Initial Submission by Telstra Corporation Limited to the Dawson Committee Review of the Trade Practices Act

July 2002

EXECUTIVE SUMMARY

1. The Trade Practices Act is clearly beneficial

Telstra Corporation Limited ("**Telstra**") welcomes the opportunity to make this submission to the Dawson Committee. Telstra believes an independent review of the *Trade Practices Act 1974* ("**Act**"), and the administration of the Act by the Australian Competition and Consumer Commission ("**Commission**"), is timely.

Most importantly, Telstra believes that the Act continues to operate effectively in achieving its objective of promoting competition in Australian markets. The Act is very clearly beneficial to the Australian economy and Telstra highlights the critical importance of the Act to Australia's continued economic prosperity. Such issues were canvassed in detail in the Hilmer Report into National Competition Policy in August 1993 and are fundamental to any review of the Act. With this in mind, Telstra's submissions below should be considered from the perspective of improving the operation and application of the Act in certain areas. Telstra emphasises that its overall message should thus be construed as a positive one.

Against this background, Telstra's key submissions are that:

- the Act is clearly beneficial;
- the misuse of market power provision in section 46 should not be amended by inclusion of an "effects test";
- the Commission should not be granted cease and desist powers, particularly given significant concerns with the extent of the Commission's existing powers;
- the Commission should be subject to greater scrutiny and accountability in relation to its use of the media; furthermore, its cross-functional role gives rise to potential conflicts of interest;
- the Act requires fine tuning and remedial attention to correct long-recognised problems with sections 4D (exclusionary provisions), 47 (third line forcing) and 50 (mergers);
- any amendments made to the enforcement provisions of the Act should be subject to appropriate safeguards, and the Act should be amended to ensure that documents subject to legal professional privilege are excluded from the scope of section 155 notices.

These submissions and a range of related concerns are summarised below and detailed in the main body of this submission.

Telstra would be willing to make oral submissions to the Dawson Committee in support of any of the issues set out in this submission. Telstra would also be willing to assist the Dawson Committee by providing further evidence, as necessary, in support of the points made by Telstra in this submission.

2. Section 46 should not be amended

Telstra submits that section 46 should <u>not</u> be amended to introduce an "effects" test. This issue has been considered by at least seven previous reform committees (most recently in 2001) who have each concluded against such an amendment based on its significant adverse effects. Importantly, such an amendment would significantly increase the risk of penalising legitimate competitive conduct, or conduct beneficial to the public interest, which clearly undermines the philosophy and intent of the Act. The amendment would also create considerable uncertainty and may have a chilling effect on vigorous competition.

For similar reasons, Telstra is opposed to the proposal to reverse the onus of proof in relation to proscribed purposes in section 46. Such a step is both unnecessary and undesirable and such a step has significant risks and likely costs, as identified in this submission.

Telstra does not believe that the Commission's powers should be increased to include cease and desist orders. Telstra submits that such powers are both unnecessary and undesirable. More importantly, such powers are unconstitutional.

3. The Commission should be more accountable, particularly in relation to media releases

Telstra submits that, firstly, the Commission should be more accountable for the content of its media releases. This lack of accountability enables the Commission to act irresponsibly in its use of the media, potentially causing significant damage to businesses. Proper procedural safeguards against misleading Commission press statements, including media releases, are imperative. Accordingly, Telstra submits that the Commission should be subject to statutory guidelines in relation to its use of media releases. Parties directly affected by Commission media releases should be given a reasonable opportunity to review them. Most importantly, such parties should have an avenue for complaint to an independent third party, such as an Inspector-General, in the event that they are dissatisfied with the contents of an ACCC media statement.

Secondly, the Commission currently does not consistently publish detailed reasoning behind its administrative decisions. This significantly compromises transparency and thus Commission accountability. The Commission's lack of transparency has been subject to international criticism and is contrary to international best practice. Accordingly, Telstra submits that the Commission should be required to publish detailed reasoning behind its administrative decisions, with confidential information deleted, ideally on its Internet web site (as occurs with the Commerce Commission in New Zealand).

However, the issues with media releases and transparency are indicative of a more general lack of Commission accountability. The Commission is not held sufficiently accountable for its daily administration of the Act. As a result, there are serious issues of regulatory error and procedural unfairness. Where a regulatory agency has significant powers and a high degree of independence, it is imperative that it is held effectively accountable for its activities. Telstra submits that Commission accountability should be increased by creating an Inspector-General, and independent board, directly accountable to Parliament. Furthermore, the Commission's Parliamentary reporting requirements should be increased and refocussed on regulatory outcomes rather than mere enforcement action.

4. Changes are needed to some substantive provisions of the Act

Section 45 (concerted conduct) and 4D (exclusionary provisions): There is widespread support for subjecting exclusionary provisions to a general competition test. Recent judicial decisions have had the effect of broadening the scope of sections 45 and 4D beyond the collective boycotts they were intended to regulate, thereby prohibiting conduct which may be pro-competitive. Telstra submits that section 4D should be deleted or at least subject to a general substantial lessening of competition test. Alternatively, certain business activities which may be pro-competitive should be expressly carved out of its *per se* application, such as joint ventures and vertical arrangements.

Section 47 (third line forcing): As with section 4D, section 47 should be amended to make all third line forcing subject to a substantial lessening of competition test, as has been widely recognised. The current *per se* approach is anachronistic and anomalous, resulting in the inadvertent prohibition of legitimate competitive conduct. A *per se* approach creates uncertainty, high compliance costs for business, and has led to the law being brought into disrepute. A *per se* approach is also inconsistent with international best practice. This amendment has been endorsed by previous law reform committees.

Telstra submits that a "related companies" exemption should be incorporated into section 47 for similar reasons. The lack of this exemption unfairly discriminates against large companies with multiple subsidiaries. It also generates significant compliance costs. The lack of this exemption is thus inequitable,

costly and anomalous. Again, such an amendment has been repeatedly advocated over a very considerable period and has been endorsed by previous law reform committees.

Section 50 (mergers and acquisitions): While the existing Australian merger test is satisfactory, Telstra submits that significant benefits would accrue from enacting a formal statutory clearance process that would complement the current informal clearance process. The existing informal clearance process lacks accountability and transparency, creating significant costs and risks for business. The incorporation of a formal clearance process into the Act would significantly improve the merger regime in Australia and would better harmonise Australian merger law with New Zealand merger law. Given that the flexibility of informal clearances does have clear advantages, Telstra submits that a hybrid approach should be adopted based on an optional formal or informal clearance procedure.

5. Enforcement provisions and the Commission's powers

Telstra submits that any amendments to the enforcement provisions of the Act and any such amendments require careful consideration an appropriate safeguards. In particular:

- **Information gathering powers**: The Commission has very significant information gathering powers and little effective accountability for the use of such powers. Section 155 notices can be extremely costly and onerous for business and the Commission has every incentive to maximise the scope of such notices without regard to such underlying costs. Accordingly, Telstra submits that the Commission should be subject to independent oversight in relation to such notices, as identified below. Furthermore, the Commission should be subject to a statutory requirement of proportionality. Telstra submits that the Commission should also be required to obtain a warrant from a magistrate or judge before entering premises to search for documents, consistent with the use of comparable powers by ASIC and consistent with the practice in New Zealand, Canada, the United States and the United Kingdom.

  In addition, the recent decision in *Daniels* has raised significant concerns regarding the ability of the Commission to obtain documents subject to legal professional privilege. This decision has significant adverse public policy consequences, as it discourages companies from seeking legal advice on their compliance with the Act. Telstra submits that the Act should be amended to ensure that documents subject to legal professional privilege are excluded from the scope of section 155 notices.

- **Criminal sanctions and imprisonment**: While Telstra supports the introduction of criminal penalties for individuals involved in hardcore cartel activity, Telstra submits that such a sanction must be accompanied by a number of important safeguards as identified later in this submission, and should apply to all businesses.

- **General penalties**: Telstra is not convinced that it is necessary to amend the Act to specifically provide for turnover based penalties for certain contraventions. The current penalties provided under Part VI are adequate. However, if the Dawson Committee were minded to recommend that the Act should be amended to provide that penalties should be based on the turnover of a corporation, Telstra considers that such penalties must also be accompanied by a number of important safeguards as identified later in this submission.

- **Concentration of power**: In general, Telstra submits that the powers of the Commission should not be further increased. There are already significant concerns regarding the concentration of power within the Commission and the conflicts of interest this creates.

CONTENTS: DAWSON REVIEW

1 INTRODUCTION

1.1 Telstra Corporation and the Trade Practices Act

As the Dawson Committee will be aware, Telstra Corporation Limited ("**Telstra**") is one of Australia's largest listed corporations with interests focussed principally in the Australian telecommunications sector, but also extending internationally and to a variety of other sectors. As at December 2001, Telstra had total assets of roughly AU$37 billion.

Telstra was formed as a Government corporation in 1991 by the amalgamation of the Australian Telecommunications Commission and the Overseas Telecommunications Commission pursuant to the *Telstra Corporation Act 1991*. During 1997 and 1999, Telstra was partially privatised by way of sale of shares to the Australian public in tranches of 33.3% and 16.6% respectively.

Throughout this period, Telstra has been subject to the *Trade Practices Act 1974* ("**Act**" or "**Trade Practices Act**"). Telstra has also been subject to industry-specific competition legislation in the form of the *Telecommunications Act 1991* and, more recently, the *Telecommunications Act 1997*. In 1995, the Trade Practices Act was amended to incorporate a Part IIIA access regime which potentially applied to Telstra. In 1997, the Trade Practices Act was further amended to incorporate a telecommunications-specific competition regime in Part XIB and Part XIC which applied to Telstra.

While Part IIIA, Part XIB and Part XIC are outside the terms of reference of the Dawson Committee, Telstra remains subject to the generic competition provisions in Part IV of the Trade Practices Act and has significant experience with the administration of the Act by the Commission.

Indeed, given the extent of regulation to which Telstra is subject under the Trade Practices Act, Telstra undoubtedly has some of the most extensive experience in interacting with the Commission over the past decade of any Australian corporation. Telstra may well be the corporation most heavily regulated by the Commission of any corporation in Australia. Telstra has drawn heavily on this experience in preparing this submission.

Telstra's significant experience with the Commission and the application of the Act over the past decade has included, for example:

- business acquisitions under Part IV of the Act;
- investigations under Part IV of the Act;
- investigations under Part V of the Act;
- enforcement and remedies under Part VI of the Act;
- notifications under Part VII of the Act;
- clearances and authorisations under Part VII of the Act;
- Tribunal reviews under Part IX of the Act;
- investigations under Part XIB of the Act;
- competition notices under Part XIB of the Act;

- record-keeping under Part XIB of the Act;
- service declarations under Part XIC of the Act;
- arbitrations under Part XIC of the Act;
- reviews of access undertakings under Part XIC of the Act;
- exercising of the Commission's powers under Part XII of the Act;
- arbitrations by the Commission under the Telecommunications Act;
- price control reviews by the Commission under the Telecommunications Act; and
- judicial review of the Commission's decisions.

Telstra has also been the subject of many Commission press releases. A simple search of the Commission's media releases on its Internet website indicated that the word "Telstra" appeared in over 211 separate media releases dating back to 1995, being roughly 12% of Commission media releases during this period.[1]

1.2 Why Telstra Corporation is Making This Submission

Given the above, Telstra is well placed to comment upon the perceived difficulties with the Trade Practices Act and the administration of the Act by the Commission.

In particular:

- Telstra has valuable practical experience that can be shared with the Dawson Committee and used to critically evaluate the operation of Part IV of the Act in its current form.
- While Part XIB and Part XIC are beyond the terms of reference of the Dawson Committee, Telstra's experiences in the context of those sections provide a number of insights for the Dawson Committee when considering other provisions of the Act that are within the Dawson Committee's terms of reference, particularly in relation to the introduction of an "effects test" into section 46.
- Telstra has extensive experience regarding the Commission's administration of the Act, including issues relating to Commission media releases.

The basis for Telstra's approach, as identified in greater detail within this submission, is as follows:

- **The Act is clearly beneficial:** Most importantly, Telstra believes that the Act continues to operate effectively in achieving its objective of promoting competition in Australian markets. The Act is very clearly beneficial to the Australian economy and Telstra highlights the critical importance of the Act to Australia's continued economic prosperity. Such issues were canvassed in detail in the Hilmer Report into National Competition Policy in August 1993 and are fundamental to any review of the Act.

[1] The Commission has apparently issued the following numbers of media releases for the following years: 1996 (181), 1997 (182), 1998 (243), 1999 (263), 2000 (368), 2001 (332), and 2002 (174 as at 15 July 2002).

- **No effects test in section 46:** Telstra strongly believes that no "effects test" should be introduced into section 46. Telstra is one of the few corporations in Australia with direct experience in the application of an "effects test" given that Telstra is already subject to an effects test in Part XIB of the Act. Accordingly, Telstra sets out in detail in this submission its concerns and experience with the effects test. Telstra believes that the adoption of an effects test would be a retrograde step under the Trade Practices Act. Similarly, the Commission should not be given the power to issue cease and desist orders, both because of their constitutional invalidity and because of the chilling effect such notices may have on the competitive process.

- **The Commission must be more accountable.** As set out in detail in this submission, Telstra has serious concerns about the propriety of the Commission's use of the media. The Commission is: in no way constrained from issuing misleading media releases or statements; under no scrutiny in relation to its use of the media; and under no obligation to consult with affected parties in relation to potentially damaging media releases. The Commission should, at minimum, be subjected to greater oversight in relation to its use of the media; for example, by making it accountable or subject to oversight by a Inspector-General or similar agency. Similarly, the steady accretion in the Commission's cross-functional powers has not been accompanied by a similar expansion in the level of its overall accountability. Measures should be introduced to ensure that the Commission is more accountable for its decisions.

- **Fine tuning and remedial attention required to Part IV:** There are a number of elements of Part IV of the Act which require further legislative fine tuning and remedial attention, such as third line forcing and exclusionary provisions. Many of the problems with such provisions of Part IV have been extensively considered over the past decade, and solutions have been proposed, but not yet adopted. Some of these problems have a significant and disproportionate impact on Australian industry and arise because Australia's generic competition laws do not accord with international best practice. The Dawson Committee should view itself as a catalyst for change to ensure such issues are given the legislative attention they rightly deserve.

- **Criminal penalties should be subject to appropriate safeguards:** Telstra submits that any amendments to the enforcement provisions of the Act should be subject to careful consideration and appropriate safeguards. In view of the current uncertainty about the operation of legal professional privilege under section 155 of the Act, the Act should be amended to ensure that documents that are the subject of legal professional privilege are excluded from the operation of section 155 of the Act.

2 REGULATION OF MARKET CONDUCT

2.1 Section 46 (Misuse of Market Power)

Summary

Telstra submits that section 46 should not be amended. In particular:

- There is no convincing case for the "effects" test. Rather, there are significant risks associated with such an amendment which provide compelling reasons why section 46 should not be amended.
- Seven previous review committees have each considered the merits of an effects-based test within section 46 and concluded against such an amendment. Indeed there has been consistent recognition that the effects test blurs the distinction between legitimate beneficial conduct and illegitimate anti-competitive conduct, so beneficial conduct would be deterred were such a test to be introduced.
- The Commission's success in bringing section 46 actions demonstrates that the current provision is operating effectively and no amendment is necessary. Purpose is not difficult to prove, as it can be readily inferred from conduct as specifically contemplated by previous amendments to the Act.
- An effects based test reduces the element of culpability inherent within a purpose test.
- An effects test is not consistent with international best practice.

Telstra's experience with an effects-based test in Part XIB of the Act, demonstrates the difficulties created by such a test and its chilling effect on pro-competitive conduct.

Telstra is also opposed to the proposal to reverse the onus of proof in section 46 for similar reasons.

2.1.1 Application and proposals for reform

(a) Application

Section 46 currently provides that

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

In order to contravene section 46, the Commission (or private applicant) must show that the corporation acted with one or more of the prohibited purposes in paragraphs (a), (b) or (c) as well as satisfying the other elements of the section.

Telstra is not concerned here with the first two elements of this section, namely "substantial market power" and "taking advantage". However, Telstra objects to proposals to amend the third element, namely the proscribed (or prohibited) purposes set out as paragraphs (a) to (c) of section 46. Telstra's submission therefore focuses on the Commission's proposals.

(b) Proposals for reform

There are two distinct proposals for reform. Telstra is strongly opposed to both proposals.

- First, Telstra understands that some parties are seeking to have an effects test added to the existing purpose test in section 46. This would mean that a corporation could not only breach section 46 if it took advantage of substantial market power for an anti-competitive purpose, but it could also breach section 46 if it took advantage of any substantial market power with the *likely effect of substantially lessening competition in a market*.

- Second, the reversal of the onus of proof under section 46 has also been proposed as an alternative to an effects test. This would mean that once the Commission establishes that a corporation has taken advantage of its significant market power, the onus would lie on the corporation to demonstrate that it did not have one or more of the proscribed purposes. Such an amendment was recently considered by the Senate Legal and Constitutional References Committee.[2]

2.1.2 An effects test should not be introduced into section 46

(a) No amendment to section 46 is required

Telstra submits that there is no compelling reason to amend section 46 to include an effects test. Rather, there are very significant risks associated with such an amendment and these provide important reasons why section 46 should not be amended. In particular, an effects test would blur the distinction between legitimate pro-competitive conduct and illegitimate beneficial conduct, so beneficial conduct would be deterred were such a test to be introduced. This would be a retrograde step and contrary to the legislative philosophy of the Act.

Distinction between legitimate and illegitimate conduct

The distinction between legitimate and illegitimate conduct is often a fine one. It is often difficult to differentiate between vigorous competition and illegitimate competition (i.e., anti-competitive conduct). On the one hand, vigorous competition is a clear objective of the Act. On the other hand, illegitimate competition is (and should be) deterred by the Act. The consequences of incorrectly making this distinction may be that vigorous competition is penalised, thereby stifling vigorous competition. For similar reasons, it is critical that clear and unambiguous guidance is provided to corporations so that they can determine the legality of their conduct. If the law is unclear or ambiguous, corporations are likely to have incentives not to engage in vigorous competition given the risk that they may inadvertently breach the Act.

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[2] The Senate Legal and Constitutional References Committee's Report, *Inquiry into Section 46 and Section 50 of the Trade Practices Act 1974,* was tabled in Parliament on 14 May 2002.

Importantly, as is well known, the distinction between vigorous competition and anti-competitive behaviour is particularly difficult to draw in the context of section 46. As Dawson J reasoned in *Queensland Wire*:[3]

> *"The difficulty in determining what conduct constitutes taking advantage of market power and what conduct does not, stems inevitably from the need to distinguish between monopolistic practices, which are prohibited, and vigorous competition, which is not. Both here and in the United States, the search continues for a satisfactory basis upon which to make the distinction. For the most part, all that emerges are synonyms which are not particularly helpful."*

Relevantly, the Hilmer Report also commented on the difficulty associated with this important distinction in the context of section 46 in the following terms:[4]

> *"The role of a provision dealing with misuse of market power is to distinguish between vigorous competitive activity, which is desirable, and economically inefficient , monopolistic practices, which are undesirable. The difficult task facing legislatures attempting to address misuse of market power is to develop a process which will make the appropriate distinctions while providing businesses with the necessary certainty as to the limits of legal conduct."*

The critical difficulty with an effects test is that it blurs this distinction and significantly increases the problems faced by courts in differentiating legitimate conduct from illegitimate conduct. An effects test also increases the scope for regulatory error in applying the law and creates greater uncertainty. As a result, firms are less likely to engage in vigorous competition given the greater risk of their conduct being held incorrectly to breach the Act or being perceived as requiring investigation. Clearly this directly contradicts the underlying philosophy and objective of the Act.

Indeed, given the considerable financial penalties involved in a breach of section 46, it is essential that corporations be in a position to know with certainty whether their conduct is unlawful. This was noted by Justice Kirby in *Melway*.[5]

Currently, section 46 has two distinct tests to differentiate legitimate vigorous competition from anti-competitive behaviour:

- First, a firm must not "take advantage" of its substantial market power. This has been interpreted as a requirement for that firm not to engage in conduct that a firm in the same position without significant market power would engage in. Essentially, this distils to a requirement that a firm with substantial market power must act in the same manner as if it were subject to competition.

- Second, a firm must not have acted for a proscribed anti-competitive purpose, which is akin to a requirement that the conduct of the firm must have been motivated entirely by legitimate business purposes.

Assuming that the second element were amended to an effects test, as proposed by the Commission (and ignoring the first element), the second element would no longer exclude from the ambit of section 46 any conduct of the firm for which the firm had a legitimate business purpose,

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3 (1989) 167 CLR 177 at 202.

4 Report of the Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, August 1993, p. 62.

5 (2001) 178 ALR 253 at 276.

but which substantially lessened competition. That is, *certain conduct which was not **intended** to be anti-competitive could still breach section 46*.

Importantly, this has three consequences:

- First, section 46 would no longer be an offence requiring culpability. Rather, section 46 would constitute an offence of strict liability where a breach could occur unintentionally. Accordingly, section 46 would apply not only to a "misuse" of market power, but also to an "inadvertent use" of market power.

- Second, such an amendment creates a much greater risk of regulatory error (i.e., the inadvertent prohibition of pro-competitive or welfare-enhancing conduct). This second point is particularly important so is considered in detail below.

- Third, certain legitimate conduct which has a public benefit could be prohibited by the Act.

Importantly, in relation to the second point, many legitimate actions of a corporation with significant market power could have a significant impact on market competition. By its nature, a firm with significant market power will have a substantial influence over that market.

For example, by engaging in vigorous price competition utilising its lower cost structures, the firm may cause competitors to exit the market thereby appearing to lessen competition. A wholesaler with substantial market power may also decide not to supply particular products for legitimate business reasons, but with the effect of lessening competition in downstream markets utilising those products. As a result, any alteration to the section 46 provision to make the section 'easier to prove' against such firms, may lead to market timidity on their part.

A firm with significant market power needs to assume that in many cases its legitimate business activity could be alleged to substantially lessen competition. This means that the firm becomes very dependent on the first element ('taking advantage') to escape liability under a section 46 effects provision, as it must acknowledge the risk that the first and third elements could be satisfied.

Yet, the application of the "taking advantage" element is often conceptually complex. It typically involves a complex competition analysis based on second-guessing the hypothetical behaviour of a hypothetical firm without substantial market power in the same situation as the firm with substantial market power. It is not uncommon for the courts, or the Commission, to get this analysis wrong. Furthermore, the analysis can have a high element of subjectivity.

Accordingly, there is a high risk of regulatory error in the application of this 'taking advantage' requirement, in turn creating compliance risks and uncertainty. As the law itself on this 'taking advantage' issue remains in a state of flux, this exacerbates such uncertainty and creates compliance risks. There are numerous articles which confirm these points, including, for example:

- R. Featherston & G. Edwards, "Recent Developments in the Misuse of Market Power" (2000) 8 *Trade Practices Law Journal* 79.

- L. Griggs & S. Hardy, "ACCC v Boral - the High Court Awaits Another Section 46 Case!" (2001) 9 *Trade Practices Law Journal* 201.

- W. Pengilley "Misuse of Market Power: *Australia Post, Melway* and *Boral*" (2002) 9 *Competition and Consumer Law Journal* 201.

- G. Edwards "Melway - A TCE Perspective" (2002) 10(2) *Trade Practices Law Journal* 76.
- D. Meltz "Market Entry - See Adjoining Map: Melway and the Right Not to Supply" (2002) 10(2) *Trade Practices Law Journal* 96.
- M. O'Bryan "Legal and Economic Principles and Reasoning in *Melway* and *Boral*" (2001) 8 *Competition and Consumer Law Journal* 203.
- W. Pengilley, "Misuse of Market Power The Unbearable Uncertainties Facing Australian Management" (2000) 8 *Trade Practices Law Journal* 56.
- D. Robertson, "Causal Concepts in Competition Law and Economics" (2001) 29 *Australian Business Law Review* 382.
- B. Stewart, "The Economics and Law of Section 46 of the Trade Practices Act" (1998) 26 *Australian Business Law Review* 111.
- W. Seah, "Fair Competition or Unfair Predation: Identifying the Misuse of Market Power under Section 46" (2001) 9 *Trade Practices Law Journal* 236.

With this in mind, a purpose test has an important role, namely to reduce the risk of regulatory error and increase certainty. It reduces the emphasis on the "taking advantage" test and instead enables a certain class of conduct to be immediately removed from the ambit of section 46, namely conduct which was not intended to be anti-competitive. It is much simpler and cleaner to remove such conduct from the scope of section 46 by a more straightforward analysis regarding the underlying intent of the firm in question.

The fact that the "purpose test" creates certainty is vital to the issue of compliance with the Act and, accordingly, to the ability of firms to assess whether their conduct is likely to be legitimate or illegitimate. Most importantly, firms can engage in vigorous competition, where they have no intention to substantially lessen competition, safe in the knowledge that they will not breach section 46. This is entirely consistent with, and promoted, by the objectives of the Act.

However, in addition to the difficulties associated with the greater scope for regulatory error there is also a more fundamental problem with an "effects test" which arises because there is a class of conduct which can satisfy both the "taking advantage" test and the "effects test" but which has a public benefit. Normally such conduct would be excluded from section 46 by the purpose test, but without such a test, such conduct would be prohibited. Even writers who have advocated an effects test have acknowledged this problem. SJ Hardy, for example, comments:[6]

> *"The writer concedes that there may well be situations in which the use of market power, which has the effect of substantially lessening competition, may have a public benefit."*

The risk of inadvertent prohibition of vigorous competition or publicly beneficial conduct has been considered repeatedly by previous law reform committees which have each recognised the dangers in moving to an effects based test. As identified below, in each case these committees have decided that the risk created by blurring the distinction between illegitimate anti-competitive conduct and legitimate beneficial conduct in section 46 outweighs any benefits from introducing an effects test into section 46.

Telstra also commends the following article, which outlines the detriments of an effects based test in considerable detail and clarifies what is a conceptually complex issue:

6 S.J. Hardy, "Misuse of Market Power - Purpose or Effect?" (1997) 5 *Trade Practices Law Journal* 114.

- M. Landrigan, A. Peters & J. Soon, "An Effects Test under s46 of the Trade Practices Act: Identifying the Real Effects" (2002) 9 *Competition and Consumer Law Journal* 258.

Telstra also notes that this analysis is confirmed by articles written on this subject in the United States. For example, the following article analyses the similar "effect" vs "intent" debate in the context of the United States law on monopolisation:

- R.A. Cass & K.N. Hylton "Antitrust Intent" (2001) 74 *Southern California Law Review* 657.

The Cass & Hylton article concludes, for example:

> *"Intent has been a controversial issue in the law, particularly in antitrust.... The structure of intent rules can be understood by focusing on the goal of minimizing the total cost of legal error, which is determined by the frequencies and costs of false acquittals and false convictions and the administrative costs associated with making the requisite decisions. As a general rule, proof of specific intent - an intent to engage in conduct that violates the law for a particular (bad) reason or with a particular understanding of its harmful effect - is required where the costs of false convictions are high relative to those of false acquittals. This error-cost approach explains the allocation of burdens and the sorts of proof required under the specific-intent tests in antitrust and in many other areas of law as well."*

The question therefore arises, given such difficulties with an effects based test, *why is such a test being advocated and do the arguments in favour of an effects based test outweigh the likely costs in introducing it?* In this regard, Telstra submits that the arguments made in favour of an effects test have little substantive merit and the benefits of introducing an effects test would not outweigh the significant risks and likely costs identified above. Telstra considers each of the three key arguments made in favour of an effects test and their merits below.

Proving Purpose

The first of the three key arguments for the introduction of an effects test is based on the claim that it is currently too difficult to prove that a corporation has an anti-competitive purpose as set out in section 46. Reference is often made to the statement of Northrop J in *TPC v Carlton & United Breweries Ltd* that: [7]

> *"A contravention of [section 46] may take many forms and in many cases a wink or a nod may be more effective than the written or expressed word. Proof of those aspects may be difficult to obtain."*

However, Telstra believes that such concerns are significantly over-stated. Such concerns do not adequately recognise the significant scope for inferring purpose created by section 46(7) of the Act. Indeed, as noted below, that provision was specifically enacted into the Act to reduce the evidential burden on parties under section 46 and to enable courts to make inferences from conduct to ease the burden of proof. Indeed, subsection 46(7) allows courts to infer purpose from the circumstances notwithstanding direct evidence to the contrary. This is a very wide power because it allows courts to reject direct evidence of subjective purpose in favour of inferences from the circumstances. Accordingly, the concerns with the burden of proof fail to adequately recognise that, in practice, a court can readily infer purpose from a wide range of conduct.

In addition, section 4F(1)(b) of the Act ensures that, even if there is credible evidence of an apparently legitimate purpose or reason, there may still be a breach of section 46 if *any* of the substantial purposes or reasons was one of those listed in section 46.

7 (1990) ATPR 41-037 at 51, 549.

> *"The fact that courts can readily infer purpose is illustrated by the range of successful prosecutions under section 46 which have relied on such inferences, including a number of recent cases. The recent history of section 46 cases successfully brought by the Commission, as well as the Commission's own public claims about the successful operation of section 46, confirm this".*[8]

Indeed, the Commission has enjoyed a relatively high success rate with section 46 actions before the Court. Since *Queensland Wire*, the Commission has prosecuted alleged contraventions of section 46 in four cases,[9] and succeeded in three: *ACCC v Rural Press Limited*[10]; *ACCC v Boral Limited*[11] and *ACCC v Universal Music*.[12] The Commission is currently appealing the decision of *ACCC v Australian Safeway Stores*[13] (the only case in which it did not succeed) to the Full Federal Court.

Harming competitors or competition?

The second of the three key arguments for introducing an effects test is based on the argument that section 46 is flawed in its focus on particular anti-competitive purposes relating to harm to competitors, rather than the overall effect on competition. Advocates of an effects test have argued such a test would be preferable because it would focus upon the process of competition, consistent with the intent of the Act. However, this argument has difficulties.

The judicial construction of section 46 already recognises that the section is intended to further the overriding objective of the Act, namely to promote competition. As the Hilmer Committee noted, the High Court's interpretation of section 46 already ensures that section 46 is concerned with protecting the competitive process rather than individual competitors.[14] In *Queensland Wire*, Chief Justice Mason and Justice Wilson observed, for example, that:[15]

> *"The object of section 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort and these injuries are the inevitable consequences of the competition section 46 is designed to foster."*

Indeed, it is when one moves from the purpose test already well-established under section 46, to the effects test, that the ability to protect the competitive process is likely to be undermined, particularly in circumstances where few competitors exist in a given market and the activities of

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8 ACCC, "High Court Confirms and Enhances Current Approach to 'Misuse of Market Power'", MR 51/01, 15 March 2001.

9 Neither *TPC v CSR Limited* (1991) ATPR 41-076 nor *TPC v Carlton & United Breweries* (1990) 24 FCR 532 are referred to because in both cases liability under section 46 was admitted.

10 (2001) ATPR 41-804. The Commission succeeded at first instance in relation to the section 46 claim. The Full Federal Court recently overturned that decision in relation to section 46 (and 45(4D)). However, the Full Federal Court found that the arrangement between Rural Press Limited, its subsidiary Bridge Printing Office Pty Ltd, and Waikerie Printing House Pty Ltd had the purpose or effect of substantially lessening competition in the Murray Bridge market for regional newspapers in breach of section 45 of the Act. See ACCC Media Release 18/7/02, at http://www.accc.gov.au.

11 (2001) 106 FCR 328.

12 (2002) ATPR 41-855.

13 (No 2) [2001] FCA 1861. The appeal has not yet been heard.

14 Report of the Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, August 1993, p. at 71-2.

15 (1989) 167 CLR 177 at 191.

one results in greater market success for that participant. It is in this instance that it becomes extremely difficult for any party with a degree of market power to embark on normal, healthy commercial activities with little fear of repercussion from the regulator or competitors.

Consistency with the rest of the Act

The third of the three key arguments made in favour of an effects test in section 46 is that it would be more consistent with other provisions of the Act, such as sections 45, 47 and 50, which are concerned with conduct that has the effect of substantially lessening competition.[16]

However, this claim fails to recognise that section 46 operates in a different context to those other provisions and the difficulty in differentiating between anti-competitive conduct and vigorous competition in the context of section 46 is significantly more acute.

Sections 45, 47 and 50 are largely intended to prevent unfair co-ordination of business activity between two or more firms. In such circumstances, the evidential focus is centred on the fact that such firms have agreed to co-ordinate their anti-competitive activity. Essentially, these provisions adopt the approach that where such co-ordination results in significant adverse effects on competition, such co-ordination should be prohibited. The risk of regulatory error is not so much one of inadvertently prohibiting vigorous competition, but rather of inadvertently preventing business co-ordination that is beneficial to society. Accordingly, the issue of differentiating legitimate competitive conduct from illegitimate competitive conduct is less acute.

In contrast, section 46 addresses a situation in which co-ordination of business activity has already been internalised within a single firm. The risk of regulatory error in such circumstances is acute and is associated with balancing vigorous competition against anti-competitive behaviour. The consequences of failing to strike the right balance, or of creating uncertainty, are that the objective of the Act will be directly undermined because competition and beneficial conduct will be prevented or deterred. Accordingly, the relevant tests in section 46 are more subtle and rely on a number of safeguards to ensure that the balance is accurate and to mitigate any scope for regulatory error.

Uncertainty

It is also apparent that an amendment to the law relating to section 46 would itself be likely to create uncertainty with associated costs.

The purpose test has been operating in its present form since 1986, and a measure of certainty has accompanied the development of case law on the provision. If a significant amendment were made to section 46, business would need to await judicial interpretation of the provision. Would there, for instance, be judicial attempts to exclude economically efficient conduct which might have the effect of substantially lessening competition?[17] Telstra submits that such uncertainty might lead to excessive caution on the part of businesses, and thus reduce competitive behaviour, having a similar adverse effect on vigorous competition to that identified above.

As noted below, this was an issue of clear concern to the Hilmer Committee in 1993, which started from the position that the costs of amending section 46 should be clearly balanced against any merits in amending it. In particular, the Hilmer Committee reasoned that section 46 as currently drafted already contained a regime which provides a basis for making the appropriate distinctions, which is broadly consistent with comparable overseas regimes, and which has been sufficiently

16 Senate Legal and Constitutional References Committee, *Inquiry into Section 46 and Section 50*, May 2002, para 3.23

17 Report of the Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, August 1993, p. 70-71.

interpreted by the High Court to provide a reasonable degree of business certainty.[18] In these circumstances, the Hilmer Committee reasoned: [19]

> *". . . proposals for alternative mechanisms for dealing with misuse of market power should offer a demonstrable improvement over the current regime to justify introducing further uncertainty in this difficult area."*

Telstra submits, consistent with the conclusions of the Hilmer Committee identified below, that there would be no demonstrable improvement that an effects test would introduce into the current regime to justify the further uncertainty in this difficult area. Rather, an effects test would be likely to exacerbate uncertainty, for the reasons identified above, with significant costs.

(b) Previous reform committees have consistently opposed reform

Following the enactment of the Act in 1974, uncertainty arose regarding whether the particular formulation of section 46 at that time contemplated a specific intent (i.e., purpose test), given the initial ambiguity in the drafting of that section. The general judicial view at that time was that section 46 *did* contemplate a specific intent (i.e., purpose test). However, given such uncertainty, the Swanson Committee expressly considered the issue in 1977.[20] The Swanson Committee concluded that:[21]

> *" The Committee believes that the phrase 'take advantage of' when read with the word 'to' necessarily imports an element of intent. However, to place the matter beyond doubt we recommend that the matter be clarified by replacing the abovementioned word 'to' by a reference to a purpose…."*

As a result of this recommendation, section 46 was amended in 1977 to incorporate a "purpose test".

From 1977, the proposal to move to, or incorporate an effects test within, the misuse of market power provision in section 46 of the Act, has been considered in nearly every subsequent major review of the Act. Importantly, without exception, on each of the seven subsequent occasions on which the introduction of an effects test for section 46 has been considered by a reviewing committee, the conclusions of the Swanson Committee have been affirmed, and an effects test has been rejected.

Over this period, consistent concerns with an effects test in section 46 have been that:

- it would not be able to satisfactorily distinguish between desirable and undesirable competitive activity by firms;
- it is likely to bring within its ambit much legitimate business conduct and so operate to stifle pro-competitive behaviour; and
- there is a risk that it would broaden the application of section 46 and so render its application uncertain for businesses.

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18 Ibid at p. 69.

19 Ibid.

20 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, AGPS, Canberra, 1976.

21 Ibid at 40.

The following analysis briefly summarises the reasons why the various reviewing committees have rejected proposals for an effects-based test in section 46. These comments support Telstra's submission above.

Blunt Committee Review (1979)

The Trade Practices Consultative Committee reported in 1979 on the purpose element of section 46 and noted that it was: [22]

> *". . . concerned that removing the purpose element altogether could give the provision a very wide application and bring within its ambit much legitimate business conduct. It is also a fundamental aim that competitive conduct should not be outlawed . . .there is a need to place some limit on the application of the section. It is only purposive misuse of market power and not inadvertent conduct or efficiency inspired conduct that should be at risk.*
>
> *Accordingly, we recommend that the purpose element should remain because we consider it is fundamental to a provision dealing with misuse of market power."*

The Blunt Committee's considerations led to the introduction of section 46(7) of the Act whereby purpose could be inferred from certain conduct of the relevant corporation. As Telstra noted above, this provision has important application within the context of section 46 and effectively removes any need for an "effects-based" test.

Griffiths Committee Review (1989)

The House of Representatives Standing Committee on Legal and Constitutional Affairs considered a number of proposed amendments to section 46 in 1989. The Standing Committee concluded that: [23]

> *"An effective provision to prevent misuse of market power is an essential, indeed fundamental, counterbalance to a policy which encourages growth by acquisition and rationalisation. As a result of the evidence before it, and particularly in light of the decision in the Queensland Wire Industries case, the Committee is not convinced that the existing provisions of s 46 of the TPA are not capable of achieving the purposes for which they are intended."*

Cooney Committee Review (1991)

The Senate Standing Committee on Legal and Constitutional Affairs, chaired by Senator Cooney, was asked to consider amending section 46 to include an effects test by the Trade Practices Commission in 1991. The Cooney Committee noted that there were some difficulties in proving purpose, and that a test based on the effect of conduct would have greater consistency with other provisions of the Act. However, the Cooney Committee, reasoned that the issue had been sufficiently addressed by the 1986 amendment, allowing purpose to be inferred from conduct. The Cooney Committee reasoned:[24]

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22 Trade Practices Consultative Committee, *Small Business and the Trade Practices Act*, AGPS, Canberra, December 1979, Vol 1, p. 69.

23 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions: Profiting from Competition?*, AGPS, Canberra, 1989, p. 41.

24 Report by the Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, AGPS, Canberra, December 1991, p. 96.

". . . in a provision directed explicitly at misuse of market power it is appropriate that a distinction between purpose and consequence be retained. The Committee accepts that purpose is an essential element of the contravention. To prohibit the taking advantage of market power where this has or is likely to have the effect of, for example, preventing a person from engaging in competitive conduct would unduly widen the operation of the prohibition. It would force corporations to evaluate the potential effect of their every action on their competitors and potential competitors.

The Committee accepts that the process of effective competition involves engaging in conduct the potential effect of which is to produce the very ends proscribed in s 46 and considers that prohibiting such conduct by reference to its effect may challenge the competitive process itself."

The Cooney Committee further reasoned:[25]

"If the difficulty with section 46 is proof of purpose, the Committee considers that this would be best dealt with by adding a further subsection to provide that, although the Trade Practices Commission has the overall onus of proving a breach of that section, when it has brought forward evidence which makes it as likely as not that one has occurred then one will be taken to have occurred unless the corporation in question shows otherwise."

The Cooney Committee recommended that such an amendment be made to section 46.[26] This recommendation suggest that an "effects test" would be an extreme step, and the matter could be addressed simply by a reversal of the onus of proof if any amendment were to be made at all. However, as noted below, the Hilmer Committee disagreed with any need for a reversal of the onus of proof as well.

Hilmer Committee Review (1993)

The Hilmer Independent Committee of Inquiry was asked to consider amendments to section 46 in the context of its consideration of a national competition policy in 1993. The Hilmer Committee stated that an effects test: [27]

". . . would not, in the Committee's view, constitute an improvement on the current test. It does not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct."

The Hilmer Committee noted that, by its very nature, competition was deliberate and ruthless, and that firms should behave aggressively in trying to gain an advantage over their competitors: [28]

"There is a serious risk of deterring such conduct by too broad a prohibition of unilateral conduct. The Committee takes the view that an effects test is too broad in this regard. The courts might develop a gloss upon an effects test to ensure that it did not prohibit economically efficient conduct, but it is not clear that the final result would differ from the existing interpretation of s 46, or that any such difference would constitute an

25 Ibid at 97.

26 Ibid.

27 Report of the Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, August 1993, p. 70.

28 Ibid at 70.

improvement. . . . The current provision has the advantages over an effects test of an appropriate interpretation and a greater level of certainty for businesses."

The Hilmer Committee concluded that it saw: [29]

> *". . . a need to strike a balance between deterring undesirable unilateral conduct, encouraging business certainty and minimising the regulatory interference in daily business decisions. The Committee is not satisfied that any perceived difficulties with the current operation of s 46 are sufficient to warrant an amendment that would create additional uncertainty and thus potentially deter vigorous competitive activity."*

The Hilmer Committee also considered proposals to reverse the burden of proof. It noted that the Industry Commission had submitted that where price discrimination which substantially lessens competition has been demonstrated, a rebuttable presumption of proscribed purpose would operate. The Hilmer Committee noted that "*to simply reverse the onus of proof when price discrimination is proven would threaten much efficient behaviour*."[30]

Reid Committee Review (1997)

The House of Representatives Standing Committee on Industry, Science and Technology, chaired by Bruce Reid, was asked to examine business conduct, and in particular, unfair conduct towards small business in 1997. The Committee considered two options to strengthen section 46. In addition to the introduction of an effects test, there was a proposal that the Commission be empowered to bring representative actions for breaches of Part IV of the Act, including section 46.

The Reid Committee recommended that the representative action option should be allowed. However, it noted that "*the Hilmer inquiry concluded that s 46, as it then stood and still stands, struck a fair balance between misuse of market power and aggressive competitive behaviour*."[31]

Baird Committee Review (1999)

A Joint Committee on the Retailing Sector, chaired by Bruce Baird, considered predatory pricing and section 46 in 1999. It concluded that: [32]

> *". . . an "effects" test would not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct. In order to avoid frivolous and capricious actions, any such change to s 46 might require only the ACCC or the Minister to bring actions in highly concentrated markets. Once proved, in order to protect private rights, damages claims would be open to affected parties. In conjunction with this, it was also considered that it may be appropriate to provide for authorisation in respect of conduct which is likely to breach the "effect" provisions, but not the "purpose" provisions (where the anti-competitive conduct would have been intentional and thus ought not [sic] be able to be authorised). However, the Committee is of the view that such far reaching changes to the law may create much uncertainty in issues dealing with misuse of market power."*

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29 Ibid at 74.

30 Ibid at 71.

31 House of Representative Standing Committee on Industry, Science and Technology, *Finding a Balance: Towards Fair Trading in Australia*, AGPS, Canberra, May 1997, p. 132.

32 Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure? A Review of Australia's Retailing Sector*, AGPS, Canberra, August 1999, p. 100.

House of Representatives Standing Committee (2001)

Finally, in 2001, the House of Representatives Standing Committee on Economic & Finance and Public Administration released a report entitled "*Competing Interests: Is There A Balance?*" on the activities of the Commission, in the course of which it considered the calls for the introduction of an effects test in section 46.[33] The Standing Committee noted the recent decisions of the Federal Court in *Melway*,[34] *Boral*, [35] and *Rural Press*,[36] and stated that: [37]

> *". . . given these breakthroughs in the interpretation of section 46 and the repeated concerns expressed by various inquiries about the move to an effects test, the committee's preference is to await the outcome of further cases on section 46 before considering any changes to the law."*

Conclusion

While the Dawson Committee must make up its own mind on this issue, Telstra believes it is important to note that every previous time the introduction of an effects test has been advocated to review committees, previous independent consideration of the issue has recommended against it and often in strong terms. Indeed, the conclusion from previous committees is overwhelmingly consistent: *the effects test does not adequately distinguish between illegitimate anti-competitive conduct and legitimate beneficial conduct, so legitimate conduct would be deterred were such a test to be introduced.* In short, competition would be blunted rather than enhanced.

(c) Telstra's experience with Part XIB supports these concerns

Although Part XIB is outside the scope of the current inquiry, Part XIB does contain a provision identical to section 46 but with an effects test, namely section 151AJ(2). Telstra's experiences with this effects test in Part XIB are therefore relevant to the proposal for section 46 to be amended to include an effects based test.

Telstra considers that its experience with the effects test set out in section 151AJ(2) and applied through section 151AK of Part XIB puts it in a strong position to evaluate the utility of introducing such a test within Part IV of the Act. Telstra has been subject to unsuccessful action by the Commission under this provision and Telstra has extensive experience with the associated compliance risks.

Section 151AK of Part XIB provides that a carrier or carriage service provider must not engage in anti-competitive conduct. This section is known as the "competition rule". The anti-competitive conduct is defined by section 151AJ, which incorporates many of the Part IV provisions, including section 46, but also introduces another provision similar to section 46 but with an effects based test. Section 151AJ(2) provides:

> *"A carrier or carriage service provider engages in anti-competitive conduct if it:*

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33 House of Representatives, Standing Committee on Economics, Finance and Public Administration, 2001, *Competing Interests: Is There A Balance? Review of the Australian Competition & Consumer Commission Annual Report 1999-2000,* September 2001, AGPS, Canberra.

34 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253.

35 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328.

36 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR 41-804.

37 Standing Committee on Economics, Finance and Public Administration, *Competing Interests: Is There a Balance? Review of the ACCC Report 1999-2000*, September 2001, AGPS, Canberra, p. 49.

(a) has a substantial degree of power in a telecommunications market; and

(b) either:

(i) takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market; or

(ii) takes advantage of that power, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market".

The Explanatory Memorandum to Part XIB identified the reasons why the effects based test was enacted into Part XIB, namely that purpose is very subjective and requires a reason or motive for certain conduct to be established and shifts the focus towards the morality of the conduct, as opposed to the economic effect of the conduct. Another concern was the risk of damage to the telecommunications industry from aberrant behaviour which has a negative effect on competition, regardless of the purpose motivating that behaviour.[38]

Telstra disagrees with this reasoning in the Explanatory Memorandum on the basis that an emphasis on economic effect creates greater scope for regulatory error, in the manner identified above, with little benefit over and above a motive-based test. Furthermore, the economic effect is ultimately assessed by reference to the hypothetical legitimate business motives of a competitive firm, under the "taking advantage" element, so the underlying test remains inherently subjective regardless of the introduction of an effects test.

Relevantly, Part XIB has a competition notice regime which operates in combination with the effects based test in section 151AJ(2). This regime enables the Commission to issue a "competition notice", either on its own initiative, or in response to a complaint.[39]

Telstra's experience with Part XIB

Telstra is in a unique position as a corporation that has been subject to both an effects based test and a purpose test. Telstra's experience with the effects test in Part XIB has been anything but satisfactory from an economic and practical perspective.

The Commission's use of the effects test in Part XIB, in combination with the competition notice regime, has resulted in several costly and drawn out disputes. Other telecommunications carriers such as PowerTel, Hutchison and One.Tel made submissions to the recent Productivity Commission Inquiry into Telecommunications Competition which commented upon the monetary and time costs of seeking action under Part XIB, confirming this issue.[40] This experience has clearly demonstrated that an effects-based test is not easier to prove than a purpose based test.[41]

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38 Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996 (Cth),* available at http://www.scaleplus.law.gov.au

39 Refer to sections 151AK and 151AL of the Act. A party may only bring an action for damages, and the Commission may only seek a penalty for conduct which breaches the Act and which was engaged in after a competition notice came into force.

40 Productivity Commission, *Telecommunications Competition Regulation (Draft Report),* March 2001, p. 5.14.

41 Telstra would be pleased to inform the Committee about its experience with Part XIB, including in relation to the Commercial Churn and Internet Peering competition notices.

Further evidence of the confusion that has arisen in the context of an effects test in Part XIB is set out, for example, in:

- D. Myers "Refusals to Deal in Telecommunications Markets: Is the Commission Reading Purpose into the Effects Test?" (2000) 8(4) *Trade Practices Law Journal* 196.

While some may claim that an effects test lowers the evidentiary burden, these cases demonstrate that, despite the effects test under Part XIB, the Commission has still struggled to identify the anti-competitive effect it has alleged. Furthermore, there is no evidence that Part XIB has been any more effective than section 46 in distinguishing pro-competitive from anti-competitive conduct.

Indeed, Telstra's experience indicates that the Commission's intervention has tended to deter or stall pro-competitive behaviour - a concern expressly raised during the reviews of the Act discussed above. This deterrence of pro-competitive behaviour has been propounded by the length of time the ACCC has taken to investigate matters. Telstra's Part XIB experience clearly contradicts the proposition that amending section 46 to be an effects-based provision would lead to superior outcomes, in terms of ease of proof or greater effectiveness in distinguishing between anti- and pro-competitive behaviour.

Telstra also notes that the Productivity Commission's initial Draft Report identified the risks associated with an effects test in Part XIB the following terms (at p.5.5 and 5.39):

> *"An effects test may "catch" behaviour that appears to reduce competition but that, nevertheless, is efficiency enhancing overall. The question remains of how an effect on competition is to be measured….*
>
> *Although there are some economic arguments in favour of an effect or likely effect test, the Commission considers that coupling it with a prima facie reversal of the onus of proof under the competition notice regime increases the possibility of regulatory error and overreach."*

The Productivity Commission also made the following comment in its Final Report (at p. 179):

> *"Section 46 gives the option of focussing on the purpose of alleged anti-competitive conduct in relation to damage to a competitor rather than damage to competition. In this regard, a contravention of section 46 may be easier to prove than a contravention of Part XIB."*

Such comments are consistent with Telstra's submissions above.

(d) International best practice

An effects test is not only controversial in Australia, but is also controversial internationally. This is illustrated by the New Zealand, United States, Canadian, UK and EU experiences.

New Zealand decided against an effects test

Criticisms of the effects test have not just been confined to Australia. Section 36 of the New Zealand *Commerce Act 1986* is almost identical to section 46 and provides that a person who has a substantial degree of power in a market must not take advantage of that power for one of a number of proscribed purposes. Recently, in New Zealand, the introduction of an effects test was rejected by the New Zealand Ministry of Economic Development for two main reasons, both of which apply equally to Australia and are consistent with Telstra's submission above:

- First, the Ministry reasoned that such a test would substantially expand the scope of conduct that would fall within the relevant provision and tend to deter efficient commercial activity. The Ministry used the example of a firm scaling up capacity to achieve economies of scale and scope as coming within the reach of an effects test.

- Second, the Ministry reasoned that such a test could increase the risk of judicial error (and thus regulatory failure) because of the difficulties associated with determining whether or not conduct was in breach of the relevant legislation. The Ministry considered that a relevant ruling would require assumptions and estimations about firms' structures and behaviour that would be difficult to predict with reasonable levels of certainty.

Again, the New Zealand consideration of this issue emphasises the considerable risk of inadvertently prohibiting legitimate pro-competitive behaviour if an effects-based test were adopted.

United States law remains in a state of flux, but still utilises a purpose test

The issue of intent in misuse of market power cases has been controversial not only in Australia, but also in other jurisdictions, such as the United States where the relevant law relates to "monopolisation". Section 2 of the US Sherman Act makes it unlawful to "monopolise" or "attempt to monopolise", a line of commerce. The elements of an "attempt to monopolise" were set out by the US Supreme Court in *Spectrum Sports, Inc. v. McQuillan*, where the Court reasoned that the plaintiff must prove:[42]

> *"…(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolise and (3) a dangerous probability of achieving monopoly power."*

Accordingly, an "attempt to monopolise" requires a specific intent (i.e., a purpose test) under US law.

However, the law relating to "monopolisation" itself is more complex and incorporates a mixture of "purpose" and "effect". Relevantly, in *United States v. Grinnell Corp*., the US Supreme Court held that the offence of "monopolisation" under section 2 of the Sherman Act has two elements:[43]

> *"…(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."*

The interpretation of the requirement of "wilfulness" has been controversial and US law on this issue remains in a state of flux. As in Australia, debate has occurred over the issue of "intent" vs "effect". In some cases, US courts have held that a "specific intent" is not required, although such a specific intent may assist in establishing monopolisation. Rather, a "general intent" may suffice, meaning that the requisite "wilfulness" could be inferred where a particular anti-competitive effect is a reasonably foreseeable consequence of the underlying conduct. The *Microsoft* case in 2001 has added to the confusion by proposing a reversal of the burden of proof.[44] Yet it remains too early to determine the extent to which that reasoning will be followed and how it will be applied in practice.

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42 *Spectrum Sports, Inc. v. McQuillan*, 113 S.Ct. 884, 890-91 (1993).

43 *United States v. Grinnell Corp*., 384 US 563, 577 (1966).

44 *United States v. Microsoft Corp*., [2000-1] *Trade Cases* (CCH) 73,321.

The exact nature of the monopolisation analysis therefore remains controversial in US law and is the subject of continuing academic debate. A useful summary of the controversy regarding the debate between "intent" and "effect" in US monopolisation cases is set out in the following articles:

- R.A. Cass & K.N. Hylton, "Preserving Competition: Economics Analysis, Legal Standards and Microsoft" (1999) 8 *George Mason Law Review* 1.

- R.A. Cass & K.N. Hylton, "Antitrust Intent" (2001) 74 *Southern California Law Review* 657.

Canadian law has an effects test, but still requires evidence of an anti-competitive purpose

Section 79(1) of the Canadian *Competition Act 1985* adopts an effects-based test, but still requires evidence that the firm intended to engage in certain proscribed acts. Accordingly, Canada utilises a purpose test to screen conduct that was not intended to be anti-competitive. The Canadian approach again suggests that purpose or intent is essential to an "abuse of market power" provision and that drafting based on an effects test alone is not sufficient.

In particular, to obtain a remedial order, the Commissioner of Competition must establish before the Canadian Competition Tribunal that the following three elements in section 79(1) are all met:

- that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business (in other words, the possession of market power in a particular market);

- that the dominant firm or firms engaged in a practice of "anti-competitive acts" (with an illustrative list of such acts provided in section 78 of the Act); and

- that the practice of anti-competitive acts, has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

The Canadian Competition Tribunal in its decision in *NutraSweet*, held that purpose is a necessary component of an "anti-competitive act" (i.e., the second element).[45] This makes intent (i.e., a purpose test) the key factor in determining whether an act is designed to harm competition or is part of a legitimate business initiative. In the Canadian Competition Bureau's *Enforcement Guidelines on the Abuse of Dominance*, the Canadian Competition Bureau explains (at page 18), for example:[46]

> *"Section 78 of the Act provides a non-exhaustive list of anti-competitive acts. In addition to these acts, there is some jurisprudence on anti-competitive acts not listed in section 78. The acts in section 78 all lessen competition when engaged in by a dominant firm for an anti-competitive purpose. The Tribunal tests for anti-competitive purpose by asking whether an act is done for a predatory, exclusionary or disciplinary reason. The purpose or intent of the act may be proven by an inference or a conclusion to be drawn from the facts established in evidence. The verbal or written statements of the personnel of a company are likely to establish subjective intent. Consideration of the act itself may lead to an inferred purpose, because persons are assumed to intend the necessary and foreseeable consequences of their acts. As the Tribunal noted in Nutrasweet, in most cases the purpose of the act will have to be inferred from the circumstances"*

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45 See *Canada (Director of Investigation and Research)* v *NutraSweet Co.*[1990] 32 C.P.R. (3d) 1 (Comp. Trib.), 35.

46 http://dsp-psd.communication.gc.ca/Collection/C2-566-2001E.pdf

(e) Reversal of Onus of Proof

As noted above, a second reform to section 46 proposed by some parties concerns a reversal of the onus of proof in the context of establishing a proscribed purpose. In effect, once a corporation is proved to have taken advantage of substantial market power, it would be required to prove it did not have a proscribed purpose. Yet there are still very serious difficulties within this proposal.

Fundamentally, it is contrary to the presumption of innocence for a corporation to be presumed guilty and then be required to establish its innocence. Such an approach would create the same uncertainty that a move to an effects test would be likely to introduce, given that a corporation could never be certain that its evidence regarding its purpose would be accepted. Accordingly, the arguments above apply equally.

The Senate Legal and Constitutional References Committee tabled their Report to Parliament on 14 May 2002.[47] The Committee declined to make any recommendations as to the reversal of onus of proof, and will await the outcome of the current Dawson Review.

As noted above, the Commission has succeeded in three of the four major contended cases since *Queensland Wire* where it has alleged a breach of section 46. The claims that the current provision make it too difficult to establish breaches of section 46 are belied by the evidence. Indeed, given that the Commission has considerable information gathering powers under section 155, as discussed elsewhere in this submission, it is already in a stronger position than a private party in its ability to enforce section 46. Simply put, the Commission is over-stating the need for reform and under-stating its ability to prosecute action under the existing section 46. Telstra submits that no amendment is required.

If the Dawson Committee is minded to consider reversal of the onus of proof, Telstra requests the opportunity to make further submissions on this issue.

2.1.3 Telstra's recommendations for reform

For the reasons outlined above, Telstra suggests the following recommendations for the Dawson Committee:

Recommendation No insertion of a provision to reverse the onus of proof in relation to establishing one or more of the proscribed purposes.

Recommendation No adoption of an effects test in section 46.

Importantly, should the Dawson Committee be minded to incorporate an effects test within section 46, Telstra would wish an opportunity to make submissions to the Dawson Committee on the appropriate format of that effects test. Telstra notes that some of the examples it has seen for the particular drafting of an effects test within section 46 have very serious flaws.

In addition, in such circumstances, the particular form of the effects test adopted in Part IV should also be reflected by amendments to Part XIB to ensure consistency of approach within the Act. This is important because Telstra and other telecommunications operators are subject to both Part IV and Part XIB of the Act.

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[47] Senate Legal and Constitutional References Committee, *Inquiry into s. 46 and s. 50 of the Trade Practices Act 1974*, May 2002.

2.2 Cease and Desist Orders

Summary

Telstra submits that the powers of the Commission should not be extended to allow it to issue cease and desist orders.

In particular, Telstra submits that:

- a power to issue cease and desist orders is not constitutionally permissible;
- the existing option of interim and interlocutory injunctions enables the Commission to respond quickly and effectively to actual or suspected contraventions of the Act, and is more than adequate;
- cease and desist orders would not provide the benefits claimed by those in favour of them, as the orders would be no quicker or less burdensome on the Commission than judicial injunctions; and
- a power to issue a cease and desist order would weaken the Commission rather than strengthen it.

2.2.1 Application and proposals for reform

(a) What is envisaged as a cease and desist order under the Trade Practices Act?

While cease and desist orders would apply to all areas of conduct falling within Part IV of the Act, Telstra has particular concerns regarding the validity of cease and desist orders in the context of the operation of section 46 of the Act. This context most closely reflects the day to day operation of Part XIB of the Act, the Part of the Act that regulates market conduct in the telecommunications industry and in relation to which Telstra has considerable experience. This notwithstanding, Telstra considers that cease and desist orders are constitutionally flawed and are likely to stall and stifle genuine, efficient competition – in the same way that the Commission's competition notice powers have tended to operate under Part XIB of the Act.

In its submission to the Standing Committee in 1999, the Commission envisaged that a cease and desist order would be issued by the Commission where it suspects that a breach of the Act has occurred. The recipient of such an order could not engage in the conduct specified in the order unless it could prove in court that it did not contravene the Act. Failure to comply would be punishable by the Federal Court. Compensation would be payable if loss or damage was caused by a breach of the order.

The Commission suggested that cease and desist orders could be used to target 'blatant damaging anti-competitive conduct'. The Commission argues that such a power is necessary in order to ensure that corporations breaching the law do not get the benefit of preventing or hindering competition while the matters are being brought to court.

It is unclear if the Commission proposes that the power to issue cease and desist orders should be legislatively restricted to instances where there is 'blatant damaging anti-competitive conduct' and, if so, how this restriction would be achieved. Notwithstanding this lack of clarity as to the precise scope of these orders, arguments for and against cease and desist orders, and some existing and effective alternatives to such orders, are discussed below.

(b) Proposals for reform by the Commission

Over the last several years the Commission has alluded to the need of the Commission to possess swift sanctions '*…in order to provide effective deterrents to conduct threatening the development of effective and sustainable competition*".[48] The Commission has also suggested that "*an administrative model where the regulator could prescribe standards of conduct having regard to competition and public interest criteria*" would provide better and quicker outcomes in respect of competition issues.[49]

It is in this context that the call for cease and desist powers to be given to the Commission has been made.

2.2.2 Telstra's analysis of these proposals

(a) Arguments against a cease and desist order

There are many arguments against cease and desist orders, as outlined below.

Constitutional invalidity of cease and desist orders

The fundamental purpose of the separation of powers is to prevent the concentration of power in any one government branch or with any one person. The principle of the separation of powers is inherent in the Australian Constitution. The Constitution is divided into separate chapters for each branch of government - legislative, executive and judicial. Section 71 of the Australian Constitution, the first section of the judicial chapter, vests judicial power in "*the High Court of Australia and in other such federal courts as the Parliament creates and in such other courts as it vests with federal jurisdiction*". Section 72 of the Constitution deals with the manner in which a Court created under section 71 is constituted.

Judicial power is defined in *Huddart Parker & Co Pty Ltd v Moorehead*[50] as "*the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects whether the rights relate to life, liberty or property".* The exercise of this power may occur when a tribunal with the power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action. A cease and desist power falls within these terms.

Supporting the principle of the separation of such judicial power from the legislative and executive functions is substantial case law including the following:

- In *New South Wales v The Commonwealth*[51]("**Wheat Case**") the High Court of Australia held that the strict insulation of judicial power was a fundamental principle of the Constitution.

- In *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan*[52], Dixon J held that "*…the Parliament is restrained both from reposing any power essentially judicial*

48 ACCC Submission to Productivity Commission, August 2000, p. 10

49 Ibid at p.11

50 (1909) 8 CLR 330.

51 (1915) 20 CLR 54

52 (1931) 46 CLR 73

in any other organ or body and from reposing any other than that judicial power in such tribunals".

- In *R v Kirby; Ex Parte Boilermakers' Society of Australia*[53] ("**Boilermakers' Case**") it was held that "*it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to section 71 and constituted in accordance with section 72 or a court brought into existence by a State*".

- In *Brandy v Human Rights and Equal Opportunity Commission*[54], the High Court unanimously held that a legislative attempt to confer judicial power on an executive body of government was constitutionally impermissible. In reaching its decision the Court found that the relevant provisions of the *Racial Discrimination Act 1975 (Cth)* effectively made a determination of the Human Rights and Equal Opportunity Commission ("**HREOC**") binding, authoritative and enforceable, without the requirement that the Federal Court make a judicial determination. Accordingly, the Court found that the provisions were invalid because, and to the extent that, they vested judicial power in the HREOC.

The Constitution is quite clear in its apportionment of the powers and responsibilities for the Parliament, Executive and Judiciary. The Parliament has the power to make laws, the Judiciary the power to interpret and enforce those laws and the Executive, through the government's administration, the power to administer the laws made by Parliament.

The Commission is an administrative body established by Parliament through legislation (Part II of the Act). The powers of the Commission are statutory in nature, and are drawn from the wider range of provisions in the Act. These powers include a power to investigate, and possibly bring proceedings, in relation to the competition and consumer protection provisions of the Act; a power to consider applications for immunity from the Act; a power to arbitrate disputes over access to essential facilities and in the telecommunications industry; a power to assist consumers who have suffered from breaches of the Act to gain compensation or redress; and a power of generally ensuring compliance with the Act through education and research. These powers do not include an enforcement power. The Commission has a similar role in the government to the Police, or the Department of Public Prosecutions - it is a tool of the Executive and is charged under the Constitution with administering the laws of Parliament.

Telstra submits that the cease and desist powers sought by the Commission raise the same concerns as the HREOC powers that the High Court found in *Brandy* to be constitutionally impermissible. While the Commission is not seeking the power to make its determinations binding per se, the powers would, in effect, be binding and enforceable because failure to comply with an Commission order would be punishable in the Federal Court and compensation would be payable if loss or damage was caused by a breach of the order. As such, Telstra submits that the cease and desist powers sought by the Commission, if enacted, would be constitutionally invalid.

Commission already has the appropriate tools

A power already exists which enables the Commission to respond quickly to claims of anti-competitive behaviour, namely the power to obtain interim injunctions. A cease and desist power is therefore unnecessary.

Section 80 of the Act confers power on the Court to grant injunctions, including interim injunctions, to restrain breaches or attempted breaches of the restrictive trade practices and consumer

53 (1956) 94 CLR 254

54 (1995) 127 ALR 1.

protection provisions of the Act. Except in the case of mergers, an application for an injunction may be made by any person, including the Commission.

A very wide discretion is conferred upon the court relating to the granting of such interim injunctions. That discretion is governed by equitable principles. When granting an interim injunction the court must first be satisfied that there is a serious question to be tried. Then the Court must consider the balance of convenience. When considering the balance of convenience, the court must assess the harm to the applicant if the injunction were not granted, the prejudice to the respondent if the injunction were granted, and the protection of the public interest against contraventions of the Act.

The seeking of interim injunctions requires the applicant to have a level of evidence to support the claims made in relation to the conduct in question. Such interim injunctions may be sought on extremely short notice. The ALRC has identified that the Commission may obtain an interim injunction in less than 48 hours, and the Commission has done so on many occasions. In addition, the court is given much greater discretion under the Act in granting an injunction – for example, it may grant an injunction restraining a party's conduct: whether or not the court believes that the person intends to engage in the conduct again; whether or not the person has previously engaged in conduct of that kind; and whether or not there is an imminent danger of substantial damage to any person if the conduct is engaged in.[55]

By way of example, in the One.Tel matter, the Commission was successful in obtaining an interlocutory injunction restraining Telstra from making representations to former One.Tel customers about moving over to Telstra MobileNet. The Commission (and prior to the Commission, the TPC) has also sought (or threatened) injunctions to restrain proposed mergers. For example, the TPC sought and obtained an injunction to restrain Coles and Rank from acquiring Foodland. The Commission also sought an injunction in the FOXTEL/Australis matter, although the parties abandoned the merger. In the Wattyl/Taubmans case, the Commission sought an interlocutory injunction which resulted in the parties undertaking not to proceed with the merger until the Commission had reached a decision.

In addition, the Commission already has a useful enforcement tool to be utilised in circumstances where court action is not appropriate and where the Commission can reach agreement with the party in question. This tool is a section 87B undertaking.

Under section 87B of the Act, the Commission may accept a written undertaking in connection with a matter in relation to which the Commission has a power or function under the Act, rather than institute proceedings. These undertakings must address the conduct which has given rise to the alleged breach, and its consequences. The Commission also requires that such undertakings proscribe future actions to prevent a recurrence or any other breaches of the Act.

If an undertaking is breached, the Commission may apply to the court for:

- an order directing the person to comply with the undertaking;
- an order directing payment of up to the full amount of any financial benefit obtained directly or indirectly and which is reasonably attributable to the breach;
- an order directing the person to compensate any person(s) who have suffered loss or damage as a result of the breach; or
- any other order that the court considers appropriate.

[55] See Section 80(4) of the Act.

Approximately 400 such undertakings were accepted by the Commission up to June 2000. Further, approximately 58 undertakings were accepted by the Commission in the 2001 calendar year and 13 undertakings have been accepted up to 14 May 2002.

In the current ALRC Background Paper Securing Compliance: *Civil and Administrative Penalties in Federal Jurisdiction*, the ALRC notes that, according to its consultations, enforceable undertakings appear to be popular with both the regulators and the regulated.[56] The flexibility of these outcomes have allowed the Commission to secure timely and cost effective outcomes that would not be achievable by court order. These outcomes are said to offer tangible benefits for affected parties and the prospect of lasting improvement in market conditions by the corporation involved.

Less formality, cost and time

Many of the arguments supporting cease and desist orders involve enabling the Commission to act quickly and more cost effectively. However, as outlined below, cease and desist orders are likely to increase the time and cost involved in pursuing breaches of the Act.

A cease and desist order, to be constitutionally valid, must be subject to judicial review in the Federal Court. The necessity for judicial review would mean that the proposed remedy of a cease and desist order would be subject to more opportunities for delay and more opportunities for litigation than an injunction. Clear examples of this potential for litigation and delay are the commercial churn and internet peering matters described in the appendices to this submission. While these matters relate particularly to the application of the Competition Notice, discussed below, they are excellent examples of instances in which the taking of the 'quick' option by the Commission led to significantly greater time and cost involvement than was actually warranted.

Competition notices are similar in practice to a cease and desist order. A competition notice is a written notice which states a specified telecommunications carrier or carriage service provider has contravened, or is contravening the competition rule (which prohibits a telecommunications carrier or carriage service provider from engaging in anti-competitive conduct).

The competition notice provisions were introduced into the Act in 1997 and subsequently amended in 1998. Since then they have been criticised for many of the same reasons as the proposal for a cease and desist order including the fact that the inability to challenge the merits of the Commission's decision to issue a notice may lead to a lack of rigour by the Commission in performing its functions. Further, the Productivity Commission, in its report, has recommended a variety of amendments to the competition notice provisions, including the right to appeal on the merits, and that a competition notice no longer be considered to constitute prima facie evidence of the conduct alleged in the notice.

The Commission has also attracted significant criticism for prematurely resorting to its significant Part XIB powers.[57] The Commission's action in issuing a competition notice against Telstra in relation to internet peering arrangements has been heavily criticised with comments that "*the ACCC either misconceived or misconstrued each of the elements in the competition rule*."[58]

Cease and desist orders do not, generally, relieve the ordering party of the onus of proof. Therefore, the time and resources required to obtain the necessary evidence to issue a cease and desist order will be the same as, if not greater than, the time currently required to obtain an injunction. This was recognised by the ALRC in its 1994 Report entitled *Compliance with the Trade Practices Act 1974.*

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56 Discussion Paper 65, April, 2002, paras 3.95-3.99.

57 See, for example, H. Ergas "Internet Peering, a Case Study of the ACCC's Use of its Powers Under Part XIB of the Trade Practices Act 1974 - available at <http://www.necg.com.au>, cited by M. Landrigan and T. Warren "Administrative Costs and Error Costs in Market Conduct Regulation: Two Case Studies" (2000) 7 *CCLJ* 22 at 231-234

58 Ibid at 232

Further, the requirements of natural justice, particularly that interested parties have a reasonable opportunity to give evidence and make submissions to the Commission before it issues a cease and desist order, mean that the time taken to issue such orders may actually be longer than the time taken to obtain an urgent injunction from the Federal Court. The experience of agencies, both in Australia and overseas is that the demands of natural justice can mean lengthy delays before a cease and desist order takes effect.

Litigation (whether for an application for review or to have a cease and desist order enforced) is only avoided where the transgressing party agrees to cease the prohibited conduct and actually does so without challenging the order. Otherwise, some form of legal action - with all the associated time and monetary costs - will still be required.

Finally, in cases where a cease and desist order is issued hastily, without appropriate foundation and is subsequently found to be invalid, the Commission may be held liable to compensate the party for any damages caused by the order. Currently, under section 80, the Commission is not required to give an undertaking as to damages when seeking an injunction.

In these circumstances, cease and desist orders may add little to the current Commission enforcement tools of requests to cease the conduct, applying for interim injunctions and section 87B undertakings.

The option of a cease and desist order has been rejected previously

The ALRC in its 1994 Report concluded that "*cease and desist orders are not as quick and efficient an enforcement mechanism as their supporters argue*". The Commission was satisfied that the TPC (now the Commission) "*…already has a number of enforcement tools, such as urgent judicial injunctions and enforceable undertakings which allow it to respond quickly and effectively to contraventions of the Trade Practices Act*". Further, the ALRC recognised that significant time and resources would still be required to gather sufficient evidence to justify issuing a cease and desist order.

The Hilmer Report had arrived at the same conclusion as the ALRC. Further, it described cease and desist orders as being particularly harsh where complex economic matters are involved:[59]

> "*The Committee also considered the possible merits of other remedies, such as administratively-applied cease and desist orders. Cease and desist orders effectively reverse the onus of proof, which could be particularly harsh where complex economic matters are involved, as if often the case in competition cases. In instances where there is an urgent need to prevent particular conduct, the competition authority could seek interim injunctions to preserve the status quo pending a full hearing. Overall, the Committee is not satisfied of the need for such additional remedies.*"

The TPC made submissions for a cease and desist power in 1991. The Attorney General's Department at that time counselled against it for constitutional reasons, namely that as an administrative body, the Commission cannot exercise judicial power.

2.2.3 Telstra's recommendations

Telstra considers that the issuing of cease and desist orders is not an appropriate function for the Commission for the following reasons:

- insurmountable issues exist in relation to the constitutional validity of these orders;

[59] *National Competition Policy: Report by the Independent Committee of Inquiry*, August 1993, p168.

- the Commission already has adequate powers and procedures to enable it to take action quickly to prevent actual or suspected contraventions of the Act; and

- in practice, using cease and desist orders would be cumbersome and inefficient.

In other words:

- there is no demonstrated need for a power in the Commission to issue a cease and desist order;

- such a power would be no less cumbersome or any faster than obtaining an injunction from the Federal Court;

- such a power would reduce the accountability of the Commission and make its decisions and conduct less transparent; and

- whilst such a power would increase the role of the Commission, it would be likely to weaken the Commission by endangering the business community's respect and confidence in the Commission. The Commission should not underestimate the value of being able to rely upon an order by the independent judiciary, rather than having to defend its own decision in controversial circumstances.

Accordingly, Telstra submits the following recommendation or consideration by the Dawson Committee:

Recommendation The power of the Commission should not be amended to allow it to issue cease and desist orders

3 ACCOUNTABILITY AND USE OF THE MEDIA

3.1 Procedures Relating to Commission Media Releases

Summary

Telstra submits that the Commission continues to issue media releases which can be misleading, inaccurate, unfair and unduly damaging to individual businesses. The Commission lacks sufficient accountability for the content of its media releases.

Telstra submits that the Commission should be held more accountable in relation to media releases, including by:

- statutory guidelines regarding the ACCC's use of the media;
- formal review of media releases by affected parties prior to publication; and
- potential for review of the content of media releases by an independent third party, such as an Inspector-General.

Each of these procedures remain entirely consistent with the Commission's use of media releases to further its statutory objectives.

3.1.1 Application and proposals for reform

Telstra notes that a focus of the Dawson Review is to consider whether the Act provides sufficient protection to the position of individual businesses.

Against this backdrop, Telstra notes the significant impact that Commission media statements can have upon a business. The importance of this issue for the Dawson Review was highlighted by the Treasurer, Hon Peter Costello, noting that the use of the Commission's powers for press coverage is: "*a legitimate issue that I hope will be teased out over the course of this inquiry*."[60]

While Telstra acknowledges the important role of Commission media releases, it is concerned that there are insufficient procedures to ensure that the Commission is held accountable for its actions in issuing media releases. The importance of this debate is highlighted by the Commission's prominent media profile and increasing exposure in both print and electronic media (see **Appendix 3**).

(a) Concerns

Telstra's main concerns relate to:

- the content of media releases, which Telstra believes have been misleading on numerous occasions or have been framed in an irresponsible manner with potential for material brand damage;
- the noticeable difference between media releases issued by the Commission at the beginning of an investigation or action, and the conclusion of an action or

60 L .Tingle and K. Murphy "Treasurer Warns Fels on Publicity" *Australian Financial Review*, 3 July 2002, p 1 & 4.

investigation, particularly in cases where there is an adverse result for the Commission;

- the manner in which the Commission often suggests in its media releases that it has had a great victory and been vindicated in its approach when, on any reasonable view, the Commission has been proved incorrect (eg the commercial churn competition notice);

- ensuring that the Commission represents the position of all parties referred to in a media release on a balanced basis; and

- fundamental principles of natural justice and overall administrative fairness, which are noticeably lacking in relation to media releases.

Telstra considers a number of case studies below, some of which do not involve Telstra, which illustrate the concerns expressed above.

(b) Proposal for reform

As a way to address these concerns, Telstra recommends a number of procedural safeguards which would provide an added discipline upon the Commission to ensure that its media releases and statements are made in a responsible manner and contain accurate material which does not mislead the general public.

3.1.2 Telstra's analysis of these proposals

(a) Importance of media releases

Telstra recognises that media releases have an important role to play in enabling the Commission to publicise its activities in relation to the Act.

However, the fact that media releases are available for use by newspapers, analysts and the general public reinforces the importance of ensuring that the media releases are accurate and framed in a responsible manner. A media release which is picked up and reported by financial papers such as *The Australian Financial Review* as a headline or important story, for example, may have a significant adverse impact on a company's reputation and brand, as well as a negative impact on the company's share price. The cost to a company from any reputation and brand damage can be extremely high.

Where the content of a statement made to the media or a media release of the ACCC is accurate, such adverse publicity is acceptable and most likely deserving. However, where the content is inaccurate and has a negative impact on the company's reputation or share price, there is currently no realistic avenue by which a company can easily regain that credibility. Even issuing its own media release refuting the claims by the Commission is unlikely to achieve similar coverage or negate the impact of the Commission's media release. As a result, there appears to be a strong presumptive case as to why the Commission should not comment on suspected breaches until it has at least decided to institute proceedings, or has resolved a particular issue.

(b) Concerns relating to the Commission's use of media releases

The Commission has been criticised on many occasions in relation to its use of media releases. It has been claimed that the adverse publicity generated by a media release from the Commission: [61]

> *". . . can do a great deal of injury to business or goodwill - perhaps injury disproportionate to the damage done to the public interest or the interests of consumers by the particular convention."*

The manner in which the Commission uses the media has received independent judicial attention. In *Electricity Supply Association of Australia v ACCC,*[62] the ESAA sought relief in relation to media releases issued by the Commission concerning the liability of electricity suppliers for defects in the supply of electricity under certain circumstances. While the ESAA was unsuccessful in invoking the Court's jurisdiction, Justice Finn was clearly concerned at the irresponsible use of media releases by the Commission. Justice Finn commented:[63]

> *"I do not wish to question the use of the media made by the ACCC in publicising its views. I would merely suggest that, as the agency responsible for policing section 52 of the Trade Practices Act, it properly can be expected to set the same example of care in its own representations to the public."*

Justice Finn further observed that the stances the Commission takes in its media releases, even where the Commission has clearly been incorrect: [64]

> *"…may constitute good public theatre. Whether they represent good public administration is another matter."*

These judicial comments were themselves widely reported in the media. Also reported recently in the media was the Treasurer's suggestion that the Commission's use of publicity is excessive, and that the Commission has "*got to be sure the press is always secondary to the enforcement activity.*"[65]

Telstra believes that Justice Finn's and Treasurer Costello's comments were well founded and are consistent with Telstra's experiences with the Commission, as identified below.

Such comments indicate a general lack of accountability of the Commission for the content of its media releases. Such a lack of accountability is illustrated by Telstra's experiences with the Commission in which Telstra's complaints to the Commission in relation to media releases have typically been ignored. Indeed, as far as Telstra is aware, the Commission has rarely issued correcting media releases.[66]

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61 J. Hilton, "Principles of Fairness and Accountability", paper presented at Penalties: Principles, and Practice in Government Regulation Conference, Sydney, 9 June 2001, p. 6 - 7.

62 *Electricity Supply Association of Australia v ACCC* [2001] FCA 1296

63 Ibid at paras 139-142

64 Ibid at paras 139-142

65 L. Tingle and K. Murphy "Treasurer warns Fels on publicity", *Australian Financial Review,* 3 July 2002, p 1 & 4

66 A rare exception was to clarify the nature of telephone charges under review by the Commission. "Correction: Untimed Local Calls Not Subject to Review", MR 252/00, 19 September 2000.

Furthermore, Telstra is not aware of any successful actions against the Commission in relation to media releases. The case *Giraffe World Australia Pty Ltd v ACCC*[67] illustrated the difficulties in challenging Commission media releases given that the Commission is not acting "*in trade or commerce*" for the purposes of section 52 of the Act. The case demonstrates that it is probably impossible for a potential applicant to establish that section 52 can be used to hold the Commission responsible for any damage it causes to a business by issuing a misleading media release.

Moreover, it is not only the content of media releases which is of concern, but also their timing. By way of example:

- The Commission may issue media releases prematurely, including prior to the adjudication of a matter and prior to issuing final decisions. This contradicts natural justice and, in the worst cases, could suggest administrative bias.

- Arguably, the Commission has engaged in "trial by media" by way of damaging media releases announcing the commencement of an investigation or action by the Commission. The fact that the media is, by its very nature, sensationalist, underlines the difficulties created by this practice and exacerbates the damage that can be caused to firms by the irresponsible use of the media by the Commission. For the Commission to use the media inappropriately is highly irresponsible and clearly unacceptable.

- Some of the Commission's media releases which announce the start of an investigation into potentially contravening behaviour, often imply that the company under investigation has already breached the Act, when in fact the company is still under review, and the Court (or even the Commission) is still to determine whether there has actually been a breach of the Act. The fact that media releases and associated publicity can have a significant adverse impact on companies suggests that such media releases themselves carry significant punitive weight and should not be used lightly. The Commission's misuse of media releases in this context is contrary to natural justice and contradicts fundamental principles of administrative fairness.

  Examples of media releases related to Telstra, issued during an investigation, include:

  — "Telstra Asked to Explain its Planned $30 Mobile Transfer Charge", MR 203/01, 28 August 2001. (This media release was issued by the Commission on the same day that media reports indicated that Telstra was considering introducing the charge).

  — "ACCC Expresses Concern as Telstra Further Increases Line Rental Charge", MR 185/01, 10 August 2001. (This release was issued on the same day that Telstra announced its intention to increase line rental charges. The Commission expressed the view that "*only firms with an exceptional degree of market power are able to achieve price rises of this magnitude in such a short period of time in the modern, generally more competitive Australian economy.*")

  As early as 1977, the practice of the Australian Trade Practices Commission in publicising a matter ahead of trial has received judicial attention. Taking into account the damaging effect of a Commission media release for the purposes of assessing the penalty to be applied, Smithers J commented in *Eva v Southern Motors Box Hill:*[68]

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67 *Giraffe World Australia Pty Ltd v ACCC* [1999] ATPR 41-669.

68 (1977) *ATPR* 40-026 at 17-359 to 17-360

"*Adverse publicity is often one of the inevitable consequences of wrongdoing… But adverse publicity initiated by the prosecuting authority itself requires special consideration. If the matter is publicised ahead of trial and widely and in terms likely to induce public censure of the parties concerned and those parties are in day to day business relationships with the public, then there is obvious danger of injury to the lawful business of the parties which from a practical point of view may have the effect of effectuating a cumulative punishment*."

(c) Consideration by Parliamentary Committee

Industry concerns relating to the Commission's use of media releases are not new, but have been growing in recent years as the Commission has become more proactive and aggressive in the use of the media.[69] In September 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration released its Final Report entitled *Competing Interests: Is There a Balance* in which it raised issues about the use of media releases by the Commission and considered allegations of "arm twisting" by the Commission.[70] These issues are examined in detail later in this submission in the context of the accountability of the Commission and are set out in **Appendix Two.**

When the Final Report was tabled in the House of Representatives the following comments were made by the Hon David Hawker MP:

> *"While the ACCC plays a vital role in consumer protection and has performed this role most effectively, there has been some disquiet about its method of operation. It has been seen as regulating by media release and arm-twisting and, while known as a friend to small business, has become the bogeyman at the end of the garden, particularly in relation to the implementation of the GST. Many small businesses felt that they had to absorb the costs associated with the GST because of the methodology of the Commission's press releases.*
>
> *This then was an important time to review the ACCC most closely. The additional powers given to the Commission with the introduction of the GST-or, as the government prefers to call it, the new tax system-brought the operation of the Commission to public attention. The ACCC came under criticism far and wide for its heavy-handed approach in respect of the price monitoring of the introduction of the GST. The Council of Small Business Organisations of Australia, normally supportive of the ACCC, has raised its concern about the introduction of the GST and price monitoring in particular. This has been echoed far and wide, and I am sure everybody in this House has had constituents, particularly those in small business, who were concerned about the heavy-handed approach of the ACCC.*
>
> *In addition, the ACCC used the media extensively to highlight its powers in respect of price exploitation and the GST. At all stages the threat of the $10 million penalties was prominent in ACCC press releases. In a submission to the committee, Professor Pengilley I think correctly stated:*[71]

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[69] The Commission has apparently issued the following numbers of media releases for the following years: 1996 (181), 1997 (182), 1998 (243), 1999 (263), 2000 (368), 2001 (332), and 2002 (174 as at 15 July 2002).

[70] House of Representatives, Standing Committee on Economics, Finance and Public Administration, 2001, *Competing Interests: Is There a Balance? Review of the Australian Competition & Consumer Commission Annual Report 1999-2000,* September 2001, Canberra.

[71] Ibid*;* House of Representatives Hansard, 24 September 2001, p 31,266.

"The ACCC also said in its Press Releases that no prices could rise above 10 per cent because its Guidelines, and thus the law, so provided. This was notwithstanding the fact that the preceding day, the Chairman of the ACCC conceded in Senate Committee Hearings that the 10 per cent price cap had no legislative backing. Finally, the ACCC wrongly proclaimed that it, rather than the courts, had the power to fine people $10 million per offence. Professor Fels claims that no one but [Professor Pengilley] would have read this claim. It was, however, in an ACCC publication entitled "Special GST Issue."

I can assure you that many others had read this statement, particularly people on this side of the House."

(d) Examples of misleading media releases relating to Telstra

There are a number of instances where Telstra considers that the Commission has issued misleading media releases in relation to matters concerning Telstra. These instances are no doubt illustrative of more general concerns with the Commission's use of media releases. Four examples are identified below.

One.Tel administration

In the One.Tel administration, the Commission issued a media release announcing it had instituted proceedings against Telstra. The media release was issued before Telstra was served with the proceedings.[72] The Commission sought Court orders including an interlocutory injunction, to restrain Telstra from engaging in unlawful misleading and deceptive conduct, followed by a hearing seeking further orders including a compliance program, corrective advertisements and allowing customers to rescind their contracts without penalty.

The interlocutory injunction was granted the following day in circumstances where the presiding judge was at pains to say that he did not consider Telstra's conduct to be blameworthy.[73] This was not mentioned in the Commission media release issued after the injunction was granted.[74]

In preparing for trial, the Commission filed and served a number of statements made by consumers. A very substantial proportion of those statements referred to an absence of information provided by the One.Tel administrators about their options, and to the conflicting messages given not just by Telstra, but by other mobile telephone service providers such as Optus and Vodafone. Nevertheless, it does not appear that the Commission at any stage contacted anyone other than Telstra (by way of a letter of demand or any other means) about such complaints. Telstra was the only entity targeted, and by way of a lawsuit.

When the matter had settled, and before the parties were to attend court to hand up agreed consent orders, Telstra asked the Commission if it could review the Commission media release (which it knew it would prepare) for accuracy. Importantly, the Commission refused this request.

The parties then attended court for the purposes of explaining that the matter had settled and to hand up consent orders. Commission representatives were in court along with a number of journalists. Before the hearing had concluded and even prior to departing the courtroom,

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72 "ACCC Institutes against Telstra for Misleading One.Tel Customers", MR 153/01, 5 July 2001

73 6 July 2001

74 "Court grants injunction against Telstra for One.Tel Representations", MR 156/01, 6 July 2001

Commission representatives were handing out the Commission's media release.[75] Telstra would not itself have engaged in conduct of distributing media releases at the court hearing. This conduct had overtones of an unhealthy desire by the Commission to ensure that its perspective was available to the press first.

In Telstra's opinion, the media release issued by the Commission after the matter settled was misleading in certain material respects. If the Commission were subject to section 52 of the Act, Telstra believes there would be a case for the media release being in breach. For example, in the release the Commission claimed:

> *"Telstra has accepted in the Federal Court that it mislead and deceived many consumers when trying to win-over previous One.Tel Next Generation customers"*

However at no time had Telstra ever accepted any such thing. Further, the Commission claimed:

> *"Telstra has now agreed to reimburse between $20 and $30 in mobile phone access charges to around 3000 former One.Tel Next Generation customers who signed up with Telstra for mobile phone services believing that they had no choice but to sign with Telstra or pay One.Tel early termination fees and who later contacted Telstra about being mislead."*

In Telstra's view, this was also misleading. Under the settlement Telstra agreed to pay $20 or $30 to two classes of customers. There was no admission, evidence or even reason to suppose that all of the customers involved had believed that they had no choice but to sign with Telstra or pay One.Tel early termination fees. Nor was it the case that all these customers contacted Telstra about being mislead.

Switchports

A second example involves the Commission's switchports media release of July 2000.[76] The Commission issued a media release three hours before Telstra's submission was due to the Commission on the issue at hand. The Commission did not inform Telstra that the Commission was intending to issue a press release or provide Telstra with any opportunity to review the media release prior to its issue. In this manner, the media release was premature in publicising the Commission's opinion that "*there is a lack of transparency and clarity for wholesale customers in Telstra's forecasting, ordering and provisioning processes*" prior to the deadline set by the Commission itself for Telstra to respond on this point.

In Telstra's view, the Commission misrepresented Telstra's position on the issue at hand and Telstra's ability to meet customer orders at a particular date, potentially misleading the industry. In particular, the Commission emphasised that corrective action would be completed by "August 2000". By revealing this date, the Commission was likely to influence and distort purchasing patterns in the market to Telstra's commercial detriment.

Furthermore, within the context of the media release, the Commission also linked the "Go-Connect" retail issue to the switchport wholesale issue, implying that Telstra's processes were, at least indirectly, to blame for Go Connect's failure to connect its customers. This was highly inappropriate, both because the inference was without foundation and also because this was not a matter which the Commission raised at any stage with Telstra during its investigation of the switchports issue.

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[75] "Court Orders Telstra to Refund ex-One.Tel Customers Misled into Signing Mobile Phone Contracts", MR 326/01, 20 December 2001.

[76] "ACCC Monitoring Telstra Interconnection Processes", MR 177/00, 7 July 2000.

More importantly, the Commission omitted to mention that Telstra was not at fault for the conduct in question. Rather, wholesale customers were at the time over-stating their switchport orders due to their own incorrect traffic growth forecast projections. Some of these wholesale customers had not even complied with their contractual forecasting obligations.

As a result of the above matters, Telstra submits that the Commission criticised Telstra's ordering and provisioning processes in a manner which unfairly damaged Telstra's reputation in the eyes of its wholesale customers. This interference in the market place is all the more surprising given that the Commission, as a result of its investigation, decided that it did not even have "*a reason to suspect that Telstra has contravened, or is contravening, the competition rule in Part XIB of the Trade Practices Act 1974*".[77]

Domestic PSTN Originating and Terminating Access

A third example is provided by the Commission's April 2000 decision on Telstra's domestic PSTN originating and terminating access charges. In that case, the Commission issued a media release proclaiming a "*$250 million win for consumers*".[78] However, the Commission failed to explain the implications of the *draft* decision it issued in relation to Telstra's proposed wholesale charges for domestic PSTN originating and terminating access (that is, the controversial link between these charges and retail prices) or to otherwise justify its sensationalist heading.

In particular, the Commission omitted to explain the nature of a draft decision and that the Commission is required to take comments in respect of the draft decision, and consider those comments prior to making a final decision which is then subject to review if Telstra or another affected party objects to the finding. The media release instead made it extremely difficult for the Commission to move away from its draft decision, and also created the impression that the Commission's costing model was the most accurate model by which to assess Telstra's costs. It also demonstrates the Commission's confusion of its roles between access determinations (where the focus ought to be on the appropriate price payable at the wholesale layer for interconnection to promote efficiency in competition) and the Commission's possible desire to appeal to the mass consumer base with the prospect of lower retail prices.

This is a clear example of a sensationalist media release with a large headline claiming that the businesses and consumers will be up to $250 million better off if Telstra reduced its prices to the levels initially claimed by the Commission.

Pacific Access Yellow Pages Connect Service

A fourth example of misleading statements in Commission media releases concerns the Commission's press release dated 18 December 2001 announcing the commencement of the Commission's action against Pacific Access over the Yellow Pages Connect service. The Commission proclaimed:

> *"Pacific Access Pty Limited represents that the Yellow Pages Connect service will provide the best or closest match to search criteria specified by a consumer."*

However, this is what the Commission contended in the proceedings (by way of an alleged implied representation). It was not a concluded fact, and it was disputed by Pacific Access. What representations were made by Pacific Access in relation to the service remains the core issue in the proceedings. Telstra believes that to state it the way the Commission did in its press release is

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77 "ACCC Monitoring Telstra Interconnection Processes", MR 177/00, 7 July 2000.

78 "$250 Million Win for Telecommunications Consumers", MR 79/00, 27 April 2000.

quite misleading. What the Commission should have said, and what any normal commercial party would say (properly advised) would be:

> *"In the proceedings, the ACCC alleges that PA represents that the Yellow pages Connect service will.....etc".*

The Commission also asserted:

> *"Pacific Access Pty Limited also offer businesses, at additional cost, the option of being listed with the Yellow Pages as a Priority Advertiser which guarantees that these businesses will be referred to consumers calling the Yellow Pages Connect service ahead of non-Priority Advertisers."*

There is no such guarantee. This might be what the Commission wanted to contend in the proceedings, but it is nothing more than that. Again, Telstra submits that, stated the way it was in the release was again misleading. Even worse, the Commission stated:

> *"We are hoping to stop them making similar representation (sic) in the future and try to be honest about it"*

This statement was made on a premise of concluded fact which had not been concluded at all (i.e., that Pacific Access was at fault). Further, to suggest dishonesty in relation to an action in which no dishonesty is necessary or even alleged is outrageous and grossly irresponsible.

(e) Suggested procedures for the Commission in relation to issuing media releases

The objective of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and providing for consumer protection. A key element of consumer protection is to ensure that companies do not behave in a way that misleads or deceives consumers.

The Commission is responsible for enforcing the requirement that companies do not engage in misleading or deceptive conduct in relation to their dealings with consumers and competitors. Telstra believes that the Commission should be required to observe the same principles it enforces under section 52 (misleading or deceptive conduct) of the Act.

While the Commission may submit that it exercises appropriate care in the preparation of its media releases, the evidence appears to contradict this. Importantly, at the present time, the Commission is not sufficiently held accountable for the content of its media releases and so has little incentive to ensure their accuracy. The only realistic option available to an affected company or person to respond to a Commission media release is usually an ineffective one, that is to issue its own media release refuting the Commission's one. However, given that initial perceptions have formed, this is unlikely to achieve anything other than to heighten publicity, particularly if the Commission is perceived to have greater credibility.

Guidelines on the use of the media

There are no legislative processes relating to the use of media releases by the Commission. Further, as far as Telstra is aware, the Commission does not have any formal guidelines regarding the drafting or content of its media releases and statements. Media releases are simply drafted by Commission staff using previous media releases as a "template" and then cleared by the public relations officer and signed off by the Chairman or a Commissioner. Quite often, these releases are accompanied by the Commission holding "door stop" interviews and discussing matters with reporters.

Telstra submits that the current procedure (or lack of procedure) is inadequate and a more rigorous procedure must be adopted.

Formal statutory requirements to subject the Commission to greater accountability for its media statements and releases would go some way towards undoing the harm that is done to businesses through incorrect representations in the public arena.

Review of media releases prior to publication

Telstra submits that industry participants should at the very least be given a proper opportunity to review and comment on media releases that relate to them. Such a requirement is imperative on the basis of natural justice and procedural fairness, particularly as media releases can have a potentially very significant adverse impact on a company, including damage to reputation, branding and share price. Media releases, in effect, should be considered as having a punitive element and should be subject to the same procedural safeguards that apply to other remedies under the Act.

Media releases should also be scrutinised by relevant parties to ensure no confidential information has inadvertently been disclosed. While such scrutiny commonly happens in relation to merger clearances, there are no formal procedural safeguards to ensure that this occurs. Furthermore, in many instances, the Commission provides the media release to the company shortly before it is released to the public, almost in the form of a *fait accompli*, without adequate opportunity to alter the content of the media release.

Independent review of Commission media releases by Inspector-General

A procedure which would involve a review by an independent third party, such as an Inspector-General, would go a considerable way towards increasing the accountability of the Commission. As Telstra submits later in this submission, aggrieved parties should have an ability to complain to an Inspector-General regarding unfair conduct by the Commission in the administration of the Act. Such a mechanism would impose greater discipline upon the Commission to exercise care and accuracy in preparing its media releases.

Telstra notes that an avenue of appeal to an independent review body, such as an Inspector-General, could also be usefully applied in a range of other circumstances as an independent check on the exercise of other Commission powers , as identified later in this submission.

3.1.3 Telstra's recommendations in relation to the Commission's use of media

Telstra submits that the following principles should be applied in relation to the use of media releases:

- Companies should be given a reasonable opportunity to review media releases that directly affect them prior to their issue.
- The Commission should be subject to the misleading conduct prohibitions it enforces under section 52 (misleading or deceptive conduct) of the Act in repsect of its public statements and the releases it issues.
- Companies should have some way of righting or alleviating any damage to the company caused by the Commission issuing a misleading or deceptive media release.

Telstra suggests the following recommendations for the Dawson Committee:

Recommendation Media release procedures should be developed, formalised and implemented by the Commission. The Commission should be required by the Act to prepare and comply with such procedures and such procedures should have statutory effect. These procedures should be published on the Commission's Internet website.

Recommendation The Commission should be required by the Act to allow directly affected parties a reasonable opportunity to review Commission draft media releases and vet them for confidential information and misleading material.

Recommendation Parties who object to a media release on the basis that it is misleading should have an avenue to complain to an independent third party, such as an Inspector-General. That third party should be required to investigate complaints and prepare a report that could be publicly tabled in Parliament, or make directions to the Commission.

Recommendation The Commission should be required to issue a media release acknowledging the findings of the independent third party. If necessary, the Commission should be required to take necessary corrective action, potentially including a public apology and acknowledgement of its inaccurate media release.

Recommendation The Commission should be deemed to be acting "in trade or commerce" when issuing media releases for the purposes of section 52 (misleading or deceptive conduct) of the Act.

3.2 Transparency of the Commission

Summary

Transparency is vital to the effective administration of the Act. Such transparency is consistent with international best practice in the administration of competition legislation. Maximum transparency is an important objective for competition regulation.

However, the current manner in which the Commission administers the Act lacks transparency in a number of significant respects. This lack of transparency has been recognised in independent international surveys, by the Commission itself, and by Parliamentary standing committees.

Such a lack of transparency compromises the effective administration of the Act, is detrimental to regulatory certainty, decreases business confidence and increases business risk. Further, market participants cannot effectively learn from the Commission's decisions. More importantly, the accountability of the Commission is reduced, contributing to the issues identified in the section on Commission accountability later in this submission.

Of particular concern to Telstra is the failure by the Commission to publish its decisions under the Act and to provide detailed reasoning for its decisions. The New Zealand Commerce Commission does publish detailed reasoning, with confidential information deleted, and decisions are readily available at:

http://www.comcom.govt.nz/adjudication/index.cfm

on its Internet web site. There is no legitimate reason why the Commission cannot do likewise.

Accordingly, Telstra submits that the transparency of the Commission's decision-making processes should be increased. In particular, the Act should be amended to require the Commission to publish its decisions and underlying reasoning, with confidential information deleted, ideally on its Internet web site.

3.2.1 Application and proposals for reform

(a) Authorisations and notifications

The existing procedures relating to authorisations and notifications in respect of restrictive trade practices are set out in Part VII of the Act:

- Division 1 of Part VII relates to authorisations and empowers the Commission to authorise corporations to enter into and/or give effect to contracts, arrangements and understandings that are otherwise anti-competitive, if the Commission determines there are public benefits which outweigh any anti-competitive detriments. The Commission is subject to various procedural requirements when determining applications for authorisation, as set out in sections 90 and 91 of the Act.

- Division 2 of Part VII relates to notifications and sets out a notification procedure for exclusive dealing. Certain statutory protections accrue as a result of such notification. Again, a number of procedural requirements apply.

(b) Proposals for reform

A key concern with the administration of the Act relates to the lack of transparency of the Commission's administrative processes and procedures. This section identifies why transparency is important to the administration of the Act. This section also proposes two mechanisms to increase transparency, namely:

- a formal clearance procedure for mergers and acquisitions; and

- a requirement for the Commission to publish detailed reasoning, with confidential information deleted.

Issues relating to a formal clearance procedure are canvassed in detail later in this submission within the context of a discussion on section 50, so are not identified below. Rather this section of the submission focuses on the more general requirement for the Commission to publish its reasoning. As noted above, the New Zealand Commerce Commission does publish detailed reasoning, with confidential information deleted, and decisions are readily available on its Internet web site at:

http://www.comcom.govt.nz/adjudication/index.cfm.

There is no legitimate reason why the Commission cannot do likewise.

3.2.2 Telstra's analysis of the proposals

(a) Existing requirements for the Commission to publish its reasoning

The existing requirements in the Act for the Commission to publish its reasoning are set out in Part VII of the Act as follows:

- In relation to determination of applications for authorisation, the Commission is required by section 90(4) of the Act to "*state in writing its reasons for a determination before making it*".

- Except in the case of merger authorisations, the Commission must prepare a draft determination before making a final determination under section 90A of the Act. If the Commission does not intend to grant an unconditional authorisation, the Commission must provide a summary of its reasons under section 90A(5).

- In relation to notifications, the Commission is required by section 93(3B) of the Act to give "*a written statement of its reasons for giving notice when the Commission gives notice*".

Accordingly, while the Act already contains certain obligations requiring the Commission to publish its reasoning, these requirements are not comprehensive. These requirements also have a number of deficiencies. In particular, these requirements do not address the following two issues:

- **Insufficient reasoning:** The Commission is not required to provide detailed reasoning behind its decisions, rather the Commission must only provide a summary or statement of its reasons.

  The deficiency in the publication of the Commission's reasoning is readily apparent from the 31 postings made to the Commission's electronic merger register between January and April 2002. The average length of the competition analysis provided was 10.5 *lines*. Only two out of the 31 decisions made by the Commission contained a competition analysis that was more than 1 page in length, and no competition analysis reached 1.5 pages. However, in direct contrast in New Zealand, to date in the 2002 year, 11 determinations in relation to proposed business acquisitions have been posted to date on the Commerce Commission's site in New Zealand. The average length of reasoning provided by the Commerce Commission for its decisions was 24 *pages*.

  In certain instances, the Commission in Australia is not required to make its reasoning available at all. This is the case, for example, with informal clearances as discussed in detail later in this submission.

- **Insufficient publication**: There is no requirement for the Commission to make its reasoning publicly available, such that subsequent applicants have the benefit of

reviewing previous Commission decisions and the basis for certain Commission decisions.

In Telstra's view, these deficiencies create serious problems for applicants. The problems are particularly acute in relation to clearances, authorisations and notifications but also exist in other areas of administration of the Act.

(b) Importance of publication of Commission reasoning

The principle of transparency has several objectives:

(a) to create a rules-based environment more conducive to the Rule of Law by ensuring greater regulatory certainty and predictability, increased confidence and reduced market risk;

(b) to disseminate information to economic actors, thereby more effectively influencing their future behaviour; and

(c) to ensure the accountability of domestic competition authorities.

Accordingly, the problems arising from the lack of transparency noted above are as follows:

- **Applicants may not understand the reasons why the Commission has denied clearance or authorisation:** As applicants do not understand the reasoning of the Commission, applicants are not able to take steps to address the concerns of the Commission. Issues relating to informal clearances are discussed in detail later in this submission in the context of sections 50 and 50A of the Act.

- **Applicants are not able to determine the likely Commission position on some issues:** As the Commission is only required to publish a summary of its reasoning, not its full reasoning, there is no body of decisions available to applicants that they can use to determine the likely Commission position on the particular transaction. In particular, their legal advisors have greater difficulty in providing guidance on the likely response of the Commission, creating commercial uncertainty. As noted later in this submission, such uncertainty increases business risk and the cost of carrying on business in Australia.

- **The Commission can act capriciously and inconsistently:** If the Commission is not required to publish its full reasoning, there is a greater risk that the Commission can act capriciously and inconsistently in the treatment of different parties. Such an approach undermines the principle of treating like cases alike by permitting the Commission to treat similar cases inconsistently. In a worst case scenario, the Commission can engage in coercive behaviour or "arm twisting" as referred to later in this submission.

- **The Commission is less accountable for its decisions:** If the Commission does not publish its full reasoning, it becomes significantly harder for applicants to determine whether or not the Commission has acted reasonably and fairly and has considered all relevant considerations, and no irrelevant considerations. In this manner, a lack of transparency precludes applicants from seeking effective review of the Commission's decisions.

- **Lack of accountability reduces the quality of Commission decisions:** Furthermore, as discussed in detail later in this submission in the context of the accountability of the Commission, a lack of transparency leads to a lack of accountability. A lack of accountability increases the risk of procedural unfairness, poor decision making, and costly administrative error. Maximum transparency would assist in increasing the accountability of the Commission to mitigate such risks.

(c) Evidence of a lack of transparency - international benchmarking

In recent years, the international journal *Global Competition Review* has undertaken an annual review known as "Rating the Regulators" which is intended to independently assess the efficiency of the competition regulators of the leading 24 competition jurisdictions, including Australia.

In the initial March 2001 survey, the Commission was rated as follows (with 5 stars being the highest rating):[79]

"Australian Competition and Consumer Commission ✯ ✯ ✯

Merger handling	***1/2	*Procedure*	***
Non-merger handling	***	*Independence*	**1/2
Technical expertise	**1/2	*Leadership*	****1/2

In the associated commentary, the *Global Competition Review* commented:

> ***"GCR Survey***
>
> *The ACCC's speed of merger handling is well regarded and its leadership is given an unusually strong endorsement. The authority also boasts good scores for security of information and speed of non-merger handling.* ***Scores for ease of access to third-party complainants, informal guidance and consistency in decision-making are only marginally satisfactory****. Dissatisfaction with the ACCC is concentrated in three areas:* ***transparency****, independence, and expertise in handling legal and economic issues.* ***Of these, transparency receives the lowest score****.*
>
> ***GCR Comment***
>
> *In general, lawyers see the lack of pre-merger enforcement as a positive aspect of Australia's competition regime. Parties may approach the ACCC for 'comfort' letters if they wish, and the authority rarely goes back on a letter suggesting that the merger or acquisition will not be challenged.* ***There are, however, serious procedural concerns when the ACCC suggests that the parties obtain authorisation for a complex transaction.*** *"In difficult matters it may delay the matter rather than make a decision which will either be unpopular or which they do not believe that they can justify," comments a top practitioner. Such tactics, which can result in parties becoming frustrated and discontinuing discussions, are seen to be a problem in the oil sector, or in new and deregulated areas. In addition, say lawyers, appeals can be delayed before the tribunal for four months or more while the Commission pursues obscure lines of reasoning.* ***"You have to disclose all the information to the Commission, but they don't always tell you of the logic behind the argument they are following," comments a respected practitioner.*** *Many in the Australian competition community feel that the Chairman's experience and his ability to come across as both erudite and populist have served the ACCC well. The overall impression is that he has been highly successful in convincing the business community to make consumer protection a high priority."* (emphasis added)

A second survey of the Commission was conducted by the *Global Competition Review* earlier this year. Telstra has not been able to obtain a copy of this survey within the time available, although Telstra understands that the conclusions of that survey were generally similar.

79 http://www.global-competition.com/rating/rating.htm

This *Global Competition Review Survey* is taken seriously by regulators, including the Commission, indicating that the rating has a high degree of international credibility. With this in mind, the results of the survey must be perceived as providing an independent and objective assessment of the performance of the Commission. For example, in the Commission's journal in March 2002, at page 71, the Commission noted as follows in relation to the more recent 2002 survey:

> *"In the recent second survey the ACCC has improved to 3.5 and is said to be very close to elevation to the "4 star" club.*
>
> *The area where the ACCC scores poorly is in that of transparency, and in particular there was a view by some of those surveyed that is was difficult to know the direction an investigation is travelling at the earlier stages. Overall transparency, however, was commended".*

Accordingly, while the transparency of the Commission has increased, there are still significant concerns regarding the transparency of the Commission's decision-making, as recognised by the Commission itself and by independent international surveys.

(d) Concerns expressed by Parliament and the Productivity Commission

Previous Parliamentary investigations of the Commission have also indicated a lack of transparency. For example, in July 1997, the House of Representatives Standing Committee on Financial Institutions and Public Administration published its final report titled *Review of the Australian Competition and Consumer Commission 1995-96 Annual Report*. In that final report the Standing Committee made several comments regarding Commission transparency, including (at para 3.54):

> *"The issues canvassed with respect to s.87B undertakings and mergers in this review generally arise from concerns regarding the transparency of the ACCC's procedures, decision making processes and judgments. Whilst not required to by law, the ACCC reports that it often does consult with third parties during its consideration of undertakings; that a public register of s.87B undertakings is kept; and that the outcomes are published. The ACCC has advised that it is willing to consider more transparency for s.87B undertakings, but point to the need for confidentiality in the negotiation process, although the outcomes are made public."*

A range of examples relating to lack of Commission transparency are set out in other sections of this submission, including in the context of informal clearances for mergers and acquisitions, Commission media releases, Commission accountability and separation of the Commission's powers. These sections also note that concerns regarding the transparency of the Commission are a recurrent theme in a wide array of independent analyses of the Commission, most notably by Parliamentary standing committees exercising their formal role as watchdog over the Commission.

In the context of its review of Part XIB of the Act (which is outside the direct terms of reference of the Dawson Committee), the Productivity Commission made the following comment in relation to the transparency of the Commission. Telstra submits this comment applies equally to the Commission's lack of transparency in other areas:[80]

> *"The lack of transparency associated with Part XIB action (section 5.3) limits the ability of telecommunications providers, as well as the community generally, to analyse and comment on the decisions of the ACCC in an informed way. It also reduces the opportunity for providers to learn from experience — greater transparency would assist firms to understand what types of conduct may, or may not, be considered anti-*

[80] Productivity Commission *Telecommunications Competition Regulation: Final Report* (Productivity Commission, Canberra, 2001), p. 196.

competitive by the ACCC. Further, limited transparency might hide any problem of asymmetry in the application of Part XIB.

Transparency would be enhanced if the ACCC were required to issue a public report in all cases in which it proceeded to formal investigations of a telecommunication provider's conduct, even where a Part A or Part B competition notice were not issued. Limiting reports to those cases where formal investigation proceeds would guard against giving undue publicity to untested complaints. Such reports need not be lengthy but would need to cover an outline of the allegations against a provider, the provider's response, the main facts as perceived by the ACCC, as well as its conclusions. As well, these reports should justify the use of Part XIB rather than other possible regulatory mechanisms such as Part XIC. Commercial-in-confidence material should not be disclosed in the report."

(e) International best practice - principle of transparency

Telstra notes that international best practice favours maximum transparency in the operation of competition authorities and the administration of competition legislation. International best practice supports Telstra's concerns expressed above. International best practice also supports the publication of decisions by competition regulators, with confidential information deleted. By way of example:

APEC comments

In September 1999, the APEC Ministers and Leaders (including Australia) endorsed a document known as the *APEC Principles to Enhance Competition and Regulatory Reform*, to guide the evolution of domestic competition law and policy within the Asia-Pacific region. Within those APEC Competition Principles, the APEC nations agreed to an over-riding principle of transparency, which was expressed as follows:

"APEC endorses the following principles:…

Transparency

Transparency in policies and rules, and their implementation…

To achieve this, APEC Member Economies will make efforts to:…

5) Take practical steps to:...

Improve the transparency of… the way rules are administered."

OECD comments

The Working Party of the Trade Committee of the OECD has published several papers on transparency including, relevantly, *Transparency in Domestic Regulation: Practices and Possibilities*. In that paper, the OECD relevantly comments:

"Transparency is an essential component in the openness of decision-making related to the introduction, administration and enforcement of new or amended regulations…

Transparency in regulation is not static, but rather is part of the dynamic process of regulatory policy-making. In both social and economic terms, it plays an important role in revealing the basis for, and the full range of possible costs and benefits of, regulatory decisions and their implementation. Regulatory transparency is conducive to both fairer and more effective governance, improving public confidence in governmental and regulatory performance, and to economic efficiency, helping to remove distortions which might otherwise undermine domestic policy objectives….

In addition, transparency and openness in decision-making is an essential part of public governance under any democratic setting. Lack of transparency reduces the information available to interested parties and undermines their ability to participate meaningfully in policy processes.[81] *On the other hand, participation of various interests through open processes can lead regulatory authorities to reflect carefully on the full range of alternatives before introducing or modifying regulations, resulting in better regulation, greater compliance and ultimately greater political legitimacy…"*

The OECD Joint Group on Trade and Competition published a document in 2001 titled *Trade and Competition Policies: Options for a Greater Coherence*. That paper identified a principle of transparency as a "core principle" for any international agreement on competition law. In relation to the principle of transparency within domestic competition laws, the OECD relevantly commented at p. 34:

"Transparency

The concept is essential to ensure that businesses and consumers know under what legal conditions they operate and to facilitate intergovernmental co-operation. It applies both "ex ante" (formulating clear rules for potential economic operators) and "ex post" (i.e., making those concerned aware of enforcement decisions). The grouping of the elements below is purely indicative, as other elements might be preferred if this framework evolves...

Where competition authorities make dispositive case decisions, publication/explanation of such decisions by the competition authorities where doing so would be administratively feasible and would not be unduly burdensome.

Competition authorities should be required to protect commercial secrets and other confidential information."

At p. 111, the OECD also reasoned:

"Transparency is a basic requirement for any body of law and is particularly important for competition law, as such laws are often general, framework laws applied on a case-by-case basis. The principle also applies generally to the participation of private parties in competition law enforcement. Thus private parties need ready access to decisions made under the law and the reasoning of the decision-makers if they are to understand their obligations and those of other market participants. Transparency is even more important for foreign parties, which may otherwise be unaware of national competition rules or their interpretation. Of course, the desirability of transparency may be offset by the need for confidentiality. Confidentiality rules are often inconsistent with the transparency principle, and therefore it is necessary for competition agencies to seek an appropriate balance between the two.

The following principles relating to transparency in competition law enforcement exist in varying degrees in all Member countries:...

Case Decisions

- *Decisions of the competition authority and the courts resolving or disposing of a proceeding or case are published in a timely manner, as are decisions by reviewing authorities.*

- *published decisions set forth the decision-maker's reasoning and pertinent facts, unless protected by confidentiality rules. The evidential record on which the*

[81] See J.E. Stiglitz, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life", Oxford Amnesty Lecture, Oxford, U.K., January 27, 1999.

decision is based is available for inspection by interested parties, subject to the protection of confidential information".

World Bank comments

The World Bank, in its 1998 publication *Competition Policy in a Global Economy: An Interpretative Summary* made the following comment in Chapter 4 (The Administration of Competition Law) at p. 21:

> *"Accountability also increases the likelihood that administrative systems will service the interests of justice. This requires transparency in the authorities' decision-making process. In this context, transparency implies clear and simple procedural rules setting deadlines for decision,* ***requiring detailed justifications*** *and providing for impartial review of decisions"* (emphasis added)

On p. 29 of the same publication, the World Bank sets out a checklist for assessing enforcement mechanisms. On that checklist are included the following questions:

> *"Is the decision-making process transparent?"*
>
> *"Are there clear, simple procedural rules setting deadlines for decisions, requiring detailed justifications?"*

In the joint World Bank and OECD publication in 1999 titled *A Framework for the Design and Implementation of Competition Law and Policy*, the World Bank and OECD comment at p. 99 in relation to competition agencies that:

> *"As a general proposition, the competition agency should conduct its business in public as much as possible, though it faces significant limitations in practice. Many of the agency's deliberations, as is true for all government agencies, are conducted on a confidential basis. Moreover, all competition laws contain strict confidentiality requirements relating to information acquired in investigations or enforcement proceedings. To the extent possible, however, the agency should make information about its activities publicly available."*

UK practice

In the recent White Paper relating to the reform of UK competition laws, the UK Department of Trade and Industry relevantly commented the UK Government was committed to "building greater transparency" into the UK merger regime. A peer review of the UK merger regime, quoted in the White Paper, had recommended measures to improve the transparency of the UK regime. The White Paper also commented (at para 4.16) that:

> *"To ensure our competition authorities work actively to promote competition in the economy:…*
>
> *Both the OFT and the Competition Commission should ensure that businesses and the public understand their decisions, the reasoning behind them and the likely impact that they will have. This will provide greater transparency and certainty for all."*

New Zealand practice

As noted previously, the New Zealand Commerce Commission does publish detailed reasoning, with confidential information deleted. Its decisions are readily available on its Internet web site at: http://www.comcom.govt.nz/adjudication/index.cfm

(f) Concerns regarding confidentiality

As some of the quotes set out above clearly note, retention of confidentiality of commercially sensitive information is clearly a matter of paramount concern when regulators publish their regulatory decisions. However, it is also true that such issues can be addressed relatively easily by deleting from public documents any information that could be commercially sensitive. Alternatively, if transactions themselves are highly confidential, documents can be suppressed. Ideally, interested parties should be provided with an opportunity to request the removal of any confidential material from Commission decisions before such decisions are published.

3.2.3 Telstra's recommendations regarding reform

Given the analysis above, Telstra believes that the Act should be amended to increase the transparency of the administration of the Act by the Commission. Such an increase in transparency would enhance the administration of the Act, create certainty, ensure greater accountability and increase procedural fairness. Such transparency would also accord with international best practice.

Telstra proposes that two amendments that should be made to the Act to increase transparency are:

- the introduction of a formal clearance procedure for mergers and acquisitions (as discussed in detail later in this submission); and
- a requirement for the Commission to publish detailed reasoning for its decisions, with confidential information deleted.

Accordingly, Telstra suggests the following recommendation for consideration by the Dawson Committee:

Recommendation	Insertion of a statutory requirement for the Commission to publish detailed reasons for its decisions (ideally on its Internet web site), with any confidential material deleted.

3.3 Accountability of the Commission

Summary

It is essential for the Commission to be held accountable for its administration of the Act, particularly given the independence of the Commission and its significant administrative powers.

Lack of accountability leads to significant regulatory failures and injustice. For this reason, international best practice requires maximum accountability of competition authorities.

While there are a range of mechanisms to ensure the accountability of the Commission, there is plenty of evidence that these measures are not sufficient. In practice, such mechanisms are either intended for extreme circumstances or impractical to apply, so do not satisfactorily hold the Commission accountable for its daily administration of the Act.

Telstra submits that the accountability of the Commission should be increased by way of oversight by an Inspector-General and independent governing board, directly accountable to Parliament. This approach is supported by existing Australian practice in relation to the governance of powerful independent agencies and by the approach of foreign jurisdictions. Telstra also submits that the Commission should be subject to greater Parliamentary reporting.

3.3.1 Proposals for reform

One of Telstra's greatest concerns with the administration of the Act, as foreshadowed by the discussion on press releases and transparency above, relates to the lack of effective accountability of the Commission in its daily administration of the Act. This lack of effective accountability creates significant difficulties for Australian industry and risks significant regulatory failure with associated economic costs.

The compelling need for the Commission to be transparent and strictly accountable is succinctly stated by the House of Representatives Standing Committee on Financial Institutions and Public Administration's ("**Standing Committee**") *Review of the Australian Competition and Consumer Commission 1995-6 Annual Report* (at page v):

> *"Given the ACCC's significant power which directly impacts on the commercial operations of business in almost every market, and its role in consumer protection matters, the ACCC must be transparent and accountable and be seen to be transparent and accountable for all its decisions."*

Telstra proposes that the accountability of the Commission could be increased if its daily administration of the Act were subject to greater oversight by:

- an Inspector-General; and
- an independent governing board, directly accountably to Parliament.

A number of additional mechanisms to increase the accountability of the Commission are also outlined below, including enhanced Parliamentary reporting.

3.3.2 Telstra's analysis of the proposals

(a) Current mechanisms used to ensure the accountability of the Commission

The current mechanisms utilised to ensure the accountability of the Commission are identified below. These mechanisms are either intended to address extreme circumstances, or do not provide an effective and necessary check on the daily activities of the Commission, or both. Accordingly, the Commission still retains a high degree of administrative discretion when

performing its daily functions and can use such power as it believes appropriate to achieve its objectives. By way of example:

- **Judicial review:** Commission decisions may be subject to review under general principles of administrative law and the *Administrative Decisions (Judicial Review) Act*. However, judicial review of Commission decision-making is uncommon. The expense and time required to pursue litigation through the courts is significant. Aggrieved parties may also be wary of commencing action against the Commission in circumstances where this could prejudice their future dealings with the Commission, as has been officially noted:[82]

  > *"While judicial review motivates the Commission to act fairly and reasonably in its daily administration of the Act, such judicial review is at best a blunt instrument to ensure Commission accountability as it tends to be reserved for the worst instances of unfairness or unreasonableness. This means that the Commission still retains considerable discretion in its administration of the Act."*

- **Appeal of Commission decisions:** Commission decisions may be appealed to the Australian Competition Tribunal, on merit, and beyond to the Federal Court and High Court. However, many transactions are often highly time-critical so a conditional authorisation by the Commission, for example, is unlikely to be challenged. In addition, appeals against Commission decisions are again likely to be expensive and time consuming with no guarantee of success. This point was recognised, for example, by the Standing Committee in its September 2001 report *Competing Interests: Is There a Balance?* in which the Standing Committee commented (at paras 2.17 and 2.18):

  > *"Professor Pengilley addressed this point in his paper, when he commented that, while rights of appeal do exist, commercial realities often put them out of practical reach:*
  >
  > > *"Rights of appeal can exist as a matter of law but often are commercially useless when time is of the essence".*[83]

  It is also important to recognise the limited role of the courts in monitoring the activities of the Commission. When hearing an appeal from a Commission decision, or when the Commission is bringing an action for a breach of the Act, the court is focused on a very narrow question - namely, whether the Commission decision should be upheld, or whether the conduct is in breach of the Act. Courts rarely venture further in terms of commenting on the role of the Commission, the appropriateness of Commission enforcement action, or the methods of investigation used by the Commission. Justice Finn's comments in the *SA Electricity Case*[84] were a rare exception, as was demonstrated by the significant degree of media attention that his statements attracted.

- **Annual reporting:** The Commission must provide annual reports to Parliament, pursuant to section 171 of the Act. However, annual reports do not impose any significant accountability disciplines on the daily activities of the Commission. In addition, such annual reports contain limited detail and largely identify the extent of enforcement activity by the Commission over the previous year. These annual reports do not provide an effective indicator of the fairness or reasonableness of the Commission's conduct. Such reporting also creates a perverse incentive for the Commission to maximise its enforcement activity.

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82 Report from the House of Representatives Standing Committee on Financial Institutions and Public Administration: "*Review of the Australian Competition and Consumer Commission Annual Report 1996-97*" at p. 7

83 W. Pengilley, "Competition Regulation in Australia: A Discussion of a Spider's Web and its Weaving" (2001) 8(3) *Competition and Consumer Law Journal* 255 at 279.

84 *Electricity Supply Association of Australia v ACCC* [2001] FCA 1296

- **Ministerial and Parliamentary declarations:** The Commission is subject to potential Ministerial directions under section 29(1) of the Act. Similarly, the Commission may be required to furnish information to Parliament under section 29(3) of the Act. Yet Ministerial and Parliamentary directions are rare. To date, Ministerial directions have been used to re-prioritise Commission activity and not to increase Commission accountability. The Senate passed a resolution on 30 April 2002 requiring the Commission to report on the conduct of tobacco companies, but this was not intended to enhance accountability. Accordingly, in practice, section 29 has little practical effect on the daily activities of the Commission.

- **Auditing:** There is regular auditing of the financial operations of the Commission by the Auditor-General. However, this only holds the Commission accountable for its financial affairs.

- **Ombudsman:** The Commission's conduct could be subject to potential investigation by the Commonwealth Ombudsman. However, while the Ombudsman has the power to consider and investigate complaints, the Ombudsman cannot override decisions nor issue directions. Instead, its powers are limited to attempting to resolve disputes by negotiation and persuasion, and if it considers it necessary, it may make formal recommendations to government.[85]

  The effectiveness of the Ombudsman as a form of accountability is also hampered by the lack of public information about the Ombudsman's powers in relation to the Commission. It is notable that there is no reference to the Ombudsman, and their function in relation to complaints about the Commission, on the Commission's website. The Commission's Service Charter sets out the following advice in relation to "Complaints":[86]

  > *"If we fail to meet these standards:*
  >
  > *First, try to sort it out with the staff member you're dealing with;*
  >
  > *Talk to that staff member's manager if you're not satisfied;*
  >
  > *If you are still not satisfied, or if the above suggestions are not appropriate in the circumstances, write to or telephone the Chief Executive Officer….*
  >
  > *If you are still not satisfied* ***we will advise you where else to take your complaint****."*(emphasis added)

  Further, it is unlikely that the Ombudsman would prioritise complaints received from large corporations relating to the conduct of the Commission. The potentially long time frames involved, coupled with the fact that the Ombudsman cannot confer any particular discipline or sanction on the Commission means that the Ombudsman does not provide an effective means of ensuring (or even promoting in any meaningful manner) the accountability of the Commission.

- **Parliamentary scrutiny:** The Commission may be subject to scrutiny by Parliamentary Standing Committees. However, Parliamentary oversight has remained infrequent. Such oversight has typically been reserved for the worst excesses of the Commission. Such Parliamentary oversight again provides no effective check on the daily activities of the Commission in administering the Act.

- **Freedom of Information legislation**: It is possible for persons to place a request under the *Freedom of Information Act 1982*. However, this is a limited form of accountability since the Commission has adopted a policy of not releasing information provided to it

85 http://www.comb.gov.au/about_us/what_we_do.html

86 www.accc.gov.au/about/charter.htm

during investigations and inquiries. If a person is dissatisfied with the Commission's response to the freedom of information request, they are entitled to appeal to the Administrative Appeals Tribunal. This appeal process, though, is an expensive and time consuming one.

Telstra has direct experience with this process. Telstra lodged a freedom of information request with the Commission in respect of an investigation into Telstra in August 1998. The Commission initially responded only be providing Telstra's submissions back to it, and charging Telstra for the privilege! The Commission slowly and, in Telstra's view, very reluctantly divulged further information over a lengthy period of time. Telstra was forced to appeal the Commission's decisions, with the appeal not heard by the AAT until February 2000, almost 18 months later.[87]

- **Termination for misconduct:** The Governor-General may terminate the appointment of members of the Commission under section 13 of the Act in limited circumstances, such as physical or mental incapacity, bankruptcy or misbehaviour. Similarly, the Minister may terminate the appointment of associate members of the Commission under section 14 of the Act in the same circumstances. However, as far as Telstra is aware, the tenure of a Commissioner or associated Commissioner has never been terminated by the Governor-General or Minister (respectively) under sections 13 or 14 of the Act.

  The section 13 and 14 powers are reserved for the worst circumstances, such as physical or mental incapacity, bankruptcy or misbehaviour. The limited scope of sections 13 and 14 is deliberate to minimise the scope for political interference in the activities of the Commission. The sections confer powers similar in nature to the powers relating to removal of judges from public office, so are of a very limited nature. As a result, Commissioners and associate Commissioners have a highly secure tenure and it is questionable whether sections 13 and 14 impose any substantive accountability discipline.

In conclusion, notwithstanding that a variety of accountability mechanisms already exist, such mechanisms remain of limited application and provide little constraint on the daily activities of the Commission. In many circumstances, particularly in the Commission's daily activities, the Commission has considerable discretionary powers and very little accountability for the use of those powers.

(b) Evidence of insufficient accountability

Some notable recent judicial expressions of concern regarding the apparent lack of accountability of the Commission are set out in **Appendix Four** to this submission.

Evidence of the lack of accountability of the Commission in certain areas is also set out in such articles as:

- W. Pengilley "Competition Regulation in Australia: A Discussion of A Spider Web and its Weaving" (2001) 8 *Competition and Consumer Law Journal* 255.
- F. Zumbo "Section 87B Undertakings: There's No Accounting for Such Conduct!" (1997) 5(2) *Trade Practices Law Journal* 121.
- B.W. Buffier "Shoot First, Ask Questions Later: The Rapid Response Powers of the ACCC to Regulate Anticompetitive Conduct in Telecommunications Markets" (2002) 10(1) *Trade Practices Law Journal* 5.

87 *Re Telstra Australia Ltd v Australian Competition and Consumer Commission* (2000) AATA 71.

The material relating to Commission media releases and section 155 notices elsewhere in this submission is also illustrative of the difficulties associated with a lack of accountability of the Commission in its daily activities. Many of the concerns expressed in those sections of this submission apply equally to issues of Commission accountability. Similarly, the transparency issues addressed earlier in this submission are also indicative of a lack of accountability.

Telstra would be happy to provide further submissions on accountability if necessary.

(c) Investigation by Parliamentary Standing Committees in 2001, 1998 and 1997

In 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration conducted an investigation into various issues relating to the Commission, including its accountability and powers. Telstra has summarised aspects of the Committee's findings in **Appendix Two**. Telstra again recommends that the Dawson Committee members familiarise themselves with this material given that it is directly relevant to the terms of reference of the Dawson Committee and was presumably a contributing factor behind the Government initiating the current review of the Act.

Telstra also recommends that the Dawson Committee review the other two instances where the Standing Committee has published its review of the Commission's annual report (i.e., June 1997 and March 1998). Some key recommendations of the Standing Committee, and some important comments, are set out in **Appendix Two**. It is clear from these final reports that the Standing Committee has significant concerns regarding the conduct of the Commission Telstra submits that it is also clear that the transparency and accountability of the Commission require legislative attention.

The advantage of this material is that it is entirely objective in its consideration of the relevant issues. The material also directly addresses many of the current issues before the Dawson Committee and is directly relevant to its terms of reference.

(d) Difficulties created by the lack of accountability

In Telstra's view, in addition to the concerns expressed by the Standing Committee above, the difficulties created by the lack of accountability of the Commission are as follows:

- **Regulatory failure and regulatory error:** The accountability of regulatory institutions matters a great deal in the implementation of competition law. Unlike other areas where the law is codified in detail, competition law is formulated in general terms and accordingly leaves considerable discretionary power to regulatory authorities. Accordingly, given that the Commission retains a high degree of discretion, it is particularly important that the Commission remains accountable for its use of that discretionary power.

  Greater accountability creates incentives to ensure more accurate regulatory decisions by reducing the scope for the regulatory agency to act in its self-interest or to act unfairly or negligently. Accountability mechanisms also enable the correction of sub-optimal regulatory decisions by way of review procedures. Conversely, a lack of accountability increases the incentives and scope for regulatory error. Telstra submits that the optimal strategy for government to minimise the scope for regulatory error in the administration of the Act should be to maximise the accountability of the Commission.

  By way of example, the Productivity Commission, in its recent report *Telecommunications Competition Regulation*, summarised the importance of regulatory accountability (in relation to the need to avoid regulatory errors and reduce business uncertainty) in section 10.7 of its Final Report as follows:

  > **"***Accountability processes are mechanisms that enable judgments by regulators to be scrutinised and challenged. They provide incentives for prudence by the*

regulator, provide new sources of information to regulators and serve to weaken the risks associated with regulatory capture and error. One of the key mechanisms is transparency. This provides others the opportunity to assess whether the decisions made by a regulatory body are appropriate, and increases the care exercised by the regulator."

- **Failures to achieve procedural fairness:** As the Dawson Committee will be aware, a fundamental principle of the rule of law is the principle of legality, namely that everyone and everything must comply with the law. Applied to government agencies, the principle requires every action to be justified by law. The rule of law also requires that government should be conducted within a framework of recognised rules and principles which restrict discretionary power. Administrative law exists as one mechanism to restrain discretionary power to ensure decision-makers act within the power or scope of the relevant discretion conferred on them, both reasonably and fairly.

  However, in circumstances where the threat of judicial review is reduced, the scope for decision-makers to act unreasonably or unfairly, or to push the limits of their statutory powers, is correspondingly increased. To offset this tendency, in circumstances where judicial review is unlikely or impracticable, it is important for Government to provide alternative accountability mechanisms, to reduce the discretionary powers conferred on decision-makers, and to eliminate any incentives for decision-makers to act unreasonably or unfairly.

  The discretionary powers of the Commission are considerable and are exacerbated by the range of these powers and the manner in which the Commission can utilise these powers to achieve its objectives. As noted above, in many circumstances it not practical for parties to seek judicial review of the Commission's actions, particularly in the context of time-sensitive mergers or acquisitions and given the costs of seeking administrative redress. There is also a reluctance to seek review of Commission decisions as this may prejudice a party's future dealings with the Commission. Accordingly, Telstra submits that additional mechanisms should be incorporated into the Act to ensure the Commission remains accountable for its daily activities.

- **Adverse economic effects on Australian industry (costs of regulatory error):** Regulatory error (that is, mistaking welfare-enhancing competitive conduct by corporations for conduct that harms the competitive process) may involve significant economic costs to Australian industry. Several examples of regulatory failures by the Commission are identified in the following articles:

  - M. Landrigan and T. Warren, "Administrative Costs and Error Costs in Market Conduct Regulation: Two Case Studies" (2000) 7(3) *Competition and Consumer Law Journa*l 224.

  - W. Pengilley, "Competition Regulation in Australia: A Discussion of a Spider Web and its Weaving" (2001) 8(3) *Competition and Consumer Law Journal* 255.

  - H. Ergas, "Internet Peering: A Case Study of the ACCC's Use of its Powers under Part XIB of the Trade Practices Act 1974" (2000) 8 *Trade Practices Law Journal*.

  The mere risk of regulatory error, in the form of poor Commission decision-making, may influence the conduct of firms in Australian industry. Telstra is always conscious in its commercial decision-making process of the risk of regulatory error and tends to err on the side of caution, foregoing legitimate pro-competitive conduct, in attempts to avoid any circumstance which may raise Commission concerns. Telstra is also less inclined to make significant investment decisions in new technologies or infrastructure if there is a significant risk of Commission intervention.

- **Failures to follow the Commission's own standards or guidelines:** There is no legal obligation for the Commission to follow its own guidelines. Similarly, there is no statutory obligation for the Commission to take into account matters set out in its guidelines, although it must consider certain statutory criteria when reaching a decision as to whether to take action against a party.

  Furthermore, there is no obligation to give substantive reasons for the decision arrived at by the Commission, including how the criteria used were applied. This significantly decreases transparency as previously identified in this submission. The party who has engaged in the conduct under inquiry cannot be satisfied of the legitimacy of the Commission's decisions.

  Such uncertainty undermines the credibility of Commission decision-making and creates significant uncertainty. Any reluctance to challenge the Commission's decision making process may again be compounded by fact that the party mounting the challenge may fear prejudicing their future dealings with the Commission.

- **Inconsistent decision-making:** Consistency in treatment of like cases is a hallmark of good administration. Inconsistent decision making is anathema to good administration.[88] As President Brennan J reasoned in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2):*[89]

  > *"Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice."*

  In order to ensure consistency, and eliminate any perception of inconsistency, it is important to have a body of material (i.e., derived from the substantive reasons for previous decisions) which can be used to demonstrate consistency. This underlines the point made earlier in this submission that the Commission must publish the reasoning underlying its administrative decisions.

  One effect of the Commission's decisions is, or should be, to establish administrative norms. Market participants should be able to understand, on the strength of precedent and sufficient reasoning, the basis upon which the Commission makes its decisions. Such transparency should allow the participant to assess how its conduct, or proposed conduct, is likely to be treated by the Commission. This transparency should also allow the participant to be satisfied as to the legitimacy of the decision making process.

  The Administrative Appeals Tribunal ("**AAT**") has commented on the approach that should be taken with respect to previous decisions. In *Re Scott and Commissioner for Superannuation*, the AAT said: [90]

  > *"One effect of the tribunal's decisions is to establish administrative norms; they enable legislation to be administered consistently. For the tribunal to make decisions inconsistent with its own previous decisions adversely affects that process.*
  >
  > *….it seems to us that it would be extremely unhelpful for the tribunal in subsequent proceedings to decide the matter in a manner inconsistent with [a reasonably tenable previous decision made after full consideration of competing arguments], particularly when the arguments advanced are substantially the same as those advanced in the previous case …."*

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88 http://www.butterworthsonline.com/lpBin20/lpext.dll?f=templates&fn=bwaltmain-hit-j.htm&2.0 (Butterworths Online, Australian Administrative Law, Chapter 2 - Administrative Appeals Tribunal, Procedure at Hearing, [245 F] Precedent and AAT decisions)

89 (1979) 2 ALD 634 at 639.

90 (1986) 9 ALD 491 at 499.

While this comment relates to the decision making process of the AAT, which performs a different function to the Commission, the comments made are also valid in the context of decision-making by the Commission. If the Commission cannot be seen to make decisions that are consistent with its previous decisions (because of lack of reasoning provided), the process of establishing norms is adversely affected. Where market participants cannot be satisfied that the Commission will treat like cases alike, or even know how previous cases, that might have been alike, were treated, the process of decision making by the Commission is brought into "disrepute".

The disadvantages of inconsistent decision making arising from the failure of the Commission to provide substantive reasons for its decisions, and the failure of the Act to oblige the Commission to do so, are exacerbated when avenues for review of decision making are either not available, or are simply not practical, as noted above.

(e) International best practice - principle of accountability

Telstra notes that international best practice favours maximum accountability of competition authorities, subject to the retention of their independence from Government. Furthermore, there is international recognition that if competition authorities are established as independent entities, there must still be clear mechanisms in place to ensure their accountability. By way of example:

APEC comments

In September 1999, the APEC Ministers and Leaders (including Australia) endorsed a document known as the *APEC Principles to Enhance Competition and Regulatory Reform*, to guide the evolution of domestic competition policy among the nations of the Asia-Pacific region. Within those APEC Competition Principles, the APEC nations agreed to an over-riding principle of accountability, which was expressed as follows:

> *"APEC endorses the following principles:…*
>
> ***Accountability***
>
> *Clear responsibility within domestic administrations for the implementation of the competition and efficiency dimension in the development of policies and rules, and their administration.…*
>
> ***Implementation***
>
> *To achieve this, APEC Member Economies will make efforts to:…*
>
> *5) Take practical steps to:...*
>
> - *Promote consistent application of policies and rules..."*

OECD comments

In a December 2000 paper by the OECD Programme on Regulatory Reform titled *Regulatory Governance: Improving the Institutional Basis for Sectoral Regulation*, the OECD commented in the context of outlining the virtues of independent regulators (at para 5):

> *"But independent regulators have not resolved some regulatory failures, and they have created new potential problems that have not been adequately assessed. It is not too early to begin a critical assessment of the performance of independent regulators to determine if improved design can avoid future problems, which can include:*
>
> ***Independence can create governance problems with democratic accountability.*** *Good regulation is not just about finding the right technical solution, but about placing that solution within a larger supportive policy, economic, and social environment in which it*

can function. The term "independent" is unfortunate in this perspective. No regulatory agency is independent from the governing system, since it operates under authority of laws that can be changed and under policy regimes that are set in part by ministries. If they are to be at the same time legitimate and effective, regulators must be responsive to political direction, and yet able to resist parochial interests that undermine efficiency goals. If independence is poorly designed, the regulator can seem to be non-accountable, and hence outside of the essential controls of the democratic system. Independence cannot become lack of accountability for performance. If this happens, the regulatory institution will not survive. Majone has argued that a mix of approaches is necessary:[91] *"[A] highly complex and specialised activity like regulation can be monitored and kept politically accountable only by a combination of control instruments: legislative and executive oversight, strict procedural requirements, public participation, and, most importantly, substantive judicial review." Regulation in Europe, he says, does not live up to these standards. In OECD countries generally, these dimensions have been neglected in the rush to independence."*

World Bank comments

Relevantly, the World Bank, in its 1998 publication *Competition Policy in a Global Economy: An Interpretative Summary* the World Bank concluded (at page 35):

> *"Administrative authorities dealing with competition issues must be able to exercise some discretion in order to carry out their activities. Discretion, if unchecked, may lead to abuses or simply discourage legitimate business transactions. Therefore, it is essential to remember that administrative discretion should never be above "due process of law". Adequate institutional and process design can ensure that administrative discretion is not abused and reduces the likelihood that legitimate business transactions will not be discouraged".*

Bearing such comments in mind, Telstra submits that the Dawson Committee should recommend that the accountability of the Commission should be increased by providing for oversight by an independent third party, such as an Inspector-General and independent governing board directly accountable to Parliament.

(f) International best practice - accountability of competition regulators

Telstra has canvassed both international and domestic practice for the Dawson Committee below with the above in mind. As a general rule, competition regulators should be subject to greater accountability where they have greater independence and greater regulatory power. There are a number of international examples which illustrate this correlation.

In the Australian context, where the Commission is highly independent and has very considerable powers (exceeding those of other competition regulators in other OECD nations), this suggests that the accountability disciplines on the Commission should be significantly enhanced. In this regard, it is useful to consider the nature of the accountability mechanisms to which foreign competition regulators are subject and whether such mechanisms could be adopted in Australia. Important aspects of the accountability of the competition regulators of the US, EU, UK and New Zealand are each considered below.

US practice

The United States has two principal competition regulators plus a number of industry-specific regulators. The two principal competition regulators are the Antitrust Division of the Department of Justice and the Federal Trade Commission. Both competition regulators are held accountable to

[91] G. Majone. (1993) "Controlling Regulatory Bureaucracies: Lessons from the American Experience," EUI Working Papers in Political and Social Sciences, European University Institute, Florence, Italy.

the US House of Representatives Committee on the Judiciary which exercises continuing oversight.[92]

The Committee on the Judiciary holds regular oversight hearings in relation to the operations of both regulators. There are clear indications that the Committee intends to increase the frequency of such hearings. The hearings are intended to foster communication between the agencies and the US government and to provide for public transparency and comment.

The Antitrust Division of the Department of Justice is also accountable to the Attorney-General, providing a further layer of accountability for one of the US agencies that does not exist in Australia.

EU practice

The EU competition authority is the Competition Directorate-General within the European Commission ("**DG**"). The DG has jurisdiction over practices and transactions that fall within the scope of EU competition law.

Relevantly, the EU utilises "Hearing Officers" to improve the accountability of the decision-making of the DG.[93] The Hearing Officers report directly to the Competition Commissioner. Their role is to safeguard the rights of companies to be heard in merger reviews and competition proceedings. The Hearing Officer produces his or her own report which is attached to each draft decision provided to the EU College of Commissioners. This report is published together with the decision itself in the EU's Official Journal, greatly enhancing the transparency of DG decision-making.

UK practice

The UK's principal competition regulator is an independent public body, the Competition Commission, established by the *Competition Act 1998*. The UK also has a number of industry-specific regulators.

The Commission comprises an appeals panel, a reporting panel, and specialist panels for utilities and newspapers. The Commission has two distinct functions: first, to carry out inquiries referred to it by the other UK competition authorities; and second, to operate as an Appeals Tribunal to hear appeals against the Director General of Fair Trading and other industry-specific regulators. Under amendments to the *Tribunals and Inquiries Act 1992* the Competition Commission was recently placed under the supervision of the Council on Tribunals. The *Enterprise Bill 2001*, scheduled for introduction into the UK Parliament in spring 2002, will further strengthen the competition authorities' independence by transferring responsibility for decisions on mergers and complex monopolies to the Competition Commission.

In the recent White Paper relating to the reform of UK competition laws, the UK Department of Trade and Industry relevantly commented that greater powers and independence required greater accountability for the Competition Commission. In particular:

> *"Greater powers and independence require more accountability. The annual reports of the OFT and the Competition Commission will assume greater importance as they report, and are held to account, against new mission statements (see paragraph 4.43). The Government will legislate to require the Competition Commission to produce its own annual report (currently it has to be covered by the OFT's document, though it also produces its own non-statutory report)….*
>
> *Competition is a matter of crucial importance to the economy. Government wants to see Parliament play a more active role in scrutinising our competition regime – probing, in particular, the extent to which the various players are delivering against their promised*

92 Rule X of the US House of Representatives.

93 http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/736|0|RAPID&lg=EN.

missions. The Government invites Parliament (the Trade and Industry Select Committee under existing arrangements) to actively scrutinise our competition regime."

New Zealand practice

The New Zealand Commerce Commission is New Zealand's competition regulator and is similar in nature to the Commission in Australia. As with Australia, the Commerce Commission is independent of Government and any Governmental directions to the Commerce Commission must be tabled in Parliament.

Importantly, the Commission is required to provide **quarterly** performance reports to the responsible Minister, rather than simply providing annual reports as in the case of Australia. Further the Commission is required to exercise its powers in accordance with the principle of demonstrable accountability, frankness and comprehensiveness.

(g) Australian examples where independent entities are subject to greater oversight

Telstra believes it is useful to identify for the Dawson Committee two examples of Australian governmental entities that have deliberately been given a high degree of operational independence from Government, and the manner in which those agencies have been held accountable notwithstanding that independence. This analysis identifies two mechanisms that could applied to the Commission, including the establishment of an Inspector-General (as with ASIO), or an oversight board (as with the Reserve Bank). Other alternatives also exist, such as a Complaints Review Panel (as with the ABC), which is not considered below.

Accountability of ASIO (Inspector-General)

One of the mechanisms for ensuring accountability of ASIO is via the Inspector-General of Intelligence and Security (**"Inspector-General"**). The Inspector-General was established under the *Inspector-General of Intelligence and Security Act 1986* with extensive powers to scrutinise actions of Australia's intelligence and security agencies and ensure their accountability. In particular, the Inspector-General must ensure that these agencies conduct their activities within the law, behave with propriety, comply with ministerial guidelines and directives, and have regard to human rights. To guarantee independence of the office, the Inspector-General is appointed by the Governor-General for a fixed term of up to five years and cannot be dismissed by the Government.

The Inspector-General may inquire into matters concerning ASIO on his own motion, at the request of the Attorney-General or the Government, or in response to complaints. The Inspector-General undertakes regular reviews of the activities of the intelligence and security agencies, including accessing operational files, monitoring warrants, liasing with law enforcement agencies, monitoring transactions, and ensuring compliance with statutory requirements.

Accountability of the RBA (Independent Board)

The Reserve Bank of Australia (**"RBA"**) is accountable directly to the Parliament for the way it carries out its responsibilities. The RBA has two Boards: the Reserve Bank Board, and the Payments System Board. The Reserve Bank Board is akin to the board of a public company and has power to determine the policy of the RBA in relation to any matter, other than its payments system policy, and to take such action as is necessary to ensure that effect is given by the RBA to the policy.[94]

[94] The Reserve Bank Board comprises nine members: three ex officio members - the Governor (who is Chairman), the Deputy Governor (who is Deputy Chairman) and the Secretary to the Department of the Treasury - and six external members, who are appointed by the Governor-General. The Governor and Deputy Governor are appointed for terms of up to seven years, and are eligible for reappointment. The external members are appointed for terms of up to five years.

The Reserve Bank Board must prepare an annual report, for presentation to the Treasurer and tabling in Parliament. The House of Representatives Standing Committee on Economics, Finance and Public Administration has a permanent reference to it of the RBA's annual report, enabling the committee to undertake 'any inquiry the committee may wish to make'. In August 1996, the Treasurer and the RBA's Governor-designate agreed that the Governor of the RBA would appear before the Committee twice each year to report on the conduct of monetary policy. Senior officials from the RBA also appear before parliamentary committees to account publicly for the conduct of RBA policy.

(h) Enhanced parliamentary reporting

At present, Telstra submits that the scope of Parliamentary reporting by the Commission contemplated by the Act is not sufficient and should be enhanced to further promote Commission accountability. At present, the Commission must produce annual reports which must contain the material listed in section 171 of the Act. This material largely emphasises enforcement action. Telstra submits that section 171 should be re-crafted so that the material reported by the Commission emphasises the extent to which the Commission has achieved the objectives of the Act, namely the promotion of competition (rather than simply engaging in enforcement activity).

Furthermore, the Commission should be required to identify the extent of complaints about its conduct and the extent of negative publicity. The Commission should also be required to identify how it is ranked relative to regulators in foreign jurisdictions. Ideally, an independent audit should be undertaken, attached to the report, to identify whether there are any areas of improvement that the Commission could focus on. Statutory key performance indicators would be useful in this regard which relate to the extent to which any regulatory failures have occurred and how these failures could be corrected.

Telstra submits that the frequency of Parliamentary reporting should also be increased, so that the Commission is required under the Act to produce quarterly and half-year reports on particular matters of concern.

In the July 1997 final report of the House of Representatives Standing Committee on Financial Institutions and Public Administration, the Standing Committee expressed concern on the issue of Commission reporting and recommended the development of performance indicators In its March 1998 final report, the Standing Committee again expressed concern and repeated its recommendation.

In addition, the Productivity Commission recognised similar issues in the context of its Final Report on *Telecommunications Competition Regulation* last year, in which the Productivity Commission made the following comment in relation to Part XIB of the Act (at p. 198):

> *"Under Part XIB, the ACCC annually reports publicly about competition in the telecommunications industry. The Commission considers transparency would be enhanced if these reports were to include more information about the ACCC's actions under Part XIB, while preserving commercial-in-confidence information"*

Telstra submits that the same issues apply more generally to Part IV of the Act:

3.3.3 Telstra's recommendations regarding reform

Given the concerns identified above, Telstra submits that it is important that the Commission is subject to greater accountability disciplines. Telstra proposes this is achieved by way of greater independent oversight of the Commission by:

(a) an Inspector-General; and

(b) an independent governing board, directly accountable to Parliament.

Telstra also submits that the Commission should be subject to greater Parliamentary reporting in the manner identified above.

Accordingly, Telstra suggests the following recommendations for consideration by the Dawson Committee:

Recommendation Amend the Act to provide for oversight by an Inspector-General, in the same manner as ASIO.

Recommendation Amend the Act to create an independent governing board for the Commission which is directly accountable to Parliament.

Recommendation Amend the Act to enhance the frequency and content of Parliamentary reporting by the Commission, including key performance indicators focused on competitive outcomes and identifying any complaints or negative publicity.

4 SUBSTANTIVE PROVISIONS OF PART IV

4.1 Section 45 (Concerted conduct) and 4D (Exclusionary provisions)

Summary

Telstra submits that the "exclusionary provisions" contained in sections 45 and 4D of the Act are drafted too broadly and thus inadvertently prohibit certain pro-competitive conduct. In particular:

- There is widespread support for subjecting exclusionary provisions to a general competition test.
- Recent judicial decisions have had the effect of broadening the scope of sections 45 and 4D beyond that of the collective boycotts they were intended to regulate, thereby prohibiting conduct which may be pro-competitive.
- Australia's approach is not consistent with international best practice, particularly that of New Zealand which has specifically amended its competition laws to address the same issues as are currently proving problematic in Australia.

Accordingly, Telstra submits that:

- section 4D should be removed from the Act so that exclusionary provisions will only be prohibited where they have the purpose or effect of substantially lessening competition; or
- at the very least, section 4D should be amended to provide that where a defendant can show that the exclusionary agreement did not exist for the purpose of substantially lessening competition, there will be no contravention; or
- if both of the above are unacceptable, joint ventures and vertical arrangements should be specifically excluded from the operation of section 4D.

4.1.1 Application and proposals for reform

(a) Section 45 (Concerted conduct)

Section 45(2) of the Act prohibits a corporation from making or giving effect to a provision of a contract if it contains a provision:

- which is an "exclusionary provision" as defined in section 4D(1) of the Act; or
- which would have the purpose, or would have or would be likely to have the effect, of substantially lessening competition.

This submission focuses on the proper scope of the prohibition against "exclusionary provisions" under the Act and does not consider other aspects of section 45. Accordingly, it is only concerned with *primary* boycotts, that is a boycott in which the parties to the agreement (say, A and B) refuse to deal with the target of the boycott (C). In contrast, *secondary* boycotts arise where A and B engage in conduct which seeks to damage D by hindering or preventing C from supplying or acquiring goods from D. While secondary boycotts are outside the terms of reference of the Dawson Committee, primary boycotts are within the terms of reference.

(b) Section 4D (Exclusionary provisions)

"Exclusionary provisions" are *per se* illegal under the Act meaning they are not subject to a test based on their effect on competition. There are two elements to the definition of exclusionary provision, both of which must be satisfied.

The first element is set out in subsection 4D(1)(a) and requires that two or more of the persons who are parties to the relevant agreement must be in competition with each other.

The second element is set out in subsection 4D(1)(b) and requires that the provision must have the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from:

- particular persons or classes of persons; or
- particular persons or classes of persons in particular circumstances or on particular conditions.

Exclusionary provisions may be authorised by the Commission on the basis of a public benefit assessment.

(c) Proposals for reform

Telstra submits that sections 45 and 4D should be amended to address the fact that they currently may inadvertently prohibit certain pro-competitive conduct, in particular:

- section 4D should be removed from the Act so that exclusionary provisions will only be prohibited where they have the purpose or effect of substantially lessening competition;
- at the very least, section 4D should be amended to provide that where a defendant can show that the exclusionary agreement did not exist for the purpose of substantially lessening competition, there will be no contravention; or
- if both of the above are unacceptable, joint ventures and vertical arrangements should be specifically excluded from the operation of section 4D.

4.1.2 Telstra's analysis of the proposals

(a) Reasons to amend section 4D

There has long been concern that the *per se* prohibition of exclusionary provisions is unduly restrictive. In 1976, for example, shortly after the enactment of the Act, the Swanson Committee recommended that section 4D be amended to prohibit collective activity only where it had a "substantial adverse effect on competition".

A number of recent decisions have had the effect of broadening the prohibition against "exclusionary provisions" beyond the collective boycotts they were originally intended to regulate. For example, in recent times, exclusionary provisions have been held to occur where:

- an agreement to reduce the number of clubs in the national rugby league competition was implemented;[95] and

- commitment and loyalty agreements between the Australian Rugby League and member clubs were agreed.[96]

These decisions and others have been subject to much academic criticism including within the following articles:

- K. McMahon, "Church Hospital Board or Board Room: The Super League Decision and Proof of Purpose under Section 4D" (1997) 5 *Competition and Consumer Law Journal* 129.

- L. Griggs, "*News Ltd* v *ARL*: The Birth of Superleague But the Death of Joint Ventures" (1997) 5 *Competition and Consumer Law Journal* 166.

- W. Pengilley, "Fifteen into Fourteen Will Go: The Full Federal Court Defines the Laws of Mathematics in the South Sydney Case" (2001) 17(4) *Australian and New Zealand Trade Practices Law Bulletin* 25.

- J. Duns, "Super Leagues and Primary Boycotts: The Souths Appeal" (2001) 9 *Trade Practices Law Journal* 46.

Such criticism has focused on the fact that the judicial application of section 4D has expanded well beyond what was originally intended by the legislature. In particular:

- There is considerable uncertainty regarding the meaning of "purpose" under section 4D, as identified by McMahon in the article referred to above. Judicial decisions oscillate between interpreting purpose as an essentially subjective or as an objective matter. Furthermore, the decisions of Burchett J and the Full Federal Court in *News Ltd v ARL* demonstrate the uncertainty that arises where a legitimate, potentially competitive purpose co-exists with the parties' commercial interests. This uncertainty has the potential to deter pro-competitive conduct, as parties to an agreement will be unable to determine whether section 4D would in fact apply.

- The judicial interpretation of "particular classes of persons" arguably could enable this requirement to be satisfied by the mere fact of exclusion although the law on this issue remains again uncertain. As Heerey J noted in the *South Sydney* case:[97]

> *"….if a particular class can be defined by the fact of exclusion, in effect the 'class' becomes the whole world, because anybody has the potential to be excluded….if Souths' argument is correct, competitors who enter into a partnership and agree to provide a lesser range of goods and services (or deal with a narrower range of customers) will have contravened section 45. Nothing in the stated object of the Act…would suggest such a startling result…. there is an inevitable slide into prohibition of conduct which amounts to no more than persons deciding the limits of the business in which they wish to engage."*

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95 See *South Sydney District Rugby League Football Club Ltd v News Ltd* [2001] FCA 862. Note that special leave to appeal to the High Court has subsequently been granted.

96 See *News Ltd* v *Australian Rugby Football League Ltd* (1996) 64 FCR 410.

97 [2001] FCA 862 at [91]-[95].

While authorisation of conduct that would otherwise contravene section 4D provides a means to address this issue, Telstra does not consider that the current authorisation procedure provides sufficient protection for neutral or pro-competitive agreements which currently may fall within section 4D. The difficulties with the current authorisation procedure are well documented. In particular:

- Proving public benefit requires a considerable investment of time and money on the part of parties to an agreement.

- Parties may be reluctant to share commercially sensitive information with the Commission.

- Authorisation is often a slow process with no guarantee of success.

- The Commission must be satisfied that those public benefits outweigh any potential detriment to competition. There may be cases where there is no clearly demonstrable public benefit, yet the conduct does not lessen competition and is not detrimental. In such a situation it would be difficult to obtain authorisation.

Should exclusionary provisions be subject to a per se prohibition?

The *per se* prohibition of exclusionary provisions is an exception to the general principle that only conduct with the potential to substantially lessen competition is prohibited. However, such a *per se* approach runs a clear risk of inadvertently prohibiting pro-competitive conduct given the absence of a competition test. Accordingly, while a *per se* approach may be justifiable if the relevant conduct is always likely to be anti-competitive, it is not justifiable if the relevant conduct could be competitive. Therefore one needs to examine whether the *per se* prohibition is justified.

The existing reasons put forward to justify the *per se* prohibition of exclusionary provisions are as follows:

- Any exclusionary provision will invariably have the purpose and/or effect of substantially lessening competition and to require proof of this places an unnecessary burden on the complainant.

- Exclusionary provisions are unfair, unreasonable and contrary to public standards of morality because they adversely affect competition and are regarded as a form of cheating.

However, Telstra submits that the reasons referred to above do not provide a compelling justification to retain the current operation of the *per se* prohibition of exclusionary provisions. In particular:

- Exclusionary provisions will not necessarily have an anticompetitive effect. In many cases, it will be commercially sensible for a group of firms to restrict their sources of supply or the markets for their output. Such behaviour can be pro-competitive in that it can support enterprises that would not otherwise be commercially viable. Joint ventures are a clear example.

- As regards the fairness of exclusionary provisions, Telstra submits that Part IV of the Act is unsuited to the enforcement of public morality and that in any case the terms of section 4D bear no relation to public concerns as to unfairness. Part IV of the Act is concerned with competition rather than fairness and the appropriate emphasis should be on promoting competition and thus economic efficiency. Concerns of fairness would be

better dealt with under Part V and concerns relating to an exercise of power on the part of large companies are in any case regulated by section 46.

There is very little international support for the *per se* prohibition of exclusionary provisions. In Canada, the European Community and the United Kingdom, such provisions would only be subject to a general restriction on agreements which have as their object or effect the lessening of competition.[98]

In the United States, exclusionary provisions are subject to evaluation under section 1 of the *Sherman Act*. Such provisions will only be subject to *per se* prohibition in limited circumstances. As noted below, agreements where the target is not a competitor are subject to a "rule of reason" analysis (i.e., a competition test based on the extent to which they affect competition). The United States Courts:[99]

> *"…will not indulge in [the per se] conclusive presumption lightly. Invocation of a per se rule always risks sweeping reasonable pro-competitive activity within a general condemnation and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a naked restraint of trade with no purpose except stifling of competition. [These are] demanding standards … per se rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive… [and] is without any redeeming virtue".*

Importantly, as discussed further below, the New Zealand provision, though originally very similar to section 4D, has been amended in a number of significant respects to introduce a competition test. Subsection (1A) of section 29 of the *Commerce Act 1986* now provides that:

> *"A provision of a contract, arrangement or understanding that would, but for this section, be an exclusionary provision under subsection (1) is not an exclusionary provision if it is proved that the provision does not have a purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market."*

As noted later in this submission, there are distinct advantages in harmonising Australian competition law with New Zealand competition law on issues where New Zealand is more consistent with international best practice.[100]

(b) Section 4D should be deleted

Telstra submits that section 4D and section 45(1)(a) should be deleted. In this manner, an exclusionary agreement would be subject to the more general competition test set out in section 45 and so would only be prohibited where it has the purpose or effect of substantially lessening competition. Telstra submits that the reasons put forward for subjecting exclusionary agreements to a stricter test than other forms of agreement are inadequate. At present, section 4D operates contrary to the stated purpose of the Act by prohibiting conduct which is competitively neutral or positive. The deletion of section 4D is supported by a number of commentators. Professor Pengilley, for example, comments:[101]

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98 Article 81 of the *Treaty of Rome*, section 45(1) of the *Competition Act* 1985 (Canada), section 2 of the *Competition Act* 1998 (UK)

99 *Smith v Pro-Football* (1978) 2 Trade Cases 62, 338 (D.C. Ct. of Appeal).

100 See also, for example, discussion in R. Patterson "Harmonisation of Australian and New Zealand Competition Laws: Never The Twain Shall Meet?" (2000) 8(1) *Trade Practices Law Journal* 1.

101 W. Pengilley, "Trade Associations and collective boycotts in Australia and New Zealand: a Mistranslation of the Sherman Act Down Under" (1987) 32 *Antitrust Bulletin* 1019 at 1036.

"Saying that various trade association activities should not be per se condemned does not mean that they are necessarily condoned. It merely means that there should be a competition evaluation to see whether or not illegality flows in the specific instances. To say that something should not be per se condemned merely means that the conduct has not been proven to have such a necessarily pernicious effect on competition that certainty is given and litigation time is saved by the application of the per se rule. On this basis, by no stretch of the imagination should collective activities of competitors restricting supply to or acquisition from a particular class of persons, whether competitive or non-competitive and, regardless of the reason for the restriction, attract the per se prohibition."

(c) Section 4D should be subject to a competition test

At the very least, Telstra submits that section 4D should be amended. Section 4D should be subject to a qualification that where a defendant can show that the exclusionary agreement did not exist for the purpose of substantially lessening competition, there will be no contravention of the Act.

This position would be consistent with the recent amendment to the New Zealand *Commerce Act 1986* noted above. Such an amendment would recognise that many agreements that would currently fall under section 4D are not anti-competitive.

This would have several key advantages over authorisation for exclusionary agreements:

- parties would not need to engage in the complex process of demonstrating that their agreement was competitive until they knew it had in fact been challenged; and
- agreements which were not anti-competitive, but which did not necessarily have a significant public benefit would no longer be illegal.

(d) There should be specific exemptions from section 4D

If the Dawson Committee is minded not to accept Telstra's submission above that section 4D should either be deleted or subject to a competition test, then Telstra submits amendments to the Act are still essential. In particular, it is necessary to specifically carve out from the harsh *per se* application of section 4D certain conduct which is likely to be pro-competitive. That conduct can then be considered under the more general competition test in section 45(2). Of the conduct that should be carved out from the operation of the Act, two types of conduct are particularly important:

- **Vertical arrangements**: There is widespread recognition of the fact that it is only 'horizontal' agreements, that is agreements where the *target* is a competitor of the parties to the agreement, that pose a significant threat to competition. Agreements in relation to, for instance, a customer or supplier, are less likely to threaten competition. This has been recognised in both New Zealand and the United States.

  The United States Supreme Court has generally examined the competitive effect of vertical agreements under a 'rule of reason' approach. The Court commented in *FTC v Indiana Federation of Dentists:*[102]

  "The per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor - a situation obviously not present here."

[102] 476 US 447 (1986), 458.

In 1990, New Zealand's *Commerce Act* 1986 was amended to provide that a provision of a contract, arrangement or understanding would only be an exclusionary provision if:

> *"…the particular person or class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or understanding."*

- **Joint ventures:** While joint ventures can have anticompetitive effects, it is widely agreed that there are many situations where a joint venture will in fact have a positive effect on competition. As Griggs has observed, joint ventures can: [103]

  – lead to economies of scale in production, research or development, which can result in the production of an item of better quality or at lower cost for the consumer;

  – eliminate unnecessary duplication;

  – lead to the production of an item that would not otherwise have existed; and

  – lead to increased output of a particular item.

  At present, as demonstrated in *News Ltd v ARL*,[104] section 4D operates to prevent parties to a joint venture from restricting access to the joint venture. As Corones has noted, this "*facilitates outsiders taking a 'free ride' on the investment of the joint venturers'*. Corones suggests that:[105]

  > *"…there is no good policy reason for assuming in the context of an exclusionary provisions in the context of a joint ventures should be automatically condemned. Rather, the courts should consider each refusal on its merits and only condemn those that lessen competition substantially or are likely to do so".*

  The fact that joint ventures can have positive benefits has been recognised by their exclusion from the *per se* operation of section 45A. This exemption recognises the fact that pro-competitive joint ventures often adopt apparently restrictive provisions in their formation. Telstra submits it is inconsistent to exempt joint ventures from section 45A but not to exempt them from section 4D.

  In discussing section 45A, the Hilmer Committee noted the potential competitive benefits of joint ventures in the following terms:[106]

  > *"Joint ventures are frequently used where there is difficulty in a single firm raising the necessary capital, or bearing all the risk, associated with a particular business venture. In the absence of joint venture agreements some projects simply would not occur."*

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[103] L. Griggs, "News Ltd v ARL: The Birth of Superleague But the Death of Joint Ventures" (1997) 5 *CCLJ* 166 at 168-9.

[104] (1996) 139 ALR 193.

[105] "Joint Ventures and Trade Practices Act", in W.D. Duncan (ed), *Joint Ventures Law in Australia*, The Federation Press, 1994, p. 253.

[106] "Report of the Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, August 1993, at p. 40

Furthermore, in the United States, it is clearly established by decisions such as *North West Wholesale Stationers Inc v Pacific Stationery & Printing Company*[107] that unless a joint venture has market power or access to an essential facility, the parties have the right to restrict third party rights of access. As Piraino has observed:[108]

> *"Joint venture partners may wish to limit access to the venture in order to prevent third parties from free-riding on resources which the partners have contributed….These concerns will be particularly acute in risky endeavours such as research and development and innovative manufacturing. If the fruits of a joint venture are freely available to third parties, prospective partners will have little incentive to contribute resources to the venture."*

4.1.3 Telstra's recommendations

Given the analysis above, Telstra submits the following recommendations for consideration by the Dawson Committee:

Recommendation Section 4D should be deleted.

Recommendation At the very least, section 4D should be qualified by a competition test.

Recommendation Otherwise, section 4D should contain exemptions for joint ventures and vertical arrangements.

[107] 474 US 284 (1985).

[108] "Beyond *Per se*, Rule of Reason or Merger Analysis; A New Antitrust Standard for Joint Ventures" (1991) 76 *Minnesota Law Review* 1 at 61.

4.2 Section 47 (Third Line Forcing)

Summary

Telstra submits that amendments should be made to the third line forcing provisions contained in section 47 of the Trade Practices Act. Such amendments should permit:

- related companies to engage in third line forcing without contravening section 47; and
- companies to engage in third line forcing as long as their conduct does not have the purpose, effect or likely effect of substantially lessening competition.

In relation to the related companies exemption, Telstra submits that:

- the lack of a related companies exemption has imposed significant costs on Australian business, both in terms of creating sub-optimal business structures and preparing unnecessary notifications;
- Australia's current approach is inconsistent with international best practice; and
- a related companies exemption would ensure the prohibition against third line forcing remained consistent with other sections, such as section 45 and the balance of section 47.

In relation to the inclusion of a competition test, Telstra submits that:

- the rationale for a *per se* prohibition is no longer valid and is inconsistent with international best practice;
- the present prohibition is anomalous, creates significant compliance costs for business and government and is often ignored, bringing the law into disrepute;
- there is considerable uncertainty regarding the application of the third line forcing provisions and the current prohibitions capture conduct that has no discernable anti-competitive effect and may be pro-competitive;
- companies are forced to structure their affairs to circumvent section 47, creating artificial business structures, transactions costs and delays; and
- while the Commission rarely prosecutes, companies are still required to address compliance risks by notifying the Commission which imposes significant compliance costs on companies and administrative costs for government.

4.2.1 Application and proposals for reform

(a) Application of section 47

Subsection 47(1) of the Act provides that a corporation shall not, in trade or commerce, engage in the practice of "exclusive dealing". Subsequent subsections define the practice of exclusive dealing.

Subsection 47(10) provides that, to contravene subsection 47(1), most types of exclusive dealing must have the purpose, effect, or likely effect of substantially lessening competition. However, the competition test set out in subsection 47(10) does not extend to the third line forcing provisions. This means that third line forcing results in a *per se* contravention of the Act. Third line forcing is the only type of exclusive dealing which is prohibited *per se*.

The third line forcing provisions are contained in subsections 47(6), (7), (8)(c) and 9(d). Essentially, a corporation engages in third line forcing when:

- it supplies a person with goods or services on the condition that the person acquires particular goods or services from another person;
- it refuses to supply a person because the person has not agreed to acquire particular goods or services from another person; or
- it grants or renews a licence on the above condition, or fails to do so, for the above reason.

Third line forcing may be notified to the Commission under section 93 and such notification provides statutory immunity while it remains in force. Third line forcing may also be authorised by the Commission.

(b) Proposals for reform

Telstra submits that the current *per se* effect of the third line forcing provisions has a significant and disproportionate adverse impact on Australian industry. These costs arise because Australia's third line forcing provisions are not consistent with international best practice, as identified below, and inadvertently prohibit legitimate competitive conduct.

Telstra submits that the third line forcing provisions should be amended so that:

- third line forcing is not a *per se* contravention of the Act, rather third line forcing should only be prohibited where it has the effect, or likely effect of substantially lessening competition (i.e., it should be subject to a "competition test"); and
- third line forcing is subject to a "related companies" exemption, consistent with other sections of the Act.

Such proposals have been advocated for a considerable period of time by a wide range of parties and have been the subject of previous law reform committee recommendations, most notably by the Hilmer Committee. Telstra submits that the Dawson Committee should view itself as a catalyst for reform on these issues as such reforms are widely endorsed and long overdue.

Importantly, in 2001, the Department of Treasury issued a discussion paper titled "*Discussion Paper - Possible Amendments to the Trade Practices Act 1974*" ("**the Treasury paper**"). This paper outlined possible amendments to the Act including:[109]

> *"…the introduction of a substantial lessening of competition test for the third line forcing provisions contained in Part IV of the Act, and a further amendment to treat third line*

[109] Department of the Treasury - *Discussion Paper - Possible Amendments to the Trade Practices Act 1974* (Commonwealth of Australia, Canberra, 2001), p. 1

forcing involving related companies in the same manner as forcing by a single corporate entity."

While there was no formal announcement by the Treasury, Telstra understands that Treasury paper was placed in abeyance following the announcement by the Prime Minister in 2001 that, if the Coalition secured a third term, it would hold an independent review of the Act. Telstra understands that the rationale for this was that Treasury envisaged that third line forcing would fall within the scope of the Dawson Review. Accordingly, there is a clear basis for the Dawson Committee to make a recommendation on the third line forcing issue.

The action of the Treasury in issuing the Discussion Paper is arguably a strong indication that the Government recognises the existence of problems with the third line forcing provisions, as identified by Telstra below.

4.2.2 Telstra's analysis of the proposals

(a) Adoption of a competition test for third line forcing

In general terms, a per se prohibition is justified only on the basis that the conduct in question is so inherently anti-competitive that, once it has been shown to have occurred, the party complaining should not be required to prove any anti-competitive purpose or effect on competition. However, as one commentary notes, it is "*far from clear that third line forcing warrants such treatment … in fact there would appear little justification for distinguishing third line forcing from other categories of exclusive dealing*".[110]

The third line forcing provisions were initially drafted in the form of *per se* contraventions to reflect the historical view in the 1970s that third line forcing would have an anti-competitive effect in virtually all circumstances.[111] As identified below, this historical view is now widely regarded as incorrect. Accordingly, Telstra submits that the continuation of a *per se* contravention for third line forcing is an anachronism which should be corrected by Government, particularly given the significant costs it creates.

In particular, Telstra agrees with the comments made in the Treasury paper that it: "*is not apparent that the competition and consumer concerns of the mid 1970's are still relevant given that Australian markets (including financial markets) are now more competitive*."[112]

Criticisms of the *per se* application of the third line forcing provisions date back almost 20 years and include both judicial and academic criticism. In the 1986 case, *Castlemaine Tooheys*,[113] for example, the court commented:

> *"Certain statutory provisions appear to attract litigation in a manner disproportionate to their seeming importance until one is left to wonder if there is not something unsatisfactory about the provisions itself; section 47(6) is such a provision."*

Academic criticism includes, most notably:

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110 Steinwell et al, *Butterworths Australian Competition Law* (Butterworths, Sydney, 2000), p 315, para 5.57

111 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, AGPS, Canberra, 1976, para 4.103.

112 Department of the Treasury - *Discussion Paper - Possible Amendments to the Trade Practices Act 1974* (Commonwealth of Australia Canberra, 2001), p. 2.

113 (1986) ATPR 40-751.

- J. Lipton, "Third Line Forcing in Australia: Current Problems and Future Directions" (1996) 4 *Trade Practices Law Journal* 77.

- R. McEwin, "Third-Line Forcing in Australia" (1994) 22 *Australian Business Law Review* 114.

- Steinwall et al, *Butterworths Australian Competition Law* (Butterworths, Sydney, 2000), p. 315, paras 57 to 65

- W. Pengilley, "Third-line Forcing: What is the Policy?" (1988) 14(1) *Australia and New Zealand Trade Practices Law Bulletin* 1.

- A. Hurley, "The Castlemaine Tooheys Case and the Interpretation of the Third Line Forcing Provisions" (1987) 61 *ALJ* 415.

Importantly, in 1993, given growing academic and judicial criticism of the *per se* application of sections 47(6) and 47(7), the Hilmer Committee recommended that third line forcing should be subject to a competition test:[114]

> *"The basis for a distinction between third-line forcing and other forms of tying is not clear. Per se prohibitions are appropriate where conduct has such strongly anti-competitive effects that it is almost always likely to lessen competition. Third-line forcing does not fall into this category ... The variety of problems and anomalies arising from the divergent treatment of third-line forcing and other forms of tying suggests that a more consistent approach would be appropriate. Accordingly, third-line forcing should only be prohibited if it substantially lessens competition."*

Despite this observation, no amendment was made to the Act along the lines suggested. McEwin reasoned in his article in 1994 that the case for adopting a competition test in relation to sections 47(6) and 47(7) was in fact much stronger than the Hilmer Report suggested.[115] Given the overwhelming body of criticism on this issue, Telstra submits that it is important that the Dawson Committee gives serious consideration to this issue.

The principal concerns with the current application of sections 47(6) and 47(7) are identified below. These concerns are best articulated by the Law Council of Australia in its recent submission: [116]

> *"The present prohibition on third line forcing is anomalous, create significant compliance costs for business and government, and is often ignored, thereby bringing the law into disrepute"*

Inadvertent prohibition of legitimate competitive conduct

The fundamental difficulty with the *per se* application of sections 47(6) and 47(7) is well summarised by a comment by McEwin in his 1994 article "*Third Line Forcing in Australia"* in which he reasoned: [117]

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114 *National Competition Policy*, August 1993 p. 52-53.

115 R. McEwin, "Third-Line Forcing in Australia" (1994) 22 *Australian Business Law Review* 114.

116 Law Council of Australia Business Law Section Trade Practices Committee, *Comments on Discussion Paper issued by Commonwealth Treasury re Possible Amendments to the Trade Practices Act 1974*, p. 1

117 R. McEwin, "Third-Line Forcing in Australia" (1994) 22 *Australian Business Law Review* 114 at 128

"Competition policy should be able to distinguish between efficient bundling and bundling used to exploit monopoly power".

McEwin noted that there are only limited circumstances in which third line forcing will have a harmful effect, and in fact there may be efficiency reasons for tying products which the authorisation process does not recognise.[118] Accordingly, the current drafting of sections 47(6) and 47(7) is likely to have an adverse effect on competition. Clearly, this is contrary to the philosophy behind the Act.

In particular, the fundamental concern with the *per se* application of the third line forcing provisions is that those provisions *inadvertently prohibit certain legitimate pro-competitive conduct*. If the *per se* application of these provisions were removed, and a competition test were introduced, the risk of prohibiting pro-competitive conduct would be substantially reduced.

Indeed, Telstra submits that the current third line forcing prohibitions often prohibit conduct that has no discernable anti-competitive effect or purpose and that may in fact otherwise improve the choice and/or price available to consumers. By way of example, the shopper docket discount schemes and other similar customer loyalty programs show that some forms of third line forcing are clearly not anti-competitive and can be of considerable benefit to consumers.

Lipton reached the same conclusion in her 1996 article, reasoning that the *per se* prohibition has a detrimental impact in its current form.[119] Lipton concluded that:[120]

> *"Despite the intentions of the Parliament, in enacting s 47(6) and maintaining it in its present form, to prevent anti-competitive conduct and enhance competition and consumer benefit in Australian markets, the wording of the prohibition and its per se nature have caused distinct problems within various Australian industries.*
>
> *Many have suggested that the best solution to these problems would be to dispense with the per se prohibition on third line forcing in Australia and replace it with a "substantial lessening of competition" test. This would probably alleviate some of the uncertainties in relation to the practical uncertainties of s 47(6). It would also be a solution more in keeping with other provisions of Pt IVB of the Act."*

Pengilley also comments, for example, that:[121]

> *"…the total illegalisation of third-line forcing … may distort the competitive process … the per se banning of the practice invalidates many proper commercial arrangements which deliver efficiencies and consumer benefits."*

Such criticisms were reinforced by the recent Treasury paper which similarly commented: *"…it is now apparent that not all third line forcing is necessarily anti-competitive and some forms of third*

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118 Ibid at 135

119 Refer for example to J. Lipton, "Third Line Forcing in Australia: Current Problems and Future Directions" (1996) 4 *Trade Practices Law Journal* 77.

120 Ibid at 92

121 W. Pengilley, "Third-line Forcing: What is the Policy" (1988) 14(1) *Australia and New Zealand Trade Practices Law Bulletin* 1.

line forcing can benefit consumers… Currently, the per se provisions apply to a range of conduct that is not anti-competitive, but must still be notified".[122]

Anomaly in the Act

Heydon makes the similarly important point that section 47(6) creates a serious anomaly in the Trade Practices Act. In particular, conduct which is *per se* prohibited under section 47(6) may be less restrictive on competition than other conduct which is subject to a substantial lessening of competition test:[123]

> *"Section 47(6) involves one basic anomaly. There is a less restrictive alternative to tying of one product of a manufacturer to another product of the same manufacturer, which falls under s 47(2)(d). The manufacturer might instead stipulate that the second product instead of being taken from it, could be taken from a specified range of competent manufacturers. This is regarded as a lawful alternative to tying in America. But these less restrictive alternatives seem to be caught by s 47(6), no matter how slight their effect on competition. Thus a less restrictive alternative is treated more harshly than the more restrictive one."*

Pengilley also recognises this anomaly, commenting:[124]

> *"Why is this form of exclusive dealing not subject to a competition test when every other form of exclusive dealing is? Surely all exclusive dealing in s 47 should be subject to the same test… Many argue that it is illogical that the practice of third-line forcing should be treated any more harshly than other forms of exclusive dealing."*

Amending the third line forcing provisions to be subject to a substantial lessening of competition test would align the third line forcing prohibition with the operation of most of the other provisions in Part IV of the Act and would eliminate this anomaly.

Uncertainty

There is considerable uncertainty regarding the application of the third line forcing provisions. For example, it is still not clear whether an element of compulsion is required. Courts have tended to interpret the third line forcing provisions very narrowly and in an extremely technical and literal fashion. This contrasts markedly with the usual broad manner in which provisions of the Act are construed, suggesting that the courts recognise the difficulties inherent in the drafting of the third line forcing provisions. Telstra agrees with Lipton's suggestion that it appears that:[125]

> *". . . part of the impetus behind some of these decisions appears to be a desire by the judiciary to confine narrowly the operation of the subsection so as to avoid the prohibition of conduct which does not seem to be particularly detrimental to competition in a market, even though it would appear technically to amount to third line forcing."*

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122 Department of the Treasury - *Discussion Paper - Possible Amendments to the Trade Practices Act1974* (Commonwealth of Australia Canberra, 2001), p. 2

123 J.D. Heydon *Australian Trade Practices Law*, Law Book Online, Chapter 6, para 6.340.

124 W. Pengilley, "Third-line Forcing: What is the Policy?" (1998) 14(1) *Australia and New Zealand Trade Practices Law Bulletin* 1.

125 J. Lipton, "Third Line Forcing in Australia: Current Problems and Future Directions" (1996) 4 *Trade Practices Law Journal* 77 at 78

However, in other circumstances, courts have refused to read down the provisions, presumably seeking to give the Act broad application. This has created both conflicting decisions and difficulties in determining the application of the third line forcing provisions.

Accordingly, the approach taken by the courts provides further reason to dispense with the *per* se prohibition in respect of third line forcing and to replace it with a competition test.[126] As (at page 317): "*the unsatisfactory state of the decisions and the law itself adds further to the case for one commentary notes subjecting third-line forcing to a competition test*".

Furthermore, as Lipton points out, subjecting the third line forcing provisions to a competition test would mean that courts would:[127]

> *"…. be encouraged to consider the motives of the defendant corporation and the effects or likely effects of the conduct in question on competition in the relevant market, rather than considering technical arguments about what types of conduct literally amount to third line forcing under the exact words of s47(6). This would enhance certainty of application of the subsection on purposive and policy oriented grounds."*

The law has been brought into disrepute

As noted by the Law Council of Australia above, the fact that the third line forcing provisions are widely regarded as penalising certain competitive conduct has meant that in some circumstances these provisions are not enforced by the Commission. Accordingly, the tacit assumption is that companies may engage in third line forcing in breach of the law. Consequently, the law is brought into disrepute.

This is confirmed by the authors of the *CCH Trade Practices Commentary*, who comment:[128]

> *"It can fairly be said that the present law has fallen into disrepute because it is often ignored, either through inadvertence or on the basis that it is unlikely to be enforced; that it fails to distinguish between undesirable conduct and conduct which is neutral or even pro-competitive; that it has not kept up with commercial developments; and that it reflects the prescriptive view of US authorities dating from the 1950s"*

The Commission has itself confirmed the comments above, by indicating that "*..it does not pursue all third line forcing conduct of which it becomes aware, particularly as the various forms it takes involve a variety of restrictions on customers and varying degrees of anti-competitive effect*".[129] Indeed, the third line forcing provisions have rarely been enforced by the Commission. Telstra submits that this provides some evidence that the *per se* status of these provisions is not necessary and that a competition test should be introduced.

High compliance costs for business

However, notwithstanding such comments, companies are still required to comply with the third line forcing provisions given enforcement risks. Companies are still at risk of enforcement action commenced by third parties in relation to third line forcing conduct. There is also no guarantee that the Commission will continue to abstain from enforcement action.

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126 Ibid at 81

127 Ibid at 83

128 CCH *Trade Practices Commentary*, Online edition, para 6-940.90.

129 *ACCC Guide to Authorisation and Notification for Third Line Forcing Conduct* (ACCC, Canberra, February 1998).

With this in mind, much time, effort and expense is spent by business and government in what are, essentially, unnecessary notifications and authorisations. Companies are also required to structure their affairs to avoid the application of the third line forcing provisions. This however, results in considerable compliance costs and associated delays for Australian business.

A number of submissions in response to the Treasury paper noted above identified the costs of the current *per se* effect of the third line forcing provisions and recommended a substantial lessening of competition test.[130] Telstra recommends that the Dawson Committee considers these submissions.

Telstra has also had its own experiences which further demonstrate the significant costs imposed by sections 47(6) and 47(7). By way of example, Telstra was required to set up a costly and complicated agency arrangement in relation to the sale of mobile handsets by dealers in conjunction with Telstra mobile telephony services Without this agency arrangement, mobile term contracts may otherwise have constituted third line forcing under the Act.

Accordingly, Telstra urges the Dawson Committee to recognise the difficulties with the current third line forcing provisions by recommending that they should be subject to a competition test.

Authorisation and notification is not sufficient

It is possible to notify or seek authorisation of third line forcing conduct. In the past, it has been argued that such notification or authorisation sufficiently addresses the risk of inadvertent prohibition of anti-competitive conduct. However, Telstra submits that this fails to recognise the significant costs associated with notification and authorisation and the inherent limitations of both procedures.

The test under the notification and authorisation procedures is whether the likely benefit to the public will outweigh the likely detriment. However, in many instances, situations involving third line forcing will not substantially lessen competition and may not result in clear public benefits. Internal efficiency reasons, for example, may not be viewed as public benefits. Accordingly, conduct that is in fact pro-competitive and efficient may still not be authorised. The ultimate outcome is a clear regulatory failure created by the fact that the third line forcing provisions are not subject to a competition test.

Amending the provisions to introduce a substantial lessening of competition test has the potential to reduce the number of notifications and authorisations received by the Commission each year. In addition, it will ensure that pro-competitive conduct is not prohibited because it fails to result in a clearly discernable public benefit.

Based on the analysis above, Telstra submits that there are compelling reasons to amend the third line forcing provisions to include a competition test.

(b) International best practice regarding third line forcing

The current *per se* prohibition for third line forcing in Australia is very clearly inconsistent with international best practice. Pengilley, for example, comments that:[131]

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[130] Submission made by David Lieberman, Special Counsel, Competition and Consumer Protection Group, Blake Dawson Waldron, dated 12 September 2001; Submission by CSR dated 12 September 2001; Submission by Blake Dawson Waldron; Submission by BP dated 13 September 2001; Submission by ANZ.

[131] W. Pengilley, "Third-line Forcing: What is the Policy?" (1998) 14(1) *Australia and New Zealand Trade Practices Law Bulletin* 1.

"*Nowhere else in the world is third-line forcing treated as a per se offence regardless of the market power of the supplier*."

None of the United States, Canada, the European Community, South Africa and New Zealand makes third line forcing a *per se* contravention. Telstra submits that Australia should adopt the same approach.

Canadian practice

Section 77 of Canada's *Competition Act 1985* prohibits tied selling where the tied selling is engaged in by a major supplier of a product in a market, or is widespread in a market, and

- it is likely to impede entry into, or expansion of, a firm in a market; or
- it is likely to impede introduction of a product into, or expansion of, sales of a product in a market; or
- it has any other exclusionary effect in a market,

with the result that competition is, or is likely to, be lessened substantially.[132]

United States practice

In the United States, a tying arrangement is subject to a presumption of illegality where the plaintiff is able to prove the following five elements:[133]

- the tied and tying products are separate items;
- the supply of the tying product is made contingent on the purchase of the tied product;
- the supplier has sufficient market power in the tying product market to actually restrain competition in the tied product market;
- the tie results in the anti-competitive effect of foreclosing the market to alternative suppliers of the tied product; and
- a substantial amount of competition in the tied product market is affected by the tying arrangement.

South African practice

Section 5(1) of South Africa's *Competition Act 1998* prohibits agreements between parties if:

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132 In Canada 'tied selling' relates to any practice whereby a supplier of a product, as a condition of supplying the product (the tying product) requires the customer to acquire another product from the supplier or the supplier's nominee, or to refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand of manufacture designated by the supplier or the nominee; and to any practice whereby a supplier of a product induces a customer to meet a condition set out above by offering to supply the tying product on more favourable terms or conditions if the customer agrees to meet the conditions set out above (Section 77(1), *Competition Act 1985*).

133 In the United States a tying arrangement occurs when the supply of one product (the tying product) is made contingent upon the purchase of another product (the tied product).

- restrictive practices occur between firms in a vertical relationship; and

- the agreement is restrictive - that is, the agreement has, or is likely to have, the effect of substantially preventing or lessening competition in the market

European Union practice

Most of the EU competition law is encapsulated in Articles 81 and 82 of the Treaty of Rome ("**the Treaty**"). However, the general prohibitions established in Article 81 do not include a specific provision relating to third line forcing conduct. These provisions are directed generally at arrangements which have the purpose or effect of damaging competition in a market.

New Zealand practice

The New Zealand *Commerce Act 1986* does not have provisions equivalent to the third line forcing provisions of the *Trade Practices Act*. The application of a competition test to third line forcing in Australia would assist in achieving greater harmonisation of Australian and New Zealand business law or contemplated by the *Memorandum of Understanding on the Harmonisation of Business Law between Australia and New Zealand*.

(c) Adoption of a related companies exemption

At present, there is no relevant "related companies" exemption in relation to third line forcing. While there is a related companies exemption in section 47(12) of the Act which applies to other forms of exclusive dealing, this exemption does not apply to third line forcing, in respect of a relationship between the two suppliers.

Such an exemption in a third line forcing context would mean that related companies of a corporation were treated as part of the same economic entity for the purposes of the application of sections 47(6) and 47 (7) of the Act. In this manner, a corporation would have flexibility to arrange its affairs within its corporate group in a manner which minimised its costs and maximised its operational efficiency.

However, the absence of a related companies exemption means that third line forcing may prevent companies which are subsidiaries of the same group sell products to consumers where the acquisition of a product or service from one company is conditional on the acquisition of a product or service from another related company within that group. If a company is structured with divisions rather than with separate subsidiaries, the same conduct is lawful unless it were to have the purpose or effect of substantially lessening competition..

Compliance costs

In particular, the absence of a related companies exemption has a disproportionate impact on large companies that have a number of subsidiaries or that are subject to statutory licensing regimes that require the use of special purpose subsidiaries.

By way of example, affiliated companies within a group may wish to reward customers with some sort of loyalty discount. In financial services, a bank may reward customers who buy a range of services from its subsidiaries. This may take the form of one subsidiary offering a discount if the customer buys services from another subsidiary. The lack of a related party exemption means that such conduct may technically breach the third line forcing provisions. Consequently, a notification must be prepared and lodged with the Commission. Effectively, large companies are therefore penalised because of their structure.

The lack of a related companies exemption therefore has the effect that large companies that are engaging in legitimate pro-competitive conduct must spend significant amounts of time preparing and submitting notifications. This can be both costly and frustrating, particularly if those companies are risk averse in circumstances where they would be required to provide commercially sensitive information to the Commission. This can also be problematic in circumstances where time is of the essence, as is often the case with commercial offerings and arrangements. Alternatively, these companies may be forced to restructure their affairs, often at considerable cost, to ensure that third line forcing does not technically occur. Further, this may lead to inefficiencies.[134]

By way of example, for Optus (or Telstra) to offer a combined package through subsidiary companies, there would be a technical breach of section 47(6) or 47(7), hence the need for a notification. Pay television has been an area where there have been numerous needless notifications. For example, in the period since 1996, Optus has notified the Commission on 17 occasions in respect of third line forcing arrangements relating to the bundling of pay TV, internet and telephony services. None of these notifications were approved by the Commission.

Again, a number of submissions in response to the Treasury paper urged that the law should be amended to include a related companies exemption given the significant compliance costs for business.[135] Again, Telstra suggests that the Dawson Committee familiarise itself with these submissions.

Academic criticism

The absence of a related companies exemption in sections 47(6) and 47(7) has again been subject to significant academic criticism. By way of example:

- F.H. Callaway, "Third Line Forcing" (1979) 53 *ALJ* 125.
- J. Lipton, "Third Line Forcing in Australia: Current Problems and Future Directions" (1996) 4 *Trade Practices Law Journal* 77.
- W. Pengilley, "Third-line Forcing: What is the Policy" (1998) 14(1) *Australia and New Zealand Trade Practices Law Bulletin* 1.
- R. McEwin, "Third-Line Forcing in Australia", (1994) 22 *Australian Business Law Review* 114.

Pengilley, for example, notes that:[136]

> *"Illegality of third-line forcing discriminates between companies purely because a different structure may be adapted in one company group to that in another. This, it is argued , is a triumph of legal form over economic reality."*

McEwin highlights the anomaly created by the absence of a related companies exemption in sections 47(6) and 47(7) of the Act in the following terms:[137]

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[134] W. Pengilley, "Third-line Forcing: What is the Policy" (1998) 14(1) *Australia and New Zealand Trade Practices Law Bulletin* 1

[135] Submission made by David Lieberman, Special Counsel, Competition and Consumer Protection Group, Blake Dawson Waldron, dated 12 September 2001; Submission by CSR dated 12 September 2001; Submission by Blake Dawson Waldron; Submission by BP dated 13 September 2001; Submission by ANZ.

[136] W. Pengilley, "Third-line Forcing: What is the Policy" (1998) 14(1) *Australia and New Zealand Trade Practices Law Bulletin* 1.

> *"In the 1974 Act related companies were treated as separate corporations for the purposes of the prohibition on third line forcing. Related companies were then exempted from 1 July 1977. However this exemption was effectively revoked by later amendments in 1978 so that unlike the rest of s 47 related companies are treated as separate corporations for [the purposes of the third line forcing provisions]. This creates an anomaly in that divisions in a corporation tying each other's products are subject to a competition test while parents and subsidiaries doing the same thing are subject to the per se test."*

McEwin emphasises the important point that elsewhere in the Act, such as sections 45(8) and 47(12), related companies are treated as one entity in economic terms. There is no defensible basis why such an approach should not apply to third line forcing.

Heydon, citing Callaway, also heavily criticises the absence of a related companies exemption in the following terms:[138]

> *"[Section 47(6)] disregards the principle that related bodies corporate should be treated as a single business entity for the purposes of economic legislation like the Trade Practices Act. In most of the provisions of Part IV– and most of the exceptions are probably no more than drafting oversights – the legislature has been careful to equate related bodies corporate with divisions. A consequence of re-introducing a distinction between related bodies corporate and divisions, which the amendment does, is to make it illegal per se to tie in favour even of a wholly-owned subsidiary but illegal subject only to a competition test to tie in favour of a division. Further, notification is available in the latter but not in the former case. It is respectfully suggested that that is an indefensible result so long as the legislature adheres to its policy not to prohibit all tying in favour of oneself outright."*

Historical background

As McEwin notes, a related companies exemption did apply between 1977 and 1978, but it was repealed in 1978.

Importantly, the Hilmer Committee recommended the reinstatement of the related company exemption for third line forcing in 1993. As yet, that recommendation has not been adopted. The Hilmer Committee commented in particular:[139]

> *"It is anomalous that a supplier tying in favour of a wholly owned subsidiary, or related company, is subject to a per se prohibition, but a supplier tying in favour of one of its divisions is subject only to a competition test."*

Given the significant costs and unfairness created by the lack of a related companies exemption in conjunction with the widespread criticism identified above, Telstra submits that the Dawson Committee should recommend the reinstatement of a related companies exemption for third line forcing.

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137 R.I. McEwin, "Third Line Forcing in Australia" (1994) 22 *Australian Business Law Review* 128.

138 F. H. Callaway, "Third Line Forcing" (1979) 53 *ALJ* 125 at 127–128.

139 *National Competition Policy: Report by the Independent Committee of Inquiry,* Canberra, August 1993, p53.

4.2.3 Telstra's recommendations regarding reform

Telstra submits that there are compelling reasons to amend the third line forcing provisions so as to include an exemption for related companies and to introduce a substantial lessening of competition test. Essentially, such amendments will mean that the prohibition is able to be applied in a more purposive and less artificial way, thereby enhancing fairness and certainty in the application of the provisions and promoting competitive trading.

For the reasons outline above, Telstra suggests that the following recommendations for consideration by the Dawson Committee:

Recommendation Amend the Act so that section 47(10) applies to sections 47(6) and 47(7)

Recommendation Amend the Act so that section 47(12) extends to situations where the two companies supplying goods and services under sections 47(6) and 47(7) are related to each other.

4.3 Section 50 (Mergers and Acquisitions)

Summary

While the existing Australian merger test is satisfactory, Telstra believes that the current informal clearance procedure requires improvement. The current informal clearance procedure lacks transparency and creates significant issues regarding Commission accountability.

Telstra therefore advocates amending the Act to incorporate a formal statutory clearance procedure, in a form similar to that which exists in New Zealand. However, the existing informal clearance procedure should remain as an option given that it has some advantages.

Such a hybrid approach would:

- reduce business risk by increasing certainty and by providing a mechanism for merging entities to obtain statutory immunity in relation to subsequent enforcement action by the Commission and third parties;
- increase the transparency of Commission decision-making, better enabling parties to mergers to identify the concerns of the Commission and the basis for the Commission's decisions (for example, the Commission should be required to provide substantial reasons for its decisions);
- increase Commission accountability and reduce the scope for inconsistent decision-making and regulatory error. This would also increase the accuracy of Commission decisions and provide scope for merger proponents to seek review of the Commission's decisions;
- address concerns regarding the considerable non-statutory administrative discretion available to the Commission in the absence of a statutory procedure;
- better recognise that the current "informal clearance" procedure is in fact relatively formal, and another more informal "letter of comfort" procedure has evolved as a result;
- recognise that the authorisation procedure is not considered a practical alternative, hence almost all approaches to the Commission are made as informal clearances; and
- better harmonise Australian merger law with New Zealand merger law, giving effect to the trans-Tasman memorandum on business law harmonisation, while avoiding the difficulties with New Zealand's approach.

4.3.1 Application and proposals for reform

(a) Key features of the Australian merger regime

Merger provisions in competition law operate to prevent firms aggregating excessive market power (usually measured by way of market concentration). The key elements of merger provisions are:

- notification procedures;
- merger thresholds; and

- public benefit assessments (i.e., authorisations).

Almost all jurisdictions operate a "pre-notification" merger regime, which contemplates notification of mergers before the transaction occurs. There are two forms of pre-notification:

- voluntary pre-notification, in which each firm decides whether it should seek clearance or authorisation from a competition authority, with that firm facing the risk of subsequent legal challenge if it does not and the merger is subsequently found to be anti-competitive (ie, Australia and New Zealand); and

- mandatory pre-notification, in which all mergers and acquisitions above a certain statutory threshold must be notified to the competition authority before the relevant transaction occurs.

Most jurisdictions around the world (roughly 90%) prefer mandatory notification.[140] Australia and New Zealand are relatively unique in their preference for voluntary notification.

Telstra makes no submission on the current Australian merger threshold (i.e., substantial lessening of competition) and notes that New Zealand adopted such a merger threshold in May 2001.

However, Telstra strongly opposes any suggestion that Australian competition law should be rebalanced to rely on stricter conduct regulation under section 46, but weaker structural regulation under section 50. Such an approach would fly in the face of microeconomic theory, modern industrial organisation theory (and its "structure-conduct-performance paradigm"),[141] modern competition policy and general common sense. Such an approach would also contradict international best practice, long-established international academic thought, and OECD and World Bank recommendations to the contrary. The World Bank and OECD comment, for example:[142]

> "*The rationale for merger control is simple: it is far better to prevent firms from gaining market power than to attempt to control market power once it exists."*

If the Dawson Committee were to consider such a rebalancing, Telstra requests the opportunity to make a separate submission on this issue.

(b) Existing application of section 50

Section 50 is the key provision of Australian merger law and prohibits share or asset acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in market in Australia (or a State, Territory or region of Australia).

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140 Annex II to UNCTAD *Model Law on Competition* TD/RBP/CONF.5/7 United Nations, Geneva, 2000. identifies 9 nations with a voluntary notification system (including Australia and New Zealand) and 62 nations with a mandatory notification system (including Canada, the United States and the EU). Annex III to the same document provides an overview of some of the regimes of key nations.

141 The structure-conduct-performance (SCP) paradigm is the dominant paradigm of the theory of industrial organisation and is fundamental to modern competition law. See detailed discussion in FM Scherer & D Ross *Industrial Market Structure and Economic Performance* (Houghton Miffin, Boston, 1990), pp4-7. See also *Butterworths Australian Competition Law* (Butterworths, Sydney, 2000), p105, para 2.29.

142 See World Bank & OECD *A Framework for the Design and Implementation of Competition Law and Policy (World Bank & OECD, Washington DC, 1998)*, page 41.

Currently, any merger or acquisition that would otherwise breach section 50 can be authorised by the Commission under section 88(9) of the Act. In determining whether to grant authorisation, the Commission weighs up the likely impact of the acquisition on competition against any countervailing public benefit which would arise as a result of the acquisition which would not otherwise be available. In practice, the authorisation process is rarely used and instead parties approaching the Commission tend to rely on "informal clearances".

The Commission will typically provide an informal clearance where it does not consider that the proposed acquisition will have the effect, or be likely to have the effect, of substantially lessening competition, or where the Commission has secured undertakings from the parties that address any concerns about the impact of the proposal on competition. This process is administrative in character without a clear statutory basis, giving it a high degree of flexibility. However, the process also has significant shortcomings, which are outlined below.

(c) Proposals for reform of these merger provisions

Telstra has no substantive concerns with the current merger test and Telstra continues to favour a voluntary pre-notification merger regime. However, Telstra does have significant concerns regarding the authorisation procedure in section 88(9) and the Commission's informal clearance procedure. Telstra outlines its concerns in detail below.

Telstra proposes two mechanism to address these concerns:

- the enactment of a statutory formal clearance procedure for mergers and acquisitions, coupled with statutory immunity, while also retaining the existing non-statutory informal clearance procedure on an optional basis; and

- a statutory requirement for the Commission to publish detailed reasoning for its clearance and authorisation decisions, with confidential information deleted.

This section of the submission address the first of these two issues. The second issue (publication of reasoning) has been addressed earlier in this submission in the context of submissions regarding the general transparency of Commission decision-making. Many of the comments made below have application in that section on transparency.

In relation to the first of these two issues, Telstra proposes that the hybrid formal and informal clearance procedure would operate in the following manner:

- Parties would have an option of either seeking an informal clearance from the Commission, or applying for a formal clearance under the Act. The Commission would not be entitled to refuse to consider an informal clearance on the basis that the party chose not to apply for a formal clearance.

- Informal clearances would continue to operate as they currently do.

- Formal clearances would be subject to a clear statutory procedure which set out strict time-frames and criteria for Commission decision-making. The Commission would be required to publish the reasoning behind its decisions, with confidential information deleted. The clearance procedure would be confidential, at the option of the party seeking clearance.

- If clearance was granted, it would remain in force for 12 months from the date it was granted or, if it was appealed, from the date on which the Court or Tribunal confirmed the determination. During this period, a statutory immunity would apply.

- If clearance was not granted, a party would have the option of either seeking authorisation, seeking judicial review of the Commission's decision, or appealing the Commission's decision on merit to a specialist merger division of the Australian Competition Tribunal (and, if necessary, to the Federal Court beyond). Accordingly, the accountability of the Commission would be clearly increased, ensuring the quality of its decision-making was increased.

- The specialist merger division of the Australian Competition Tribunal would be subject to strict time frames for decision-making and would have the requisite specialist expertise in mergers. The specialist merger division would also provide a forum for appeals from authorisation decisions of the Commission. Decisions of the specialist merger division could be appealed to the Federal Court and beyond.[143]

- The authorisation procedure would remain.

4.3.2 Telstra's analysis of the proposals

(a) Difficulties created by an informal clearance procedure

Telstra recognises that the existing informal clearance procedure for mergers and acquisitions has a number of advantages. These advantages would, in many cases, be lost if a formal clearance process were to entirely replace the existing informal clearance process. These advantages largely concern the speed, flexibility and cost-effectiveness with which concerns can be addressed and proposals cleared by the Commission. Indeed, Australia currently is recognised as having a rapid clearance process relative to world standards. Accordingly, Telstra strongly suggests that the Dawson Committee should recommend the retention of the existing informal clearance procedure.

However, there are certain aspects with that informal clearance procedure that are not satisfactory. These aspects are as follows:

- **Lack of transparency:** There is a lack of transparency in the Commission's administrative decision-making process in granting informal clearances for acquisitions. In particular, the lack of any statutory basis for informal clearance processes gives the Commission a very high degree of administrative discretion which it can use to influence transactions and extract concessions from applicants. This lack of transparency is closely associated with a lack of accountability, in which the Commission is not subject to any significant statutory constraints regarding its powers to give informal clearances or the procedures it uses regarding informal clearances.

- **Inconsistency:** As informal clearances have no statutory basis, there is no statutory requirement for the Commission to take into account the matters set out in the Commission's own Merger Guidelines when granting informal clearances. As a consequence, the decisions of the Commission can be inconsistent and can even contradict the Commission's own publicly-expressed methodology and approach. Such inconsistency leads to a high degree of uncertainty for transaction parties, who find it hard to assess the likely reaction of the Commission to particular mergers.

- **Incomplete information:** The lack of formality in the informal clearance procedure means that the Commission is not required to aggregate all information it considers necessary in order for it to make its decision on a merger. There is no guarantee that the Commission's decision will be based on complete information, particularly as information is not necessarily obtained from all interested persons.

[143] Another option to a specialist merger division may be a specialist, independent, merger review oversight panel.

- **Insufficient reasoning:** There is no requirement for the Commission to publish the reasoning behind its informal clearance decisions or even to disclose its reasons at all. Accordingly, if a transaction is denied informal clearance it may be difficult for a party to determine precisely why it has been denied informal clearance. Again, this increases uncertainty for the parties to the transaction and places the Commission in a position of considerable power, particularly if the Commission wishes to extract concessions from the parties seeking informal clearance. As discussed later in this submission, the failure of the Commission to publish its reasoning also has serious transparency consequences.

- **Power to extract concessions:** As part of the process of reviewing informal clearances, the Commission may seek undertakings from the parties involved. Such undertakings then provide a basis for the Commission subsequently providing the informal clearance. The mix of statutory and non-statutory mechanisms within the context of a non-statutory procedure raises significant procedural issues, as the Commission can leverage its considerable discretion regarding informal clearances to maximise its powers in relation to undertakings.

  The Commission's powers are illustrated by the limited alternatives available to parties if the Commission decides it will not provide a clearance:

  - the parties can proceed with the transaction, in which case the Commission may seek Federal Court orders to prevent the transaction proceeding;

  - the parties may withdraw the transaction;

  - the parties may offer undertakings to try to overcome the competition concerns raised by the Commission; or

  - the parties may seek authorisation of the arrangements by arguing that the public benefit outweigh any anti-competitive concerns.

  There is currently no right to review or appeal the Commission's informal clearance decision.

- **Lack of judicial scrutiny:** In particular, parties seeking informal clearances do not have the opportunity to seek judicial review of the Commission's decision or reasoning. The decision by the Commission whether or not to grant an informal clearance is not a statutory administrative decision, so is not subject to administrative review. Accordingly, the Commission has very little accountability in relation to the accuracy or administrative proprietary of its informal clearance decisions. Such lack of accountability is troubling for the reasons canvassed in detail later in this submission in relation to Commission accountability.

- **Lack of enforceability:** Informal clearances have no statutory basis and do not confer statutory immunity in relation to subsequent enforcement action. This means that even if an informal clearance has been obtained, there is no guarantee that the Commission may not change its mind and subsequent undertake enforcement action, particularly if its initial informal clearance were negligent or ill considered. Furthermore, there is no guarantee that other parties in the industry will not seek to challenge the transaction.

- **"Informal clearances" are still relatively formal**: Notwithstanding that Australia refers to informal clearances as "informal clearances", they are in practice relatively formal. The main reason why they are known as "informal clearances" is because they operate in a vacuum outside the ambit of the Act. This is illustrated by the development of the practice of "letters of comfort" from the Commission, which are a less formalised version of an informal clearance in which the Commission indicates whether or not the

transaction is of interest to it. Telstra believes it would be preferable to formalise informal clearances, while retaining the scope for letters of comfort and other informal approaches to the Commission.

- **Authorisation is not a practical alternative:** As recognised by the Standing Committee on Economics Finance and Public Administration in its September 2001 review of the Commission's 1999-2000 Annual Report: "*one of the criticisms made of the ACCC, is that the authorisation process is too difficult and expensive for small business*".[144] Anecdotal evidence further suggests that merger proposals are being abandoned rather than applications for authorisation made, because merger proponents are unwilling to face the long and uncertain process of obtaining authorisation from the Commission. This evidence is supported by the statistic that in 1996-1997, out of 169 merger proposals considered by the Commission, not one application for authorisation was made.[145]

- **Compliance risks:** A voluntary pre-notification regime inherently shifts compliance risks to industry participants. A formal clearance procedure provides industry participants with a means to remove that compliance risk and reduce uncertainty. Such a formal clearance procedure is inherent within most mandatory pre-notification regimes in which parties to the transaction would be required to notify the competition authority if certain notification thresholds were met. Typically such notification would confer an element of statutory immunity against prosecution if the regulator did not oppose the acquisition following notification.

  As noted below, New Zealand, as one of the few other nations with a voluntary pre-notification regime, has recognised the advantages of certainty created by a formal clearance procedure. Accordingly, Australia remains largely unique in the international community in requiring transaction parties to assume the full compliance risks. In this manner, Australia's informal clearance procedure remains uniquely disadvantageous to firms carrying on business in Australia and is not consistent with international best practice.

- **Overall uncertainty:** As a result of the issues expressed above, there is little certainty for parties engaged in a transaction whether or not an application for an informal clearance will actually be granted by the Commission. Furthermore, even if an informal clearance has been granted, there is still uncertainty whether or not the Commission or other parties may decide to undertake enforcement action as an informal clearance does not provide any immunity from prosecution if a transaction happened to breach the Act.

  Such inherent uncertainty impacts not only on the parties to the transaction, but also on the wider business community and consumers, by increasing overall business risk and thus the cost of carrying on business in Australia. All interested parties would benefit from a clearer understanding of the basis on which decisions are made, and from a procedure with greater legitimacy. From the point of view of public accountability, it is also clearly necessary for the current procedure to become more transparent.

Telstra notes that a formal clearance procedure could be more cumbersome so therefore suggests that formal clearances and informal clearances should co-exist. Where a party requires certainty and statutory immunity, it can apply for a formal clearance. Where a party requires speed, it can utilise informal clearance. However, the formal clearance procedure should itself be subject to strict time frames. Telstra believes that if the Act was amended to give parties the option of a

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144 Standing Committee on Economics, Finance and Public Administration, *Competing Interests: Is There a Balance? Review of the ACCC Report 1999-2000*, September 2001, AGPS, Canberra, p. 11.

145 *Australian Competition and Consumer Commission Annual Report 1996-97*, AGPS, Canberra, August 1997, p. 4-5, 26-27 and 29.

formal or informal clearance, this would ensure that the advantages of both procedures were incorporated into the Act.

(b) History behind the informal clearance procedure

Since the enactment of the Act in 1974, the clearance procedure for mergers and acquisitions has been considered on a number of occasions. There is therefore a lengthy history to the clearance issue with which Telstra recommends the Dawson Committee acquaints itself. An overview of that history is set out below.

Importantly, however, that history concludes in 1989 with the recommendations of the Griffiths Committee. The Griffiths Committee recommended that a formal clearance procedure **should** be adopted. It is unclear why the Government did not follow these recommendations.

Initial enactment (1974)

The Act incorporated a formal clearance procedure in 1974 upon its enactment. That clearance procedure was based on the voluntary pre-notification model in which an applicant could request the Trade Practices Commission ("**TPC**") to determine, in advance, whether the merger would be opposed by the TPC on the basis of it being anti-competitive before the proponent decided whether to seek authorisation. If the TPC considered the merger to be acceptable, it would grant clearance for the acquisition.[146]

The TPC was required under the Act to decide an application for clearance, and notify the applicant of its decision, within 30 days. Clearance would automatically be granted if the TPC failed to meet this deadline. However, clearance decisions by the TPC could not be appealed to the Australian Trade Practices Tribunal.

Swanson Committee (1976)

The Swanson Committee in 1976 recommended that the clearance procedure be retained in relation to mergers and acquisitions but abolished in relation to other Part IV conduct. In particular, the Swanson Committee commented:[147]

> *"… the present system of clearance offers a reasonable opportunity for parties who believe that they have complied with the law, or are entitled to the benefit of the exception which the authorisation procedure provides, to obtain assurance of their position by application to the Commission."*

The Swanson Committee, however, recommended that the Act should be amended to better indicate the circumstances under which the TPC should grant clearance.[148] Accordingly, the Swanson Committee, in effect, recommended the inclusion of greater formality into the clearance procedure for mergers and acquisitions.

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[146] House of Representative Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting From Competition?* AGPS, Canberra 1989, para 5.1.1.

[147] Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, AGPS, Canberra, 1976, para 8.12.

[148] Ibid at para 8.35.

Repeal of clearance procedure (1977)

Notwithstanding the recommendations of the Swanson Committee that the clearance procedure should be retained for mergers and acquisitions, the clearance procedure was repealed in 1977. This repeal occurred within the context of an amendment to the Act to replace the initial 'substantial lessening of competition' test in the Act with a 'market dominance' test.[149]

The removal of the clearance procedure was intended to reduce the administrative burden on the TPC.[150] However, in place of the clearance procedure the TPC was encouraged to develop a practice of informal consultation with parties to mergers and acquisitions. Through this process of consultation the TPC would indicate whether, in its view, the proposal would be likely to breach section 50, and whether it would be likely to result in the TPC approaching the court for an injunction.

This informal clearance procedure was intended to provide certainty for merging parties and to enable them to formulate a modified proposal which was acceptable to the TPC if the TPC expressed concern with the merger.[151]

Griffiths Committee (1989)

During the period from 1977 to 1989, considerable debate took place in relation to the reintroduction of a formal clearance procedure. The Commission appeared uncertain whether it wished to take on the additional administrative burden of a formal clearance procedure, and the balance of opinion perceived more disadvantages than advantages. The issue of a formal clearance procedure also became embroiled in the more general issue whether Australia should adopt a mandatory pre-notification regime.

In May 1989, the House of Representatives Standing Committee on Legal and Constitutional Affairs ("**Griffiths Committee**") released its report on mergers and acquisitions. The Griffiths Committee clearly recommended the re-enactment of a clearance procedure in the following terms:[152]

> *"The Committee considers that legislative recognition of the existing informal consultative process for mergers would provide significant advantages in terms of public accountability considerations, the effectiveness of undertakings entered into as part of the process, and the effectiveness of cost recovery measures."*

This recommendation was formed by the Griffiths Committee after weighing the advantages of a formal and informal clearance procedure. In relation to the advantages of an informal clearance procedure, the Griffiths Committee reasoned (at para 73-4):[153]

- it avoids adversarial proceedings and allows the TPC to respect commercial confidentiality of information provided by companies;

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149 Hansard, House of Representatives, 3 May 1977, p. 1478.

150 House of Representative Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting From Competition?* AGPS, Canberra 1989, para 5.1.5.

151 Ibid at para 6.1.4.

152 Ibid.

153 Ibid at paras 6.2.1 - 6.2.6

- it promotes a co-operative rather than confrontational relationship between business and the TPC;

- it may result in a speedier, more efficient and cost-effective resolution of a matter, compared with the substantial costs and delays that may be occasioned via merger enforcement through the courts.

Current situation

Despite the recommendation of the Griffiths Committee that a formal clearance procedure should be reinstated into the Act, the Act has never been amended and the informal clearance procedure introduced in 1977 remains in place today. The criticisms by the Griffiths Committee of the informal clearance procedure remain true today.

(c) International best practice

As noted above, most jurisdictions do not rely on a voluntary pre-notification regime, rather they require mandatory pre-notification of mergers which achieve a certain notification threshold.

New Zealand is one of the few jurisdictions that operates a voluntary pre-notification regime similar to that of Australia. However, unlike Australia, New Zealand does have a formal clearance procedure. The New Zealand experience is therefore useful.

The introduction of a clearance procedure into Australian law, following the approach of New Zealand, would give effect to the current desire of the Australian and New Zealand governments to achieve greater harmonisation of their respective competition laws pursuant to the *Memorandum of Understanding on the Harmonisation of Business Law* entered into to supplement the *Australia New Zealand Close Economic Relations Trade Agreement*.

New Zealand experience

New Zealand's merger provision is set out in section 47 of New Zealand's *Commerce Act 1986* and is now almost identical in nature to that of Australia. As with Australia, New Zealand permits authorisation of business acquisitions on the basis of a public benefit assessment. However, section 66 of the Commerce Act also provides for a statutory formal clearance process. Under this process:

- A person who proposes to acquire assets of a business or shares may give the Commerce Commission notice seeking clearance for the acquisition.[154] The Commerce Commission is then obliged, within 10 working days, to provide a written notice to the applicant either giving or declining to give clearance to the proposal.

- If the Commerce Commission has not provided the applicant with written notice of its decision within the time frame provided, then the Commerce Commission is deemed to have declined the proposal.[155] A clearance granted under section 66 expires 12 months after it is granted, or, if a decision granting clearance is appealed, 12 months from the date on which the Court confirms the determination to grant clearance.[156] A clearance

[154] Section 11(1) of the *Commerce Act 1986* (NZ).

[155] Section 66(4).

[156] Section 66(5).

under section 66 therefore remains in effect for a period of 12 months and gives a party statutory immunity from prosecution while the clearance remains in force.[157]

Reinforcing Telstra's submission that Australia should retain its informal clearance process if it adopts a formal clearance process, the Commerce Commission utilises informal letters of comfort (i.e., informal clearances) if parties do not wish to apply for formal clearance.

The New Zealand experience has not suggested litigation is the consequence of a formal clearance procedure. Therefore, it unlikely that the adoption of a formal clearance procedure would be any more adversarial than under the existing informal clearance procedure.

Importantly, the New Zealand Commerce Commission publishes its decisions relating to informal clearance on its web site, unless the transaction is confidential (in which case the decision is suppressed). Confidential information is deleted from these decisions. The decisions are typically fairly detailed and identify the Commission's reasoning.[158]

Other jurisdictions

As noted previously, most other jurisdictions rely on mandatory pre-notification. Upon receiving notification of the merger, the relevant competition authority typically has a period of time within which it must respond identifying whether it has any concerns with the merger. If the competition authority does not identify any concerns, a statutory immunity typically applies.

Accordingly, given that mandatory pre-notification is typically coupled with statutory immunities, such mandatory pre-notification procedures typically have the same effect as a formal clearance procedure and provide certainty to merging parties. By not providing a formal clearance procedure, the Australian regime therefore arguably contradicts international best practice on this issue and creates uncertainty.

4.3.3 Telstra's recommendations regarding reform

Given the concerns expressed above, Telstra proposes that the Act should be amended to incorporate a formal clearance process for mergers and acquisitions but while also retaining the existing informal clearance process.

Accordingly, Telstra suggests the following recommendations for consideration by the Dawson Committee:

Recommendation The existing informal clearance procedure should be retained.

Recommendation Parties should have an option of either seeking an informal clearance from the Commission, or applying for a formal clearance under the Act. The Commission would not be entitled to refuse to consider an informal clearance on the basis that the party chose not to apply for a formal clearance.

Recommendation Formal clearances would be subject to a clear statutory procedure which set out strict time-frames and criteria for Commission decision-making. The Commission would be required to publish the reasoning for its decisions, with confidential information deleted. The clearance procedure would be confidential, at the option of the party seeking clearance.

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[157] Section 69.

[158] http://www.com.com.govt.nz/adjudication/index.cfm.

Recommendation A formal clearance should provide statutory immunity for a period of 12 months from the date of the decision granting clearance and, if the decision is appealed, from the date on which the Court or Tribunal confirmed the determination to grant clearance.

Recommendation If clearance was not granted, a party would have the option of either seeking authorisation, seeking judicial review of the Commission's decision, or appealing the Commission's decision on merit to a specialist merger division of the Australian Competition Tribunal (and, if necessary, to the Federal Court beyond). Accordingly, the accountability of the Commission would be clearly increased, ensuring the quality of its decision-making was increased.

Recommendation The specialist merger division of the Australian Competition Tribunal would be subject to strict time frames for decision-making and would have the requisite specialist expertise in mergers. That specialist merger division would also be available for appeals from authorisation decisions of the Commission. Decisions of the specialist merger division could be appealed to the Federal Court and beyond.

Recommendation The existing authorisation procedure should be retained.

5 ENFORCEMENT PROVISIONS AND THE COMMISSION'S POWERS

5.1 Section 155 (Information Gathering Powers)

Summary

At present, there are inadequate means for the recipient of a section 155 notice to challenge obligations that may be unduly harsh or burdensome.

Telstra submits that an independent body or Inspector-General should have the power to evaluate complaints regarding section 155 notices, and to provide their opinion on whether a notice is reasonable.

The existence of legal professional privilege is vital to ensure that companies seek legal advice on the application of the Act. Telstra submits that section 155 should be amended to ensure that legal professional privilege is available in relation to a section 155 notice.

5.1.1 Application and proposals for reform

A focus of the Dawson Review is the extent to which the Act, and the method by which it is administered, provides sufficient protection to individual businesses.

Telstra acknowledges that section 155 provides the Commission with a vital and important means of gathering information necessary for it to perform its role under the Act. However, Telstra is concerned at the absence of procedural safeguards in relation to the exercise of the Commission's powers under section 155 for the reasons set out below. Telstra therefore submits that section 155 notices should be subject to a requirement of proportionality. Section 155 notices should also be subject to review by an independent body, such as an Inspector-General.

The Commission's ability to enter premises under section 155(2) without any form of external approval is somewhat unique and appears contrary to international best practice. ASIC, for example, must seek judicial approval when it utilises its comparable powers under the Australian Corporations Act. In New Zealand, Canada, the United States and the United Kingdom, the respective competition regulators must each obtain judicial approval in such circumstances. Telstra submits that the Commission should be required to obtain a warrant from a magistrate or judge before entering premises to search for documents.

Telstra further submits that section 155 should be expressly amended to uphold legal professional privilege.

5.1.2 Telstra's analysis of the proposals

(a) Oversight by Inspector-General

Section 155, it has been accepted, confers a broad investigatory power on the Commission.[159] In order to issue a notice, it is sufficient that the Commission has a reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter which may constitute a contravention of the Act.

[159] *SA Brewing Ltd v Baxt* (1989) ATPR 40-967 per Fisher and French JJ.

The Commission states in its guideline on section 155 that "*the notice will incorporate a sufficient description of the matter alleged to show the necessary relationship between the information sought and the matter in respect of which it is sought*."[160]

However, Telstra believes that in some circumstances, the volume of information that is required to be produced by a section 155 notice can be unreasonable. This is particularly so in relation to large organisations with complex and extensive records, such as Telstra.

On occasion, the Commission has issued section 155 notices which impose highly onerous obligations (both in terms of time and money) on the recipient of the notice. In relation to a section 155 notice received by Telstra, its compliance costs exceeded $200,000. The notice was also phrased broadly to an extent that was reminiscent of a "fishing expedition" by the Commission.

Telstra therefore submits that section 155 notices should be subject to a requirement of proportionality.

Furthermore, there are few incentives for the Commission not to phrase its section 155 notices as broadly as possible. By doing so, the Commission can capture maximum possible information without regard to the compliance costs of the firm receiving the notice. The Commission is subject to little effective accountability for the content of its section 155 notices. In addition, the Commission, even in cases where it has acknowledged that the scope of the section 155 notice it issues was too broad, has refused to revoke and re-issue a correct notice. Rather, the recipient of the notice is left to rely upon statements made by Commission officers as to the reduced scope of the notice , notwithstanding that the corporation is liable for potential penalties for non-compliance with a validly issued notice.

As has been judicially noted, the current means by which a recipient of a section 155 notice can seek review are very limited:[161]

> *"The mere fact that compliance with a requirement to furnish information or to produce documents would be burdensome will not invalidate that requirement in a sec. 155 notice…Nor will objective harshness, unreasonableness or oppressiveness of a requirement in such a notice constitute an independent ground of invalidity. If invalidity by reference to these qualities is to be established, it must be by reference to the implied general limitation upon the power conferred by sec. 155(1) of the Act to which reference has already been made, namely that it is a condition of a valid exercise of the power that it be used in good faith for the purpose for which it was conferred and with regard to the effect that the exercise of the power will have upon those affected thereby.*
>
> *It is only if the harshness, oppressiveness or unreasonableness of a requirement in a sec. 155 notice is, in all the circumstances, such as to warrant the conclusion that the requirement could not have been imposed in good faith or could only have been imposed to achieve a collateral purpose or without regard to the burden which it would impose upon the recipient, that harshness, oppressiveness or unreasonableness will result in invalidity".*

Telstra submits earlier in this submission that the Commission should be subject to oversight by an Inspector-General or independent governing body. One function of such a body could be to consider complaints in relation to section 155 notices so as to promote Commission accountability.

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160 ACCC, "Section 155 of the Act", October 2000, http://www.accc.gov.au/pubs/Publications/Legislation/s155TPA.pdf.

161 Ibid at 43,448-9.

A recipient of a notice who believed that it was unduly burdensome or unreasonable could make a submission to this person or body, to which the Commission could respond. The independent person or body could review both submissions, and issue an opinion as to whether the notice was unduly harsh or burdensome. This would involve a consideration of the type of information required, the difficulty of collecting such information, and the Commission's view as to why such information was necessary. The Commission would not necessarily be bound to follow the decision of the Inspector-General, but it would clearly carry persuasive force.

Such a process would provide an independent check on the Commission's considerable power in relation to section 155 notices. Although such a body would not have the same power as a Court to declare notices invalid, it would exercise a valuable restraint on the Commission and help to ensure that the Commission did its best to request only relevant information, so that notices were not unduly harsh or burdensome on recipients.

(b) Commission should require a search warrant to enter premises

At present, under section 155(2), if the Commission has reason to believe that a person has engaged in, or is engaging in conduct that may constitute a contravention of the Act, it may enter any premises for the purpose of examining and copying any documents in those premises.

This means that the Commission has the power to enter premises without recourse to any form of external authority. As indicated above, there is little scope for review of the Commission's decision to undertake such an entry.

Telstra submits that international best practice, as illustrated below, clearly requires that the powers exercised by the Commission under s155(2) should be subject to judicial approval. In addition, such a requirement for judicial approval would be consistent with the requirements imposed on ASIC under the Corporations Act. Telstra submits that, at present, the Commission possesses an unusual and inappropriate degree of power in relation to entering premises.

By way of example, ASIC officers must obtain a warrant from a magistrate before entering premises to inspect company books. Such a warrant may only be granted where the magistrate is satisfied that there are reasonable grounds to suspect that books which are required to be produced have not been produced.[162]

Telstra submits that, in order to enter premises for the purpose of searching for documents, the Commission should be required to obtain a warrant from a judicial officer, after satisfying that judicial officer that there are reasonable grounds to believe that such entry is necessary to investigate a contravention of the Act.

New Zealand

In New Zealand, if an employee of the Commerce Commission wished to enter a place for the purpose of ascertaining whether the person had engaged in a breach of the Commerce Act, he would need to obtain a warrant to do so. A warrant may be issued by a District Court Judge, Community Magistrate or Court Registrar who is satisfied by an application made on oath that there are reasonable grounds to believe it is necessary in order to determine whether a contravention of the Act has occurred, for an employee of the Commission to search the place.[163]

162 *Australian Securities and Investments Commission Act 2001*, section 35 and 36.

163 *Commerce Act 1986*, section 98A.

Canada

Under the Canadian *Competition Act 1985*, the Commissioner (or his representative) is required to obtain a warrant from a judge of a superior or country court or the Federal Court before entering any premises.[164] The judge must be satisfied that there are reasonable grounds to believe that [165]

- an offence has been committed; and
- there are, on any premises, any record or other thing that will afford evidence with respect to the circumstances of the offence.

Only where "by reason of exigent circumstances it would not be practical to obtain the warrant" may the Commissioner enter and search premises. Even then, there must still be reasonable grounds to believe that an offence has been committed and there is evidence on the premises as to this offence.[166]

United States

As a consequence of the Fourth Amendment to the US Constitution, the Federal Trade Commission cannot enter premises to search for documents without obtaining judicial approval. The Fourth Amendment states that:

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

United Kingdom

In the United Kingdom, an investigating officer may only enter the premises without a warrant if he has:[167]

- given at least two working days' notice of the intended entry; and
- indicated the subject matter and purpose of the investigation; and
- indicated the nature of the offences created

Notice does not need to be given where the officer has a *reasonable suspicion* that the premises are, or have been occupied by a party to an agreement which he is investigating under Chapter I, or an undertaking which he is investigating in relation to a contravention of Chapter II.[168]

If the investigating officer wishes to enter premises to obtain documents which he has already requested, but have not been supplied, or which he believes would be concealed or removed were they required to be produced, then he must obtain a warrant from a judge in accordance with the rules of the court.[169]

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164 *Competition Act 1985*, section 15.

165 Ibid at section 15(1).

166 Ibid at section 15(7).

167 *Competition Act 1998*, section 27(2).

168 Ibid, section 27(3) and 27(4).

169 Ibid, section 28.

(c) Legal Professional Privilege

In the recent decision of *Daniels*, the Full Federal Court has held that, under section 155, the Commission is empowered to compel the production of documents and information subject to legal professional privilege.[170]

On 15 February 2002, the High Court of Australia granted special leave to Daniels to appeal this decision.[171] The decision was heard on 18 June 2002.

Telstra is concerned that, if the High Court were to uphold the Federal Court's decision, this could have serious ramifications for trade practices compliance. Regardless of the High Court's ultimate decision, Telstra submits that this issue is of sufficient importance that the Committee should recommend an amendment to section 155 to ensure legal professional privilege is maintained.

The purpose of legal professional privilege was explained by the High Court in *Grant v Downs*:[172]

> *"The rationale of this head of privilege… is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a fill and frank disclosure of the rel/evant circumstances to the solicitor. The existence of this privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."*

As Deane J observed in *Waterford v Commonwealth*:[173]

> *"Another aspect of the rationale of the principle of legal professional privilege is… that the ready availability of confidential legal advice is in the public interest because it promotes the observance of the law generally and of the administration of justice in particular".*

The point made by the High Court is of great relevance in the context of the Act. If companies and individuals were discouraged from consulting a lawyer, because of fear that communications might subsequently be used by the Commission, there is a real chance that they will cease communicating with their lawyer. Given the complexities of competition law, it is vital that persons not be discouraged from seeking legal advice in an effort to understand their legal rights. Even if the strategy of obtaining non-written advice was adopted, this could still pose considerable dangers, as both the instructions given and the advice received are unlikely to be remembered in sufficient detail.

In *Re Compass Airlines Pty Ltd*, the Full Federal Court recognised that legal professional privilege rested on very different foundations to the privilege against self incrimination. Beaumont and Gummow JJ considered that:[174]

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170 *ACCC v Daniels Corp International* [2001] FCA 244

171 http://www.austlii.edu.au/au/other/hca/transcripts/2001/S72/1.html

172 (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ.

173 (1987) 163 CLR 54 at 82.

"It is one thing to construe a provision of the type found in [s597 of the Corporations Law] as taking away, by implication, the right of silence, yet it is a very different thing to read into such a provision an intention to eliminate the very different privilege inherent in a proper legal professional relationship."

Legal professional privilege does not apply to advice obtained for the purpose of facilitating the commission of a crime, fraud or civil offence. For this reason, the existence of the privilege would not undermine the Commission's investigatory powers under section 155.

The importance of maintaining legal professional privilege, and the problems with the *Daniels* decision, are discussed in further detail in:

- R. Travers "Confidentiality of Legal Advice after *Australian Competition and Consumer Commission* v *Daniels*" (2002) 9 *Competition and Consumer Law Journal* 289.

5.1.3 Telstra's recommendations regarding reform

Recommendation Section 155 notices should be subject to a requirement of proportionality and should be subject to oversight by an independent person or body, such as an Inspector-General

Recommendation The Commission should be required to obtain a warrant from a magistrate or judge before entering premises to search for documents

Recommendation The Act should be amended to preserve legal professional privilege in relation to section 155 notice

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[174] (1992) 35 FCR 447 at 464

5.2 General Penalties

Summary

Telstra submits that the Act should not be amended to specifically provide for turnover based penalties for certain contraventions until a proper assessment has been made as to whether:

- the current penalties provided under Part VI of the Act are inadequate; and
- a turnover based penalty system is an appropriate response to any identified difficulties with the existing regime.

However, if the Dawson Committee were minded to recommend that the Act should be amended to provide that penalties should be based on the turnover of a corporation, Telstra considers that the following safeguards should be adopted:

- penalties should be calculated in accordance with clear, impartial guidelines which are published and widely available;
- decisions to impose a penalty should be published, setting out the reasons why a certain level of fine was imposed;
- corporations should have the opportunity to appeal a penalty if they consider that irrelevant considerations were taken into account or relevant factors were omitted; and
- the Act should provide that the Commission establish a clear and reasoned leniency policy, delivering immunity from penalties for a "first mover" to come forward and reduced penalties for co-operation during the course of an investigation.

5.2.1 Application and proposals for reform

(a) Position adopted by the Commission

Telstra understands that the Commission may be intending to call for the introduction of turnover based penalties for certain contraventions of the Act.

(b) The current position under the Act

At present, there are a number of different sanctions which may be imposed for a breach of Part IV of the Act, including: [175]

- pecuniary penalties under section 76 of up to $10 million for corporations and up to $500,000 for individuals;
- injunctions - under section 80 : a Court may grant an injunction (including interim injunctions) to restrain breaches or attempted breaches of the restrictive trade practices

[175] Under section 81 of the Act , the Court may also order the divestiture of shares or assets if a person has contravened the merger provisions.

provisions of the TPA. An application for an injunction (with the exception of mergers[176]) may be made by any person;

- damages - under section 82, a person who suffers loss or damage as a result of a contravention of Part IV of the TPA may bring proceedings against the person who is in contravention or a person who is involved in that contravention; and

- ancillary orders under section 87 for specific performance and rescission and variation of contracts.

- Section 76 of the Act provides that a Court may impose pecuniary penalties for breaches or attempted breaches of Part IV. Section 75B of the Act also provides for the application of pecuniary penalties to those who aid, abet, induce, are knowingly concerned in, or have conspired with others to effect the contravention.

5.2.2 Telstra's analysis of the proposals

(a) Arguments made by the Commission

The main arguments put forward by those advocating turnover based penalties are that:

- the fines currently imposed on individuals or corporations are not an effective deterrent; and this is evidenced by an increase in international cartel activity in Australia; and

- pecuniary penalties in particular should be tied to the perpetrator's turnover to ensure that the perpetrator does not "profit" from the conduct in question.

(b) Arguments against the imposition of turnover based penalties

However, there are some arguments against the introduction of such penalties:

- **Current penalties are adequate as a deterrent:** The current pecuniary penalties which may be imposed under section 76 of the Act ($500,000 for an individual and $10 million for a corporation) are adequate.

  A review of penalties which have been imposed (both negotiated and non-negotiated) indicates that maximum penalties have rarely been imposed for the types of breaches that the Commission is concerned with. Since the introduction of much higher maximum penalties in 1993, the median average corporate penalty imposed in price fixing decisions as at 2000 was only $259,859.[177] The largest pecuniary penalty imposed on a company was $15 million. The largest pecuniary penalty imposed on an individual has been $150,000.[178]

- **Evidence that the existing legislative regime is already effective:** Assertions that the imposition of current levels of penalties is not effective to deter anti-competitive conduct do not, as far as Telstra is aware, have any quantitative data to support it. Telstra is not

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176 Only the Commission and the Advocate General may apply for an injunction to restrain the implementation of a merger.

177 D. Round, "Have Australia's Corporate Colluders Been Corralled?" (2000) 8 *Competition and Consumer Law Journal* 83 at 94.

178 *Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR 41-809.

aware if any study has ever been attempted to analyse the effect of penalties on individuals. On the contrary, the anecdotal experience of many in the Australian business community is that the threat of the imposition of the current monetary penalties is a very significant deterrent.

Telstra is not convinced by arguments to the effect that the current penalty regime under the Act is inadequate particularly as the Courts have not seen fit in most cases to impose the maximum penalty.

Even if the current system is viewed by the Dawson Committee as inadequate, Telstra questions whether a turnover based system is an appropriate response. Penalties based on turnover could potentially have serious consequences for the commercial viability of some businesses and may damage a whole company when breaches may have occurred as a result of the behaviour of a few managers.

Irrespective of the argument of whether the current penalty regime adequately delivers against key policy objectives in this regard, it is also important that any regime which enforces potentially severe penalties should incorporate adequate "checks and balances". In particular:

- penalties should be calculated in accordance with clear, impartial guidelines which are published and widely available. This will afford corporations some certainty when assessing the likely level of penalty that may be imposed;

- decisions to impose a fine should be published, setting out the reasons why a certain level of penalty was imposed; and

- corporations should have the opportunity to appeal a penalty if they consider that irrelevant considerations were taken into account or relevant factors were omitted.

Moreover, the ability to impose potentially stringent penalties should be accompanied by a clear, reasoned leniency policy, delivering immunity from fines for a "first mover" to come forward and reduced fines for co-operation during the course of an investigation.

Accordingly, Telstra submits the following recommendation for consideration by the Dawson Committee:

Recommendation The Act should not be amended to incorporate turnover-related penalties without further analysis of the adequacy of the existing penalty regime and the likely consequence of introducing turnover-related penalties.

5.3 Criminal Sanctions and Imprisonment

Summary.

Telstra understands that the Commission is seeking the introduction of criminal penalties, including jail sentences, for participants in "hard core" cartels. Telstra would support such a position provided that it was accompanied by appropriate safeguards.

Telstra understands that the Commission is proposing to limit criminal penalties to executives of "big business". Telstra submits that such a limitation would be inconsistent with both fundamental principles of criminal law and with the need for an effective competition regime. Rather, criminal penalties should apply to all businesses.

Telstra submits that such a sanction must be accompanied by a number of important safeguards. These

include:

- consistent with international best practice, criminal sanctions should be confined to hard core cartels;
- the definition of the offences that carry with them the sanction of imprisonment should be clarified so that technical breaches of the Act are not caught;
- consistent with criminal law generally, prosecutions should be conducted by the Director of Public Prosecutions, there should be a mens rea requirement, proof should be required to the criminal standard, and there should be trial by jury;
- the limitation period applicable should be consistent with international standards and with periods set under Australian law for similar corporate offences
- there should be the legislation of a mandatory leniency policy.

5.3.1 Application and proposal for reform

(a) Position adopted by the Commission in public

The Commission has made a number of calls for the introduction of jail sentences for "hard core" collusion. In a submission to the House of Representatives Standing Committee on Economics, Finance and Public Administration on 25 June 2001 the Commission argued that imprisonment should be included as a possible sanction and stated that:[179]

> *"…the acts that[it] would see as being defined as fit for possible jail sentences would be price fixing agreements between competitors, bid rigging, probably market sharing and quite likely, agreements between competitors to boycott".*

The Commission's arguments for the imposition of jail terms, as Telstra currently understands them, are essentially that the existing civil penalties have not been effective as a deterrent for some types of conduct and that Australia's regime should be harmonised with the laws of certain other major trading partners, where jail sentences can be imposed in cases of hard core collusion.

5.3.2 Telstra's analysis of the Commission's proposal

Subject to the safeguards outlined below, and provided that any criminal penalty has equal application to all businesses, Telstra supports the Commission's proposal.

(a) Criminal penalties should apply to all participants in hardcore cartels

In calling for the introduction of criminal sanctions, the Commission has drawn heavily on the presence of such penalties in other jurisdictions. Telstra notes that none of the jurisdictions to which the Commission has referred - the United States, Canada, or the proposed regime in the United Kingdom - has introduced jail terms as a penalty only for a particular size of business.

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[179] House of Representatives Standing Committee on Economics, Finance and Public Administration, *Competing Interests: Is There a Balance? Review of the ACCC Annual Report 1999-2000*, Commonwealth of Australia, Canberra, September 2001, at p. 53-55.

Equality of application has always been a fundamental tenet of the criminal law. Consideration of levels of moral culpability and the degree of social harm are reserved for the sentencing process. It is therefore unclear to Telstra why the Commission believes that jail sentences should be reserved solely for the officers of big business.

Whilst Telstra understands that the basis of the Commission's proposal is that it is concerned that cartels and such arrangements on the part of larger businesses may have a greater impact on society, it is clear that this would be taken into account by the judge when determining the appropriate sentence.

In Telstra's view, though, there is little evidence to support this belief that only big business has the potential to engage in damaging collusive behaviour.

Even if it was assumed that, in practice, it is more likely that a sentence of imprisonment would be imposed where larger businesses were involved, because a greater degree of social harm, the assessment of such issues is a matter better left to the discretion of the prosecutor and Court.

A situation where only members of companies of a certain size were liable for criminal penalties could produce anomalous situations. For instance, members of a price-fixing cartel, who has engaged in exactly the same conduct, would not be liable to the same penalties.

(b) Necessary safeguards

The introduction of imprisonment as a sanction for contravention particular provisions in Part IV of the Act, it should be accompanied by the introduction of appropriate safeguards as identified below.

- **Definition of the criminal offence:** If there is an offence to be created which carried with it the sanction of imprisonment for individuals, Telstra is of the view that it should only be for individuals involved in "hardcore" cartels. That is, conduct involving price fixing arrangements and the worst forms of collusive market sharing and bid rigging.

  The definition of the offence should, as far as possible, exclude activities which arguably could attract exemption under other provisions of the Act, such as the provisions in relation to authorisation. The offence should not extend to all conduct which would breach section 45 (that is, agreements which substantially lessen competition) or section 47 (exclusive dealing). Rather, the offence should have very narrow application only to the most heinous cartel conduct. Importantly, this definition is narrow, consistent with international best practice.

  The elements of the offence should be capable of being clearly understood by those people who are caught by it. For this reason, it will be important to explain to people in plain English what obligations they must meet or contraventions they must avoid, if the ultimate sanction for a contravention of the Act is to be imprisonment. This is also important because the Act must be eventually capable of being understood by juries (assuming that a jury trial would occur for this type of offence).

- **Mens rea requirement**: It is well established that only those who deliberately and flagrantly contravene the law should be imprisoned. Accordingly, there should be some element of intention for the sanction of imprisonment to be levied.

- **Standard and onus of proof:** In particular, the standard of proof that must be discharged to secure a conviction under any of the provisions that results in a jail term must be that the offence be established beyond reasonable doubt. Further, there is no

reason that there should be a departure from the usual position that the prosecution should bear the onus of that proof.[180]

- **Trial by jury:** If the sanction of imprisonment is imposed, the Act should require that the trial should be on indictment. Section 80 of the Constitution guarantees a jury trial of any offence against any law of the Commonwealth for a trial on indictment. However, Parliament may make an offence triable summarily and then section 80 does not apply. The defendant may elect to have the matter heard summarily, but that election should be the defendant's choice alone. Trial by jury means that the jury is required to return a unanimous verdict.[181] There is no reason why this general rule should be changed for offences under the Act.

- **Prosecution authority:** It would be desirable for the Commission not to prosecute. Rather the Department of Public Prosecution should conduct any prosecution. This should be done to ensure that there is a clear separation between the investigation function and the prosecution function. It would avoid any question of the arbitrary exercise of powers by the Commission.

- **Maximum penalty:** Because the reason for imposing imprisonment as a sanction is deterrent, the ability to impose any prison sentence should be a sufficient deterrence. Therefore, the maximum jail sentence which should be imposed should be limited. The maximum sentence for cartel activity in the United States is three years. In Canada and Germany, and in the United Kingdom under the proposed regime, the maximum period would be five years. Telstra further notes that the maximum penalty for insider trading and share market manipulation under the *Corporations Act 2001* is five years.[182]

- **Limitation Period**: Under the existing regime, remedies under the Act must be sought within a period of three to six years after the contravention. An action for the recovery of pecuniary penalties must be brought within six years, and an action for the recovery of damages under section 82 or for other orders under section 87 within three years. Telstra submits that the limitation period for a criminal offence under Part IV should be three years at the most. This is consistent with the majority of the existing remedies under the Act, and recognises that a defendant to criminal proceedings may be severely prejudiced in presenting their case if a lengthy period of time has elapsed since the alleged contravention occurred.

- **Legislation of a mandatory leniency regime:** It would be desirable to adopt leniency arrangements in any legislation that enacts a sanction of imprisonment, which include:

  – amnesty from breaches being automatic if there is no pre-existing investigation being conducted by the Commission (i.e. for the first informant);

  – amnesty may still be available if co-operation begins after the investigation is underway;

  – all officers, directors and employees who co-operate are protected from criminal prosecutions; and

  – "no jail" deals to be available.

  The benefits would be that the arrangements would encourage people to report illegal conduct and to stop the conduct quickly. The deterrent effect would be amplified by this arrangement. To avoid arbitrary use of the arrangement, the requirements should be enshrined in legislation.

180 *Woolmington* v *Director of Public Prosecutions* [1935] AC 462.

181 *Cheatle v Commonwealth* (1993) 177 CLR 541.

182 *Corporations Act 2001*, sections 1002G and 1013.

5.3.3 Telstra's recommendations

Recommendation	Telstra supports the introduction of criminal penalties for those individuals involved in hardcore cartels, provided that such penalties are accompanied by appropriate safeguards. Telstra believes that such penalties should apply to any such individual, regardless of the size of the business for which they act.
Recommendation	Any criminal provision should be confined to hardcore cartels (i.e., the worst forms of price fixing, collusive market sharing and bid rigging)
Recommendation	Mens rea requirements, the standard of proof and onus of proof should be appropriate. Prosecutions should be conducted by the DPP and a jury trial required. An appropriate maximum penalty and limitation period should be specified.
Recommendation	A mandatory leniency regime should be incorporated into the Act.

5.4 Concentration of power in the Commission and the potential for conflicts of interest

Summary

The Commission has a broad array of regulatory functions and powers to an extent that is unrivalled by any competition regulator of any other OECD nation.

The dangers associated with the concentration of too many functions in one body are significant. Furthermore, there are significant conflicts of interest which arise as a result of concentration of a diverse array of functions within a single regulatory entity, particularly where that regulator can, in effect, determine the scope of its own functions and powers.

Telstra submits that the divergent regulatory functions carried out by the Commission are excessive. The powers conferred on it for the purposes of carrying out its functions are broad, and the Commission's use of these powers in performing its different functions compromises its ability to act impartially. More importantly, it also compromises the *impression* of the Commission's impartiality.

Telstra notes that these factors make is vital that the Commission's decisions are transparent and that there are mechanisms for accountability, if the Commission is to be, and be seen to be, a fair regulator. They also provide compelling reasons why the Commission's powers should not be further increased.

5.4.1 Proposals for reform

A key concern with the current administration of the Act relates to the breadth and depth of the regulatory functions of the Commission and the resulting conflicts of interest, broad administrative discretions and lack of accountability that arise as a result of that breadth and depth. A discussion of the issues arising as a result of the breadth and depth of these regulatory functions is set out below.

Telstra submits that an examination of the range of the Commission's powers is important in the context of considering the Commission's accountability. More importantly, it illustrates why the Commission's powers should not be further increased.

5.4.2 Telstra's analysis of the proposals

(a) The breadth and depth of the functions of the Commission

The Commission currently has a diverse array of powers and functions to an extent that is unrivalled by any competition regulator of any other OECD nation. By way of illustration, the functions of the Commission currently include the following:[183]

- *Trade Practices Act 1974:*
  - general competition advocacy;
  - providing submissions relating to government policy development;

[183] This list is not intended to be exhaustive.

- initiating compliance education programs and research in relation to compliance with the Act;
- investigation of breaches of the Act;
- enforcement of the competition provisions of the Act;
- enforcement of the consumer protection provisions of the Act;
- liasing with Federal, State and Territory Governments and regulatory authorities on economic structural reform;
- administering the prohibition on GST price exploitation;
- enforcing product safety standards;
- adjudicating on applications relating to restrictive business practices (clearances, authorisations and notifications);
- arbitration of Part IIIA access arbitrations;
- declaration of services under Part XIC;
- arbitration of Part XIC access arbitrations.

- *Prices Surveillance Act 1983:*
  - price surveillance;
  - vetting proposed price rises;
  - monitoring prices, costs and profits of an industry or business;
- *Airports Act 1996:*
  - performing quality of service monitoring and reporting;
  - facilitating access to airport services of national significance;
  - receiving accounts and reports to facilitate prices oversight.
- *Australian Postal Corporation Act 1989:*
  - inquiring into disputes over the amount of postal rate reduction for mail interconnection;
- *Broadcasting Services Act 1992:*
  - reporting on the allocation of subscription TV broadcasting licences; and

- monitoring cross-media ownership of the holders of subscription TV broadcasting licences.

- *Gas Pipelines Access (Commonwealth) Act 1998:*
  - regulating third party access to natural gas pipeline systems;
  - arbitration of disputes over spare capacity;
  - regulation of increases in capacity and the terms and conditions of haulage;
- *Moomba-Sydney Pipeline System Sale Act 1994:*
  - arbitration of disputes over spare capacity and interconnection;
- *Telecommunications Act 1997:*
  - arbitration of various disputes, including in relation to facilities access;
- *Trade Marks Act 1995:*
  - approval of certification trade marks.

The powers of the Commission have increased considerably over the past decade. In its report *Competing Interests: Is There a Balance?,* the House of Representatives Standing Committee on Economics, Finance and Public Administration noted (at Table 1.1) that the following significant additions have been made to the Commission's powers since 1995:

Significant additions to the powers of the Commission since 1995	
1995	Prices Surveillance
	Arbitrating disputes over access to facilities of national significance
	Enforcing the Act's restrictive trade practices provisions in relation to unincorporated entities (including the professions) under the competition code
	Enforcing the Act in relation to Government business enterprises
	Arbitrating disputes over access to facilities of national significance
1997	Telecommunications Industry: Competition Regulation and Access Regimes
1998	Unconscionable conduct in small business transactions
	Industry codes

1999	Price exploitation in relation to the New Tax System
	Monitoring prices in the transition to the New Tax System
2000	Misrepresentations about the effect of the New Tax System
2001	Representative actions for most of restrictive trade practices provisions (except section 45D and 45E)
	Right to intervene in private proceedings instituted under the Act

In July 1997, the same Standing Committee published a final report titled "*Review of the Australian Competition and Consumer Commission 1995-96 Annual Report*". In that final report the Standing Committee considered the expanding powers of the Commission and relevantly commented:

> *"2.7 The annual report emphasises that the ACCC now has a wider role than previously -with responsibilities in new sectors, such as telecommunications, electricity, gas, water, the professions, and local government.*
>
> *2.8 The annual report refers to an increase in enforcement activities, and that the ACCC's role has become much more demanding with the increased range of sectors within which it must operate. These raise complex competition and public benefit issues, including the effectiveness and efficiency of competition in the delivery of goods and services. Changes in information technology have also created more complex products, different marketing and distribution techniques, which present new challenges.*
>
> *2.9 In response to this wider brief, the ACCC reports that it has recognised the need to sharpen its focus on core business, which it sees as enforcement and administration of the law."*

In this manner, the Commission now has a diverse mix of functions, including roles as educator, policymaker, prosecutor, advocate, adjudicator and arbitrator. The Commission also acts as expert regulator in such industries as telecommunications, aviation, and gas.

(b) Difficulties created by the breadth and depth of the functions of the Commission

The difficulties created by the breadth and depth of the functions of the Commission arise due to the fact that these different functions overlap and conflict. The Commission can also potentially apply powers in one area to leverage results in another, so the discretionary power of the Commission in aggregate is much greater than the sum of the individual powers considered in isolation. Telstra believes that the following issues arise as a result of such overlapping functions and extensive discretionary power:

- **Misuse of information:** A significant concern of Telstra's is the potential of the Commission to use information obtained in one area to assist its operations in other areas. This is of particular concern where Telstra has provided confidential information to the Commission, in the Commission's capacity as arbitrator, to assist the Commission to arbitrate upon a dispute; but the Commission has later used that information as the basis for an investigation of Telstra or for enforcement action.

Indeed, the Commission apparently believes that it has a right to use information gained by it exercising one function in the exercise of another:[184]

> *"Regulatory activity is an information rich activity. The ACCC will at times receive information in its regulatory role that indicates how various business decisions are made in response to particular market circumstances. This information could be used in a different context for some antitrust enforcement activity."*

The concept of misuse of confidential information is an important aspect of modern commercial law. In *Johns v Australian Securities Commission and Others*,[185] the High Court considered the use that could be put to confidential information received by the Securities Commission pursuant to a statutory power. In relation to the general principles applying to the use of confidential information at common law (as opposed to the duties imposed by the relevant statutory provisions in this case), Brennan J observed at 576-7:

> *"Prima facie, it is the privilege of any person who possesses information to keep the information confidential. In Attorney-General v Guardian Newspapers (No 2) [1990] 1 AC 109 at 214 - the Spycatcher case - Bingham LJ said: "It is a well settled principle of law that where one party (the confidant) acquires confidential information from or during his service with, another (the confider), in circumstances importing a duty of confidence, the confidant is not ordinarily at liberty to divulge that information to a third party without the consent or against the wishes of the confider." … In Moorgate Tobacco Co Ltd v Phillip Morris Ltd (No 2) ((1984) 156 CLR 414 at 437-8) Deane J said: "Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of confidence arising from the circumstances in or through which the information was communicated or obtained."*

In this judgment, such statements are made in the context of the permissibility of a confidant divulging information to a third party. However, similar principles apply equally in the context of arbitrations by the Commission. Arguably it is not the intention of the Act that the Commission should be permitted to use information it has obtained in an arbitral context for another purpose. This should be clarified by appropriate amendments to the Act.

Furthermore, in an arbitral context, it is fundamental to arbitral processes that the arbitrator should not reveal confidential information, or use information for the arbitrator's own personal gain. It is important to the integrity of the arbitration that the parties to the arbitration should be confident that they can disclose their commercially sensitive information to the arbitrator without fear that such information will prejudice their position in the regulatory arena. In a sense, the same public policy reasons apply to this proposition as attach to the doctrine of legal professional privilege. That is, significant benefits accrue when a party is encouraged to make a full and frank disclosure of its position.

Telstra remains concerned that information it has disclosed to the Commission, in confidence, in the context of arbitrations, could be used by the Commission to exercise its other functions. Such other functions include, for example, enforcement action, and even the consideration of clearances and authorisations. In Telstra's view this is another

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184 Professor Allan Fels, *Competition Policy in Italy: The Ten-Year Anniversary of the Italian Antitrust Law: The Benefits of Institutional Integration: Antitrust Enforcement and Regulatory Interventions in Australia*, Rome, 9 October, 2000.

185 (1993) ALR 567.

important reason why some degree of functional separation should occur in relation to the Commission's arbitral and quasi-judicial powers.

- **Institutional conflict of interest:** As the Dawson Committee is well aware, general principles of administrative law require procedural fairness by administrative decision-makers. A key form of procedural fairness is absence of any bias. Conflicts of interest can result in bias as they can lead a decision-maker to pre-determine decisions or take into consideration irrelevant considerations. Such conflicts of interest lead to a strong inference that the decision-maker is not acting reasonably and fairly when making administrative decisions. Furthermore, where the Commission is acting in its quasi-judicial capacity (for example, as arbitrator), the standard of procedural fairness expected of the Commission will be correspondingly higher and conflicts of interest are less acceptable.

  Notably, the Commission recently commissioned an independent review by Phillips Fox into arbitral processes under Part XIC of the Act which is illustrative of the fact that the Commission does face acute conflicts of interest, particularly in relation to its arbitral powers. The Phillips Fox review provides a number of insights into the conflicts of interest that have arisen as a result of the aggregation of power within one regulatory agency. By way of example, Phillips Fox noted that one of the benchmarks for effective dispute resolution processes is "fairness". However, Phillips Fox commented, in effect, that bias was inevitable where the Commission exercised both arbitral and regulatory functions (at paras 6.2, 6.3 and 6.6):[186]

  > *"The question of bias is whether the arbitrator is seen to be impartial and to make an objective assessment of the case based solely on the issues before him/her.*
  >
  > *There have been some concerns expressed about neutrality. This perception appears to have been fostered by a number of matters, some process driven and some structural.*
  >
  > *The close connection in the past between the ACCC's roles in setting access pricing principles and in the arbitration of particular disputes is one reason that a perception of bias may have arisen. Strictly speaking, the setting of pricing principles is the exercise of the regulatory rather than the arbitration function. It is an example of where the ACCC's views in one area, its regulatory role, may cause a perception of bias in dispute resolution. However, without altering the entire system, this cannot be changed; rather, the focus should be on minimising the risk of any actual bias occurring."*

  While Phillips Fox's comments are framed diplomatically, the inference is clear.[187] The Commission should not be acting as arbitrator of disputes when it also exercises its regulatory functions. In the current institutional arrangement, bias is inevitable and cannot be eliminated without "altering the entire system" (i.e., separating the functions of the Commission).

  Another example of conflict of interest in the Act arises in Part XIC in which the Commission both has the power to determine whether or not services should be subject to Part XIC (ie, the power to determine the breadth of its powers) in conjunction with powers to actually regulate services (ie, the powers themselves). In this manner, the

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[186] Phillips Fox *Review of Telecommunications Arbitration Processes,* 18 April 2002, http://www.accc.gov.au/telco/disp_res/public.pdf

[187] Phillips Fox was commissioned by the Commission.

entity that has powers to shape an activity also has the power to determine whether or not it should be placed in a position where it can do so, resulting in a clear conflict of interest. Public choice theory suggests it is a logical assumption that a regulator would seek to maximise its power and influence. This issue is avoided under Part IIIA by providing for the initial declaration decision to be made by the independent National Competition Council, illustrating that there is a precedent in the Act for distributing powers between regulators so that they do not conflict.

In the context of conflicts of interest in the powers of the Commission, the Productivity Commission recently concluded in a section on "Best Practice Principles for Prices Oversight" in Part B3 of its Draft Report on the Review of the *Prices Surveillance Act 1983* that:

> *"The credibility and effectiveness of prices oversight can be enhanced if the entity that advises government about whether regulation is needed is separate from the entity that implements the regulation. This will help to avoid a conflict of interest that might exist if the regulator undertakes both functions, namely that it may tend to favour regulatory functions that expand its role. However, having separate entities undertaking these two roles could lead to a more cumbersome and lengthy process, and so may not be efficient in all situations. Having these two functions undertaken by entities with some independence from the government also can add to the credibility of prices oversight, by reducing pressures for decisions based on short-term political considerations."*

Telstra believes that the conclusions of the Productivity Commission (which were made in the context of the Commission's conflicting powers under the Prices Surveillance Act) apply equally to the Commission's powers under the Trade Practices Act. Furthermore, there are clear divisions of functional roles that could be made in a restructuring of the Commission that would directly address the relevant conflicts of interest without unduly decreasing regulatory efficiency. In fact, the benefits of separating certain Commission functions may outweigh any costs of doing so.

- **Separation of powers:** As is well known in constitutional and institutional theory, the concentration of power in one group or one person always presents dangers. Where power is divided, such dangers will be reduced. As William Blackstone wrote in 1765: *"In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing the laws is nested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty"*. Modern constitutional theory therefore recognizes the values of the tried-and-tested doctrine of the separation of powers, which is fundamental to Australia's status as a modern constitutional democracy.

  While it is well recognised that a mixing of executive, legislative and judicial power is sometimes necessary in a regulatory context in the form of executive, quasi-judicial and quasi-legislative functions, the same overriding principle of separation of powers applies. The principle of separation of powers thus applies not only at the macro level, but also at the micro level within all administrative and regulatory institutions. The aggregation of such powers must be carefully controlled, and mechanisms to ensure accountability introduced, to ensure that such powers are not destructive of the values they were intended to promote.

  So while it is true that the Commission does not exercise "judicial" power in the pure constitutional meaning, the Commission clearly does exercise quasi-judicial powers. A greater degree of separation of such power is therefore desirable relative to the Commission's executive and quasi-legislative powers.

- **Conflict in regulatory philosophy:** It is fundamental to the regulatory philosophy underlying competition law that consumer protection and competition law are not one and the same thing. Consumer protection laws are, by definition, intended to protect consumers. Competition laws, however, are intended to protect the competitive process. There is a key difference between the two. Competition laws are a finely balanced regulatory construct in which the regulator intervenes in the market to prevent the aggregation and misuse of market power and the dangers this may cause. By regulating such aggregations of, and misuses of, market power, competition laws permit the market mechanism to operate efficiently. Competition laws carefully balance productive efficiency (realised by greater co-operative activity) against allocative efficiency (in which welfare gains are ultimately distributed to consumers in the form of reduced prices, greater diversity and better quality), in what Bork referred to as the "antitrust paradox".[188]

- **Desire to avoid accountability:** The above points notwithstanding, if the general and sustained accretion in the Commission's powers were accompanied by greater accountability upon the Commission, then the expansive nature of its functions may not be particularly problematic. However, the Commission's accountability has not increased at the same pace as the expansion of its powers. Nor has the Commission desired it to. Instead, for example, the Commission has sought to limit the extent of review of its telecommunications arbitration-related decisions from merits review to judicial review. This is despite the fact that, within Part XIC of the Act alone, the ACCC has both declaration and arbitration functions - and therefore has the ability to define the scope of its own regulatory functions. Indeed, the Commission has publicly (and erroneously) described the extent of review of its arbitration powers as, variously, "unusual "special", "very questionable", and 'the envy of human rights lawyers throughout the world'. Its obvious intention has been to limit the scope of review of its arbitral decisions. Indeed, the Commission has made these public claims in spite of the fact that the existing review rights in Part XIC of the Act are: no more broad than those in Part IIIA of the Act; no broader than those available for the Commission's Part IV authorisations; and no wider than the rights of review available in several overseas jurisdictions, including the European Union.

  Telstra commends the following article, which addresses this debate, and its history, in greater detail.

  - M. Landrigan, "The Merits of Merits Review", (2002) 52(2) *Telecommunications Journal of Australia,* forthcoming.

(c) Recommendations by Parliamentary Standing Committee in September 2001

As noted previously, in September 2001, the Standing Committee on Economics, Finance and Public Administration of the Parliament of the Commonwealth of Australia tabled its report *Competing Interests: Is There Balance?* which investigated various concerns relating to the accountability and powers of the Commission. Relevantly, the Standing Committee specifically considered the issue whether the Commission had too many roles and whether competition might be better served by separating some functions of the Commission into another body. The issues considered by the Committee in relation to this issue included:

- whether the Commission has too many divergent functions leading to its impartiality being infringed;

- whether separation of the Commission's functions (in particular its price setting and competition enforcement functions) should be effected to give the Commission regulatory credibility; and

[188] See R. Bork *The Antitrust Paradox* (The Free Press, New York, 1993).

- whether separation of the Commission's functions should be achieved by setting up independent regulatory bodies or by setting up independent units within the Commission.

The Standing Committee relevantly commented in its final report, at page 56:

> *"4.50 Prior to 1995, the competition regulator, the Trade Practices Commission, was principally focused on enforcing the restrictive trade practices and consumer protection provisions of the TPA. The passage of the Competition Policy Reform Act 1995 saw price surveillance functions formerly performed by the Prices Surveillance Authority assumed by the new competition regulator - the ACCC. In addition, the Commission was given responsibility to arbitrate on disputes about access to facilities of national significance. Since that time the ACCC has assumed the role of AUSTEL as the telecommunications regulator, as well as powers to prevent price exploitation in the transition to the new tax system.*
>
> *4.51 Professor Pengilley submitted to the committee that the Commission has too many roles and that competition policy would be better served by breaking up the regulator:*
>
> > *"The ACCC has far too many divergent functions. It cannot be price setter, competition enforcer, adjudicator and arbitrator. Inevitably, one function runs into the other and impartiality is infringed…"*
>
> *4.52 Professor Pengilley argued that there is a conflict of interest between the regulatory and competition roles performed by the ACCC. The example he gave was in the area of telecommunications where under the access regime in Part XIC the ACCC has to assess the rate of return in arbitration disputes. He stated that the consumer protection role that the Commission has conflicts with this function:*
>
> > *"Telstra would believe—and there is a lot to be said in the old adage that justice must not only be done but must appear to be done—that it could not get a fair shake out of the ACCC, because the ACCC has a consumer interest and it is going to balance it that way."*
>
> *4.53 All states and territories except Western Australia have established their own statutory bodies to arbitrate access disputes and regulate the pricing policies of Government owned businesses. These bodies include the Independent Pricing and Regulatory Tribunal (NSW), the Office of the Regulator General (Vic), the Queensland Competition Authority. One option to address the issues raised by Professor Pengilley would be to establish a body at a Commonwealth level that would perform similar functions. Professor Pengilley said that there seemed to be little disquiet about the performance of the State regulators. He attributed this not to the possibility that they may be better at setting prices but rather that were structurally independent so that participants in the process felt that they had obtained a fair hearing.*
>
> *4.54 The committee notes the PC is examining or has examined three major 'regulatory' functions of the ACCC: namely access regimes, the PS Act and the telecommunications competition regime. The committee believes that it would premature to make any recommendations about the appropriate structure of the ACCC pending the outcome of these reports and the government response.* ***Nonetheless the committee believes that this issue should be re-examined in the next Parliament."*** (emphasis added)

Accordingly, the Standing Committee thought the concerns were sufficiently serious in September 2001 that they were worthy of further serious consideration and investigation. Telstra believes that the Dawson Committee should address such concerns and further investigate the issues as contemplated by the Standing Committee.

(d) International practice regarding scope of regulatory functions

In order to identify how conflicts of interest could be addressed within the Commission, it is useful to consider how such conflicts of interest have been addressed in other jurisdictions.

Telstra has therefore sought to identify international best practice on this issue. Consistent with the conclusions earlier in this section of this submission, international best practice does not appear to favour the aggregation of power within a single competition regulator in a manner likely to generate significant conflicts of interest. Rather, most jurisdictions appear to divide different regulatory and quasi-judicial powers over multiple regulators.

By way of example, the United Nations Conference on Trade and Development (UNCTAD), a key organ of the United Nations, undertook an analysis of the relationship between sectoral regulators and competition regulators in its June 2001 publication *Model Law: The Relationships Between a Competition Authority and Regulatory Bodies, including Sectoral Regulators*. UNCTAD noted that the powers of industry-specific regulators was rarely aggregated within competition authorities:

> *"Nevertheless, it is clear that the dominant pattern of distribution of roles between competition agencies and regulatory agencies is rarely one whereby competition authorities simply replace regulatory agencies."*

When comparing the scope of the Commission's powers with the scope of the powers of competition regulators in the United States, Jacobs recently expressed the following concerns, for example, in his chapter "An Outsider's Perspective of Australian Competition Law":[189]

> *"Compared with that of its American counterparts, the scope of the ACCC's responsibility is enormous. This circumstance is noteworthy by itself, but it also holds important implications for the culture of competition in Australia and for the nature of law enforcement here. As mentioned above, in the United States the Antitrust Division of the Department of Justice is responsible, along with the FTC, for enforcing federal antitrust laws. No small task, this is nevertheless the Division's sole responsibility. The FTC shares this responsibility and is charged with enforcing the various statutes that collectively constitute federal consumer protection law.*
>
> *The ACCC does all that and much more. For starters, its competition brief is much wider. The Competition is actively involved in access to essential facilities, such as utilities, telecommunications and airports, all of which have been recently deregulated. It is responsible for price surveillance with regard to newly initiated access regimes at certain of the country's airports. As of July 1 1999, it will be responsible for revenue regulation in the area of utility transmission. It administers the statutory processes of undertakings and authorisations, processes largely without parallel in the United States, that require the Commission's ongoing attention to promises made by parties in connection with those processes and to any changed economic circumstances that may materially affect those promises.*
>
> *Its consumer protection brief is also wider. In addition to investigating claims involving fraud, duress, and misrepresentation, the Commission is charged with prosecuting claims*

[189] See M.S. Jacobs "An Outsider's Perspective on Australian Competition Law" in R. Steinwall (ed) *25 Years of Australian Competition Law* (Butterworths, Sydney, 2000), chapter 7.

of unconscionable conduct, a charge recently expanded by statutory amendment to include unconscionable conduct in certain categorises of business transactions. This is a novel areas of law, essentially untested not only in Australia but in the developed world at large. As a consequence, the Commission must develop this law without the aid of precedent or any of the other customary forms of legal guidance. Finally, the Commission has a more involved role than its United States counterparts in regulating the interactions between franchises and their franchisees; and has earned worldwide acclaim in competition law circles for its initiative in establishing industry-wide codes of conduct and in encouraging alternative dispute resolution.

These activities would occupy the time and exhaust the energy and expertise of all other competition agencies in the developed world. In fact, no other has as many different areas of responsibility. The Commission has additional responsibilities, however, in two areas unrelated to competition or consumer protection but linked to one another by their high levels of potential political volatility.

First, by virtue of its authority under the Act to investigate and prosecute certain kinds of boycotts, the Commission is periodically involved, as circumstances warrant, in labour-management disputes. Some of these disputes, such as the recent one between Patrick and the MUA, for example, can be highly acrimonious and politically charged. Inevitably, in order to resolve the disputes in accordance with the law, the Commission must choose between the claims of management and those of labour, and must occasionally seek to impose penalties on any party found to have violated the Act.

In the United States, the field of labour-management relations is for all intents and purposes, entirely outside the scope of competition law. It is governed by separate legislation (the National Labour Relations Act), administered by a separate agency with dedicated expertise (the National Labour Relations Board), and bound by conventions and common law of its own. With some rare exceptions, antitrust enforcers are not asked, and not permitted, to intervene in the labour-management area; and they are never asked (nor are they permitted) to resolve labour-management disputes. In the States, labour boycotts are part of labour law, outside the purview of antitrust, viewed as one of the weapons - sometimes licit, sometimes not - in the arsenal of self-help measures available to unions in their struggles with management. They are decidedly not the concern of antitrust agencies.

In addition, the ACCC is also responsible for ensuring that firms do not take advantage of the new Goods and Services Tax (GST) to "exploit" consumers. It is clear that the government intends the Commission to play an important role in enforcing the tax plan and in ensuring that firms pass on tax savings to consumers. This, of course, is an enormous - if imprecise - responsibility, given to the ACCC no doubt by virtue of the esteem in which the government holds it. But it is a highly unusual responsibility as well, very complex, and without analogue among the tasks of competition enforcement agencies in the developed world.

Besides being complicated and requiring expertise somewhat removed from the core of competition law and consumer protection, these two fields - labour boycotts and alleged exploitation in violation of the GST - are peppered with political landmines. The GST was the centrepiece of the last federal election campaign; and it seems a certainty that the Opposition is watching its administration and enforcement carefully, with a view to the next election. Labour management relations are everywhere fraught with political implications. In Australia, however, where one of the major political parties is the Labour party and where the ruling coalition has made economic rationalisation, with its attendant loss of jobs, the centrepiece of economic policy, the implications are especially weighty and fraught with danger for the enforcing agency.

Its responsibilities in these politically volatile areas place the ACCC and the future of the Trade Practices Act in a potentially perilous position. Should these responsibilities be so

extensive and time-consuming to divert the Commission from its core enforcement obligations under the Act, competition policy will suffer from unavoidable neglect. More importantly, however, should its involvement in these areas make new political enemies for the Commission, as well it might, political pressure could be brought to rear that could weaken both the Commission and the Act. Finally, should the Commission's decisions cause aggrieved parties publicly to question its political independence, its role and efficacy as an impartial investigative body could be called into serious question.

All of this spells danger for the Act and for competition policy generally. At the age of 25, the Act is still in its relative infancy and public acceptance of it remains tentative and fragile. It seems doubtful that the Act and the Commission could emerge unscathed from a sustained and concerted political attack. Yet these two highly charged areas of responsibility place the Commission in harm's way, requiring it to tiptoe carefully around and through these tasks without setting off one of the landmines underfoot. The FTC has no such concern. Neither does the DOJ, or any other competition agency in the developed world. In my opinion, those responsibilities contain the potential to burden and obstruct the work of the Commission and to hold competition policy hostage to unrelated area law driven by different political goals."

It is notable that the Commission itself appears to be a leading international advocate of the aggregation of regulatory powers within a single institution (as one would expect from any rational governmental agency acting in its self-interest). Professor Fels has made several speeches to international agencies on this issue. By way of example, in a paper contrasting the Canadian approach to competition governance with the Australian approach, titled *Competition Policy: Governance Issues - What are the Alternative Structures?,* Professor Fels argued the virtues of the Australian approach relative to the Canadian approach. While Telstra does not disagree with many of the points made by Professor Fels in that paper, Telstra believes it is useful to critically analyse some of the key points made by Professor Fels as this provides a number of insights into the views of the Commission on this issue. Relevant features of the Australian model identified by Fels in his paper were as follows:

"• *The Australian competition regulator performs both enforcement and adjudication functions as well as regulatory functions discussed briefly below.* ***The integration of these functions in one body, is not an especially controversial issue, partly because the ACCC can not affect the legal rights of any person or business without their consent, unless it successfully prosecutes cases in court. Also, where it makes authorisation decisions, they can be appealed. It is also arguably important in a small economy to have the economic and legal resources in the one body.***

• *In terms of the distinction made by Judge Howard Wetsten between a bifurcated and an integrated model, the model is clearly a bifurcated one in relation to the enforcement of the provisions relating to anti competitive behaviour, ie, the ACCC investigates such behaviour and prosecutes it in the Federal Court. The apparent mixture of investigatory, prosecutory and adjudication functions of the Federal Trade Commission referred to in Mr Cavani's paper does not exist either. It is especially necessary to make this point clearly about the Australian approach because the ACCC* ***does perform adjudicatory functions*** *in relation to applications for authorisation. Whilst the combining of these functions in one body* ***does give rise to occasional debate****, that debate does not relate to the different debate about the wisdom of linking prosecutorial and adjudication functions in regard to the enforcement of the prohibited provisions of the law.*

• *It is also important to note that, as in Canada,* ***a very large amount of decision making under the Act is made by the Commission without Court involvement*** *(or with minimal Court involvement via the equivalent of consent*

orders). In other words, de facto, there has been a strong drift to an informal "integrated model". This is especially the case with mergers.

- *The same point applies in relation to the Commission's role in relation to regulatory decision making.*

- *Australia has a single conglomerate regulator with a pro consumer and pro competition culture…*

- *Of considerable short term significance, the ACCC was given* ***extremely strong powers*** *regarding price changes made by business when a 10 per cent goods and services tax was recently introduced. The ACCC also has some limited ongoing prices surveillance roles."* (emphasis added)

Telstra disagrees with the manner in which Professor Fels has downplayed concerns relating to the aggregation of power within the Commission. While Telstra agrees that the Australian model of an independent regulator is superior to the current Canadian model in which the regulator is part of the government bureaucracy, there are also dangers associated with insufficient accountability of independent regulators, as discussed earlier in this submission. These concerns are exacerbated when the regulator has a broad aggregation of powers and functions. In relation to the points Fels makes above, Telstra makes the following comments:

- The Commission can have a very significant influence over business activity in Australia. It is true that the Commission cannot exercise "judicial power" in the constitutional sense as under the Australian Constitution this is reserved as a matter for the courts alone. However, the Commission does have quasi-judicial powers which can have a similar practical effect. The Commission can utilise telecommunications competition notices under Part XIB, for example, and has requested the ability to issue cease and desist orders which would have a similar effect. Furthermore, the coercive powers of the Commission can be as effective as if enforcement action had been conducted by the Commission.

- For reasons noted above, authorisation decisions are often time-sensitive so a right of appeal is not necessarily a right which is practically available to the parties in the circumstances. The time-sensitivity of transactions gives the Commission enormous power and influence over the manner in which those transactions are conducted. Furthermore, as Fels himself notes, a very large amount of decision-making under the Act is made without judicial involvement, therefore the quasi-judicial role of the Commission has considerable importance. As a corollary, it is critically important to ensure that the fairness and impartiality of such decisions is retained by removing scope for functional conflicts of interest.

- Telstra disagrees with the conclusion that in a small economy it is important to have all relevant economic and legal resources in one body. Relatively speaking, Australia is an economy of moderate size and high legal and institutional sophistication. Fels' argument would better apply to a developing nation without the capability to sustain multiple institutions. In the Australian context it may well be preferable to ensure greater accuracy of regulatory decision-making by removing the scope for conflicts of interest, notwithstanding that synergies may be sacrificed as a result. The avoided costs of regulatory failure arising as a result of conflicts of interest could potentially outweigh the loss of regulatory synergies. It would also be possible for two independent regulators to pool common resources without creating conflicts of interest.

- Professor Fels makes a reference to "occasional debate" in the context of the undue aggregation of regulators within the Commission. However, Telstra believes that this under-states the significance of this issue, particularly to entities such as Telstra which are subject to Commission oversight across a broad range of activities (and are therefore

- more susceptible to issues arising as a result of conflicts of interest within the Commission). Telstra believes this is a serious issue and requests that the Dawson Committee treat it as such.

5.4.3 Telstra's recommendations regarding reform

Given the concerns identified above, Telstra believes the it is vital that the Commission's decision making process be transparent, and subject to adequate accountability, as discussed earlier in this submission. More importantly, the issues and conflicts of interest identified above should not be further exacerbated by further expanding the already considerable powers of the Commission. In Telstra's view, it is already a telling fact that the Commission has the greatest concentration of regulatory powers and functions of any competition regulator of any other OECD nation.

Recommendation Increase the accountability of the Commission in the manner identified above and consider mechanisms to reduce conflicts of interest and misuse of confidential information.

Recommendation Do not further increase the Commission's powers.

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6 APPENDIX ONE: HISTORICAL BACKGROUND TO THE REVIEW

This Appendix provides a brief historical overview of the terms of reference and recommendations of law reform committees that have previously reported on the Act.

6.1 The Swanson Committee

In 1976, the Trade Practices Review Committee (the "**Swanson Committee**") undertook a review of the Act to examine and report on the impact of the Act on business.

The terms of reference for the Committee included:

- whether the Act was achieving its intended purpose of developing and maintaining a free and fair market, and whether it was benefiting consumers;
- whether the Act was causing unintended difficulties or unnecessary costs to the Australian public, including Australian business;
- whether in Australia's current economic circumstances the operation of any part of the Act inhibited, or was likely to inhibit, economic objectives of the Government;
- the measures open to the Government, by way of amendment of the Act or otherwise, to improve the operation of the Act in the light of the above;
- the effect of the Act on small businesses and whether small businesses could and should be accorded special treatment by the Act;
- in relation to the sections dealing with exclusive dealing, price discrimination and mergers:
  - whether it was desirable for the Act to contain a prohibition relating to anti-competitive mergers and, if it was, what form that prohibition should take; further, if there was to be such a prohibition, whether it would be appropriate to make special provision for mergers involving failing companies and whether it would be appropriate and practicable to exclude mergers involving small companies, possibly by a threshold test; and
  - whether, in relation to price discrimination, it was appropriate for the Act to have regard to anti-competitive effects in the market of the buyers, subject to a discrimination in price, or in any other markets other than the market of the seller;
- the application of the Act to anti-competitive conduct by employees, and employee or employer organisations; and
- any particular problems due to the inter-relationship between the provisions of the Act dealing with consumer protection and State consumer protection provisions.

The Committee reported on 20 August 1976 and most of its recommendations resulted in major amendments to the Act in 1977. Its recommendations (excluding those recommendations relating to consumer protection), included that:

- a single test of effect upon competition be introduced, namely a 'substantial adverse effect on competition';
- when determining a market, regard should be had to substitute products having a reasonably high inter-changeability of use and cross-elasticity of demand;

- the Act should apply to holding companies to restrict the dealings of their subsidiaries;
- a franchisee should have a right, upon termination of his franchise, to secure fair compensation for his investment, including goodwill, except where the termination is for default by the franchisee;
- section 49 (dealing with price discrimination) be repealed;
- clearance procedures:
  - should be retained for mergers;
  - should be repealed for all other conduct
- the following conduct be capable of authorisation:
  - 'true' recommended price agreements, including agreements to maintain prices;
  - multilevel collective pricing agreements;
  - joint venture agreements (except some price fixing agreements);
  - buying group agreements; and
  - collective boycotts;
- all price fixing agreements between competitors (subject to exceptions relating to joint venture and joint acquisition pricing) should be absolutely prohibited and incapable of authorisation.
- the authorisation test should be changed to allow conduct where the restrictions on competition are outweighed by the public benefit of the conduct.

The most significant recommendations that were not adopted were those relating to franchisees and the repeal of s 49.

6.2 The Blunt Committee

The establishment of the Trade Practices Consultative Committee (the "**Blunt Committee**") was announced by the Minister for Business and Consumer Affairs on 28 June 1978. The Committee's stated aim was to assist the Government on an ongoing basis to maintain the currency of its information on the Act.

The Committee did not receive material or representations from the public in fulfilling its aim of providing the Minister with advice.

On 15 November 1981, the Minister announced that the Blunt Committee was to be discontinued.

The Blunt Committee recommended that:

- **there be no change in thrust to Part IV of the Act, and no change to sections dealing with contracts, arrangements or understandings between businesses (s 45), exclusive dealing (s 47), price fixing agreements (s 45A), boycotts (s 45D), resale price maintenance (s 48) or mergers (s 50);**

- **the ambit of section 46 (monopolisation) be extended to apply to all firms that have a substantial degree of market power;**

- **section 49 (price discrimination) be repealed;**

- **a franchisee protection law be introduced that would require certain matters to be disclosed to a franchisee, allow a franchisee to assign his franchise, and limit the grounds upon which a franchisor could terminate or fail to review a franchise;**

- **government agencies cooperate with small business bodies and trade associations to increase the awareness and understanding that small business has of the Act;**

- **the same protection from intimidation enjoyed by witnesses before the Federal Court be afforded to those who provide information to the Trade Practices Commission (the "**TPC**");**

- **lower courts have jurisdiction under the Act; and**

- **legal aid for private litigation be more freely available.**

6.3 The Griffiths Committee

In 1988, the House of Representatives Standing Committee on Legal and Constitutional Affairs (the "**Griffiths Committee**") inquired into the adequacy of existing legislative controls over mergers, takeovers and monopolies under the Act with particular reference to:

- **what extent of control over mergers, takeovers and monopolisation was necessary to safeguard the public interest;**

- **the adequacy of existing legislation;**

- **the role and effectiveness of the TPC in its implementation of sections 46 and 50.**

The Griffiths Committee tabled its report in Parliament in 1989. Among its recommendations were that:

- **section 46 be retained in its existing form (ie no amendment to incorporate an "effects test");**

- **no provision for pre-merger notification to be introduced;**

- **the existing "dominance" test in section 50 be retained;**

- **the private right to injunctive relief in relation to mergers be re-introduced, but not available to takeover targets and associated persons;**

- **the procedure for authorisation of mergers be retained in its existing form, and that the Attorney-General give a direction to the TPC to continue its policy of giving emphasis to the authorisation process to ensure that the net public benefit is exposed to public scrutiny;**

- **there be incorporation of legislative recognition of the informal consultative process used by the TPC in relation to mergers;**

- **remedies be provided in respect of breaches of undertakings entered into in connection with the merger authorisation process and the statutory consultative process for mergers that is recommended; and**

- **there be substantial increases in the existing maximum pecuniary penalties for breaches of the merger and misuse of market power provisions.**

On 22 August 1991, the Attorney-General formally responded to the report on behalf of the Government and accepted most of the above recommendations. The Attorney-General indicated, however, that this response would be examined in the light of any contrary recommendations of a Senate Committee then inquiring, among other issues, also into the adequacy of existing legislative controls into mergers, monopolies and acquisitions (the Cooney Committee).

6.4 The Cooney Committee

In 1991, the Senate Standing Committee on Legal and Constitutional Affairs (the "**Cooney Committee**") inquired into:

- **the adequacy of the existing legislative controls in the Act over mergers and acquisitions, with particular reference to:**

  - the appropriate test that should apply; and

  - whether compulsory pre-merger notification should be introduced, and, if so, in what circumstances;

- **whether, in situations of existing market dominance, the TPC should be able to examine conduct in addition to that already covered by s 46, and, if so, what action (including divestiture) might be taken as a result of such examination;**

- **the extension of section 52A (unconscionable conduct) to all commercial dealings;**

- **any other matters (including review mechanisms) considered by the Committee to be relevant to any or all of these matters.**

Among the Cooney Committee's recommendations were:

- **to amend section 50 to prohibit mergers or acquisitions which would have the effect of substantially lessening competition in a substantial market for goods and services;**

- **that the ambit of this test be made clear through the inclusion of guidelines in the Act with recommended guidelines provided by the Committee;**

- **to allow the TPC to authorise proposed mergers on public benefit grounds where the merger fails to meet the test (including the guidelines);**

- **to oblige pre-merger notification where proposed mergers or acquisitions are of a substantial nature ('substantial' to be defined in the Act);**

- **that section 46 be amended so that, while the TPC bears the overall onus for establishing an offence under section 46, when the TPC has brought evidence that shows that it is as likely as not that a corporation has engaged in conduct constituting a misuse of market power, the corporation must show that it has not engaged in such conduct;**

- **to repeal section 52A (relating to unconscionable conduct);**

- **not to re-introduce the private right to injunctive relief in relation to mergers;**

- **to provide remedies for breaches of undertakings made between the TPC and another person(s); and**

- **to substantially increase the pecuniary penalties for breaches of Parts IV and V of the Act.**

In June 1992, the Government announced that it was considering these recommendations and some of them were given effect by the *Trade Practices Legislation Amendment Act 1992*, on 21 January 1993. The most important changes were to:

- **amend section 50 to include the substantially lessening of competition test;**

- **substantially increase the maximum pecuniary penalties contraventions of Part IV; and**

- **make undertakings legally enforceable under section 87B.**

Contrary to the recommendation of the Cooney Committee, Pt IVA dealing with unconscionable conduct under sections 51AA and 51AB (the latter mirroring sec 52A) was also inserted into the Act by the *Trade Practices Legislation Amendment Act 1992*.

6.5 The Hilmer Committee

In October 1992, the Independent Committee of Inquiry into National Competition Policy (the "**Hilmer Committee**") was established, following agreement between Commonwealth, State and Territory Governments. On 25 August 1993, the Hilmer Committee recommended specific amendments to the Act, including:

- **strengthening the prohibition on price fixing agreements**

- **relaxing the prohibition on third line forcing by requiring that it substantially lessen competition;**

- **permitting the authorisation of resale price maintenance where it can be demonstrated to offer net public benefits;**

- **repealing the specific prohibition on price discrimination;**

- **removing unjustified distinctions between goods and services in the Act.**

These recommendations were made in the context of a recommended policy comprising six main elements:

- **to universally apply a set of 'competitive conduct rules' of the kind contained in Part IV of the TPA;**

- **to implement principles and processes to ensure greater scrutiny of government regulations or ownership policies that restrict competition;**

- **to introduce a new legal regime to provide third-party access to certain facilities that are essential for effective competition and which cannot be duplicated economically;**

- **to introduce a targeted system of prices oversight to deal with concerns over monopoly pricing where pro-competitive reforms are not practicable or sufficient; and**

- **to implement a framework of principles for achieving "competitive neutrality" between government-owned businesses and private firms when they compete in the one market.**

This policy framework was to be supported by two key institutions:

- **a "National Competition Council", to be established jointly by Commonwealth, State and Territory Governments to provide high level and independent advice to governments and assist in coordinating and implementing cooperative reforms; and**

- **the "Australian Competition Commission", based on the current TPC and the Prices Surveillance Authority ("**PSA**"), to administer important parts of the new policy. The Australian Competition Commission would conduct the authorisation process for conduct otherwise infringing the Act. This Commission was to be directed to give primacy to economic efficiency considerations in determining questions of public benefit.**

On 29 March 1995, the legislative package to implement the national competition policy was introduced into Federal Parliament and was agreed to by the Commonwealth and all State and Territory Governments at the Council of Australian Governments (COAG) meeting on 11 April 1995. The package contained four elements:

- **the Competition Policy Reform Bill 1995;**

- **the Intergovernmental Conduct Code Agreement;**

- **the Intergovernmental Competition Principles Agreement; and**

- **the Intergovernmental Agreement to implement the National Competition Policy and Related Reforms.**

The centre-piece legislation, the *Competition Policy Reform Act 1995* (passed by Federal Parliament on 30 June 1995 and assented to on 20 July 1995), amended the Act to provide for:

- **the creation of a new regulator, the Australian Competition and Consumer Commission ("**the ACCC**"), on 6 November 1995, following upon the merger of the TPC and the PSA;**

- **the establishment of the advisory body, the National Competition Council ("**the NCC**"), under Pt IIA on 6 November 1995;**

- **the renaming of the Trade Practices Tribunal as the Australian Competition Tribunal on 6 November 1996;**

- **the creation of the access regime under Pt IIIA;**

- **amendments to Pt IV;**

- **facilitation of the application of the competitive conduct rules under Pt IV of the Act (and related provisions) to areas within State and Territory jurisdiction; and**

- **removal of the shield of the Crown on 21 July 1996 in relation to the States, the Northern Territory and the Australian Capital Territory in so far as the Crown in those capacities carries on a business.**

7 APPENDIX TWO: INVESTIGATIONS BY PARLIAMENTARY STANDING COMMITTEES IN 1997, 1998 AND 2001

In recent years, the Parliamentary Standing Committee on Financial Institutions and Public Administration has sought to scrutinise the administration of the Trade Practices Act by the Commission within the context of its reviews of the Commission's annual reports in 1997, 1998 and 2001. As noted previously in this submission, Telstra **strongly recommends** that the Dawson Committee members familiarise themselves with this material given that it is directly relevant to the terms of reference of the Dawson Committee and was a motivating factor behind the Government initiating the current review of the Trade Practices Act. The advantage of this material is that it is entirely objective in its consideration of the relevant issues. The material also directly addresses many of the current issues before the Dawson Committee.

7.1 Standing Committee on Public Administration (June 1997)

In June 1997 the Standing Committee on Financial Institutions and Public Administration reported on its review of the Commission's 1995-1996 Annual Report and published its final report titled "*Review of the Australian Competition and Consumer Commission 1995-96 Annual Report*".

This examination of the Annual Report was the first of three reviews that have been conducted by the Standing Committee to date, promoting the Commission's accountability.

The recommendations arising out of the review of the Commission's 1995-6 annual report were:

- that the Commission investigate mechanisms whereby the process of accepting section 87B undertakings in merger cases can be made more transparent and that the Commission report on this investigation to the Standing Committee at a public hearing when the Standing Committee reviews the Commission's 1996-97 Annual Report.

- that the Treasurer initiate a study of the extent to which the benefits of competition are flowing to rural and regional Australia;

- that the Commission give a higher priority to monitoring and evaluation of the impact of its merger decisions on market competition and that the Commission report on its findings on a regular basis; and

- that the Treasurer consult with business and industry, the community and the Commission to ascertain an appropriate means by which the general impact on competition and benefits to the community, of the Commission's merger decisions, could be reviewed over the medium to long term.

In that final report the Standing Committee commented on the issue of holding the Commission accountable for outcomes on competition in the context of greater Parliamentary accountability of the Commission as follows (at paras 4.14 to 4.23):

> ***"Monitoring and evaluation of outcomes***
>
> *4.14 The pursuit of competition is not an end itself, but is intended to contribute to the public good, to create more efficient markets, to improve the provision of goods and services, and bring about lower prices. With these objectives it is crucial that government, business and industry, and the general public can measure the extent to which these benefits are being realised, and whether the approaches being undertaken are working.*

4.15 Evaluation of competition policy per se is not the task of the ACCC. However, to the extent that the ACCC implements aspects of competition policy, as embodied in the law, it can be expected to monitor and evaluate that work.

4.16 Professor Fels has noted in a recent journal article that:

> *The ACCC is aiming for a cumulative effect over many years. Although it has achieved some notable successes in its short existence, a real measure of the effectiveness of the Commission (and the new competitive regime) should not be attempted for quite a few years.*

4.17 Professor Fels commented during the public hearing that the ACCC has not generally devoted sufficient resources to the evaluation of outcomes:

> *...in organisations like ours there is always immense pressure on the organisation to deal with here and now problems. We keep saying to ourselves, ' Yes, it is important to evaluate outcomes ' and so on but, typically, we do not devote sufficient resources to evaluating outcomes.*

The ACCC has also suggested that lack of cooperation from the industry/business sector, and the long time frames required to see outcomes, are also factors.

4.18 The ACCC does monitor some of its activities but with a focus on internal processes, rather than public outcomes. It has commented that ideally it would see the evaluation processes focussing on the market place, but argues that this would be very expensive.

4.19 As the ACCC has commented, there is room for a more substantial monitoring and evaluation regime with respect to the ACCC's administration and implementation of aspects of competition policy. There is also a strong desire and expectation from business and the community generally that evidence of the benefits of competition will be forthcoming. Moreover, the systematic collection of information about the effects of ACCC decisions in the mergers area, and its administration of the Trade Practices Act is important feedback for the ACCC, the business/industry, the community and government.

4.20 The ACCC has suggested that with the establishment of the National Competition Council and the Productivity Commission more comprehensive monitoring and evaluation of outcomes from competition policy could be undertaken. More detailed consideration of monitoring and evaluation issues is a matter for the ACCC, the National Competition Council and the Council of Australian Governments in their ongoing planning and development work.

4.21 While the Committee supports the role played by the ACCC, it believes there would be some benefit in a more systematic review of the general impact of the ACCC's decisions in the mergers area on competition and benefits to the community.

4.22 Recommendation 3

That the ACCC give a higher priority to monitoring and evaluation of the impact of its merger decisions on market competition and that the ACCC report on its findings on a regular basis.

4.23 Recommendation 4

That the Treasurer consult with business and industry, the community and the ACCC to ascertain an appropriate means by which the general impact on competition and benefits to the community, of the ACCC's merger decisions, could be reviewed over the medium to long term."

7.2 Standing Committee on Public Administration (March 1998)

In March 1998, the House of Representatives Standing Committee on Financial Institutions and Public Administration published its final report titled "*Review of the Australian Competition and Consumer Commission Annual Report 1996-97*". The recommendations arising out of the review of the Commission's 1996-7 Annual Report were:

- that the Commission include in the undertakings section of its regular publication, *The Commission's Approach to Mergers: A Statistical Summar*y, details of the undertakings listed;

- that as a matter of priority the Commission prepare guidelines on the interaction between private sector parties and the Commission on the preparation of cases. The preparation of the guidelines should involve public consultation and the guidelines should be forwarded to this Committee for its consideration;

- that the Australian National Audit Office when undertaking its next financial audit of the AGS look closely at the issues outlined by the Standing Committee and related matters; and

- that the Commission monitor the impact of the change in responsibility for compliance programs and report on this matter in its 1997- 98 Annual Report.

Importantly, in relation to the accountability of the Commission, the Standing Committee reasoned as follows (at paras 1.15 to 1.34):

"Roles, powers and criticisms

1.15 In its annual report the ACCC advised that:

> *Australia's decision, through the Council of Australian Governments, to ...[involve the Commission in issues of market recognition] is a departure from the traditional international practice of vesting public utility regulation in a variety of separate agencies. The objective is reform based on the achievement of competitive outcomes of broad national benefit, rather than the pursuit of traditional, narrowly defined regulatory targets.*

1.16 As a result of COAG's approach and the aforementioned reforms, the ACCC now has significant powers which directly impact on the commercial operations of businesses in almost every market. The ACCC stressed that it is expected to move fast because of market imperatives and its decisions have significant market impact and immediacy. There is no doubt that the ACCC is a very powerful regulatory body. Not surprisingly, some groups have suggested that the ACCC has too much power and influence.

1.17 This fact is well recognised by the ACCC. In evidence the ACCC points out that it sees the Trade Practices Act as quite a powerful law. It notes '...It affects the property

rights of very powerful groups indeed in our society, and there is often very strong resistance to that, using every means possible...' It goes on to argue that '...obviously businesses will fight very hard to protect their interests - and none more so than monopolies.'

1.18 At the same time the ACCC reports it has an approach of trying to minimise regulation as much as possible. It says:

> *...That is one reason why in the last two years there has been a very sharp reduction in the amount of prices surveillance regulation. The commission was dealing with the order of about 70-odd firms who had to tell us in advance about their price rises...That number is down to 10...*

1.19 While there always have been safeguards in the Trade Practices Act to protect the rights of businesses, more recently the Commission appears to stress those mechanisms more strongly and frequently. The ACCC argues:

> *...the commission cannot affect people's rights against their will without going to court, as a general proposition - that is, if the commission thinks there has been a breach of the law it has to go to the Federal Court and prove its case...So the main powers the commission has rely upon our going to court to get results or, alternatively, there being an appeal to the tribunal [Australian Competition Tribunal].*

1.20 However, this process is not as straightforward as the ACCC suggests, since many of its cases are never tested in the court because either the ACCC, or the business involved, withdraws.

1.21 While businesses may seek to protect their interest against the ACCC's decisions, over a long period of time they and others have made significant criticisms of the decisions and operations of the ACCC and its predecessor bodies. These days rarely does a week, on occasions a day, go by without some concerns about the ACCC being raised in the media. This is an important avenue of transparency of the ACCC's activities.

1.22 A recurring pattern of criticism pervading many of the ACCC's activities appears to be developing. As well, friction appears to be increasing as the number of sectors in which the ACCC operates expands - a fact that is acknowledged by the ACCC itself. These concerns are particularly prevalent regarding the ACCC's activities in the mergers area.

1.23 While in the past the ACCC may not have given much attention to such concerns, this is becoming increasingly more difficult for the ACCC to overlook. The Committee will continue to monitor these reactions.

1.24 Further, the ACCC commands significant budget resources which were expanded, not cut, in the past financial year. In 1996-97 the commission's budget allocation was $32.789 million which was supplemented by $1.110 million to provide temporary supplementary staffing to facilitate the transfer of telecommunications regulatory functions to the ACCC. Its full time and associate commissioners both increased by one (now six full commissioners and 12 associate commissioners) and its actual staffing level increased from 308 in 1995-96 to 317 in 1996-97.

1.25 Given its critical role and substantial resources, the ACCC must be transparent and accountable, and be seen to be transparent and accountable for all of its decisions. The ACCC clearly recognises this and in evidence stressed:

> *The Australian Competition and Consumer Commission is an independent statutory body appointed under an act of parliament, so it is clearly answerable to parliament and to the Australian people...We for our part try to be as open and public as possible because we see ourselves as serving the public interest...*

Who watches the competition watchdog: The review

1.26 One significant way in which this accountability is being achieved is through the Committee's review of the Australian Competition and Consumer Commission's annual report 1996-97.

1.27 The basis for that review is House of Representatives' standing order 28B(b) whereby annual reports within a committee's area of portfolio responsibility stand referred for any inquiry the committee may wish to undertake (see terms of reference at page ix). As the ACCC falls within this Committee's portfolio responsibilities, at its meeting on 28 August 1997 the Committee resolved to examine the ACCC's annual report for 1996-97.

1.28 The Committee's review of the annual report obviously is a public process. However, it is not as comprehensive as an inquiry into a specific reference, since the review is not formally advertised, and submissions generally are sought only from those organisations directly involved in the review process....

1.34 Detailed specific documentation of businesses and others concerns with the ACCC is difficult to find. The Committee is pleased that in this review some organisations, particularly Santos Ltd, were prepared to put on the public record their concerns with the ACCC and have them tested. However, the Committee is aware that some other organisations have reported that they are unwilling to express their concerns publicly because they perceive they could prejudice future dealings with the ACCC....".

The Standing Committee also noted, relevantly, in another other point in its Final Report (at para 2.17):

"2.17 This and the other cases cited by Santos and others, point to the need for greater transparency and accountability in the ACCC's actions which were the subject of major recommendations in the Committee's review of the ACCC's 1995-96 annual report..."

In relation to the issue of greater monitoring and evaluation of outcomes, the Standing Committee commented (at paras 2.33 and 2.44):

"Monitoring and evaluation of outcomes

2.33 Monitoring and evaluation of merger outcomes was another issue to which the Committee recommended in its last report that the ACCC give a high priority.

2.34 The ACCC reported that it is still working on this. It reiterated that such evaluations are extremely difficult, resource intensive, expensive, and require industry

cooperation which is difficult to achieve. Nevertheless, the ACCC noted that it has included them in its forward planning and corporate plan. Further, it has recently done an internal evaluation of s 87B processes and does internal reviews of its processes, especially the mergers area quite regularly. The Committee encourages the ACCC to continue working on the market based evaluations as this is an important avenue for assessing the benefits of mergers decisions for the community. It also supports the ACCC's suggestion that 'Ideally some research body or University needs to do work like this...' This however, does not negate the need for the ACCC to do work on evaluation."

7.3 Standing Committee on Public Administration (September 2001)

In 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration conducted an investigation into various issues relating to the Commission, including the accountability and powers of the Commission. Professor Warren Pengilley was asked to appear before the Standing Committee as a result of his article *Competition Regulation in Australia: A Discussion of A Spider Web and its Weaving* as noted earlier in this submission.

Within the context of the following documents, the Standing Committee canvassed in detail the various concerns raised with the accountability of the Commission:

- Hansard of House of Representatives Standing Committee on Economics, Finance and Public Administration, Reference: Review of the ACCC annual report 1999-2000, 25 June 2001, Canberra (setting out the initial examination of Professor Fels by the Standing Committee);
- Submission by Professor Warren Pengilley, "A Background Briefing Document for the House of Representatives Standing Committee on Economics, Finance and Public Administration", Reference: Review of the ACCC annual report 1999-2000;
- Letter by ACCC (Cassidy) to Standing Committee (Luttrell) dated 20 August 2001, regarding Review of the ACCC annual report 1999-2000 (setting out the ACCC's comments in response to the Pengilley article);
- Hansard of House of Representatives Standing Committee on Economics, Finance and Public Administration, Reference: Review of the ACCC annual report 1999-2000, 23 August 2001, Canberra (setting out the examination of Pengilley by the Standing Committee);
- Letter by Pengilley to Standing Committee (Luttrell) dated 24 August 2001, regarding Review of the ACCC annual report 1999-2000 (setting out the Pengilley's response to Commission's criticisms of the Pengilley article); and
- *Competing Interests: Is There a Balance?,* Review of the ACCC Report 1999-2000, Standing Committee on Economics, Finance and Public Administration, September 2001, Canberra (report of the Standing Committee).

The Standing Committee's review of the Commission's 1999-2000 annual report did not provide a list of recommendations like the earlier reviews. Instead, it provided a summary of the Commission's performance overall. The Standing Committee commented that:

- the committee considers that the Commission has shown itself to be an effective regulatory body, as evidenced by its handling of its responsibilities relating to the introduction of the New Tax System;
- the committee is concerned that the Commission has been subject to considerable criticism for its tactics in some cases and allegations of a heavy handed approach. It has also exhibited a dismissive attitude toward criticism of its actions. If the public, or even a single firm, considers

that there is a problem, it needs to be dealt with in a positive way. Even where the complaint has no substance, the Commission needs to address community perceptions;

- overall, the committee would like to see the Commission ensure that it adopts a balanced approach to its responsibilities;

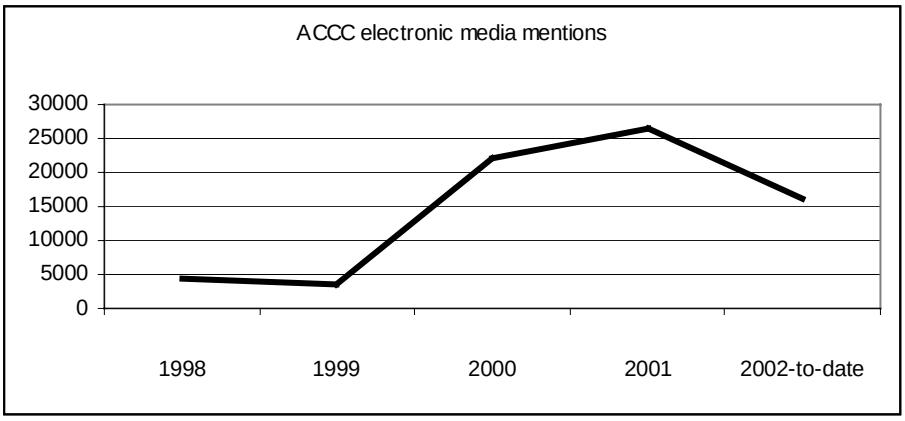
    - regarding the Commission's requests for further powers, the Standing Committee's assessment is that the existing powers generally seem adequate to allow the Commission to carry out its responsibilities in an efficient manner. However, an exception to this is in relation to cartels, where the deterrent effect of the law needs to be strengthened. In this context, the committee believes that serious consideration should be given to amendments to the Act to permit the imposition of a penalty of imprisonment for participants in hard core cartels;

    - the Standing Committee is aware that there have already been suggestions that the wide range of the powers administered by the Commission produces some conflict of interest. Consequently, the Standing Committee believes that very serious consideration should be given to the implications, before any further powers are assigned to the Commission.

8 APPENDIX THREE

8.1 ACCC electronic media mentions

Figure 3.1 represents the number references in electronic media to either the ACCC or Professor Fels,



for years 1998 to 2002 (year to date).

Figure 3.1 Source: Rehame Media Monitors

8.2 ACCC media releases

Figure 3.2 represents the number of press releases issued by the ACCC for years 1998 to 2002 (year to date).

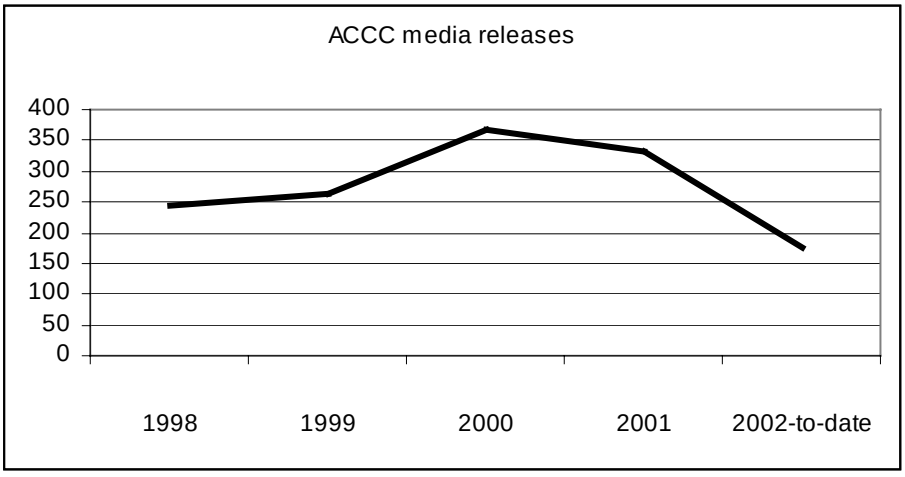


Figure 3.2 Source: Rehame Media Monitors

9 APPENDIX FOUR: ACCOUNTABILITY OF THE COMMISSION

9.1 Judicial criticism

Judicial criticism regarding the conduct of the Commission was made by the Federal Court of Australia in the recent case *Electricity Supply Association of Australia Ltd* v *Australian Competition and Consumer Commission.*[190] In that case, Justice Finn expressed concern regarding the manner in which the Commission has used the media to achieve its ambitions in circumstances where the legality of the Commission's interpretation of the Act was incorrect:

> *"Matters of Public Administration*
>
> *139 There are two matters to which it is necessary to draw attention. Both relate to the manner in which the ACCC conducted itself in its dispute with ESAA and the electricity suppliers. The first is simply a matter for comment. In his evidence Professor Fels indicated on a number of occasions that, in light of the issues that have achieved prominence in this proceeding, he would have been more careful in what he said in press releases and comments to the media. He took the view that in a media release it has to be "really simple". I do not wish to question the use of the media made by the ACCC in publicising its views.* ***I would merely suggest that, as the agency responsible for policing s 52 of the TP Act, it properly can be expected to set the example of care in its own representations to the public.***
>
> *140 Secondly, Professor Fels has not been reluctant to question in public forums the legal advice of those Queens Counsel who advised ESAA or its members. As I earlier noted, he characterised as "absurd" the view that Division 2 of Part V might not apply to the supply of electricity. And he has not been slow to raise the threat of civil and criminal proceedings under the TP Act against electricity suppliers who publicise or who might be minded to publicise views about the implied warranties that differ from the Commission s view. I refer by way of example to the ACCC's letter of 1 May 1997 which has been reproduced in part earlier in these reasons at [35].*
>
> *141* ***The stances so taken may constitute good public theatre. Whether they represent good public administration is another matter.*** *There is a very real prospect that the view the ACCC has taken of Division 2 of Part V will be found to be incorrect. At the moment, as the ACCC's counsel in this proceeding properly acknowledges, whether and if so how the implied conditions apply to electricity supply contracts is a matter of debate about which there can be respectable opinions on both sides of the argument.* ***To describe the opinions supporting one side of the debate as "absurd" borders on the mischievous.***
>
> *142 I indicated earlier in these reasons the difficulties, presumably well known to the ACCC, that could confront the ACCC were it to take proceedings (civil or criminal) against ESAA or a supplier for stating its opinions about Division 2. While an erroneous statement of opinion can, in its particular setting, contravene the TP Act, it will by no means necessarily do so. The stance taken by the ACCC, in at least some of the instances in which threats were made against ESAA and the suppliers,* ***could quite reasonably be interpreted as simply an attempt to stifle debate. It would be censurable for so powerful and influential a public agency to take such a course."*** *(emphasis added)*

Another example of lack of accountability by the Commission, in conjunction with a position of considerable administration power, is illustrated by Jeffrey S Hilton SC's recent conference paper for the

190 [2001] FCA 1296.

Australian Law Reform Commission on the issue of Penalties: Policy, Principles and Practice and Government Regulation. In that paper, titled "Principles of Fairness and Accountability", he noted:

> *"As I have already mentioned, the approach of reaching agreement with the ACCC upon penalty has become popular in recent years. It has the advantage of predictability, which corporate clients appreciate and it saves both the ACCC and the contravenor the cost and uncertainty of contested litigation with the ACCC.*
>
> *The difficulty with this approach, in terms of accountability, is that it seems to me effective responsibility for deciding the appropriate quantum of penalty has shifted from the Federal Court to the ACCC. Moreover, the ACCC is currently in a position of great negotiating strength when dealing with a contravenor on the quantum of penalty. The reason is that, because so few cases have been contested in the last seven or eight years, there is great uncertainty about what a Court would do when confronted with a serious breach of the Act. Hence most litigants prefer to avoid that risk or uncertainty by reaching agreement with the ACCC.*
>
> *However the ACCC will not agree upon an appropriate quantum of penalty – quite understandably – until the contravenor has disclosed the full circumstances of the alleged contravention including the identities of any other parties which may have been involved in that contravention. It follows by opening negotiations with ACCC the contravenor effectively loses the opportunity to contest the merits of the matter at a hearing before the Court. Further, having disclosed everything, what is the contravenor to say when confronted with the invariable suggestion from the ACCC that it considers the contravention so serious that it calls for the imposition of a penalty greater than that ever previously imposed by the Court. At present that lamentable record is held by Roche Vitamins Australia Ltd which consented to the imposition of a penalty of $15M arising out of its leadership of a price fixing cartel in relation to the supply of vitamins used in animal feed products.*
>
> *In response to such a suggestion, the contravenor could, I suppose, decide not to continue negotiations for an agreed penalty and instead risk its chances upon a contested hearing before the Court. The first difficulty is that, by already having disclosed its hand to the ACCC, its forensic position is weakened. Secondly, and at present, it is thereby setting sail on uncharted waters. Moreover it may lose the benefit of the discount or penalty which a party cooperating with the ACCC rather than litigating with that organisation, will gain from the Court.*
>
> *I suppose there is nothing inherently unfair about this. It seems to me, however, that there is a distinct lack of accountability. There is no oversight or supervision of the ACCC in the manner in which it decides to negotiate for a penalty. If it acts in a highhanded or unreasonable manner, the only choice for the party with which it is negotiating is to cease negotiations and take its chances in the Court. Given the frequency with which would-be contravenors of the Act now choose to negotiate for an agreed penalty with the ACCC, I consider the Act should set out standards or criteria upon the basis of which these negotiations should be conducted. Further, a party should be able to place before the Court, if it wishes, evidence as to those negotiations, notwithstanding they may have failed, in an appropriate case where the matter proceeds to a hearing on the question of penalty.*
>
> ***To use the current parlance, the process of negotiating an agreed penalty with ACCC lacks transparency. Unless there are legislative criteria for these negotiations, and unless the threat of these negotiations being able to be placed before the Court is real, then this lack of transparency may lead to unfairness, given the manifest inequality in negotiating power between the ACCC and a party alleged to have contravened the Act****."* (emphasis added)

9.2 Expressions of concern by a member of the Australian Law Reform Commission

This observation has also been made by others. For example Ian Davis, a Commission of the Australian Law Reform Commission said: [191]

> *"Regulators determine whether there has been non-compliance but do not themselves determine the penalty that flows from the breach… However, this principle [of openness] is compromised when the regulator enters into negotiation with the regulated party to compromise the action, or potential action, against the latter. This may take the form of an agreed penalty that is put to the court or tribunal for ratification or in a private arrangement such as an enforceable or informal undertaking that is agreed in the shadow of the court*
>
> *…. Unlike a court's published reasons for judgment, the rationale for the regulator's decisions to offer or accept the undertaking in its final form is not disclosed. .. that does not permit the public through the court to consider the whole of the available evidence and respond accordingly."*

191 Ian Davis, Commissioner ALRC: "Penalties: Policy, Principles and Practice and Government Regulation" Australian Law Reform Commission Conference - Principles of Accountability and Fairness at p 6