AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS

ABN 11 008 484 197

Professionalism in Directorship

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Submission

To

The Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974

19 July 2002

CONTENTS

1. Executive Summary

1.1 This submission is made by the Australian Institute of Company Directors ("AICD"). The emphasis of this submission is on aspects of relevance to the Committee's Inquiry as they affect AICD's members: directors of companies, both large and small.

1.2 AICD, as directed in the Terms of Reference, has principally focused on Part IV of the Trade Practices Act 1974 (Cth.) ("the Act") and the administration of the Act.

1.3 AICD's key recommendations are:

1.3.1 S.155 Notices should be issued by a Federal Magistrate and a Federal Magistrate should conduct oral examination.

1.3.2 Legal professional privilege should be preserved in relation to s.155.

1.3.3 A protocol should be developed for the ACCC's use of the Media and public comment.

1.3.4 Imprisonment should not be introduced as a penalty for breach of Part IV.

1.3.5 Consideration could be given to the possible introduction of disqualification orders for company officers who engage in serious cartel conduct.

1.3.6 Accountability and governance of the ACCC should be increased, possibly by a restructure on corporate lines, with clearly defined responsibilities.

1.3.7 The time limit for commencing action for breach of Part IV of the Act should not be extended to ten years.

1.3.8 The onus of proof in s.46 cases should not be reversed.

1.3.9 An "effects" test should not be imported into s.46.

1.3.10 A form of business judgment rule should be included in relation to alleged breaches of the Act.

1.4 In preparing this submission, AICD also has sought and been assisted by a survey of the views of its members.

1.5 AICD will be happy to further assist the Committee by expanding on this submission or providing such other information as may be requested.

1.6 AICD has no objection to this submission being made public.

2. Australian Institute of Company Directors

Australian Institute of Company Directors (AICD) is the peak organisation representing the interests of company directors in Australia. Current membership is over 16,600, drawn from large and small organisations, across all industries, and from private, public and the not-for-profit sectors. Membership is on an individual, as opposed to a corporate basis.

AICD is a federation of seven State divisions, each of which is represented on a National Council. Overall governance of the AICD is in the hands of its National Council which is comprised of the seven division Presidents, plus a National President, two National Vice-Presidents and a National Treasurer. AICD has several national policy committees, focusing on issues such as law, accounting and finance, sustainability, taxation and economics, and national education, along with task forces to handle matters such as corporate governance.

The key functions of AICD are:

- to promote excellence in director's performance through education and professional development;
- to initiate research and formulate policies that facilitate improved director performance;
- to represent the views and interests of directors to Government, regulatory bodies and the community;
- to provide timely, relevant and targeted information and support services to members and, where appropriate, Government and the community;
- to maintain a member's code of professional and ethical conduct;
- to uphold the free enterprise system;
- to develop strategic alliances with relevant organisations domestically and internationally to further the objectives of the AICD.

3. COMPETITION

3.1 The object of the Act is set out in s.2:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading **and** provision for consumer protection (emphasis added).

3.2 Despite its critical importance to Part IV of the Act, "competition" is not defined in the Act, except for the unhelpful note in s.4:

> **"Competition"** includes competition from imported goods …

3.3 However, the writings of academics (economists and lawyers) and judgments of courts have provided guidance on the meaning of competition.

3.4 AICD's concern is that, despite the clear terms of the Act's object, there appears to be considerable confusion about the purpose of the Act. In particular, in some circles, the view seems to have currency that Part IV of the Act is specifically intended "to protect consumers".[1] This impression is not dispelled, at times in pronouncements of the Australian Competition and Consumer Commission ("ACCC").[2] The confusion about the protections offered by Part IV, of course, does not apply, in general, to the Courts.[3]

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1 For example, the comments by Louise Sylvan, Chief Executive of the Australian Consumers' Association: "Mugged ACCC only helps big business", *Australian Financial Review*, 5 June 2002, p.63. Also, "Making markets add up" by Cameron Stewart, *The Weekend Australian*, 8-9 June 2002, p.21, quoting Joe Hockey, Small Business Minister: "Allan Fels is the Robin Hood of regulation. He is seen as the **great defender of consumers** and small business…." (emphasis added).

2 For example, ACCC Media Release MR114/02 of 9 May 2002: "*Trade Practices Act* Review 'Major Opportunity': ACCC:

> To a degree the Act contains compromises that were made with big business in an earlier era when governments were feeling their way and when the practical muscle of big business was greater. The Act's limitations particularly impact on consumers …

3 See the comments of the majority of the High Court (Gleeson CJ, Gummow, Hayne and Callinan JJ.) in the Melway appeal (*Melway Publishing Pty Ltd* v *Robert Hicks Pty Ltd* (2001) ATPR 41-805 @ p.42, 752):

> Section 46 aims to promote competition, not the private interests of particular persons or corporations.

Also see Lindgren J. in *Monroe Topple & Assoc.* v *The Institute of Chartered Accountants in Aust.* (2001) ATPR (Digest) 46-212 @ p.52, 352.

> It is not the object of s.46 to protect the private commercial interests of a competitor …

The High Court's statement was adopted by Hill J. in *ACCC* v *Universal Music Aust. Pty Ltd*. (2002) ATPR 41-855 @ p. 44, 686. He also said:

> The object of s.46 was said by the High Court in [*Queensland Wire*] to be to protect the interest of consumers and, by the same Court differently constituted in [*Melway*] to promote competition, the former policy being effected by the latter.

3.5 Other provisions of the Act, especially parts IVA and V, are directly intended to offer protection to consumers, even though in some respects, at least, they can be said to work against competition.

3.6 It is the clear legislative intent that Part IV of the Act is designed to protect competition, or the competitive process, rather than protect competitors. What is often ignored by certain commentators is the nature of the competitive process. Competitive behaviour inevitably will benefit some competitor(s) at the expense of some other competitor(s). The more efficient competitor seeks to increase its market share – which, almost inevitably, must come from other participants in that market.

3.7 It may be to the public benefit, and public confusion would be reduced, if consideration were given by the Committee to recommend dividing the ACCC into two constituent parts: a Competition Commission and a Consumer Commission.

4. ADMINISTRATION OF THE ACT

4.1 AICD supports the Act and its objectives although we have concerns about aspects of its administration.

SECTION 155

4.2 The ACCC has extremely wide powers, under s.155 of the Act, to investigate possible breaches of the Act by obtaining evidence, such as information and documents. This power was exercised no less than 278 times in 2000-2001 and 171 times in 1999-2000.[4]

4.3 Because of the serious penalties, which can follow a breach of the Act, investigations into alleged breaches plainly must be undertaken with the utmost propriety.

[4] *Annual Report* 1999-2000 p. 144, 2000-2001 p. 181.

4.4 In these circumstances, AICD considers that the exercise of power under s.155 should no longer be authorised by the ACCC itself. Rather, the ACCC could go to the Federal Magistrates Court (which has been created since the last substantial amendments to the Act) for authority – obviously on an ex-parte basis. This would be analogous to the issue of a Police warrant.

4.5 A Federal Magistrate should also be involved in conducting the taking of oral evidence under s.155, rather than leaving the responsibility in the hands of the ACCC, which is probably better suited to other investigative functions.

4.6 AICD believes that the question of legal professional privilege remains in doubt in relation to s.155, as a result of the ACCC's demonstrated attitude.[5] In the event that the High Court finds against legal professional privilege in the current Daniels appeal, AICD would urge that the Act be amended to provide clearly for the existence of the privilege – which AICD clearly recognises is for the benefit of its members and not of lawyers.

MEDIA

4.7 The ACCC is adept at using the media. The ACCC's output of Media Releases is now running at an average of more than thirty (30) per month. This use of the media has been of great assistance to the ACCC in publicising its work, the reach of the Act and the necessity for compliance – and has been a cost-effective strategy. Accordingly, it can be said to have some public benefit.

4.8 However, the use of Media Releases has reasonably been subjected to criticism as being excessive at times, especially in the context of litigation, actual or potential.[6] This criticism has extended to the Federal Court.[7]

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5 See, for example, the article by the Chairman of the ACCC: "Privilege v. Right", *Business Review Weekly,* 16-22 May, 2002, p.24; with an interesting rebuttal by Michael Corrigan of Clayton Utz: "Is Truth Worth the Price", *Business Review Weekly,* 30 May-5 June 2002, p.13.

6 For example, recently there has been much loud and strong criticism of the ACCC and its media handling in relation to the widely publicised "raids" by the ACCC on various offices of Australian oil companies.

7 *Electricity Supply Association of Australia Ltd* v *ACCC (2001)* ATPR 41-838 @ pp. 43,372-3, where Finn J. inter alia, observed:

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

4.9 It is also clear that the adverse publicity which can follow an ACCC Media Release may be very harmful to a company and its directors. The Chairman of the ACCC has claimed:

> "The public knows the difference between an investigation, an allegation and a court verdict of unlawful behaviour".[8]

4.10 This claim is not borne out by the experience of AICD's members, who firmly believe that a Media Release saying the ACCC is investigating Company XYZ immediately results in a public perception that Company XYZ is "guilty as charged".

4.11 AICD members also consider, perhaps understandably, the ACCC's Media Releases are more inclined to emphasize its Court victories and the institution of proceedings by the ACCC. It is thought that the ACCC places much less emphasis on litigious setbacks or the termination of investigations or proceedings.

4.12 AICD believes that a protocol should be developed which governs the use of media and public comment by all regulatory agencies including the ACCC. It may be most appropriate for this protocol to be developed by the Commonwealth Attorney General's Department.

ACCOUNTABILITY/GOVERNANCE OF ACCC

4.13 Apart from AICD's concerns about the ACCC's seeming lack of accountability in relation to its use of Media Releases, AICD believes there is a general lack of transparency and accountability about the ACCC's processes.

4.14 The ACCC is fond of asserting, strongly, that it is accountable – to the Courts, to the Australian Competition Tribunal and Parliament.[9]

Undaunted by this judicial pronouncement, the ACCC issued a Media Release immediately after the judgment (M/R 225/01 of 14 Sept., 2001) which quite failed to note the Judge's criticism and whilst noting the dismissal of the ESAA claim against the ACCC added:

> He endorsed the ACCC's ability to make public its views as to the rights and obligations of consumers and electricity suppliers under the Act.

8 ACCC M/R 99/02 1 May 2002 – "Qantas Criticism Unfounded".

9 See, for example, letter from Acting Chairman, Sitesh Bhojani, *Australian Financial Review*, 14 June 2002, p.79.

4.15 Closer examination of this oft-repeated assertion is less comforting. The option of Tribunal and Court appeals is not all-embracing. Nor does a printed report tabled annually in the Commonwealth Parliament or the occasional appearances before parliamentary committees satisfy the concept of accountability as is understood by AICD members, accustomed to the principles and practice of good corporate governance.

4.16 The Chairman of the ACCC has a very high public profile – which is, of course, appropriate for the profile of the ACCC as a key regulator. In any commercial organisation, no matter how high the profile of the CEO, it is clearly understood that he/she is accountable to his/her board and, ultimately, to the owners.

4.17 In addition to the Chairman, the Act provides for the ACCC to have a Deputy Chairman (although that position has been left unfilled since the retirement of the previous, and only, incumbent in 2000) and various other Commissioners.

4.18 AICD believes that issues of corporate governance are not limited to the private sector. The imminent establishment of the Australian School of Government is recognition of this. Increasingly, issues of accountability, risk management and the cost of supporting board structures have become concerns in public sector corporate governance. The AICD believes a similar model could usefully be explored and possibly be adopted by the Government for the administration of the ACCC.

4.19 The principles that ought to be adopted for any such board include:

- the differing roles of the Minister, the CEO, Chairman or similar and the board should be clear and separate; and
- legislation should provide boards with sufficient authority to carry out governance responsibilities.

4.20 These principles should be translated into specific criteria relating to board powers, responsibilities and accountabilities with a view towards ensuring that any such boards can "add value" to the governance of the ACCC.

4.21 The principle underpinning the criteria regarding the relationship between the board and the Minister, CEO, Chairman etc and the ACCC is that the framework

for the board and its decision-making processes should allow the board effective control over the organisation it is "governing".

4.22 This means that there should be a separation of powers and concomitant responsibilities as between the board, the Minister, CEO, Chairman etc and the ACCC.

4.23 In order to clarify board roles and responsibilities, these should:

- be defined in legislation;
- be clarified in a set of public guidelines, charters or similar;
- be defined with respect to: decision-making and control and reporting arrangements; and
- make provision for the CEO, Chairman etc to be appointed by, or at least have a performance agreement with, the Board.

4.24 All parties need a clear understanding of their responsibilities and there needs to be a "robust" governance structure in order to be able to achieve full public accountability.[10]

4.25 If a board structure were adopted for the ACCC the board should be publicly accountable for their decisions. They should be accountable for their statutory responsibilities, expenditure of public money and governance practices. The AICD is concerned that so-called supervisory boards run the risk of being unaccountable.

4.26 The new board should be accountable to all stakeholders for their performance. This includes reporting to the parliament and/or the Minister. To communicate the board's achievements and practices, board performance needs to be measured against standards and targets, rigorously and regularly reported and regularly and publicly reviewed.

[10] Chartered Institute of Public Finance and Accountancy, "Corporate Governance: A Framework for Public Sector Bodies", CIPFA, London, 1995, p. 9 referred to in "Towards More Effective Governance Of Government Businesses" presented by A C Harris as the then New South Wales Auditor-"General Corporate Governance, Risk Management and Internal Control" Conference the Institute of Chartered Accountants in Australia Thursday 29 May 1997.

4.27 This evaluation of the board and individual directors' performance needs to be supported by a regular assessment of the performance of the Chair and the CEO.

4.28 The need for a greater accountability could be satisfied in one of at least three possible ways:

4.28.1 the appointment of a Competition Policy Ombudsman or an Inspector General;

4.28.2 the appointment of a supervisory board of independent persons;

4.28.3 a slight restructuring of the Commission, along corporate lines with an independent Chairman, a Chief Executive Commissioner, with possibly other Executive Commissioners and a majority (including the Chairman) of non-executive Commissioners.

4.29 Schedule 1 to this submission sets out a comparison of the powers and accountability of the ACCC compared with ASIC and the Australian Tax Office ("ATO").

5. IMPRISONMENT FOR PART IV MISCONDUCT

5.1 In its submission to the Committee – and for many months before that – the ACCC has promoted the adoption into the Act of terms of imprisonment for what it calls "hard-core cartels" (see 5.7 below). However, despite its long gestation period, the proposal is still relatively undeveloped.

5.2 The existing penalties (corporate and personal) under Part IV are very substantial and, to the best of AICD's knowledge, no Court has ever imposed penalties at the maximum level. Further, AICD is not aware of any Courts having complained of the inadequacy of existing maxima. Indeed, to the contrary, Finkelstein J. observed of the current penalties, introduced in the 1990s, that they had caused unlawful arrangements to cease and added:

> "This shows that high penalties will deter unlawful conduct"[11]

5.3 No real case has been made out for the introduction of imprisonment and, in these circumstances, AICD is opposed to the proposal.

5.4 The Committee may wish to consider the possibility of introducing a disqualification order from managing a corporation, under s.206C of the *Corporations Act*. It would be appropriate for ASIC to decide whether to make application to the Court, because of ASIC's responsibilities for administering that legislation and its knowledge and experience in dealing with conduct that may merit disqualification.

5.5 In relation to imprisonment, AICD would make the following points:

5.5.1 Despite the long standing existence of imprisonment as a sanction in the USA, breaches of anti-trust law continue.

5.5.2 The burden of proof would require the case to be made out beyond reasonable doubt. This may well give rise to future complaint from the ACCC that cases have become harder to prove, therefore some further changes must be made to the Act.

5.5.3 The possible introduction of a gaol sentence will necessarily mean that in any trial, the case against the corporation must be tried separately from any case against an employee. The latter will be a jury trial should the employer be a "large" corporation. This will add considerably to the complexity and expense of Part IV actions. Does it also mean that the ACCC will decide whether or not to proceed against a corporation, but the DPP will have to be involved in relation to the employee?

5.5.4 The fact that there are possible exemptions (including authorisation) for some conduct which otherwise would offend Part IV also emphasises the inequity and unreasonableness of any proposal to introduce gaol sentences for breaches of the Act.

5.5.5 The large majority of Part IV cases brought by the ACCC result in a negotiated settlement/penalty being put to the Court, with the potential resultant restriction on the discretion of the Court. In the face of a potential sentence of imprisonment, Courts are unlikely to accept the fetter of an agreed penalty and offenders are less likely to settle.

5.5.6 The introduction of imprisonment as a penalty would require a review of the ACCC's powers under s.155 of the Act. In facing a potential gaol

[11] ACCC v ABB Transmission & Distribution Ltd (2001) ATPR 41-815 @ p42,939

> sentence, an officer of a corporation should not be denied the usual criminal law privilege in relation to self-incrimination.

5.7 We point out that the term "cartel" has no precise legal meaning. We have real concerns about the use of such a term to describe unlawful conduct when it does not appear in the Act. It may be that a clear definition should appear in the Act and the conduct so proscribed. However, this may involve extensive redrafting of Part IV which we do not consider is warranted.

5.8 AICD considers the ACCC's proposal to apply the sanction of imprisonment only to officers of "large" companies as inequitable and impractical. As one example, the Committee may consider the *Tasmanian Frozen Foods Case*. Proceedings were taken for price fixing by the ACCC against a number of corporations and their officers. There was an agreement as to penalties. The judge found that the parties had engaged in "seriously unlawful conduct" and imposed, in one case, a higher penalty than had been agreed (although this was reversed on appeal). The penalties were substantial, for the time. However, none of the defendant corporations would have been "large" in ACCC terms, so imprisonment would not have been an option available to the Court.[12]

5.9 AICD requests that the Committee to consider a typical price-fixing case where the defendant corporations are of different sizes. Some officers may face imprisonment merely because of the size of their employer, irrespective of the degree of wrongdoing of that employer/employee. It is a fundamental principle of criminal law that offenders should be treated equitably, according to the nature of wrongdoing – not according to the size of their employer. This view has been confirmed recently by the Federal Court in a trade practices case:

> "There is a well established principle of sentencing known as the parity principle. All things being equal, the same crime should receive the same punishment. The principle applies to the imposition of penalties for a contravention of the …Act"[13]

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12 *ACCC* v. *N W Frozen Foods Pty Ltd & Ors* (1996) ATPR 41-515. Even the largest defendant with a market share of 50%, had turnover of only about $42.6 mil.

13 Finkelstein J. in ACCC v ABB Transmission & Distribution Ltd (2001) ATPR 41-834 @ p 43,303

5.10 The AICD also is opposed to the extension of the limitation period to ten years. No case has been made out to support such a change. A ten-year limitation period is contrary to normal statutory limits and outside the reasonable requirements in other areas for retention of documents.

6. DIRECTORS AND CORPORATE RESPONSIBILITY

6.1 The limited liability company is a cornerstone of the Australian economy, it is so important that more than 600,000 businesses large and small chose to arrange their business using a corporate structure.

6.2 While AICD agrees that directors must be subject to a high level of accountability it believes that they should not be liable for decisions made in good faith and with due care.

6.3 AICD would like to see the Act include a form of the business judgment rule similar in form to s 180(2) of the *Corporations Act 2001* Cth.

6.4 AICD believes that liability rules in the Act ought to be tempered against the reasonable belief that the corporate form provides some protection for investors provided they act in good faith, in the company's interest and took reasonable steps to inform themselves about the matters the subject of the defence.

6.5 The provision would act as a rebuttable presumption that directors should be shielded from liability but if rebutted would still require that the plaintiff establish that the officer had breached the Act.

6.6 Section 75B and cases concerning it provides some scope for Courts to exclude directors from liability provided they have not been actively involved in the contravention (eg *Porter v Audio Visual Promotions Pty Ltd* (1985) ATPR 40-547) but there is still a fair degree of uncertainty regarding its operation. The safe harbour discussed above would also dovetail with the cases concerning pecuniary penalties under s76.

6.7 AICD believes that there are many situations in which a contravention of Part IV may occur, but it would take teams of lawyers and economists years to identify clear areas of risk (take the *Safeway Case* for example).

6.8 It is not appropriate for imprisonment to be an option in cases of 'technical' or even negligent contraventions. The REIWA case in WA is a good example - it was a price fixing case, but the parties were not conscious of that in a criminal sense. If dishonesty is required for insider trading, it should also be required for contraventions of the Act that might lead to gaol.

7. OTHER POSSIBLE AMENDMENTS

7.1 **Reverse Onus of Proof in s.46**

AICD is opposed to a reversal of the onus of proof in s.46 cases. As a universal statutory principle, we consider the reversal of the onus of proof as bad policy and bad law.

7.2 **Effects Test**

This amendment appears to be sought by the ACCC, because of their perception that they have difficulty in succeeding in s.46 cases. AICD does not believe that perception is borne out by the reality of case law to date. We see no justification for the introduction of the “effects” test or the other changes sought by the ACCC. All they would accomplish is a marked reduction in competitive behaviour with companies reluctant to engage in normal competitive conduct. The possession of a substantial degree of market power is not always a function of size, nor is it always a permanent or long term state.

7.3 Safe Harbour for Directors & International Accounting Standards

7.3.1 AICD appreciates that this matter falls outside the Committee's Terms of Reference, but our members consistently and frequently raise s.52 as a matter of concern and its application and use in the full range of commercial dealings. Many question how a section, which was initially intended to have a consumer protection focus, can have moved so far afield.

7.3.2 We realise that it would now be impossible to limit s.52 to the consumer protection area, but submit that a strong case can be made for some commercial "carve-outs", especially those that may involve a statutory requirement. The Corporations Act is a principal example. A particular instance is the proposed incorporation of International Accounting Standards (IAS) into Australian law. These have their genesis in countries, where accounting practices and legal concepts differ markedly from those applying here. We submit that a specific exemption from s.52 should be made for companies (and their directors) which produce accounts in accordance with a statutory requirement to do so in accordance with IAS.

7.3.3 Strong concern has been expressed by our members with accounting expertise, about a potential flood of s.52 litigation involving accounts prepared in accordance with IAS. It has been suggested to us that an exemption regime for specified commercial conduct could be established by a regulation making power under s52. S.51AF provides support for this “carve-out” approach, but we are suggesting a more flexible approach by way of regulation.

SCHEDULE 1

Comparisons between ACCC and Other Regulators

Australian Securities and Investments Commission (ASIC)

1. Functions of ASIC

ASIC is an independent Commonwealth Government body that regulates Australian companies, financial markets, and financial services organisations as well as professionals who deal and provide advice in financial services.[14] ASIC carries out its regulatory functions under the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) but it administers, in addition, the following legislation:

- Corporations Act 2001 (Cth)
- Australian Securities and Investments Commission Act 2001 (Cth)
- Insurance (Agents and Brokers) Act 1984 (Cth)
- Insurance Contracts Act 1984 (Cth)
- Superannuation (Resolution of Complaints) Act 1993 (Cth)
- Superannuation Industry (Supervision) Act 1993 (Cth)
- Retirement Savings Accounts Act 1997 (Cth)
- Life Insurance Act 1973 (Cth)

2. ASIC's powers

Under Part 3 of the *Australian Securities and Investments Commission Act 2001* (***ASIC Act***) ASIC has various powers related to conducting inquiries and investigations. These include the power to request documents and to conduct examinations of persons.

ASIC does not, however, have a broad access power comparable to that available to the ACCC under, in particular, section 155 of the TPA or that available to the ATO under section 263 of the ITAA 1936. If an ASIC officer requires access to the premises of persons being investigated, or wishes to seize documents, then ASIC must obtain a warrant from a court (see section 35 of ASIC Act).

The more important provisions of Part 3 dealing with ASIC's powers of inquiry and investigation are set out in attachment 1.

[14] http://www.asic.gov.au ASIC at a glance.

3. Accountability mechanisms

ASIC is accountable to the Commonwealth Parliament and to the Treasurer, as well as to the Parliamentary Secretary who in turn reports to the Treasurer.
In the course of conducting investigations ASIC is required to prepare an interim report (section 16) and must prepare a final report (section 17) on the matter being investigated where ASIC is of the opinion that a serious contravention of a Commonwealth law has occurred, where preparation of a report would assist in recovery or protection of property, or where there is an urgent need to amend corporations legislation. In the case of an investigation the report must set out ASIC's findings about the contravention and the evidence and other material on which the findings are based (section 16(1)(a) and (d)). In relation to other investigations commenced under Division 1 of Part 3 ASIC may prepare a report and must do so if the Minister so directs.

The reporting requirement may be a significant accountability mechanism and control on the exercise of ASIC's powers. In the case of an investigation into what ASIC believes to be a serious contravention of a Commonwealth law, under section 18(3) ASIC may at the request of a person whose affairs are materially affected by the investigation, or of its own motion, provide that person with a copy of the report or part of the report. A report relating to a serious contravention may also be given by ASIC to the Australian Federal Police, the National Crime Authority, the Director of Public Prosecutions, or to a prescribed agency (section 18(2)). Arguably, this mechanism provides for some separation of the role of investigator and prosecutor, at least where the role of prosecution is assumed by the agency to which the report is referred. ASIC may however cause a prosecution to be commenced (section 49) or a civil proceeding (section 50).

There are certain other controls relating to how ASIC may deal with material, and dealing with the rights of persons being investigated in relation to, for example, legal representation or assistance. Details of these are set out in the relevant attachment.

4. Review of decisions/ remedies

In the context of the previous legislation the operation of the National Companies and Securities Commission (***NCSC***) were subject to compliance with the rules of natural justice; but there is no such general requirement in the ASIC Act.

Australian Taxation Office

1. Functions of the ATO

The ATO manages and shapes the revenue systems that give effect to social and economic policy and fund services for Australians.[15] Principally, the ATO administers the legislation for taxes and excise. The ATO works in conjunction with other government bodies on matters of policy that relate to tax and excise. The ATO administers the following areas of tax law:

- Income Tax Assessment Act (Income tax)
- Company tax
- Fringe benefits tax
- The Australian Business Number and the Australian Business Register
- A New Tax System (including the goods and services tax and pay as you go system)
- Higher education funding
- The Medicare levy
- The Superannuation Guarantee
- Small superannuation accounts
- Self-managed superannuation fund regulation
- Superannuation contributions tax and
- Excise duty.

2. Accountability mechanisms

There are a variety of accountability mechanisms to which the ATO is subject. The Taxpayers' Charter (the ***Charter***) oversees the ATO as it carries out its various functions. The Charter sets out the way in which the ATO deals with individuals, companies, partnerships, trusts, superannuation funds and other organisations. The Charter also outlines the steps to take if one is dissatisfied with the ATO's decisions, actions or service. There is an internal complaints system that facilitates complaints from the public if one feels that the expectations as stated in the Charter have not been met. The ATO reports to Federal Parliament on such complaints and it also reports on how the various complaints will be resolved. Complaints concerning the actions of the ATO may also be made to the Commonwealth Ombudsman. The ATO reports to Federal Parliament on its results and activities and also on how the Taxpayers' Charter is functioning. This information is available to the public.

[15] see http://www.ato.gov.au

3. Powers of the ATO: Access and information gathering powers

To carry out its functions the ATO may require access to information held by an individual. The "access to information powers" are provided under section 263 of the *Income Tax Assessment Act 1936* (Cth) (the ***ITAA***). When a request for access and information is carried out under this section, it is referred to as a 'formal' request. If a formal request is made, then the Commissioner or authorised officer should provide the subject of the request with a copy of the legislation that bestows the power. The context of sections 263 and 264 and some brief comments about its operation is set out in attachment number 2.

The ATO's main access and information gathering power fall under three categories, these are:

- the power to gain access to premises and documents;
- the power to require the furnishing of information and attendance through the giving of evidence. Note that this power can only be exercised through the service of a notice; and
- the power to require the production of documents. As with (ii), this power can only be exercised through the operation of a notice.

The right to full and free access is the right to access all buildings and examine all documents relevant to the purposes of the ITAA. These issues have been the subject of detailed discussions in cases such as *FCT & Ors v ANZ Banking Group Ltd.* In *O'Reilly and Ors v Commrs of the State Bank of Victoria and Ors,* the High Court of Australia held that full and free access must be without physical obstruction.

Over a period of time there have been built up a series of interesting rules in relation to the operation of these powers. The ATO has issued Guidelines entitled Access and Information Gathering Powers which are quite detailed (compare the ACCC's Guidelines on the use of section 155 notices). The Master Tax current position is that authorised officers are permitted to take "all reasonable and necessary steps to remove any physical obstruction to access but should not act in an excessive manner." Tax-related information may be obtained from the offices of solicitors and accountants whose clients are subjected to investigations by the ATO (see *Commissioner of Taxation and Others v Citibank Limited*).

The ATO's guidelines, Access and Information Gathering Powers, provide a framework for using the access and information gathering powers. The guidelines are purely administrative and do not have the force of law. The guidelines include the following:

- prior notice should be given of access requests unless there are exceptional circumstances;
- officers should grant a request by the occupier of premises to delay the search temporarily to enable professional advice to be obtained;
- where it is expected that some of the records sought will be subject to legal professional privilege, the custodian should be given the opportunity to make a privilege claim;

- where access is temporarily delayed to enable professional advice to be obtained, arrangements should be made to ensure there is no tampering with the records;
- the Commissioner reserves the right to argue that legal professional privilege does not apply to salaried lawyers employed by the client;
- when acting under an access provision, answers can only be demanded to questions that are incidental to the exercise of the right of access (eg the location of records); and
- access to documents includes access to hard discs, CD ROMs, magnetic tapes or other forms of storing electronic information;
- usually, 28 days notice is given to a subject of a formal request for access and information.

4. Review of decisions and available remedies

The Commissioner or authorised officer may only exercise the access laws for the purposes of the ITAA and not for any other purpose.[16] If a subject of the access and information gathering power believes that there has been an abuse of the power, a review may be undertaken within and outside the ATO.

The Taxpayers' Charter provides that there is a "right to obtain a review of most decisions the Tax Office makes about…tax affairs, including those made about private rulings, assessments, a request for the issue of a tax file number, requests for extension of time, penalties and requests under the Freedom of Information Act.[17] There is also a right to review of administrative actions taken by the ATO, including the conducts of audits and debt collection action.

A review may be undertaken by the ATO and/or by an independent third party such as by the Administrative Appeals Tribunal, the Federal Court or the Commonwealth Ombudsman. Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***), decisions made by the Commissioner or authorised officer are amenable to review as they are a:

a) decision;
b) of an administrative character;
c) made under an enactment.[18]

Furthermore, a person or corporation subject to the access and information gathering powers, may firstly seek reasons for the decision in question under the ADJR Act which may clarify the *reasons* for the use of the power by the Commissioner or authorised officer. If the subject remains unsatisfied after a furnishing of the reasons for the decision, and if they believe there has been an abuse or misuse of power under the ITAA 1936, actual review of the decision may be sought under the ADJR Act provided a relevant ground of review can be made out.

[16] section 263 (1) (though that purpose is very widely stated)
[17] The Taxpayer's Charter para 12
[18] Section 5 of the ADJR Act

Where the amount of tax is in dispute is less than $5000, the Small Taxation Claims Tribunal can undertake a timely, inexpensive and independent review of the matter.

Further, recourse may be had to the Commonwealth Ombudsman regarding a range of administrative actions taken by the tax office.

The ATO is generally subject to the provisions of the *Freedom of Information Act 1982* (Cth) (***FOI Act***). The FOI Act provides a mechanism for seeking access to relevant information or documents such as public rulings and guidelines held by the ATO. Note however that the FOI Act exempts some documents from being available, such as documents that may prejudice the conduct of an audit or the proper administration of the law.

5. Recent steps to further increase the accountability of the ATO

Notwithstanding the accountability mechanisms within and outside the ATO, a new tax regulator is to be established[19] that will be granted investigative powers to facilitate inquiries into, among other things, the administration of public and private rulings, financial penalties and audit guidelines.

It has been stated that what business is seeking from the inspector general is someone to hold the ATO accountable yet the discussion paper as released on 29 May 2002 does not specifically address how the new office will do that and it has been suggested that the inspector general will need "more teeth" and far reaching powers because "without a board sitting over the ATO, there is nobody to hold the Tax Office accountable and this new role must be the one to do that."[20] The proposal has indicated that the areas for investigation will include:

- The operation of the self-assessment system, compliance and clarity of the information provided;
- The ATO's processing of tax returns;
- The system of public, private and oral rulings and how the system can be improved;
- The administration of penalty and interest provisions including remission criteria;
- The appropriateness of the ATO audit guidelines, their application and timeliness.

It is expected that the inspector general will be established by the Government by the end of 2002. Despite the current accountability measures for the ATO, it is apparent that the Government recognises the importance of heightening and increasing the checks on the exercise of the ATO's powers. This can only result in a fairer and more transparent system.

[19] See the Financial Review 30 May 2002 *ATO powers come under scrutiny* Fiona Buffini and Allesandra Fabro http://www.afr.com.au

[20] Mr David Stevens quoted in Australian Financial Review 30 May 2002 *ATO powers come under scrutiny* at http://www.afr.com.au

Attachment 1
ASIC's Powers

Clearly, as one can see from the extraordinary range of detail which is provided in the brief summary in the attachment, ASIC is required to be far more precise and disciplined in obtaining information under its powers. Some of the accountability mechanisms discussed in the next section are worthy of consideration of replication under the Trade Practices Act.

- sections 13 and 14 setting out ASIC's general powers of investigation and the circumstances in which investigations may be commenced;
- Division 2 (sections 19 to 27) dealing with the conduct of examinations;
- sections 30 – 34 provide for ASIC to issue a notice requiring the production of books about financial products or services; or documents relating to the affairs of a body corporate, or registered scheme; and authorising persons to require the production of books;
- sections 35 provides that ASIC may apply for a warrant to search premises for books whose production has been required but that have not been produced, when there are reasonable grounds to suspect that the books are at, or will within 3 days be at, particular premises; while section 36 provides for a warrant to be granted. These provisions contrast with the broader power of entry and seizure available to the ACCC under s 155 of the TPA;
- section 37 sets out how books seized or produced may be dealt with; while sections 38 and 39 give ASIC a power to require a person to state where requested books may be found; and to require a person to identify the property of a body corporate;
- Division 4 sets out the powers of ASIC in relation to investigation of financial products;
- Division 5 and 6 deal with the conduct of proceedings after an investigation and with hearings;
- Division 7 sets out a range of offences, and also provides:
    - in section 68, that there is no right to refuse to give information, sign a record or produce documents on the basis of a right to protection from self-incrimination, but that these statements will not generally be admissible against a person in a criminal proceeding or in a proceeding for the imposition of a penalty; and
    - in section 69, that a lawyer will be entitled to refuse to give information or produce documents where the communication is protected by legal professional privilege, though the lawyer will be required to provide information about the persons to whom or by whom the communication was made, and "sufficient particulars" to identify the communication.
    - Division 8 sets out ASIC's powers in relation to non-compliance with the ASIC Act;
    - Division 9 sets outs rules relating to the evidentiary use of material including:
    - section 76, which states that a statement made in an examination of a person is admissible in proceedings unless the person could claim legal professional privilege, or several related grounds (that the statement is not relevant to the proceedings, that the statement is qualified by other evidence, or that the statement is not admissible because of section 68; and

- several other provisions that largely adopt common law principles relating to the admissibility of evidence, and that provide for objections to be made to the admission of certain documents and other information.

- Division 10 deals with miscellaneous matters including the requirement that evidence of authority is shown by an ASIC officer.

Review of decisions/remedies

However, certain provisions may have an effect comparable to that achieved by the application of natural justice principles. These include section 19 which sets out the required contents of a notice that is to be issued to a person to require them to attend an examination; sections 22-24 dealing with the conduct of examinations; and, in the Divisions providing for powers of investigation and inquiry, a preliminary section outlining how the power may be exercised.

A persons aggrieved by investigative conduct may therefore seek judicial review or a remedy under the ADJR Act, the Freedom of Information Act, possibly the Ombudsman Act, the Privacy Act, or, in some circumstances, the AAT Act (see sections 244 and 244A).

Attachment 2

Australian Taxation Office

Access and information gathering powers

Section 263 provides:

> (1) The Commissioner, or any officer authorised by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.
>
> (2) An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise the powers under this section.
>
> (3) The occupier of a building or place entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.
> Penalty: 30 penalty units

Section 264 provides:

> (1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connection with any department of a Government or public authority:
>
> > (a) to furnish him with such information as he may require; and
> > (b) to attend and give evidence before him or before any officer authorised by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.