# Review of the competition provisions of the *Trade Practices Act* 1974 - Submission to the Trade Practices Review Committee by Hutchison Telecommunications (Australia) Ltd

## 1. Executive Summary

1.1 Hutchison Telecommunications (Australia) Ltd (***Hutchison***) welcomes the Government's review of the competition provisions of the *Trade Practices Act* 1974 (Cth) (***TPA***).

1.2 A primary object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading. It is well settled that the long-term interests of consumers and the economy are ultimately best served by competitive markets. This review plays an important role in ensuring that the competition provisions of the TPA are suited to the current needs of Australian society.

1.3 Hutchison believes that the pro-competitive aims of the TPA may not always be realised, due to the form of certain of the competition provisions or their administration by the Australian Competition and Consumer Commission (***ACCC***) . Hutchison submits that amending the TPA as follows would assist in better achieving the objects of the legislation:

(a) introducing an effects-based test as an alternative to the existing purpose test in section 46;

(b) reversing the onus of proof in relation to the purpose element of section 46;

(c) empowering the ACCC to issue cease and desist orders;

(d) maintaining the ACCC's existing information-gathering powers, but amending section 155 to clarify that the ACCC cannot compel the production of information subject to legal professional privilege;

(e) amending section 47 to remove the per se prohibition on third line forcing in favour of a competition test;

(f) narrowing the definition of 'exclusionary provision' in section 4D and specifically exempting joint ventures from per se contraventions of section 45;

(g) retaining the existing civil penalty regime and opposing the introduction of criminal sanctions;

(h) introducing a prescriptive and wide-ranging leniency policy; and

(i) clearly defining the way in which the ACCC may disseminate information in the media.

## 2. The Telecommunications Industry

### A. Hutchison's Business

2.1 Hutchison is a listed Australian company focused on the provision of wireless telecommunications services in Australia. Hutchison's principal activities are the operation of its own mobile telephony network under the Orange brand using Code Division Multiple Access (CDMA) technology and the development of a third generation business in a joint venture with Telecom New Zealand, to be launched in early 2003.

2.2 Hutchison is a player in the mobile services market. It competes directly with Telstra, Optus and Vodafone, as well as smaller companies such as Virgin Mobile, Primus and AAPT. Hutchison has approximately a two per cent share of the mobile services market.

2.3 Hutchison is also involved in other related markets. For example, Hutchison acquires and re-supplies content services in connection with its provision of mobile services. Hutchison's ability to offer such services is critical to its ability to compete effectively in the mobile services market.

### B. The Importance of the Telecommunications Industry

2.4 It is well accepted that efficient and competitive telecommunications markets are essential to the continuing development of the Australian economy.

2.5 The importance of the telecommunications industry was recognised by the Productivity Commission in its recent report on telecommunications competition regulation.[1] The principal reasons cited were that: there is large value added from communications services, amounting to around 3 per cent of Australia's gross domestic product in 1999-00; the telecommunications industry involves large capital expenditure, with investment in new infrastructure totalling more than $9 billion during 2000-01; and telecommunications services are strategically important for the rest of the economy as they are an input to all other industries.[2]

2.6 The Australian telecommunications industry has developed rapidly, with revenue growth between 1997 and 2000 averaging around 13 per cent a year. This makes the telecommunications industry one of the fasting growing in Australia.

2.7 It is essential that the competition provisions of the TPA provide adequate controls against anti-competitive conduct in telecommunications markets, so as not to stifle what is an emerging and fundamental element of the Australian economy.

### C. Competition in Telecommunications Markets

2.8 The Government de-regulated the telecommunications industry in 1997 and introduced the industry-specific competition regime contained in Part XIB of the TPA. This additional

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[1] Productivity Commission 2001 *Telecommunications Competition Regulation* Report No. 16 AusInfo Canberra

[2] Productivity Commission 2001 *Telecommunications Competition Regulation* Report No. 16 AusInfo Canberra at 67

regulation of telecommunications markets was deemed necessary because of: 'the state of competition in the telecommunications industry and the fast pace of change'.[3]

2.9 A significant factor in the Government's decision to establish a telecommunications-specific competition regime was the extent to which Telstra dominated the industry. Telstra's control of existing infrastructure meant that the general competition provisions were insufficient to adequately restrain anti-competitive conduct by this powerful former incumbent. Part XIB provided for a broader prohibition against anti-competitive conduct founded in an effects-based test and the granting of increased powers to the ACCC. This was aimed at encouraging new entrants to invest in telecommunications infrastructure and thereby promoting competition in telecommunications markets.

2.10 However, the telecommunications-specific competition regime is only an interim measure, intended to apply until telecommunications markets are sufficiently developed to be regulated by general competition laws. Although this point has not yet been reached, the Government's intention is that: 'competition rules for telecommunications will eventually be aligned, to the fullest extent practicable, with general trade practices law'.[4]

2.11 It is therefore important that Parts IV and XIB are consistent in approach and that the general competition provisions empower the ACCC to adequately control a firm of Telstra's size and market power.

2.12 Hutchison primarily operates in telecommunications markets and has therefore expressed its concerns regarding the competition provisions of the TPA in that context. However, Hutchison's submissions have wider application and indeed, many of the problems experienced by players in the telecommunications industry are mirrored in other industries.

## 3. Misuse of Market Power

### A. Overview

3.1 Section 46 contains a general prohibition against the misuse of market power. Hutchison submits that several significant amendments are required to this section to ensure that anti-competitive conduct is properly restrained and there is consistency between the general and telecommunications-specific competition regimes.

3.2 The ACCC has recommended introducing an effects-based test to supplement the existing purpose test and allowing faster action in certain cases under the TPA by introducing cease and desist orders.[5] Hutchison believes these measures are appropriate and necessary. Hutchison would also support reversing the onus of proof in relation to the purpose element of section 46.

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[3] Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 at 6

[4] Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 at 7

[5] ACCC *Submission to the Trade Practices Act Review* June 2002 at 60

## B. An Effects-Based Test

3.3 Introducing an effects-based test in section 46 would render it a breach of the TPA for a corporation to take advantage of its substantial market power either for a prescribed anti-competitive purpose or for a prescribed anti-competitive effect. This amendment would not unduly broaden section 46 as the elements of 'market power' and 'taking advantage' would still need to be satisfied and would therefore act as a safeguard to ensure that pro-competitive conduct was not prohibited.

3.4 There are four main reasons why Hutchison supports the introduction of an effects-based test. First, it is consistent with the approach adopted in relation to the remainder of the competition provisions of Part IV. That is, sections 45, 47, 48 and 50 are directed towards prohibiting conduct which has the effect or likely effect of substantially lessening competition and section 46 is inconsistent in that it is solely focused on the corporation's purpose. This is not to suggest that a purpose test is inappropriate, but merely that it should be supplemented by an effects-based test, as in sections 45 and 47. It is unclear why a different approach was adopted in relation to section 46.

3.5 Second, amending section 46 to include an effects-based test would render it consistent with the competition rule in Part XIB. This is particularly important as the telecommunications-specific regime is an interim measure and the general competition provisions must therefore be capable of controlling anti-competitive conduct in telecommunications markets once Part XIB is amended. Further, not all conduct involving telecommunications firms is caught by the provisions of Part XIB, such as conduct in the market for content services. Therefore, this amendment is necessary if the Government's intention of subjecting telecommunications firms with a substantial degree of market power to an effects-based test is to be realised.

3.6 Third, it is an unduly onerous process to prove an infringement of section 46 because of the difficulties associated with establishing a corporation's purpose. Relying exclusively on a purpose test means that proving a misuse of market power is dependant upon whether the corporation's intent was documented in, or can be inferred, from a 'smoking gun memo'. This is clearly inappropriate and often results in anti-competitive conduct going unchecked. For example, Telstra is able to leverage power from one market to another by bundling between traditional telecommunications services, such as local call services, mobile services and internet access services. However, it is very difficult to prove whether this conduct is engaged in for an anti-competitive purpose because the advantages of a sole provider and single bill are well documented. Yet, Hutchison submits that the actual economic consequences of the conduct are anti-competitive and should be prohibited under section 46. This claim is supported by the forensic difficulties experienced in recent cases involving section 46.

3.7 Fourth, adopting an effects-based test is consistent with the experience in many overseas jurisdictions. Hutchison submits that Australia must endeavour to keep in line with the thinking of the rest of the world. For example, the comparable provisions prohibiting an abuse of market power in the United States, European Union and Canada are all directed towards the effect or likely effect of the relevant conduct.

3.8 If it is determined that an effects-based test is inappropriate, Hutchison submits that section 46(7) be strengthened so that anti-competitive purpose is established notwithstanding that the existence of that purpose is ascertainable only by inference from the anti-competitive effect of the relevant conduct. This approach would overcome some of the hurdles of satisfying a purpose test but does not go so far as to create the alleged uncertainty flowing from an effects-based test. In essence, it represents a compromise position.

### D. Shifting the Burden of Proof

3.9 Hutchison submits that section 46 be amended to shift some of the burden of proving an infringement to the defendant. This suggestion can be accepted in conjunction with the proposal for an effects-based test, or as a separate recommendation for reform. However, it would obviously only apply to proving the purpose element of section 46.

3.10 Once the plaintiff has established that the defendant has a substantial degree of market power, Hutchison submits that the defendant be required to provide evidence of its pro-competitive justification for engaging in the relevant conduct. There is currently no formal requirement that a defendant must supply such information and although, some defendants will choose to do so, the court is not obliged to take this into account in determining whether a infringement has occurred.

3.11 Reversing the onus of proof in relation to the purpose element of section 46 takes account of information asymmetries and acts as a deterrent to firms with substantial market power.

### E. Cease and Desist Orders

3.12 There is often a significant time lag between when a corporation engages in anti-competitive conduct and when a legal resolution is attained. This is particularly damaging to competition in rapidly developing markets, such as telecommunications markets, where the effects of anti-competitive conduct often result in new entrants being forced to leave the market or, in some cases, being unable to enter the market at all.

3.13 The ACCC has submitted that the TPA would operate more effectively with appropriate provision to address misuses of market power more expeditiously and that its preferred approach is the introduction of cease and desist orders.[6] Hutchison supports this proposition and notes that it is consistent with the competition notice regime in Part XIB and the approach adopted in New Zealand competition laws.

3.14 Hutchison submits that empowering the ACCC to issue interim administrative orders restraining corporations from engaging in specified anti-competitive conduct allows relief to be granted swiftly and efficiently. It also encourages a non-litigious resolution of the matter.

## 4. Information Gathering Powers

[6] ACCC *Submission to the Trade Practices Act Review* June 2002 at 95

### A. Overview

4.1 Section 155 of the TPA provides the ACCC with wide information gathering powers. There is currently some uncertainty as to the application of this provision, namely whether it abrogates legal professional privilege. This issue is presently being considered by the High Court.[7]

4.2 Hutchison submits that section 155 be amended to clearly and expressly legislate that the ACCC is not empowered to compel the production of privileged material. This can be done prior to the pending decision of the High Court and will provide businesses and individuals with some assurance as to the treatment of privileged communications.

### B. Information Asymmetries

4.3 It is important that the ACCC is able to obtain information regarding the business practices of firms with a substantial degree of market power in order to implement the competition provisions of the TPA. Significant information asymmetries exist in telecommunications markets and Hutchison acknowledges that this is a major hurdle for new entrants.

4.4 Hutchison submits that the information gathering powers of the ACCC be maintained. Hutchison would not support an extension of those powers but rather, asserts that the ACCC be encouraged to better utilise its existing resources.

### C. Privileged Communications

4.5 The ACCC should not be granted access to privileged communications. This would act as a disincentive for businesses and individuals to seek legal advice and thereby most likely result in increased infringements of the TPA. This is contrary to the objectives of the legislation.

4.6 It is often only through open and honest communications between legal advisers and clients that compliance with the TPA is attained. By removing the protection afforded to privileged communications, clients would be encouraged to request verbal advice, or perhaps even refrain from seeking any advice at all. In the light of the complexities of the TPA, this is a dangerous prospect and one which should be avoided.

## 5. Exclusive Dealing and Third Line Forcing

### A. Overview

5.1 Section 47 of the TPA prohibits the practice of exclusive dealing. This provision deals with various forms of such conduct.

5.2 Sections 47(6) and 47(7) impose a per se prohibition on third line forcing, which means it is per se unlawful for a supplier of goods or services to compel, as a condition of sale, the acquirer of those goods or services to acquire other goods or services from a third party.

[7] *Daniels Corporation International v ACCC (*High Court proceeding S27/2002)

Third line forcing is permissible if the ACCC is notified under section 93 of the TPA. Authorisations are also available for conduct which breaches the third line forcing provisions.

5.3 Other forms of exclusive dealing described in section 47, such as territorial restrictions and full line forcing, are not subject to a per se prohibition and are only considered unlawful if they substantially lessen competition.

5.4 Hutchison submits that there is no valid reason for imposing differential treatment on third line forcing and, similarly to other forms of exclusive dealing, this conduct should be subject to a competition test. However, if a per se prohibition is retained, an exemption should be included in section 47 for third line forcing activity within a corporate group.

**B. Competition Test**

5.5 The distinction established in section 47 between third line forcing and other forms of exclusive dealing is largely historical and unwarranted. The Hilmer Committee noted that this distinction was not a feature of the competition laws of other jurisdictions and that the basis for adopting such an approach in Australia was unclear.[8]

5.6 Per se prohibitions are appropriate where conduct has such strongly anti-competitive effects that it is almost always likely to lessen competition. However, this is not the case in relation to third line forcing. Indeed, third line forcing arrangements are often beneficial to consumers and, as evidenced by the fact that the overwhelming majority of notifications are accepted by the ACCC, are generally pro-competitive.

5.7 The notification process is time consuming and costly for both the regulator and the applicant. Imposing this burden in relation to third line forcing cannot be justified. Hutchison therefore submits that the prohibition against third line forcing be restricted to those arrangements which are not pro-competitive and which are detrimental to consumers.

**C. Exemption for related bodies corporate**

5.8 In the alternative, Hutchison proposes that section 47 be amended to correct the inconsistency in treatment between a supplier tying in favour of a wholly owned subsidiary, or related company, and a supplier tying in favour of one of its own divisions. The former is currently subject to a per se prohibition, while the latter is subject to the less onerous competition test.

5.9 There is no valid reason for discriminating against a corporate group which chooses to structure itself as related but separate companies, particularly as this is generally motivated by factors completely unrelated to third line forcing provisions.

[8] National Competition Policy *Report by the Independent Committee of Inquiry* August 1993 at 51-52

## 6. Exclusionary Provisions

### A. Overview

6.1 Section 45 of the TPA prohibits agreements that either substantially lessen competition or contain 'exclusionary provisions'.

6.2 Hutchison submits that the definition of 'exclusionary provision' in section 4D is too broad and that joint ventures should be specifically exempted from per se contraventions of section 45.

### B. Section 4D

6.3 Section 4D is currently drafted in such a way that a provision of a contract, arrangement or understanding can be taken to be an 'exclusionary provision' even if the party that is excluded by the contract, arrangement or understanding is not a competitor of the parties to the agreement.

6.4 This definition renders section 45 far broader in application than was originally intended by the Swanson Committee, upon whose recommendation the prohibition against exclusionary provisions was originally introduced. It is also inconsistent with the treatment of boycott provisions in overseas jurisdictions.

6.5 Hutchison submits that section 4D be amended to require that the class of persons excluded by the relevant contract, arrangement or understanding are competitors of the boycotting parties.

### C. Joint Venture Exemption

6.6 Section 45A imposes a per se prohibition on price fixing. However, the per se application of this provision is expressly stated to exclude joint ventures, which means that price fixing agreements between participants in a joint venture are only considered unlawful if they substantially lessen competition under section 45.

6.7 Hutchison submits that this exemption should be extended to all exclusionary provisions in joint venture agreements. Otherwise, participants in joint ventures would be in breach of the TPA if they agreed with each other not to compete with the joint venture product. While participants may seek authorisation of their conduct, this is a public, time-consuming and costly process.

6.8 If adopted, this proposal would not legalise all conduct associated with a joint venture agreement but only that conduct which is considered pro-competitive under the competition test in section 45. In such circumstances, it is unnecessary to subject joint venture participants to an authorisation process.

## 7. Enforcement and Penalties

### A. Criminal Sanctions

7.1 The ACCC has proposed that a criminal penalty regime be introduced in relation to hard core collusion.[9]

7.2 Hutchison supports the submission by the Business Council of Australia that price collusion, bid rigging and market sharing are abhorrent forms of conduct.[10] Hutchison therefore supports the view that all participants in such conduct be exposed to the threat of criminal sanctions.

7.3 Hutchison would not support any proposal to extend a criminal penalty regime beyond hard core collusive conduct.

**B. Increased Pecuniary Penalties**

7.4 The ACCC has also proposed two changes to the existing civil penalty regime.[11] First, the ACCC submitted that the maximum penalty which a court may impose on a corporation be increased to the higher of $10 million or three times the value of any commercial gain from the contravention. In the event that it is difficult to estimate this gain, the ACCC provided that the court should have the option of substituting 10 per cent of the corporation's Australian turnover for the duration of the infringement for a maximum of three years.

7.5 Hutchison submits that the existing pecuniary penalties under the TPA are substantial and have the intended deterrent effect. Courts are presently empowered to, and in fact do, impose large penalties on corporations, as evidenced by the recent cases involving the vitamin cartel and the electricity transformers cartel. Hutchison expresses concern at the suggestion that penalty levels be linked to turnover, in any situation.

7.6 The second change proposed by the ACCC to the civil penalty regime is the extension of the statutory limitation period for the commencement of proceedings to 10 years in relation to contraventions of section 45.

7.7 Hutchison would not support any extension of this limitation period. The significant evidentiary difficulties associated with proving a cause of action 10 years after it has accrued render this suggestion impracticable. Further, a plaintiff which has suffered damage as a result of anti-competitive conduct would clearly be aware of any relevant cause of action far earlier than 10 years and should be encouraged to take action at that point.

**C. ACCC Leniency Policy**

7.8 The present leniency policy of the ACCC[12] sets out in a general and 'flexible' manner the matters that will influence the regulator in exercising leniency in its investigation and prosecution of breaches of the TPA. However, the policy is overly general and does not

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[9] ACCC *Submission to the Trade Practices Act Review* June 2002 at 21

[10] Business Council of Australia *Submission to the Dawson Review of the Trade Practices Act 1974 and its Administration* June 2002 at 117

[11] ACCC *Submission to the Trade Practices Act Review* June 2002 at 21-22

[12] ACCC *Cooperation and Leniency in Enforcement* (1988) ACCC Journal No. 17 at 8

provide specific guarantees regarding the determination of penalties. Rather, it contains vague assurances that leniency is: 'most likely to be considered appropriate' in certain circumstances. This is contrary to the comprehensive and detailed policies which exist in jurisdictions such as the United States, Canada, the United Kingdom and the European Union.

7.9 Hutchison submits that the ACCC's existing policy is inadequate and does not encourage potential whistleblowers and companies which might otherwise be disposed to cooperation to come forward. In order to operate as a means to better enforcement, a leniency policy must be easily accessible and provide concrete guarantees for immunity or leniency.

7.10 The ACCC recently released its draft policy for the application of leniency in relation to cartel conduct. This policy is also deficient, for example, only providing for protection for the 'first in'. It is also limited in its application.

7.11 Hutchison asserts that a clear and detailed policy, applying to all forms of anti-competitive conduct, should be introduced.

## 8. Administration of the Act

8.1 Section 28 of the TPA empowers the ACCC to disseminate information regarding its functions and make available to the public general information in relation to matters affecting the interests of consumers.

8.2 Hutchison acknowledges the valuable educative role the ACCC fulfils. It is important that the general public is well informed about their rights and obligations under trade practices laws and the media necessarily plays a part in broadcasting that information. However, adverse press coverage can have a significant detrimental effect and the ACCC should therefore be careful to provide a balanced view of the relevant issues.

8.3 Hutchison submits that the circumstances in which the ACCC may exercise its power to disseminate information needs to be clearly defined and that the ACCC should be required to take into account the timing of its media releases and avoid sensationalising the issues.