Submission by Allens Arthur Robinson to the Dawson Committee's Review of the Trade Practices Act

July 2002

The Chifley Tower
2 Chifley Square
Sydney NSW 2000
Tel 61 2 9230 4000
Fax 61 2 9230 5333
www.aar.com.au

EXECUTIVE SUMMARY

Allens Arthur Robinson (***AAR***) has been and continues to be involved in Australia's land-mark litigation under the Act, s155 investigations and mergers. A number of our partners were also involved in the development of the Law Council's submission to the Review Committee, which we, as a firm, endorse.

Drawing on this experience, AAR makes the following recommendations for the reform of the Act:

Joint Ventures, Exclusionary Provisions and Price Fixing

The terms on which parties agree to enter into joint ventures should be considered under a competition test rather than a per se test.

The scope of the per se prohibition on exclusionary provisions should be amended to:

- require that the target of the provision is a competitor of one of the parties to the agreement;
- provide a defence for agreements which do not have the purpose or effect of substantially lessening competition in a market; and
- ensure that the 'class of persons' is defined by reference to a quality or attribute, and not merely by the fact of their exclusion.

The joint venture exemption for price fixing should be amended to apply whenever joint venture partners reach agreement about the price at which they will sell the output of the joint venture or the price at which a company owned by them will sell the output of the production joint venture.

A specific exemption to the per se prohibitions on price fixing and exclusionary provisions by joint venturers should also be introduced so that any such arrangements are considered under a competition test.

Misuse of Market Power

It is neither necessary nor appropriate to introduce:

- an 'effects' test to replace the 'purpose' element currently contained in s46;
- a reversal of the onus of proof in relation to 'purpose'; or
- a 'cease and desist' power for the ACCC.

Exclusive Dealing

The prohibition on third line forcing should be amended so that it is subject to the competition test which applies to all other exclusive dealing conduct. Further, an exception should be introduced for third line forcing by related companies.

Section 47 and s45(6) should be amended to make it clear that all exclusive dealing conduct is to be considered under the substantial lessening of competition test set out in s47.

Resale Price Maintenance

A related company exception to the per se prohibition of resale price maintenance should be introduced, similar to that currently applying to sections 45 and 47.

Mergers

AAR supports the Law Council's recommendations for:

- the introduction of an independent review panel to refer a decision back to the ACCC for further analysis or to substitute its own decision for that of the ACCC;
- the direct application to the Tribunal for merger authorisations; and
- the introduction of public benefit considerations into s50 to ensure that the ACCC takes public benefit considerations into account as part of the informal process.

Authorisations

The Act should be amended to allow applications for authorisation of a merger or acquisition to be made either to the ACCC or directly to the Tribunal. Any decision by the Tribunal would not be further reviewable.

Strict time limits should apply of:

- 60 days (with a maximum 14 day extension) for merger/acquisition authorisation applications; and
- 120 days for non-merger matters (with the only extension of time, otherwise than by agreement with the applicant, being for a maximum of two 14 day periods to enable the applicant to provide further information requested by the ACCC or the Tribunal).

Only persons with a real and substantial interest in an authorisation should be able to seek a review by the Tribunal.

Authorisation for s46 conduct should be introduced.

Sanctions

The arsenal of penalties that may be sought by the ACCC in Court proceedings is already considerable, but the ACCC has not yet sought the full extent of the penalties currently available.

It is not the purpose of AAR's submission to comment on whether cartel activity should be criminalised. However, it is our view that the ACCC's proposal for a threshold for criminal sanctions based on the offender's status would be unique in the criminal law and impose an invidious double standard. The ACCC's proposed offence appears to confuse the issue of seriousness with the issue of criminal responsibility.

AAR is concerned about a number of practical issues associated with the introduction of criminal sanctions for cartel conduct:

- responsibility for breaches of Part IV of the Act currently applies to a broader class of persons than the criminal law would presently permit;
- changes to the ACCC's investigatory powers under s155 would be necessary;

- there would be a prospect of decreased enforcement outcomes; and
- the ACCC and the DPP would need to implement consistent prosecution policies.

AAR does not support proposals to introduce:

- incentives for individuals to bring actions for the recovery of damages resulting from breaches of Part IV; or
- a general remedy of divestiture.

Section 155 and legal professional privilege

If the High Court finds that s155 abrogates legal professional privilege, the Act should be amended to expressly preserve the application of legal professional privilege in respect of s155.

The Review Committee should also recommend that s155 be amended to require that:

1. the ACCC adopt guidelines which require it:
   (a) to set out the specific allegations being investigated and the basis for its 'reason to believe' in s155 notices; and
   (b) before it can exercise its powers under s155(2), to satisfy a judge or magistrate that in the absence of a search warrant being granted, it is reasonably likely that the information it is seeking will be destroyed, removed or concealed;
   (c) to give a company that is subject to a s155(2) investigation a right to seek legal advice or to have a lawyer present while the ACCC is investigating the matter at the person's premises;
2. the protection currently provided in s155AA for Part IV or Part VB information should be extended to cover Part V information. This should be supported by guidelines issued by the ACCC in relation to documents received under s155 notices.

The Review Committee could also recommend that 2 additions be made to the ACCC's present s155 guide, all of which should be instituted pursuant to and have the force of a provision such as s75AV:

- The guideline should not be administered so rigidly as to artificially cause the unnecessary expense of multiple legal representatives where no conflict of interest arises.
- That where a conflict appears to a party's legal adviser or the ACCC to have arisen, the party concerned should be given a reasonable opportunity to retain another legal adviser. The administration of this guideline would also be capable of internal review as suggested in section 18 below.

Cease and Desist

The need for a cease and desist power has not been adequately demonstrated. Injunctive relief is adequate, and indeed preferable, given the attendant safeguards. There are also significant constitutional issues raised by the introduction of such a power.

Leniency

Although further consideration of the ACCC's Draft Leniency Policy may be necessary if criminal sanctions are introduced, it should nonetheless be implemented as a matter of priority. It provides the basis for a clear, certain leniency policy which will operate as a useful enforcement weapon and deterrent.

Administration of the Act

The ACCC should be given the opportunity to institute and manage an internal review procedure.

As part of establishing an internal review procedure, the General Manager of the ACCC could appoint a senior officer within the ACCC (not on the enforcement Committee) as a point of review to resolve problems that may arise about the conduct of the ACCC when carrying out its functions such as administering its guidelines, dealing with s155 notices, litigation and decisions of the Enforcement Committee.

As part of his or her role, the review officer could also be responsible where appropriate for developing further guidelines for the ACCC to adopt to deal with any other perennial problems that are identified as a form of continuous improvement.

AAR recommends the position be reassessed after 2 or 3 years to see whether or not the internal review procedure is working and has sufficiently resolved the issues that seem to have concerned the ACCC's critics.

1. INTRODUCTION

1.1 Overview of AAR's practice

Allens Arthur Robinson's competition law practice is led jointly by a former Chairman of the Trade Practices Commission and the only Australian lawyer who sits as a lay member of the High Court of New Zealand on competition law cases arising under the Commerce Act (NZ). 6 of the firm's partners and one of our special counsel are members of the Trade Practices Committee of the Law Council of Australia. One of our partners is the national chair of the Trade Practices Committee.

AAR has been and continues to be involved in the landmark cases under the Act including for example:

- we advised Melway about the High Court appeal;
- we are acting for News in the South Sydney appeal to the High Court;
- we are acting for Coles Myer in relation to the abrogation of legal professional privilege by s155 in the High Court;
- we acted for PAWA in the Northern Territory PAWA litigation;
- we acted for Sony Music in the Universal Music litigation;
- we are acting for Shell in the recent ACCC raids.

In addition to litigation, AAR is acting in several significant s155 investigations relating to alleged collusion and price fixing issues in the liquor and manufacturing industries, bank interchange fees and refusal to deal issues in the supply of advertising services.

AAR is one of the leading advisers in relation to mergers under the Act and has been involved in the negotiation of landmark s87B undertakings in connection with the largest and most innovative corporate transactions involving mergers and other Part IV conduct including:

- we acted for Ampol in the Ampol/Caltex merger;
- we acted for Westpac in the Bank of Melbourne merger;
- we acted for FritoLay in the Smiths Snackfood merger;
- we acted for both parties in the SPC/Ardmona merger;
- we are acting for FOXTEL in the Optus/FOXTEL content sharing agreement.

A number of AAR's partners were involved in the formulation of the Law Council's submissions to the Review Committee with particular responsibility for the sections on mergers, joint ventures and exclusionary provisions. AAR, as a firm, endorses and supports the Law Council's submission and the views expressed in it. This submission involves complementary submissions to those expressed by the Law Council, taking into account, particularly, the firm's experience in acting for major Australian companies in relation to compliance with the Act and in relation to the ACCC's enforcement of the Act

and research in relation to overseas regulatory approaches to sanctions for breach of restrictive trade practices provisions.

As a firm, we have assisted a number of clients with the preparation of submissions to this Review Committee. Some of our clients have also expressed what appears to be a misconception, that in making submissions to this Review Committee they may be making themselves a target for retribution by the ACCC. This appears to be a reflection of community concern about the behaviour of the ACCC that may arise because the ACCC has not in the past sufficiently addressed concerns that have been expressed about its conduct.

1.2 Structure of submission

Our submission is structured in 3 parts.

Part A deals with the substantive restrictive trade practices provisions in Part IV and Part VII of the Act and discusses amendments to those provisions. Part B deals with the sanctions currently available for breach of the provisions of Part IV and discusses whether those sanctions are adequate or should be amended. Part C deals with the ACCC's enforcement of the Act and whether its powers should be strengthened. Part C also considers the ACCC's approach to enforcement of the Act and administration issues generally.

1.3 Glossary

In our submission the following terms have the following meanings:

- ***AAR*** means the national firm Allens Arthur Robinson and in particular the national competition law practice of the firm.
- the ***Act*** means the Trade Practices Act (Cth) 1974 as amended from time to time;
- ***ACCC*** means the Australian Competition & Consumer Commission;
- ***ALRC*** means the Australian Law Reform Commission;
- the ***DPP*** means the Commonwealth Director of Public Prosecutions;
- ***judicial review*** means proceedings for review of a decision under the Administrative Decisions (Judicial Review) Act 1977;
- the ***Law Council*** means the Law Council of Australia;
- the ***restrictive trade practices provisions*** means Part IV of the Act;
- the ***Review Committee*** means the Dawson Committee for the review of the Trade Practices Act (Cth) 1974;
- the ***Trade Practices Committee*** means the national Trade Practices Committee of the Business Law Section of the Law Council of Australia;
- the ***Tribunal*** means the Australian Competition Tribunal;

PART A: THE RESTRICTIVE TRADE PRACTICES PROVISIONS OF THE ACT – DO THEY NEED TO BE AMENDED?

This part is in 6 sections.

2. Section 45 (4D and 45A): Joint Ventures, exclusionary provisions and price fixing.
3. Section 46: Misuse of market power
4. Section 47: Exclusive dealing and third line forcing
5. Section 50: Mergers
6. Part VII: Authorisations
7. Section 48: Resale Price Maintenance

2. Sections 45(4D and 45A): Joint Ventures, Exclusionary Provisions and Price Fixing

2.1 Introduction

(a) Joint Ventures

Joint ventures make a valuable contribution to the Australian economy in that they allow the capital costs and risk associated with large scale projects, expansion into new regions and the development of innovative new products and ventures to be shared. As a result, their impact on the economy is often pro-competitive.

AAR is concerned that the current application of both of the per se prohibitions (on exclusionary provisions in s4D and price fixing in s45A) impedes the formation of pro-competitive joint ventures in Australia. This can make Australia a less attractive destination for companies considering launching new ventures.

As a general proposition, AAR submits that the terms on which parties agree to enter into joint ventures should be considered under a substantial lessening of competition test, rather than a per se test.

(b) Exclusionary Provisions

AAR is concerned that at present, there is a significant risk that many competitively neutral, or even pro-competitive arrangements, including joint venture arrangements, may breach the per se prohibition on exclusionary provisions (at least as that prohibition is currently interpreted by the Federal Court).

AAR submits that the scope of the prohibition on exclusionary provisions should be amended through three amendments to the Act:

- to require that the target of the provision be a competitor of one of the parties to the agreement;
- to provide a defence for agreements which do not have the purpose or effect of substantially lessening competition in a market; and

- to ensure that the 'class of persons' is defined by reference to a quality or attribute, and not merely by the fact of their exclusion.

(c) Price Fixing

Although there is an exception to the per se prohibition on price fixing for the joint setting of price by joint venturers, AAR submits that, as currently drafted, the exception is too narrow, and may not apply to many standard joint venture agreements to the extent that it is limited to agreements on price that relate to "goods jointly produced" by the joint venture. Further, in developing areas of the economy, like e-commerce, looser collaborative joint venture arrangements, which are difficult to fit into the terms of the current exemption, are becoming increasingly common vehicles for innovation and expansion.

2.2 Exclusionary Provisions

An exclusionary provision is defined in s4D as a *contract, arrangement or understanding* between persons, any two or more of whom are *competitive with each other*, which has the *purpose of preventing, restricting or limiting supply to or acquisition from a particular person or class of persons* by all or any of the parties to the contract, arrangement or understanding.[1] Exclusionary provisions are prohibited *per se* under s45(2)(a)(i) and s45(2)(b)(ii) of the Act.

On a plain reading, and as currently interpreted, this is a provision of broad application, which may apply to arrangements which have a competitively neutral or even pro-competitive effect on the market. Further, as the law currently stands, the prohibition on exclusionary provisions appears to threaten the legality of a range of agreements which were never intended to be caught by the prohibition, and which do not have the characteristics of a classic horizontal boycott. Specifically, AAR is concerned that, as interpreted in a number of cases, many of the provisions commonly included in joint venture agreements to ensure their efficient operation may be prohibited.

As these provisions commonly have no anti-competitive impact, considering them under a per se test creates obstacles for businesses located in Australia and discourages investment.

To the extent that s4D prohibits conduct that has no effect on competition, or indeed, may be pro-competitive, the per se prohibition is anomalous, and should be amended accordingly.

2.2.1 Current Interpretation of exclusionary provisions

Recent judicial consideration of the provision has interpreted the requirement that the restriction be aimed at 'particular persons' or 'particular classes of persons' very broadly, to a point where it might be suggested that a class of persons may almost be defined by the

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

fact of exclusion only.[2] The consequences of such an interpretation are, as Justice Heerey noted in *South Sydney*, that:

> *"competitors who enter into a partnership and agree to provide a lesser range of goods or services (or deal with a narrower range of customers) will have contravened s45(2). Nothing in the stated object of the Act ("to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection") would suggest such a startling result."*[3]

In addition, the requirement that the arrangement have the purpose of preventing, restricting or limiting supply or acquisition has also been interpreted in a way that potentially expands the operation of the provision. In *South Sydney* Merkel J held that although the ultimate purpose of the term (the end) was the achievement of a viable and sustainable national competition, its immediate purpose (the means) was to exclude any clubs in excess of the 14 selected to participate in the 2000 competition. This seems to confuse the purpose of the provision with its effect. The result of a strict application of this reasoning is that many provisions which are entered into with the primary aim of sustaining a viable joint venture may also involve what could be regarded as an immediate anti-competitive effect, which as currently interpreted exposes the companies involved to the possibility of a finding on purpose that can form the basis of an exclusionary provision in circumstances where it should not.

South Sydney is currently on appeal to the High Court and it is likely that the High Court will clarify these issues. The recent decision of the full Federal Court in *Rural Press*[4] is encouraging, as it supports the dissenting minority views of Heerey J in *South Sydney*. However, even on the assumption that the High Court clarifies the current interpretation of the law, AAR submits that the wording of the provision requires clarification.

2.2.2 Application to Joint Ventures

To ensure that a joint venture will be an efficient and competitive entity, it is AAR's experience, that parties proposing a joint venture commonly consider it necessary to include clauses which, under the law as currently interpreted, risk being found to be exclusionary provisions. For example:

- Joint venture parties commonly reach an agreement not to compete with the joint venture. Such clauses allow the joint venture to build up plant and facilities, trade secrets, customer lists and competitive initiatives, so that it is able to compete vigorously. Further, such clauses are commonly critical to creating sufficient confidence in the joint venture to induce the investment required for its establishment from the parties involved themselves and other third parties.
- In addition, parties often find it necessary to agree not to supply goods or services produced by the joint venture to a particular person. This may be because the

[2] See *South Sydney District Rugby League Football Club v News Ltd* (2001) 181 ALR 188 (***South Sydney***) and *ASX Operations Pty Ltd v. Pont Data Australia Pty Ltd (No. 1)* (1990) 27 FCR 460 (***Pont Data***).

[3] see n2 above

[4] Rural Press Ltd v ACCC [2002] FCAFC 213(***Rural Press***).

person had not invested in the joint venture facility, had not agreed to pay a price the joint venturers regarded as adequate or following a competitive tender for the sale of the joint venture's output in which the particular person was unsuccessful.

Nonetheless, on a strict application of the law, and as currently interpreted, restrictions of these kinds are potentially exclusionary provisions caught by the per se prohibition in s45(2)(a)(i).

If a joint venture agreement is caught by the prohibition, the only way around this is for the parties to seek authorisation. There are a number of disadvantages to the authorisation process, including the cost, its public process, and the fact that applications can involve up to a two year delay. (This is discussed further in section 6 below) Third parties can use the process to delay competitors' transactions, and can also benefit from the information which the parties seeking authorisation are required to make public. This option is commercially unattractive, and in the context of many transactions, impractical. Clients are reluctant to embark on this course, preferring in the main to abandon the venture for an easier investment option. Australia loses out in the result.

Further, AAR submits that authorisation is a fundamentally inappropriate process for dealing with agreements that have no adverse effect on competition, as it begins from an assumption of detriment, and looks for public benefits to balance this.

2.2.3 History and Position Overseas

(a) History

The per se prohibition on exclusionary provisions, as currently drafted and interpreted, does not accord with the intentions of the Swanson Committee, at whose recommendation it was introduced, in a number of fundamental respects.

The Swanson Committee recommended the prohibition of collective boycotts if they had *"a substantial adverse effect on competition between the parties to the agreement or any of them or competition between those parties or any of them and other persons."*[5] Unfortunately, this requirement of an effect on competition was not incorporated into the legislation.[6]

AAR submits that such a requirement would have helped to focus the operation of the provision on competitively harmful agreements, and was a critical element of the reforms recommended by the Swanson Committee. AAR submits that this is an important indicator that the provision should be reconsidered.

The current per se prohibition on exclusionary provisions is also inconsistent with international practice.

[5] Trade Practices Act Review Committee, Report to the Minister for Business and Consumer Affairs, August 1976 (the ***Swanson Committee Report***) at 4.116

[6] It is not clear why the additional requirement was not incorporated into the final draft of s4D, and no mention is made in the Explanatory Memorandum or the Second Reading Speech about the removal of this requirement.

(b) US Position

An important motivation for the original introduction of the *per se* prohibition on exclusionary provisions was that it would bring the Act into line with the US position on collective boycotts. However, the definition of exclusionary provision in s4D differs quite substantially from the US concept of a collective boycott, which has recently been described as a situation where *"a group of competing suppliers came to a mutual understanding that they would restrict sales to a distinct target group, withholding merchandise that directly competes with that sold to favoured customers".*[7]

Further, the treatment of exclusionary provisions under s45(2)(a)(i) is far less flexible than the approach adopted in US case law in relation to collective boycotts, as set out in *California Dental Association v FTC*:[8]

> *"The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear. We have recognised, for example, that "there is often no bright line separating* per se *from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "*per se*" condemnation is justified. 468 U.S. at 104, n. 26. "Whether the ultimate finding is the product of a presumption or actual [*780] market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." 468 U.S. at 104. Indeed, the scholar who enriched antitrust law with the metaphor of "the twinkling of an eye" for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a 'spectrum' of adequate reasonableness analysis for passing upon antitrust claims: "There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for . . . . Nevertheless, the quality of proof required should vary with the circumstances."*[9]

In general, collective boycotts are only prohibited *per se* under US law when they are either an attempt by competitors with market power to eliminate a competitor or are designed to fix prices. In all other circumstances, they are subjected to rule of reason analysis, which requires consideration of the competitive impact of the agreement.[10]

(c) New Zealand

In New Zealand, although the *Commerce Act 1986* originally picked up the same statutory language as s4D, in its s29, the New Zealand Parliament has

---

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

[8] 119 SCt 1604.

[9] *P. Areeda, Antitrust Law P1507, p. 402 (1986).*

[10] See n6; *Northwest Wholesale* (1985) 105 SCt 2613.

subsequently made two relevant amendments, to better target true boycott behaviour and limit the application of the provision to arrangements that should be assessed for their market impact.

First, in 1990, Parliament added an additional requirement that the provision in question targeted a competitor of one or more of the parties to the agreement, on the grounds that this reflected US law, and was the only form of conduct appropriate for *per se* examination.[11]

Most recently, in May 2001 a defence was introduced for agreements which do not have the purpose, effect or likely effect of substantially lessening competition in a market that is real or of substance,[12] to exclude the possibility that it could be taken to apply to pro-competitive arrangements.[13]

(d) European Position

In Europe, restraints on trade flowing from collaborations between competitors will essentially only be illegal under Article 81(1) if they have the effect or likely effect of restraining trade between member states. Importantly however, the European Commission can declare that article 81(1) does not apply where an agreement contributes to the production and distribution of goods, technical or economic progress, while delivering a "fair share" of the resulting benefit to consumers. Further, specific block exemptions have been introduced to deal with specific types of collaborative agreements, like specialisation and R&D agreements, in the recognition that they are generally pro-competitive.

(e) Consistency with international position

AAR is of the view that it is important for Australian competition law to be consistent with the law in other jurisdictions wherever possible. The Australian economy is relatively small, and it is important that we should benefit from the competitive analysis in other jurisdictions. Further, where an inconsistency in our law creates a situation whereby firms seeking to operate in Australia face barriers they would not face in other jurisdictions, they may be forced to structure their operations inefficiently, or alternatively, to locate their operations offshore. Both of these alternatives have negative implications for the Australian economy.

2.2.4 Recommendations

AAR has formed the view that the *per se* prohibition on exclusionary provisions needs to be amended to exclude its operation on agreements which have no anti-competitive effect in the market.

---

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

[12] Section 29(1A) Commerce Act 1986 (NZ).

[13] Explanatory Memorandum to the Commerce Amendment Bill 1999 (1999B296-2) (NZ).

AAR endorses the Law Council's submission and recommends that s4D should be amended to incorporate both of the reforms that have been introduced into the corresponding New Zealand provision.

First, the scope of s4D should be limited, so that the provision must be targeted at a competitor of one or more of the parties. This would restrict the operation to agreements that are more likely to be of competitive concern. This could be done by inserting an additional subparagraph into s4D(1), which could read:

> ***"(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."***

In addition, a defence should be inserted, to allow parties to an agreement which includes an exclusionary provision to demonstrate that the agreement does not substantially lessen competition and should not be prohibited. This would also help to bring the Australian law on this issue into line with the position in the US and Europe.

AAR supports the Law Council's submission that this should 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."***

These amendments would not only implement good public policy, they would also be consistent with Australia's obligations to harmonise business law, including specifically competition law, as agreed during the 1988 review of the Australia and New Zealand Closer Economic Relations Trade Agreement (**ANZCERTA**) agreement between Australia and New Zealand.

AAR also supports the Law Council's submission that, given the expansive interpretation of "class of persons" in recent case law, depending on the outcome of the High Court's decision in *South Sydney*, it would 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 the class of persons was defined by reference to the restriction, and was the 'target' of that restriction.

Not only would these amendments bring the prohibition on exclusionary provisions back to the sort of boycott behaviour that was intended to be restrained by the provision, it would also bring Australian law into line with the state of the law in other jurisdictions.

2.3 Prohibition on Price Fixing

AAR is also concerned that despite the specific joint venture exemption, many joint venture agreements may technically fall foul of the per se prohibition on price fixing in s45A.

Section 45A(1) creates a *per se* prohibition for provisions of a contract arrangement or understanding that have the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services supplied or acquired by the parties to the contract, arrangement or understanding in competition with each other.

In many joint venture arrangements, the parties each physically take production from the joint venture separately and sell that production separately. As a result, they are regarded as competitors for the purposes of s45A, and any agreement between them about the price at which they will sell the output of the joint venture risks being a per se breach of s45.

2.3.1 Joint Venture Exemption

The Act provides a specific exemption for joint ventures from the per se prohibition on price fixing, in recognition of the fact that they will often involve no restrictions or only minimal restrictions on competition, and make a positive contribution to the Australian economy.[14] The Swanson Committee, at whose recommendation the exemption was introduced, expressed the view that it:

"would not wish the law to frustrate the formation of joint ventures which provide the ability to embark on a project of development which may be desirable in the public interest and which would not otherwise be undertaken."[15]

Where arrangements are able to fall within the exemption, they will still be assessed under the general substantial lessening of competition test in s45.

However, AAR submits that the exemption, as currently drafted, may be too narrow to achieve its policy objective. First, the requirement that the agreement on price be made "**for the purposes of a joint venture** … [and relate to the sale] of goods **jointly produced** by those parties in pursuance of the joint venture" may limit the application of the exemption to many standard joint venture agreements, where joint sales and marketing are not governed by the joint venture agreement, but rather under a separate agreement. Secondly, the exemption may be inapplicable to emerging forms of collaboration, which are less structured than the traditional resources-based joint venture model, but which, from a policy perspective, still offer the same positive economic contributions, and as a result, are appropriately treated under a substantial lessening of competition test.

[14] n4 at page 4.71.

[15] n4 at page 4.79.

(a) Current Provision

The current joint venture exemption is contained in s 45A(2), which relevantly provides:

"Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at … for the purposes of a joint venture to the extent the provision relates or would relate to:

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

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

(c) in the case of a joint venture carried on by a body corporate … :

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:

(A) a person who is the owner of shares in the capital of the body corporate; or

(B) a body corporate that is related to such a person."

(b) "For the purposes" limitation

On a strict reading, there is a possibility that the requirement that the agreement on price be made "**for the purposes** of a joint venture … [and relate to the sale] of goods **jointly produced** by those parties in pursuance of the joint venture" may limit the application of the exemption to many, if not all, standard joint venture agreements.

In many cases, a production joint venture agreement will not provide for joint marketing. Rather, sales and marketing activities will be carried out pursuant to a separate arrangement, possibly by a separate company, owned by the joint venture participants in the same proportions as their interests in the joint venture. That company may then either sell as the agent of the joint venture participants, or alternatively, as a principal. As the exemption is currently worded, it is not clear whether these sorts of sales and marketing arrangements can be said to have been made "for the purposes of" the production joint venture or relate to the sale of "goods jointly produced".

Where the sales company is selling as principal not as agent, there is also an argument that the supply is not a supply **by the parties to the joint venture** as required by s45A(2)(a).

AAR submits that the joint venture exception should apply wherever joint venture partners reach agreement about the price at which they will sell the output of the joint venture or the price at which a company owned by them (and only by them) in their joint venture proportions will sell the output of the production joint venture. This would enable joint ventures to be structured in the most efficient manner without unnecessary and excessive overarching agreements being required to ensure compliance with an inadequately drafted provision. Such agreements would still be caught by the general substantial lessening of competition test in s45 if their effect was anti-competitive.

(c) Recommendations

AAR recommends that the joint venture exemption in s45A(2) should be amended so that it reads:

"Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, to the extent the provision relates or would relate to:

(a) the supply by two or more of the parties to a joint venture, or the supply by a body corporate owned by two or more of the parties to a joint venture and no other persons, of goods jointly produced by the parties in pursuance of the joint venture;

(b) the supply by two or more of the parties to the joint venture, or the supply by a body corporate owned by two or more of the parties to a joint venture and no other persons, of services made available as a result of, the joint venture; or

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

"(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:

(A) a person who is the owner of shares in the capital of the body corporate; or

(B) a body corporate that is related to such a person."

(d) Collaborative Joint Ventures

Particularly in areas of innovative growth, like e-commerce, it is becoming increasingly common for joint venture parties to adopt looser collaborative arrangements.

The current joint venture exemption is based on the Swanson Committee's consideration of traditional resources based joint ventures, in which the parties pool resources to jointly produce and supply a product. Newly emerging forms of collaboration will not necessarily involve either a pooling of resources or a joint supply, however, like traditional joint venture arrangements, their contribution to the Australian economy is commonly pro-competitive. Indeed, from a commercial perspective, these arrangements will often be the only vehicle through which new products or services can be developed, or companies can expand into new markets.

AAR submits that these joint venture collaborations should be afforded the same protection from the per se prohibition on price fixing as standard joint venture agreements, as they offer the same potentially pro-competitive economic benefits. As they will still be subject to the substantial lessening of competition test, where they do involve anti-competitive restrictions on competition, such arrangements will still be caught by the substantial lessening of competition test in s45.

Although it has been suggested that those joint venture collaborations which are not able to come within the current exemption, should be required to seek authorisation, as discussed above, this outcome is undesirable in our view. Especially for innovative new businesses, in emerging areas like e-commerce, going through the process of authorisation in Australia is inefficient when they can simply set up the site overseas without it. AAR submits that the predominantly pro-competitive contributions made by these arrangements, especially in terms of innovation and expansion into new markets, should be recognised by treating them in the same way as standard joint venture agreements. If the wording of the current exemption is amended, it should apply to these sorts of arrangements as well.

(e) Recommendations

AAR has formed the view that collaborative joint venture arrangements between competitors should be subject to a competition test. This exemption should apply to both of the per se prohibitions (price fixing under s45A and exclusionary provisions under s4D and s45(2)(a)(i)) and, as the Law Council has submitted, should adopt similar principles to those of the US Antitrust Guidelines for Collaborations Among Competitors and the US Doctrine of Ancillary Restraints. These 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..."

AAR supports the submission of the Law Council that the exception could be worded as follows:

"Section 45(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."

2.3.2 Input Supply Agreements

AAR adopts the submissions of the Law Council in relation to input supply agreements. We agree that the Act should not interfere with legitimate arrangements to obtain an input supply merely because the parties are competitors in a downstream market.

Section 45A should be amended to insert an additional interpretative subsection which provides that:

"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.

2.4 Joint Advertising Exception

AAR also adopts the Law Council's recommendation of a technical amendment to the joint advertising exception, as the exception for price fixing associated with joint advertising does not seem to appropriately exempt any agreement about the price of the actual resupply of the goods or services.

AAR concurs with the Law Council's 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."

2.5 Dual listed companies (DLCs)

DLC's are becoming an increasingly common means of merging companies, particularly very substantial companies, because of the significant benefits this form of merger delivers to shareholders.

As submitted by the Law Council, AAR strongly believes that the law should be amended to ensure that DLC parties are treated as related bodies corporate, and thus as a single economic entity.

3. Section 46: Misuse of Market power

3.1 Overview

AAR embraces the views expressed in the submission on this issue prepared by the Law Council.

We wish to make a few complementary remarks concerning s46 and the proposals for its reform.

In our view there is no persuasive evidence that the section is not working well. Indeed, the contrary appears to be the case as a number of recent cases involving the Federal Court, the Full Federal Court and the High Court of Australia have illustrated. In addition, the existence of s51AC of the Act, which prohibits unconscionable conduct in relation to small business, now provides additional and seemingly adequate avenues both for the ACCC and others to pursue remedies, thereby ensuring that the small business sector is adequately protected by the current regime. In this context it is important to note that the ACCC has the power to bring representative proceedings on behalf of small businesses which allege that they have been dealt with unfairly (in the context of the legislation), and representative actions are now available for breaches of part IV of the Act.

Section 46 in its current form, and its application and construction in recent cases, is consistent with the policy objectives of s46 enunciated in the various cases. The more recent cases demonstrate that both s46 and its principles are clear and effective. There are also two appeals which have been heard by the Full Federal Court and the High Court, in which judgments are expected shortly, and which should provide further important judicial guidance on the interpretation of s46. It would be prudent to assess the approach taken by the relevant appeal courts in these cases before considering any substantive reassessment of s46.

These recent cases illustrate a maturity in the judicial evaluation and interpretation of s46. They also demonstrate that both s46 and its principles are clear and effective. It is our view that, unless the outstanding judgments in these cases illustrate defects in the section, there is no reason to amend the section.

Changes suggested by both the ACCC and others which would:

- **introduce an 'effects' test to replace the 'purpose' element currently contained in s46;**
- **involve a reversal of onus of proof in relation to 'purpose';**
- **see the introduction of a divestiture remedy if a breach of s46 is proved; or**
- **introduce 'cease and desist' power be exercised by the ACCC,**

are neither necessary nor appropriate at this time.

(The divestiture remedy is discussed in section 14 and cease and desist powers are discussed in section 16 below).

3.2 Object of s46

The object of s46, when taken together with other major provisions of the Act including s51AC, can be said to encourage corporations (and others) to engage in competitive behaviour, which may at times be ruthless and aggressive, so long as this activity is not engaged in for anti-competitive purposes or is not unfair or unconscionable . This philosophy was well described in judgments of the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd*.[16] In *Qld Wire* Mason CJ and Wilson J stated:[17]

> *"The object of s46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to an end. Competition is by its very nature deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. This competition has never been a tort….and these injuries are an inevitable consequence of the competition s46 is designed to foster".*

Further, Deane J stated:[18]

> *"The objective is the protection and advancement of a competitive environment and competitive conduct."*

This philosophy of s46 was further reinforced in *Eastern Express Pty Ltd v General Newspapers Pty Limited*[19] where Lockhart and Gummow JJ stated that:[20]

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

The recent High Court decision in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[21] confirmed that the mere attainment of a substantial market share, and the steps taken by a corporation to protect that market share is not of itself a contravention of s46. The High Court reaffirmed that the essence of the prohibition is that a corporation may not use that market share for one of the anti-competitive purposes set out in s46(1). Even more recently the Full Court of the Federal Court in *Rural Press* held that while certain aspects of behaviour by the applicant may have been open to some criticism, it had not taken advantage of its market power for a purpose that would amount to a contravention of s46.[22] *Rural Press* highlights that the current form of s46 achieves its desired objective and that ultimately it is the relevant facts of a case that will govern whether there is a finding of a breach in any particular case.

---

[16] (1989) 167 CLR 177 (***Qld Wire***).

[17] n15 at page 191.

[18] n15 at page 194.

[19] (1992) 35 FCR 43 *(**Eastern Express**)*.

[20] n18 at page 58.

[21] (2001) 25 ALJR 600 *(**Melway**)*.

[22] n20 at paragraphs 142 – 151.

The proposed changes supported by the ACCC (see paragraph 3.5 of the ACCC submission to the Review Committee) would link the effects test to the specific paragraphs of s46(1) of the Act, rather than bringing s46 in line with other provisions of the Act which prohibit agreements or conduct that have the effect of substantially lessening competition in a relevant market(s). This would have the undesirable effect of punishing corporations which engaged in aggressive and ruthless behaviour as endorsed by the High Court in *Qld Wire,* and would also have a chilling effect on competitive business behaviour, thus reversing the policy underpinning the section as recognised by the courts. Furthermore, any change to the section will take time to be understood and interpreted by the ACCC, private parties and by the courts. This will lead to further uncertainty at a time when there is still a developing maturity in the interpretation in s46, and when the community has gained some confidence that the interpretation of this section is providing a clear set of rules relating to competition.

Furthermore, there are other aspects of the section that are yet to be fully tested, in particular s46(7) (which is discussed in section 3.4.1 below), and as noted earlier s51AC provides additional comfort and assistance to small business who complain that they cannot obtain appropriate relief in relation to unfair behaviour in the market. This section has only been available for less than four years and AAR believes that it must be given time to be utilised by both the ACCC and private litigants.

3.3 The development of s46

A number of recent cases which interpret s46 as amended in 1986[23] have demonstrated that the operation of s46 is consistent with its objectives. These recent cases include:

- *Melway*;
- *Rural Press*;
- ACCC v Boral Besser Masonry Limited & Ors;[24]
- NT Power Generation Pty Ltd v Power and Water Authority;[25]
- ACCC v Universal Music Australia Pty Ltd;[26] and
- ACCC V Australia Safeway Stores Pty Limited.[27]

Whilst not all of these cases have resulted in success for the applicant (whether the ACCC or a private litigant), they do illustrate that s46 is an effective tool in regulating anti-competitive behaviour.

[23] s46 of the Act was amended in 1986 with the introduction of a lower threshold of a substantial degree of power in a market.

[24] (2001) AIPR 41-803 *(Boral)*.

[25] [2001] FCA 334 *(NT Power)*.

[26] [2001] FCA 1800 *(Universal Music)*.

[27] [2001] FCA 1961 *(Safeway)*.

3.4 Suggested changes to s46

As stated in section 3.1 AAR does not support any of the proposed amendments to s46.

3.4.1 The effects test

The introduction of an effects test has often been proposed as a way of helping with the perceived difficulties that an applicant bears in making out a breach of s46, or as providing a more appropriate method of delineating between legitimate competitive conduct and anti-competitive conduct. On the contrary, the introduction of an effects test, especially as enunciated by the ACCC in its submission to the Review Committee, would damage competition by punishing successful and efficient businesses for engaging in normal competitive behaviour.

The ACCC has stated that its preferred formulation is an effects test based on the current paragraphs (a), (b) and (c) of s46(1) of the Act.[28] In particular, the ACCC has suggested that an effects test be incorporated into s46 by retaining the existing purpose test and incorporating an effects test in addition to, and in the same terms as, the existing purpose test.[29]

AAR's view is that an effects test drafted in the terms suggested by the ACCC would be extraordinarily damaging to the competitive environment. It would outlaw legitimate competitive behaviour and most likely to result in successful and efficient businesses being punished for engaging in normal competitive behaviour. This outcome is contrary to the desired objective of promoting the vigorous competition that s46 is intended to achieve.

Assuming that the Review Committee contemplates introducing an effects test in a different form to that proposed by the ACCC, there are other arguments which we put forward in opposition to it. Two main problems are likely to arise if an effects test is introduced:

- An effects test would encompass behaviour that may have an adverse impact on a competitor rather than on competition. This would be the result of this section regardless of the legitimate purpose behind the relevant behaviour. Other provisions of the Act which contain an "effects test" measures this in the context of competition being substantially lessened, not by reference to the impact on an individual competitor. The objective of the current s46 is to encourage pro-competitive conduct even though individual competitors may get damaged. An effects test drafted in the form favoured by the ACCC would not only prevent this philosophy from being facilitated, but would make it extraordinarily difficult to distinguish between pro-competitive and anti-competitive behaviour by corporations in many circumstances. It would be very difficult to give legal advice which drew a line between conduct which fell outside of an effects test and conduct caught by an effects test.
- An effects test would cause considerable uncertainty. The change would lead almost to a complete reversal of the current interpretation that has been formulated by the courts and in particular by the High Court of Australia. It would create

[28] Submission of the ACCC to the Review Committee at page 94.

enormous business and other expense as the community has to adjust to dealing with the provision that was being introduced with no discernible evidence of the need for such change. Such a change would also send a very confusing message to the business community as a whole. It could also result in a stagnation of business activity as companies prefer not to innovate or change their behaviour because of the uncertainty. It is interesting to note that there are many organisations which represent small businesses and which have expressed concerns at the possible introduction of an effects test. AAR echoes those concerns.

The operation of s46 in encouraging aggressive competition that is not unfair, anti-competitive or unconscionable is complemented by s51AC of the Act. Section 51AC provides significant opportunities to the ACCC and private litigants[30] to seek remedies in appropriate circumstances by extending the unconscionable conduct provisions of the Act to business transactions involving the supply or acquisition of goods or services under $3 million[31]. As noted earlier, this provision has only been in place for a short period of time (since July 1998) and should be given an opportunity to be tested, not only by the ACCC which has been encouraged to bring proceedings under this section in the appropriate circumstances, but also by private litigants. AAR emphasises that the ACCC does have the ability to bring representative actions not only in relation to s51AC breaches but now also in relation to breaches of s46.

Finally, although most aspects of s46 have now been explored in some detail by the courts, the effectiveness of s46(7) has yet to be fully explored in the courts. Section 46(7) of the Act permits purpose to be ascertained through inference from the conduct of the corporation or any other person or from any other relevant circumstances. However, this provision has not been extensively considered.

An effects test should only be considered if s46 is fully tested and proven to be ineffective as a tool in preventing conduct that is anti-competitive, unfair or unconscionable. This is clearly not the case at this time.

3.4.2 Reversal of the onus of proof

To reverse the onus of proof for the purpose element of s46 would potentially require a corporation with a substantial degree of market power to justify all of its competitive conduct against an allegation of a misuse of that market power.

It is a fundamental tenet of the common law system that a person is innocent until proven guilty. The general rule at common law is that the onus of proof lies on the party making the allegation of unlawful conduct.[32] Therefore, significant policy reasons must exist for legislation to effect a reversal of the onus of proof in a particular context.

---

[29] n27 above.

[30] The "definition" of unconscionable conduct in s51AC is very wide.

[31] There are limitations on the use of this provision.

[32] See for example *Ex parte Ferguson; Re Alexander* (1944) 45 SR NSW (64).

AAR does not believe that any significant policy reasons exist to warrant a reversal of the onus of proof in s46 with respect to purpose.

Section 46 carries with it the prospect of heavy pecuniary penalties and significant negative publicity. As a matter of fairness, the ACCC and other applicants ought to be required to plead a positive case and present evidence to prove it. The Law Council, in its submission to the Review Committee, notes that the ACCC rejects in principle the reversal of onus of proof in its consideration of the National Electricity Code Administrator's proposal to reverse the onus of proof for generators in the context of bidding and re-bidding.[33]

The ACCC has complained that in the absence of any 'smoking gun' documents, proving a relevant purpose under s46 on the balance of probabilities is an onerous evidentiary process.[34] Despite the ACCC's assertion that applicants face serious difficulty in proving purpose, there is no compelling evidence of this difficulty, particularly in light of the following:

- All proceedings brought under s46 are civil proceedings to which the rules of civil procedure and civil burden of proof apply.
- The ACCC in *Universal Music* and *Safeway* was able to establish the existence of a proscribed purpose on the strength of inferences from the conduct concerned. Further, in *Boral* purpose was established by reference to internal strategic planning documents which were produced to the ACCC pursuant to its powers under s155 of the Act.
- Private litigants appear to have had little difficulty in establishing the proscribed purpose in appropriate cases. A proscribed purpose was found by the court in *Qld Wire*, *Taprobane Tours WA Pty Ltd v Singapore Airlines Limited*[35] (at first instance, the decision was reversed on appeal on different grounds), and *Melway*, among other matters.[36]
- Section 4F(1)(b) and 46(7) of the Act make it clear that a proscribed purpose may be established by direct evidence or by inference from the conduct of the corporation, and that the proscribed purpose need only be a substantial purpose among several purposes of particular conduct.

---

[33] Submission of the Law Council to the Review Committee at 2.5.

[34] Hansard, Legal and Constitutional References Committee of the Senate, Public Hearings, Melbourne 17 April 2002 at p3, evidence of Professor Fels, Chairman of the ACCC.

[35] (1990) 96 ALR 405.

[36] n31 above.

- The ACCC has extensive investigative powers under s155. These powers provide the ACCC with opportunities to compel a corporation to supply the ACCC with information and other documents which may be helpful in proving that a corporation acted for an anti-competitive purpose. The ACCC used this power in its investigations prior to several s46 prosecutions including *Boral, Safeway, Rural Press and Universal Music*.

4. Section 47: Exclusive Dealing

4.1 Introduction

Third line forcing, supplying a product on condition that the customer also acquires a second product from another person, is a form of exclusive dealing, prohibited by s47 of the Act. However, unlike other forms of exclusive dealing, third line forcing is prohibited per se, without the need to prove any anti-competitive effect or likely effect.

In our view, the anomalous position where third line forcing is prohibited per se can no longer be justified and accordingly the Act should be amended so that third line forcing would only be prohibited if it were anti-competitive. This recommendation is consistent with the recommendations of the Law Council, which has been advocating for this change for many years. The adoption of such an amendment would remove an existing unnecessary constraint on business and would reduce the cost of compliance. Our proposed amendment would also relieve the ACCC of its present unnecessary work load of examining all third line forcing notifications to see whether they ought to be allowed to stand or should be revoked.

Section 47 should also be amended to resolve the further anomaly between that section and the rest of the Act by reintroducing a related company exception for third line forcing conduct. The absence of such an exception means that the legality or otherwise of a supplier's arrangements with its customers may depend entirely on the supplier's corporate structure rather than on the substance of the arrangement with its customers.

4.2 History

Third line forcing has been prohibited per se since the introduction of the Act in 1974. There is little explanation as to why this approach was taken, other than in the Second Reading Speech where it was stated that forcing another maker's product was,

> often done pursuant to arrangements under which the supplier obtains a commission or other benefit on sales by the third person to the supplier [37]

Around that time, it was a common practice among financial institutions, banks and building societies to make mortgage monies available to home owners on condition that the mortgagor take out home and contents insurance with an insurance company nominated by the financial institution. The banks would receive commissions or other benefits from the nominated insurance companies in return for insisting that their borrowers insure with those companies. Building Societies likewise received commissions from those insurance companies or, in many cases, the insurance companies provided substantial capital sums to the Building Societies which they then lent on mortgage to members of the Building Society. That tied lending practice, which was rife in the 1960s and 1970s, clearly reduced competition in the home insurance market, where a large proportion of home owners had no choice for home and contents insurance. That may explain the rationale for making third line forcing a per se prohibition in 1974.

[37] Hansard, Volume 89, page 229 16 July 1974.

Third line forcing was reviewed in 1976 by the Swanson Committee[38], which said that while the practice of forcing another person's product may be justifiable in certain cases, the practice will, in virtually all cases have an anti-competitive effect. Authorisation for such conduct was available on public benefit grounds, but because of the view of the Swanson Committee, full line forcing remained a per se prohibition.

It should be noted, however, that the re-written s47 introduced in 1977 as a result of the Swanson Committee recommendations[39] contained an exception for related companies, ie. requiring a customer to purchase a product from a company related to the supplier did not constitute third line forcing. For reasons which are now obscure, that related company exception was repealed in 1978.[40]

Third line forcing was again reviewed by the Hilmer Committee[41] which recommended that third line forcing should not be a per se prohibition, but should be subject to a competition test. In discussing the reasons why the per se prohibition should be removed, the Hilmer Report stated[42]:

> *"…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."*

Further on, the Hilmer Report stated:[43]

> *"…in some cases third-line forcing will be less restrictive than full-line forcing conduct. It is anomalous that a supplier tying in favour of a wholly owned subsidiary, or related company, is subject to a per se prohibition, but a supplier tying in favour of one of its divisions is subject only to a competition test."*

The Hilmer Report recommended that third line forcing should only be prohibited if it substantially lessened competition. The report also recommended that notification, which was available for vertical restraints other than third line forcing, should be extended to third line forcing.

As the Hilmer Report pointed out, Australia appears to be unique in its per se prohibition of third line forcing. In the United States, third line forcing is, like full line forcing, considered under the rule of reason, except to the extent that for third line forcing to be found illegal, it must also be demonstrated that the tying firm gained an economic advantage from the tie, a requirement which is always met when a firm is tying its own product.[44] Although New Zealand has adopted the vast majority of the provisions of the Act, on the issue of third line

---

[38] n4 above.

[39] *Trade Practices Amendment Act* 1977 (No. 81 of 1977).

[40] *Trade Practices Amendment Act* 1978 (No. 206 of 1978).

[41] National Competition Policy Review, report dated 25 August 1993.

[42] n40 at page 52.

[43] n40 at page 53.

[44] *Ohio-Sealy Mattress Manufacturing Co v Sealy Inc* F 2d 821 (1978).

forcing, it has instead adopted an approach similar to that of the EU and Canada, where vertical agreements like third line forcing are only prohibited where there is an adverse effect on competition.

For reasons which are not clear, when the Act was amended following the Hilmer Report, through the *Competition Policy Reform Act* 1995, notification was introduced for third line forcing but the per se prohibition remained.

Following the 1995 amendment, the current position is that third line forcing remains the only type of exclusive dealing conduct which is prohibited per se, although since 1995 protection can be gained through notifying that conduct to the ACCC. The per se prohibition of third line forcing applies whether or not the supplier of the second product is a related party to the supplier of the first product.

4.3 The per se prohibition in practice

The prohibition of third line forcing conduct regardless of its effect on competition has sparked a number of different solutions to enable pro-competitive or competitively neutral third line forcing to take place without contravening s47.

Judicial interpretation of the third line forcing provisions has enabled some third line forcing conduct to escape the prohibition simply by the way the arrangement is structured. In *Castlemaine Tooheys*[45] the High Court found that while a brewery which required its customers to use a nominated transport company to have that beer delivered to the customer would be engaging in third line forcing, if the brewery sold the beer on a delivered basis (using a particular delivery company), that did not breach s47(6). In that case, a change to the accounting arrangements between the brewery and its customers was sufficient to overcome the prohibition of third line forcing.

Similarly, in the *Paul Dainty* case[46] the Court held that parties wishing to use the Melbourne Tennis Centre could be required to use the booking service operated under contract to the Tennis Centre by a third party, because the Tennis Centre was providing a combined product of a fully ticketed venue rather than a venue supplied on condition that the third party ticketing service also be used.

While judicial interpretation has enabled the Courts to avoid applying the per se prohibition in circumstances where there are no appreciable effects on competition, this is not a satisfactory outcome. It is not appropriate for persons wishing to make particular commercial arrangements to rely upon the Courts adopting an approach which looks at the particular structure of the arrangement rather than the reality and the effect of that arrangement, to avoid breaching s47.

One response from the commercial world to the third line forcing anomaly has been, since 1995 to lodge a significant number of notifications with the ACCC for third line forcing conduct. This provides protection to enable the party notifying the conduct to engage in that third line forcing, but is an administrative and financial burden both on industry and

[45] *Castlemaine Tooheys v Williams & Hodgson Transport Pty Ltd* (1986) 162 CLR 395.

[46] *Paul Dainty Corporation Pty Ltd v National Tennis Centre Trust* (1989) ATPR 40 – 951.

government. There is expense for a company contemplating a third line forcing arrangement, where it will typically incur costs in seeking legal advice and then further costs in lodging a notification with the ACCC. From the ACCC's point of view, the number of third line forcing notifications requires it to devote significant resources to examining and assessing those third line forcing notifications. Yet of the hundreds of third line forcing notifications made to the ACCC since the procedure become available in 1995, only one notification has ever been revoked by the ACCC as having insufficient public benefits.

The ACCC itself seems to regard the third line forcing per se prohibition as an anomaly, since its stated policy is, in effect, to ignore third line forcing conduct engaged in by small or medium businesses. In a 1997 press release, the ACCC stated:

> "*..where the practice is being undertaken by a large business such as a major supermarket chain or a large oil company, the ACCC would expect notification under s93. However as the ACCC's letter to the small Victorian retailer indicates, it is not requesting notification from small players nor will it take any legal proceedings*.[47]"

The ACCC has also stated in its third line forcing guideline[48] that it is unlikely to pursue third line forcing conduct which does not have anti-competitive effects. The guideline states:

> *"..third line forcing conduct under which customers can buy the package of products A and B at a real saving on the total price of the products bought separately in competitive markets, has positive benefits in terms of competition and consumer welfare and would not be opposed by the Commission."*

The difficulties with the existing anomalous position of the *per se* prohibition of third line forcing are, in summary;

- many instances of third line forcing are benign or provide benefits to consumers (eg, loyalty programs);
- while the Courts have, to date, adopted a benevolent approach in interpreting s47(6) and (7), that interpretation cannot necessarily be relied on in the future;
- to obtain protection, those wishing to engage in third line forcing which has neutral or pro-competitive effect, are required to notify that conduct to the ACCC, with all the costs and use of resources that entails;
- the ACCC has said that it in effect ignores third line forcing conduct by small businesses, notwithstanding that it may be in clear breach of the Act;
- the ACCC's approach differentiates between big business (which is expected to notify the conduct) and small business (which is not);
- while the ACCC may not necessarily take action against third line forcing conduct, private litigants may pursue breaches of s47(6) and (7) regardless of the effect of the conduct on competition.

[47] ACCC Media Release 100/97, 14 August 1997.

[48] *Guide to authorisation and notification for third line forcing conduct* ACCC Feb 1998.

Recommendation – Competition Test

It is recommended that the prohibition of third line forcing in s47(6), (7), (8)(c) and (9)(d) be made subject to the competition test which applies to other exclusive dealing conduct. This can be achieved by a simple change to s47(10) and would remove the existing anomaly.

Such a change would provide uniformity within s47, make the exclusive dealing provisions simpler and easier to enforce and administer and remove unnecessary costs and unnecessary uncertainty for business. To the extent that there still exists any problem about secret commissions (which was a motivating factor when the per se prohibition was originally introduced) those issues are dealt with specifically by the criminal law or other legislation such as corporations law.

Recommendation - Related Company Exemption

In addition to the removal of the per se prohibition on third line forcing and the introduction of a competition test, there should also be introduced an exception for third line forcing in relation to the products of a related company.

Such an exception would overcome the second anomaly in third line forcing, whereby a company may quite lawfully sell a product on the basis that the purchaser must buy another product from the company, but if the business is structured so that the second product is supplied by a subsidiary company, that would constitute third line forcing and is currently illegal. The reintroduction of a related company exception in sections 47(6) and (7) would make s47 internally consistent with s47(8)(c) and s47(9)(d) and consistent with s45 which provides, in s45(8), an exception from that section for contracts, arrangements or understandings between related bodies corporate. This is not presently achieved by s47(12).

4.4 Exclusive Dealing Overlap

(a) Introduction

AAR submits that clarification is needed in relation to the overlap between exclusionary provisions and exclusive dealing. We recommend that the Act should be amended to make it clear that all exclusive dealing conduct is to be regulated by s47, regardless of whether it involves a supply or offer to supply or an acquisition or offer to acquire.

(b) The Scope of s47

Section 45(6) of the Act exempts provisions from the operation of the *per se* prohibition to the extent that they can be characterised as exclusive dealing under s47 and become subject to a *substantial lessening of competition* test.

In *ACCC v. Visy Paper Pty Ltd*,[49] the Federal Court was asked to decide whether the proper characterisation of a non-compete clause which provided that NPP was not to collect waste paper from any customers of Visy was that it prohibited both the provision of recycling services and the acquisition of goods. Second, if that was in fact the correct

[49] [2001] FCA 1075 (***Visy***).

construction, whether the exception in s45(6), operated to exclude that conduct notwithstanding that it also involved the acquisition of goods (which falls outside of s47) The majority held that in this instance, the provision related to both the acquisition of goods and the provision of services, and that as a result, it was caught by both s45(2) and s47.

It is clear that from a policy objective, there was no relevant difference between the characterisation of the proposed agreement as one involving the supply of a service and one involving both the supply of goods and the supply of a service. Further, the exception in s45(6) was clearly designed to create a situation where s45 did not apply to exclusive dealing arrangements. As Conti J in dissent argued in this case:

"Unintended results may well follow in circumstances where the test of substantially lessening competition will apply to one element of the dual character of a restraint between contracting parties, but not to the other."[50]

Although this case is on appeal to the High Court, if the decision is not reversed, AAR believes that this precedent leaves an undesirable degree of complexity and uncertainty in this area of the law.

For these reasons, AAR supports the Law Council's recommendation that s47 should be amended so as to make it clear that all exclusive dealing conduct is to be considered under the substantial lessening of competition test set out in that provision, regardless of 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, as demonstrated by *Visy*, a considerable amount of commercial uncertainty is created by the unclear application of s47.

AAR also submits that s47(2) and 47(4) should be amended so that:

(a) s47(2) covers conditions restricting any *supply* of goods or services, not merely *re-supply* of the same goods or services; and

(b) s47(4) extends to any restriction on the *acquisition* of goods or services, not merely a *supply* of goods or services.

These amendments would eliminate the potential overlap between s45 and s47, and ensure that s47 catches the full range of exclusive dealing conduct which ought to be prohibited if it substantially lessens competition.

[50] (2001) ATPR 41-835 at 43,321.

5. S50: Mergers

AAR endorses the Law Council's recommendations and makes the following additional observations to support these recommendations:

5.1 The informal clearance process

The informal clearance process has developed for mergers as a matter of administrative practice and convention over the last decade in response to the fact that, unlike the United States and New Zealand, Australia does not have mandatory pre-merger notification. Other than in relation to a few substantial and complex mergers the informal clearance process operates efficiently (as to cost and timing) to give merger parties a greater degree of certainty about the ACCC's attitude to their proposed merger and the likelihood or regulatory intervention in the proposal either before or after the merger.

One consequence of this efficiency is that the ACCC does not, generally, publish extensive reasons for its decisions in informal clearance decisions. This, combined with a lack of case law and merger authorisation decisions, has resulted in the current situation of the legal interpretation of s50 being supplanted by the ACCC's administrative approach to the section to be derived from practice, experience and anecdotal evidence about negotiations.

Further the possibility of judicial review proceedings of an ACCC informal clearance decision are largely an illusory remedy given the time and expense involved and restricted grounds available in any such proceedings.

In order to overcome these issues AAR supports the Law Council's recommendations for:

- **the introduction of an independent review panel to refer a decision back to the ACCC for further analysis or to substitute its own decision for that of the ACCC;**
- **the direct application to the Tribunal for merger authorisations; and**
- **the introduction of public benefit considerations into s50 to ensure that the ACCC takes public benefit considerations into account as part of the informal process.**

AAR believes that a Court, giving appropriate weight to the economic considerations underpinning s50 would (even under the current s50) consider public benefit issues such as efficiencies, failing firm considerations, exports and import replacement as properly coming within the substantial lessening of competition test. However, because of the lack of opportunity for the Court to pronounce on s50 due to the unique timing and strategic issues involved in mergers there has been no occasion for the Court to direct the ACCC to take these matters into account as part of the substantial lessening test. AAR sees no reason why this situation is likely to change.

Accordingly, AAR believes that it is essential that the Review Committee recommends that a public benefit qualification be inserted into s50 to overcome the legitimate frustration

experienced by a few merger proponents when the ACCC refuses to consider these arguments other than in an authorisation.

In addition, AAR recommends that the Act should be amended to require the ACCC to give reasons for its decisions to refuse an application for informal clearance where such reasons are requested by a party.

5.2 Mandatory pre-merger notification

The only alternative approach to the Law Council's recommendation for the introduction of an independent review panel which would result in the ACCC's informal clearance process being made transparent and accountable would be to abandon the informal clearance process and introduce mandatory pre-merger notification for mergers above a certain threshold with a right of appeal from the ACCC's decision either to the Tribunal or a Court. Interestingly none of the submissions to the Review Committee which argue for greater transparency and accountability are advocating this approach. AAR would be strongly opposed to the introduction of mandatory pre-merger notification for the following reasons:

- all the efficiency benefits both in relation to cost and speed would be lost as many hundreds of additional mergers would be referred to the ACCC which raised no competition issues;[51]
- any significant or complex merger proposal is already referred to the ACCC for its consideration as part of the informal process; and
- the introduction of an appeal right to the Tribunal or a Court would introduce impossible delays into the merger timetable unless the appeal right was limited to the merger parties. Although even this limitation would still leave open the possibility for a target in a hostile takeover to appeal as "one of the merger parties".

5.3 Direct approach to the Tribunal

AAR notes that the Business Council in its submission to the Review Committee is suggesting that merger applicants should be able to apply directly to the Tribunal both for an informal clearance (as well as for an authorisation). Whilst such a proposal achieves a similar result to the Law Council's recommendations for an independent review panel namely that the decision of a third party can be substituted for a decision of the ACCC in an informal clearance, AAR submits that the Business Council's approach would lead to unnecessary inefficiency.

- First, the Tribunal would need to be staffed effectively replicating the ACCC's mergers branch. The Tribunal would need officers who could undertake merger inquiries and provide an analysis of competition issues.
- Second, it would not be possible to remove this duplication if all merger parties were given a chance to make direct application to the Tribunal.[52]

[51] Currently the ACCC considers an average of 250 mergers per year.

[52] The same duplication argument does not arise in relation to merger authorisations as they are so rare and further the Tribunal is already staffed to consider appeals from authorisations.

- Third, the Law Council's independent review panel involves much less resources as it involves a review of the ACCC's approach based on the ACCC's internal papers.
- Fourth, the Law Council's proposal preserves the informal clearance process which works in the vast majority of mergers and targets its reform proposals to better deal with the complex mergers which are largely the cause of concern about the ACCC's administration of mergers.

6. Part VII: Authorisations

6.1 Authorisations generally

While the notion of competition (and its role in ensuring optimal resource allocation) is at the heart of the prohibitions in Part IV of the Act, no market conforms to micro-economic theoretical conditions for perfect competition. In the words of the current Chairman of the ACCC, 'competition should not be preserved so far as to operate to the public detriment'[53].

Consequently, the Act contemplates a process for considering whether conduct which may substantially lessen competition should nevertheless be authorised because it enhances efficiency or involves other benefits which are advantageous to society.

It is thus important that recourse should be available to an authorisation process which is commercially practicable and which operates effectively. The existing authorisation process does not operated efficiently or effectively and accordingly is frequently not a realistic commercial option. Overall, the authorisation process is:

- too slow and cumbersome;
- frequently too uncertain in its outcome; and
- too costly and time consuming for all parties.

6.2 Authorisations in merger cases

As the Law Council and the Business Council both observe in their submissions to the Review Committee, the difficulties in pursuing an authorisation application are such that in relation to mergers, there have been no applications for authorisation of mergers since 1999 and there were virtually none for several years before then. At the same time, the number of requests for 'informal clearances' from the ACCC for mergers has grown steadily from 71 in 1993/94 to a total of 265 in 2000/01. The reliance on a non-statutory, informal arrangement introduced by the ACCC highlights the deficiencies with the current authorisation process.

The Act recognises the need for speedy resolution of merger authorisations by imposing a 30 day time limit on the ACCC, but this does not work in practice. In most cases it would be impossible for the ACCC to undertake the authorisation process completely within a 30 day period, and there is an opportunity for the ACCC to extend that by a further 45 days[54]. However, the time taken can be further extended if the ACCC asks the applicant for further

[53] A Fels 'The political economy of regulation' (1982) 5 *University of NSW Law Journal* 29 at 54.

[54] For example, the ACCC relied on s90(11A) to extend the 30 day period in *Queensland Independent Wholesalers Ltd* (1995) ATPR (Com) 50-185 and in *Adelaide Brighton Ltd* (1999) ATPR (Com) 50-272 and (1999) ATPR (Com) 50-273.

information and 'stops the clock' while it waits for that information to be provided. Even then, further time may be taken if the ACCC's decision is reviewed by the Tribunal, where there is a complete rehearing of the matter. No time limits apply if the Tribunal considers that the matter cannot be dealt with within the 60 day period allowed because the matter is complex or there are other special circumstances. The lengthy time scale of this kind is not commercially realistic for any proposed merger.

The outcome of an authorisation application is also, in many cases, too uncertain for it to be a realistic commercial option. If the ACCC authorises an acquisition, any person dissatisfied with the ACCC's decision may seek a review of that decision by the Tribunal. That very low threshold provides an opportunity for almost anyone to frustrate the acquisition authorised by the ACCC, even if the application for review by the Tribunal subsequently turns out to be without substance. It is suggested that the threshold for seeking review by the Tribunal should be significantly higher than presently applies. This is dealt with in sections 6.4 and 6.6 below.

The authorisation process is also expensive and time consuming, particularly if it involves a review by the Tribunal. While significant resources will need to be expended in making an initial authorisation application to the ACCC, those costs are greatly escalated if the matter goes through the adversarial process of the Tribunal, where very substantial legal and other expenses can be incurred. If there is to be a review *de novo* by the Tribunal, that review should be undertaken in a non-adversarial and non-legalistic environment. This again is dealt with in section 6.6 below.

One way to overcome some of the problems of time, uncertainty and expense in the case of a merger would be to provide, as an alternative to seeking authorisation from the ACCC, an opportunity to seek authorisation directly from the Tribunal, with no further right of review of the Tribunal's decision. Such a procedure would provide the certainty that is currently lacking and, if the Tribunal were subjected to time limits similar to those imposed on the ACCC, much of the problem of excessive time would also disappear. The overall cost of the authorisation application would also be reduced. Where an authorisation application was made direct to the Tribunal, it should be subject to an absolute time limit (60 days would be realistic) with no opportunity for extending the time beyond, say, up to two 7 day extensions to allow the applicant to provide any additional requested information.

On this proposal, it will be necessary for the Tribunal to adopt an informal, non-adversarial procedure, this is already envisaged by s103 of the Act.

In any such proceeding before the Tribunal, staff provided by the ACCC would undertake the necessary investigation and analysis of the application, on behalf of the Tribunal, in the same way as those ACCC staff would do if the authorisation application had been made initially to the ACCC itself.

6.3 Recommendations

- **Application for authorisation of a merger could be made either to the ACCC or directly to the Tribunal. Any decision by the Tribunal, either as a review of the ACCC's decision or following an application direct to the Tribunal, would not be further reviewable.**
- **Absolute time limits of 60 days, with a maximum 14 day extension of time should apply to merger authorisation applications to either the ACCC or the Tribunal.**
- **Where the Tribunal is considering a merger authorisation application made direct to it, it should be assisted by staff seconded from the ACCC and the process should be the investigative and analytical process used by the ACCC, not any formal or adversarial process as applies currently to Tribunal reviews.**

6.4 Authorisations in non-merger matters

The importance of a workable authorisation regime for potentially anti-competitive conduct is equally important. Whilst the resolution of authorisation applications in non-merger cases within a reasonable time is not necessarily quite as imperative as is the case with the merger authorisations, it is nevertheless important that these issues be resolved quickly. Again, the same problems which occur in relation to merger authorisations also arise with other authorisations, namely that the process is too slow, cumbersome and expensive and the outcome is uncertain.

Whilst some authorisations are still being sought, the situation is similar to that with merger authorisations where, because of the difficulties identified with the process, authorisation is regarded by business as very much a last resort and is therefore rarely used, when in fact there are numerous situations where it would be sensible and appropriate for particular types of conduct to be assessed against the potential public benefits flowing from that conduct, and should be allowed to occur if there were positive public benefits.

The length of time taken to resolve authorisation applications is of particular concern. There are no time limits applying to the ACCC in its determination of authorisation applications, which has led to some such applications taking several years to resolve. An overall timeframe of some years is almost the norm in the case of authorisations which have then been taken on review to the Tribunal. To quote some recent examples which involve the ACCC to the periods alone (ie none of which has the added time of a Tribunal review):

- Agsafe Ltd applied for authorisation on 9 February 1999 with the determination made on 23 May 2002;
- Australian Payments Clearing Association Ltd applied for authorisation on 6 September 1996 with authorisation granted on 6 August 2000;

- Victorian Egg Industries Co-operative Limited sought authorisation on 1 July 1997 and authorisation was denied on 2 August 2000;
- The Royal Australian College of Surgeons sought authorisation in November 2000 but no determination has yet been issued; and
- on 1 March 2000, the Australian Diary Farmers Federation sought authorisation which was granted, subject to conditions, on 12 March 2002.

Such lengthy authorisation processes will often mean, in themselves, the costs incurred by the applicants are very high. Those costs increase significantly if there is a review by the Tribunal, where Tribunal hearings can last for considerable periods, with significant legal and other costs being incurred by the parties.

The likelihood of applications for review by the Tribunal is increased because of the wide range of persons who may initiate the review; any person "dissatisfied" with the ACCC's determination may seek review by the Tribunal. As the Tribunal itself recognised[55], the interest required for standing to make a review application ought to "be sufficient to warrant putting those who will be involved in the review to the very considerable time, effort and expense that a review involves". In addition to the time and effort involved in reviews by the Tribunal, the ready availability of such reviews adds to the uncertainty of the process from the applicant's point of view.

A further level of uncertainty can arise because, notwithstanding that ACCC authorisation decisions can be reviewed by the Tribunal, there is also an avenue for judicial review. The Review Committee could consider whether it is appropriate that the judicial review procedure should also be available.

6.5 Recommendations

- **Applications for authorisation of non-merger matters should be dealt with by the ACCC within 120 days, with the only extension of time (otherwise than by agreement with the applicant) being for a maximum of two 14 day periods to enable the applicant to provide further information requested by the ACCC.**
- **Review by the Tribunal of authorisation determinations for non-merger matters should also be subject to the same time constraints as apply to the ACCC when making its determination of an application.**
- **Section 101 of the Act should be amended to provide that only persons, other than the applicant, with a real and substantial interest in an authorisation application would be able to seek review by the Tribunal.**

6.6 Australian Competition Tribunal procedures

As outlined above, applications to the Tribunal for a review of ACCC authorisation determinations can be expensive and time consuming and add a layer of uncertainty in the decision making process. Section 103(1) of the Act provides:

[55] *Re Wakeman (*1999) ATPR41-675.

"In proceedings before the Tribunal:

(a) *the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;*

(b) *the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and*

(c) *the Tribunal is not bound by the rules of evidence."*

Notwithstanding this provision, proceedings in the Tribunal are akin to those in the Federal Court, with formal directions, pleadings or their equivalent and, at the hearing, the giving of sworn evidence with examination, cross examination and addresses and argument by Counsel. The formality of the procedure in the Tribunal is not surprising, perhaps because those proceedings are essentially adversarial. Tribunal hearings will often include extensive economic evidence, and while the Tribunal has made efforts in recent years to streamline the giving of expert economic evidence, Tribunal hearings are nevertheless complex, lengthy and expensive.

If reviews to the Tribunal were resolved more quickly and simply than at present, the whole authorisation process would be seen as a more acceptable avenue for business. While it is recognised that the parties to a Tribunal hearing will of necessity hold differing views, if the Tribunal were to get away from adversarial procedures, that would provide a real opportunity for simplifying and shortening the process.

Accordingly, to give effect to the intent of s103(1) of the Act, it is proposed that the Tribunal dispense with the giving of sworn testimony and formal examination and cross examination, with the Tribunal instead receiving written submissions from the various parties addressing the relevant issues and the Tribunal then, if necessary, questioning the parties about particular aspects of their submissions. While it is obviously appropriate to test the veracity of any particular proposition being put to the Tribunal, that could be done in a way which does not involve the full processes of a court hearing. The adoption of such informal processes should go some way to getting away from the adversarial nature of Tribunal hearings.

Dealing with applications for review in this informal fashion should also enable the Tribunal to dispose of those applications within a limited time, thus enabling the imposition of absolute time limits (say 120 days) for final resolution of the Tribunal's review. The adoption of such processes would have the dual benefits of shortening the time taken for the Tribunal's review and very significantly reducing the cost to the parties of a review by the Tribunal.

Another element of the uncertainty and cost of review by the Tribunal is that an application for review can be made by a person with relatively little interest in the subject matter of the authorisation, and those applications can be maintained by use of insubstantial or frivolous arguments. In either case, the applicant for authorisation can be put to unnecessary expense and delay in having to have such applications for review resolved. It is therefore proposed that, as outlined above, the category of persons entitled to seek review by the Tribunal should be confined to those with a real and substantial interest in the authorisation. Further, frivolous or vexatious applications for review could be minimised if

the Tribunal were able to make a finding that the arguments put forward by an applicant for review (other than the original applicant for authorisation) were unmeritorious, frivolous or vexatious and require that person to contribute to the expense incurred by the applicant in the course of the review. At present, the Tribunal has no power to award costs.

6.7 Recommendations

- **Procedures before the Tribunal should be made much less formal and adversarial by an approach which relies on written submissions by interested parties and questioning based on those submissions, without the giving of sworn evidence and examination and cross examination of witnesses.**
- **The Tribunal should be required to resolve applications for review within 120 days, with no extension to that time except by agreement with the parties.**
- **The Tribunal should be empowered to order an applicant for review to contribute to the expense incurred by the applicant for authorisation where the Tribunal has found that the application for review was unmeritorious, frivolous or vexatious.**
- **Only persons with a real and substantial interest in the subject matter on the authorisation should be allowed to seek a review by the Tribunal.**

6.8 Authorisation for s46 conduct

When the authorisation process was first introduced in 1974, it was considered that some types of conduct were so intrinsically anti-competitive (e.g. price fixing between competitors) that engaging in that conduct could never be in the public interest, and thus there was no point in making that conduct subject to authorisation.

Over time, it has become apparent that there may be some circumstances where almost any types of anti-competitive conduct will be in the public interest. Thus, in recent years resale price maintenance and price fixing by competitors have been able to be authorised, when previously they were not. Misuse of market power, s46 of the Act, is the only major anti-competitive conduct for which authorisation is still not available. Misuse of market power is not intrinsically worse than some of the other types of conduct for which authorisation is available. Indeed, while consideration is being given to imposing criminal sanctions for price fixing, which is capable of authorisation, few if any are suggesting that criminal sanctions should apply to misuse of market power.

The fact that misuse of market power has a purposive element is not a reason to distinguish it from other anti-competitive conduct; authorisation is already allowed for arrangements which have an anti-competitive purpose.

Accordingly, the unavailability of authorisation for s46 conduct is an anomaly which should be corrected to make the Act consistent and AAR endorses the Law Council's recommendations to introduce authorisation for s46 conduct.

7. Part VIII: Resale Price Maintenance

7.1 Introduction

The practice of resale price maintenance (***RPM***) is a per se prohibition (section 48) and is defined in detail in Part VIII, ss96 – 100. The prohibition has worked well since its introduction in the early 1970s, but there is one relatively minor anomaly, the lack of a related party exception, which, in our view, needs to be corrected.

7.2 Related Party Conduct

The prohibition of RPM prevents a supplier from specifying a minimum price at which the person to whom it supplies the product may resell that product. At the same time, the supplier is free to set its own prices for sale of its products through its own company distribution chain or for sale by agents on the supplier's behalf.

While some companies operate their production and distribution activities through a single corporate structure, others may separate their production, distribution and sales activities between parent and subsidiary companies or between different subsidiaries of a common parent company. Where those separate corporate structures are used, there will be a sale of the product from, for example, the production parent company to the sales or distribution subsidiary, which will then resell the product to retailers or consumers. The production company will frequently, implicitly or explicitly, specify the price at which its products shall be sold by the sales or distribution subsidiary. That price specification may amount to RPM, and is prohibited per se, notwithstanding that the conduct occurs entirely within the same corporate group.

7.3 Effect on Competition

That conduct has exactly the same effect as a business operating in a single company structure, which specifies the price at which its sales department may sell its products. There is no adverse effect on competition in such circumstances, whether the producer and distributors are both part of the same company, or whether they are related bodies corporate, either both subsidiaries of a common parent, or parent and subsidiary.

However, because RPM is a per se prohibition, the conduct of the related bodies corporate is prohibited, while the conduct of the separate divisions within the same company is not. This anomaly should be corrected so that the application of the RPM prohibition is not dependent on whether a business operates as a single corporate structure or as separate related companies in a corporate group. Also, providing a related company exception for RPM would make the Act consistent by bringing s48 in line with ss45 and 47.

7.4 Recommendation

We recommend that the per se prohibition of resale price maintenance include a related company exception, similar to that applying to ss45 and 47. This can be done by adding a new s96(8) to provide:

(8) Subsection (3) does not apply to any supply or proposed supply where the supplier and the second person are or would be bodies corporate that are related to each other.

PART B: SANCTIONS AVAILABLE FOR BREACH OF THE RESTRICTIVE TRADE PRACTICES PROVISIONS OF THE ACT – ARE THEY ADEQUATE?

This part is in 7 sections.

8. The current regime of penalties under the Act.
9. The existing process of penalty determinations.
10. Proposed reforms to the current regime of civil penalties.
11. Criminal sanctions for cartel conduct.
12. Practical issues associated with the introduction of criminal sanctions for cartel conduct.
13. Private enforcement of Part IV of the Act.
14. Divestiture.

As part of its review of the operation and administration of Part IV of the Act, the Review Committee has been asked to review the penalties and remedies that presently exist in relation to breaches of Part IV.

When considering the views set out in this Part B it should be noted that AAR does not seek to express a view about the merits of criminal sanctions in a competition law context, but to comment on the legal and practical aspects of the proposals that have been put forward by the ACCC in its submission.[56]

The matters set out in this Part are the product of a considerable amount of research undertaken for the preparation of an article on the ACCC's proposals for criminal sanctions to be published in July/August 2002: LM Castle & SJ Writer *A little bit wary: applying the criminal law to the regulation of competition in Australia* (2002) 10 C & CLJ 1. In some cases the material in this Part may bear some similarity to the content of that article.

[56] See n27, Chapter 2 – Criminal Sanctions.

8. The current regime of penalties

8.1 Consistency with the objects of the Act

One of the purposes of anti-trust enforcement must be to bring about a cultural shift in community and corporate awareness of the pernicious effects of certain forms of conduct on the functioning of the economy. The legislation is therefore designed to discourage certain forms of behaviour by business people that impede or damage the effective operation of the economy.

Such a shift in community and corporate attitudes has been achieved through the efforts of the Trade Practices Commission and the ACCC over the 26 years of the Act's operation. The TPC and the ACCC have an enviable record of prosecutions for cartel conduct. In contrast to the highly regulated and organised markets which operated in Australia in the 1960s and early 1970s, Australian business practices are now aligned with the objects of the Act with very few exceptions.

8.2 Criticism of the current regime of civil penalties

The ACCC has made a number of criticisms of the current regime of penalties for breaches of Part IV to the effect that current penalties do not pose a sufficient deterrent to offenders, particularly *big business*.[57] This is given as one of the main justifications for the introduction of criminal sanctions for *hard core collusion* (This is discussed in sections 11 and 12 below).

In considering these criticisms the following matters should be borne in mind:

- the penalties imposed in the trade practices jurisdiction are among the highest available in an Australian regulatory context and are considerably larger than those imposed on offenders in general criminal cases;
- many of the penalties that have been imposed by the Federal Court have been the subject of negotiation between the ACCC and the offender and an agreed submission is made to the Court by both parties. These submissions are generally accepted by the Court;
- it is rare for penalties to be contested in cartel cases brought by the ACCC;
- in the most recent high-profile case where penalties were contested: *ACCC v ABB Transmission & Distribution Pty Limited (No.2)*[58], Finkelstein J heard submissions from the ACCC as to the appropriate penalties and also received evidence about:
    - capacity to pay the penalty from one party; and

[57] See n27 at pages 25-31. NB The ACCC states on page 28 of its *Submission* that "[existing civil sanctions] *fail to effectively deter the worst collusive arrangements*", on page 55 of the *Submission* the ACCC says "*existing maximum penalties are inadequate, particularly for large corporations ….*" but on page 34 states "*another reason for introducing criminal penalties is that it may not be practical to set pecuniary penalties high enough to deter cartel participation …*"

[58] [2002] FCA 559 (3 May 2002) (*Electrical Transformers)*.

- the ongoing viability of the company from another party after having had the penalty imposed and taking into account the prospect of actions for the recovery of damages by third parties.

The ACCC submitted that both parties should pay penalties that were considerably higher than the evidence suggested that the companies could sustain. The penalties imposed on those parties by Finkelstein J were considerably lower than those that were submitted as being appropriate by the ACCC. Finkelstein J had regard to the evidence from the parties and made a determination of the penalty in accordance with that evidence:[59]

- the actual deterrent effect of civil penalties imposed by the Federal Court is difficult to measure; and
- the ACCC has not conducted any analysis of those companies the subject of cartel investigations and prosecutions since 1993 as between *small business* and *big business* and the examples cited in its submission are a very limited selection of the cartels prosecuted since 1993.[60]

8.3 Imposing more effective penalties

The arsenal of penalties that may be sought by the ACCC in court proceedings is already considerable but the ACCC has not yet sought the full extent of the penalties it may currently seek under Part VI of the Act:

- **pecuniary penalty maximums are theoretically much higher than the current level of penalties for large cartels of long duration;**
- **the ACCC has played an active part in the current approach to penalty setting and, if it is concerned about penalty levels, it has the option of contesting penalties and seeking higher penalties from the Court; and**
- **the ACCC has other penalties available including community service and probation,[61] both of which have considerable potential for inconvenience and embarrassment to senior executives, which it has not yet sought in penalty proceedings.**

[59] NB AW Tyree Transformers Pty Limited was penalised A$3.5 million, A$1.5 million less than was submitted as being appropriate by the ACCC. The directors of the company later placed it into voluntary administration.

[60] See n27 at n54 at pages 24, 29-31.

[61] Which were introduced into the Act in July 2001.

9. The existing process of penalty determination

9.1 The approach of the ACCC to the negotiation of penalties

The ACCC is an active participant in the current system of penalty imposition. It is rare for penalties to be contested and the ACCC and parties generally agree a penalty, which is then presented to the court for consideration and approval, provided that it is within the appropriate range.[62]

The process by which the ACCC negotiates an agreed position on penalty with parties to cartel arrangements is a flexible, informal process which has advantages that allow the ACCC to:

- deal with a variety of circumstances within the general framework of its investigatory and prosecutorial role; and
- save considerable public money through the reduction of investigation and prosecution costs.

However, the process also suffers from a lack of transparency and consistency as between cases, at least so far as other participants in the process are concerned. There are a number of issues arising from the current process of negotiation with the ACCC:

- the process of agreeing facts as between parties; and
- the lack of any meaningful linkage between the penalties proposed by the ACCC and:
  - the ACCC's current leniency and cooperation policy;
  - the conduct of the party in respect of the contravention;
  - the cooperation and information provided by the party to the ACCC; and
  - the degree of parity of the proposed penalty to those to be imposed on other participants in the proceedings.

9.2 Problems associated with the agreement of facts

The agreement of facts with the ACCC prior to the determination of penalty is an efficient means of disposing of the factual issues once liability has been conceded. The process has the advantage of saving time and money for the parties by the avoidance of expensive litigation to determine factual issues.

Having said that, the agreed facts can really only stand as a series of admissions to the court rather than as a definitive statement of the facts. These admissions may be coloured by a number of issues including:

- the desire of the party to resolve the matter quickly and with a minimum of expense;

[62] See *ACCC v NW Frozen Foods Pty Limited* (1996) ATPR 41-515.

- an incomplete understanding of all relevant factual issues;
- evidentiary weaknesses in the ACCC's case;
- uncertainty or disagreement as to what actually occurred; and
- the absence of any testing of the evidence one way or the other.

These matters are compounded when the ACCC agrees facts with a number of parties, which may not be consistent as between each other.

These issues were alluded to by Finkelstein J in *Electrical Transformers*[63], a case in which the ACCC has so far agreed facts separately with 4 parties, and those facts contain inconsistencies as between one another. This situation gave rise to two issues in the proceedings:

- whether the agreed facts could be used to allow the court to make findings of fact; and
- whether the court can make orders under s83 of the Act, which allows an aggrieved party to use findings of fact as the prima facie basis of a case for damages, where those findings are based on agreed facts, inconsistent or otherwise.

In respect of these issues his Honour remarked:

> *"The Commission also asks me to make findings that may be used in other proceedings in accordance with s 83 which is what I have done in the earlier case. Now I am not so sure whether that was the proper course. I have disposed of this case on the formal admissions made by the respondents. The general rule is that formal admissions are only binding for the purpose of the particular case in which they are made: … It is not clear whether a judge who acts on formal admissions is making findings of fact. I rather think he is not, because the purpose of an admission, such as may be made in a pleading, is to dispense with the need to prove the admitted fact. That is quite different from a case where the judge hears evidence and makes findings based on that evidence. At all events, I propose to do no more than record that I have resolved this case on the basis of the formal admissions. If that constitutes findings of fact for the purposes of s83, an issue upon which I make no comment, so be it."*

Where an order pursuant to s83 of the Act is made on the basis of agreed facts, then the party seeking to use those findings is really left in no better position than they would be otherwise, as the evidence that might relate to those agreed facts has never been attested to and has not been tested in cross-examination before a court.

9.3 The negotiation of penalties

The process of negotiation with the ACCC in relation to cartel conduct is centred on the negotiation of the level of penalties. The ACCC enters into the process of negotiating penalties with corporate defendants, with the consequence that there is some "bargaining" as to the level of the appropriate penalty having regard to all of the circumstances.

- This process suffers from a number of deficiencies:

[63] See n56 above at paragraph [51].

- negotiations are conducted, at least from the perspective of the defendant, without any real understanding of:
  - the determining factors behind the selection of a particular penalty figure by the ACCC; and
  - how that figure is linked to the conduct alleged and the matters set out in the ACCC's leniency policy.
- the ACCC's setting of an appropriate penalty level for the purposes of negotiation is not currently governed by any externally verifiable criteria other than by reference to the "*French factors*",[64] which do not of themselves provide guidance as to the amount of penalty to be imposed other than a general consideration of seriousness.

In the US there exist very detailed public guidelines for the setting of penalties, which is a situation that does not exist in Australia to any great extent.[65] While there are considerable public policy justifications to not tying the quantification of penalties too closely to specific criteria, so as to preserve the court's ability to fit the sanction to the specific circumstances, there is scope for the ACCC to more adequately ascribe the amount of penalty to elements of the offending conduct and the circumstances of the offender.

The current situation is not assisted by the present leniency policy of the ACCC: *Cooperation Policy for Leniency Matters*, which does not set out, as do other countries' leniency and immunity policies, specific guarantees in relation to the determination of penalties, nor does it provide any indication, other than very vague assurances, as to the degree of leniency that will be granted in particular instances. The issues of the ACCC's current leniency policy and its draft *Leniency Policy for Cartel Conduct* are discussed in section 17 below.

9.4 The determination of penalties by the court

The agreement of penalty levels between the ACCC and respondents has recently been the subject of adverse comment by Justice Weinberg in *ACCC v Colgate-Palmolive Pty Limited*[66]. His Honour noted the agreement of the parties on a specific level of penalty and remarked:

> *"I cannot leave this matter without commenting briefly upon what I consider to be the somewhat undesirable practice on the part of the ACCC in presenting this Court with a specific figure as an "agreed pecuniary penalty". I acknowledge that both the ACCC and Colgate have accepted that the figure proposed is in no way binding upon the Court. However, when pressed to point to a single instance when the Court has not, in the past, endorsed such a figure, counsel found it difficult to do so.*

[64] See the judgement of Justice French in *TPC v CSR Limited* (1991) ATPR 41-076 (***CSR***).

[65] The recent "Guideline Judgment" handed down by the NSW Court of Criminal Appeal in relation to Commonwealth drug importation offences was overturned by the High Court as being outside of the Court's powers as set out in the Constitution: see *Wong v The Queen; Leung v The Queen* [2001] HCA 64 (15 November 2001). Similar concerns would apply in respect of any Commonwealth offence.

[66] [2002] FCA 619 (16 May 2002) at paragraphs [32]-[35].

> *It is difficult to imagine that the parties would propose a pecuniary penalty that is so clearly beyond the permissible range that the Court would depart from it. As the authorities presently stand, the Court is bound to impose an agreed pecuniary penalty, save in such circumstances. ……..*
>
> *However, there are dangers associated with this approach. The Court may be seen, perhaps not altogether incorrectly, to act as a "rubber stamp" in simply approving a decision taken at an executive level by a body charged with investigating and prosecuting contraventions of the Act, but having no role in actually imposing particular sanctions for those contraventions. Negotiated settlements are an important vehicle for resolving complex matters such as those involved in the present case. It must also be borne in mind, however, that the public interest in ensuring that corporations that engage in behaviour of the kind that occurred in this case are dealt with appropriately, and that proper recognition is given to the need for specific and general deterrence. There are important parallels between the fixing of a pecuniary penalty under s 76, and the ordinary sentencing process which is quintessentially a matter for the courts….*
>
> *I should emphasise that nothing that I have said should be regarded as a criticism of a joint submission being received regarding what might be the appropriate* ***range*** *of pecuniary penalties to be imposed. A submission couched in those terms can assist in achieving a measure of certainty, and consistency of treatment with other like cases. At the same time, unlike what seems to have emerged as the more usual practice, namely putting forward an "agreed penalty", the suggestions of an appropriate range of pecuniary penalties allows for the proper exercise of judicial discretion in what is fundamentally a matter for the courts to determine.*"

Agreed penalties provide a valuable saving of court time and public money in relation to the conduct of prosecutions for anti-competitive conduct. However, Justice Weinberg's remarks highlight a deficiency in the current approach: the Court may be presented with a penalty without sufficient understanding as to:

- the process by which that penalty was agreed; and
- the considerations that determined the reduction of that penalty to a level that might be regarded otherwise as being at the low end of, or below, the permissible range of penalties for a particular class of offence.

A similar concern could be made out in respect of suggested penalties that are at the high end of the range, as was considered by Hill J in *Universal Music*.[67]

This concern reflects the general concern that the ACCC's determination of what it thinks are appropriate penalties in a given instance is not clearly linked with verifiable criteria.

[67] NB the penalties sought by the ACCC in this case - $8 million for each company - were not agreed.

10. Proposed reforms to the current regime of civil penalties

10.1 Increased pecuniary penalties

The ACCC has submitted that the current level of civil penalties imposed on corporations for breaches of the Act is inadequate and that a more flexible regime of penalty calculation should be available in the Act, including the introduction of turnover based penalties.[68]

In recent years penalties imposed on corporations have increased considerably. In the 2 most recent large cartel matters: Vitamins[69] and *Electricity Transformers*, the total amount of penalties imposed is considerably larger than any that have been imposed previously. It should also be noted that in relation to *Electricity Transformers,* the companies involved were either local, or the local subsidiaries of international corporations, and the alleged cartel activity was confined to Australia.

10.2 Constraints on the level of penalties

The ACCC may seek very high penalties for cartel conduct as the theoretical maximum is potentially very large for cartels of a long duration. However, any method of civil penalty calculation will be constrained by a number of factors:

- the capacity of companies to pay the ACCC's suggested penalties;
- the effect of a penalty on a company's ongoing ability to function and remain a viable participant in a market; and
- the nature and seriousness of the conduct.

These are matters that are referred to in the ACCC's submission in support of the contention that criminal sanctions should be introduced.[70] However, it is difficult to understand how these factors will not apply in any different form to any other mode of calculating penalties for breaches of Part IV of the Act.

10.3 Current trends in penalty determination

Civil penalties are set according to 2 factors:

- the seriousness of the conduct; and
- the ability of the company or individual to meet the penalty.

In *Universal Music*[71] penalties were contested, and Hill J imposed penalties much lower than those requested by the ACCC. His Honour determined the penalty having regard to the seriousness and the effect of the conduct in keeping with the principles set out by

[68] See n27 at page 55.

[69] **[**(add in Reference to Vitamins)**]**

[70] See n27 at pages 28-31; 34-35.

[71] See n25 at paragraphs [12]-[33]. The penalties sought by the ACCC were A$8 million for each of the corporate respondents. Hill J imposed penalties of A$450,000 on each of them.

French J in *CSR*, and accordingly imposed a small penalty on each of the companies found to have breached the Act as the conduct was short-lived and had minimal impact in the market.

In *Electrical Transformers* Finkelstein J also had the opportunity to impose penalties as the issue was contested by the parties.[72] The ACCC made submissions about the level of penalties that was appropriate in the circumstances, and 2 of the respondents (both family-held Australian companies) adduced confidential evidence on issues such as capacity to pay, and the effect of the penalty on the company in the longer term. The penalties imposed on those respondents by Finkelstein J reflected a consideration of this evidence and were lower than those sought by the ACCC. Otherwise, the penalties imposed in that case were broadly in line with what the ACCC submitted was appropriate.

10.4 Indemnification of executives for penalties

It remains theoretically possible for companies to indemnify employees for civil penalties for contraventions of the Act, provided that the indemnification does not fall within the prohibition set out in s198A of the Corporations Act.[73] Having said that, many companies refuse to provide such indemnifications and take other disciplinary measures against employees who are found to have breached the Act.

In New Zealand corporate indemnities for pecuniary penalties imposed on executives in respect of price-fixing and cartel conduct are expressly prohibited by s80A of the *Commerce Act 1986 (NZ)*[74].

[72] (2002) FCA 559 (3 May 2002) at paragraphs [33]-[50].

[73] S198A of the Corporations Act provides that companies cannot provide indemnities for liabilities that did not arise out of conduct in good faith.

[74] Inserted by the *Commerce Amendment Act 2001 (NZ)*.

11. Criminal sanctions for cartel conduct

11.1 The ACCC's proposals for criminal sanctions

The ACCC has made a number of calls for the introduction of criminal sanctions for *hard core collusion* along the following lines:

- prison sentences of up to 7 years for executives guilty of penalties for *hard core collusion*;
- *hard core collusion* to only include large-scale national or international cartel activity conducted by companies that satisfy 2 of the following 3 criteria:
  - annual group turnover of A$100 million in the previous year;
  - total group assets valued at A$30 million or more; or
  - more than 1,000 full time equivalent employees; and
- no criminal sanctions for small businesses, unions and farmers who might be involved in such conduct.

The ACCC's expressed justifications for this approach are that criminal sanctions will:

- send a clear message to *big business* that cartel activity is wrong;
- provide a significant deterrent to individual businesspeople who engage in this sort of activity;
- give an incentive to whistleblowers to come forward and report such activity; and
- bring Australia into line with its major trading partners on this issue, which will provide yet another disincentive for large-scale international cartels. Other countries with criminal sanctions include the United States, Canada, Japan and South Korea and the United Kingdom is poised to introduce such penalties.

Responses to the ACCC's proposals have ranged from support to outright opposition, but it is not the purpose of AAR's submission to comment on the general issue of whether cartel activity should be criminalised.

11.2 The ACCC's proposals for criminal sanctions and the existence of community consensus on the necessity of those sanctions

The ACCC has made numerous assertions of the existence of widespread community consensus for the introduction of criminal sanctions for hard core collusion. While it is hard to know whether this is really the case without empirical data being made available, the

ACCC's proposal to introduce a criminal offence of only limited application tends to mitigate against such a conclusion.[75]

The exclusion of particular segments of society from criminal liability for the same conduct in society is exceptional, and otherwise only applies in the case of minors below the age of responsibility and the mentally unfit. The criminal law is of universal application, with penalties determinable by reference to the seriousness of the conduct. Such an exclusive offence as has been proposed by the ACCC is inconsistent with a general community view that cartel conduct is, of itself, criminal, as it ignores the requirement that all competent persons should be equal before the law.

Criminal antitrust enforcement regimes either in place or proposed in the United States, Canada, Japan, South Korea and the United Kingdom are of general application.

11.3 The proposed threshold for the application of criminal sanctions

Criminal offences have the following essential features:

- the offender's mental state (*mens rea*), being an intention to act criminally; and
- the offender's physical actions (*actus reus*), being the physical giving effect to his or her criminal intention.[76]

In the criminal law offences may be graded according to:

- the mental element, so that offenders are distinguished according to their mental state. For example, a person who assaults someone without an intention of killing them, but does so, may be guilty of the offence of manslaughter, whereas a person who assaults someone with the intention of killing them may be guilty of the more serious offence of murder; or
- the physical element, so that offenders with the same intention but who inflict more harm may be distinguished. For example: a person who assaults someone but causes no serious physical injury may be guilty of common assault, whereas a person who assaults someone and causes the victim serious injury may be guilty of the more serious offence of assault occasioning grievous bodily harm.

These gradations can then determine the forms of punishment that may be imposed in respect of the conduct by the treatment of criminal offences either summarily or by indictment and the setting of varying penalty levels according to the seriousness of the offence.

The ACCC's proposal for a threshold for criminal sanctions that is based on the offender's status cuts across these distinctions and gives rise to a situation where 2 offenders with the same mental state who engage in similar physical actions may be treated differently because of the financial situations of their employers.

---

[75] The Business Council of Australia, a body representing many of Australia's largest companies, has indicated in its submission to the Review Committee that it does not object to the introduction of criminal sanctions for cartel conduct on the basis that the offence is of general application. See Business Council of Australia *Towards Prosperity: Submission to the Dawson Review of the Trade Practices Act 1974 and its administration* July 9 2002, at pages 116-118.

[76] See Part 2.2 *Commonwealth Criminal Code 1995 (Cth).*

The ACCC's proposed approach would be unique in the criminal law and imposes an invidious double standard.

11.4 Alternative approaches for the treatment of criminal anti-competitive conduct

Parliament has recognised that, depending on the seriousness of the conduct in question and the existence of criminal intent, similar types of conduct can be prosecuted civilly and criminally. This is recognised in a number of ways in Australian law and in comparable overseas jurisdictions:

- the Act criminalises particular forms of false and misleading conduct in the criminal offences set out in Part VC of the Act and provides for fines and imprisonment for breaches of those provisions. Otherwise, where there is no element of fraud or dishonesty, these matters are dealt with civilly;
- the *Corporations Act 2001* (Cth) has a division between offences that can be prosecuted criminally and those that are dealt with civilly, but the distinction between the two is the legal concept of "*dishonesty*"[77] and not some arbitrary division of offenders into "*serious*" and "*non-serious*" categories.

In the proposed UK regime, the Enterprise Bill 2001 sets out a new offence – "*dishonestly entering into cartels*" – which may be punished by imprisonment for a term of up to 5 years or fines. The proposed offence requires that the participants in the cartel dishonestly agree to make or implement an arrangement between 2 business undertakings which involves one or more of a series of proscribed forms of serious anti-competitive collusion.[78]

In Canada the legislature has proscribed serious collusive conduct that results in an "*undue prevention or lessening of competition*"[79] which must be proved on the criminal standard. Such a test poses difficulties, as only economically significant matters are caught within the prohibition, and then only very rarely due to the need to satisfy the criminal standard.[80] In

---

[77] The civil and criminal penalty provisions of the *Corporations Act 2001* are set out in Part 9.4 Division 2 of the Act. The civil consequences of contravening civil penalty proceedings are set out in Part 9.4B of the *Corporations Act*. The legal concept of dishonesty was dealt with in detail in the High Court's decision in *Peters v The Queen* [1998] 151 ALR 51. Dishonesty involves a notion of criminal intent or reckless disregard that is additional to or replaces civil law concepts such as failing to comply with duties or being negligent in one's performance of those duties.

[78] The prescribed conduct is set out at subs179(2) *Enterprise Bill 2001* (UK) includes: price fixing; limiting or preventing the supply of a product or service; limiting or preventing the production of a product; dividing the supply of a product or service to customers; dividing customers for the supply of a product or service; or bid-rigging.

[79] See s.45 Competition Act 1985 (Ca) – "45. (1) Every one who conspires, combines, agrees or arranges with another person: (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product, (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both."

[80] In Canada enforcement actions between 1980 and May 2000 totalled 51 cases, of which 29 resulted in guilty pleas. However, out of 22 contested matters, the Attorney-General has succeeded in securing a conviction in only 3: see H Chandler "*Beyond merriment and diversion: the treatment of conspiracies under Canada's Competition Act*" (2001) Roundtable on Competition Act Amendments (Insight Conferences) at www.strategis.ic.ca/SSG/ct10747e; see also JW

both of these cases the legislation is designed to screen out competitively neutral or beneficial conduct, but the difficulty of deciding what such conduct might be remains. The paucity of decided case law demonstrates that testing the effectiveness of such provisions is difficult, if not impossible.[81]

The situation in the United States is somewhat different, as the Sherman Act prohibits the formation of cartels and combinations on a *per se* basis, but permits the Department of Justice to bring suits in equity to restrain or prevent breaches of the law. Accordingly, the division between types of action lies not in the seriousness of the conduct, but in the type of the conduct being dealt with. A cartel will be prosecuted criminally by the Department of Justice, because a civil action can do nothing meaningful to deter conduct that has already occurred, whereas a monopolisation case is suitable for injunctive relief, sought by the Federal Trade Commission, so as to prevent or restrain the occurrence of anti-competitive conduct.[82]

The table set out in **Annexure 1** sets out the regimes that exist for the prosecution of cartels in comparable jurisdictions and a number of Australia's major trading partners.

11.5 A principled approach to criminalising cartel conduct

In this respect it is our view that the ACCC's proposed offence confuses the issue of seriousness with the issue of criminal responsibility and that the criminal offence would require the following elements in order to conform with the general requirements of the criminal law:

- **a mental element, such as dishonestly entering into an agreement, arrangement or understanding for the purpose of fixing prices, rigging bids or allocating customers or markets; and**
- **a physical element, being the making of such an agreement, arrangement or understanding.**

The forms of punishment for the general offence could then be graded according to the degree of harm caused.

Gradation of the offence according to the status of the offender cuts across the Court's discretion to sentence according to the offender's particular circumstances and the nature of the conduct. As such it is akin to mandatory sentencing. We do not propose to consider the merits of that comparison in this submission.

Rowley QC, DM Low QC and OK Wakil *Recent trends in the prosecution of cartels in Canada* (a paper delivered to the International Forum, ABA International Cartel Workshop, New York NY, 31 January – 1 February 2001) at pages 2-6.

[81] This issue was the subject of a paper prepared by M Corrigan entitled *Criminal sanctions for Part IV and ACCC leniency policy* delivered at the 2002 Trade Practices & Consumer Law Conference, Sydney 11 May 2002.

[82] See ss1 & 2 Sherman Act 1890 for criminal offences; and ss3, 7 & 8 of the Clayton Act 1914 for civil remedies. Other legislation deals with more specialised offences.

12. Practical issues associated with the introduction of criminal sanctions for cartel conduct

12.1 The problems associated with attributing responsibility

The tension inherent in penalising anti-competitive conduct is between penalising the company that engages in the conduct and the officers of the company who are the principal actors in giving effect to the conduct. Imposing penalties on those employees of a company who are immediately responsible for the anti-competitive conduct is not such a difficult exercise where there is sufficient proof of their involvement, such as where the offenders are the owners of the company, or its senior executives. However, it is often the case that the offenders are lower level employees who manage a specific market. The problem lies in penalising those who direct and formulate the conduct, or who know of the conduct, tacitly approve of its benefits and do nothing to stop it.

Responsibility for breaches of Part IV of the Act applies to a broader class of persons than the criminal law would currently permit.

S76(e) of the Act provides that persons who have "*been in any way, directly or indirectly, knowingly concerned in*" a contravention of the Act may be found liable. A person who is "*knowingly concerned*" must be someone who has actual knowledge of the facts constituting the contravention and a close and intentional involvement in the contravening conduct.[83] For the purposes of the Act, there may be another element: that the person does not sufficiently exclude himself or herself from the contravention. It is possible for a person to know of the conduct amounting to a contravention of the Act but not be "*knowingly concerned*", such as where a person is aware of the conduct but excludes him or herself from that conduct.

The Australian courts have not yet developed the concept of exclusion to the degree of refinement that exists in the US.[84] The criminal law rules of complicity are analogous to the "*knowingly concerned*" formulation in that the underlying principle of the law of complicity is

[83] See *Fencott v Muller* (1983) 152 CLR 570 per Gibbs CJ; *Yorke v Lucas* (1985) 158 CLR 661 per Mason ACJ, Wilson, Deane & Dawson JJ at 670; *TPC v JJ & YK Russell Pty Limited* (1991) ATPR ¶41-090; *Compaq Computer Australia Pty Limited v Merry & Ors* (unreported, 14 August 1998, Fed Ct) per Finkelstein J at page 4.

[84] Some assistance may be drawn from the US: there is emphasis in the law on s1 Sherman Act on the positive acts of a person not to participate in an anti-competitive conspiracy or combination. The thrust of the US cases in this area is that, where an anti-competitive conspiracy has been found to exist, then there must be an affirmative act to show withdrawal by persons who may be involved (see *US National Association of Leather Glove Manufacturers, Inc* 1952 US Trade Cases ¶67,582) and the burden of proving this lies with the person against whom the conspiracy is alleged (see *US v Consolidated Laundries Corporation* 1961 US Trade Cases ¶70,039, *US v Gillen* 1979 1 US Trade Cases ¶ 62,627). The affirmative act should be more than a mere cessation of the relevant anti-competitive activity (see *US v Continental Group Inc; Chase Bag Co; Cooper & Rue* 1979 2 US Trade Cases ¶62,782). US courts have held that it was not enough to exit the relevant geographic market (see *US v Packcorp Inc* 1965 US Trade Cases ¶71,616), as there was not sufficient proof that there was no intention of re-entry into the market, or to temporarily withdraw from a trade association (see *US National Association of Leather Glove Manufacturers, Inc* 1952 US Trade Cases ¶67,582) as this mistook the wrong, which was membership of a trade association with a wrongful purpose. The US requirement for withdrawal from a conspiracy is a clear and irrevocable turning away from the wrongful conduct.

that persons who encourage or assist in the performance of a criminal act are as great or greater dangers to society as the principal offender. A person who deliberately promotes the commission of a criminal act by another person is equally guilty of that offence.[85] Such a person could be guilty of an offence of concealing a serious offence for benefit, or the common law offence of misprision of felony where that offence has not been abolished.[86] The use of the term "*knowingly concerned in*" in a criminal context slightly modifies the traditional view of the mental element in that it extends the class of persons who may be imputed with criminal liability for an act beyond the traditional classes of counsellors, procurers, aiders and abettors,[87] but it does not go so far as to include those who might be aware of criminal conduct but do not actively exclude themselves from it.

One means of ascribing responsibility to indirectly involved participants would be to alter the basis of accountability and expand it to include persons who either permit or perform the relevant acts.[88] The difficulty with this is its imprecision, as senior executives, totally unaware of the conduct, could be imputed with responsibility for conduct they did not prevent.

12.2 Changes to the ACCC's methods of investigation

With the introduction of a criminal regime of cartel enforcement, there will need to be a reconsideration of the ACCC's investigatory powers under s155 of the Act (discussed in section 15 below).

In keeping with the general principles of law designed to protect the rights of persons accused of criminal offences, the ACCC's investigatory powers will need to conform with those of the police and other criminal investigation bodies.

This will mean:

- **judicial supervision and scrutiny of the issuance of warrants for the raiding of premises, the seizure of documents or the giving of evidence;**

---

[85] See Crimes Act 1900 (NSW) ss345, 346 & 371; Criminal Code Act 1983 (NT) ss8-9, 12-13; Criminal Code Act 1899 (Qld) ss7-9; Criminal Law Consolidation Act 1935 (SA) s267; Criminal Code Act 1924 (Tas) ss3-5; Crimes Act 1958 (Vic) ss323-5; Criminal Code Compilation Act 1913 (WA) ss7-9.

[86] See s316 Crimes Act 1900 (NSW) (misprision of felony has been abolished in NSW); ss332B(1) & 326 Crimes Act 1958 (Vic).

[87] The High Court found in *Giorgianni v The Queen* (1985) 156 CLR 473 that for a person to be knowingly concerned in criminal conduct, they must intend to assist or encourage the principal offender; see also *Walh v Sainsbury* (1925) 36 CLR 464; *R v Goldie* (1937) 59 CLR 198; *ex parte Coorey* (1944) 45 SR (NSW) 287; *Mallan v Lee* (1949) 80 CLR 198; *Ashbury v Reid* [1961] WAR 49; *Dennis v Pight* (1968) 11 FLR 458; *Hamilton v Whitehead* (1988) 63 ALJR 80; *Pereira v DPP* (1988) 82 ALR 217; *R v Nitadopoulos* (1988) 36 A Crim R 137; *R v Tannous* (1987) 10 NSWLR 303; *R v Haddad* (1988) 33 A Crim R 400.

[88] Such a reform was proposed in the US under President Wilson's unsuccessful amendments to the penalty provisions in the Sherman Act set out in the Clayton Act, which expanded the notion of criminality to persons who "*shall have authorised, ordered or done*" the acts. This was again ventilated in the early 1960s. See SH Kadish *Some observations in the use of criminal sanctions in enforcing economic regulations* (1963) 30 University of Chicago Law Review 423. This also gives rise to another consideration, which is whether this kind of imputation of responsibility is most appropriately dealt with in the Corporations Act, as it imposes a very real and important additional duty on all directors and senior officers of companies.

- **strict controls on the exercise of the powers of the ACCC to obtain evidence, particularly in relation to the conduct of any interview or formal examination of a person;**
- **protection of the rights of persons subject to compulsory examination under s155 of the Act, particularly in respect of the right to decline to answer questions on the basis that any response might tend to incriminate the person;[89] and**
- **the treatment of evidence gathered under the s155 powers in a manner consistent with the treatment of evidence adduced before Royal Commissions and other commissions of inquiry, which is not able to be used in subsequent criminal proceedings, but must be reproved in its entirety.[90]**

This will mean that the ACCC will need to ensure that if a matter is to be investigated criminally, then any investigation of the matter will need to conform with the intention to prosecute criminally.

Any failure to accord proper treatment to persons accused of criminal conduct will almost certainly result in an undermining of the effectiveness of the ACCC's enforcement of the Act.

12.3 The prospect of decreased enforcement outcomes

12.3.1 Evidence

Criminal sanctions will be harder to impose as the ACCC will need to prove its cases *beyond reasonable doubt* not *on the balance of probabilities*.

This will involve the collection of more evidence which will also need to be more compelling. Given the secretive nature of most cartel activity the ACCC will also need to rely on more aggressive investigation techniques including surveillance, undercover operations, informers and raids. These higher standards of investigation and prosecution are a reality of the criminal justice system and the investigator and prosecutor will need to be content with a less *successful* mechanism for the penalisation of anti-competitive conduct than presently exists.

12.3.2 Less incentive for cooperation after the commencement of an investigation

There will be considerably less incentive for Australian companies and executives to cooperate with the ACCC with the threat of criminal penalties and the lack of a clear, consistent and well-publicised immunity and leniency policy.

---

[89] NB s155(7) of the Act does provide that evidence adduced under s155 cannot be used in any criminal proceedings other than proceedings under s155.

[90] See ss6DD,7C & 7D Royal Commissions Act 1902 (Cth); s17 Royal Commissions Act 1923 (NSW); s14A Commissions of Inquiry Act 1950 (Qld); s16 Royal Commissions Act 1917 (SA); s21 Commissions of Inquiry Act 1995 (Tas); s30 Evidence Act 1958 (Vic); s20 Royal Commissions Act 1968 (WA); s24 Royal Commissions Act (ACT); s13 Inquiries Act 1945 (NT). Section 122 of the Evidence Act 1995 (Cth) also excludes evidence obtained under compulsion of law.

By raising the stakes the ACCC will bring about a situation that almost certainly will mean a reluctance on the part of companies and business people to cooperate and to fight matters in the hope of acquittal. With the increased burden of proof, such an approach by defendants is not an unrealistic one.

12.3.3 Difficulties in securing convictions

There is considerable scope for a reduction in the level of the ACCC's success in cartel prosecutions by the introduction of criminal penalties.

The ACCC will need to be mindful of a host of additional procedural and legal issues in conducting investigations and prosecutions, which given the frequent complexity of cartel cases, may prove problematic.

In the Republic of Ireland there has been some disquiet about the poor record of cartel enforcement under its exclusively criminal regime of enforcement. [91] This low level of success has led to calls for the introduction of civil penalties for cartel conduct, which do not exist there at present, so as to enable the Competition Authority to achieve a greater degree of success.[92]

12.4 Consistent prosecution policies

The current proposal of the ALRC, set out in it recent discussion paper *Securing Compliance – Civil and administrative penalties in Australian Federal regulation* is that all Federal regulatory agencies should refer matters to the DPP for the prosecution of Federal regulatory statutes. [93] Such an approach has been adopted by the ACCC and is part of the ACCC's current mechanism for the prosecution of offences in Part VC of the Act.

However, the mechanism for referral and the interaction of the agencies will require a coordinated and effective framework, so as to avoid the conflicts that have been referred to in the context of ASIC and in Canada between the Competition Bureau and the Attorney-General's Department, over a perceived unwillingness on the part of the prosecutor to take action and the converse view that the cases presented to the prosecutor were not supported by sufficient evidence.[94] Similar issues have arisen in the relationship between ASIC and the DPP, with conflicts over enforcement priorities and the strength of cases referred to the DPP by ASIC.[95]

---

[91] See J Gledhill *Rating the regulators 2001* (2001) Global Competition Review 10 at 23

[92] The imposition of civil sanctions of a high level may be subject to limits under the *Constitution* 1937 (Ire.), as there is authority to suggest that the imposition of civil sanctions of a high level is tantamount to a criminal proceeding which requires the exercise of due process of law (ie. trial by jury). See Articles 38.1 & 38.5 *Constitution* 1937 (Ire.); *Cullen v The Attorney-General* [1979] IR 394; *Pesca Valentia Limited v Minister for Fisheries (No.2)* [1990] 2 IR 305. See also Competition & Mergers Review Group *Proposals for discussion in relation to competition law* September 1999 (available at www.entemp.ie/tcmrnew/discussion) at pages 164-168.

[93] See ALRC *Securing Compliance – Discussion Paper* AGPS April 2002 at page 206.

[94] This is referred to in M Corrigan *Criminal sanctions for Part IV*, at n79 above, at page 7.

[95] n90 at page 204.

The conduct of prosecutions by the DPP will also mean that the ACCC's involvement in the issues of leniency, immunity and penalty negotiation after the time of referral will effectively be transferred to the DPP. In such a situation, for there to be a coherent immunity and leniency policy, there will need to be a clear link between the factors considered by the ACCC and also by the DPP in determining these issues.

If the ACCC wants criminal sanctions, there is a trade-off: the loss of its flexibility in handling prosecutions, due to the following issues:

- **ASIC's approach is to obtain the advice of the DPP as to the likelihood of criminal conviction and, if the DPP is of the view that a conviction is likely, to refer matters to the DPP once it has decided that the evidence is sufficient to support a conviction and the matter otherwise warrants prosecution.[96]**
- **under a criminal regime all serious cartel matters will need to be referred to the DPP for prosecution as either indictable or summary offences. Negotiations on penalty will be conducted by the DPP and will be governed by different considerations, particularly the need for obvious consistency between cases now that criminal principles apply, which is not something that is evident from the current operation of the opaque penalty negotiation process.**
- **this will necessarily involve a reduction in the ACCC's role in the negotiation and settlement of matters, a greater role for judges and prosecutors at the sentencing stage and a de-emphasis on the obtaining of record penalties and maximum publicity by the regulator.**

12.5 The problem of moral neutrality

It can take a long time for these penalties to be imposed seriously and severely. The notion of punishing the individuals concerned in order to defeat anti-competitive conduct is not a new one, but the common problem, faced by the United States over the past century, is the difficulty of criminalising conduct that may not be regarded, rightly or wrongly, as being truly criminal. The real question is whether criminal sanctions do provide the optimal deterrent effect, this is because:

- historically speaking, people have seen anti-competitive conduct as being a victimless action, or at least an activity where the victim is abstracted as "*the consumer*" or "*the economy*";
- in Australia penalties for these sorts of offences are generally low when compared to other criminal acts. This view is changing, not least due to the publicity efforts of the ACCC;

[96] See ASIC, *Annual Report 2000-2001* ASIC, page 21, located at www.asic.gov.au/asic/pdflib.nsf. ASIC's relationship with the DPP is governed by a Memorandum of Understanding which sets out the protocols under which matters will be considered by and referred to the DPP. A similar regime applies in respect of the Australian Taxation Office (see http://law.ato.gov.au/atolaw/index.htm).

- the US Courts have continued to treat anti-trust offenders leniently when compared with other classes of offender although this is changing with recent penalties increasing in severity.[97] This reluctance to punish as severely as otherwise is the inherent problem of so-called "*white-collar*" crime, as it invariably has none of the dramatic and repellent elements of what are traditionally perceived as crimes;
- the efficacy of criminalising conduct must be considered in introducing a regime of criminal sanctions. When considering the imposition of criminal penalties for corporate misconduct under the Corporations legislation, the Cooney Committee said:"[w]*hen gaol terms are provided for a breach of the law but the courts are disinclined to impose them because they seem too draconian, the law tends to fall into disrepute. The modest fines which are imposed instead cause some discontent in the community*."[98]

Under a criminal enforcement regime the ACCC will not succeed in as many cases as it might like, and certainly not as often as it currently does.

[97] See Elzinga & Breit *Anti-Trust Penalties* Yale University Press 1976 p30-2; L Orland *Reflections on Corporate Crime: Law in search of theory and scholarship* (1980) Am Crim LR 511 at p511; SA Yoder *Comments: Criminal sanctions for corporate illegality* (1978) Journal of Criminal Law and Criminology 40 at 41-4. Of the 44 criminal cases filed in 1999 in the US, the US Federal District Court imposed criminal sanctions on 26 offenders (14 custodial sentences and 12 mixed custodial/community sentences (ie home, intermittent or community confinement)), and 18 offenders were sentenced to probation. The average sentence was 9.2 months and the median sentence was 4 months. There were 33 cases where only a fine was imposed, 1 case where only restitution was imposed and 4 cases where only restitution was ordered. The average amount paid as a fine or as restitution was $40,379: see *Sourcebook on criminal justice statistics online* at www.albany.edu/sourcebook /1995/pdf/t538.pdf. Of late the average sentence in the US has risen to 15 months with the dramatic increase in penalties recently: see JM Griffin *Key elements of an effective antitrust leniency policy and criminal penalties and deterrence – the American experience* a paper given at the ACCC Competition & consumer Protection Law Enforcement Conference, Sydney on 4-5 July 2002. In Canada only 1 custodial sentence has been imposed of 1 year for a competition offence since 1974. The other 2 sentences imposed were served "in the community" and were for periods of 12 months and 9 months respectively. The only other sentences for competition offences were 2 sentences of 100 hours, a sentence of 50 hours and a sentence of 25 hours of community service. Fines were also imposed in some of these cases. Other custodial sentences have been imposed for misleading advertising: see Competition Bureau of Canada, Compliance & Enforcement www.strategis.gov.ca/SSG/ct01709e. html#2.

[98] Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee) *Mergers, monopolies and acquisitions. Adequacy of existing legislative controls* AGPS Canberra 1992.

13. Private enforcement of the Part IV

13.1 The current regime of private enforcement

Private litigants have always been able to seek compensation for proven breaches of the restrictive trade practices provisions of the Act. Private enforcement is essentially divided into:

- the protection of a company's position by relying on the anti-monopoly provisions of Part IV to prevent or stop anti-competitive conduct and consequential damages (ss45, 46 & 50); and
- the recovery of damages by aggrieved third parties who have suffered loss and damage as a consequence of anti-competitive conduct: this form of action usually follows on from the successful prosecution of anti-competitive conduct by the ACCC (breaches of ss4D, 45, 45A, 47 & 48).

Private litigants have been successful in enforcing their rights to prevent anti-competitive conduct. However, the experience of private litigants seeking to obtain damages as a consequence of anti-competitive conduct has been far less successful. This is partly because follow-on actions for the recovery of damages have been relatively rare until recently and also because of apparent disincentives to litigation in the current system.

13.2 Proposals to facilitate private litigants protecting their rights under the Act

These proposals are addressed elsewhere in this submission, see in particular section 3 which discusses the proposed amendments to s46 and section 14 which discusses divestiture.

13.3 Existing assistance to private litigants for the recovery of damages resulting from anti-competitive conduct

The following provisions of the Act are designed to facilitate the bringing of private actions for the recovery of damages:

- s79B – the Court must give preference to compensation in a situation where the Court may either impose a penalty or order compensation be paid to an aggrieved person and the defendant cannot meet the cost of doing both;
- s83 – the court may make findings of fact that demonstrate that a party has breached a provision of Part IV or has participated in such a breach in proceedings commenced by the ACCC for the recovery of a penalty which may then be *prima facie* evidence of those facts in a subsequent proceeding for the recovery of damages;[99]
- s87(1A) - the ACCC may bring representative actions on behalf of persons who have suffered loss and damages as a consequence of breaches of Part IV. The

[99] NB We have commented on a number of features of this – see for example s8.2 above.

ACCC may also bring "grouped" proceedings under Part IVA of the *Federal Court of Australia Act 1976 (Cth)*;

- s87A – the Court may, on the application of the Minister or the ACCC, make such orders as are necessary for the preservation of the assets of a company the subject of proceedings for injunctions under s80.

AAR is not aware of any matters in which the ACCC has used its powers to bring representative proceedings and the ACCC has not commented in its Submission to the Review Committee as to why it has not yet used these powers.[100]

13.4 Proposals to assist private litigants in the recovery of damages resulting from anti-competitive conduct

Proposals have been made by various groups for the introduction of incentives for the bringing of actions for the recovery of damages resulting from breaches of Part IV, including:

- the introduction of a new remedy of account of profits for unjust enrichment;
- the introduction of multiple damages awards;
- the introduction of *cy-prés* awards;
- the extension of limitations periods;[101] and
- the allowance of contingency fees for lawyers who act in such matters.[102]

These are matters which relate to the reform of litigation processes generally, and have been considered many times by Commonwealth and state law reform bodies.[103] Furthermore, the introduction of such innovations would set litigants in this field apart from any other litigant in Australia. With this in mind, many of the proposals set out above would appear to lie beyond the Review Committee's terms of reference.

---

[100] n27 at pages 292-293.

[101] David Roche *Submission* to Review Committee pages 1-2; Australian Consumer Association *Submission on the review of the competition provisions of the Trade Practices Act 1974* July 2002 at page 34; Consumer Law Centre of Victoria *Trade Practices Act Review: Submission* June 2002 at page 2.

[102] P Cashman *Private enforcement of competition and consumer protection laws: The need for financial incentives to achieve corrective justice* a paper delivered at the ACCC Competition & Consumer Protection Law Enforcement Conference, Sydney 4-5 July 2002.

[103] See ALRC DP 4 Access to the courts I - standing: public interest suits, 1978; ALRC DP 11 Access to the courts II - class actions, 1979; ALRC 46 - Grouped proceedings in the Federal Court, 1988; ALRC DP 61 Who can sue? A review of the law of standing, 1995; ALRC 89 Managing justice: A review of the federal civil justice system 1999; WALRC 92 *Review of the Criminal and Civil Justice System* 1997-1999.

14. Divestiture

14.1 Introduction

The introduction of a general remedy of divestiture has not been a focus of debate in the current review of the Act, although some submissions have raised the possibility of introducing such a power following a breach of s46.[104]

The introduction of a divestiture power beyond the merger context for breaches of s46 raises many legal and practical issues.[105] Such a remedy risks penalising corporations that have acquired their market share through efficient and well run business practices and stifling the very competition that the Act sets out to promote. Practical enforcement of divestiture orders is difficult because it involves considerable delay and cost. In the relatively small Australian economy there may not be a purchaser available for the assets. Also, divestiture orders are particularly difficult to apply to unitary companies. It is also strongly arguable that divestiture orders are open to attack on the basis that they may be unconstitutional as an acquisition of property on unjust terms. Many of these difficulties have even been recognised by the ACCC itself.[106]

In addition, there are already a range of effective remedies that exist for deterring breaches of s 46 and a divestiture remedy is unnecessary.

14.2 Existing penalties

The Courts already have access to a large range of penalties and orders which can be used to enforce s46. These include pecuniary penalties, declaratory relief, damages, injunctive relief and adverse publicity orders. Some of these penalties such as community service and probation orders were only recently inserted into the Act and the ACCC has not yet asked the Court to impose such penalties on an offender.

The introduction of further remedies is at the present time unwarranted and would cause considerable uncertainty while new legal principles and judicial precedent were developed.

Since this is unlikely to occur quickly because of the rarity of this order and the difficulties with its implementation, the existence of the remedy may adversely affect further investment in Australia.

---

[104] n27 at page 105:

The Commission believes that an amendment introducing the remedy of divestiture for a contravention of s 46 warrants consideration, although it is not actively pursuing such an amendment at this time.

[105] Senate Legal and Constitutional References Committee, *Inquiry into s 46 and s 50 of the Trade Practices Act 1974* at pages 30 to 34.

[106] ACCC submission to the Senate Legal and Constitutional References Committee's Inquiry into the Trade Practices Act at pages 10 to 12.

14.3 Undue penalisation of efficient well run businesses

The Act currently allows courts to order divestiture as a remedy only for contravention of s50.[107] Divestiture in the context of s50 is appropriate as it directly 'undoes' the conduct which contravened the section.

In the situation where a corporation has breached s46, a corporation would be forced to divest itself of assets simply because it had a substantial market share. It may be that this market share has been obtained through innovative and competitive conduct of the corporation. **Such a power would be inappropriate and out of kilter with other countries, for instance the United States which only allows divestiture orders if there has been a wilful acquisition of market power rather than growth due to superior product or business acumen.[108] If efficient and well run businesses are penalised in this way there is a risk of encouraging inefficiency and stagnation in the Australian economy.**

14.4 Practicality

Breaking up a company which has contravened s46 is also likely to be impractical. Not only would the divestiture of assets involve lengthy and expensive sale negotiations and due diligence but divestiture assumes that a purchaser is available for the assets.[109]

The small size of the Australian economy may mean that there is not an acquirer available for the assets which are subject to the orders. This was the case in the Ansett/East-West merger and also in the Allied Mills/Fielder Gillespire/Goodmans merger. In those cases, acquisitions were made in contravention of s50 and divestiture orders were made. Ultimately however a suitable acquirer could not be found and the assets were not divested.

A particular difficulty has arisen in making divestiture orders which relate to *unitary* companies. In the merger context, it is relatively easy to identify assets which may be divested immediately after the merger occurs. As time progresses however, assets become increasingly 'scrambled' and more difficult to separate.[110] In the case where divestiture orders are made subsequent to contravention of s46, it may be that there are no easily identifiable means by which divestiture could be ordered. Recently, the United States Court of Appeal dealt with this issue in *United States of America v Microsoft*

---

[107] S81(1) provides that:

> *"The Court, may on the application of the Commission or any other person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, by order, give directions for the purpose of securing the disposal by the person of all or any of those shares or assets acquired in contravention of that section."*

[108] *United States v Grinnell Corp* 384 US 563 (1966).

[109] Heydon, *Trade Practices Law* at page 4711.

[110] *TPC v Bowral Brickworks Pty Ltd & Ors* (1984) ATPR ¶40-480.

Corporation finding that the logistical difficulty in ordering divestiture has meant that it is rarely used.[111]

14.5 Constitutional issues

It has been suggested that there is a possibility that divestiture orders may be open to challenge on constitutional grounds.[112] S51(xxxi) of the Constitution relates to acquisition of property on just terms.[113]

It is established law that s51(xxxi) does not apply to the acquisition of property as a penalty for the unlawful conduct.[114] It has been held that s81 of the Act is such a provision and does not contravene s51(xxxi).[115] In reaching the decision in *WSGAL v TPC* however the court focused on policy considerations such as:

"[the provisions] *enable property which the contravener has acquired in contravention of the Act to be disgorged so that the parties to the transaction may be restored to their original position. They enable also the re-establishment of the competition which prevailed in the market before the occurrence of the prohibited acts that distorted the market."*[116]

The Court went on to distinguish the divestiture provisions from laws which are subject to 51(xxxi) by their nature 'as adjectival provisions doing no more than providing a remedy in the event of a breach of the substantive provisions of s50.'[117]

---

[111] *"One apparent reason why courts have not ordered the dissolution of unitary companies is logistical difficulty. As the court explained in United States v. ALCOA, 91 F. Supp. _333, 416 (S.D.N.Y. 1950), a "corporation, designed to operate effectively as a single entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency." A corporation that has expanded by acquiring its competitors often has preexisting internal lines of division along which it may more easily be split than a corporation that has expanded from natural growth. Although time and corporate modifications and developments may eventually fade those lines, at least the identifiable entities preexisted to create a template for such division as the court might later decree. With reference to those corporations that are not acquired by merger and acquisition, Judge Wyzanski accurately opined in United Shoe:*

> *United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts. United States v. United Shoe Machine Co., 110 F. Supp. 295, 348 (D. Mass. 1953)." (United States of America v Microsoft Corporation* 253 F3d 34 at 106*)*

[112] n105 above; n74 at page 114.

[113] The Constitution of Australia section 51(xxxi) gives power to the Commonwealth to make laws relating to:

> *The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws.*

[114] *Re DPP ex parte Lawler* (1994) 179 CLR 270; *Della Patrona v DPP (Cth) (No 2)* (1995) 38 NSWLR 257.

[115] *WSGAL Pty Limited v TPC & Ors* (1994) ATPR ¶41-314.

[116] n114 above at page 42,182.

[117] n114 above at page 42,194.

While provisions allowing divestiture orders following contravention of s46 may be 'adjectival provisions' and not subject to s51(xxxi), there is an argument that could be made that such a provision is unconstitutional. This is because the majority in *WSGAL v TPC* relied on the policy considerations of restoring a pre-existing state of competition. As discussed above, it may be, in a s46 context that market power has been acquired from efficient and innovative business practice. As such, there is no pre-existing state of competition which the orders seek to re-establish. This could require that the reasoning in *WSGAL v TPC* be reconsidered in a more general context.

Part C: THE ACCC's ENFORCEMENT OF THE ACT – DOES THE ACCC NEED MORE POWERS?

This part is in 4 sections.

15. Section 155 and legal professional privilege.

16. Cease and desist orders.

17. The ACCC's leniency policy.

18. Governance Issues.

15. Section 155 Notices

All regulators need broad information-gathering powers. In this section, AAR considers the ACCC's use of the investigative powers conferred on it by s155 of the Act.

In particular, AAR comments on:

1. the application of legal professional privilege;
2. the generality of allegations made by the ACCC;
3. the ACCC's use of its search power in s155(2);
4. the protection afforded commercially sensitive material produced to the ACCC; and
5. legal representation.

15.1 Legal Professional Privilege and s155 notices

Whether s155 of the Act abrogates legal professional privilege is currently the subject of an appeal before the High Court of Australia.[118] The Court has reserved its decision.

Should the High Court find that s155 abrogates legal professional privilege, AAR believes the Act should be amended to preserve expressly the application of this privilege.

There are three reasons for this:

- Legal professional privilege is a substantive and fundamental common law right.[119]

[118] Heard in the High Court on 18 June 2002. The appeal of the Full Federal Court decision in *ACCC v. The Daniels Corporation International Pty Limited* (2001) 108 FCR 123 in *The Daniels Corporation International Pty Ltd and Meerkin & Apel (A Firm) v. ACCC* (No. S27 of 2002), and *Woolworths Limited v. Fels and ACCC* (No. 238 of 2002) and *Coles Myer Limited and Liquorland (Australia) Pty Limited v. Fels and ACCC* (No. 239 of 2002).

[119] *Baker v Campbell* (1983) 153 CLR 52 at 58 (Gibbs J), *The Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500; *Waterford v The Commonwealth of Australia* (1986-7) 163 CLR 54 at 64-65 (Mason and Wilson JJ); *Australian Federal Police Commissioner v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 505 (Brennan CJ); at 564-5 (Kirby J); and *Esso v Federal Commissioner of Taxation* (1991) 201 CLR 49 at 64-65 (Gleeson CJ, Gaudron & Gummow JJ).

- The abrogation of legal professional privilege in this context will adversely affect the ability of clients to seek candid legal advice which in turn will affect compliance with the Act.
- The operation of the privilege does not undermine the exercise of the ACCC's investigative power. The class of documents attracting legal professional privilege is limited, applying only to communications made for the *dominant purpose* of giving or receiving legal advice or for use in existing or anticipated litigation. The privilege does not attach to documents where the communication is made for an illegal or improper purpose.[120] Notably, the ACCC has conducted investigations for many years without requesting or needing to request privileged communications.[121]

15.2 Generality of Allegations – Reason to Believe

The content of s155 notices sent out to parties whom the ACCC has 'reason to believe' can provide it with information that is relevant to its investigations is also cause for concern. This is because the allegations set out in such notices as well as the basis for the 'reason to believe' are usually couched in vague, general terms that render compliance with any such notice extremely onerous for the party from whom the relevant information is sought.

In this context, we note that, in its submission the ACCC states that it will 'not use its powers under s.155 to conduct a "fishing expedition" for information. It does not issue a notice unless it has a requisite "reason to believe" in relation to the matter.'

In addition the ACCC states that 'the "reason to believe" statement will go beyond a mere assertion that the relevant matter constitutes or may constitute a contravention. The notice will incorporate a sufficient description of the matter alleged to show the necessary relationship between the information sought and the matter in respect of which it is sought. The contravention to which the s155 notice relates is often described as the "matter" which is the subject of the notice'. In this regard, we note that in *Riley McKay Pty Ltd v Bannerman* the Court stated that a notice must specify the information sought with sufficient particularity to enable the recipient to know what is required.[122]

The ACCC also notes that 'while it is not necessary for the Commission, Chairperson or Deputy Chairperson to set out the basis for its reason to believe in relation to a particular matter, it must have an actual belief and a proper factual basis for that belief. There must, in other words, be reasonable grounds for cause for that belief.

Nevertheless, and while AAR agrees with the views put by the ACCC in its submission, the practical experience in some instances has not been in accordance with the principle set down in *Riley McKay*. Rather, in some instances, the ACCC's notices are couched in somewhat vague terms which could amount to a 'fishing expedition'. Moreover, where disclosure of the basis of the 'reason to believe' is inadequate, the burden on parties

---

[120] *Australian Federal Police Commissioner v Propend Finance Pty Ltd* (1997) 188 CLR 501.

[121] Trade Practices Commission, "*Section 155 of the Trade Practices Act – A Guide"*, November 1994. This Guide expressed the policy of the TPC and subsequently the ACCC, that is, a proper claim of privilege was a valid answer to a s155 notice since the enactment of the Act in 1974 until the year 2000.

[122] (1977) 31 FLR 29; 15 ALR 561; ATPR 40-036 (***Riley McKay***)

seeking to provide information to the ACCC can be extremely onerous. This is exemplified by instances where the party from whom the information is sought is not a party who has engaged in any conduct which might contravene the Act. Rather such parties simply have certain information which the ACCC has 'reason to believe' would assist in its investigations. However such parties can be put to considerable expense in meeting the requirements of notices that are not always set out in sufficient detail.

This burden is increased by the limited avenues currently available to recipients of s155 notices to challenge the issue of such notices or obtain further information in relation to the alleged contravention or the ACCC's reason to believe. For example, s13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) does not give the recipient of a s155 notice the right to obtain a statement of reasons in respect of that notice.[123] Moreover, the burden is on the recipient of the notice to demonstrate that the requisite 'reason to believe' was not held.[124] However, this can be a difficult burden of proof given that the recipient of the notice will not have access to the documents used by the ACCC in its deliberations. In this regard, any documents requested from the ACCC in relation to its deliberations under the *Freedom of Information Act* (***FOI Act***) will in large part come within the exemptions in the FOI Act and the recipient of the notice does not usually discover either the nature of the allegations made against it or the basis for the ACCC's 'reason to believe.'

Recommendation

In order to overcome some of the above difficulties, the Review Committee could recommend that the ACCC be required under the Act to adopt guidelines which it must have regard to, much as it was under s75AV of the Act. These guidelines would require it to set out in its s155 notices the nature of the relevant allegations and the basis for its 'reasons to believe' with sufficient particularity to limit the search for documents to those that are likely to be relevant to its investigation. In particular, an issue often arises where recipients of s155 notices are large organisations with a range of businesses, subsidiaries, departments and employees. The ACCC should be required to set out with particularity the nature of the business to which the information that it seeks relates and where possible, the type of employees who the ACCC believes would be in a position to furnish that information, the geographic location at which the ACCC believes the information is stored and the like.

15.3 The ACCC's use of its search power in s155(2)

Section 155(2) states that where the Commission, Chairperson or Deputy Chairperson has reason to believe that a person has engaged or is engaging in conduct that constitutes a contravention of the Act a member of the Commission may authorise a member of the staff assisting the Commission to enter any premises, and to inspect any documents in the possession or under the control of the person and make copies of, or take extracts from,

[123] *Ricegrowers Co-operative Mills Ltd v Bannerman* (1981) 56 FLR 443.

[124] *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1979) 36 FLR 450.

those documents. They may do this for the purpose of ascertaining whether the person has engaged or is engaging in the alleged conduct.

The occupier or person in charge of any premises that an authorised officer enters under s155(2) is required to provide the authorised officer with all reasonable facilities and assistance for the effective exercise of the powers under that sub-section: s155(6). In its booklet in relation to s155, the ACCC states that it considers this section requires the occupier of the premises to direct the ACCC officer to the location of relevant documents, open locked doors and safes, provide access to computers and provide reasonable space to view and copy documents. The ACCC states that since the obligation is a statutory one there is no requirement that reasonable compensation be paid for the use of these facilities.[125]

The ACCC's search power is extremely invasive in nature and can cause disruption to the business of the company under investigation. In this context, the ACCC is not subject to any independent scrutiny in relation to its use of powers under s155(2). This is in contrast to similar search powers such as those of the police which generally require assessment by an independent third party such as a magistrate or judge before they can be used. We also note that in relation to this power the ACCC has told the Senate Economics Legislation Committee (6 June 2002) that it will only exercise a s155(2) power where it has concerns that the documents in question are likely to be destroyed.

Given the level of disruption and costs to business which the Review Committee may find to be associated with the ACCC's exercise of its power under s155(2), the Review Committee may consider that the exercise of this power should be vetted by the Federal Court or Federal Magistracy before it can be used. In this regard, the ACCC could be required to satisfy a judge or a magistrate that in the absence of a search warrant being granted, it is reasonably likely that those documents will be destroyed. On these grounds, as in the United Kingdom, a judge or magistrate would grant the ACCC a warrant to use the powers in s155(2)[126].

In some circumstances, the exercise of this power can be intimidating. We also note that under Rule 13 of the Directors Rules contained in the Competition Act (Directors Rules) Order 2000 (UK) an investigating officer may, if he or she thinks it is reasonable, grant the right to obtain legal advice before a raid begins. The introduction of such a guideline by the ACCC could provide the company under investigation with the right to seek legal advice or to have a lawyer present while the ACCC is investigating the matter at the persons premises pursuant to its powers under s155(2) of the Act.

[125] ACCC booklet at pages 18 to 19.

[126] Section 28 of the UK Competition Act provides for a judge to grant a warrant on an application made by the director, if the judge is satisfied of a variety of matters under that Act, including that there are reasonable grounds for suspecting that the documents are on the premises and that those documents would not be produced but would be instead concealed, removed, tampered with or destroyed if the warrant is not granted.

Recommendations: search warrant

Before it can exercise its powers under s155(2), the ACCC must satisfy a judge or a magistrate that in the absence of a search warrant being granted, it is reasonably likely that the information it is seeking will be destroyed, removed or concealed.

Recommendation: legal advice

The Review Committee could also recommend that the ACCC be required under the Act to introduce a guideline giving a company that is subject to a s155(2) investigation a right to seek legal advice or to have a lawyer present while the ACCC is investigating the matter at the persons premises. The implementation of this guideline could also be the subject of internal review as suggested in section 18 Governance below.

15.4 Confidentiality of documents obtained pursuant to a s155 notice

Documents and information obtained on a s155 notice may be commercially sensitive. In AAR's view, s155AA in its present form affords inadequate protection for commercially sensitive material.

Section 155AA currently provides that a Commission official must not disclose any protected Part IV or Part VB information to any person, except where "*the Commission official is performing the duties or functions as a Commission official*".[127] The ACCC may therefore disclose commercially sensitive documents to a third party such as an expert or a competitor in the performance of its duties or functions.

The Review Committee could consider that:

1. s155AA should be extended to include Part V documents;

2. the ACCC should issue guidelines that apply to its use of documents obtained on a s155 notice.

The proposed guidelines should deal with both the use of documents received on a s155 notice generally, and in particular, the treatment of commercially sensitive documents. The guidelines might include the following:

(a) A general prohibition against the ACCC providing documents prematurely to the press or any media organisation, until such time as they become tendered in evidence, if that occurs.

(b) A mechanism to protect commercially sensitive documents.[128] AAR suggests the following mechanism:

[127] S155AA(1)(a).

[128] The principle that providers of confidential information have certain "legitimate and reasonable expectations" in respect of the use of those documents is discussed in *Consolidated Press Holding Ltd v Commission of Taxation* (1995) 57 FCR 348. In particular, at page 357 where Justice Lockhart states "I*n my opinion the taxpayers had a legitimate and reasonable expectation that the material which they had provided and were continuing to provide to the Commissioner in support of their applications under ss206 and 207 would not be communicated to persons outside the Australian Taxation Office and the Australian Government Solicitor without the applicants first being consulted…*". Further at page 358 his Honour states "*In the long run the duty of the Commissioner to accord procedural fairness to the applicants is directly referable to the*

(i) **The recipient of a s155 notice (the *Recipient*) can, at the time of providing the documents in answer to a notice, advise the ACCC whether the documents (or part of them) are commercially sensitive (the *commercially sensitive documents*) and if so, why.**

(ii) **If the ACCC wishes to disclose a commercially sensitive document to a third party it must first notify the Recipient and identify:**

(A) **the document it intends to disclose; and**

(B) **the person or class of person to whom the document is to be disclosed.**

(iii) **Where the third party is a competitor, the ACCC should also identify the reasons for such proposed disclosure.**

(iv) **The ACCC should afford the Recipient a right to be heard in respect of the proposed disclosure within a specified period of not less than 14 days.**

(v) **If the Recipient objects to the proposed disclosure of the commercially sensitive document, the ACCC must decide whether the public benefit in disclosing the commercially sensitive document outweighs the potential harm to the Recipient.**

(vi) **The ACCC must advise the Recipient of its decision. If the ACCC decides to disclose the commercially sensitive document then it must wherever practical give the Recipient 28 days' notice of its decision prior to the disclosure, which would enable the Recipient to seek judicial review of the ACCC's decision if it wishes.**

15.5 Legal representation

In its guide in relation to s155 of the Act, the ACCC states that in its conduct of oral examinations, an examinee will generally be permitted to be legally represented, except in exceptional circumstances. Such 'exceptional circumstances' include instances in which the legal adviser's presence would prejudice the investigation, including:

- where the legal adviser is being instructed by more than one examinee in the same matter; or
- where the legal adviser also acts for the subject of the investigation, not being the examinee.[129]

The position taken by the ACCC in this regard is sometimes, in our view, too rigid. This is because it can be artificial for the ACCC to require that executives of a company who are subject to a s155 oral examination always have separate representation to the company.

proper administration of the Act because it is not conducive to the confidence of taxpayers if highly sensitive and important information about their finances and affairs may be revealed to persons or bodies outside the ATO…".

[129] n123 at page 16.

In many circumstances, the legal representative will be instructed on behalf of the company by the very executives that the ACCC has required to participate in the s155 oral examinations. In some circumstances, the company and its executives or employees may be served with s155 notices on the grounds that the ACCC has 'reason to believe' that they are in possession of information that will assist the ACCC with its investigations and such persons may not themselves be under suspicion in relation to the alleged contravention.

This issue relates to conflicts of interest that the legal representative may find him or herself exposed to as a result of the ACCC's investigation. This is generally a matter for the legal representative and his or her client.

Recommendation

The Review Committee could recommend that two additions be made to the ACCC's present s155 guide, all of which should be instituted pursuant to and have the force of a provision such as s75AV.

1. **The guideline should not be administered so rigidly as to artificially cause unnecessary expense where no conflict of interest arises.**
2. **That where a conflict appears to a party's legal adviser or the ACCC to have arisen, the party concerned should be given a reasonable opportunity to retain another legal adviser. The administration of this guideline would also be capable of internal review as suggested in section 18 below.**

16. Cease and Desist Orders

16.1 Introduction

The ACCC seeks the ability to issue cease and desist orders[130] and this is supported by a number of parties.[131]

The need for such a power has not been adequately demonstrated. In AAR's view injunctive relief is adequate and indeed preferable, given the attendant safeguards. These are particularly relevant as the recipient of a notice will not be entitled to any compensation should it transpire that the notice was wrongly issued. There are also significant constitutional issues raised by the introduction of such a power.

Proponents of this new enforcement power argue that it would be used infrequently and only to require the immediate cessation of conduct that could cause irreversible damage to competition if allowed to continue. The advantages of such a power have been described as speed, cost-effectiveness and informality.[132]

---

[130] n27 above at pages 97 to 98; the ACCC has proposed the following provisions to govern the cease and desist power:

i *Where the Commission is satisfied that*

(a) a corporation

(b) has a substantial degree of power in a market

(c) is engaging in conduct

(d) the conduct involves a use of its power in a market

(e) the conduct is anti-competitive

(f) the conduct is likely to cause loss or damage to particular persons or consumers generally

(g) there is an urgent need to prevent the continuation of the conduct in order to prevent such loss or damage, and

(h) the conduct is contrary to the public interest

the Commission may, after considering any submissions by the corporation, issue a cease and desist order prohibiting the corporation from engaging in conduct the subject of the order.

ii *Cease and desist orders would operate for a limited duration (for example, up to 90 days). During this time damage to markets would be restrained while the Commission would have the opportunity to fully investigate and gather information and evidence to support issuing proceedings for contravention of the Act.*

iii *The cease and desist order would expire at the specified time or on the institution of court proceedings by the Commission, whichever is sooner.*

iv *The issue of an order would be subject to review before or at the time of proceedings for non-compliance in (v). However, when there is a challenge to the validity of the order it should remain on foot pending final determination of the issues. Only in exceptional circumstances could a court stay the operation of a cease and desist order, pending determination of a challenge to the issue of the order, or*

v *A corporation to whom a cease and desist order is issued shall not engage in the conduct or conduct of a kind specified in the order during the period in which that cease and desist order is in operation. On application by the Commission, a court may impose penalties and issue injunctions for non-compliance with the order.*

[131] See submissions to the Review Committee of Australian Consumer Association; Consumer Law Centre, Victoria; Small Business Development Corporation; Council of Small Business Organisations of Australia Ltd; Hutchison Telecommunications (Australia) Ltd; Fair Trading Coalition.

[132] n27 at pages 96 to 97.

16.2 The availability of interlocutory injunctions as a remedy

Section 80 of the Act allows the court, on application by either the ACCC or any other person, to grant an injunction preventing a person from engaging in or proposing to engage in conduct which breaches the Act. The court is also given the power to order interim mandatory injunctions.[133] An interim injunction can be obtained within a day, and has the immediate effect of stopping the offending conduct until the court can make a final determination.

A substantial body of law has developed concerning the circumstances in which an injunction should be granted. In order to grant an injunction, the court must be satisfied on the balance of probabilities that:[134]

- there is a serious question to be tried, and
- the balance of convenience lies with the party seeking the injunction.

Whether there is a serious question to be tried is a relatively low threshold. As the House of Lords has noted it need only "be satisfied that the claim is not frivolous or vexatious, in other words that there is a serious question to be tried".[135] The ACCC has argued that in the time available to them, it would be unable to find sufficient cogent evidence to make out a serious question to be tried.[136]

It is of concern to AAR that the ACCC wishes to exercise this power without possessing evidence sufficient to establish a serious question to be tried.

The ACCC refers to one example to illustrate the problems it identifies with interlocutory injunctions: *South Sydney*. In that case, Justice Hely declined to grant an injunction on the balance of convenience. Subsequently the trial judge found there had been no contravention of the Act[137] and on appeal the Full Federal Court, by a majority, found there had been a contravention of the Act.[138] The High Court has granted special leave to appeal, and the hearing has been set down for 6 August 2002. In these circumstances it seems premature for the ACCC to suggest, as it has, that the public interest in that case would have been better served by the ACCC issuing a cease and desist order.

16.3 Inadequacy of proposed safeguards

The ACCC details a number of safeguards to curtail the risk of administrative error.[139] These are:

---

[133] S80(5).

[134] *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board of Queensland* (1983) 46 ALR 398; *Tableland Peanuts Pty Ltd v Peanut Marketing Board* (1984) 52 ALR 651.

[135] *American Cyanide Co v Ethicon Ltd* [1975] AC 396 at 407.

[136] n27 at page 99.

[137] *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611;

[138] *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 181 ALR 188.

[139] n27 at pages 100 to 101.

(a) Preliminary thresholds to be satisfied

In AAR's view a threshold less than that to be met by a party seeking an injunction is too low. This is particularly so, given the disruption caused to a company's business upon receipt of a cease and desist order and the unavailability of compensation if the notice is wrongly issued.

(b) Natural justice will be afforded

The proposed recipient of an order will be able to make submissions to the ACCC that will be taken into account by the ACCC in deciding whether to issue an order. While a safeguard, it is far from adequate.

(c) Ability to issue an order rests solely with the ACCC

The ACCC describes its experience issuing competition notices to illustrate the likely infrequent issue of cease and desist orders. The process by which competition notices have been issued has given rise to adverse comment regarding the propensity for regulatory error.[140]

(d) Judicial oversight

Judicial oversight would largely be limited to ensuring that the recipient was afforded natural justice. If the Court finds that this did not take place then the matter would be remitted to the ACCC so the company's submission may be reconsidered. Judicial oversight as to the ACCC's decision-making process, as distinct from the merits of the ACCC's decision, is in our view an inadequate safeguard.

(e) The order will only operate for a limited duration

The ACCC says that the cease and desist order would remain in force for a limited period. The ACCC states "such orders are intended to maintain the status quo while the Commission gathers information and evidence to support instituting judicial proceedings in relation to the conduct."[141]

While not wishing to over-analyse the precise expression employed by the ACCC, the statement appears to highlight the difficulty posed by a cease and desist order. On the one hand the ACCC seems to suggest that in issuing a cease and desist order it will have already decided to commence proceedings, and the ensuing investigation will merely gather evidence to facilitate that course. On the other hand, the ACCC wishes to retain its broad statutory information-gathering powers during the investigation notwithstanding that it has already decided to commence proceedings. In our view this may be an inappropriate use of the ACCC's statutory powers for circumstances where the ACCC has decided to commence proceedings it should be relegated to exercising the rights of an ordinary litigant for the reasons discussed by the Full Federal Court in *Kotan Holdings v TPC*.[142]

---

[140] Productivity Commission, *Telecommunications Inquiry Report*, 21 December 2001 at page 196.

[141] n27 at page 101.

[142] (1991) 102 ALR 51.

16.4 Other jurisdictions

In relation to the experience of other countries, we note and agree with the comments of the Law Council.[143]

In addition, AAR believes it is premature for the ACCC to comment on the success or otherwise of the recent amendment to the New Zealand Commerce Act.

16.5 Constitutionality

Section 71 of the Constitution enshrines the separation of powers doctrine that requires the exercise of judicial power to be reserved for the courts alone. The strict operation of this doctrine in Australia is undisputed.[144]

It is sometimes difficult to define the nature of a judicial power.[145] For a power to be judicial in nature it must be exercised in relation to a controversy; must impact on a right, liberty or property; and must be exercised conclusively.[146]

The proposed cease and desist power clearly affects the rights of a recipient and will have application in resolving a dispute between the recipient and the ACCC or others. It is less clear whether the cease and desist power would satisfy the element of conclusiveness. Proponents of the cease and desist power emphasise that as a court order is required to enforce the cease and desist order, it does not invoke the exercise of a judicial power but is merely an interim administrative measure.[147] Those who object to the introduction argue that the order is binding in effect, because failure to comply will be punishable by the Federal Court without the need to prove the substance of the order.[148]

In AAR's view the very serious doubts raised as to the constitutionally of a cease and desist power renders its introduction unwise, particularly given that the need for such a power has not been demonstrated and the safeguards proposed are not adequate.

[143] n32 at page 31-35.

[144] See *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Attorney-General (Commonwealth) v R, Ex Parte Boilermakers' Society of Australia* (1957) 95 CLR 529; *Polyukhovich v* Commonwealth (1991) 172 CLR 501; Wilson *v Minister for Aboriginal and Torres Straight Islander Affairs* (1996) 189 CLR.

[145] *R v Davison* (1954) 90 CLR 353.

[146] *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

[147] n27 at page 99.

[148] n74 at pages 105 to 106.

17. Leniency policies and competition law enforcement

17.1 Overseas approaches to cooperation and leniency in competition law enforcement

In the US, Canada and the UK, competition authorities have recognised the value of a clear leniency policy with concrete outcomes for co-operation as an enforcement weapon.[149] This is most clearly demonstrated in the cartel arena with the existence of clear policies with definite guarantees for those who come forward.

In the US there has been dramatic success in securing prosecutions as a consequence of evidence from executives who have taken advantage of the US Department of Justice's immunity for the first informant both before an investigation commences and the leniency shown, subject to conditions, to those who cooperate after an investigation has begun.[150] The UK policy provides for clear guarantees of immunity for the first person to report the existence of a cartel and provide evidence to mount a case, and further gradations of leniency for those who cooperate with the Office of Fair Trading in the course of its investigation.

17.2 Current Position

Drawing on this overseas experience, AAR submits that for a leniency policy to be an effective enforcement tool for the ACCC, it must offer clarity, certainty of outcome, and give priority to the party which comes to the ACCC with information first.

- Currently, there are two leniency policies in operation in Australia:
- the draft *Leniency Policy for Cartel Conduct* which was published in July 2002 (***Draft Leniency Policy***); and
- the Co-operation Policy for Enforcement Matters[151] (**Co-operation Policy**), which was first published in 1998.

---

[149] See Annexure 1. For a description of these policies see M Corrigan "*Cartel Immunity Policies –The impact of certainty*" Law Council of Australia, Business Law Section, Trade Practices Committee, Trade Practices Workshop, 17-19 August 2001. See also http://www.usdoj.gov/atr/public/guidelines/lenind.htm for the US policy for individuals; http://www.usdoj.gov/atr/public/guidelines/lencorp.htm for the US policy for companies, http://strategis.ic.gc.ca/SSG/ct01990e.html for the Canadian Competition Bureau's bulletin *Immunity Program under the Competition Act*; see also DM Low QC *Canada's Immunity Program: One year on* (a paper delivered at the CADE Seminar on Competition Law, São Paulo, Brazil, 17-19 December 2001), http://www.oft.gov.uk/News/ Publications/ Leaflet+Ordering.htm#address_info for the UK Office of Fair Trading's *Guide to the leniency programme for cartel cases under the Competition Act 1998* and http://europa.eu.int/comm /competition/antitrust/leniency/ for the EC's *Commission notice on immunity from fines and reduction of fines in cartel cases.*

[150] See M Corrigan "*Cartel immunity policies*", above at n147, at pages 6-8; this was particularly evident in the Lysine and Graphite Electrode cartels prosecuted by the US Department of Justice. The Canadian Immunity Policy was amended to provide explicit guarantees of immunity in 2000, in an attempt to address concerns that the previous, less clear, policy was not encouraging people to come forward with information or to cooperate: see DM Low QC *Canada's immunity program*, at n79 above, at pp6-7.

[151] ACCC "*Cooperation and leniency in enforcement*" (1998) ACCC Journal No. 17, p8. This policy was published on the ACCC website in early 2002 and has recently been published as a glossy brochure.

(a) Draft Leniency Policy

The Draft Leniency Policy which was issued on 4 July 2002, proposes to guarantee immunity for "cartel conduct" in certain circumstances. The ACCC's Interpretation guidelines define a cartel as *"any course of conduct that involves or may involve the suspected per se contravention of s45 of the Act of two or more competitive businesses"*. This effectively means that they are limited to horizontal arrangements that effect prices or exclusionary provisions. However, the Guidelines state that if there is any uncertainty as to whether conduct amounted to a per se prohibition, this alone would not alter the ACCC's application of the leniency policy.

AAR agrees with the position taken by the ACCC, that a leniency policy which guarantees immunity is not appropriate in circumstances where the conduct can be unilateral, as any deterrent value would be undermined if the only party to the conduct could receive immunity.[152]

In our view, the Draft Leniency Policy proposes a model that offers appropriate guarantees of immunity to provide an effective incentive for disclosure of cartel conduct to the ACCC. Relevantly, it provides:

- a guarantee of immunity from proceedings for the first person and/or corporation to inform the ACCC of a cartel of which it is unaware and which provides full and frank disclosure, ceases involvement in the cartel and has not coerced other corporations or individuals to participate in the cartel; and
- a guarantee of immunity from a pecuniary penalty for the first person and/or corporation to provide the ACCC with conclusive evidence of a cartel of which the ACCC is aware and which provides full and frank disclosure, ceases involvement in the cartel and has not coerced other corporations or individuals to participate in the cartel.

(b) Co-operation Policy

The Co-operation Policy is a "flexible" leniency policy, which currently applies to all potential civil contraventions of the Act, and which, after the implementation of the Draft Leniency Policy, will continue to apply to all non-cartel conduct.

It sets out the matters that will influence the ACCC in exercising leniency in the investigation and prosecution of breaches of the Act. However, it makes no guarantees about the ACCC's treatment of those it investigates, and does not provide a scale of priorities for informants or emphasise the importance of being the "*first in*". It merely states the circumstances in which leniency is "*most likely to be considered appropriate*".[153]

[152] Draft Immunity Policy, section 1.2

[153] These are: **for individuals** -providing valuable and important evidence where the ACCC would not otherwise have enough evidence; providing full and frank disclosure; providing cooperation; not using the same legal representation as the employer; and not being the ringleader of the conduct or coercing others to participate; **for corporations** – the same as for

The table set out in **Annexure 2** provides a comparison between the Co-operation Policy, the Draft Leniency Policy and the leniency policies in comparable jurisdictions.

(c) Co-existence of the Co-operation Policy and the Draft Leniency Policy

Although it might be suggested that the scope of the Draft Leniency Policy is unnecessarily narrow, and that certain arrangements, suitable for leniency are not covered, the continued operation of the Co-operation Policy will mean that the ACCC continues to have a discretion to grant leniency or immunity, as appropriate.

17.3 Draft Leniency Policy and Criminal Sanctions

As the ACCC has recognised in its submissions, the introduction of criminal sanctions will undoubtedly complicate the application of a uniform leniency policy, to the extent that it will require co-operation between the ACCC and the DPP.

The DPP currently has the power, under s9(6) and 9(6D) of the *Director of Public Prosecutions Act 1986 (Cth)* to give undertakings that grant immunity to an accomplice, where he or she considers it appropriate. However, the *Prosecution Policy of the Commonwealth* states that this power will only be used where 2 conditions are met:

(a) the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant, and that evidence is not available from other sources; and

(b) the accomplice can reasonably be regarded as significantly less culpable than the defendant.

Clearly, there are some elements of the two policies which appear to be in conflict. Unlike the DPP's Prosecution Policy, the ACCC's Draft Leniency Policy does not require that the informant be any less culpable, and instead gives priority to the party who is "first in".

Although further consideration of the policy may be necessary if criminal sanctions are introduced, the Draft Leniency Policy should nonetheless be implemented as a matter of priority. It provides a solid basis for a clear, certain leniency policy which will act as a useful enforcement weapon and deterrent, and bring the Australian law into line with that of the US, Canada and the UK.

individuals plus terminating the activity as soon as it was aware of it; making restitution where appropriate; taking immediate steps to rectify the situation; and not having a prior record of contraventions.

18. Governance: criticisms of the ACCC's enforcement of the Act

18.1 Is there a need for the introduction of an oversight body

There have been a number of concerns raised about how the ACCC administers the Act including criticism over its tactics in some cases and concern that the criticism has been dismissed peremptorily. In its regulatory and enforcement role the ACCC is likely to attract criticism, particularly from those companies or individuals that are subject to its scrutiny. In many cases the criticism may be unwarranted, but in others it arises out of genuine concerns.

The Review Committee has been asked to consider if the status quo provides adequate protection for the commercial affairs and reputation of individuals and corporations, and to identify improvements to the Act and its administration. The Terms of Reference direct the Review Committee to examine the processes followed by the ACCC and the laws under which it operates but not to reconsider the merits of past individual cases. The old adage that "*justice must not only be done, but be seen to be done*" is very true. As a body invested with powers that are designed to assist with the promotion of competition, fair trading and consumer protection, AAR agrees that it is important that the ACCC is seen to be acting fairly and even handedly in its application and enforcement of the law.

Sometimes public perception arises that advocates of a particular cause become too close to the cause and lose perspective. When this involves a legal representative, or a person within a company that is promoting a particular cause or matter, it can result in the loss of perspective, and inhibit the ability of that individual or the organisation they represent, to resolve the particular issue in the most efficient and fair manner for all parties involved. If this occurs there is real benefit in having someone run "fresh eyes" over the issue to determine if the concern is justified or not.

Some of the main areas where complaints seem to arise about the ACCC's conduct are those involving:

- the ACCC's conduct in relation to s155 notices and correspondence following on from the issuing of those notices;
- litigation or the pre-litigation steps undertaken by the ACCC including initial "please explain" letters and follow-up correspondence and meetings; and
- decisions taken by the Enforcement Committee such as not to accept settlement of matters recommended by a Regional Office of the ACCC; and
- the content of and use by the ACCC of press releases.

There are other areas about which concern has been expressed.

AAR is of the view that it is important that business and public confidence in the role that the ACCC is undertaking is maintained. For this reason it is also important that criticism not be dismissed without due consideration. At the same time, it is vital that the ACCC's role as an enforcer of the Act not be hampered unnecessarily. Any reaction to a genuine problem should be in proportion to the problem identified.

18.2 Model litigant

The ACCC, as a Commonwealth government entity, is already subject to the model litigant rules that require, among other things.

> "*… that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:*
>
> *(c) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation,*
>
> *(d) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid,*
>
> *(e) acting consistently in the handling of claims and litigation,*
>
> *(f) endeavouring to avoid litigation, wherever possible,*
>
> *(g) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:*
>
> *(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and*
>
> *(ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum,*
>
> *(h) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim,*
>
> *(i) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement,*
>
> *(j) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and*
>
> *(k) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.*[154]"

Interestingly, ensuring compliance with the model litigant obligations are primarily the responsibility of the agency which has responsibility for the litigation. In this case, the ACCC itself.

18.3 Statutorily Required Guidelines and Internal Review

AAR has suggested in sections 15.2 to 15.5 above that the Review Committee should recommend that the Act be amended to require that the ACCC adopt guidelines to cover those issues about which concern has been expressed. There is a precedent for the adoption of guidelines which the ACCC was required to have regard to in s75AV of the Act.

[154] Attorney-General's Department, Legal Services Directions, 1 September 1999

In addition, there are times when genuine concerns arise that individual officers of the ACCC have become too zealous in their conduct of a particular matter and a more independent assessment of the position is needed to diffuse concerns. In our experience, such an independent assessment has occurred in the past on an ad hoc basis when particular instances have been referred to more senior officers in the ACCC and, in many instances, any problems have been resolved. Nonetheless, AAR is of the view that apart from circumstances where guidelines may be appropriate, it would also be useful for the Review Committee to recommend that the ACCC put in place some procedures for dealing with these types of issues with a view to ensuring that appropriate procedures are seen as being followed.

Rather than being proscriptive about the particular standards that the ACCC should adopt, AAR thinks that in the first instance, the ACCC should be given the opportunity to see if it can institute and manage an internal review procedure. As part of establishing an internal review procedure, the General Manager of the ACCC could appoint a senior officer within the ACCC (not on the Enforcement Committee) as a point of review to resolve problems that may arise about the conduct of the ACCC when carrying out its functions such as administering its guidelines, dealing with s155 notices, litigation and decisions of the Enforcement Committee. The review officer could be asked to consider particular instances as they arise and to provide an appropriate form of report to the person or entity which raised the issue.

As part of his or her role, the review officer could also be responsible, where appropriate, for developing further guidelines for the ACCC to adopt to deal with any other perennial problems that are identified as a form of continuous improvement. These guidelines should be published by the ACCC from time to time by putting them on the ACCC website. An internal review procedure of this sort is one with which the ACCC should be familiar, since it often forms part of the mechanics adopted in compliance programs that it requires companies to institute. The review officer could also be a focal point for any issues arising from the ACCC's compliance with the model litigant rules.

AAR recommends the position be reassessed after 2 or 3 years to see whether or not the internal review procedure is working and has sufficiently resolved the issues that seem to have concerned the ACCC's critics.

Annexure 1 - International penalties regimes for anti-competitive conduct

NB Where possible the information set out in this table has been obtained from information published by the regulator concerned.

	Australia	Canada	New Zealand	United Kingdom	United States	Japan	South Korea	European Union
Regulator	ACCC	Competition Bureau	Commerce Commission	Office of Fair Trading	Anti-trust Division of the Department of Justice	Japan Fair Trade Commission	Fair Trade Commission	Directorate-General of Competition
Prosecutor/ Complain-ant	ACCC	Attorney-General	Commerce Commission	OFT Enterprise Bill scheme (***EB***): Serious Fraud Office (England & Wales) Lord Advocate (Scotland)	Deputy Assistant Attorney-General, ADDOJ having obtained a vote of a Grand Jury	Japan Fair Trade Commission (administrative matters); Prosecutor-General (criminal matters)	Fair Trade Commission (administrative matters); Prosecutor-General (criminal matters	Directorate-General of Competition
Who imposes the penalty?	The Federal Court of Australia after submissions from the ACCC and the contravenor.	The Federal Court of Canada and relevant provincial courts after submissions from the CB and the offender.	The High Court of New Zealand after submissions from the CC and the contravenor.	The Office of Fair Trading with a right of appeal to the Competition Commission Appeal Tribunal. Appeals on points of law may then be made to the Court of Appeal or the Court of Session (in Scotland). EB: High Court of England & Wales (appeals to Court of Criminal Appeal and House of	The US District Court after submissions from the ADDOJ and the offender.	Japan Fair Trade Commission can impose administrative penalties which may then be subject to Court review. The High Court of Japan.	Fair Trade Commission can impose administrative penalties which may then be subject to Court review. The District Court of the Republic of Korea.	The European Commission with appeals available to the European Court of First Instance and then, on points of law, to the European Court of Justice.

	Australia	Canada	New Zealand	United Kingdom	United States	Japan	South Korea	European Union
				Lords) High Court of Justiciary (Trial Div) (Scotland) (Appeals to High Court of Justiciary (Appeal Div.))				
Legislation	Part IV and Part VI, Trade Practices Act 1974	Part IV, Competition Act 1985	Commerce Act 1986	Competition Act 1998 **EB**: Enterprise Act (has passed the Commons and has been read a second time in the House of Lords)	Sections 1 & 2, Sherman Act 1890	Act concerning prohibition of private monopolisation and maintenance of fair trade 1947	Monopoly Regulation & Fair Trade Act 1980	Articles 81-82, Treaty of Rome
Criminal conduct	N/A	Agreements unduly lessening competition; price-fixing, bid-rigging, market sharing, price-discrimination, predatory pricing, resale price maintenance	N/A	N/A **EB**: Price-fixing, bid-rigging and market sharing.	Price-fixing, bid-rigging, market sharing	Unreasonable restraints of trade, private monopolisation, failure to abide by a decision of the Japan Fair Trade Commission in relation to unfair trade practices	Serious offences: Abusing a dominant market position, establishing holding companies, price-fixing, bid rigging, market sharing, hindering other businesses. Lesser offences: Resale price maintenance, unfair business practices such as refusals to deal, unfair discrimination, unreasonably engaging in activities designed to damage	N/A

	Australia	Canada	New Zealand	United Kingdom	United States	Japan	South Korea	European Union
							competitors and taking advantage of bargaining power. Failure to abide by a decision of the Fair Trade Commission in relation to unfair trade practices	
Criminal test	N/A	Offences are illegal if they *unduly lessen competition*	N/A	N/A	Offences are *per se* illegal	Offences are *per se* illegal	Offences are *per se* illegal.	N/A
Civil/criminal offences	No.	No.	No.	No. **EB**: Yes - in respect of cartel conduct only.	No – all Sherman Act offences are criminal.	System divided between administrative and criminal enforcement	System divided between administrative and criminal enforcement	No.
Corporate penalties	Civil penalty of up to A$10 million per breach.	Up to C$10 million per offence.	Civil penalty of the greater of NZ$10,000,000 or either 3 times the value of any commercial gain resulting from the contravention or 10% of the turnover of the corporation and its related corporations.	Civil penalty of up to 10% of UK turnover in the relevant market for 3 years of an infringement.	Criminal penalty of up to US$10 million per offence	Up to ¥100 million and/or administrative surcharge of 6% on turnover for a period of 3 years	Administrative surcharge of 5% of turnover effected by the cartel or ₩1 billion; requirement of submission of tender documents for scrutiny of KFTC; reduction of points in Performance Qualification Tests; limited opportunities for future bidding	Up to 10% of worldwide group turnover in the financial year preceding the decision.
Individual penalties	Up to A$500,000 per breach.	5 years imprisonment and/or penalties of C$550,000.	Up to NZ$500,000 per breach.	N/A. **EB**: the maximum penalty for the offence to be five	Up to US$350,000 or 5 years' prison per offence	Up to ¥5 million or 3 years' prison for unreasonable restraints of trade	*Serious offences:* up to ₩200 million and 3 years imprisonment.	N/A

	Australia	Canada	New Zealand	United Kingdom	United States	Japan	South Korea	European Union
				years' imprisonment; fines to be available in addition or as an alternative.		and private monopolisation and up to ¥3 million or 2 years' prison for failures to abide by decisions of the Fair Trade Commission.	*Lesser offences:* Up to ₩ 150 million and 2 years imprisonment. Failure to comply: Up to ₩ 150 million and 2 years imprisonment.	
Other remedies	Injunctions, declarations, community service, probation, orders to enable evidence in prosecution proceedings to be used by aggrieved parties, damages for third parties	Injunctions, declarations, restitution to victims, home detention, probation, community service, orders to enable evidence in prosecution proceedings to be used by aggrieved parties		Orders to enable evidence in prosecution proceedings to be used by aggrieved parties; damages for third parties **EB**: Additional powers for the OFT to bring representative proceedings and seek restitution from offenders.	Injunctions, declarations, restitution to victims, home detention, probation, community service, treble damages available in civil cases for damages			Administrative orders requiring the parties to terminate the infringing conduct and take action to ensure that future conduct is lawful.
Leniency Policy	Yes.	Yes.	Yes.	Yes.	Yes.	No.	Yes.	Yes.
Frequency of criminal prosecuti-ons	N/A.	Between 1980 and May 2000 there were 51 prosecutions under the Competition Act. 29 prosecutions resulted in guilty pleas and of the remaining contested matters there were only 3 convictions.	N/A	N/A	Increasingly used in relation to major national and international cartels. Recent cases include the Vitamins cartel (8 corporate prosecutions); Fine Art Dealers (Sotheby's and Christie's); Lysine (5 corporate prosecutions); Graphite Electrodes (3 corporate	Rarely required as most companies abide by the administrative procedure.	Rarely required as most companies abide by the administrative procedure.	N/A.

	Australia	Canada	New Zealand	United Kingdom	United States	Japan	South Korea	European Union
					prosecutions)			
Highest individual sentence	N/A	1 year (J Perrault – Ecoles de Sherbrooke)	N/A.	N/A.	3 years of a total of 10 years imprisonment (Austin J "Sonny" Shelton)	Not published by the JFTC, however GCR's Cartel Regulation 2002 states that sentences range from 6 months to 1 year.	*The KFTC website does not disclose whether any sentences have been imposed (see "Harms of cartels and sanctions against them - Republic of Korea" presentation to the OECD June 2001).*	N/A.
Highest cumulative fine for a cartel	A$26 million (International Vitamins - 2001)	C$91.495 million (International Vitamins - 2001)	$5.5 million NZ (North Island meat companies –1998)	£848,000 (Arriva plc and FirstGroup plc – both reduced – July 2002).	US$889.5 million (International Vitamins – 2001)	Administrative surcharge of ¥11.2 billion (Cement industry cartel).	~~₩~~ 190.1 billion (surcharge on K, LG- Caltex and S-Oil, conspiring on bids to supply oil to military – 2000)	855,7million (Vitamin Cartel – 2001)
Highest corporate fine	A$15 million (Roche Vitamins - 1999)	C$50.9 million (F Hoffman-La Roche - 1999)	NZ$1.5 million imposed on each of Affco New Zealand Ltd, Richmond Ltd and Lowe Walker NZ Ltd (North Island meat companies – 1998)	£3.21 million reduced to £2.2 million.- (Napp Pharmaceutical – 2001)	US$500 million (F Hoffman-La Roche - 1999)	Administrative surcharge of ¥7 billion (Kubota Limited)	~~₩~~ 3.336 billion - Showa Denko K.K. (2002)	462 million(Hoffman La Roche – 2001)
Highest individual fine	A$150,000 (Measey, Elliott, Boyce, Stocker)	C$550,000 (P Pare)	NZ$10,000 (CEO Christchurch Transport)	N/A.	US$7.5 million (Taubman)	*Not published by the JFTC.*	*The KFTC website says that criminal fines have been imposed but does not disclose any particular fines. (see "Harms of cartels and sanctions against them - Republic of Korea" presentation to the*	N/A.

Australia	Canada	New Zealand	United Kingdom	United States	Japan	South Korea	European Union
						OECD. June 2001).	

Annexure 2 - International Leniency Policies (Comparable Legal Systems)

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
Regulator	Australian Competition & Consumer Commission (***ACCC***)	Australian Competition & Consumer Commission (***ACCC***)	Competition Bureau (***CB***)	Commerce Commission (***CC***)	Office of Fair Trading (***OFT***)	Antitrust Division of the Department of Justice (***ADDOJ***)	European Commission Directorate-General of Competition (***DGC***)
Is there a published policy?	Yes – *Cooperation Policy for Enforcement Matters* (see www.accc.gov.au/compliance/leniency.htm)	Yes – *Draft Leniency Policy for Cartel Conduct* (see www.accc.gov.au)	Yes – *Immunity program under the Competition Act* (see http://strategis.ic.gc.ca) (currently under review)	Yes – *Leniency Policy* (currently under revision)	Yes – *Leniency in cartel cases* (see www.oft.gov.uk)	Yes – *Leniency policy for individuals* and *Leniency policy for corporations* (see www.usdoj.gov/atr/[ublic/guidelines)	Yes – *Commission notice on immunity from fines and reduction of fines in cartel cases* (see http://europa.eu.int/comm/competition/antitrust/leniency)
Do criminal sanctions apply for competition offences?	No.	No.	Yes, in relation to cartel activity such as price-fixing, market sharing and bid rigging.	No.	No (although criminal sanctions are contemplated in the *Enterprise Bill* 2001 presently before Parliament)	Yes, in relation to cartel activity such as price-fixing, market sharing and bid rigging.	No, although some member states do have criminal sanctions for cartel activity.
Who prosecutes?	The ACCC.	The ACCC.	The Attorney-General after referral from the CB. The Attorney-General can accept or decline a recommendation from the CB as to immunity or leniency.	The CC.	The OFT.	The ADDOJ.	The DGC.
Who imposes the penalty?	The Federal Court of Australia after submissions from the ACCC and the contravenor.	The Federal Court of Australia after submissions from the ACCC and the contravenor.	The Federal Court of Canada and relevant provincial courts after submissions from the CB and the offender.	The High Court of New Zealand after submissions from the CC and the contravenor.	The OFT with a right to appeal to the Competition Commission Appeals Tribunal. Further	The US District Court after submissions from the Antitrust Division of the ADDOJ and the	The European Commission with a right of appeal to the Court of First Instance.

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
					appeals on issues of law can be made to the Court of Appeal and to the Court of Session (in Scotland).	offender.	
What does the policy offer?	"*This statement deals with one aspect of the Commission's approach to enforcement – its policy on the adoption of leniency in circumstances flowing from cooperation. Because the policy continues to evolve in the light of Commission experience and changing markets it is presented in terms of flexible guidelines.*" "*Recognition of such cooperation and assistance takes a variety of forms, eg complete or partial immunity from action by the Commission, submissions to the Court for a reduction in penalty or even administrative settlement in lieu of litigation*."	*"The ACCC is of the view that a leniency policy that provides clear and certain incentives to potential applicants is a valuable tool in fighting illegal cartel conduct. When the extent of the leniency to be provided is certain, persons are more likely to take advantage of such policy and disclose potentially illegal and harmful conduct."*	"*Anyone implicated in activity that might have violated the Competition Act may offer to cooperate with the Bureau and request immunity. ….* *In this bulletin the term immunity refers to a grant of full immunity from prosecution under the Competition Act. When a party does not qualify for immunity, the Commissioner may recommend that the Attorney-General grant another form of leniency.*"	"*Leniency means that the Commission may decide to take a lower level of enforcement action, or no action at all, against you in exchange for your information and full cooperation.*"	"*Under the leniency programme, members of cartels may have their financial penalty reduced substantially or avoid a penalty altogether*." "*Leniency may take the form of total immunity from financial penalty or a significant reduction. It does not extend to the other consequences of infringing Chapter 1 prohibition, which include the fact that the unlawful agreement cannot be enforced and the possibility that third parties who consider they have been harmed by the agreement may have a claim for damages in the courts.*"	"*The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "leniency" means not charging a firm criminally for a the activity being reported."* *"*[The Individual Leniency Policy] *applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware.*"	"*The Commission considered that it is in the Community interest to grant favourable treatment to undertakings which cooperate with it*." "*The Commission considers the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to undertaking in question, on condition that certain additional requirements are fulfilled.* *"Moreover, cooperation by one or more undertakings may justify the*

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
							reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution , in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are limited to those undertakings that provide the Commission with information that adds significant value to that already in the Commission's possession.
Guarantees of particular treatment for classes of cooperative corporations or individuals	No.	Yes.	No, but such guarantees are presently being considered.	No.	Yes.	Yes.	Yes.
What factors will be considered for leniency?	Leniency will be most likely considered for a corporation which: • comes forward with valuable and important evidence of a contravention of which the ACCC is otherwise unaware or has insufficient evidence to initiate proceedings;	When a corporation or individual does not qualify for immunity, leniency may still be considered under the *ACCC Co-operation Policy for Enforcement Matters*.	When a party does not qualify for immunity, the Commissioner may recommend that the Attorney General grant another form of leniency. When a party believes it does not meet the requirements for immunity, it may still offer to co-operate with the Bureau and	The CC is most likely to consider requests for leniency where individuals or businesses: • fully inform the Commission about the behaviour that may breach the Commerce, Fair Trading or Electricity Industry Reform Acts;	The OFT will consider reductions in penalty of up to 50 per cent in two cases: • where the undertaking is not the first to come forward with information but does so before the Director General has given written notice of his	Leniency will be granted if the corporation meets 6 guidelines: • At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity	Undertakings that do not meet the conditions for immunity below may be eligible to benefit from a reduction of any fine that would otherwise have been imposed. In order to qualify, an undertaking must provide the Commission with evidence of the

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
	• on discovering the breach, takes prompt and effective action to terminate its part in the activity; • provides the ACCC with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the ACCC's investigation and any ensuing prosecution; • has not compelled or induced any other corporation to take part in the anti-competitive agreement and was not a ringleader or originator of the activity; • is prepared to make restitution where appropriate; • is prepared to take immediate steps to rectify the situation and ensure that it does not happen		request another form of leniency.	• are prepared to fully co-operate with the Commission during any subsequent investigation (or investigations). This includes a full, frank and truthful disclosure about their own behaviour and provision of all relevant information (including written documents). Co-operation could also include giving evidence in court if necessary; • are prepared to pay compensation to injured parties where the Commission considers that this is appropriate; • upon discovering that their behaviour may breach the Commerce, Fair Trading or Electricity Industry Reform Acts, stop that behaviour	proposal to make a decision that the Chapter I prohibition has been infringed; and • where the undertaking would have qualified for total immunity had it not been the instigator or leader of the cartel or compelled others to join. In both cases, to qualify for a reduction, the undertaking must: • provide the OFT with all the information, documents and evidence available to it regarding the existence and activities of the cartel; • maintain continuous and complete cooperation throughout the investigation; • and cease its involvement in the cartel from the time it comes forward	being reported from any other source; • The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; • The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; • The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; • Where possible, the corporation makes restitution to injured parties;	suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence. The concept of added value refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
	again, undertakes to do so and complies with the undertaking; and • does not have a prior record of Act, or related offences.			immediately; and • are willing to put in place an effective compliance programme.	with information	and • The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity. If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met: • The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported; • The Division, at the time the corporation comes in, does not yet have	considered to have a greater value than that with only indirect relevance. The Commission will determine in any final decision adopted at the end of the administrative procedure: • whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time; • the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, as follows. For the: • first undertaking to meet the requirements: a reduction of 30-50 %, • second undertaking to

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
						evidence against the company that is likely to result in a sustainable conviction; • The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; • The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation; • The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; • Where possible, the corporation	meet the requirements: a reduction of 20-30 %, • subsequent undertakings that meet the requirements: a reduction of up to 20 %. In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the Condition was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission. In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
						makes restitution to injured parties; and • The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward. In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to	Commission will not take these elements into account when setting any fine to be imposed on the Undertaking which provided this evidence.

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
						having evidence that is likely to result in a sustainable conviction.	
What factors will be considered for immunity?	No specific guidelines exist for the granting of immunity other than the general guidelines that exist under the policy.	Total immunity from ACCC initiated proceedings will be granted to the first corporation to disclose the existence of a cartel to the ACCC where the ACCC is unaware of the alleged cartel and the following criteria are met: • the corporation gives full and frank disclosure and provides the ACCC with all evidence and information in its possession or available to it relating to the suspected cartel and co-operates fully, on a continuous basis and expeditiously throughout the ACCC's investigation and any ensuing proceedings; • the admissions and co-operation are a truly	Subject to the following requirements, and consistent with fair and impartial administration of the law, the Commissioner will recommend to the Attorney General that immunity be granted to a party in the following situations: • the Bureau is unaware of an offence, and the party is the first to disclose it; or • the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General. **Requirements:** • The party must take effective	No specific guidelines exist for the granting of immunity other than the general guidelines that exist under the policy.	Total immunity is available to the first member of the cartel to come forward with relevant information. Immunity is automatic if the information is provided before the OFT has begun an investigation and the OFT does not already have sufficient evidence to establish that the cartel exists. It is discretionary if the OFT has already begun an investigation but the Director General has not yet given written notice of his proposal to make a decision that the Chapter I prohibition has been infringed. In both cases, the following conditions must also be met. The undertaking must: • provide the OFT with all the information, documents and evidence available	Total immunity is available to the first member of the cartel to come forward with relevant information.	The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if: • the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with an alleged cartel affecting the Community; or • the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC in connection with an alleged cartel affecting the Community.

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
		corporate act; • the corporation immediately ceases its involvement in the suspected cartel, or acts as otherwise directed by the ACCC; • the corporation has not coerced other corporations to participate in the cartel and has not been the clear leader in the cartel. The ACCC will not apply for a pecuniary penalty against the first corporation to make an application for leniency where the ACCC is aware of the cartel, but has insufficient evidence to institute proceedings and the corporation meets the above criteria.	steps to terminate its participation in the illegal activity. • The party must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada. • Throughout the course of the Bureau's investigation and subsequent prosecutions, the party must provide complete and timely co-operation: • the party must reveal any and all offences in which it may have been involved; • the party must provide full, frank and truthful disclosure of all the evidence and information		to it regarding the existence and activities of the cartel; • maintain continuous and complete cooperation throughout the investigation; • not be the instigator or leader of the cartel and not have compelled others to join; and • cease its involvement in the cartel from the time it comes forward with information.		Immunity pursuant to the first limb will only be granted on the condition that the Commission did not have, at the time of the submission, sufficient evidence to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with the alleged cartel. Immunity pursuant to the second limb will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under the first limb in connection with the alleged cartel. The following cumulative conditions must be met in any case to qualify for any immunity from a

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
			known or available to it or under its control, wherever located, relating to the offences under investigation. There must be no misrepresentation of any material facts; and • the party must co-operate fully, on a continuing basis, expeditiously and, when the party is a business enterprise, at its own expense throughout the investigation and with any ensuing prosecutions. Companies must take all lawful measures to promote the continuing co-				fine: • the undertaking cooperates fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it remains at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned; • the undertaking ends its involvement in the suspected infringement no later than the time at which it submits evidence under the first or second limbs, as

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
			operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions. • Where possible, the party will make restitution for the illegal activity.				appropriate; • the undertaking did not take steps to coerce other undertakings to participate in the infringement.
Position of individuals	The ACCC will most likely consider leniency, including immunity, to be appropriate for individuals who: • come forward with valuable and important evidence of a contravention of which the Commission is either otherwise unaware or has insufficient evidence to initiate proceedings; • provide the Commission with	Total immunity from ACCC initiated proceedings will be granted to the first individual to disclose the existence of a cartel to the ACCC where the ACCC is unaware of the alleged cartel and the following criteria are met: • he or she gives full and frank disclosure and provides the ACCC with all evidence and information in his or her possession	Same conditions apply as for corporate immunity.	Same conditions apply as for corporate immunity.	Same conditions apply as for corporate immunity.	Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met: • At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other	Immunity policy does not apply to individuals as the Commission cannot fine individuals.

Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
full and frank disclosure of the activity and relevant documentary and other evidence available to them; • undertake the cooperate throughout the Commission's investigation and comply with that undertaking; • agree not to use the same legal representation as the firm by which they are employed; and • have not compelled or induced any other person/corporation to take part in the conduct and were not a ringleader or originator of the activity. • Immunity would not be granted where the person seeking leniency has compelled or induced any other person/corporation to take part in the	or available to him or her relating to the suspected cartel and co-operates fully, on a continuous basis and expeditiously throughout the ACCC's investigation and any ensuing proceedings; • he or she immediately ceases his or her involvement in the suspected cartel, or acts as otherwise directed by the ACCC; • he or she must not have been involved in the coercion of other persons to participate in the cartel and must not have been the clear individual leader in the cartel. The ACCC will not apply for a pecuniary penalty against the first individual to make an application for leniency where				source; • the individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and • the individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity. Any individual who does not qualify for leniency under the conditions set out above will be considered for statutory or informal immunity from criminal prosecution. Such immunity decisions will be made by the Division on a case-by-case basis in the exercise of its prosecutorial discretion.	

	Australia: *Co-operation Policy for Enforcement Matters*	Australia: *Draft Leniency Policy for Cartel Conduct*	Canada	New Zealand	United Kingdom	United States	European Union
	conduct or was a ringleader or originator of the activity.	the ACCC is aware of the cartel, but has insufficient evidence to institute proceedings where the individual meets the above criteria. In addition, if a corporation qualifies for leniency, all directors, officers and employees of the corporation who admit their involvement in the cartel as part of the corporate admission will receive leniency in the same form as the corporation provided that they: • provide the ACCC with full and frank disclosure of all evidence and information in their possession or available to them relating to the suspected cartel in the form requested by the ACCC; and • co-operate fully, on a continuous basis and expeditiously throughout the ACCC's investigation and any ensuing proceedings.				If a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy.	