

Submissions to the Trade Practices
Act Review Committee by the
Business Law Committee of the
Law Council of Australia

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Executive Summary

This submission is being made by the Trade Practices Committee of the Business Law Section of the Law Council of Australia (the **Council**). The Council represents a wide cross-section of lawyers (both in private practice and the public sector), economists and academics working across all aspects of competition law.

The Council's submission recommends some changes to the provisions of the Trade Practices Act 1974 (Cth) (the **Act**) in order to modernise it, to overcome anomalies and to reform the administration of the merger provisions, the authorisation process and the administration of Section 155 Notices to achieve an appropriate balance between the interests of business and the proper administration and enforcement of the Act.

The Council's principal recommendations include:

Section 46

- The Council submits that there should be no change to the provisions of s46, for three main reasons:
 - (1) First, the current form of s46 and the emerging law in relation to its construction and application are in line with the policy objectives of the section, and are consistent with the maintenance of effective competition in Australian markets and consumer welfare.
 - (2) Secondly, it has taken many years for cases under the current form of s46 to have been brought and finally determined. The current law and general principles are workably clear. Presently, there are several important appeals on foot in the Full Federal Court and High Court, from which significant and useful judicial guidance is expected. It is undesirable and costly for there to be any substantive change to the provisions of s46 in this context.
 - (3) Thirdly, there is little evidence that any of the changes suggested by the Australian Competition & Consumer Commission (the **ACCC**) or by others in the course of public debate to date such as:
 - the reversal of the onus of proof in relation to “purpose”;
 - replacement of the “purpose” element with an “effects” test;
 - the introduction of a divestiture remedy; or
 - the introduction of a power to issue “cease and desist” notices by the ACCC,is required or appropriate at this time. Further, some of the suggested changes may be either unworkable, or likely to lessen competition in Australian markets.

Amendment of Sections 45 and 47

- The Council believes that the breadth of the current per se prohibition on exclusionary provisions is inappropriate and needs to be reformed to ensure that the prohibition is better targeted towards conduct which is of concern from a competition perspective. These reforms will also bring the Act into line with developments in other countries.

- A joint venture exemption to the per se prohibitions against exclusionary provisions and price fixing should be included to ensure that joint venture arrangements are subject only to a substantial lessening of competition test.
- Section 45A should be amended to ensure that the price fixing prohibition does not interfere with legitimate arrangements to obtain an input supply.
- The operation of s45(6) should be clarified to ensure that the Act's policy that exclusive dealing conduct be regulated only by s47 and not by s45 of the Act is assured.
- The Council is also proposing technical amendments to the joint advertising exceptions.
- The Council has advocated for many years that third line forcing conduct should be made subject to a competition test and recommends the removal of the per se prohibition against third line forcing.

Section 50

- The Council submits that there is no demonstrated need to change the "substantial lessening of competition" test in s50(1) of the Act, and that accordingly, it should not be amended.
- The prohibitions in s50 should be subject to a public benefit qualification.
- The factors in s 50(3) which must be considered in applying the test should be supplemented to include failing firm considerations.
- The Council also recommends that s50 should be amended in a technical respect so that dual listed company structures are subjected to the same competition assessment as a merged entity after a traditional merger.
- From an administrative perspective, the Act should also be amended to introduce an independent review panel to ensure that informal merger decisions made by the ACCC are subjected to appropriate review.
- The Act should be amended to impose stricter time limits on the authorisation process, and to allow applicants for authorisation of mergers to apply directly to the Tribunal.

Authorisations

- The ability to exempt certain conduct from the operation of the Act through the authorisation process is a significant feature of Australia's regulation of competition law.
- Procedural reform, particularly of time limits of the ACCC and Tribunal authorisation procedures is required to support the effectiveness and utility of the regime.
- The Act should be amended to allow merger applicants to have the option of direct access to the Tribunal.
- The Act should be reformed to permit authorisation for conduct that comes within s46 of the Act. There is no basis for precluding corporations from obtaining exemption from s46 on the basis of public benefit.

Section 155

- Section 155 confers on the ACCC investigative powers which are greater than virtually any other regulatory or law enforcement agency in Australia.
- The ACCC's power under s155(2) to enter premises to inspect and copy and take extracts of documents should only be exercisable upon issue of a warrant of entry by a Federal Court Judge, if he or she is satisfied that there is reason to believe that documents would be in imminent danger of being destroyed or concealed.
- The Council regards protection of legal professional privilege as an essential factor in the giving of legal advice. Regardless of the outcome of the High Court's appeal in *Daniel's* case the Act should be amended to make it clear that s155 does not remove the privilege.

Criminal Sanctions

- The Council agrees that systematic price fixing, bid rigging, market sharing and output restrictions are very serious matters.
- The Council considers, however, that the "moral equivalence" argument for criminalising these types of anti-competitive conduct (as opposed to all other anti-competitive conduct) needs to be evaluated carefully.
- The Council does not consider it appropriate for it to express a view as to whether some or all anti-competitive conduct should be characterised as criminal.
- There is no demonstrated case that the current regime including both substantial pecuniary penalties and a right of private action is not effective in achieving deterrence.
- There is no established case that the introduction of criminal sanctions is necessary to achieve deterrence.
- The Council considers that the ACCC should implement its new cartel leniency policy as soon as possible and monitor it for at least three years, to assess its effectiveness in increasing the detection of cartels. At that time the need for criminal sanctions and how an effective leniency policy could accommodate them could be considered.
- The ACCC's proposal to limit criminal sanctions to large corporations is discriminatory and is wrong in principle and in practice. Further it is inconsistent with the universal application of the Act and the universal application of criminal law.
- The ACCC's proposal to limit criminal sanctions to hard-core cartel behaviour without an element of dishonesty or mens rea is inappropriate.

Increased civil pecuniary penalties

- There is no evidence that existing pecuniary penalties are too low.
- The ACCC proposal is premature as the Australian Law Reform Commission is currently involved in substantive research on civil and administration penalties.

Administration of the Act

- Guidelines should be introduced governing the way in which the ACCC issues press releases.

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- Transparency in the ACCC's decision-making processes is an important issue.
- However, the Council is not persuaded that the solution to the ACCC's use of publicity and other issues surrounding governance of the ACCC is likely to be best achieved by the establishment of a supervisory board or a review body.
- The Council would like the opportunity to make a supplementary submission on this particular issue.

1. Introduction

The Council makes submissions to Governments, Courts and other Federal Agencies on ways in which the law and the justice system can be improved for the benefit of the community. Its focus is broad ranging and is concerned not with the narrow interests of lawyers but with broader issues of justice and fairness. The Council's mission is to promote the administration of justice, access to justice and general improvement of the law.

The Council is a national organisation which draws its membership from across the country. Membership of the Trade Practices Committee of the Council is not confined to lawyers but includes a diverse range of people including economists, academics and lawyers. The Trade Practices Committee has over many years provided well informed advice to governments, regulators and others on issues of competition law and policy as well as on matters of procedure and administration.

Importantly, membership of the Trade Practices Committee which has prepared this submission is not confined to lawyers. Its membership is diverse and includes economists, both those in private practice and those with academic appointments, academics in the field of law, lawyers working in the public sector and practicing lawyers. These members have vast experience in trade practices litigation including advising on and providing expert evidence in such litigation and in teaching competition law. Given the breadth of the membership of the Trade Practices Committee, the views which it expresses reflect a wide range of perspectives of legal, economics and consumer interests. This has been reflected in the breadth of matters on which the Trade Practices Committee has provided input and the substance of the submissions which it has made over the course of the life of the Act.

2. Misuse of Market Power

2.1 Introduction

The Council submits that there should be no change to the provisions of s46, for three main reasons:

- (a) First, the current form of s46 and the emerging law in relation to its construction and application are in line with the policy objectives of the section, and are consistent with the maintenance of effective competition in Australian markets and consumer welfare.
- (b) Secondly, it has taken many years for cases under the current form of s46¹ to have been brought and finally determined. The current law and general principles are workably clear. Presently, there are several important appeals on foot in the Full Federal Court and High Court, from which significant and useful judicial guidance is expected. It is undesirable and costly for there to be any substantive change to the provisions of s46 in this context.
- (c) Thirdly, there is little evidence that any of the changes suggested in public debate to date:
 - the reversal of the onus of proof in relation to "purpose";
 - replacement of the "purpose" element with an "effects" test,
 - the introduction of a divestiture remedy;
 - the introduction of a power to issue "cease and desist" notices by the ACCC; or(each of which is addressed below) is required or appropriate at this time. Further, as discussed below, some of the suggested changes may be either unworkable, or likely to lessen competition in Australian markets.

2.2 Current law is consistent with the object of s46.

The objective of s46 is clear. The High Court in *Queensland Wire Industries Pty Ltd v BHP* (1989) 167 CLR 177 (*Qld Wire*) stated the object of the provision as:

*"... to protect the interest of consumers, the operation of the section being predicated on the assumption that competition is a means to that end."*²

*"... the protection and advancement of a competitive environment and competitive conduct."*³

Since then, in *Eastern Express Pty Ltd v General Newspapers Pty Limited* (1992) 35 FCR 43 (*Eastern Express*) at page 58, Lockhart and Gummow JJ stated that:

"Part IV of the (Trade Practices Act) is designed to promote competition, and the role of s46 is to maintain competitive markets by restraining misuses of market power that will produce a non-competitive market."

¹ Section 46 was substantially amended in 1986, with the introduction of a "lower threshold" of a "substantial degree of power in a market".

² per Mason CJ and Wilson J at p191.

³ per Deane J at p194.

In the most recent High Court decision on s46, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 75 ALJR 600 (**Melway**), the High Court confirmed the position in *Qld Wire* that (shortly put) an illegal misuse (or "taking advantage") of market power will be made out, where:

- a corporation with substantial power in a market;
- has taken advantage of that market power, in the sense that it has engaged in conduct in which it would not have engaged (in the "reality of the market") if it did not have substantial market power⁴;
- for one or more of the proscribed purposes set out in paragraphs 46(1)(a), (b) or (c).

While the law in relation to s46 is unquestionably still developing, it is currently workably clear. The following notes set out an overview of the current position:

- (a) *Market Power*. Identifying the relevant market and whether the corporation enjoys substantial market power within the market are part of the same process and to the same end.⁵ Market power is the ability to behave in a manner unconstrained by competitors, customers or suppliers.⁶ Alternatively, market power is the ability profitably "to raise price by restricting output".⁷ A necessary, but not sufficient, condition to the existence of market power is the presence of barriers to entry.⁸ These may include both structural⁹ and "strategic"¹⁰ barriers to entry¹¹. Market share is an indicium of market power, but is not determinative.¹² Other features such as vertical integration¹³ and significant financial resources¹⁴ may also be indicative. Several corporations in a market may enjoy substantial market power.¹⁵ Market power may be inferred from the ability to engage persistently in "exclusionary conduct".¹⁶
- (b) *"Taking advantage" of market power*. To "take advantage" of market power is simply to "use" that power.¹⁷ As stated above, where a corporation engages in conduct in which it

⁴ An alternative and broader formulation of the "take advantage" element was accepted by the Court to some extent, namely that the impugned conduct need only be "materially facilitated" by the substantial market power the company enjoyed.

⁵ *Qld Wire*, Mason J and Wilson J at p187.

⁶ See subsection 46(3), which was introduced into the section so as to "provide a guide to the way in which 'market power' is to be determined" – para 43, Explanatory Memorandum.

⁷ *Qld Wire*, Dawson J at p200.

⁸ *Qld Wire*, Dawson J at p201.

⁹ For example, sunk costs, intellectual property rights, limited access to raw materials.

¹⁰ For example, a reputation for vigorous competitive response.

¹¹ *ACCC v Boral Masonry Limited* (2001) 106 FCR 328 (**Boral Masonry**).

¹² *Qld Wire*, Mason CJ and Wilson at p189. In recent cases, corporations with as little as 15% to 30% market share have been found to have substantial market power; *Boral Masonry* and *ACCC v Universal Music* (2001) FCA 1800.

¹³ *Qld Wire*, Mason CJ and Wilson at p190.

¹⁴ *Boral Masonry* at p388.

¹⁵ Explanatory Memorandum, Trade Practices Revision Bill (1986) at para 45.

¹⁶ This is a controversial proposition for which authority may be found in the judgments of Merkel and Finkelstein JJ in *Boral Masonry*.

¹⁷ *Qld Wire* at pp191, 194 and 202, and *Melway* at p606. Note however, that in the course of argument in the recent appeal to the High Court in *Boral Masonry v ACCC* (heard 21/22 May 2002), several of the 7 members of the Court sitting expressed doubts about this proposition.

would have been unlikely to have engaged if it did not enjoy substantial market power,¹⁸ it may be found to have "taken advantage" of its market power.¹⁹ This assessment should not be undertaken against a model of a perfectly competitive market, but must be assessed against the "realities" of a workably competitive market, in which no competitor enjoys a substantial degree of market power.²⁰ A taking advantage of market power may be made out where it is established that the conduct of the corporation was "materially facilitated" by the market power it enjoyed.²¹ Conduct such as refusing to supply products or a service²², selling products at low prices with a view to damaging or eliminating a competitor (known as "predatory pricing")²³, and "tying" two or more products together (such that one may not be purchased without the other)²⁴, has been found to constitute "taking advantage" of market power.

- (c) *Purpose.* A corporation which "takes advantage" of market power must have a purpose as set out in paragraphs (a), (b) or (c) of subsection 46(1) in doing so. That purpose need only be a "substantial" purpose among several purposes²⁵, and may be inferred from the circumstances and the effect of the conduct.²⁶

In the Council's view, the current law in relation to the definition of a relevant market and the adjudication of whether a corporation has "substantial power in a market" is sufficiently clear.

Long standing authorities on market definition, such as *Re Queensland Cooperative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169 at p190 (adopted by the High Court in *Qld Wire*), for example, have been widely accepted. Section 4E is clear in its terms. Equally, the legislative guidance set out in subsection 46(3), and the judicial pronouncements in *Qld Wire* and many cases since, provide adequate assistance in identifying substantial market power.

The current law in relation to s46 confirms that a company with substantial market power may not engage in conduct which has a proscribed purpose and which is open to it only (or predominantly) by virtue of the market power it enjoys. However, it is clear that a company with substantial market power may compete in the same way as a firm which does not enjoy substantial market power (even if, in doing so, it has a proscribed purpose).²⁷ Thus, all firms in a market may compete on the

¹⁸ In the sense that such conduct would not have been sensibly, profitably or ordinarily undertaken by the Corporation in those circumstances, even though the conduct may have been possible.

¹⁹ *Melway* at p610.

²⁰ *Melway* at p611.

²¹ *Melway* at p610.

²² *Melway, Qld Wire*, for example.

²³ *Boral Masonry*, for example.

²⁴ *TPC v CSR Ltd* (1991) ATPR 41-076, for example.

²⁵ See paragraph 4F(1)(b).

²⁶ See ss46(7), *Dowling v Dalgety Australia Limited* (1993) 34 FCR 109 at p143.

²⁷ This is consistent with the approach set out in the Explanatory Memorandum to the 1986 amendments to s46, at para 47:

"A corporation having the requisite degree of market power is not prohibited from engaging in any conduct directed to one or other of the objectives set out in paras 46(1)(a), (b) and (c). Such a prohibition would unduly inhibit competitive activity in the market-place. The section is not directed at size as such, nor at competitive behaviour as such. What is prohibited, rather, is the misuse by a corporation of market power." (original emphasis).

merits, but those with substantial market power may not go further, so as to take advantage of that power for a proscribed purpose.

"It is in the interests of competition to permit dominant firms to engage in vigorous competition, including price competition".²⁸

This prevailing construction of s46 is consistent with the objectives of the section set out above.

In the Council's view, to achieve its objectives, s46 must accommodate and encourage vigorously competitive behaviour in all markets - with more efficient and effective competitors (whether large or small) taking sales from others, with lower prices and better products. On the approach to s46 outlined by the High Court in *Qld Wire* and *Melway*, the current law seems to achieve this. As the High Court observed in *Qld Wire*:

"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. ... these injuries are the inevitable consequence of the competition section 46 is designed to foster."²⁹

A more interventionist approach to regulating "dominant" firms and their impact on competition in a market risks fostering a reluctance to engage in vigorous competition, inefficiency and higher prices for consumers.

Most suits brought under s46 have their genesis in competitor complaints. A competitor's objectives however, are commonly inconsistent with the publicly beneficial objectives of s46 particularly the promotion of vigorous, efficiency-enhancing competition. As the Full Federal Court has warned in relation to this issue in the context of predatory pricing allegations under s46:

"[T]he Court should be vigilant to ensure that its jurisdiction is not invoked to interfere with normal and legitimate competitive pricing activities ... under the guise that such activities are predatory".³⁰

In the same context, the Supreme Court of the United States has also observed that:

"It would be ironic indeed if the standards for predatory pricing liability (under s2 of the Sherman Act, inter alia) were so low that anti-trust suits themselves became a tool for keeping prices high".³¹

The current law in relation to the construction and application of s46 is consistent with the provision operating in a way which:

- (a) will not impede genuinely competitive behaviour in Australian markets;
- (b) constrains the behaviour of corporations which enjoy substantial market power, but does not restrict them from competing as other corporations may; and
- (c) in doing so, promotes competitive conduct in Australian markets.

²⁸ US Supreme Court, *Atlantic Richfield Co v USA Petroleum G* 495 US 328 (1990) at p340-1.

²⁹ per Mason CJ and Wilson J at p191.

³⁰ *Eastern Express*, per Lockhart and Gummow JJ at p604.

³¹ *Brooke Groups Ltd v Brown and Williamson Tobacco Corp* 509 US 209 (1993) at pp226-7.

There is still uncertainty in relation to the application of s46 in particular circumstances, as is evident from several controversial cases currently before the Courts. However, resolution of these cases is expected to clarify and expand broadly upon the construction adopted by the High Court to date.

2.3 Since *Queensland Wire* – Settled and Emerging s46 cases

Until recently, there had been little significant appellate court guidance on the application and construction of s46 since *Qld Wire* and the Full Federal Court decision in *Eastern Express*. Set out in Annexure A are brief notes on the more significant cases brought under s46 since *Qld Wire*, including all of the reported s46 prosecutions brought by the ACCC or its predecessor in that period, and more recent cases which are still to be determined on appeal before the Full Federal Court or the High Court.

The following points may be drawn from the list of cases set out in Annexure A (and more generally):

- (a) Of the prosecutions brought by the ACCC or its predecessor, it has been unsuccessful (to date) in the following: in 1980, *TPC v CSBP & Farmers Ltd* (1980) 53 FLR 135 (under the old "monopolisation" test), recently *ACCC v Australian Safeway Stores Pty Ltd* (No. 2) [2001] FCA 1861 (**Safeway**) and on appeal from *Rural Press Ltd v ACCC* [2002] FCAFC 213 (**Rural Press**).³² However, the judgements in *Boral Masonry* and in *ACCC v Universal Music Australia Pty Ltd* [2001] FCA 1800 (**Universal Music**) and other private suits, demonstrate that successful action is taken by both private litigants and the ACCC under the current provision.
- (b) Many of the private suits brought under s46 have been brought by competitors of the respondent (in the same, or "downstream" markets), and most of the ACCC/TPC prosecutions follow on from competitor complaints.³³ This highlights that an overly inclusive approach to the application and enforcement of s46 runs the grave risk of dampening or inhibiting competition, as legal proceedings or complaints to the ACCC may be used by competitors to deter vigorous competitive conduct by others. In turn, if competition becomes less aggressive, so as to accommodate a wider and less certain application of s46, this will be to the detriment of all consumers.³⁴

Further, the latest decisions by the Courts have expanded the application of s46.³⁵ The ACCC has acknowledged this. As Professor Fels put it in a speech in July 2001:

"Court action by the Commission can produce judgments that extend its powers under the Trade Practices Act and this is particularly true with section 46. ... The decisions (of the Courts in Melway and Boral Masonry) are a warning to companies tempted to use their

³² The ACCC was also unsuccessful at first instance in *Boral Masonry*, but succeeded on appeal.

³³ For example, the *Boral Masonry* case was provoked by complaints by another producer of concrete masonry products; the *Safeway* case was the result of complaints by store-owners about the conduct of local supermarkets to talk-back radio, a Victorian MP and the ACCC.

³⁴ See the points made on page 9 above.

³⁵ For example, the *Boral Masonry* and *Universal Music* cases suggest that a firm may have substantial market power with market shares of only 15-30%, significantly lower than was previously thought to be the case; and are authority for the novel approach of inferring the existence of market power, and its use, from findings in relation to the firm persistently engaging in "exclusionary" conduct.

muscle to crush their competitors, that section 46 is as vital in the quest for a competitive economy as are other provisions of the Act dealing with cartels and company mergers".³⁶

Shortly thereafter, the ACCC confirmed that, in its view:

"The recent "Boral" and "Rural Press" court decisions have strengthened the impact of those areas of the Trade Practices Act outlawing actions such as predatory pricing, price fixing and other restrictive practices. ... The "Boral" and "Rural Press" decisions indicate that the Courts are prepared to take a hard line where there is misuse of market power to the detriment of small business".³⁷

Forthcoming judgments in the cases referred to in Annexure A which are currently on appeal, will clarify to varying degrees the application of s46 to many of the particular types of conduct which are regulated under it. They include:

- (a) predatory pricing - *Boral Masonry* and *ACCC v Qantas Airways Limited (Qantas)* (in which other "predatory" conduct, described by the ACCC as "capacity dumping", will also be considered);
- (b) refusal to supply – *Universal Music*;
- (c) refusal to purchase ("delisting" of a product) - *Safeway*; and
- (d) threats against a competitor – *Rural Press*.³⁸

Upon these cases being concluded and the judgments published, it is expected that there will be greater clarity in the application and enforcement of s46, for the benefit of those seeking to enforce the provision in private litigation, and for the benefit of the ACCC in its role as regulator. Further, these decisions are expected to bring greater certainty for those businesses to which the provision may apply, and their advisers. This will significantly enhance the certainty with which businesses may regulate their own operations and their ability to ensure compliance with the law.³⁹

Any change to the terms of s46 is likely to require a fresh approach to its construction as a whole. As the 1986 Explanatory Memorandum made clear:

³⁶ Law Institute of Victoria Presidents Luncheon, "Current Issues at the ACCC" Melbourne, 10 July 2001.

³⁷ ACCC Press Release, 12 July 2001.

³⁸ The Full Court of the Federal Court has very recently allowed the appeal on the s46 allegations, in its judgment published on 16 July 2002., *Rural Press Ltd vACCC* [2002] FCAFC 213

³⁹ The judgments published in *Rural Press* and the judgements to be published in these appeals are expected to address the "problem" identified by Professor Warren Pengilly in his submission to the Senate Legal and Constitutional References Committee Inquiry into s46 and s50 of the Act, where he submitted:

"I firmly believe that the major problem of s46 is not whether or not it needs to be "beefed up" but the complete uncertainty of what the law means. This uncertainty is not fair to business decision-makers and leads to considerable inefficiencies. It is not fair to small business or consumers either because unpredictability of result can involve unreal or non-achievable expectations and the futile expenditure of significant resources."

The High Court took up this issue in its approach to resolving the issues in *Melway*,

"There is some force in the suggestion ... that provisions such as section 46 should, if such a construction is fairly open, be construed in a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful". at p602.

"... subsection 46(1)... is a composite provision. It should therefore, in the final analysis, be construed as a single provision even if particular words or expressions need to be looked at separately in the first instance".⁴⁰

The Council's view is that any legislative change to the provisions of s46 at this time (just as further pronouncements from the superior Courts are emerging) is likely to deny to the business community, consumers and to the ACCC many of the benefits of the emerging and increasing certainty in the application of the current s46.⁴¹

Those benefits are significant and should not be underestimated. In practical terms, they are likely to deliver:

- increased compliance by business (and decreased compliance costs);
- less contested litigation (as the legal position in different circumstances becomes clearer)⁴²; and
- decreased inadvertent failure to comply with the law.

2.4 Publicly Suggested Changes to s46

In the course of public comment and submissions made since the announcement of the *Trade Practices Act Review* in October 2001, the following changes or additions to s46 have been suggested or considered:

- reversal of the onus of proof in relation to the "purpose" of a corporation;
- replacement of the "purpose" element in s46 with an "effects" test;
- introduction of a "divestiture" remedy; and
- introduction of a "cease and desist" remedy which may be enforced by the ACCC.

The first and third proposals were the subject of a recent inconclusive Inquiry by the Senate Legal and Constitutional References Committee.⁴³

⁴⁰ Explanatory Memorandum, Trade Practices Revision Bill 1986 paragraph 36. See also *Melway* at p606.

⁴¹ In the United States the relevant legislation in this area (section 2 of the *Sherman Act*) has remained unchanged in over 100 years. The Courts have refined the application of that law to particular situations and it now provides considerable certainty and guidance for American business. As Senator Sherman himself put it in 1890:

"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries". 21. Cong. Rec. 2460 (1890).

⁴² In this regard, a useful comparison can be drawn between the rate at which the ACCC "settles" its price fixing prosecutions (by way of agreed joint submissions and findings of fact and penalty being put to the Court with the consent of respondents), where the law is quite clear, as against the current record of all s46 prosecutions being vigorously defended and subsequently appealed.

⁴³ The Inquiry published its report on 14 May 2002. A copy may be found at www.aph.gov.au/senate/committee/legcon_cte/tradepactices/tpa.pdf. The conclusion to the report deferred making any finding until after the publication of the report and recommendations of the Committee.

The second⁴⁴ and fourth⁴⁵ proposals are advocated by the ACCC in its Submissions to the Committee. The ACCC also suggests that the proposal in relation to divestiture remedies "warrants consideration", but is not pressing for such a change "at this stage".⁴⁶

The Council does not support any of these proposals for change to s46 or the remedies which may flow from it. Detailed reasons for that position in each case are set out below. More broadly however, the Council considers that the cost to the community of changing the law, at a time when the current law is both broadly satisfactory and becoming increasingly certain, significantly outweighs any potential benefit that may be achieved by any or all of the proposed changes.

2.5 Reversal of Onus of Proof on Purpose

The ACCC has stated that:

"The ACCC's experience has been that in the absence of "smoking gun" documents, proving a relevant purpose under section 46 to the satisfaction of a Court is an onerous forensic process."⁴⁷

The ACCC has also referred to difficulties in establishing purpose in light of corporations hiding records or creating false evidence.

"... firms with substantial market power seem to be very aware of the consequences of smoking gun documents. A number appear to be taking great care to avoid potentially incriminating documents being created or stored. ... This makes the task of proving purpose in these cases more difficult."⁴⁸

The ACCC's record in recent times is contrary to the propositions above. In the *Universal Music* and *Safeway* cases, the ACCC was able to establish the existence of a proscribed purpose on the strength of inferences from the conduct concerned.⁴⁹ In the *Boral Masonry* case, purpose was established by reference to internal strategic planning documents which were produced to the ACCC pursuant to its powers under s155 of the Act.⁵⁰ Similar documents were produced to the ACCC in the same way in the *Rural Press* prosecution.

Equally, private litigants appear to have had little difficulty in establishing the proscribed purpose. For example, a proscribed purpose was found in *Qld Wire*, *Eastern Express*, *Taprobane Tours WA*

⁴⁴ The "effects test" submissions of the ACCC are set out at p79-95 of its Submissions.

⁴⁵ The "cease and desist" submissions of the ACCC are set out at p95-105 of its Submissions.

⁴⁶ See p105 of the ACCC Submissions.

⁴⁷ Hansard, Legal and Constitutional References Committee of the Senate, Public Hearings, Melbourne 17 April 2002, p2, evidence of Professor Fels, Chairman of the ACCC. See also p80 of the ACCC Submissions.

⁴⁸ Hansard, Legal and Constitutional References Committee of the Senate, Public Hearings, Melbourne 17 April 2002, p3, evidence of Professor Fels, Chairman of the ACCC. See also p82-3 of the ACCC Submissions.

⁴⁹ See paragraph 443 of Hill J's judgment in *Universal Music*, and paragraphs 1132-3 of Goldberg J's judgment in *Safeway* (in which matter, the ACCC was partially successful in establishing a proscribed purpose, but unsuccessful in establishing other elements of s46).

⁵⁰ As the trial judge in *Boral Masonry* (1999) 166 ALR 410, put it - "*The processes of s155 examination, discovery and cross-examination at trial have bared the corporate soul of [the respondent]. Its intimate and confidential documents have been exposed to the most critical scrutiny.*", at p442. On appeal, Finkelstein J confirmed that "*The finding on purpose was made largely because of the "smoking gun" documents found during discovery or in reliance on the Commission's statutory right to obtain the production of documents.*", at 106 FCR page 405.

Pty Ltd v Singapore Airlines Limited (1990) 96 ALR 405 (at first instance, decision reversed on appeal on different grounds), and *Melway*, among other matters.

In any event, establishing a proscribed purpose under s46 is not currently onerous, in light of the following:

- (a) Subsections 4F(1)(b) and 46(7) of the Act make it clear that a proscribed purpose may be established by direct evidence or by inference from the conduct of the corporation, and that the proscribed purpose need only be a "substantial purpose" among several purposes of particular conduct.⁵¹

These provisions establish a flexible framework in which "purpose" may be inferred by a court from conduct or other circumstances.

- (b) In addition to subsection 46(7), there is authority that the "purpose" of conduct may be inferred from the nature of the conduct concerned, the circumstances in which it occurred and its likely effect. In *General Newspapers Pty Ltd v Telstra Corp* (1993) 45 FCR 164, Davies and Einfeld JJ (at 187) regarded "purpose" in s46 as meaning "the effect which it is sought to achieve - the end in view", or the "result aimed at". Equally, in *Eastern Express*, Lockhart and Gummow JJ considered that (in the context of allegations of predatory pricing):

*"Whether the finding as to purpose which is sought against the corporation should be inferred from the evidence as to pricing must be judged by considering not only the logic of the matter; the court must also consider whether "general human experience" would be contradicted if the conduct which occurred were unaccompanied by the purpose sought to be proved": see Morgan v Babcock & Wilcox Ltd (1929) 43 CLR 163 at 173; Director of Public Prosecutions v Boardman [1975] AC 421 at 444.*⁵²

See also *Dowling v Dalgety Australia Limited* (1992) 34 FCR 109, at p143 per Lockhart J.

- (c) In the case of the ACCC, it has extensive investigative powers under s155, by which it can require:⁵³
- (i) information to be furnished;

⁵¹ Subsection 4F(1)(b) provides:

"4F(1) For the purposes of this Act:

(a)...

(b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason."

Subsection 46(7) provides:

"Without any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances."

⁵² At p72.

⁵³ With no privilege against self-incrimination to be relied upon (ss155(7)) and as yet uncertain rights in relation to material to which legal professional privilege applies. (*The Daniels Corporation v ACCC*, heard by the High Court on 18 June 2002, decision reserved (*Daniels*)).

- (ii) the production of documents;
- (iii) the giving of evidence in an examination under oath; or
- (iv) access to private premises to inspect and copy documents.

The ACCC has used these powers extensively in its investigations prior to several s46 prosecutions, including the *Boral Masonry*, *Rural Press* and *Universal Music* prosecutions. Clearly, the ACCC already enjoys considerable advantage in finding evidence of, and proving the existence of, a proscribed purpose.

- (d) All proceedings brought under s46 (including ACCC prosecutions) are civil proceedings, to which the rules of civil procedure apply. Proof is on the balance of probabilities. In the absence of evidence from a party on a particular issue, the Court may draw any open negative inference. Discovery of all relevant documents (including e-mails) must be given and, with the leave of the Court, interrogatories may be administered. In all, proceedings brought initially on little evidence (or indeed, on reliance on ss46(7)) are likely, by these rules and procedures alone, to deliver to an applicant (whether the ACCC or a private litigant) all existing evidence as to a respondent's purposes.
- (e) Whatever the means used to discover it, many Australian businesses are likely to have records replete with statements of an intention to harm competitors⁵⁴ - as McHugh J pithily observed in argument in the appeal in *Boral Masonry*:

"I do not know how anybody in a competitive market could ever avoid having one of the proscribed purposes. It seems almost a contradiction in terms to say that a company in a market fighting for a market share is not doing so for the purpose of "substantially damaging a competitor", or all its competitors".

In light of the current law, the Council is of the view that a reversal of the onus of proof in relation to "purpose" is unnecessary.

In addition, any reversal of onus raises very serious questions of fairness. A contravention of s46 is conduct of a quasi-criminal nature and carries with it the prospect of "heavy pecuniary penalties"⁵⁵ and significant negative publicity, among other sanctions. As a matter of fairness, the ACCC and other applicants ought to be required to plead a positive case and present evidence to support it. This will ensure that companies are not required to defend themselves in the absence of clear evidence of each of the substantive requirements of s46. Indeed, the ACCC itself has supported these principles in an analogous context:

"The Commission does not support NECA's proposal to reverse the onus of proof for generators. Such a clause would require generators to prove themselves innocent to the satisfaction of the Tribunal if their behaviour was questioned by NECA. While the Commission believes that the term "good faith" can be made to work in the rebidding context, it is of the view that having to prove that one acted honestly is very difficult.

⁵⁴ This is increasingly the case with the expanding prevalence, and durability, of email records.

⁵⁵ *Melway*, at p602.

*The Commission is concerned that the power to accuse a party of acting without good faith has the potential to impose significant costs being imposed (sic) on participants that are called upon to defend themselves. The Commission supports the principle that an accused party should be required to justify its actions if called into question. However, it believes that it is not unreasonable to require the Code Administrator to undertake such investigations as are necessary to build a substantive case before making such allegations.*⁵⁶

It should be borne in mind also, that s46 is a provision of general application. It should be clearly distinguished from a regulation which addresses a "special case" where a reversal of onus, or other amendment, is required so as to deal with a particular competitive context. An example of the latter is Part XI B of the Act, introduced in 1996, which includes provision for a reversal of onus generally in relation to the "competition rule" applying to the telecommunications industry. These provisions were introduced only in light of a particular industry requiring special regulatory attention in a transitional phase. As the ACCC described the position in an October 1997 publication:⁵⁷

"The regime (under Part XI B) applies in addition to Part IV of the TPA, which regulates restrictive trade practices in general. It was felt by government that total reliance on Part IV may be ineffective to constrain anti-competitive conduct in the telecommunications industry, given the still developing state of competition. The fast pace of change and complex nature of horizontal and vertical arrangements of firms operating in the industry meant that any anti-competitive behaviour, if remained unchecked, could cause rapid damage to the limited competition that had already developed and severely hamper new entry".

Such special considerations do not apply in relation to the application of s46 to Australian commerce generally.⁵⁸

If a general proposal to reverse the onus of proof on the question of purpose under s46 is to be seriously considered, careful attention must be given to the serious technical implications of the proposal and other necessary consequential amendments.

- (a) As the High Court found in *Melway*, the various "aspects" of s46 are "inter-related".⁵⁹ That this is the case means that a reversal of the onus in relation to the "purpose" aspect is likely to have a substantive effect on a Court's approach to its determinations on the other inter-related "aspects" of that provision. By way of example, in the *Boral Masonry* case, the Full Court's findings in relation to market power proceeded from the characterisation of conduct as "exclusionary" (ie intended to damage or deter competitors). As Finkelstein J put it at page 413:

"The evaluation of market power and the abuse of that power is part of one analysis. The existence of market power based on this approach cannot be

⁵⁶ *Draft Determination, Amendments to the National Electricity Code, Changes to Bidding and Re-bidding rules*, ACCC, 3 July 2002, at p57.

⁵⁷ Telecommunications Industry – ACCC note, October 1997, p9.

⁵⁸ In this regard, the Council is open to the view that some industries, in addition to telecommunications, may require specific regulations at particular times in order to prevent monopolisation conduct effectively.

⁵⁹ *Melway* at p606.

examined independent of the alleged exclusionary conduct. It is the exclusionary conduct that establishes market power, not the reverse".

If this approach survives appeal, the proposal to reverse the onus of proof on the question of purpose has two alternative serious implications:

- (i) On the one hand, the ACCC (or private applicant) may be required to adduce considerable evidence in relation to "purpose" in any event, in order to establish the elements of "market power" and "taking advantage". Thus, the trial will proceed on the basis that the applicant must prove an "exclusionary" purpose to one objective (namely to establish market power), and the respondent has to prove a "purpose" other than a proscribed purpose, to another (to overcome the reversed onus on the question of purpose). Clearly, this is unwieldy and means that the applicant will not be spared from having to adduce extensive evidence as to the respondent's purpose notwithstanding the reversal of onus.
- (ii) Alternatively, if the court accepts as proved a proscribed purpose on the basis of a reversed onus of proof, then (in the absence of satisfactory evidence to the contrary from the respondent) findings on other issues may flow automatically from that point, such that, in light of the respondent's "exclusionary" purpose, its conduct is found to be "exclusionary" and that of a corporation which enjoys, and is taking advantage of, substantial market power.⁶⁰ This outcome is clearly unfair.

Both outcomes are unworkable as they stand. Thus, any changes to the onus of proof in relation to "purpose" may require a substantial revision of the current case law on s46 more broadly, to deal with the consequential implications of the amendment.

- (b) There will have to be consequential amendments to subsections 46(7) and 4F(1)(b) of the Act. It will be doubly onerous if those provisions remained unchanged such that the respondent would be required to establish that:
 - (i) its purpose was not a proscribed purpose under paragraphs 46(1) (a), (b) or (c); and
 - (ii) it did not have any substantial purpose which falls within paragraph 46(1) (a), (b) or (c); and
 - (iii) no such substantial purpose can be inferred from the circumstances or its conduct.
- (c) There are fundamental differences between the several outcomes which may be described loosely as a "reversal of the onus of proof". There are examples of the different forms already in the Act:
 - (i) Under s83, findings of fact in prosecution proceedings will be prima facie evidence of those facts in proceedings under s82. Equally, under sections 75AW⁶¹ and 151AKA⁶², the ACCC is entitled to issue notices specifying certain conduct, whereupon the notice will be prima facie evidence of the contention in the notice.

⁶⁰ This approach to the construction and application of s46 was adopted by the ACCC in the *Boral Masonry* case.

⁶¹ In relation to GST matters under s75AU.

⁶² In relation to "competition notices" under Part XIB.

- (ii) Under ss51A(2), a corporation against which an allegation of misleading conduct in relation to a "future matter" is made, is to "be deemed not to have had reasonable grounds for making the representation"⁶³, "unless it adduces evidence to the contrary".

This was an issue to which the recent Senate Committee was alive.

"3.37 None of the submissions discussing the reversal of the onus of proof, neither those supporting it nor those opposing it, differentiated between the legal and evidential burden of proof. However, the ACCC clarified in evidence that it was referring to the legal burden of proof. The distinction is important. If the legal burden were reversed, defendants would have to establish, on the balance of probabilities, that they did not use their market power for an improper purpose. If the evidential burden were reversed this would merely require defendants to introduce evidence showing that their purpose was not improper. In this latter case the burden of proving improper purpose on the balance of probabilities would remain with the ACCC."⁶⁴

- (d) Finally, the proposal before the Senate Committee was that only the ACCC, as applicant, would enjoy the benefit of the reversal of onus of proof.⁶⁵ In the view of the Council, for the reasons set out above, it is perhaps the ACCC which least needs this assistance.

2.6 The Introduction of an "Effects Test"

The Council generally opposes any change to the terms of s46 for the reasons set out above. The Council is confirmed in this view in relation to the proposal to introduce an "effects" test into s46, on the basis that:

- (a) there is no clearly identified need to make the change; and
- (b) any such change (except in the case of one proposal) is likely to have limited practical effect (other than to create considerable uncertainty among those to whom the provision potentially applies).

There has been much public discussion of (even considerable barracking for and against) the proposal to introduce an "effects" test to s46. The following points are made by way of introduction, and to address some misconceptions which have emerged from, or are bound up, with some of that commentary:

- (a) A "purpose" or "effects" test in s46 does not, of itself, discriminate between conduct which is "pro-competitive" or "anti-competitive". In each case, the "test" will tell you no more than whether the conduct was intended to damage a competitor, etc, or had that effect. Whether or not a firm "takes advantage", or "uses", its market power in particular

⁶³ In which case, "the representation shall be taken to be misleading" (ss51A(1)).

⁶⁴ Senate Legal and Constitutional References Committee Report, 14 May 2002, p21.

⁶⁵ The proposed amendment to s46 was:

"46(8) In an action brought against a corporation by the ACCC under subsection (1), if the ACCC can show that the corporation:

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

(b) has taken advantage of that power;

the onus rests with the corporation to show that the corporation has not taken advantage of its power for a purpose referred to in subsection (1)."

circumstances is the discriminating factor by which permissible "pro-competitive", or illegal "anti-competitive", conduct is predominantly identified. It is then "the purpose provisions which define what uses of market power constitute misuse".⁶⁶ For example, from an economic perspective, to raise price and decrease output is a use, or taking advantage, of market power. However, because that conduct does not have, by its very nature⁶⁷, a proscribed purpose, it will not be a contravention of s46.

- (b) Most vigorously competitive conduct is likely to have a subjective purpose⁶⁸ of damaging competitors or deterring or responding to their competitive behaviour.⁶⁹ Competitive conduct will even more commonly have that effect. Whether conduct is "efficiency enhancing", on the one hand, or "exclusionary" on the other, each may have a proscribed purpose (or effect).
- (c) In other jurisdictions, little regard is had to the "purpose" of allegedly monopolistic conduct so as to avoid misleading inferences and to minimise the costs of investigation and subsequent litigation. As the 7th Circuit Court of Appeal stated in *AA Poultry Farms v Rose Acre Farms* 881 F.2d 1936 (1989) at pp1401-2:

"Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare down price to cost, all in pursuit of more business ... You cannot be a sensible business executive without understanding the link among prices, your firm's success, and other firms' distress. If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden "intent", they run the risk of penalising the motive forces of competition....

Traipsing through the warehouses of business [records] in search of misleading evidence [of intent] both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation."

- (d) Against this, an anti-competitive purpose may, in some circumstances, be a more confined issue to litigate than the question of whether conduct has, or is likely to have, the effect of substantially lessening competition in a market. That question requires a very extensive analysis of one or more markets as a whole and all those participating in them, rather than an inquiry into the subjective purpose of the respondent alone. Thus, it is not correct to say that the "purpose" test necessarily results in a more "onerous forensic process" or any undue evidentiary burden on the ACCC or any other applicant.⁷⁰

⁶⁶ *Qld Wire*, Mason CJ and Wilson J at p191.

⁶⁷ This is the case as raising prices is likely only to create opportunities for competitors rather than damage them.

⁶⁸ It is predominantly the subjective purpose of the respondent in engaging in impugned conduct which is relevant: see *Eastern Express* at p66.

⁶⁹ One notorious example is the often quoted advice of Ray Kroc, founder of McDonalds:

"When you see the competition drowning,...stick a water hose down their throats".

See also paragraph 24(e) above.

⁷⁰ See ACCC Submissions p80.

- (e) For the reasons set out above, it is not the case, in the view of the Council, that establishing a proscribed purpose represents an onerous evidentiary barrier to bringing successful s46 proceedings.
- (f) Equally, as is also discussed above, in many cases the "purpose" of particular conduct will be largely inferred from its obvious effects. As the Privy Council found in *Telecom Corp. of NZ Ltd v Clear Communications Ltd* [1995] 1 NZLR 385, at p402:⁷¹

"...it will frequently be legitimate for a Court to infer from the defendant's use of his dominant position that his purpose was to produce the effect in fact produced".

Further, the ACCC seems to share this approach to discerning a proscribed purpose to particular conduct:

"Evidence pointing to the effect of undermining competition may be used to infer proscribed purpose."⁷²

As the purpose and effect of a corporation's conduct are bound up together (with each evidencing or relevant to the other to some extent), it remains likely that pleadings in s46 cases and the consequential processes of discovery and adducing evidence will still involve issues of purpose. Thus, few savings may be made in terms of reduced investigation or litigation costs.

- (g) That other provisions in Part IV of the Act refer to "purpose, effect or likely effect" is not to the point of whether s46 should refer to either or both. Each provision in Part IV deals with clearly different conduct in its own way. Exclusionary provisions, for example, are identified only by reference to the "purpose" of the impugned arrangement.⁷³ Anti-competitive mergers or acquisitions are identified only by their "effect or likely effect".⁷⁴

In light of the points above, as a practical matter, there may be little difference in the ambit or application of s46 if the words "for the purpose of" in ss46(1) were replaced with either:

- (a) "with the effect of";
- (b) "for the purpose, or with the effect or likely effect of".⁷⁵

One important evidentiary issue will arise upon introducing either of the above versions of an "effects test". In the case where a misuse of market power is alleged to have the (purpose or) effect of:

"(c) deterring or preventing a person from engaging in competitive conduct in that or any other market",

the change from a "purpose" test to an "effects" test has a very significant impact on the evidence to be adduced by each party. Under a "purpose" test, an inquiry into the respondent's subjective purpose is required, and the parameters of that inquiry are largely the respondent's records and the evidence of its witnesses. If an "effects" test is adopted however, the position changes. The

⁷¹ The case involved allegations of a contravention of s36 of the Commerce Act (NZ), in very similar terms to s46.

⁷² "Anti-competitive conduct in Telecommunications Markets – An Information Paper", ACCC, August 1999, p41.

⁷³ See s45 and s4D of the Act.

⁷⁴ See s50 of the Act.

⁷⁵ This second formulation is the one proposed by the ACCC - see p94 of its Submissions.

inquiry will then be focused wholly on the circumstances of the "victim" so as to determine whether it was or was likely to be "deterred ... from engaging in competitive conduct". Evidence on that issue will lie almost wholly in the "victim's" records and witnesses, much of which may be self-serving and extremely difficult to rebut.⁷⁶

Importantly, also any such change to an "effects" test will cause very significant uncertainty – indeed, to the Council's observation, the mere proposal of such a change has done so already.

There is a range of views among the members of the Trade Practices Committee of the Council as to whether an "effects test" will really operate to broaden the ambit or application of s46. Whether or not that is the case, however, it is clear that the change is likely to have the effect of creating uncertainty and deterring businesses (whether their fears are real or only perceived) from competing as vigorously. Even if this were only a short-term phenomenon, in the absence of a clear need for the change, the cost to the economy in those circumstances would outweigh any potential benefit.

In circumstances where:

- (a) a change to an "effects" test may, in fact, over time, achieve little, or have only negative impacts;
 - (b) settled law in relation to the construction and application of the current form of s46 is just emerging; and
 - (c) that emerging law is satisfactory from a policy perspective (even if not ideal),
- it is clear, in the Council's view, that no change ought to be made.

There have been many previous occasions on which the introduction of an "effects" test into s46 has been considered.⁷⁷ In each of the previous Committee Reviews, the proposal has been rejected. Consistent themes in those recommendations were:

- (a) the proposal risked unduly widening the ambit of s46;
- (b) such an amendment would create uncertainty; and
- (c) the broader application and/or the uncertainty would potentially deter vigorous competitive activity.

The following conclusion of the most recent review on this issue, by the House of Representatives Standing Committee on Economics, Finance and Public Administration in 2001, is wholly in line with the Council's view:

"Given (the Melway, Boral and Rural Press judgments) in the interpretation of s46 and the repeated concerns expressed by various inquiries about the move to an effects test, the

⁷⁶ As the ACCC itself has put it, in relation to one type of conduct under s46, "The Commission believes that an argument based on self-interest should not be the basis of deterring predatory pricing cases.", at p87 of the ACCC Submissions.

⁷⁷ An extremely useful survey of the history of "effects" test proposals, their application in Part XIB of the Act, and the review by the Productivity Commission of the operation of Part XIB may be found in "An effects test under s46 of the Trade Practices Act - identifying the real effects", Landrigan, Peters and Soon, (2002) 9 Competition and Consumer Law Journal 258. The Review Committees include the Blunt Committee in 1979; Griffiths Committee in 1989; Cooney Committee in 1991; Hilmer Committee in 1993; Reid Committee in 1997; Baird Committee in 1999 and the House of Representatives Standing Committee on Economics, Finance and Public Administration in 2001.

*Committee's preference is to await the outcome of further cases on s46 before considering any change to the law.*⁷⁸

An alternative formulation of "effects" test (to those set out above) is that which was adopted in 1997 in Part XIB of the Act, which applies only to telecommunications markets. Section 151AJ provides that a corporation will contravene the "competition rule" set out in s151AK where it:

- "(a) has a substantial degree of power in a telecommunications market; and*
- (b) ...takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market..."*

As stated above, the Council opposes any change to s46. Further, there are particular reasons, set out above, as to why neither of the "effects tests" set out above, should be adopted. However, if the Committee is inclined to recommend an "effects" test be introduced into s46, the Council is of the view that the following formulation be considered in preference to alternative formulations:

"A corporation that has a substantial degree of power in a market shall not take advantage of that power to engage in conduct with the effect, or likely effect, of substantially lessening competition in that or any other market."

This is for the following reasons:

- (a) The inclusion of a substantial lessening of competition test into s46 is likely to entrench the stated objective of the provision, namely to promote and protect competition (for the benefit of consumers), not competitors. By moving away from a focus on "competitors", to a focus on the effect of conduct on competition in a market, s46 would be likely to encourage vigorous competitive behaviour. Section 46 would then be in a form more perceptibly in line with the statement that:

*"Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. In an industry plagued by falling demand and excess capacity, the sinking of a competitor may be an indication of a healthy competitive process".*⁷⁹

This might mean that there would be less concern for the fate of any one competitor in circumstances where the competitive process in the industry does not notice its passing.⁸⁰ Such an outcome may not be acceptable to all, but the approach reflects mainstream economic thinking on anti-trust regulation.

- (b) The removal of all reference to "purpose" in s46 would have the benefits identified by the 7th Circuit Court of Appeal in the *Rose Acre Farms* case, cited above, namely to remove the prospect of mistaken inference from purpose and to reduce the costs of investigation and litigation.⁸¹
- (c) If this formulation were adopted, the Australian law in relation to "monopolisation" conduct generally would be more closely aligned with that in the US. This would have some

⁷⁸ Economics Committee's Report may be found at www.aph.gov.au/house/committee/efpa/ACCC9900/report.pdf.

⁷⁹ *Pacific Engineering and Production Company of Nevada v Kerr-McGee Corporation* 551 F.2d 790 (10th Cir 1977) at p795.

⁸⁰ This is to be contrasted with the present position where a firm takes advantage of its market power for the purpose of eliminating a small, marginal competitor. Such conduct may, in fact, have little impact on competition (or, in turn, consumers), but it would nevertheless contravene section 46.

⁸¹ See also *Advo Inc v Philadelphia Newspapers Inc* 51 F.3d 1191 (3^d cir. 1995) at p1199.

benefits, particularly the increased ability to draw guidance from over 100 years of jurisprudence on s2 of the *Sherman Act* and related provisions (such as s2 of the *Clayton Act*, as amended by the *Robinson-Patman Act*).

The Productivity Commission recently reviewed the operation of the "effects" test under s151AJ in comparison with the existing provisions of s46.⁸² Its conclusions included:

- (a) the differences between s46 and Part XIB may not be large, especially in light of subsection 46(7);⁸³
- (b) the "effects" test under Part XIB is more expansive than a purpose test, which has implications for regulatory error;⁸⁴ and
- (c) s46 permits a focus on damage to a competitor, rather than to competition, and hence a contravention of s46 may be easier to prove than a contravention of the "competition rule".⁸⁵

However, for a revised s46 (with an "effects" test in the form suggested) to operate properly, it must preserve and confirm the separate requirement that the respondent firm be shown to have "taken advantage" of its market power in order to be liable, even if the firm's conduct has the effect of substantially lessening competition. If this were not clearly the case, the new provision would be likely to prohibit unilateral conduct by a dominant firm which lessens competition, but which does not take advantage of market power – such conduct might include the development, production and sale of a better and cheaper product. That this needs to be the case to avoid prohibiting obviously beneficial conduct, illustrates clearly a danger in amending the provision in the way suggested. This is particularly the case where the Full Federal Court has found that an "exclusionary" purpose (let alone, an "exclusionary" effect) is evidence of, and may establish, a "taking advantage" of market power.⁸⁶

Overall, the Council does not support the adoption of an "effects" test for s46, in the form of an effect of "substantially lessening competition", at this time. As already submitted above, the present law in relation to s46 is workable, achieves its broad objectives and is expected to be significantly clarified in the near future. The benefits of the status quo outweigh the potential for any possible benefits upon making the change discussed above.

2.7 Divestiture of Assets or Shares.

The Council understands that there is a general proposal to include in the Act a remedy for compulsory divestiture of assets by a corporation, following on from a contravention of s46.⁸⁷ A second proposal, which was considered by the Senate Committee, is that a provision such as the suggested s50AA be introduced, to provide for divestiture at large, in the following terms:

⁸² Telecommunications Competition Regulation Inquiry Report, 21 December 2001.

See www.pc.gov.au/inquiry/telecommunications/finalreport/index/html.

⁸³ See p176.

⁸⁴ See p176-7.

⁸⁵ See p179.

⁸⁶ See *Boral Masonry*, p413.

⁸⁷ The ACCC suggests that such an amendment "warrants consideration", but it "is not actively pursuing such an amendment at this time". See p105 of the ACCC Submissions.

"50AA(1) If a corporation:

- (a) owns shares in the capital of a body corporate; or*
- (b) owns assets of a person (sic)⁸⁸;*

and the ownership has the effect of substantially lessening competition in a market, the ACCC may apply to the Court for an order that the corporation divest itself of the shares or assets."

The Council considers the first proposal, in relation to a divestiture sanction consequential upon a contravention of s46, to be unnecessary in the present circumstances. The Council opposes the second proposal, for a divestiture power at large, as bad law, unconstitutional and contrary to the objectives of Part IV of the Act.

2.8 Divestiture on Contravention of section 46

A contravention of s46 already exposes a corporation to the following sanctions and remedies:

- (a) a penalty of up to \$10 million (s76);
- (b) declaratory relief and findings of fact on which others may rely (see s83);
- (c) (following on from (b)) damages (s82) and other remedies under s87, which may be sought from a respondent by proceedings brought by a single applicant or collectively including by way of class action or representative proceedings brought by the ACCC;
- (d) injunctive relief (s80); and
- (e) adverse publicity orders (s86D).

This is already a substantial armoury at the Court's disposal to prevent or deter a contravention of s46.

Section 46 proscribes conduct by a corporation, rather than a structural position that a corporation enjoys or has acquired. To have substantial market power is an element to a contravention of s46, but it is not, alone, illegal conduct. Instead, conduct which "takes advantage" of that market power, for a proscribed purpose, contravenes s46. Logically and equitably, the sanctions attendant to s46 should address the conduct proscribed by the section, rather than the structure of the contravening corporation.

To be sure, a position of substantial market power often arises as a result of competitive advantage or efficiency or an innovation achieved by a corporation. With that advantage, the corporation is able to deliver many outcomes which are to the benefit of customers and consumers. Indeed, this may be the case, even if the corporation has otherwise taken advantage of that market power in one or more respects. In recent cases, the ACCC has identified as "sources" of market power of respondent corporations, many factors which may equally be categorised as "efficiencies" or other advantages which a corporation has achieved to the benefit of its customers. In the current *Qantas* proceedings, for example, the "market power" which Qantas is alleged to have, and to have misused, is particularised as being "as a result of" various factors including:

- a "fleet of approximately 147 aircraft";
- a "reputation in the world for safe operation";

⁸⁸ Presumably, the words "of a person" should be deleted.

- "loyalty programs including a frequent flyer program";
- "special lounges for frequent and business travellers"; and
- "a national network offering services between all major centres in Australia".⁸⁹

An order to divest assets upon a contravention of s46 is likely to be a very "blunt instrument". First, there is a high likelihood that a court will destroy pro-competitive efficiencies.

Indeed, no profit maximising firm is likely to hold any assets which do not deliver to it some degree of efficiency or competitive advantage. Secondly, it is likely to be extremely difficult to identify the particular assets to be divested so as to address precisely the illegal conduct. In the case of an anti-competitive merger, the assets acquired may be divested, or their acquisition declared void, with relative ease (although, see the discussion below). However, in the case of conduct which contravenes s46, the identification of particular assets which ought to be divested so as to preclude, or to deny the benefit of, a refusal to deal, or a predatory campaign, for example, will be extremely difficult.

Special difficulties will confront courts in requiring divestiture by single, unitary companies. Indeed, in the recent *Microsoft* decision, *United States of America v Microsoft Corporation*, United States Court of Appeal, No. 00-5212, 28 June 2001⁹⁰, the Court expressly noted the difficulty of splitting up a unitary company:

"On remand, the District Court must reconsider whether the use of the structural remedy of divestiture is appropriate with respect to Microsoft, which argues that it is a unitary company. By and large, cases upon which plaintiffs rely in arguing for the split of Microsoft have involved the dissolution of entities formed by mergers and acquisitions. On the contrary, the Supreme Court has clarified that divestiture "has traditionally been the remedy for Sherman Act violations whose heart is inter-corporate combination and control" (du Pont 366 US at 329), and that "[c]omplete divestiture is particularly appropriate where assets or stock acquisitions violate the anti-trust laws" (Ford Motor Co, 405 US at 573).

One apparent reason why courts have not ordered the dissolution of unitary companies is logistical difficulty. As the Court explained in United States v Alcoa 91F Supp 333, 416 (SDNY 1950), a "corporation, designed to operate effectively as a singly entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency". A corporation that has expanded by acquiring its competitors often has pre-existing internal lines of division along which it may more easily be split than a corporation that has expanded from natural growth. Although time and corporate modifications and developments may eventually fade those lines, at least the identifiable entities pre-existed to create a template for such division as the court might later decree. With reference to those corporations that are not acquired by merger and acquisition, Judge Wyzanski accurately opined in United Shoe:

"United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labour force. It takes no Solomon to see that this organism cannot

⁸⁹ Paragraph 18 of the Statement of Claim filed by the ACCC on 7 May 2002 in *ACCC v Qantas Airways Limited*.

⁹⁰ The opinion may be found at <http://pacer.cadc.uscourts.gov/common/opinions/200106/00-5212a.txt>.

be cut into three equal and viable parts". ... United States v United Shoe Machine Co. 110 F. Supp. 295, 348 (D. Mass. 1953)."

There are numerous other difficulties in splitting up a unitary company. For example, a divestiture order may have adverse effects on third parties, such as creditors, minority shareholders and employees.

In the Council's view, the only basis on which a divestiture remedy to s46 may be justified is if there is compelling evidence that other, already available sanctions fail to address the wrong adequately. Particularly, it must be the case that an injunction, no matter how creatively or specially crafted, will not provide adequate relief.⁹¹

The Council notes however, that in some special cases injunctive relief in relation to conduct which contravenes s46 may be difficult to formulate and enforce. The difficulty is apparent, for example, in the case of illegal predatory pricing conduct. On the one hand, an injunction preventing a corporation from selling its products below a specified price is particularly dangerous and largely contrary to the objectives of antitrust laws.⁹² On the other hand, an injunction in general terms, prohibiting conduct which takes advantage of market power, has the vice identified by the High Court in *Melway*:

"... An injunction expressed in terms which leave unclear the form of conduct which will expose a party to the consequences of breach of a court order, and which beg the major question in issue in the case, is inappropriate".⁹³

Further, there may be a case where persistent contravening conduct has so entrenched a dominant structural market position that justice and economic efficiency require that it be undone. On one view, the recent *Microsoft* prosecution in the US is such a case.

As a matter of general approach therefore, it is accepted by the Council that it is possible that cases will emerge in which injunctive and other relief may be inadequate to address fully conduct which constitutes a contravention of s46.

Areeda and Hovenkamp in their Treatise on *Antitrust Law* at paragraph 653c4 (Vol III, Revised Edition), suggest that, as a "general presumption", "it is the duty of the Court to assure (the) complete extirpation" of "monopoly to which plainly exclusionary conduct appears to have made a significant contribution". However, that "general presumption" is subject to two reservations:

- (a) "a different result may be called for where the causal relationship between the exclusionary act and the monopoly is plainly weak or a tailored remedy plainly adequate to eliminate any effects"; and
- (b) "the conclusion is limited to plainly exclusionary conduct of relatively recent origin".

⁹¹ The court has a wide discretion in granting injunctive relief under s80 of the Act. Its discretion may extend to mandatory relief, such as compelling the supply of products and to the compulsory implementation of compliance programs, as well as to other prohibitive relief such as forbidding certain pricing or other practices such as bundling of goods or supplying products on exclusionary terms.

⁹² Any form of minimum price regulation by the courts ought to be avoided. It is not only difficult and inaccurate (as costs, demand and technology are constantly changing) but it risks chilling the very conduct that anti-trust laws are designed to promote. It is noteworthy, for example, that the ACCC sought no injunctive relief in the *Boral Masonry* case, other than in relation to a compliance program. In the *Qantas* case, however, the ACCC has sought an injunction prohibiting any reduction in pricing or addition of capacity which has the "substantial purpose" of eliminating or substantially damaging a competitor, preventing the supply of airline services or deterring competitive conduct in the airline market.

⁹³ *Melway* at p611.

It should be particularly noted that these propositions are directed at all conduct which contributes to a monopoly – particularly to acquisitions which would be regulated under s50 in Australia.

The Act already provides for divestiture upon an acquisition of shares or assets which has the effect of substantially lessening competition in a regional, State or other Australian market, contrary to s50. Section 81 of the Act provides that any person, including the ACCC, may seek an order for divestiture of shares or assets acquired by a corporation in contravention of s50. Alternatively, a court may, in certain circumstances, declare such an acquisition void, or it may accept from the acquirer an undertaking to dispose of other shares or assets.⁹⁴ These remedies have rarely been used⁹⁵, and have attracted criticism when invoked. See especially Sheppard J in *TPC v Australian Meat Holdings* (1989) ATPR 40-932 at pp 50,098-9 (***Meat Holdings***), where His Honour referred to a likelihood that, in the event of a dispute over an order made under s81, the Court "will be faced with a most difficult task in resolving questions concerning [the Court's] satisfaction or not with the fulfilment of (the) various conditions" to the divestiture orders. His Honour then referred to an Australian article published in 1973 in which the author stated:

"Once a merger has been completed, it is very difficult, costly, and time-consuming to 'undo' it.

During the course of litigation, the acquiring firm may be in a position to strip the acquired firm of key assets and management, thus rendering divestiture of the acquired firm as a viable entity highly unlikely.

Even if divestiture is finally achieved, US experience demonstrates that it is unlikely to prove a successful remedy. For one thing divestiture or dissolution remedies provide great opportunities for delaying tactics. Enforcement officials, at least in the US, generally seek divestiture of specific assets, or of lines of commerce, rather than a 'going concern'. In this kind of partial divestiture there is little likelihood of a viable competitor arising from the ashes. This has led a number of commentators to conclude that 'comprehensive implementation of meaningful structural reorganisation seldom occurs'.

For these reasons, it appears vital to attack questionable mergers before completion."⁹⁶

The Council notes however, that the ACCC and the US, EC and other international competition regulators have considerably advanced their supervision of divestitures in a merger context since those comments in 1973 and, indeed, since the *Meat Holdings* case in 1989. Features such as "hold separate" arrangements, ongoing independent management obligations and trustee sales are now commonly a part of the ACCC administered divestiture arrangements in a merger context⁹⁷, and can operate to secure effective divestiture of assets which promotes the prospect of "a viable competitor arising from the ashes".

⁹⁴ s81(1A) and 81(1C).

⁹⁵ see *TPC v Australian Meat Holdings Pty Ltd* (1988) ATPR 40-876, and on appeal (1989) ATPR 40-932.

⁹⁶ "Aspects of the Trade Practices Bill 1973", J R Levine, 47 ALJ 679 (1973) at p709.

⁹⁷ See for example, the s87B undertakings given in the course of the PaperlinX/Spicers Paper merger in 2001 – at www.accc.gov.au/pubreg/876_2001/d01_29602.pdf.

Divestiture remedies have also only rarely been adopted by the Courts in the United States since 1974.⁹⁸ This can be attributed largely to the fact that the Hart Scott Rodino pre-merger filing regulations bring to the attention of the anti-trust authorities in the United States most mergers which would otherwise be contested, with the result that decrees as to appropriate divestiture arrangements are almost always by consent.

This has a very important consequence. As one US author has observed:

"The increase in pre-merger participation by federal agencies may affect the future of the Supreme Court's divestiture jurisprudence. While the Supreme Court will likely continue to consider divestiture as a viable remedy, the Court may reserve the remedy for only the most exceptional and unique cases. Microsoft, for example, may represent the last breed of divestiture cases that the Supreme Court will consider. In the absence of a large merger to remedy under section 7 of the Clayton Act, the Court will consider divestiture where a new paradigm in business structure or complex and burdensome behavioural relief renders injunctive relief inadequate".⁹⁹ (emphasis added)

This is confirmed by a review of the history of the monopolisation cases in the US. Upon conducting an "exhaustive review of the anti-trust remedies that have been imposed as a result of government victories or consent decrees in cases brought by the Government charging monopolisation between 1890 and 1996", Robert W Crandell, a Senior Fellow in Economic Studies at the Brookings Institution, concluded:

I conclude that there are only four or five cases (that involve a single firm that has not attained its market position through [illegal] merger or conspiring with other firms) in the history of Sherman Act enforcement...I conclude that with one exception, the break up of AT&T in 1984, there is very little evidence that (structural relief – vertical or horizontal divestiture –) is successful in increasing competition, raising industry output, and reducing prices to consumers. The exception turns out to be a case of overkill because the same results could have been achieved through a simple regulatory rule, obviating the need for vertical divestiture of AT&T".¹⁰⁰

In Australia, where s81 regulates divestitures following on from anti-competitive mergers, and the ACCC is a highly effective regulator of problematic mergers before they occur, it is equally the case, in the Council's view, that it is "only the most exceptional or unique cases" where a divestiture remedy could possibly be appropriate to remedy a misuse of market power. On one view, such a remedy could only be appropriate in cases where:

- (a) there is conduct of the respondent, which clearly¹⁰¹ contravenes s46;

⁹⁸ Only 4 cases have been considered by the Supreme Court in that period:

California v Am. Stores Co., 495 US 271 (1990); *Maryland v United States*, 460 US 1001 (1983) (the AT&T case); *Brunswick Corp v Pueblo Bowl-O-Mat Inc.* 429 US 477 (1977); *United States v Gen. Dynamics Corp.*, 415 US 486 (1974). Three of these cases concerned mergers – only the AT&T case may be described as a "s46 case".

⁹⁹ "The Jurisprudence of Antitrust Divestiture – A Path Less Travelled", E Thomas Sullivan, 86 Minn. L. Rev. 565 (2002) at p574 – published immediately prior to the proposed Microsoft consent decree.

¹⁰⁰ The "Failure of Structural Remedies in Sherman Act Monopolisation Cases", Robert W Crandell, AEI-Brookings Joint Course for Regulatory Studies, Working Paper 01-05, March 2001, Executive Summary.

¹⁰¹ In the context of changing or uncertain legal standards, this is particularly important. That such a serious remedy might be invoked in relation to conduct which is proscribed only upon a change in legal standard is not only inequitable, but may deter aggressive competition by firms which may have, or are approaching a position of substantial market power.

- (b) injunctive relief (in any permissible form) is inadequate to remedy the illegal conduct;
- (c) there is a clear and direct nexus between the assets to be divested and the contravening conduct; and
- (d) those assets can be effectively divested so as to contribute to the competitiveness of another firm, without imposing undue or outweighing competitive detriment to the markets in which the respondent operates.

These requirements could be concentrated to just two questions¹⁰² - where the respondent clearly has substantial market power, and has used it in contravention of s46:

- (a) does divestiture of particular assets provide the least restrictive alternative to remedy the alleged harm? and
- (b) will divestiture effectively remedy the contravention?¹⁰³

However the standard may be stated, appropriate circumstances for the application of such a remedy upon a contravention of s46 will be rare.

Of the Australian cases referred to in Annexure A, none give rise to the possibility that a divestiture of assets might arguably have been required to effect an adequate, let alone a more appropriate, remedy.

It is really only in cases where a vertically integrated firm enjoys the ownership or use of a natural monopoly at one functional level and may effectively eliminate or inhibit effective competition at another functional level as a result, that a divestiture remedy is likely to be required.¹⁰⁴ However, in those cases the Act already provides for a form of "divestiture" of proprietary rights under Part IIIA of the Act, introduced into the Act in 1995. Part IIIA provides for the compulsory provision of "services" at competitive prices by owners and operators of natural monopoly "facilities".

In Part IIIA, s44H provides that the Minister may "declare" a "service" (which is the precursor step to that service having to be provided to any access seeker) where (shortly put):

- (a) access to the service would promote competition in another market;
- (b) it would be uneconomical for anyone to develop another facility to provide the service;
- (c) the facility is of national importance;
- (d) access can be provided safely; and
- (e) access would not be contrary to the public interest.

The introduction of Part IIIA into the Act follows on from the US jurisprudence, under s2 of the Sherman Act in relation to "essential facilities". In *Re Australian Union of Students* (1997) ATPR 41-573 the Tribunal stated that:

"Part IIIA is based on the notion that competition, efficiency and public interest are increased by overriding the exclusive rights of the owners of 'monopoly' facilities to determine the terms and conditions on which they will focus their services".

¹⁰² See Sullivan, *supra*, at pp597-8.

¹⁰³ Particularly, will divestiture produce a net positive effect on competition and will it be practically effective in the competitive context?

¹⁰⁴ Examples arise in the newly corporatised, but formerly government owned, Australian power, gas, telecommunications and other network or natural monopoly utilities. Another example in which analogous issues arise is in relation to the conduct and market position of Microsoft, as found by the US Courts.

In effect, Part IIIA (and indeed, other industry specific access regulatory schemes around Australia)¹⁰⁵ provides for a limited interference with proprietary rights in relation to "facility" assets which cannot be economically replicated, in circumstances where a failure to do so might eliminate or substantially prejudice competition in a market.

In summary therefore, although it is possible that a very special case might arise where conduct in contravention of s46 cannot be dealt with adequately by injunctive relief under s80 and a divestiture remedy might be desirable, the Council is of the view that:

- no such cases seem to have arisen in Australia among reported cases to date;
- any such cases will be very rare – indeed, they will be "only the most exceptional and unique cases";¹⁰⁶
- any such remedy will involve considerable risks of undue or outweighing competitive detriment and consumer harm;
- divestiture remedies in the case of "anti-competitive" mergers and acquisitions are already available under s81 and may be effectively administered; and
- Part IIIA provides for a form of "divestiture" of proprietary rights in "natural monopoly" industries in cases where an exercise of market power by way of refusal to deal might otherwise eliminate or inhibit competition in other markets.

On this basis, there is no clear case for the introduction into the Act of a remedy for the divestiture of assets consequential upon a contravention of s46.

2.9 Divestiture at Large – s50AA

In the Council's view, the proposal to introduce a s50AA in the form set out above, or otherwise to introduce a general power to require divestiture where the ownership of shares or assets may have the effect of substantially lessening competition, is simply bad law and clearly contrary to the objectives of Part IV of the Act.

It has long been recognised in the United States, that prohibition of monopoly or a monopolist, per se, is unnecessary.

"By the omission of any direct prohibition against monopoly in the concrete, it [s2 of the Sherman Act] indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted."¹⁰⁷

More fundamentally still, in an often quoted passage, Judge Learned Hand explained that to prohibit monopoly per se would be counter-productive to fostering competitive markets:

¹⁰⁵ For example, the National Gas Access Code etc.

¹⁰⁶ See above.

¹⁰⁷ Justice White, *Standard Oil Co v United States* 221 US 1 (1911) at p62.

"A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins."¹⁰⁸

These are principles which apply equally to Australian commerce and the objectives of Part IV of the Act.

The proposed s50AA would give the ACCC unprecedented power to seek orders for divestiture at any time, in any industry and against any market participant which enjoys substantial market power. There is no limitation expressed in the wording of s50AA as to the markets or situations in which divestiture orders may be sought. It would clearly deter corporations from increasing their market presence or competitive advantage by product innovation, price competition or improved customer service. Instead of rewarding such pro-competitive behaviour, the new s50AA would seek to deprive corporations of the increased market share, and market power, resulting from their competitive and innovative conduct.

The proposed s50AA could have startling consequences. For the first time anywhere in the world, a company which has a monopoly, or which is one of several large firms in an oligopoly (such that the ownership of its assets may be said to have the effect of substantially lessening competition), could be broken up – irrespective of whether it has acted, or might act, to the detriment of competition. That would represent a significant obstacle to foreign investment, company growth and expansion.

Further, given that ownership of assets is a continuous, passive state (as distinct from acquisition of assets, which involves a clear point of action), it is quite unclear how any "effect of substantially lessening competition" by virtue of it is to be assessed. One approach might be to assess the existing position against the state of competition that might otherwise prevail in a perfectly competitive, atomistic market. Another might compare it to a lesser standard of assumptions about levels of competition in a "workably competitive" market, in which no participant enjoys substantial market power. Even if this were the case, any company with substantial market power would be exposed to the risk of a divestiture order, irrespective of its conduct. In either case however, the Court, in endeavouring to apply such a law, would be engaged in an unreal theoretical comparison.

The Council understands that the principal perceived vice to which the proposed s50AA is addressed is "creeping" acquisitions in the Australian retailing sector.¹⁰⁹ It should be noted however, that the ACCC has power under s50 currently to address incremental acquisitions, particularly in "regional" markets.¹¹⁰ Indeed, in the ACCC's Merger Guidelines, it has specifically addressed its approach to such acquisitions:

"5.99 A further relevant consideration is the extent of the increase in concentration. In many situations the acquisition of a small market player, resulting in a small increase in concentration, will have little effect on competition. However, in some instances a small increase in concentration may involve the removal of a market participant which played a

¹⁰⁸ *United States v Aluminium Co.* 148 F.2d 416, 430 (2d Cir. 1945).

¹⁰⁹ See Senator Murray's supplementary remarks to the Joint Select Committee on the Retailing Sector, August 1999.

¹¹⁰ s50(6) was amended in 2001 to refer specifically to "regional" markets.

significant role in maintaining a competitive market eg by undermining attempts to co-ordinate market conduct. In other circumstances a small acquisition may form part of a pattern of creeping acquisitions which have a significant cumulative effect on competition."

Further, the Merger Guidelines also expressly address the significant competitive role even very small firms may play in a market:

"In some markets the 'maverick' behaviour of particular firms, even small firms, serves to undermine attempts to coordinate the exercise of market power. These firms tend to deliver benefits to consumers beyond their own immediate supply, by forcing other market participants to deliver better and cheaper products. Alternatively a small firm may be an innovative new entrant with a new product or process capable of upsetting established market shares. The Commission would be particularly concerned if such firms were the target of mergers."¹¹¹

Further, neither the ACCC's Merger Guidelines nor s50 itself require there to be a substantive change in market concentration caused by any merger or acquisition for it to be investigated or prohibited. The ACCC's Merger Guidelines thresholds simply provide that if the merging parties' combined market share is:

- greater than 40%; or
- greater than 15% (if the market share of the largest four competitors is greater than 75%),

the ACCC will scrutinise the merger and assess it in relation to its competitive effect. Unlike the position in the United States¹¹², the *change in market concentration* arising from an acquisition is not a relevant factor under these thresholds. Indeed, it is entirely conceivable that a corporation that has, say, 50% of the market could be prohibited from acquiring a competitor which has 2% of that market. Such an acquisition would be more likely to be prohibited if the smaller competitor played a significant role in maintaining a competitive market.

The Woolworths-Franklins merger demonstrates that concerns as to concentration in the retailing sector are already being heeded by the ACCC. In light of this, it is very doubtful that s50AA is required to address the issues identified by the Joint Senate Committee on Retailing and, in particular, by Senator Murray.

Finally, the proposed s50AA is likely to be unconstitutional. In its proposed form, it appears to be a law with respect to the "acquisition of property". Under paragraph 51 (xxxi) of the Constitution, any such law will only be valid if the acquisition is on "just terms".

In *WSGAL Pty Ltd v TPC* (1994) ATPR 41-314 at p42,194 Beaumont J, in the course of considering s81 of the Act to be "adjectival" to s50 and hence not a law "with respect to the acquisition of property", stated that:

"It is true that if s81(1) stood alone, that is, if it were a free-standing provision having a substantive operation in its own right, there would be much to be said for the view that an independent provision of that kind would be a law with respect to an 'acquisition' within

¹¹¹ ACCC Merger Guidelines, 1999, para 5.139.

¹¹² Under the US Horizontal Merger Guidelines, the change in Herfindahl-Hirschman Index (HHI) is the reference point for detailed investigation. The HHI is assessed by summing the squares of the % market shares of all participants.

s.51(xxxi). If so, it would then be necessary to enquire whether such a law did, in fact, provide for just terms as required by s.51(xxxi)."

The proposed s50AA would be likely to be an "independent provision" of the kind addressed in that passage, and hence unconstitutional, as it makes no provision for "just terms".

2.10 Cease and Desist Powers for the ACCC

The Council opposes the introduction of a power invested in the ACCC to issue "cease and desist" notices to corporations which the ACCC has reason to believe are contravening s46 (or other provisions of Part IV), for several reasons:

- (a) such a power is likely to be unconstitutional;
- (b) there is no need for such a power as the ACCC may readily seek interlocutory relief from the Courts (and has done so in many cases);
- (c) the exercise of such a power may significantly compromise the rights and reputations of Australian businesses without the benefit of a court's supervision or prior intervention; and
- (d) the power the ACCC proposes is without precedent in the common law world.

Under Chapter III of the Constitution the judicial power of the Commonwealth can be exercised only by a court established pursuant to s71 and constituted in accordance with s72. The ACCC is not such a body.

The exercise of power by a body to enforce its own orders has sometimes been seen as an essential element in the exercise of judicial power. This was the view adopted by Latham CJ in *Rola Co. (Australia) Pty. Ltd. v. The Commonwealth* (1944) 69 CLR 185 at 199:

"If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then all the attributes of judicial power are plainly present."

However there are contrary authorities. In *Reg v Davison* (1954) 90 CLR 353 Dixon CJ and McTiernan J observed (at 368 – 369):

"(T)he enforcement of a judgment or judicial decree by the court itself cannot be a necessary attribute of a court exercising judicial power. The power to award execution might not belong to a tribunal, and yet its determinations might clearly amount to an exercise of the judicial power. The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss 71 and 72 of the Constitution."

In *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (at para 21) Mason CJ, Brennan and Toohey JJ explained the expression 'judicial determination' in that passage as meaning an enforceable decision reached by applying the relevant law to the facts as found.

In all ways, except recourse to the court for enforcement, a decision by the ACCC to issue a "cease and desist" order would seem clearly to be an exercise of judicial power. On the model proposed

by the ACCC,¹¹³ its power to issue an order would require the ACCC to be satisfied (after some process) of the existence of certain facts, to apply the law of s46 to those facts, and to reach a conclusion that the conduct contravenes that law. The outcome of this process is then to be attended with consequences. It is not just an opinion. Nor is it, like the issue of a "competition notice" under Part XIB of the Act in respect of telecommunications, a decision that will trigger extra penalties should the conduct finally be found by a court to be in contravention of the Act. The assumption on which the proposed "cease and desist" power is based is that a failure to comply with the ACCC's order will be visited by sanctions.

The ACCC does not need the power itself to prevent illegal conduct. The Federal Court has that power pursuant to s80 of the Act. The ACCC has the capacity to seek injunctions and has done so, *ex parte*, on an interim, interlocutory basis and as a final order.

The test for the granting of an interlocutory injunction, simply stated, is that the Court has to be satisfied that (broadly speaking) there is a fair chance of success on the action and (if so) to consider the balance of convenience. In a trade practices context, an assessment of the balance of convenience must take into account any risk to competition from the conduct being allowed to continue in the short term.¹¹⁴

The ACCC's perception that the test for an interlocutory injunction is too demanding¹¹⁵ is a warning about the way in which the ACCC would exercise a "cease and desist" power. It would be inappropriate for a regulator equipped with a "cease and desist" power to intervene and prohibit conduct where the facts would not clearly justify an interlocutory injunction being granted.

Interlocutory injunctions may be sought and granted on very short notice. The ACCC has said in the past that it has been able to obtain *ex parte* injunctions within 26 hours.¹¹⁶ In its submission to this Review, the ACCC refers to the time between commencement of the conduct to when it can file court proceedings as being likely to be measured "*in years, not days or weeks*".¹¹⁷ This period of time (whatever its duration) is the investigative phase in which the ACCC conducts its inquiries. Clearly, upon its inquiries being completed the ACCC may now seek interlocutory injunctive relief. That relief will be highly likely to be granted under the present rules if the ACCC can show that:

- it has a strongly arguable case, with good prospects of success;
- some continuing damage to competition will occur if injunctive relief is not granted; and
- the ACCC has proceeded to seek injunctive relief without any unnecessary delay.

It is noteworthy that, to date, the ACCC has not even sought interlocutory relief in any of the prosecutions under s46 brought by it or its predecessor, let alone been frustrated by a court's reluctance to grant it.

If the lapse of the ACCC's investigative powers under s155 is the reason for its reluctance to institute court proceedings, then that issue could be taken into account in considering the ACCC's powers more broadly under that provision. That factor does not justify the introduction of such an

¹¹³ ACCC Submissions, 97-98.

¹¹⁴ *Tytel Pty Ltd & Ors v Telecom* (1986) ATPR 40-711 at 47,783.

¹¹⁵ ACCC Submissions, 98.

¹¹⁶ Australian Law Reform Commission, *Compliance with the Trade Practices Act* (1994) Chapter 11 fn 33.

¹¹⁷ ACCC Submissions, 98-99.

unprecedented power in the ACCC. It should be noted though, that in connection with its proposal for a "cease and desist" power, the ACCC has proposed that legislation confirm that the Commission retains its s155 powers in the period after a "cease and desist" order is issued.¹¹⁸ If loss of s155 powers is a problem, legislation could equally preserve those powers after an application for interlocutory injunction.

The ACCC's capacity under s87B to accept enforceable undertakings means that already in many cases it does not have to go to court to achieve an outcome.

Several inquiries have looked at the case for giving the ACCC a "cease and desist" power. Uniformly, they have recommended against. One was the Hilmer Inquiry in 1993.¹¹⁹ Another was the ALRC in its inquiry into *Compliance with the Trade Practices Act* in 1994.¹²⁰ In 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration also recommended against.¹²¹ Also in 2001, in the context of telecommunications, the Productivity Commission discussed submissions in favour of a "cease and desist" power. It was not persuaded.¹²²

The ACCC points to its record of restraint in issuing "competition notices" under Part XIB as a reassurance of the responsible way in which it can be expected to exercise a "cease and desist" power that is of general application. The Productivity Commission was critical of the ACCC's record under Part XIB. Its criticism was not that the ACCC too readily issued "competition notices", but rather that the ACCC channeled into its Part XIB process cases that would have been dealt with more appropriately under other processes – processes that offered more checks and balances, and more transparency.¹²³ The Productivity Commission's review of the ACCC's record under Part XIB confirms the lack of wisdom in giving the ACCC a broad "cease and desist" power in respect of conduct which may contravene s46. Any regulator (not just the ACCC) is likely to favour an in-house process that can be counted on to deliver the outcome that it has in mind over a process that the regulator does not control.

The Council knows of only very few precedents for the kind of "cease and desist" power proposed for the ACCC. One example is a power invested in the Victorian Essential Services Commission to issue "mandatory orders" against "significant producers" under Part 5 of the *Gas Industry Act 2001* (Vic). However, these sorts of powers are extremely rare, confined to special applications, are generally subject to clear rights of appeal, and must generally be justified by transparent reasons and processes. Under the proposed model, however, a corporation threatened with an order may do no more than make a submission to the ACCC.

Importantly, the European examples listed in the ACCC's submission¹²⁴ come from a different legal system. That the European Commission (EC) has power to make interim orders is not relevant in the Australian context because the EC is the first-instance enforcer of Articles 81 and 82 for all

¹¹⁸ ACCC Submissions, 98.

¹¹⁹ Hilmer Report (1993) 168.

¹²⁰ Australian Law Reform Commission, *Compliance with the Trade Practices Act* (1994).

¹²¹ House of Representatives Committee on Economics, Finance and Public Administration, *Competing Interests: is there a balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000* 57.

¹²² Productivity Commission, *Telecommunications Competition Regulation Inquiry Report*, (20 September 2001), 190-191.

¹²³ *Ibid* 197.

¹²⁴ ACCC Submissions, 101-103.

purposes. The role of the Court of First Instance and the European Court of Justice is to review decisions of the EC.

Canada grants its Commissioner a cease and desist power only in the aviation sector. The new s 103.3 of the *Competition Act* extends temporary order powers to other industries. However, those orders are to be made by the Canadian Competition Tribunal on application by the Commissioner. The Tribunal is a body external to the Commissioner's office. It sits as a 3-person panel, and the chairman is always a judge of the Canadian Federal Court.

Advocates for a "cease and desist" power often point to the power given to the United States Federal Trade Commission under s5(b) of its own Act and s11 of the *Clayton Act*. However the FTC's power requires a lengthy administrative process – a hearing of which 30 days notice must be given, a reasoned decision, and a period of at least 60 days thereafter before violation of the FTC's order attracts sanctions. If the FTC's order is appealed, it does not take effect until the appeal has been disposed of. The FTC's "cease and desist" power is accordingly, quite different from the sort of summary action that is currently proposed. Certainly, the FTC's powers are not intended to play the role of preserving the status quo while the FTC gets in evidence. When the FTC was established in 1914, it was not given a power to apply to the court for an injunction. Its "cease and desist" power was simply a new decision path for a new body. It is notable that since 1973, when the FTC was given power to seek court injunctions, a judicial injunction has been its preferred path.¹²⁵

The closest analogy to the "cease and desist" power that the ACCC proposes is s74A of the New Zealand Commerce Act, enacted in 2001. Section 74A gives a Commissioner power to make a "cease and desist" order when it is necessary to act urgently. However, the Act goes on to require processes that are quite different from those proposed by the ACCC - the opportunity of access to the information held by the Commission, a hearing at which there is a right to be represented by counsel and to call and cross-examine witnesses, and then the order must clearly set out the facts and reasons on which it has been issued.

The Council is opposed to the ACCC being given a "cease and desist" power in any form. There is no evidence that the ACCC is not able to procure appropriate interlocutory injunctive relief in appropriate cases. Further, there is no Australian precedent for such a power in a general regulatory context. Finally, even the New Zealand model exposes businesses to unjustified disruption and loss of reputation without the safeguard of court involvement

¹²⁵ Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority* at <http://www.ftc.gov/ogc/brfovrw.htm>.

3. Joint Ventures and Exclusionary Provisions

3.1 Exclusionary Provisions

Under the Terms of Reference for the Review, the Committee has been asked to consider whether the competition and authorisation provisions of the Act inappropriately impede the ability of Australian industry to compete both locally and internationally.

The Council is concerned that the per se prohibition on exclusionary provisions in s45(2)(a)(i), as currently drafted and interpreted, potentially applies to a wide range of co-operative arrangements that do not have an anti-competitive impact on the market, like joint ventures. Indeed, as the law currently stands, it appears to threaten the legality of a range of agreements which were never intended to be caught by the prohibition and which do not necessarily contain all the elements of a classic horizontal boycott.

Further, when introduced this per se prohibition was inconsistent with, and more onerous than, the position in many other jurisdictions. Since its introduction, the gap between the laws of those countries and the Australian law has widened as other countries' case law has developed or they have adopted statutory reforms. As a result s45(2)(a)(i) imposes burdens on firms attempting to operate in Australia which they would not have to bear if they were operating in other jurisdictions and creates a disincentive for firms to invest in Australia. It also places restraints on Australian firms which may hinder their ability to develop new products and expand, which may hinder their ability to compete internationally.

For the reasons set out in this submission authorisation is not an effective solution.

Ultimate consumers also suffer when the prices they pay for final products and services includes a component attributable to the costs of firms being inefficiently encouraged to locate outside Australia or attributable to firms being required to structure their Australian operations inefficiently.

On a more fundamental level, the current provisions are inconsistent with the object of the Act, which is to:

“enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”¹²⁶

S4D is anomalous to the extent that it prohibits certain conduct even where such conduct has no effect on competition, and should be amended accordingly.

It is also significant that the Australian legislative landscape into which the sections relating to exclusionary provisions (in their current form) were introduced has shifted over the years. Not only have there been amendments to the Act to provide for the payment of substantially greater penalties in the event of a contravention of Part IV, where conduct involves the possible exploitation of power, that conduct can be adequately dealt with under s51AC (unconscionable conduct in business transactions) and s46 of the Act.

Over the period since s45(2)(a)(i) was introduced in 1976, as the levels of Australian tariff and other trade protection have been lowered or removed altogether, the Council's

¹²⁶ s2

members have been increasingly briefed to advise Australian firms seeking to re-structure their operations in response to greater competition from abroad. On the one hand, as the focus of competition in many industries has shifted from competition between domestic suppliers to competition between domestic and overseas suppliers, the concerns in respect of cooperation between Australian firms are fewer. On the other hand, the anti-competitive handicap on Australian firms resulting from s45(2)(a)(i) has become of more concern as they are exposed to competition from firms who, without the impediments of s45(2)(a)(i), can be more efficiently structured.

In this context, the Council is of the view that the breadth of the current *per se* prohibition on exclusionary provisions is inappropriate.

The scope of the prohibition on exclusionary provisions needs to be reformed, to ensure that the *per se* prohibition is better targeted towards conduct which is of concern from a competition perspective and that the Australian law is updated to conform with the developments in other countries.

3.2 Prohibition – what does it cover?

Definition of exclusionary provision generally

Exclusionary provisions are prohibited *per se* under s45(2)(a)(i) of the Act, which, in Australian competition law, means that they breach the Act regardless of whether they have any effect on competition. An exclusionary provision is defined in s4D(1) as a *contract, arrangement or understanding* between persons, any two or more of whom are *competitive with each other*, which has the *purpose of preventing, restricting or limiting supply to or acquisition from a particular person or class of persons* by all or any of the parties to the contract, arrangement or understanding.¹²⁷

S4D(2) limits the circumstances in which parties are considered relevantly competitors, to competition in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision relates. That filter is an important, but crude, basis upon which the prohibition in s45(2)(a)(i) is targeted towards conduct that is potentially of concern.

Nevertheless, on a plain reading, and as currently interpreted, the definition in s4D has the potential to be applied too broadly in the following respects:

- much competitively benign conduct between competing firms is captured; and
- aspects to the structure or operation of joint ventures including the most efficient and commercially sensible way of structuring joint ventures (set out below) are almost certainly prohibited even though they can be, from a competition perspective, relatively minor when compared with the procompetitive impact these joint ventures can bring.

¹²⁷ There are exemptions in ss45(6) and 45(7) for conduct which is caught by the exclusive dealing or merger provisions, which are taken out of the *per se* prohibition regime and subjected to a *substantial lessening of competition* test.

3.3 Exclusionary Provisions in the Context of Joint Ventures

In most cases when a joint venture is formed it is impossible to efficiently and competitively manage and operate the joint venture unless each shareholder or partner undertakes to the other shareholders, partners or the joint venture itself that the partner or shareholder will not compete with the joint venture. Without such undertakings, the joint venture is continually vulnerable to having its trade secrets, customer lists and competitive initiatives “white anted” through the directors and managers who represent particular shareholders appropriating those customers lists, trade secrets and competitive initiatives for the shareholders or partners.

However, on a strict application of the law, and as currently interpreted, whenever two or more competitors get together and form a joint venture or a partnership, to develop a new product, or supply in a new region, and the shareholders or partners provide assurances that none of the parties to the agreement will compete against the joint venture, the assurances are each potentially an exclusionary provision caught by s45(2)(a)(i).

The requirement in s4D that the restriction be aimed at ‘particular persons’ or ‘particular classes of persons’ has effectively been construed to include a class of people who can be defined by the fact of exclusion only.¹²⁸ The consequences of such an interpretation are, as Justice Heerey noted in *South Sydney*, that:

“competitors who enter into a partnership and agree to provide a lesser range of goods or services (or deal with a narrower range of customers) will have contravened s45(2). Nothing in the stated object of the Act (“to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”) would suggest such a startling result.”

The other main issue when considering whether an arrangement involves an exclusionary provision is the consideration of whether or not there is a purpose of preventing, restricting or limiting supply or acquisition. In *South Sydney* Merkel J held that although the ultimate purpose of the term (the end) was the achievement of a viable and sustainable national competition, its immediate purpose (the means) was to exclude any clubs in excess of the 14 selected to participate in the 2000 competition. This seems to confuse the purpose of the provision with its effect. The result of a strict application of this reasoning is that many provisions which are entered into with the primary aim of sustaining a viable joint venture may also involve what could be regarded as an immediate exclusionary effect, which may be interpreted as providing the relevant purpose.

The *South Sydney* case is currently on appeal to the High Court and it is possible that a High Court decision will clarify these issues. However, even on the assumption that the High Court clarifies the current interpretation of the law as it stands, there is still an issue of principle that needs to be addressed.

In the Council’s view, there needs to be a specific exemption from the per se prohibition of exclusionary provisions for joint ventures to avoid an unnecessary restraining effect on investment and development of new co-operative arrangements.

¹²⁸ See the *South Sydney District Football Club* case and *ASX Operations Pty Ltd v. Pont Data Australia Pty Ltd* (No. 1) (1990) 27 FCR 460. (**South Sydney**)

The Act exempts a limited class of joint venture arrangements (that class which meets either the test applying to incorporated joint ventures or the test applying to unincorporated joint ventures) from the s45A price-fixing prohibition, leaving those exempted joint ventures to be dealt with under the general s45 test.¹²⁹ This reflects the mining consortium context for which that exception was designed. However, when it comes to exclusionary provisions, even that limited joint venture exemption is inapplicable.

3.4 Does the authorisation process effectively limit the prohibition to the areas which should be targeted by a prohibition against exclusionary provisions?

If a joint venture agreement is caught by the prohibition, the parties may seek authorisation.

However, it will be exceedingly rare that authorisation is a suitable course because:

- the authorisation process can take up to two years;
- the process is vulnerable to appeals of a strategic and delaying nature by third parties;
- it is necessary to disclose at least the details of the proposed transaction and often related commercially and competitive sensitive material;
- when granted, authorisations are often for a limited period which substantially complicates the commercial arrangements for succession to the business or subject to other conditions, the content of which are highly uncertain at the time the transaction being conceived by the parties; and
- the process is costly.

These factors are particularly unattractive to parties when joint ventures or agreements are necessary to bring new products or processes into being. Once publicised by an authorisation application such products or processes can be copied by competitors and brought to market by those competitors before the authorisation process is finalised.

In addition, the process is fundamentally inappropriate for dealing with agreements that have no adverse effect on competition, as the authorisation test begins from an assumption of detriment, and looks for public benefits to balance this. *South Sydney* is particularly instructive in this regard. Had an application for authorisation been lodged with the ACCC, the ACCC would have been required to determine whether the arrangement agreed upon by commercial parties dealing at arm's length with each other following lengthy negotiations, would have a public benefit by ensuring that rugby league was financially viable and sustainable in the future.

3.5 History and international comparisons

Where possible international uniformity in competition law is desirable:

- so that Australia benefits from the analysis and policy developments of other jurisdictions;

¹²⁹ s45A (2).

- to enhance certainty for potential plaintiffs and defendants by enabling the case law of other countries to supplement the Australian case law in areas where Australia does not generate a sufficiently heavy case load; and
- to ensure that there is not an incentive for firms to locate their activities inefficiently.

In considering alterations to the Act the aim should be to establish a coherent field of law. In that context, the Council considers it important to recognise that the current standards of the Act have been drawn from, and cross-fertilised by the laws of other countries and that to transplant or alter one element of the law without regard for other elements of the legal structure which are complementary to the element transplanted is often a nonsense.

3.6 Key historical background to s 45(2)(i) and s4D

In 1974 the then new Act replaced two previous Trade Practices Acts of similar name. The former Acts had largely been UK based while the new 1974 Act was closely based on the US standards of anti-trust. There was no explicit recognition or prohibition of exclusionary provisions. Rather, s45 directly adopted the language.

“A corporation shall not...make a contract arrangement or understanding, in restraint of trade.

That language is drawn from Section 1 of the Sherman Act. The Sherman Act outlaws:

every contract, combination . . . , or conspiracy, in restraint of trade.”

US case law as to the meaning of “restraint of trade” recognised a concept broadly similar to that of the exclusionary provision.

However, it is not possible to effectively transplant laws verbatim from other countries when they are not reasonably well understood by those who must comply. The Swanson Committee received:

“many submissions [which] saw the phrase [in restraint of trade or commerce] as a technical ‘in house’ legal expression, unfamiliar to the business community.”

While continuing to accept that the principles of the US law were appropriate, the Committee took the view that in the Australian context, further codification of key standards was appropriate. The Committee thus recommended that the phrase in restraint of trade or commerce be replaced by a prohibition against agreements, arrangements or understandings with the purpose or effect of substantially lessening competition supplemented with per se breaches including the following per se recommendation:

“We consider that a collective boycott, i.e. an agreement that has the purpose or effect of or is likely to have the effect of restricting the persons or classes of persons who may be dealt with, or the circumstances in which, or the conditions subject to which, persons or classes of persons may be dealt with by the parties to the agreement, or any of them, or by persons under their control, 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.”¹³⁰

¹³⁰ Trade Practices Act Review Committee, Report to the Minister for Business and Consumer Affairs, August 1976 at 4.116

Unfortunately, the Swanson Committee recommendation that “a substantial adverse effect on competition” should be necessary to prove a breach was not originally incorporated into the legislation. It is not clear why the additional requirement was not incorporated into the final draft of s4D, and no mention is made in the Explanatory Memorandum or the Second Reading Speech about the removal of this requirement.

Curiously, the language of s4D as adopted in response to the Swanson Committee, had the same language as s35(1)(e) of the 1965 *Trade Practices Act* which recognised a class of examinable agreements. Examinable agreements included agreements which were between:

“parties who are competitive with each other” which contain “restrictions in respect of ... the persons or classes of persons who may be dealt with, or the circumstances in which, or the conditions subject to which, persons may be dealt with.”

Even if it were appropriate to adopt that language in substitution for the Swanson wording, the language used should have been accompanied with the enforcement framework of the 1965 and 1971 Acts. That enforcement regime only permitted the ACCC to take action, and only provided for the ACCC to succeed in having the Tribunal quash the agreement when it was contrary to the public interest.

Perhaps, the drafts-person who prepared s4D succumbed to the temptation to revert to language from one of the 1965 and 1971 Acts because, at a superficial level, that language dealt with the same general category of agreements as those analysed by the Swanson Committee. The Council believes that the additional requirement initially proposed by the Swanson Committee, requiring an adverse effect on competition between the parties, or between the parties and other persons would have been an important way to target the prohibition to conduct of competitive concern.

3.7 Cross-fertilisation of the Australian and US laws

As noted above an important motivation for the original introduction of the per se prohibition on exclusionary provisions was the intention that it would, through codification adopt the US case law position on collective boycotts. Unfortunately, the definition of exclusionary provision in s4D differs quite substantially from the US concept of a collective boycott, and its treatment under s45(2)(a)(i) is far less flexible than that adopted in US case law.

First, it is important to note that the Australian approach to the treatment of per se conduct does not have the sophistication of a spectrum of prohibitions from the strictly per se to a full prohibition based on a competition analysis as does the US law. The leading case concerning the interaction of the concepts of per se conduct and conduct subject to a “quick look” or “full blown” rule of reason is *California Dental Association v Federal Trade Commission* 119 S.Ct. 1604 (**California Dental**). In that case the majority stated:

“The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like “per se,” “quick look,” and “rule of reason” tend to make them appear. We have recognised, for example, that “there is often no bright line separating per se from Rule of Reason analysis,” since “considerable inquiry into market conditions” may be required before the application of any so-called “per se” condemnation is justified. 468 U.S. at 104, n. 26. “Whether the ultimate finding is

*the product of a presumption or actual [*780] market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." 468 U.S. at 104. Indeed, the scholar who enriched antitrust law with the metaphor of "the twinkling of an eye" for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a 'spectrum' of adequate reasonableness analysis for passing upon antitrust claims: "There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for . . . Nevertheless, the quality of proof required should vary with the circumstances." P. Areeda, *Antitrust Law* P1507, p. 402 (1986)."*

Second, currently in the US, collective boycotts are only prohibited per se when they are either an attempt by competitors with market power to eliminate a competitor or are designed to fix prices. In all other circumstances, they are subjected to the "full-blown" rule of reason analysis, which requires consideration of the competitive impact of the agreement.

The US law on collective boycotts was recently clarified in the case of *Toys R Us Inc v FTC* 221 F.3d 928 (7th Cir 2000). In this case, the Commission clarified its definition of a "true horizontal boycott" being a situation where:

*"a group of competing suppliers came to a mutual understanding that they would restrict sales to a distinct target group, withholding merchandise that directly competes with that sold to favoured customers."*¹³¹

In this case, the Court imposed a per se standard after examining the agreement under the criteria set out in the earlier case of *Northwest Wholesale* (1985) 105 S Ct 2613, where it was held that:

*"Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors...In these cases, the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete...and frequently the boycotting firms possessed a dominant position in the relevant market...In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive."*¹³²

Clearly, the Australian position with respect to boycotts and per se prohibitions generally is not in line with the current US position, and indeed it is questionable whether it ever has been in line with the US position, as an exclusionary provision in s4D is a far broader concept than the 'collective boycotts' which are banned per se in the US.

The maintenance of a per se prohibition with respect to the full range of agreements caught by s4D is simply not justified by an examination of the US case law.

To achieve a similar result to the US approach in a codified competition law regime such as the Australian, New Zealand and Canadian regimes, it is necessary to correctly identify the conduct which warrants per se treatment and recognise that in some cases a mid-way

¹³¹ *Toys R Us Inc v FTC* 221 F.3d 928 (7th Cir 2000) at 39

¹³² (1985) 105 S Ct 2613 at 2619-2620

course between per se and competition based prohibitions should be available such as competition defences.

3.8 Cross-fertilisation of the Australian and New Zealand laws

The *Commerce Act 1986* (New Zealand) originally picked up the same statutory language as s4D. However, it is interesting to note that the relevant provision in New Zealand has been subsequently amended in two important ways, to bring the standards adopted from Australia better back into line with their US roots and more recent developments in the US law.

Thus the New Zealand standard does not inhibit legitimate commercial activity in the way the Australian provisions continue to do so.

First, in 1990, the test in s29 of the *Commerce Act*, was supplemented with the requirement that the provision in question targeted a competitor of one or more of the parties to the agreement. This subsection was introduced following a discussion paper issued by the Department of Trade and Industry, which drew heavily on a paper written by Dr Warren Pengilley.¹³³ Dr Pengilley advocated the insertion of this additional requirement on the following grounds:

- (a) It would be consistent with US law after much experience of case by case evaluations;
- (b) Only this sort of conduct should be per se banned. Conduct other than this is appropriate for competition assessment;
- (c) This conduct is the main cause of concern in boycott activity.¹³⁴

Second, in May 2001 a defence was introduced to soften the strictly per se character of the prohibition in like fashion to the US case law. The effect is that, although exclusionary provisions are prima facie of public policy concern, there is an avenue for exculpation in appropriate cases. The defence is available for agreements which do not have the purpose, effect or likely effect of substantially lessening competition in a market.¹³⁵

In summary, the two amendments made to the New Zealand provision have been in recognition that the drafting in Australia's s4D is too broad and too rigid to achieve its purpose.

3.9 European Position

The European law equivalent provision to s45(2)(a)(i) of the Act is Article 81(1) which prohibits:

agreements between undertakings...which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which...share markets or sources of supply.

¹³³ "The Exclusionary Provisions of the New Zealand Commerce Act in Light of United States Decisions and Australian Experience", presented at the Trade Practices Workshop, New Zealand, 20-22 March 1987

¹³⁴ Ibid at p54

¹³⁵ Section 29(1A) Commerce Act 1986 and Explanatory Memorandum to the Commerce Amendment Bill 1999 (1999B296-2)

This standard is broadly in line with the US and New Zealand approaches but is achieved in a somewhat different manner.

Article 81(3) provides that the European Commission can declare the provisions of Article 81(1) inapplicable for particular agreements or categories of agreements which contribute to improving the production and distribution of goods, technical progress or economic progress while delivering a “fair share” of the resulting benefit to consumers. In some respects this may appear similar to the Australian authorisation process but this is not the case because the process is not necessarily as public and block exemptions provide significant safe harbours.

Block exemptions have been introduced to deal with specific types of collaborative agreements, like specialisation and R&D agreements, in the recognition that they are generally pro-competitive.

3.10 Inconsistency with international position generally

Having a law that is inconsistent with the position in other jurisdictions, and which imposes burdens on firms attempting to operate in Australia which they would not have to bear if they were operating in other jurisdictions creates an incentive to invest outside Australia rather than in it. Furthermore, it places restraints on Australian firms which may hinder their ability to develop new products and enter into new regions, which may hinder their ability to compete internationally.

3.11 Possible Solutions

As noted above, the two reforms needed in respect of s4D and 45(2)(a)(i) are:

- that competitively benign conduct between competing firms should not fall within the prohibition; and
- pro-competitive joint ventures should not be prohibited or impeded on account of relatively minor ancillary restraints which are necessary or facilitate the management or operation of such joint ventures.

In respect of the scope of the prohibition generally, s4D(1) should be amended in similar fashion to the *Commerce Act* to better target the prohibition to the conduct that is most likely to be of public policy concern by adding a paragraph (c):

“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.”

As in *California Dental*, the per se prohibition should recognise that, while exclusionary prohibitions (re-defined as suggested in this submission) are likely to be of competition concern, there are circumstances in which the parties to the agreement should be able to exculpate themselves.

This could be achieved by including a defence as in s29(1A) of the *Commerce Act* in s4D to the effect that:

“A provision of a contract, arrangement, or understanding or of a proposed contract, arrangement or understanding that would, but for this subsection, be an exclusionary provision under section 4D(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 amendment would not only implement good public policy, it would also be consistent with Australia's obligations to harmonise business law, including specifically competition law, as agreed during the 1988 review of the Closer Economic Relations (CER) agreement between Australia and New Zealand.

The Council is also of the view that given the expansive interpretation of “class of persons” in recent case law, it may be useful to have inserted into the Act an additional interpretative provision in s4D providing that:

“A class of persons does not constitute a particular class of persons for the purposes of this section unless the persons who comprise the class each share a quality or attribute and it is by virtue of that quality or attribute that they have been selected as the object of the provision.”

This would ensure that whatever the outcome of the *South Sydney* case the class of persons was defined by reference to the restriction, and was the ‘target’ of that restriction.

An alternative form of words to address the same issue would be:

“Persons do not constitute a class of persons for the purposes of section 4D unless they were identified or selected by one or more parties to the relevant provision as sharing a characteristic or attribute relevant to competition in the market other than merely being the object of the relevant provision.”

3.12 Joint Venture Exceptions to per se prohibitions

Two issues arise specifically in respect of the joint ventures and the per se prohibitions:

- the scope of the existing exception in respect of price fixing; and
- the absence of an exception in respect of exclusionary provisions.

3.13 Exception from Prohibition on Price Fixing

The predominantly pro-competitive contribution made by joint ventures to the Australian economy is recognised in the Act by the specific exemption available to joint ventures in relation to the per se prohibition on price fixing. These arrangements are still assessed under the substantial lessening of competition test in s45.

The Council is concerned that the current drafting of the joint venture exemption does not achieve its policy objective. As currently drafted, the Council believes that the joint venture exception in s45A(2) may arguably be too narrow, and be inapplicable to joint ventures which are less structured than the traditional resource based model, yet still appropriate for a substantial lessening of competition test. The sort of joint ventures contemplated by the Swanson Committee generally involved the pooling of resources by the parties to jointly produce and supply a product. In the current economy, particularly in areas of innovative growth, like e-commerce, it is far more common for joint venture partners to reach looser collaborations, which will not necessarily involve joint supply.

For example, in relation to s45A(2)(a), it is unclear whether the exception would apply where the production joint venturers take product separately but sell products jointly through a separate marketing joint venture or marketing company.

3.14 Legislative Intention

This provision was introduced following a recommendation of the Swanson Committee. The rationale expressed by the Committee was to recognise that many joint ventures involve no restrictions or only minimal restrictions on competition.¹³⁶ The Committee expressed the view that it:

“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 be desirable in the public interest and which would not otherwise be undertaken.”¹³⁷

The introduction of this provision was a recognition of the positive contributions made to the economy by joint venture arrangements, and a recognition that although they might involve some restriction on the competition between the joint venture parties, their overall impact on the economy would often be pro-competitive, and that as a result, they should be subjected to a substantial lessening of competition test.

¹³⁶ Ibid at 4.71

¹³⁷ Ibid at 4.79

3.15 Current Provisions

The current joint venture exemptions from the per se prohibition on price fixing are that s45A 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 purpose 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 of 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*
 - (i) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):*
 - (ii) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or*
 - (iii) 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.”*

In effect, this means that the exception is only useful for joint venture arrangements which fit the traditional prototype whereby the separate resources of each party are pooled, and a product or service is then jointly produced or supplied and the exception is not available in respect of s4D and s45(2)(a)(i).

3.16 Joint Ventures under s4D and s45(a)(i)

S4D and s45(a)(i) substantially impede the formation of procompetitive joint ventures.

While the joint venture exception to s45A is far too limited (as noted above) in respect of s4D and s45(a)(i) there is no commercially effective joint venture relief at all. Authorisation is particularly cumbersome and impractical in this context for the reasons set out above.

3.17 Reforms required

The Council recommends that a joint venture exemption (or matching exemptions) to the per se prohibitions against exclusionary provisions and price fixing should be introduced so that such joint venture arrangements are subject only to the substantial lessening of competition test in s45(2)(a)(ii).

Such an exception to s4D, s45(2)(a)(i) and s45A should adopt the principles of the US Antitrust Guidelines for Collaborations Among Competitors and the US Doctrine of Ancillary Restraints. The Guidelines state:

“Agreements not challenged as per se illegal are analysed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity. ... The Agencies’ analysis begins with an examination of the relevant agreement. As part of this examination, the Agencies ask about the business purpose of the agreement...”

The exception could be worded as follows:

“S45(2)(a)(i) and s45(2)(b)(i) and s45A do not apply to conduct undertaken in connection with the formation or operation, or proposed formation or operation, of a joint venture if the joint venture is not or is unlikely to prevent or lessen competition except to the extent reasonably required to undertake or facilitate the formation or operation of the joint venture.”

3.18 Input Supply Agreements

There is a need for clarification of the manner in which s45A of the Act applies (if at all) where there is an agreement between competitors in an “output” market as to the price of any “input” where the agreement on the price of the input would not itself breach s45.

This issue arose in relation to bank interchange fees. It also arises in relation to any access arrangement between a vertically integrated network owner and a retail competitor.

It is a business reality that input costs may influence the minimum price that a supplier is willing to receive in the long term for a product. This means that a provision determining the level of these input costs is likely to have an “effect” on the final price for the product. Where the parties to an agreement are competitors in relation to a downstream product and agree on input prices there is a risk on the current drafting of s45A that the parties may be breaching the Act. This is consistent with the findings of Lindgren J in *ACCC v CC (NSW)* and of the ACCC’s recent Federal Court proceedings in relation to interchange fee arrangements associated with the credit card schemes.¹³⁸

In the Council’s view, the Act should not interfere with legitimate arrangements to obtain an input supply merely because the parties are competitors in a downstream market. It is the input supply agreement that enables the purchaser to produce the downstream product and be a competitor.¹³⁹

S45A should be amended to insert an additional subsection which provides:

“Subsection (1) does not apply to a provision of a contract, arrangement or understanding made at arm’s length which has the purpose or has or is likely to have the effect of directly fixing, controlling or maintaining the price at which goods or services are to be supplied by one party to another if the supplier and acquirer

¹³⁸ *Concrete Constructions* (1999) 92FCR375; *ACCC v National Australia Bank Limited*, Federal Court of Australia, proceedings N948/2000 (discontinued)

¹³⁹ See Aldo Nicotra and James O’Regan, “Dare to Deem – does s45A Trade Practices Act Prohibit “Pro-competitive” Price Fixing”, prepared for the BLS Trade Practices Workshop, 17-19 August 2001, Hyatt Hotel, Canberra

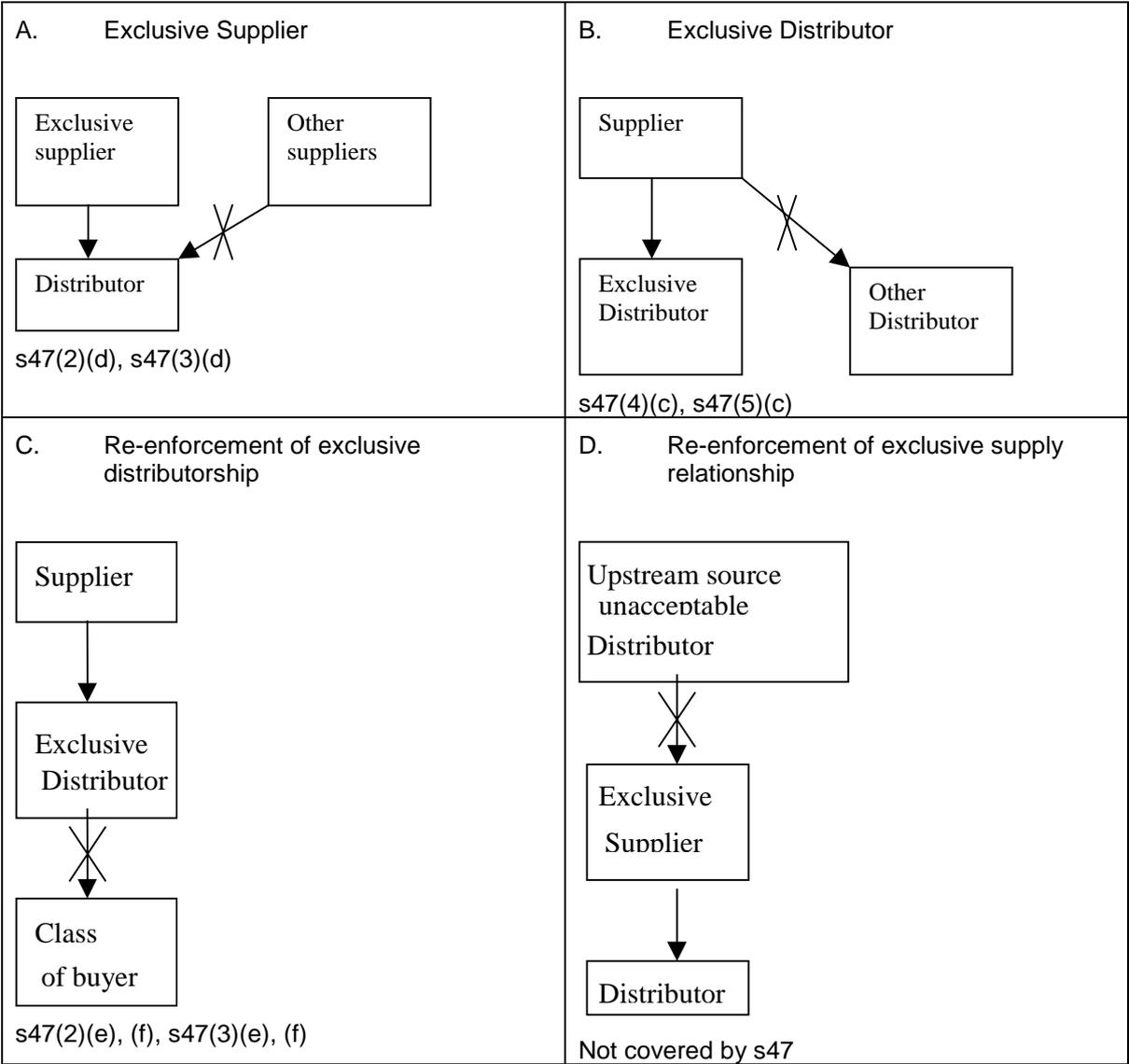
do not supply those goods or services in competition with each other, regardless of any other effect (but not purpose) the provision may have.”

3.19 Exclusive Dealing Provisions

S45(6) of the Act exempts provisions from the operation of s45, including the per se prohibitions, to the extent that they give rise to exclusive dealing conduct under s47. The policy of s45(6) of the Act is to ensure that exclusive dealing conduct is regulated only by s47 and not by s45 of the Act: *ACCC v Visy Paper Pty Ltd* [2000] FCA 1640 at paras 93f. (per Sackville J.) The practical significance of conduct being covered by s47 and not by s45 is that, apart from third line forcing conduct, s47 prohibits only exclusive dealing conduct which has the purpose, or effect, or likely effect, of substantially lessening competition. Certain other rare exemptions under ss47(10A)-(12) also exist, but are not analysed here.

In *ACCC v. Visy Paper Pty Ltd* [2001] FCA 1075, (**Visy**) the Federal Court was asked to decide whether the proper characterisation of a proposed non-compete clause which provided that a customer (which was also a potential competitor) of Visy was not to collect waste paper from certain specified customers of Visy was that it prohibited both the provision of waste disposal and recycling services to and the acquisition of goods (the recyclables) from those specified customers. Secondly, if the non-compete clause covered both an acquisition and a supply, whether the exception in ss45(6), operated to exclude both aspects of the conduct from the operation of s45 notwithstanding that it regulated both the supply of services (covered by s47) and the acquisition of goods (not explicitly provided for in s47). The majority held that in this instance, the provision related to both the acquisition of goods and the provision of services, and that s45(6) excluded s45 only in respect of the supply of waste disposal and recycling services and not the acquisition of recyclables. Consequently a single proposed contractual restraint was caught by both s45(2) and s47, despite the apparent legislative intention of s45(6) of the Act.

It is anomalous as a matter of policy that the supply of goods or services should be treated asymmetrically when compared with the acquisition of goods or services. However, as it stands today, s47 applies to each of the situations illustrated in diagrams A, B and C below, but not that in diagram D. This is illogical and anomalous and has no apparent policy justification. It appears to be a case of legislative oversight and should be amended).



Further, the exception in s45(6) was clearly designed to prevent s45 from applying to exclusive dealing arrangements generally, and thereby eliminate double jeopardy. As Conti J (in dissent) reasoned in *Visy*:

“Unintended results may well follow in circumstances where the test of substantially lessening competition will apply to one element of the dual character of a restraint between contracting parties, but not to the other.”¹⁴⁰

The High Court of Australia recently granted *Visy Paper Pty Ltd* special leave to appeal from this decision of the Full Federal Court (S190/2001, 31 May 2002). At the time of this submission no date has been set for the hearing of the appeal. Accordingly the scope of these important provisions of the Act, which have wide practical implications for Australian business, remains uncertain and controversial.

¹⁴⁰ ACCC v *Visy Paper* (2001) ATPR 41-835 at 43,321

To promote commercial and legal certainty, the Council recommends that s47 be amended so as to make it clear that all exclusive dealing conduct of any sort is regulated only by that section, whether that conduct involves a supply or offer to supply (including a re-supply or offer to re-supply) or an acquisition or offer to acquire any goods or services by any of the parties to the arrangement. At present s47 (in particular, ss47(2) and 47(4)) fail to achieve that apparent policy objective of the Act due to their clumsy or inadequate drafting. In particular:

- (a) s47(2) should be extended to cover conditions restricting any *supply* of goods or services, not merely *re-supply* of the same goods or services; and
- (b) s47(4) should be extended to any restriction on the *acquisition* of goods or services, not merely a *supply* of goods or services.

These proposed amendments will not only assist to eliminate the overlap of s45 and s47, but will also catch within the s47 prohibitions conduct which ought to be prohibited if it substantially lessens competition.

If amendments along these lines were made to the Act, the opportunity might also be taken to improve the language of s45(6), which fails to achieve the straightforward and desirable legislative intention lying behind it: see *ACCC v. Visy Paper Pty Ltd* [2000] FCA 1640 at paragraphs 93-109.

Appropriate wording would be:

“S45 has no application to conduct to which any of ss47(1)-(9) and 47(13) apply.”

3.20 The Joint Advertising Exception

There is also a technical amendment to the joint advertising exception that the Council recommends.

The exception for price fixing associated with joint advertising does not seem to appropriately exempt any agreement about the price of the actual resupply of the goods or services.

The Council is of the view that s45A(4)(b) should be amended so that it provides that s45A(1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:

“for the joint advertising of the price for the re-supply of goods or services so acquired and the re-supply of those goods or services at that price.”

3.21 Dual Listed companies

Section 5.6 discusses the relationship between s45 and s247 and the per se offences in those sections to dual listed companies and recommends that the Act be amended to ensure that parties who use the dual listed company technique are exempt from the application of s45 and s47.

4. Third Line Forcing

4.1 Notifications – s47(6) and (7)

Due to the per se nature of a breach of s47(6) and (7), notifications are regularly lodged for a wide variety of promotions and discount offers, usually associated with the use of a credit card. The usual situation is that the offeror of the discount or other benefit, makes the offer conditional on the use of a third party credit card.

It is understood that the ACCC concedes that in such a situation there is a benefit to the public, and no substantial lessening of competition. However, the difficulty is that a fresh notification must be lodged every time a promotion or a special offer is instigated.

For this reason, the Council has previously advocated, and continues to advocate, the removal of the per se prohibition by the introduction of the competition test which applies to other s47 conduct. Excepting related party dealings from third line forcing would also reduce the unintended effect of s47(6) and (7).

The proposals for removal of the per se prohibition and introduction of a related party exemption for third line forcing have been made several times in recent years by numerous parties, including the Treasury in its 2001 discussion paper. The Council attaches for information an extract from the Council's response to the Treasury paper in Annexure B which deals with third line forcing. Without reiterating the reasons for having a competition test apply to third line forcing conduct, which have been elaborated several times in recent years, the Council submits that the anomaly of treating third line forcing as a per se breach should be removed by having s47(6) and (7) subject to a competition test in the same way as other exclusive dealing conduct is dealt with elsewhere in s47 to this end the Council attaches in annexure C a copy of the relevant part of its submission to Treasury.

Further, the Council notes that much of the alleged consumer concern about reforming the prohibition should be addressed, at least in part, by the fact that there are now considerably strengthened unconscionable conduct provisions to address some of these concerns.

5. Mergers

5.1 Introduction

The Council would like to comment on a number of issues relating to the Committee's review of the merger provisions of the Act. As part of its review of the Act, the Committee has been asked to look at whether the current competition and authorisation provisions of the Act inappropriately impede the ability of Australian Industry to compete locally and internationally, and whether they adequately protect the reputations of individuals and companies.

The issue of greatest concern for the Council in relation to the merger provisions is the lack of transparency and accountability associated with the informal clearance process. In our view, s50 of the Act has ceased to be a law by which anti-competitive mergers are subject to judicial examination and order. Instead, by accident of circumstance, it has, as a practical matter, become a charter for the administration of mergers by the ACCC, unfettered by formal limits and, to date, not the subject in any instance of administrative review.¹⁴¹

This is a remarkable development considering that the present system of administration of mergers by the ACCC was not established and is not supported by any legislation or regulation. Our view is that an effective constraint should be placed on the ACCC, through the introduction of an independent review panel, so that there is a real means to ensure that pro-competitive, efficiency enhancing mergers can be allowed to proceed. The Council is seeking to allow timely and meaningful recourse to review the ACCC's decisions concerning informal clearances to ensure mergers are assessed strictly in accordance with Australia's merger legislation and that appropriate checks and balances are imposed.

Finally, the Council is of the view that the merger authorisation process should be strengthened by allowing parties to apply directly to the Tribunal.

5.2 Reviewing the test in s50(1)

S50(1) of the Act prohibits acquisitions that have the effect, or are likely to have the effect, of *substantially lessening competition* in a market for goods or services in Australia, a state, a territory or a region of Australia.

This test was inserted in 1992 in place of the previous "dominance" test, to make the provision consistent with both the other anti-trust provisions of Part IV of the Act under which the impact on competition in markets is measured and international anti-trust practice. The Cooney Committee, at whose recommendation the test was amended, stated:

"The Committee Considers that the essential thrust of the Trade Practices Act should be to prohibit acts which substantially injure competition, except where public benefit can be demonstrated. This principle is embraced elsewhere in Part

¹⁴¹ Although Virgin Blue sought to have the Commission's decision to accept certain undertakings in the Qantas/Impulse merger reviewed under the ADJR Act, this was ultimately settled before a final decision was delivered (*Virgin Blue Airlines Pty Ltd v Australian Competition & Consumer ACCC* [2001] FCA 1271).

IV of the Act, and should also be incorporated in the merger provisions.¹⁴² ... Those countries having most in common with Australia have legislation similar to the Trade Practices Act. A goodly proportion of them operate under the 'lessening of competition' test. Australia would bring itself into line with them were it to adopt that test."¹⁴³

Although there is an argument that in the context of the size of Australia's markets and the trend towards increasingly global competition, a dominance test would be more appropriate, the Council does not think such a change is necessary where the merger test is applied appropriately and is subject to appropriate checks and balances. Indeed, where an Australian firm is actually trading in a global market, a merger, even within a highly concentrated Australian market, is unlikely to lead to a substantial lessening of competition, as the Australian firms will continue to be subject to international competition.

The Council has formed the view that there is no demonstrated need to revert to a dominance test. Further, to do so would be inconsistent with current international practice.¹⁴⁴

5.3 Public benefits and the authorisation process

The Council's primary submission is that the process for authorisation of mergers has ceased to be a *"commercially realistic means of balancing competition and other public benefit aspects of proposed mergers."*¹⁴⁵ As noted in greater detail below, there has been only one successful merger authorisation application since 1995, and no applications at all since 1999.

Provided that a review panel is established, in line with section 5.7 of these submissions the Council submits that a "public benefits" qualification for mergers should be incorporated directly into s50 to supplement the current authorisation process. Public benefits, including increased exports, increased substitution of domestic products with foreign goods, increased international competitiveness of Australian industry and efficiency gains, could then be considered in the informal clearance process, used in relation to all mergers considered by the ACCC since 1999, and also by the review panel if necessary.

Although, in theory, a competition test should capture all of these factors, if applied in a liberal manner by a Commission with a sufficiently long time-horizon, this is not the reality of the application of s50 by the ACCC. The ACCC has ruled out matters which the parties have thought important to be considered as part of the ACCC's analysis of the substantial lessening of competition test, such as efficiencies, in relation to rationalisation in a number of industries, including petroleum, on the grounds that such matters are relevant only in an application for authorisation, and not in the application of s50 at the informal clearance stage. The practical effect of the insertion of a public benefits test into s50 would simply be that the ACCC would be unable to rule these matters out of consideration during the informal clearance process.

¹⁴² "Mergers, Monopolies and Acquisitions: Adequacies of Existing Legislative Controls", Report by the Senate Standing Committee on Legal and Constitutional Affairs, December 1991 at 3.116

¹⁴³ Ibid at 3.129

¹⁴⁴ A substantial lessening of competition test applies in the US, Canada and New Zealand

¹⁴⁵ This is consistent with the view of the Business Council of Australia in its submission to the Review.

The amendment to s50 could be in the following terms:

“Subsection (1) and (2) will not apply if the acquisition will or is likely to result in public benefits that:

- (a) would or would be likely to be greater than, and offset, the effects of any prevention or lessening of competition that will or is likely to result from the acquisition; and*
- (b) would not or would not be likely to be achieved if the acquisition were prohibited.”*

In determining what amounts to a benefit to the public for the purposes of this provision:

- (a) regard must be had to the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):*
 - (i) a significant increase in the real value of exports;*
 - (ii) a significant substitution of domestic products for imported goods;**and*
- (b) without limiting the matters that may be taken into account, regard should be had to all other relevant matters that relate to the international competitiveness of any Australian industry.*

The second paragraph referring to exports and imported goods are set out in s90(9A) as specific public benefits which must be taken into account in merger authorisation applications.

Such a qualification would continue to recognise public benefits arising from mergers, but in a more effective manner which would facilitate the ability of Australian firms to compete internationally. This issue falls squarely within the terms of reference.

The qualification would also facilitate the assessment of efficiency gains in the analysis of the impact of mergers on competition, consistently with international practice. The consideration of efficiency gains is discussed in greater detail below.

Although there is an argument that such “public benefit” considerations should not be incorporated into a pure competition test, nor applied to mergers in this way, on balance, the Council believes that these changes should be incorporated as they are:

- (a) important considerations for the Australian public;
- (b) recognise the unique position of mergers as requiring speedy treatment; and
- (c) the deficiencies in the current authorisation process mean that important benefits to the Australian economy are being lost.

Importantly, this proposal does not involve any change in the policy underlying s50, which presently permits mergers to proceed where public benefits outweigh anticompetitive detriments.

Although the Council is of the view that this would, in all but the most exceptional circumstances, remove the need for parties to seek authorisation for mergers, the Council does not advocate the abolition of the authorisation process. There may be occasions where a party wishes to gain the immunity offered by the authorisation process.

For that reason, even though it will rarely be used, the Council believes that the authorisation process should be improved, by imposing stricter time limits, so that it is a realistic alternative for merger parties. The Council also submits that it would be efficiency-enhancing to amend the authorisation provisions relating to mergers so that parties could apply directly to the Tribunal.

The Tribunal is a quasi-judicial body, chaired by a judge of the Federal Court, who sits with two other members, usually one economist and one person with business experience. Allowing them to hear applications for merger authorisation directly, rather than only on appeal from the ACCC, with the ACCC as an essential party to the process, would allow a valuable body of precedent to build up. Further, allowing parties an alternate route to authorisation would provide an appropriate check and balance on the ACCC's power to obtain undertakings which reduce the efficiency or commercial viability of a transaction.

5.4 Efficiencies

S50(3) currently lists a non-exclusive range of factors that must be taken into account when considering the application of s50(1).

(a) Current Position

S50(3) concentrates mainly on matters that indicate an anti-competitive consequence. The Council is of the view that assessment of the competitive impact of a merger should also take into account the pro-competitive contributions of efficiencies.¹⁴⁶

Managers proposing mergers which fall into the "grey" area under s50 often protest, many with more than a little justification, that their merger will be pro-competitive, not anti-competitive: it will enhance the ability of the merging parties to compete against larger market participants, and the merger will create efficiencies as a result of so called "merger synergies" from better utilisation of assets and the elimination of unnecessary duplication.

However, the ACCC is rarely persuaded by such arguments. Instead, it has adopted an oligopoly theory under which the tendency of competitors to collude increases as the number of market participants decreases. The consequence of this theory is that before it even examines the facts of a particular merger, the ACCC begins its assessment with a working assumption that a reduction in the number of participants in a market will be anti-competitive because it will increase the likelihood of collusion.

In paragraph 5.156 of the Merger Guidelines, the ACCC lists factors which it says affect the likelihood of co-ordinated conduct. Those factors include:

"a small number of firms increases the likelihood that firms will recognise mutual benefits from co-operation, and makes it easier to reach an agreement and detect cheating."

The ACCC then asserts in paragraph 5.157 that *"if a merger increases the likelihood of co-ordination it is likely to substantially lessen competition. Both*

¹⁴⁶ _____-In this section, the Council has drawn heavily on a recent paper prepared by Philip Williams and Graeme Woodbridge for a conference organised by the National Bureau of Economics Research in the United States, entitled "Antitrust Merger Policy: Lessons from the Australian Experience", yet to be published.

horizontal and vertical mergers may have this effect. For example, mergers can increase the level of concentration in a market...

In other words, all mergers which breach the concentration thresholds are assumed to be anti-competitive unless proved otherwise. The onus is on the merger parties to prove innocence rather than the ACCC to establish a contravention. In a small, open economy such as Australia, as industries rationalise to achieve efficiencies through economies of scale, the Council believes that the ACCC's approach is inhibiting mergers which do not, as a matter of law, contravene the merger provisions.

As a consequence, an economic theory has been used as the basis for a reversal of the onus of proof, by an administrative body which has found itself, by an accident of circumstance, as the sole effective enforcer of s50 in Australia.

The ACCC appears to be powerfully influenced by oligopoly theory in the administration of mergers: the theory sits comfortably with an already healthy cynicism about the motivations of large corporations seeking to merge. While such cynicism should properly be expected from the anti-trust regulator, the ACCC should also give appropriate weight to the pro-competitive aspects of mergers. Parties claiming pro-competitive consequences must first leap the high hurdle presented by oligopoly theory.

There has been a recent resurgence of interest in the consideration of efficiency gains in the context of the administration of mergers. Williams and Woodbridge have reiterated arguments that mergers which are efficiency-enhancing should, as a matter of policy, be permitted.

They argue that:

"The criteria for assessing mergers should direct the regulators or the courts to allow those mergers that promote economic efficiency and to disallow those mergers that promote monopoly power

The experience over the last quarter of a century is that Australia's formal, statutory processes have been quite unsuitable when assessed against these criteria ... Confidential, informal clearance of mergers has satisfied the criterion of a speedy and confidential process but it has not enabled the proper weighting of efficiency and monopoly. The process of informal clearance of mergers has led, in turn to two other problems: a lack of formal guidance by legal precedent; and the assumption by the anti-trust regulator of an unhealthy degree of power to extract concessions from the enterprises which wish to merge."¹⁴⁷

(b) Recent Canadian Experience

Section 96 of the Competition Act provides that the Canadian Competition Tribunal may not prohibit a merger:

"if it finds that the merger ... has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger and that

¹⁴⁷ Williams and Woodbridge, at 2

the gains in efficiency would not be likely be maintained if the [merger were prohibited]”.

In April 2002, the Canadian Competition Tribunal delivered a landmark ruling concerning the application of s96. It decided that the merger of Superior Propane and ICG Propane could proceed notwithstanding that the merged entity would have market shares exceeding 95% in 16 local markets for propane and that price increases were likely between 7% and 11% for consumers in various market segments. The Tribunal, whose first decision permitting the merger had been set aside by the Canadian Federal Court of Appeal, decided when the matter was remitted that notwithstanding the broader definition of anti-competitive effects required to be considered by the Court of Appeal, this merger should be permitted on the basis that the efficiencies generated by the merger were likely to exceed and offset the effect of any lessening of competition.

The Canadian Act, unlike Australian and United States competition laws, establishes the promotion of efficiency as the main objective in its merger provisions, rather than the protection of consumers.

Although the ACCC, in its Merger Guidelines, acknowledges that merger efficiencies should be taken into account when assessing the impact on competition, this is currently only seen to be implemented by the ACCC in a limited manner.

In paragraph 5.20 of the Merger Guidelines, the ACCC observes that:

“The analysis of efficiencies in a section 50 context must be integrated within the framework of competition analysis, rather than being considered as a “trade off” with competition effects, as might be done in an authorisation context... The relevant question is the effect or likely effect of the merger on firms’ abilities and incentives to compete in the relevant market including any effect flowing from efficiencies.”

The ACCC is concerned with the flow on of any efficiencies for the benefit of consumers. At paragraphs 161 and 162 of the Merger Guidelines, the ACCC concludes that:

“If efficiencies are likely to result in lower (or not significantly higher) prices increased output and/or higher quality goods or services, the merger may not substantially lessen competition. While recognising that precise quantification of such efficiencies is not generally possible, the Commission will require strong and credible evidence that such efficiencies are likely to accrue and that the claimed benefits for competition are likely to follow.”

Therefore, the ACCC presently views efficiencies (if at all) in the context of consumer benefits rather than taking a broader view of efficiencies as being sufficient to justify, in themselves, the approval of a merger which may otherwise be anti-competitive. The Council submits that whether or not there is immediate flow on of those efficiencies to consumers, consumers benefit in the medium to long term, from more efficient suppliers of goods and services.

(c) Amendments to recognise efficiencies

The Council recommends that both the ACCC and the Courts should be asked to take the full efficiency implications of a merger into account when assessing its impact on the market under s50 where those efficiency arguments are put forward by the merger proponent(s).

This could be done in one of three ways:

- By making a general “public benefit” qualification to s50(1) and (2) as suggested above. This is the Council’s preferred position;
- Alternatively, by making a specific qualification to s50(1) and (2) in the following terms:
“Subsections (1) and (2) will not apply if the acquisition will or is likely to result in gains in efficiency that would be greater than, and would offset, the effects of any prevention or lessening of competition that will or is likely to result from the acquisition, and the gains in efficiency would not or would not be likely to be achieved if the acquisition were prohibited.”
- Again alternatively by inserting an additional factor for consideration under s50(3) in the following terms:
“whether the acquisition would be efficiency enhancing.”

5.5 Failing firm

Whether or not the Committee accepts the Council’s primary submission to include the public benefit qualification in s50, the likelihood that the target firm will fail if the merger does not proceed should also be considered in the assessment of mergers under s50(3).

S50(3) presently requires consideration of the likelihood that the acquisition would result in the removal of a vigorous and effective competitor, however it does not require consideration of the likelihood of the target ceasing to be an effective competitor altogether if the merger does not proceed. The Council is of the view that it is artificial to consider the former and not the latter.

Although there may be some difficulty establishing the criteria for a ‘failing firm’, the ACCC has recently shown in merger applications like Qantas and Impulse, and Woolworths and Franklins, that it is not impossible to apply the test. In the Council’s view, inclusion of failing firm considerations into an assessment under s50(3) would merely allow a realistic assessment of the competitive impact of the merger.

The Council recommends the insertion as an additional factor in s50(3):
“whether one competitor is insolvent and or is likely to cease being a competitor in the market.”

5.6 Exemptions for dual listed companies

Last year, the 2 largest merger transactions involving Australian companies utilised the “dual listed company” (**DLC**) technique. Under this arrangement, the 2 companies remain separate legal entities and each continues to own its own businesses. There is no transfer or acquisition of any shares or assets, simply a combining of the management of the businesses and the adoption of common boards of directors. These transactions were also

reviewed by the ACCC, but created no issues as there was no or insignificant Australian overlap between the relevant companies. Therefore, unlike all other mergers which satisfy s50, the parties to a DLC will continue to be subject to per se offences under the Act including price fixing, the adoption of exclusionary provisions, and third line forcing.

From a policy perspective, the Council believes that the law should apply in the same way to companies which choose to merge traditionally and those which choose new structures to combine their business operations such as dual listed company arrangements. If the law is not updated, Australia risks being out of step with international competition law trends and becoming an unattractive destination in which to conduct business.

If the operations of the DLC parties overlap in markets in Australia, and they align their operations, in a way that involves “fixing, controlling or maintaining” a price for products each produces or sells in competition, they run the risk of being caught by the per se prohibition on price fixing in a way that parties to a traditional merger would not. They could also inadvertently reach an arrangement or understanding between them that may be prohibited as an exclusionary provision, particularly in light of the current expansive interpretation of “purpose” by the full Federal Court in *South Sydney*.

In the Council’s view, the law should be amended to ensure that DLC parties are treated as related bodies corporate, and thus as a single economic entity. This could be achieved by amending the definition of related body corporate in s4A(5) to include a new paragraph:

“(d) *is party to a dual listed company arrangement with another body corporate.*”

Section 4A could also include a definition of ‘dual listed company arrangement’.

5.7 Informal clearance process

The Council believes that a lack of transparency and accountability in the administration of s50 by the ACCC is the area of greatest concern in relation to mergers. Since s50 was amended in 1992 to adopt a “substantial lessening of competition” test in place of a “dominance” test, there have been only four s50 cases instituted, the last in 1998. In none of these matters was a proposed merger tested at a full trial for a breach of s50.¹⁴⁸ Further, there have been no applications for authorisation of mergers since 1999. The only successful application for authorisation of a merger since 1995 was the authorisation of the acquisition of shares in Adelaide Brighton Cement Limited, on 30 April 1999.

During the last 3 years, in which there have been no judicial proceedings¹⁴⁹ and no authorisations for mergers, the ACCC has examined merger proposals under s50 at a rate of over 200 per year.

The problem is that unlike New Zealand, the informal clearance process in Australia lacks transparency in that the reasoning of the ACCC is not exposed to appropriate checks and balances. The ACCC’s arguments that its merger decisions are subject to challenge in the Courts lacks support from the Council. Unlike other jurisdictions such as the United States,

¹⁴⁸ See *ACCC v Pioneer International Limited* (unreported, Federal Court 1996), *ACCC v The Adelaide Steam Ship Company Limited* (1996) ATPR 41 – 462, *ACCC v Watty Limited* (unreported, Federal Court, 1996) and *ACCC v Australis and FOXTEL* (discontinued, Federal Court, 1998)

¹⁴⁹ With the exception of the Virgin Blue experience.

Australian merger cases are not litigated or dealt with within a timeframe of less than six months.¹⁵⁰

(a) Why don't merger parties litigate or seek authorisation?

The answer to this question appears to lie in the peculiar commercial circumstances in which merger proposals arise.

Once a merger proposal becomes public, as a general rule, commercial pressures mean that it must be consummated quickly, or abandoned. There are obvious difficulties for the uncertainties this creates for employees as well as the management of businesses which must continue to compete against each other pending the outcome of litigation or authorisation proceedings, notwithstanding that the terms of the proposed merger have been agreed and integration plans made. Both the Wattyl and Australis/FOXTEL matters show that it is difficult to hold arrangements together for the time needed to fully litigate a matter.

The uncertainty for management and staff during this period can be severely detrimental for the businesses, to the point where it is most unlikely that a merger proposal can survive for a period likely to be at least 12 months in the courts or at least 6 months in the authorisation process. The stress on management in these circumstances is immense, particularly given the amount of time which must be devoted to litigation or the authorisation application, to the detriment of the day to day management of the businesses.

Not only are litigation and the authorisation process extremely time consuming: they are also extremely expensive, there can be no guaranteed outcome, and the parties take a substantial reputational risk litigating against a media-savvy ACCC.

The informal clearance process, on the other hand, is quick, comparatively inexpensive, carries greater certainty, and thus carries lesser reputational risk due to a greater certainty of outcome.

s50 itself is quite vague. There are a substantial number of merger proposals formulated each year in Australia for which the application of s50 is unclear and therefore uncertain. The only efficient way to resolve that uncertainty at present is to seek an informal clearance from the ACCC.

In most cases, an approach for an informal clearance is dealt with in 2 months. It is rare for the ACCC to take more than 3 months to reach a final view and negotiate any undertakings which are believed to be necessary. Parties can then proceed with a relatively high degree of certainty to implement their merger.

For these reasons, the management of companies proposing to merge, or the management of a bidder proposing to make a hostile takeover bid for a competitor (also becoming rare) seek the usually safe haven offered by the informal clearance process administered by the ACCC.

As a result, s50 has become a source of administrative power rather than a provision of black letter law enforced by the administrator in the courts.

¹⁵⁰ "Sound Economics and Hard Evidence: "The Touchstones of Sound Merger Review" - William J Kolasky, Deputy Assistant Attorney-General Antitrust Division, U.S. Department of Justice - the article states that most merger challenges are "litigated to a final decision on the merits in three to four months" (at page 21).

(b) Shortcomings of the Informal Clearance Process

Notwithstanding its obvious popularity, the informal clearance process does, however, suffer from a number of shortcomings. Firstly, it is very informal. It does not proceed with the benefit or constraint of any regulatory support but appears rather to be the result of an ad hoc process where judicial or formal administrative processes have failed or would fail due to their impracticality.

As a consequence, the ACCC has not been constrained in the manner in which it exercises its administrative power under the informal clearance process. No decision of the ACCC in relation to an application for informal clearance has ever been judicially reviewed. As a result:

- in some cases the parties are unable to progress mergers because the ACCC takes an overly narrow view of market delineation or disagrees with the market dynamics that are presented; or
- the ACCC occasionally seeks undertakings which vary the terms of a merger or impose obligations, in circumstances where the ACCC's requirements will have little impact, if any, on the effect which the merger will have on competition.

It is not to say that the ACCC is always wrong or that there are not undisclosed reasons for the ACCC's decisions. The Council's concerns relate to the legitimate issue that if the ACCC is not compelled to provide reasonably detailed reasons or there is no judicial review available in a timely and commercial way, there is no ability for there to be any real checks and balances on the ACCC's decisions. The ACCC's claims that parties can test their position in Court is somewhat hollow - even with the best directions from Federal Court judges.

The Council is also concerned that the ACCC may require parties who propose a merger which will be efficiency-enhancing to divest assets or undertake behaviour which destroys those efficiencies.

(c) Recent Trends

For this analysis, the Council has relied on an ad hoc review of the mergers examined by the ACCC between January 2001 and March 2002, where the ACCC has made a public statement about the outcome carried out by Tim Bednall for a paper titled "Section 50: Whither the Law?"¹⁵¹ and from experiences of Council members working with the ACCC on merger matters. This review showed that between January 2001 and March 2002, the ACCC has permitted mergers to proceed with s87B undertakings on 10 occasions. The most interesting feature of this summary was that in approximately 80% of cases in which the ACCC obtained undertakings for a merger, those undertakings included behavioural undertakings.

In most cases where behavioural undertakings are accepted by the ACCC, the Council believes that those undertakings are unlikely to facilitate greater competition than would otherwise occur in the relevant markets. Rather, the behavioural undertakings appear to be designed to constrain what might otherwise

¹⁵¹ presented at the 2002 Trade Practices and Consumer Law Conference, 11 May 2002

be monopolistic behaviour. This is so in relation to 50% of the mergers approved with undertakings since January 2001.¹⁵²

Each of these mergers created monopolies or near monopolies that were nevertheless permitted by the ACCC. They appear to be largely justified on the basis of efficiencies, although that is not necessarily apparent from the published reasons of the ACCC.

In three cases, failing firm was a motivating factor for the merger.¹⁵³ In those cases the ACCC compared the consequences of market failure where companies compete in a receivership for the failing firm's customer base and/or assets with the merging parties request to deliver those customers and/or assets to the acquiring firm. In all 3 cases the ACCC required independent verification that the target would fail or exit and that there were no alternative buyers for the assets or investors willing to commit additional funding.

(d) Recommendations

There appears to be a groundswell of support for some constraint to be placed on the ACCC in relation to the informal clearance process. The Council submits that an Independent review panel should be set up to review informal clearance decisions by the ACCC. The review panel should have the power to itself grant clearance or require the ACCC staff to do more work or confirm the ACCC decision. This would give parties a chance to argue their merger case before an independent body, provide a quick mechanism for review and act as a constraint to the ACCC's existing monopoly power of decision making on mergers. The proposed review panel should not be confused with the Tribunal which is untouched by this suggestion (although in section 6 of this Submission the Council recommends that the Tribunal should be allowed to hear merger authorisation applications directly).

Members of the review panel may or may not be Associate Commissioners, but should be 3-5 eminent experienced persons in this field appointed by the Treasurer. They would be independent of the normal ACCC full time Commissioners and involved only in mergers. They would not participate in the ACCC's internal processes in the informal clearance process. Typical members would be business people; economists, lawyers and a consumer advocate. To ensure that the review panel does not experience the same lack of transparency as is currently experienced in the informal clearance process, the review panel should publish reasons, omitting any confidential information.

Review should essentially be conducted on the basis of the papers before the ACCC, however we suggest that the appellant should have the right, when seeking a review, to put a further submission direct to the review panel. Although the appellant should not get to see normally confidential ACCC staff papers, they should perhaps see the final staff recommendation and an edited summary of the ACCC reasons (omitting any truly confidential third party information). The Council

¹⁵² AES Environmental, Manildra Wesfarmers, Gunns Limited and SPC/Ardmona

¹⁵³ Ansett and Hazelton, Qantas and Impulse, and Woolworths and Franklins

is open minded on the issue of whether there should be a right of appearance before the panel.

The introduction of such a review panel would require legislating to make it clear that the review panel can substitute its views for those of the ACCC on the limited question of whether or not to oppose a merger and institute s50 proceedings. However, this may be able to be achieved by regulation. To be effective, the legislation would need to preclude the ACCC commencing proceedings under s50 unless there had been a material change in circumstances or withholding of material information by one of the parties. Further, decisions of the review panel should not be subject to judicial review or appeal to the Federal Court.

The right of third parties seek divestiture under section 81 of the Act would remain. The ACCC's right to seek divestiture would be limited in circumstances where it (or the review panel) had given informal clearance to circumstances involving a material change of circumstances or a withholding of material information. For parties who wish to obtain statutory immunity against this possibility, authorisation would remain the only course.

The Council submits that there should be no third party rights to seek a review of a clearance to this Panel. There should also be a strict time limit so that a party would need to seek a review within a short period of, for example 14 days of the ACCC declining clearance, and lodge its submission within a further 7 days, with the Panel to give its decision within a month after that unless the appellant consents to an extension of time.

In addition, the Council believes that merger applicants should be able to apply directly to the Tribunal for authorisation. This is discussed in detail in the following Section 6.

6. Authorisation

6.1 Introduction

The ability to exempt certain conduct from the operation of the *Trade Practices Act* (the **Act**) through the authorisation and notification provisions of Part VII of the Act is a significant feature of the regulation of restrictive trade practices in Australia¹⁵⁴.

Access to such an exemption is important to Australian business and aids the enhancement of the welfare of all Australians by permitting the correct balance between competition and broader public benefits to be considered in respect of specific conduct that may contravene the Act¹⁵⁵.

This submission is primarily directed toward aspects of the process that apply when parties seek authorisation which currently undermine the ability of business to utilise the process. In addition it is submitted that authorisation of conduct that may come within s.46 of the Act should be available.

The absence of any time period in which non-merger applications for authorisation must be determined and features of the timing provisions governing merger applications¹⁵⁶ undermine the effectiveness and relevance of the authorisation process to potential applicants. This submission supports amendments to the Act to secure meaningful time limits in the consideration of all authorisation applications. It also supports greater discipline on Tribunal procedures for all authorisation applications.

Currently, the ACCC, at first instance, and the Tribunal on review, are both given a role in considering authorisation applications. On the grounds set out below, it is submitted that the Act should be amended so as to provide an applicant for authorisation with the option of direct access to the Tribunal in respect of mergers, with the ACCC to maintain a role in utilising its resources to assist the Tribunal in arriving at its determination.

This proposal for direct access to the Tribunal in merger applications is not to be confused with the proposal put forward elsewhere in this Submission that there should be an independent review panel to reconsider informal clearances by the ACCC. As is explained below, the two processes sit comfortably together.

Authorisation is not currently available in respect of conduct that comes within s. 46 of the Act. There is no basis for precluding corporations that may come within the substantial degree of market power threshold in s. 46 from obtaining exemption from s. 46 in respect of conduct in the public benefit.

¹⁵⁴ Sections 51(1) and 51(1A) of the Act are the only other avenues open to parties to seek exemption of relevant agreements or conduct from the operation of the Act.

¹⁵⁵ Since the 1995 reforms to the Act, it has been an expressed object of the Act to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection (s.2). The authorisation and notification processes in Part VII of the Act are entirely consistent with achieving this welfare objective.

¹⁵⁶ This submission draws a distinction between non-merger and merger applications for authorisation. Non-merger applications are made pursuant to s.88(1), anticompetitive arrangements; s.88(5), anticompetitive covenants; s.88(7) and (7A), secondary boycotts; s.88(8), exclusive dealing and (8A), resale price maintenance. Merger applications are made pursuant to s.88(9) of the Act.

It is not intended in this submission to deal in any detail with the specific issues that the ACCC must take into account in granting an authorisation. It is important to note (and this relates to the issue of considering mergers in the context of a global environment) that the value to Australia of export industries and the substitution of those goods for imported goods for imported goods, and all relevant matters relating to the international competitiveness of any Australian industry, are matters that are regarded as very important.

6.2 Meaningful Time Limits

There are provisions in the Act imposing time limits on the consideration of merger authorisation applications. No such time period is prescribed for non-merger authorisation applications.

(a) Merger applications

Section 90(11)(a) provides that the ACCC must determine a merger authorisation within 30 days of receipt of an application. That time limit is susceptible to extension:

- (i) by a “clock-stopping” mechanism when the ACCC requests that the applicant provide more information relevant to the determination of the application (s.90(11)(a));
- (ii) where the ACCC, of its own volition, gives notice extending this period to 45 days due to the complexity of the issues involved (s.90(11A));
- (iii) where the applicant informs the ACCC in writing that it agrees to the ACCC taking a specified longer period (s.90(12)).

If the ACCC does not make its determination within the specified (or agreed) time period, the authorisation applied for is deemed to have been granted (s.90(11)).

Given that complexity in such applications can be identified without difficulty, the 45 day “extended” period in s.90(11A) is likely to be the effective minimum period for consideration of merger applications¹⁵⁷.

The “clock-stopping” mechanism in s.90(11)(a) can readily have the effect of significantly extending the time limit where the ACCC makes numerous requests for additional information. While administrative law remedies may in theory assist an applicant faced with any capricious use of this procedure, the pursuit of such remedies will in effect mean that the merger authorisation process is of little or any use. If there is a need to go to the court to seek administrative review, this will, in effect, put an end to the merger. This is one of the reasons why the Federal Treasurer decided to introduce changes to the *Corporations Act* (discussed later in this Submission) whereby challenges in the courts in relation to mergers were removed from the court to the Takeover Panel. If the ACCC feels that it does not have enough information to deal with the matter, it retains the right to determine the application, within the prescribed time period, on the information before it (whether to reject or grant authorisation).

¹⁵⁷ In the Commission’s consideration of the Davids Limited/Composite Buyers Limited merger (*Re Queensland Independent Wholesalers Limited* (1995) ATPR (Com.) ¶150-185) the Commission availed itself of the additional time allowed in s.90A(11A) and further extensions of time were also invoked under s.90(11)(a) and s.90(12).

It is submitted that the current open-ended ability to “stop the clock” fails to impose sufficient discipline on the ACCC’s consideration of a merger application where time itself can scuttle a merger proposal and the perceived potential for delay can itself deter would-be applicants from availing themselves of the authorisation process.

Overall, however, the major factor undermining legislative attempts to ensure the timely processing of merger applications is the requirement that a party pursue its application first before the ACCC and then through *de novo* review by the Tribunal (a matter which is addressed in the following section). While there is an attempt to impose a 60 day time limit upon the Tribunal’s consideration of a merger application review¹⁵⁸ the Tribunal is given very broad discretion to extend that period where it considers that the matter cannot be dealt with properly in that period or because of other special (but unidentified) circumstances¹⁵⁹.

Mergers do not lend themselves easily to the authorisation process. This has resulted in the sparse consideration by the Tribunal of merger applications¹⁶⁰. This is largely due to the fact that Tribunal proceedings adopt a court style procedure for determining applications.

While the Tribunal is not bound by the rules of evidence and proceedings are required to be “conducted with as little formality and technicality as the requirements of the Act and a proper consideration of the matters before the Tribunal permit”¹⁶¹, there are currently no rules laid down in the Act and/or Regulations¹⁶² to otherwise prescribe the Tribunal process. There is little opportunity for a speedy and efficient process suited to the processing of merger authorisation in those circumstances. Clearly, this is an area that needs urgent attention, not only in relation to mergers but generally in the context of authorisations and other work of the Tribunal.

(b) Non-merger applications

There are currently no time limits imposed on the ACCC to consider non-merger authorisation applications. This is despite s.90(10) of the Act which suggests that such applications should be determined within 4 months. While s.90(10) envisages that the Minister will fix a date for the application of s.90(10), there has been no gazettal of the provision which remains dormant.

¹⁵⁸ Subsection 102(1A).

¹⁵⁹ Subsection 102(1B) and (1C). The Tribunal extended the time that it had available in the Davids/CBL merger (*Re Queensland Independent Wholesalers Limited* (1995) ATPR ¶41-438).

¹⁶⁰ There has only been one merger application brought to the Tribunal that proceeded to a determination – the Davids/CBL merger. An application in respect of the Watty/Taubmans proposal was made to the Tribunal but was subsequently withdrawn. There have been no merger applications made to the Tribunal since 1999. The application to review the Davids/CBL merger was made on 19 June 1995 and the Tribunal’s decision was given on 29 September 1995 (with written reasons being handed down on 17 October 1995). See Smith and Grimwade, *Authorisation: Some Issues* (1997) 25 ABLR 351. In this article Rhonda Smith (then a Commissioner of the Commission) and Tim Grimwade (who was in charge of the authorisation work at the Commission at this time) discuss issues, some of which are referred to later in this Submission (see paragraph 0 to 0).

¹⁶¹ See s.103 of the Act.

¹⁶² Regulation 22 gives the Tribunal a broad general discretion to control its procedure but is not prescriptive.

Despite the ACCC having stated that it “*aims to issue a draft determination within four months of receipt of an application*”¹⁶³, experience has shown that such an aim is often not realised¹⁶⁴.

The absence of any time limit for the ACCC determination of non-merger authorisations is most unfortunate and has created difficulties for those seeking to utilise the authorisation procedure.

Two examples illustrate the difficulties with the current situation.

- (i) In November 2000 the Royal Australasian College of Surgeons sought authorisation of its rules in relation to admission and training of candidates¹⁶⁵. The Submission in support of the application was made to the ACCC at the end of March 2001. The ACCC commenced its consideration of this matter on 2 April 2001 but now, some 15 months later, the application is still under consideration by the ACCC. No draft determination has been issued, although an interim authorisation was obtained to ensure that the relevant conduct was not at risk under the Act. The Applicants have raised this delay not only with the ACCC but also with the Federal Treasurer and other bodies set up to review the operation of the *Trade Practices Act* in the context of the medical profession.
- (ii) On 1 March 2000, the Australian Dairy Farmers Federation lodged an application seeking authorisation for groups of dairy farmers to collectively negotiate pricing and supply arrangements with the dairy processing company they supply¹⁶⁶. The ACCC's final determination was issued some twelve months later on 12 March 2002, granting authorisation subject to a number of conditions¹⁶⁷. The application arose in consequence of the deregulation of the dairy industry in July 2000 and was aimed, in part, at assisting a transition by dairy farmers to a deregulated market. The matter is currently the subject of an application for review before the Tribunal¹⁶⁸. The net result of this process is that dairy farmers seeking to enhance their bargaining position in a deregulated market by means of procedures recognised by the ACCC as likely to facilitate the transition to a deregulated market¹⁶⁹ have been denied the ability to pursue the collective

¹⁶³ See the Commission's publication *Guide to Authorisations and Notifications* (November 1995) at p.10. The Commission has omitted reference to any such aim in its *Guide to Authorisation and Notification for Third Line Forcing Conduct* (February 1998) and in its leaflet *Authorisations and Notifications* (May 1999).

¹⁶⁴ An examination of the Commission's web site readily reveals that since 1998 Commission consideration of applications generally exceed four months by a considerable period.

¹⁶⁵ Authorisation application A90765.

¹⁶⁶ Authorisation application A90782.

¹⁶⁷ A draft determination had been released on 2 October 2001 and a pre-decision conference was held on 8 November 2001.

¹⁶⁸ There appears to be some prospect that the application for review will be the subject of a consent determination under s.101(1A) of the Act. If that does not eventuate, the Tribunal has made directions for a timetable leading to a hearing on the merits in February 2003.

¹⁶⁹ The Commission so held in its final determination. This submission makes no comment on the merits of the authorisation application.

bargaining procedure for the 2001 and 2002 negotiating periods¹⁷⁰. Thus, at the earliest, any public benefits of the collective bargaining process will have been delayed until the 2003/04 financial year – three years after deregulation.

These examples illustrate that it is not only merger applications which require the discipline of time constraints.

While it is appropriate to consider non-merger applications within a longer period than that which ought to apply for merger applications, the absence of any time constraint is unacceptable. Indeed, time constraints may have to be included for other authorisation applications which will impact significantly in relation to the operation of various important public interest schemes from time to time.

It is submitted that a meaningful time limit should be imposed on the ACCC in respect of non-merger applications by:

- (a) requiring the ACCC to determine an authorisation application within four months of it being received by the ACCC (either by making s.90(10) operative or by other appropriate amendment to the Act such as deeming the authorisation to be approved in the 4 month period); and
- (b) if any clock-stopping procedure along the lines of s.90(11)(b) is to apply, by limiting the ACCC's ability to use this device to extend the time period by requests for additional information so that only two such time extensions are available to the ACCC¹⁷¹. If the ACCC considers that the parties are impeding its consideration of the issues by not supplying information, it retains its right to determine the application on the material before it, including the option of rejecting the application for authorisation on the basis that it has inadequate information. The ACCC might also seek to negotiate further time extensions with the parties to overcome any difficulties.

For non-merger applications there is also currently no attempt to impose any time limit upon the Tribunal's consideration of applications for review of determinations. Tribunal applications are almost invariably protracted matters taking many months, if not years. As with the review of merger applications there are no rules laid down in the Act to prescribe the Tribunal process¹⁷².

It is submitted that further discipline in the way in which non-merger authorisation applications are to be dealt with by the Tribunal is required.

¹⁷⁰ The ADFF has stated that the majority of farmers enter contracts for a financial year and that negotiations take place in the period prior leading up to the commencement of the next financial year (see Transcript of hearing before the Tribunal on 15 May 2002, p.12).

¹⁷¹ That does not, of course, prevent the Commission from making further requests for information, but simply prevents the further extension of time arising in consequence of such requests.

¹⁷² Other than s.103 of the Act.

6.3 Direct Access to the Tribunal¹⁷³

A party contemplating an application for authorisation must not only take into account the process before the ACCC but must also consider the real prospect of review by the Tribunal. The right of review to the Tribunal is a two-edged sword to the business community.

On the one hand it is obviously important for affected parties to be able to seek a review of the decision of the ACCC in relation to its determinations. ACCC determinations are made in a non-judicial context by an administrative body and can have far reaching consequences to a business, an industry and indeed the welfare of the broader public. The review mechanism is vital because:

- (a) if authorisation is granted, it in effect, provides immunity from the operation of the Act of the relevant agreement or conduct; and
- (b) if authorisation is not granted, businesses may be denied the opportunity to pursue commercial activities that serve the public benefit.

On the other hand, the two step process of application to the ACCC followed by review to the Tribunal adds significantly to the delay and uncertainty of the authorisation process¹⁷⁴. It is submitted that, particularly in respect of mergers, this factor alone undermines the attractiveness of the authorisation process to potential applicants and diminishes the role that process was intended to have in relieving beneficial conduct from the operation of the Act.

The combination of the initial application to the ACCC and subsequent right of review to the Tribunal has been utilised to discourage persons from seeking an authorisation application in appropriate cases. The current procedure provides an incentive for certain parties to stifle the proper consideration of authorisation applications. It can be used as “economic blackmail” in appropriate circumstances to prevent authorisations proceeding.

These elements of the process can be seen to have had an impact upon a number of merger proposals, including the Wattyl merger¹⁷⁵, the Shell and Mobil Refinery merger proposal in 1999 and the 2001 merger proposal of the SPC and Ardmona companies. It is interesting to note that when SPC Limited and Ardmona Foods Limited announced their intention to merge they decided to seek a clearance of their merger by the ACCC rather than to pursue an authorisation application, which had been the procedure the parties chose in 1988 (the merger then also involved a third company (Letona Cooperative Company Limited)¹⁷⁶. The ACCC did clear the 2001 merger but on the basis of certain undertakings to the ACCC under s87B. There is little doubt that had the merger been

¹⁷³ This matter was raised publicly by Bob Baxt, former Chairman of the Trade Practices Commission, in 1995. See Baxt *Why authorisation should be available directly* (1995) 23 ABLR 151.

¹⁷⁴ A Tribunal review may be sought not only by the original applicants for authorisation but also by persons who oppose the granting of the authorisation. The Tribunal must review a determination where an application for review is made by a person dissatisfied with a determination by the Commission who has a “sufficient interest” (s.101(1AA)). This provision has often been interpreted widely, although recently there has been some willingness to narrow its scope in the context of an application in a merger authorisation (in effect, one for a joint venture) (see *Re Wakeman* (1999) ATPR 41-675).

¹⁷⁵ An application for review of the Commission’s determination rejecting the merger proposal was made to the Tribunal but was subsequently withdrawn.

¹⁷⁶ At that time merger proposals were subject to a dominance test.

made subject to an authorisation process the chance of a review from “disgruntled” parties would have made it very difficult for the merger to have proceeded.

Too often the current features of the authorisation process have the effect of relegating authorisation to an option of last resort. That is undesirable and, it is submitted, not consistent with what was intended to be achieved by Part VII of the Act.

Moreover, the deterrent effect of an inefficient authorisation process presents an undesirable risk that parties to a proposed merger may proffer undertakings that may undermine efficiency and other public benefits rather than be obliged to go through a protracted authorisation process where they could be properly taken into account. It should be noted that unlike the authorisation process, those undertakings are not subject to the same degree of public scrutiny prior to acceptance by the ACCC.

6.4 Current Right of Appeal Important

One suggestion to overcome this potential impasse in the use of authorisations is to remove the right of review to the Tribunal. A similar approach has been recently recommended in relation to the telecommunications regime under Part XIC of the Act with respect to arbitration disputes (under the current law there is a right of appeal to the Tribunal).

It is submitted that it is essential that the final decision in an authorisation context does not rest with the ACCC. Where the ACCC continues to have a role as the primary decision maker, the right of review should not be taken away.

The number of successful “appeals” brought against ACCC determinations justify the existence of the review process. Leading matters include:

- Re John Dee (Export) Pty Ltd (1989) 95 FLR 250;
- Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357;
- Re Queensland Independent Wholesalers Ltd (1995) ATPR 41-438;
- Re AGL Cooper Basin Natural Gas Supply Arrangements (1997) ATPR 41-593;
- Re 7-Eleven Stores Pty Ltd (1998) ATPR 41-666; and
- Re Australasian Performing Rights Assn (1999) ATPR 41-701.

By way of example, two of these matters offer interesting insights.

- (a) In *Re Queensland Independent Wholesalers Ltd* the Tribunal reviewed a determination by the then Trade Practices Commission (**TPC**) which authorised Davids Limited’s proposed acquisition of shares in Composite Buyers Ltd, a competitor subject to certain conditions, including, in effect, Davids proffering extensive undertakings pursuant to s.87B of the Act¹⁷⁷. The Tribunal held that the acquisition would deliver cost savings and increase competition by creating a “Fourth Force” in Australian supermarket retailing. Accordingly, the Tribunal upheld the authorisation, but, contrary to the TPC, did not require the s.87B undertakings as a condition of authorisation.

¹⁷⁷ Contrary to the submissions of the TPC that the s.87B undertakings had a life independently of the authorisation, the Tribunal held that the undertakings had no independent existence ((1995) ATPR ¶41-438 at 40,929).

- (b) In *Re AGL Cooper Basin Natural Gas Supply Arrangements* the Tribunal reviewed a 1996 determination by the ACCC revoking a 1986 determination that authorised agreements relating to the development and operation of the Cooper Basin gas joint venture. That authorisation identified public benefits in efficiently making available natural gas from the Cooper Basin. However, in 1996, the ACCC determined there had been a material change in circumstances since authorisation was granted and on reviewing the authorisation revoked the authorisation¹⁷⁸. The gas producers applied to the Tribunal for a review of the ACCC's determination. The Tribunal agreed that there had been a material change in circumstances but held that there remained a substantial public benefit. Moreover, the Tribunal held that the public benefit continued to outweigh the anti-competitive detriment and set aside the ACCC's 1996 revocation of the 1986 authorisation.

These two matters illustrate the importance of a review process from ACCC decisions by a body such as the Tribunal.

6.5 Proposed New Authorisation Procedures

A relatively simple way of overcoming at least some of the difficulty with the current process in respect of merger applications would be to amend the Act to allow merger authorisation applications to be made directly to the Tribunal, rather than being made first to the ACCC.

For such an approach to work the procedural and other changes discussed briefly below should be put into effect.

Where an applicant elects to proceed directly to the Tribunal the ACCC would retain an important role and be required to act, in effect, as amicus tribunal. The ACCC is already familiar with fulfilling the contradictor role in applications for review brought under s.101 and this role could be further clarified by appropriate rules in the Act or regulations. Indeed, such a role should be regarded as part and parcel of the general work of the ACCC – it is after all there to represent all public interests and not to act as an advocate for any particular person or interest.

Direct approach to the Tribunal should be optional - applicants should have a choice in such a matter. Parties who felt that there was no reason to fear any review by third parties could apply to the ACCC (subject to rights of merit review to the Tribunal). In those applications meaningful time constraints on ACCC decisions and improved discipline on Tribunal procedures as discussed earlier would apply.

Once the Tribunal's decision is made, it would not be subject to further merits review, although appeals on questions of law would be available in the Federal Court.

Arguments raised against direct access to the Tribunal have included that the Tribunal could not work effectively because it has no resources; there would be no contradictor in such an application and the Tribunal's rules of operation have proved to be time consuming and inappropriate¹⁷⁹. These are matters that will need to be addressed in developing a

¹⁷⁸ The review was undertaken under s.91(4) of the Act as it then stood (now s.91B).

¹⁷⁹ There has already been some public debate about this proposal. See R Baxt *Why Authorisations Should be Available Directly* (1995) 23 ABLR 151; R Baxt, *Banking Mergers and the Australian Competition – Do We Need a Change*

direct access proposal – however they should not represent insurmountable barriers to a procedure that can greatly assist the authorisation process.

The ACCC's role will overcome the first difficulty. The Tribunal does not presently have the resources to undertake these authorisation applications. However, an active presence of the ACCC in a role of amicus Tribunal should alleviate such concerns. With the ACCC providing major assistance to the Tribunal it should only be necessary to provide for a minimal increase in the staff of the Tribunal. Interested parties, including competitors, as well as the ACCC (possibly following legislative direction to do so) would be able to fulfil the role of contradictor. There is no reason why the Tribunal, or the ACCC assisting the Tribunal, could not ensure that notice of the Tribunal application was given to potential interested parties.

As to the Tribunal's procedures, appropriate (and strict) rules should be introduced into the Act (and/or the regulations) to ensure that the Tribunal (and the parties before it) move effectively and speedily. This is the critical issue as there is no point introducing a direct application to the Tribunal unless the Tribunal is properly resourced, appropriate procedural rules are introduced and all parties are required to comply with the rulings made by the Tribunal. Lawyers are used to turning around transactions which clients regard as very urgent, particularly in commercial matters. Transactions of this kind should be expedited if the authorisation option is to find its appropriate place as a serious and viable option for securing mergers in the public interest.

There is already an excellent parallel in the operation of the Corporations and Securities Panel (the **Takeovers Panel**) under the *Corporations Act*. The ability to apply to the court for relief in relation to takeovers (which are, after all, mergers) has been removed by amendments made in 2000 and the Takeovers Panel is now vested with a universal authority to deal with these matters. Although the Takeovers Panel has only been in operation for a short time, the record of turn around by the Takeovers Panel has been very good. Whilst it is obvious that some persons may have been unhappy with decisions of the Takeovers Panel, its decisions have not been the subject of any challenge in the courts on questions of law or on other bases.

A streamlined Tribunal process need not carry significant risk that exemptions from the Act will be granted lightly or without foundation (as has been shown by the Takeovers Panel experience). The expertise of the Tribunal members remains and the ACCC is also well placed to ensure that public interest issues are properly put before the Tribunal for its consideration. The ACCC's role of pursuing the public interest (as distinct from being an advocate in favour or against a proposal) should be clearly defined. Affected parties with a sufficient interest in the application would also have the right of appearance. The powers to review any resulting authorisation also remain if grounds exist to warrant such a review¹⁸⁰.

It has been suggested that the direct access proposal is inconsistent with Government policy to provide for merits review¹⁸¹. There will of course be an opportunity to seek a

of Law or a Change of Procedure, (1996) *The Australian Banker* 110 at 170 and Smith & Grimwade *Authorisation: Some Issues* (1997) 25 ABLR 351.

¹⁸⁰ Section 91B provides grounds for review including where an authorisation was granted on the basis of false or misleading evidence.

¹⁸¹ Smith & Grimwade, *op cit* at 366-368

review from the Court on questions of law and this should provide an appropriate mechanism for any disgruntled applicant. A similar approach has been adopted in relation to the operations of the Takeovers Panel discussed above. Furthermore, the applicant will have a choice to select which procedure is appropriate for its particular merger application, either to go direct to the Tribunal with a faster and final evaluation of the application and to avoid the chance of review, or to make application to the ACCC if it is felt that it will deal adequately and speedily with the relevant application but in the knowledge that a review would be available to the Tribunal if considered necessary.

6.6 Informal clearance and authorisations in respect of merger proposals

Elsewhere in this Submission improvements to the process of clearance of mergers is proposed which include a role for an independent Review Panel to review informal clearance decisions of the ACCC. The proposal for direct access to the Tribunal in merger applications outlined above is not to be confused with this proposal. On the contrary, the two processes complement each other.

For most parties the informal clearance process (via the ACCC and/or through the proposed Review Panel) provides sufficient comfort to allow a particular merger proposal to proceed. The proposal for there to be a Review Panel to review ACCC clearance decisions is aimed at supporting that process for the vast majority of merger proponents.

For the remaining few merger proponents, however, the security of total exemption from the operation of the Act is important. It is in respect of such mergers (and these are likely to involve only a small proportion of mergers), that it is proposed that direct access to the Tribunal ought to be an option.

6.7 Authorising s.46 conduct

The ability to exempt conduct from the operation of the Act by the authorisation and notification procedures is currently available in respect of:

- (a) **Subsection 88(5)**: the making of, or giving effect to, contracts, arrangements or understanding that would otherwise come within s.45 as having a substantial anticompetitive effect (including price fixing, for both goods and services (s.45A)¹⁸² and exclusionary provisions (4D));
- (b) **Subsection 88(5)**: covenants with a substantial anticompetitive effect (s.45B);
- (c) **Subsection 88(7) and (7A)**: secondary boycotts and arrangements affecting the supply or acquisition of goods (s.45D, s.45DA, s.45DB, s.45E or s.45E);
- (d) **Subsection 88(8)**: exclusive dealing (including third-line forcing) (s.47);
- (e) **Subsection 88(8A)**: resale price maintenance (s.48); and
- (f) **Subsection 88(9)**: mergers and acquisitions (s.50).

Currently no exemption is available for conduct that comes within s.46 of the Act as a misuse of market power.

This poses significant issues for companies that may come within the s.46 threshold of having a substantial degree of power in a market.

¹⁸²

The previous exceptions precluding authorisation of price fixing conduct have been removed from the Act.

An important feature of the authorisation and notification process is that it provides certainty to companies (and their financiers) in respect of proposed conduct beneficial to the public but that has the potential to contravene provisions in Part IV of the Act. As has been amply demonstrated by the history of Part VI, many parties have availed themselves of the process in a variety of circumstances including transactions, joint ventures, distribution arrangements, marketing schemes and buying schemes. In developing such proposals parties, acting on advice, may recognise the potential anticompetitive effects and seek to relieve the risk of contravention proceedings in respect of the conduct by securing authorisation or by giving notification.

The corporation with a substantial degree of market power is presented with an additional difficulty that currently cannot be relieved by authorisation. As has been stated by the High Court, the conduct of such companies is to be viewed through a special lens¹⁸³. Thus conduct that might be viewed as pro-competitive or competitively neutral, when undertaken by a corporation without market power, could be viewed as a misuse of market power by a company with such power within the terms of s.46 of the Act.

Recent experience has shown that in a variety of circumstances there is the potential for larger corporations to be exposed to s.46 proceedings in respect of distribution arrangements, access to infrastructure and pricing policy, for example. But, in the face of identifiable risks concerning such conduct, no avenue is currently available to secure protection from the Act even where public benefits can be identified.

A useful illustration of the potential risks facing a large corporation can be seen in the recent decision of Mansfield J in *NT Power Generation Pty Ltd v Power and Water Authority and Ors*¹⁸⁴ which might be summarised as follows.

- (a) The respondents were the Power and Water Authority (**PAWA**), a statutory corporation empowered to licence persons to generate and sell electricity in the Northern Territory and Gasco, a subsidiary of PAWA. Gasco had agreements with the NT gas producers which gave it pre-emptive rights in relation to the sale of gas by those producers to third parties.
- (b) The applicant, NT Power Generation (**NT Power**), operated a power station and supplied electricity under licence from PAWA to Mount Todd Gold Mine. NT Power sought to supply electricity to NT consumers generally and obtained a licence from PAWA to supply customers in the Darwin/Katherine region. In order to supply electricity to Darwin/Katherine NT Power required access to infrastructure owned by PAWA and an uninterrupted gas supply. Negotiations between NT Power and PAWA for access to the PAWA infrastructure were terminated without agreement

¹⁸³ *Melway* per Gleeson CJ, Gummow, Hayne and Callinan JJ at 26. The phrase is drawn from the judgment of Scalia J in the Supreme Court of the US in *Eastman Kodak Co v Image Technical Services Inc* 504 US 451; at 488 (1992) where he stated:

“Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws or that might even be viewed as procompetitive can take on exclusionary connotations when practiced by a monopolist.”

¹⁸⁴ (2001) 184 ALR 481. Mansfield J held that the neither of the respondents in the proceeding were susceptible to the Act or the Competition Code and thus dismissed the application. However, his obiter comments on the operation of s.46 expose the issue now discussed.

being reached. Moreover, Gasco refused to undertake not to exercise its pre-emptive rights against NT Power.

- (c) NT Power commenced proceedings alleging, inter alia, contraventions of s.46 of the Act¹⁸⁵ by PAWA (in its refusal to supply access to its infrastructure) and Gasco (in its refusal to give an undertaking not to exercise its pre-emptive rights under the gas supply agreements).
- (d) Mansfield J, having held that the Act did not apply to either PAWA or Gasco, stated in obiter comments that if the Act had been found to be applicable to PAWA its refusal to grant access to NT Power would have amounted to a taking advantage of market power for a purpose proscribed by s.46 of the Act. In so concluding, Mansfield J accepted¹⁸⁶ that it was PAWA's "...*overriding desire to encourage genuine and efficient competition in the medium to long term*" but to introduce competition to the benefit of consumers gradually "...*so as to allow time to eliminate or reduce tariff mismatches and poor work practices within PAWA*". Nevertheless, his Honour considered that in pursuit of that ultimate end PAWA sought to exclude NT Power from participating in the electricity supply market until a future time. In the face of that purpose and his other findings his Honour held that he would have found a contravention of s.46 had it applied to PAWA.

Putting aside the question of whether Mansfield J's obiter comments were correct, it seems incongruous that a party in PAWA's position would not be able to secure protection from s.46 of the Act in order to pursue what it may be able to establish are significant public benefits sufficient to outweigh any perceived short term anticompetitive effect.

That incongruity is further reinforced when it is noted that a party in PAWA's position could secure protection in respect of conduct that might contravene other provisions such as s.45 or s.47, but not s.46. Subsection 46(6) does provide a collateral exemption from the operation of s.46 in respect of conduct that has been freed from the operation of s.45, 45B, 47 and 50 by reason that an authorisation is in force in respect of that conduct. However, that would not assist in protecting conduct which may fall within s.46 that is part of an overall transaction or scheme but which does not come within s.46(6).

Indeed, although this may not come strictly within the terms of reference of the Committee, the overlap between s46 and Part IIIA of the Act creates significant problems for an organisation such as PAWA (and there are other examples). Persons could seek to challenge PAWA's actions, not only under s46 but could also seek access to the relevant facilities under Part IIIA of the Act, thus creating, what is in effect, a situation of double jeopardy. Indeed, many new projects that are required to be given a "kick start" may not be able to proceed if there is a risk that the relevant parties (in a position similar to PAWA) might be subject to a misuse of power allegation, in breach of s46.

It might be said that it is an uneasy concept to consider exempting s.46 conduct from the Act where the provision is directed toward conduct that might loosely be described as a "misuse" of market power or "monopolisation". But the same might be said of exemptions for price fixing conduct or primary boycotts which are illegal *per se* by s.45A and s.4D respectively.

¹⁸⁵ Proceedings were also brought under the equivalent provision in the Competition Code of the Northern Territory.

¹⁸⁶ *Ibid* at 567, [373]

It is artificial and potentially damaging to legitimate and beneficial practices to exclude all potential s.46 conduct from authorisation. Just as price fixing and primary boycotts are unlikely to ever be the subject of an authorisation application so too might monopolisation be unlikely to be the subject of any such application. But, as with s.45A and s.4D conduct, that is no reason to continue to exclude the potential to grant authorisation in respect of all s.46 conduct

7. Section 155

7.1 Power to enter premises

S155 confers on the ACCC investigative powers equal to, or greater than, those of virtually any other regulatory agency or law enforcement agency in Australia. While the need for these powers is not queried here in this submission, the strength of those powers and their potential intrusiveness or effect means that they must be exercised with great care and only in appropriate circumstances. This is especially so where in recent years, the enforcement activity of the ACCC, and consequently the use of its investigative powers, has increased significantly.

Perhaps the most intrusive and far reaching of the ACCC's powers under s155 is its power under 155(2) to enter premises to inspect and copy or take extracts of documents, where the ACCC has reason to believe that a person has engaged in conduct that constitutes, or may constitute, a breach of the Act. While the premises which the ACCC would enter using its powers under s155(2) would normally be occupied by the person suspected of having breached the Act, that is not required by the section; the ACCC could exercise its powers of entry into any premises, provided it is for the purpose of examining documents in the possession or control of the suspected person.

The ACCC normally exercises its investigative powers under s155 by issuing a notice to a person or company, requiring production of documents or information to the ACCC, giving the recipient of the notice adequate time to gather the information or documents and provide it to the ACCC. However, it is recognised that there may occasionally be circumstances where it may be necessary to enter premises without notice, because of a likelihood that the person receiving the notice would otherwise destroy or remove the documents to prevent the ACCC gaining access to them.

Because this power of entry is so draconian, (indeed, it is very similar to a police search warrant), it is submitted that this power should be exercised on the same basis as the power to enter premises given to the National Crime Authority by Section 22(1) of the National Crime Authority Act, or in line with the requirements to obtain an Anton Pillar order; that is the power should only be exercisable when there is reason to believe that documents would be in imminent danger of being destroyed or concealed. The ACCC should be required to satisfy a Federal Court Judge that the documents were in danger of imminent destruction or concealment and if satisfied, the Judge could then issue a warrant of entry to the ACCC under s155(2). The existing preconditions to s155(2), reason to believe that a person had contravened the Act and had documents in his possession or control, should also still need to be satisfied.

7.2 Legal Professional Privilege

The Council submits that legal professional privilege facilitates the ability of lawyers to give clients advice. If legal professional privilege was abrogated for the purposes of s155 then the Council is concerned that it may inhibit clients seeking candid legal advice and interfere with compliance with the Act. The Counsel recommends that if, following the *Daniels* appeal in the High Court, there is any doubt about whether s155 abrogates legal professional privilege, then the Act should be amended to make it clear that s155 does not remove such privilege.

This is not to enhance the position of lawyers in trade practices investigations; the privilege is the client's privilege which may be claimed or waived as the client wishes.

The unavailability of legal professional privilege in complying with s155 notices has the potential to produce most undesirable side effects. Businesses are discouraged from seeking legal advice on trade practices issues, even after they become aware of ACCC concerns, because of the risk of that advice being provided to and made use of by the ACCC. In the absence of legal professional privilege, some legal advisers may be reluctant to give written advice to clients, or to express that advice in robust terms, especially if the advice was that the client was or may have been in breach of the Act.

This is particularly so since the ACCC has indicated that, if the Full Federal Court decision in *Daniels* is confirmed by the High Court, the ACCC may on occasion require the production of legal advice given to clients after the client became aware of the ACCC's investigation, and relating to that investigation.

Further, if the *Daniels* Full Federal Court decision is upheld in the High Court and legal professional privilege were not available to prevent the disclosure of material to the ACCC under s155 during the ACCC's investigation, that would not necessarily mean that privileged material would be able to be put into evidence during any subsequent trial. S122(2) of the *Evidence Act (Cth)* 1995 already protects privileged material from being adduced where it came to the tendering party "under compulsion of law". Provided the disclosure of the privileged material under s155 was not taken to be a waiver of privilege, the court's power to protect privileged material during proceedings would still apply.

In order to support the operation of s122(2) of the *Evidence Act*, s155(2) could be amended to provide that any material provided to the ACCC under compulsion of a s155 notice would not operate as a waiver of privilege in any subsequent proceedings.

The Council also notes that if in fact criminal penalties are introduced for a breach of Part IV of the Act, then s155(7), which provides that self incrimination is not an excuse, would also have to be reviewed.

7.3 Cost of complying with a s155 Notice

It is not uncommon for the recipients of s155 notices to be put to considerable time and expense in searching for, analysing and collating large amounts of material to comply with the notice. While s155 notices are frequently directed to those who are suspected of having breached the Act, that is by no means always the case.

It is submitted that a recipient of a s155 Notice who is not her or himself believed to be, or suspected of being, involved in a contravention of the Act, should be entitled to reimbursement of reasonable costs of complying with the Notice.

In addition to the equity in such a situation, an entitlement to reimbursement may encourage more diligent compliance with notices by third parties.

Another issue which arises from the wide ranging power given to the ACCC under s155 relates to the protection of commercially sensitive or confidential material from unnecessary disclosure to third parties. The nature of the ACCC's investigations and the requirements of its notices under s155 frequently require that highly sensitive commercially confidential material be provided to the ACCC for the purpose of its investigations.

It is accepted that commercial sensitivity or confidentiality should not be a reason for refusing to provide particular documents or information to the ACCC. However, commercially confidential material provided to the ACCC in compliance with a s155 notice has insufficient protection against its further disclosure to third parties, including competitors or other parties who may be in dispute with the person who provided the documents to the ACCC. The ACCC currently has no general legal obligation to keep such material confidential and has therefore, at least on some occasions, declined to give any undertaking to the person providing the documents (under compulsion) that they will not be disclosed to third parties.

Whether the ACCC does disclose confidential documents to third parties or not, its refusal to agree to protect such documents has been a cause of concern to those providing confidential documents to the ACCC in such circumstances and may have led (although we are not aware of any specific instance where this has occurred) to some persons withholding confidential documents from the ACCC when they should have been provided in compliance with a s155 notice.

Whilst sections 155AA and 155AB do provide some protection against further disclosure, those sections are incomplete, insofar as they do not relate to s155 material relating to a Part V contravention, nor do they prevent disclosure to third parties provided the disclosure is in the course of the ACCC official performing his or her duties or functions.

This difficulty could be overcome by a provision enabling a person providing material of a confidential nature under s155 to require the ACCC to not disclose that material to outside persons or to named outside persons (eg, the competitors of the document owner) without consent of the document owner.

This should not, of course, preclude the ACCC from using the documents internally or using them in proceedings. Requiring the documents to be of a confidential nature would avoid any blanket claims and is consistent with the approach to protection of confidentiality in the *Freedom of Information Act*. If the ACCC and the person were unable to agree on disclosure to a third party, that issue could be resolved by application to a single Judge of the Federal Court.

8. Criminal Sanctions

8.1 The current position

The Act currently provides that, for contraventions of most of the prohibitions in Part IV of the Act, the Federal Court of Australia may:

- impose pecuniary penalties on any person involved in a contravention subject to a maximum penalty of \$10 million for each contravening act or omission for corporations and \$500,000 for each contravening act or omission for individuals (s76); and
- grant injunctions (s80);
- award compensatory damages (s82);
- impose community service orders, probation orders for a period of less than 3 years and information disclosure orders or orders requiring the publication of an advertisement (s86C);
- make an adverse publicity order (s86D); and
- make a variety of remedial orders, including payment of compensation (s87).

A proceeding for a pecuniary penalty must be commenced within 6 years after the contravention (s77).

The Act provides, in s78, that criminal proceedings do not lie against a person for contraventions of Part IV.

8.2 ACCC amendment proposals

The ACCC proposes, in Chapter 2 of its Submissions to the Committee that:

- New criminal offence provisions prohibiting price fixing/bid rigging/market sharing/output restrictions be inserted in the Act. The ACCC refers to this as hard-core cartel conduct. Criminal sanctions would include fines for corporations and individuals and imprisonment for individuals. These prohibitions would only apply to large corporations and their officers, employees and agents.
- The maximum civil pecuniary penalty for contravention of any provision of Part IV which a court may impose on a corporation should be the greater of \$10 million per contravention and three times the value of any commercial gain from a contravention. If the commercial gain cannot be quantified, the court should have power to substitute 10% of the corporation's Australian turnover for the duration of the infringement up to a maximum of three years.
- The statutory limitation period for contravention of s45 of the Act should be extended to ten years with an amendment to make it clear that, when an action is commenced within the limitation period, a court may take account

of conduct before the limitation period in determining an appropriate penalty.

8.3 Rationales for the introduction of criminal sanctions

In essence, the ACCC advocates the introduction of criminal sanctions for "hard-core cartel" conduct on two grounds:

- "hard-core" collusion is the moral equivalent of fraud (and similar white-collar conduct) and should be criminalised accordingly; and
- criminal sanctions are the most effective way to deter and prevent hard-core cartel conduct.

8.4 Hard-core cartel conduct is the equivalent of fraud

The Council agrees that systematic price fixing, bid rigging, market sharing and output restrictions are very serious matters.

The Council considers, however, that the "moral equivalence" argument for criminalising these types of anti-competitive conduct needs to be evaluated carefully. Part IV of the Act contains a range of prohibitions on anti-competitive conduct and arrangements. It is not clear why some forms of anti-competitive conduct should be criminalised and not others. For example, price fixing is prohibited by deeming it to have the purpose or likely effect of substantially lessening competition. Exclusive dealing is prohibited in s47 if it has the purpose or likely effect of substantially lessening competition. If a substantial lessening of competition can properly be characterised as involving some "criminal" element, such as fraud, it is not clear why only some forms of anti-competitive arrangement should be subject to criminal sanctions. The Council does not consider that the distinction can be made simply by attaching adjectives such as "hard-core" to particular types of anti-competitive conduct.

As noted below, Parliament has, to date, considered that the most appropriate sanctions for conduct which materially distorts or damages competition and the proper operation of competitive markets are civil sanctions such as the imposition of pecuniary penalties. The statutory maxima for these penalties are considerably greater than any fines which may be imposed for so-called white-collar crimes. This difference in approach raises the question of whether anti-competitive conduct should continue to be recognised as different in its nature and impact on society from white-collar crimes, such that the sanctions for engaging in it should reflect its particular characteristics.

There is considerable debate as to what offences should be characterised as criminal. The Australian Law Reform Commission (**ALRC**) issued a discussion paper, *Securing Compliance - Civil and Administrative Penalties in Australian Federal Regulation*, in April 2002. In that paper the ALRC (on page 46) cites a test proposed by the Law Reform Commission of Canada for the identification of offences as criminal:

"To determine whether the act should be a real crime within the Criminal Code we should inquire:

- *Does the act seriously harm other people?*
- *Does it in some way so seriously contravene our fundamental values as to be harmful to society?*

- *Are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?*
- *Given that we can answer 'yes' to the above three questions, are we satisfied that criminal law can make a significant contribution to dealing with the problem?"*

The Council acknowledges that serious harm may be the result of anti-competitive conduct. The Council considers, however, that the evaluation of society's fundamental values contemplated by the Canadian test is a matter of policy to be determined by Parliament, rather than a matter of legal interpretation. For this reason, the Council does not consider it appropriate to express a view as to whether anti-competitive conduct in general or certain types of anti-competitive conduct should be characterised as crimes.

8.5 Criminal sanctions are required to deter cartel conduct

The current position is that the purpose for the imposition of sanctions for contraventions of provisions of Part IV of the Act, such as the prohibitions on price fixing and on exclusionary provisions, is deterrence (both specific and general) and not retribution, rehabilitation or compensation. The object of the penalty regime under the Act is deterrence (*NW Frozen Foods v ACCC* 1996 71 FCR 285). For this reason the Council focuses in this part of its Submission on the proposition that criminal sanctions are required for effective deterrence of cartel conduct.

(a) International best practice

In a number of places in its Submissions the ACCC contends that a criminal penalty regime represents international best practice. The Submissions suggest that the recent OECD Report, *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programs*, supports this proposition. In the view of the Council, the OECD Report does not suggest that effective deterrence of cartels requires criminal sanctions, or that criminal sanctions necessarily represent "best practice".

The OECD Report does provide support for the following propositions:

- increasing the likelihood of detection is a crucial element in the deterrence of cartels;
- the penalties imposed on corporations should be such that the expected loss from violating the law should exceed the gain from participating in cartels;
- penalties imposed on individuals are important elements in effective deterrence; and
- compensatory damages for victims assist in achieving optimal deterrence.

The OECD Report does not identify any particular collocation of features as representing "best practice" and it is instructive to compare the current position in Australia with the OECD Report.

(b) The Australian statutory regime is not weak

In its Submissions the ACCC suggest, in a number of places, that the current Australian statutory regime of substantial pecuniary penalties for corporations and individuals and a right of private action to recover damages is inadequate or ineffective and compares unfavourably with a number of regimes overseas.

In the view of the Council the OECD Report indicates that, in fact, the Australian statutory regime compares very favourably with those of other OECD countries. Australia is, for example, one of relatively few countries that provides for the imposition of any kind of sanction against individuals for cartel conduct. Furthermore, only a minority of OECD countries permit the recovery of damages by victims of a cartel.

The OECD Report leads to the conclusion that the areas in which Australia must improve are the development and implementation of an effective leniency policy and a thorough analysis of the illicit gains derived from and harm done by cartels in Australia.

(c) Need for imprisonment for effective deterrence

The OECD Report provides no real support for the proposition that imprisonment or the threat of it is a necessary element of effective deterrence of arrangements.

During the period from 1996 to 2001, participants in cartels were only imprisoned in two OECD countries – the United States and Canada. The persistence of cartels in the United States suggests that the risk of imprisonment does not necessarily deter individuals from engaging in cartel conduct.

The ACCC's Submission contains an anecdote about certain executives of Hoffman La Roche who, while being interviewed in connection with their participation in the citric acid cartel, denied participation in the "vitamins" cartel, which was subsequently unearthed. The ACCC appears to have included this anecdote in its Submission to make the point that the substantial fines imposed in respect of the citric acid cartel did not deter these individuals from continuing to participate in the vitamins cartel. The anecdote left a different impression on members of the Council: these individuals, who would understand the risk they faced of imprisonment in the United States better than most other cartel participants, were, nonetheless, not deterred by that risk. Their conduct seems to be explicable by a belief that the vitamins cartel would not be detected, rather than a cavalier disregard for fines.

In summary, the Council submits that Australia should be very cautious in accepting that the penal culture of the United States represents best practice deterrence for cartels in Australia.

The ACCC Submission also places considerable weight on the fact that there is currently a Bill before the House of Lords in the United Kingdom, which will impose criminal sanctions for cartel conduct. The significance of the UK Enterprise Bill for assessing the effectiveness of the current Australian sanctions is highly debatable.

The UK had, prior to the Competition Act, the *Restrictive Trade Practices Act* of 1976 which was very complex and which conferred very limited powers of investigation and enforcement. The Competition Act, which was enacted in 1998, contains prohibitions on cartels/price fixing/bid rigging which came into force on 1 March 2000. In other words, there has been no opportunity in the United Kingdom to assess the effectiveness of a regime comparable to the current prohibitions and sanctions regime in Australia. The relevant prohibitions have only been in force in the UK for approximately two years. The introduction of criminal sanctions after such a short period provides no basis for drawing inferences concerning the effectiveness of Australia's current regime or the need for criminal sanctions.

The OECD Report makes it quite clear that there is no compelling international evidence that suggests imprisonment is an effective or necessary deterrent for cartel conduct.

(d) Leniency program

The Council is concerned that the ACCC's focus on imprisonment and criminal sanctions deflects attention from features of the sanctions regime in Australia which require improvement.

The OECD Report makes it absolutely clear that the challenge in attacking cartels is to penetrate their cloak of secrecy. To deter a person from engaging in cartel conduct it is crucial that the likelihood of detection is maximised. The OECD Report confirms that a clear and certain leniency program is essential for attacking cartels. The Report states:

"Clarity, certainty and priority are critical as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximise the incentive for detection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the 'best deal' but also that the terms of the deal be as clear as possible at the outset." (page 8)

The ACCC has, on 4 July 2002, published a draft cartel leniency policy which appears to possess the essential features of clarity and certainty.

The ACCC's Submissions itself make it clear that the proposed separate criminal provisions for cartels are likely to complicate the issue of leniency greatly. For there to be an effective and certain leniency program, which is consistent across civil and criminal sanctions, the ACCC and the DPP will need to agree on essentially all aspects of the leniency policy. Agreement between the ACCC and the DPP is by no means guaranteed. The "amnesty approach" proposed by the ACCC's draft policy for an active participant in a cartel does not appear to be consistent with the DPP's approach to undertakings under sections 9(6) and 9(6D) of the *Director of Public Prosecutions Act 1983*, as set out in the Prosecution Policy of the Commonwealth. This conflict is likely to have the unfortunate consequence of further delaying the development and implementation of that policy.

As noted above, increasing the likelihood of detection of cartels is the aspect of the current Australian regime which requires greatest attention. Accordingly, the Council considers that the ACCC should implement its new cartel leniency policy as soon as possible and monitor it for at least three years, to assess its effectiveness in increasing the detection of cartels. At that time the need for criminal sanctions and how an effective leniency policy could accommodate them could be considered.

(e) Adequacy of current pecuniary penalties

In the OECD Report, there is significant focus on the importance of understanding the extent of the harm done by cartels. For instance, it is stated that:

"The 2000 Cartel Report noted that an important step in enhancing anti-cartel enforcement is 'overcoming the knowledge gap concerning the harm done by cartels'." (page 75)

The Report also states that it is:

". . . only by understanding the extent that cartels cause harm can governments apply appropriate sanctions against the practice, sanctions that provide an effective deterrent." (page 77)

The ACCC, lists in its Submissions, a number of cartels which have been implemented in Australia after the increase in the statutory ceiling on pecuniary penalties for corporations to \$10 million per contravention in 1993 and, in some instances, after the imposition in the mid to late 1990s of substantial penalties. In very few of those cases is there any indication that the ACCC, which has substantial coercive investigative powers, has made substantial efforts to investigate and analyse the gains from the cartel conduct.

As the OECD Report indicates, it is crucial for the understanding of the issues by both government and the public, that an assessment be made of the illicit gains from and, to a reasonable extent, the harm done by the cartel conduct. This assessment would permit an informed analysis of one of the crucial issues in deterrence; namely, whether the penalties imposed in Australia on participants in cartels are exceeding the likely gains made from their participation. Before jumping to the conclusion that the pecuniary penalty regime in Australia is inadequate for deterrence and that other elements are required, such as imprisonment, a proper assessment of the relationship between illicit gain and penalty imposed should be undertaken. The ACCC is in the best position to do this because it can collect the necessary information and it has access to economists and other consultants who can provide any additional required expertise.

If the fact that cartels have occurred in Australia during the 1990s suggests some failure of deterrence, the first issue to be considered is the effectiveness of the sanctions imposed under the current regime and whether they have been fully exercised. In the significant majority of the cartel cases listed in the ACCC Submissions, the penalties were imposed based on recommendations to the court made jointly by the ACCC and the cartel participants. It would be surprising if, in support of the proposed criminalisation of cartel conduct, the ACCC was relying on an implication that those penalties were inadequate.

8.6 Criminal sanctions - implementation issues

The ACCC's Submissions to the Committee indicates that it has given thought to many of the issues that the introduction of criminal sanctions would involve. The precise solutions to many of the problems are, however, touched on, rather than fleshed out.

The Council makes the following observations concerning a number of the issues raised by the ACCC.

(a) Application of criminal sanctions to both corporations and individuals

The Council considers that, of the approaches outlined in paragraph 2.5.1 of the ACCC's Submission, it would be preferable to impose primary criminal liability on a corporation for entering into, or giving effect to, a cartel arrangement and for the individuals who participate in the conduct to be liable as accessories. This approach maintains some consistency with the approach taken in the relevant provisions of Part IV. The Council does not favour the alternative approach identified by the ACCC.

(b) Application of criminal sanctions only to "large" corporations

The ACCC proposes, in paragraph 2.5.2 of its Submissions, that the criminal sanctions would apply only to "large corporations". It proposes that a "large corporation" would be one that satisfies two or more of the following criteria in the financial year in which a contravention occurs:

- gross revenue in excess of \$100 million;

- gross asset value in excess of \$30 million;
- more than 1,000 full-time equivalent employees.

The Council notes that the criteria selected by the ACCC are derived from the *Corporations Act* where they are relevant to reporting obligations. They are not criteria used for the selective imposition of criminal liability. The Council considers that the proposed discrimination is wrong in principle and in practice.

The ACCC listed a number of cartels in its Submission in support of the proposition that the current regime provides inadequate deterrence for cartels. For example, the Tasmanian frozen foods cartel was apparently not deterred by the introduction of the increased penalties in 1993 – it was, for the cartel participants, in the words of Justice Heerey, "business as usual". It is clearly the case that cartel conduct can be engaged in by relatively small organisations but with serious consequences for the relevant consumers. The ACCC presumably regards the Tasmanian frozen foods cartel as serious, not least because the participants held 80-90% of the relevant market. The information in the judgments concerning that cartel indicates that none of its participants would satisfy the criteria for large corporations and, accordingly, the proposed criminal sanctions would not apply. In other words the limitation to "large corporations" would fail the ACCC's own "effective deterrence" test.

More disturbingly, a consideration of the Queensland fire protection cartel in the ACCC's list suggests that some of the participants in that cartel would satisfy the "large company" criteria while others clearly would not. The consequences of the ACCC's proposal would be that, for essentially the same conduct, an employee of an organisation which satisfied the "large corporation" criteria could face up to seven years in prison, while an employee of a company which did not satisfy those criteria would not.

The Council considers that the proposed restriction of the criminal provisions to "large corporations" and their employees is discriminatory and is bad policy and bad law. If criminal sanctions are to be introduced, they must apply to all corporations.

(c) A separate regime for criminal sanctions

The ACCC proposes, in paragraph 2.6.1, as its preferred option, that new criminal offences, distinct from Part IV would be created. These offences would be specific forms of conduct serious enough to be criminalised. Under this approach, the current provisions of Part IV would be enforced by civil proceedings. The Council agrees that this approach is to be preferred to the other options identified in the ACCC's Submission.

(d) Proposed elements of criminal offences

In paragraph 2.6.2 of its Submissions, the ACCC identifies the proposed elements of the criminal offences. Despite its claim that it takes, as its benchmark, "international best practice" the ACCC is, in fact, very selective in the adoption of the features of overseas regimes. For example, in Canada the criminal prohibition on cartel conduct requires proof of both the likely effect of preventing or unduly lessening competition and the intention to have that effect. The proposed legislation in the United Kingdom will require proof that the parties "dishonestly" agreed to make or implement an agreement. The ACCC does not support the inclusion of either of these safeguards in its criminal prohibitions.

In the view of the Council it does not follow from the fact that the current prohibitions on price fixing and exclusionary provisions are *per se*, that proof of an anti-competitive

purpose and/or effect should not be a requirement of the proposed criminal offences. The essential object of the Act is to preserve and encourage competition. While it may be supposed that conduct that falls squarely into the proposed provisions would have an anti-competitive purpose or effect, this is not so. Elsewhere in this Submission we point out that both s4D and s45A can apply to conduct that is competitively benign. Even if those sections are amended along the lines that we propose, there will always be the risk that arrangements that are not clearly anti-competitive will be caught by these per se prohibitions.

The ACCC has not suggested precise drafting for the criminal provisions and so it is not possible to gauge the extent to which arrangements which were not, in fact, anti-competitive could be caught.

Even if precise drafting was available, the Council considers that it would be preferable to require proof of the anti-competitive purpose and/or effect of the impugned conduct if criminal sanctions are to be imposed.

The Council notes, in relation to the ACCC's opposition to the inclusion of a requirement of proving dishonesty that:

- Under s85(6) of the Act, a court may relieve a person, either wholly or partly, from any liability to a (civil) penalty if it appears to the court that the person has engaged in contravening conduct "honestly and reasonably" and that, having regard to all the circumstances of the court, the person "ought fairly to be excused". The Council considers that a similar safeguard should be incorporated in any criminal provisions.
- The Council considers that any provisions establishing criminal liability for cartel conduct should explicitly state whether dishonesty is an element requiring proof. The Council does not consider that *Peters v The Queen* (1998) 192 CLR 493 is authority for the proposition suggested by the ACCC. If anything, the differences of approach taken by the various judges highlights the need, in the opinion of the Council, for any criminal provisions to state clearly whether dishonesty is an essential element of the crime and what the appropriate test of dishonesty should be. The Council considers that, for the reasons outlined above, dishonesty should be an essential element of the proposed criminal provisions. This will assist in identifying which cartel conduct is truly "criminal" and should have the important consequence of reducing prosecutorial discretion as to whether particular conduct should be prosecuted as criminal.

(e) Public benefit as a defence

The ACCC contemplates, in paragraph 2.7.2, that there may be some circumstances where conduct, which would fall within the terms of proposed criminal provisions could be authorised and that, accordingly, an authorisation under Part VII should offer protection from both civil and criminal sanctions. This raises the question of whether proof of the appropriate level of public benefit resulting from conduct falling within the terms of the criminal prohibitions should be a defence in any criminal proceedings. The Council is not suggesting that authorisation should, indirectly, be made retrospective as far as civil sanctions are concerned. The suggestion is that proof of the requisite level of public benefit should also be a defence in criminal proceedings.

(f) Self incrimination

In paragraph 2.9.3 of its Submission the ACCC notes, in summary form and apparently with approval, that, under the relevant corporations legislation, the privilege against self-incrimination cannot be relied on as a basis for refusing or failing to give information but, if a person claims the privilege, the information is not admissible in evidence against the person in either a criminal proceeding or a proceeding for the imposition of a penalty.

The current position, under s155 of the Act, is that a person is not excused from furnishing information or producing documents to the ACCC on the ground that the information or document may tend to incriminate the person but the information or document is not admissible in evidence against the person in any criminal proceedings. In other words, it is admissible against that person in proceedings for a pecuniary penalty. The Council considers that the corporations legislation approach is more appropriate and that amendment to s155 of the Act would be required.

(g) Period of imprisonment

The ACCC proposes, in paragraph 2.9.6, that the maximum period of imprisonment should be seven years, which is more than twice the maximum period in the United States and almost half as much again as the maximum period in Canada, which are the only two countries in the last five years to have actually imprisoned any person for cartel conduct. The Council considers that the suggested maximum period of 7 years imprisonment is excessive.

The Council also considers that the formula specified in s4B of the *Crimes Act* 1914 for converting prison terms to pecuniary penalties raises an important issue. Even with the very lengthy maximum prison term proposed by the ACCC, the equivalent pecuniary penalty (applying the s.4B formula) would be substantially smaller than those currently contemplated as appropriate civil pecuniary penalties. It follows that the introduction of criminal sanctions would require specific amendment of s4B of the *Crimes Act* and the ACCC has suggested no formula which would be appropriate for cartel conduct.

The inapplicability of the s4B formula to the current level of pecuniary penalties also suggests that the assumption that contraventions of some of the provisions of Part IV of the Act are essentially equivalent to other criminal conduct may be misconceived.

On the one hand, the ACCC seeks to justify its proposed maximum prison terms by reference to certain essentially white-collar crimes but, on the other hand, rejects the suggestion that the alternative criminal pecuniary penalties should be calibrated by reference to those white-collar crimes. The inappropriateness of the conversion formula in s4B suggests that substantial pecuniary penalties, rather than imprisonment may be the appropriate sanctions for cartel conduct.

8.7 Increased civil pecuniary penalties

In paragraph 2.10.1.2.1 of its submission to the Committee the ACCC has proposed that:

- The maximum penalty for a contravention of the Act would be the greater of \$10 million or three times the value of any commercial gain from the contravention.
- The Court should have the power to substitute a percentage of turnover if it is difficult to quantify the commercial gain from the contravention. The

ACCC proposes 10 per cent of the firm's Australian turnover for the duration of the infringement for a maximum of three years.

The ACCC says that "existing maximum pecuniary penalties are inadequate, particularly for large corporations who may net substantial gains from their participation in cartels". It asserts in paragraph 2.10.1 that the "penalties are too low and are arbitrary because they bear no relation to the illicit gain or the harm caused".

The Council does not support the ACCC's proposal because:

- it is not supported by sufficient evidence that penalties are too low; and
- it is premature to introduce this change - the ALRC reference on Civil and Administrative Penalties should be completed and Courts should be given time to further develop the principles relating to the imposition of penalties.

Whilst the Council agrees that, as a matter of principle, it is appropriate in setting pecuniary penalties to take into account the level of gain or harm caused, it does not consider that there is sufficient evidence that the current penalties fail to permit this objective to be met. The ACCC concedes, in paragraph 2.10.1 and footnote 80, that 'calculating the gain raised by a cartel is rarely done' and it offers the single Australian example of the Queensland fire protection case to support the argument that penalties are too low to support the use of penalties for deterrence. In any event in that case it seems that the maximum penalties available would have been sufficient to cover the estimated loss calculated by the ACCC. If it could be demonstrated that current maximum penalties are inadequate to enable recovery of an amount equivalent to gains associated with contravening conduct the Council would support an increase in the level of maximum penalties.

It will be apparent from preceding paragraphs that the Council considers an increased focus on assessing the gain from cartel conduct and the harm done by it should be a key priority for the ACCC in assessing the effectiveness of the current sanctions.

The ACCC's additional proposal that, in circumstances where the illicit gain is difficult to calculate, the court should have the power to substitute 10% of the firm's Australian turnover for the duration of the infringement for a maximum of three years is, in the opinion of the Council, misconceived and inappropriate.

First, it will always be much easier to use the "10% of turnover" proxy with the result that the important and difficult work of assessing the illicit gain may be avoided wherever possible. Secondly, there is no necessary connection between a firm's total turnover and the contravening conduct. A firm may, for example, have a range of businesses which supply different materials to the construction industry. The sales of one of those materials, for example, sand, may represent 5% of the company's total Australian turnover. If that company's sand division engaged in cartel conduct affecting the supply of sand, it would not be appropriate to use 10% of the company's total turnover as a proxy for the gain made by engaging in cartel conduct in the supply of sand no matter how difficult the assessment of the actual gain was.

Thirdly, the Council is aware of no cases since the penalties were increased to \$10 million per contravention where judges have indicated that the statutory maximum has inhibited them from imposing an appropriate penalty. Each time products are supplied or bids are submitted in accordance with cartel arrangements, a contravention of s45 occurs and so,

as Justice Finkelstein observed in the *Transformers* decision, it is possible to impose a very substantial penalty on a corporation for those multiple contraventions.

There have been some expressions of judicial concern about the level of penalties suggested jointly to the court by the ACCC and contravening parties. These comments do not suggest that the current statutory limit is inadequate. In the view of the Council, they are another consequence of the fact that there has not been an appropriately transparent and certain leniency policy which would indicate to the courts precisely how a penalty has been reduced to take account of co-operation.

The ALRC has, as noted above, been involved in a large research reference on 'Civil and Administrative Penalties'. It is expected that this project will result in carefully researched and considered recommendations on the question of civil penalties and a detailed report on the ALRC's investigation of two areas of reform - greater legislative clarity and greater legislative consistency. In its submission to the Committee the ALRC argues that 'any changes to be made to the Act should be considered in the light of the need to increase or maintain transparency and clarity, and consistency both with the Act and amongst federal regulatory legislation generally'. The Council strongly supports this approach and considers that any reform to pecuniary penalties under the Act ought to be deferred until the final report of the ALRC on the Civil and Administrative penalties reference can be considered.

Since the commencement of the significantly increased penalties in 1993 there have been relatively few contested pecuniary penalty cases determined by the Federal Court under Part IV of the Act¹⁸⁷. Currently three cases are subject to appeals to the Full Court of the Federal Court - *ACCC v Rural Press*, *ACCC v Universal Music Australia* and *ACCC v Warner Music Australia*. As the Full Court of the Federal Court and perhaps the High Court adjudicate on the various submissions of the ACCC and other parties on the issue of penalties, principles of law will develop and any problems with the current provisions may become evident. Those considering reform proposals should have the benefit of this jurisprudence before implementing further legislative changes.

8.8 Limitation period

The ACCC has proposed that the limitation period for contraventions of s45 be extended so that proceedings must be commenced within ten years of the alleged contravention.

There may be a number of practical issues which militate against extending the limitation period to ten years. For example, ordinary document retention obligations under tax and corporations legislation are typically for six to seven years. Accordingly, many organisations will not, in the ordinary course, retain sales documentation and other accounting records for more than seven years. Furthermore, the staff turnover in many organisations is such that the "corporate memory" does not extend much beyond six to seven years.

¹⁸⁷ We know of 8 cases since the 1993 amendment in which the court fixed a penalty, rather than adjudicated on the appropriateness of a penalty negotiated between the ACCC and the respondent. They are: *ACCC v Australian Safeway Stores* (1997) ATPR 41-562, *ACCC v Mayo* (1998) ATPR 41-655, *ACCC v J McPhee & Son* [2000] FCA 365, *ACCC v George Weston Foods* [2000] FCA 690, *ACCC v Rural Press* [2001] FCA 1065, *ACCC v ABB Transmission (No 2)* [2002] FCA 559, *ACCC v Universal Music Australia/ACCC v Warner Music Australia* [2002] FCA 192.

The ACCC has stated that in at least three cases which it has prosecuted, there has been collusive conduct, which had started more than six years before the commencement of legal proceedings. The ACCC has not, however, indicated that there have been any cases where it has been unable to bring proceedings because the collusive conduct had finished more than six years before the ACCC had concluded its investigations.

In these circumstances, and having regard to some of the practical and likely evidentiary problems for legal proceedings in respect of conduct and arrangements which may have ceased more than nine years before the commencement of proceedings, the ACCC's proposal should be viewed cautiously.

It is also unclear how the limitation period, of any duration, will apply to the proposed criminal provisions.

9. Administration of the Act

9.1 The ACCC and the Press

Several submissions to this review and numerous persons and organisations have criticised the ACCC for its active and frequent involvement with the media in recent years, in publicising its activities and views.

The Council recognises that the ACCC's enforcement and other activities, as with other publicly funded agencies, should be transparent and accountable, so it is legitimate and appropriate that the ACCC publicise what it is doing.

However, unlike publicly funded agencies generally, different and more stringent publicity obligations apply or ought to apply to agencies such as the police, the National Crime Authority, Directors of Public Prosecutions and the ACCC and ASIC when exercising a law enforcement or prosecutorial function.

While the Council does not wish to comment on particular instances where it has been claimed that the ACCC has used the media inappropriately in relation to investigations or the institution of proceedings, there is one example (*Electricity Supply Association of Australia v ACCC (2001) ATPR 41-838*) where press statements by the ACCC and its public comments were referred to by the Court in its judgment. Towards the end of that judgment, Finn J, under the heading "Matters of Public Administration", made a number of comments critical of the ACCC.

He stated, inter alia:

"In his evidence Professor Fels indicated on a number of occasions that, in light of the issues that have achieved prominence in this proceeding, he should have been more careful in what he said in press releases and comments to the media. He took the view that in a media release it is only to be "really simple". I do not wish to question the use of the media made by the ACCC in publicising its views. I would merely suggest that, as the agency responsible for policing S.52 of the TP Act, it properly can be expected to set the example of care in its own presentation to the public".

After referring to further comments of Professor Fels, Finn J stated;

"the stances so taken may constitute good public theatre. Whether they represent good public administration is another matter".

His Honour also stated:

"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".

While the ACCC issued a press release after the ESAA judgment, saying it had won the case and ignoring the comments of Finn J, it is noted that the ACCC never sought costs in that case, as a successful litigant would almost always do.

This significant difficulty with the ACCC's present approach to publicising its activities could be largely overcome if it were to adopt published guidelines for dealing with the press and publicising its activities, as well as for its approach to its education function under s28 of the Act.

The preparation of such a guideline would require the ACCC to carefully focus on its relationship with the press and its responsibilities to the business community and those whom it is investigating. It is suggested that such guidelines could include the following principles, among others:

- The ACCC should not, in the absence of special circumstances, issue press releases, or hold press interviews, about particular investigations before the institution of proceedings. If the ACCC does issue press releases in these circumstances, those releases should not imply that proceedings have been commenced when they have not, that the offence has been proven when it has not, that there has been an adverse finding against a company when there is not, that the actions of the company that led to the investigation have not been accurately presented, that the company has no defence or the defence is not credible (the ESAA example in the submission), that undertakings or assurances have been sought or have been sought and not provided, that the ACCC is the decision making body rather than the court or the likely consequence to the public and the administration of the Act if the offence is proven or not proven.
- The ACCC may respond to questions about what action it is or may be taking in relation to a particular matter or complaint, before proceedings have been issued, but the responses should be in general terms.
- In press releases and press interviews relating to cases before the courts, the ACCC should not imply that the defendant is guilty, unless and until a court so finds.
- Prior to issuing press releases after a court determination or acceptance of an 87B undertaking, the ACCC should provide an opportunity to the other party to comment on the factual accuracy of the proposed ACCC press release. It is not sufficient that the other party is able to issue its own release to correct any points made by the ACCC.

9.2 Corporate Governance of the ACCC Generally

While the use of publicity by the ACCC, especially when associated with its investigations, has raised concern in the business community and is commented on in section 9.1 above, the Council is not persuaded that the solution to this and other issues surrounding the governance model for bodies such as the ACCC is likely to be best achieved by the establishment of a supervisory board or a review body to oversee the work of the regulator.

The Council has recommended in its treatment of mergers that an independent review panel should be introduced to consider decisions made by the ACCC in relation to mergers (that is the clearance process) when appropriate (see section 5.7). Transparency in any decision making is an important factor in the operation of any regulator and the ACCC, and other regulatory bodies, should be subject to such transparency. However, there are dangers of over-reaction in this area. The Council would like the opportunity to make a supplementary submission on this particular issue which it regards as very important in light of the concerns expressed.

10. Principal conclusions and recommendations

10.1 Misuse of Market Power

(a) Current law is consistent with the objective of s46

In the Council's view, the current law in relation to the definition of a relevant market and the adjudication of whether a corporation has "substantial power in a market" is sufficiently clear.

The prevailing construction of s46 is consistent with the objectives of the section set out above.

A more interventionist approach to regulating "dominant" firms and their impact on competition in a market risks fostering a reluctance to engage in vigorous competition, inefficiency and higher prices for consumers.

(b) Since *Queensland Wire* – Settled and Emerging s46 cases

The Council's view is that any legislative change to the provisions of s46 at this time (just as further pronouncements from the superior Courts are emerging) is likely to deny to the business community, consumers and to the ACCC many of the benefits of the emerging and increasing certainty in the application of the current s46.¹⁸⁸

(c) Reversal of Onus of Proof on Purpose

In light of the current law, the Council is of the view that a reversal of the onus of proof in relation to "purpose" is unnecessary.

(d) The Introduction of an "Effects Test"

Any such change to an "effects" test will cause very significant uncertainty – indeed, to the Council's observation, the mere proposal of such a change has done so already.

In circumstances where:

- (a) a change to an "effects" test may, in fact, over time, achieve little, or have only negative impacts;
 - (b) settled law in relation to the construction and application of the current form of s46 is just emerging; and
 - (c) that emerging law is satisfactory from a policy perspective (even if not ideal),
- it is clear, in the Council's view, that no change ought to be made.

¹⁸⁸ In the United States the relevant legislation in this area (section 2 of the *Sherman Act*) has remained unchanged in over 100 years. The Courts have refined the application of that law to particular situations and it now provides considerable certainty and guidance for American business. As Senator Sherman himself put it in 1890:

"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries". 21. Cong. Rec. 2460 (1890).

Overall, the Council does not support the adoption of an "effects" test for s46, in the form of an effect of "substantially lessening competition", at this time. As already submitted above, the present law in relation to s46 is workable, achieves its broad objectives and is expected to be significantly clarified in the near future. The benefits of the status quo outweigh the potential for any possible benefits upon making the change discussed above.

(d) Divestiture of Assets or Shares

The Council considers the proposal in relation to a divestiture sanction consequential upon a contravention of s46, to be unnecessary in the present circumstances. The Council opposes the second proposal, for a divestiture power at large, as bad law, unconstitutional and contrary to the objectives of Part IV of the Act.

(e) Divestiture on contravention of s46

An order to divest assets upon a contravention of s46 is likely to be a very "blunt instrument". There is a high likelihood that a court will destroy pro-competitive efficiencies.

Although it is possible that a very special case might arise where conduct in contravention of s46 cannot be dealt with adequately by injunctive relief under s80 and a divestiture remedy might be desirable, the Council is of the view that:

- no such cases seem to have arisen in Australia among reported cases to date;
- any such cases will be very rare – indeed, they will be "only the most exceptional and unique cases",¹⁸⁹
- any such remedy will involve considerable risks of undue or outweighing competitive detriment and consumer harm;
- divestiture remedies in the case of "anti-competitive" mergers and acquisitions are already available under s81 and may be effectively administered; and
- Part IIIA provides for a form of "divestiture" of proprietary rights in "natural monopoly" industries in cases where an exercise of market power by way of refusal to deal might otherwise eliminate or inhibit competition in other markets.

On this basis, there is no clear case for the introduction into the Act of a remedy for the divestiture of assets consequential upon a contravention of s46.

(f) Divestiture at Large – s50AA

In the Council's view, the proposal to introduce a s50AA, or otherwise to introduce a general power to require divestiture where the ownership of shares or assets may have the effect of substantially lessening competition, is simply bad law and clearly contrary to the objectives of Part IV of the Act.

¹⁸⁹ See above.

The proposed s50AA would be likely to be an "independent provision" of the kind addressed in that passage, and hence unconstitutional, as it makes no provision for "just terms".

(g) Cease and Desist Powers for the ACCC

The Council opposes the introduction of a power invested in the ACCC to issue "cease and desist" notices to corporations which the ACCC has reason to believe are contravening s46 (or other provisions of Part IV), for several reasons:

- (a) such a power is likely to be unconstitutional;
- (b) there is no need for such a power as the ACCC may readily seek interlocutory relief from the Courts (and has done so in many cases);
- (c) the exercise of such a power may significantly compromise the rights and reputations of Australian businesses without the benefit of a court's supervision or prior intervention; and
- (d) the power the ACCC proposes is without precedent in the common law world.

The Council is opposed to the ACCC being given a "cease and desist" power in any form. There is no evidence that the ACCC is not able to procure appropriate interlocutory injunctive relief in appropriate cases. Further, there is no Australian precedent for such a power in a general regulatory context. Finally, even the New Zealand model exposes businesses to unjustified disruption and loss of reputation without the safeguard of court involvement.

10.2 Joint Ventures and Exclusionary Provisions

(a) Exclusionary Provisions

S4D is anomalous to the extent that it prohibits certain conduct even where such conduct has no effect on competition, and should be amended accordingly.

In this context, the Council is of the view that the breadth of the current *per se* prohibition on exclusionary provisions is inappropriate.

The scope of the prohibition on exclusionary provisions needs to be reformed, to ensure that the *per se* prohibition is better targeted towards conduct which is of concern from a competition perspective and that the Australian law is updated to conform with the developments in other countries.

(b) Prohibition – what does it cover?

On a plain reading, and as currently interpreted, the definition in s4D has the potential to be applied too broadly in the following respects:

- much competitively benign conduct between competing firms is captured; and
- aspects to the structure or operation of joint ventures including the most efficient and commercially sensible way of structuring joint ventures (set out below) are almost certainly prohibited even though they can be, from a

competition perspective, relatively minor when compared with the procompetitive impact these joint ventures can bring.

(c) Exclusionary Provisions in the Context of Joint Ventures

In the Council's view, there needs to be a specific exemption from the per se prohibition of exclusionary provisions for joint ventures to avoid an unnecessary restraining effect on investment and development of new co-operative arrangements.

(d) Australian and US laws

The maintenance of a per se prohibition with respect to the full range of agreements caught by s4D is simply not justified by an examination of the US case law.

(e) Australian and New Zealand Laws

The New Zealand standard does not inhibit legitimate commercial activity in the way the Australian provisions continue to do so.

(f) Inconsistency with International Position Generally

Having a law that is inconsistent with the position in other jurisdictions, and which imposes burdens on firms attempting to operate in Australia which they would not have to bear if they were operating in other jurisdictions creates an incentive to invest outside Australia rather than in it. Furthermore, it places restraints on Australian firms which may hinder their ability to develop new products and enter into new regions, which may hinder their ability to compete internationally.

(g) Possible Solutions

The two reforms needed in respect of s4D and 45(2)(a)(i) are:

- that competitively benign conduct between competing firms should not fall within the prohibition; and
- pro-competitive joint ventures should not be prohibited or impeded on account of relatively minor ancillary restraints which are necessary or facilitate the management or operation of such joint ventures.

In respect of the scope of the prohibition generally, s4D(1) should be amended in similar fashion to the *Commerce Act* to better target the prohibition to the conduct that is most likely to be of public policy concern by adding a paragraph (c):

“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.”

The proposed reforms could be achieved by including a defence as in s29(1A) of the *Commerce Act* in s4D to the effect that:

“A provision of a contract, arrangement, or understanding or of a proposed contract, arrangement or understanding that would, but for this subsection, be an exclusionary provision under section 4D(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.”

The Council is also of the view that given the expansive interpretation of “class of persons” in recent case law, it may be useful to have inserted into the Act an additional interpretative provision in s4D providing that:

“A class of persons does not constitute a particular class of persons for the purposes of this section unless the persons who comprise the class each share a quality or attribute and it is by virtue of that quality or attribute that they have been selected as the object of the provision.”

This would ensure that whatever the outcome of the *South Sydney* case the class of persons was defined by reference to the restriction, and was the ‘target’ of that restriction.

An alternative form of words to address the same issue would be:

“Persons do not constitute a class of persons for the purposes of section 4D unless they were identified or selected by one or more parties to the relevant provision as sharing a characteristic or attribute relevant to competition in the market other than merely being the object of the relevant provision.”

(h) Reforms Required

The Council recommends that a joint venture exemption (or matching exemptions) to the per se prohibitions against exclusionary provisions and price fixing should be introduced so that such joint venture arrangements are subject only to the substantial lessening of competition test in s45(2)(a)(ii).

Such an exception to s4D, s45(2)(a)(i) and s45A should adopt the principles of the US Antitrust Guidelines for Collaborations Among Competitors and the US Doctrine of Ancillary Restraints. The Guidelines state:

“Agreements not challenged as per se illegal are analysed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity. ... The Agencies’ analysis begins with an examination of the relevant agreement. As part of this examination, the Agencies ask about the business purpose of the agreement...”

The exception could be worded as follows:

“S45(2)(a)(i) and s45(2)(b)(i) and s45A do not apply to conduct undertaken in connection with the formation or operation, or proposed formation or operation, of a joint venture if the joint venture is not or is unlikely to prevent or lessen competition except to the extent reasonably required to undertake or facilitate the formation or operation of the joint venture.”

(i) Input Supply Agreements

S45A should be amended to insert an additional subsection which provides:

“Subsection (1) does not apply to a provision of a contract, arrangement or understanding made at arm’s length which has the purpose or has or is likely to have the effect of directly fixing, controlling or maintaining the price at which goods

or services are to be supplied by one party to another if the supplier and acquirer do not supply those goods or services in competition with each other, regardless of any other effect (but not purpose) the provision may have.”

(j) Exclusive Dealing Provisions

To promote commercial and legal certainty, the Council recommends that s47 be amended so as to make it clear that all exclusive dealing conduct of any sort is regulated only by that section, whether that conduct involves a supply or offer to supply (including a re-supply or offer to re-supply) or an acquisition or offer to acquire any goods or services by any of the parties to the arrangement. At present s47 (in particular, ss47(2) and 47(4)) fail to achieve that apparent policy objective of the Act due to their clumsy or inadequate drafting. In particular:

- (a) s47(2) should be extended to cover conditions restricting any *supply* of goods or services, not merely *re-supply* of the same goods or services; and
- (b) s47(4) should be extended to any restriction on the *acquisition* of goods or services, not merely a *supply* of goods or services.

If amendments along these lines were made to the Act, the opportunity might also be taken to improve the language of s45(6), which fails to achieve the straightforward and desirable legislative intention lying behind it: see *ACCC v. Visy Paper Pty Ltd* [2000] FCA 1640 at paragraphs 93-109.

Appropriate wording would be:

“S45 has no application to conduct to which any of ss47(1)-(9) and 47(13) apply.”

The Council is of the view that s45A(4)(b) should be amended so that it provides that s45A(1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:

“for the joint advertising of the price for the re-supply of goods or services so acquired and the re-supply of those goods or services at that price.”

10.3 Third Line Forcing

The Council has previously advocated, and continues to advocate, the removal of the per se prohibition by the introduction of the competition test which applies to other s47 conduct. Excepting related party dealings from third line forcing would also reduce the unintended effect of s47(6) and (7).

10.4 Mergers

(a) Reviewing the test in s50(1)

The Council has formed the view that there is no demonstrated need to revert to a dominance test. Further, to do so would be inconsistent with current international practice.¹⁹⁰

¹⁹⁰ A substantial lessening of competition test applies in the US, Canada and New Zealand

(b) Public benefits and the authorisation process

Provided that a review panel is established, in line with section 5.7 of these submissions the Council submits that a “public benefits” qualification for mergers should be incorporated directly into s50 to supplement the current authorisation process. Public benefits, including increased exports, increased substitution of domestic products with foreign goods, increased international competitiveness of Australian industry and efficiency gains, could then be considered in the informal clearance process, used in relation to all mergers considered by the ACCC since 1999, and also by the review panel if necessary.

The amendment to s50 could be in the following terms:

“Subsection (1) and (2) will not apply if the acquisition will or is likely to result in public benefits that:

- (a) would or would be likely to be greater than, and offset, the effects of any prevention or lessening of competition that will or is likely to result from the acquisition; and*
- (b) would not or would not be likely to be achieved if the acquisition were prohibited.”*

In determining what amounts to a benefit to the public for the purposes of this provision:

- (a) regard must be had to the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):*
 - (i) a significant increase in the real value of exports;*
 - (ii) a significant substitution of domestic products for imported goods;**and*
- (b) without limiting the matters that may be taken into account, regard should be had to all other relevant matters that relate to the international competitiveness of any Australian industry.*

Further, even though it will rarely be used, the Council believes that the authorisation process should be improved, by imposing stricter time limits, so that it is a realistic alternative for merger parties. The Council also submits that it would be efficiency-enhancing to amend the authorisation provisions relating to mergers so that parties could apply directly to the Tribunal.

(c) Efficiencies

The Council recommends that both the ACCC and the Courts should be asked to take the full efficiency implications of a merger into account when assessing its impact on the market under s50 where those efficiency arguments are put forward by the merger proponent(s).

(d) Failing Firm

The Council recommends the insertion as an additional factor in s50(3):

“whether one competitor is insolvent and or is likely to cease being a competitor in the market.”

(e) Exemptions for dual listed companies

In the Council's view, the law should be amended to ensure that DLC parties are treated as related bodies corporate, and thus as a single economic entity. This could be achieved by amending the definition of related body corporate in s4A(5) to include a new paragraph:

“(d) is party to a dual listed company arrangement with another body corporate.”

Section 4A could also include a definition of 'dual listed company arrangement'.

(f) Recommendations

There appears to be a groundswell of support for some constraint to be placed on the ACCC in relation to the informal clearance process. The Council submits that an Independent review panel should be set up to review informal clearance decisions by the ACCC. The review panel should have the power to itself grant clearance or require the ACCC staff to do more work or confirm the ACCC decision. This would give parties a chance to argue their merger case before an independent body, provide a quick mechanism for review and act as a constraint to the ACCC's existing monopoly power of decision making on mergers. The proposed review panel should not be confused with the Tribunal which is untouched by this suggestion (although in section 6 of this Submission the Council recommends that the Tribunal should be allowed to hear merger authorisation applications directly).

Members of the review panel may or may not be Associate Commissioners, but should be 3-5 eminent experienced persons in this field appointed by the Treasurer. They would be independent of the normal ACCC full time Commissioners and involved only in mergers. They would not participate in the ACCC's internal processes in the informal clearance process. Typical members would be business people; economists, lawyers and a consumer advocate. To ensure that the review panel does not experience the same lack of transparency as is currently experienced in the informal clearance process, the review panel should publish reasons, omitting any confidential information.

Review should essentially be conducted on the basis of the papers before the ACCC, however we suggest that the appellant should have the right, when seeking a review, to put a further submission direct to the review panel. Although the appellant should not get to see normally confidential ACCC staff papers, they should perhaps see the final staff recommendation and an edited summary of the ACCC reasons (omitting any truly confidential third party information). The Council is open minded on the issue of whether there should be a right of appearance before the panel.

The introduction of such a review panel would require legislating to make it clear that the review panel can substitute its views for those of the ACCC on the limited question of whether or not to oppose a merger and institute s50 proceedings. However, this may be able to be achieved by regulation. To be effective, the legislation would need to preclude the ACCC commencing proceedings under s50 unless there had been a material change in circumstances or withholding of material information by one of the parties. Further, decisions of the review panel should not be subject to judicial review or appeal to the Federal Court.

The right of third parties seek divestiture under section 81 of the Act would remain. The ACCC's right to seek divestiture would be limited in circumstances where it (or the review panel) had given informal clearance to circumstances involving a material change of circumstances or a withholding of material information. For parties who wish to obtain statutory immunity against this possibility, authorisation would remain the only course.

The Council submits that there should be no third party rights to seek a review of a clearance to this Panel. There should also be a strict time limit so that a party would need to seek a review within a short period of, for example 14 days of the ACCC declining clearance, and lodge its submission within a further 7 days, with the Panel to give its decision within a month after that unless the appellant consents to an extension of time.

In addition, the Council believes that merger applicants should be able to apply directly to the Tribunal for authorisation. This is discussed in detail in the following Section 6.

10.5 Authorisation

The ability to exempt certain conduct from the operation of the *Trade Practices Act* (the **Act**) through the authorisation and notification provisions of Part VII of the Act is a significant feature of the regulation of restrictive trade practices in Australia¹⁹¹.

(a) Meaningful Time Limits

It is submitted that the current open-ended ability to "stop the clock" fails to impose sufficient discipline on the ACCC's consideration of a merger application where time itself can scuttle a merger proposal and the perceived potential for delay can itself deter would-be applicants from availing themselves of the authorisation process.

While the Tribunal is not bound by the rules of evidence and proceedings are required to be "conducted with as little formality and technicality as the requirements of the Act and a proper consideration of the matters before the Tribunal permit"¹⁹², there are currently no rules laid down in the Act and/or Regulations¹⁹³ to otherwise prescribe the Tribunal process. There is little opportunity for a speedy and efficient process suited to the processing of merger authorisation in those circumstances. Clearly, this is an area that needs urgent attention, not only in relation to mergers but generally in the context of authorisations and other work of the Tribunal.

The absence of any time limit for the ACCC determination of non-merger authorisations is most unfortunate and has created difficulties for those seeking to utilise the authorisation procedure.

It is submitted that a meaningful time limit should be imposed on the ACCC in respect of non-merger applications by:

- (a) requiring the ACCC to determine an authorisation application within four months of it being received by the ACCC (either by making s.90(10) operative or by other

¹⁹¹ Sections 51(1) and 51(1A) of the Act are the only other avenues open to parties to seek exemption of relevant agreements or conduct from the operation of the Act.

¹⁹² See s.103 of the Act.

¹⁹³ Regulation 22 gives the Tribunal a broad general discretion to control its procedure but is not prescriptive.

appropriate amendment to the Act such as deeming the authorisation to be approved in the 4 month period); and

- (b) if any clock-stopping procedure along the lines of s.90(11)(b) is to apply, by limiting the ACCC's ability to use this device to extend the time period by requests for additional information so that only two such time extensions are available to the ACCC¹⁹⁴. If the ACCC considers that the parties are impeding its consideration of the issues by not supplying information, it retains its right to determine the application on the material before it, including the option of rejecting the application for authorisation on the basis that it has inadequate information. The ACCC might also seek to negotiate further time extensions with the parties to overcome any difficulties.

It is submitted that further discipline in the way in which non-merger authorisation applications are to be dealt with by the Tribunal is required.

(b) Proposed New Authorisation Procedures

A relatively simple way of overcoming at least some of the difficulty with the current process in respect of merger applications would be to amend the Act to allow merger authorisation applications to be made directly to the Tribunal, rather than being made first to the ACCC.

(c) Authorising s46 Conduct

It is artificial and potentially damaging to legitimate and beneficial practices to exclude all potential s.46 conduct from authorisation. Just as price fixing and primary boycotts are unlikely to ever be the subject of an authorisation application so too might monopolisation be unlikely to be the subject of any such application. But, as with s.45A and s.4D conduct, that is no reason to continue to exclude the potential to grant authorisation in respect of all s.46 conduct.

10.6 Section 155

(a) Power to Enter Premises

Because this power of entry is so draconian, (indeed, it is very similar to a police search warrant), it is submitted that this power should be exercised on the same basis as the power to enter premises given to the National Crime Authority by Section 22(1) of the National Crime Authority Act, or in line with the requirements to obtain an Anton Pillar order; that is the power should only be exercisable when there is reason to believe that documents would be in imminent danger of being destroyed or concealed. The ACCC should be required to satisfy a Federal Court Judge that the documents were in danger of imminent destruction or concealment and if satisfied, the Judge could then issue a warrant of entry to the ACCC under s155(2). The existing preconditions to s155(2), reason to believe that a person had contravened the Act and had documents in his possession or control, should also still need to be satisfied.

¹⁹⁴ That does not, of course, prevent the Commission from making further requests for information, but simply prevents the further extension of time arising in consequence of such requests.

(b) Legal Professional Privilege

The Council submits that legal professional privilege facilitates the ability of lawyers to give clients advice. If legal professional privilege was abrogated for the purposes of s155 then the Council is concerned that it may inhibit clients seeking candid legal advice and interfere with compliance with the Act. The Council recommends that if, following the *Daniels* appeal in the High Court, there is any doubt about whether s155 abrogates legal professional privilege, then the Act should be amended to make it clear that s155 does not remove such privilege.

In order to support the operation of s122(2) of the *Evidence Act*, s155(2) could be amended to provide that any material provided to the ACCC under compulsion of a s155 notice would not operate as a waiver of privilege in any subsequent proceedings.

The Council also notes that if in fact criminal penalties are introduced for a breach of Part IV of the Act, then s155(7), which provides that self incrimination is not an excuse, would also have to be reviewed.

(c) Cost of complying with a s155 Notice

It is submitted that a recipient of a s155 Notice who is not her or himself believed to be, or suspected of being, involved in a contravention of the Act, should be entitled to reimbursement of reasonable costs of complying with the Notice.

This difficulty could be overcome by a provision enabling a person providing material of a confidential nature under s155 to require the ACCC to not disclose that material to outside persons or to named outside persons (eg, the competitors of the document owner) without consent of the document owner.

10.7 Criminal Sanctions

(a) Is hard-core cartel conduct the equivalent of fraud?

The Council agrees that systematic price fixing, bid rigging, market sharing and output restrictions are very serious matters.

The Council acknowledges that serious harm may be the result of anti-competitive conduct. The Council considers, however, that the evaluation of society's fundamental values contemplated by the Canadian test is a matter of policy to be determined by Parliament, rather than a matter of legal interpretation. For this reason, the Council does not consider it appropriate to express a view as to whether anti-competitive conduct in general or certain types of anti-competitive conduct should be characterised as crimes.

(b) Is there a need for imprisonment for effective deterrence?

The Council submits that Australia should be very cautious in accepting that the penal culture of the United States represents best practice deterrence for cartels in Australia.

Increasing the likelihood of detection of cartels is the aspect of the current Australian regime which requires greatest attention. Accordingly, the Council considers that the ACCC should implement its new cartel leniency policy as soon as possible and monitor it for at least three years, to assess its effectiveness in increasing the detection of cartels. At

that time the need for criminal sanctions and how an effective leniency policy could accommodate them could be considered.

(c) Criminal Sanctions – implementation issues

The Council considers that the proposed restriction of the criminal provisions to "large corporations" and their employees is discriminatory and is bad policy and bad law. If criminal sanctions are to be introduced, they must apply to all corporations.

Even if precise drafting was available, the Council considers that it would be preferable to require proof of the anti-competitive purpose and/or effect of the impugned conduct if criminal sanctions are to be imposed.

The current position, under s155 of the Act, is that a person is not excused from furnishing information or producing documents to the ACCC on the ground that the information or document may tend to incriminate the person but the information or document is not admissible in evidence against the person in any criminal proceedings. In other words, it is admissible against that person in proceedings for a pecuniary penalty. The Council considers that the corporations legislation approach is more appropriate and that amendment to s155 of the Act would be required.

On the one hand, the ACCC seeks to justify its proposed maximum prison terms by reference to certain essentially white-collar crimes but, on the other hand, rejects the suggestion that the alternative criminal pecuniary penalties should be calibrated by reference to those white-collar crimes. The inappropriateness of the conversion formula in s4B suggests that substantial pecuniary penalties, rather than imprisonment may be the appropriate sanctions for cartel conduct.

(d) Increased Civil Pecuniary Penalties

The Council does not support the ACCC's proposal because:

- it is not supported by sufficient evidence that penalties are too low; and
- it is premature to introduce this change - the ALRC reference on Civil and Administrative Penalties should be completed and Courts should be given time to further develop the principles relating to the imposition of penalties.

In these circumstances, and having regard to some of the practical and likely evidentiary problems for legal proceedings in respect of conduct and arrangements which may have ceased more than nine years before the commencement of proceedings, the ACCC's proposal should be viewed cautiously.

10.8 Administration of the Act

(a) The ACCC and the Press

The Council recognises that the ACCC's enforcement and other activities, as with other publicly funded agencies, should be transparent and accountable, so it is legitimate and appropriate that the ACCC publicise what it is doing.

This significant difficulty with the ACCC's present approach to publicising its activities could be largely overcome if it were to adopt published guidelines for dealing with the press and

publicising its activities, as well as for its approach to its education function under s28 of the Act.

The preparation of such a guideline would require the ACCC to carefully focus on its relationship with the press and its responsibilities to the business community and those whom it is investigating. It is suggested that such guidelines could include the following principles, among others:

- The ACCC should not, in the absence of special circumstances, issue press releases, or hold press interviews, about particular investigations before the institution of proceedings. If the ACCC does issue press releases in these circumstances, those releases should not imply that proceedings have been commenced when they have not, that the offence has been proven when it has not, that there has been an adverse finding against a company when there is not, that the actions of the company that led to the investigation have not been accurately presented, that the company has no defence or the defence is not credible (the ESAA example in the submission), that undertakings or assurances have been sought or have been sought and not provided, that the ACCC is the decision making body rather than the court or the likely consequence to the public and the administration of the Act if the offence is proven or not proven.
- The ACCC may respond to questions about what action it is or may be taking in relation to a particular matter or complaint, before proceedings have been issued, but the responses should be in general terms.
- In press releases and press interviews relating to cases before the courts, the ACCC should not imply that the defendant is guilty, unless and until a court so finds.
- Prior to issuing press releases after a court determination or acceptance of an 87B undertaking, the ACCC should provide an opportunity to the other party to comment on the factual accuracy of the proposed ACCC press release. It is not sufficient that the other party is able to issue its own release to correct any points made by the ACCC.

(b) Corporate Governance and the ACCC Generally

While the use of publicity by the ACCC, especially when associated with its investigations, has raised concern in the business community and is commented on in section 9.1 above, the Council is not persuaded that the solution to this and other issues surrounding the governance model for bodies such as the ACCC is likely to be best achieved by the establishment of a supervisory board or a review body to oversee the work of the regulator.

Annexure A

1. *TPC v Carlton United Breweries Limited* (1990) 24 FCR 532.

CUB admitted it had contravened s46 by taking advantage of its market power as an acquirer of beverage cans for the purpose of preventing or deterring Payless Superbarn from competing in the beverage can market. CUB had told a supplier it would not acquire beer cans from it if it continued to supply beer bearing the label "Payless" to Payless Superbarn in March 1987.

The only issue which had to be determined at trial was the appropriate pecuniary penalty to be imposed on CUB. Judgment was delivered on 19 July 1990.

2. *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd* (1990) 21 FCR 385, and on appeal (1990) 27 FCR 460.

At trial ASX was found to have contravened s46 by entering into agreements, between September 1988 and June 1989, under which it was taking advantage of its power in the stock exchange information market for the purpose of deterring or preventing competition in that market. Judgment was handed down 9 February 1990 and upheld on appeal on 19 December 1990.

Although the evidence did not reveal a deliberate strategy to deter or prevent competition, this purpose could be inferred from the conduct of ASX.

3. *APRA v Ceridale Pty Ltd* (1990) 18 IPR 245, (1991) ATPR 41-074

APRA, which owned the copyright in the public performance of most popular music, issued a writ in May 1990 seeking injunctions to restrain Ceridale from performing in public, or authorising the performance in public, of certain musical works due to non-payment of licence fees. Ceridale cross-claimed alleging a contravention of s46 by APRA.

The trial judge found that APRA had contravened s46 as it had market power in the market for the supply of performing rights to nightclubs, which it took advantage of by refusing to grant a license for the purpose of preventing or deterring Ceridale from engaging in competitive conduct in order to settle a disputed debt. Judgment was handed down on 26 July 1990.

The Full Federal Court found there was no contravention of s46 as APRA's purpose in issuing the writ was to prevent unauthorised use of its material and protect the integrity of its licensing system and not to prevent or deter competition. This judgment was delivered on 19 December 1990.

4. *TPC v CSR Ltd* (1991) ATPR 41-076

CSR admitted to taking advantage of its power in the Western Australian ceilings material market for the purpose of deterring North Perth Plaster and Boral, a competitor to CSR,

from engaging in competitive conduct in the ceilings market and preventing the entry of Boral into this market. CSR had refused to supply North Perth Plaster with plasterboard and related products if they were to be used to supplement or "top-up" Boral products acquired by North Perth Plaster.

This conduct took place from May 1988 until September 1990. Proceedings were instituted on 23 December 1988 and judgment was delivered on 20 December 1990. As with *TPC v Carlton United Breweries Limited* the main issue at trial was the appropriate pecuniary penalty due to CSR's admission of the prohibited conduct.

5. *Eastern Express v General Newspapers Pty Ltd* (1991) 30 FCR 385, (1992) 35 FCR 43.

The respondent was accused of engaging in predatory pricing in respect of prices charged for real estate advertising in eastern Sydney during the first half of 1990. Proceedings were instituted on 23 August 1990.

At trial it was found that the respondent did have market power but that its pricing was not predatory as it was not shown to be operating at a loss by any measure of cost. This judgment was delivered on 23 July 1991.

On appeal the respondent was found not to have market power in any relevant market. Given this finding it was not necessary to determine whether the respondent had acted with an anti-competitive purpose. However, the Court did find that no pre-ordained rules could be set out with respect to the definition of "predatory pricing" conduct and that each case would need to be judged by its own circumstances. This judgment was delivered on 2 April 1992.

6. *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 199

The applicant, a licensed stock agent, accused the three respondents, who collectively formed the Goondiwindi Livestock Auction Sales Association ("the Association") and owned the Goondiwindi sale yards, of contravening s46 by refusing his application to join the Association in March 1987. This refusal meant that the applicant could not conduct stock sales from the Goondiwindi sale yards.

The trial judge found that the respondents did not have market power in the market for livestock selling services in the Goondiwindi district. The judge also found that even if the respondents did have market power they would not have contravened s46, as they were taking advantage of proprietary rights rather than market power. Furthermore, their purpose in refusing the application was to ensure their proprietary right was being exercised as they saw fit rather than to prevent or deter the applicant from engaging in competitive conduct. Judgment was delivered on 10 February 1992.

7. *Aut 6 Pty Ltd v Wellington Place Pty Ltd* (1993) ATPR 41-202

The applicant accused the respondent of contravening s46 by refusing to renew a dealership agreement for the supply of Mercedes Benz cars in May 1992.

Proceedings commenced on 9 October 1992. The trial judge found that the respondent did not have market power and hence could not contravene s46. Further, the trial judge found that the respondent's actions were an exercise of a contractual right and could not be viewed as taking advantage of market power. Judgment was handed down on 3 December 1992.

8. *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164

The decision at first instance on 15 January 1993 held that Telstra had contravened s46 by entering into long term agreements in September 1992 for the printing of telephone directories. Under the terms of these agreements, the printers had to obtain Telstra's consent before using their facilities to print directories for other customers.

This decision was overturned on appeal on 22 September 1993. It was found that although Telstra had market power, the agreements had the purpose of ensuring that there was sufficient printing capacity for Telstra's directories and not an anti-competitive purpose. It was also found that entering an agreement with two printers rather than using a tender process was a commercial decision which did not reveal an anti-competitive purpose.

9. *Petty v Penfold Wines Pty Ltd* (1993) ATPR 41-263 and on appeal (1994) 49 FCR 282

In late 1990, a dispute arose over late payment of accounts by Petty, who owned two liquor retailing operations, to Penfolds. Penfolds ceased supplying Petty.

The judgment at first instance on 3 September 1993 held that although Penfolds did have market power, its decision to cease supply was motivated by a concern that Petty's account did not fall further into arrears and did not constitute taking advantage of market power.

This decision was upheld on appeal on 18 May 1994.

10. *Venning v Suburban Taxi Service Pty Ltd* (1996) ATPR 41-468

In September 1990, Suburban, which provided registered taxi drivers with bookings, terminated its agreement with Venning, who owned several taxis registered with Suburban. It took this action following a discovery that Venning's taxis had boosters which gave him an advantage over other taxis in bidding for bookings. Venning claimed this action contravened s46.

The trial judgment delivered on 9 February 1994 held that Suburban did not possess market power. It also found that if Suburban did have market power, it was not acting with an anti-competitive purpose. Rather it was trying to ensure that a fair system for bidding for bookings existed between its registered drivers.

11. *Plume v Federal Airports Corporation* (1997) ATPR 41-589

The FAC had granted a sole licence for the operation of a shuttle bus service for Alice Springs Airport. Plume sought to operate a rival service but was not permitted to do so as it did not have a licence from the FAC. The FAC finally refused a license in June 1996. Proceedings were commenced on 23 August 1996.

The trial judgment handed down on 3 October 1997 found that the FAC was exercising a regulatory power rather than market power. Furthermore, its purpose was not a proscribed purpose, but rather to ensure an orderly bus service was provided to airline passengers.

12. *Regents Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647

Subaru terminated its car dealership arrangement with Regents and also refused to continue to supply Regents with spare parts and service authorisation for Subaru cars in 1995.

The trial judgment handed down on 24 June 1998 found that Subaru did not have market power in the market for cars, parts and ancillary services.

The trial judge also went on to find that even if Subaru did possess market power its actions did not reveal an anti-competitive purpose as they were motivated by a legitimate concern that the applicant was not putting sufficient effort into selling Subaru cars.

13. *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1998) 42 IPR 627, on appeal to Full Federal Court (1999) 90 FCR 128, and on appeal to the High Court (2001) 75 ALJR 600

The respondent cancelled the applicant's distributorship for Melbourne street directories in June 1996. The applicant alleged this was a contravention of s46.

The judgment at first instance handed down on 30 October 1998, found that the respondent had taken advantage of its market power for the purpose of preventing the applicant from engaging in competitive conduct. This was on the basis that Melway would not have refused to supply directories in an otherwise competitive market. This decision was upheld on appeal (by majority) in a judgment delivered on 20 May 1999.

However, the High Court overturned this decision in a judgment handed down on 15 March 2001. The High Court found that although the respondent had market power, its actions in cancelling the distributorship could not be characterised as taking advantage of that market power for an anti-competitive purpose.

The respondent had always used exclusive distributors to supply particular segments of the market and cancelling the applicant's distributorship was a consequence of this policy. A connection between the respondent's decision to cancel the distributorship and its market power could not be shown as the respondent had used the same distribution system at a time when it clearly had no market power.

14. *ACCC v Boral Masonry Pty Limited* (1999) 166 ALR 410, on appeal to the Full Federal Court (2000) 106 FCR 328

This is the first predatory pricing prosecution brought by the ACCC (or its predecessor)¹⁹⁵ post the 1986 amendments to s46. Proceedings were issued in March 1998. At trial, in July 1999, the ACCC failed to establish that the respondent had substantial market power or that it had taken advantage of that power. The Court found however, that the respondent had priced major products below cost for a proscribed purpose.

On appeal (heard in February 2000, with judgment published in February 2001), the Full Federal Court reversed the decision with controversial judgments published by the Court. On 21/22 May 2002, an appeal from that decision was heard by the High Court in Canberra¹⁹⁶, with its decision currently reserved.

15. *ACCC v Universal Music Australia Pty Limited* [2001] FCA 1800

The ACCC alleged that Universal, a wholesaler of music CDs, in the latter half of 1998, had implemented a policy whereby it would review its trading policy with retailers if they stocked parallel imports (that is CDs supplied by independent wholesalers from overseas sources). This included refusal to supply CDs in some instances.

The trial judgment handed down on 14 December 2001 found that although Universal Music did not have market power in the overall recorded music market, it did have "temporary" market power in the narrower chart music market. The judge went on to find that Universal Music had taken advantage of this market power for the purpose of preventing entry of another person into the market. In making this decision the argument that the respondent's purpose was not a proscribed purpose but rather was an attempt to prevent "free-riding" on its own promotional efforts was dismissed.

This decision was controversial, particularly with respect to market definition and market power. An application for appeal was filed on 26 March 2002.

16. *ACCC v Australian Safeway Stores Pty Limited (No 2)* [2001] FCA 1861

The ACCC alleged that, between May 1994 and November 1995, Safeway engaged in a policy whereby it removed, or threatened to remove, brands of bread from its stores if the bread was being sold at a discount to independent stores who retailed the bread at a lower price, unless Safeway was offered the same discount. The ACCC contended that this conduct was taking advantage of market power for the purpose of damaging competitors or deterring or preventing competitive conduct.

¹⁹⁵ Previously, the only predatory pricing cases brought in Australia have been *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) 20 ALR 129, *Eastern Express* and *TPC v CSBP and Farmers Ltd* (1981) 53 FLR 135.

¹⁹⁶ Transcript available at <http://www.austlii.edu.au/au/other/hca/transcripts/>.

Judgment handed down on 21 August 2001 held that there had been no contravention of s46. Safeway was found to have market power as an acquirer of bread from bread manufacturers in Victoria. However, its actions were not seen as taking advantage of market power, as it would have been able to engage in the same policy in an otherwise competitive market (as it could readily access alternative suppliers of bread). The judge found that Safeway's actions had the purpose of deterring competitive conduct in two instances, but not so in another five instances.

An appeal against this decision was filed by the ACCC on 18 February 2002.

17. *ACCC v Rural Press Ltd* [2001] FCA 1065

The ACCC alleged that between July 1997 and May 1998 Rural Press took advantage of its market power in the market for the supply of regional newspapers in the Murray Bridge market for purpose of preventing entry of another person into the market and/or deterring or preventing competitive conduct. It was alleged Rural Press threatened a competitor, which was expanding its coverage into the relevant market, with retaliatory entry into the competitor's market.

The trial judgment handed down on 1 March 2001 found that Rural Press had contravened s46. Rural Press accepted that it did possess market power in the relevant market but argued that it had not taken advantage of this market power for an anti-competitive purpose. Rather it was taking advantage of its financial resources which allowed it to establish a new publication. The trial judge did not accept this argument and found that Rural Press' financial resources were related to its market power. He found that its actions could be characterised as taking advantage of market power for a proscribed purpose.

An appeal was filed on 24 August 2001. Judgment was handed down on 16 July 2002 and allowed the appeal on the s46 allegations..

In dismissing the s46 allegations, Whitlam, Sackville and Gyles JJ pointed out that "care must be taken not to proceed too quickly from a finding about purpose to a conclusion that the corporation with that proscribed purpose has taken advantage of its market power (para 138). They considered "...*whether, even without the substantial market power...Rural Press and Bridge might have been able to act in the same way*", and concluded they could. Even in a perfectly competitive market, Rural Press and Bridge could have threatened to launch, or actually launched a newspaper into the Riverland market.

"They may have lacked the motivation to make the threat, but they could have acted in precisely the same way." (at para 150)

In coming to this conclusion, their Honours noted that "*use of (or the threat to use) financial resources, of itself, cannot be a use of market power*" (para 140). Also, "*the proposition that financial resources may be relevant to the existence of market power is debatable*".

Annexure B – Extract from Treasury Discussion Paper

Competition test for third line forcing

Section 47 states that a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing. A number of subsections go on to define exclusive dealing. Subsection 47(10) provides that there will only be a contravention of s47(1) if there is the purpose, effect, or likely effect of substantially lessening competition.

This qualification does not apply in respect of the 'third line forcing' provisions (subsections 47(6), (7), (8)(c) and (9)(d)). Third line forcing is the only type of exclusive dealing subject to a per se prohibition. An amendment is being considered to make the third line forcing provisions also subject to a competition test.

Historically, there were major concerns about the anti-competitive nature of third line forcing. For example, in 1976 the Swanson Committee Report stated that third line forcing is considered 'in virtually all cases to have an anti-competitive effect'. At the time, there were particular concerns about lending institutions insisting on borrowers using a nominated insurer.

It is not apparent that the competition and consumer concerns of the mid-1970s are still relevant given that Australian markets (including financial markets) are now more competitive. In 1993, the Hilmer Report recommended that the provisions relating to third line forcing should be made consistent with the other provisions dealing with vertical arrangements, by replacing the per se prohibition with a competition test.

With the growth in 'shopper docket' petrol discount schemes, it is now apparent that not all third line forcing is necessarily anti-competitive, and that some forms of third line forcing can benefit consumers. These schemes typically give shoppers a discount on petrol purchases in return for shopping at a participating supermarket. It was to remove an obstacle to the growth of such schemes that the Government reduced the notification fee for third line forcing conduct. Currently, the per se provisions apply to a range of conduct that is not anti-competitive, but must still be notified. This amendment has the potential to reduce the number of notifications received by the ACCC each year.

Related companies under subsections 47(6) and (7)

An amendment is being considered to treat related companies as effectively one business entity under subsections 47(6) and (7). This arrangement applied between 1977 and 1978. A similar arrangement to that proposed already applies in the case of subsections 47(8)(c) and (9)(d), which deal with third line forcing in relation to the leasing of land or a building.

Subsections 47(6) and (7) prohibit a corporation from forcing the product of a related company or offering a discount on that basis. If the same practice was undertaken by a single corporate entity, it is subject to a substantial lessening of competition test. The effect of the proposed amendment would be to treat third line forcing involving related companies in the same manner as forcing by a single corporate entity.

Annexure C - Extract from Law Council submissions on Treasury Discussion Paper

Law Council of Australia

Business Law Section Trade Practices Committee

Comments on discussion paper by Commonwealth Treasury re: possible amendments to Trade Practices Act 1974

Third line forcing. The proposals in relation to third line forcing, namely to apply a lessening of competition test and to treat related companies on the same basis as a single corporate entity, are to be welcomed. They have been advocated by this committee for a long time, and in particular after the Hilmer Committee reported to that effect in 1993. The present outright prohibition on third line forcing is anomalous, creates significant compliance costs for business and government, and is often ignored thereby bringing the law into disrepute. A number of judicial decisions have failed to dispel the uncertainty about how the law applies. Many examples of third line forcing, which is common in the retail market, are pro-competitive and offer additional consumer choice. Those few instances where third line forcing has an adverse effect on consumers will either fail the substantial lessening of competition test or should otherwise be dealt with by specific consumer protection measures.