AUSTRALIAN BANKERS' ASSOCIATION

SUBMISSION TO THE

REVIEW OF THE TRADE PRACTICES ACT

(DAWSON REVIEW)

JULY 2002

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ABA SUBMISSION TO THE TPA REVIEW

Table of Contents:

EXECUTIVE SUMMARY

The Australian Bankers' Association (ABA) welcomes the opportunity to make a submission to the Dawson Review of the competition provisions of the Trade Practices Act (TPA) and its administration by the competition regulator, the Australian Competition and Consumer Commission (ACCC).

Since the last review by Professor Fred Hilmer in 1993, Australia has undergone significant economic and social change, as has the rest of the world. In addition, key concepts have been reinterpreted by new legal precedents and academic work relevant to competition law. This has significance for how regulators and policy makers should regulate competition law in the Australia.

The ABA's submission seeks to make a positive contribution to improving competition. The banking industry supports the principle of competition and endorses the objectives of the Trade Practices Act (TPA).

SOUND REGULATORY PRACTICE (Ch.2)

The main theme of the ABA's submission is that competition law, like all other laws, should adhere to the principles of sound regulatory practice. Sound regulatory practice is no more than the vigilant and consistent application of sound principles to regulation and its enforcement but, nonetheless, it is critical for ensuring the effectiveness, efficiency and fairness of government.

Sound regulatory principles include transparency, accessibility and accountability. The ABA's submission benchmarks its analysis of competition law and its administration against these and other sound principles.

MERGERS & ACQUISITIONS (Ch.3)

The ABA recognises the importance of prohibiting mergers between companies that will substantially lessen competition and therefore risk community detriment through excessive prices, lower quality goods and less efficient management.

The ABA submission does not argue for fundamental changes to the mergers regime, but believes there is scope to improve its effectiveness in key areas. The ABA's recommended changes are:

- Maintaining the substantial lessening of competition (SLC) test, but ensuring the ACCC's competition assessment is thorough and gives proper regard to all the characteristics which determine a market's competitiveness;

- Improving accessibility, transparency and accountability of ACCC decisions in mergers by:

(a) allowing applications for authorisation of a proposed merger to be made directly to the Australian Competition Tribunal (ACT);

(b) requiring the ACCC to publish substantial reasons for its decisions in relation to a merger; and

(c) expanding the ACCC's *Merger Guidelines* to provide greater guidance in relation to the circumstances in which section 87B undertakings will be used, to ensure they are appropriate and proportional to the actual competitive concerns associated with mergers.

AUTHORISATION (Ch.4)

ABA recognises that 'authorisation' is a unique concept in competition law throughout the world by providing a formal avenue for business transactions that may raise competition problems to be exempted from the law on the basis of a demonstrated public benefit.

The problem with the authorisation process as set down in the TPA relates to its cumbersome and time-consuming nature, making it a commercially unrealistic option for businesses to utilise. In order to overcome the key problems, the ABA is recommending that:

- Authorisation applicants be able to apply directly to the Australian Competition Tribunal (or a special mergers division of the ACT) for authorisation without first obtaining a decision from the ACCC on their application; and

- Strict time limits are specified for the authorisation process.

ACCC POWERS (Ch.5)

The ABA and member banks strongly support prohibitions against misuse of market power and collusive behaviour such as price fixing and bid rigging. In Chapter Five of the Submission, the ABA comments on a range of proposals to increase ACCC powers and penalties for breaches of the TPA.

Specifically, the proposals include reversal of the onus of proof, introduction of an effects test, granting of cease and desist orders for regulation of misuse of market power (section 46), and the introduction of criminal sanctions for hard core collusion prohibited under section 45.

The ABA argues in the submission that the proposed changes to section 46 suffer from a lack of hard evidence that there is a need for change. The ACCC appears to have all the powers it needs to investigate and prosecute misuse of market power by companies. There is a risk of creating anti-competitive outcomes through business uncertainty if the ACCC is given unnecessary and excessive powers.

On criminal sanctions, the ABA sees much merit in the criminal sanctions proposal but is unable to support it unconditionally, given the considerable uncertainty in the law governing sections of the TPA. An example is the joint venture exemptions to prohibitions under section 45 of the TPA. There is also a range of other problems associated with its implementation that would need to be properly considered.

JOINT VENTURES (Ch.6)

Joint ventures are examples of collaboration between firms in the production or supply of goods or services. Joint ventures are critical business structures for the banking industry and the wider Australian economy.

In recent years, considerable uncertainty surrounding the interpretation of the per se price fixing prohibitions and their application to joint venture activity is causing difficulty for banks in decision-making and investment.

The ABA's submission makes recommendations to give greater certainty to the law in this area by recommending a series of amendments to sections 4D, 45 and 45A of the TPA. These amendments will address the uncertainties and will assist in focusing the law back on to its original objective.

THIRD LINE FORCING (Ch.7)

Third line forcing is the practice of a company selling a good or service to a customer, but making the purchase (or price) from another person of that good dependent upon the purchase of some other good or service.

This practice is very common in Australia and throughout the world as a normal business strategy used to expand product choice and value for customers. The treatment of third line forcing under the TPA, however, does not reflect this reality. The ABA, therefore, is recommending two changes to the TPA:

- third line forcing be treated equally with other types of exclusive dealing, by subjecting it to the substantial lessening of competition test; and

- that a related company exception be introduced.

ACCC ACCOUNTABILITY (Ch.8)

As set out in Chapter Two of this submission, to adhere to principles of sound regulatory practice, regulation should be accessible, transparent and accountable.

The ABA submission provides examples of where the ACCC's use of media does not adhere to sound regulatory practice which supports the ABA's view that the current accountability mechanisms applicable to the ACCC are ineffective.

The ABA therefore supports reforms to the TPA and its administration that will increase the likelihood that the TPA is fairly and consistently administered and enforced by the ACCC.

The ABA's submission proposes that:

- the TPA be amended to include specific guidance on the broad principles to be followed by the ACCC in administering the TPA;

- an Inspector-General of Competition be appointed to investigate specific complaints about decisions or behaviour of the ACCC;

- a Charter of Competition Regulation (Proposed Charter) to guide the development and implementation of the competition provisions of the TPA be established; and

- a Board of Competition be established to oversee the implementation of the Proposed Charter.

CONCLUSION (Ch.9)

In conclusion, the ABA submission briefly reviews the chapters against the sound regulatory principles outlined in Chapter Two. We conclude that certain provisions of the TPA, (including proposals for their reform) and the manner in which it is administered by the ACCC do not comply with these principles.

Chapter One

INTRODUCTION

The Australian Bankers' Association (ABA) welcomes the opportunity to make a submission to the Dawson Review of the competition provisions of the Trade Practices Act (TPA) and its administration by the competition regulator, the Australian Competition and Consumer Commission (ACCC).

Professor Fred Hilmer in 1993 undertook the last substantial review of competition laws as part of the National Competition Policy report to Australian Heads of Government.

Significant changes have occurred in the Australian and global economies since the 1993 review. In addition, the Courts have made a number of important decisions interpreting key concepts in competition law.

Competition within the Australian financial services industry has increased markedly in the last decade, due mainly to regulatory reform aimed at reducing barriers to participation in financial services, breakthroughs in technology that have reduced the cost of providing financial products, and the increased sophistication of market-linked investment products.

The starkest example of increased competition is shown in the home mortgage market. In 1992, mortgage originating firms entered the home-loan market with securitised lending products.

This was made possible by deregulation in the financial services industry in the mid 1980s. Mortgage originating firms did not operate large branch networks and, with lower costs, were able to compete with other lenders by offering highly competitive interest rates.

In aggregate, home borrowers today are saving billions of dollars per year in interest repayments as a result of increased competition in this sector. In addition, small and medium sized business and corporates have also benefited from lower interest rate spreads on loans and higher rates on deposits, notwithstanding the offset from charges for direct service delivery. The increasingly competitive environment has resulted in the offering of more innovative products, increased access points and wider choice.

Competition in financial services is an example of how regulation, technology and consumer demands can have a powerful impact on competition. It is imperative that competition regulators understand the implications of the increased opportunity for entry into the financial services sector when assessing issues in competition law.

Where barriers to entry have fallen, mergers between financial institutions, for example, are unlikely to create the competition concerns that they once might have. Geographic boundaries are diminishing in importance as technology provides convenient financial services over the Internet and other electronic delivery channels.

In light of these changes, the ABA is pleased to be able to make some recommendations for change to the operation of the TPA that will assist in making it more effective in achieving its purpose of promoting competition and thereby enhancing the welfare of all Australians.

The next chapter sets out the basic principles of sound regulatory practice which serve as benchmarks for our assessment of the TPA. Chapter 3 deals with mergers, Chapter 4 looks at authorisation, Chapter 5 deals with proposals to increase ACCC powers, Chapter 6 discusses joint-ventures, Chapter 7 recommends changes to the treatment of third line forcing and Chapter 8 recommends some changes to the administration of the TPA.

Chapter Two

SOUND REGULATORY PRACTICE

The ABA submits that competition law and its administration should adhere to principles of sound regulatory practice. This will ensure the effectiveness and efficiency of the regulations and minimise costs to the community.

Sound regulatory practice is no more than the vigilant and consistent application of sound principles. Throughout the world, the importance of sound regulation as an essential ingredient of economic performance is being recognised.

The OECD runs a regular seminar series on best regulatory practice. In Australia, the Federal Government established the Office of Regulation Review within the Productivity Commission to promote sound regulatory practice throughout government.

In the long-term, a country’s productivity achievements will determine its economic growth and quality of life for its citizens. This in turn is significantly influenced by a country’s public policy environment – whether policies are growth enhancing, focused on long term improvements in education, R&D spending and continuous microeconomic reform.

Sound regulatory principles provide the roadmap to these policy outcomes.

What are the principles of sound regulatory practice?

Sound regulatory principles are primarily concerned with ensuring government interventions in competitive markets are clear, soundly-based, designed to minimise unintended costs and subject to accountability tests.

The principles of sound practice are well known and accessible to policy makers. Paul Coghlan, former Assistant Commissioner of the Office of Regulation Review in the Productivity Commission, provides a useful summary[1] and description of eight characteristics of sound regulatory practice. These are:

1. Regulation must yield a *net benefit to the community*, not just to a particular group or sector.

2. Regulation must be *set to the minimum level necessary* to achieve the objectives and to avoid unnecessary restrictions. It should be targeted at the problem.

3. Regulation should be *integrated and consistent with other laws*, agreements and international obligations. Any restrictions on competition should only be retained if they provide a net benefit to the community and if government objectives cannot be achieved by other means.

4. Regulation *should not be unduly prescriptive* and, preferably, be specified in terms of performance or outcomes. It should be flexible enough to allow business some freedom to find the best way to comply and so it can adapt to changed circumstances.

5. Regulation should be *accessible, transparent and accountable*. Not only should the public be able to readily find out what regulations they must comply with, but the regulations must also be reasonably easy to understand and they should be fairly and consistently administered and enforced.

6. Regulation must be *clear and concise and communicated effectively*.

7. Regulation should be *mindful of the compliance burden* imposed, proportionate to the problem being addressed and set at a level that minimises compliance costs while still achieving the set objective.

8. Regulation must be *enforceable* and embody the minimum incentives needed for reasonable compliance. Adequate resources must be provided for monitoring and to ensure reasonable compliance.

The Characteristics of Poor Regulatory Practice

The characteristics can be further illuminated by examination of characteristics of bad regulatory practice. Poor regulation will tend to exhibit:

- High compliance costs – substantial compliance costs will lower the net community benefit from the regulation;

- Lack of clarity – where the law is difficult to understand compliance will be eroded;

- Excessive discretion in the law – if laws are too vague or open to interpretation, there is the possibility that the division of

[1] Principles of Good Regulation, Conference Proceedings, Achieving Better Regulation of Services, ANU 26-27 June 2000

responsibility between those who administer the laws and those who make them will become blurred;

- Overlapping regulations – the concern that some activity is subject to various sets of laws, which increases the cost of regulation as concluded by the Financial System Inquiry Final Report:

  "…Dual administration of regulation should be avoided as it generates additional compliance costs, uncertainty and the risk of inconsistency."[2]

- Collateral damage - the situation where a law is introduced to address an identified problem, but has the consequence of damaging an interest elsewhere;

- Failure to enforce – no regulation will be effective if it is not enforceable. The best means of achieving this is to have high community support for the laws and therefore high levels of self-enforcement.

Conclusion

The principles of sound regulatory practice as detailed above, serve as the benchmarks by which the ABA will assess the competition provisions of the TPA in the following chapters.

They also provide a clear vocabulary to highlight shortcomings in the TPA and its administration.

Chapter Three

MERGERS & ACQUISITIONS

Introduction

Overall, the ABA believes Australia's merger regime is not fundamentally flawed.

However, the ABA believes there are some important changes to the operation of the mergers regime that would be of benefit to the Australian community. These include:

- Maintaining the substantial lessening of competition test, but ensuring the ACCC's competition assessment is thorough and gives proper regard to all the characteristics which determine a market's competitiveness;

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2 Financial System Inquiry Final Report, Report to the Federal Treasurer, Hon. Peter Costello, March 1997, AGPS.

- Improving accessibility, transparency and accountability of ACCC decisions in mergers by:

  (a) allowing applications for authorisation of a proposed merger to be made directly to the ACT; and

  (b) requiring the ACCC to publish substantial reasons for its decisions in relation to a merger.

  (c) expanding the ACCC's *Merger Guidelines* to provide greater guidance in relation to the circumstances in which section 87B undertakings will be used, to ensure they are appropriate and proportional to the actual competitive concerns associated with mergers.

Assessing 'substantial lessening of competition'

The ABA endorses the test which applies under section 50 of the TPA which prohibits a merger which would have the effect or be likely to have the effect of substantially lessening competition. However, the ABA considers that the ACCC's analysis of the effects of a merger on competition is based on a narrow conception of the test. Specifically, the ACCC applies the test formulaically by emphasising the importance of concentration ratios and maintaining the current structure of the relevant market, rather than the importance of maintaining workable competition in the market.

Examples of the difficulties caused by this approach which have been experienced by ABA members include the following:

- The ACCC often disregards or places less weight on supply side substitution in market analysis, giving more weight to demand side substitution. The market should, however, be viewed as a field of rivalry between firms and sufficient recognition given to the likelihood of supply-side substitution in determining the dimensions of the market and competitive constraints;

- The ACCC over-emphasises the short run as opposed to the long run for the purposes of analysing the time dimension of the market. In the long-run suppliers have sufficient time to organise and redeploy existing capacity in response to profit incentives. This is generally recognised as the period of time relevant to market analysis;

- The ACCC does not adequately analyse the height of entry/exit barriers into markets. Competition analysis requires focus on barriers to entry, as significant barriers to entry are recognised as the *sine qua non* of monopoly or oligopoly. Over-reliance on the number of players or concentration ratios in a market will potentially distort analysis of the matters relevant to the level of competition in the market. A market can be highly contestable with very few players; and

- The ACCC has an over-emphasis on the significance of maintaining the same market structure, or number of competitors rather than the level of competition post merger. Indeed, the distinction between the number of competitors and the intensity of competition is acknowledged in the Explanatory Memorandum to the Trade Practices Legislation Amendment Bill 1992 which states:

> *"It is possible that a merger which increases concentration may have the effect of enhancing post-merger competition. For example, two merging firms may be better placed to compete more effectively with the remaining firms and competition may be heightened in a more concentrated market."*[3]

Importance of 'efficiency'

Efficient production of goods and services is critical for any country if it is to ensure economic growth and rising standards of living over the long-term.

For the most part, economists believe the best way to promote efficient production of goods and services is to ensure the economy remains vibrant and competitive. Competition laws like the TPA are designed for this purpose.

However, there is a grey area for competition law where a merger may result in some increase in market power, but where the negative impact of this is outweighed by the gains from greater efficiency.

The ABA notes that under the current Merger Guidelines, the ACCC already factors efficiency considerations into its competition assessment.

In addition, the authorisation regime in Part VII of the TPA recognises that section 50 should not prevent a merger in circumstances where the parties apply for authorisation and the ACCC determines that the proposed merger would result "in such benefit to the public" that it should be allowed to take place.

The concept of a public benefit recognises a broader range of factors, however, as was noted by the ACT in *Re Queensland Co-operative Milling Association Ltd*, efficiencies are the most important of these factors. In this case, the ACT described public benefits as:

> *"anything of value to the community generally, any contribution to the aims pursued by the society* ***including as one of its principal elements*** *(in the context of trade practices legislation)* ***the achievement of the economic goals of efficiency and progress****."*[4]

The primary difficulty with the authorisation procedure (as outlined in greater detail in chapter 4 below) is that it inevitably involves time delays which render the procedure commercially impracticable. This means that mergers which produce net public benefits are, in many cases, not able to be considered in an practical time frame and hence may not proceed.

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[3] The Parliament of the Commonwealth of Australia, House of Representatives, Trade Practices Legislation Amendment Bill 1992, Memorandum, Clause 22.

[4] (1976) ATPR ¶40-012 at 17,242.

Given the importance of efficiency for economic growth and living standards over the long-term, the ABA agrees with the Business Council of Australia's submission[5] to the Dawson Review, which elevates the importance of efficiencies as a core public benefit in merger assessment.

Improving the transparency, accountability and effectiveness of the mergers approval process

Overall, the ABA endorses the ACCC's informal clearance process. It provides a flexible, timely and confidential means of having a merger assessed for its compliance with the TPA.

However, because the process is informal, without legislative backing in the TPA, the ACCC can exercise considerable autonomy over the process. The ABA considers that this is the source of a number of procedural problems, in particular:

- the ACCC is not compelled to provide substantive reasons behind its decisions; and
- there is the risk that the ACCC can impose inappropriate conditions with its use of undertakings under section 87B of the TPA.

Currently, ACCC merger decisions lack transparency. The ACCC relies heavily on short media releases rather than substantive detailed explanatory (background) papers outlining the theoretical and empirical basis for its decisions.

This is in contrast with some other jurisdictions, such as the United States and New Zealand, where competition regulators provide detailed explanations for their merger decisions.

Provided that genuinely commercially sensitive material is protected from release by the ACCC, the ACCC should provide clear reasons for its decisions in public documents. This would provide increased certainty to business and legal counsel about the application of section 50. This would also improve accountability, enhancing compliance with sound regulatory principles.

The applicants for merger clearance should be given these documents and accompanying press releases, sufficiently in advance of publication to ensure they are accurate and do not inadvertently disclose confidential information.

It is noted, however, that bank mergers are some of the few merger decisions to receive more lengthy treatment from the ACCC.

The reliance on short media releases can mean that detailed explanation of key economic concepts in ACCC merger decisions is often lacking. For example, where mergers have been opposed on the basis of concerns about

[5] Towards Prosperity, Submission to the Dawson Review of the Trade Practices Act 1974 and its Administration, July 9 2002

coordinated conduct in a particular market, due, say, to a high four-firm concentration ratio (CR-4), the ACCC has not always provided a clear exposition of the nature of the coordinated interaction between firms in those markets (e.g. the game theory basis for firms cooperating rather than competing, the mechanisms for detection and punishment of cheating, etc.) and the empirical basis for fears that coordination would be facilitated by merger (e.g. similarities in cost structures, etc).

Concern over inappropriate conditions in undertakings

Another major procedural concern is the use of section 87B undertakings in merger clearances. Section 87B of the TPA makes provision for the ACCC to accept court enforceable undertakings which address a wide range of matters under the TPA.[6]

In merger cases, parties to a transaction can offer section 87B undertakings to address competition concerns identified by the ACCC. If the ACCC considers that a particular section 87B undertaking is sufficient to address its concerns and is workable in practice, it may accept the undertaking and not oppose the merger.

Section 87B undertakings can provide a flexible means of addressing the ACCC's concerns in merger cases. However, it is not always clear that the remedy, which is effectively imposed by the ACCC (through the negotiation of section 87B undertakings that the ACCC is prepared to accept), is set to the minimum level necessary to address to the competition problem identified.

Since challenging the ACCC in court is both a time-consuming and resource-intensive exercise, there is a danger that parties and their counsel may be encouraged by the ACCC to offer undertakings that are unnecessarily onerous and not sufficiently targeted at the competition problem.

Requiring undertakings that are too stringent as a pre requisite to merger clearances has the potential to destroy some of the welfare-enhancing effects of merger transactions, particularly in relation to longer run dynamic efficiency benefits.

Overall, the use of section 87B undertakings by the ACCC in section 50 merger decisions appears at times to be disproportionate to the anti-competitive detriment and demonstrates an asymmetry in bargaining power between the ACCC and the merger parties.

Recommendations

In order to improve the regulation of mergers in Australia, the ABA **recommends** the following proposals to the Review Committee:

[6] See ACCC (1999), *Section 87B of the Trade Practices Act: a guideline on the ACCC's use of enforceable undertakings*, Procedural Guide Series, August.

- Improvements to the transparency and accessibility of the current ACCC clearance process by requiring the ACCC to publish substantial reasons for its decisions in relation to a merger.

- Expanding the ACCC's *Merger Guidelines* to provide greater guidance in relation to the circumstances in which section 87B undertakings will be used, to ensure they are appropriate and proportional to the actual competitive concerns associated with mergers.

Chapter Four

AUTHORISATION

The authorisation provisions under Part VII of the TPA explicitly recognise that conduct regulated by the TPA, including mergers, joint ventures and other forms of cooperation amongst competitors, can in certain circumstances be welfare enhancing.

The authorisation process enables the ACCC, for example, to grant immunity to mergers or acquisitions that would otherwise contravene section 50 of the TPA, provided that they result:

> *"in such a benefit to the public that the acquisition should be allowed to take place".*[7]

The range of potential public benefits to be considered by the ACCC (and ACT) for authorisation is very wide and not only covers efficiencies, but also encompasses matters such as employment effects, regional issues, and the promotion of consumer interests. For this reason the authorisation process would continue to allow the broadest possible range of public benefits to be considered, in addition to the efficiency gains which would, following the ABA's proposed amendment, be included in the analysis of the effects of a merger on competition under section 50.

For merger authorisations, in addition to other benefits, section 90(9A) of the TPA provides that the ACCC must have regard to the extent to which the merger provides:

> *"a significant increase in the real value of exports", "a significant substitution of domestic products for imported goods" and "all other relevant matters that relate to the international competitiveness of Australian industry."*[8]

The ABA's concerns with Part VII of the TPA lie in the way the provisions are currently administered. Procedurally, the authorisation process has not functioned effectively and has not met its primary objective of facilitating the clearance of mergers and cooperative arrangements between firms that generate welfare-enhancing efficiencies.

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7 See section 90(9) TPA.
8 See ACCC (1999), *Merger Guidelines*, p. 63.

ACCC statistics reveal that the use of authorisation for mergers and joint ventures has been very low. While it is difficult to identify the precise reasons for this, it appears that parties to a merger or joint venture (and their counsel) have considered that the potential costs associated with applying for clearance under authorisation significantly outweigh the benefits.

Key concerns include:

- the very nature of the authorisation process, where commercial information is potentially exposed to interested parties, including competitors;
- the delays involved, which often render the process commercially impracticable; [9]
- the fact that the ACT cannot make costs orders, which serves to encourage vexatious or strategic appeals to the ACT; and
- the uncertainty imposed on merger parties where there are wide avenues for appeal to the ACT made possible by the ease of establishing standing to appeal.

The net impact is that rational commercial reorganisation (e.g. mergers or joint ventures) with the potential to yield significant welfare benefits is discouraged under current authorisation procedures.

To improve and streamline the authorisation process, the ABA **recommends** the Review Committee ensure that:

- Applicants be able to apply directly to the ACT (or a special mergers division of the ACT) for authorisation without first obtaining a decision from the ACCC on their application (Note: this proposal would not exclude public submissions or scrutiny. The purpose is a more efficient, one-step, process but not one that will erode the integrity of the final determination); and
- Strict time limits are specified for the authorisation process.

[9] For mergers, it should be noted that the ACCC must complete its authorisation determination in 45 days (for complex matters) or 30 days (for less complex matters), which is timely. The difficulty for merger parties is if the ACCC decision is appealed to the ACT, then a long and uncertain process ensues which, in many cases, has the effect of defeating the merger.

Chapter Five

ACCC POWERS

Reversal of the onus of proof

The ABA strongly opposes the misuse of market power by Australian companies and endorses the purpose of section 46 of the TPA which is to make such conduct illegal.

Section 46 prohibits a company with market power from using that power with the purpose of:

- Eliminating or substantially damaging a competitor;
- Preventing the entry of a person into any market; or
- Deterring or preventing a person from engaging in competitive conduct in any market.

A number of proposed amendments to section 46 were recently considered by the Senate Legal and Constitutional Committee. One of those was the reversal of the onus of proof in relation to the purpose element in actions brought by the ACCC under section 46.

The proposal is that, once the ACCC can demonstrate that a corporation has a substantial degree of market power and that it has taken advantage of that power, then the onus rests with the corporation to show that it has not taken advantage of its power for a purpose prohibited by section 46(1).

The ABA has serious concerns that this policy would promote uncertainty in the business environment and undermine investment and consumer welfare generally. Our principal arguments against the proposal are that:

- there appears little demonstrated need - the ACCC has extensive investigative powers and has had significant success in prosecuting cases under section 46;
- the change would place businesses in the unfair position of having to prove that they do not have a prohibited purpose; and
- consumer welfare would suffer from less vigorous competition.

Success in prosecuting cases under section 46

At present, the onus of proof rests with the ACCC to prove that the corporation has acted in an improper, anti-competitive manner.

The ACCC has complained that the proof needed to establish offences under section 46 is very difficult to obtain. They argue in the absence of "smoking gun" documents, purpose is hard to prove conclusively [10].

[10] In its submission to the Senate Inquiry.

But the ACCC has access to extensive information gathering powers under section 155 of the TPA . This power, combined with the fact that "purpose" can be ascertained merely from inference, gives the ACCC substantial means by which to establish "purpose".

Recent cases have also demonstrated that the ACCC's ability to establish "purpose" is adequate. Courts have expanded the reach of s46 – eg, in the *Melway* [11] and *Boral* [12] decisions. (It should be noted that Boral has been granted leave to appeal to the High Court).

The submission of the Law Council of Australia to the Senate Inquiry notes <u>that</u> since 1988 four cases have been reported where the ACCC has prosecuted under s46. The ACCC won all four cases. [13]

Reversal of proof unfair to business

The reversal of the onus of proof places an enormous burden on the party involved. It essentially means that the accused business would have to prove a negative proposition, i.e that it did *not* act with a particular purpose or intention in mind. This could be a very difficult, time-consuming task.

A reversal of the onus of proof would be inconsistent with standard and established common law systems. Where the court has the power to impose large civil penalties on corporations and individuals which contravene provisions of Part IV of the TPA, it is appropriate that the onus of proof should be on the complainant.

Reversing the onus of proof will also introduce the issue of unnecessary and unfair reputation damage. It is likely that a perception in the community would arise that any business charged under section 46 must automatically be breaching the law.

This concern is amplified by the uncertainty surrounding many of the key concepts used in section 46. Defining exactly what constitutes a 'substantial degree of power in the market' is controversial.

For example, in the Federal Court decision in *ACCC v Universal Music* and *ACCC v Warner Music* (2002) ATPR 41-855, the judge found that both firms had market power, even though their market shares were below 20 per cent in the same market. The Court established a concept of 'temporary monopoly'. As this concept is unprecedented in the case law and has little support in economics, the Court's decision has cast uncertainty on the circumstances in which a corporation will be found to have a substantial degree of market power.

Consumer welfare would suffer from less vigorous competition

Competitive markets should not be constrained by weak or ineffectual competitors. This may well happen, however, if corporations have to justify their activities in the manner implied by the reversal of onus of proof.

[11] Melway Publishing Pty Ltd v Robert Hicks Pty Ltd.
[12] ACCC v Boral [2001] FCA 30
[13] One of those was *Boral*.

Section 46 is designed to promote and foster competition for the welfare of consumers. The welfare of consumers is best advanced by the operation of a strongly competitive market. Consumers benefit from this in the form of lower prices and better quality goods.

This view of the purpose of section 46 was recently expressed by Merkel J in the *Melway* decision (at first instance):-

> *"The objective of section 46(1) is the protection, advancement and promotion of a competitive environment and competitive conduct on the assumption that competition protects the interests of consumers and is in the public interest."* [14]

The competition provisions in the TPA are designed to protect the process of competition, rather than individual companies.

Competition can be very aggressive, as noted by Mason CJ and Wilson J:-

> *". . . the object of section 46 is to protect the interests of consumers, the operation of this section being predicated on the assumption that competition is a means to that end."* [15]

Part of this process of vigorous competition is aggressive price setting behaviour by firms as acknowledged by Wilcox J:-

> *"Traders commonly fix prices with the intention of diverting to themselves custom which would otherwise flow to their competitors. In doing so, they realise that, if they are successful, the result will be to damage – in some cases, even to eliminate – those competitors. But such conduct is the very stuff of competition, the result which Part IV seeks to achieve."* [16]

Normal competitive behaviour will be severely constrained if the onus is on a company to prove that it did not have the requisite intent.

This will severely limit the ability of companies to act competitively – yet, as noted by Merkel J in *Melway*, the promotion of competition is one of the prime objects of the Act. Any restraint on legitimate competitive behaviour will have an adverse affect on consumer welfare.

Effects Test

In the ACCC's submission to the Dawson Review, the ACCC argues for a substantial change to the way in which it can be proven that a business with market power has misused that power.

At the moment, to prove that a powerful firm has misused its power, the ACCC or another party must prove to a Court that the firm had an anti-competitive "purpose" to damage a competitor. The ACCC has argued in

[14] *Robert Hicks Pty Ltd (t/a Auto Fashions Australia) v. Melway Publishing Pty Ltd* (1998) 1379 FCA.
[15] *Queensland Wire Industries Pty Ltd v. The Broken Hill Proprietary Company Limited* (1988) 167 CLR 177, at 191.
[16] *Eastern Express Pty Ltd v. General Newspapers Pty Ltd* (1991) 30 FCR 385, at 409-410.

its submission to the Dawson Review that this proof is often too difficult to obtain, so another test should be that of "effect".

In other words, if the conduct of the firm with market power has the "effect" of damaging competition, then this is evidence of misuse of market power.

The ABA does not believe this change would be of benefit to the community. Our principle arguments against the proposal are that:

- There is little evidence that such a power is needed; and
- An effects test could cause uncertainty and erode competitive behaviour in the economy.

Where is the evidence of need?

Arguments have been advanced regarding the high evidentiary burden under the current test. However, recent cases such as Boral and Melways would appear to suggest that the burden is not so onerous as to discourage the ACCC and competitors from commencing and succeeding in claims under section 46. As such, the ABA submits that the present test is workable.

The TPA also establishes that purpose can be inferred from evidence on conduct and effect. This, combined with extensive information gathering powers under section 155, give the ACCC ample means to establish "purpose".

Uncertainty impacts on competitive behaviour

The ABA believes the effects test is not warranted and could cause serious uncertainty in the business environment. It could lead to some firms being accused and found guilty of misusing market power when they never had any such intention.

They may, for example, inadvertently damage a competitor by implementing a normal business strategy of lowering prices to gain market share. Under an effects test, this could constitute a misuse of market power.

More broadly, section 46 of the TPA must clearly be interpreted as a provision to protect competition and not protect individual firms. Less efficient or failing firms should not be able to gain support from section 46 as an alternative to competition.

The existing "purpose" test was crafted deliberately so as not to capture aggressive competition that enhances market outcomes and promotes dynamic efficiency. According to the High Court in *Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1989) 167 CLR 177 (QWI):

> *"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 an inevitable consequence of the competition s 46 is designed to foster."

In this way, section 46 is not concerned with the protection of individual firms, but the protection of the process of competition.

If section 46 is to remain focused on preventing "misuse" of market power (e.g. predatory conduct), then it is the purpose of such conduct that is critical. A move towards an "effects" test would broaden the scope of section 46 and potentially proscribe welfare-enhancing, aggressive competitor conduct.

As per the High Court in QWI, this is the type of competition that section 46, under a purpose rather than effects test, is designed to foster.

Even though the ACCC itself has proposed the introduction of an effects test, ACCC Chairman Professor Fels has conceded a range of arguments that undermine the case for its implementation. In evidence to the Senate Committee, Professor Fels noted:

"it (the effects test) could be regarded as too intrusive and too interventionist "for many tastes";

"parliament has consistently refrained from introducing an effects test because they felt it "went too far". The purpose test, whilst imperfect, acts as a brake on "going too far";

"an effects test can deter genuinely competitive behaviour. It could "take the edge of incentive for firms to compete keenly";

"an effects test create uncertainty for business. Section 46, in its present form, was "far less likely " to catch unintended behaviour. [17]

These arguments detail the core reasons why an effects test would damage competition.

The ABA supports the current "purpose" test under section 46 of the TPA, for determining misuse of market power. Equally, the ABA opposes any changes from the current "purpose" test to an "effects" test.

Cease and desist powers

In its submission to the Dawson Review, the ACCC has argued that it should be granted powers to issue 'cease and desist' orders to businesses where it suspects the business is misusing its market power.

The ACCC has written that it is concerned with the time it takes to resolve matters relating to misuse of market power in the Courts. It has acknowledged that the TPA already grants the ACCC the capacity to gain interim injunctions from the Courts, but has argued that this has not worked well over the years.

[17] op cit, RS 1162.

The ABA opposes the granting of this power to the ACCC. Our principal opposition is on the following grounds:

- There does not appear to be a well demonstrated need that these powers are necessary;

- Granting the ACCC these powers would be unjust and an inappropriate means of enforcing the TPA. The ACCC would take on the function of a Court, with powers to effectively issue an interim Count injunction; and

- There could be a constitutional barrier to this proposal. It is well established that only courts may exercise judicial power of the Commonwealth.

These key points are expanded in detail in Appendix 2.

Criminal sanctions

The ABA supports appropriate sanctions against corporate wrongdoing. Strong appropriate laws which are properly enforced are necessary if consumers and investors are to have confidence in our financial system and corporations.

Such confidence is also important in underpinning our position that the current competition law contributes to making the Australian economy more efficient, robust and competitive.

Executives who are operating in accordance with good corporate governance practices obviously have no need to fear introduction of criminal sanctions.

We see much merit in the criminal sanction proposals but we are unable to support their introduction in relation to Part IV of the Trade Practices Act at this time. This is because of our primary concern with the present application of the provisions.

For example, as the ABA submits in chapter 6 , there is a high degree of uncertainty in relation to the interpretation and application of the price fixing provisions to payment system and other financial services joint ventures.

If criminal penalties were introduced to the scheme of the TPA, it would be imperative to reform this area of the law. Criminal sanctions should only apply when both business and the regulator have a clear understanding of what constitutes a breach.

It is in this specific context that the ABA makes its submission on this point.

The ABA does not rule out giving serious consideration to any new properly defined offences should that be an outcome of this inquiry. We have noted with some interest commentary around this issue.

In addition to our primary and fundamental concern discussed above we also ask the Review to note:

(a) That serious consideration should be given to the need for balance in any sanction regime. The introduction of criminal sanctions for offences proscribed by statute needs to be addressed with great care and should be based on clear evidence of the failure of the current provisions.

(b) The introduction of criminal sanctions would require extensive amendment to the TPA as the TPA is not generally framed with a view to the dual nature required for civil and criminal sanctions;

(c) the introduction of such sanctions generally requires an informed and careful debate of exactly what is proposed and how such sanctions would operate.

(d) The current sanction regime does include quite extensive penalties such as penalties per corporation per offence of $10 million and for individuals of $500,000 per offence. In relation to individuals, directors and officers insurance would not cover payment of such fines. Indeed Courts are typically concerned to ensure that a pecuniary penalty is a personal liability for an individual who is successfully prosecuted.

Chapter Six

JOINT VENTURES

Joint ventures are examples of collaboration between firms in the production or supply of goods or services. Because joint ventures may be entered into by competitors and it is often necessary for joint venturers to agree on issues such as the prices they will charge for the goods or services produced by the joint venture, joint venture activity is closely scrutinised by competition authorities.

The ABA makes three points in relation to joint ventures and their treatment under the TPA:

- Joint ventures are critical business structures for the banking industry and the wider Australian economy;

- Uncertainty surrounding the interpretation of the provisions relating to per se offences to joint venture activity is causing considerable difficulty for banks in decision-making and investment and needs to be addressed;

- The authorisation process is too slow and cumbersome to be an effective means of facilitating joint ventures.

Importance of joint ventures for banks and the wider economy

Joint ventures in banking are becoming increasingly common in Australia. This was predicted by the Wallis Committee that reported to the Federal Government in 1997.[18]

The growth in joint venture activity is being driven by the recognition that real efficiency gains and product innovations that benefit consumers and businesses alike, can be derived from creating and expanding network systems, sharing the risks of product development, sharing expertise and engaging in innovation.

Examples in the financial services industry include the EFTPOS system which allows customers of any financial institutions to use their debit card in any EFTPOS terminal, the ATM networks that similarly allow universal access and the BPAY outsourced payments collection service.

All of these networks provide convenience and added value services to consumers and could not be made available without collaboration between banks. The benefits to individual consumers and producers feed into the economy wide benefits of efficiency, productivity and innovation.

A review of joint ventures under Canadian competition law noted that:

> *"The Canadian approach to the review of joint ventures reflects a growing recognition of the need for Canadian law to promote both short-term market efficiency and the longer-term gains in economic efficiency that result from innovation" …*[19]

The ABA is particularly keen to ensure that joint venture activity in Australia is not unnecessarily impeded by legal uncertainty, particularly where the joint ventures involve large fixed costs.

Uncertainty of the treatment of joint ventures under section 45 of the TPA

In recent years, the ACCC has caused considerable uncertainty in relation to the treatment of payment system and other financial services joint ventures as a result of its investigations and challenges to the credit card and BPAY schemes. This uncertainty centres, in part, on the debate as to whether on the exemption for joint ventures from prohibition under section 45 of the TPA applies.

Joint ventures must be afforded exceptions to the normal anti-competitive practices that apply to single-firm conduct. It would be impossible to undertake joint ventures unless the law allowed agreement between parties on matters relevant to price, production and supply.

It is therefore appropriate for competition regulation which aims to facilitate pro-competitive joint initiatives to provide relief against prohibitions on legitimate business practices in joint-production.

[18] Financial System Inquiry (1997) *Financial System Inquiry Final Report*, AGPS, March, p. 138.
[19] Goldman and Corley (1997) "The Review of Joint Ventures under the Canadian Competition Act"

The consumer benefits of collaborative payments products provided by the banks cannot be disputed. For example, the BPAY centralised electronic bill payment service has now over 8,000 registered billers.
The purpose of the joint venture exception to section 45A of the TPA is to allow necessary pricing arrangements to be negotiated between joint venturers in order to facilitate pro-competitive production and supply of goods.

The recent controversy over BPAY and credit cards suggests that the exception has failed to meet its objective.

As a result, the ABA **recommends** a series of amendments to sections 4D, 45 and 45A of the TPA which will address these uncertainties and focus the exemption on its original objective.

Detailed recommendations are contained in Appendix 1 of this submission.

The ABA also advocates that the Dawson Review Committee should recommend that the ACCC issues a binding guide on the ACCC's approach to regulating joint ventures under the TPA (including in relation to sections 45A and 4D). This recommendation is also discussed more fully in Appendix 1.

The ABA also submits that authorisation is too cumbersome to be used to clear joint ventures. As with mergers, joint ventures that are likely to substantially lessen competition can be authorised under Part VII of the TPA. But, as argued earlier in relation to mergers, authorisation is a slow and cumbersome process that exposes firms to the risk of appeals by competitors motivated by strategic benefit and can lead to lost opportunity through delay.

Modifications to the authorisation process along the lines of those recommended by the ABA in relation to mergers would therefore contribute to the increased facilitation of joint ventures. However, a more attractive and streamlined authorisation procedure does not substitute for certainty under the competition provisions of the TPA.

Informal clearance (in a similar vein to merger clearances) can be efficient and streamlined but lacks the level of certainty required for the formation of ongoing business relationships. The ACCC reserves the right to revisit the issue, and later veto or prosecute the arrangement, even after businesses have invested substantially in establishing and operating the venture in reliance on the earlier clearance.

The ABA **recommends** changes to the authorisation of joint ventures, consistent with the recommendations in Chapter 4.

Chapter Seven

THIRD LINE FORCING

Third line forcing is the practice of a company selling a good or service to a customer, but making the purchase (or price) from another person of that good dependent upon the purchase of some other good or service. Another name for this practice is ‘tying’.

This practice is very common in Australia and throughout the world as a normal business strategy used to expand product choice and value for customers.

The treatment of third line forcing under the TPA does not reflect this reality. The ABA, therefore, is **recommending** two changes to the Act:

- Third line forcing be treated equally with other types of exclusive dealing, by subjecting it to the substantial lessening of competition test; and

- That a related company exception be introduced.

Substantial lessening of competition test should apply

Despite the practice of third line forcing being a common feature of business trading in Australia and throughout the world, it is prohibited under Section 47 of the TPA.

The law classifies third line forcing in the category of offences known as ‘exclusive dealing’.

But unlike other types of exclusive dealing, the law is particularly harsh in relation to third line forcing, because the practice is prohibited even if competition is not substantially lessened. Other exclusive dealing practices are allowable under the Act, so long as the conduct does not substantially lessen competition.

The only justification for this asymmetry would be if third line forcing were particularly damaging to competition. But there is nothing inherently anti-competitive about third line forcing behaviour that justifies a *per se* prohibition.

This has become increasingly clear by the significant increase in the number of third line forcing applications that have been cleared by the ACCC.

Since 1995, the ACCC’s public register shows that 1,175 applications have been lodged and only four of these were disallowed.

In fact, the ACCC has not rejected any notifications in the last 2 years. A recent example is supermarket-issued discount vouchers for the purchase of petrol from a related company.

The ACCC found that these types of arrangements had significant public benefits, and increased competition in the market for petrol retailing, outweighing any associated anti-competitive detriment.

The *per se* prohibition is inconsistent with the encouragement of such pro-competitive business arrangements.

It is the view of the ABA that the third line forcing provisions in section 47 of the TPA should be subject to a competition test consistently with the other provisions of Part IV and the overall objectives of the TPA.

The ABA's view is widely supported, most notably, by a 2001 Federal Treasury Discussion Paper that recommended a competition test for third line forcing.[20] This view was also supported by the 1993 Hilmer Committee review of the TPA.

Financial service markets are now much more competitive than they were in the 1970s and this has alleviated the need for government to unnecessarily restrict product markets in the heavy handed way implied by the current third line forcing prohibition. Competition is driving greater choice and better value for consumers.

Need for a related company exception

The effect of the *per se* prohibition on financial services companies is exacerbated within firms that structure themselves as financial conglomerates rather than as a single entity (i.e. firms that own a range of stand-alone companies under their corporate umbrella, as opposed to firms that incorporate all their operating divisions under a single entity).

The law regarding third line forcing disadvantages conglomerates compared to single-entity firms, because conglomerates are prohibited from bundling products under the TPA, whereas the single-entity firm is not, even though both firms may be offering products that provide the same features to consumers.

Conglomeration in the financial services sector is growing rapidly. As a consequence, third line forcing type arrangements are becoming increasingly commonplace in the normal course of business within corporate groups.

An example in the financial services industry is used by the ACCC in its guidelines for third line forcing.[21] Colonial State Bank offered customers a discount on their banking, on condition that the customer also purchased insurance or investment services from a related company in the Colonial Group.

This conduct would be clearly prohibited under the TPA (in the absence of clearance through notification). The company notified the ACCC of the conduct. The ACCC concluded that the arrangement would:

[20] Department of the Treasury (2001) *Discussion Paper: Possible Amendments to the Trade Practices Act 1974*.
[21] ACCC (1998) *Guide to authorisation and notification for third line forcing conduct,* February, p. 15.

> *"… be unlikely to result in anti-competitive detriment, but would be likely to result in a public benefit through lower product prices and increased competition in the relevant markets."*[22]

The customers were not being forced to acquire a product and alternatives were available from many competing suppliers. These types of arrangements are often pro-competitive and beneficial to consumers. As a result, conglomerates should be treated equally to single-entity firms with respect to third line forcing.

The opportunity for authorisation or notifications of third line forcing is not a substitute for proper competition analysis under section 47. The notification process imposes significant compliance costs upon business.

This places a special burden on the financial services sector, given that a sizeable proportion of notification applications for third line forcing is made by financial institutions.

Chapter Eight

ACCC ACCOUNTABILITY

The Importance of accountability

As set out in Chapter 2 of this submission, to adhere to principles of sound regulatory practice, regulation should be accessible, transparent and accountable. The Office of Regulation Review principles endorse that in order to meet the requirements of good regulatory practice, the TPA needs to be fairly and consistently administered and enforced by the ACCC.

Parliament underlined the importance of transparency and accountability when increasing the ACCC's reporting requirements in 2001. The Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 which introduced the changes stated that '[t]he inclusion of an expanded list which the ACCC must report on seeks to ensure the Commission is accountable for its actions and provide greater transparency to the operation and enforcement of the TPA'.

The ABA's concerns about accountability are intensified as a result of the dual role the ACCC plays in administering both consumer protection and competitive conduct provisions of the TPA. This dual role heightens the need for transparency in the ACCC's administration of the TPA to ensure it is apparent that the appropriate purposes are being considered relevant to each role.

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[22] *Ibid*.

Without adequate assurance that the ACCC is accountable in the exercise of its functions, there can be no assurance that the TPA is being fairly administered or that the objectives of the TPA are being consistently promoted.

The ABA's concerns regarding insufficient accountability

As stated in chapter 2 of this submission and above, accountability is one of the essential characteristics of sound regulatory practice. The ABA considers that the measures currently in place covering the administration of the TPA by the ACCC are insufficient to ensure that the ACCC is actually accountable for its administrative decisions and conduct.

The need for effective accountability measures is highly significant, given the ACCC's extensive powers, broad discretions and in view of the concerns expressed by business, parliament and courts.

In its most recent report the House of Representatives Standing Committee on Economics, Finance and Public Administration (the Committee) stated that the ACCC:[23]

> *"is at the centre of Australia's competition policy regulation and also has a leading role in consumer protection issues. The importance of these responsibilities makes it essential that it is seen to be accountable for its actions and that its operations and decision making are as transparent as possible".*

The Committee found that while the ACCC is an effective regulator, there are "concerns with some of the ACCC's tactics, approach and attitudes to business as well as the way in which, on occasions, the ACCC uses the media."[24]

In the Electricity Supply case[25] the Federal Court expressed serious concern that the ACCC's approach to managing public information and comment were inappropriate.

The Federal Court noted its view that the ACCC's attacks on those who held contrary views to it bordered on "*the mischievous*"[26]. In particular, Justice Finn made the following observations regarding the ACCC's conduct in the Electricity Supply Case:

> *"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 TPA, it properly can be expected to set the example of care in its own representations to the public…The stances so taken [by the ACCC] may constitute good public theatre. Whether they represent good public administration is*

[23] House of Representatives Standing Committee on Economics, Finance and Public Administration, *Competing Interests: is there a balance*, Parliament of Australia, Canberra, tabled 24 September 2001, p vii

[24] ibid.

[25] *Electricity Supply Association of Australia Ltd v Australian Competition and Consumer Commission* (2001) ATPR 41-838

[26] ibid., at para.141

> *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…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."*[27]

Despite Justice Finn's criticisms of the ACCC's use of the media in the Electricity Supply Case, after Justice Finn handed down his decision, the ACCC issued a press release in which it represented that the Federal Court had vindicated its position and implied that its view of Division 2 of Part V of the TPA was correct.

However, the ACCC's investigation was subsequently settled on terms favourable to ESAA's position.

The expression of concerns by both the Commonwealth Parliament and the Federal Court and the circumstances of the conduct of the ACCC in its administration of the TPA that gave rise to those concerns support the ABA's view that the present mechanisms are not ensuring that the ACCC is sufficiently accountable. The ABA is also aware of circumstances affecting ABA members which further evidence such concerns and the need for additional accountability measures.

Appendix 3 to this submission outlines the current accountability mechanisms that apply to the ACCC and the reasons why the ABA considers these mechanisms to be inadequate.

Specific examples that illustrate the ABA's concerns

The Committee's terms of reference provide that in reviewing the administration of the TPA it:

> *"may examine the processes followed by the ACCC and the laws under which the ACCC operates, but is not to reconsider the merits of past individual cases."*[28]

The ABA agrees that an important issue for review is whether existing laws "provide adequate protection for the commercial affairs and reputation of individuals and corporations" as stated in the Treasurer's press release introducing the terms of reference for the review.[29]

The ABA understands that bringing to public notice acts of wrongdoing is part of the regulatory responsibility of the ACCC[30]. An important way of doing this is through the appropriate use of media. Our concern, however, centres around the use and timing of the media especially with reference to the initiation and conduct of potential litigation.

27 (2001) ATPR ¶41-838, 43,372 – 43,373.
28 "Review of the Competition Provisions of the Trade Practices Act 1974", as issued by the Treasurer on 9 May 2002, para 1.(d)
29 "Review of the Competition Provisions of the Trade Practices Act 1974" as issued by the Treasurer on 9 May 2002
30 Section 28 of the TPA

The ACCC has been highly successful in using the media to publicise alleged breaches of the TPA by some of the ABA's members. Such publicity prior to any actual decision on such allegations is contrary to the aforementioned regulatory responsibilities and has caused serious damage to the reputation of the ABA members in the course of ACCC investigations. It does not assist in creating a regulatory environment in which business works co-operatively with the ACCC.

The ABA considers that, as a high profile regulator and enforcer with the ability to significantly influence public perceptions and investor confidence, the ACCC needs to be extremely careful and responsible in its use of the media.

The following examples relating to ABA members are provided to illustrate the need for more effective accountability mechanisms. Whilst the factual material relates to member banks, the commentary is made in our capacity as the industry body for the banking sector.

The examples relate to a broader point in relation to the use of the media by the ACCC. In both instance serious matters were either before the court and not yet adjudicated on or the subject of investigation. In our view it is inappropriate for the Regulator as a party to those proceedings to be engaging in a discussion on the merits of a matter and, in particular, legal matters which are yet to be dealt with by the court.

Credit card investigation

In March 2000 the ACCC advised banks and credit card schemes that it believed the process for setting interchange fees may be in breach of the TPA. This was in respect of conduct which had been engaged in by members of credit card schemes in providing services to cardholders and merchants in Australia for over 20 years.

During the course of the ACCC investigations, a number of media comments were made by representatives of the ACCC that the major trading banks were engaging in collusive behaviour and that consumers were being considerably damaged as a result of this behaviour.

Suggestions that the interchange system was costing consumers $600 million a year continually appeared in the media. The banks each agreed to work through the relevant issues with the ACCC including a proposed study by a leading firm of economists, Frontier Economics, which was proposed to the ACCC and agreed to by it.

The ACCC then commenced confidential negotiations with the banks and credit card schemes with a view to reforming the schemes' rules which could be authorised by the ACCC on the basis of public benefit.

Without warning the ACCC instituted proceedings in the Federal Court on 31 August 2000 against one Bank (despite the fact that all major banks had received section 155 notices).

The ACCC alleged that the Bank was engaged in breaches of sections 45 and 45A of the TPA. While the very nature of the offence of price fixing requires participation of more than one party, the ACCC only sued one bank.

The Bank denied the allegations and appropriate defences were lodged. The Bank foreshadowed to the court that it wished to raise as a discrete and important issue the application of the 'joint venture defence' contained in section 45A(2) of the TPA to the allegations.

Just prior to the trial the Chairman of the Commission was reported in the *Australian Financial Review* as saying there is no substance [to the joint venture defence] and that the ACCC was happy to argue that in court. The Article carries the following quotation from Professor Fels in relation to the joint venture defence:

> *"That's a legal question, we've considered it and we think there is no substance in it and we are happy to argue that in Court."*[31]

The matter was yet to be adjudicated on.

During the course of the proceedings in the Federal Court Justice Branson indicated that the joint venture defence was in fact a matter that she was prepared to consider but that it could not be dealt with by her or the court prior to all the relevant banks being made parties to the relevant proceedings.

Justice Branson later made orders to this effect in February of the following year. The issue on whether the joint venture defence was relevant, or whether there was a breach of the TPA at all, was never resolved because shortly after this defence was raised, the ACCC discontinued the proceedings and paid its own costs.

Following the discontinuance of the proceedings, the banks, including the bank that was the subject of the litigation continued to work towards a solution in relation to the ACCC's concerns.

Subsequently, for a period the banks and the ACCC continued confidentially meeting to attempt to reach a resolution. However, in March 2001, without prior notice to the banks the ACCC terminated negotiations by issuing a media release announcing that it had recommended to the Reserve Bank of Australia that it consider using its legislative powers to progress reform of the credit card schemes in Australia.

The concern that the ABA has in relation to this example is that the ACCC was publicly discussing serious legal matters while they were before the court and not yet adjudicated on. In our view it is inappropriate for the regulator as a party to those proceedings to be engaging in a discussion on the merits of a matter and in particular a legal question which is yet to be dealt with by the court.

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[31] George Lekakis AFR 8 December 2000. This was a Friday, the actual trial of the matter was to commence on Monday the 11th of December.

BPAY system

BPAY is an outsourced payments collection service designed to assist companies with their collection process.

Prior to the commencement of BPAY's operations in 1997, representatives of BPAY met with the ACCC in relation to the proposed payments collection scheme.

BPAY representatives disclosed information about its operations and explained their view that there was no contravention of the TPA.

The ACCC was informed of the nature of the scheme and raised no concerns.

In September 2001 BPAY and certain BPAY members received a section 155 notice which alleged that the ACCC had reason to believe that aspects of the scheme (which had been disclosed to the ACCC in 1997) may contravene the TPA.

BPAY and those BPAY members complied with the requirements of the notices and after a period of time were informed that the ACCC was continuing the investigation as it had not yet resolved its view as to whether the TPA had been contravened.

In May 2002, while the investigation was on foot, the ACCC commented to the media that it was conducting an investigation and it was reported by Andrew Cornell in the AFR as follows:

> *"ACCC chairman Allan Fels said there were questions as to whether BPAY, which is in effect a joint payment system operated by the banks, was in breach of Part IV of the TPA"*[32].

The Media Article reported extensively on views attributed to the ACCC which could be held to have reflected adversely on BPAY and its members.

The example raises serious questions of process.

Proposed Reforms

The examples of conduct referred to above support the ABA's view that the current accountability mechanisms applicable to the ACCC are ineffective. The ABA therefore supports reforms to the TPA and its administration which will increase the likelihood that the TPA is fairly and consistently administered and enforced by the ACCC. ABA agrees with reform initiatives outlined by the Business Council of Australia in its submission to the Dawson Review.

[32] A. Cornell, "ACCC investigates BPay system", Australian Financial Review, 16/5/02, p. 49

The ABA proposes that:

- the TPA be amended to include specific guidance on the broad principles to be followed by the ACCC in administering the TPA;
- an Inspector-General of Competition be appointed to investigate specific complaints about decisions or behaviour of the ACCC;
- a Charter of Competition Regulation (Proposed Charter) to guide the development and implementation of the competition provisions of the TPA be established; and
- a Board of Competition be established to oversee the implementation of the Proposed Charter.

Principles to be followed in the administration of the TPA

The ABA proposes that the TPA be amended to include specific guidance on the broad principles to be followed by the ACCC in administering the TPA, including principles relating to the careful and responsible use of the media.

The proposed amendment would require the ACCC, in administering and exercising its powers under the legislation, to have regard to:

- fairness and impartiality in its dealings with all businesses;
- transparency in its processes and decision making, while respecting privacy and commercial confidentiality;
- consistency in its action, including treating like situations in a like manner; and
- the requirement to consult before making public statements directly affecting specific parties.

The ABA considers that this amendment would provide banks, businesses and consumers with a clear statement upon which to base their expectations of how the ACCC should operate in exercising its powers under the TPA.

Incorporating these broad principles in the TPA will ensure the principles inform the ACCC’s decision making and encourage greater consistency in the administration of the TPA.

Appointment of Inspector-General of Competition

The ABA considers that the existing avenues for companies and individuals with concerns about the actions of the ACCC are inadequate and proposes that an Inspector-General of Competition (Inspector-General) be appointed as an independent statutory authority to investigate complaints about the decisions or behaviour of the ACCC.

The role of the Inspector-General would be to:

- examine specific complaints made by companies and individuals about the ACCC where they believe they have been wrongfully or unfairly treated by the ACCC; and

- make recommendations to the ACCC about appropriate means of providing redress where complaints are found to be valid.

The Inspector-General would supplement the existing avenues of review, which clearly contain gaps in the ability to seek redress where ABA members have concerns regarding the actions of the ACCC.

An Inspector-General dedicated to monitoring the operations of the ACCC would quickly develop a detailed understanding of the complexities of competition regulation.

Based on its investigations, the Inspector-General would also be able to make recommendations to the Board of Competition and the Treasurer on ways to improve the fairness, efficiency and integrity of competition regulation.

The Inspector-General would also provide a public report to the Treasurer and Board each year on the investigations undertaken, the results of those investigations and the consequent actions taken by the ACCC.

The Inspector-General would not have the power to overturn or intervene in decisions of the ACCC. The ACCC would continue to administer the TPA independently while benefiting from the recommendations of the Inspector-General on steps to improve the fairness, efficiency and integrity of competition regulation.

The importance of a dedicated complaints mechanism was demonstrated when complaints to the office of the Ombudsman increased 145% after the establishment of a dedicated Tax Ombudsman.[33]

The ABA envisages that the Inspector-General would be similar to the proposed Inspector-General of Taxation, which is to act as a key independent adviser to Government on tax administration and process.[34]

In introducing to the Consultation Document in relation to the proposed Inspector General of Taxation, Senator Coonan stated:

> *"The Government's ongoing objective is to ensure that the taxation system is fair and efficient, and operates to achieve its various policy roles without undue intrusion into the way individuals and businesses conduct their affairs. Where taxpayers feel that their tax affairs have not been dealt with fairly there need to be appropriate mechanisms to resolve those concerns within a reasonable time frame…The*

[33] Commonwealth Ombudsman, Annual Report, 2002–01, available at http://www.comb.gov.au/publications _information /Annual_Reports/AR2000-01/ARindex.html, p. 19

[34] See Press Release by Senator Helen Coonan, Minister for Revenue and the Assistant Treasurer, "A new tax advocate", 29 May 2002

> *Inspector General will not replace existing points of review by rather will fill gaps that currently exist and help guide further improvements to them…"*

The ABA considers that just as the Inspector General of Taxation "would need broad investigation powers and access to information"[35] the Inspector General would also need similarly wide-ranging powers.
The ABA considers that the appointment of an Inspector-General of Competition will promote a core characteristic of effective regulation, by making the ACCC accountable for its actions.

Establishment of Proposed Charter and Board of Competition

The ABA recommends the establishment of the Proposed Charter to guide the development and implementation of the competition provisions of the TPA and a Board of Competition to oversee the implementation of the Proposed Charter.

The ABA considers that the ACCC's existing Service Charter is too narrow in scope. The ABA considers that the Proposed Charter would be an effective means of providing guidance to:

- companies and individuals on how competition provisions will be administered, assisting and encouraging compliance by all; and

- the legislature and the ACCC by incorporating a set of principles to guide the development, implementation and administration of competition regulation.

The ABA agrees with the BCA's recommendation that a Board of Competition is necessary both to prepare the Proposed Charter (through a consultative process) and to advise the Treasurer on the Proposed Charter's operation and effectiveness.

The ABA considers that the Proposed Charter and the Board of Competition will increase the likelihood that the TPA is fairly and consistently administered and enforced, in line with the principles of sound regulatory practice.

Conclusion

On the basis of the significant concerns raised by the Federal Court, comments made in the Commonwealth Parliament and the particular examples affecting the financial services industry, the ABA considers that in certain material respects the ACCC's administration of the TPA has not met the standards set by the principles of sound regulatory practice. For these reasons the ABA supports reforms to improve the accountability of the ACCC.

[35] The Inspector-General of Taxation in the Taxation System, Consultation Paper, May 2002, p. 1

Chapter Nine

CONCLUSION

In conclusion, the ABA will summarise the chapters of the submission in direct reference to the principles of sound regulatory practice outlined in Chapter 2. The Chapter established the eight characteristics of sound regulatory practice. Regulations should be:

- a net benefit to the community;
- set at the minimum necessary level;
- integrated and consistent;
- not unduly prescriptive;
- accessible, transparent and accountable;
- clear, concise and communicated effectively;
- a minimal compliance burden; and
- enforceable.

In Chapter 3 (mergers and acquisitions), the ABA argued that the merger regime needed to be more transparent by requiring the ACCC to publish substantial reasons for its merger decisions and that compliance burdens should be reduced by allowing merger applicants to apply directly to the ACT for authorisation. The submission also argued that 87B undertakings should be targeted directly at addressing competition problems and that they should be set at the minimum necessary to achieve this.

Chapter 4 highlighted the cumbersome process of authorisation, which imposes significant compliance burdens on applicants. The submission advocated an option for applicants to lodge their authorisation application directly with the Australian Competition Tribunal. It also proposed that strict time limits apply to the authorisation process.

In Chapter 5 (ACCC powers) the ABA argued that proposals to increase ACCC powers under section 46 were lacking strong evidence justifying their adoption. Without this evidence, the risk is that the ACCC powers will not meet the principle of the minimum necessary level of regulation and create uncertainty and increased costs for business generally.

On criminal sanctions, while seeing merit in the proposal the inaccessibility of the law – or the legal uncertainty surrounding key sections of the TPA like the joint ventures exception to section 45 - prevented the ABA from giving unqualified support.

Chapter 6 (Joint Ventures) again highlighted the inaccessibility of the law, caused by its uncertainty treatment of joint ventures under section 45.

Chapter 7 (Third Line Forcing) supported the submission made by many parties in relation to the inconsistency of the treatment of third line forcing compared with other forms of exclusive dealing and the anomaly in relation to conglomerates.

Chapter 8 (ACCC Accountability) highlighted the accountability shortcomings in the way the ACCC is structured and operates and proposes the appointment of an Inspector General of Competition – among other initiatives - to overcome these inadequacies.

Appendix 1:

TREATMENT OF JOINT VENTURES IN SECTIONS 4D AND 45A OF THE TRADE PRACTICES ACT 1974 (Cth)

Section 1

BACKGROUND

The purpose of this Appendix is to outline current concerns regarding the operation of sections 4D and 45A of the TPA as they apply to joint ventures and to make recommendations regarding how these concerns should be addressed.

Section 2

EXECUTIVE SUMMARY

Joint ventures play a critical role in Australian business. They are commonly employed as a business structure through which new products are developed or existing products are produced more efficiently. In this way joint ventures often generate pro-competitive effects.

In the financial services sector, a number of joint ventures have been established. These joint ventures have greatly enhanced the efficiency and quality of payment systems in Australia as well as other financial products and services, whilst allowing vigorous competition between the participants in those joint ventures in respect of the supply of other competitive services and products.

This Appendix makes recommendations regarding the ‘price fixing’ (section 45A) and ‘collective boycott’ (section 4D) provisions of the TPA. Both of these provisions are of particular significance to joint ventures.

The joint venture exemption to section 45A

The TPA recognises the potential benefits of joint ventures by providing an exemption from the price fixing provisions in section 45A of the TPA. The object of the joint venture exemption is to exclude joint venture pricing agreements, between parties who are otherwise competitors, from being deemed to have the purpose, effect or likely effect of substantially lessening competition (and, therefore, deemed to contravene section 45 of the TPA).

However, recent case studies in the financial services sector suggest that the joint venture exemption has failed to achieve its objective. As a result, the ABA **recommends** that the joint venture exemption be amended to return the focus of the exemption to its original objective of facilitating pro-competitive joint venture activity.

The ABA also **recommends** that the ACCC issue a binding guide on the ACCC's approach to regulating joint ventures under the TPA (including in relation to sections 45A and 4D).

The application of section 4D to joint ventures

Section 4D of the TPA defines an exclusionary provision (also known as a collective boycott) as an agreement between two or more parties, at least two of whom are competitive with each other and which has the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods and services from, a particular person or class of persons. A person that makes or gives effect to an exclusionary provision contravenes section 45 of the TPA.

In the recent decision of *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) ATPR 41-824 (***South Sydney v News***), section 4D was applied to joint venture activity in a way which highlighted the potential breadth of section 4D. *South Sydney v News* has created particular uncertainty regarding the circumstances in which joint venturers, who are also competitors, are entitled to limit the parties who may participate in their joint ventures.

As a result of these concerns, ABA **recommends** that there should be a 'joint venture exemption' to section 4D.

ABA submits that the joint venture exemption should operate in a similar manner to the joint venture exemption to section 45A. That is, joint venturers would be able to reach agreement about the membership of their joint ventures without the risk that they would contravene section 45, as a result of section 4D, **unless** it could be established that the purpose, effect or likely effect of such an agreement was to substantially lessen competition.

Further, either in addition to a joint venture exemption to section 4D or as an alternative, ABA recommends to the Dawson Review Committee that amendments be made to section 4D to bring it more closely into line with aspects of section 29 of the *Commerce Act 1986* (NZ). This would involve limiting the application of section 4D to agreements that excluded competitors. However, ABA recommends that rather than introducing a competition "defence" to section 4D, which would be consistent with the *Commerce Act 1986* (NZ), exclusionary provisions should be subject to a competition test.

Section 3

WHAT IS A JOINT VENTURE?

Joint ventures can take a range of different legal and commercial forms. There is no single definition of the term 'joint venture'. It is often used as a generic expression as a label for an association of a contractual nature between two or more parties for the purposes of conducting a particular commercial activity.

Joint ventures can be structured as a corporate entity that is legally separate from the parties that have established the joint venture. Alternatively, joint ventures can be structured less formally, as unincorporated joint ventures that do not have a separate legal identity.

The High Court has made the following observations in relation to unincorporated joint ventures:

> *The term "joint venture" is not a settled one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purpose of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill.: Mason, Brennan and Deane JJ in United Dominions Corporation Limited v Brian Pty Ltd (1985) 157 CLR 1, 10.*

Despite this judicial uncertainty about the precise nature of joint ventures, joint ventures have become increasingly common in Australian business, particularly in natural resources and more recently in financial services. The expansion in the use of joint ventures can be attributed to the advantages of the joint venture model which include the ability to share business and technical skills, resources, finances, costs and risk, and the ability to access markets. Often, joint ventures make the production of a new good or service possible or make the production of an existing good or service more efficient.

Further, in other business cultures, such as Japan, the joint venture model is commonly favoured as a means of developing flexible “business partnerships” across international borders. Given the significance of international joint ventures to the Australian economy (consider, for example, the North West Shelf Joint Venture Project), it is important that Australian laws facilitate such ventures.

However, joint ventures raise difficult competition law problems. On the one hand, joint ventures can create considerable benefits to their participants and to the community more generally. On the other, in order to achieve these benefits, it is often necessary for competitors to form joint ventures in which they must agree on issues such as the prices they will charge for goods or service produced by the joint venture and from whom the joint venture will acquire and supply goods and services.

Section 4

THREE KEY PROVISIONS - SECTIONS 4D, 45 AND 45A OF THE TPA[36]

Section 45 of the TPA establishes a general prohibition against making or giving effect to contracts, arrangements and understandings (***agreements***) that:

(a) contain an exclusionary provision; or

(b) have the purpose, effect or likely effect of substantially lessening competition.

Sections 4D and 45A of the TPA support the general prohibition in section 45 by defining ‘exclusionary provisions’ and deeming certain agreements regarding prices (and related matters, such as discounts) as having the purpose, effect or likely effect of substantially lessening competition.

Significantly, section 4D and section 45A establish *per se* contraventions of section 45. In other words, if an agreement falls within section 4D or section 45A it will contravene section 45. Critically, it is not necessary to establish that the agreement has the purpose, effect or likely effect of substantially lessening competition. From a legislative policy perspective, this approach is justified because ‘collective boycott’ and ‘price fixing’ agreements are presumed to have negative market effects. As a result, if the requirements of section 4D or section 45A are satisfied, it is considered unnecessary to examine the actual purpose or effect of the agreement.

Competitors that form joint ventures need to keep in mind section 4D and section 45A because such ventures necessarily require competitors to reach agreements about the creation and operation of the joint venture to which they are a party. Moreover, given the *per se* nature of these provisions, competitors who form joint ventures must be particularly vigilant about the way in which they interact.

Despite the fact that joint ventures between competitors are often pro-competitive, section 4D does not grant agreements between joint ventures any special treatment. On the other hand, section 45A recognises that agreements in relation to prices charged by joint ventures should not always be deemed to substantially lessen competition. This is achieved by the joint venture exemption to section 45A.

[36] Section 50 of the TPA is also highly relevant to joint venture arrangements as it prevents a corporation from acquiring shares in a body corporate (for example, shares an incorporated joint venture) or the assets of a person if the acquisition has the effect or is likely to have the effect of substantially lessening competition in a market. Further, section 45(7) provides that section 45 does not apply to agreements in so far as they are for the acquisition of shares in a body corporate or any assets of a person.

Section 5

JOINT VENTURE PRICING AGREEMENTS - SECTION 45A AND THE JOINT VENTURE EXEMPTION

The provisions of section 45A

Section 45A(1) of the TPA provides that agreements between competitors which have the purpose, effect or likely effect of fixing, controlling or maintaining the price for, or discount, allowance, rebate or credit in relation to, goods or services supplied by them, are deemed to have the purpose, effect or likely effect of substantially lessening competition.

As a result, an agreement to which section 45A(1) applies, contravenes section 45 of the TPA. However, where the joint venture exemption in section 45A(2) applies the agreement is not deemed to have this purpose, effect or likely effect and, thus, will not, by itself, contravene section 45. Of course, the agreement may, nonetheless, contravene section 45 if it can be established that it has the purpose, effect or likely effect of substantially lessening competition.

There are a number of alternative circumstances in which the statutory joint venture exemption will apply. Specifically, section 45A(2) provides as follows:

[The deeming provision in section 45A(1)] does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:

(a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

(b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate as mentioned in sub-paragraph 4J(a)(ii):

> *(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or*
>
> *(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:*
>
> > *(A) a person who is the owner of shares in the capital of the body corporate; or*

> *(B) a body corporate that is related to such a person: subsection 45A(2) of the TPA.*

Section 4J defines 'joint venture' as:

> *… an activity in trade or commerce:*
>
> *(i) carried on jointly by two or more persons, whether or not in partnership; or*
>
> *(ii) carried on by a body corporate formed by 2 or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate …*

Thus, whilst the definition of 'joint venture' in section 4J is broad and simple, the joint venture exemption to section 45A of the TPA is complicated and uses a number of concepts the scope of which has been the subject of debate. As a result, in practice, this has assisted the ACCC in arguing that the joint venture exemption does not apply even in cases where, from a policy perspective, the joint venture exemption should clearly apply. In this regard, it is relevant to note that there has been no authoritative Australian court consideration of the operation of section 45A(2) of the TPA and that it is likely that a decision on the operation of section 45A(2) would help to clarify its operation.

It is also relevant to note that the ACCC has the power to 'authorise' joint venture pricing agreements which might otherwise contravene section 45 of the TPA: see section 88 of the TPA. In determining whether to grant authorisation in relation to a joint venture, the ACCC must be satisfied that the agreement would, or would be likely to, result in a benefit to the public that would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the agreement was given effect to: see section 90 of the TPA. In this way the authorisation provisions of the TPA provide joint venturers with a means of obtaining protection from section 45 on the basis that the public benefits of the joint venture outweigh any anti-competitive effects.

The objectives of the joint venture exemption

The joint venture exemption was introduced into the TPA in recognition of the potential pro-competitive benefits of joint ventures and with the intention of avoiding competition laws which unduly restrict joint venture activity.

As a result of the potential pro-competitive benefits of joint ventures it was considered appropriate to exclude joint venture pricing decisions from being deemed to have the purpose, effect or likely effect of substantially lessening competition. It would then be possible for the Court in appropriate cases to determine whether a particular joint venture pricing agreement had the purpose, effect or likely effect of substantially lessening competition under section 45.

In proposing the introduction of the joint venture exemption, during his Second Reading Speech to the House of Representatives, the Minister, Mr John Howard, made the following statement:

> *The Bill recognises the special contribution of joint ventures to the economy of Australia. In particular, it recognises the joint decisions as to the marketing of the joint venture product – including pricing decisions – are often inseparable from the decision to establish the joint venture in the first place: page 3,531 of the Hansard of the House of Representatives on 8 December 1976.*

Similar sentiments were expressed in the Second Reading Speech to the Senate.[37]

The joint venture exemption was introduced as part of the package of reforms made to the TPA that followed the recommendations of the Trade Practices Act Review Committee that was chaired by Mr T B Swanson (the ***Swanson Committee***).

The principle that joint ventures can be pro-competitive was acknowledged by the Swanson Committee. In this regard the Swanson Committee's *Report to the Minister for Business and Consumer Affairs, August 1976* (the ***Swanson Report***) makes the following observations:

> *Many submissions received by the Committee urge that joint ventures, particularly those directed towards the development of natural resources, should be afforded special and favourable treatment under the Act in the national interest. We note that many joint venture agreements involve no restrictions or only minimal restrictions on competition.* ***Even where significant restrictions are present, the joint venture can be pro-competitive rather than anti-competitive. This may the case where, but for the joint venture, the activity would not be undertaken in the first place.***
> …
> *The treatment of joint ventures was one of the most difficult problems which the Committee considered. Obviously, the Committee would not wish the law to frustrate the formation of joint ventures which provide the ability to embark on a project of development which may desirable in the public interest and which would not otherwise be undertaken.: pages 25 and 26 of the Swanson Report (emphasis added).*

From a policy perspective, the critical issue is how should competition law strike a balance between the competing interests of facilitating pro-competitive joint ventures and prohibiting joint venture agreements that are designed as a cover for anti-competitive agreements. As the Swanson Committee noted:

> *… the question is how the legislation can differentiate such useful joint ventures from other joint-venture agreements which are, in substance, a substitute for agreements not to compete.: pages 25 and 26 of the Swanson Report.*

[37] See Senate Hansard, 1708-1712 (Trade Practices Amendment Bill 1977 Second Reading, Senator Durak)

In the following section the effectiveness of the joint venture exemption is assessed from the perspective of the quotation above and the ABA submits that the current form of the joint venture exemption and, in particular, its interpretation by the ACCC, has failed to clearly delineate between legitimate, pro-competitive joint ventures and anti-competitive agreements. Finally, in order to address this issue, the ABA has recommended an alternative to the current joint venture exemption.

Recent examples suggest that the operation and interpretation of the joint venture exemption is uncertain

In light of the statements made regarding natural resource joint ventures in the Swanson Report and the fact that the joint venture exemption was drafted over 20 years ago, it is likely that the focus of the drafters of the joint venture exemption was on joint ventures in the natural resources sector and other traditional sectors (such as manufacturing and engineering). Thus, whilst the highly prescriptive language used in section 45A(2) is difficult to apply in any context, it can be more readily understood in the context of natural resources joint ventures. This background also helps to explain why the application of section 45A(2) to payment system and other related financial services joint ventures has been the subject of debate. This is the case even though the legislative policy that justifies the joint venture exemption strongly supports the view that payment system and other related financial services joint ventures should fall within the joint venture exemption.

Two recent case studies involving joint ventures in the financial services sector have highlighted the difficulties in this area. The first of these is the ACCC's proceedings against the one of the banks in relation to the setting of credit card interchange fees (the ***Interchange Litigation***). The second is the ACCC's on-going investigation into BPAY.

Interchange Litigation

In the Interchange Litigation, the ACCC alleged that Visa's, MasterCard's and Bankcard's (the Schemes') interchange arrangements contravened section 45 of the TPA. In particular, the ACCC claimed that the interchange arrangements involved 'price fixing' and, as a result, were deemed to have the purpose, effect or likely effect of substantially lessening competition. The bank strongly denied the ACCC's allegations and, amongst other things, relied upon the joint venture exemption in section 45A(2) in doing so. This is discussed further in Chapter 8.

The Chairman of the Australian Competition and Consumer Commission (***ACCC***), Professor Allan Fels, indicated that the ACCC's view was that the joint venture exemption in section 45A(2) did not apply.[38] Indeed, Professor Fels was reported as giving the following response to the question of whether the joint venture exemption applied:

[38] See George Lekakis, 'ACCC Case of too strong to refuse: Fels', *Australian Financial Review* (8 December 2000) (attached).

> *"we've [the ACCC] considered it, and we think there's no substance to it and we're quite happy to argue that in court.*[39]

The matter did not proceed with the ACCC discontinuing proceedings. What is of concern however is the fact that the ACCC considered that there was 'no substance'[40] to the bank's position that the joint venture exemption applied highlights the joint venture exemption's failure to achieve the objective the Commonwealth Parliament of 1976 envisaged it would achieve.

ACCC's investigation into BPAY

More recently, the ACCC has indicated that it is investigating BPAY in relation to the setting of BPAY's Capture Reimbursement Fee (***CRF***).[41]

As is the case with interchange fees in the Schemes, the CRF plays an integral role in the efficient operation of BPAY and the creation of the BPAY service. Specifically, the CRF is used to reimburse members for certain costs they incur in capturing a bill payment from payer customers thereby facilitating a particular BPAY transaction.

The collaboration of the members of BPAY (who may otherwise be competitors in the supply of payment system services and other related financial products) to create the BPAY product is an excellent example of a 'pro-competitive' joint venture…where, but for the joint venture, the activity would not be undertaken in the first place'.[42] Thus, if the joint venture exemption in section 45A(2) does not apply to arrangements that are integral to the creation of the BPAY product, such as those regarding the CRF, it is difficult to envisage any circumstances in which the joint venture exemption would apply. In these circumstances, the fact that the ACCC is investigating BPAY's CRF arrangements under section 45A, reflects the joint venture exemption's failure to reach its legislative objective.

However, this is not to say that a particular provision should be necessary to the existence of the joint venture, or its activities, for the joint venture exemption to apply. In fact, the relevant inquiry should be whether a provision of a joint venture agreement facilitates and is for the purposes of a joint venture that does not have the effect or likely effect of substantially lessening competition. If this is the case, the joint venture parties should not be subject to the *per se* provisions of section 45A but instead any agreement between them should be assessed under section 45 on the basis of whether it has the purpose, effect or likely effect of substantially lessening competition.

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39 See George Lekakis, 'ACCC Case of too strong to refuse: Fels', *Australian Financial Review* (8 December 2000) (attached).

40 See Chapter 8 of this submission.

41 See Andrew Cornell, 'ACCC investigates BPay system', *Australian Financial Review* (16 May 2000).

42 Page 26 of the Swanson Report.

Summary

In each of the cases cited above, the parties involved in the proceedings and investigation commenced by the ACCC strongly maintain that the joint venture defence, as well as other legal defences, apply to their conduct. This is clearly at odds with the ACCC's public position on the application of the joint venture defence. This uncertainty is undesirable from a policy perspective, as it creates a disincentive for investment in joint ventures and leads to uncertainty in day-to-day decision-making in existing payment system and other related financial services joint ventures. It is also inconsistent with the objectives of the joint venture exemption and the recognition by Parliament of their "special contribution" to the economy of Australia.

Recommendation – an amended joint venture exemption in section 45A

In order to address the uncertainty in relation to views on the operation of the joint venture exemption it is recommended that section 45A(2) be amended as follows:

Subsection 45A](1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, to the extent that the provision facilitates and is for the purposes of a joint venture that does not have the effect or likely effect of substantially lessening competition.

For the purposes of this subsection, in order to determine whether a provision facilitates and is for the purposes of a joint venture that does not have the effect or likely effect of substantially lessening competition, the following must be taken into account:

(a) the extent to which the joint venture facilitates the production or supply of a new good or service or the more efficient production or supply of a good or service;

(b) whether the purpose of the joint venture is to facilitate the production or supply a new good or service or the more efficient production or supply of a good or service;

(c) the extent to which the joint venture is non-exclusive, in that parties to the joint venture are likely to continue to compete independently outside the joint venture ;

(d) the extent to which parties to the joint venture retain independent control of assets necessary to compete;

(e) the nature and extent of the joint venture parties' financial interests in the joint venture or in each other;

(f) the control of the joint venture's competitively significant decision making;

(g) the likelihood of anti-competitive information sharing about prices or other matters between the parties to the joint venture; and

(h) the duration of the joint venture.

For the purposes of this section, section 45(3) will continue to apply to define “competition”.

This recommendation draws on the United States’ approach to assessing the competitive effect of joint ventures for the purposes of section 1 of the *Sherman Act 1890* (US). Section 1 of the *Sherman Act 1890* (US) provides that:

> *Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal.*

In this way, price fixing is also illegal *per se* in the United States.

The difficulty with section 1 of the *Sherman Act* is that if it was applied literally every regulation of trade would be captured as every regulation of trade restrains in some way. In response to this difficulty, the United States Courts have developed the ‘rule of reason’. Under the rule of reason , the Court considers ‘whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.’[43]

In considering the application of section 1 of the *Sherman Act* to joint venture activity, the United States Courts have sought to determine whether a restraint that might be caught by section 1 is necessary to achieve a pro-competitive result. If this is the case the rule of reason analysis is then applied to determine whether the restraint under consideration contravenes section 1. The United States Courts’ consideration of joint ventures in this context indicates that pro-competitive joint ventures are defined by the partial integration of activities by the joint venturers in order to either create a new product or service or to produce one more efficiently.

In April 2000, the United States Department of Justice and the Federal Trade Commission issued a report titled ‘Antitrust Guidelines for Collaborations Among Competitors’ (the ***DOJ Report***). The DOJ Report was issued to provide guidance to business people regarding when antitrust issues would arise in competitor collaborations. The United States Department of Justice and the Federal Trade Commission recognised that:

> *In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms towards complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts and lowering production and other costs: page 1 of the DOJ Report.*

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[43] *National Bank of Canada v Interbank Card Association* 507 F Supp 1113, 1122 (1980) (quoting *Chicago Board of Trade v United States* 246 US 231, 238 S Ct 242, 243, 62 L. ED 683 (1918))

The factors (a) through to (d) of ABA's proposed joint venture exemption are based on the 6 factors used by the United States Department of Justice (***DOJ***) and the Federal Trade Commission (***FTC***) in assessing whether the participants in a collaboration have the ability and incentive to compete independent of each other.[44]

The advantage of ABA's recommendation is that it would return the focus of the joint venture exemption to the pro-competitive conduct that it is intended to protect from the deeming provision in section 45A. It would also provide joint venturers and their advisors with a clear set of criteria for assessing when the joint venture exemption applies.

Recommendation – ACCC to issue a guide on the treatment of joint ventures under the TPA

The ABA also recommends that the ACCC issue a guide on the treatment of joint ventures under the TPA (including in relation to section 45) in order to help bring certainty to this area. This could be a requirement under the TPA, similar to that imposed on the ACCC by section 75AV of the TPA in relation to the ACCC's Goods & Services Tax responsibilities.

The DOJ Report could provide a model of the way in which a guide could assist joint ventures to understand their obligations under the TPA.

Section 6

EXCLUSIONARY PROVISIONS - SECTION 4D

Section 4D

As noted above, section 45 prohibits 'exclusionary provisions' (or collective boycotts).[45] Specifically, section 45(2) of the TPA also provides that:

A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding if:

  (i) the proposed contract, arrangement or understanding contains an exclusionary provision …

Section 4D defines the term 'exclusionary provision' for the purposes of section 45.

The section 4D definition establishes that an exclusionary provision is an agreement between two or more parties, at least two of whom are competitive with each other and which has the purpose of preventing,

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[44] United States Department of Justice (***DOJ***) and the Federal Trade Commission (***FTC***), 'A*ntitrust Guidelines for Collaborations Among Competitors*' (April 2000), page 19 .

[45] Although the TPA uses the term 'exclusionary provision' such agreements are commonly called 'collective boycotts'.

restricting or limiting the supply of goods or services to, or the acquisition of goods and services from, a particular person or class of persons.

The operation of section 4D to joint ventures between competitors

It has traditionally been considered that joint venture agreements between competitors that include provisions dealing with restrictions on the membership of the joint venture would not be caught by section 4D provided such provisions only incidentally had the effect of restricting access to the joint venture by third parties.[46] The basis for this conclusion was that in agreeing to these provisions the competitors would not have the purpose of targeting particular third parties.

As a result of this analysis (and for a number of other reasons), it was considered that the membership criteria of financial services joint ventures, such as the Schemes and BPAY, did not constitute 'exclusionary provisions'. Specifically, the membership criteria were not exclusionary provisions because they did not have the purpose of targeting for exclusion particular third parties or a particular class of third parties. Instead the membership criteria had the purpose of ensuring the financial security of the relevant joint venture.

South Sydney v News

However, in the recent New South Wales Court of Appeal decision, *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) ATPR 41-824 (***South Sydney v News***), section 4D was applied to joint venture activity in a way which highlighted the potential breadth of section 4D and created considerable uncertainty regarding the circumstances in which joint venture activity falls within section 4D.[47]

South Sydney v News arose out of a decision by the Australian Rugby League (***ARL***) and News Limited (***News***) to form a joint venture, National Rugby League (***NRL***), to run a unified national rugby league competition. Fundamental to the new competition was the condition that by the year 2000 it would be reduced to one with 14 teams (the ***"14 team term"***). The South Sydney District Rugby League Football Club Ltd (***Souths***) brought the proceedings following its exclusion from the national rugby league competition for the year 2000. Souths successfully claimed that it was unlawful for the parties to the NRL joint venture to make or give effect to the agreement for a "14 team term" in 2000 as this term was an exclusionary provision within the meaning of sections 4D and 45 of the TPA.

From a joint venture perspective, the most disturbing aspect of the decision in *South Sydney v News* was Justice Merkel's analysis of the meaning of 'purpose' in section 4D.[48] Justice Merkel, distinguished the 'ultimate purpose' of the '14 team term', that of achieving a sustainable national

[46] See for example S G Corones, *Competition Law in Australia* (2nd Ed, 1999), page 193.

[47] News Limited has been granted leave to appeal *South Sydney v News* to the High Court. The appeal is set down to be heard by the High Court in August 2002 and was brought forward, presumably to coordinate with the Dawson Review.

[48] Each judge gave separate judgments in *South Sydney v News*.

competition, from its ‘immediate purpose’ of excluding clubs in excess of the 14 teams selected. His Honour held that this ‘immediate purpose’ was proscribed. In his Honour’s view it was not relevant that there was no other way to reduce the competition to 14 teams; and that any public benefit which might attach to this goal is only relevant to an authorisation application.

The distinction made by Justice Merkel between ‘immediate’ and ‘ultimate’ purpose is not contained in the TPA: rather it recognises that a provision of an agreement may have more than one substantial purpose and that it is enough that one of these purposes is proscribed.

The potential application of Justice Merkel’s analysis to joint ventures, including joint ventures in the financial services sector, is that any joint venture containing a provision the ‘immediate’ or the ‘ultimate’ purpose of which is capable of being seen as a proscribed purpose may be at risk under section 4D. Further, this could be the case even if the ultimate purpose of the provision is quite legitimate.

For example, it might be argued that, even if the ultimate purpose of the Schemes’ membership criteria is to protect the financial security of each Scheme, the membership criteria also have the immediate purpose of excluding a particular class of persons. ABA considers that there are strong legal arguments that could be successfully made in response to such an allegation. However, Justice Merkel’s analysis has created uncertainty regarding the circumstances in which joint venturers, who are also competitors, are entitled to limit the parties who may participate in their joint ventures.

The current exposure of joint ventures in relation to section 4D is undesirable from a policy perspective as it creates a disincentive for competitors to enter into joint ventures. This is significant because of the widely acknowledged benefits joint ventures, including those between competitors, can create.

It is also disturbing that section 4D may now be used by opportunistic third parties to force their way into joint ventures. From a policy perspective, it is inappropriate that section 4D may now be used to facilitate ‘free riding’ by third parties at the expense of joint venturers who have taken the risks associated with developing a joint venture. Parties should not ordinarily be prevented from determining with whom they wish to enter into joint ventures.

Recommendations

As a result of these concerns, ABA proposes to the Dawson Review Committee the following amendments to section 4D (and/or section 45) of the TPA.

(1) A joint venture exemption to section 4D

The ABA recommends that there be a joint venture exemption to section 4D that is similar to the joint venture exemption to section 45A. Such an exemption, would allow joint venturers to reach agreement about the membership of the joint venture or about to whom the joint venture supplies goods or service without the risk that they would contravene section 45(2), as a result of section 4D, **unless** it could be established that the purpose, effect or likely effect of such an agreement was to substantially lessen competition.

Critics of a joint venture exemption to section 4D might argue that the authorisation process in Part VII of the TPA provides an appropriate means of protection to joint venturers. However, as has been articulated in ABA's draft submission to the Dawson Review Committee, the authorisation process has significant limitations in practice. As a result, given the pro-competitive benefits of many joint ventures, ABA considers that it would be appropriate to only proscribe agreements between joint venturers, who are also competitors, regarding the membership of their joint ventures if they have the purpose, effect or likely effect of substantially lessening competition. The inclusion of an exemption for joint ventures would also be consistent with the United States treatment of this issue, where the rule of reason analysis is generally applied to assess the competitive impact of the exclusion of a third party from a joint venture.[49]

(2) Amendments based on section 29 of the Commerce Act 1986 (NZ)

Section 29 of the *Commerce Act 1986* (NZ) (***Commerce Act***) defines and prohibits 'exclusionary provisions' and is based on section 4D of the TPA. However, section 29 of the Commerce Act is more effective than section 4D at addressing the competition problem with which legislation prohibiting exclusionary provisions should be concerned.

There are two key differences between section 29 of the Commerce Act and section 4D of the TPA. In particular:

(a) the definition of an exclusionary provision in the Commerce Act includes an additional element, which is not included in section 4D as follows:

> *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 in relation to the supply or acquisition of those goods or services.*[50]

This means that the particular person or class of persons to which the exclusionary provision relates must also be in competition with the parties who enter into the prohibited agreement. Unlike section 4D, it is not sufficient for an exclusionary provision to relate to any person or class of persons; and

(b) section 29(1A) of the Commerce Act provides that:

> *A provision of a contract, an arrangement, or an understanding that would, but for this subsection, be an exclusionary provision under*

[49] See for example S G Corones, *Competition Law in Australia* (2nd Ed, 1999), page 194 and, in the context of credit cards, *National Bank of Canada v Interbank Card Association* 507 F Supp 1113, 1122.

[50] See section 29(1)(c) of the Commerce Act.

subsection (1) is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.

This means that the parties to an agreement which contains an exclusionary provision are not liable for contravening the Commerce Act if they can prove that the provision does not have the purpose, effect or likely effect of substantially lessening competition.

ABA advocates amendments to section 4D to bring it into line with section 29 of the Commerce Act in addition to a joint venture exemption to section 4D.

However, in ABA's submission, it is not appropriate for the parties to the contract, arrangement or understanding to bear the onus of proving that an exclusionary provision does not have the purpose or does not have or is not likely to have the effect of substantially lessening competition. Instead, this test should form one of the elements of the contravention, in which case the complainant would have the onus of proving the purpose, effect or likely effect of substantial lessening of competition. This is consistent with the recommendations of the Swanson Committee, to the effect that a collective boycott "should be prohibited if it has a substantial adverse effect on competition between the parties to the agreement or any of them or competition between those parties or any of them and other persons … not by reference to a market". : .[51]

If these amendments were made to section 4D, even if the membership rules of joint ventures such as those operated by the Schemes were caught by the definition of exclusionary provision, the Schemes and BPAY would be able to argue that section 4D did not apply because (consistently with the ACCC's allegations) the relevant rules did not have the purpose, effect or likely effect of substantially lessening competition.

[51] See page 33 of the Swanson Report.

Appendix 2

CEASE AND DESIST

The ACCC has indicated that it needs power to issue "cease and desist orders" as an additional mechanism for dealing with alleged abuses of market power.[52]

ABA's view

The ACCC has called for the introduction of cease and desist orders in order to overcome the perceived limits of section 46.[53] Recent case law indicates that the ACCC and private parties have been able to successfully bring actions under section 46.[54] Further, as the ACCC has acknowledged, these cases have broadened section 46.[55] The ACCC has also called for a 'cease and desist power similar to that in other countries'[56].

However, this power is not available in relation to abuses of market power in comparable countries such as the United States, the country upon which many of Australia's competition laws are based.[57] Finally, in its 1994 inquiry into compliance with the TPA, the Australian Law Reform Commission (***ALRC***) concluded that cease and desist orders were not warranted.

ABA also opposes the introduction of cease and desist orders for the following reasons:

1. cease and desist orders are unnecessary because of the availability of existing enforcement and compliance mechanisms;

2. cease and desist orders would be unjust and inappropriate because of the impact they would have on the reputations of recipients before a breach of the TPA has been established; and

3. cease and desist orders may be unconstitutional.

First, cease and desist powers are unnecessary. The ACCC currently has a range of appropriate enforcement and compliance tools to respond to alleged abuses of market power. These include pecuniary penalties, injunctions and section 87B undertakings.

[52] ACCC Submission to the Dawson Review, July 2002.

[53] See for example, Dialogue between Senator Cooney and Professor Allan Fels during the ACCC appearance before the Senate Constitutional and Legal References Committee on 17 April 2002.

[54] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13; *ACCC v Boral Ltd* [2001] FCA 30.

[55] 'Competing Interests: is there balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000' Report of the House of Representatives and the Standing Committee on Economics, Finance and Public Administration September 2001, page 50

[56] Speech by Allan Fels 'ACCC Airports and Aviation: Regulatory Competition Issues' 12 November 2001 (http://www.accc.gov.au/speeches/2001/pdf/Fels_Airports_Aviation_12_11_01.pdf, 18).

[57] In the US, the Federal Trade Commission (***FTC***) has the power to issue cease and desist orders in relation to its consumer protection legislation and only certain parts of its anti-trust legislation. The FTC may issue cease and desist orders in relation to sections 13 (certain forms of price discrimination), 14 (sales or agreement not to use goods of competitor) and 18 (corporate acquisition that substantially lessen competition) of the Clayton Act. There is no power to issue cease and desist orders for alleged monopolisation offences under the Sherman Act.

Critically, the current blend of enforcement and compliance tools gives the ACCC the necessary powers to achieve direct compliance with the TPA as well as quick, inexpensive and informal means of enforcement. As a result, the introduction of cease and desist powers would create regulation above the minimum level necessary to achieve effective compliance and enforcement of the TPA.

For example, if the ACCC considered that a party had contravened section 46 it could seek an urgent interim injunction from the Federal Court to address the conduct. The ACCC could also use section 87B undertakings to address ongoing compliance as part of its response to the same investigation.

Interim injunctions can be obtained on very short notice by the ACCC. This has been acknowledged by the TPC (in its submission to the ALRC) and is apparent from the number of cases in which the TPC/ACCC has been able to obtain injunctions within very short timeframes.[58] In some cases, the ACCC has been able to obtain ex-parte injunctions within 26 hours of becoming aware of the conduct allegedly in contravention of the TPA.[59]

The ability of the Court to respond to the urgency of injunction applications under the TPA is further demonstrated by the Foodland case in which the TPC obtained an interim injunction in relation to alleged contraventions of section 50 of the TPA.[60]

In that case, Justice Beaumont directed that the final hearing be fixed to commence within two weeks so as to bring about a final determination of the matter within two months. Moreover, an appeal from the decision of Justice Beaumont was heard, and judgment delivered, within a week of the filing of the notice of motion to appeal.

In July 2001, the ACCC was able to obtain an urgent interim injunction within 24 hours of instituting proceedings against Telstra in relation to representations it made to former customers of One.Tel.

It is also relevant to note that the Courts are generally more willing to grant an interim or final injunction in TPA cases given the element of public interest involved.[61] In addition, the ACCC is not required to give an undertaking as to damages when it applies for an interim injunction.[62] This makes seeking an interim injunction an attractive enforcement mechanism for the ACCC.

58 'Compliance with the Trade Practices Act 1974', ALRC Report 68 1994 (***ALRC Report 68***), paragraph 11.14. For an example of case in which an interlocutory injunction was obtained in relation to section 46 see *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) ATPR 40-081.

59 TPC Submission to the ALRC DP56 page 78.

60 *TPC v Rank Commercial Limited & Ors* (1994) ATPR 41-331.

61 See for example the comments of Justice von Doussa in *Glev Pty Ltd v Kentucky Fried Chicken Pty Ltd* (1994) ATPR 41-299, where his Honour held that the Court will be reluctant to withhold relief given the public interest nature of applications for injunctions under the TPA.

62 See section 80(6) of the TPA.

It is very unlikely that the ACCC would be able to investigate and impose a cease and desist order within the short timeframes in which it is able to obtain interim injunctions. As pointed out by the ALRC in 1994, the requirements of natural justice dictate that the ACCC would have to give a party the opportunity to appear before the ACCC to make submissions.[63]

The time taken to issue cease and desist orders, therefore, may actually be longer than the time it takes to obtain an urgent injunction from the Federal Court.[64]

The ACCC can also negotiate directly with a party and seek court enforceable undertakings under section 87B. Although the ACCC cannot impose a section 87B undertaking, the ACCC is in a powerful negotiating position because of the very large penalties that may follow if the ACCC can prove a breach. Parties, therefore, are generally open to giving section 87B undertakings. The flexibility of section 87B undertakings has been demonstrated by the variety of undertakings that the ACCC has agreed with various companies in the past.

For a number of these reasons, the ALRC considered cease and orders were unnecessary when it last considered the issue in 1994.[65] Similarly, the Hilmer Report relied on the availability of urgent interim injunctions to reach the same conclusion.[66]

Secondly, cease and desist orders are an inappropriate and unjust means of enforcing the TPA. In contrast to interim injunctions, cease and desist orders would be issued by the ACCC rather than the Federal Court. The involvement of the Court provides critical judicial oversight to the enforcement of the TPA, which ensures that regulatory power is not exercised in an arbitrary and capricious fashion.

A cease and desist order would also have a deleterious effect on a business's reputation before that business has been proven to have contravened the TPA. The mere fact that an order has been issued would have ramifications in the market place.

The ACCC's power to issue competition notices in telecommunications cases under Part XIB of the TPA is analogous to the proposed power to issue cease and desist orders.[67] Competition notices can be issued when the ACCC has 'reason to believe' that a party is engaging in anti-competitive conduct.

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63 ALRC Report 68, paragraph 11.14. For example, in the United States, a cease and desist order can not be issued until a hearing has been held giving the party an opportunity to show cause why the FTC should not issue a cease and desist order.

64 ALRC Report 68, paragraph 11.15.

65 ALRC Report 68, paragraph 11.15.

66 Report by the Independent Committee of Inquiry (the ***Hilmer Report***), 'National Competition Policy', August 1993, page 168.

67 ABA notes that competition notices were introduced because of the special circumstances of the telecommunications market (the existence of a formerly government owned monopoly) and should not be used as a model for cease and desist orders in other markets.

When Part XIB was introduced in 1997, it effectively lowered the evidentiary threshold to allow the ACCC to act more quickly in a less administratively burdensome manner. The lower evidentiary threshold, however, has led to less rigorous decisions on the part of the ACCC. Telstra has described the current provisions of Part XIB as an 'opened ended licence for abuse, with the ACCC being only too willing to rely on the discretion they provide'.[68]

Since the introduction of Part XIB in 1997, 9 competition notices have been issued in relation to three matters against Telstra. None of the cases led to a court finding that Telstra had acted in breach of the TPA and Telstra maintained it had not behaved anti-competitively. In spite of this, the issuing of the competition notices resulted in Telstra making very costly changes to its business conduct.

In ABA's view, if cease and desist orders were introduced based on the model in Part XIB, the risk that the ACCC will take action where it is not warranted is high. The costs to the ACCC of issuing an order would be small given the minimal evidence that would be required to support the order.

If it is subsequently found that a party is not acting in contravention of the TPA, the potential (unjust) detriment to the party from the notice is very high. As demonstrated by Telstra's experience in relation to competition notices, a party may suffer not only through damage to its reputation but also due to a potential loss of profits. This loss would be compounded by the possibility that the party would have no recourse to seek compensation from the ACCC.

As noted above, the current process of seeking an interim injunction is a much more satisfactory method of enforcement given that the evidentiary threshold required will force the ACCC to be vigilant in preparing its case against a party. Moreover, the proposal that the onus of proof be reversed (such that a recipient of a cease and desist order is required to prove that it has not contravened the TPA) is likely to lead to unjust outcomes in many cases. In this regard, the Hilmer Report noted that reversing the onus of proof 'could be particularly harsh where complex economic matters are involved, as is often the case in competition cases.'[69]

Thirdly, ABA notes that cease and desist powers may be unconstitutional. It is well established that only courts may exercise the judicial power of the Commonwealth.[70] Issuing a cease and desist order would appear to be equivalent to an exercise of judicial power by the ACCC. Therefore, it could be argued that giving the ACCC the power to issue cease and desist orders, would invest the ACCC with part of the judicial power of the Commonwealth and be unconstitutional.

[68] Cited in Productivity Commission Report on Telecommunications Competition Regulation, September 2001 page 180.

[69] Hilmer Report, page 168.

[70] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 demonstrates the entrenchment of the separation of powers in doctrine in our constitution. In that case, the High Court unanimously held that certain sections of the Racial Discrimination Act 1975 (Cth) were invalid because they had the effect of conferring judicial power on the Human Rights and Equal Opportunity Commission. Mason CJ, Brennan and Toohey JJ held (at 260) that 'an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination'.

For these reasons, ABA opposes the introduction of cease and desist orders.

Recommendation

- ACCC should not be given the power to issue “cease and desist” notices.

Appendix 3

CURRENT ACCOUNTABILITY MECHANISMS THAT APPLY TO THE ACCC

General

This appendix outlines the current accountability mechanisms that apply to the ACCC and the grounds upon which the ABA considers those mechanisms to be insufficient. The appendix covers merits review by the ACT, judicial review at common law and pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) and other forms of review, such as by Parliament and the Commonwealth Ombudsman.

Accountability and merits review –review by the ACT

There is no common law right to a ‘merits’ review of an ACCC ‘decision’ to exercise a power or discretion. Furthermore, the ‘decisions’ of the ACCC are not subject to merits review by the Administrative Appeals Tribunal. The only mechanism for review of a ‘decision’ of the ACCC ‘on its merits’ is the appeal mechanism to the ACT.

Review by the ACT is only available for certain ‘decisions’ made by the ACCC, being:

- ‘decisions’ on whether or not to grant an authorisation under Part VII;
- ‘decisions’ on whether or not to revoke an authorisation or notification under Part VII; and
- arbitration ‘decisions’ in cases involving access to essential facilities under Part IIIA.

Many other ‘decisions’ are made by the ACCC in the exercise of its powers and functions under the TPA. Although they are not subject to review by the ACT, they may still impact significantly on the rights and well-being of parties that are affected by the decision.

These ‘decisions’ include those that are not reviewable under the TPA but may be reviewable under the ADJR Act, such as the decision to accept enforceable undertakings under section 87B of the TPA (although note the doubts raised by *Virgin Blue Airlines Pty Ltd v ACCC* (2001) 186 ALR 377 (**Virgin Blue**) mentioned below) as well as the following ‘decisions’ which are not reviewable either under the TPA or the ADJR Act:

- the decision to bring enforcement proceedings (or other action) with respect to an alleged contravention of the TPA;
- the decision to take no action with respect to a complaint;
- the decision to issue a section 155 notice; and

- the decision to publish allegations and/or other potentially damaging information about a particular party/industry.

Accountability and Judicial Review

One important mechanism for ensuring that government agencies are accountable in the exercise of their statutory powers is judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (***ADJR Act***), or at common law.

The ADJR Act permits judicial review of a decision to which the ADJR Act applies (section 5 of the ADJR Act), conduct engaged in for the purposes of making such a decision (section 6) and the failure to make a decision where there is a duty to make a decision.

An act or omission which is neither a decision, nor conduct engaged in for the purposes of making a decision, nor a failure to make a decision within the terms of the ADJR Act is not susceptible to review under that Act.

There are three factors which need to be fulfilled before any ACCC actions will be reviewable under the ADJR Act. There must be:

- a decision;
- of an administrative character;
- made under an enactment.

The key hurdle faced by an aggrieved party seeking judicial review of the actions of the ACCC is that many of the ACCC's actions are informal, in the sense that they are not required by the TPA to be made.

For example, in the Electricity Supply case referred to above[71] Justice Finn, emphasised that:

- a 'decision' must be final or operative and determinative (at least in a practical sense) of the issue of fact falling for consideration;
- a decision is 'made under' an enactment if it is a decision which the statute requires or authorises, or one for which provision is made by or under a statute.
- a decision meets that test only if it is one for the making of which the relevant statute either expressly or impliedly provides and one to which the statute gives legal force or effect. The decision in the Electricity Supply case also illustrates the difficulty in seeking review of other ACCC actions undertaken in purported fulfilment of their functions under the TPA, but not specifically required by it (such as issuing media releases and other public statements).

[71] ATPR ¶41-838, 43,359 - 43,360

In *Giraffe World Australia Pty Ltd v ACCC* (1999) ATPR ¶41-669, the Federal Court decided that:

> *the ACCC's decision to publish words in a media release was not 'given force or effect' by section 28(1) of the [TPA]; and the decision to issue a media release was 'not provided for at all in section 28(1) but was a decision taken in the exercise of an aspect of the ACCC's capacity as a legal person in the course of the performance of its functions.'*

In the Electricity Supply case, Justice Finn refused the application of ESAA for review of the decision of the ACCC to publish its view on the operation of certain provisions of the TPA in relation to the electricity industry.

However, Justice Finn strongly criticised the ACCC's handling of the matter from a public administration point of view (see above).

Doubts have also been raised about the availability of judicial review of a decision of the ACCC to accept (or reject) court enforceable undertakings offered under section 87B, particularly for affected third parties to a proposed merger: see for example *Virgin Blue*.

In *Virgin Blue* Justice Gyles noted (without deciding the issue) that it may be against the policy of the TPA to allow an aggrieved third party 'standing' to unsettle a proposed merger through judicial review.

Furthermore, he noted that a third party may not be entitled to obtain 'reasons for a decision' pursuant to section 13 of the ADJR Act, as the decision may come within the exception to section 13 applications for decisions 'in connection with the institution and conduct of proceedings in a civil court'.

Similar arguments could obviously be raised against an application for reasons for a decision to bring proceedings against a company, or to take no action in relation to a complaint or proposed merger.

If an affected party is unable to obtain reasons for a decision, even if such a decision was a decision to which the ADJR Act applied in other respects, it would be difficult to challenge the lawfulness of that decision.

The need for further strong measures of accountability in the use of these powers is most apparent when consideration is given to the availability of judicial review of the exercise of section 155 powers.

The only condition precedent to the exercise of the section 155 power by the ACCC is that the ACCC must have 'reason to believe' that the person is capable of providing information relating to a matter that constitutes or may constitute a contravention of the TPA.

The difficulty with challenging a notice on the basis of a lack of the requisite reason to believe was identified by Smithers J in *Melbourne Home of Ford Pty Limited v TPC* (1979) ATPR ¶40-107.

In the absence of satisfactory evidence that the ACCC does not have the relevant reason to believe, the applicants are faced with the prima facie validity of the notice and a Court will be very reluctant to order discovery of the ACCC's reason to believe for the purposes of a speculative inquiry.

Importantly, it is not possible to obtain reasons for a decision to issue a section 155 notice pursuant to section 13 of the ADJR Act as such a decision comes within the exception to the operation of this provision for 'decisions under enactments requiring the production of documents' (see *Ricegrowers Co-operative Mills Ltd v Bannerman* (1981) 53 FLR 408).

For these reasons, the exercise of section 155 powers are seldom challenged in the courts and, indeed, only a very small number of successful challenges have ever been brought. In the absence of judicial review in the use of section 155 powers, it is important for there to be some other mechanism of accountability to ensure that the ACCC uses these powers appropriately.

Annual Report Requirements

Section 171 of the TPA sets out the requirement for the ACCC, within 60 days after each year ending on 30 June, to furnish to the Treasurer, for presentation to the Parliament, a report with respect to its operations in that year.

This provision was amended by the *Trade Practices Amendment Act (No 1) 2001* (Cth) which came into effect as at 26 July 2001, to include subsection(3), which requires the ACCC to report on an expanded list of factors relating to the exercise of the ACCC's powers pursuant to section 155 of the TPA.

The additional reporting requirements, as explained in the Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000, are intended to ensure that the ACCC is accountable for its actions and there is greater transparency to the operation and enforcement of the TPA.

The Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 asserted that '[t]he inclusion of an expanded list which the ACCC must report on seeks to ensure the Commission is accountable for its actions and provide greater transparency to the operation and enforcement of the TPA'.

In the Appendices to its 2000-2001 Annual Report, the ACCC set out two tables in purported compliance with these requirements (at pages 180-181). If this is how the ACCC intends to comply with the requirements of section 171(3) in relation to notices served or authorisations given under section 155 then, in the ABA's view, the new provisions do not achieve their goal of greater 'accountability' and 'transparency'.

In accordance with Standing Order 324 of the House of Representatives Standing and Sessional Orders – 'Chapter XXIV – Standing Committees', annual reports of government departments and authorities (including the ACCC) tabled in the House, can be referred to the relevant standing committee (being, in this case, the Standing Committee on Economics, Finance and Public Administration) for any inquiry the committee ***may*** wish to make. Review of the ACCC's Annual Report by the Standing Committee is therefore discretionary.

According to the website of the Standing Committee, the ACCC's Annual Report has only been reviewed by it three times since 1976 (the 1995-96 Annual Report, the 1996-97 Annual Report, and the 1999-2000 Annual Report).

Section 29 of the TPA

Aside from a review of the Annual Report, the ACCC may also be held accountable for the performance of its functions by Parliament or a parliamentary committee under section 29(3) of the TPA, which provides:

If either House of the Parliament or a Committee of either House, or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information concerning the performance of the functions of the Commission under this Act, the Commission shall comply with the requirement.

However, this power has been used by the Australian Senate (at least in recent times) to attempt to initiate inquiries by the ACCC into various industries that the ACCC may not otherwise have chosen to investigate. Inquiries have been initiated by the Senate under section 29 into the following industries:

- the private health insurance industry (25 March 1999);
- the grocery industry (30 June 2001); and
- the tobacco industry (24 September 2001).

The ABA is not aware that this power has been used for any other purpose since its enactment as part of the original Trade Practices Bill in 1974. Therefore it cannot be argued to be a true accountability mechanism. In any event, it does not establish a regular review procedure for the performance of the ACCC.

Section 29(1), on the other hand, is a mechanism whereby the relevant Minister may give the Commission directions connected with the performance of its functions or the exercise of its powers under this Act.

This provision enables the relevant Minister to exercise limited control over the ACCC. This provision has only been utilised once, in 1998, by the Minister for Customs and Consumer Affairs, in, amongst other things, directing the ACCC to bring a test case under section 51AC of the TPA.

Importantly, section 29(1A) provides that the Minister must not give directions relating to Part IV or Part VII of the TPA.

Commonwealth Ombudsman

Concerns relating to the ACCC can also be raised with the Commonwealth Ombudsman (the ***Ombudsman***). The primary role of the Ombudsman is to investigate complaints concerning defective administration by government. Investigations are conducted with a view to resolving disputes between aggrieved parties and government.

The Ombudsman can investigate complaints about the ACCC's actions and 'decisions' to see if they are wrong, unjust, unlawful, discriminatory or unfair. However, the Ombudsman is not obliged to investigate complaints. Its authority to investigate is merely discretionary.

Even if the Ombudsman does conduct an investigation, the complainant generally has no right to participate in the hearings that the Ombudsman may conduct.

Furthermore, if the investigation ultimately results in a report, then, depending on the circumstances, the complainant may not have any right to a copy of the report prepared by the Ombudsman.

Another unsatisfactory aspect of the role of the Ombudsman is the fact that details of investigations and any recommendations made are difficult to obtain. Although the Ombudsman is able to draw media attention to the ACCC if the ACCC fails to accept recommendations made by the Ombudsman as a result of an investigation, information relating to complaints made to the Ombudsman are not easily accessible.

The Annual Report of the Ombudsman contains statistics of complaints made over the financial year. However, the ACCC is generally considered to form part of the category of departments and authorities that may be reviewed by the Ombudsman as 'Other'.

Therefore, the focus of the reports and publicity of the Ombudsman is less likely to draw attention to complaints made against the ACCC unless there is some particular reason to do so.

Restricted powers of the Ombudsman

Although for the purposes of conducting an investigation the Ombudsman has power to require people to produce documents, furnish information, attend to answer questions and enter premises to inspect documents, the powers of the Ombudsman to affect the outcome of the investigation are limited.

The Ombudsman has no determinative powers. He or she cannot set aside 'decisions', require action to be taken or not taken or substitute his or her decision for those of the ACCC.

The Ombudsman can only recommend that certain things occur and if the ACCC refuses or if the Ombudsman considers that the ACCC's action in response to the report is inadequate or inappropriate, the only avenue for the Ombudsman to take is to submit a report to the Prime Minister and Parliament outlining the concerns and to seek media attention.

The Ombudsman's investigation and recommendations in relation to the Australian Broadcasting Commission (**ABC**) illustrates how limited the Ombudsman's powers are. The Ombudsman acknowledged the limitation of its powers in that instance stating: 'I can only express regret at this stage that I have employed so much time in fruitless endeavours to obtain real rather than ostensible cooperation from the Board [the ABC].'

Limits of expertise

The Ombudsman has a general mandate to investigate complaints relating to a very broad range of activities undertaken by the Commonwealth. The Ombudsman does not have any particular expertise in trade practices law and its application.

Given the trend of the ACCC to test the boundaries of its powers of investigation and its ability pursuant to section 28 of the TPA to justify using media releases to cast suspicion over conduct of businesses or individuals alleged by the ACCC to be in breach of the laws (as illustrated in the Electricity Supply case and other instances set out below), it is the ABA's view that it is essential that there be a body in existence to maintain sufficient checks and balances on the ACCC's exercise of its powers.

Such a body should be given sufficient experience in trade practices regulation to ensure that the complexities are well understood and that complainants can be confident that their complaints will be properly addressed.

Although the subject matter is unrelated to the ACCC, an example of the limitations and difficulties of the Ombudsman's functions is demonstrated by a complaint made to the Ombudsman about the Australian Broadcasting Commission (the ***ABC***) reported in the Annual Report of the Ombudsman in 1983-1984.

In that case, the ABC virtually ignored the Ombudsman's recommendations. In the Ombudsman's view, as reported in the Annual Report for 1983-1984, the ABC rejected its recommendations upholding the substance of the Principal's complaints.

The only avenues for further action that could be taken by the Ombudsman were to present a report to the Prime Minister, present a report to Parliament and include the matter in its Annual Report for the following year.

The Ombudsman has recognised the limitations of the Ombudsman's powers. For example the Ombudsman stated in relation to a complaint made about the Australian Broadcasting Commission[72]

[72] Commonwealth Ombudsman Annual Report for 1983-1984