1. Principal conclusions and recommendations

1.1 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.[1]

(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.

[1] In the United States the relevant legislation in this area (section 2 of the *Sherman Act*) has remained unchanged in over 100 yeas. 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";[2]
- 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.

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] See above.

(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.

1.2 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."

1.3 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).

1.4 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.[3]

[3] 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.

1.5 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 Australia[4].

(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"[5], there are currently no rules laid down in the Act and/or Regulations[6] 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

[4] 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.

[5] See s.103 of the Act.

[6] 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 ACCC[7]. 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.

1.6 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.

[7] 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 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.

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.

1.7 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.

1.8 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 that 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.