SUBMISSION TO THE

TRADE PRACTICES ACT REVIEW

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The Minerals Council of Australia and the Australian Minerals Industry

The Minerals Council of Australia is the peak, national organisation representing the exploration, mining and minerals processing industry in Australia. The membership of the Council accounts for in the order of 85 per cent of Australian minerals production and a slightly higher percentage of Australia's mineral exports.

The industry the Council represents is diverse, commodity oriented, technologically advanced, capital intensive, characteristically high risk / high reward, heavily export oriented and increasingly profoundly globally aware and internationally integrated. Many of the industry's operational characteristics are synonymous with other commodity sectors, but it does have unique, differentiating characteristics.

Australia's minerals industry has successfully demonstrated its capacity to operate in highly competitive international markets and an increasingly globalised economy. The industry's future performance will depend in part on economic conditions in Australia maintaining that competitive edge given increased globalisation of the industry. This will see established and emerging producers elsewhere looking to achieve the same economic success that Australia has had for an expanding minerals sector.

The Dynamic Global Business Environment

The economic environment in which Australian business operates has undergone significant change during the last decade. Greatly increased globalisation (even for an industry historically one of the most heavily engaged in the global trading system), the liberalisation of trade and investment and the evolution of new technologies have had significant impacts on the Australian economy, particularly on heavily trade exposed industries such as the Australian minerals industry.

In a global economy, firms must be able to operate at world's best practice in an internationally competitive economic environment. A company's drive for cost efficiency and optimum revenue must be complemented by reforms to the national domestic costs structure and other domestic policy initiatives conducive to sustained development and growth.

The Australian minerals industry competes in the global market:

- unprotected and without structured industry assistance;
- suffering existing and potential artificial barriers to markets; and
- bearing the lead weight to its global competitiveness of an inflated domestic cost structure principally founded in a high regulatory "over-burden", a decreased commitment to workplace relations reform, an ageing and inadequate public **infrastructure and over-restrictive competition policy**.

The Importance of Competition Policy

Competition policy is simply about protecting competition in the market. It is an essential component in sustaining the competitiveness and flexibility of the Australian economy and contributing to higher standards of living. The National Competition Policy and the progressive implementation of the Competition Principles Agreement continue to deliver strong economic and employment growth and to improve the efficiency of resource allocation and utilisation.

The Minerals Council of Australia supports the review and reform of laws that restrict competition and effect:

- the development of more competitive material input markets;

- the provision of competitive and capable utilities and essential infrastructure; and

- a less restrictive, more definitive and more orderly regulatory regime such that the Australian Competition and Consumer Commission (ACCC) is able to take greater account of globalisation of economic and commercial activity and competition in the industry and its product markets in administering and enforcing the merger provisions of the ***Trade Practices Act 1974***.

In addition, the Council notes the national or public interest is often confused with, and simply equated to, consumer interest. Clearly, the wider community extends beyond the direct interests of consumers. However, achieving and as significantly being seen to achieve, an appropriate balance between the interests of the community, or wider public, and the direct and often short-term interest of the consumer is difficult, but critical to the integrity of equitable and effective competition policy.

Improvements to Existing Policy

The Minerals Council considers, that to the extent business has difficulties with the administration of the ***Trade Practices Act 1974***, those difficulties lie more with the administration of the Act than the Act ***per se***. In particular, there exists a great deal of scope for subjectivity in judgements as could be expected when judgements are required on such matters as:

- equity or fairness;

- levels of competitiveness and the substantial lessening of competition in the market;

- the definition of the market;

- identified barriers to entry;

- potential imports and exports;

- proportion of exports that warrant special attention;

- market power; and

- abuse of market power.

Each of these critical market and competition criteria are highly subjective concepts upon which subjective judgements are made about what are ultimately objective outcomes.

In this regard, the costs of regulatory error have, and will continue to, become more significant as the Australian economy is increasingly integrated with the global economy and, therefore, more exposed to international competition. Incorrect regulatory interventions result in inefficiencies, disincentives to invest and higher costs to business and customers with limited capacity to externalise extraordinary costs as imposts which must be internalised.

Accordingly, in this review of the Act, the Council's focus is on achieving increased definition, improved transparency and greater accountability in the application/administration of the Act.

Increased Definition and Transparency

The scope for subjectivity in administrative determinations needs to be narrowed, more accurately defined and quantified where feasible, and more comprehensively communicated to business and the wider community. This, in a manner that confers greater clarity, surety and confidence in the way in which the ACCC will interpret and apply critical market and competition criteria, and within the context of current and potential circumstances, consistent with an evolving and dynamic market.

Specific to matters relating to mergers, acquisitions and monopolies, the Minerals Council of Australia considers that the full composite of public benefits that would result, or be likely to result, on account of a proposed acquisition or merger should be taken into account in

satisfying a Section 50 test in a manner comparable to that which applies during an authorisation application pursuant to Sections 88(9) and 90(9).

This position is consistent with the Minerals Council's desire for markets that operate competitively and efficiently and not necessarily just less concentrated or less regulated, and in the national or public interest. It also goes to the notion that competition policy should seek to establish a "balance" between the interests of the community or wider public and the direct interests of business and the consumer.

To give effect to this position, **the Minerals Council recommends**:

- **that the Commission's power to challenge a merger be clarified (currently, the relationship between the Commission's determination and the ruling of the Court is imprecise);**

- **amendment to Section 50 of the Act to the effect that where a merger or acquisition would otherwise fail the substantially lessening of competition test (pursuant to subsections (1) and (2)) it not be prohibited if the public benefits of the acquisition would, or are likely to, outweigh any public detriment arising or likely to arise from the substantial lessening of competition;**

- **that consideration of public benefit be consistent with a public interest test that takes into account in establishing in terms of economic efficiency when the benefits outweigh the costs:**
  - **government legislation and policies relating to sustainable development;**
  - **social welfare and equity, including community service obligations;**
  - **laws and policies relating to matters such as occupational health and safety, workplace relations, access and equity;**
  - **economic and regional development, including employment and investment growth;**
  - **the interests of consumers generally or a class of consumers;**
  - **the competitiveness of Australian business; and**
  - **the efficient allocation of resources;**
- **the ACCC, in assessing issues relating to market dominance and anti-competitiveness, should be required to give real assessment to export considerations, also in a manner comparable to that which applies during an "authorisation application";**

- **amendments to the list in sub-section 50(3) of the Act in respect of matters that can be taken into account when considering the competition implications of a merger to specifically include consideration of public benefits and efficiency gains;**

- **to complement the recommendations for amendments to the Act, changes to the current ACCC Merger Guidelines to include public benefit considerations;**

- **the ACCC be required to monitor and evaluate publicly (with due regard to commercial confidence and sensitivity) the impact of merger decision(s) on market competition and where any failures in appropriate merger administration is compromising overall public benefit; and**

- **that the ACCC be required to give substantive and substantial reasons for its decisions to clear or oppose a merger or acquisition proposal under Section 50 and that the process and outcomes of accepting Section 87B – undertakings – be more transparent.**

For the purposes of determining anti-competitive conduct (Part IV of the Act), the Minerals Council considers that the definition of "related bodies corporate", for the purposes of determining anti-competitive conduct, that is, collusive pricing and exclusionary behaviour, should accommodate normal structural arrangements that, for all intents and purposes, provide for a single entity.

The Minerals Council recommends:

- **dual listed companies (DLCs) be treated as "related bodies corporate" for the purposes of the Act**

  - this would reflect the fact that DLCs are for all intents and purposes part of the same entity;

- **In a similar way, unincorporated joint ventures (UJVs) in which one party has more than a 50 per cent interest be treated as "related bodies corporate" for the purposes of the Act**

  - the incorporated or unincorporated form of JVs should not dictate whether an agreement between those JVs breaches the Act;

- **an exception to the prohibition on exclusionary provisions be introduced for JVs**

  - this would remove the existing risk that many standard JV arrangements may breach the prohibition on exclusionary provisions under the Act; and

- **the current exception to the prohibition on price fixing for JVs be clarified**

  - the current exception is limited and open to interpretation. The exception should be redrafted to both expand its application and ensure that it applies to minerals industry JVs.

In relation to anti-competitive agreements, the Minerals Council recommends export arrangements be clearly exempted from the provisions of the Act by amending Section 51(2)(g) of the Act to remove the ACCC notification requirement.

Increased Accountability

Compounding the inherent subjectivity in judgements made against legislated criteria for determining anti-competitive conduct is the real or perceived, less than adequate, public accountability of the ACCC. This is particularly so given its multi-faceted role as a policy body prosecutor, arbiter, consumer protection body and enforcer of competition policy.

An area of concern that has been raised in a number of submissions to the review is the ACCC's use of publicity as part of its administration of the Act. The ACCC itself strongly defends its use of the media and its publicity of administration of the Act. The Council is however concerned that it may be the case that such publicity compromises the right of a company under investigation or against whom action has been bought, to a fair hearing and the right to be presumed innocent of wrongdoing until a court determines otherwise.

In relation to the merger provisions, the Council's recommendations aim to ensure that the merger provisions and the ACCC's administration of them remain relevant to the Australian minerals industry, particularly in the context of the changing global economic environment it faces.

The Council considers that the ACCC appears not to have made a strong case for changes to enhance its powers (broadly, the proposals include 'cease and desist' powers, the introduction of an 'effects' test, reversal of onus of proof and possible divestiture powers) other than to equate Australian law and practice to that existing elsewhere internationally. The case that offshore legislation is best practice in relation to these matters has not been made and ***prima facie*** could have deleterious or adverse consequences to the market by affecting anti-competition, anti-investment sentiment and not pro-competition as theorised by the advocates of this amendment to the Act.

Improved Governance

Along with the Reserve Bank of Australia (RBA) and the Australian Taxation Office (ATO), the ACCC is one of Australia's most important economic regulators. It has a key role to play in ensuring markets operate effectively and competition provides benefits for all Australians. It is therefore important to consider whether the ACCC's current administrative arrangements and, importantly, governance arrangements support the discharge of these duties and whether improvements to the

current arrangements should be made. The Council has concluded that a number of improvements are possible.

The Minerals Council recommends:

- **a Board of Competition Policy be established to provide a natural extension of the ACCC's current consultative arrangements with business; and**

- **an Ombudsman of Competition Policy be appointed to investigate both "systemic" issues associated with the administration of the Act and to investigate specific complaints about decisions or actions of the ACCC.**

These recommended improvements will be bring arrangements for the ACCC more in line with aspects of the arrangements of the RBA and ATO and achieve a more efficient, fair, timely and accessible framework for competition law.

SECTION 1 — THE MINERALS COUNCIL OF AUSTRALIA AND THE AUSTRALIAN MINERALS INDUSTRY

This submission to the review of the ***Trade Practices Act 1974*** (the Act), its administration and regulatory governance arrangements is made by the Minerals Council of Australia.

The Minerals Council of Australia is the peak, national organisation representing the exploration, mining and minerals processing industry in Australia. The membership of the Council accounts for in the order of 85 per cent of Australian minerals production and a slightly higher percentage of Australia's mineral exports.

The Council's charter is to promote the development of a safe, profitable and environmentally responsible minerals industry that is internationally competitive and attuned to community expectations.

The industry the Council represents (excluding oil and gas sectors) is diverse, commodity oriented, technologically advanced, capital intensive, characteristically high risk / high reward, heavily export oriented and increasingly profoundly globally aware and internationally integrated.

It is an industry of considerable size and economic and social significance, benefiting all Australians both directly and indirectly.

The Australian mining and minerals processing sector accounted for:

- around 8.6 per cent of national gross domestic product in 1999-2000;
- in 2000-01, around $42 billion of Australia's total export revenues, which is 37 per cent of total merchandise exports and 28 per cent of Australia's total exports of goods and services;
- exports of mining technology, equipment and services of approximately $1.3 billion in 1999-2000 increasing to around $1.7 billion in 2000-01;
- directly and indirectly, some 240,000 jobs, representing 4.6 per cent of total employment in 2000-01, many of which are in sparsely populated remote and regional Australia;
- 20.9 per cent of private new capital expenditure in Australia in 2000-01;
- total Government revenue payments of $4.3 billion in 2000-01, comprising $1.1 billion, $1.1 billion, $1.7 billion and $0.5 billion for mineral royalties, Government port and rail charges, income tax expense and indirect taxes, respectively; and
- significant infrastructure development – since 1967, the industry has built 25 towns, 12 ports and additional port bulk handling infrastructure at many existing ports, 25 airfields and over 2,000 kilometres of rail line. The industry is often the sole provider of social infrastructure – health, education and welfare – in remote areas of the country; this infrastructure is often enduring long past the completion of mining activities.

Many of the industry's operational characteristics are synonymous with other commodity sectors, but it does have unique, differentiating characteristics vis:

- **profoundly externally integrated and reliant upon international markets** arguably more so than any other industry sector. This exposes the industry to:

  - fluctuations in demand, prices and exchange rates – many ***metal prices are cyclic*** in the short to medium term. Prices for metals have been falling in real terms for many years. Export price contracts are typically fixed in US dollars (offset to some extent by borrowings, which are usually in the same currency, and hedging arrangements)

  - changes in market access conditions through tariffs, quotas, fuel taxes and other government policy instruments – just as for other processed products, tariff escalation (a higher rate of tariff with increasing levels of industrial transformation of the raw commodity) is

a feature of the minerals products market; and

- competition from alternative suppliers and alternative materials.

· **an increasingly globalised industry** characterised by:

- rationalisation and reconsolidation (to the circumstances of the 1970s) of businesses and operations;

- increased concentration of ownership;

- intensified competition; and

- convergence to global sourcing of materials to supply global markets.

· **few companies have earned their real cost of capital**, and even less have delivered above average shareholder returns In the past 15 years:

- over the last 25 years net profit return on average shareholders funds has averaged 10.1 per cent, was severely depressed in the three years 1997-2000 at 1.8 per cent, 3.7 per cent and 4.0 per cent respectively, but recovered strongly in 2000-01 post a net profit return on shareholders funds of 13.9 per cent;

- over the period 1985-2000, the average return for western world resource companies of 4.8 per cent and for Australian companies of 5.7 per cent was significantly less than the average return of 7.3 per cent investment in US bonds.

· **The industry's terms of trade have continued to decline** on a long-term trend basis by around 2 per cent per annum – reflecting a decline in prices in real terms of the same order – **competition between minerals companies has been so fierce that productivity gains of the past have been transferred almost entirely to customers (and likely to consumers) in the form of lower real prices**.

· Mining **operations are capital intensive**. This partly explains the industry's high productivity but carries with it the disadvantage of heavy interest and loan repayment commitments.

· **Development costs are high**. A large amount of debt funds required to develop any new major mining project has to be borrowed from overseas lenders, with currency and other risks. The reason for this is that the size of most of the projects is beyond the capacity of the Australian capital markets to finance. Furthermore, costly investigation and proving up of each ore body is necessary to reduce risks associated with development.

· **High** wages and good conditions are necessary to compensate labour for the nature of the work and often the isolated location. Operating costs are consequently high.

· **Replacement and incremental investment is high** in order to maintain production levels after the early years because of declining head grades and deeper mining levels.

· **Each mine is unique**. The mine and associated processing facilities must be designed to cater for the unique features of each ore body.

· **High cash flows are necessary** in the early years to fund ***high loan repayments*** because lenders perceive the high risk in mining and lend on short-term bases.

· **A mine is a wasting asset**. Thus, the industry requires ***high-risk funds,*** which are best obtained from cash flows, to be applied in the search for new ore deposits. The establishment, expansion and replacement of operations depend on the success of this unique, costly (it has been estimated that it typically costs $50 million to find a 'world class' deposit), high-risk exploration activity.

- **Mine closure costs must be recovered.** These include severance costs for labour and rehabilitation costs (for example, revegetation costs).

- **Competition for capital** both within Australia and globally is intense.

- **Mine locations are frequently in remote, inhospitable areas** with poor transport, communications, town and port facilities which must be upgraded, enhanced or, more generally, built to maximise economies for the transport of low value, high volume products.

- Minerals companies are often required to provide **social and industrial infrastructures** that would normally be provided by government for other industries.

Australia's minerals industry has successfully demonstrated its capacity to operate in highly competitive international markets and an increasingly globalised economy.

Australia's comparative advantage in natural geological wealth is in itself insufficient to maintain competitive strength in an increasingly globalised economy and industry. A company's ability to internationalise its operations is as significant as its ability to trade globally. This has already taken many forms through consolidation, subsidiaries, joint ventures and/or strategic partnerships in and across many countries with geological wealth and/or strong demand for mineral products.

Trans-national businesses are under increasing pressure to justify Australia as a strategic location for corporate mining and minerals processing, irrespective of whether they are Australian or foreign owned.

There are no guarantees that Australia's comparative advantages will secure its inclusion in any international company's global consideration of where best to strategically locate its operations to supply global markets.

The Australian minerals industry has based, but not relied upon, its comparative advantage in raw materials to, in effect, cross-subsidise its competitive strength in value-added industrial transformation of raw commodities to mineral/metal products. As globalisation deepens and trade liberalisation expands, differentials in commodity prices will "pan out", increasingly shifting the determinants of global competitiveness to conversion cost efficiency. Plant capacity utilisation, economies of scale, labour productivity, factor input costs, processing systems technology, in particular, continue to challenge Australian operations' competitiveness and growth, both on and off shore.

This focus on improving companies' financial performance in increasing production and improving conversion cost efficiency has been founded on improved access to capital and its utilisation through significant technological advancement.

Latterly though, the focus on improving margins has transcended the traditional sources of resource and labour productivity gains to increase pricing power through the greater strategic employment of capital, even to the point of controlling "dumb capital". And, in an increasingly globalised economy and industry, that means, in general at least, supply control globally.

The industry's future performance will depend in part on economic conditions in Australia maintaining that competitive edge given increased globalisation of the industry. This will see established and emerging producers elsewhere looking to achieve the same economic success that Australia has had for an expanding minerals sector.

SECTION 2 — THE DYNAMIC GLOBAL BUSINESS ENVIRONMENT

The economic environment in which Australian business operates has undergone significant change during the last decade. Greatly increased globalisation (even for an industry historically one of the most heavily engaged in the global trading system), the liberalisation of trade and investment and the

evolution of new technologies have had significant impacts on the Australian economy, particularly on heavily trade exposed industries such as the Australian minerals industry.

The interdependency of the world's economies, their trade and commerce is increasing at a rapid rate. Globalisation is fuelled by the removal of barriers to the flow of information, capital, services and goods and driven by rapid technological advancements in telecommunications, transport, biology and packaging.

The industry is competing in a global economy that is characterised by borderless mines and minerals processing, borderless markets, borderless supply chains and "real time" discovery of material and matters.

Globalisation of the world's trade and commerce:

- presents both threats and opportunities delivering more open, more prosperous markets, but intensifying competition in domestic and export markets and concentrating ownership;

- facilitates global sourcing of goods and services, which has in recent years been significantly enhanced through the development of global exchanges as trading hubs of the internet, and technological advances in transport and logistics systems;

- will continue to test the competitiveness of Australian industry, increasingly exposing any underlying weaknesses, whether businesses are engaged in exports or not. Comparative advantages will not be sufficient to sustain competitiveness onshore in meeting import competition, and offshore in sustaining or forging new opportunities in export markets.

In a global economy, firms must be able to operate at world's best practice in an internationally competitive domestic economic environment. A company's drive for cost efficiency and optimum revenue must be complemented by reforms to the national domestic costs structure and other domestic policy initiatives conducive to sustained development and growth.

For many businesses, the frustration of globalisation is the uncertainty and the pressure of managing change in a dynamic and complex market, to be efficient, competitive and profitable and often with little if any control over some of the major determinants of business success – the exchange rate being principal among them, but there are others. The Australian minerals industry competes in the global market:

- unprotected and without structured industry assistance;
- suffering existing and potential artificial barriers to markets; and
- bearing the lead weight to its global competitiveness of an inflated domestic cost structure principally founded in a high regulatory "over-burden", a decreased commitment to workplace relations reform, an ageing and inadequate public **infrastructure and over-restrictive competition policy**.

SECTION 3 — THE IMPORTANCE OF COMPETITION POLICY

Competition policy is simply about protecting competition in the market. It is an essential component in sustaining the competitiveness and flexibility of the Australian economy and contributing to higher standards of living. The National Competition Policy (NCP) and the progressive implementation of the Competition Principles Agreement continue to deliver strong economic and employment growth and to improve the efficiency of resource allocation and utilisation.

As the Hilmer Report[1] itself noted

> ***Competition policy is not about the pursuit of competition per se. Rather, it seeks to facilitate effective competition to promote efficiency and economic growth while accommodating***

[1] Hilmer, F., Raynor, M. and Taperell, G. (The Independent Committee of Inquiry) (1993), ***National Competition Policy***, AGPS, Canberra.

situations where competition does not achieve efficiency or conflicts with other social objectives. These accommodations are reflected in the content and breadth of application of pro-competitive policies, as well as the sanctioning of anti-competitive arrangements on public benefit grounds.

The NCP has been in force since 1995 and has focused on extension of the ***Trade Practices Act 1974***, infrastructure reform, review of laws restricting competition and improving performance of government businesses.

Competition policy applying to the suppliers of goods and services in both the traded and non-traded goods sectors is vital to ensure the globally exposed traded goods sector is not impaired by uncompetitive and inefficient supplier arrangements.

Therefore, the focus on competition policy of particular interest to the minerals industry, as it was for other traded goods sectors, was and continues to be on the potential to:

- reduce input costs through reforms to essential infrastructure, the development of competitive material input markets, the review and reform of statutory government business enterprises and/or marketing arrangements that restrict competition contrary to the national interest; and
- enhance opportunities for growth and competitiveness through acquisitions and mergers that provide economies of scale and vertically integrated strategic alliances.

Informed commentators consider the deregulation of Australia's economy during the 1980s and the reinvigoration of competition policy (post the Hilmer Report) to be key determinants in the shift in Australia's trade and commerce activity to industry's able to exploit genuine comparative advantage and build competitive strength. This has delivered real gains in business competitiveness, reductions in prices for essential infrastructure and utility services and increased disposable income and quality of life of ordinary Australians.

The significant gains for the Australian community from implementing NCP reforms far outweigh any localised, socioeconomic costs, particularly borne by uncompetitive sectors, either in economic transition or closure.

Few argue the imperative for competition policy conducive to markets operating competitively and efficiently not necessarily just less concentrated or indeed less regulated, and in the national or public interest.

The Minerals Council of Australia supports the review and reform of laws that restrict competition and effect:

- **the development of more competitive material input markets;**
- **the provision of competitive and capable utilities and essential infrastructure; and**
- **a less restrictive, more definitive and more orderly regulatory regime such that the Australian Competition and Consumer Commission (ACCC) is able to take greater account of globalisation of economic and commercial activity and competition in the industry and its product markets in administering and enforcing the merger provisions of the *Trade Practices Act 1974*.**

The Minerals Council of Australia appreciates the inherent conundrum for both policy makers and the regulator in ensuring that Australia's competition policies provide for global (import and export competing) business scale and competitiveness without compromising effective and efficient competition in the domestic market.

Further, the national or public interest is often confused with, and simply equated to, consumer interest. Clearly, the wider community extends beyond the direct interests of consumers. However, achieving and as significantly being seen to achieve, an appropriate balance between the interests of the community, or wider public, and the direct and often short-term interest of the consumer is difficult, but critical to the integrity of equitable and effective competition policy.

SECTION 4 — IMPROVEMENTS TO EXISTING POLICY

The Minerals Council considers, that to the extent business has difficulties with the administration of the ***Trade Practices Act 1974***, those difficulties lie more with the administration of the Act than the Act ***per se***. In particular, there exists a great deal of scope for subjectivity in judgements as could be expected when judgements are required on such matters as:

- equity or fairness;
- levels of competitiveness and the substantial lessening of competition in the market;
- the definition of the market;
- identified barriers to entry;
- potential imports and exports;
- proportion of exports that warrant special attention;
- market power; and
- abuse of market power.

Each of these critical market and competition criteria are highly subjective concepts upon which subjective judgements are made about what are ultimately objective outcomes.

The costs of regulatory error have, and will continue to, become more significant as the Australian economy is increasingly integrated with the global economy and, therefore, more exposed to international competition.

Incorrect regulatory interventions result in inefficiencies, disincentives to invest and higher costs to business and customers with limited capacity to externalise extraordinary costs as imposts which must be internalised.

The consequences of inappropriate regulatory intervention are both direct and indirect – the latter more likely effected through market sentiment. For example, irrespective of whether it is perception or reality, the sentiment in the market is that of an ACCC aggressively pursuing an "anti-dominance policy on only a national market basis" which serves as a significant disincentive to pursuing growth through acquisitions and mergers, which can be a significant source of growth for larger companies, and to long-term investment in operations and capacity building.

Accordingly, in this review of the ***Trade Practices Act 1974,*** the Minerals Council of Australia's focus is on achieving **increased definition, improved transparency and greater accountability** in the administration of the Act (even if the latter is only perceived as such).

4.1 Increased Definition and Transparency

As detailed in Section 2, rapid and complex change in global trade and commerce poses increasing challenges and requirements for modification to standing competition policy and legislation giving effect to it.

While there is an inherent ambiguity in many of the criteria upon which the ACCC is required to make administrative determinations, business and indeed the Federal Parliament[2] are looking for increased definition and transparency.

Accordingly, the scope for subjectivity in administrative determinations needs to be narrowed, more accurately defined and quantified where feasible, and more comprehensively communicated to business and the wider community. This, in a manner that confers greater clarity, surety and confidence in the way in which the ACCC will interpret and apply critical market and competition

[2] As indicated in House of Representatives Standing Committee on Industry, Science and Technology (1997), ***Finding a balance: towards fair trading in Australia***, Canberra, AGPS and Joint Select Committee on the Retailing Sector (1999), ***Fair market or market failure***, Canberra, Parliament.

criteria, and within the context of current and potential circumstances, consistent with an evolving and dynamic market.

The process and indeed the reform outcomes to the ACCC's consideration of new Export Guidelines in the late 1990s is a model which could be usefully replicated – this entailed consideration of amendments to the Act in addition to the revisions to the Guidelines.

Specific to matters relating to mergers, acquisitions and monopolies, the Minerals Council of Australia considers that the full composite of public benefits that would result, or be likely to result, on account of a proposed acquisition or merger should be taken into account in satisfying a Section 50 test in a manner comparable to that which applies during an authorisation application pursuant to Sections 88(9) and 90(9).

This position is consistent with the Minerals Council's desire for markets that operate competitively and efficiently and not necessarily just less concentrated or less regulated, and in the national or public interest. It also goes to the notion that competition policy should seek to establish a "balance" between the interests of the community or wider public and the direct interests of business and the consumer.

To give effect to this position, **the Minerals Council recommends**:

- **that the Commission's power to challenge a merger be clarified (currently, the relationship between the Commission's determination and the ruling of the Court is imprecise);**

- **amendment to Section 50 of the Act to the effect that where a merger or acquisition would otherwise fail the substantially lessening of competition test (pursuant to subsections (1) and (2)) it not be prohibited if the public benefits of the acquisition would, or are likely to, outweigh any public detriment arising or likely to arise from the substantial lessening of competition;**

- **that consideration of public benefit be consistent with a public interest test that takes into account in establishing in terms of economic efficiency when the benefits outweigh the costs:**
  - **government legislation and policies relating to sustainable development;**
  - **social welfare and equity, including community service obligations;**
  - **laws and policies relating to matters such as occupational health and safety, workplace relations, access and equity;**
  - **economic and regional development, including employment and investment growth;**
  - **the interests of consumers generally or a class of consumers;**
  - **the competitiveness of Australian business; and**
  - **the efficient allocation of resources;**

- **the ACCC, in assessing issues relating to market dominance and anti-competitiveness, should be required to give real assessment to export considerations, also in a manner comparable to that which applies during an "authorisation application";**

- **amendments to the list in sub-section 50(3) of the Act in respect of matters that can be taken into account when considering the competition implications of a merger to specifically include consideration of public benefits and efficiency gains;**

- **to complement the recommendations for amendments to the Act, changes to the current ACCC Merger Guidelines[3] to include public benefit considerations;**

- **the ACCC be required to monitor and evaluate publicly (with due regard to commercial confidence and sensitivity) the impact of merger decision(s) on market competition and**

[3] Australian Competition and Consumer Commission (1999), ***Merger Guidelines***, Canberra, June, at http://www.accc.gov.au/pubs/Publications/Business_general/Mergers_and_acquisitions/Mergerguide.pdf.

where any failures in appropriate merger administration is compromising overall public benefit; and

- **that the ACCC be required to give substantive and substantial reasons for its decisions to clear or oppose a merger or acquisition proposal under Section 50 and that the process and outcomes of accepting Section 87B – undertakings – be more transparent.**

For the purposes of determining anti-competitive conduct (Part IV of the Act), the Minerals Council considers that there exists anomalies in Section 4A of the Act in respect to definitions of subsidiary, holding company and related bodies corporate. The **Minerals Council considers that the definition of "related bodies corporate", for the purposes of determining anti-competitive conduct, that is, collusive pricing and exclusionary behaviour, should accommodate normal structural arrangements that, for all intents and purposes, provide for a single entity**. The behaviour of the entity in its totality, not as separate components, should be judged against the provisions of the Act where that may constitute dual listed companies (DLCs), unincorporated joint ventures (UJVs) and/or wholly-owned subsidiaries.

Accordingly, **the Minerals Council recommends:**

- **DLCs be treated as "related bodies corporate" for the purposes of the Act**
  - this would reflect the fact that DLCs are for all intents and purposes part of the same entity;
- **In a similar way, UJVs in which one party has more than a 50 per cent interest be treated as "related bodies corporate" for the purposes of the Act**
  - the incorporated or unincorporated form of JVs should not dictate whether an agreement between those JVs breaches the Act;
- **an exception to the prohibition on exclusionary provisions be introduced for JVs**
  - this would remove the existing risk that many standard JV arrangements may breach the prohibition on exclusionary provisions under the Act; and
- **the current exception to the prohibition on price fixing for JVs be clarified**
  - the current exception is limited and open to interpretation. The exception should be redrafted to both expand its application and ensure that it applies to minerals industry JVs.

Specifically, **in relation to anti-competitive agreements**, Section 51(2)(g) of the Act provides an exemption from the application of certain provisions of Part IV of the Act (specifically Section 45) in relation to a provision of a contract, arrangement or understanding that relates exclusively to the export of goods from Australia or the supply of services outside Australia. This (partial) exemption applies if accurate particulars of the provision were furnished to the ACCC before 14 days after the date on which the contract, arrangement or understanding was made.

This Section recognises that the Act is generally not concerned with the effect of conduct on buyers located outside Australia. However, in the Council's view the Section does not go far enough. The requirement that the exports be notified to the ACCC causes administrative and compliance difficulties and creates concerns for parties in relation to the confidentiality of commercial arrangements.

Therefore, **the Minerals Council recommends export arrangements be clearly exempted from the provisions of the Act by amending Section 51(2)(g) of the Act to remove the ACCC notification requirement.**

4.2 Increased Accountability

Compounding the inherent subjectivity in judgements made against legislated criteria for determining anti-competitive conduct is the real or perceived, less than adequate, public accountability of the

ACCC. This is particularly so given its multi-faceted role as a policy body prosecutor, arbiter, consumer protection body and enforcer of competition policy.

An area of concern that has been continually raised by business is the ACCC's use of publicity as part of its administration of the Act.

The ACCC itself strongly defends its use of the media and its publicity of administration of the Act. For example, in a recent speech to the National Press Club in Canberra, ACCC Chairman Professor Allan Fels argued the ACCC's use of, for example, media releases, does not represent "trial by media". In addition, the ACCC notes that Australia's system of justice is public and uses this to argue that once the ACCC or any law enforcement agency institutes proceedings, it is a public matter. Professor Fels goes on to claim:

> ***ACCC practice is to make a media release which provides a simple, accurate, fair and balanced account of what it is alleging, what relief it is seeking. We make it clear the claims by the Commission are allegations. The Commission does not try to make its case or provide evidence prior to the hearing.***[4]

The Council is however concerned that, notwithstanding these comments, it may be the case that such publicity compromises the right of a company under investigation or against whom action has been bought, to a fair hearing (including the right to present their case to the regulator and to courts), and the right to be presumed innocent of wrongdoing until a court determines otherwise.

One recent high profile case concerned the raid of a number of oil company premises on 24 April 2002. Whilst the ACCC has disputed the extent to which it sought to publicise these raids,[5] and the Council does not question the need for the ACCC to investigate allegations about serious breaches of the Act, the Council is concerned that the ACCC's defence of its actions, contained in Professor Fels' speech to the National Press Club, do not address the substantive issues about the potential damage caused to companies under investigation.

In relation the particular issue of merger proposals, it is the Council's view that reform of the Act and its administration may allow a more commercially realistic means of balancing the competition and other public benefit aspects of proposed mergers to avoid inefficient commercial processes and outcomes for the Australian economy.

Failure to do so can lead to considerable uncertainty and delays, making merger proponents vulnerable to adverse market reaction and to their competitors. In addition, it is important to ensure that the ACCC's analysis of markets and the impact of mergers is rigorous and, importantly, underpinned by transparent administrative process. To do otherwise will result in inefficient commercial processes and outcomes for the Australia minerals industry in particular, and the Australian economy more generally.

In the Council's view, the ACCC makes too much of defining its record of the number of mergers allowed to proceed and only "a few" rejected. To the few, the statistics are not of any real comfort and if there has been an error in preventing a successful acquisition or merger from proceeding then direct shareholders and the community at large may bear the loss however that might appear in overall percentage terms of cases considered.

In this context, the Council considers that the ACCC[6] appears not to have made a strong case for changes to enhance its powers (broadly, the proposals include 'cease and desist' powers, the introduction of an 'effects' test, reversal of onus of proof and possible divestiture powers) other than to equate Australian law and practice to that existing elsewhere internationally.

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[4] Fels, Prof A. (2002), ***The Review of the Trade Practices Act and issues concerning the ACCC and the media***, Address to the National Press Club, 31 July, p. 9.

[5] Fels, Prof A. (2002), ***The Review of the Trade Practices Act and issues concerning the ACCC and the media***, Address to the National Press Club, 31 July, pp. 12-13.

[6] Australian Competition and Consumer Commission (2002), ***Submission to the Trade Practices Act review***, Canberra, June 2002, pp. 60-105.

The case that offshore legislation in respect of these matters is best practice has not been made and ***prima facie*** could have deleterious or adverse consequences to the market by affecting anti-competition, anti-investment sentiment and not pro-competition as theorised by the advocates of this amendment to the Act. The proposed changes, which would greatly increase the ACCC's powers to intervene in the market, would create an unnecessary level of uncertainty for business and would have potential adverse consequences for the economy more broadly.

With respect to the proposed **'effects test'**, Section 46 of the Act prohibits business with a substantial degree of market power from taking advantage of that power for the **purpose** of eliminating or substantially damaging a competitor, preventing the entry of a person into any market or deterring or preventing a person from engaging in competitive conduct in any market.

The ACCC has proposed, in its submission to the review, the introduction into Section 46 of the Act of an 'effects' test that would prohibit conduct that would have the **effect** of eliminating or substantially damaging a competitor, preventing the entry of a person into any market or deterring or preventing a person from engaging in competitive conduct in any market, **regardless** of whether such an outcome was the purpose of this conduct.[7]

The critical policy issue behind Section 46 is to distinguish between unilateral action by companies with substantial market share that is undesirable (anti-competitive conduct) and action that is desirable (strongly competitive conduct).

The ACCC has not made a substantive case for the introduction of an 'effects' test. The Council also notes that a proposed 'effects' test has been considered and rejected on at least five previous occasions.[8]

An 'effects' test under Section 46 would add considerably to the uncertainty about whether the conduct in question was desirable or undesirable. Before engaging in competitive behaviour, companies would need to predict the future effect of that behaviour on the market to know whether they were likely to be in breach of Section 46 of the Act. The need to satisfy such a requirement could discourage strong competition by companies with substantial market share, thereby reducing the overall level of competition in the relevant market.

Nor has the ACCC made a case for the **reversal of the onus of proof** in relation to the "purpose" element under Section 46 of the Act.[9] Such a reversal would:

- have the effect of rendering a business guilty until proven innocent. It is a fundamental premise of Australian law that a person seeking to prove a cause of action bears the onus of proof. That onus is only reversed in extreme circumstances;

- require the accused business to produce a large range of documents to prove it was not abusing market power; and

- create substantial uncertainty for businesses, adding significantly to the regulatory burden of affected businesses involved in innocent competitive behaviour.

Changes of this nature should not be contemplated without a far more compelling case mounted in their support.

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[7] Australian Competition and Consumer Commission (2002), ***Submission to the Trade Practices Act review***, Canberra, June 2002, pp. 60-62.

[8] House of Representatives Standing Committee on Legal and Constitutional Affairs (1989), Mergers***, takeovers and monopolies: Profiting from competition?,*** Canberra, AGPS, pp 29-30 and 41; Senate Standing Committee on Legal and Constitutional Affairs (1991), ***Mergers, monopolies and acquisitions: Adequacy of existing legislative controls,*** Canberra, AGPS, pp 81-86 and 96; Hilmer, J. (1993), ***National Competition Policy: Report by the Independent Committee of Inquiry,*** Canberra, AGPS, pp 70-71 and 74; House of Representatives Standing Committee on Industry, Science and Technology (1997), ***Finding a balance: towards fair trading in Australia***, Canberra, AGPS, p 132; and Joint Select Committee on the Retailing Sector (1999), ***Fair market or market failure***, Canberra, Parliament, p 100.

[9] See, for example, Australian Competition and Consumer Commission (2002), ***Submission to the Senate Legal and Constitutional References Committee for the Committee's Inquiry into the Trade Practices Act 1974***, Canberra, February, p. 2.

In addition, given the broad powers of the ACCC to obtain information, documents and evidence under the Act, the Council fundamentally rejects any moves to broaden these powers, which many people consider are already too invasive and often their exercise a violation of moral conduct if not observed rights.

4.3 Improved Governance

Along with the Reserve Bank of Australia (RBA) and the Australian Taxation Office (ATO), the ACCC is one of Australia's most important economic regulators. It has a key role to play in ensuring markets operate effectively and competition provides benefits for all Australians.

This submission has argued that the Act as its stands (and with the amendments recommended in Section 4.1 above) provides the ACCC with the powers it requires to effectively discharge its regulatory duties in accordance with the intent and wishes of the Parliament.

A related but somewhat different question is whether the ACCC's current administrative arrangements and, importantly, governance arrangements support the discharge of these duties and whether improvements to the current arrangements should be made.

The Council has concluded that a number of improvements are possible. These recommended improvements will be bring arrangements for the ACCC more in line with aspects of the arrangements of the RBA and ATO and achieve a more efficient, fair, timely and accessible framework for competition law.

Therefore, **the Minerals Council recommends:**

- **a Board of Competition Policy be established to provide a natural extension of the ACCC's current consultative arrangements with business.**

  Both the RBA and the ATO, for example, have Boards to provide

  - in the case of the RBA, oversight to ensure that the monetary and banking policy of the RBA is directed to the greatest advantage of the people of Australia and that the powers of the RBA are exercised in such a manner as, in the opinion of the RBA Board, will best contribute to the stability of the currency of Australia, the maintenance of full employment in Australia and the economic prosperity and welfare of the people of Australia;[10]

  - in the case of the ATO, the Board of Taxation provides an independent, non-statutory body to advise the Government on the development and implementation of taxation legislation and the ongoing operation of the tax system. Recognising the Government's responsibility for determining taxation policy, and the statutory role of the Commissioner of Taxation, the Board contributes a business and broader community perspective to improving the design of taxation laws and their operation.[11]

  The functions and administrative arrangements of these Boards differ from each other and would differ from the appropriate functions and administrative arrangements for a Board of Competition Policy. Nevertheless, they provide relevant examples of the way in which a Board can provide oversight to an economic regulator that may enhance its effectiveness while ensuring an efficient, fair, timely, transparent and accessible framework for the relevant law is made available to all Australians; and

- **an Ombudsman of Competition Policy be appointed to investigate both "systemic" issues associated with the administration of the Act and to investigate specific complaints about decisions or actions of the ACCC**

[10] See http://www.rba.gov.au/AboutTheRBA/rba_board.html for further details.
[11] See http://www.taxboard.gov.au/default.html for further details.

- a similar system is currently under consideration for the ATO through the proposed Inspector-General of Taxation,[12] an initiative that has been supported by the Council as a member of the Business Coalition for Tax Reform (BCTR)[13]

- the proposed Ombudsman would not mirror the role of the Inspector-General of Taxation, but would rather be a combination of this envisaged role and the more usual role of an ombudsman.

Adoption of these recommendations will improve the overall governance of the ACCC, public confidence in decision-making processes and the transparency with which the ACCC operates. This will enhance the operation of competition regulation and improve outcomes for the Australian minerals industry, Australian businesses more broadly and the Australian economy in general.

[12] The proposed Inspector-General of Taxation aims to strengthen the advice the Government receives about tax administration and process. The Inspector-General will be an independent adviser to government with a focus on improving the operation of the tax administration system. Further details can be found at http://www.taxboard.gov.au/consultation.html.
[13] A copy of the BCTR's submission can be downloaded from the BCTR website at http://www.bctr.org/upload/bctr per cent20submission per cent2025 per cent20june per cent202002.doc.