach to TPA dispute resolution.
VIII. The removal of entities and related details from ACCC maintained public registers should occur when activities (eg. corrective advertising) under S. 87B TPA undertakings have been completed.

IX. Finally, the ACCC should remedy the problem which exists under Part IVB of the TPA whereby a business which complies with an industry code of conduct can not raise that compliance as a defence to an action under the TPA, or at least as a mitigating factor in determining penalties for a proven TPA contravention.

Section 5 – Contacts

Should the Committee wish to discuss these matters further the following people are available for discussion at the convenience of the Committee.

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Section 6 – References

Articles/submissions

ACCC submission to the Trade Practices Act review June 2002
ALRC 68 (1994) "Compliance with the *Trade Practices Act* 1974"
Fels, A. H. M. (1999) "Compliance Programs – The Benefits for Companies and Their Stakeholders" ACCC Journal, Issue 24
OECD (2000) "Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance".

Cases

ACCC –v- George Weston Foods [2000] FCA 690
ACCC v J McPhee & Son (Australia) Pty Ltd (No. 5) [1998] 310 FCA
ACCC v Simsmetal Ltd [2000] 818 FCA
ACCC v Pioneer Concrete (Qld) Pty Ltd (1996) ATPR 41-457
ACCC v Boral Ltd [2001] FCA 30
Trade Practices Commission v Simsmetal Limited and Ors (1996) ATPR 41-449
Trade Practices Commission v. TNT Australia Pty Limited and Ors (1995) ATPR 41-375
ACCC v Australian Safeway Stores Pty Ltd (1997) 75 FCR 238.
ACCC v George Weston Foods [2000] FCA 690

Media Releases

ACCC Media Release MR 118/01
ACCC Media Release MR 113/02
ACCC Media Release MR 37/01
ACCC Media Release MR 190/00
ACCC Media Release MR 229/01

Appendix A

Source: ACCC submission to the Trade Practices Act review June 2002

Table 1 – Institution of proceedings by the ACCC

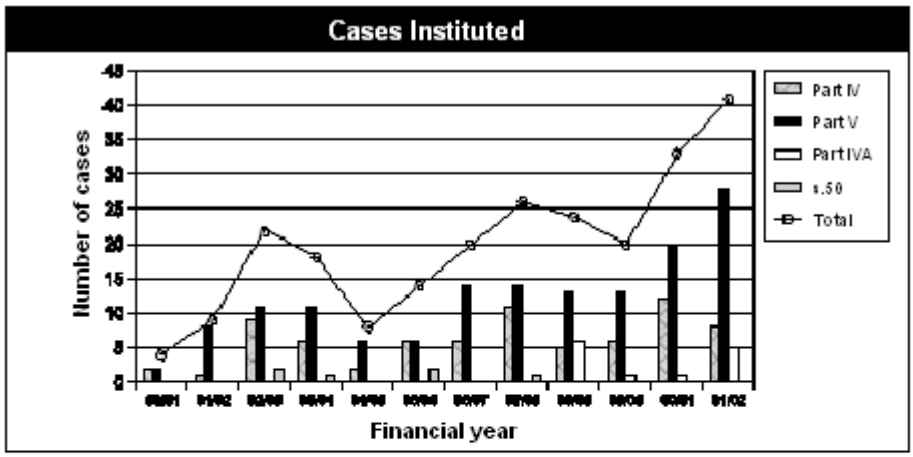

Table 2 – s 87B undertakings