THE AUSTRALIAN INDUSTRY GROUP

Submission
to
Committee of Enquiry into the Competition Provisions of the Trade Practices Act 1974, and their Administration

15 July 2002

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Section [1] Executive Summary

1. *The Australian Industry Group represents over 10,000 employers, large and small, operating in every State and Territory in Australia in the manufacturing and related services industries. Ai Group brings the representational weight of this constituency in presenting its view on the review of the competition issue embodied in the Trade Practices Act. Ai Group believes that a competition policy embodied in clear and easily understood regulations, enforced by a fair and responsible regulatory authority bound by the principles of clarity, consistency, accountability and certainty. and facilitated by a responsive and flexible set of rules for all businesses, is an essential part of Australia's growth strategy.*

2. *Ai Group sought a review of the Trade Practices Act in accordance with the principles in the Terms of Reference, prior to the last Federal election*[1]*. Consequently, the Review is welcomed by Ai Group as an opportunity to discuss issues affecting competition policy in Australia. This submission addresses a range of competition provisions in the Act and their impact on business, the interaction between industry and the Australian Competition and Consumer Commission and governance matters relating to the administration of the Act. It further provides recommendations on improving the competition environment.*

3. *The **Trade Practices Act 1974** defines the regulatory framework within which competition operates in the Australian economy and shapes how Australian businesses and consumers alike meet the challenges of emerging markets, globalisation of markets and deregulation of domestic markets. The Australian Competition and Consumer Commission, amongst other things, has the responsibility for administering the competition provisions of the Act. In exercising its responsibilities, the ACCC must act in a manner that maintains the confidence and trust of its constituency in order to pursue its goals fairly and properly.*

4. *The ACCC is possibly unique among regulatory agencies, world-wide. It must combine powers and authority in respect of the management of the broad competitive environment, with guardianship of the domestic consumer's welfare. Australia is fortunate that the essential integrity and professionalism of the ACCC has historically served the economy well. However, Ai Group submits that a transparent and accountable regulatory process is fundamental to the effectiveness of competition law in Australia. This submission to the Dawson Review of the Competition Provisions of the Trade Practices Act and their administration, attempts to assist the Review in understanding how the Act and the manner in which it is presently administered, affects business and business decision making in Australia. From that understanding, it should be possible to design a regulatory framework that enables the ACCC to operate efficiently and with authority, in an environment of accountability and transparency of process.*

5. *In our view, the Act itself is reasonably sound. Ai Group believes, though, that to*

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[1] "Renewing the Nation's Agenda" – address by I D James, Deputy National President, Ai Group National Annual Dinner, Parliament House, 6 August 2001

maintain this strength and to bolster confidence in the Act's broad mandate, it is time to revisit the terms of the Act and its administration by incorporating more flexibility and commercial relevance into its framework.

6. *The ACCC has been the receptacle for a vast array of powers and authorities since the Act's inception in the 1970s. The ACCC has been effective in its administration of many areas of the Act. Ai Group endorses the principle that unfair, anti-competitive behaviour must be punished with appropriate penalties. However, Ai Group opposes the imposition of criminal sanctions like prison sentences in the enforcement of Part IV. Ai Group submits that a re-focus of the ACCC's already extensive powers, to be used more in the area of compliance and education and less in the pursuit of public enforcement, would be markedly more efficient and effective.*

7. *The perception of Ai Group members is that a simple increase in individual enforcement powers by the ACCC does not adequately deal with the complexities of the modern competitive environment. We believe that education should play a far more prominent role in pursuit of the objectives of the Act. This is especially so, in light of the significant behavioural issues that have marked the corporate world in recent times, like corporate fraud, and a diminution in corporate governance standards.*

8. *Accordingly, Ai Group's submission focuses on the legislative and administrative platform from which Australia must build an internationally competitive, fair and efficient economy.*

A. Administration of the Act
Supervision

i. The ACCC, which is the body charged with administering the Trade Practices Act, suffers from a business perception that it is unresponsive to commercial imperatives in a globalised market environment. Also, that the ACCC operates inappropriately in its public pursuit of perceived offenders against the Trade Practices Act.

ii. We submit that the ACCC be prescribed in its handling of competition matters., This is to be facilitated through the development of co-operative guidelines with business, which have due regard to certainty, consistency and fairness in its approach.

iii. Ai Group therefore recommends the implementation of a three-tiered process that covers:

- *"Board of Governance" to oversee the implementation and development of procedural guidelines and charter of service, and administration of the ACCC.*
- *A charter of service governing the relationship between the ACCC and its customers (both business and individual consumers).*

- *Procedural guidelines for the conduct of investigations by the ACCC, including the issue of media material.*

iv. *To redefine the ACCC's role in competition policy, and to show accountability in its processes, Ai Group submits that* ***a Board of Governance*** *or supervisory body, needs to oversee the activities of the regulator in its administration of the Act (particularly Part IV). The Board would be required to monitor and supervise the conduct of the ACCC along generally accepted corporate governance principles. It would not have any appellate function in respect of the strictly legal decisions of the ACCC but would be accountable for the ACCC's procedural compliance with the Act, the Charter of Service and the procedural guidelines.*

v. *The Board of Governance would be comprised of skilled competition representatives, the ACCC and Treasury.*

vi. *In tandem with the establishment of such an authority, Ai Group also recommends that the* ***Charter of Service*** *for the ACCC be redesigned, to provide guidance to its officers and assurance to customers. Such a Charter would enshrine those principles which safeguard the integrity of the ACCC and preserve the highest standards of accountability in its relationship with its customers, both business and consumers generally.*

vii. *Issues which have drawn considerable debate in recent years, are claims of public vilification of companies and management, "trial by media" and inappropriate use of powers by the ACCC. These criticisms should be resolved by developing a set of dynamic* ***procedural guidelines*** *to cover matters of publicity, investigations, and undertakings. In Ai Group's view, the Board of Governance would be the appropriate body to develop these guidelines.*

Enforcement

viii. *Enforcement of the Act has been a central objective of the regulator. Appropriate use of the ACCC's extensive powers of investigation and enforcement is critical for business . An ACCC action, reported widely, impacts on markets around the world. While debate continues on the effectiveness or otherwise of certain forms of penalties and punishments, the manner in which prosecutions and legal proceedings are effected is of extreme importance in the pursuit of proper judicial process.*

ix. *Arguments in relation to the types of punishment that should fit the circumstances of the offence have been the subject of extensive examination in all legal jurisdictions. It is apparent that there is no precise or certain answer to the issue. Ai Group believes that Australia should not address these concerns through a reactive acceptance of the*

harshest penalties devised, such as the imposition of criminal sanctions.

x. *As the Prime Minister cautioned: "It is important that governments in their responses draw a distinction between criminal behaviour and fraud and business." He said it was important to "draw a distinction between criminal behaviour and fraud, and legitimate, robust business activity."*[2] *We wholly support the Prime Minister's comments.*

xi. *Ai Group believes there is a need for tough penalties for corporate crimes like fraud, theft and conspiracy, and where individuals are found guilty of these, they should be punished under the appropriate criminal laws. However, we oppose the imposition of criminal sanctions against offenders charged with anti-competitive behaviour under Part IV.*

xii. *The proposals to incorporate criminal sanctions for certain Part IV offences are unacceptable to Ai Group for a number of reasons:*

- *It is absolutely imperative that the elements of a crime be precise and certain before any criminality attaches to the alleged commission of the offence. The Act does not provide that certainty, nor does it define the offences as crimes.*

- *The Act is not the proper vehicle for them, nor is the ACCC the appropriate prosecuting authority.*

- *In the current legislation, the* per se *offences that might become the subject for the imposition of criminal sanctions, do not carry the element of* mens rea *(the intent or purpose) usually associated with criminal activity. To escalate these offences to the level which might attract prison sentences and a criminal record, is not warranted.*

- *Although there is argument that criminal sanctions can be a more effective deterrent, there is no evidence from overseas (where such laws have been in effect for some time, like the USA) that this is in fact the case. The OECD has been investigating deterrent options for some years and has reported that, even with the ability to impose prison sentences on executives of offending companies, the number of cases does not appear to be diminishing . Indeed, there are significant cartel cases emerging even in the USA.*[3]

- *Australian penalties for anti-competitive conduct are already high - $10 million for a corporate offender and $500,000 for an individual knowingly concerned in the offence. These pecuniary penalties are*

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2 *As reported in The Australian, 9 July 2002, by Dennis Shanahan: "Leave Bosses Alone: Howard", p.17*

3 OECD Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee: "*Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws*", 9 April 2002

able to be ordered for each individual offence and yet the ACCC has not sought the maximum of these fines in court proceedings. As the Federal Court has observed, the ACCC has usually made a "penalty bargain" which stops far short of the extreme end of the penalty range. It is difficult to support the ACCC's call for harsher penalties when it has not used its existing penalty regime to measure its effectiveness.

- *The Australian Law Reform Commission has raised in its recent Discussion Paper 65 whether behavioural offences such as those under Part IV occur as a result of "amoral calculators" on the part of the managers charged with the offence, or rather through "organizational incompetence or ignorance".[4] In Ai Group's opinion, there is a strong argument that many of these complex anti-competitive activities are the by-products of the "organizationally incompetent". Driven by performance targets, middle management can embark on commercial activity that meets revenue goals in circumstances where they fail to identify the anti-competitive elements inherent in their actions. Often, senior executives are unaware of the specific actions undertaken by their managers.*

xiii. *Accordingly, Ai Group cannot support the introduction of criminal sanctions into Part IV offences, as they are presently expressed. Nor can we accept any increase in the powers of the ACCC in respect of enforcement of the Act. We do not believe that there is sufficient evidence to convince the Review that there is any need for such an increase, or indeed, that any extension of the existing powers of enforcement will necessarily be effective as a deterrent for anti-competitive behaviour. This is particularly so in the absence of rigorous education and compliance initiatives.*

xiv. *The ALRC has already started the process in respect of civil penalties for federal regulatory authorities. Issues essential to the integrity of the criminal judicial system, like the availability of legal professional privilege, authority for search and seizure activities, and the protection of the innocent, must not be casualties in the process of developing appropriate deterrent measures.*

Role of the Regulator

xv. *As part of the examination of the administration of the Act, regard must be had to the perceived conflict of roles for the regulator. The question of whether it is time to distinguish, through a separation of functions, the*

[4] Australian Law Reform Commission *"Securing Compliance Discussion Paper – Civil and Administrative Penalties in Australian Federal Regulations", April 2002*

role of the competition facilitator, and the role of the consumer protector, must be addressed.

xvi. *In either respect, Ai Group wants the ACCC to become more focused on education and compliance. In our view, anti-competitive behaviour is more likely to occur as a result of ignorance and lack of understanding about the Act and the economic effects of certain conduct, rather than as a result of any deliberate and willful intention to damage or injure competition.*

B. Legislative Amendments

i. *There have been a number of enquiries and reviews into particular aspects of the Act over the last ten years and there is currently a range of matters before parliamentary committees and external bodies which involve consideration of the powers of the ACCC and the scope of the Act. Ai Group is most concerned to emphasise that in our view, there is no basis for extension of the regulator's powers under the Act, though it is appropriate to review the powers it now has.*

ii. *The Prime Minister, John Howard, has also stated he wants to ensure that business is not overly hindered and has a Trade Practices Act appropriate to the size of the country.*[5]

iii. *Ai Group agrees with the Prime Minister and is therefore wary of a number of legislative amendments that have been proposed by the regulator in recent times, particularly those that seek to extend the ACCC's powers, and that might add further impediments to "robust business" in Australia As a matter of principle, Ai Group regards vigorous competition as essential to wealth creation in Australia.*

iv. *Ai Group's position in relation to changes to the legislation that might "impede the ability of Australian industry to compete locally and internationally"*[6] *are drawn from opinions expressed by our general membership on certain provisions within Part IV (and incidentally, Part VII). Not all the competition provisions are included in this examination. Ai Group's particular focus is on the merger provisions, the misuse of market power provisions, the authorizations process (which includes the process used in collective bargaining by small business) and the possible penalties applicable to offences under Part IV.*

v. *In summary, in respect of the competition provisions in Parts IV and VII of the Act, Ai Group does* ***not*** *support:*

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5 Op. cit 2

6 *Terms of Reference of the Review of the Competition Provisions of the Trade Practices Act and its Administration issued on 9 May 2002*

- *Any extension or increase in the powers of the ACCC.*

- *Any change in section 46 of the Act (misuse of market power) that would effectively shift the onus of proof onto the defendant company.*

- *Any alteration to section 46 whereby the test of intention or purpose is replaced with, or added as an alternative to, one of established effect or likely effect.*

- *The imposition of gaol-sentences on management from business involved in anti-competitive conduct.*

- *The conferring on the ACCC of the power to issue "cease and desist" orders, or to allow for orders of divestiture to be sought in respect of anti-competitive offences (other than is allowed presently under section 50).*

vi. The Ai Group, on the other hand, ***would*** *support:*

- *Changes to section 50 (and, as appropriate, sections 88 and 90) relating to merger policy and the authorisation process whereby the factors to be considered in a section 50 proposal took account of public interest as a priority and extended the criteria to include efficiencies and global imperatives under wider, not narrower, market definitions.*

- *Changes to the authorization process to make it more responsive to present-day commercial needs and to streamline the system. In particular, a detailed examination of possible improvements to the authorization process (including those that would enable small business the opportunity to engage in collective bargaining in certain instances), should be undertaken. Ai Group believes that there is legitimacy in business concerns with the present system. Greater clarity and certainty is required in respect of the process of approval (whether as a notification or through authorization). This would also assist small business to efficiently compete through economies of scale from aggregation of bargaining power for supplies, amongst other things. Mechanisms to reduce the costs and delays incurred in seeking authorization should also be reviewed.*

- *Introducing some statutory authority for the informal "clearance" procedure (that operates in lieu of formal authorizations) to provide certainty, consistency and clarity in its scope and uniformity in its application by the ACCC in an open, transparent and accountable way.*

Extension of statutory powers

vii. *In essence, to implement any of these recommendations, will involve some restructuring of the Act. Ai Group believes that it is time to focus more on the educational role of the ACCC: that the enforcement tactics of the ACCC have not resulted in any serious diminution of offensive behaviour under Part IV, and that increased penalties (whether pecuniary or criminal) are unlikely to effect the desired outcome.*

viii. *Ai Group is recommending that the ACCC's existing powers not be extended. However, a powerful regulator is not necessarily a bad one, so long as both the regulator and the regulated are bound by mutual obligations of respect, trust and honesty in their relations. Hence, the establishment of an overseeing body to whom the ACCC is accountable for its decision making, its procedures and its outcomes. The Board of Governance would be responsible for instilling in the corporate culture of the ACCC the same principles of corporate governance that the ACCC requires of its customers.*

ix. *That body should, if structured properly, give the ACCC the comfort and confidence to pursue its regulatory program without fear of criticism or uncertainty as to the parameters of its authority or role. In turn, the Board would be a body that is obliged to address community concerns with the way in which the regulator performs its functions.*

x. *Ai Group believes that with the constitution of such a Board of Governance, and the implementation of procedural guidelines to secure fairness, equity and transparency in the ACCC's processes, many of the legislative amendments being suggested by the ACCC would not be required.*

Section 46

xi. *Most of Ai Group's concerns with the ACCC's proposals for more powers lie with the fact that there are insufficient checks and balances to the application of such powers. At present, the ACCC's interpretation of what is right or wrong in the market remains largely unquestioned, and the exercise of their powers not subject to appropriate checks and balances. In some respects, the ACCC has usurped the authority of the courts, both in determining the facts of the offence and the appropriate penalty. The business "customer" of the ACCC feels powerless to challenge its decisions, and vulnerable to possible retribution.*

xii. *ACCC recommendations for subtle changes to provisions governing the misuse of market power (s.46) also run the risk of increasing the ACCC's already significant power. The ACCC recommendation that section 46 be amended to provide for an "either / or" test of intention or purpose* ***and / or*** *effect in relation to the damaging of a competitor or the substantial lessening of competition through abuse of market power, in practice, would amount to*

simply an "effects" test being applied. Looking from the outside onto the daily activities of a normal, vigorous, and competitive business, it would be hard for the ACCC to distinguish between what it perceives as intentional malevolent conduct aimed at harming a competitor, and the reasonably expected outfall of competition dynamics. Hence, Ai Group would expect that in all likelihood, the lower criterion – a damaging effect – would be all too frequently observed. But in a commercial environment, this is not necessarily an indicator of improper purpose or dishonest conduct: it may simply reflect healthy competition.

xiii. *Accordingly, these proposals submitted by the ACCC in respect of section 46 are not supported by Ai Group.*

Section 50

xiv. *There is room for further debate on whether the substantial lessening of competition test is appropriate for Australia – in that sense, the mergers provisions in section 50 of the Act should take into account the size of the markets in Australia and the number of participants, in the context of global competition pressures. This imbalance between the global imperatives of competition and the localized market definitions in the Act, has greater significance for Australian industry and the general welfare of the community in the longer term, than issues relating to whether or not the number of participants in the domestic market meets the ACCC's views on acceptable levels.*

xv. *Commercially, the process for formal approval of mergers and acquisitions under the Act, is frequently lacking in efficiency and timeliness. Resort to the informal process of clearance leads to uncertainty and cannot satisfy commercial and legal requirements that require unequivocal approvals.*
The factors to be taken into consideration (in section 50(3)) must recognize efficiency gains and issues of scale. In this respect, the current public interest criteria in section 90 should be introduced into section 50 itself. In addition, the consequences of a rejected merger, like job losses or corporate insolvencies and failure should bear consideration.

xvi. *The Act needs to accommodate the business environment as it operates now, and as it evolves, in the twenty-first century. With the speed and responsiveness that modern technology offers to business and consumers, administrative delays in the processing of merger applications (by any method) or other activities proscribed in the Act, are untenable. The Act needs to be "revitalized" by providing mechanisms for the proponents that can be swiftly and deftly executed in a certain legislative environment. Streamlining authorizations, for example, will, in Ai Group's view, help both small and large business to meet their requirements for effective commercial outcomes.*

Gaol Sentences

xvii. *As mentioned earlier, Ai Group opposes the incorporation of criminal sanctions into the Act's enforcement regime. The deprivation of liberty and the stigma of a criminal record are frightening in any society. To empower the ACCC to impose these on individuals on the basis of a regulator's moral judgment and discretion is unacceptable. The criminal laws in Australia adequately and effectively address the community's needs for punishment of heinous offences. Fraud, extortion, theft, even conspiracy, are all managed by the criminal justice system. If any of these "crimes" can be properly associated with anti-competitive conduct, then they can be dealt with as crimes under those laws. Ai Group does not see any need to establish a parallel criminal system in the Act, where the terms of the offence are vague or subject to a statutory body's personal interpretations.*

Section [2] Introduction:

> *A competition policy embodied in clear and easily understood regulations, enforced by a fair and responsible regulatory authority bound by the principles of clarity, consistency, accountability and certainty, and facilitated by a responsive and flexible set of rules for all businesses, is an essential part of Australia's growth strategy.*

2.1 The Australian Industry Group (Ai Group) is an employer organization representing over 10,000 firms in manufacturing and general related services. Its membership spans multinational corporations, medium to large domestic companies, and SMEs. Through its National Executive and member-based State Councils, Ai Group has unique access to the opinions and practices of industry in Australia and can confidently assert that the views expressed in this submission reflect the general concerns of that broad membership. Ai Group has always been a strong advocate of international competitiveness and supports policies and regulation that promote economic growth in a fair, efficient and certain legislative environment.

2.2 *The Trade Practices Act 1974* (the Act) has been the subject of a number of reviews in recent years. This submission examines the Act and its administration in accordance with the Terms of Reference announced on 9 May 2002 which called on the review to examine the competition provisions of the Act including Part IV of the Act and its associated penalty provisions, and Part VII but excluding reconsideration of sections 45D - 45EB, 51(2) or (3) or Parts IIIA, X, XIB or XIC.

2.3 This submission concentrates on the issues of whether the Act:

- inappropriately impedes the ability of industry to compete
- provides an appropriate balance of power between competing businesses
- provides adequate protection to individuals and businesses affairs and reputations
- facilitates ready access to the law, and to the exercise of the rights and obligations of citizens; and
- is appropriately flexible and responsive to the changing needs of industry.

2.4 The Act is an essential element in the regulatory infrastructure impacting on Australian industry as it becomes increasingly part of the global marketplace. Since the Act expressly recognised the principles of competition and enshrined them (in the objectives of the Act), the regulations governing the marketplace for Australian businesses have become central to the Government's strategic vision of Australia as a global competitor.

2.5 The Act itself appears to be sound. It measures favorably against Australia's trading partners' and competitors' regulations in this area. In some respects, especially in the emerging markets, Australia has taken a positive lead in the development for those countries of like-minded legislation. The adoption of similar regulation in other countries which play such a vital role in Australia's economic standing can only

benefit Australian industries in the long term - the rules of engagement in competition will be similar.

2.6 Australia has thereby embraced competition as the strongest driver of efficient, innovative and fair markets. It is therefore important that our competition laws address market failures as well as regulate market diversity and maintain market dynamics through fair principles for all.

2.7 But enforcement of the principles of competition should not be encouraged for competition's own sake. There is a cost involved in regulation of any kind and it is imperative that the regulation is bound to honour the fundamentals under which a democratic and free society will tolerate its intrusion, namely:

- efficiency
- transparency
- certainty
- accountability
- equality
- consistency.

2.8 The regulatory authority in charge of the enforcement of the regulation, in this case the Australian Competition and Consumer Commission (ACCC), must also undertake these principles as a way of life in the performance of its functions and in the despatch of its duties to businesses and consumers alike.

2.9 This submission concentrates on the issue which Ai Group members have consistently contended to be of the single greatest concern for business, whether large or small : the administration of the Act.

2.10 Whilst individual consumers support over the ACCC's high profile efforts against business misconduct in the areas of consumer protection under the Act, the business consumer is less approving of the manner in which the regulator conducts its "competition" watchdog role. This disapproval is expressed by small local businesses as well as by larger business with offshore markets. Ai Group has uncovered some variance in the reasons for the disapproval - for some it's the perception that the ACCC only acts in ways favourable to big business, while in others, the perception is that the ACCC is anti-big business and against globalised competition.

2.11 It is clear that the ACCC suffers from a perception problem. If the evidence cannot support such perceptions as accurate, then the fault would appear to lie with the manner in which the regulator publicly undertakes its duties. At this time, the ACCC enjoys immense public support as the consumer champion, but for the Australian economy, it is the role of *competition* watchdog that has the strongest bearing on business perception and on business' willingness to embrace competition in its drive for international competitiveness, and it is this aspect (the administration of the competition provisions in the Act) that is the main subject of the Review.

2.12 The ACCC has grown in strength and size rapidly and has been given increasing powers and authority in the realm of regulation. It is doubtless the most powerful

regulatory authority in Australia. Within Treasury's portfolio, it has access to and therefore significant influence on, the country's economic managers. It can, by its actions, remodel markets, restructure economic outcomes for participants in those markets, shift entries, remove barriers, and foster innovation or limit inefficiencies. Such power demands high scrutiny and rigorous application of governance principles. And yet, the ACCC enjoys a relatively unsupervised position amongst regulatory administrators.

2.13 In **section [4]** of this submission, Ai Group contends that the administration of the Act requires the incorporation of a number of checks and balances, not unlike those expected of the corporate sector, to safeguard the integrity of the administration, and the Act itself. Issues such as transparency in decision-making, accountability of performance, fairness in conduct, efficiency in its administration, certainty and consistency in its interpretations and equity in enforcements are at the forefront of Ai Group members' list of principles for ACCC.

2.14 In **section [5]**, specific legislative problems under Part IV and Part VII are addressed. Ai Group does not seek to cover all the competition provisions in the Act - some of them are adequate, some of them have been already subjected to intense examination under other reviews recently, and some are of minor drafting significance.

2.15 Ai Group will therefore concentrate on the corporate governance, administration and accountability issues affecting the operation of the Act and the ACCC's function as regulator, being the predominant concerns of the broad spectrum of Ai Group's membership, and which are raised consistently and uniformly across all levels of business.

2.16 By virtue of recent media statements highlighting areas of the Act with which the ACCC has particular concerns, Ai Group will also concentrate on those of mutual importance to ACCC and business - the sections dealing with mergers, misuse of market power, the authorisations process and penalties.

2.16 To properly understand the significance of competition forces in Australia and the importance of competition regulation, **section [3]** of this submission describes business' approach to market dynamics and defines the landscape for competition in Australia under the Act.

Section [3] Market Dynamics in Australia

*The **Trade Practices Act 1974** defines the regulatory framework within which competition operates in the Australian economy and shapes how Australian businesses and consumers alike meet the challenges of emerging markets, globalisation of markets and deregulation of domestic markets.*

3.1 The Act has now been in operation in Australia for almost 30 years. At the time of its enactment, the nature of the Australian marketplace was considerably different from what it is today.

3.2 The Act sought to regulate market structure and pricing behaviour in essentially what was a closed economy. Australia imposed high import tariffs on a wide range of goods, including a high of 55% for apparel, 35% for motor vehicles and 15% for general manufacturers. Imports represented less than 20 per cent of all sales in the Australian marketplace.

3.3 In a competitive and open marketplace, prices play an important role in allocating goods and services according to supply and demand. Market prices convey information about the willingness of consumers to pay for goods and services and the ability of firms to produce these goods and services at a given price. In a competitive market, companies are generally price takers as the marketplace determines the appropriate price relative to supply. In a competitive economy, companies cannot charge in excess of the market price due to the substitutability of like products. Consumers will usually switch to firms who are able to sell at a lower price (all other things being equal), new entrants will enter the market, and imports can act as substitutes.

3.4 However, in a closed market place, the size and structure of an industry has the potential to significantly impact on market behaviour and pricing. A closed economy effectively limits competition by creating a barrier to entry, like tariffs. This allows incumbent firms to exert more influence over prices.

3.5 Twenty years ago a small number of large firms dominated the Australian marketplace. Australia had, for example, only a few dominant producers of steel, glass, petroleum and other manufactured goods. In some instances, such as telecommunications, postal services, and electricity, government owned monopolies controlled the market. Through their pricing strategies, these entities could influence the overall marketplace (referred to as oligopolistic behaviour), particularly the sales and profits of its competitors. This essentially required regulations to ensure competition operated effectively, promoted efficiency, and prevented further "squeezing" of an already tight market.

3.6 Today, while Australia's economy remains largely oligopolistic in nature, (primarily due to its relative size) the significance of this has been considerably eroded by Australia's more open marketplace. Australia now operates on a low tariff regime, with tariffs on a wide range of goods now removed or operating on tariffs as low as

3%. On cars, the tariff is now 15% (and set to fall to 10% in 2005) and on clothing down to a low 25% (to 17.5% in 2005). Equally important, imports are now approaching one in every two goods sold (ratio of 1 to 2.3).

3.7 Instead of Australian firms competing for sales against domestic producers, Australian firms are now competing for sales against both domestic and offshore producers. The openness of the marketplace means that no single firm can easily dominate the marketplace. Firms which seek to extract excessive profits will find that imports and new overseas players will enter the marketplace, driving down prices and profits.

3.8 Indeed, in such an open and global market, size actually matters because in order for Australian firms to compete successfully in the domestic and global marketplace they need to become either larger or specialised or both.

3.9 A global marketplace requires global firms with the size and capacity to compete with the industrial giants of United States and other developed countries, as well as rapidly developing economies with investments in world-class technologies. The United States economy is almost 20 times larger than the Australian economy, the disparity between the two widening considerably over the last decade. Competition needs to been seen not in regard to Australian business' ability to compete with other domestic firms, but in regard to its capacity to compete with firms operating in the global marketplace.

3.10 Australia needs strong internationally competitive industries if it is to compete in the domestic market place, but equally importantly, grow export markets. As Australia's automotive producers are showing, a larger scale of production can generate greater efficiencies and competitiveness, as well as generate new investment, jobs, productivity and innovation. These benefits flow through to the broader economy and assist in helping the economy to grow faster.

3.11 Australia's competition laws reflect the fundamentals of market principles. The Act's objectives are to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers (and business when they are purchasers) in price, quality and service; to safeguard the position of consumers in their dealings with producers and sellers; and protect businesses in their dealings with other businesses.

3.12 There are two broad principles which underlie Part IV of the Act. These principles are:

i. that any behaviour which has the purpose, or effect, of substantially lessening competition in a market should be prohibited; and
ii. such behaviour should be able to be authorised on the basis of a net public benefit test.

3.13 The main types of anti-competitive conduct which are prohibited include:

- Anti-competitive agreements. These include price fixing agreements between competitors; other agreements which substantially lessen competition (such as market sharing and bid rigging); and exclusionary provisions, including primary and secondary boycotts (s.45), with a per se ban on price fixing and boycotts.

- Misuse of substantial market power, for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct (s.46), such as predatory pricing and refusal to supply.
- Exclusive dealing which substantially lessens competition (s.47), with third line forcing prohibited per se.
- Resale price maintenance for goods (ss. 48, 96-100), also prohibited per se.
- Mergers and acquisitions that substantially lessen competition in a substantial market (s.50).

3.14 Various penalties and remedies are available for breaches of Part IV of the TPA, including:

- penalties of A$10 million for companies and A$500,000 for individuals;
- injunctions;
- damages;
- divestiture in relation to illegal mergers; and
- various ancillary orders such as rescission and variation of contracts, orders for specific performance of contracts, and provision of repairs or spare parts are examples.

3.15 Conduct that may substantially lessen competition under Part IV may be granted authorisation under Part VII, which is a mechanism that provides immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act. Authorisation is granted on the grounds of prevailing public benefit. Depending on the arrangement or conduct in question, the ACCC must be satisfied that the arrangement results in a benefit to the public that outweighs any anti-competitive effect; or that the conduct results in such a net benefit to the public that the conduct should be allowed to occur. Decisions made by the ACCC in relation to authorisations can be appealed to the Australian Competition Tribunal.

3.16 This Review is vitally important for the future of Australian industry. It provides business, consumers, governments and regulatory agencies with an opportunity to create a strong foundation on which to build a structure of economic strength, endurance, dynamism, and responsiveness to meet the challenges of the emerging global village. The Act must be moulded to accommodate changes to trade agreements, shifts from what were yesterday's trading partners to tomorrow's trading competitors, and vice versa, collapsing barriers to imports, mobile investment and borderless markets. The Act must provide Australian business of all sizes and in all industries with the confidence to pursue these new targets, to embrace the world economies and to deliver sustainable competitive markets in that new economic environment. The regulatory body charged with the facilitation of the competition objectives in the Act must be provided with a regulatory framework that offers certainty, clarity and consistency in its application. The agency for economic

management in the form of the ACCC must also be given the right tools to help business secure those outcomes for itself.

3.17 The key would seem to be in developing best practice for Australia, not a carbon copy of one designed for another economy, with different variables and different criteria for its success. Market successes come from applying the principles of compliance in a fair regulatory regime to produce sustainable profits in the longer term. Education in these principles allows all participants to enjoy the rewards. Harsh enforcement against those few who do not understand the rules or seek to avoid them altogether cannot, in our view, provide any support or confidence to the others which might lead to a stronger and sustainable competitive environment to bequeath to the next generations.

Section [4] Administration of the Act

The ACCC, amongst other things, has the responsibility for administering the competition provisions of the Act. In exercising its responsibilities, the ACCC must act in a manner that maintains the confidence and trust of its constituency in order to pursue its goals fairly and properly.

4.1 Issues raised by Ai Group members that will be considered in this section include:-

- Accountability of the ACCC (paras 4.2 to 4.37)
- Conflict of functions (paras 4.38 to 4.52)
- Public vilification and trial by media (paras 4.53 to 4.66)
- Inappropriate use of powers (paras 4.67 to 4.77)
- Use of penalties and sanctions (paras 4.78 to 4.85)

Ai Group suggestions as to ways in which these might be addressed efficiently are also set out in this Section, being:

- Supervising the Authority (para 4.86)
  - Charter of Service (para 4.88)
  - Procedural Guidelines for Information Release (para 4.89)
  - Board of Governance (para 4.90)
- Test Case Program (para 4.91)
- Compliance Fund (para 4.92).

Accountability

The ACCC must be prescribed in its handling of competition matters. This is to be facilitated through the development of co-operative guidelines with business, which have due regard to certainty, consistency and fairness in its approach, overseen by a Board of Governance that delivers accountability, transparency, and equality to the process.

4.2 Since1995, the objective of the Act was clearly expressed in section 2 - *to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.* This objective is still sound in 2002. However, there have been substantial changes to the competitive and economic landscape in the last twenty years. Rather than facilitate competition in the reality of the present day global environment for goods and services, the current regulatory regime and the policy of its administration could well be stifling competition by preventing Australian businesses from becoming larger (relative to the Australian marketplace) in order to deal with the challenges of an open and global marketplace.

4.3 Promotion of competition for competition's sake is no longer an acceptable benchmark for regulatory overseeing of the market. Where the regulation or the policies behind the regulation fail to address the needs of that market, they fail in the promotion of the

very efficiencies, certainties and incentives necessary for the economic growth of the nation inherent in the Act's objective.

4.4 The provision of consumer protection in the context of enhancement of the welfare of Australians cannot be translated into an authority to crusade for the lowest prices. The protection of the consumer is developed through a number of layers of legal rights: a regulatory exercise aimed solely at reducing the price for the good or service to the lowest profit margin stifles incentive for innovation, development, improvement, and efficiencies, and ultimately is counterproductive to the well-being of the economy.

4.5 Standard economic models for the last 100 years demonstrate that competition pressures businesses to keep prices low, to keep costs contained and to continuously seek ways in which to differentiate their product through improvements or innovation. It is an unarguable aspect inherent in competition that the main objective is to expand your customer base. In a large economy, the movement of consumers between producers can be dynamic and volatile but less obvious - loyalties can be tested against marketing attractiveness, special promotions, value adding service, staff changes, geographic locations, fashion trends, convenience, as well as price. In a smaller market like Australia, the shift in customer preferences can be observed more readily but the factors influencing the decision to change suppliers are the same. And not simply because of a price change.

4.6 In the twenty-first century, the legislative framework for fair and robust competition must be dynamic and responsive to the changing demands and expectations of the players in a market no longer easily defined by territorial borders. The administrator of the regulation must be equipped with the financial means and the technical skills to use the legislation to responsibly address market failures. It is not the intent of the Act nor is it a desirable outcome for the regulator to be empowered to redesign the market in accordance with its own standards and specifications. As Senator McMullen put it in an address to the Australian Equipment Lessors Associations:[7] *"The government's role in regulating a market economy must be to support a framework for informed competitive markets. Its role should not be to support the claims of individual businesses or groups of businessmen."* In other words, the ACCC's function is not to support one competitor against another or others or to champion the cause of individual businesses or consumers.

4.7 Although the Review is required to examine all aspects of the competition provisions in the Act, especially those in Parts IV and VII, and to consider specific legislative changes where a proven need arises, the broader aspects of the administration of the regulations are of the highest concern for Ai Group across all business and consumer levels of our membership.

[7] Shadow Treasurer, Senator R McMullen: "Politics is about Choices" speech delivered 4 July 2002, Sydney NSW at p.2

4.8 In a report tabled on 24 September 2001[8] it was noted that the ACCC had a central role in both competition policy regulation and in consumer protection issues. The report went on to say that "*The importance of these responsibilities makes it essential that it is seen to be accountable for its actions and that its operations and decision making are as transparent as possible."*[9] The Committee tabling the report highlighted the need for the ACCC to not only be fair and balanced in its decision-making, but also be **seen** to be fair and balanced .[10]

4.9 This emphasis on the appearance of fairness and reasonableness is reflected in the single principle of transparency. At this point, notwithstanding the honesty and diligence employed by the ACCC in its decision making processes, there is a marked lack of transparency in the process. This causes practitioners and businesses alike to question the methodologies and the reasoning engaged by the ACCC in some of its findings, having no reference point to check the accuracy or understanding of the ACCC about the premises on which it has based its decision.

4.10 The ACCC has amassed a vast range of powers and responsibilities probably unique amongst regulatory authorities of this kind anywhere in the world. There are obvious efficiencies in administration in the pooling of such duties and powers in the one agency, but the accumulation of such power should also be accompanied by a careful system of checks and balances and be subject to review and supervision to safeguard its ongoing integrity of performance.

4.11 The fundamentals of ***transparency, certainty and efficiency*** form the basis of this submission, both in the examination of the regulation itself, and in the investigation of its administration and enforcement. In a world that recognises the enforcement of high standards of corporate governance as a measure of the value of the enterprise, of equal importance to its profitability, and a driver in sustained profitability and consumer loyalty and welfare, Ai Group is keen to ensure the enshrinement of those principles in and for the Act and in its administration.

4.12 As the Chairman of the ACCC has acknowledged - *"Regulation can complement competition policy.....Regulation can conflict with competition policy"*[11] When power is so concentrated, as Prof Fels pointed out in 2001[12]:

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8 House of Representatives Standing Committee on Economics, Finance and Public Administration "Competing Interests: Is there a balance?"

9 House of Representatives Standing Committee on Economics, Finance and Public Administration Media Release 24 September 2001

10 House of Representatives Standing Committee on Economics, Finance and Public Administration Media Release 22 June 2001

11 Prof. A Fels, "Competition Policy: The Road Ahead for Egypt", ECES & the Australian Embassy, Cairo, 24 May 2001

12 Ibid

"Transparency and accountability are essential to ensure that businesses and consumers know under what legal conditions they operate and to facilitate inter-governmental cooperation. It applies both ex ante (formulating clear rules for potential economic operators) and ex post (making those concerned aware of enforcement decisions).

The following are important elements in achieving transparency and accountability:

- *Laws and regulations should be made publicly available.*
- *Any current gaps in coverage should be specified. Consideration should also be given to a "standstill" or "roll back" of such gaps.*
- *If any special rules exist for certain sectors, they should also be specified.*
- *All exceptions to laws and regulations should be publicly stated and justified.*
- *Where exemptions exist, exemption criteria - whether predetermined or through rule of reason analysis - should be set out in the published regime or guidelines, or judicial opinions.*
- *Provisions should be made also that modifications to the regime are regularly published.*

Transparency of enforcement policy could include publication of priorities, guidelines, case selection criteria and exemption criteria.

Case decisions should be publicised and explained, particularly where competition authorities make a negative decision on a case. Publication/explanation of such decisions by the competition authorities should be pursued where possible.

In order to promote transparency and accountability for decisions, it is considered important that an appeal body exists to consider matters that are dealt with by the competition enforcement agency. An appeal body is necessary to protect the integrity of the decision making process. ***It is also important that this level of accountability is both real and perceived in the wider community****."(emphasis added)*

4.13 At the same conference, Prof. Fels spelt out the need for independence in such an agency - *"The need for independence ties in with several other issues that have already been mentioned, namely institutional structures and transparency."* To promote such transparency and accountability for decisions and to provide natural justice, Prof. Fels said it was important that *"both merits and process review mechanisms"* exist. *"Such mechanisms will protect the integrity of the decision-making process. It is also important that this level of accountability is both real and perceived to be such in the wider community."*[13]

4.14 An international survey of practitioners in competition law compared the efficiencies of competition regulators in several countries. The survey produced some confused findings in respect of the ACCC, some of which do not appear to coincide with the more generally accepted public perception of the ACCC in Australia. The survey[14] commended the ACCC for its speed with merger handling, and particularly endorsed its leadership. It scored well for security of information and the speed of handling non-merger matters. However, in the areas of consistency in decision-making and informal guidance on issues affecting business, the scores were only marginally

13 Ibid.

14 The Global Competition Review : Rating the Regulators, 2000 (UK)

satisfactory. The lack of independence, transparency and expertise in legal and economic matters were the three areas of major dissatisfaction.

4.15 In addressing Egyptian regulators, the ACCC Chairman suggested that consideration be given to implementing the following types of provisions in a competition regime:

- *"rights of complainants to petition the competition authority and seek explanations for inaction on matters;*
- *rights of complainants to bring complaints before the competition authority;*
- *rights of private parties to access the judicial system to seek remedies for injury suffered by anti-competitive practices;*
- *due process for all parties in administrative or judicial procedures including protection of confidential information;*
- *where the competition authority makes dispositive case decisions, publication/explanation of such decisions by the competition authority; and*
- *appropriate access to avenues of appeal on merits and process."*[15]

4.16 When the formulation of policy, its implementation, and its operation (in regulation) are mixed into the one entity, there is a real risk that the entity could wittingly or unwittingly create policy to perpetuate its own power. This is undesirable in any democratic state.

4.17 One solution might be a more structured approach to empowering the NCC or conferring on it express policy powers and functions in this respect. Or, our suggestions raised in the context generally of accountability might be explored further.

4.18 It is accepted that the realities of the marketplace are savage. To win, everyone plays hard. There are rules, enforced by the referee, to keep the game fair. But there is inherently in the game the prospect of win or lose. At best, all players get to play again another day, but sometimes the team is constituted differently, and sometimes there are different teams playing on the same board. Sabotage of opponents is unacceptable behaviour but honest betterment through strength or skill or strategy is applauded. It is not in the interests of any player to reduce the game to a single team or a single player. It is certainly not within the power or authority of the referee to make up new rules as the game progresses or to shift players from one team to another. If a player is sidelined , it is an accepted and recognised penalty for foul play. The player knew the rules beforehand, and if they acted unconscionably in the conduct of the game, then they miss out on the prospects of the rewards of playing. If the referee's behaviour is considered unfair, biased or inconsistently applied, the referee is also accountable to a higher, independent authority.

4.19 Enforcing the Act is something akin to refereeing in the game of the marketplace. It's a commercially four dimensional game, where the various factors influencing the play at any time can shift, expand , and dissolve rapidly. Ai Group submits that the enforcement of the Act needs a charter of accountability for the referee, a precise and certain set of behavioural guidelines for the players and the right of appeal to a higher independent body on the interpretation of the rules and the referee's decisions.

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[15] Op. cit 11

4.20 Regulated parties have been variously categorised by commentators, but the two most popular classifications which would seem to encompass the broad constituency of the Act's cover would be:

- *"Amoral calculators, who will comply with the law if it is economically rational for them to do so and whose decision whether or not to comply is based on the sanctions they might incur and the probability of detection;....*
- *The organisationally incompetent, who are also inclined to comply, but fail to do so because of lack of knowledge and lack of internal controls"*[16].

4.21 Ai Group would submit that in most cases in Australia, even the worst anti-competitive behaviour is more likely to have been driven by the "incompetent organisation" rather than by deliberate "economic amoralists". Research alluded to in the ALRC Discussion Paper 65[17] confirms that ignorance and incompetence rather than deliberate intent usually forms the reason for non-compliance.

4.22 The Law Reform Commission also suggested that if the regulated party was ill-informed but otherwise well intentioned (meaning in this context, not with malicious fraudulent or dishonest intent) then persuasion and education would be more appropriate than prosecution. International commentators agree that it is important to use the appropriate strategy or combination of strategies for a given circumstance, the issue *being "not whether to punish or persuade, but when to punish and when to persuade"*.[18]

4.23 Obviously, there are a range of factors that influence the ACCC's strategy, but it might be said, (as it has been in the course of the ALRC's examination) prosecutions are most likely to be pursued *"where a contravention gives rise to an immediate risk to health, safety or environment, a direct harm has already resulted or infringements are flagrant, repeated or extreme in their culpability."*[19] The ACCC uses a range of enforcement and regulatory tools, but Ai Group believes that the ACCC must use the right regulatory tool to achieve the best outcome - *"Education and consumer alerts... maybe more effective and reach a wider audience more cheaply and effectively, than a conviction or civil order."*[20]

4.24 The examination of mechanisms by which to gauge the effectiveness of a regulatory regime and its administration shows that the rules and the implementation of those

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16 Australian Law Reform Commission, "Securing Compliance Discussion Paper - Civil and Administrative Penalties in Australian Federal Regulation" April 2002 at p.118.

17 Ibid, referring to J Black, "Managing Discretion" paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001 at p. 13

18 J Braithwaite, "To Punish or Persuade: Enforcement of Coal Mine Safety" (1985) State University of New York Press Albany, NY, USA

19 Op.cit 16 at p.119

20 J Segal, "ASIC Issues: An update on the Last 12 Months" (paper presented to Insurance Council of Australia, 10 August, 2000)

rules must be understandable, predictable and consistent. There may be at least five criteria by which "good regulation" can be judged -

- is the action or regime supported by legislative authority?
- is there an appropriate scheme of accountability?
- are the procedures fair, accessible and open?
- is the regulator acting with sufficient expertise?
- is the action or regime efficient?[21]

It has also been argued that a lack of fairness or accountability in the regulator can affect compliance and therefore the regulator's ability to fulfil its mandate.[22]

4.25 In the United Kingdom, the Better Regulation Task Force established a list of "Principles of Good Regulation"[23]:

- Transparency – including a clear statement of the purpose of regulation and the penalties for non-compliance, with guidance for those affected in plain English;
- Accountability – including clear accountability of regulators and enforcers to government and the community and a well-publicised, accessible, fair and efficient appeals process;
- Proportionality – including proportionality between enforcement action and risk, and between penalties and harm done;
- Consistency – including consistency of enforcement action within and across regulators, and consistency with international laws:
- Targeting - including the use of *"a goal-based approach... with enforcers and those being regulated given flexibility in deciding how best to achieve clear, unambiguous targets*."[24]

4.26 To apply these principles to the ACCC, it might be properly asserted that the ACCC has demonstrated an enviable degree of transparency through its publicity machine in respect of the regulations it seeks to enforce and the penalties for non-compliance. However, in respect of the other four principles, it seems to Ai Group that they are not self evident in the ACCC regime. If this is not the case, then the perception by the regulated of the failure of the regulator to exhibit the levels of ***proportionality, consistency, and accountability*** required of it, has also lead the regulated to express reluctance to confer on the regulator powers which can only be exercised and should only be exercised (such as those suggested in targeting) by responsible and sophisticated administrators with proven records of implementation and maintenance of **all** the principles of fairness.

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21 R Baldwin and M Cave, Understanding regulation: Theory, Strategy and Practice" (1999, Oxford University Press, at p.77

22 Ibid

23 Better Regulation Task Force" Principles of Good Regulation" from www.cabinet-office.gov.uk/regulation/TaskForce/> 21 December 2001

24 Ibid, p 8, 9

4.27 The Australian Taxation Office appears to have embraced the tenets of good administrative behaviour by its adoption of a significant charter of service and performance (Taxpayers Charter) which attempts to address the guidelines that were issued for local governments and their agencies in the UK in 1998:

i. Standards - setting out performance levels
ii. Openness - requiring wide dissemination of plain language guidance about applicable rules and how they will be enforced
iii. Helpfulness - advising, assisting and educating business on how to comply, with the aim of preventing rather than punishing non compliance
iv. Complaints handling process - effective, timely and trusted
v. Proportionality - action proportionate to the risk, including consideration of individual circumstances and attitudes of the regulated
vi. Consistency - a commitment to fair, equitable and consistent activity by the regulator.[25]

4.28 Procedural best practice demands the giving of written reasons for decisions, consultation before enforcement action is taken (unless otherwise absolutely necessary) and written advice on appeal mechanisms to be given at the time any action is taken.[26]

4.29 All these matters must be actively embraced by the ACCC in a more transparent manner to secure the confidence of the regulated parties. It is accepted that there is pressure on the ACCC, as with all regulatory agencies, to demonstrate to its comptrollers, (the Government and in particular the Senate Appropriations and Staffing Committee) to justify its funding and resources. In today's environment, this justification must be outcomes-focussed, and this is difficult indeed to both quantify and define. To measure the impact of its regulatory activity, it is not enough to show the amount of fines amassed, or the number of cases being prosecuted, or even the number of enforceable undertakings in the register. It may be frustrating and problematical, but it is necessary to drill down to smaller more specific items, in order to get some realistic idea of the regulator's success with its regulated.

4.30 An American commentator[27] has suggested that key indicia of such success would include:

- empirical validation of effects and outcomes
- behavioural outcomes: compliance rates or other outcomes like the adoption of
- best practice, other risk reduction activities, "beyond compliance" activities or voluntary actions

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25 Enforcement Concordat issued by the Cabinet Office, UK, 1998 (reference sourced to www.cabinet-office.gov.uk/PublicSector/Enforcement/Concordate.pdf>)

26 Op.cit 16 at para. 4.91

27 M Sparrow, "The Regulatory Craft" (2000.) Brookings Institution Press, Washington DC

- agency activities and outcomes such as enforcement actions, inspections, education and outreach, collaborative partnerships, administration of voluntary programs or other compliance generating or behaviour change-inducing activities; and

- resource efficiency.[28]

4.31 Ai Group suggests that the ACCC could be seen to do more in the area of ***compliance education as persuasive enforcement*** rather than as its presently, somewhat notorious, public face of rigid enforcement through punishment. Much might be learnt and much gained by a closer examination of the Australian Taxation Office's activities in this area.

4.32 The ACCC has an important role in the general market to identify investigate and penalise illegal and unacceptable anti-competitive behaviour. The Act is prescriptive and complex. Its provisions make reference to vague concepts such as "market", "substantial lessening of competition", "unconscionable conduct". The courts have struggled to explain and clarify the Act and its impact on both businesses and consumers, in a vacuum of legal exigencies, based on a skill set usually unfamiliar with commercial drivers or economic principles. The ACCC as regulator and enforcer of a legal prescriptive, has also had to assimilate the commercial prerogatives governing competitive activities so as to act effectively and fairly in its interpretation of the statute and its underlying policy.

4.33 Incidental to its aim of rectifying market imbalances, is the ACCC's emerging offensive in correcting perceived market failures. Market failure in this context does not mean insolvency or dissolution of a firm, but rather, where the forces of competition lead to a less than optimum competitive outcome: where there is inequality in the way in which different participants can absorb costs or have to incur additional expenses to compete.

4.34 However, it is submitted that the ACCC is not intended to act as an architect of market dynamics. Yet in an effort to avoid potential anti-competitive outcomes, the ACCC has moved to restructure markets where it perceives there to be imbalances in the level of competition, thereby interfering with those market dynamics.

4.35 How this perception by the ACCC of its role is formed, is an issue of grave concern for advisers and participants in the market. The ACCC is a regulator and enforcer. Is it the role or the right of the ACCC to determine the players in the market, who they should be, how big they must be, how many there must be, and what prices they should offer? It is Ai Group's submission that this is not the function of the ACCC, nor should it become so. Some of the matters discussed later in this submission challenge the proposal that the ACCC powers be increased in order to assist it in effecting just this outcome. A fundamental platform of this submission is to reject that possibility and to lay the foundation for an operational mandate for the ACCC that avoids any extension of the ACCC's power.

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[28] Ibid, at p.119

4.36 Furthermore, the static interpretation of market dynamics which appears to be the current method adopted by the ACCC is inadequate and inappropriate. Even where outside expertise is called upon to assist the ACCC in making its determinations, this expertise is only valuable for a "snapshot" summation of the issues since it is offered either on the basis of inadequate briefing or on the basis of a retrospective view of the market in question. The advice could not provide more than an overview of the indicia. The market itself will have moved beyond the point at which the picture is taken and is therefore of no use in assessing the components of the picture at some time in the future.

4.37 This is of particular concern in the case of mergers and authorisations – the state of the market after a merger has been effected may still be competitive, notwithstanding the substantial lessening of competition the merger may have caused. Is Australia large enough to sustain a policy of hierarchical competition when the market can only support a relatively "flat" or limited participation level? To re-emphasise that competition for competition's sake is not meant to be the aim of the Act, we suggest that section 50 of the Act should take into account that notwithstanding the loss of a competitor in a merger, if the end result is still a viable competitive market (albeit with fewer players) then the merger should be allowed to proceed, and market dynamics determine the outcome.

Conflict of functions

The question of whether it is time to distinguish, through a separation of functions, the role of the competition facilitator, and the role of the consumer protector, must be addressed.

4.38 A most significant aspect of the role and function of the ACCC is in its potential conflict as regulator of competition and as champion of the consumer's protection. The enormity of its impact on the economy cannot be understated, given this wide-ranging mandate. In one sense, (and the interpretation that the ACCC's Chairman, Prof. Fels, has recently accepted) individual or domestic purchasers are one type of consumer and businesses in the supply chain are another, and therefore, there is little perceived conflict for the ACCC in managing this joint function.

4.39 According to Prof Fels[29] *"Australia's anti-trust law needs to be viewed in the context of its attempt to adopt a wider 'comprehensive, national competition policy'"*, which *"goes well beyond traditional anti trust law and includes policies on trade, public and private ownership, intellectual property...."*

4.40 It is in endeavouring to draw together the pervasive influences on corporate behaviour that much of the confusion for business lies.

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[29] The Future of Canadian Competition Policy in the 21st Century Conference - Prof. A Fels, "Competition Policy: Governance Issues - What are the alternative structures?" 20 June 2001 at p.1

4.41 Ai Group does not dispute that consumers can be business as well as individuals. Or that businesses as consumers may also require protection from other businesses outside the normal interplay of competition, where the business is impacted by virtue of the acts or practices of other businesses as suppliers to the consumer business.

4.42 However, Ai Group does see a very clear conflict between the general consumer protection role and that of regulating the activities of the suppliers to those consumers. When the Act was originally enacted, Australia was a very different economy than it is today. The anti-trust regulations in the United States provided the basis for the development of Australia's own law governing restrictive trade practices. The main evils under US law were the price fixing cartel and the monopoly. Consumer protection, on the other hand, was a relative newcomer, fuelled by consumer power advocates like Ralph Nader. Australia embraced both issues and empowered a single authority to oversee their enforcement - the Trade Practices Commission.

4.43 The integrity of the Commissioners of the ACCC in particular has never been questioned. On the contrary, practitioners have been able to exercise a significant degree of confidence and trust in the word of the ACCC in "comfort" letters and preliminary advices.

4.44 Although the main focus has been on the criticisms aimed from the business sector in respect of the ACCC behaviour against business, there is also a strong inference drawn from media reports that suggest that the consumer groups are also vocal against what they often perceive to be the "voice for big business".

4.45 Why is this so? The ACCC has long championed the benefits of a vigorous competitive economy for domestic consumers and most legal actions undertaken by the ACCC relate to consumer protection issues. There is a general feeling that the ACCC's pursuit of corporate compliance of the Act has in fact increased awareness of the benefits of compliance from a profitability aspect. But according to a House of Representatives Economics Committee report[30] the volume of criticism from the small business sector is increasing, and it is becoming more authoritatively sourced, with skilled analysis and reasoning behind the complaints or concerns expressed. No longer can the ACCC claim that the critics of its behaviour are based in the exclusive domain of big (and often multinational) business.

4.46 The current Chairman of the ACCC has publicly[31] refuted any suggestion that he or his agency are anything but accountable to a series of persons: the government, the business sector, and the consumer, and questions what more can be necessary to satisfy the need for accountability.

4.47 However, the issue stems from the fact that the ACCC can conduct itself in a way that is not overseen by any third independent party. Its actions are presently undertaken without the necessary checks and balances to ensure that the *manner* in which it

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30 House of Representatives Standing Committee on Economics, Finance and Public Administration "Competing Interests: Is there a balance?" tabled 24 September 2001

31 Australian Financial Review, 20 May 2002, p 62

conducts its investigations, the *manne*r in which it alerts the public to potential issues, and the *manner* in which it commences actions for any alleged offence under the Act meets the highest standards of fairness and equity. Reputations as well as profits are at risk when the media (often less than properly briefed on the facts) takes up the sensationalism of an ACCC "raid" or the ACCC issues a writ seeking significant penalties or damages and this is accompanied by a provocative media release from the office of the ACCC Chairman.

4.48 The ACCC's active and aggressive positioning with respect to consumer protection in Australia has led to consumer protection compliance becoming a main priority with most businesses. The "shame file" mentality behind the publication of alleged offences before evidence has been properly assessed and compiled to commence an action has certainly assisted in increasing the profile of both the ACCC and its compliance programs in this area.

4.49 However, this fear response has not necessarily contributed to any greater understanding of the principles of fairness in *competition behaviour*. Whilst the ACCC enjoys a marked degree of popularity with the general consumer public, this popularity is not replicated in businesses generally.

4.50 We do not believe that consumer advocates need to be represented on the Competition Tribunal or on any other board or authority that is created to manage the accountability of the ACCC in its competition functions. Nor would their specialised qualities necessarily improve the operation of competition behaviour of business. For the reasons expressed earlier in this paper, consumer protection per se is not a matter that easily co-resides with competition regulation and enforcement. Effective and positive management of competition can certainly lead to enhanced consumer protection, but consumer advocacy is not an essential part of the competition process and its influence is found at the end of the supply chain not in the structure of the chain itself.

4.51 It should not be too late to separate the functions and devolve the enforcement and regulation of the consumer's interests (including the business consumer) to another body, independent of the present regulatory bureaucracy in the ACCC. With a restructuring of the ACCC so that it merely governed the competition aspects of the Act, and the specific regulated areas of telecommunications, etc, this might allow the ACCC to focus more of its attention on economics and assume a more positive role in the promotion of economic growth through enhanced constructive and efficient competition regimes. Alternatively, it could focus on the consumer protection aspects and another established body acquire the role of competition guardian.

4.52 The Global Competition Review: "Regulating the Regulators, which questioned expert practitioners and advisers in the field, asserted that small business had the largest record of increased criticisms of the ACCC.[32] This is an interesting assertion, being somewhat inconsistent with the general perception we in Australia have been lead to believe is the case. Without the context of the survey's details, however, (only its results), it is difficult to say where the criticism lies – with the ACCC's handling of big

[32] Op. cit. 14

business matters, consumer protection matters or the unconscionable conduct provisions.

Public vilification and "trial by media"

> *Issues which have drawn considerable debate in recent years, are claims of public vilification of companies and management, "trial by media" and inappropriate use of powers by the ACCC. These criticisms should be resolved by developing a set of dynamic procedural guidelines to cover matters of publicity, investigations, and undertakings.*

4.53 Ai Group has received a number of comments from our member companies complaining about what they perceive to be the "public vilification" of a company and its senior executives by the ACCC in its pursuit of a case.

4.54 The public vilification that presently occurs should be eliminated altogether from the armoury of the ACCC. The ACCC uses the media to roust the alleged offender and to provoke competitors and consumers to support its investigations. Too frequently the outcome of these "trials by media" reveal that there was insufficient evidence to bring a case in the first place but the alleged offender is battling a critical stock market, and consumer backlash as well as waste of management time in resolving the matter.

4.55 The regulatory agency is often accused of using the most derogative and pernicious forms of attack on a suspect offender (especially those involving a well known brand or multinational business). The manner in which the respected offices of the ACCC helps the media to sensationalise issues unfortunately only reinforces the misunderstanding in the eyes of most consumers that big business is again trying to get away with something that benefits only the big business.

4.56 In some respects it might be suggested that the ACCC, in taking this action, is trying to secure its own form of punishment on the alleged offender irrespective of the conclusions drawn by a court based on legal evidence and due process and without regard to the penalties provided for under its governing statute. The only possible outcome of the pre-emptive strike in these circumstances is a loss of consumer confidence in the company so marked, and a retreat from its products. At worse, there can be significant loss of shareholder confidence in the company, possible action by financiers, suppliers, employees, and competitors. Even other regulatory authorities who perceive the ACCC action as a possible threat to their own enforcement agenda (especially where there are financial penalties or fines involved) can be involved.

4.57 The ACCC must be curbed in its manner of publishing its views as law before the court can determine the matter. There is to be a distinction drawn between accurate and appropriate reporting of issues affecting the public interest (as is supported in section 28 of the Act[33]) which has been approved by the courts in Australia for some

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[33] "(1) In addition to any other functions conferred on the Commission, the Commission has the following functions:

(a) to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the

time[34] and the manipulation of the media which leads to the inference by the public that the derogatory comments are already established and proven facts against an alleged offender. When Mandie, J observed that *"In an open and truly democratic society, the right of various forms of media (that is, the media as a means of communication of the issues, parties and hearing) to be present and publish is generally regarded as being in the public interest, so long as the reports are accurate, and do not misrepresent by omission or unbalanced selection, the evidence and its effect."*[35], he was reinforcing the statutory permission in section 28 of the Act to the extent that the media has a rightful place also in the dissemination of valuable public interest material arising out of a court proceeding. By natural extension, he seems to be inferring that the ACCC, under its statutory authority, could use the general media's rights in this way effectively, and for the public benefit.

4.58 But the emphasis in His Honour's judgment rests on "accuracy", and the failure to "misrepresent by omission" or by "unbalanced selection the evidence and its effect." There is anecdotal material which calls into question whether the ACCC has always diligently pursued accuracy, completeness and consistency in its media statements.

4.59 There has been a creeping acceptance of adverse publicity as a means of punishing perceived bad behaviour on the part of business, targeting the business's markets, its investors, consumers and suppliers to sanction the alleged illegal activity by withdrawing their capital, their loyalty or their products and services. It is now part of the ACCC's armoury where it sees the impact on a company's profitability as the most effective weapon against anti-competitive behaviour, on the basis that if a company were to profit from its illegal activities, then when it is "caught" that profit will be taken away from it by the very market it has sought to control.

4.60 But the overriding consideration in our society is that the defendant is innocent until the contrary is proven. It is therefore of utmost importance that the regulatory authority whose job it is to collect the evidence against an alleged offender, does not also act as judge and jury before the appropriate authority of the court can properly determine that the guilt has been so proven, and pass sentence accordingly. As Smithers, J stated in *Eva v Southern Motors Box Hill Pty Ltd*[36] , "*appropriate restraint in tone and content is required. But adverse publicity initiated by the prosecuting authority requires special consideration...In such a case, an element has been injected into the situation which subjects the parties to more than the natural and probable*

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carrying out of the functions, or the exercise of the powers of, the Commission under this Act;

(b) to make available to the public general information in relation to the matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;

(c) to make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers."

34 See the chain of authorities such as Eva v Southern Motors Box Hill Pty Ltd (1974-1977) ATPR 40-026, Thompson v J T Fossey Pty Ltd (1978) ATPR 40-076, Trade Practices Commission v Cue design Pty Ltd &ors (1996)ATPR 41-475, ACCC v Nationwide News Pty Ltd & Ors (1996) 18 ATPR 41-519, and ACCC v Nissan Motor Co (Australasia) Pty Ltd & Anor (1998) ATPR 41-660

35 Herald & Weekly Times Ltd & Ors v Magistrates Court of Victoria & Ors (1999) 3VR 231 at p.248

36 (1974 - 1977) ATPR 40-026 at 17,359

consequences of mere publication of the fact that they are being prosecuted for named offences."

4.61 The ACCC has agreed that accurate reporting of offences is essential given the often complex issues surrounding a Part IV offence. But it is also aware that its position is impressively authoritative and that media representatives, unfamiliar with the intricacies of the Act and its application, will readily restate ACCC releases for the consumption of an inexpert public, relying on the ACCC's authority alone so as to avoid independent investigation or confirmation. This is not to suggest that the ACCC necessarily issues statements that are not based on its reasonable expectations of an investigation proceeding to a prosecution. However, there is a line to be drawn when an ill-placed statement can have such severe consequences in circumstances where the case has yet to be proven.

4.62 Ai Group acknowledges that a balance must be drawn between effectively discouraging anti-competitive behaviour and inappropriate regulatory tactics that have not been subjected to due process. It is our contention that until the ACCC has sufficient evidence to support a legal action (whether that evidence is adequate to bring a successful prosecution is another matter) of any kind, there should be no publicity of an alleged illegal activity. To the extent that the courts may find some usefulness in adverse publicity preventing ongoing offences through consumers becoming aware of the possible offence, it is our belief that the principles of natural justice and fairness in undertaking due and proper process to safeguard the civil right of innocence until proven otherwise must stand paramount.

4.63 Representing, as we do, both corporate and individual consumers, we fail to see how the ACCC should be allowed to acquire (effectively) injunctive relief based on its timely adverse publicity in the absence of strong statutory rights to that effect. Furthermore, Ai Group has grave concerns that the ACCC has, whether deliberately, or through innocent misrepresentation by reporters, embarked on public vilification not only of companies that it targets, but of individual executives associated with those alleged offenders. Anti-competitive behaviour under the Act is associated with dishonesty and greed in the minds of the media and the public. Persons, whether named or simply generally known to be associated with corporations that are mentioned as possible offenders, are irreversibly damaged by the innuendo and inferences surrounding such a claim by the ACCC.

4.64 Unlike the usual criminal offences where an individual person is specifically named and identified, a corporation is manifested in the eyes of the general public, in the persona of any individual known to them that works with or for the corporation. That person automatically becomes clothed with the same malfeasance accorded the corporation, irrespective of whether that individual was concerned in the practice the subject of the action or investigation. This is grossly unfair to those persons, who have no recourse of any nature and yet stand to lose much by implication.

4.65 An argument that the ACCC may raise to justify the continued use of pre-emptive publicity, is the suggestion put forward by some judicial commentators that adverse publicity should have a bearing on the severity of the sentence in cases where subsequently, the case is made out against a company or officer. This approach

appears to receive the favour of some courts for a period depending on the personal philosophies of the judges concerned.

4.66 The ACCC may also contend that adverse publicity in that event will effectively reduce the possible penalty otherwise incurred by a party, because much of the "punishment" will be seen to have already been meted. However, there are growing concerns being expressed from the bench that the role of judge and executioner are too often and too glibly being assumed by the competition regulator, and that these functions should be rightfully performed only by the court of jurisdiction, with proper evidence and due process.[37]

Inappropriate use of powers

Appropriate use of the ACCC's extensive powers of investigation and enforcement is critical for business. An ACCC action, reported widely, impacts on markets around the world.

4.67 The Federal Court recently raised its concerns about the prevalence of the ACCC acting in the capacity of executioner as well as regulator and usurping the role of the Court in determining penalties. It was accepted that the practice of "penalty bargaining" by the ACCC had been approved by the courts over a period of years, perhaps as a means of both clearing the court's list as well as providing the court with some comfort that the ACCC, being the regulator, would also be conscious of its enforcement and compliance obligations in complex issues such as those offered by Part IV.

4.68 Nevertheless, there would seem to be a growing disquiet amongst the judiciary that the reach of the ACCC was extending beyond its statutory powers, particularly in respect of Part IV offences. *"The settlement of quasi-criminal proceedings (in which may be included proceedings for pecuniary penalties) is not without its critics. There are very real problems. Consent may be coerced. It may be given to avoid detection of other contraventions and higher penalties. The absence of a trial has the potential to create difficulty when the court is finally asked to intervene. A hasty disposal of a case, though it does free up the court's time, may sometimes be at the expense of justice.*[38] *"The traditional aim of the criminal law is deterrence, rehabilitation and incapacitation. However, in antitrust cases, the position may not be so simple. Of course, it is correct that an appropriate penalty must take into account mitigating circumstances such as remorse, the expression of remorse before discovery of the contravention, cooperation with the Commission, a plea of guilty, the financial*

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[37] See Weinberg, J in ACCC v Colgate-Palmolive Pty Ltd [2002]FCA 619 "The Court may be seen, perhaps not altogether incorrectly, to act as a "rubber stamp" in simply approving a decision taken at an executive level by a body charged with investigating and prosecuting contraventions of the Act, but having no role in actually imposing particular sanctions for those contraventions. There are important parallels between the fixing of a pecuniary penalty under s 76, and the ordinary sentencing process which is quintessentially a matter for the courts: Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited [2001] FCA 383 at pars 4-6 per Finkelstein, J"

[38] ACCC v ABB Transmission and Distribution Limited [2001] FCA 383

capacity to pay the penalty, the parity principle, and the totality principle."[39] These are properly matters for a court to consider in setting the penalty and the sentence, and highlight the real risk for the regulator whose charter is not judicial or quasi-judicial in this respect. As Weinberg, J asserted in the Colgate-Palmolive as recently as May 2002: *"…nothing I have said should be regarded as a criticism of a joint submission being received regarding what might be the appropriate **range** of pecuniary penalties to be imposed …..… At the same time, unlike what seems to have emerged as the more usual practice, namely putting forward an "agreed penalty", the suggestion of an appropriate range of pecuniary penalties allows for the proper exercise of judicial discretion in what is fundamentally a matter for the courts to determine."*[40]

4.69 An enforceable undertaking, the mechanism provided to the ACCC under section 87B, is an instrument which takes on the authority of an enactment that can be reviewed under the *Administrative Decisions (Judicial Review) Act 1997*, and hence can also be the subject of a court order to enforce its terms. It has been used extensively by the ACCC since its incorporation into the Act in 1993.[41] Accordingly, it too must be subject to the rigours of accountability and transparency to ensure that it is administered fairly.

4.70 There is grave concern amongst Ai Group members that the enforceable undertaking is often used as a threat to force firms to enter into obligations in respect of their commercial decision making that would not be necessarily imposed on them if the ACCC were to pursue its allegations through the due process of a court prosecution. The rationale for them entering the enforceable undertaking is posed as a way of preventing a costly and time-consuming court battle. In most instances, it can be confidently said that the ACCC's knowledge of the Act significantly outweighs that of the alleged offender.

4.71 The firm involved is therefore acutely aware that the ACCC holds significant cards in the prosecution of alleged offences under Part IV - expensive expert advice from economists, actuaries, financial and accounting professionals would be required to rebut arguments put forward by the ACCC. Management time and effort will be distracted from the business of the firm for lengthy periods, and there will be extraordinary costs associated with any defence of a prosecution. Expediency more than guilt can often dictate that firms will agree to an enforceable undertaking in these circumstances.

4.72 But is this justice and is this appropriate use of the regulatory power of the ACCC? Does it effect an outcome required by the regulations or does it effect an outcome that suits the ACCC? In other cases, it may also be argued that enforceable undertakings provide a clever arrangement for some firms to avoid the otherwise market sensitive public scrutiny of a court's examination of the issues under Part IV. Although the Act provides a mechanism for the ACCC to seek enforcement of its terms through the Federal Court, overt monitoring of compliance or any program of checking or audit of

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39 Ibid at para 34

40 Op. cit 37 at para 35

41 Refer to the ACCC website for specific details of undertakings - www.accc.gov.au

the firm's activities, appears, at least publicly, to be non-existent or of negligible effect.

4.73 There is also the growing unease amongst the professions serving firms in this area that enforceable undertakings are becoming *de facto* "cease and desist" orders, based on evidence that could not support either an injunction or a prosecution in the ordinary course. Whilst it might be asserted that firms that believed in their innocence should not be frightened into submitting to a strenuous undertaking, the commercial reality is that such decisions are driven by a need for the firm to "get on with business" - a balance between the possible detriment caused by the terms of an enforceable undertaking, against the costs and potential damage caused by pursuing an issue through the legal system. The undertaking involves a compromise which for commercial reasons is acceptable, although it might be questionable in the pursuit of justice.

4.74 Moreover, enforceable undertakings are recorded in a public register maintained by the ACCC. This is in accordance with the Act. However, it would be appropriate for enforceable undertakings that are either terminated or abandoned or which, by their terms expire, to be removed from the register and all mention of the names of the firms that entered them similarly expunged from the record. The access to this register from overseas investors, competitors and trading parties, means that the continued publication of a firm's details under section 87B when the terms are no longer relevant or applicable can lead to a lack of confidence in the firm and signals to investors potential issues that might have an impact on their investment decisions in that firm.

4.75 The ACCC issued its Charter of Service in November 1997 and there has been no material update or amendment since then, notwithstanding the growth in corporate governance issues and the most recent announcement by the Federal Government[42] which emphasizes the Government's commitment to extracting the same degree of accountability from its agencies and authorities as is being demanded from the corporate enterprises they serve.

4.76 The Chairman of the ACCC has appropriately identified the powers to which the ACCC *reported*, namely, parliament, the courts and the community. He also acknowledged that it was "highly accessible to the media" and that its Annual report was tabled before a parliamentary committee which provided a forum for critics and supporters alike to comment on the activities and conduct of the ACCC *in the preceding financial year*. But this is not, in Ai Group's view, proper accountability. Being responsible for current conduct and to answer to another body for the behaviour of the Commission, its officers and staff, and to demonstrate strict adherence to the principles of corporate governance and probity in the performance of their duties are matters that require a currency and a dynamism of engagement between the parties involved throughout that course of conduct or behaviour. At present, there is no such

[42] The Prime Minister, John Howard, announced a review of the accountability and corporate governance of statutory authorities and agencies on 1 November 2001 in the Liberal Party Election Policy paper "Backing Australia's Industry – Part 3: Corporate Governance with Statutory Authorities" at p.14

body or authority that oversees the performance or the decision-making processes of the ACCC."[43]

4.77 One wonders whether an overseeing authority might have questioned a number of recent actions by the ACCC as to whether they wholly served the purpose of the Act:

- On 9 May 2002, the ACCC commenced an action against Danoz Direct Pty Ltd for alleged misleading and deceptive conduct in the advertising of a home-gym device known as *"Abtronic"*. The action was not prompted by any Australian consumer's complaint or by the independent investigation by the ACCC. It arose, Ai Group believes, solely by virtue of a similar action having been commenced a few days earlier in the USA by the ACCC's regulatory counterpart against the *"Abtronic"* promoters in the USA.

- A childcare centre (the Labrador Child Care Centre) telephoned the ACCC's regional office in Brisbane seeking advice and guidance on its plan to introduce minimum fees with other centres in the area. Instead of using this opportunity to assist the industry in understanding the Act and the impact of such a plan on competition (and taking the time to understand the market issues), the ACCC took the call as evidence that a contravention had already occurred and commenced legal action against the centre. It might be said that the call to the ACCC had been prompted by a genuine need and willingness on the part of the centre to comply with the law – that effort had been "rewarded" with a court action when it could reasonably be expected that the ACCC should have used the circumstances to facilitate compliance through education rather than enforcement.

- Recently, in a public forum, the ACCC Chairman was asked whether the ACCC would seek to impose any penalty on the Microsoft group of companies operating in Australia after the US courts had found Microsoft (US) to be in contravention of the equivalent of section 46, in the USA. The Chairman's response was to the effect that the ACCC did not see that there would be much deterrence in a $20 million fine when used against a company of Microsoft's size. Is this "selective" enforcement actually an acknowledgement by the ACCC that penalties, no matter how severe, are unlikely to have any impact on certain behaviourable offences?

Use of penalties and sanctions

Ai Group believes there is a need for tough penalties for corporate crimes like fraud, theft and conspiracy, and where individuals are found guilty of these, they should be punished under the appropriate criminal laws. However, we oppose the imposition of criminal sanctions against offenders charged with anti-competitive behaviour under Part IV.

[43] Australian Financial Review, 20 May 2002 at p 62

4.78 The ACCC speaks of the need to take immediate action to prevent greater loss or damage arising from the actions that it alleges to be occurring in contravention of the Act, and regards the issue of public warnings, press releases and "retaliatory" statements as appropriate in such circumstances. However, as the recent oil company investigation has shown, the issue of these pre-emptive strikes and the accompanying media fanfare over the possibility of an action, are not always soundly based. The encouragement of whistleblowers is part of the ACCC's enforcement strategy but must be carefully supervised to ensure that actions undertaken in consequence of a whistleblower's representations are supported by sufficient evidence before the assertions or allegations are made public.[44]

4.79 At the time of this submission, the ACCC had announced its draft leniency policy on what it sees as the "most serious and economically damaging contraventions …such as price fixing, bid rigging and market sharing."[45] This draft policy seeks to legitimise the whistleblower and grants the company and the individual certain immunities from prosecution, subject to conditions. Without the checks and balances to the ACCC that Ai Group is advocating be implemented, there is a real risk that such a policy in operation would attract severe criticism from all sectors of the community. Moreover, is the ACCC qualified (either legislatively or administratively) to apply such a policy?

4.80 There is no doubt that the power of the ACCC has grown significantly in the last decade. Its portfolio shift to the Treasurer reflects the importance it holds to the economic managers in government and its appropriations funding secures it as a lynchpin in the regulatory needs of the legislature.[46]

4.81 The ACCC now has extensive powers of investigation, search and seizure and is currently involved in an appeal from a decision which allowed it to disregard legal professional privilege in its preliminary investigations.[47]

4.82 Its regulatory and enforcement powers have developed into interventionist authority. The ACCC can examine from all aspects the very commerciality of an enterprise, its strategies, its plans and motivations. It can demand details of accounting, financial and marketing material that contain at best, commercial in confidence matters but also extremely market sensitive information that bears on the immediate commercial position of that enterprise in domestic markets, its investors' market and its competition. Whilst it enjoys a fine reputation in most instances for upholding the confidentiality of its investigations, this seems to be almost an accident of the

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44 See ACCC Media Release 143/02, 7 June 2002 - "ACCC Asks Whistleblower to Call In" and article by Carolyn Cummins in Sydney Morning Herald on 6 April 2002 "Caltex Chairman Hounds ACCC", p.20. Note also the ACCC's response to claims of trial by media as reported in the Australian Financial Review on 20 May 2002 at p.62 – "Recently there have been two claims of trial by media. Rregarding the recent allegations against oil companies, the whistleblower went to the media: with Qantas it was Virgin. The ACCC, in both cases, confirmed its investigations."

45 ACCC Media Release 4 July 2002 "Draft Leniency Policy to Break Hard Core Cartels Issued"

46 Australian Government Federal Budget 2002-2003 - Treasury: Australian Competition and Consumer Commission total appropriation $61.8 million. ACCC Annual Report 2000-2001 noted at p.155 a total of $43,981,000 in fines and costs was remitted to the Official Public Account and a further $432,000 remitted for Authorisation Fees under the Act

47 ACCC-v-The Daniels Corporation International Pty Ltd (2001) 182 ALR 114

administration rather that as a result of adherence to a rigorous set of governance rules or guidelines.

4.83 Ai Group is a strong advocate of compliance education. Ai Group believes that education of this nature is likely to have a far greater impact on the conduct of the market, than individualised enforcement actions. Compliance can drive profitability. Enforcement merely denies it.

4.84 The ACCC should be required to change its focus from a concentrated enforcement zeal to a broader education and compliance approach which can return benefits to **all** the participants in an industry or industry sectors, as well as consumers and the economy generally.

4.85 The incorporation of a supervising authority to regulate the actions of the ACCC and to steer the allocation of its resources toward securing the objectives of the Act through education and facilitation (rather than enforcement) would be a necessary part of the overhaul of the ACCC's administration of its powers.

Supervising the authority

- *"Board of Governance" to oversee the implementation and development of procedural guidelines and charter of service, and administration of the ACCC.*
- *A charter of service governing the relationship between the ACCC and its customers*.
- *Procedural guidelines for the conduct of investigations by the ACCC,*

4.86 Ai Group has a number of suggestions in this respect. These suggestions are not intended to call into question the integrity of the Commission or its staff. They are not designed to hobble the ACCC in the important enforcement role it has under the Act. To the contrary, these suggestions are aimed at assisting the ACCC in continuing to undertake these activities with confidence and without risk of adverse and unnecessary criticism which could distract it and those to whom it reports (government, court and community) from the real issues at hand.

4.87 Suggestions for further examination are set out in the following paragraphs.

4.88 ***Charter of Service***

4.88.1 First, Ai Group would propose a significant redefinition of the ACCC's Service Charter. It was a pioneer statement in 1997, when most regulatory authorities and government agencies were still trying to come to terms with the Competition Reforms outlined in Prof. Hilmer's first report in 1993.[48]

[48] Hilmer,F "National Competition Policy: Report by the Independent Committee of Enquiry into Competition Policy in Australia" AGPS, 1993

4.88.2 The Charter is a mission statement of general principles but does not provide any real guidance for the officers of the ACCC in pursuing their obligations and responsibilities under the Act. Ai Group recommends that the Charter deal with the procedures and processes to be adopted by the regulator in its enforcement undertakings, the manner in which it must document and detail its investigations and allegations, the procedures for media releases and clearance of conduct at all levels, including the Commission itself.

4.88.3 It should set out a mechanism for the despatch of investigators and the handling of confidential and commercial information. It must provide details of complaint handling protocols.

4.88.4 A model for the Charter could be the Taxpayers' Charter issued by the Australian Taxation Office,[49] which is a comprehensive document setting out the rights of the taxpayer (business and individual) and the standard of service delivery that can be expected of the Australian Taxation Office, including avenues of complaint and appeal, decision making processes, actions and general services.

4.88.5 Although the skeleton of the Taxpayers' Charter is visible in the ACCC's Service Charter, Ai Group believes that the public perception of the behaviour of the ACCC would be improved if the ACCC were to undertake a more rigorous approach to defining the processes and procedures and embarking on a restructuring of its own guidelines (in a public way) on how its relationship with the public is handled.

4.88.6 Consideration might also be given to inserting the principles of the freedom of Information legislation into the Charter itself. At present, the Charter does not even mention this avenue for obtaining information about the decisions and the conduct of the ACCC as they affect the individual or business concerned.

4.88.7 Like other agencies, the "customer" of the ACCC has the right to complain to the Commonwealth Ombudsman, but the ACCC's Charter dos not mention this option. The Charter does not list a Privacy Officer or other complaint handler details. Even the telephone number of the ACCC is not available from its website address or from the Charter in download form.

4.88.8 Under all Parts of the Act, the ACCC encourages businesses to adopt a complaints handling process that is transparent and accessible to customers (whether other businesses or individual consumers). It is not unreasonable to expect that the ACCC would have a similar process in place for its "customers".

4.89 ***Procedural guidelines for Information Releases***

4.89.1 Anecdotal evidence provided by members to Ai Group raises a number of concerning practices or omissions by the ACCC in its daily interaction with its customers. Basically, all of theses concerns might be summarised as the lack

[49] Australian Taxation Office Taxpayers' Charter 2002, Commonwealth of Australia

of procedural fairness and a failure to follow commitments and undertakings in relation to process and procedures.

4.89.2 Businesses are squeezed into exacting performance obligations by pressure from investors or shareholders (sometimes even financiers) to increase profitability and pressure from customers (whether businesses in the supply chain or end consumers) to keep prices low. Of the two, the customer has the strongest bargaining power to effect its desired outcome by its ability to choose.

4.89.3 The ACCC has extraordinary power to influence the customer's choice. Although it is true that the ACCC only alleges that an offence may have been committed in its media releases and other public statements when it commences an action or investigation, the authority of the ACCC is such that customers of an "alleged" offender are keen to mitigate their own potential damage or loss, however remote the actuality, by choosing to change suppliers. Thus, a precipitate media release by the ACCC can and does have a deleterious impact immediately on the alleged offender.

4.89.3 Procedural guidelines on the issue of media statements and the conduct of investigations would be an appropriate way for the ACCC to manage its activities in these areas. This would be in keeping with the principles of transparency and fairness essential to its charter.

4.89.4 It is envisaged that due notice to the company or companies concerned about the investigation or possible action and a mutual undertaking not to release details of the allegation publicly until or unless an action was commenced, would go some way to avoiding many of the present criticisms. It should also be of equal prominence and speed that the abandonment or otherwise of proposed actions or investigations be notified to the press and media.

4.90 ***Overseeing Board of Governance***

4.90.1 Ai Group strongly urges the establishment of an independent body to oversee the operations and administration of the ACCC as far as its actual conduct and approach to issues like mergers, authorisations, section 155 notices, investigations under Part IV, media use, etc.

4.90.2 Ai Group wants to confirm that it is not suggesting that the ACCC is anything but independent in its decision-making role. Furthermore, we do not consider the ACCC to be partisan or political in its enforcement of the Act. The proposal to establish an overseeing body goes to the principle of accountability in a more day-to-day sense.

4.90.3 Board of Governance

i. Our suggestion is the establishment of a new independent body made up of business representatives, legal practitioners, judicial and academia incumbents and economists and persons suitably qualified in competition issues. The ACCC would also be represented on the Board,

as would Treasury. It would provide advice and guidance to the Treasurer in respect of policy matters affecting the operation of the Act and its responsiveness to the changing economic landscape. It would also provide assistance on legislative changes necessary to keep pace with global shifts in competition policy and consumer protection, and act as an independent overseer of the ACCC in its routine administration of the Act.

ii. This body may absorb or act in tandem with the National Competition Council, depending on its own charter. The NCC is considered by the general public as a body relevant only to governments and local councils and their agencies under the National Competition Principles Agreement and seems to have had only a limited impact on the wider issues under the Act. This perception may be misfounded but it exists, all the same.

iii. The Board would be responsible for ensuring that the ACCC adheres to its Charter in all respects and for its preparation and approval by the Treasurer. It should also be responsible for acting as an effective interface between the customer, the policy developer and the regulatory authority in competition issues affecting any sector of the community. It would monitor the performance of the ACCC in its relationships with the public and recommend structural or policy changes to the procedures of the ACCC to optimise that relationship.

iv. Such a Board could operate in all spheres of the ACCC's competition activities, but it would not be an administrative appellate body, or supplant the Australian Competition Tribunal.

v. The Board's function would be to align competition policy with competition in action to meet the broad objectives of the first part of section 2 of the Act, by "enhancing the welfare of Australians through the promotion of competition".

vi. Like the Board of Taxation constituted by the Treasurer last year as a response to the business tax reform agenda, a trade practices Board would also provide a mechanism for consultation with the public and sectors of the public on matters of general interest or sectoral interest such as industry viability. It might work closely with existing economic agencies in this respect and therefore have the ability to work with the ACCC's own staff in better understanding the markets they are examining and the underlying dynamics of competition in that market.

vii. The most important aspect of the Board's constitution would be the business expertise and competition experience to complement the regulatory expertise of the ACCC. This perceived lack of business or commercial expertise within the ACCC has fuelled assertions by business that the decisions of the ACCC on anti-competitive issues follow a "competition for competition sake" philosophy. Moreover,

that the ACCC's domestic consumer focus is too restrictive and unrealistic of today's commercially global environment.

viii. Another important function of the Board would be to assist in defining the relevant markets for the ACCC to ensure that there was equal balance given to global issues as well as localised ones.

ix. We submit that the Act be amended in order to create and govern this new Board. It would report to the Treasurer, and be accountable to the Auditor-General in much the same way as the ACCC is presently, but act independently of the ACCC's enforcement and regulatory powers.

4.90.4 The National Competition Council

i. The ACCC relegates the functions of the National Competition Council (NCC) to making "recommendations to Government on access declarations under Part IIIA of the Trade Practices Act and prices oversight of State/Territory Government businesses".[50] Part IIA of the Act confers somewhat wider functions on the NCC and could in fact have a significantly stronger role in competition policy itself if the Minister saw fit. Also, the Act allows for the carrying out of research and the provision of advice to the government on any matter under any Commonwealth law, so widely is section 29B expressed.

ii. Although, it is true that to date, the NCC has focussed on access issues and the implementation of the National Competition Principles by governments and their agencies, there could be scope for widening the NCC's role.

4.90.5 Australian Competition Tribunal

Ai Group acknowledges that there is an avenue of appeal already entrenched in the Act in the form of the Australian Competition Tribunal, in respect of authorisations. Ai Group is not suggesting that the powers vested in the Tribunal should be necessarily altered or extended. However, further examination of its usefulness under other parts of the Act may necessitate its redesign to include certain other appellate functions.

4.90.6 Ombudsman

The Commonwealth Ombudsman has less than a high profile in this area of its functions as a body to whom complaints may be registered. The ACCC's Charter presently does not mention this option. There should be greater publicity for this office and its function in respect of the ACCC.

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50 ACCC Digest March 2000, para 2-1600

4.91 ***Test case program***

4.91.1 Unlike the tax legislation in Australia, the Act is does not require the exercise of any discretion on the part of the ACCC in most cases and there has also been built up a large body of case law to assist in the interpretation of the Act.

4.91.2 However, where discretion or uncertainty does exist in relation to issues of general principle, there may be scope for examining the practice of test cases as adopted by the Commissioner for Taxation. The test case model allows the regulatory authority the opportunity to bring an issue of uncertainty in respect of the application of the law through the judicial process for an authoritative outcome on which both the commissioner and taxpayers generally can then rely. Although it may involve a dispute or an objection initially, it is usually a matter that of itself is too minor (expense-wise) to justify drawn out and costly court cases on the part of the taxpayer. On the other hand, it usually involves a widespread issue that impacts on the Commissioner's revenue forecasts and may also be administratively expensive and time consuming for the Australian Taxation Office to manage across all taxpayers.

4.91.3 In such circumstances, through the Tax Counsel process, a taxpayer agrees to become the test case in the matter in return for which the Commissioner agrees to either fund entirely or to assist in the funding or to limit possible enforcement or penalties resulting from the judicial determination of the matter, incurred by the taxpayer in question.

4.91.4 Anything which can effectively and efficiently avoid the unnecessary costs in expensive defensive litigation and can assist in an industry –wide way to educate "customers" of the Act in understanding their obligations and the limits of their commercial requirements, should be examined to determine whether they have any value in application under the Act.

Establishment of a Compliance Fund

Ai Group wants the ACCC to become more focused on education and compliance. In our view, anti-competitive behaviour is more likely to occur as a result of ignorance and lack of understanding about the Act and the economic effects of certain conduct, rather than as a result of any deliberate and willful intention to damage or injure competition.

4.92 Ai Group wishes to express its concern that the ACCC appears to be concentrating on its role as enforcer of the Act and has ignored the most important aspect of the

regulator's role - to educate its "market" in compliance with the Act. Since the ACCC became subject to the same user pays principles of public administration, its education activities have apparently diminished. The ACCC is extremely vocal about its self image and markets its enforcement successes cleverly. However, it is clear from the burgeoning number of cases that the message of compliance in the area of Part IV in particular is fading or being misinterpreted. ACCC collected over $43 million in "taxation" from its administration in 2000-2001[51], and there are more cases than ever.

4.93 Ai Group contends that there should be a mechanism whereby the fines and taxes collected by the ACCC should be pooled into a compliance fund which is used for education and advice to business on all aspects of the Act (not simply the popular consumer protection sections) with particular emphasis on educating industry in anti competitive practices and providing practical solutions to competition issues for participants. Given the large sums of revenue collected by the ACCC in fines penalties and other fees[52] this pool could be made available specifically to fund a market-wide compliance program of education , thus directly returning to the customer (both businesses and consumers generally) long term benefits.

[51] Annual Report ACCC 2000-2001

[52] Refer to the Annual Report of the ACCC for 2001, p 154 by way of example

Section [5] Legislative Issues

In Ai Group's view, the Act itself is reasonably sound. Ai Group believes, though, that to maintain its strength, and to bolster confidence in the Act's broad mandate, it is time to revisit the terms of the Act and its administration by incorporating more flexibility and commercial relevance into its framework.

A Mergers (Sections 50, 88, 90)

There is room for further debate on whether the substantial lessening of competition test is appropriate for Australia – in that sense, the mergers provisions in section 50 of the Act should take into account the size of the markets in Australia and the number of participants, in the context of global competition pressures.

5.1 It is clear from extensive discussions with Ai Group members and the legal profession, that there is a ***perception*** that the mergers rules impede companies in Australia from globalising or becoming of sufficient size and mass as to be internationally competitive.

5.2 This perception does not arise from an examination of the number of rejected mergers. The ACCC will confirm that of the proposed mergers put to the ACCC each year, there is an extraordinarily small percentage that is declined. Indeed, some of the least popular mergers in recent times have not been rejected by the ACCC. So, on the surface at least, the substantial lessening of competition test and the authorisation process as it stands, seem to be working.

5.3 Ai Group is not demanding a reversion to the dominance test in section 50, although it might be argued that the dominance test is a more appropriate test for a market and markets as small as those in Australia. With so few participants in any market in Australia, any absorption of a competitor might result in a substantial lessening of competition in that market. "Substantial" in this case may simply be the removal of one participant out of three. Dominance, on the other hand, would be a clearer determinant. This leads Ai Group to question whether the "substantial lessening of competition test" is valid or appropriate in this country, where the opportunity for competition emerging from external sources (through imports, reduction in trade barriers, foreign investment and the like) (which do not automatically fall within the definition of an Australian market under the Act) is more likely to impact on the consumer in the long term, than if inefficient participants in Australia were absorbed by more efficient and globally competitive firms.

5.4 It is apparent that the ACCC is aware that markets in Australia must be structured in a way which makes them globally competitive and attractive to international investment, whilst at the same time securing the necessary protections for the Australian domestic consumer. The ACCC has struggled with the concept of "branch economy" and the argument for "national champions" in an effort to come to terms with the changing market scape of a globalised economy. It has rejected overhauling

the mergers provisions for Australian business to reach the "critical mass" to compete effectively in both our domestic and offshore markets or for international investment.[53] The Review may afford the ACCC an opportunity to revisit these arguments, having the benefit of substantial evidence submitted by business generally, not simply those companies that it has encountered in merger matters previously. It is regrettable that the ACCC's views are so markedly in contrast to those of the businesses whose competitiveness the ACCC is charged to promote and facilitate. Whilst these opposing views remain unresolved, the perception problems and the concerns remain for industry world wide, and effectively stalls management from making investment decisions.

5.5 Vigorous domestic competition is essential for Australia. This must be balanced against realism - the Australian market is unarguably small, under any criteria. Competition should be seen as a reflex of efficiency and innovation. The costs of achieving efficiencies and scale could well mean the absorption of smaller competitors. But the competition policy that purports to promote healthy competition in all markets must also provide a mechanism for the fluid transition from a small market economy to an outwardly focussed globalised one in order for it to remain relevant in the 21st century, and industry as well as consumers must be fully aware of this approach by the ACCC. The Prime Minister has also asserted that he wants to ensure that business is not overly hindered and has a Trade Practices Act appropriate to the size of the country.[54]

> *Ai Group supports changes to section 50 (and as appropriate, sections 88 and 90) relating to the merger policy and the authorisation process whereby the factors to be considered in a section 50 action took account of public interest as a priority and extended the criteria to include efficiencies and global imperatives under wider, not narrower, market definitions.*

5.6 This means that the mergers policy as generally reflected in section 50 of the Act and the authorisation process that facilitates it, must be flexible and responsive to the demands of an international market and to borderless industry imperatives. It must be able to meet the timetable of its customers, not a detached bureaucratic system. It must examine the proposal from the perspective of evolutionary impact on an industry or a sector and understand the dynamics of the market that spawns it. In contradiction to the findings of the UK survey mentioned previously[55], complaints from customers of the ACCC (members of Ai Group) exhibit frustration at the length of time taken for the process of authorisation, (especially on appeal) its necessary investigation into markets that provides access to competitors to sensitive information or innovative ideas of the proponent firms, and the open-ended approach to such investigations which do not provide the proponents with any certainty in a commercial framework.

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53 Prof. Fels: "Mergers and Market power" 24 May 2001; "Globalisation and Competition Policy" 23 April 2001; "The Trade Practices Act: Are we becoming a branch economy?" 4 April 2002; R Jones, "Bank Mergers and the Trade Practices Act", 12 April 2002 - recent speeches available from the ACCC website - www.accc.gov.au

54 Op. cit 2

55 Op. cit 14

5.7 One of the greatest concern for industry is the possible exposure of their trade secrets their plans and strategies, their unique commercial decisions and market information, to the wider public, most particularly, the competitors and customers of the proponents.

5.8 Accordingly, most practitioners will advise their clients to embark on the informal "clearance" or approval process that avoids the risk of the ACCC interviewing those competitors and customers or otherwise examining the broader market implications. The informal process (without access to those other interested parties) runs the risk of the ACCC being unable to clearly determine the parameters of the merger and its implications across the public interest, which in turn would result in a refusal to clear but there have not been many mergers which have been stopped by the ACCC. However, the alternative - a protracted and very public authorisation procedure - is less commercially attractive, more costly and potentially damaging to the proponents in their business and for their investors. The ACCC will report that of the informal clearances it has been asked to approve, very few are rejected. Some approvals might be accompanied by enforceable undertakings on the part of one or more of the proponents and this seems to have the desired result for those parties, at least for the immediate future.

5.9 Therefore, it is extremely difficult to suggest a course of action that might expedite the formal merger approval process (authorisation) or limit its impact on the personal commercial affairs of the proponents to an acceptable risk, given that the variables in determining competition in a market alter so rapidly and can shift in so many different spontaneously.

> *The factors to be taken into consideration (in section 50(3)) must recognize efficiency gains and issues of scale. In this respect, the current public interest criteria in section 90 should be introduced into section 50 itself. In addition, the consequences of a rejected merger, like job losses or corporate insolvencies and failure should bear consideration.*

5.10 Another option in the review of the mergers provisions in the Act, would be to escalate the factor of public interest from the authorisation process to the test itself. Although the Act compels the ACCC not to grant an authorisation in cases where it is not satisfied that in all the circumstances, that the proposed activity, contract or arrangement would result or be likely to result in a benefit to the public that outweighed the detriment constituted by the lessening of competition arising from the activity etc,[56] it would be more efficient if this overriding consideration were to become part of the test in section 50.

5.11 In Ai Group's opinion, section 50 could be redrafted to enable the public interest factor in section 90 to become a statutory defence to a claim that a merger resulted in a substantially lessening of competition in breach of the Act. In other words, a subsection (2A) may be introduced which provides that an acquisition in subsection (1) or (2) of section 50 will not be taken to be in breach of the Act notwithstanding its effect or likely effect of substantially reducing competition, where the benefit to the

[56] See section 90 of the Act generally and subsection (9) specifically in respect of mergers.

public outweighs the detriment resulting from the effect or likely effect of substantially reducing competition. The onus of establishing that public interest would be on the proponent to the acquisition. This might alleviate the need for wider public engagement in commercial and confidential trade matters by the ACCC who would otherwise need to take the offensive in investigating the markets broadly and publicly. Alternatively, reliance could be placed on the existing resources of the ACCC to determine public interest from an independent source which would not involve direct access to competitors of the proponents.

> *The process for formal approval of mergers and acquisitions under the Act, is frequently lacking in efficiency and timeliness. Resort to the informal process of clearance leads to uncertainty and cannot satisfy commercial and legal requirements that require unequivocal approvals*

5.12 The authorisation process (section 88) has failed to attract the interest of merger proponents in Australia. According to the ACCC, there have been only two applications in the last 5 years. A major disincentive for parties is the possibility of the ACCC's decision being reviewed by the Australian Competition Tribunal. An application for review can be made by anyone with a sufficient interest in the merger. Commercially, such a process is untenable, hence the anticipated reaction of industry to the availability of that process.

5.13 Reasons for approval or disapproval of a merger under a revised section 50 test would need to be clearly enunciated and published to the parties in a timely fashion. This could be a requirement of the section.

5.14 If the merger provisions themselves cannot be challenged legally or commercially, and the ACCC is legislatively directed to take into account the matters such as the actual and potential level of import competition, barriers to entry, substitute markets and product availability, other dynamic characteristics such as innovation, product differentiation and growth, then perhaps it is the failure of the legislation to keep pace with emerging issues that face industry in the competition stakes that is the underlying problem. Some legislative amendment to section 50(3) to include other factors such as business efficiencies and economies of scale seem appropriate. The ACCC' s Chairman has publicly acknowledged that there may be room to improve the provisions of section 50(3) by making the section more responsive to today's economic factors by including matters such as efficiency gains[57].

> *Introducing some statutory authority for the informal "clearance" procedure (that operates in lieu of formal authorizations) to provide certainty, consistency and clarity in its scope and uniformity in its application by the ACCC is in the public interest.* Prof. A. Fels AO at The Australian Industry Group "Industry Directions" launch Brisbane, 21 March 2002

[57] Commentary in an open, transparent and accountable way,

5.15 The procedure governing the authorisation of mergers and the tests applied for that authorisation process are the areas where the negative perception in industry has taken hold. The length of time for an authorisation to be processed, and the diligence of the ACCC's methods in securing the views of competitors and consumers are seen as major causes for concern. Although they might in one sense be evidence of the strengths of the existing regime, they also reflect the very weakness which leads to the perception by business that the procedure is lacking. The fact that third parties who claim an interest in the outcome are entitled to appeal a formal decision of the ACCC in respect of an authorised merger, is also a cause for frustration and concern. Commercially only the parties to the merger and the regulatory authorities should have any say in the deliberations.

5.16 Changes to the formal authorisation process to make it more streamlined and responsive to today's commercial needs must be implemented.

5.17 The informal process that is usually adopted by business has certain shortcomings - the most obvious being that its benefits (no publicity and no potential breach of confidentiality, speed, informality in procedures, and the lack of strict regulatory prescription) are derived from its lack of statutory authority. The decisions of the ACCC cannot therefore bind the ACCC in the same way that a specific determination under section 88 or 90 would. The approvals are not enactments or instruments subject to review under administrative appeals procedures or under the Act or by the Australian Competition Tribunal. Nevertheless, the ACCC has been diligent in the way in which it has acted in respect of these informal approval processes and usually treats itself as being bound morally to the outcome, provided of course, that the information provided to it on which it has made its decision, is truthful and complete.

5.18 However, its very confidentiality also exposes it to the risk of challenge by a private party with an interest in the outcome. Although the terms of any approval may be confidential to the parties, the merger itself may invite litigation from competitors or customers. If a court were to find the merger unacceptable (in conflict with the ACCC decision) then the risk of divestiture remains high and the consequences of unravelling such a merger would involve detriment to all parties and interested persons including the very market in which the merger took place.

5.19 Therefore, the uncertainty which, in a way, attaches to the informal process could be reason for its discontinuance in its current form. However, in the absence of an alternative that provides the same certainty, efficiency, and accountability, it is Ai Group's view that the informal process is a good approach in many respects and should only be strengthened by statute through perhaps a formal recognition of its binding application on the parties, akin to the private rulings program undertaken by the Commissioner of Taxation under the tax legislation. The process should carry authority and certainty and the application of the process be consistent and clear.

B. Misuse of market power (Section 46)

Ai Group does not support

- *Any change in section 46 of the Act (misuse of market power) that would effectively shift the onus of proof onto the defendant company.*
- *Any alteration to section 46 whereby the test of intention or purpose is replaced with, or added as an alternative to, one of established effect or likely effect.*

5.20 Section 46 dictates that a corporation cannot use its market power with the intention of damaging or eliminating a competitor (whether in the same market or in another). According to the leading High Court case on section 46[58] the objective of that provision is to protect the interests of consumers, predicated on the assumption that competition is a means to an end: the protection and advancement of a competitive environment and competitive conduct. The provision does not seek to restrain competitors from trying to advance their position in the market, nor does it make it an offence to act in a manner which has the effect of substantially lessening competition unless the purpose was in fact to damage or lessen competition.

5.21 This is an area where Ai Group is acutely aware of the problems facing both small and large businesses. Balancing the rights of both ends of the spectrum whilst recognising that reducing one's competition is a tenet of survival and growth for all business is a difficult philosophical question. Ai Group does not believe that changing the onus of proof whereby the larger business is simply assumed to be acting in a manner designed solely to reduce competition if it has substantial market power is appropriate or desirable. The provision carries heavy penalties. To actually embark upon a course of conduct that is intended to damage a competitor and has no other commercial viability is extreme and must necessarily damage the perpetrator as well. This type of conduct cannot be excused, but there are not sufficient grounds for changing the onus to one where such a company would need to disprove its intention in such cases.

5.22 It is the objective of all businesses to compete vigorously. The best of those businesses will have an effect on less efficient or less effective businesses engaged in the same competitive market. That is the nature of competition, and reflects a healthy market.

5.23 Competing fairly is, and must remain, an inherent quality of competing vigorously. Section 46 presently acknowledges this by requiring adverse consequences for a competitor to be tested against the purpose or intention of the more successful competitor, to determine whether or not the underlying activity creating those consequences was the result of unfair behaviour against a party with insufficient power or opportunity to deflect the effects or whether it was the result of effective, albeit aggressive, management against a less efficient party.

5.24 Proponents of a change to section 46 (to remove the need to establish intent or purpose) argue that the economic outcome of the activity rather than the morality of

[58] Queensland Wire Industries Pty Ltd v Broken Hill Proprietary (1989) 167 CLR 177

the behaviour should be the focus for determining the offence. Ai Group would argue, however, that it is in fact the behaviour that requires regulation, and if necessary, cultural redevelopment. Market forces should be left to dictate the outcome. It is only in circumstances whether the behaviour of a player affects that outcome in an unfair, anti-competitive way that an offence is committed.

5.25 As with any offence which involves the establishment of intent or purpose, the *mens rea* can be extremely difficult to prove. All the more so when the intent must be attributed to a corporation. The ACCC has suggested that it would facilitate their prosecutions of section 46 if the onus were shifted to the alleged offender to establish that it did not have that intention, where the ACCC could show that it had substantial market power and that the effect or likely effect would be a substantial lessening of competition if the power were used against competitors. Such a fundamental change to the civil rights of citizens (whether individual or corporate) merely to ease the evidenciary burden of the prosecutor would not be tolerated under any other statute and particularly any that had penal consequences. Ai Group rejects completely any proposal to shift the onus of proof onto the defendant.

5.26 Another suggestion raised by proponents of change is for the test to be subtly extended to include an "either or" option so that there would be a per se offence if either the intent was established or it could be established (on the balance of probabilities only, it might be assumed) that the conduct would have the effect or likely effect of substantially lessening competition or damaging a competitor.

5.27 Some of the conduct likely to come within the purview of section 46 might be properly described as healthy competition in its rawest form and legitimised in any market provided the conduct is not undertaken with the sole or predominant purpose of damaging competition. As the Prime Minister has stated – "*Part of the trade practices review was to ensure business is not overly restricted*."[59] He went on to say: "*It is important to draw a distinction between criminal behaviour and fraud, and legitimate, robust business activity."*

5.28 *A*cquiring a significant amount of the market is the holy grail for most market participants. Curbing their endeavours to achieve this outcome would be seen as anti-competitive in some environments. Including an alternative to intent, in an effects test, would exacerbate the issue of delineating between common commercial practices and determining deliberate annihilation tactics by a firm. For firms that may have a substantial degree of market power (or are close to attaining it), it would have extreme difficulty in deciding whether pro-competitive activity on their part might be interpreted as anti-competitive conduct if the effect were to damage a competitor. The effect of robust competition is to drive out inefficient operators. It is a tenet of management to improve profitability and to increase market share. There will be casualties in such an environment but it is dangerous to suggest that because the effect occurs, the conduct was necessarily anti-competitive under section 46.

5.29 To extend the section to an either or test is surely a less than transparent means of changing the section altogether to an effects test. Given the concerns of the ACCC

[59] Op. cit 2

about the due process it must accommodate in order to obtain the evidence to support an existing section 46 prosecution, it cannot be reasonably suggested that the ACCC would ever see fit to exercise the first option in that section by pursuing the intention course.

5.30 Most importantly, the ACCC has been successful in recent years in proving section 46 offences, and there is a growing body of case law to assist it in construing the provisions.[60] There is, in short, no evidence to support the need for any changes to section 46.

C. Enforcement

Ai Group does not support

- *Any extension or increase in the powers of the ACCC.*
- *The imposition of gaol-sentences on management from business involved in anti-competitive conduct.*

5.31 Penalties for anti-competitive behaviour have increased significantly since 1994. Fines have risen to $10 million for corporations and $500,000 for individuals knowingly concerned in the contraventions. The increase was "justified" on the basis that overseas regulatory agencies were increasing their pecuniary penalties and, as a deterrent against wrongful conduct, heavy fines sent a strong message to the market that such conduct would not be tolerated.

5.32 The number of cases brought to court under Part IV is also increasing and the ACCC also appears to be using its powers under sections 87B and 155 of the Act more frequently.

5.33 There is evidence that the ACCC penalty regime can in fact be oppressive and that it does not serve as a deterrent nor does it contribute to the community's awareness of the **advantages** that ensue from fair competition: it merely serves to destroy a participant in the market, and potentially destroy the very supply chain in which it was located, through the "ripple" effect.

5.34 The main purpose of enforcement is to effect compliance. There is no evidence to support the assertion that more enforcement powers, comprised of more oppressive penalties like prison sentences, cease and desist orders, divestiture orders and the like, actually produce broader compliance with the Act. Around the world, anti-competitive behaviour appears to be on the rise, notwithstanding some of the most onerous enforcement powers conferred on the regulatory agency dispensing them.

5.35 Instead of seeking increased powers of enforcement, Ai Group contends that the ACCC should be re-directing its focus onto compliance through education, persuasion and change management to effect an overlying culture of fair competitive behaviour for every market and every industry in Australia.

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60 ACCC v Boral Ltd (2001) 106 FCR 328; ACCC v Universal Music Australia Pty Ltd No 2 [2002] FCA 192; ACCC v Rural Press Ltd (2001) 96 FCR 389

5.36 The proliferation of section 155 notices (search and product notices) in recent years is also a concern. Presently, the Act entitles the ACCC (or its Chairperson or Deputy Chairperson) to authorise the issue of such a notice when they suspect an offence has been committed under the Act.

5.37 A person receiving such a notice treats it very seriously: it inevitably involves large expenditures of resources, both financial and management, to comply with one. It may also necessarily lead to significant legal costs. Ai Group contends that the power to issue such a notice should be conferred on a judicial or quasi-judicial body, and not left with the regulator. If likened to a warrant, the notice should only be issued by a judge or magistrate and court rules applied to the evidence and process supporting their issue. If likened to a subpoena, these too should be issued by order of a court and not left to one of the parties and the possible litigator to effect the issue. When the ACCC takes the next step and searches the business premises or its facilities, and in the process, seizes documents and other material that might be taken as evidence, it is important that the ACCC only undertake that activity with the judicial authority of a search warrant, and in the presence of law enforcement officers, such as the Federal police.

5.38 There are three specific matters of grave concern to Ai Group which are being mooted by the ACCC:

- the conferring of power on the ACCC to issue "cease and desist" orders in respect of any anticipated breach of the Act
- the extension of the right to seek divestiture orders to misuse of market power offences
- the adoption of criminal sanctions for certain types of anti-competitive behaviour.

Cease and desist orders

Ai Group cannot support the conferring on the ACCC of the power to issue "cease and desist" orders, or to allow for orders of divestiture to be sought in respect of anti-competitive offences (other than is allowed presently under section 50).

5.39 In respect of the proposal to allow the ACCC to issue cease and desist orders, Ai Group cannot see how the ACCC can justify this circumvention of the rules of equity. Injunctive relief would be available if there were sufficient evidence to support that equitable remedy. But an injunction, dispensed by an independent court (not the regulator), would also require an undertaking as to damages from the applicant. The ACCC has submitted that there is a real need for this extension of its powers "*in order to provide effective deterrents to conduct threatening the development of effective and sustainable competition*"[61] It has also suggested that such a power would only be

[61] Productivity Commission : "Competing Interests: Is there a balance?" Issued August 2000

exercised where there were blatant damaging anti-competitive behaviour where the speed of the sanction was imperative to prevent recurring and irreversible damage.

5.40 The ACCC has not been able to provide clear indications of when such "blatant" behaviour would call for such a power to be exercised and why, in such circumstances, the equitable remedies (designed along the lines of fairness and efficiency) presently available could not be used.

5.41 The discretionary nature of such a power and the failure on the part of the regulator to suggest legislative definitions of conduct that might prompt its exercise, should be reason for disquiet . Whilst the ACCC is keen to put forward the arguments that such illegal behaviour could have irreparable damage to the market or the individuals within a market or indeed the general public (there is no limit since there is no definition), it fails to concern itself with the reverse - the damage done to an alleged offender in circumstances where it is only the opinion of the ACCC that triggers the order, not a determination of a properly appointed judiciary with evidence to support the exercise. And what degree of certainty would the regulator need to satisfy to determine to exercise that power - would it need to be satisfied beyond reasonable doubt or could it be satisfied with something lesser, such as on the balance of probabilities or even lower still, like a strong suspicion?

5.42 Equity has long recognised the need to have the ability to compensate a defendant for actions taken under its mantle of efficiency. It requires the plaintiff applicant to provide some assurances to the court that if it is wrong and if the remedy sought is unfounded then any damage caused by its zealous approach will be rectified by the plaintiff. Undertakings as to damages are not lightly proffered and hence, injunctive relief is usually only sought in extreme cases, especially urgent injunctions. The ACCC should be required to meet the same standards of diligence and care in the preparation of its case and to support its claim with the requisite undertakings. The suggestion that such requirements should not be expected of the regulator of competition policy is of great concern and there would not appear to be any basis for contemplating its acceptance, and Ai Group opposes any change.

5.43 The extension of power to include the right to issue or cause to be issued "cease and desist" orders in a way will also impact on the current 'purpose" test in section 46, albeit by stealth.

5.44 The issue of such an order, in circumstances where it is acknowledged that the ACCC may not have sufficient evidence to establish the basis for injunctive relief, or where the *mens rea* (the state of mind or purpose) of the corporation cannot be readily ascertained to prove intent, is an easy way for the ACCC to circumvent due process and the established civil rights of the innocent.

Divestiture

5.45 The right to seek an order of the court compelling divestiture of certain assets or property in the event of an illegal or unacceptable merger is already provided in the Act. There have been few calls for such an order - commercially it is preferable for the

proponents of a merger to effect a restructuring under an enforceable undertaking arrangement than to appear in a public forum to contest its application. However, the merger provisions as previously noted are surrounded with a number of protective measures that would obviate the need for any such order to be made except in the most extreme cases. The informal clearance process, the formal authorisation process, the comfort letters from the ACCC and undertakings tend to provide proponents of a merger with a number of options which allow them a range of mechanisms under which they can prevent litigation or the more onerous of penalties.

5.46 However, the ACCC is seeking to extend the right to seek orders of divestiture to situations arising under the misuse of market power provisions - to effect a restructuring of the market on the basis of the ACCC's views of the market definitions applying, and the capacity of the alleged "misuser" to perpetrate further damage.

5.47 The Senate Legal and Constitutional References Committee recently[62] conducted an enquiry into whether the Act should be amended to allow the ACCC to seek divestiture orders in a wide array of situations, including where "*an ownership situation arises that has the effect of substantially lessening competition"* and in cases where there is a flagrant or repeated anti-competitive conduct. Senator Murray in his Supplementary remarks to the report[63] argued that such a power for the ACCC would be largely a reserve power. However, he did not articulate the bases for its use as a reserved power and the ACCC did not offer any guidance on its restrictions or limitations that might be incorporated into the Act if it were adopted as such.

5.48 The Chairman of the ACCC himself was awed by the suggestion. He observed to the Joint Select Committee on the retailing sector[64] that "*It is very interventionist*." It is hard to see how the ACCC could support such a power for itself without providing irrefutable evidence of its need, which it has not.

5.49 Ai Group does not support any increase in the ACCC's powers in the manner contemplated.

Criminal sanctions

Ai Group opposes the incorporation of criminal sanctions into the Act's enforcement regime. The Act is not the proper vehicle for them, nor is the ACCC the appropriate prosecuting authority.

5.50 Criminal sanctions for hard-core collusion has been on the ACCC's agenda for some time, and most recently the OECD has released a paper examining the types of sanctions available for cartel activity amongst its member countries[65] Although the

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62 Joint Select Committee on the Retailing Sector : "Fair market or Market failure? A review of Australia's retailing sector"

63 Supplementary remarks to report of Joint Select Committee on the Retailing Sector : "Fair market or Market failure? A review of Australia's retailing sector"

64 Ibid in Hansard p. 1167 reported on 13 July 199

65 OECD Directorate for Financial Fiscal & Enterprise Affairs Competition Committee: "Report on the nature and Impact of Hard Core cartels and Sanctions Against Cartels under National Competition

paper discussed the issue of criminal sanctions, of 25 OECD member countries, only nine have criminal sanctions and fewer again impose prison sentences on individuals.[66] The paper also acknowledged that those countries that did have the legislative capacity to impose custodial sentences, did so very rarely. The OECD noted that "*Sanctions are not the only deterrent to cartel conduct, of course. The probability of detection is a related and important element. Detection can be enhanced in a variety of ways, including the provision of adequate investigation tools, an effective amnesty programme, and in the context of international cartels, effective international co-operation among national competition agencies.*"[67]

This submission looks at the pecuniary penalty system as it stands today and Ai Group makes some suggestions as to improving this aspect of the enforcement regime.

Fines

Australian penalties for anti competitive conduct are already high - $10 million for a corporate offender and $500,000 for an individual knowingly concerned in the offence. It is difficult to support the ACCC's call for harsher penalties when it has not used its existing penalty regime to measure its effectiveness.

5.51 Cartels are universally acknowledged as the most harmful of all types of anti-competitive conduct. It has been considered established fact that cartels "*harm consumers and have pernicious effects on economic efficiency*"[68]. The principal purpose of sanctions in cartel cases is deterrence : an effective deterrent takes away the prospect of unlawful gains. However, it is difficult to quantify the harm caused, especially for punishment and enforcement purposes. Although it is acknowledged that calculating the harm done by cartel is extremely difficult, Ai Group agrees with the OECD that this must be done since the overarching need is "*to inform consumers and policy makers about the importance of implementing an aggressive program against this practice*"[69].

5.52 In Australia, there are fixed, maximum substantive pecuniary penalties for collusive behaviour that can be imposed on both the corporation (($10 million) and the individuals involved ($500,000). At present, from evidence provided by Ai Group members, it is apparent that the fines are imposed without having regard to the capacity of the corporation or individual to pay or the size of the activity. They seek to send a message to the offenders that any perceived spoils from their illegal activity will be recovered through large fines (and legal costs) without considering the context of the market in which the offender might be operating at the time of the sanction or the financial state of affairs of the offenders at the time. It is usually several years after the alleged illegal activity has taken place that a prosecution is brought, and sometimes some years after that when judgment is given. The end result is that the circumstances

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Laws", 9 April 2002

66 Ibid. at p.24

67 Ibid at p.18, note 12

68 OECD Observer, May 2002 "Hard Core Cartels - Harm and Effective Sanctions"

69 Ibid

of the environment in which the activity originally took place can have changed dramatically.

5.53 There have been a number of studies devoted to the assessment and evaluation of pecuniary penalties for cartel activity and some experts have recommended a percentage of total turnover as appropriate. But the OECD has acknowledged that "*in some cases the optimally-sized fine would be so large as to bankrupt the organisation, causing it to exit the market, a result that some competition agencies would want to avoid."*[70]

5.54 Ai Group would suggest that for corporations, the fines should be a measure of their capacity to pay without requiring them to dissolve as economic entities.

5.55 Group is not suggesting that penalties should not be imposed on corporations and in established cases, on the individuals involved. However, there may be other mechanisms apart from oppressive fines or prison sentences, that are more likely to bring about the desired results – being the cessation of the activity, an effective deterrent to other industry participants, deprivation of reward for individuals involved, or return of some economic profit to the industry or market which was the victim of the unlawful activity. Following the 1998 Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels, the OECD issued a report in 2000 examining the issues relevant to deterrence. It noted that "*an important step in enhancing anti-cartel enforcement is 'overcoming the knowledge gap concerning the harm done by hard core cartels.' Improving public knowledge about the nature of this conduct and the harm that it causes would bolster popular support for more effective action against it."*[71]

5.56 Ai Group endorses this recommendation of the OECD and believes that

- greater education of the possible conduct that might be anti-competitive,
- more effective investigation into the quantification of harm from collusive activity,
- more research into the use of pecuniary penalties (along the lines of the work done by the OECD and the New Zealand Office of the Minister for Enterprise and Commerce),[72] and
- examining the structure of existing penalties and their effectiveness in light of the ACCC practice of "penalty bargaining" before a court has determined the appropriate sentence for antic-competitive offences would be useful, before the ACCC claimed that criminal sanctions are necessary or appropriate.

Prison sentences

70 Ibid at p. 2

71 Op cit 65 at p. 5

72 "Review of the Penalties Remedies and Court Processes under the Commerce Act", New Zealand, 1998. See also "Sanctioning Pursuant to the Norwegian Competition Act", Norwegian Competition Authority, 2001.

The deprivation of liberty and the stigma of a criminal record are frightening in any society. To empower the ACCC to impose those on individuals on the basis of a regulator's moral judgment and discretion is unacceptable.

5.57 Athough it can be difficult to fix an appropriate fine or penalty in cartel and other collusion cases, it is still unsound logic in Ai Group's view, to suggest that imprisonment of individual executives or managers engaged in the cartel activity for the corporation will act as a more effective deterrent to other corporations or individuals.

It is absolutely imperative that the elements of a crime be precise and certain before any criminality attaches to the alleged commission of the offence. The Act does not provide that certainty, nor does it define the offences as crimes.

5.58 The main concerns for Ai Group with the suggestion of prison sentences for offenders in "hard core" collusion cases are:

- The lack of any viable definition of "hard core". That uncertainty and vagueness must never be applied to a law that can ultimately deprive an individual of his or her freedom.

- The issue of burden of proof required for that sanction. Obviously, such a penalty would require proof beyond reasonable doubt (the burden applied to criminal activities).

- If the offence were subject to a jury determination (as it should be in such a case), then consideration would need to be given to the complexity and costs of trying such white collar crime. Past cases (particularly out of the 1970s and '80s) showed how difficult it was for a jury of reasonable citizens, unqualified in commercial disciplines, to determine the issues in corporate fraud and corporations law offences. Competition law is no less complex or demanding of expert knowledge.

- Administration of the sanctions.

Ai Group does not see any need to establish a parallel criminal system in the Act.

5.59 Australia has both Federal and State criminal laws. Criminal offences are investigated by the police who are trained in accordance with the principles of natural justice, freedom from self-incrimination, and civil liberties. They are prosecuted by specialised authorities (such as the Director of Public Prosecution) who observe these principles within a precise set of judicial rules governing the collection of evidence and the establishment of the terms of the offence. They are tried by a criminal judicial system versed in the laws of evidence, who manage the enforcement of justice.

In the current legislation, the per se *offences that might become the subject for the imposition of criminal sanctions, do not carry the element of* mens rea *(the intent or purpose) usually associated with criminal activity. To escalate these offences to the level which might attract prison sentences and a criminal record, is not warranted.*

5.60 The sorts of criminal laws that the ACCC has suggested would apply to hard-core anti-competitive conduct are fraud, theft, conspiracy, corruption, extortion. The criminal laws in Australia already adequately deal with such offences. They all have elements of intention, purpose, or reckless disregard and a sense of maliciousness or malfeasance in the perpetration of the offence. Under the Act, the offences which are being considered as being liable to attract criminal sanctions in most cases are those regarded as "per se" offences – in other words, no level of harm is required to be proven, nor is there any intention or purpose required to be established before the offence is found to have been committed in breach of the Act. In Ai Group's view, these are important distinctions which lead us to the conclusion that the Act is not the appropriate or desirable vehicle for the creation of criminal offences.

5.61 Furthermore, in our view, the ACCC is neither the appropriate nor the qualified agency to be the enforcer or administrator of criminal matters. There is an existing legal structure that can effectively manage truly criminal offences and there does not appear to be any justification for the ACCC to take on this function. There is also no evidence to support an argument that criminal sanctions **will** have the necessary deterrent effect.

Australian penalties for anti-competitive conduct are already high - $10 million for a corporate offender and $500,000 for an individual knowingly concerned in the offence. It is difficult to support the ACCC's call for harsher penalties when it has not used its existing penalty regime to measure its effectiveness.

5.62 Equally, the ACCC cannot claim, in our view, that it has properly and thoroughly investigated pecuniary sanctions, the quantification of harm, and the various options available to achieve deterrence (including further work on the desirability of their penalty bargaining practices), to enable it to be in a position to assert that only criminal sanctions will effect the desired outcome of deterrence. Even in the United States, which has had criminal sanctions (of some severity) in their enforcement regime for cartel activity for some time, cannot claim that prison sentences have been successful in curbing anti competitive conduct or corporate crime. Between 1996 and 2000, 15 member countries of the OECD notified the Competition Committee of 119 cases of cartel activity that had been processed during that time. However, the OECD was quick to point out that those reported cases represented "substantially less than half of the total number prosecuted by OECD countries in that period."[73] Of the eight largest cases which the USA provided to the OECD Survey, only three carried imprisonment

[73] Op cit 65 at p. 7

for executives involved in the activity, and fines in excess of USD 1.99 billion were imposed[74] including USD 1 billion in damages.[75]

5.63 Of grave concern is the ACCC's assertion that criminal sanctions should only be applied to "big business" offenders. Under no circumstances could Ai Group condone the imposition of such penalties on any individual, based as it were on some discretionary and arbitrary boundary between "big business" offenders and other types of offenders.

> *In Ai Group's opinion, there is a strong argument that many of these complex anti-competitive activities are the by-products of the "organizationally incompetent". Often, senior executives are unaware of the specific actions undertaken by their managers.*

5.64 When the focus is properly placed on the *behaviour* that drives the outcome rather than on the means employed to achieve an outcome, it is clear that any person, whether engaged in a large or small organisation, has the capacity to act unfairly or inappropriately. In fact, a large corporation is more likely to have stronger checks and balances within its systems to avoid a maverick officer undertaking unfair activities in relation to its business. But the distance between the Board and the management engaged to meet performance targets, is sometimes too wide for there to be culpability of Board members for the actions of management. Sometimes, too, the emphasis on performance and profitability and the pressure on middle management is such that competition considerations are neglected in favour of simply returning a profit. In that respect, middle management might share the same impediments as small business owner/operators: without the education or resources to know better, each is likely to suffer more from ignorance of the complexities of the competition laws, than they are likely to be "amoral calculators" intent in damaging their market.

5.65 Again, there is also this assumption that collusive activity in breach of the Act must necessarily be undertaken by the most senior managers or officers of a corporation. This is not necessarily the case - often it is overzealous middle management without the benefit of any commercial expertise or qualifications, who sets up the arrangements. The lack of effective compliance programs, education, monitoring and supervision on the part of the Board of such a company, in the absence of gross indifference or deliberate disregard for the consequences, should not be the basis for imprisonment of its officers.

> *Issues essential to the integrity of the criminal judicial system, like the availability of legal professional privilege, authority for search and seizure activities and the protection of the innocent, must not be casualties in the process of developing appropriate deterrent measures.*

74 Op cit 65 at p. 23

75 Incidentally, the US case which ordered damages of USD 1 billion was also the case which the ACCC sought fit to prosecute in Australia, solely by virtue of the prosecution in USA. It was also the most significant case for fines for Australia in that period - $26 million was imposed on the local companies involved (ACCC v Roche Vitamins Australia Pty Ltd [2001] FCA 21).

5.66 Overall, there is also the issue of the administration of such sanctions. The ACCC is not an agency equipped to deal with this type of fraud. Presently, the Commonwealth Director of Public Prosecutions (DPP) is responsible for criminal prosecutions under federal criminal laws. Most regulatory agencies lack the authority to bring criminal actions, although there are limited rights conferred on the ATO for summary offences. (It should be noted that even the ATO has a policy in place that requires it to refer possible prosecutions to the DPP in any case where the ATO reasonably believes there is a realistic possibility of the offender being sentenced to prison and where a high profile or publicly attractive figure is involved that would attract significant media coverage).

5.67 The DPP itself follows fairly strict guidelines on prosecution powers: the decision whether or not to prosecute is never taken "automatically" and the criteria governing the decision include:

- the public interest including the victim's, the alleged offender's and the community at large
- maintaining the confidence of the community in the justice system
- fairness, not weakness, and consistency, not rigidity
- the need to tailor general principles to individual cases
- the availability of admissible, substantial and reliable evidence; and
- the risk of prosecuting an innocent person.[76]

5.68 Fundamental issues such as the seriousness of the offence (and whether it was simply a technical offence), the staleness of the alleged offence, the availability and effectiveness of alternative "punishments", the prevalence of the offence and the need for deterrence, the length and cost and complexity of prosecuting a criminal case, and the willingness of the alleged offender to co-operate in the investigation are all examined carefully before the DPP makes the decision to prosecute. The DPP is staffed with experts and qualified persons who are well versed in the accountability aspects of their duties and are vocationally aware of the effect of their decision on the people involved.

5.69 The ALRC has commended the DPP's Prosecution Policy as a model for the development of policies and guidelines structuring the use of civil and administrative penalties.[77] At this time, the ALRC has not recommended that regulatory authorities unskilled in criminal prosecutions be conferred with power or authority to undertake such prosecutions, nor that any such regulatory authority without such a policy and proven ability to comply with it and to be accountable in the same manner as the DPP be considered for such a power.

5.70 The suggestion raised by the ACCC that it be given the power to seek criminal sanctions (particularly imprisonment) for offences under Part IV (and any other serious offence in the Act) begs a number of other preliminary questions - Would it share its function with the Director of Public Prosecutions or would it be in the domain of the

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[76] Op cit 16 at para 6.3, p 194

[77] Op cit 16 at para 6.7, p 195

new Australian Crime Authority? Would all other criminal laws and policies apply to the Act in this area, such as self-incrimination, double jeopardy, etc? Would the ACCC be given power to plea bargain? Would the sanction be imposed on all persons knowingly concerned in cartel activity or would the ACCC be selective in meting out this type of punishment, based on the public profile or the ACCC's own views of particular individuals? Would it be applied equitably? In the end, it is this total uncertainty and equivocation that leads Ai Group to strongly reject the proposal as presently submitted. (For a detailed examination of penalties administered by federal regulators, the ALRC Discussion Paper[78] previously mentioned is commended by Ai Group to the Review.)

D. Other provisions of the Act

5.71 There are a number of other competition provisions in the Act which are also worthy of comment, although in essence, they have worked well and are accepted generally in the business community as appropriate regulations.

5.72 However, Ai Group is concerned about two matters in particular - collective bargaining by small business and the per se offences in sections 45 and 47.

> *A detailed examination of possible improvements to the authorization process (including those that would enable small business the opportunity to engage in collective bargaining in certain instances), should be undertaken.*

5.73 In respect of ***collective bargaining*** (section 45A) and the authorisation process that must be engaged in to prevent the participants falling foul of the Act, Ai Group believes that the problem lies specifically with the complexity and inadequacy of the authorisation process itself, as mentioned earlier in this submission. We sympathise with businesses of any size that are hindered in their effectiveness in the market by laws that do not recognise their need to act together in certain circumstances for the benefit of all participants in that market, quickly and efficiently without recourse to the competition regulator. However, we do not see any reason for parts of markets to be treated differently based simply on the size of the participants in that sector. All participants in a market should be treated equally and fairly in accordance with the laws.

5.74 *Changes to the authorization process to make it more responsive to present-day commercial needs and to streamline the system. In particular, a detailed examination of possible improvements to the authorization process (including those that would enable small business the opportunity to engage in collective bargaining in certain instances), should be undertaken. Ai Group believes that there is legitimacy in business concerns with the present system. Greater clarity and certainty is required in respect of the process of approval (whether as a notification or through authorization). This would also assist small business to efficiently compete through economies of scale from aggregation of bargaining power for supplies, amongst other things.*

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[78] Op cit 16

Mechanisms to reduce the costs and delays incurred in seeking authorization should also be reviewed.

5.75 The collective bargaining arrangements should be clarified and the Act altered to reflect the changing corporate structures used to effect efficiency outcomes such as joint ventures, dual-listed companies, and limited partnerships. The scope of the provision and their impact on these newly-evolved business vehicles is uncertain.

5.76 Some offences under sections 45 and 47 are ***"per se" offences*** whereas others in Part IV require the conduct or activity in question to have had an effect or likely effect of substantially lessening competition before they become illegal. The reason for this distinction is lost to Ai Group and its members. The world is moving toward a substantial lessening of competition test in almost all areas of competition law. *Per se* offences are being limited to those which could not provide any reasonable justification or benefit in the eyes of the public, such as cartel or collusive price fixing, exclusionary arrangements and monopoly activity.

5.77 However, activities such as third line forcing can, and have been proven to have, benefits for consumers if conducted fairly (ie if they do not have the effect of substantially lessening competition.)

5.78 The notification option under the Act depicts third line forcing as inherently unlawful, and hence anti-competitive. This may not necessarily be so and there are significant arguments (even some supported by the ACCC) that suggest that third line forcing can positively benefit the public consumer and can enhance competition (eg the Safeway petrol discounts) in some cases.

5.79 Resale Price Maintenance (section 48) (being a form of price fixing) is a *per se* offence, but does not allow for the "related corporation" exemption found in other section 48 offences. Again, Ai Group is concerned that, in the absence of a sustainable argument that related party resale price maintenance is inherently anti-competitive in the wider market, this exemption should be extended to section 48 resale price maintenance offences.

Section [6] Conclusion

The Australian Industry Group recognises that the Trade Practices Act and its administrator have provided a firm platform for the promotion of competition and the encouragement of fair trading practices through its enforcement regime and the efforts of a zealous regulator.

However, we believe that there is now an opportunity to re-assess the operation of the Act and to provide a new dimension in administration of the competition provisions. Through the establishment of a structured framework for accountability of the administrator's actions; a corporate governance program that sets a standard of excellence for its constituents; and a role model for the general business community, we hope that the ACCC can continue to pursue its objectives under the Act with confidence.

Essentially, the Act itself is sound, and the ACCC is a responsible agency for its enforcement. Now is the time to secure a future for both the Act and its administration that meets the demands of the rapidly evolving environment of global markets.