REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT 1974

SUBMISSION TO THE COMMITTEE OF INQUIRY BY AAPT LIMITED

JULY 2002

1 INTRODUCTION

AAPT Limited ("**AAPT**") welcomes the opportunity to provide a submission to the Committee of Inquiry on the operation of the competition provisions of the *Trade Practices Act* 1974 ("**Act**").

AAPT's submission is organised as follows:

- section 2 briefly outlines AAPT's operations and experience with the operation of the Act and its administration;

- section 3 sets out the aims of competition regulation. AAPT considers that these aims should guide the Committee in its deliberations;

- section 4 lists AAPT's recommendations to the Committee which include suggestions for both the reform in some cases, and the retention in others, of the existing legislation and administrative processes; and

- sections 5 to 13 elaborate on the reasoning behind each of AAPT's recommendations to the Committee.

AAPT would be pleased to answer questions that the Committee has in relation to its submission or regarding AAPT's experience more generally with Australia's competition law. AAPT has had experience with the generic competition provisions in Parts IV and VII of the Act, and also the telecommunications-specific provisions in Parts XIB and XIC of the Act.

AAPT appreciates that the telecommunications specific provisions of the Act, (both Part XIB which deals with telecommunications specific anti-competitive conduct, and Part XIC which deals with the telecommunications access regime), have recently been the subject of a separate review by the Productivity Commission and are not to be directly considered by this Committee. AAPT, however, considers there are some aspects of the operation of the telecommunications provisions which may assist the Committee when considering reform proposals for the more generic competition law provisions.

2 AAPT'S OPERATIONS

AAPT is Australia's third largest telecommunications carrier. The AAPT group offers local, national and international voice, mobile, data and Internet products and services to business, corporate, government and residential customers throughout Australia. AAPT's offerings are supplied using the company's voice and data networks and also through other telecommunications providers' networks which are made available to AAPT through several interconnection and reseller arrangements.

AAPT offers its range of telecommunications products and services either directly, or through its related companies which include Cellular One Communications Limited and Connect Internet Solutions Pty Limited. AAPT also has:

- a one-third shareholding in a joint venture interactive media company which operates under the name AOL|7 Pty Limited; and

- a strategic alliance with Hutchison Whampoa Limited, Hutchison Telecommunications (Australia) Limited and Telecom New Zealand Limited which is focused on the provision of third generation (3G) mobile products and services.

AAPT is a wholly-owned subsidiary of Telecom Corporation of New Zealand Limited.

3 AIMS OF COMPETITION REGULATION

AAPT's recommendations to the Committee are aimed at ensuring that the Act and its administration are consistent with the objectives underlying competition regulation in Australia, as well as the more general principle of minimum effective regulation.

The competition provisions of the Act are directed at enhancing competitive processes as reflected in section 2 of the Act. Section 2 identifies the object of the legislation as being "*… to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.*" This policy objective is pursued because promoting competition, fair trading and consumer protection has the ultimate goal of enhancing community welfare.

The principle of minimum effective regulation requires regulation not only to be effective, but also to be the most efficient means for achieving the relevant policy objectives[1]. The principle operates from the premise that there must be a clear case for intervening in markets and interfering with private property rights and contracts. It is said to involve three stages. First, there must be a market failure which public policy requires be addressed. Second, intervention must be able to advance the desired public policy objectives. Third, the benefits of intervention must outweigh the costs of that intervention[2].

The competition provisions in the Act should therefore provide for regulatory intervention that interferes with the competitive process only to the extent necessary to ensure that the competitive process is not undermined by anti-competitive behaviour of a firm.

Finally, AAPT also recognises the importance of there being a regulator that administers the Act in an accountable manner. The regulator must also act fairly, and with transparency and predicability.

4 SUMMARY OF AAPT'S RECOMMENDATIONS

AAPT appreciates that the Committee's terms of reference are broad, encompassing a review of the competition and authorisation provisions of the Act, including their associated penalty and remedy provisions, and a review of the administration of the Act. AAPT, however, does not seek to comment in this submission on all issues that are likely to arise for the Committee's consideration. This submission focuses on what AAPT sees as a number of key issues that the Committee ought to give careful consideration.

AAPT makes the following recommendations to the Committee.

(a) The misuse of market power prohibition in section 46 of the Act should be made subject to the conduct having the purpose or effect of substantially lessening competition rather than the current purpose test. Section 46 should be amended to provide:

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[1] See, for example, the Office of Regulation Review Guide, A Guide to Regulation – Second Edition (29 January 1999). This Guide identifies factors relevant to choosing the best regulatory form to address specific problems as including: the extent of the risk; the severity of the problem; the nature of the industry concerned; the need for flexibility or certainty in regulatory arrangements, and the availability of resources.

[2] See, for example, Productivity Commission 2001, *Review of the National Access Regime*, Position Paper, Canberra, March at page 53 *"… in assessing the case for any regulation, the costs of intervention itself are an important consideration. Even if a regulation will provide benefits, intervention will only be warranted if those benefits exceed the regulatory costs."*

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

(b) If the Committee supports the retention of the current formulation of the misuse of market power prohibition in section 46, there should not be any reversal of the onus of proof in relation to the purpose element.

(c) The Australian Competition & Consumer Commission ("**Commission**") should not be given cease and desist powers in relation to conduct that it considers amounts to a misuse of market power under section 46 of the Act, nor in relation to conduct that it considers breaches any other of the competition law prohibitions in Part IV of the Act.

(d) Exclusionary provisions, as defined in section 4D of the Act, should only be prohibited if they have the purpose, effect or likely effect of substantially lessening competition.

(e) The exemption in section 45A(2) of the Act against certain conduct carried out by joint venture parties from being in breach of the price fixing prohibition in sections 45 and 45A of the Act, should be amended to provide that any price fixing provision in a joint venture (regardless of the way the joint venture is structured) should only be prohibited if it has the purpose, effect or likely effect of substantially lessening competition.

(f) Conduct should only amount to third line forcing in breach of section 47(6) or 47(7) of the Act if it has the effect or likely effect of substantially lessening competition.

(g) The Commission should be required to provide reasons for either allowing, or refusing to provide, informal clearances for mergers and acquisitions from breaching section 50 of the Act.

(h) The Commission's information gathering powers in section 155 of the Act should be amended to provide that:

(i) they can not be used to require a person to produce information, documents or evidence to the Commission that is properly subject to legal professional privilege; and

(ii) an independent third party body or a member of the judiciary be required to approve the issue of a notice requiring a person to produce information to the Commission under section 155(1) of the Act or permit a member of the Commission to enter premises and inspect and make copies of documents under section 155(2) of the Act.

(i) Criminal sanctions should not apply to conduct that contravenes the Act.

(j) The pecuniary penalties that a court may award against a company or an individual for a breach of Part IV of the Act should not be increased.

5 MISUSE OF MARKET POWER – A PURPOSE OR EFFECTS TEST

Recommendation:

The misuse of market power prohibition in section 46 of the Act should be made subject to the conduct having the purpose or effect of substantially lessening competition rather than the current purpose test. Section 46 should be amended to provide:

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

As it is currently formulated, section 46 of the Act is not as clearly targeted at the competitive process as are many of the other provisions in Part IV of the Act. Section 46 currently reads:

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

Each of the proscribed purposes in section 46 is directed at a person rather than at conduct which impacts the competitive process. In this regard, and while courts have generally recognised that the aim of section 46 is to protect the competitive process rather than individual competitors, section 46 is in contrast to other provisions of the Act which incorporate a competition assessment. Those other provisions all focus on whether conduct has the purpose, effect or likely effect (sections 45 and 47) or the effect or likely effect (section 50) of substantially lessening competition.

The Commission's submission to the Committee notes that (at page 78):

> The reason for the distinction between s.46 and the other Part IV prohibitions is not obvious. The policy objective of s.46 is fundamentally the same as the other prohibitions in Part IV- that is, the prohibition of specified conduct that will damage competition. As well, Australia's prohibition on misuse of market power is inconsistent with similar prohibitions in the United Kingdom, Europe and the United States.

AAPT considers that the focus of the section on individual competitors is inappropriate given the very nature of competition. This tension was remarked on by McHugh J in argument in the High Court appeal in the *Boral* case where he observed:

> 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 of its competitors[3].

The intent of the section is to prohibit conduct which can only be, or is only likely to be, engaged in because of the existence of a substantial degree of market power and the use of that power which is targeted at, and likely to impact on, the competitive process. It is

[3] *Boral Besser Masonry Limited (now Boral Masonry Ltd) v ACCC*, M1/2002 - transcript of High Court appeal.

apparent that the concern sought to be addressed by misuse of market power is the "use" of market power to adversely affect the competitive process. The current formulation is not directed to that end. AAPT's recommended formulation of the prohibition in section 46 would be directed to the competitive process. In this regard, AAPT agrees with the comment made by Professor Stephen Corones in his submission to this Committee, where he says:

> In my opinion, s46 requires re-drafting so that the emphasis is placed on the effect of the conduct on **competition** rather than the purpose or intent of the defendant to harm or injure a particular **competitor**.[4]

In considering the need to retain Part XIB of the Act and, in particular, in comparing the misuse of market power provision contained in Part XIB with section 46, the Productivity Commission said:

> From an economic point of view, the effect of conduct can be more important than its purpose …
>
> The Commission notes that the economic rationale for anti-competitive conduct regulation is to prevent conduct that is regarded to be against the public interest, and that this objective stands irrespective of the intent of the carrier or carriage service provider involved. Under the competitive market benchmark, the effect or likely effect test better focuses on the policy objective.[5]

AAPT considers that these arguments apply equally to general competition regulation as to the telecommunications specific provisions. The current structure of section 46 is ill-suited to meet the policy objectives to which it is directed. As outlined earlier, the focus of Part IV is ensuring a competitive marketplace. A competitive environment is sought because of the outcomes which competition produces. To ensure these benefits are achieved the focus of section 46 should be on the process of competition and conduct which affects that process rather than on behaviour which is directed at a particular competitor. This is consistent with what the United States Courts have described as the underlying purpose of competition law regulation:

> 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.[6]

The Commission, in its submission to this Committee, has suggested that the current framework of section 46 should be preserved and that an effects test should be added by simply adding the words, "*or with the effect or likely effect*," to the opening words of section 46 of the Act. In recommending this approach, the Commission argues that (at page 94):

> Section 46 applies to conduct directed at harming individual competitors or potential competitors. In this, it differs from the other provisions in Part IV, which are directed more broadly towards the competitive environment. The assumption is that if a firm has substantial market power and engages in non-competitive conduct that is damaging to an individual competitor or a potential competitor, that conduct will be sufficiently detrimental to

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[4] Submission to the Trade Practices Review Committee by Stephen Corones, Professor of Law, Queensland University of Technology, 18 June 2002.

[5] Productivity Commission 2001, *Telecommunications Competition Regulation,* Report No.16, AusInfo, Canberra at p175.

[6] *Pacific Engineering and Production Company of Nevada v Kerr-McGee Corporation* 551 F.2d 790 (10th Cir 1977) at p795. See also *United States v Microsoft* [2001-1] Trade Cases (CCH) 73,321 (at 90,791).

> competition and fair trading (and the welfare of Australians) to justify prohibition. The standard or threshold of liability under s.46 has been consciously set lower by the Parliament than the threshold in the other sections in Part IV. This choice is deliberate and recognises the damage that can be done to competition, fair trading and consumers by firms with substantial market power - that is acting in a non-competitive manner.

This suggestion of a deliberately "*lower*" threshold for section 46 is not supported by the relevant Explanatory Memoranda or Second Reading Speeches and is inconsistent with other parts of the Commission's submission, such as at page 78 where the Commission says that:

> As currently drafted, there is a significant difference between s.46 and the remaining prohibitions in Part IV of the Act concerning the outcome of the proscribed conduct. ...
>
> Section 46 differs because it prohibits conduct only if it has one of the three proscribed purposes set out in paragraphs (a), (b) and (c) of subs.1.
>
> The reason for the distinction between s.46 and the other Part IV prohibitions is not obvious. The policy objective of s.46 is fundamentally the same as the other prohibitions in Part IV - that is, the prohibition of specified conduct that will damage competition. As well, Australia's prohibition on misuse of market power is inconsistent with similar prohibitions in the United Kingdom, Europe and the United States. The Commission believes the distinction between s.46 and the other Part IV provisions should be removed.

AAPT considers that the concern often expressed by parties who oppose the introduction of an effects test in section 46, that an effects test will catch genuinely pro-competitive behaviour, is not a valid one, provided that courts properly interpret the "taking advantage" element in the prohibition. Conduct will only be caught where a corporation with a substantial degree of market power takes advantage or uses that power to do what it could not otherwise do but for the existence of its substantial degree of market power. In this regard, it therefore will not catch genuinely competitive behaviour.

6 MISUSE OF MARKET POWER - ONUS OF PROOF FOR PURPOSE

Recommendation:

If the Committee supports the retention of the current formulation of the misuse of market power prohibition in section 46, there should not be any reversal of the onus of proof in relation to the purpose element.

As the Committee is aware, the Senate Legal and Constitutional References Committee's *Inquiry into s.46 and s.50 of the Trade Practices Act 1974* examined whether the Act should be amended to provide for a reversal of the onus of proof under section 46 in actions brought by the Commission where it can first be shown that the corporation has a substantial degree of market power and has taken advantage of that power.

AAPT notes that the Senate References Committee referred its report to this Committee and will await this Committee's report before making its own recommendations.

The Senate References Committee report states that the intention of this amendment is to increase the likelihood of the Commission succeeding in actions against corporations with a substantial degree of market power because of the alleged difficulty of obtaining adequate evidence of a company's purpose.[7]

[7] Senate Legal and Constitutional References Committee, *Inquiry into s.46 and s.50 of the Trade Practices Act*, May 2002, Senate Printing Unit, Department of Senate, Parliament House, Canberra pages 14-26.

If AAPT's primary recommendation on section 46 of the Act, as discussed above in section 5, is not accepted, no question of reversal of the onus of proof for section 46 will arise. This is because the misuse of market power prohibition would require a demonstrated actual or likely effect on competition rather than evidence on subjective purpose.

If, however, the Committee does not accept AAPT's principal recommendation, AAPT would not support a reversal of the onus of proof for the purpose element, either for actions under section 46 commenced by the Commission, or by private litigants. AAPT supports the reasoning against a reversal of the onus of proof as set out in the Senate References Committee report, (see pages 21 to 26) including for the following reasons:

(a) no such change is necessary for the effective administration of the Act;

(b) a reversal of the onus is inappropriate given the seriousness and "quasi-criminal" nature of a breach of section 46 of the Act; and

(c) no special case is made out by those advocating this option; they argue only that it would facilitate the proof of breaches.

7 CEASE AND DESIST POWERS

Recommendation:

The Commission should not be given cease and desist powers in relation to conduct that it considers amounts to a misuse of market power under section 46 of the Act, nor in relation to conduct that it considers breaches any other of the competition law prohibitions in Part IV the Act.

The Commission's submission to the Committee seeks powers for the Commission to issue cease and desist orders in certain cases to allow faster action and less costly resolution of disputes than litigation and to widen the available enforcement options under the Act. Cease and desist orders are an extraordinary form of power that can only be justified in very limited and specific circumstances to prevent conduct from occurring that is particularly egregious and where there is no other effective process available to deter the conduct. AAPT considers that there is no such justification for the powers in relation to a breach of section 46 of the Act, nor in relation to other conduct that breaches Part IV of the Act.

AAPT considers that cease and desist powers sought by the Commission are not justified or necessary for the following reasons.

(a) One of the reasons the Commission gives for requiring cease and desist powers is that evidentiary requirements make it difficult for it to satisfy the requirements for the grant of an injunction. AAPT considers that making the Commission's tasks easier is not by itself an appropriate reason for increasing its powers.

The Commission is currently able to obtain injunctions from a court on very short notice, provided that it can establish that there is a serious question to be tried and that the balance of convenience favours the granting of the injunction. Unlike all other private litigants, the Commission is not required to provide an undertaking as to damages as a prerequisite to the granting of an injunction.

AAPT considers that it would be extremely dangerous to give the Commission the broad cease and desist powers it is requesting, particularly when the threshold already

applied by courts for the grant of an injunction provides an appropriate balance between the interests of the parties.

An example used by the Commission in support of cease and desist powers is the *South Sydney Rugby League* case where an injunction was initially refused by the Court at the interlocutory stage, but breaches of section 45 of the Act were ultimately established[8]. It should be noted that success at the final hearing does not indicate that the minimum criteria required to obtain an injunction are inappropriate. It will not always be appropriate for a court to grant an injunction at the interlocutory stage, even, in retrospect, where at the final stage a breach of the Act is proven. The *Souths* case is, in fact, a good example of where the balance of convenience did not favour the granting of an injunction and appropriate relief was ultimately granted.

(b) There is a substantial risk that the low threshold that the Commission considers is necessary to invoke cease and desist powers (and which is less than that required for an injunction), would mean that the powers could be used to stop pro-competitive or competitively neutral conduct. Such powers would effectively remove the inherent right available to all corporations for a judge, not a prosecutor, to determine whether a breach of the Act has occurred.

(c) The knowledge that the Commission has such extensive rights to be used at its discretion could also stop pro-competitive or competitively neutral conduct. Conferring a wide discretion on the Commission to invoke its cease and desist powers would also increase the regulatory uncertainty in how the Act will be administered.

(d) The model proposed by the Commission is not likely to withstand constitutional challenge. The powers sought by the Commission will give the Commission the ability to cause a corporation to stop conduct that the Commission believes contravenes section 46 of the Act without a court deciding whether or not the conduct contravenes section 46.

The cease and desist orders proposed by the Commission can be issued when the Commission *is satisfied* that a corporation with a substantial degree of market power is using that power in an anti-competitive manner. AAPT considers that this would involve the Commission exercising judicial power contrary to the Australian Constitution. Further, if a corporation breaches a cease and desist notice it will be subject to penalties imposed by the Federal Court on application by the Commission. It appears that these penalties can be imposed without any determination of whether in fact the company has breached section 46. To that extent, a corporation can be penalised for conduct which is not in fact a breach of section 46, but simply because it breaches a cease and desist order issued by the Commission.

Therefore, even though the cease and desist order is not binding per se as if it were a decision of the Federal Court, the *effect* of a cease and desist order may be that the Commission is effectively exercising judicial power. By issuing a cease and desist order, the Commission would be able to impose a required course of conduct punishable by a penalty imposed by the Court without the need to prove that the conduct in question was in fact a breach of the Act.

For example, in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 153 CLR 245, the High Court considered legislation which provided that decisions of the Human Rights and Equal Opportunity Commission would, upon registration by

[8] *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 169 ALR 120 and [2001] FCA 862.

the Federal Court, have effect as if in fact they were an order of the Federal Court. The High Court held the legislation to be invalid on the basis that it was unconstitutional because an exercise of an executive power (making the decision) and the performance of an administrative duty (registering the decision) could not take effect as if it were an exercise of judicial power. The existence of a right to have the Commission's decision reviewed would not change the nature of the function to be exercised by the Commission from a judicial to an executive function.

(e) The Commission's suggestion that the cease and desist powers sought in relation to the Act mirror those of the New Zealand Commerce Commission is not correct. In New Zealand, cease and desist orders operate much like injunctions do in Australia. Cease and desist orders can only be made by Commissioners who are appointed especially for the purposes of determining applications for cease and desist orders. Such Commissioners have no other functions within the Commerce Commission.

In New Zealand, an investigation must be undertaken before the making of a recommendation to the Commerce Commission by a Commissioner that the cease and desist order be sought. The person in relation to whom an order is being sought is given notice that an order is being sought (which sets out nature of allegation, the proposed order and the reasons for order) and has opportunity to gain access to relevant documents from the Commission.

Before a cease and desist order will be issued, the Commerce Commission must prove that it has a prima facie case and that there is a need to act urgently. A hearing takes place before order is issued at which the affected corporation can appear and give evidence, be represented, call witnesses and cross-examine witnesses.

(f) Finally, the cease and desist powers that the Commission is proposing are largely unconstrained as they do not provide the minimum safeguards necessary to ensure that they will only be used to the extent necessary to facilitate effective competition. For example, there is nothing in the model proposed by the Commission that precludes the Commission from continuing to issue orders once the ninety-day limit on its first order has expired.

8 EXCLUSIONARY PROVISIONS AND PRICE FIXING

Recommendations:

Exclusionary provisions, as defined in section 4D of the Act, should only be prohibited if they have the purpose, effect or likely effect of substantially lessening competition.

The exemption in section 45A(2) of the Act against certain conduct carried out by joint venture parties from being in breach of the price fixing prohibition in sections 45 and 45A of the Act, should be amended to provide that any price fixing provision in a joint venture (regardless of the way the joint venture is structured) should only be prohibited if it has the purpose, effect or likely effect of substantially lessening competition.

As a group of companies that conducts business in a number of emerging markets, AAPT understands and appreciates the benefits that can be derived by entering into joint ventures for the development and/or distribution of products and services.

To be effective there are certain issues that should be addressed in the joint venture documentation. These include:

- maximising business through the joint venture. It is likely to undermine the viability of the venture if the joint venture participants were able to compete with the venture and to create free rider effects; and

- the price at which joint venture products and services are sold - as it is necessary for each participant to be involved in the pricing decisions of the joint venture.

A number of restrictions in the Act operate as a disincentive to an efficient joint venture. In particular, the provisions in the Act relating to exclusionary provisions and price fixing:

- apply to a very broad range of conduct, including conduct that is pro-competitive or competitively neutral; and

- lack clarity in the way they are drafted and interpreted.

Certain provisions in joint ventures, such as restraints that also fall within sections 4D and 45 of the Act, are prohibited regardless of their purpose, effect or likely effect. While there is an exemption from specific joint venture activity for price fixing, no similar exemption applies to the prohibition on exclusionary provisions.

The prohibition on exclusionary provisions is aimed at preventing boycotts or other forms of market sharing arrangements that are directed at carving up a market or boycotting particular persons. Joint ventures, on the other hand, are directed at developing new products or exploring new markets in a way that the individual participants of the venture could not do on their own. The first type of conduct is fundamentally anti-competitive. The second will generally be pro-competitive or competitively neutral. The lack of an exemption for exclusionary provisions in joint venture arrangements fails to recognise that a number of joint venture arrangements do not necessarily have an anti-competitive purpose or effect.

The lack of a specific exemption for joint ventures is inconsistent with the way joint ventures are regulated in other jurisdictions such as New Zealand and the United States. [Section 29] of the New Zealand *Commerce Act* 1986 (NZ) only prohibits exclusionary provisions between competitors where:

(a) the person against whom the exclusionary provision is directed is a competitor of one or more of the parties to the contract, arrangement or understanding; and

(b) the provision has the purpose or effect of substantially lessening competition in a market.

The reason for the proviso that an exclusionary provision have an anti-competitive purpose or effect, as indicated by the Commerce Committee commentary on the Bill, was to ensure that section 29 did not capture pro-competitive arrangements involving a vertically integrated firm that also operates exclusive dealing arrangements with other downstream firms. The Commerce Committee provided the following example:

> … a manufacturer might agree to sell its products through one or more, but not all potential retailers of the products. If the manufacturer also sells direct to the public through, say, the internet then it appears that the three conditions … [of section 29] will have been met. Such an arrangement is most unlikely to be anti-competitive because the distributor's market power will usually be limited by inter-brand competition.

While the envisaged impact of section 29 of the Commerce Act was to alleviate the difficulties for vertically integrated organisations, the provision clearly has an impact on joint ventures. The defence provided for in section 29(1A) of the Commerce Act is available to joint ventures accused of entering into exclusionary provisions. The effect of this section is

that if the exclusionary provision between joint venturers does not substantially lessen competition, then it will not breach section 29.

In the United States, boycotts by competitors are only prohibited per se if the competitors have market power and the boycott constitutes an attempt to eliminate a competitor or involves price fixing. All other types of boycotts are subject to the rule of reason.

Section 45A(2) of the Act contains very limited exemptions from the per se prohibition for price fixing by joint venturers. This conduct still must be assessed for compliance with the general prohibition in section 45 on contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition.

The exemption, however, does not contemplate different types of structures of joint ventures and restrictions in joint ventures or the supply of services by joint ventures.

The provision was introduced on the recommendation of the Swanson Committee. This Committee's report[9] stated at paragraph 4.71 that it would not want the Act:

> … 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.

This recognises that joint ventures do not necessarily have an anti-competitive effective. There is no reason of which AAPT is aware that the exemption should be limited to only applying to joint ventures or restrictions in joint ventures that are structured in a particular way or only to joint ventures formed for the purpose of supplying goods.

AAPT believes that the current drafting of section 45A(2) lacks clarity and is too narrow to achieve its objectives. The section should be amended to provide that any price fixing provision in a joint venture (regardless of the way the joint venture is structured) should only be prohibited if it has the purpose, effect or likely effect of substantially lessening competition.

9 THIRD LINE FORCING

Recommendation:

Conduct should only amount to third line forcing in breach of section 47(6) or 47(7) of the Act if it has the effect or likely effect of substantially lessening competition.

Section 47 of the Act regulates the practice of exclusive dealing. Third line forcing is a form of exclusive dealing that is prohibited per se, whereas other forms of vertical restraints in section 47 are subject to a substantial lessening of competition test.

Suppliers of goods or services may seek to enter into arrangements with others on the basis that the purchaser of the first supplier's goods or services acquire related goods or services from a second supplier, or will only give a particular discount on that basis. The corollary is that they will refuse to supply their goods or services (or give the discount) unless the customer has agreed to acquire, or has acquired, the other goods or services.

In AAPT's view, it is incorrect to assume that third-line forcing is invariably anti-competitive. Schemes which fall within the third line forcing provisions can offer distinct benefits to

[9] Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, August 1976.

consumers and can encourage corporations (both small and large) to offer more innovative and useful products to consumers where one corporation alone could not do so.

Third line forcing may be anti-competitive where other features are present in the arrangement, such as where:

- substantial market power in the market for the tying product is being relied on to extend into the market for the tied product;
- a "kick-back" or secret commission is paid by one supplier to another;
- there is some misrepresentation about the benefits of the goods or services being offered; and
- there is some misrepresentation about the ability of the consumer to choose the supplier of the second product and the availability of alternative suppliers, despite the benefits the tying arrangement may offer.

Third line forcing was made subject to a per se prohibition in response to concerns that lending institutions were insisting on borrowers acquiring insurance using a nominated insurer. The insurer, therefore, had little incentive to offer the consumer a lower premium or more attractive coverage or service. In such a case, the insurer, the lending institution or both may be taking advantage of their position of market power.

However, in other cases, the reasons for third line tying arrangements may be pro-competitive or merely benign. Consumers may benefit from discounts on goods or services purchased together. Consumers may also benefit where, for instance, a manufacturer is able to offer after-sales service on the goods from another trusted supplier. Many such situations are pro-competitive and many more certainly have no anti-competitive effect. They may, however, be difficult to support on the basis of express public benefit and so cannot take advantage of the notification procedure in the Act. Alternatively, the notification procedure in many cases needlessly creates additional costs and administration on companies.

Given that not all forms of third line forcing are anti-competitive, it makes little sense to subject the practice to a per se prohibition. It would be more desirable for suppliers and consumers alike if sections 47(6) and (7) of the Act were subject to a substantial lessening of competition test.

In AAPT's view, third-line forcing should be subject to a substantial lessening of competition test. Such a test would catch conduct that was anti-competitive while allowing conduct which was competitively neutral or pro-competitive. This would benefit consumers and suppliers alike.

This is consistent with previous recommendations to make sections 47(6) and (7) subject to a substantial lessening of competition test. In 1993, the Hilmer Committee made such a recommendation:

> As noted in the background discussion, the effects on competition and economic efficiency of vertical arrangements need to be examined on a case by case basis. The US has per se prohibitions against tying arrangements, but these rules have come under increasing scrutiny and criticism. The Australian rules applying to vertical arrangements generally adopt a competition test, and thus accord with economic principles.
>
> The basis for a distinction between third line forcing and other forms of tying is not clear. Per se prohibitions are appropriate where conduct has such strongly anti-competitive effects that it is almost always likely to lessen competition. Third line forcing does not fall into this category …

> The variety of problems and anomalies arising from the divergent treatment of third line forcing and other forms of tying suggests that a more consistent approach would be appropriate. Accordingly, third line forcing should only be prohibited if it substantially lessens competition.[10]

AAPT considers that this reasoning is sound. It is also consistent with that of the Department of Treasury when it said:

> 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.[11]

One of the undesirable effects of the per se prohibition on third line forcing is that the courts have drawn a number of artificial distinctions in the application of sections 47(6) and (7). The sections give rise to ambiguity in their application to particular factual situations so that outcomes are not always predictable.

For instance, it is not always clear whether the Courts will treat the tied products as two separate products or a single product. In *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* (1986) 162 CLR 395, the High Court found that the product itself was a single product, delivered beer, so an arrangement where a supplier of beer insisted that customers use the government railway for delivery did not constitute third line forcing. Where the competitive consequences are identical, the form of the transaction should not determine whether or not the third line forcing provisions in the Act have been contravened.

There is also uncertainty as to whether an element of compulsion is essential to section 47(6). In *SWB Family Credit Union v Parramatta Tourist Services Pty Ltd* (1980) 32 ALR 365, Northrop J suggested that the elements of compulsion and futurity were essential but in *TPC v Tepeda Pty Ltd* (1994) ATPR 41-319, Davies J declined to import a concept of compulsion into section 47(6).

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[10] National Competition Policy Review, *Report by the Independent Committee of Inquiry*, August 1993, AGPS, Canberra, pages 52-53.

[11] Department of Treasury, *Possible Amendments to the Trade Practices Act 1974*, 2001, pages 4-5.

Further difficulties are created by the fact that section 47(7) has a lower threshold than section 47(6) since the elements of compulsion and futurity are not required. For instance, if a credit card company offers an exclusive discount to members who use the credit card at a certain store, the store may breach section 47(7) if it refuses to offer the discount to a customer who does not use their credit card to make the purchase. Similarly, if a supermarket prints a shopper docket offer from another trader on the reverse of its receipt, if the consumer does not have the shopper docket and is refused the same offer by the trader, then the trader will breach section 47(7).

If third line forcing were subject to a substantial lessening of competition test, many of these uncertainties would no longer be of critical import because they would result in no substantial lessening of competition.

10 INFORMAL MERGER CLEARANCES

Recommendation:

The Commission should be required to provide reasons for either allowing, or refusing to provide, informal clearances for mergers and acquisitions from breaching section 50 of the Act.

AAPT does not support any change to the merger test that is currently applied under section 50 of the Act. AAPT considers that the current test, (namely that a corporation must not directly or indirectly acquire shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market), is appropriate for the Australian business environment and is appropriately consistent with the competition test applied to other anti-competitive prohibitions in Part IV of the Act.

AAPT considers that the process by which corporations seek informal clearance from the Commission for mergers and acquisitions generally works well and does not require significant change.

AAPT does not consider that changes need to be made to the merger test or the Commission's approach to informal merger clearances in order to specifically require an assessment of global competition and the need for Australian businesses to compete locally and internationally.

AAPT considers that there would be little benefit in formally enshrining the Commission's current informal merger clearance processes in the Act. Doing so may merely remove the flexibility that is sometimes required in the way that the Commission approaches informal clearance applications so that it can properly carry out its assessment of the proposed merger and consider submissions of parties wishing to merge, and those of other interested parties wishing to comment on the likely competitive impact of a merger.

However, AAPT considers that it would be helpful to parties, others industry players and others generally, if the Commission provides a more comprehensive set of reasons for its informal clearance decision than currently occurs. Provided that the parties approaching the Commission for an informal clearance are happy to make the proposed arrangement public, such reasons could also be kept by the Commission on a formal merger register for access by interested parties. Such a system would provide greater transparency, consistency of approach and certainty.

11 THE COMMISSION'S INFORMATION GATHERING POWERS AND LEGAL PROFESSIONAL PRIVILEGE

Recommendation:

The Commission's information gathering powers in section 155 of the Act should be amended to provide that:

(i) they can not be used to require a person to produce information, documents or evidence to the Commission that is properly subject to legal professional privilege; and

(ii) an independent third party body or a member of the judiciary be required to approve the issue of a notice requiring a person to produce information to the Commission under section 155(1) of the Act or permit a member of the Commission to enter premises and inspect and make copies of documents under section 155(2) of the Act.

The Commission's powers to obtain information are broad. Section 155 of the Act provides that:

- section 155(1): if the Commission has a reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention of the Act, or is relevant to a "designated telecommunications matter", or is relevant to the making of certain decisions by the Commission in relation to an exclusive dealing notification, a member of the Commission may, by notice in writing served on that person, require the person to furnish information, produce documents or appear before the Commission to give evidence, either orally or in writing, and produce any such documents; and

- section 155(2): if the Commission has reason to believe that a person has engaged or is engaging in conduct that constitutes or may constitute a contravention of the Act or certain provisions of telecommunications legislation, a member of the Commission may authorise a member of staff assisting the Commission to enter premises and inspect any documents in the possession or under the control of the person and make copies of, or take extracts from, those documents.

AAPT notes that the Full Federal Court in *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd & Anor* (2001) 108 FCR 123 held that a claim of legal professional privilege is not a valid answer to a notice issued by the Commission under section 155 requiring a party to furnish information to it. The Court reasoned that the wording of section 155 of the Act excludes the operation of the doctrine of legal professional privilege.

An appeal from the Full Federal Court's decision in *Daniels* was heard by the High Court on 18 June 2002 and at the time of writing, the High Court's decision on this appeal was still reserved. The appeal in *Daniels* was heard by the High Court together with two other matters, namely *Woolworths Limited v Fels and Australian Competition & Consumer Commission*, and *Coles Myer Limited and Liquorland (Australia) Pty Ltd* v *Fels and Australian Competition & Consumer Commission.* These two matters raised the same legal issue as in *Daniels*, but relate to a slightly amended version of section 155.

AAPT considers that regardless of the outcome handed down by the High Court in the *Daniels, Coles and Woolworths* cases, the Act should be amended to explicitly provide that legal professional privilege is not abrogated by section 155 of the Act.

Even if the High Court decides that legal professional privilege is not abrogated by the existing formulation of section 155, or the formulation relevant in the *Daniels* case, AAPT considers that an amendment to the Act should be made to put the matter beyond any doubt. It should not be left open for a High Court in the future to decide that legal professional privilege is in fact abrogated by section 155 of the Act.

Legal professional privilege has been identified by the Courts as a substantive and fundamental common law right.[12]

In its submission to this inquiry, the Commission correctly identifies that legal professional privilege, *"is generally available unless a contrary statutory intention is shown by express words or necessary implication"*. Moreover, the Commission acknowledges that section 155 does not, by clear words, abrogate legal professional privilege. However, the Commission does submit that section 155 does demonstrate an intention to exclude legal professional privilege.

In order to establish a legislative intention to interfere or abrogate legal professional privilege, that intention, *"must be clearly manifested by unmistakable and unambiguous language"*.[13] AAPT submits that no such legislative intention is manifest in the language of section 155.

The Commission's states:

> The ACCC's view is based on the consideration that s. 155 confers a broad investigative power which would be undermined if the privilege were available"[14].

This view is consistent with the Full Federal Court's view in the *Daniels* case where it was held that section 155 should be given a broad application because it expressly overrides the privilege against self incrimination.

AAPT submits that there is a fundamental difference between legal professional privilege and the privilege against self-incrimination and that the availability of legal professional privilege does not undermine the operation of section 155.

The High Court in *Pyneboard Pty Limited v Trade Practices ACCC* (1983) 152 CLR 328 recognised that the availability of the privilege against self-incrimination would undermine the operation of section 155 of the Act because the result could be that a person could resist answering a statutory notice on the basis that the information or documents could tend to incriminate that person. In that way, the privilege against self-incrimination is entirely inconsistent with section 155.

However, there is nothing inconsistent between section 155 and legal professional privilege. Legal professional privilege is not aimed at protecting a person against incrimination. Rather, it is aimed at preserving the confidential nature of communications between a lawyer and a client. In any event, legal professional privilege does not attach to a communication that is made for the purposes of promoting or facilitating a crime.[15]

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[12] *Baker v Campbell* (1983) 153 CLR 52; *Attorney-General (NT) v Maurice* (1986) 151 CLR 475; *Goldberg v Ng* (1995) 185 CLR 83; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

[13] *Coco v The Queen* (1994) 179 CLR 427.

[14] Australian Competition & Consumer Commission, *Submission to the **Trade Practices Act** review*, June 2002, page 289.

[15] *Commissioner of Australian Federal Police v Propend Finance Pty Limited* (1997) 188 CLR 501.

The Commission's present position, that section 155 of the Act does abrogate legal professional privilege, is inconsistent with the Commission's:

- general practice since section 155 commenced which was to refrain from calling for privileged material; and

- guideline document on its approach to section 155 of the Act and privilege. Prior to the special leave application to the High Court in the *Daniels* case, the Commission's guideline document stated that the Commission's general policy is to refrain from calling for privileged material. This was amended after the application for special leave to appeal in the *Daniels* case was lodged. [reference these guidelines]

In *SA Brewing Ltd v Baxt*[16] Fisher and French JJ acknowledged that "[s]ection 155 of the *Trade Practices Act* 1974 provides the Trade Practices Commission with a powerful investigative tool". Whilst AAPT understands the rationale behind section 155 powers and the need for the Commission to possess information gathering powers, it considers that such powers must be balanced with accountabilities and the need for certainty. AAPT is concerned that there are currently insufficient checks and balances on the Commission's use of its section 155 powers and that maintaining legal professional privilege is the appropriate check and balance.

As noted above, section 155(1) of the Act gives the Commission the power to obtain information, documents and evidence where it, or the Chairperson or Deputy Chairperson:[17]

> … has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act, or is relevant to a designated telecommunications matter….. or is relevant to the making of a decision by the Commission under subsection 93(3) or (3A)…

AAPT is concerned that there is no adequate check on the Commission's ability to issue a section 155(1) notice given the limited scope for judicial review. In particular AAPT is concerned about this fact due to the low threshold that section 155(1) requires to be satisfied in order for the Commission to be able to issue a section 155(1) notice. The Commission only has to have a reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention.

To this effect, AAPT believes that consideration should also be given to requiring either an independent third party body or a member of the judiciary to approve the issue of a notice under section 155(1).

As noted above, section 155(2) of the Act gives the Commission the power to authorise an officer to enter premises and inspect or take copies of, or extracts from, certain documents in the possession or control of a person where it, the Chairperson or Deputy Chairperson:[18]

> … has reason to believe that a person has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of this Act, Part 20 of the Telecommunications Act 1997 or Part 9 of the Telecommunications (Consumer Protection and Service Standards) Act 1999…"

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[16] (1989) ATPR 40-967.

[17] Section 155(1) of the Act.

[18] Section 155(2) of the Act.

For the same reasons apply to the section 155(1) power, AAPT believes that an independent third party body or a member of the judiciary be required to approve the issue of a notice under section 155(2). AAPT submits that there is even stronger justification for such a recommendation in relation to section 155(2) given the greater power that section 155(2) confers on the Commission.

12 CRIMINAL SANCTIONS

Recommendation:

Criminal sanctions should not apply to conduct that contravenes the Act.

The Commission's submission to the Committee has called for the introduction of criminal sanctions for companies and individuals involved in what it refers to as "hard core cartel conduct" such as price fixing, bid rigging, output restriction and market sharing. The Commission is seeking that individuals directly involved in criminal collusion face custodial sentences of up to seven years and that companies and individuals face pecuniary penalties or other appropriate remedies.

The Commission has proposed that criminal sanctions only apply to "large companies" which it defines as those companies that satisfy two of the following three criteria: gross revenue in excess of $100 million; gross asset value in excess of $30 million or more than 1000 employees. The Commission states that small business, including the rural and professional sectors and unions, are not to be liable for criminal sanctions.

While AAPT wishes to make it clear that it in no way condones cartel activity, AAPT strongly believes that criminal sanctions should not apply to cartels or any conduct in breach of the Act. AAPT's reasons are as follows.

(a) Most importantly, those who engage in hard core cartel conduct generally do so under a veil of secrecy. They do not believe their conduct will be detected. The Commission explicitly acknowledges this in its submission to the Committee (section 2.2.3.3) where it discusses the conduct of two Hoffmann-La Roche executives who, following the imposition of a $US14 million fine for involvement in one cartel, denied their involvement in a larger cartel and re-doubled their efforts to avoid detection. Rather, it is recognised that the most effective deterrent to cartel conduct is the threat of detection.[19] Criminal sanctions do not carry a threat of greater detection of cartel activity and as such would seem to provide little deterrent effect to cartel activity. AAPT considers that criminal sanctions on top of the Commission's leniency policy for cartel conduct are not needed in order to increase the likelihood of cartel activity being brought to the Commission's attention.

(b) Experience in the United States suggests that the only mechanism which will assist in the prevention of collusive agreements is an *effective leniency policy* which encourages individuals (especially employees of those companies involved in collusive agreements) to report collusive agreements to regulators.[20] This fact seems to have been appreciated by the Commission with the release of its draft *Leniency policy for cartel conduct*, July 2002 which provides incentives for parties to inform

[19] Hammond, S., "Lessons Common to Detecting and Deterring Cartel Activity", ABA International Forum: International Cartel Workshop, 2002, vol 1, tab 16, p 1.

[20] Klawiter, D., "Corporate Leniency in the Age of International Cartels: The American Experience" (2000) 14 *Antitrust*, .

the Commission of cartel activity. The policy states that its aim is the detection, stopping and deterring of significant domestic or international hard core cartels.

Hammond, the Director of Criminal Enforcement in the US Department of Justice Antitrust Division, has remarked:

> More than anything else, the expansion of the Amnesty Program has been responsible for the success that we have had in cracking international cartels.[21]

The "first in, full reward" leniency policy adopted in the United States also has the advantage of engendering tension and mistrust between cartel members, thereby destabilising cartels more quickly and providing a significant disincentive for those who propose to engage in cartel conduct.[22]

An effective leniency policy will ensure that companies will be dissuaded from entering collusive agreements by the threat of "internal surveillance". This threat of detection is far more powerful than criminal sanctions or increased pecuniary penalties.

(c) There are a number of measures already built into the current competition law regime that act as effective deterrents for the vast majority of individuals and companies from engaging in cartel behaviour. Current deterrents include the threat of pecuniary penalties, including the threat than an individual knowingly concerned in the contravening conduct may also be prosecuted and face penalties for their involvement in the cartel. The attendant embarrassment and damage to reputation and career which can occur if a company and/or individual is prosecuted in relation to a collusive agreement, or even if it is suspected of being involved in a contravention of the competition prohibitions in the Act, also acts as a deterrent. Finally, a company engaged in cartel conduct may also open itself up to civil claims from victims of the cartel conduct.

(d) Even if it were the case that the existing measures under the Act, including pecuniary penalties of any magnitude, were ineffective in deterring corporations and individuals from engaging in cartel conduct, AAPT is not aware of any convincing evidence which supports the theory that criminal sanctions will provide effective deterrence. For instance, in the United States the fact that gaol sentences have been imposed for hard-core cartel conduct carried out with specific intent, and that the length of these gaol sentences has increased over time, has not resulted in any decrease in the level of cartel activity being investigated by the Department of Justice.[23]

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[21] Hammond, S., "Lessons Common in Detecting and Deterring Cartel Activity", ABA International Forum: International Cartel Workshop, 2002, vol 1, tab 16, p 3.

[22] Hammond, S., "Lessons Common to Detecting and Deterring Cartel Activity", ABA International Forum: International Cartel Workshop, 2002, vol 1, tab 16, p 9.

[23] See, for example, Spratling, G., "Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies relating to Plea Agreements in International Cases", paper presented at the 13th Annual National Institute on White Collar Crime, San Francisco, California, 4 March 1999.

13 PECUNIARY PENALTIES

Recommendation:

The maximum pecuniary penalties that a court may award against a company or an individual for a breach of Part IV of the Act should not be increased.

The Commission has proposed to the Committee that the level of pecuniary penalties for both civil and criminal contraventions should be increased. It claims that the existing $10 million maximum penalty is not seen as a truly effective deterrent and that a gain a corporation obtains from collusion may be many times more than $10 million.

AAPT does not support the Commission's proposal as AAPT considers that there is no convincing evidence to suggest that the current pecuniary limits are set to low. The evidence from recent court decisions is that in many cases the Commission has asked for a much higher level of penalty than the court has considered it appropriate to impose. That does not provide a justification for increasing the level of penalties.

Additionally, the Australian Law Reform Commission is currently undertaking a detailed reference on civil and administrative penalties. It would therefore seem inappropriate for the Committee to make a recommendation for increased penalties outside the scope of that reference.

Conceptually, AAPT is supportive of the notion the penalty should be referable to the extent of any gain obtained from the relevant cartel conduct and the harm done by it. The Commission foresees difficulty with determining what is an appropriate penalty calculated on this basis and offers as a proxy 10% of the Australian turnover for the duration of the infringement for a maximum of three years. In AAPT's submission that proposal is not consistent with any of the notions underlying the nature of the determination of appropriate penalties as set down by the courts and therefore should not be supported by the Committee.