BUSINESS COUNCIL OF AUSTRALIA

Supplementary Submission
to the Review
of the
Trade Practices Act 1974
and its Administration

2 October 2002

FOREWORD

The Business Council of Australia is pleased to provide this submission to Trade Practices Act Review Committee.

The Business Council believes that this Review is both necessary and timely. Competition regulation must create the right balance between:

1 Australia's interests in becoming more internationally competitive, and the need to protect strong competition in domestic markets; and

2 the power of the Australian Competition and Consumer Commission to achieve the objects of the *Trade Practices Act 1974*, and the level of governance and accountability applied to the exercise of the ACCC's extensive and intrusive powers.

There are dangers for Australia if this balance is not achieved. Ultimately, the result will be a less competitive Australian economy, resulting in fewer jobs, higher costs to Australian consumers and a potential acceleration of Australian companies preferring to invest overseas. As outlined in this submission, the Business Council believes there is a case for reforms (in governance and accountability of the ACCC, mergers and in a number of other areas) which are important to restoring and maintaining the right balance.

The Business Council believes that it is important to use the opportunity of the Review to keep our focus on the issues I have outlined - the big issues - which really matter for the future of competition policy in Australia. We should not be distracted. Much has been made by the ACCC in the media of criminal sanctions for "hard core" collusion. "Hard core" collusion is abhorrent and clearly unlawful. The Business Council will support criminal sanctions for such behaviour if the Review Committee considers that greater deterrence is needed.

The Business Council of Australia is an association of chief executives of leading Australian corporations. It was established in 1983 to provide a forum for Australian business leaders to contribute directly to public policy debates to build a better and more prosperous Australian society. A list of companies comprising the Business Council is contained in the following pages.

The key role of the Business Council is to formulate and promote the views of Australian business. The Business Council is committed to achieving the changes required to improve Australia's competitiveness and to establish a strong and growing economy as the basis for a prosperous and fair society that meets the aspirations of the whole Australian community.

The Business Council has a particular responsibility to apply Australia's business experience and understanding to successfully resolving the challenges now facing Australia. In a global environment, Australia's future depends on achieving world class performance and competitiveness. On the basis of sound research and analysis, the Business Council seeks to play a key role with government, interest groups and the broader community to achieve performance and world class competitiveness.

I commend the Business Council's initial submission and this supplementary submission to the Review Committee.

John Schubert
President

Business Council of Australia
GPO Box 1472N
Melbourne Vic 3001
Ph (03) 9610 4222 Fx (03) 9610 4223
www.bca.com.au

Member Companies of the Business Council of Australia

ABB Australia Pty Limited

ABN AMRO Australia Limited

Accenture Australia Ltd

ACI Packaging Group

Alcoa World Alumina Australia

Allens Arthur Robinson

Amcor Limited

AMP Limited

ANZ Banking Group Limited

Australia Post

Australian Gas Light Company

Australian Stock Exchange

AWB Limited

BHP Billiton Limited

BHP Steel Limited

BOC Gases Australia Limited

Boral Limited

BP Australia Limited

Brambles Industries Limited

British American Tobacco Australasia Limited

Caltex Australia Limited

Carter Holt Harvey Limited

Cisco Systems, Australia and New Zealand

Coca Cola Amatil Limited

Coles Myer Ltd

Commonwealth Bank of Australia

Corrs Chambers Westgarth

Credit Suisse First Boston

CSC Australia Pty Ltd

CSR Limited

David Jones Limited

Deloitte Touche Tohmatsu

Deutsche Bank AG

DuPont (Australia) Limited

ENERGEX Limited

Ernst & Young

Esso Australia Pty Ltd

Ford Motor Company of Australia Limited

Foster's Group Limited

Freehills

George Weston Foods Limited

Goodman Fielder Limited

Hanson Australia Pty Limited

Holden Ltd

HP Australia Pty Limited

IBM Australia Limited

ING Australia Limited

Insurance Australia Group Limited

James Hardie Industries Limited

JBWere Limited

JP Morgan Chase

Jupiters Limited

KPMG

Kraft Foods Limited

Leighton Holdings Limited

Lend Lease Corporation Limited

Lion Nathan Limited

Lucent Technologies Australia Pty Limited

Macquarie Bank Limited

Mallesons Stephen Jaques

Mayne Group Limited

McDonald's Australia Limited

Minter Ellison

Mitsui & Co (Australia) Ltd

National Australia Bank Group

Newmont Australia

OneSteel Limited

Orica Limited

P & O Australia Limited

PaperlinX Limited

Pasminco Limited

Perpetual Trustees Australia Limited

Philip Morris (Australia) Limited

PricewaterhouseCoopers

Publishing & Broadcasting Limited

Qantas Airways Limited

Rio Tinto

Salomon Smith Barney

Santos Limited

Shell Australia Limited

Siemens Ltd

Smorgon Steel Group Ltd

Southcorp Wines Pty Limited

St. George Bank Limited

Sydney Airports Corporation Limited

TABCORP Holdings Limited

Telstra Corporation Limited

The Boston Consulting Group Limited

Toyota Motor Corporation Australia Limited

UBS Warburg

Visy Industries

Wesfarmers Limited

Western Power Corporation

Westpac Banking Corporation

WMC Limited

Woodside Petroleum Ltd

Woolworths Limited

PROCESS AND ACKNOWLEDGEMENTS

The preparation of the Business Council's submissions to the Review Committee has involved:

(a) consultation with members and with a number of other business and other bodies;

(b) contributions from member companies through their CEO's and other representatives;

(c) external expert advice (economic and legal) on certain aspects of the submission;

(d) research and input by the Business Council's Secretariat.

The Business Council's work is directed by the Council's Regulatory Reform Task Force and the Council's Secretariat reporting to the Business Council's President and Board.

On behalf of the Business Council, we thank all those involved for their time and assistance.

Business Council of Australia, Regulatory Reform Task Force

Peter Brown, Chief Executive, Amcor
Terry Campbell, Chief Executive, J B Were & Son
Tony D'Aloisio, Chief Executive, Mallesons Stephen Jaques
Richard Humphry, Chief Executive, Australian Stock Exchange
Peter Kirby, Chief Executive, CSR
Tony Stuart, Chief Executive, Sydney Airport Corporation
Other member Chief Executives on selected issues

Key Advisers to Task Force

Bob Baxt, Partner, Allen Arthur Robinson
Andrew Bryant, Senior Manager, PricewaterhouseCoopers
Henry Ergas, Managing Director, Network Economics Consulting Group
Len Gainsford, Partner, Pricing & Competition Policy, PricewaterhouseCoopers
Mitchell Landrigan, Group Regulatory Manager, On Air, Telstra
Dave Poddar, Partner, Mallesons Stephen Jaques
Andrew Robb, Business Adviser, Minter Ellison
Donald Robertson, Partner, Freehills
Philip Williams, Chairman, Frontier Economics
Rod Shogren, Consultant, Access Economics
Rhonda Smith, Senior Lecturer, Faculty of Economics and Commerce, University of Melbourne
Luke Woodward, Gilbert + Tobin

Business Council Secretariat and Assistants

Steven Münchenberg, Director Policy, Business Council of Australia
John Hine, Director Communications, Business Council of Australia
Julian Leeser, Executive Adviser, Mallesons Stephen Jaques
Kate Newman, Solicitor, Mallesons Stephen Jaques

Other Advisers from Members of the Business Council

A number of other advisers from member companies and other organisations.

Katie Lahey
Chief Executive
Business Council of Australia

Tony D'Aloisio
Chairman, Business Council of Australia
Regulatory Reform Task Force

EXECUTIVE SUMMARY

This supplementary submission has 2 purposes:

- First, to elaborate further and deal with issues concerning the areas where the Business Council is seeking change.

- Second, to respond to some of the major proposals put before the Review Committee by others.

To assist the Review Committee in following the Business Council's propositions, following is the Executive Summary of the Council's initial submission (first column) together with the change and additions made by the supplementary submission (second column). In this way, it provides an easy reference point on how the Business Council's thinking has progressed as it has done further work on these important issues.

EXECUTIVE SUMMARY **Initial Submission - 9 July 2002**	**CHANGES AND ADDITIONS** **Supplementary Submission - 2 October 2002**
This review of the *Trade Practices Act* 1974 (Cth) ("TPA") and its administration is an important opportunity to ensure that the TPA and the Australian Competition and Consumer Commission ("ACCC") are operating in a way that promotes the productivity, efficiency and growth of an open, integrated Australian economy. It is also an important opportunity to ensure that the TPA and the ACCC are keeping pace with community and business needs and expectations in a rapidly changing market place. The basic theme of the Business Council's submission is that, while the TPA has been important in fostering competition, there is a compelling case for: • strengthening governance and accountability of the ACCC; • making the merger process more workable for an economy which is internationalising; and • making a number of other modest but important changes to improve the operation of the TPA.	The Business Council remains of the view that there is a compelling case for change in each of the areas identified in our initial submission.

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
1 Australia's Changing Economic Context The economic context within which Australian businesses are operating has changed dramatically over the past decade. The Australian economy has become more open, connected and integrated with the world economy. Markets have become more dynamic, with new products, services and competitors emerging and changing constantly. Globalisation, the liberalisation of trade and investment, and the evolution of new technologies, have all made significant inroads. Consumers have more choices and are better informed. This pattern of change is set to continue, and to intensify. Australia's changing economic context has two major implications for competition regulation: (a) It is increasingly difficult to ensure that competition regulation contributes to the productivity, efficiency and growth of an open, integrated Australian economy. In particular, rapid and complex change makes it harder to define key concepts such as the market and market power. (b) The costs of regulatory error are more significant as the Australian economy becomes more exposed to international competition. Incorrect regulatory interventions result in inefficiencies, disincentives to invest, and higher costs to consumers. As a result, there is a growing need for greater oversight of competition legislation and its administration. In the case of the TPA and ACCC, this need is compounded by the continued growth, largely ad hoc over a number of years, in the ACCC's powers to intervene in the market and in the commercial activities of businesses of all sizes. This growth in the ACCC's powers gives rise to a greater risk of regulatory error, along with higher costs. This means that more checks and balances are needed on ACCC powers. It also means that key decisions of the ACCC, particularly in determining the interests of consumers and the appropriate definition of markets, need to be subject to greater scrutiny.	**1 Australia's Changing Economic Context** Following are additional comments to supplement what we said in our initial submission under this heading. The Council supports competition regulation, overseen by an independent, competent and fair regulator. The Business Council strongly rejects the view being publicly put by the Chairman of the ACCC that: *"If big business had its short-sighted way, Australia would be an economy made up of anti-competitive, inefficient monopolies and cartels and riddled with unfair trading practices and unconscionable behaviour with harm ultimately being done to businesses as much as to consumers."* The statement is not a reasonable response to the positions of either the Council or of large businesses as expressed in their submissions to the review. Those submissions have been measured and responsible, seeking improved public policy outcomes. It is deeply disturbing that, rather than address genuine and legitimate concerns of business, the ACCC Chairman should characterise those concerns in a deliberately inaccurate and pejorative manner. The Council is also concerned with the views expressed in some submissions regarding the appropriate role of competition regulation. In relation to the key themes relevant to the review, the Council reiterates its position that the TPA is designed to promote competition in the interests of economic efficiency and consumer welfare. The Council cannot agree with the proposal in the Australian Democrats' submission that the TPA should be redirected towards various social and environmental goals, industrial health and safety, sustainability and similar. The TPA is a powerful tool but it cannot in itself be a complete formula for attaining all of society's goals. Other laws and institutions have their parts to play in that ambition. Equally, competition regulation is about the protection of dynamic competitive processes. A number of submissions appear to confuse this role with the protection of specific competitors in the market. **Refer to Section A of the Supplementary Submission.**

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
2 Governance and Accountability While the Business Council sees much that is positive about competition regulation in Australia, the Council has along with others a growing concern about certain elements of the TPA and, more particularly, about the performance and operation of the ACCC. The ACCC is widely recognised as the most powerful economic regulator in Australia. It has the ability to intervene deeply in the operation of the market and the commercial activities of all businesses. But while it has accumulated powers rapidly since its establishment in 1995, there has been no corresponding growth in its governance and accountability. The Business Council believes that change must occur at two levels: (a) an improvement in the overall governance of the ACCC, including clearer definition of how the ACCC should operate; and (b) additional checks and balances on specific powers under the TPA. Specifically, as to overall governance, the Business Council proposes that: (a) the TPA be amended to include clear guidance on the broad principles to be followed in its administration; (b) a *Charter of Competition Regulation* be established as a clear framework to guide the development and implementation of the competition provisions of the TPA; (c) a Board of Competition be established, to develop and then to oversee the implementation of the Charter;	**2 Governance and Accountability** The Business Council remains of the view that all the governance and accountability reforms set out in its initial submission are needed. **The most important of these is the Board of Competition (BOC)**. We believe a confusion of functions has developed in the formulation of policy and administration of the TPA. The ACCC has a larger policy role than is appropriate for an administrative body and this represents a compromising of the separation of powers. Rectifying this confusion of roles, in the way we propose, would introduce an important check and balance on policy formulation and the role of the ACCC. It would do so, in a way, which does not detract from the ACCC's independence and freedom to enforce and administer the TPA. • What is the confusion of functions? There is a widely held perception that the ACCC determines policy, enforces the TPA and (essentially) reviews its own performance. The BOC would provide a mechanism to engage the ACCC and the Government in a constructive debate on TPA related policy issues. It would ensure that a range of perspectives is considered. • What is the "check"? The BOC would act as a "check" in the sense of checking on the ACCC and advising the Government and the community on the operation and enforcement of the TPA.

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
2 Governance and Accountability (Cont'd) (d) an Inspector-General of Competition be appointed to investigate complaints about decisions or actions of the ACCC. As to checks and balances on specific powers under the TPA, the Business Council proposes that: (a) the TPA be amended to provide greater administrative certainty in the operation of s 87B, under which court enforceable undertakings can be given to the ACCC; and (b) the accountability of the use of the powers of investigation under s 155 be improved through: (i) requiring the ACCC to obtain a warrant before entering premises under its powers under s 155(2) of the TPA; and (ii) improving the reporting measures on the use of s 155 notices (under which the ACCC may require the production of documents or information or require a person to appear before the ACCC). Essentially, the Business Council agrees that the growth in ACCC powers should be matched with improvements in governance, accountability and checks and balances. Importantly, the changes proposed by the Business Council will not hinder the ACCC in pursuit of its objectives.	**2 Governance and Accountability (Cont'd)** • What is the "balance"? The "balance" is that the BOC would provide a range of views on important issues. At present there is reason to believe that the policy makers are taking only one view into account and that view is given undue prominence in the media, the bureaucracy and in the Parliament because there is no real avenue for conveying alternative views. • Why would it not interfere? The BOC would be advisory only. Its impact and weight would come from its ability to deal with issues referred to it and to provide views. The BOC would deal with wide perceptions about the ACCC which exist at present and would provide the ACCC and the Government with an important "safety valve". The BOC is based on a proven model - The Board of Taxation. **Refer to Section C and Appendix 2 of the Supplementary Submission.**

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
3 Reform of the Merger Regime The relatively small size of the Australian economy (compared to, for example, a number of other OECD countries) creates an acute dilemma for competition policy. Robust domestic competition contributes significantly to productivity and efficiency gains, which in turn deliver benefits for domestic consumers and businesses alike and underpin our international competitiveness. However, competition policy can also deny firms in small, fragmented economies the economies of scale and scope needed to successfully compete and grow in increasingly global markets. Specifically the Business Council proposes that: (a) Section 50, (which prohibits mergers or acquisitions that will, or are likely to, substantially lessen competition), be reformed to allow early consideration of the public benefits (for example, efficiency gains) of a merger proposal, through: (i) retaining the "substantial lessening of competition" test for mergers and acquisitions under s 50 of the TPA; (ii) introducing into s 50 a provision to the effect that, despite the prohibition on mergers or acquisitions that will, or are likely to, substantially lessen competition an acquisition is not prohibited if the public benefits (including efficiency gains) of the acquisition would, or are likely to, outweigh any public detriment arising or likely to arise from the substantial lessening of competition; (iii) amending the list in subsection 50(3) of matters to be taken into account when considering the competition implications of a merger, to specifically include considerations such as efficiency gains, and impact on Australian jobs and failing companies; and (iv) adding public benefit considerations to the current ACCC Merger Guidelines, to increase certainty in their application.	**3 Reform of the Merger Regime** The Business Council has assessed the mergers regime once again. It remains of the view that the changes it proposed in its initial submission should be made. By way of clarification of its views: • informal clearance The Business Council does not propose that the ACCC be required to give extensive reasons for all merger proposals considered under the informal clearance process. The decisions in many of these clearances would add little to our understanding of the ACCC's approach to mergers, particularly as many do not appear to raise any competition issues of substance. The Council does however believe that more extensive reasons should be given where: • the ACCC opposes a merger; • the merger is cleared with conditions; • the merger raises new issues, or a new approach is adopted by the ACCC; • the merger occurs in a sector of the economy not recently examined by the ACCC; and or • they are requested by the parties. • direct to the Tribunal The diagram at the end of the Executive Summary illustrates how the Business Council envisages the merger provisions operating.

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
3 Reform of the Merger Regime (Cont'd) (b) The current ACCC clearance process for mergers and acquisitions be improved, through requiring the ACCC to give substantial reasons for its decisions to clear or oppose a merger or acquisition proposal under the amended s 50. (c) The TPA be amended to promote the efficient operation of markets. In particular, an alternative impartial and timely decision-making process be introduced, through: (i) allowing merger proponents to elect to take an application to approve a merger directly to the Australian Competition Tribunal; (ii) subjecting the Australian Competition Tribunal to strict timelines when considering applications; (d) improving the resources available to the Australian Competition Tribunal to perform this extended function; or (e) As an alternative to the extended powers of the Tribunal as set out in the preceding point establishing a Competition Panel, based on the successful Takeovers Panel, to arbitrate a disputed merger or acquisition proposal.	**3 Reform of the Merger Regime (Cont'd)** Being able to go direct to the Tribunal provides proponents: • with a timely way to deal with the more difficult issues • with access to wider expertise to assess both competition and public benefit aspects of mergers. This alternative could be a substitute (the Business Council's preference) or an addition to the existing authorisation procedure. • adding public benefit to the test in section 50(1) Because of the nature of the Australian economy, mergers should be assessed against both competition and public benefit considerations. Both the ACCC and the Tribunal should, in their role, look at both considerations. To limit one (ACCC) to competition and the other (Tribunal) to benefits may have a symmetry but that symmetry lacks commercial reality. **Refer to Section B of the Supplementary Submission and to the flow charts at the end of this Executive Summary.**

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
4 Rationalising and Modernising the TPA The Business Council believes this review is an opportunity to rationalise and modernise a number of provisions of the TPA, and to address some anomalies that have developed over time. In particular, the Council believes there is a need to make improvements in relation to: (a) collective boycotts; (b) third line forcing; (c) price fixing; and (d) legal professional privilege.	**4 Rationalising and Modernising the TPA** The Business Council's views on these matters are as set out in its initial submission.

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
5 Initial Response to Other Proposals Based on our understanding of what is being proposed, the Business Council believes the Review Committee should reject the introduction of: • an effects test and the reversal of the onus of proof under s 46 (covering misuse of market power); • cease and desist orders; • divestiture powers under the TPA; and • turnover-based penalties.	**5 Initial Response to Other Proposals** The Business Council has reviewed other submissions in these areas. It remains of the view that the Review Committee should continue to reject the introduction of the proposals set out opposite. Following are further reasons for its views on the effects test and cease and desist. **Effects Test** The ACCC has proposed an amendment to s 46 of the TPA, which would prohibit a corporation with substantial market power from taking advantage of that power with the affect or likely effect of: eliminating or substantially damaging a competitor; preventing a competitor entering a market; or deterring or preventing a competitor engaging in competitive conduct. The Business Council's initial submission raised a number of concerns with an "effects" test in s 46. These concerns have not been overcome by the proposal in the ACCC's submission to the Review Committee. The principal concerns remain that an "effects" test: • blurs the fine line between anti-competitive and strongly competitive legitimate commercial conduct, increasing the uncertainty of the provision and making compliance more difficult for companies; • is likely to catch innocent, competitive behaviour; and • requires companies to be able to predict the future effect of their activities on competitors, potential competitors or the dynamic process of competition. The Business Council remains of the view that, because of the above concerns, an "effects" test is more likely to be harmful to competition than beneficial. This would be the case with either the "effects" test as proposed by the ACCC, or an "effects" test based on substantial lessening of competition. The Business Council is also of the view that the current provision is working appropriately and that change would create considerable, and unnecessary, uncertainty over the operation of the provision. This view is confirmed by submissions from, for example, the Law Council of Australia. The detailed analysis in this submission of the ACCC's arguments in support of an "effects" test shows them to be questionable or flawed. The Business Council is concerned that the ACCC's proposals seem more concerned with protecting certain players in the market from competition than with the protection of the competitive process itself. Protecting inefficient or less competitive players from robust competition will result in a decrease in competition overall, which is undesirable from the point of view of the overall efficiency of the Australian economy and from the point of view of consumers. **Refer to Section D of the Supplementary Submission.**

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
5 Initial Response to Other Proposals (Cont'd)	**5 Initial Response to Other Proposals (Cont'd)**

Cease and Desist

The ACCC has argued for the introduction of cease and desist orders, to be available for alleged breaches of s 46 (misuse of market power). The power to issue cease and desist orders would effectively allow the ACCC to stop commercial activity that it considers may breach the TPA.

In its initial submission, the Business Council opposed the ACCC having power to issue cease and desist orders on the grounds that

- the ACCC already has adequate powers to achieve the result proposed for cease and desist orders, through interlocutory injunctions;
- interlocutory injunctions provide an appropriate check and balance on the powers of the ACCC in that they can only be granted by a court;
- cease and desist orders are highly interventionist and would significantly increase the scope for regulatory error;
- when such powers have been sought in the past, they have raised constitutional issues; and
- it would be unwise to grant the ACCC sweeping new coercive powers when there are serious concerns about the way in which it uses the powers it already has.

The Business Council does not believe that that ACCC has made a case for such highly interventionist powers and is concerned that the ACCC is seeking to lessen its accountability through replacing court issued injunctions with ACCC issued orders.

The Business Council is also concerned that, throughout its argument for cease and desist orders, the ACCC has assumed that it can readily distinguish anti-competitive conduct from strongly competitive conduct. When coupled with the ACCC proposal for an "effects" test, the ACCC is also assuming that it can readily identify conduct that will have a future effect that contravenes s 46. This raises two serious concerns: first, whether the ACCC would actually conduct sufficient inquiries to make a proper determination of whether a cease and desist order should be issued (and if it does make such inquiries, whether a cease and desist order would be any more efficacious than an interlocutory injunction) and secondly, that the ACCC considers it has, or should have, the power to make the judgement of what conduct breaches the TPA. This is a role for the Courts, not the regulator. Despite the ACCC's confidence that it can readily identify contraventions of s 46, recent court decisions and subsequent appeals demonstrate that determining whether s 46 has been contravened is not a straight forward matter.

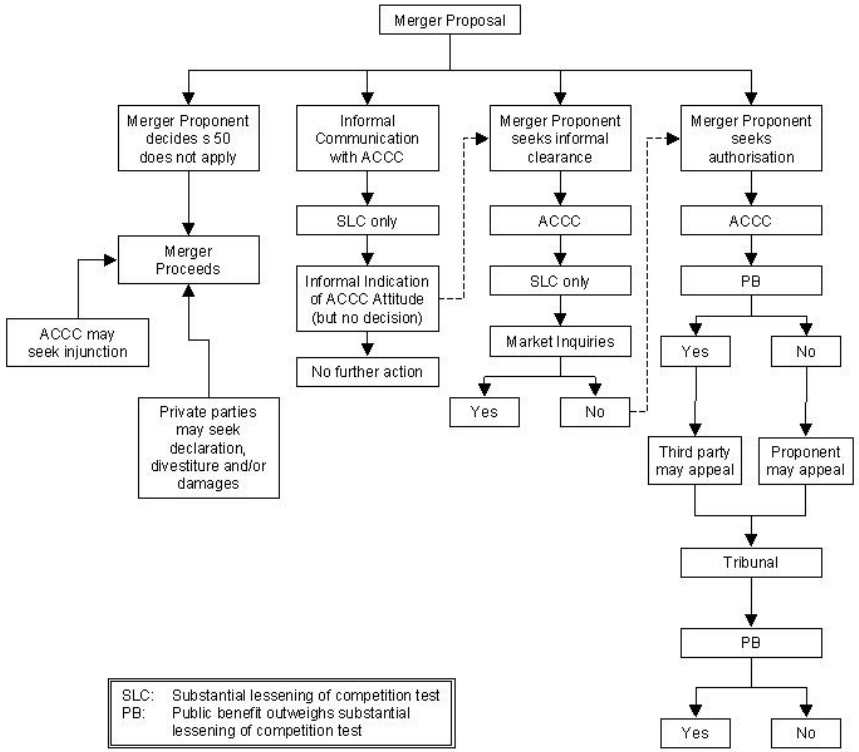
Refer to Section E of the Supplementary Submission.

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
5 Initial Response to Other Proposals (Cont'd)	**5 Initial Response to Other Proposals (Cont'd)**
Collective Bargaining	**Collective Bargaining**
As to the proposal to improve the processes for collective bargaining by small business, the Business Council wishes to see more detail before determining its position. However, it is sympathetic to the concerns that small business has raised about the authorisation process.	The Business Council has considered this issue further. The Business Council recognizes that many of the problems identified with the current authorization process for collective bargaining are similar to the problems that companies face when seeking authorization for mergers. The Business Council has therefore indicated it would support moves to make the authorization process more efficient and less costly to small businesses. For example, consideration could be given to setting time limits on the ACCC's consideration of authorisations and on reducing the fees payable by small business. Considerable caution is needed, however, as collective bargaining is, *prima facie*, anti-competitive and should not be approved without consideration of the competition and public benefit implications of the proposal through a process that gives affected parties the opportunity to put their views to the ACCC. The ACCC's proposal for allowing notification for collective bargaining is therefore inadequate. While collective bargaining may be appropriate to industries in transition, there is the potential that collective bargaining may be used as a tool to gain countervailing power that goes beyond that necessary to address any imbalance of power. Nor is there any inherent reason to expect that any countervailing power so obtained will be used for the benefit of consumers rather than for the private benefit of the parties. Indeed, the contrary is more likely, as the habit of collaboration in collective bargaining is likely to spill over into parallel behaviour on the reselling side, with resulting higher prices to consumers. For these reasons, the Business Council does not support the ACCC's proposal for notifications for collective bargaining. **Refer to Section G of the Supplementary Submission.**

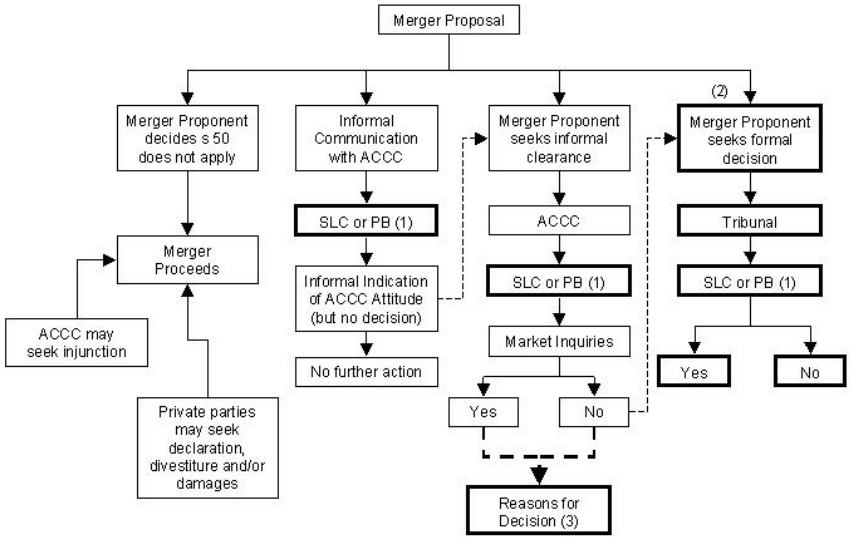
EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
5 Initial Response to Other Proposals (Cont'd)	**5 Initial Response to Other Proposals (Cont'd)**
Criminal Sanctions	**Criminal Sanctions**
Currently, the practices of collusion, bid rigging and market sharing are unlawful under Part IV of the TPA. Breaches attract severe penalties for corporations, executives and employees. The ACCC has argued publicly for the introduction of gaol sentences and fines for this unlawful conduct. These would apply to executives of "big business" but not for executives of small to medium-sized businesses or union officials. The ACCC has justified its proposed sanctions by likening the collusion to a form of "theft". On that rationale it makes no commercial, legal or common sense to exempt "thieves" who are employed by small to medium-sized businesses or union officials. If the Review Committee concludes greater deterrence (in the form of new crimes which carry criminal sanctions) is needed then the Business Council would support such measures. Those measures should apply to employees and executives of all businesses regardless of size and should contain usual safeguards for the prosecution of crime.	The ACCC has proposed that large corporations and their employees should be subject to criminal sanctions for "hard core" collusion. The Business Council's position remains as set out in its initial submission. Having reviewed the ACCC's arguments in support of its proposal for criminal sanctions, the Business Council concludes that: • there is little or no probative evidence that: - blatant price fixing and market sharing is becoming more prevalent, and there is a reasonable basis to believe that the opposite position is likely to be true; or - the existing penalty regime is inadequate or constrained by the existing maximums; • coupled with appropriate detection and court enforcement, the existing individual and corporate penalty framework provides a strong deterrent to breaching the TPA; • the concept of a hard core cartel proposed by the ACCC is uncertain and likely to be overly inclusive and therefore apply to competitive and efficient arrangements; • Australia's TPA enforcement regime does represent international best practice, and comparisons to overseas analogues ignore the existence of individual liability for penalties and damages – according to the OECD, only two other countries apply criminal sanctions to collusion (US and Canada); • a prohibition which is targeted to "big business" is arbitrary and lacks a principled basis; • there is no evidence that existing maximum penalties do not provide sufficient scope to impose appropriate penalties for cartel conduct; and • a combined civil/criminal penalty regime raises both important questions for the Commonwealth's criminal law policy and practice which are not addressed by the ACCC's submission.

EXECUTIVE SUMMARY Initial Submission - 9 July 2002	CHANGES AND ADDITIONS Supplementary Submission - 2 October 2002
5 Initial Response to Other Proposals (Cont'd) **Criminal Sanctions (Cont'd)**	**5 Initial Response to Other Proposals (Cont'd)** **Criminal Sanctions (Cont'd)** The Business Council is also concerned that insufficient attention has been given to the *mens rea* appropriate for the proposed criminal offence. While in its public campaigning for criminal sanctions, the ACCC has argued that "hard-core collusion" is a form of theft, is abhorrent and a blatant fraud, it has rejected that dishonesty, for example, should be part of the offence. The ACCC proposal for criminal sanctions, therefore, fails to distinguish morally reprehensible and harmful conduct from conduct the ACCC is currently prepared to authorise under the TPA. The Business Council believes that it is essential that any proposal for criminal sanctions include an effective *mens rea*, such as an intention to act dishonestly (or perhaps with reckless indifference to the harmful consequences of the conduct). The ACCC's proposal that criminal sanctions would only apply to large corporations and their employees is arbitrary and contrary to the basic principle that all individuals should be treated equally before the law. To the extent that criminal sanctions should apply to serious offences, this should be determined by the adverse impact or potential impact on the market and consumers. Such a determination should be a matter for the discretion of the prosecuting authorities and the Court in sentencing. All those involved should be subject to any laws which may be passed. **Refer to Section F of the Supplementary Submission.**

Current Merger Regime



Business Council Proposed Merger Regime



Principal Reforms Proposed by Business Council (in bold)

(1) amend s 50 to allow the broader public benefits of a merger to be considered, including as part of the informal clearance process.

(2) allow merger proponents to take a proposal directly to the Australian Competition Tribunal for a decision, coupled with imposing strict time limits on the Tribunal. ACCC assists the Tribunal.

(3) require the ACCC to give detailed reasons for its decisions to clear or oppose a merger (significant decisions only)

SLC: Substantial lessening of competition test
PB: Public benefit outweighs substantial lessening of competition test

TABLE OF CONTENTS

A. INTRODUCTION

The Business Council of Australia welcomes the opportunity to provide this additional submission to the Trade Practices Review Committee.

The purpose of this submission is two fold:

(i) to provide further information to the Committee on the reform proposals made by the Business Council in its initial submission; and

(ii) to respond to some of the main proposals put before the Committee by other organisations.

The Business Council has not sought to respond to all comments made on its reform proposals, nor to all proposals put in other submissions to the Committee. Rather, we have sought to provide a response to the principal issues that have been raised. The Council is always happy to provide additional information and input to the Committee.

1. Scope of this Submission

This submission covers seven broad areas:

(i) *mergers and acquisitions* – the reform proposals put by the Business Council for mergers and acquisitions, including our response to alternative proposals put before the Committee;

(ii) *governance and accountability* – the reform proposals put by the Business Council for improving the governance and accountability of the Australian Competition and Consumer Commission (ACCC); again including our response to alternative proposals put before the Committee;

(iii) *an "effects" test* – the Council's response to an "effects" test for s 46 of the Act, as proposed by the ACCC and some other organisations;

(iv) *cease and desist orders* – the Council's response to the proposal to give the ACCC powers to issue cease and desist orders;

(v) *criminal sanctions* – the Council's response to the ACCC's proposal for criminal sanctions for collusion between competitors to fix prices, rig bids, limit output or share markets, including the practical issues raised by the proposal;

(vi) *collective bargaining* – the Council's response to the proposal for improved processes for permitting collective bargaining by small businesses; and

(vii) *small business and consumer issues* – the Council's response to a number of other proposals from small business and consumer interest organisations.

This submission builds on the initial submission made by the Business Council to the Review Committee and should therefore be read in conjunction with that original submission. Where the Business Council has revised its position on an issue, this is clearly stated.

2. Key Theme

In its initial submission to the Review Committee, the Business Council noted a key theme that it considered relevant to the review, namely that there is a need for competition regulation to strike the right balance in two areas:

(i) between Australia's interests in becoming more internationally competitive, and the need to protect strong competition in domestic markets; and

(ii) between the power of the ACCC to achieve the objectives of the *Trade Practices Act 1974* (TPA), and the level of governance and accountability in relation to the use of that power.

The Council's submission clearly stated its support for competition regulation, overseen by an independent, competent and fair regulator. The Business Council strongly rejects the view being publicly put by the Chairman of the ACCC that[1]:

> *"If big business had its short-sighted way, Australia would be an economy made up of anti-competitive, inefficient monopolies and cartels and riddled with unfair trading practices and unconscionable behaviour with harm ultimately being done to businesses as much as to consumers."*

The statement is not a reasonable response to the positions of either the Business Council or of large businesses as expressed in their submissions to the review. Those submissions have been measured and responsible, seeking improved public policy outcomes. It is deeply disturbing that, rather than address business's genuine and legitimate concerns, the ACCC Chairman should characterise those concerns in a deliberately inaccurate and pejorative manner.

Such a view expressed by such a high profile public figure is seriously damaging to Australian business. When such a view is expressed by the Chairman of the competition regulator it raises real concerns of bias and a lack of impartiality. Given the current Chairman's long tenure in the role, there is a real danger that such bias has become institutionalised. For these reasons, the Business Council remains strongly of the view that mechanisms such as a Board of Competition are essential to give confidence that such a bias does not exist and to improve the communication and understanding between the regulator and the regulated. A vibrant economy needs to encourage and protect and treat fairly both buyers and sellers or suppliers and consumers.

The Chairman's statement, and similar dismissive comments he has made in recent times, also overlook the fact that submissions similar in content and force to the Business Council's have been lodged by a former Chairman of the Commission (Mr W R McComas), a former Deputy Chairman (Mr R S Gilbert), a former long serving, full time commissioner (Dr W J Pengilley) and the Law Council of Australia.

The Council is also concerned with the views expressed in some submissions regarding the appropriate role of competition regulation. In relation to the key themes relevant to the

---

[1] Speech by Professor Allan Fels, Chairman, ACCC, to the National Press Club, 31 July 2002.

review, the Council reiterates its position that the TPA is designed to promote competition in the interests of economic efficiency and consumer welfare. The Council cannot agree with the proposal in the Australian Democrats' submission that the TPA should be redirected towards various social and environmental goals, industrial health and safety, sustainability and similar. The TPA is a powerful tool but it cannot in itself be a complete formula for attaining all of society's goals. Other laws and institutions have their parts to play in that ambition.

Equally, competition regulation is about the protection of dynamic competitive processes. A number of submissions appear to confuse this role with the protection of specific competitors in the market. This issue is discussed in detail in this submission.

B. MERGERS AND ACQUISITIONS

> *"Since the role of competition is to increase a nation's standard of living via rising productivity, the new standard for antitrust should be productivity growth, rather than limiting price/cost margins or profitability. All practices scrutinized in antitrust should be subjected to the following question: how will they affect productivity growth? If a merger, joint venture, or other arrangement will significantly enhance productivity growth, it is probably good for society"*
>
> – Michael E Porter[2]

1. Introduction

The initial submission of the Business Council of Australia to the Trade Practices Review Committee identified the dilemma Australia's small economy presents to competition regulation: robust domestic competition contributes significantly to productivity and efficiency gains, which in turn deliver benefits for domestic consumers and businesses and underpin our international competitiveness. However, competition policy can also deny firms in small, fragmented economies the economies of scale and scope needed to compete successfully and grow in increasingly global markets.

The TPA recognises this dilemma and, as a result, mergers that would otherwise be prohibited as substantially lessening competition may be authorised if their public benefits outweigh that loss of competition. As the Business Council's initial submission argued, however, the current authorisation process fails to provide a commercially realistic means of achieving this.

The informal clearance process developed by the ACCC is seen as a strength of the current merger regime, however, the Business Council believes improvements can be made, particularly to increase the transparency of the decision making process.

Reforms to the merger regime are necessary to ensure that Professor Porter's "new standard" is attainable in Australia.

2. Current Failings

There are two basic problems with the current merger regime. The first relates to procedural failings, namely that the current authorisation process does not provide a commercially realistic means of balancing competition and other public benefit aspects of proposed mergers. The process leads to uncertainty and delay and is therefore seldom used by merger proponents.

---

[2] M E Porter, "*Competition and Antitrust: Towards a Productivity-Based Approach to Evaluating Mergers and Joint Ventures*", based on a presentation to the American Bar Association, Antitrust Section, Fundamental Theory Task Force, Washington DC, 11 January 2001.

The second problem relates to analytical failings, particularly in relation to

- the ACCC's delineation, particularly under the informal clearance process, of the relevant market, when considering the competition implications of a proposed merger; and

- the ACCC's interpretation, under the authorisation process, of public benefits and the degree to which these offset competition concerns.

3. Proposed Reforms

The Business Council's initial submission proposed three principal changes to mergers regulation:

- amending s 50 of the TPA to allow the broader public benefits of a merger to be considered, including as part of the informal clearance process;

- allowing merger proponents the option of taking a proposal directly to the Australian Competition Tribunal (the Tribunal) for a decision, coupled with imposing strict time limits on the Tribunal; and

- requiring the ACCC to give more detailed reasons for significant decisions clearing or opposing a merger.

Table 1 summarises the key failings of the current merger regime and their relationship to the Business Council's proposed responses. It also identifies other proposals put before the Review Committee which the Business Council supports.

Table 1: Summary of key failings of the current merger regime, Business Council's proposed responses and proposals in other submissions supported by the Business Council

Current Failing	BCA Proposals	Proposals supported by BCA
Procedural • failure of authorisation process	Amend s 50 to allow public benefits to be considered as part of informal clearance process Allow proponents to go direct to Tribunal for decision, with strict time limits on Tribunal	Amended definition of "market" in ss 4E and 50(6)
Analytical • definition of market • definition of public benefit	Improve transparency through statements of reason in appropriate, limited matters Allow proponents to go direct to Tribunal for decision, with strict time limits on Tribunal	Amended definition of "market" in ss 4E and 50(6)

The Business Council remains firmly of the view that the changes it has advocated should be made.

4. Revised Section 50

The Business Council has proposed a number of amendments to s 50, while supporting the retention of the 'substantial lessening of competition' test, namely:

- allowing public benefits to be considered as part of s 50; and
- including a number of other considerations, such as failing company issues, into subs 50(3).

Introducing public benefits into s 50 makes it explicit that the ACCC may take these matters into account in the informal clearance process. It would allow merger proponents to put before the ACCC the full range of matters relevant to their proposals, not just those strictly related to competition in a narrow sense. For example, the ACCC currently takes a very narrow approach to efficiencies. Under this approach, the enhanced productivity sought by Professor Porter will not be achieved. The Business Council's proposed amendment would therefore overcome the tendency of the ACCC to reject information on the basis that it is only relevant to an authorisation decision, not to an informal clearance, where the latter is considered to be strictly confined to factors affecting competition.

Concern has been expressed about the Business Council proposal, particularly that it is inappropriate for the ACCC to be "*asked to accede to a merger that may constitute a significant accumulation of market power, even to a monopoly situation in some cases*"[3] without "*a rigorous public process that enables a thorough testing and examination of public benefit claims*"[4] and "*scope for participation in the process by parties likely to be affected by such a serious transaction*"[5].

In this regard, it is important to note that the introduction of public benefit considerations into s 50 does not compel the ACCC to take these matters into account. Moreover, as shown by the ACCC's very public consultation process in relation to the s 87B undertakings proposals in the Foxtel matter, the ACCC is able to ensure that the public can comment and make submissions on matters before it. The current informal clearance process already allows a "*rigorous public process*" and "*testing*" of public benefit claims.

It might also be argued that including public benefits in s 50 would increase the discretion available to the ACCC to approve mergers informally, without adequate public input. While including public benefits in s 50 does increase the range of considerations the ACCC may take into account, the present "substantial lessening of competition" test and its component parts already provides the ACCC with considerable discretion to approve mergers, if it so wishes. The inclusion of public benefits in s 50 is therefore not going to increase significantly the inclination or capacity of the ACCC to approve mergers without adequate

---

3 ACCC, Submission to the Review Committee (June 2002, p 136).

4 Id.

5 Id.

public input. The current high profile Foxtel matter is again an example of the ACCC's preparedness to obtain public input.

Finally, the majority of mergers going to the ACCC through the informal clearance process would be unaffected by this change. As proposed in the Business Council's initial submission, s 50 could be amended so that the majority of proposals could still be examined under the substantial lessening of competition test, without the need to consider public benefits.

5. Reasons for Decisions

At the moment, the ACCC provides some public reasons for its decisions on merger clearances. As the ACCC submission to the Review Committee notes[6]

> "*The Commission's decisions and the reasons behind them are published on a register that is posted and accessible from the Commission's Internet site. The register does not include confidential or other sensitive information, but has brief details of a proposed merger (including the names of the acquirer and target), a product description and brief reasons for the Commission's response to that acquisition*". (emphasis added)

The Business Council's concern is that, in most cases, the reasons given are too brief for any meaningful analysis of how the ACCC arrived at a decision, how it treated arguments for and against a merger, how it conducted its economic analysis and whether it applied its own Merger Guidelines.

The Business Council does not propose that the ACCC be required to give extensive reasons for all merger proposals considered under the informal clearance process. The decisions in many of these clearances would add little to our understanding of the ACCC's approach to mergers, particularly as many do not appear to raise any competition issues of substance. The Council does however believe that more extensive reasons should be given where:

- the ACCC opposes a merger;
- the merger is cleared with conditions;
- the merger raises new issues, or a new approach is adopted by the ACCC;
- the merger occurs in a sector of the economy not recently examined by the ACCC; and/or
- they are requested by the parties.

By limiting the requirement for reasons to the above circumstances, any additional administrative burden on the ACCC would be minimised. A more transparent mergers process would, of course, reduce the overall administrative burden on the ACCC by helping companies understand better how the ACCC will assess their proposals.

---

[6] ACCC, Submission to the Review Committee (June 2002, p 155).

The ACCC argues that on "*important merger matters the Commission publishes a detailed statement of reasons behind the decisions*"[7]. The ACCC submission gives four examples where the ACCC has done this over the past five years. These cases provide examples of the sort of statements of reasons, or background papers, that the Business Council considers should be provided more often. The Council does not believe, however, that there have only been 4 important mergers considered in the past five years.

The Business Council does not believe that the legislative mandating of statements of reasons is necessary to overcome the current opaqueness of the clearance process. The clearance process is an informal, administrative construct of the ACCC and as such generally works well. Introducing a statutory requirement to provide statements of reasons would arguably give a formality to the clearance process that is inconsistent with its informal, administrative nature. This is consistent with the approach favoured by the International Competition Policy Advisory Committee in the ICPAC Report[8], which examined the question of transparency in competition matters in some detail. In summary, the ICPAC Report concluded that individual jurisdictions should seek to provide enhanced transparency in merger review and this may be achieved by clearly articulating the rationale underlying decisions where the agency in question decides to challenge or, as the case may be, not to challenge "significant transactions".

The Business Council believes that it should be adequate for the ACCC to give a public commitment to providing detailed statements of reasons in the circumstances identified above. The ACCC should provide public guidelines on when it will provide reasons, the extent of those reasons and the timeframe within which those reasons will be made publicly available. The Business Council has noted in its initial submission, however, that the ACCC does not always comply with its own guidelines. We therefore see a role for the proposed Board of Competition in monitoring the effectiveness of the ACCC guidelines and compliance.

6. Application Direct to Tribunal and Strict Time Periods

The Business Council has proposed that the TPA be amended to allow merger proponents the option of taking a merger proposal directly to the Tribunal for a decision. The Tribunal would determine whether a proposed merger was likely to lead to a substantial lessening of competition, and if so, whether that loss of competition was outweighed by other public benefits. The Tribunal already has a role in considering the competition and public benefit merits of merger proposals, through its role as the appeal body on ACCC authorisation decisions.

The advantage of going direct to the Tribunal is two fold. It can provide a short cut through the process. Rather than having to wait for an adverse ACCC decision on an authorisation and then appealing (where the parties believe the ACCC has already formed an adverse view on the competition impact, eg Sigma/API), merger proponents can trigger an earlier consideration by the Tribunal. This can be particularly important for complex or politically sensitive mergers, where there may be a range of pressures on the regulator, which may delay

---

7 ACCC, Submission to the Review Committee (June 2002, p 15).

8 International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Anti-Trust, Final Report, 2000.

making a tough decision, in anticipation of the merger application being withdrawn or abandoned. This is a real issue, given the time sensitivity of significant mergers. For this reason, the decision of the Tribunal should be final.

The second benefit is that it provides a more independent assessment of a merger and an assessment with a broader range of skills. Some may argue that the ACCC itself provides that independent judgement. The ACCC, however, sees its role very much in terms of competition regulation. It states that it "*gives considerable emphasis to any negative effect on competition when considering an authorisation*"[9]. This may be appropriate for a competition regulator, but also means that public benefits are unlikely to be given adequate weight.

Unlike the Tribunal, the ACCC tends to take a narrow view of the public benefit and a short term view of the effects of mergers on competition. A comparison of the approaches of the ACCC and the Tribunal to the concept of "public benefit" was provided in the Business Council's initial submission to the Review Committee[10]. A detailed comparison of the approaches taken by the ACCC and the Tribunal to the definition of markets is provided in Appendix 1 of this submission. The narrow view of markets adopted by the ACCC can be addressed, in part, through greater transparency in the ACCC's informal clearance process for mergers, as well as through allowing merger proponents the option of taking their merger proposals direct to the Tribunal.

An example of the narrow, short term ACCC view on mergers is the ACCC's use of undertakings in the Caltex/Ampol merger to engineer the oil industry towards greater reliance on imports and competition from independents. As Caltex points out in its submission[11], this has brought low pump prices, but the short term focus of the ACCC's agenda and the poor earnings it has produced have deprived Australia of a strong, internationally competitive refining industry that can mobilise the large investments needed for refining cleaner fuels.

Special arrangements may be needed to allow the Tribunal to perform this expanded role effectively. For example, a separate, less formal process may be needed and the Tribunal may require additional resources and specialist members.

The Tribunal should also be subject to strict time limits. This is an important point for business. The takeover market is dynamic and requires speedy decisions. The Tribunal (like the Foreign Investment Review Board) should operate on the basis that a favourable decision results if, at the end of 30 or 45 days, it has not made an interim order (or stop order). Thereafter, it should have a further set period (30 to 45 days) to make a final decision. An example of legislation which operates in this way is the *Foreign Acquisitions and Takeovers Act 1975*. The Business Council recommends a similar regime for the workings of the Tribunal. As markets are dynamic and need certainty, any rights of appeal from a Tribunal decision should be very limited.

---

[9] See, for example, the ACCC Determinations on the Adelaide Brighton authorisations, 30 April 1999, p ii, available at http://www.accc.gov.au/pubreg/pubreg.htm

[10] Business Council of Australia, Submission to the Review Committee (July 2002, pp 37-38).

[11] Caltex Australia Limited, Submission to the Review Committee (July 2002, p 1).

Use of the Tribunal raises issues of resources and composition of the Tribunal:

(a) Resources

The Tribunal would have access to the ACCC and the ACCC would assist the Tribunal.

(b) Composition

The Business Council believes that a panel of members with different fields of experience would facilitate the selection of the appropriate composition of the Tribunal for each case. We would expect that a judge would chair each Tribunal sitting but this is not essential. The composition would not need to materially change although it would be preferable for judges with experience in merger law to hear such Tribunal matters.

Based on current merger statistics, the Business Council would expect the number of merger proponents using this approach would be small (although the mergers themselves would be significant in terms of the Australian economy) and therefore the additional resources needed would not be great.

A comparison of the current and proposed reformed merger regimes is provided in Figure 1 (Current Merger Regime) and Figure 2 (Business Council Proposed Merger Regime).

Under the proposed changes to the merger regime, the proponents could go direct to the Tribunal or to the ACCC for an informal indication of the ACCC's possible attitude to the merger. In the latter case, depending on the ACCC's response, the merger proponents would then elect to either:

(a) approach the ACCC for an informal clearance of the merger (either on the basis that the merger does not substantially lessen competition or, despite substantially lessening competition, the public benefits of the merger outweigh that loss of competition); or

(b) apply to the Tribunal for a decision that the merger does not substantially lessen competition or, despite substantially lessening competition, the public benefits of the merger outweigh that loss of competition.

If the merger proponents approach the ACCC for an informal clearance, they would still have the option of applying subsequently to the Tribunal for a decision, either before or after the ACCC had made its informal clearance decision. This is similar to the current situation where merger proponents can apply to the Federal Court for a declaration that their proposal is not in contravention of s 50. It allows this decision to be made, however, by a dedicated, specialist body in the form of the Tribunal within commercially realistic timeframes.

The current process of authorisation by the ACCC, subject to appeal to the Tribunal, could be retained. The Business Council, however, believes that this process should be improved through stricter time limits on the Tribunal and restrictions on the scope for appeal of the ACCC decision to the Tribunal.

Figure 1: Flow chart of current merger regime under Trade Practices Act

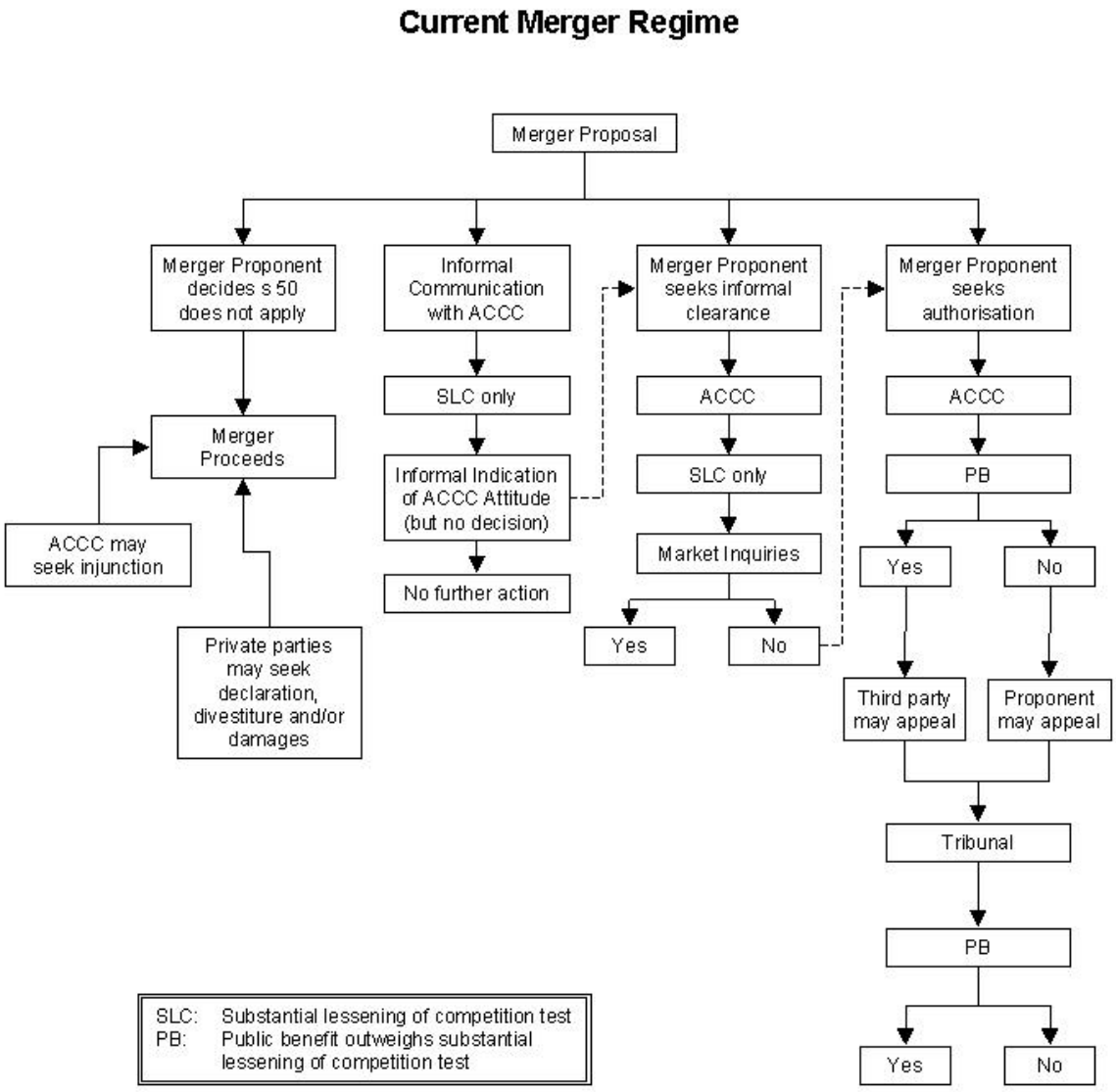
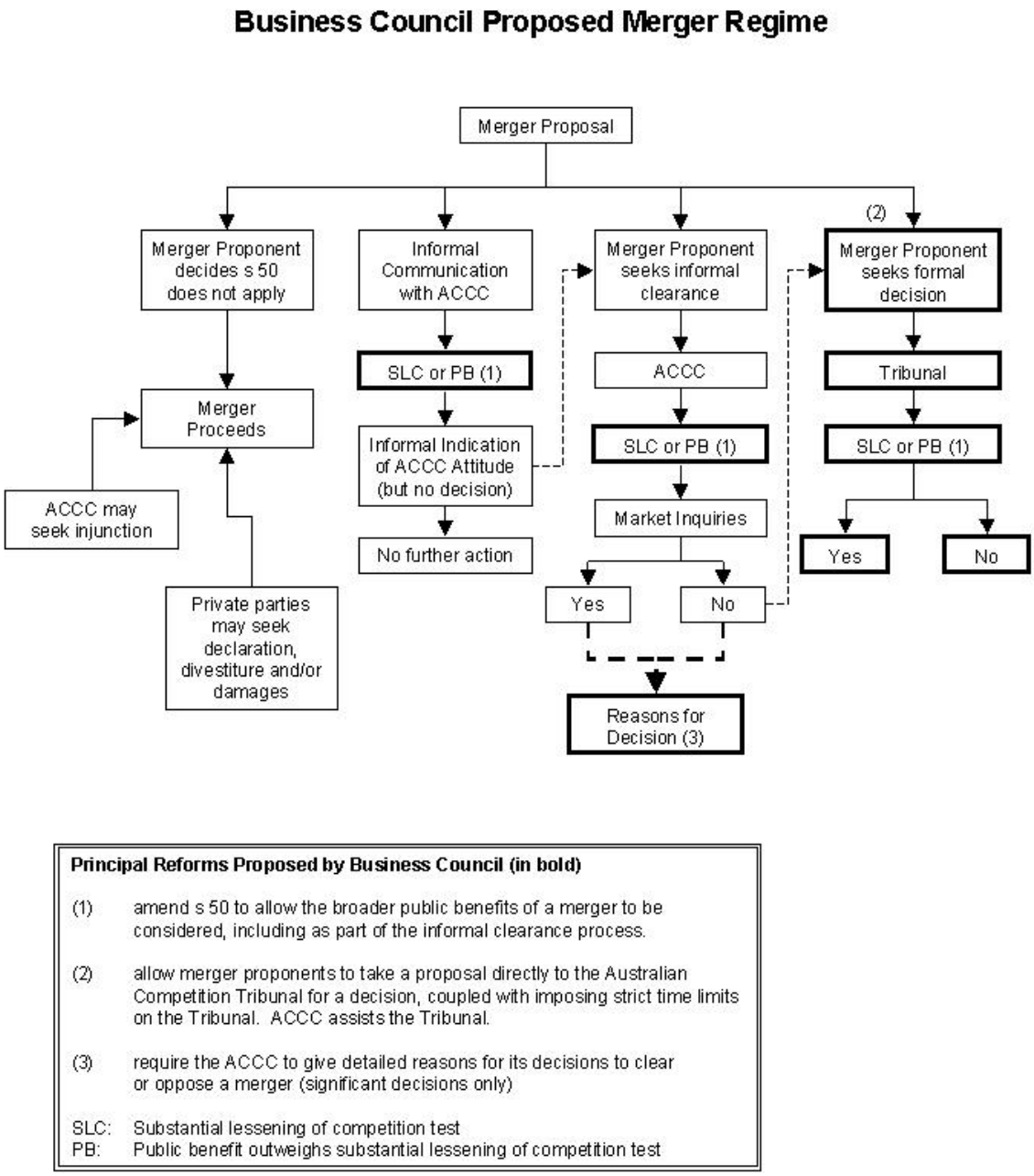


Figure 2: Flow chart of reformed merger regime including Business Council proposals



Principal Reforms Proposed by Business Council (in bold)

(1) amend s 50 to allow the broader public benefits of a merger to be considered, including as part of the informal clearance process.

(2) allow merger proponents to take a proposal directly to the Australian Competition Tribunal for a decision, coupled with imposing strict time limits on the Tribunal. ACCC assists the Tribunal.

(3) require the ACCC to give detailed reasons for its decisions to clear or oppose a merger (significant decisions only)

SLC: Substantial lessening of competition test
PB: Public benefit outweighs substantial lessening of competition test

It is the Business Council's view that the changes set out above, while not dramatic, provide a necessary foundation for addressing the concerns many businesses have expressed with the adequacy of the current merger regime in Australia. We believe that the basic merger policy is right, but that improvements can be made in practice to assist mergers that are in the interests of the Australian economy and public.

The changes we have proposed would see companies given a more commercially realistic opportunity to argue the full benefits of their merger proposals, rather than being constrained by the limitations of the current system. They would also see the merger process made more transparent and include appropriate checks and balances.

7. Public Benefit

As noted at the start of this section, the concept that the competition issues raised by a merger can be offset by broader public benefits is not new to the TPA and is the policy rationale behind the authorisation process. Consideration has therefore already been given, including by the ACCC and the Tribunal, to the sorts of matters that may constitute such public benefits.

Importantly, the Tribunal has defined public benefit as[12]

> *"anything of value to the community generally, any contribution to the aims pursued by the society including as one of the principal elements (in the context of Trade Practices legislation) the achievements of the economic goals of efficiency and progress"*

From the decisions of the Tribunal, four basic principles can be discerned that guide the Tribunal in its determination of public benefits:

- primacy will be given to the economic goals of efficiency and progress;
- benefits must contribute value to the community generally – benefits to particular sectors of the economy at the expense of other sectors will not be counted as public benefits;
- everything that is of value to the community generally, will be considered; and
- consideration of benefit entails the (often difficult) specification of a counter-factual so that alternative futures can be considered, with and without the proposal before the Tribunal going ahead.

With these principles in mind, there is a range of issues that can be more effectively raised under the Business Council proposals, including where:

(a) economies of scale are needed to achieve international competitiveness for exports;

(b) industry rationalisation will lead to a more efficient industry;

---

[12] *QCMA. Re Queensland Co-operative Milling Association Ltd, Defiance Holdings Ltd* (1976) ATPR 40-012 at 17,242.

(c) consolidation will allow domestic suppliers to compete more successfully with import competition; and

(d) consolidation will result in industry cost savings resulting in contained or lower prices to consumers.

The ACCC has also issued a list of matters it considers may be public benefits, which is largely, though not entirely, consistent with the Tribunal's views[13].

Examples such as these involve important trade offs for Australia's future and a Tribunal route such as the Business Council has outlined will be more likely to provide a better result for Australia than the existing processes.

8. Alternative Proposals

(a) Amended Market Definition

Professor Maureen Brunt, in a submission to the Review Committee, has proposed that the statutory definition of market under the TPA be amended. Specifically, she has proposed that the definition in ss 4E and 50(6) be amended to read, a[14]

> *"'**Market**' means a market in relation to Australia."*

In support of this change, Professor Brunt has noted that[15]

> *"There is one feature of the Trade Practices Act that is glaringly inappropriate to the global challenge. This is the narrow definition of "market" contained in s. 4E and s. 50(6)."*

Professor Brunt also raises concerns with the approach of the ACCC in deciding the market it considers relevant to a matter before it. While noting that the ACCC purports to adopt an appropriately flexible approach to determining the relevant market, Professor Brunt goes on to state that[16]

> *I have the strong impression that, where international forces are taken into account by the Commission, it is often confined to import competition. Yet it would be relevant to consider the pressures arising from participation in export markets as well as, more generally, the evidence relating to business strategies.*

The Business Council supports the view that there is a tendency for the ACCC to interpret the market too narrowly and to disregard or discount the role of import and export competition, both current and potential, when considering, for example, the competition implications of a merger proposal. The Council also recognises that this has been an issue with some decisions

---

13 ACCC, "Guide to authorisations and notifications", November 1995, p 20.

14 Professor Maureen Brunt, Melbourne Business School, Submission to the Review Committee (August 2002, p 1).

15 Id.

16 Ibid at 4.

of the Federal Court (see Appendix 1). The Business Council would therefore support amending the definition of "market" in s 4E and s 50(6) to overcome the problems created by the current narrow definition. This would ensure the relevant market could be determined in accordance with economic principles rather than confined by principles of statutory interpretation.

While the Business Council supports the thrust of Professor Brunt's submission, it is not convinced that the amendment proposed by Professor Brunt would necessarily address all the issues that have been raised. The Council believes that the current definitions should be amended to make it clear that, in determining a market under the TPA, competition pressures arising from outside Australia are also relevant.

(b) Improved Authorisation Process

A number of small business organisations have put alternative proposals before the Review Committee to improve the mergers regime[17]. In putting these proposals forward, these organisations have recognised that, while they have no fundamental concerns with the current merger regime, they do "*accept that merger procedures can be improved*"[18]. The proposed reforms range from the introduction of a dedicated ACCC Merger Authorization Unit[19] to a more comprehensive overhaul of the current authorisation process[20]. In particular, it has been proposed that the authorisation process can be improved by[21]:

- *changing the public benefit test to a no significant public detriment test;*
- *retain and perhaps even tighten the current strict time limits on ACCC process;*
- *allowing only the applicant or the Federal Minister to have standing to appeal to the Australian Competition Tribunal;*
- *the ACCC role in Australian Competition Tribunal hearings to be clearly defined to include an amicus role;*
- *other parties to be allowed to seek leave to intervene in Australian Competition Tribunal hearings but to be required [to] submit their views via the ACCC;*
- *an Australian Competition Tribunal review should no longer be de novo and unless there are very good reasons to do otherwise, the Australian Competition Tribunal should confine itself to consideration of the papers that were before the ACCC;*

---

17 See, for example, the submissions of the Fair Trading Coalition (July 2002, p 35), the Council of Small Business Organisations of Australia (July 2002, p 14) and the National Association of Retail Grocers of Australia (July 2002, p 117).

18 Submission of the Fair Trading Coalition (July 2002, p 35).

19 Submissions of the Council of Small Business Organisations of Australia (July 2002, p 14) and the National Association of Retail Grocers of Australia (July 2002, p 117).

20 Fair Trading Coalition, Submission to the Review Committee (July 2002, p 35).

21 Id.

- *imposing strict time limits on an Australian Competition Tribunal review, say 30 days, or an ACCC decision should stand; and*

- *the Australian Competition Tribunal be given the power to award costs.*

The Business Council recognises that, overall, these changes would improve the mergers authorisation process. The Council believes that, if the authorisation test were changed to one of public detriment, it should be one of "no significant net public detriment", as it is possible that a significant public detriment in one area could be more than outweighed by public benefit in other areas. The weighing of public benefit and detriment should also only be an issue where a merger will or is likely to substantially lessen competition, that is, mergers that do not substantially lessen competition should continue to be permitted on competition grounds.

The Council supports the view that only the applicant or the Federal Minister should have standing to appeal an ACCC authorisation decision to the Tribunal. At present, the scope for appeal is cast far too widely and is a significant deterrent to the use of the authorisation process. If the scope for appeal is reduced, there should be an active role for the ACCC as *amicus tribunal*. This is consistent with current practice and the Business Council's proposal to allow merger proponents to take their merger straight to the Tribunal[22].

While the Business Council sees merits in these proposals, overall, its preference remains for the set of reforms it has put before the Review Committee. The model proposed by the Fair Trading Coalition goes some way towards addressing the procedural failings of the current authorisation process, however, in the view of the Business Council, it does not adequately address deficiencies in the ACCC's own consideration of mergers. Nor does it address concerns with the informal clearance process. The proposal to introduce a dedicated ACCC Merger Authorization Unit does not address the principal concerns with the current merger regime.

(c) Conclusion

The Business Council supports the view put to the Review Committee by Professor Brunt, that the current definitions of market under the TPA are too narrow and could be contributing to the ACCC and the courts interpreting relevant markets too narrowly when assessing merger proposals and making other decisions under the TPA where the definition of the market is critical. The Business Council has suggested an alternative approach to defining the "market" under the TPA.

The Business Council also supports the proposal of the Fair Trading Coalition to only allow the applicant or the Federal Minister to have standing to appeal a merger authorisation decision to the Tribunal. The Council agrees that this would require the ACCC's role in Tribunal hearings to be clearly confirmed to include an *amicus* role, with other parties allowed to seek leave to intervene in Tribunal hearings but to be required to submit their views via the ACCC. Overall, however, the Business Council does not believe that the alternative put forward by the Fair Trading Coalition addresses all of the concerns raised by the Business Council and others.

---

[22] Business Council of Australia, Submission to the Review Committee (July 2002, p 80).

C. GOVERNANCE AND ACCOUNTABILITY

1. Introduction

In its initial submission to the Review Committee, the Business Council of Australia identified a number of concerns with the performance and operation of the ACCC. The Council argued that the appropriate response to overcome these concerns is to increase the level and effectiveness of the governance and accountability of the ACCC. In particular, the Council proposed:

- a Charter, designed to guide the development and implementation of the competition provisions of the TPA;
- a Board, to develop and oversee the implementation of the Charter; and
- an Inspector General, to investigate systemic issues arising from the administration and operation of the competition provisions of the TPA.

Following its meeting with the Review Committee, the Business Council also wrote to the Committee providing further information on its proposals, particularly in relation to the Board. The Council sees the Board of Competition as the most important of the reforms needed in this area. A copy of that letter is at Appendix 2.

(a) The Need for Greater Governance

The arguments for greater governance set out in the Business Council's submission can be summarised as follows:

- in a rapidly changing world, competition regulation is becoming more difficult, particularly in terms of understanding and defining key concepts, such as the market and market power;
- the costs of regulatory error become greater as Australia becomes more exposed to international competition;
- there should always be a balance between power and accountability, yet while the powers and the breadth of regulatory responsibility of the ACCC have grown markedly, there has been no commensurate increase in the ACCC's accountability;
- the ACCC is not always responsive to adverse findings by the bodies currently charged with keeping it accountable, including the Tribunal, courts and Parliamentary committees; and
- there is evidence before the Committee, both from the Business Council and other organisations, that there are real issues with how the ACCC operates and exercises some of its powers.

(b) The Need is Ongoing

Some organisations and commentators, while recognising the validity of business concerns with the operation of the ACCC, have suggested that these concerns can be addressed

through the ACCC issuing better guidelines, through internal review processes or through the ACCC being given "one last chance". The Business Council has reservations about these approaches. Clearly, proper guidelines play an important role in improving the certainty of administration and in assisting companies and individuals to understand how the law will be applied and therefore how best to comply with that law.

Guidelines, however, are of little use if they are not adhered to by the ACCC. The Business Council's initial submission identified a number of areas where the ACCC has issued guidelines but has not always complied with them (for example, the ACCC's s 87B undertakings guidelines).

The ACCC has also demonstrated a tendency to be dismissive of its critics. The House of Representatives Economics Committee has reported that the ACCC gives "*glib responses*"[23] to concerns raised with the Committee and displays "*an intolerance for criticism, even where it is well-founded*"[24]. The ACCC continues to maintain publicly that there is no substance to current business concerns[25] and prefers to resort to the sort of public attacks noted in the Introduction to this Submission. Criticism from the courts appears also to be dismissed lightly by the ACCC. Despite the concerns with the ACCC's media conduct raised by the Federal Court in the *ESAA* case[26] and given prominence in a number of submissions to the Review Committee, the Federal Court has felt obliged to again rebuke the ACCC for inappropriate media and public statements made earlier this year. In his decision in *Cassidy v Medical Benefit Fund of Australia*[27], Hill J noted the publicity given by the ACCC to its action against Medical Benefit Fund and its advertising agency. Specifically, his Honour noted that

> *"It might be said that while the Commission is entitled to tell the public that proceedings have been brought and the general nature of those proceedings, there is a danger that wide dissemination of the fact before a hearing might in a particular case injure, perhaps irreparably, the person against whom the proceedings are brought."*

His Honour then went on to warn the ACCC against further publicising the case[28]. His Honour's concerns echo concerns raised by the business community about the use of the

---

23 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 September 2001 at 31110, Ms Anna Burke MP (ALP Member for Chisholm).

24 Australia, House of Representatives Standing Committee on Economics, Finance and Public Administration, *Competing Interests: is there a balance? Review of the Australian Competition and Consumer Commission Annual Report 1999 - 2000*, Parliament of Australia, Canberra, at 47.

25 See, for example, Professor Allan Fels, ACCC Chairman, "*I'm rather used to assaults from big business…There has been nothing substantial in the latest criticisms*", *Australian Financial Review*, 4 September 2002, p 5.

26 *Electricity Supply Association of Australia Ltd v Australian Competition and Consumer Commission* (2001) ATPR ¶41-838. For a discussion of the Court's criticism of the ACCC, see Business Council of Australia, Submission to the Review Committee (July 2002, p 30).

27 *Cassidy & Anor v Medical Benefits Fund of Australia & Anor* (No. 2) [2002] FCA 1097.

28 In its initial submission to the Review Committee (pp 57-58), the Business Council raised a concern that the ACCC used s 87B undertakings to require corrective advertising as a form of punishment and to promote its own success as a regulator. The Council noted that this was despite judicial pronouncements that corrective advertising should not be used in such ways. This issue was raised in the *Medical Benefits*

media and public statements by the ACCC. It also seriously calls into questions the ACCC's repeated claims that its use of the media in connection with prosecutions is sanctioned by the courts.

The ACCC's governance problems are widely recognised in the submissions to the review. The Commonwealth Bank, for example, explains that as the TPA has in effect become omnibus legislation, the need for good governance has become acute[29]. Telstra draws out the harmful results of the ACCC having too many functions, more than its peers in any other OECD nation, and even including (under Part XIC) the power to determine the scope of its own powers[30]. This has led to conflicts of interest and duty, as where the ACCC receives information in confidence in its arbitral role, but then uses it in its enforcement role, or where it applies powers in one area to leverage results in another. It also leads to conflicts of regulatory philosophy, such as between competition and consumer protection. Finally, it has compromised the separation of powers. Invested with both quasi-judicial and executive functions, it has tended to push many of its powers to the limit. As the former Deputy Chairman, Mr Gilbert, puts it[31], the ACCC has developed the position that its opinion is the law, that it is the decision maker for all purposes. And in exercising its vast powers, the ACCC, as former Commission Chairman, Mr McComas, candidly expresses it, is "biased" and lacks objectivity[32].

The Business Council does not believe that the current questions over the operation of the ACCC stem just from the style of the current Chairman. While it is true that certain issues, particularly relating to the use of the media, may be linked to a particular personal style, the majority of the concerns raised in the Business Council's submissions relate to cultural and administrative problems within the ACCC, and not just the public persona of its Chairman. The Business Council is therefore strongly of the view that governance and accountability remain issues, regardless of the tenure of the current Chairman.

Finally, the Business Council believes that good governance and accountability is not just about ensuring the ACCC operates in an appropriate manner or consistent with the rule of law. Equally important is the opportunity the Business Council's proposals provide for better understanding and co-operation between the regulator and those affected by the regulator, including businesses, big and small, and consumers. As detailed below, this has been one of the principal benefits of the government's Board of Taxation.

(c) "More Bureaucracy"

Some critics of the Business Council's proposals have dismissed the need for additional governance and accountability out of hand. The Business Council's original submission,

---

Fund case, where the ACCC sought a "corrective advertising" order against the advertising agency. Hill J rejected the order, noting, "*Such an order would not, as such, assist in informing the public. Rather it would seem directed at punishing the agency by reporting it to its peers and announcing a win for the applicants*.".

29 Commonwealth Bank of Australia, Submission to the Review Committee (July 2002, p 11).

30 Telstra Corporation Limited, Submission to the Review Committee (July 2002, p 113).

31 R S Gilbert, Second Supplementary Submission to the Review Committee (25 July 2002, p 1).

32 W R McComas, Submission to the Review Committee (July 2002 p 14).

along with a number of other submissions, sets out the reasons why additional accountability is needed. These have also been summarised above.

Critics of the Council's proposals have also dismissed them as just "additional layers of bureaucracy". Related to this is the argument that the proposals are an attempt to "regulate the regulator". Neither criticism has substance.

The Business Council has proposed a governance and accountability model with a number of elements. As detailed below, each element of the Council's proposal has a specific function and has been designed to ensure that governance and accountability are improved, while still protecting the independence of the ACCC. Neither the proposed Board nor Inspector General has the power to pre-empt or overturn decisions of the ACCC, nor to make directions to the ACCC. Their role is advisory only.

Advisory Boards to government agencies are not uncommon and in many ways the ACCC's lack of such a Board is the exception rather than the rule. At present, the ACCC only has a "consultative committee" that provides information sessions about the ACCC's activities. While these information sessions are useful to participants, they are not high level discussions. Invitations to these sessions are also limited and major organisations such as the Australian Institute of Company Directors and the Australian Industry Group have at various times had their requests to participate denied by the ACCC.

The Board and Inspector General would provide external verification of whether the ACCC is operating appropriately. In that regard, if the ACCC is confident of its performance, it should welcome the opportunity for independent verification.

(d) The Model

There are three elements to the Business Council's model for greater governance and accountability:

- the Charter;
- the Board; and
- the Inspector General.

The Council has also proposed that a provision be introduced into the TPA to provide guidance on the broad principles to be followed in the administration of the Act. This could be similar to subsection 1(2) of the *Australian Securities and Investments Commission Act 2001*. The Council continues to support this proposal, full details of which were provided in the Council's initial submission[33].

2. The Charter

The purpose of the Charter is to provide a clear framework for both the development and the administration of competition regulation. While the TPA would continue to define the powers of the ACCC, the Charter would provide a transparent framework within which those

---

[33] Business Council of Australia, Submission to the Review Committee (July 2002, p 44).

powers are exercised. The Business Council's initial submission sets out a number of principles, such as transparency, certainty and proportionality, that should form the basis of the Charter[34].

In effect, the Charter provides a checklist for the ACCC and for external observers, including the proposed Board and Parliament, to test the operation of the ACCC. It also provides benchmarks for measuring the performance of the provisions of the TPA or proposed changes to the Act. For example, proposed amendments can be tested on whether they increase the transparency and certainty of regulation, or whether they are in proportion to the issue being addressed. The Charter also provides the framework that would guide the operation of the Board and the Inspector General.

A comparable Charter was proposed for business taxation and a draft was included in the Ralph Report[35].

The Board would develop the Charter through a consultative process, but the government would determine the final form and content of the Charter.

The Charter would:

- *provide guidance on how the ACCC will exercise its powers under the Act*
- *guide the future development of the competition provisions under the Act*
- *be based on broadly agreed principles of best practice regulation*
- *be developed through a consultative process*
- *be determined by the government.*

The Charter would not:

- *restrict the scope of the powers under the Act*
- *restrict the independence of the ACCC*

3. The Board

A Charter by itself will not guarantee improvements in the administration of the TPA. The Business Council has therefore proposed that a Board be established to monitor the performance of competition regulation against the principles of the Charter.

---

34 Ibid at 47.

35 *Review of Business Taxation - A Tax System Redesigned*, pp 104-110.

The Board's role would be advisory. As proposed by the Business Council, the Board would not have decision making powers in relation to the TPA. The Board would not have the power to overturn or pre-empt decisions of the ACCC, nor make directions to the ACCC. The Board could not therefore "regulate the regulator", as some critics of increased accountability have suggested.

The Board should have broad membership, making expertise and perspectives from across business, including small business, and consumers available to the ACCC. The Board would provide a vehicle for small business and consumers to raises their issues with the administration of the competition provisions as much as it would provide a vehicle to address "big business" concerns.

The Board would have a clearly defined role to provide advice to the ACCC and Treasurer over the direction and development of competition policy and regulation, within the framework set out by the Charter.

***The Board would**:*

- *be an advisory body only*
- *ensure the government gets a broad range of perspectives, including business and consumer views, in the development of competition regulation*
- *ensure the ACCC gets a broad range of perspectives on the administration of competition regulation*
- *provide a vehicle for testing business and consumer concerns with competition regulation, and advising the government and ACCC on appropriate responses.*

***The Board would not**:*

- *restrict the powers or independence of the ACCC*
- *be involved in the day to day operations of the ACCC*
- *be able to pre-empt or overturn ACCC decisions*
- *give the ACCC binding directions*

(a) The Board of Taxation Model

The Board proposal is modeled on the Board of Taxation implemented by the current government. Early indications suggest that the Board of Taxation has been very successful at ensuring a range of perspectives is taken into account in the development and implementation

of tax policy. Like tax policy and administration, competition regulation has the potential to significantly affect individuals and the commercial operations of companies. The Business Council therefore considers the model being implemented for the tax system is a suitable model for adapting to competition regulation. For these reasons, the Business Council has set out in this submission considerable detail on the operation of the Board of Taxation, with the intention that this will create a more informed debate and better understanding of the proposal.

Specific strengths of the Board of Taxation, which the Business Council believes should be carried over to a Board of Competition, include that:

- members have extensive experience and are appointed in their personal capacities;
- members are remunerated, reflecting the time and effort Board members are expected to contribute to the Board; and
- there is a small secretariat, independent of the Australian Tax Office (ATO), dedicated to assisting the Board.

In principle, the Board proposed by the Business Council is the same as advisory Boards in place for other agencies or areas of government, such as the Financial Services Advisory Board. However, the Business Council sees the above elements of the Board of Taxation as giving it additional strengths that ensure it is an active and constructive player in the development of tax law. Like the Board of Taxation, the Board of Competition could be non-statutory, although consideration should be given to a Board with a statutory basis.

The function of the Board of Taxation is to provide advice to the Treasurer on:

- the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspects of tax design;
- improvements to the general integrity and functioning of the taxation system;
- research and other studies commissioned by the Board on topics approved or referred by the Treasurer; and
- other taxation matters referred to the Board by the Treasurer.

The Business Council sees the Board of Competition as having a similar function in regard to competition regulation. The sorts of issues that the Board of Competition might examine in future could include:

- how to maintain the balance in competition regulation between Australia's international competitiveness and the need to protect strong competition in domestic markets (as this will continue to change over time);
- whether the efficient restructuring of particular sectors of the economy is being facilitated by competition regulation; or
- the implications for competition regulation of new and emerging technologies or market practices.

The Board would also provide a vehicle for an independent consultation process to test whether changes to the legislation are needed to address emerging issues for business or consumers.

Experience with the Board of Taxation provides an illustration of how the Board of Competition might operate.

Since its inception the Board of Taxation has been engaged in a number of reviews of government policy and dealt with a number of problematic issues referred to it by the Treasurer. These activities of the Board of Taxation are set out below.

(i) Review of consultation arrangements for the development of tax legislation

The Board undertook a review of general arrangements for government consultation with the community on the development of tax legislation.

The Board made recommendations to the government to create tax legislation that:

- reflects the government's policy intent;
- is more compatible with commercial realities and the circumstances of individuals;
- minimises complexities and resulting compliance costs; and
- avoids unintended consequences.

The objective of the consultation was to identify "best practice" community consultative processes, recognising the range of circumstances in which tax laws can be developed. The review aimed to:

- document existing consultative processes;
- survey stakeholder views about the relative strengths and weaknesses of current approaches and ideas about potential future processes; including, importantly, the role the Board should play in them;
- assess practices in selected overseas jurisdictions (New Zealand, UK, Canada, Ireland, US);
- assess processes used in developing other Commonwealth and State government laws;
- examine the goals of government consultation with the community on the development of tax legislation;
- recommend best practice principles for consultation, recognising the range of different circumstances in which tax legislation can be developed;
- consider possible processes or procedures for providing feedback from the Government on its consideration of community ideas or views contributed during consultation;

- identify performance measures that can be used to assess the effectiveness of consultation on an ongoing basis; and

- recommend 'operational' improvements to the methods and procedures employed by the government for consultation with the community on tax legislation.

The Treasurer broadly endorsed and committed the government to implementing the processes recommended by the Board.

The Board will have an on-going role in monitoring the consultation process, and conducting post-implementation reviews of major pieces of tax legislation to ensure that government policy intent has been effectively translated into practice.

In line with the Board's recommendation, the Treasurer announced that responsibility for the drafting of tax legislation would be transferred from the ATO to the Treasury from 1 July 2002.

(ii) The Tax Value Method

At the direction of the Treasurer, the Board has been actively involved in the development and evaluation of the Tax Value Method (TVM) for calculating taxable income, the adoption of which was recommended by the Ralph Review of Business Taxation.

The Board pursued an open and inclusive community consultation process. The process was designed to develop, test and evaluate further the facts about the TVM with an emphasis on comprehensive "road-testing", based on actual financial information and the circumstances of affected taxpayers.

Developing a draft legislative framework

The Board has been developing a draft legislative framework with accompanying explanatory material. The draft demonstration legislation and assorted material were developed progressively through a series of four prototypes, each refining and expanding on the previous version in light of comments from interest groups.

In addition, the Board hosted a major TVM conference. The emphasis of the conference was to promote a better understanding of the TVM and to establish the critical issues that would need to be addressed in evaluating its potential.

Evaluating the TVM

A range of work has been undertaken to evaluate the TVM. With the assistance of the ATO, workshops were conducted with tax practitioners from large and small accounting firms, business and the legal profession to educate participants about the TVM and to consider, and test possible methodologies by which TVM taxable income calculations might best be derived. The Board also had the assistance of leading tax academics, representative organisations and major practitioners.

The Board commissioned some early testing of the TVM concept, utilising the 1999-2000 financial transactions and accounts of BHP Limited, Telstra Corporation and Australia Post, as well as a number of small and medium sized enterprises.

The Board also evaluated the following key aspects of TVM:

- issues testing – harnessing transactional data of sufficient complexity and diversity to test comprehensively the conceptual robustness of the TVM;

- compliance cost impacts – quantification of the transitional and on-going impacts on users of the law including administrators, taxpayers, accountants and other "second-tier" service providers;

- certainty and transparency – measuring/inferring the extent to which TVM might result in greater legal certainty and transparency of the law;

- simplicity – whether the TVM is "simpler" than the current income tax law;

- durability – the TVM legislative framework's ability to accommodate changes to the law; and

- integrity – the extent to which TVM might offer a more robust foundation for maintaining the integrity of the law.

The Board reported to the Treasurer and Minister for Revenue and Assistant Treasurer on the TVM in July 2002.

(iii) Taxation of Trusts

Following advice from the Board, the Treasurer announced on 27 February 2001 that the entity tax legislation released in exposure draft form in October 2000 would not be pursued by the government. Instead, the Treasurer stated that the government would begin a new round of consultations on principles which can protect legitimate small business and farming arrangements whilst addressing any tax abuse in the trust area, with the Board to be a part of this consultation.

(iv) Inspector-General of Taxation

The Minister for Revenue asked the Board of Taxation to gather and consider the views of business taxpayers, the tax advising professions and the community on an Inspector-General of Taxation and to make its own recommendations to her by 19 July 2002.

To facilitate community input, the Board prepared a Consultation Plan setting out how it proposed to gather the community's views. The Consultation Plan was published on the Board's internet site and was advertised in daily newspapers throughout Australia.

Thirty four submissions were received by the Board. The Board reported on the consultations and made recommendations to the Minister for Revenue in July 2002. A copy of the press release announcing the government's response to the Board's recommendations is at Appendix 3.

(v) Effectiveness of tax legislation and improvements to the tax system

The Board has been examining processes by which it can effectively perform its key functions of advising the Treasurer on the "quality and effectiveness of tax legislation" and

on "improvements to the integrity and functioning of the tax system". One specific initiative taken by the Board was to establish an advisory panel to provide it with an additional source of high level expert technical advice on which it can readily and quickly draw in considering technical issues in the tax law. Invitations for membership of the panel were made on the basis of the known capabilities and expertise of the individuals involved.

(vi) Company consolidation regime

The Treasurer announced, following advice from the Board, that the commencement of the company consolidation regime would be deferred until 1 July 2002. This reflected the Board's view that a significant proportion of businesses, especially smaller to medium sized businesses, were not at the time prepared for the change. Given its involvement in deferring the commencement of the new regime, the Board took steps to ensure that the legislation would be enacted from 1 July 2002.

(vii) Review of international tax

On 2 May 2002, the Treasurer announced a review of international tax arrangements with particular attention to be given to current international tax arrangements and whether they:

- impede Australian companies expanding offshore;
- impede the attraction of domestic and foreign equity; and
- affect holding companies and conduit holding companies being located in Australia.

In his announcement, the Treasurer asked the Board of Taxation to undertake public consultations on these issues in the second half of this year and to provide the Government with a report by the end of the year.

(viii) Twin Roles

From this brief summary of the role of the Board of Taxation, it is possible to observe that the Board performs twin consultative functions. Firstly, facilitation of consultation between the broader community and tax policy makers, and secondly, between members of the Board of Taxation and the ATO. The consultation is thorough and matters are properly thought out and tested before they are implemented.

4. The Inspector General

While the role of the Board of Competition would be to advise on broad policy issues, the role of the Inspector General would be to examine and advise on systemic issues with the administration of the TPA. For example, in the context of the current inquiry, the Business Council has raised concerns with the use of the ACCC's investigative powers under s 155 and the use of court enforceable undertakings under s 87B. The Council sees these issues, where there is evidence of a systemic failing in the administration, as the type of issues that would be covered in future by the Inspector General. Similarly, it would be the role of the Inspector General to examine the appropriateness of the use of the media by the regulator.

The Inspector General would not investigate specific complaints about the ACCC, except to the extent that those complaints illustrate systemic failings in the administration of the TPA.

It is not therefore intended that the Inspector General replace the right of individuals or companies to take specific complaints to the Ombudsman. The relationship of the Inspector General with the Ombudsman was set out in the Business Council's initial submission[36].

The Inspector General would not have powers to direct or require specific responses to its inquiries. Like the Board, it could not pre-empt or overrule decisions of the ACCC, nor direct the ACCC to take certain action. It would, however, provide public advice to the ACCC, Board of Competition or Treasurer and make recommendations for improvements to the administration of the TPA. It would report annually on its investigations, the recommendations made and the outcomes.

The Inspector General model proposed by the Business Council is similar to that currently being developed for tax administration. The proposed Tax Inspector General would focus on identifying possible improvements to the operation of the tax system, but would not have a direct role in handling complaints from individual taxpayers. The proposed Tax Inspector General would have broad investigative powers and access to information and would be independent of the Tax Office[37].

***The Inspector General would**:*

- *investigate systemic issues with the administration of competition regulation*
- *make recommendations to address systemic failings in the administration*
- *report annually on its investigations, the recommendations made and the outcomes*

***The Inspector General would not**:*

- *have the power to pre-empt or overturn ACCC decisions*
- *give binding directions to the ACCC*
- *investigate individual complaints against the ACCC, except to the extent that they illustrate systemic failings in administration*

---

36 Business Council of Australia, Submission to the Review Committee (July 2002, p 51).

37 Further details of the proposed Tax Inspector General are available in the consultation paper issued in May 2002 by the Board of Taxation.

5. Interrelationship

The Business Council has proposed a carefully structured model for improving the governance and accountability of the administration of the TPA, while respecting the independence of the administrator.

The TPA should be amended to introduce a set of broad principles to guide its administration, comparable to subsection 1(2) of the *Australian Securities and Investments Commission Act 2001*. This would provide the legislative core for the governance model proposed by the Business Council.

A Charter, Board and Inspector General should be introduced. The Charter would provide the framework to guide the exercise of the extensive powers under the TPA; the Board would ensure that this occurs and that the Charter remains relevant to Australia's needs; and the Inspector General would provide a specialist body for the independent examination of the systemic operation of the TPA and regulator.

Each element has a specific focus and supports the other elements to give a governance model than will ensure that *"Australia has a good competition regulator, one that not only is fair and balanced in its decision-making, but is also seen to be fair and balanced"*[38].

While the Business Council believes that each element of the model is necessary, the Board is the centre piece and the most important. If the scope of the legislative amendment and the Board are sufficiently wide, the need for the Charter and the Inspector General could be diminished.

6. Alternative Proposals

A number of organisations have put alternative proposals before the Review Committee to improve the oversight of the operations of the ACCC. In particular, it has been proposed that a Joint Standing Parliamentary Committee be established[39]. The Business Council would not oppose such a committee, however, it does not believe that such a committee could or would address the concerns raised by the Business Council and others.

The operations of the ACCC are already subject to Parliamentary scrutiny by, for example, the House of Representatives Standing Committee on Economics, Finance and Public Administration. The dismissive attitude of the ACCC to that Committee is seen in the "*glib responses*"[40] it gives to concerns raised through the Committee and its displays of "*intolerance for criticism, even where it is well-founded*"[41]. There is no reason to believe that

---

[38] Australia, House of Representatives Standing Committee on Economics, Finance and Public Administration, "ACCC under the microscope", *Media Release*, 24 September 2001 (emphasis in original).

[39] See, for example, the submissions of the Fair Trading Coalition (July 2002, p 46) and the National Farmers' Federation (June 2002, p 24).

[40] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 September 2001 at 31110, Ms Anna Burke MP (ALP Member for Chisholm), Deputy Chair of the House of Representatives Standing Committee on Economics, Finance and Public Administration.

[41] Australia, House of Representatives Standing Committee on Economics, Finance and Public Administration, *Competing Interests: is there a balance? Review of the Australian Competition and Consumer Commission Annual Report 1999 - 2000*, Parliament of Australia, Canberra, at 47.

the ACCC would be any less dismissive of the concerns of a dedicated Parliamentary committee.

There is also currently scope for Parliamentary inquiries into the operation of the ACCC through s 29 of the TPA, which requires the ACCC to provide to the Parliament information regarding the ACCC's functions. This power, however, has not been used to investigate the operation of the ACCC, but rather, has been used to direct the ACCC to hold inquiries into industries that may not otherwise have warranted review by the ACCC. There is therefore a danger that a dedicated Parliamentary committee would focus more on competition issues in politically sensitive industries, with an associated distraction of ACCC resources, than on reviewing the actual operation of the ACCC. This concern could possibly be addressed through care in determining the terms of reference of the committee.

The issue of whether the ACCC, in the exercise of its investigative and prosecutorial powers, acts in accordance with the *Directions on the Commonwealth's Obligations to Act as a Model Litigant*, has also been raised with the Review Committee[42]. It has been suggested that, while the ACCC is already required to comply with the standards set out in the *Directions*, this requirement should be given more explicit through, for example, a code of practice. The Business Council supports this proposal and would see the Council's proposed Charter as a suitable vehicle for setting out the requirements of the ACCC to act as a model litigant.

7. Conclusion

The Business Council and others have identified in their submissions a range of issues with the current administration of the TPA. These echo earlier concerns expressed by Parliamentary Committees, courts and trade practice practitioners. Unfortunately, despite growing criticism over many years, the ACCC has not demonstrated a willingness to treat these concerns seriously, nor to adjust its performance accordingly. Its dismissiveness of its critics has continued throughout the current review. At best, the ACCC responds defensively to comment or criticism, rather than looking for opportunities to improve the TPA and its administration.

For these reasons, the Business Council believes it is necessary to put in place dedicated, external accountability measures, such as those proposed by the Council. The Business Council is firmly of the view that further guidelines and internal reviews by the ACCC are no more likely to result in improved performance than they have in the past.

Finally, the Council believes that the ACCC should welcome the increased accountability that will come from external bodies such as the Board and the Inspector General, as providing an opportunity to have the strength and quality of its administration independently tested and verified.

---

[42] See for example, Minter Ellison Legal Group, Submission to the Review Committee (June 2002, p 10).

D. AN "EFFECTS" TEST FOR MISUSE OF MARKET POWER

The ACCC has proposed an amendment to the operation of s 46 of the TPA, through the inclusion of the words "*or with the effect or likely effect"*. The Business Council's initial submission raised a number of concerns with an "effects" test in s 46. The principal concerns were that an "effects" test:

- blurs the fine line between anti-competitive and strongly competitive legitimate commercial conduct, increasing the uncertainty of the provision and making compliance more difficult for companies;
- is likely to catch innocent, competitive behaviour; and;
- requires companies to be able to predict the future effect of their activities on competitors, potential competitors or the dynamic process of competition.

The Business Council remains of the view that, because of the above concerns, an "effects" test is more likely to be harmful to competition than beneficial.

The Business Council is also of the view that the current provision is working appropriately and that change would create considerable, and unnecessary, uncertainty over the operation of the provision. This view is confirmed by submissions from, for example, the Law Council of Australia.

Certainty of the law is an essential pre-requisite for high levels of compliance with the law[43]. Compliance with the TPA requires line and operational managers, as well as corporate counsel and legal advisers, to have a clear understanding of the decisions and conduct that are likely to contravene or raise issues under the TPA. This is particularly the case with s 46, where the line between robust competition and anti-competitive conduct can be a fine one.

From a legal perspective, in light of the level of pecuniary penalties which may be imposed on a corporation found to have contravened s 46 (that is, a financial penalty of up to $10 million for corporations and up to $500,000 for individuals[44]), corporations should be in a position to know, with some degree of certainty, what is lawful before engaging in a particular course of conduct.

The only 'advantage' of greater uncertainty in the law is that it increases the discretion of the regulator. In the case of the TPA, increased uncertainty over the operation of s 46 would increase the scope for the ACCC to extract undertakings from companies, under threat of prosecution and adverse publicity. When combined with the proposal for the ACCC to have the power to issue cease and desist orders, the risk is magnified considerably.

---

[43] A general discussion of this issue is provided in Section H of this submission.

[44] Section 76 of the TPA. In addition, damages and injunctive remedies are available under ss 80 and 82 and remedial orders under s 87.

1. Protecting Competition or Competitors

The ACCC proposes introducing an "effects" test while retaining the three paragraphs of subs 46(1). The test therefore becomes one of the effect of conduct upon competitors and potential competitors in a market. This approach would entrench a view that s 46 is about the protection of specific competitors, rather than the protection of competition. This is inconsistent with judicial interpretation of the section, which focuses on the role of protecting the dynamic state of competition. In the Business Council's view, this latter approach is more appropriate. There is a risk that, if s 46 is cast to protect competitors, it will result in inefficient or less competitive players being protected from robust competition, resulting in a decrease in competition overall. Such a result is undesirable from the point of view of the overall efficiency of the Australian economy, and from the point of view of consumers.

A number of submissions to the Review Committee have highlighted perverse outcomes that could result from an "effects" test in s 46[45]. The following hypothetical examples further illustrate how the ACCC's proposal could result in unintended consequences.

(a) Hypothetical – Conduct with the effect of preventing new entry

Pharmacorp is an ASX listed company and manufactures a range of pharmaceutical products. Pharmacorp has achieved a substantial degree of market power through its efficient operations, its use of innovative technology and research methods and its commitment to R&D. The market in which Pharmacorp operates is relatively mature and Pharmacorp has enjoyed a relatively high and stable market share for a number of years although there are two smaller rivals operating in the same market, one of which is Medico.

Given Pharmacorp's mature market share and limited opportunities for growth, Pharmacorp decides to diversify its operations into a related market in order to achieve satisfactory returns for its shareholders. Accordingly, it dedicates significant amounts of expertise and commits substantial funds to the research and development of a revolutionary new treatment, Wonderdrug. Pharmacorp supports the launch of Wonderdrug with a vigorous marketing campaign and, thanks to its industry-wide brand recognition, the new product quickly achieves high levels of market penetration and becomes the leading treatment in its market.

Unbeknown to Pharmacorp, one of its rivals, Medico, had also embarked upon research and development into a similar drug therapy. However, upon learning of Pharmacorp's product and witnessing its success in the market, Medico decides to abandon the development of its own competing product.

Pharmacorp took advantage of its market power, particularly its brand recognition, to achieve a high level of market penetration ahead of its rivals. Pharmacorp did not develop its new product with the purpose of preventing any other person from entering the market or, for that matter, deterring or preventing a person from engaging in competitive conduct. Rather, Pharmacorp developed its product with a view to diversifying its operations and achieving satisfactory returns for its shareholders. No anti-competitive purpose could be inferred and all Pharmacorp's internal documents supported Pharmacorp's legitimate commercial

---

[45] See, for example, the submissions by the National Farmers' Federation (June 2002, p 14) and the Productivity Commission (July 2002, p 10).

rationale for developing and launching the product. Nevertheless, the degree of market penetration achieved and high market share by Pharmacorp's new product could only have been achieved by Pharmacorp using its market position and its brand awareness amongst consumers.

The ultimate effect of Pharmacorp's use of its market power has been to prevent a new player from entering the market with the apparent effect of reducing competition whereas, in reality, Pharmacorp launched a new product and thereby increased consumer choice. Nevertheless, under the ACCC's proposed formulation of s 46, proceedings could be brought against Pharmacorp for engaging in anti-competitive conduct.

(b) Hypothetical – Conduct with the effect of damaging/eliminating a competitor

Fizz soft drinks are the second most popular soft drink in Australia. Fizz Limited supplies Fizz soft drinks to ACME convenience stores, whose major product lines are soft drinks and snack foods. However, ACME has not been displaying Fizz soft drinks according to Fizz's retail guidelines. ACME does not display Fizz promotional material appropriately, does not supply refrigerated Fizz as required and does not re-stock the shelves promptly with Fizz when they are empty.

As a result, Fizz sales by ACME convenience stores are very poor compared to other channels of distribution. Fizz decides to terminate supply to ACME convenience stores and plans to rely on sales from nearby Fizz vending machines instead. The Fizz vending machines make Fizz a technical competitor of ACME convenience stores.

ACME has been poorly managed for some time and as a result has been struggling to remain commercially viable. Due to its inability to sell the popular Fizz soft drinks, ACME stores lose further business and its losses force it to exit the market. ACME accuses Fizz Limited of misusing its market power by changing its distribution network to eliminate or substantially damage ACME convenience stores.

Under the current s 46 test, Fizz Limited's purpose is not a prohibited one - it simply wanted to protect the value of its product and the integrity of its brand. However, under the "effects" test proposed by the ACCC, Fizz Limited may have breached s 46 as its conduct produced the *effect* of ACME going out of business, even though its purpose was commercially legitimate.

(c) Hypothetical – Conduct with effect of deterring competitive conduct

Over the last 10 years, Cyber Limited has grown to become one of the largest manufacturers of software in Australia. Its success is a combination of strategic management, efficiency and innovation. Accordingly, its software is very popular with consumers and retail stores are very keen to stock Cyber Limited's products.

As a result, Cyber Limited enjoys considerable bargaining power when it comes to retailers, and receives significantly better trading terms than most of its smaller rival manufacturers. Many retail stores reserve more shelf space for Cyber Limited's products and, due to high turnover, mark up the cost price by only 10% for Cyber Limited's products whereas other products receive a mark-up of 15%. Some of the major retailers allow considerable shop

space to be taken up by Cyber promotional material and display computers, whereas other manufacturers are charged a fee for such an arrangement.

This means that many of the smaller manufacturers find it more expensive and more difficult to compete with Cyber Limited. They accuse Cyber Limited of misusing its market power with the effect of deterring or preventing competitive conduct as they cannot obtain shelf space.

Under the current purpose test in s 46 of the TPA, it could be argued that Cyber Limited's conduct is intended to reduce its costs and to increase efficiencies, which is pro-competitive and not intended to prevent competitive conduct. However, under the "effects" test proposed by the ACCC, this pro-competitive purpose may become irrelevant if it can be shown that Cyber Limited's conduct had the *effect* of preventing other manufacturers from engaging in competitive conduct.

2. A "Substantial Lessening of Competition" Threshold

The Business Council believes that introducing an "effects" test limited by a threshold of substantially lessening competition does not address the principal concerns with an "effects" test.

While this approach would correctly focus s 46 on the protection of competition rather than the protection of competitors, it would not overcome the increased uncertainty an "effects" test introduces. For example, before engaging in robust competition, a company that may have substantial market power and may be taking advantage of that power, would still need to predict the impact of its activities on other players in the market and whether that impact would amount to a "substantial" lessening of competition. In other parts of the TPA, such as s 50, determining whether a proposed action will substantially lessen competition can involve detailed economic analysis and market inquiries, highlighting that determining the competition impact of actions is not necessarily a straightforward matter.

Moreover, the hypothetical examples demonstrate that conduct could be in contravention of a substantial lessening of competition effects test despite being unobjectionable and even socially desirable. They also show that, notwithstanding the requirement that a substantial degree of market power be taken advantage of, a firm could contravene a provision based on an effects test inadvertently.

Arguments that these concerns can be overcome through allowing the authorisation or notification of conduct that may contravene an amended s 46 do not recognise the impracticality of requiring companies to seek the approval of the regulator before engaging in day-to-day competitive conduct.

Replacing paragraphs 46(a), (b) and (c) with a "substantial lessening of competition" test is therefore **not** a comprise position that would remove or even significantly reduce the serious practical problems and uncertainty that would result from an "effects" test in s 46.

3. The ACCC's Case

The ACCC has advanced a number of arguments in favour of an "effects" test in s 46. These can be summarised as:

- an effects test in s 46 would better serve the object of the TPA in protecting the process of competition and fair trading;
- s 46 would be brought into line with the other prohibitions in Part IV of the TPA which are generally directed towards conduct that has the purpose or effect of damaging competition;
- the effects test would overcome enforcement difficulties associated with proving purpose in a range of circumstances;
- an effects test is better suited to examining conduct in new technology markets where network effects are present; and
- s 46 of the TPA would be consistent with international best practice, including the United States and Europe.

Each of these arguments is analysed in detail in Appendix 4 of this submission. The Business Council's conclusion is these arguments are questionable or flawed and do not support the need for an "effects" test in s 46, as proposed by the ACCC or in any other form. A summary of the ACCC's arguments and the Business Council's responses is provided in Table 2.

4. Alternative Proposals

An alternative proposal has been put forward to amend s 46(7) to make it explicit that the purpose of a corporation can be inferred from the effect of its conduct[46]. The Business Council understands that under the current s 46(7), which allows a court to infer purpose from the conduct of a corporation, or from other relevant circumstances, it is already open to a court to infer purpose from the effect of the conduct[47]. The Business Council does not, therefore, see the need to make any change but would not oppose it.

---

[46] See, for example, the submission of the National Farmers' Federation (June 2002, p 18).

[47] See, for example, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) HCA 13.

Table 2: ACCC arguments for a s.46 "effects" test and Business Council responses

ACCC Argument	Business Council Response
• An effects test in s 46 would better serve the object of the TPA in protecting the process of competition and fair trading	• The effects test proposed by the ACCC will establish a low threshold for liability that is likely to catch socially beneficial, competitive behaviour. • The effects test will lead to greater commercial uncertainty for all businesses and may deter lawful competitive conduct, thereby creating an efficiency cost. • The ACCC's proposed effects test is erroneously orientated towards the protection of individual competitors, in particular small businesses. Instead, s 46 should seek to promote the process of competition and efficiency in the Australian economy, consistent with economic and competition legal theory.
• Section 46 would be brought into line with the other prohibitions in Part IV of the TPA which are generally directed towards conduct that has the purpose or effect of damaging competition	• The proposed effects test in s 46 does not achieve consistency with other provisions of the TPA, which examine the effect on competition in terms of a substantial lessening of competition
• The effects test would overcome enforcement difficulties associated with proving purpose in a range of circumstances	• The ACCC has effective legislative tools at its disposal for discerning "purpose". • The ACCC has extensive investigative powers at its disposal to seek evidence of "purpose". • The ACCC need only adduce evidence to satisfy the civil standard of proof - that is, "on the balance of probabilities". • The ACCC has had a number of successes in bringing proceedings under s 46. • In the majority of section 46 litigation brought by the ACCC, for example, *Boral* and *Rural Press*, the Courts have found the prohibited "purpose" • For these reasons, it is doubtful whether the ACCC requires an effects test to overcome any enforcement difficulties associated with proving a purpose
• An effects test is better suited to examining conduct in new technology markets where network effects are present	• The ACCC already has tools at its disposal to intervene in instances where conduct may significantly damage high technology markets • An effects test already is in force in relation to telecommunications markets . No case has been made that network industries lend themselves to the need for new remedies • An effects test may not be appropriate for other high technology markets

Table 2 (cont'd)

ACCC Argument	Business Council Response
• Section 46 of the TPA would be consistent with international best practice, including the United States and Europe	• A call for uniformity with the competition regimes in other jurisdictions is a weak basis for the adoption of an effects test in Australia. • The overriding consideration should be whether an effects test is appropriate and necessary for the efficient operation of the Australian economy. • The effects test as proposed by the ACCC goes well beyond any comparable overseas provision.

E. CEASE AND DESIST ORDERS

The ACCC has argued for the introduction of cease and desist orders, to be available for alleged breaches of s 46. The ACCC argues the orders are necessary to counter the difficulties it perceives with the enforcement of s 46, in particular the "*significant length of time between anti-competitive uses of market power and the final legal outcomes in these matters*"[48]. The ACCC considers that the introduction of cease and desist orders (which would restrain corporations from engaging in specified conduct) would enable the TPA to address misuses of market power more expeditiously.

The Business Council's initial submission raised a number of issues with the proposal for cease and desist orders. The principal issues were that:

- the ACCC already has adequate powers to achieve the result proposed for cease and desist orders, through interlocutory injunctions;
- interlocutory injunctions provide an appropriate check and balance on the powers of the ACCC in that they can only be granted by a court;
- cease and desist orders are highly interventionist and would significantly increase the scope for regulatory error;
- when such powers have been sought in the past, they have raised constitutional issues; and
- it would be unwise to grant the ACCC sweeping new coercive powers when there are serious concerns about the way in which it uses the powers it already has.

1. The ACCC's Case

The key arguments advanced by the ACCC for cease and desist orders are:

- the need for speed in response to alleged breaches of s 46;
- the role cease and desist orders could play in resolving disputes;
- the deterrent effect of the power to issue cease and desist orders.

Each of these arguments is analysed in detail in Appendix 4 of this submission. The Business Council remains of the view that cease and desist orders are highly interventionist and lack accountability, notwithstanding the checks and balances proposed by the ACCC. The Business Council does not believe that the ACCC has made a valid case for such highly interventionist powers.

It is also important to note that, throughout its argument for cease and desist orders, the ACCC has assumed that it is readily able to distinguish anti-competitive conduct from strongly competitive conduct. When coupled with the ACCC proposal for an "effects" test,

---

[48] ACCC, Submission to the Review Committee (June 2002, p 95).

the ACCC is also assuming that it will be readily able to identify conduct that will have a future effect that contravenes s 46. This raises two serious concerns: first, whether the ACCC would actually conduct sufficient inquiries to make a proper determination of whether a cease and desist order should be issued (and if it does make such inquiries, whether a cease and desist order would be any more efficacious than an interlocutory injunction) and secondly, that the ACCC considers it has, or should have, the power to make the judgement of what conduct breaches the TPA. This is a role for the courts, not the regulator. While the ACCC proposes that cease and desist orders would be challengeable in court, this is little comfort to companies that have been prevented from competing or have suffered commercial loss as a result of an incorrectly issued order. The Business Council also notes that, despite the ACCC's confidence that it can readily identify contraventions of s 46, recent court decisions and subsequent appeals demonstrate that determining whether s 46 has been contravened is not a straight forward matter.

Finally, the ACCC submission sets out a number of reasons that it claims mean the ACCC is unlikely to use cease and desist orders extensively. The Business Council notes, however, there is a very real danger that powers, once given, can be used with increasing frequency. For example, the use of s 155(1) notices by the ACCC has increased by 600% in the last four years[49].

A summary of the Business Council's responses to the ACCC's arguments is in Table 3.

[49] Business Council of Australia, Submission to the Review Committee (July 2002, p 63).

Table 3: ACCC arguments for cease and desist orders and Business Council responses

ACCC Argument	Business Council Response
• Cease and desist orders would provide an effective and practical answer to the irreparable damage done to competition during the period in which alleged anti-competitive conduct is normally pursued by way of legal proceedings.	• The ACCC does not need the power to make a cease and desist order to enforce s 46 – its current powers to seek an interlocutory injunction are adequate to address these issues. • The ACCC has not demonstrated that such "irreparable damage" is actually taking place, certainly not to an extent that warrants such highly interventionist powers. • The constitutionality of cease and desist orders is questionable.
• Introducing cease and desist orders would facilitate early intervention to maintain the status quo of the market until such time that the alleged contravener ceases the conduct or the matter comes before the court for adjudication under s 46 of the TPA.	• Cease and desist orders may not necessarily save time. • The ACCC argument suggests that cease and desist orders may become a standard precursor to bringing an action under s 46, raising the question of compensation if the ACCC ultimately loses its case. • Cease and desist orders may compromise the policy objectives of the TPA and s 46 (i.e. the protection of the processes of competition).
• The Commission also argues that the availability of cease and desist orders would have a deterrent effect and thereby would promote a higher standard of competitive behaviour	• The ACCC will not be sufficiently accountable in the exercise of its powers. • The risk of ACCC intervention, even to preserve the "status quo", will discourage strong competitive behaviour, thereby incurring an efficiency cost to the detriment of the Australian economy and public. • The ACCC does not need additional powers to 'threaten' companies.

F. CRIMINAL SANCTIONS

1. Introduction

The ACCC has submitted to the Review Committee that the TPA should be amended to introduce criminal sanctions for "hard-core cartel conduct". The ACCC position in support of the introduction of criminal sanctions is based on the following propositions:

- hard core cartel conduct is prevalent and has not been deterred by recent increases in the civil penalties under the TPA;
- hard core cartels are blatant frauds;
- international best practice favours the introduction of a criminal sanctions regime for hard core cartels in addition to the existing civil penalty regime;
- hard core cartel prohibitions can be targeted to big business;
- further, there should be scope to impose substantial civil penalties based on the volume of commerce affected or the size of the business involved in contraventions of Part IV of the TPA; and
- practical implementation issues in relation to a dual civil/criminal penalty regime can be adequately addressed.

The Business Council's position, as set out in its initial submission to the Review Committee, is that:

- it views with abhorrence price collusion, bid rigging and market sharing;
- it believes the severe penalties which currently apply for those offences are an adequate deterrent and a case for any change in this area has yet to be made out;
- these issues are also currently the subject of a detailed inquiry by the Australian Law Reform Commission (ALRC), the report of which should be considered before final recommendations on the penalties under the TPA are made.

The Business Council has also stated that, if the Committee concludes that greater deterrence over and above the current penalties is needed (in the form of offences which carry criminal sanctions) then the Business Council would support such measures. It would do so on the basis of proper safeguards. That is, so long as they:

- clearly identify the culpable behaviour which takes the collusion outside the ordinary application of Part IV of the TPA;
- makes that culpable behaviour a separate crime in the criminal code (with all normal criminal law protections, such as the need to prove *mens rea* or intentional or fraudulent acts). (Part IV of the TPA would continue to apply as at present);

- punish the culpable behaviour by a range of sanctions such as gaol sentences, penalties and fines (depending on the gravity of the crime), as is currently the case with other criminal offences;

- apply the punishment to all those directly involved in the culpable behaviour - that is, to those employees or persons who committed the crimes as well as the executives of companies who were culpable participants;

- make no distinction between the size of business or the industrial organisation to whom the culpable employee or culpable executive may belong; and

- accord those charged with the due process of the criminal law (involving police investigation and prosecution by the Director of Public Prosecutions).

However, while recognising that there should be strong sanctions against conduct such as price collusion, bid rigging and market sharing, having reviewed the ACCC's arguments in support of its proposal for criminal sanctions, the Business Council concludes that:

- there is little or no probative evidence that:

  – blatant price fixing and market sharing is becoming more prevalent, and there is a reasonable basis to believe that the opposite position is likely to be true; or

  – the existing penalty regime is inadequate or constrained by the existing maximums;

- coupled with appropriate detection and court enforcement, the existing individual and corporate penalty framework provides a strong deterrent to breaching the TPA;

- the concept of a "hard core cartel" proposed by the ACCC is uncertain and likely to be overly inclusive and therefore apply to competitive and efficient arrangements;

- Australia's TPA enforcement regime does represent international best practice, and comparisons to overseas analogues ignore the existence of individual liability for penalties and damages;

- a prohibition which is targeted to "big business" is arbitrary and lacks a principled basis;

- there is no evidence that existing maximum penalties do not provide sufficient scope to impose appropriate penalties for cartel conduct; and

- a combined civil/criminal penalty regime raises both important questions for the Commonwealth's criminal law policy and practice which are not addressed by the ACCC's submission.

The Business Council has serious reservations about the ACCC's proposed model for criminal sanctions. In particular, the Council is concerned that insufficient attention has been given to the *mens rea* appropriate for such criminal offences. While in its public

campaigning for criminal sanctions, the ACCC has argued that "hard-core collusion" is a form of theft, is abhorrent and a blatant fraud, this position is not carried through to the proposal for criminal sanctions advanced by the ACCC in its submission to the Review Committee. The ACCC explicitly rejects that dishonesty, for example, should be part of the offence[50].

As pointed out in the ACCC submission[51], the Commonwealth Criminal Code requires criminal offences to include a fault element (*mens rea*). The ACCC has proposed a slightly different *mens rea* for different elements of collusion (eg price fixing or bid rigging), however, in essence the ACCC has proposed that the *mens rea* should be one of intention or recklessness. For example, in price fixing, the *mens rea* element would be met simply by an intention to fix prices. That intention, however, would apply in all cases of price fixing, including those that are routinely authorised by the ACCC as being in the public benefit. The ACCC proposal for criminal sanctions, therefore, fails to distinguish morally reprehensible and harmful conduct from conduct the ACCC is currently prepared to authorise. The Business Council believes that it is essential that any proposal for criminal sanctions include an effective *mens rea*, such as an intention to act dishonestly (or perhaps with reckless indifference to the harmful consequences of the conduct).

The ACCC has only recently sought to agitate for criminal sanctions for "hard core cartels". In the Business Council's view, the ACCC's proposal is not well supported or adequately formulated. Further, it would be premature to entertain the prospect of introducing additional criminal sanctions for cartel conduct or any breaches of Part IV of the TPA, while the issue of criminal/civil liability is still before the Australian Law Reform Commission for assessment and report.

The proposal for more substantial civil penalties, including for example turnover based penalties, was addressed in the Business Council's initial submission[52].

2. Rationale for Introducing Criminal Sanctions

(a) The Harmful Impact of Hard Core Cartels

The ACCC submits that criminal sanctions are justified by the serious impact of "*hard-core cartel conduct*" [53]:

> *[Cartels] injure consumers by raising prices above the competitive level and reducing output. Cartels can be very harmful across wide areas of an economy by artificially creating market power and leading to inefficient and wasteful allocations of resources.*

The Business Council agrees[54] with the ACCC's submission that the impact of cartels on the Australian economy can be extremely harmful and that it is important to ensure that the

---

50 ACCC, Submission to the Review Committee (June 2002, p 46).

51 Ibid at 43.

52 Business Council of Australia, Submission to the Review Committee (July 2002, pp 108-110).

53 ACCC, Submission to the Review Committee (June 2002, p 25).

54 Business Council of Australia, Submission to the Review Committee (July 2002, p 117).

sanctions which apply to anti-competitive cartel conduct under the TPA are sufficient to deter such conduct.

The ACCC submits that because cartels are "blatant frauds" criminal sanctions should apply to ensure parity with comparable forms of criminal conduct, such as theft, insider trading and market manipulation[55]. This proposition would be more supportable if the formulations of "hard core cartel" were such as to lead inevitably to the conclusion that all conduct proposed to be caught were "blatant frauds".

As further discussed below, the various formulations of "hard core cartel" proposed by the ACCC include conduct which in fact could be beneficial and is not clearly morally reprehensible. Hence, there needs to be careful consideration of what is meant by "hard core cartel" before the ACCC's proposition that they have a serious impact and are blatant frauds can be accepted.

The Australian Law Reform Commission in its recent discussion paper "Securing Compliance" discusses what behaviour should attract criminal sanctions[56]. It identifies the notions of individual culpability and criminal intention as aspects of the concept of criminality[57]. In this context, it cites the mid 1970s test put forward by the Law Reform Commission of Canada[58]:

> *To determine whether the act should be a real crime within the Criminal Code we should inquire:*
>
> - *Does the act seriously harm other people?*
> - *Does it in some way so seriously contravene our fundamental values as to be harmful to society?*
> - *Are we confident that the enforcement measures necessary for using criminal law against the act will not themselves contravene our fundamental values?*
> - *Given that we can answer 'yes' to the above three questions, are we satisfied that criminal law can make a significant contribution to dealing with the problem?*

Applying this framework to the ACCC's proposition exposes the need for a clear definition of "hard core cartel" conduct to prevent the application of criminal penalties to behaviour

---

55 It is worth noting that the level of penalties that are available under the TPA are significantly in excess of those for theft, insider trading and market manipulation. For example, an individual guilty of insider trading may be liable to pay a penalty of 2000 penalty units ($220, 000) and a corporation, a penalty of 10,000 penalty units ($1.1 million), compared to the $500,000 per contravention penalty for individuals and $10 million per contravention penalty for corporations under the TPA.

56 Australian Law Reform Commission, "*Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*" ALRC Discussion Paper 65.

57 Ibid at para. 2.9.

58 Ibid at para. 2.14.

which falls outside the sphere of what could properly be defined as criminal, and even to cover behaviour which could be socially desirable.

The ALRC also looks at the 'enforcement pyramid' model put forward by Ayres and Braithwaite[59]. This approach advocates the availability of a range of penalties arranged in order of seriousness. The ALRC cites Braithwaite on the operation of the pyramid:

> *My contention is that compliance is most likely when the regulatory agency displays an explicit enforcement pyramid…Most regulatory action occurs at the base of the pyramid where initially attempts are made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance civil monetary penalties are imposed; if this fails, criminal prosecution ensues; if this fails the plant is shut down or a licence to operate is suspended; if this fails, the licence to do business is revoked. The form of the enforcement pyramid is the subject of the theory, not the content of the particular pyramid.*

The ALRC notes that civil penalties play a key role in the pyramid because they are sufficiently serious to act as a deterrent, and refers to their attractiveness under the TPA. The ALRC further points to the appeal of civil penalties where there is a continuing relationship between the regulator and the regulated, citing Freiberg[60]:

> *The greater flexibility and range of civil sanctions makes them the preferred mode of social control where persuasion, negotiation and voluntary compliance are viewed as the techniques most likely to achieve the desired results. Whilst the criminal sanction is said to be suitable for the control of isolated or instantaneous conduct, the civil sanction is said to be better in cases where continuous surveillance is desired.*

The different rationales between civil and criminal penalty regimes means that the precise definition of the types of behaviour to which criminal penalties would apply is essential to avoid applying such penalties to behaviour which should not attract such penalties.

Karen Yeung, in her evaluation of the ACCC's work, identifies five possible theoretical justifications for criminal punishment[61]:

- deterrence (which seeks to deter people from committing crimes);
- rehabilitation (which seeks to achieve rehabilitation of the offender);
- incapacitation (which seeks to incapacitate offenders so as to render them incapable of re-offending for substantial periods);

---

59 Ibid at paras. 2.58-2.59.

60 Ibid at para. 2.59, citing A Freiberg, ""Civilising" Crime: Reactions to Illegality in the Modern State". (1985) Thesis p 119.

61 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001) Australian Competition and Consumer Commission, Canberra, 34, citing A Ashworth, *Sentencing and Criminal Justice*, (1992) George Weidenfeld and Nicholson Ltd, London.

- desert (which seeks to ensure that offenders receive their 'just deserts' for crimes committed); and

- restoration or reparation (which aims to provide justice to victims of crime).

Yeung states that three of these are *prima facie* unsuited to penalty setting in the context of regulatory law. She finds that while rehabilitation may play a role in encouraging corporations to comply with economic and social regulations, it provides little guidance for determining the quantum of penalties. Incapacitation has little relevance to economic and social regulation, as it is usually confined to dangerous offenders and career criminals. She further finds that restoration is the primary function of private actions to enforce regulatory law rather than the basis for determining punishment payable to the state in proceedings commenced by a public regulator. This leaves deterrence and desert as possible bases for determining penalties for regulatory offences, neither of which is necessarily relevant to, nor advanced by, a criminal regime, in comparison with, say, a civil penalty and damages regime.

The ACCC submits that the primary benefit of introducing criminal sanctions is that it will have a major effect in deterring "hard-core cartel conduct". This proposition may have some basis, although the Business Council notes that it is rarely possible to deter all illegal conduct and it may not be desirable to endeavour to do so. It is well recognised that there are risks inherent in attempts at complete deterrence which may outweigh the gains from such deterrence. Capital punishment, for example, is not appropriate for non-compliance with tax laws, although it too may have a substantial deterrent effect.

In particular, there is a risk that laws which have the goal of complete deterrence of illegal conduct are likely to also deter legal conduct. This is particularly the case where there is room for doubt as to the dividing line between illegal and legal conduct. The ACCC has stated that while sanctions will over deter if they lead to business being over-cautious or discourage innovative and pro-competitive arrangements, in the context of hard-core cartel conduct, which is, and is understood to be illegal *per se*, it cannot be argued that criminalising such conduct will over-deter competitive conduct[62]. But this is only true if the definition of hard-core cartel is not itself over inclusive and there is not substantial grey area as to what conduct is prohibited and what is not.

As noted above and discussed further below, the ACCC proposals are over inclusive and uncertain.

(b) Increasingly Prevalent Cartel Conduct

Aside from an in-principle belief that "hard core cartels" should be subject to criminal sanctions, the ACCC has advanced an empirical rationale. The ACCC submits that criminal sanctions are necessary because pecuniary penalties have failed to act as sufficient deterrents to hard-core cartel conduct.

The ACCC refers at several points in its submission to the increasing numbers of complaints it has received and investigations it has undertaken in relation to alleged cartel conduct in more recent years[63]. It has also referred to the increasing numbers of investigations and

---

62 ACCC, Submission to the Review Committee (June 2002, p 35).

63 Ibid at 24, 28-29.

prosecutions undertaken by overseas regulators[64]. This data is relied upon to support a conclusion that the civil penalty regime which is currently in place has failed to act as a sufficient deterrent to cartel conduct.

In the Business Council's view, the fact that the ACCC has an increasing number of complaints and investigations is most likely due to its higher resource levels and its increasing levels of public recognition as an enforcement agency. It is also likely to be influenced by its increasing effectiveness in detecting and enforcing breaches of the TPA. In particular, the ACCC has developed an increasingly complex and sophisticated investigation and cooperation strategy in relation to breaches of the TPA such that the resources involved in investigating any one contravention are significantly less than they were, say, in relation to the express freight investigation in the early 1990s.

The ACCC has also recently noted that many of the matters it is investigating have been referred by overseas agencies[65].

There is of course also a logical gap in the proposition that because the ACCC receives more complaints there is more illegal conduct. Further, this proposition runs counter to the ACCC's own arguments and submissions where it has in the past expressed the view the overall level of corporate compliance in Australia is good.

The increasing number of investigations and prosecutions conducted by the ACCC in the Business Council's view is the result of the ACCC's *success* in detecting and prosecuting cartel conduct, rather than the failure of the existing civil penalty regime to deter conduct.

(c) Inadequate Civil Penalty Regime

The TPA currently treats contraventions of Part IV very seriously, such that a corporation or an individual involved in a contravention are subject to the following remedies:

- penalties (corporate $10 million per contravention, individuals $500,000 per contravention)[66]. These are amongst the highest penalties available in Australia;
- damages and other compensatory orders[67];
- injunctions[68]; and
- community service orders, probation orders and disclosure and publication orders[69].

These are very serious remedies.

---

64 ACCC, Submission to the Review Committee (June 2002, pp 23, 27-28).

65 See, for example, ACCC Annual Report 2000-2001, *Review by the Chairman*. See also the speech by Brian Cassidy, Chief Executive Officer ACCC "Can Australian and US Competition Policy be Harmonised?", 21 June 2001, available at www.accc.gov.au

66 Section 76.

67 Sections 82 and 87.

68 Sections 80 and 80A.

69 Section 86C and 86D.

The pecuniary penalties which are currently in place possess characteristics of both civil and criminal penalty regimes. While the penalties are part of a civil regime, they can only be brought at the suit of the ACCC on behalf of the state and the ACCC has more extensive information gathering powers than a private litigant in civil proceedings. Moreover, the penalties can be seen as part of a punitive regime[70]. This hybrid role means that the current regime already provides for appropriate penalties.

While the ACCC contends that the illegal conduct is prevalent (and appears to suggest it is increasing) and that this is due to the limitations of the current penalty regime, it is notable that the ACCC has not fully tested the scope of the current penalty regime to enhance detection of illegal conduct and to deliver appropriate remedies to enhance the deterrent effect of the current regime[71].

There are a number of factors directly within the ACCC's control which it could use to enhance the existing penalty framework and which have largely been unexplored to date by the ACCC. These are discussed below.

(i) Leniency Policies

A leniency policy which provides a clear and certain statement as to the ACCC's approach to requests for leniency (including amnesty) could be a powerful tool in detecting and prosecuting cartel conduct.

The OECD Report on Leniency Programmes to Fight Hard Core Cartels identified the main points to be considered in formulating a leniency policy, including that[72]:

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

The ACCC introduced a leniency policy in 1998 now referred to as its "cooperation policy")[73]. The policy states that it is "*presented in terms of flexible guidelines*" and that the ACCC "*determines each request on a case by case basis*". The policy affords considerable discretion to the ACCC and a corresponding lack of certainty to the parties involved. There is no guarantee that any penalty will be reduced as a result of disclosing information. Such a policy is not likely to provide a significant incentive to parties involved in cartel conduct to come forward. Without further guarantees, the parties may prefer to risk non-disclosure. For this reason, the efficacy of the cooperation policy as a compliance tool is greatly reduced.

---

70 K Yeung, *The Public Enforcement of Australian Competition Law*, (2001) Australian Competition and Consumer Commission, Canberra, p 68.

71 See, for example, *ACCC v ABB Transmission and Distribution Ltd* (2001) ATPR 41-815 at 42,937-42,938.

72 Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, Report on Leniency Programmes to Fight Hard Core Cartels, 27 April 2001 DAFFE/CLP(2001)13 p 2.

73 ACCC, "Cooperation and Leniency in Enforcement", ACCC Journal n17 p 8.

There is no evidence that the ACCC's cooperation policy has been at all effective in assisting in the detection of cartels. Furthermore, not only has the ACCC's cooperation policy been ineffective due to the uncertainty of its application and the considerable discretion in the hands of the ACCC, the Courts appear unwilling to apply it[74]. This highlights the uncertainty of making disclosures under the policy.

In the Business Council's view, by enhancing the detection of cartel activity, a coherent and clear leniency policy is more likely to further the ACCC's policy objective of detecting and preventing such conduct as opposed to any deterrent effects which may result from a criminal sanction regime. Of course, the success of such a policy is largely in the hands of the ACCC and how it applies the policy in practice.

The limitations of its existing policy have been recognised by the ACCC, which recently published a draft Leniency Policy for Cartel Conduct (referred to as a "leniency policy" and in effect an amnesty policy which applies in limited cases). This policy deals with many of the short comings in the original policy, although this would still be used for second and subsequent applications for leniency for cartel conduct, together with other types of behaviour.

The draft leniency policy represents a substantial improvement over the existing cooperation policy. The draft leniency policy provides clear and certain guidance as to the circumstances in which a participant in a cartel will obtain amnesty for coming forward first to offer full cooperation[75].

In this context, the experience of the USA Department of Justice is worth noting. The Department of Justice has attributed the increase in the number of cartels it has detected, prosecuted and fined to the effectiveness of its leniency policy, which was substantially revised in 1993. In February 1999, the Department of Justice announced that the total fines it had imposed on corporate defendants in 1997 – 1998 was virtually identical to the total fines imposed in the previous 20 years from 1976 – 1996. The average criminal fine imposed on corporations in 1998 was also fifteen times higher than the average fine imposed in 1996[76]. There was no change to the criminal sanction regime in place in the US over this period. The ALRC cites transparency as a factor credited with the effectiveness of the US policy[77].

---

74 *ACCC v SIP Australia* (1999) ATPR 41-702.

75 The ACCC acknowledged these advantages in its letter dated 5 July 2002 regarding its draft leniency policy for cartel conduct. The ACCC notes that "*the policy has been drafted with a view to providing greater certainty for leniency applicants so that the Commission is better able to detect and break up hard-core cartels operating in Australia*".

76 *Making Companies an Offer They Shouldn't Refuse: the Anti-Trust Division's Corporate Leniency Policy – an Update* presented by Mr Gary R Spratling, Deputy Assistant Attorney-General, Anti-Trust Division, US Department of Justice at the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Anti-Trust on 16 February 1999. Mr Spratling states that "*the Amnesty Program is the Division's most effective generator of large cases, and it is the Department's most successful leniency program. Amnesty applications over the past year have been coming in at the rate of approximately 2 per month – a more than twenty-fold increase as compared to the rate of applications under the old Amnesty program*".

77 Australian Law Reform Commission, "*Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*" ALRC Discussion Paper 65, paragraph 15.75, citing G Spratling, "Transparency in Enforcement Maximises Cooperation from Antitrust Offenders" (Paper presented at

It would also be desirable if the ACCC provided greater transparency and certainty in relation to its cooperation policy, both in terms of substance and its application, given that the ACCC currently intends both the draft leniency policy and the cooperation policy to apply to cartel activity. In this context, it should be recognised that the ACCC's recently released draft leniency policy for cartel conduct applies in very limited circumstances (that is, only for the first person to come forward to disclose cartel activity to the ACCC). In many, if not most cases, of cooperation on cartel activity, those circumstances will not apply (including second and subsequent applications for leniency).

In many cases, the ACCC actively seeks the cooperation of one or more parties, even with the offer of individual amnesties. Hence, in practice, the ACCC's cooperation policy is likely to be the more significant enforcement policy for some time. The question as to whether a party should cooperate with the ACCC, in line with its cooperation policy, will be just as influenced by considerations of transparency and certainty as the leniency policy.

For example, it would be desirable for the ACCC to provide advice as to the general tariff for a specific contravention and provide clear guidance as to the level of discount that would be provided for particular forms of cooperation. This is not so unusual, the idea of a tariff for a contravention being quite common in the criminal sphere and prosecutors are required and expected to provide clear guidance to the courts as to the appropriate tariff. However, as noted below, the ACCC's conduct of penalty cases appears to be characterised by a lack of transparency and game playing.

If the ACCC developed and consistently applied its leniency and cooperation policies (with the support of the Courts), much of the uncertainty as to cooperation would be reduced, thereby enhancing the detection of cartel conduct.

(ii) Conduct of Penalty Cases

Many penalties awarded for breaches of Part IV of the TPA are not decided by the Court, but are negotiated by the ACCC and the party concerned and put forward to the Court as appropriate penalties under s 76 of the TPA. While the Court has the power to award penalties, it is accepted that parties can jointly submit a quantum[78]. The Court will award that penalty, even if it is not the figure that it would have set, unless there is some clear reason not to, such as its falling outside the range of penalties a Court would fix[79]. The ACCC will therefore have a significant impact on the quantum of penalties awarded.

As noted by French J at paragraph 22 to his judgment in *ACCC v. Real Estate Institute of Western Australia Inc.*[80]:

> *"It is not the function of the Court to impede settlements between parties legally represented and able to understand and evaluate the desirability of agreeing to a*

Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy, New York, 15 October 1999).

78 See, for example, *TPC v Allied Mills Industries Pty Ltd (No 4)* ATPR 40-241 at 43,182.

79 See, for example, *TPC v TNT Australia Pty Limited & Ors* (1995) ATPR 41-375 at 40,165; *ACCC v ABB Transmission and Distribution Ltd* (2001) ATPR 41-815 at 42, 936.

80 (1999) FCA 18.

settlement nor to refuse to give effect to terms of settlement by refusing to make orders to accept undertakings where they are within the Court's jurisdiction and are otherwise unobjectionable. This approach extends to the submission of agreed pecuniary penalties."

Having in place a trade practices compliance program which, in the view of Mansfield J in *ACCC v Rural Press Ltd*[81] "*is carefully designed and properly implemented*" is a "*factor relevant to the assessment of a pecuniary penalty under s 76, even if in the particular instance it proved to be ineffective to prevent the contravention. The significance of such a compliance program will depend upon its thoroughness and the extent of the commitment to its implementation*". It is now reasonably common for a contravener to present to the Court a proposal to undertake a trade practices compliance program as part of the orders sought to be made by consent. Such a proposal needs to address what French J outlined in *TPC v CSR*[82] as "*whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention*".

There have been some comments made by the Court over a long period of time that the negotiated penalties arrived at by the ACCC and parties involved in breaches have been too low. It is worth noting the recent Queensland ice price fixing case, *ACCC v Ithaca Ice Works*. In that case, the ACCC sought to appeal the penalty imposed on Ithaca Ice works ($100,000) on the basis that it was manifestly too low and that the Court erred in having regard to the penalty level imposed on a similar but smaller company ($25,000). That penalty level had been agreed to by the ACCC, but the basis of its calculation had not been provided to the Court. The ACCC contended that had not the other offender cooperated it would have sought a penalty of $180,000 and that a penalty in the order of $300,000 – 550,000 was appropriate against Ithaca.

The Court noted that in general it agreed the penalty against Ithaca was too low. But it went on to state[83]:

Further, where the Commission proposes to the Court an agreed penalty which is calculated taking into account a substantial discount from what would otherwise be considered the appropriate penalty so as to reflect a degree of co-operation, it would be desirable that the Commission disclose the process by which the discounted penalty has been arrived at. In particular, it would be of assistance to the Court, particularly where there are other proceedings pending, to hear submissions on the range of appropriate penalties and the discount which it is proposed should be allowed to take into account the level of co-operation afforded by the offender. Had that been done in the present case, the learned primary judge would have been able to form a view as to the appropriate range of penalty absent co-operation and have then been in the position to calculate an appropriate discount to take into account the exceptional level of co-operation afforded by QIS. It is only in this way that a comparison could properly be made

---

81 (2001) FCA 1065 at para. 22.

82 *TPC v. CSR Ltd* (1991) ATPR 41-076.

83 *ACCC v Ithaca Ice Works Pty Ltd* (2002) TPR 41-851 at 44,544.

between the penalty payable where the offender had offered a high level of co-operation and the penalty payable where the level of co-operation was of a lesser magnitude.

The ACCC has available to it penalties against individuals but it often fails to exercise its discretion to seek such penalties[84]. It also has the ability to influence the penalties awarded by the Court through the level of agreed penalties put forward after negotiation. However, not only are these penalties generally far beneath the maximum available penalties, they are often below what the Court would have awarded itself[85]. In that context, it is inappropriate for the ACCC to seek criminal penalties as the full scope of the current penalties has not yet been tested and the ACCC's practice has arguably resulted in the Courts not setting penalties at appropriate levels.

(iii) Other Remedies

The ACCC's Submission also does not consider whether existing non-monetary sanctions could serve the objective of deterring cartel conduct effectively. In particular, the Law Reform Commission's Report No 68, *Compliance with the Trade Practices Act 1974* (1994), addressed the question of "*whether the purposes of the TPA could be achieved more effectively if a wider range of penalties was available*". At the time of the ALRC's Report, the TPA provided only for monetary penalties in respect of breaches of Part IV of the Act. The ALRC noted that there were significant limitations on monetary penalties as a sanction against corporations. One key recommendation was that a wider range of sanctions should be available to the court to overcome these limitations. These included corporate probation orders, community service orders and adverse publicity orders. The ALRC's recommendation has now been followed by the introduction of corporate probation orders, community service orders and adverse publicity orders under the *Trade Practices Amendment Act (No 1) 2001* (Cth). Sufficient time should be given to assess whether these sanctions assist in deterring hard-core cartel conduct. Any proposal to introduce criminal sanctions or to increase the maximum amount of civil penalties should address the issue of whether, given the amendments in 2001, any further amendments are required.

Greater emphasis should also be placed on developing a culture of compliance to supplement the ACCC's current 'bounty hunting' orientation. The PricewaterhouseCoopers submission[86] shows how making the ACCC a facilitator of competition is likely to produce better long term results than a purely adversarial stance. PricewaterhouseCoopers illustrates the ACCC's current mentality with the *Labrador Playschool* case[87]. The owner of the playschool outside Brisbane apparently telephoned the ACCC for advice, saying he was concerned about poor profitability and had discussed with some local competitors the possibility of establishing a minimum price. It is a clear breach of the TPA, but a minor one. Instead of educating the

---

84 See, for example, *ACCC v Roche Vitamins Australia Pty Ltd* (2001) ATPR 41-809.

85 See in addition to the *Ithaca Ice* case, *N W Frozen Foods Pty Ltd v ACCC* (1997) ATPR 41_546; *TPC v TNT Australia Pty Ltd* (1995) ATPR 41_375; *ACCC v ABB Transmission and Distribution Ltd* (2001) ATPR 41_815.

86 PricewaterhouseCoopers, Submission to the Review Committee (July 2002).

87 Ibid at 13.

owner and seeking immediate undertakings, the ACCC successfully prosecuted the playschool for an attempt to breach s 45.

(d) International Best Practice

The ACCC has also suggested that criminal sanctions represent international best practice in relation to "hard core cartels". In this regard, the ACCC refers to the OECD Report, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* as supporting its submission[88]. The OECD report indicates that penalties imposed on individuals are important in effective deterrence. However, the OECD report does not indicate a preference (or any basis for a preference) for criminal penalties over civil penalties. Nor is there any consideration of the impact of the very significant individual penalties, such as apply in Australia, or the deterrent significance of corporate probation, corporate adverse publicity orders and the other additional sanctions incorporated in the TPA by the *Trade Practices Amendment Act (No 1) 2001*.

Furthermore, the OECD Report notes that imprisonment is not a sanction for hard-core cartels in many countries and that imprisonment has been imposed only in two countries (USA and Canada) [89]:

> *As noted above, while the laws of as many as thirteen OECD countries provide for the imposition of fines against individuals and seven provide for imprisonment for cartel conduct, only four have actually fined individuals in recent years and in only two have sentences of imprisonment been imposed. Thus, few countries are currently employing this potentially important, additional sanction.*

It is not clear whether individual penalties (as are currently available in Australia) generally or imprisonment in particular (which is not currently available) are the important additional sanctions. It appears more likely this is a reference to individual penalties (whether criminal or not).

The OECD Report does not advocate the introduction of imprisonment as a sanction under Australian competition law. The conclusion expressed in the report was: "*Sanctions against natural persons and civil damages are currently employed in only a few countries, but these alternative methods can provide an important supplement to organisational fines.*"[90]. The Australian enforcement regime meets these elements.

Imprisonment is not a sanction under EC competition law, which is one of the two most significant competition law regimes globally, and is restricted to the competition laws of some EU member countries. Moreover, to the extent that imprisonment is a sanction under the competition laws of some EU member countries, the sanction is more token than real[91].

---

88 ACCC, Submission to the Review Committee (June 2002, p 21).

89 OECD, *Report on the Nature and the Impact of Hard-core Cartels and Sanctions against Cartels under National Competition Laws*, 9 April 2002, p 90.

90 Ibid at p 91.

91 See Joshua, "A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic?" [2002] ECLR 231 at 243, who notes that it was largely American prompting that led the OECD to brand international cartels "*the most egregious violations of competition law*".

The ACCC has submitted that the proposal is "*consistent with the formulation of offences proposed in the UK Enterprise Bill*"[92]. However, the ACCC's proposed definition does not incorporate important limitations included in the UK Enterprise Bill, as discussed further below.

3. Definition of "Hard-Core Cartel Conduct"

(a) Hard Core Cartels – Their Effect on Competition

The ACCC case against hard core cartels is based principally on competition grounds. In its submission, the ACCC states[93]:

> *Cartels are fraudulent because they enrich participants at the expense of customers. They injure consumers by raising prices above the competitive level and reducing output. Cartels can be very harmful across wide areas of an economy by artificially creating market power and leading to inefficient and wasteful allocations of resources.*
>
> *By entering a cartel a group of firms can effectively form a monopoly.*

While based on substantial and legitimate concerns as to the impact of certain conduct on competition, the term "hard-core cartel" tends to be used in an emotive way and lacks clarity. The submission that "hard-core collusion" is a form of theft, is abhorrent and a blatant fraud does not help define the type of conduct sought to be criminalised.

Despite its apparent widespread use and general acceptance that "cartel" conduct is morally reprehensible, there does not appear to be a clear conception of what constitutes a "hard core cartel". There is no clear definition and the ACCC discussion of the concept of a "hard core cartel" tends to be inconsistent and somewhat confusing.

The ACCC refers to such examples as the international vitamin cartel to suggest that a "hard-core cartel" is one that has at least the effect or likely effect of severe and pervasive distortion of a market[94]. However, no such restricted meaning is reflected by the ACCC's outline of the approach it proposes.

The most obvious and economically important index of the seriousness of the "cartel" conduct is that the conduct is likely to cause a substantial or very substantial lessening of competition in a market. Descriptions of hard core cartel conduct typically focus on the deliberate intent to raise market prices or to otherwise substantially lessen competition[95]. If criminal sanctions are to be introduced for "hard-core cartel conduct", the relevant offences should reflect the concern with highly anti-competitive conduct.

---

92 ACCC, Submission to the Review Committee (June 2002, p 36).

93 Ibid at p 24-25.

94 Ibid at 28-29.

95 See, for example, Preamble to 1998 Recommendation of the OECD Concerning Effective Action Against Hard Core Cartels, which stated that "*…hard core cartels are the most egregious violations of competition law…they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others*".

The definition of "hard core cartel" given in the OECD's Recommendation of the Council (1998) as attached to the OECD's Report, *Fighting Hard-Core Cartels* (2002) (cited by the ACCC), does reflect this concern. The definition proposed is:

> *For purposes of this Recommendation:*
>
> *(a) a "hard-core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;*
>
> *(b) the hard-core cartel category does not include agreements, concerted practices, or arrangements that i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or iii) are authorised in accordance with those laws.*

While the ACCC refers to part (a) of the definition in its submission[96], it does not include the requirement of anti-competitiveness in its proposed offences. The ACCC submission also omits mention of part (b) of the OECD definition. Part (b) of the OECD definition exempts agreements that are "reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies". To this significant extent, the OECD Recommendation advocates a competition test. The benchmark test is that of raising prices, but the ACCC's proposed test is much broader.

The ACCC sets out as an example of what constitutes a hard core cartel cases of blatant price fixing in which competitors did seek to raise or fix market prices. However, it would be more useful if the ACCC Submission illustrated what it means by "hard-core cartel conduct" by reference to other decided cases which are less clear cut. For example, would there be "hard-core cartel conduct" on the facts of the *Rural Press case* [2002] FCAFC 213? On the facts of *ACCC v Visy Paper Pty Ltd* [2001] FCA 1075? On the facts of the *South Sydney Rugby League Club case* [2001] FCA 862? Each of these cases at least in part were based on the deeming provisions in s 4D and s 45A.

The result is that under the ACCC's proposed criminal offences, conduct could constitute a hard core cartel where it is not entered into for the purpose of raising market prices or otherwise to substantially lessen competition. The specific forms of hard core cartel conduct proposed by the ACCC are discussed below.

(b) Specific Forms of Hard Core Cartel Conduct

While excluding any competition test, drawing on part (a) of the OECD definition, the ACCC has proposed that new offences be created to criminalise agreements between competitors that would directly or indirectly[97]:

---

96 ACCC, Submission to the Review Committee (June 2002, p 35).

97 Id.

- *fix a price of a product or service*
- *limit or prevent supply or production of a product of service*
- *restrict the ability of the parties to the agreement to freely supply specified goods or services or to freely supply goods or services to specified customers*
- *in response to a request for tenders, restrict the freedom of one or more of the parties to the agreement to put in independent tenders.*

Further, the ACCC recognises that it is necessary to define more specifically what amounts to bid rigging, price fixing, market sharing and output restriction and offers some suggestions. This is important, as the categories of conduct identified by the ACCC do not of themselves identify conduct which could be considered either morally reprehensible or necessarily anti-competitive.

(i) Price Fixing

The reference to price fixing appears on its face unobjectionable. The ACCC notes that[98] "*price fixing is so pernicious that it raises a presumption against legitimacy – it is illegal per se*".

However, in practice there is no clear concept of morally reprehensible price fixing. An agreement amongst competitors which has the purpose of raising the price at which goods or services are supplied in a market in competition with each may be considered objectionable. However, there is a tendency to substantially broaden the scope of conduct which is said to constitute price fixing. The ACCC has cited a definition of price fixing as[99]:

> *an agreement among rivals with the purpose or effect of raising prices or reducing output in order to (a) increase profits or (b) achieve some other result that may result from higher prices or profits.*

This definition raises a number of concerns, including firstly the extension of the definition to conduct which has the effect of raising prices, where that was not the purpose. Further, the inclusion of a motive to increase profits is a curiosity as this is a usual corporate motive and of itself not objectionable. The objective of "*achieving some other result that may result from higher prices or profits*" contemplates its application in all circumstances. The inclusion of "*reducing output*" appears anomalous in a definition of price fixing.

Notwithstanding this definition, the ACCC has suggested that its starting point is to use s 45A of the TPA, the existing prohibition on price fixing, as an appropriate basis for defining a new criminal offence in relation to price fixing[100]. Section 45A is a deeming provision which deems certain conduct to substantially lessen competition. The provision provides a simple legislative device to ensure that conduct which is generally likely to be anti-competitive is prohibited without requiring a full competition assessment. However, as with

---

98 Ibid at 36.

99 Id.

100 Ibid, footnote 42 and p 48.

all such deeming provisions, it is likely to be over inclusive in certain respects. This is partially addressed through exceptions for certain joint ventures[101] and joint buying groups[102].

Furthermore, it is clear that s 45A is still potentially over inclusive as it may apply to arrangements amongst parties in respect of which they are not competitive if it potentially has an effect on price at a level in respect of which they are competitive[103]. The ACCC has sought to apply s 45A to credit card interchange arrangements on this basis.

For example, the ACCC alleged in its proceedings against the National Australia Bank Limited that an agreement between the National and other major banks to charge and pay interchange fees in respect of credit card transactions had the purpose, effect or likely effect of controlling or maintaining the price of fees charged to merchants. However, it was never alleged in this case that such arrangements had the effect of substantially lessening competition. Interchange fees have been found to promote the competitiveness and efficiency of credit card systems in court actions in the United States[104].

It is clear that such arrangements could not be considered morally reprehensible, frauds or theft. Without such arrangements, there would be no open credit card system. Nor is it an answer to say that such conduct could be authorised. Conduct which can be authorised does not become morally reprehensible simply because it was not authorised. A party may have legitimately taken the view that there was doubt and it did not require authorisation.

(ii) Market Sharing and Market Division

Market sharing is generally considered to be anti-competitive. Agreements amongst competitors that they will not supply certain customers or not supply certain products or in certain territories can potentially restrict competition in a market. However, the practical issue is how to define "market sharing " or "market division" in a way that does not apply to legitimate, efficient and potentially pro-competitive conduct. For example, many joint venture arrangements include prohibitions on competition between the joint venture parties and with the joint venture entity.

The ACCC has proposed to define market sharing or market division by reference to s 4D of the TPA.

Section 4D defines an exclusionary provision 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. Exclusionary provisions are *per se* illegal.

---

101 Section 45A(2).

102 Section 45A(4).

103 See Business Council of Australia Submission to the Review Committee (July 2002, pp 83-85) and Law Council of Australia Submission to the Review Committee (July 2002, pp 47-50).

104 See *National Bankcard Corporation (NaBANCO) v Visa Usa Inc* 596 F.Supp.1231.

It is well recognised that s 4D includes many forms of arrangements which are not anti-competitive[105]. For example, s 4D does not include a joint venture defence (as is the case with s 45A - in relation to price fixing).

Further, the application of a *per se* standard in the United States to collective boycotts, upon which s 4D is based, was directed to boycotts of other competitors, not market sharing or market division as such[106]. The equivalent provision in New Zealand's Commerce Act was amended in 1990 to provide that the target must be in competition with one or more of the parties to the contract, arrangement or understanding, in line with the United States approach.

There has been ongoing consideration of whether s 4D in its current form should is appropriate. This reflects a consistent concern with the form of s 4D. For example, the Swanson Committee recommended that "*a substantial adverse effect on competition*" should be necessary to find a breach[107].

The reliance on s 4D reflects the inappropriate application of a *per se* standard for criminal liability. It is important to recognise that even in the United States, where the *per se* concept was developed, it is still a flexible judge applied rule, which in the case of collective boycotts has a limited application and in practice is subject to some form of more considered competition assessment[108].

While an authorisation process is available in Australia, through which such issues could be considered, this is often not commercially feasible, as the process is lengthy and expensive. Further, it is not appropriate to utilise a *per se* standard for criminal liability simply on the basis that it is possible to have the conduct authorised. If it is the case that such conduct may have public benefits, it should not be the subject of criminal sanctions.

The peculiar application of s 4D can be seen in the recent *South Sydney Rugby League Club* decision. The decision of the League to reduce the number of teams in the competition to 14 and to exclude the team ranked 15 by the selection criteria, South Sydney, was held to amount to an exclusionary provision.

The expansive nature of s 4D means that behaviour which is not morally reprehensible will be caught by the provision and will therefore be *per se* illegal. Indeed, behaviour which is beneficial may be caught under the provision. It would be inappropriate for such behaviour to give rise to criminal penalties.

---

105 See, for example, Law Council of Australia Submission to the Review Committee (July 2002, pp 38-49). See also W Pengilley, "The Ten Most Disastrous Decisions Made Relating to the Trade Practices Act", Speech given at IIR Conference, Sydney, 25 June 2002.

106 *Northwest Wholesale* (1985) 105 SCt 2613.

107 Trade Practices Act Review Committee, "Report to the Minister for Business and Consumer Affairs" 1976. The Hilmer Committee recommended no change, but noted that it had not received any detailed submissions on primary boycotts, *Report of the Independent Committee of Inquiry, "National Competition Policy"* 1993.

108 See, for example, *California Dental Association v FTC* 119 S.Ct 1604.

(iii) Bid Rigging

Bid rigging is presumably a reference to agreements amongst potentially competing bidders as to the price at which they will bid in order to increase the price which they receive for their goods or services above the level that they would receive had they not reached agreement[109].

The ACCC's proposed definition criminalises agreements "between competitors", but does not specify that the product or service which is the subject of the anti-competitive agreement must be supplied by the competitors in competition with each other. The corresponding provision in the UK Enterprise Bill is much more limited, in that parties to the agreement must be operating at the same level of the supply or production chain. This is an important limitation on the existing prohibition on price fixing under s 45A.

The ACCC's proposed definition of a bid-rigging offence is much wider than the corresponding provision of the UK Enterprise Bill. This provision specifically prohibits arrangements under which one company but not another may make a bid or where each of the companies may make a bid, but only a bid arrived at in accordance with the arrangement. The ACCC's proposed definition would criminalise any arrangement which "*restricts the freedom of one or more of the parties*" in tendering. This would prevent, for example, the formation of a legitimate joint venture between two companies to submit a bid for a tender which restricted either party from entering into a joint venture with another party in the same tender process. As restrictions such as these can have pro-competitive effects, the introduction of a criminal bid-rigging offence as suggested by the ACCC would be extremely harmful to competition.

(iv) Restrictions of Free Supply of Goods

The ACCC's proposal to criminalise agreements which restrict the ability of the parties to freely supply specified goods or services or to freely supply goods or services to specified customers is much wider than the proposed offence in the UK Enterprise Bill. The UK Enterprise Bill more clearly applies to market sharing activity as it criminalises agreements which *divide* supply of a product or service to customers or which *divide* customers for the supply of a product or service. In each case, market sharing is defined in terms of customers. By contrast, the ACCC's proposal applies to agreements which restrict supply of goods or services. It is widely recognised that such restrictions can have pro-competitive effects, such as a non-compete clause which encourages investment in a business by protecting its goodwill. Consequently, it would be extremely harmful to criminalise conduct of this nature.

(c) Limitations on proposed offences: What constitutes a "hard core" cartel?

It is not clear what turns cartel conduct into hard core cartel conduct. For example, the notion of "hard-core" cartel conduct could readily be taken to mean that *repeated* or *recidivist* cartel conduct has occurred, but this does not appear to be the ACCC's intention.

Hard core could also refer to an overall effect of substantial lessening competition in a market.

---

[109] The position in relation to a depression of the price which competing bidders may pay for an item is more problematic, as is recognised by s 45A(4) of the TPA.

However, it appears that the ingredient the ACCC proposes that turns cartel conduct into hard core cartel conduct is the size of the corporation involved. This is an unsustainable proposition. It may be argued that such conduct by large corporations would be more likely to hurt consumers and competition but this is not clearly the case. Smaller corporations may participate in "hard core cartels" with larger corporations, as was the case, for example, in the power transformer and fire protection cartels[110].

A principled approach to assessing the seriousness of cartel conduct should not draw some arbitrary line between large and small corporations but assess the anti-competitive impact or likely impact in the particular market that is exposed to cartel conduct.

Nor does the exemption proposed for small companies reconcile with a concern to safeguard the interests of small business. A small company should equally wish protection from collusive anti-competitive conduct by small companies in markets largely populated by small companies. For example, in *ACCC v N.W. Frozen Foods Pty Ltd et al* (1996) concerning price fixing in the frozen food service industry, Heerey J of the Federal Court indicated that although the contraveners were not large in comparison to other entities, their conduct in all relevant respects was serious enough to warrant the imposition of heavy penalties. The exemption of small businesses is discussed in detail at the end of this section.

4. Evidentiary and Procedural Issues

The ACCC recognises that evidentiary and procedural issues would arise from the introduction of criminal sanctions for "hard-core cartel conduct". However, the ACCC believes that these issues can be resolved. Reliance is placed on the approaches taken to help resolve similar issues in other civil and criminal statutory regimes, including that under the *Corporations Act 2001* for breach of directors' duties.

However, the evidentiary and procedural issues posed by introducing criminal sanctions for criminal conduct cannot be readily assessed unless a specific blueprint is advanced for review and comment.

The ALRC lists the characteristics which typify a criminal offence. Such an offence[111]:

- places a high burden of proof (beyond reasonable doubt) on the prosecution;
- requires the presence of mental elements such as intent;
- applies procedural protections to investigation and prosecution, such as the right to remain silent. The accused is not required to specify its defence, discover documents or answer interrogatories before trial;
- imposes greater ethical obligations of candour, fairness and disclosure on the prosecution;

---

110 Business Council of Australia, Submission to the Review Committee (July 2002, pp 116-117).

111 Australian Law Reform Commission, "*Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*" ALRC Discussion Paper 65, para. 2.72.

- confers a privilege against self-incrimination, a right to silence and protection against double jeopardy on the accused;

- extends the range and severity of sentencing powers, including imprisonment;

- requires a judge to impose the penalties.

Many of these elements differ greatly from the current position under the civil penalty regime in the TPA.

(a) Conducting Dual Proceedings

One of the procedural issues which is unclear in the ACCC's proposal is at what stage of the investigation the choice is made about how the case progresses. It is difficult to identify when the election is made to pursue criminal sanctions.

The ALRC points out that the prospect of attracting liability for both civil and criminal penalties for the same conduct can undermine the role of both sets of penalties[112]. There are a number of uncertainties that arise from conducting dual proceedings.

It is unclear how the ACCC would approach a case such as the *Rural Press Case* in which enforcement action was taken on the basis of not only the *per se* prohibition against exclusionary provisions but also the general prohibition against anti-competitive agreements under s 45 of the TPA. The Full Federal Court held that the Federal Court had erred in finding a breach of the prohibition against exclusionary provisions but that the finding of a breach of the general prohibition against anti-competitive agreements should stand. Under the civil and criminal regime proposed by the ACCC, would there be a criminal prosecution for the alleged cartel conduct and separate civil enforcement proceedings for the alleged breach of the general prohibition against anti-competitive agreements? If so, such an approach seems highly cumbersome, protracted and costly for all participants in the proceedings.

Additionally, the interrelationship between the ACCC and the DPP must be clearly defined to avoid a situation in which criminal penalties are held as a bargaining chip over a party to force settlement with the ACCC and agreed civil pecuniary penalties.

(b) Investigative Powers

The investigative powers of the ACCC are far broader than is appropriate in a criminal context, in which pre-trial discovery and interrogatories are not permitted.

The ACCC Submission does not canvass any specific changes to the investigative powers under s 155. The possible introduction of criminal sanctions for cartel conduct should only proceed upon a detailed consideration of the precise powers of investigation that would apply to criminal investigations and the exact extent, if any, to which evidence gathered by reliance on the s 155 powers could be used in criminal proceedings.

---

[112] Ibid at para. 8.23.

(c) Caution and Privileges

The conduct of criminal proceedings confers a privilege against self-incrimination, a right to silence and protection against double jeopardy for the accused. This contrasts sharply with the powers of the ACCC. For example, under s 155 the right to silence is specifically abrogated. While the material obtained is not admissible in evidence in criminal proceedings against a natural person, it is not clear from the ACCC proposal how its investigative processes will be separated. Without a clear definition of the ACCC's powers and the rights of an accused party in a criminal investigation, any proposed criminal penalty regime should not go ahead.

(d) Burden of Proof and Jury Trial

The ACCC recognises the need for jury trial if the proposed offences carry a maximum jail term of 7 years. The ACCC states[113] that the offences proposed do not require proof "beyond reasonable doubt" of complex competition and market definition issues. This may possibly be true under the regime of *per se* offences advocated by the ACCC. However, as discussed in section 4 above, this fails to recognise that the concept of "hard-core cartel conduct" must be defined in terms of a competition test. If the offences proposed should be defined in terms of a competition test, this squarely raises the issue of whether or not jury trials are workable for competition law offences. The Business Council strongly doubts the workability of jury trial in this context.

(e) Australian Law Reform Commission

If criminal sanctions are to be considered for cartel conduct, the evidentiary and procedural implications should be referred to the ALRC for assessment and report. This Commission is preparing a report on Civil and Criminal Penalty regimes which deals with these issues. The ALRC has previously laid some of the groundwork for such an inquiry in its earlier report, Report No 68, *Compliance with the Trade Practices Act 1974* (1994). The Business Council notes that the ACCC does not refer to that groundwork in its Submission on criminal sanctions.

(f) Criminal sanctions as an alternative

Importantly, the ACCC does not propose to do away with the existing civil remedies, rather it proposes to add additional criminal sanctions. Aside from the practical and policy issues this raises (discussed below), this regime would be contrary to the practice in Australian criminal law of separating the prosecution function from the investigation function.

There are sound policy reasons why Australian governments have sought to implement a dual criminal law enforcement function. A regime in which the investigator retains substantial quasi-penal prosecutorial discretion is contrary to that position.

Further, there appears to be little good reason to retain a civil pecuniary penalty regime for individuals (where penalties are up to $500,000 per contravention) and a criminal regime for imprisonment. A more principled approach would be to replace individual penalties with criminal sanctions, both criminal fines and imprisonment.

---

[113] ACCC, Submission to the Review Committee (June 2002, p 51).

The same issues do not arise in relation to a corporation, which cannot be incarcerated. Accordingly, corporations could continue to be subject to civil penalties, or civil penalties should be replaced with criminal penalties. There would be no good reasons to provide for both.

(g) Mental Elements of Proposed New Offences

The ACCC argues (somewhat unclearly) that the fault element that should apply to price fixing should be intention or recklessness. It claims that the fault element that should apply to bid rigging, market sharing and output restrictions is recklessness. No rationale is given as to why it is appropriate for these fault elements to apply to the proposed offences.

The proposal that the fault element of recklessness should apply is extremely troubling. Under the *Criminal Code Act 1995* (Cth), an offence consists of physical elements and fault elements. A physical element of an offence may be conduct, a result of conduct or a circumstance in which conduct, or a result of conduct, occurs.

The ACCC's proposed definition of *per se* offences criminalises *conduct*. It does not seek to *criminalise a result of conduct*, such as a substantial lessening of competition, or *the circumstances in which conduct or a result of conduct occurs*. However, recklessness does not apply under the *Criminal Code* as a fault element relevant to offences which require proof of conduct. It only applies to offences which require proof of a result or a circumstance. As such, to ensure consistency with the *Criminal Code*, it would be necessary to provide that the fault element of intention applies to the ACCC's proposed offences. This means that a person could only be found guilty of the ACCC's proposed offences if the person meant to engage in the prohibited conduct. Furthermore, the ACCC proposal for criminal sanctions fails to distinguish morally reprehensible and harmful conduct from conduct the ACCC is currently prepared to authorise. The Business Council believes that it is essential that any proposal for criminal sanctions include an effective *mens rea*, such as an intention to act dishonestly.

Recklessness might possibly be relevant if the proposed offences were to be defined in terms of an anti–competitive result or a competition test. However, if the offences were of a preparatory or preliminary kind (ie conduct yet to cause but likely to cause a substantial lessening of competition in a market) then the mental element should be intention and knowledge of the likely harmful result, as for the offence of attempt under the *Criminal Code*.

(h) Criminal sanctions and forfeiture

The ACCC Submission urges the deterrent power of imprisonment without assessing the significance of the fact that forfeiture laws have been introduced in Australia and other countries as a means of dealing with individual offenders for whom jail is or may be an acceptable risk.

The ACCC Submission also fails to address the issue of whether or not the offences proposed would be subject to the application of the *Proceeds of Crime Act 1987* (Cth). Here, as in the other respects indicated above, the ACCC's position lacks the detail required to enable a properly informed assessment to be made.

The inter-relationship between the criminal sanctions proposed by the ACCC and the *Proceeds of Crime Act* is complex and warrants detailed specialist inquiry. The Business Council notes in this context the previous work of the ALRC, and in particular Report No 87, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (1999). If it was felt necessary for the question of criminal sanctions for cartel conduct to be pursued, it would be appropriate, for this as well as other reasons, for this question to be referred to the ALRC for assessment and report.

(i) Application of the proposed provisions only to "big business"

The ACCC proposal for criminal sanctions would only apply to large corporations and the individuals involved[114]. For example, custodial sentences of up to seven years would only apply to individuals when employed by a large corporation[115].

Specifically, under the ACCC proposal such sentences would apply to a corporation, or an individual that is employed by the corporation, that satisfies two or more of the following criteria[116]:

(i) gross revenue over $100 million;

(ii) gross asset value over $30 million;

(iii) more than 1000 full time equivalent employees.

The ACCC's rationale for restricting the application of criminal sanctions is that[117]:

> *Conduct involving large corporations with a significant market presence will usually have the most harmful economic impact. At the time when many economies are reducing trade barriers and international competition is increasing, the Commission has a particular focus on combating international cartels. These will normally involve large corporations. Of particular concern to the Commission is that Australia has laws in place that can combat international cartels effectively.*

The Business Council sees no validity in the proposal that criminal sanctions should be restricted to large corporations and the individuals that work for them. Such a proposal is discriminatory and contrary to the basic principle that all individuals should be treated equally before the law.

The argument that large corporations and their employees should be the subject of criminal sanctions because the impact of their conduct can be assumed to be "*most harmful*" is not borne out by experience. This argument ignores the history of restrictive trade practices in Australia, in particular the role of trade associations in suppressing all effective wholesale and retail competition over most of the Australian economy after World War II. Even before

---

114 ACCC, Submission to the Review Committee (June 2002, p 39).

115 Ibid at 54.

116 Ibid at 42.

117 Ibid at 41.

the registration and examination systems under the 1965 Act[118] came into effect, economic research uncovered at least 600 to 1000 trade associations, most operating formal price fixing, market sharing or quality restriction agreements enforced by 'black lists', 'stop lists' and even 'fines'. Many of these associations included manufacturers, some of them large, but they were dominated by smaller retailers and wholesalers who were the main instigators of anti-competitive 'orderly marketing' schemes. These agreements greatly increased consumer prices for everything from groceries to petrol to liquor to motor tyres[119].

The annual reports of the Commissioner of Trade Practices, Mr R M Bannerman, showed that earlier research had if anything seriously underestimated the pervasiveness of these practices[120]. One of the cartels dismantled through the Commissioner's efforts covered the manufacture, wholesaling and retailing of tyres. Mr Bannerman estimated that its abolition resulted in a net saving to consumers of over $200 million ($2 billion in today's dollars) in the first year alone. After the 1971 amendments forced oil companies to cease resale price maintenance, it was the service station associations that kept petrol discounting at bay for several more years.

Mr W R McComas, former Trade Practices Commission Chairman, confirms in his submission to the review that price fixing is more often perpetrated by small business. His submission notes that[121]

> *Of the eleven "price fixing and cartel" cases reported in the ACCC's annual report to have been instituted during 2000/2001, five were against or involved large corporations, the remainder (the majority) being small to medium enterprises.*

There is no principled reason why criminal sanctions should be limited to large corporations and their employees, based on an arbitrary threshold. To the extent that criminal sanctions should apply to serious offences, this should be determined by the adverse impact or potential impact on the market and consumers. Such a determination should be a matter for the discretion of the prosecuting authorities and the Court in sentencing. The ACCC acknowledges this approach in its submission[122], however, it dismisses it without discussion. The ACCC's arguments for criminal sanctions, however, rest heavily on the fact that some overseas jurisdictions have criminal sanctions for similar offences. As noted above, the OECD Report, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, found that only two countries, the US and Canada, actually use criminal sanctions. In neither case is there a threshold that applies criminal sanctions only to large corporations and their employees, as is recognised in the ACCC submission[123].

Applying criminal sanctions only to larger corporations and their employees also fails to take account of the ability of the owners and operators of small businesses to avoid civil penalties

---

118 *Trade Practices Act* 1965 (Cth)

119 See J Nieuwenhuysen, "Australian Trade Practices: Readings", Cheshire, Melbourne, 1970, ch. 9.

120 Id.

121 W R McComas, Submission to the Review Committee (July 2002, p 3).

122 ACCC, Submission to the Review Committee (June 2002, p 42).

123 Id.

through seeking bankruptcy. In those cases, criminal sanctions against the individuals involved may be the only effective penalty for collusion.

The threshold proposed by the ACCC also raises the possibility of some individuals involved in collusion being subject to criminal investigation and prosecution, while other individuals involved in the same act of collusion are not. For example, two recent prosecutions by the ACCC, involving a fire protection cartel in Queensland and an electricity transformer cartel, involved individuals from companies that fell either side of the ACCC proposed threshold.

G. COLLECTIVE BARGAINING

1. Introduction

In its submission to the trade practices review, the ACCC has proposed a notification process for collective bargaining by small businesses, based on a modified version of the exclusive dealing notification in s 93 of the TPA. The ACCC has argued that this modified notification procedure will provide "*an appropriately streamlined mechanism*"[124] for granting small business immunity from competition law to facilitate collective bargaining while providing checks and balances to ensure that:

- access to the process is limited to small businesses collectively bargaining with large businesses having a substantial degree of market power; and
- immunity is not available in cases where there are substantial competition or public interest concerns.

In its initial submission to the review, the Business Council noted that the Council[125]

> *does recognise that many of the problems identified with the current authorisation process for collective bargaining are similar to the problems that companies face when seeking authorisation for mergers. The Business Council is therefore likely to support moves that would make the process more efficient and less costly to small businesses. The Council would not, however, support blanket exemptions or 'carve outs' from the TPA.*

Elsewhere in this submission, the Business Council has argued that the TPA should apply to businesses equally, regardless of size. This is a fundamental principle that needs to be observed if we are to avoid the TPA itself becoming an instrument for anti-competitive conduct. As the Swanson Committee stated[126]:

> *We believe it to be extremely important that the Trade Practices Act should start from a position of universal application to all business activities…Only in this way will the law be fair, and be seen to be fair, and avoid giving a privilege position to those not bound to adhere to its standards…"*

The ACCC has also argued in its own submission to the Review Committee that there are "*principles that are at the heart of Australia's competition law regime*", including that "*prohibitions should apply equally to all market participants*"[127].

The Business Council notes that, conceptually, collective bargaining can be viewed as a form of collusion and that the ACCC and a number of small business groups have advocated criminal sanctions for collusion by larger corporations. Given the serious nature of allowing

---

124 ACCC, Submission to the Review Committee (June 2002, p 107).

125 Business Council of Australia, Submission to the Review Committee (July 2002, p 119).

126 Trade Practices Act Review Committee, Report to the Minister for Business and Consumer Affairs, 1976, p 84, cited in ACCC, Submission to the Review Committee (June 2002, p 129).

127 ACCC, Submission to the Review Committee (June 2002, p 117).

such conduct, the Business Council does not believe that proposals to bargain collectively should be approved through a notification process as proposed by the ACCC. The essence of a notification process is that notified conduct becomes immune from prosecution under the TPA after a fixed period of time, unless an objection is raised by the ACCC within that time frame. Given their significance, the Business Council believes that approvals for collective bargaining should only be given through the authorisation process, which allows a proper consideration of the competition and public benefit implications of the proposal. Furthermore, any authorisation should only be given after affected parties have had the opportunity to put their views to the ACCC. Improvements to the authorisation process for collective bargaining should be focussed on removing procedural impediments to appropriate authorisations, as has been argued by the Business Council for the authorisation of mergers.

2. The Proposal

The ACCC has proposed a notification process based on the exclusive dealing notification in s 93 of the TPA. In essence, a notification for collective bargaining would operate in a similar way to s 93. That is, once an application is lodged and the relevant time period has expired, the collective bargaining arrangement will gain automatic immunity for a period of three years from the relevant provisions of the TPA unless the ACCC intervenes to prevent the notification taking effect or subsequently revokes immunity on the basis of competition concerns or other public benefit considerations.

Since collective bargaining involves horizontal agreements between competitors rather that (vertical) exclusive dealing arrangements which are likely to give rise to fewer competition concerns, the ACCC has proposed a number of added features, as follows:

- no immunity for collective boycotts (under s 45 and s 4D of the TPA), although authorisation under s 90 of the TPA would continue to be available;

- immunity should not come into effect until 30 days (or 45 days in complex cases) after lodgement of the notification;

- the ACCC should be able to prevent a notification from coming into force where substantial competition and public interest concerns are raised by interested parties or where the notification does not contain sufficient information to enable the ACCC to make an informed decision about the notification;

- the ACCC should be able to impose conditions on notifications;

- immunity should operate for 3 years, subject to renewal; and

- eligibility criteria should be put into place to ensure that only small businesses collectively bargaining with large businesses with substantial market power may avail themselves of the procedure.

The ACCC has formed the view that such a notification procedure would address the policy objectives of:

- providing a mechanism to ensure that immunity is only granted where conduct is likely to operate in the public interest; and

- minimising the regulatory burden on small businesses seeking immunity from the TPA to collectively bargain with large businesses with a substantial degree of market power.

3. Assessment of the Proposal

Collective bargaining agreements are structural approaches to power imbalances. Accordingly, there are a number of risks inherent in adopting such an approach[128]:

> *"Collective action to create countervailing power may create power beyond what is necessary to confront a power buyer or seller; that power may be indiscriminately exercised against the small and vulnerable as well as the power player; and countervailing power created by collective action may act as a virus that quickly permeates the economy, leaving a structure in which all players are either oligopolists or acting collectively to create oligopoly power".*

Further, there is no guarantee that such countervailing power, once obtained, will be used in the interests of consumers rather than against them.

While the Business Council recognises that collective bargaining can be an appropriate structural approach to addressing the imbalance of power in industries that are undergoing deregulation, any process which permits collective bargaining must contain sufficient safeguards to ensure that the countervailing power of the collective does not, in itself, create a situation of collective dominance. The Business Council's view is that the ACCC proposal does not contain sufficient safeguards.

The ACCC has sought to achieve checks and balances in its proposal by providing that:

- the ACCC should be able to prevent a notification from coming into effect if substantial competition or public interest concerns are raised by interested parties;
- immunity would operate for a proscribed period of 3 years (subject to renewal);
- the ACCC should be able to impose conditions on notifications; and
- the notification procedure would not permit small businesses to seek immunity for primary boycotts (although the authorisation procedure would be available in such circumstances).

The ACCC proposal fails to address a number of key concerns. In particular:

- collective bargaining has the potential to be used as a strategic tool to gain countervailing power beyond that necessary to address any inherent imbalance of market power. Accordingly, rather than permitting immunity to take effect automatically on the expiry of the time period unless the ACCC intervenes on the basis of competition concerns or other public benefit grounds, the process should require active approval by the ACCC or another body. Approval should only be granted where the likely benefit to the public from the proposed conduct would outweigh any likely detriment to the public from the

---

[128] Grimes, "*The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*" (2001) 69 Antitrust Law Journal 195 at 200.

proposed conduct. For industries in transition, this is unlikely to be a burdensome task. In addition, approval should only be granted following a proper consideration of the competition and public benefit implications of the proposal, following a process that gives affected parties the opportunity to put their views to the decision maker;

- the ACCC has proposed that "eligibility criteria" should apply to ensure that only small businesses collectively bargain with large businesses with a substantial degree of market power. The ACCC does not take a firm view of the form such criteria should take, although it does recognise that it may be difficult to draft workable legislation in this regard and appears to favour issuing guidelines and requiring the notifying parties to demonstrate that they meet the relevant criteria. Despite the difficulties in defining "small" business in the legislation, to ensure legal certainty, such a definition is necessary and should not be left to the discretion of the ACCC;

- careful consideration should be given to whether the time frames proposed by the ACCC would give the ACCC sufficient opportunity to consult interested third parties and to consider arguments that may raise competition issues or public benefit considerations. Even a 45 day limit may not, in complex cases, provide sufficient time with the result that a notification could, under the ACCC proposal, take effect automatically at the expiry of the time limit or, in the alternative, the ACCC could oppose a notification without undertaking a full and proper consideration of all the relevant issues. Either outcome would be undesirable and would not be in the interests of proper decision-making. Consideration should be given to adopting the conference process used in relation to third line forcing notifications. Under this process, the ACCC can write to applicants, identifying its concerns and inviting the applicants to attend a conference with the ACCC before it issues a notice refusing immunity. While not supporting the ACCC's notification proposal, the Business Council would support appropriate time lines for authorisations;

- given that the ACCC has adopted contradictory approaches to the question of countervailing power and whether it is a benefit in itself, there should be clarification of the types of matters that may constitute a public benefit for these purposes. The creation (eg through collective bargaining) of countervailing power is not of itself a public benefit. Whether a public benefit ensues depends on the characteristics of the relevant market. This is because collective bargaining represents a structural approach to addressing an imbalance of power, which could have a potentially significant impact on the market in question. For example, where collective bargaining applies to the supply of goods to wholesalers and those goods are subsequently supplied in a competitive retail market, collective bargaining may raise prices to consumers; and

- the time period of 3 years appears too long, having regard to the ability to renew. The time period should be shorted, so that the impact of the arrangements can be revisited, thereby creating another area of balance..

4. Conclusion

The Business Council recognises that many of the problems identified with the current authorisation process for collective bargaining are similar to the problems that companies face when seeking authorisation for mergers. The Business Council has therefore indicated it would support moves to make the authorisation process more efficient and less costly to

small businesses. For example, consideration could be given to setting time limits on the ACCC's consideration of authorisations and on reducing the fees payable by small business.

Considerable caution is needed, however, as collective bargaining is, *prima facie*, anti-competitive and should not be approved without consideration of the competition and public benefit implications of the proposal, through a process that gives affected parties the opportunity to put their views to the ACCC. The ACCC's proposal for allowing notification for collective bargaining is therefore inadequate.

While collective bargaining may be appropriate to industries in transition, there is the potential that collective bargaining may be used as a tool to gain countervailing power that goes beyond that necessary to address any imbalance of power. Nor is there any inherent reason to expect that any countervailing power so obtained will be used for the benefit of consumers rather than for the private benefit of the parties. Indeed, the contrary is more likely, as the habit of collaboration in collective bargaining is likely to spill over into parallel behaviour on the reselling side, with resulting higher prices to consumers.

For these reasons, the Business Council does not support the ACCC's proposal for notifications for collective bargaining.

H. SMALL BUSINESS AND CONSUMER PROTECTION PROPOSALS

A number of submissions to the Review Committee have put forward proposed changes to the TPA intended to provide additional protection to the interests of small businesses or consumers.

As there are a number of these proposals, the Business Council has not sought to respond to each in detail. Rather, the Council believes it is appropriate to advance a number of principles that it believes should be used to test the merit of these proposals. These are set out below, together with a discussion of some of the proposals put before the Review Committee.

In summary, the principles cover:

- protecting competition not competitors;
- equality before the law;
- certainty to encourage compliance;
- legal certainty generally;
- proportionality of response;
- using existing powers first; and
- bedding down change.

1. Protecting competition not competitors

The Business Council believes that Part IV of the TPA is about protecting the dynamic process of competition. This does not equate with the protection of specific competitors or classes of competitors. The Business Council is concerned that some proposals put before the Review Committee seem to be more concerned with protecting classes of competitors, rather than the competition process. If adopted, these proposals could lead to some provisions of Part IV having the effect of protecting some players *from* competition. This concern has already been raised in connection with the ACCC's proposed amendments to s 46, but is also relevant to other proposals put before the Review Committee.

The Business Council acknowledges that parts of the TPA are concerned directly with the protection of specific interests, especially those of consumers and small businesses. Section 51AC, for example, provides considerable protection to the small business sector. While this raises issues with the diversity of roles the ACCC is expected to perform (on the one hand protecting the competitive process, while on the other, protecting particular business without reference to competition issues), it does not justify blurring the purpose of Part IV of the Act, to protect competition.

The argument that the competition provisions should be modified to protect small business has been run before. In its report[129], *Finding a Balance: Towards Fair Trading in Australia*, the House of Representatives Standing Committee on Industry, Science and Technology (the Reid Committee) stated, while it considered that[130]

> *"section 46 of the Trade Practices Act does not address many of the problems small businesses encounter in dealing with powerful suppliers and competitors…it is not appropriate to attempt to protect small businesses through the competition provisions of the Trade Practices Act – which are designed to engender strong competition."*

To overcome the perceived limitations of s 46, the Committee recommended the strengthening of the unconscionability provisions of Part IVA, with the result that s 51AC came into effect in July 1998. Section 51AC was therefore a direct result of the need to address unfair trading, while ensuring s 46 remained focussed on protecting strong competition, not particular competitors.

The same issues arise with the proposal to amend s 50(3) to provide special consideration of the viability of small business when mergers are considered[131]. To the extent that valid competition issues arise in connection with the viability of small business, they are already covered by s 50. To the extent that the proposal is designed to give special protection to small business, it is not appropriate to the competition provisions of Part IV. The Business Council does not support the view that s 50 is about protecting certain market structures or certain market players, particularly as the most competitive market may be between medium to larger enterprises. Consumers should not have to pay a premium to protect certain business. Where consumers see value in particular businesses, they can reflect that in their purchasing decisions.

2. Equality before the law

It is the Business Council's view that, in competition regulation, all businesses and all individuals should be treated equally before the law. This is particularly the case for individuals, who should, as a matter of fundamental principle, be treated equally before the law, regardless of the size or nature of their employer.

The principle should also apply to firms. In particular, larger or successful competitors should not be artificially constrained from competing fairly in the market place. Even where special provisions are considered appropriate to deal with, for example, the misuse of market power, these provisions should relate to the relevant characteristic of the firm, such as its market power, not to the size of the firm *per se*.

In this connection it should be noted that in discussions of 'inequality of bargaining power' there is a tendency to confuse size with power. From a competition point of view, what

---

129 Australia, House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance: Towards Fair Trading in Australia*, Parliament of Australia, Canberra, May 1997.

130 Ibid at para. 4.67.

131 Council of Small Business Organisations of Australia, Submission to the Review Committee (July 2002, p 12).

matters in dealings with a corporation is not its size but whether it is facing effective competition.

If the seller is in a competitive market, even a small buyer can be in an advantageous bargaining position. Before Ansett collapsed, for example, and even today, a consumer whose travel dates were flexible could obtain very low fares from the airlines, even though the sellers were billion dollar corporations.

On the other hand, when competition is weak, even a small supplier can reap monopoly rents, as can be seen in the prices of many goods and services in small country towns.

This point is relevant to proposals to amend s 51AC to proscribe, as *per se* offences, the unilateral variation of contracts, termination of contracts without just cause or due process, or the presentation of 'take it or leave it' contracts[132]. Proponents of this amendment argue that such conduct "*typically is made possible because of the market power held by large corporations*"[133] and "*only occurs because one party to a commercial transaction has much greater market power than the other*"[134]. As noted above, however, market power is not the same as corporate size, nor is it unique to "*large corporations*". If prohibitions such as these were to be adopted, they would need to apply to all contractual dealings, regardless of whether the contractual parties were large corporations, small businesses or individual consumers. The issues such prohibitions raise for the certainty of the law are also discussed below.

Finally, the Business Council notes that the ACCC, in rejecting proposals for a general legislative exemption for small businesses for collective bargaining, has argued that there are "*principles that are at the heart of Australia's competition law regime*", including that "*prohibitions should apply equally to all market participants*"[135]. The Business Council supports this view, however, it notes that such a principled approach has not been adopted by the ACCC in connection with its proposals for criminal sanctions for collusion, which the ACCC proposes apply only to individuals employed by businesses above a certain size.

3. Certainty to encourage compliance

The primary focus of the law, and the ACCC, should be on encouraging compliance with the competition provisions, rather than on prosecution and deterrence[136]. While prosecutions play a role in encouraging compliance, it is difficult for companies to comply if the requirements of the law are uncertain. As the majority of companies wish to comply, uncertainty can lead to unnecessary and excessive compliance costs, penalising those that abide by the law. Where laws are certain and the requirements are clear, higher levels of compliance can be expected.

---

132 Fair Trading Coalition, Submission to the Review Inquiry (July 2002, p 42); Council of Small Business Organisations of Australia, Submission to the Review Committee (July 2002, p 17).

133 Fair Trading Coalition, Submission to the Review Inquiry (July 2002, p 42).

134 Ibid at 43.

135 ACCC, Submission to the Review Committee (June 2002, p 117).

136 For further discussion on this point, see PricewaterhouseCoopers, Submission to the Review Committee (July 2002).

Uncertainty in the law can be significantly compounded where administrative processes are opaque, where the regulator has largely unfettered discretion and where the regulator has power to extract penalties or order certain conduct directly (such as demanding undertakings from companies under threat of prosecution or issuing cease and desist orders as proposed by the ACCC).

In considering proposed reforms to the TPA, regard should be had to whether these reforms enhance or detract from the certainty of the operation of the law.

4. Legal certainty generally

Legal certainty in a wider sense becomes relevant when evaluating the Australian Consumers' Association's (ACA) proposals for more legislation on what it calls one sided 'take it or leave it' contracts.

Contractual provisions exist that, on their face, may appear one sided, however, the ACA's position rests on the false assumption that positive law is the only effective restraint on human behaviour. Much more important in most consumer transactions is the reputation of the supplier or the retailer. The ACA argues that[137] "*Typically, consumers do not bargain or shop around in the area of non-core terms and traders do not compete*". That however is usually because consumers know that non-core contract terms are seldom relevant, so there is little demand for better ones. As consumers, we all buy air tickets, despite their fine print, because we know that for reasons of reputation the airline will give us essentially what we bargained for.

If the demand for better contract conditions develops, sellers will have an incentive to satisfy it. In the 1960s, the warranties on new cars seldom exceeded 3 months, but consumer expectations for reliability rose, creating a demand for longer warranty periods. Now 3 year warranties are common. The same thing is starting to happen in relation to contracts for computers and software, as a computer increasingly becomes a home appliance.

Apart from its lack of factual foundation, the ACA proposal overlooks the social value of predictable contract law. Lack of legal certainty here results in higher transaction costs and thus higher prices and lower living standards. Part IVA and similar state legislation are already importing greater risk factors into Australian commerce. Many commercial contracts now select New Zealand law and jurisdiction because of the right of appeal to the Privy Council, which has a reputation for enforcing bona fide contracts as made.

This lack of legal certainty may also have constitutional consequences. Already s 51AA has been challenged on separation of powers grounds as an invalid delegation of legislative power to the judiciary. Though upheld at first instance[138], doubts remain about it that may need to be resolved by the High Court. Sections 51AB and 51AC, which give the courts an unfettered discretion to overturn contracts, may also be vulnerable on the grounds of the *Boilermakers* case[139].

---

137 Australian Consumers' Association, Submission to the Review Committee (July 2002, p 35).

138 *ACCC v Berbatis* [2000] ATPR 41-755 at 40810-14.

139 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

The best solution would be to allow competition to sort matters out, but if laws such as those proposed by the ACA are to be enacted, they should preferably take the form of uniform state legislation and so avoid separation of powers issues.

5. Proportionality of response

There are significant dangers in both under-regulating and over-regulating. The Business Council's initial submission set out some of the issues with regulatory error and the misuse of regulatory power[140]. The submission also argued that, due to globalisation, liberalisation of trade and investment and the evolution of new technologies, competition regulation is becoming more difficult and the likelihood, and costs, of regulator error are growing.

In light of this, it is essential that regulatory responses, in both legislative and administrative terms, are in proportion to the specific issues being addressed. Another approach to this is to ask whether the benefits of a proposed regulatory solution outweigh the costs. These issues often arise where regulatory solutions are proposed for very specific issues, often involving only a few companies or one part of the economy, but the new regulation imposes costs across all companies or sectors of the economy.

6. Using existing powers first

The Business Council believes that before new powers are added to the TPA, the scope of existing powers to address concerns should be fully explored. For example, the Business Council has noted elsewhere in this submission that the ACCC has not sought the maximum penalties currently available under the TPA for collusion, yet is arguing that the current penalties are inadequate. Similarly, many of the issues raised as "misuses of market power", in support of an effects test under s 46, appear to relate more to issues that should be considered under the unconscionability provisions (particularly s 51AC).

There have also been proposals to amend s 46 to proscribe certain conduct, such as "*selling at unreasonably low prices*"[141]. While it is not entirely clear, it appears that "*selling at unreasonably low prices*" equates with predatory pricing, which is already proscribed by s 46. There is therefore no need for an amendment to s 46 and such an amendment, by introducing new concepts such as "unreasonably", will increase uncertainty about the scope of s 46.

7. Bedding down change

Related to the need to explore the potential of existing powers before introducing new ones, is the need to allow the effect of recent changes to be felt before further changes are made.

When changes are made to legislation, there can be a significant lag before the effect of these changes is felt "on the ground". For example, it may take some time for people to become aware of new rights or obligations under legislation, complainants may be hesitant to be the first to test new powers or the regulator may take time to build the administrative systems to

---

140 Business Council of Australia, Submission to the Review Committee (July 2002, p 21).

141 Fair Trading Coalition, Submission to the Review Committee (July 2002, p 29); Council of Small Business Organisations of Australia, Submission to the Review Committee (July 2002, p 5).

give effect to new powers. Regardless of the reason, caution needs to be exercised when considering calls for further legislative changes before the effect of past changes has been felt.

For example, there have been recent changes to the TPA to address many of the issues raised in some small business submissions to the Review Committee. These changes resulted from the inquiry of the Joint Select Committee on the Retailing Sector and were given effect by the *Trade Practices Amendment Act (No 1) 2001*. These amendments expand considerably the options and protection available to small business and consumers under the Act. As a result, the ACCC was able to state that it "*is now in a better position to assist small business after changes to the Trade Practices Act*" and that the "*new legislation fills in gaps in the protection already given to small business with unconscionable conduct provisions passed in 1998*" [142].

The relevant amendments made by the *Trade Practices Amendment Act (No 1) 2001* are set out in Table 4.

[142] ACCC Media Release, *Greater ACCC Support for Small Business*, 12 July 2001.

Table 4: Relevant amendments introduced through the *Trade Practices Amendment Act (No.1) 2001*

Recent amendments to the *Trade Practices Act 1974*, which came into effect on 26 July 2001, have covered:

1. extending the ACCC's right to take representative action under Part IV of the Act and to seek damages on behalf of third parties;

2. providing that a person who contravenes the Act may be required to pay both a fine or pecuniary penalty and compensation to those who have suffered loss or damage as a result of the contravention;

3. extending the period within which a person who has suffered loss or damage can commence an action for damages to six years;

4. amending the definition of 'market' in subsection 50(6) to now include a substantial market in a region of Australia;

5. allowing a court to make a non-punitive order where a person has contravened the Act, including a community service order, a probation order, an order requiring the disclosure of information or an order requiring an advertisement to be published;

6. allowing a court to make an adverse publicity order, for example, an order that a corporation publicise the fact that it has breached the TPA, and details of what it has been ordered to do;

7. raising the transactional limit in s 51AC from $1 million to $3 million, thereby enhancing small business access to the unconscionable conduct provisions of the Act;

8. allowing a person who has suffered loss or damage as a result of a contravention of the unconscionable conduct provisions to seek damages;

9. clarifying that the laws of the States and Territories operate alongside the unconscionable conduct provisions of the TPA, giving small business access to a range of options under State, as well as Federal, laws;

10. allowing the ACCC to intervene in private proceedings where the issues are of public interest;

11. giving the ACCC the right to seek declarations from the court on the operations of the Act, which the ACCC argues are "*relatively quick and inexpensive, providing authoritative statements on the operations of the Act*" [143].

[143] ACCC Media Release, *Greater ACCC Support for Small Business*, 12 July 2001.

APPENDIX 1 – ANALYSIS OF THE MARKET

The definition of the relevant market is critical to key decisions under the TPA, including whether a proposed merger will result in a substantial lessening of competition (s 50) and whether a company has a substantial degree of power in a market (s 46).

This Appendix examines the significance of the market definition and the overall difference in approach to this key concept by the ACCC and the Federal Court, which tend towards narrower definitions, and the Australian Competition Tribunal, which takes a broader perspective. The Business Council has argued in its submissions to the Review Committee that these differences in approach can be addressed, in part, through greater transparency in the ACCC's informal clearance process for mergers and through allowing merger proponents the option of taking authorisation applications direct to the Tribunal. The Business Council also believes that consideration needs to be given to proposals to allow the Tribunal to review the ACCC's informal clearance decisions.

1. Introduction

Governments have supported the spread or preservation of competition throughout the Australian economy in a belief that competition is often the best way to further the long term interests of consumers. Competition spurs firms to produce goods and services that better satisfy the desires of consumers and at lower prices. Firms engage in activities such as research and development, exploration, innovation and production efficiency in order to be able to offer better and cheaper goods and services.

The TPA is the Commonwealth Government's key legislative tool for promoting competition. However, being legislation, the TPA needs to be interpreted by a range of bodies such as the ACCC, as administrator of the Act, the Tribunal, the National Competition Council and the Federal Court (the Court).

2. The Economic Framework

The key interpretative question under the TPA is what constitutes competitive (or anti-competitive) conduct. However, this cannot be answered in the abstract, because competition (and its antithesis, market power) take place (or are exercised) in the context of a market. The TPA attempts to deal with this issue by setting out types of behaviour that are proscribed, if they have the purpose and/or effect of substantially lessening competition *in a market*. Therefore, the bounds of the market are crucial in determining whether the specified behaviours are proscribed under the TPA.

3. Defining the Market – The Approach of the Tribunal

In *Re QCMA and Defiance Holdings*[144], the Tribunal discussed the factors that are important in coming to a view about market definition:

> *"A market is the area of close competition between firms, or, putting it a little differently, the field of rivalry between them… Within the bounds of the market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive."*

There are two key messages that should be taken from this familiar extract.

First, competition is a process that is dynamic, not a situation or state of affairs. Therefore, the mere existence of a number of parties who sell a similar good is not a guarantee of competitive behaviour. It is the jostling for position, the capturing of market share, the undercutting of prices and the introducing of new products that is the essence of competition.

Second, potential transactions are just as important as actual transactions. Therefore, there is strong emphasis on substitutability on both the demand and supply sides and the notion of substitutability in the long term, rather than in the short term. This further raises the issue of barriers to entry.

In *Re QCMA*, the Tribunal stressed the primacy of barriers to entry in a passage that has subsequently been adopted by the Full Court of the Federal Court in *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd*[145]. The Tribunal listed the elements of market structure that would need to be considered in analysing the competitiveness of any market. The Tribunal went on to say:

> *"Of all these elements of market structure, no doubt the most important is…the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct."*

---

144 *Re Queensland Co-operative Milling Association Ltd., Defiance Holdings Ltd*. (1976) 25 FLR 169, ATPR 40-012 at 17,247.

145 (1982) ATPR 40-327 at 43,983.

A more recent decision of the Tribunal took the opportunity of elaborating on what it meant when it referred to "*the long run*". In *AGL Cooper Basin Natural Gas Supply Arrangement*[146] the Tribunal quotes from the New Zealand decision of *Telecom Corporation of NZ Ltd v Commerce Commission* (in which Professor Maureen Brunt had sat as a lay member of the High Court of New Zealand) as to the meaning of the long run[147]:

> *"We include within the market those sources of supply that come about from redeploying existing production and distribution capacity but stop short of including supplies arising from entirely new entry. Thus 'the long run' in market definition does not refer to any particular length of calendar time but to the operational time required for organising and implementing a redeployment of existing capacity in response to profit incentives."*

These passages from decisions by the Tribunal indicate that it has adopted a long time horizon when analysing forces of competition.

The time horizon has been relevant in two ways. In the first place, the Tribunal has stressed the importance of the condition of entry in analysing the competitive pressure to which incumbents are subject. This, of itself, suggests a long time horizon. In effect, the Tribunal has been prepared to wait for potential entrants to undertake the necessary research, acquire the assets needed to enter a market and then to start active rivalry without stepping in and condemning the market as not competitive.

The second way in which time has been relevant to the Tribunal's analysis of competition has been in its approach to analysing competition among those incumbents who are already operating within the market. Even rivalry among these enterprises may take time to emerge. As the Tribunal states, in order to become an active rival, an incumbent may need to '*redeploy existing production and distribution capacity*'; and this takes time. Of course, as the Tribunal proceeds to say, it will take even longer for a completely new entrant to appear.

One of the seminal works in economics on the relation between competition and innovation is Joseph Schumpeter, *Capitalism, Socialism and Democracy*. Schumpeter argued that the real forms of competition that contributed to the functioning of the market were competition from new products and new processes. Schumpeter argued that the enterprises that innovated in these ways could have a destructive impact on their competitors. The new products and the new processes created what he termed 'perennial gales of creative destruction'. Indeed, if the new product or the new process was a significant improvement on what had previously been available, it may even wipe out all competition for a while. This is no bad thing, according to Schumpeter, because it is the prospect of a (short-lived) monopoly that creates the incentive for firms to develop new products and new processes and to incur the risks associated with releasing them to the market.

---

146 (1997) ATPR 41-593.

147 (1997) ATPR 41-593 at 44,210.

Professor Brunt refers to Schumpeter's perennial gales of creative destruction when she comments on the time horizon for assessing competition[148]:

> *"Competition is a process rather than a situation. Dynamic processes of substitution are at work. Technological change in products and processes, whether small or large, is ongoing and there are changing tastes and shifting demographic and locational factors to which business firms respond. Profits and losses move the system: it is the hope of supernormal profits and some respite from the "perennial gale" that motivates firms' endeavours to discover and supply the kinds of goods and services their customers want and to strive for cost-efficiency. Such a vision tells us that effective competition is fully compatible with the existence of strictly "limited monopolies" resting upon some short run advantage or upon distinctive characteristics of product (including location). Where there is effective competition, it is the on-going substitution process that ensures that any achievement of market power will be transitory."*

A Schumpeterian approach to competition and time is critical to any proper consideration of what have recently come to be called 'innovation markets'. These are markets (often based on electronics or biotechnology) in which the very essence of competition seems to be the development of new technologies of one type or another[149].

4. Defining the Market – The Approach of the ACCC

Although the Tribunal has, in general, adopted a sophisticated approach to dealing with the relationship between competition and time, the same cannot be said of the ACCC and the Federal Court. Indeed, many decisions by the ACCC and the Court seem to be quite unaware that the time horizon they are implicitly assuming is driving the approach they are taking to market definition, market power and remedies.

In assessing the relevant market for the purposes of competition analysis, the ACCC adopts a predominantly structural approach which focuses on the "price elevation test". In support of this approach, the ACCC refers to the *QCMA*[150] case in which the Court stated that[151]:

> *"It is the possibilities of such substitution which sets the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market, we ask a quite simple but fundamental question: If the firm were to 'give less and charge more', would there be, to put the matter colloquially, much of a reaction?"*

In its Merger Guidelines, the ACCC sets out the various tests it applies in identifying the scope of the relevant market, the principal test being the price elevation test set out above.

---

148 "Market Definition Issues in Australian and New Zealand Trade Practices Litigation", 18, *Australian Business Law Review*, 86 at 96.

149 See for, example, F M Fisher, J J McGowan and J E Greenwood, *Folded, Spindled, and Mutilated, Economic Analysis and U.S. v. IBM*, MIT Press, 1983; in particular, Chapter 2.

150 *Re Queensland Cooperative Milling Association Ltd, Defiance Holdings Ltd (Proposed mergers with Barnes Milling Ltd)* (1976) ATPR 40-012.

151 Ibid at 17, 247.

As such, the process of market definition, according to the ACCC, is establishing the smallest area of product, functional and geographic space within which a hypothetical current and future profit-maximising monopolist would impose a small but significant non-transitory increase in price ("SSNIP") above the level that would otherwise prevail. The ACCC's approach is therefore based primarily on the issue of substitutability in terms of the product, geographic, functional and temporal dimensions[152].

Against this background, there is an argument that the ACCC's continuing use of the traditional, structural approach to market definition as set out in the *QCMA* case does not take heed of the role of market definition in providing an aid to clear thinking about economic relationships and causality. As a consequence, the business community argues that the ACCC's approach does not recognise the challenges of the modern economy, including globalisation.

In particular, it is arguable whether the ACCC, in its submission to the Review Committee, attributes sufficient significance to the changes wrought by new industrial organisation or strategic approaches. While the ACCC states that "*the modern shift away from a structuralist approach [to market definition] has found favour, particularly in new economy industries such as high technology and communications*"[153], it goes on to comment that:

> *"Nevertheless, the economic tools for analysing market power outlined above [QCMA] are still relevant as long as they are applied to assist in identifying the effects of particular conduct, rather than applied mechanically as the ultimate end".*

It is not disputed that market definition is first and foremost an economic tool which must be based upon sound economic principles. However, the continuing adherence to a "first principles" approach fails to recognise or to attach sufficient weight to the practical realities (and challenges) of contemporary markets.

For example, the ACCC's continuing reliance on the SSNIP test as the starting point for market definition takes account of only one factor relevant to the exercise of market definition and appears to discount the relevance of issues such as the dilution of the significance of national borders and other internal domestic boundaries due to technological advancement. This sits uneasily with the ACCC's acknowledgement that significant transformations in Australia's economic environment are under way, including globalisation, technological change (especially information technology) and trade liberalisation or deregulation.

In its submission to the Review Committee, the Productivity Commission has noted[154] a tendency in competition policy (and with the ACCC) to define the boundaries of a market in terms of close substitutes. This approach is likely to lead to too narrow a market definition because it ignores the whole field of weaker substitution possibilities which collectively may restrain price rises (as is the case in a "chain of substitution" between differentiated products). Ideally, the Productivity Commission argues, the ACCC should worry less about

---

152 ACCC, Submission to the Review Committee (June 2002, p 200).

153 Ibid at 202.

154 Productivity Commission, Submission to the Review Committee (July 2002, p 46).

drawing precise market boundaries in merger cases but make an empirical assessment of whether a merger would be likely to lead to a price rise after considering all the substitution possibilities and responses by rivals. Such an analysis needs to consider the competition pressures from imports and exports, both current and potential.

In contrast to the Productivity Commission's approach, the practical results are markets that tend to be narrowly delineated by the ACCC, in terms of geographical and temporal scope.

(a) Geographical scope

Insofar as geographical scope is concerned, in a number of merger matters the ACCC has appeared to be reluctant to accept that in markets where goods are internationally traded commodities and priced on an international basis, the relevant market should be a global market, that is, the true market that effectively sets the price. Instead, the ACCC (presumably for jurisdictional purposes) tends to find a national market. This position may be contrasted with the approach of overseas regulators who have acknowledged that in certain cases, it may be proper to find a global market[155].

(b) Temporal scope

Insofar as the temporal scope is concerned, the ACCC has been found to have adopted an excessively narrow time frame when delineating the relevant market. For example, the Tribunal rejected the ACCC's finding relating to the time frame it adopted in the context of the revocation of the authorisation of certain provisions of an arrangement between AGL and a number of Cooper Basin gas producers[156]. The Tribunal rejected the ACCC's assertion that the competitive consequences of a long term contract between the parties to the arrangement should be analysed within a time frame of about 1 year. The Tribunal instead adopted a far more expansive time frame which referred to the time period stipulated by the long term contract. The Tribunal looked to the finding in *QCMA* that a market must be defined '*at least in the long run*'. The Tribunal reasoned that the reference to time in that case was necessarily a reference to operational time, that is, the time required to redeploy existing production capacities in response to profit incentives. The Tribunal stated that the commercial realities of the given industry were material considerations in determining operational time. As such, the Tribunal contemplated the effects on competition of reform programs which were already underway but continuing. On the basis of this more expansive approach the Tribunal found the relevant temporal dimension of the market was approximately 25 years of 'real' time.

Excessively narrow market definition as a result of a traditional, structuralist approach has two important consequences:

- as the ACCC recognises in its submission, its market definitions "*may not reflect the parties' idea of competition*"[157]; and

---

[155] See for example the decisions of the European Commission in Case No IV/M.470 - *Gencor/Shell* and Case No IV/M.660 - *CRA/RTZ.*

[156] See the discussion of Debra Kruse "Competition law analysis and the concept of time", Competition and Consumer Law Journal 7(90) 1999 at 2.

[157] ACCC, Submission to the Review Committee, (June 2002, p 241).

- arguably the logical extension of the above, an excessively narrow market definition may not reflect the realities of economic relationships and causality in the market place in issue. For this reason, the defined market may not capture competitive constraints placed upon a firm by substitutable products and suppliers. In the context of globalisation, this is likely to mean that factors such as increased reliance on exports may constrain the conduct of an exporter within the Australian market - the converse of the ACCC's position regarding the role of imports in assessing mergers under s 50 of the TPA.

5. Conclusion

There is little dispute that market definition is an economic tool which is used to define the relevant arena of competition in the context of which conduct will be assessed. Nevertheless, there is an argument that the ACCC's continuing application of the traditional, structural approach to market definition (as set out in *QCMA*) fails to delineate the "true" boundaries of competition in markets which are evolving rapidly as a consequence of globalisation and technological innovation.

The consequences of this approach are two fold. Firstly, a frequent complaint is that the ACCC defines markets too narrowly, particularly in terms of the geographic and temporal dimensions. Not only does this approach mean that the ACCC's approach does not accord with the parties' view of competition, but a narrowly defined market may not take into account competitive constraints placed upon the parties' in question, such that their market position (and possibly market power) is erroneously magnified. From both an economic and legal standpoint, this is a highly undesirable outcome.

Experience suggests that the ACCC is more likely to find a narrow market in matters which are contentious. This is particularly the case insofar as mergers are concerned. From the Business Council's perspective, this supports the view that parties to a merger should have the opportunity to challenge the ACCC's decision on matters such as market definition before the Tribunal.

Secondly, the ACCC's traditional approach to market definition suggests that the ACCC may be failing to administer competition law in a flexible and forward looking manner and, arguably, failing to apply "sound economics and hard evidence" (to borrow the expression of William J. Kolasky[158]). As Kolasky recently noted[159], there are a number of guiding concepts that are critically important to any successful competition enforcement regime, regardless of its maturity or the specific statutory structure under which it operates. In particular, Kolasky noted that decisions should be based on "sound economics and hard evidence", meaning that decisions should be grounded in economic theory and fully supported by empirical and factual evidence such that they may be tested against "*the cold metal of economic theory*[160]". In addition, antitrust agencies should be:

---

158 Deputy Assistant Attorney General, Anti-trust Division - US Department of Justice.

159 W J Kolasky, "Six guiding principles for antitrust agencies". Address at the International Bar Association Conference on Competition Law and Policy in a Global Context, March 18 2002.

160 per Joseph Schumpeter.

> *"as flexible and dynamic as the industries with which they deal…. antitrust [must] adapt to changes in technology and in the economy".*

Given that the Terms of Reference of the Review Committee specifically include a consideration of the ability of Australian companies to compete globally, one must question whether the ACCC's approach to market definition is sustainable. Not only does this approach delineate markets in an inflexible manner and, in some cases, without "hard evidence" as to economic relationships and causality, but the competition analysis which flows from a narrow market definition may actually impede the ability of Australian companies to compete in the international market place. Corporations whose conduct is assessed in the arena of a narrowly defined market are more likely to be found to have market power and therefore are more likely to be found to contravene provisions of the TPA. This outcome is likely to have significant adverse consequences for both the Australian economy and Australian consumers.

APPENDIX 2 – BUSINESS COUNCIL OF AUSTRALIA LETTER TO THE REVIEW COMMITTEE ON THE PROPOSED BOARD OF COMPETITION

The Hon Sir Daryl Dawson AC KBE CB
Chairman
Trade Practices Act Review
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir Daryl

Board of Competition

On behalf of the Business Council of Australia ("BCA"), I would like to thank you and the members of the Review Committee for seeing us to discuss our submission on the reform of the Trade Practices Act ("TPA") and its administration.

Our Regulatory Reform Task Force, which I chair, is preparing a supplementary submission covering the points arising from our discussions and answering the specific questions you raised. The supplementary submission will also expand on some other important issues covered by the BCA submission and respond to key proposals put to the Review Committee by other groups.

In this letter we would like to elaborate on the BCA's proposal for a Board of Competition ("BOC") (see pages 46 to 50 of the BCA's submission of 9 July 2002) an issue which is extremely important to the BCA, consumers and small to medium businesses in Australia.

An important check and balance

We believe a confusion of functions has developed in the formulation of policy and administration of the TPA. The ACCC has a larger policy role than is appropriate for an administrative body and this represents a compromising of the separation of powers. Rectifying this confusion of roles, in the way we propose, would introduce an important check and balance on policy formulation and the role of the ACCC. It would do so, in a way, which does not detract from the ACCC's independence and freedom to enforce and administer the TPA.

- What is the confusion of functions?

  There is a widely held perception that the ACCC determines policy, enforces the TPA and (essentially) reviews its own performance. The BOC would provide a mechanism to engage the ACCC and the Government in a constructive debate on TPA related policy issues. It would ensure that a range of perspectives is considered.

- What is the "check"?

  The BOC would act as a "check" in the sense of checking on the ACCC and advising the Government and the community on the operation and enforcement of the TPA.

- What is the "balance"?

  The "balance" is that the BOC would provide a range of views on important issues. At present there is reason to believe that the policy makers are taking only one view into account and that view is given undue prominence in the media, the bureaucracy and in the Parliament because there is no real avenue for conveying alternative views.

- Why would it not interfere?

  The BOC would be advisory only. Its impact and weight would come from its ability to deal with issues referred to it and to provide views. The BOC would deal with wide perceptions about the ACCC which exist at present and would provide the ACCC and the Government with an important "safety valve".

The BOC would be advisory only

The BOC would only advise. It would meet at least twice a year. The members would be drawn from a cross section of business and consumer groups. It would report to the Treasurer. Its reports would, subject to oversight by the Government on sensitive issues, be released to the public (eg, like the Productivity Commission reports). The BOC's agenda would be set by the Treasurer.

The ACCC Chairman and the Secretary of the Treasury would, under the BCA proposal, be ex-officio members. They would attend and participate in all meetings. Additional ex-officio members could be Chairman of the National Competition Council or the Chairman of ASIC.

There is a range of ongoing policy issues that should be examined by the BOC. These include:

- Long term trends which may affect Australia's competitiveness and competition regulation. The ACCC acknowledges that major transformations in Australia's economic environment are under way, specifically globalisation, technological change (especially information technology) and trade liberalisation or deregulation.

- Each of these gives rise to important long term competition issues for Australia. They need to be subjected to wider debate rather than just dismissed as issues driven "by the big end of town". The future prosperity of Australia depends on the way these issues are dealt with. A mechanism which promotes open debate on these issues will be invaluable.

- Balancing size (to achieve efficiencies to compete globally and to overcome the transaction costs involved) against the impact on domestic competition.

- Examining whether the efficient restructuring of particular sectors of the economy is being facilitated or hindered by competition regulation

- Providing a vehicle for examining the implications for competition regulation of new and emerging technologies or market practices

The BOC could also look at operational issues such as:

- The use of media statements and benchmarks for avoiding misleading content or expression, including the development of a media code of conduct.

- the procedure of issuing a section 155 order.

- the use of s 87B undertakings.

In essence, the BOC would provide access to a range of views on important issues. It would be able to deal with the issues in a timely way rather than allowing a build up of tension which would require a lengthy inquiry.

The Dawson Committee is the fourteenth inquiry into the Trade Practices Act since its enactment (see Attachment A). Attachment B shows how the ACCC's power has grown since it was established in 1995. Competition is constantly changing. On average there has been one inquiry every two years. These large numbers of inquiries indicates that competition law requires regular monitoring.

What the BOC would do is to assess particular issues, consult externally and provide the Government with 2 reports:

- The first report would be the result of the consultation process (ie a faithful record of what views were expressed).

- The second would be its recommendation on how the issue should be handled.

It would then be up to the Government to determine a course of action.

The BOC is backed by a proven model

The model outlined is based on the practice established with the Board of Taxation.

Prior to the Board of Taxation, taxation reform and administration was largely the province of the Australian Taxation Office ("ATO"). There was widespread concern that policy and administration were all dealt with by the ATO with no checks or balances. Committees, such as the Ralph Committee, were established from time to time to deal with a backlog of issues. Competition like tax policy requires frequent review.

The Board of Taxation has filled a gap and provided a check and a balance in the area of taxation.

Examples of issues which have come before the Board of Taxation have been:

- Development of a consultation model for handling tax issues.
- Tax value method.
- Taxation of trusts.
- Reform of international taxation.

The Board of Taxation comprises representatives from businesses (both large and small), consumer organisations and other taxpayers. The Secretary of the Treasury and the Tax Commissioner are ex-officio members as is the Parliamentary Counsel. The Board has received widespread support. This has helped all affected parties (ie, Treasury, the ATO and tax payers) to handle a range of complex issues, like the Tax Value Method.

As the Board of Taxation is relatively new, we have attached an outline (Attachment C) of its work to date [Attachment not included in this Appendix. See Section C of this submission].

Some further questions and answers

We recognise that the proposal raises other issues. In question and answer form, these are:

- Why not Treasury?

  We believe a BOC would be more effective.

  – There would be a need to present a range of views on these issues and a Board with a varied membership is more effective.

  – Treasury has not shown the willingness to make TPA policy development a priority. It has tended to refer the issues to the ACCC.

  – A BOC could provide direct commercial and consumer experience to the Government and the ACCC.

  Treasury could, however, combine the BOC with an expanded TPA policy section which could work with the BOC. The BOC will not be able to operate without support from the Treasury. Hence the two combined could provide an effective way of handling TPA issues.

- Why not Parliament?

  The BOC's work will assist the Parliament. The reports of BOC will provide useful data and information and views to improve political debate.

  It is difficult for parliamentary committees to keep statutory authorities accountable because the committee system was not designed to handle independent authorities of the kind which have come into existence over the last 25 years.

- Why not the ACCC?

  There is an inherent conflict in the ACCC performing the role outlined for BOC. It is not fair to impose the burden of formulating policy and enforcing and administering the TPA on the ACCC and until recent years the Commission had only a minor policy role.

Conclusion

The BCA believes that the introduction of BOC:

- Fills a gap.
- Provides a check and balance.
- Is backed by proven experience.

Importantly, it does not threaten or interfere with the independence of the ACCC.

The effectiveness of BOC will come from its very existence, its ability to provide input and advice on the difficult competition issues. It is a simple reform which has the potential to deal with many of the concerns on the policy formulation and administration of the TPA.

The introduction of BOC would be in addition to, and not instead of, any other internal or cultural changes that the Committee may wish to recommend in relation to the operation of the TPA and the ACCC.

Yours sincerely

Tony D'Aloisio
Chairman
BCA Regulatory Reform Task Force

A. Inquiries into the *Trade Practices Act 1974*

1. Swanson Committee[161] (1976)

   Terms of reference included:

   - whether the Act is achieving its intended purpose of the development and maintenance of a free and fair market, and whether Australian consumers are benefiting from the Act;
   - whether the Act is causing unintended difficulties or unnecessary costs to the Australian public, including Australian business;
   - whether in Australia's then current economic circumstance the operation of any part of the Act inhibits or is likely to inhibit economic recovery, contrary to the economic objectives of the Commonwealth Government; and
   - whether small business should be accorded special treatment.

2. Blunt Committee[162] (1979)

   Terms of reference focussed on an examination of whether there were any changes to the Trade Practices Act that would improve the market position of small business in Australia.

3. Griffiths Committee[163] (1989)

   Terms of reference covered:

   - the extent of controls of mergers, takeovers and monopolisation necessary to safeguard the public interest;
   - adequacy of existing legislation; and
   - the role and effectiveness of the Trade Practices Commission in its implementation of ss.46 and 50 of the Trade Practices Act..

---

[161] Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*. The inquiry was established by the then Minister for Business and Consumer Affairs, the Hon. John Howard MP.

[162] Trade Practices Consultative Committee, Small Business and the Trade Practices Act.

[163] Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition?*.

4. Cooney Committee[164] (1991)

   Terms of reference covered:

   - the adequacy of the existing legislative controls in the Trade Practices Act over mergers and acquisitions with particular reference to the appropriate test that should apply and whether a compulsory pre-merger notification be introduced;

   - whether in situations of existing market dominance, the Trade Practices Commission should be able to examine conduct in addition to that already covered by s.46 and if so, what action (including divestiture) might be taken;

   - the extension of s.52A (unconscionable conduct) to all commercial dealings; and

   - any other relevant matters.

5. Hilmer Committee[165] (1993)

   Terms of reference included:

   - whether the scope of the Trade Practices Act should be expanded to deal effectively with anti-competitive conduct in areas of business currently outside the scope of the Act;

   - alternative means for addressing market behaviour and structure;

   - whether the authorisation and exemption provisions have sufficient scope, flexibility and transparency;

   - the need for and approaches to the transition of government regulatory arrangements to more competitive and nationally consistent structures;

   - the best structures for regulation, including price regulation, in support of pro-competition conduct by government business and trading enterprises and the interests of consumers and users of goods and services; and

   - the past and present justification for the current exemptions from application of the Trade Practices Act.

---

[164] Report of the Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*.

[165] Report of the Independent Committee of Inquiry, National Competition Policy.

The report of the Hilmer Committee noted that, while a form of merger regulation is an important part of a national competition policy, the Committee concluded that "any more detailed review of the merger provision of the TPA could best be undertaken with the benefit of more practical experience with the amended provisions"[166]

6. Brazil Committee[167] (1993)

   The Committee examined Part X of the Trade Practices Act, which provides certain protection from competition law for participants in liner cargo shipping services.

7. Law Reform Commission[168] (1994)

   The Commission made recommendations aimed at encouraging compliance and facilitating enforcement.

8. Reid Committee[169] (1997)

   The Committee examined major business conduct issues arising out of commercial dealings between firms, particularly in the areas of franchising and retail tenancy.

9. Productivity Commission[170] (1999)

   The Productivity Commission undertook an inquiry into Part X of the Act, on liner cargo shipping services.

---

166 ibid., p 83.

167 Report of the Pt X Review Panel, *Liner Shipping Cargoes and Conferences.*

168 Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68.

169 House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance – Towards Fair Trading in Australia*.

170 Productivity Commission Report, *International Liner Cargo Shipping: Part X of the Trade Practices Act 1974.*

10. Baird Committee[171] (1999)

The Joint Select Committee on the Retailing Sector (Baird Committee) inquired into the degree of industry concentration within the retailing sector in Australia, with particular reference to the impact of that industry concentration on the ability of small independent retailers to compete fairly in the retail sector. Amendments have recently been made to the Trade Practices Act, including to the definition of "market" under s.50, as a result of the Committee's recommendations.

11. Productivity Commission (2001)

The Productivity Commission has recently completed three reports relating to aspects of the Trade Practices Act and the ACCC:

- the *Prices Surveillance Act 1983*;
- telecommunications competition regulation; and
- national access regime.

These reports are currently with the government. The Commission is also currently undertaking an inquiry into price regulation of airports.

An inquiry into section 2D, which provides certain exemptions from the Trade Practices Act for local government, has also recently been announced.

12. House of Representatives Economics Committee[172] (2001)

The Committee examined a range of issues with the operation of the ACCC.

13. Senate Legal and Constitutional References Committee (2002)

The Committee examined whether the *Trade Practices Act 1974* should be amended to:

- provide for a reversal of the onus of proof under section 46 in actions brought by the Australian Competition and Consumer Commission (ACCC) where it can first be shown that the corporation has a substantial degree of market power and has taken advantage of that power; and

---

171 Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure?*, August 1999.

172 House of Representatives Standing Committee on Economics, Finance and Public Administration, *Competing Interests: is there a balance?*, Parliament of Australia, Canberra.

- give the ACCC a power to order divestiture where an ownership situation exists that has the effect of substantially lessening competition.

B. Growth in Power of the ACCC

Over the past six years, the powers and operations of the ACCC have expanded considerably with many areas previously exempt now within its scope. The operations of the ACCC now directly impact on the commercial operations of business in almost every market. This table demonstrates the growth in power of the ACCC since 1995.

Significant additions to the powers of the ACCC since 1995

1995	Took over the functions of the Prices Surveillance Authority. Given power to arbitrate disputes over access to facilities of national significance. Extension of the TPA's restrictive trade practices provisions in relation to unincorporated entities (including the professions) under the competition code. ACCC given the power of enforcing the TPA in relation to government business enterprises.
1996	Extension of the TPA to cover all areas of business, including the previously exempt business activities of Australian local governments.
1997	ACCC assumed the primary role for competition and economic regulation of telecommunications services (including on-line services). ACCC given the role of Transmission regulator under the National Third Party Access Code for Natural Gas Pipeline Systems.
1998	Amendments to the TPA aimed at strengthening the position of small business: (i) Section 51AA prohibiting unconscionable conduct by a corporation engaged in trade or commerce. (ii) Section 51AC prohibiting a stronger party from dealing with a disadvantaged party in a harsh or oppressive manner in transactions under $ 1 million dollars. Not available to publicly listed companies. (iii) Section 51AD providing for codes of conduct to be enforceable under the Act.
1999	ACCC given competence over price exploitation and price monitoring in relation to the New Tax System with penalties of up to $ 10 million per offence (to 30 June 2002).

2001	ACCC assumes role as regulator of electricity transmission pricing from 1 January 2001. Major court decisions handed down that considerably broaden the application of s 46 - *ACCC v Rural Press; Melway Publishing Limited v Robert Hicks, ACCC v Boral.* On 26 July 2001, the Act was further amended. The amendments extended the ACCC's power to commence representative actions to include a contravention Part IV of the TPA. They simplified the requirements that the ACCC must satisfy before it may commence representative actions. In addition, the ACCC has been given the option of intervening, with leave of the court, in private proceedings which raise an issue of public interest. The amendments expanded the types of sanctions that a Court may impose. The Court may now make "community service orders", "probation orders", "corrective advertising orders" and "adverse publicity orders" where they find the Act has been breached. The penalties which the Court may order for a breach of the consumer protection provisions of the Act have also been increased to a maximum of $220,000 for individuals (from $40,000 previously) and $1.1 million (from $200,000) for corporations. In addition, the unconscionable conduct provisions have been extended to business transactions involving the supply or acquisition of goods and services to a value of up to $3 million (increased from $1 million). Furthermore, the limitation period in which a person must commence legal proceedings has been extended to six years from the date that a cause of action accrued. The ACCC has also been expressly empowered to investigate "regional mergers" in markets smaller than a single state, removing any doubts that such small mergers were within the ACCC's regulatory competence.

APPENDIX 2

APPENDIX 3 – GOVERNMENT RESPONSE TO BOARD OF TAXATION RECOMMENDATIONS ON THE INSPECTOR-GENERAL OF TAXATION

C98/02

16 September 2002

MINISTER RESPONDS TO INSPECTOR-GENERAL REPORT

Minister for Revenue and Assistant Treasurer Senator Helen Coonan today released the Board of Taxation's recommendations on the establishment of the Inspector-General of Taxation and the Government's response.

"As Minister for Revenue, my key priorities are to improve the responsiveness of the tax system to the genuine concerns of taxpayers and to ensure that the tax system is fair," Senator Coonan said.

"A vital part of the Government's election platform to improve the tax system is the establishment of the Inspector-General of Taxation as a new advocate for taxpayers and an independent adviser to Government on tax administration issues.

"On 29 May, I released a Consultation Paper outlining the Government's preliminary proposals for the office of Inspector-General of Taxation, and asked the Board of Taxation to conduct public consultation on this paper and to report with any recommendations.

"I have now had an opportunity to consider the Board's report and I am pleased to advise that the Government has accepted all the Board's recommendations in principle."

The Board of Taxation's recommendations and the Government responses are detailed in attachment A.

"I would like to congratulate the Board and thank each of its members sincerely for the excellent work that they have done within a tight timeframe," Senator Coonan said.

"I would also like to thank all those who participated in the consultation process by writing submissions and/or attending the round table meetings that the Board convened in Sydney, Melbourne and Canberra.

"I am appreciative of the depth of consideration given to the role of the Inspector-General and I know that the investment of time and intellectual effort by Board members, tax professionals and taxpayer representatives will result in a stronger and more effective Inspector-General of Taxation."

The Inspector-General of Taxation Report is available on the Board of Taxation website at www.taxboard.gov.au/inspector_general/index.htm

SPECIFIC RECOMMENDATIONS AND OUTCOMES

Recommendation 1

The legislation establishing the Inspector-General should include an object clause stating that the object of the legislation is to improve the way in which the Australian Taxation Office administers the Australian taxation system from the perspective of taxpayers.

Response: Agreed in principle.

Recommendation 2

In achieving this objective, the functions of the Inspector-General of Taxation should be broadly defined to include providing advice to the Government, reviewing the systems used by the Australian Taxation Office to administer the tax system, and making recommendations to the Government about how these systems could be improved.

Response: Agreed in principle.

Recommendation 3

The Inspector-General of Taxation should be established outside the Ombudsman's office, with the Ombudsman retaining its existing functions.

Response: Agreed.

Recommendation 4

The efficiency and effectiveness of the new office should be reviewed within five years of the appointment of the first Inspector-General of Taxation.

Response: Agreed.

Recommendation 5

The Inspector-General of Taxation should have a right of access to individual taxpayer information held by the Australian Taxation Office, but only to the extent necessary to carry out its functions, and should be under an obligation comparable to that of the Ombudsman to maintain the confidentiality of any such information.

Response: Agreed.

Recommendation 6

The Inspector-General of Taxation should be appointed by the Governor-General.

Response: Agreed.

Recommendation 7

The Governor-General should be able to remove the Inspector-General of Taxation from office only for misbehaviour or physical or mental incapacity.

Response: Agreed.

Recommendation 8

The Inspector-General of Taxation should be able to undertake work on both an "own motion" basis and in response to a direction given by a Minister. The legislation should not prescribe how the Inspector-General of Taxation's work priorities would be established.

Response: Agreed in principle. The Inspector-General will be able to undertake reviews on an `own motion' basis and will have a high degree of discretion in prioritising work.

However, the Inspector-General will be obliged to respond to directions from Treasury Ministers, to reinforce the Inspector-General's role in providing a new source of advice to the Government on matters of tax administration, independent of the Australian Taxation Office and the Treasury.

Recommendation 9

The Inspector-General of Taxation should be required to report annually to the Parliament. The legislation should require that the annual report outline the matters on which advice has been provided to the Minister, and list the formal reports given to the Minister, in the reporting period.

Response: Agreed in principle. The Inspector-General's enabling legislation will impose a special annual reporting requirement on the Inspector-General to ensure transparency.

Recommendation 10

The Inspector-General should be able to publish reports of reviews of the systems used by the Australian Taxation Office to administer the tax system, and recommendations to the Government about where these systems could be improved (but not advice to the Government), but only after giving the Minister a reasonable opportunity to comment. A person whose interests would be adversely affected by the publication should be given a reasonable opportunity to comment, and to have their comments included in the publication. The Inspector-General should not be liable to be sued for an act done in good faith in exercise of any power conferred by the legislation, including the power to publish.

Response: Agreed in part and in principle.

The Government agrees that it will be important for the Inspector-General's reports to be made public. It will be important for the Inspector-General to be accountable to taxpayers, their advisers and representatives, for the way in which taxpayers' concerns are addressed. It follows that the operations of the office of Inspector-General must be transparent and that the Inspector-General must maintain the respect and cooperation of taxpayers.

However, the Inspector-General of Taxation is not intended to duplicate the roles of the Auditor-General nor the Ombudsman, both of whom have a continuing public reporting role on tax administration.

A key function of the Inspector-General of Taxation will be to advocate the concerns of taxpayers to the Treasury Ministers to enable fast resolution of any systemic problems in the tax system. For this reason, the Inspector-General will report to the Treasury Ministers.

The Inspector-General's inquiries and reports may include recommendations for legislative amendments or changes in administrative processes. It is desirable for recommendations involving changes to the tax system to be released simultaneously with the Government's decision on such changes to avoid speculation and uncertainty about the taxation system. Accordingly, it is proposed that the Treasury Ministers would have the responsibility for releasing reports by the Inspector-General.

The Government agrees that, if there is criticism of the Commissioner or any other tax official arising from a review by the Inspector-General, then the Commissioner should have an opportunity to address such criticisms prior to completion of the report.

The Inspector-General of Taxation will be given appropriate immunity from being sued.

Recommendation 11

The Ombudsman's role in reviewing administrative action taken by the Australian Taxation Office, both in response to a complaint and on an "own motion" basis, should not be affected by the establishment of the Inspector-General of Taxation.

Response: Agreed.

Recommendation 12

The Inspector-General of Taxation should be obliged to consult with the Ombudsman and the Auditor-General in establishing a work program and priorities.

Response: Agreed. However, it is not intended that such a consultation arrangement would impinge on the independence of any of the statutory office-holders involved.

Recommendation 13

The Government should appoint as the inaugural Inspector-General of Taxation someone who:

(a) has a strong capacity to understand commercial and public sector issues in tax administration;

(b) is committed to community consultation and building constructive relationships with stakeholders; and

(c) has earned the trust of both government and external stakeholders.

Response: Agreed.

Recommendation 14

The establishment of the Inspector-General of Taxation should not affect the functions of the Board of Taxation.

Response: Agreed.

Recommendation 15

The Inspector-General of Taxation should not be an ex-officio member of the Board of Taxation.

Response: Agreed.

APPENDIX 3

APPENDIX 4 – RESPONSE TO THE ACCC'S PROPOSED REFORMS OF S 46

1. Introduction

This Appendix evaluates the proposed reforms to s 46 of the TPA which have been recommended by the ACCC. In summary, the ACCC has recommended that:

- s 46 be amended to include an effects test; and
- cease and desist orders be introduced to enforce s 46.

This Appendix is intended to supplement the points already raised by the Business Council in its Submission to the Review Committee and to provide a response, in particular, to the points raised by the ACCC in favour of incorporating an effects test into s 46 of the TPA.

2. The ACCC Proposal

(a) The legislative prohibition

Section 46 in its current form provides that:

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

Section 46 is directed at preventing firms with a substantial degree of market power from engaging in conduct with an anti-competitive purpose, which is open to it only (or predominantly) by virtue of the market power it enjoys. The underlying policy objective of s 46 is to promote the processes of competition. This was recognised by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Co Pty Ltd*[173], which commented that:

> *"[T]he object of s 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort … and these injuries are an inevitable consequence of the competition s 46 is designed to foster."*

---

[173] (1989) 167 CLR 177.

This focus on the processes of competition was also recognised in *Eastern Express Pty Ltd v General Newspapers Pty Limited*[174]:

> *"Part IV [of the Trade Practices Act] is designed to promote competition and the role of section 46 is to maintain competitive markets by restraining misuses of market power that will produce a non-competitive market"*.

In line with current judicial interpretation[175], conduct will only contravene s 46 if:

- a corporation has a *substantial degree of market power*;
- the corporation has *taken advantage* of its market power. In this context, "taken advantage of" means that a corporation has "used" its power to engage in conduct in which it would not have engaged (in the "reality of the market") if it did not have substantial market power[176] - it does not require conduct which is predatory or morally blameworthy[177]; and
- that conduct satisfies *one of the three proscribed purposes*.

(b) The amendment proposed to s 46

The ACCC has proposed that s 46 of the TPA be amended to include an effects test. The relevant provision would read as follows:

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

---

174 (1992) 35 FCR 43, per Lockhart and Gummow JJ, at 58.

175 See the most recent High Court decision on section 46, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 75 ALJR 600.

176 The majority judgement of the High Court in *Melway* noted that "*it may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the existence of power, even though it may not have been absolutely impossible without the power. To that extent, one may accept the submission made on behalf of the ACCC, intervening in the present case, that section 46 would be contravened if the market power which a corporation had made it easier for the corporation to act for the proscribed purpose than otherwise would be the case.*" (2001) 75 ALJR 600; [2001] HCA 13 at para. 51.

177 Ibid at para.26.

(c) ACCC Arguments for an effects test

In general terms, the ACCC supports the introduction of an effects test in s 46 on the basis that[178]:

> *"The Commission believes that the provisions of section 46 are generally appropriate…however the Commission believes that it is wrong in principle that when a corporation with a substantial degree of power in a market takes advantage of it in an illegitimate manner (for example by predatory conduct that involves substantial pricing below cost) with the effect of damaging competition, it is not prohibited. The absence of an effects test in section 46 constitutes a gap in Australia's competition law."*

More particularly, the ACCC has supported its inclusion of an effects test for the following five reasons:

- an effects test in s 46 would better serve the object of the TPA in protecting the process of competition and fair trading;
- s 46 would be brought into line with the other prohibitions in Part IV of the TPA which are generally directed towards conduct that has the purpose or effect of damaging competition;
- the effects test would overcome enforcement difficulties associated with proving purpose in a range of circumstances;
- an effects test is better suited to examining conduct in new technology markets where network effects are present; and
- s 46 of the TPA would be consistent with international best practice, including the United States and Europe.

Each argument is examined in turn.

"Section 46 does not currently fulfil the objective of protecting the process of competition and fair trading"

The ACCC states that Part IV of the TPA is underpinned by a common policy objective of protecting competition[179]. In this regard, the ACCC refers to s 2 of the TPA which provides that:

> *"The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".*

According to the ACCC's argument, this objective is achieved by way of prohibitions on various types of conduct that are likely to be damaging to competition and fair trading. It

---

178 ACCC, Submission to the Review Committee (June 2002, p 60).

179 Ibid, section 3.3.1.

follows, therefore, that if a firm takes advantage of its substantial market power to damage the competitive process (presumably irrespective of that corporation's purpose), this is contrary to the underlying economic aims of the TPA.

The ACCC therefore concludes that the current drafting of s 46 ignores the actual competitive effects of conduct and is therefore inconsistent with the underlying policy of the TPA.

Accordingly, the ACCC believes that commercial strategies that are both non-competitive (interpreted by the ACCC as meaning inconsistent with competitive market behaviour) and that lead to actual damage to competition should be prohibited, even though it may not be possible to discern an anti-competitive purpose motivating the conduct in question.

Has the ACCC made out its case sufficient to justify a change to s 46?

In summary:

- the effects test proposed by the ACCC will establish a low threshold for liability which is likely to catch socially beneficial, competitive behaviour.

- the effects test will lead to greater commercial uncertainty for all businesses and may deter lawful competitive conduct, thereby creating an efficiency cost.

The ACCC's proposed effects test is erroneously orientated towards the protection of individual competitors, in particular small businesses. Instead, s 46 should seek to promote the process of competition and efficiency in the Australian economy consistent with economic and competition legal theory.

The key issue here is whether the effects test in the form proposed by the ACCC achieves the policy objective set out in s 2 of the TPA. If s 46 were to be amended in accordance with the ACCC's proposal and taking into account current judicial interpretation, conduct would contravene s 46 if:

- the corporation has a *substantial degree of market power*;

- the corporation has *taken advantage* of its market power (in the sense described above); and

- the corporation engages in that conduct *for the purpose of* achieving one of the three proscribed events; or

- that conduct has *the effect or the likely effect of* one of the three proscribed events.

The three proscribed events would remain:

- eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

- preventing the entry of person into that or any other market; or

- deterring or preventing a person from engaging in competitive conduct in that or any other market.

The effects test, as formulated, will establish a low threshold for liability

Most vigorous (legitimate) competitive conduct is likely to have a subjective purpose of damaging competitors or deterring or responding to their competitive behaviour. Rational, competitive conduct will even more commonly have that effect. Therefore, both ostensibly pro-competitive conduct (for example, conduct which enhances efficiencies) and anti-competitive conduct (such as exclusionary conduct) may have a proscribed purpose or a proscribed effect.

The application of those three events in the context of an effects test establishes a low threshold for liability. It is arguable that *any* conduct on the part of a corporation which has a substantial degree of market power may have the effect or likely effect of, say, deterring or preventing a person from engaging in competitive conduct in that or any other market. This would come at a time when the liability threshold has already been lowered by narrower market definitions, as in the *Boral* case[180].

The ACCC argues that the "taking advantage" component of s 46 acts as the filter which distinguishes competitive conduct from anti-competitive conduct, when the "take advantage" element is considered in conjunction with the purpose element. This, however, is debatable when current judicial interpretation of this element of s 46 simply requires a corporation to "use" its market power[181] to engage in conduct which it would not have engaged in but for its market power. Furthermore, recent case law suggests that the assessment of conduct a corporation would have engaged in (in the context of a workable competitive market) may only require the conduct in question to be "materially facilitated" by the corporation's market power[182].

In light of ''the interpretation of "taking advantage", this element of s 46 is unlikely to distinguish desirable conduct which may inadvertently have a proscribed anti-competitive effect from conduct which is motivated by an anti-competitive purpose. Indeed, the Full Federal Court in *Melway*[183] recognised that the maintenance of a distribution system necessarily involves the deterrence or prevention of competition from would-be distributors. The two concepts (one which may be regarded as competitive, the other anti-competitive) are, as Heerey J commented, "*both sides of the same coin*"[184].

It is therefore debatable whether the "taking advantage" element of the s 46 will, as the ACCC contends, act a safeguard against the risk of innocent competitive behaviour contravening the proposed s 46 prohibition.

---

180 (2001) 106 FCR 328. This case is currently on appeal to the High Court.

181 *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited and Anor* (1989) 167 CLR 177.

182 *Melway*, ibid.

183 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [1999] FCA 664.

184 Ibid at 562-25.

The effects test, as formulated, will lead to greater commercial uncertainty and is likely to stymie or deter competition

For the reasons stated above, the application of an effects test in the form proposed by the ACCC is likely to lead to even greater regulatory uncertainty on the part of corporations which may be found to have a substantial degree of market power. This is undesirable from both a legal and a practical perspective.

From a legal perspective, in light of the level of pecuniary penalties which may be imposed on a corporation found to contravene s 46 (that is, a financial penalty of up to $10 million for corporations and up to $500,000 for individuals[185]), there is an argument that corporations should be in a position to know, with some degree of certainty, what is lawful before engaging in a particular course of conduct. Indeed, it is incumbent on the Courts to construe the section in such a way as to enable any corporation with a substantial degree of market power to know with certainty what is unlawful before that corporation carries out the act in question: see the *Melway* case.

Arguably, therefore, it is also incumbent on the legislator to pass legislation which is sufficiently certain such that all corporations are able to comply with it. This view is supported by the Terms of Reference of the 1976 Swanston Committee which provided that:

> *"The committee shall pay particular attention to ensure that the Trade Practices Act is sufficiently certain in its language to enable persons affected by it to understand its operations and effect so as to be reasonably able to comply with its obligations in the ordinary course of business".*

Moreover, from a practical perspective, it is equally questionable whether a corporation should be subject to an inherent uncertainty in the application of s 46 when assessing or formulating its commercial strategies on a day-to-day basis, particularly as the threshold established by the effects test, as proposed by the ACCC, would be relatively low. Corporations would either be faced with a high degree of commercial uncertainty when assessing their exposure to regulatory risk or, in the alternative, the prospect of carrying out a potentially costly and time consuming economic assessment of whether a proposed course of conduct would have the effect, or even the <u>potential</u> effect of resulting in one of the three proscribed outcomes.

Therefore, rather than enhancing the welfare of Australians through the promotion of competition in accordance with s 2 of the TPA, there is an argument that the uncertainty inherent in the "effects" test proposed by the ACCC could result in potentially "chilling" the outcome of usual market disciplines and, furthermore, potentially deterring competition. Such a disincentive to compete is likely to be costly to the Australian economy and to Australian consumers.

This view is supported by the Productivity Commission's submission to the Review Committee. The Productivity Commission noted that because an effects test will catch unintended conduct, this may lead to decisions not to engage in competitive conduct for fear of regulatory response and such decisions have an efficiency cost. The proposed effects test

---

[185] Section 76 of the TPA. In addition, damages and injunctive remedies are available under sections 80 and 82 and remedial orders under section 87.

has also been opposed in submissions to the review by former Trade Practices Commission Chairman McComas, former Commissioner Pengilley, the Law Council of Australia and a large majority of businesses.

The effects test, as proposed by the ACCC, will not promote the process of competition

The ACCC argues in paragraph 3.3.1 in its Submission that the prohibitions in Part IV (including the s 46 prohibition) are underpinned by a common policy objective of protecting competition. In this context, the ACCC also refers to s 2 of the TPA, which provides that the object of the TPA is to *"promote competition and fair trading"*.

But rather than focusing on the effects of conduct on the dynamics of competition in a market, the ACCC's drafting focuses, for the most part, on the effect on individual competitors.

Indeed, the Productivity Commission has argued that s 46 should not be particularly orientated towards the needs of small firms and that there is no evidence that small business is facing any systemic or deep-rooted problems that stem from anti-competitive behaviour by large businesses[186]. Rather, the Productivity Commission agrees that s 46 should be directed towards promoting efficiency and this goal will not necessarily be met by using s 46 as a "fair trading" clause. Relations between small and large firms, the Productivity Commission argues, may be better managed under Part IVA or outside the TPA altogether (for example, by way of industry specific codes of practice).[187]

Firm size distribution in a market reflects costs and demand conditions and therefore, s 46 should not be used as a policy tool to protect small firms from being disadvantaged by the benefits being enjoyed by larger firms. Thus, while small firms may appear vulnerable, this can be easily misinterpreted by small business as the hallmark of market power exerted by big business rather than the result of vigorous competition[188]:

> *"large firms are merely successful small firms - it is incongruous to depict as adverse to the interests of small firms that some of them may grow"*

Finally, the Productivity Commission notes that small businesses themselves may posses market power. However, because the "footprint" is smaller, it may be harder to detect.

In summary, therefore, not only is the proposed effects test likely to deter legitimate competitive activity, but it also flies in the face of the stated policy objective of the TPA and s 46.

"Section 46 is not consistent with the other prohibitions in Part IV of the TPA, which are generally directed towards conduct that has the purpose or the effect of damaging competition".

The ACCC's argument

---

186 Productivity Commission, Submission to the Review Committee (July 2002, p 29).

187 Ibid at 30.

188 Ibid at 29.

The ACCC argues that s 46 is inconsistent with the other Part IV prohibitions because its sole focus is on purpose and other provisions in Part IV are framed in terms of purpose or effect. The ACCC goes on to argue that as the TPA is intended, from a policy perspective, to encourage efficiency, it is both unnecessary and undesirable for this efficiency motivation to be undermined by conduct (particularly by firms having substantial market power) which has anti-competitive effects.

In summary:

- the proposed effects test in s 46 does not achieve consistency with other provisions of the TPA, which examine the effect on competition in terms of a substantial lessening of competition.

The effects test proposed by the ACCC is not symmetrical with s 45 and s 47 of the TPA

Firstly, while there may be merit in the argument that prohibitions which share the same policy objective should also share a common legislative 'architecture', the effects test proposed by the ACCC does not achieve consistency with either s 45 of the TPA (which prohibits agreements, arrangements or understandings which have as their purpose or effect a substantial lessening of competition in a market) or s 47 of the TPA (which imposes a similar standard for exclusive dealing arrangements). The assessment of an agreement, arrangement or understanding in both sections 45 and 47 of the TPA is conducted in the context of a substantial lessening of competition in a market. In contrast, the ACCC has proposed that conduct on the part of a corporation having substantial market power should be prohibited if it has the effect or likely effect of one of three proscribed events.

Not only is there an inconsistency on the face of the ACCC's proposed drafting, but there is also a substantive inconsistency concerning the threshold for liability in s 46 and that which applies in sections 45 and 47. As noted above, conduct which has the effect of "deterring or preventing a person from engaging in competitive conduct" is a significantly lower threshold than conduct which would have the effect or likely effect of "substantially lessening competition". An analysis of whether there has been a substantial lessening of competition focuses on the effect on competition in the whole market and not on the ability of one given player to compete. However, as noted in the body of this submission, merely replacing the paragraphs of s 46(1) with a 'substantial lessening of competition; test does not overcome the fundamental problems of an effects test.

Similarly, the Productivity Commission's submission noted that the ACCC's argument in favour of consistency *"does not withstand deeper scrutiny"*. In particular, the Productivity Commission remarked that the context in which the same words appear will mean that the impact on competition/economic welfare will differ[189].

The low threshold established by the effects test fails to appreciate the nature of competition.

The ACCC has sought to justify a lower threshold for liability in the context of s 46 by arguing that[190]:

---

189 Ibid at 33.

190 ACCC, Submission to the Review Committee (June 2002, p 94).

> *"The assumption is that if a firm has substantial market power and engages in non-competitive conduct that is damaging to an individual competitor or to a potential competitor, that conduct will be sufficiently detrimental to competition and fair trading (and the welfare of Australians) to justify prohibition".*

This argument, however, fails to recognise that the legitimate and competitive activity of a player having a substantial degree of market power may be vigorous and may result in one of the three proscribed events set out in s 46 (i.e. constitute so-called "anti-competitive conduct"), even where there is no subjective anti-competitive purpose and the conduct is motivated by a legitimate business rationale of competing vigorously. Rather[191]:

> *"Antitrust legislation is concerned primarily with the health of the competitive process, nor with the individual competitor who must sink or swim in competitive enterprises".*

It follows that if a competitor exits a market, or a potential competitor is deterred from entering a market, it does not inexorably lead to the conclusion that it is the 'victim' of an abuse of market power or that the outcome is necessarily "anti-competitive". Entry or exit from a market may simply indicate that the dynamics of competition in that market are at work.

"The effects test would overcome enforcement difficulties associated with proving purpose in a range of circumstances"

The ACCC contends that in the absence of "smoking gun" documents, proving the relevant purpose under s 46 to the satisfaction of a court is an "onerous forensic purpose" and cites a number of factors in support of this proposition.

Has the ACCC made out its case sufficient to justify a change to s 46?

In summary:

- the ACCC has effective legislative tools at its disposal for discerning "purpose".
- the ACCC has extensive investigative powers at its disposal to seek evidence of "purpose".
- the ACCC need only adduce evidence to satisfy the civil standard of proof - that is, "on the balance of probabilities".
- The ACCC has had a number of successes in bringing proceedings under s 46.
- For these reasons, it is doubtful whether the ACCC requires an effects test to overcome any enforcement difficulties associated with proving a purpose.

There are a number of arguments that support the proposition that the ACCC is not faced with an "onerous" forensic purpose in proving the requisite "purpose" in s 46.

---

[191] *Pacific Engineering and Production Company of Nevada v Kerr-McGee Corporation* 555 F 2d 790 (10th Cir 1977) at 795.

The TPA contains legislative tools relevant to discerning "purpose"

Section 46(7) of the TPA permits a court to infer purpose from any relevant circumstances, notwithstanding that there may be direct evidence before a court to the contrary. For example, in *ACCC v Universal Music Australia Pty Ltd (No. 2)*[192], Hill J stated that he had no difficulty in inferring that the respondent's refusal to supply stock to retailers who sold parallel imported compact discs was motivated by their intention to prevent the entry into the wholesale market of persons who would sell imported recordings under the Universal or Warner labels.

Section 4F(1)(b) of the TPA provides that a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if, *inter alia*, that purpose or reason was or is a substantial reason. The three proscribed purposes specified in s 46, therefore, need only be a substantial purpose and not the only purpose.

In addition, there is authority to support the proposition that the purpose of conduct may be inferred from the nature of the conduct in question, the circumstances in which that conduct occurred and its likely effect. For example, in *General Newspapers Pty Ltd v Telstra Corp*[193], the Court regarded "purpose" in s 46 as meaning "*the effect which it is sought to achieve - the end in view*"[194].

The outcome, therefore, is a flexible framework in which the Court has the opportunity to infer the necessary purpose, even if there is direct evidence to the contrary.

The ACCC has extensive investigative powers at its disposal

The ACCC has extensive powers at its disposal under s 155 to seek evidence of purpose. Section 155(1) of the TPA empowers the ACCC to compel a person to:

- furnish information in writing;
- produce documents; or
- to appear before the ACCC and to give evidence under oath,

in circumstances where the ACCC believes that a person is capable of furnishing information, producing documents or providing evidence relating to a matter that may constitute a contravention of the TPA.

Section 155(2) of the TPA gives the ACCC the power to issue a notice and enter any premises to inspect documents and to take copies of those documents where the ACCC has reason to believe that a person has engaged in, or is engaging in conduct that constitutes, or may constitute a breach of the TPA.

---

192 [2002] FCA 192; currently under appeal.

193 (1993) 45 FCR 164.

194 See also *Dowling v Dalgety Australia Limited* (1992) 34 FCR 109.

In addition, the extent of the ACCC's powers under s 155 becomes even clearer, given that s 155 excludes the privilege against self-incrimination and the position regarding the ACCC's rights of access to documents subject to legal professional privilege is unclear pending the outcome of the appeal in *Daniels*[195].

It is also important to note that in the *Rural Press* case[196], one of the most recent cases on s 46, the ACCC relied heavily on internal documentation discovered pursuant to a s 155 notice.

Civil standard of proof

Section 46 of the TPA is found in Part IV of the TPA and by virtue of s 78 of the TPA, the relevant standard of proof is the civil standard of proof – that is, "on the balance of probabilities", rather than the higher, criminal burden of proof of "beyond reasonable doubt". This was confirmed by the Full Federal Court in *The Heating Centre Pty Ltd. v. TPC*[197], which found that in characterising the proceedings under s 46 as civil, Parliament must be taken to have intended that the Federal Court would apply the civil standard of proof.

Contrary to the ACCC's claim, therefore, that it has been unable to bring proceedings in the past where conduct appeared to have an anti-competitive effect but it could not have proved the requisite purpose, surely there is an argument that there may not have been, as a practical matter, an anti-competitive purpose at all <u>even on the balance of probabilities</u> and therefore no case to make out.

Success in previous s 46 cases

In any event, the ACCC's recent success in bringing an action under s 46 of the TPA would tend to suggest that the ACCC does not have "onerous forensic difficulties" it claims to have in proving the requisite purpose to the satisfaction of the Court – see the examples set out at pages 96-97 of the Business Council's initial submission to the Review Committee and the examples the ACCC itself provides at paragraph 3.3.3 of its submission, noting that:

> *"In the last few years, the Commission has instituted a number of cases under section 46…".*

In addition, the ACCC referred to Northrop J in the *CUB*[198] case as providing a summary of the difficulty of establishing sufficient evidence of a proscribed purpose under s 46:

> *"A contravention of [section 46] may take many forms and in many cases a wink, a look or a nod may be more effective than the written or expressed word. Proof of those aspects may be difficult to obtain".*

However, it should be remembered that the ACCC succeeded in *CUB* and the defendant was ordered to pay a penalty of $185,000. At that time, the maximum pecuniary penalty which

---

195 *ACCC v Daniels Corp International* [2001] FCA 244.

196 *ACCC v Rural Press Limited (2001)* 96 FCR 389.

197 (1986) ATPR 40-674.

198 *Trade Practices Commission v Carlton & United Breweries* (1990) ATPR 41-037 at 51, 549.

could be imposed was $250,000 and so the award in this case was at the higher end of the scale.

Proving an effect may be more onerous than proving purpose

Indeed, notwithstanding the low threshold established by the ACCC's proposed formulation of an effects test, there is also an argument that it may be more difficult for the ACCC to prove an effect or a likely effect of conduct in s 46 proceedings.

While a Court may infer the relevant purpose from all the relevant circumstances and the purpose at issue need only be a substantial purpose, a Court has no power to infer an effect or a likely effect from the relevant circumstances. The ACCC, therefore, would have to adduce positive evidence to the Court and engage in a complex analysis of the market, the dynamics of competition in that market and possibly the potential effects of the conduct in question. Moreover, the ACCC would have to adduce evidence of a causal link between a corporation's market power, the conduct under scrutiny and the alleged effect or potential effect.

An effects test will increase the scope for regulatory error

There is also likely to be a higher incidence of regulatory error in applying an effects test. The assessment of whether a corporation has "taken advantage of" its market power giving rise to a prohibited effect will involve:

- the construction of a hypothetical market scenario or the workable realities of competition;
- an analysis of whether a corporation would have engaged in a course of conduct but for its market power; and
- establishing a casual link between that conduct and a proscribed effect,

all of which may leave room for extensive second guessing of competitive behaviour and a greater risk that competitive behaviour will be condemned (a false positive) or anti-competitive behaviour will not be condemned (a false negative). As the Productivity Commission noted in its submission to the Review Committee[199], a purpose and effects test is likely to have a higher false positive rate and a greater tendency to deter some forms of pro-competitive conduct. Further, as Dr Pengilley points out in his supplementary submission, an effects test would enable s 46 to be used for tactical, and anti-competitive purposes[200].

"An effects test is better suited to examining conduct in new technology markets where network effects are present".

The ACCC's arguments

In summary, the ACCC argues that characteristics of high-technology markets (such as substantial investment in research and development, network effects and high fixed costs and low marginal costs) create incentives for unilateral anti-competitive conduct, such as tying,

---

199 Productivity Commission, Submission to the Review Committee (July 2002, p 17).

200 W Pengilley, Supplementary Submission to the Review Committee (June 2002, p 2).

predatory pricing or exclusionary behaviour. According to the ACCC, the application of a "purpose" test (rather than an effects test) could allow significant harm to occur to rapidly developing, high technology markets before action can be taken under s 46. In addition, the ACCC also notes that UK experience advocates a "first principles" approach to high-technology and network markets, under which the focus of an investigation is primarily on the anti-competitive effects of market conduct[201].

Has the ACCC made out its case sufficient to justify a change to s 46?

In summary:

- the ACCC already has tools at its disposal to intervene in instances where conduct may significantly damage high technology markets
- an effects test already is in force in relation to telecommunications markets
- an effects test may not be appropriate for other high technology markets

The ACCC's case appears to be focussed on the length of time it may take between significant harm occurring to high-technology markets as a result of anti-competitive conduct and achieving a legal outcome. This, according to the ACCC, would be overcome by the introduction of an effects test.

However, if the perceived issue with high-technology market is, as the ACCC contends, enforcement difficulties, it is suggested that:

- the ACCC already has the power to seek interim interlocutory injunctions which could be used to intervene at short notice in cases where significant harm may be caused to a market; and
- importantly, it is likely that evidence as to the purpose may be adduced more quickly and readily as opposed to potentially complex evidence as to the effect on competition.

Importantly, since 1 July 1997 the ACCC has had recourse to an effects based version of s 46 in relation to telecommunications markets[202] which may be described as being "high-technology". Nevertheless, this has not resulted in the ACCC successfully bringing an action against any corporation for a contravention of this equivalent of s 46. In any event, other high technology areas are not big industries in Australia and therefore, an effects test is not warranted.

---

[201] Office of Fair Trading, "Innovation and Competition Policy", Economic Discussion Paper 3, March 2002, at 14.

[202] Section 151AJ(2) and section 151AK(1) of the TPA.

It is important to note that the Productivity Commission[203] also argues that an effects test is not necessary to regulate high technology markets for the reason that:

- significant inventions can be patented, so there is less incentive for corporations to engage in prohibited anti-competitive conduct as a legal basis for insulating themselves from competition;

- convergence in telecommunications, the internet, broadcasting and content will not necessarily accentuate market power and may, in face, be pro-competitive by encouraging new entry into the market, and

- there is a particular risk of regulatory error in relation to high technology industries because information concerning what is 'reasonable' conduct is poor and analytical frameworks are underdeveloped.

Section 46 of the TPA would be consistent with international best practice, including the laws of the United States and Europe

The ACCC's arguments

The ACCC argues that s 46 in its current form is inconsistent with the relevant legislative provisions of the laws of a number of countries, including the United States and Europe. In support of this argument, the ACCC states that:

- s 2 of the *Sherman Act* provides that it is a felony for a person to "monopolise or combine or conspire with any person to monopolise any part of trade or commerce among the several states" and has been found to require the relevant purpose to be examined by reference to the effect on competition of the conduct of the person; and

- Article 82 of the Treaty of Rome prohibits, in broad terms, any abuse of a dominant position which may affect trade between Member States.

Has the ACCC made out its case sufficient to justify a change to s 46?

In summary:

- a call for uniformity with the competition regimes in other jurisdictions is a weak basis for the adoption of an effects test in Australia.

- the overriding consideration should be whether an effects test is appropriate and necessary for the efficient operation of the Australian economy.

- the effects test as proposed by the ACCC goes well beyond any comparable provision overseas.

It is true that on the face of it, the relevant provisions of US and EU law do appear to focus on the effects of conduct. Nevertheless, the inclusion of an effects test in overseas jurisdictions cannot support the inclusion of an effects test in Australia simply on the basis of uniformity,

---

[203] Productivity Commission, Submission to the Review Committee (July 2002, p 31).

given that legislation overseas may be based on a policy objective or, as a practical matter, the test may be interpreted in a manner specific to the jurisdiction in question.

Section 2 of the Sherman Act - different practical application

Insofar as s 2 of the *Sherman Act* is concerned, there is an argument that the standard which is applied is considerably more stringent than the standard envisaged by the ACCC under s 46. In interpreting the *Sherman Act*, the US Courts have commented that[204]:

> *"competition is a ruthless process. A firm that reduces costs and expands sales injures rivals - sometimes fatally….These injuries to rivals are by-products of vigorous competition and the antitrust laws are not balm for rivals' wounds".*

Against this background, US Courts begin their interpretation of s 2 of the *Sherman Act* on the basis that a plaintiff must show:

- the possession of monopoly power in the relevant market; and
- the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident[205].

Moreover, it was held in *Standard Oil v US*[206] that a breach of s 2 required sufficient evidence to establish that the corporation's behaviour was "not as a result of normal methods of industrial development" - in other words, that the behaviour was not using the corporation's market power[207].

In effect, s 2 of the *Sherman Act* requires a plaintiff to satisfy a stringent burden and it is not enough for a plaintiff to show that a single firm appears to restrain trade unreasonably, given that even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival whose own ability to compete may suffer as a result. Rather, "*this is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster*"[208]. Section 2 of the *Sherman Act* governs the unilateral conduct only when it threatens actual monopolisation[209]. The practical application of s 2 of the *Sherman Act* suggests that the relevant threshold of the effects test is a significantly more stringent threshold than that proposed by the ACCC. The prohibition in s 2 will only come into effect when it can be shown that unilateral conduct threatens actual monopolisation, as opposed to conduct which has the effect or the potential effect of leading to one of three specified outcomes.

---

204 *Ball Memorial Hospital, Inc v Mutual Hospital Insurance, Inc*., 784 F.2d 1325 (7th Circuit, 1986).

205 *United States v Grinnell Corp*., 384 US 563, 570-71 (1966).

206 221 US 1 (1911).

207 Chief Justice White did not provide any further elaboration on this point.

208 *Arthur S. Langenderfer Inc v S.E. Johnson Co*. 917 F.2d 1413 C.A.6 (Ohio) 1990, quoting *Copperweld Corp v Independence Tube Corp.*

209 *Copperworld Corp v Independence Tube Corp*, 467 U.S. 752, 767, 104 S. Ct. 2731, 2739, S1 L. Ed. 2d 628 (1984).

Article 82 of the Treaty of Rome - different policy objective

In addition to a different practical application, it may also be the case that a provision in overseas legislation which, on the face of it, is equivalent to s 46 of the TPA may be based on a different set of policy objectives aside from, or in addition to, promoting the competitive process.

For example, the principles governing Article 82 of the Treaty of Rome are:

- the Europeans' stated commitment to competition "*as bringing out the best in Community industry*"; and

- Article 3(1)(g) of the Treaty of Rome provides that activities of the European Community shall include the institution of "*a system ensuring that competition in the internal market is not distorted*".

Article 82 of the Treaty of Rome therefore seeks to assist in the creation of a single European market, a policy objective wider than the promotion of competition and competitive markets. In this way, the other underlying policy objectives of general European Law may also have an impact on the application of Article 82. For example, the protection of the environment and the preservation of cultural diversity are now expressed as distinct objectives under the Treaty of Rome and will be taken into account, where appropriate, in particular cases.

While there may be some merit in examining how other jurisdictions seek to distinguish between pro-competitive and anti-competitive unilateral conduct on the part of a corporation having market power, the overriding consideration should be whether an effects test is appropriate to the operation of the Australian economy. In this regard, it is noted that the Australian economy is not concerned with the operation of a single market between a number of sovereign states (as is the case in Europe) and that the economy itself is significantly smaller than that of the United States and Australia's other trading partners. Indeed, the equivalent provision to s 46 in New Zealand, a country with a comparable sized economy to Australia, is not based on an effects test.

The Productivity Commission adopted a similar view in its submission to the Review Committee, reasoning that comparisons with other countries are not necessarily helpful as different tests in different jurisdictions may operate quite differently to the manner envisaged by the ACCC. The Productivity Commission concluded that[210]:

> *". . . the use of effects tests in some jurisdictions provides weak evidence for its adoption in Australia".*

3. The ACCC's proposal to introduce cease and desist orders to enforce s 46

(a) The ACCC's case

The ACCC has proposed the introduction of cease and desist orders in order to counter the difficulties it perceives with the enforcement of s 46, in particular the "*significant length of*

---

[210] Productivity Commission, Submission to the Review Committee (July 2002, p 35).

time between anti-competitive uses of market power and the final legal outcomes in these matters". The ACCC considers that the introduction of cease and desist orders (which would restrain corporations from engaging in specified conduct) would enable the TPA to address misuses of market power more expeditiously.

(b) Proposed model for cease and desist orders

The ACCC has proposed a model based on the one found in s 74A of the New Zealand *Commerce Act.* In summary, the ACCC has proposed that a cease and desist order would be available where the ACCC is reasonably satisfied that a corporation has contravened s 46 and such contravention is:

- likely to cause loss or damage to particular persons or consumers generally;
- there is an urgent need to prevent the continuation of the conduct in order to prevent such loss or damage; and
- the conduct is contrary to the public interest.

Under the ACCC's proposed model, the ACCC would be obliged to consider submissions by the corporation in question before issuing a cease and desist order. The ACCC envisages that the order would operation for a limited duration (for example, 90 days) and would be subject to judicial review. Judicially imposed penalties and injunctions would be available for breach of a cease and desist order.

(c) The ACCC's arguments in support of cease and desist orders

The ACCC has put forward several arguments in favour of the introduction of cease and desist orders for the enforcement of s 46. These are:

(i) Speed

The ACCC believes that cease and desist orders will provide an effective and practical answer to the irreparable damage done to competition during the period in which alleged anti-competitive conduct is normally pursued by way of legal proceedings. The ACCC argues that the introduction of cease and desist orders would facilitate early intervention to maintain the status quo of the market until such time that the alleged contravener ceases the conduct or the matter comes before the court for adjudication under s 46 of the Act. Cease and desist orders would therefore prevent the alleged contravener from profiting from the illegitimate conduct in the intervening period before proceedings commence;

(ii) Informal resolution of disputes

The ACCC argues that the introduction of cease and desist orders would benefit all parties by promoting and resolving disputes in a more timely and cost effective manner. According to the ACCC, the issuing of cease and desist orders may avoid the need for litigation at all where the subject of an order ceases engaging in the impugned conduct, with the effect that any damage is avoided or remedied; and

(iii) Deterrent effect

The ACCC also argues that the availability of cease and desist orders would have a deterrent effect and thereby would promote a higher standard of competitive behaviour.

(d) Checks and balances on the use of cease and desist orders

The ACCC argues that the proposed model for cease and desist orders incorporates "rigorous" safeguards to ensure their use is appropriate, balancing the interests of the recipient of an order with the overriding objective of protecting competition:

(i) Preliminary thresholds

A cease and desist order would only be imposed when the preliminary thresholds are fulfilled to the reasonable satisfaction of the ACCC;

(ii) Natural justice requirements

Prior to issuing a cease and desist order, the ACCC would consider submissions put forward by the alleged contravener concerning why such an order should not be imposed in the circumstances;

(iii) Ability to issue orders rests solely with the ACCC

Similar to the ACCC's "careful and considered" approach to the use of competition notices under Part XIB of the TPA, the ACCC argues it would be unlikely to issue cease and desist orders frequently or carelessly, given that the ACCC has no incentive to pursue unmeritorious claims;

(iv) Limited duration

Cease and desist orders would operate for a strictly limited period and would expire upon withdrawal, at the end of the specified period or upon the commencement of proceedings; and

(v) Oversight by the Courts

Cease and desist orders would be subject to the original jurisdiction of the High Court and would provide for a statutory right of review as to the validity of an order. In addition, the orders would be enforceable only by the Courts.

Has the ACCC made out its case for the introduction of cease and desist orders to enforce s 46?

In summary:

- the ACCC does not need the power to make a cease and desist order to enforce s 46
- cease and desist orders may not necessarily save time
- the ACCC will not be sufficiently accountable in the exercise of its powers
- cease and desist orders may compromise the policy objectives of the TPA and s 46
- the constitutionality of cease and desist orders is questionable

Cease and desist orders are not necessary to enforce s 46

It is questionable whether the power to make cease and desist orders are necessary to enforce s 46 given that the ACCC is already able to seek interlocutory injunctions in the Federal Court on short notice (in as little as 26 hours, according to the ACCC, for *ex parte* injunctions[211]) and it is always open to the ACCC to accept s 87B undertakings.

In particular, insofar as interlocutory injunctions are concerned, it is likely that a Court will grant relief under the present rules if the ACCC can demonstrate that:

- there is a serious issue to be tried;
- the balance of convenience is in favour of granting relief. In the context of s 46, this element will require the ACCC to show that some continuing damage to competition will occur in the short term if injunctive relief is not granted[212]; and
- there are no discretionary reasons for refusing the grant of the relief sought.

Importantly and unlike private litigants, the ACCC is not required to give an undertaking as to damages as a criterion for obtaining an interlocutory injunction.

The ACCC's belief that the test for obtaining an interlocutory injunction is too demanding[213] should be treated with some caution given that the ACCC need only demonstrate that there is a serious issue to be tried. While this will require the ACCC to adduce cogent evidence of the alleged contravention of s 46, the investigative time required by the ACCC to seek an interlocutory injunction is likely to be considerably shorter than the length of time needed to issue Court proceedings. Moreover, given its powers under s 155 of the TPA, it is doubtful whether the ACCC would, as a practical matter, have difficulty in[214] "*quickly [gathering]*

---

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

212 *Tytel Pty Ltd & Ors V Telecom* (1986) ATPR 40-711.

213 ACCC, Submission to the Review Committee (June 2002, p 99).

214 Id.

evidence of an anti-competitive purpose in support of an application for an interim injunction".

In any event, the efficacy of cease and desist orders to enforce s 46 (and to prevent subsequent litigation) depends upon the contravening corporation agreeing to cease the impugned conduct. If a corporation does not cease the conduct specified in an order, or if a corporation decides to challenge the validity of an order, not only will the enforcement function of such an order be deficient but the matter will also end up in court, an eventuality which the ACCC is seeking to avoid.

Cease and desist orders may not necessarily save time

According to the Australian Law Reform Commission, cease and desist orders may not be as time and cost effective as their proponents suggest. Instead, it is suggested that the onus of proof, the time and the resources necessary to obtain the relevant evidence will be the same whether the ACCC issues a cease and desist order or applies for an interlocutory injunction.

The requirements of natural justice (such as allowing interested parties to make submissions regarding the proposed order), may mean that as a practical matter, the process in its entirety may take longer than the time needed to obtain an interlocutory injunction from the Federal Court (which can be obtained in less than 48 hours where necessary). This conclusion is based upon the experiences of overseas such as in the United States.

Moreover, it has been argued[215] that the power to issue cease and desist orders may engender complacency within the ACCC. In effect, once the impugned conduct has ceased (the ACCC's ultimate objective), there may be little incentive for the ACCC to pursue the investigation in a timely manner and to litigate the matter before a Court.

The ACCC will not be sufficiently accountable in the exercise of its powers

There is a strong case to suggest that the ACCC would be less accountable if it were vested with the power to issue cease and desist orders. According to Professor Pengilley, the introduction of cease and desist orders would contradict the ACCC's assertion that it cannot be unaccountable because[216] *"it cannot obtain a fine, injunction or court order without proving its case before the Federal Court"*.

In effect, cease and desist orders would permit the ACCC to order the cessation of conduct on a potentially inadequate evidentiary basis. At best, the ACCC need be only reasonably satisfied that there is a *prima facie* contravention of s 46 in order to issue a cease and desist order. By contrast, interlocutory injunctions would render the ACCC more accountable because seeking injunctive relief would require the ACCC to formulate is ultimate objective at the outset and to prove to a Court that there is, amongst other factors, a serious issue to be tried. As argued by the Productivity Commission, it would be inappropriate for the ACCC to be able to issue a cease and desist order on the basis of weaker evidence than that required for

---

215 W Pengilley, Submission to the Review Committee (June 2002, p 7).

216 Professor Alan Fels, *Business Review Weekly*, January 24-30 2002, cited in W Pengilley, Submission to the Review Committee (June 2002, p 8).

the issue of an interlocutory injunction. This would inevitably lead to a greater risk of regulatory error[217].

In addition, while the ACCC argues that the exercise of its powers to issue a cease and desist order will be subject to judicial review, it is possible that the issue of an order will, as a practical matter, be treated in a similar manner to s 155 notices. Case law concerning the proper scope of s 155 indicates that it is likely to be difficult to challenge the "substance" of a s 155 notice. While the ACCC must have reasonable grounds or cause for belief that there has been or may be a contravention of the TPA, the Courts have held that the ACCC does not have to show that there is reason to believe that the information, documents or evidence will establish a *prima facie* case but merely that they relate to a matter which might constitute a contravention[218].

Given the similarity between the proposed formulation of the power to issue a cease and desist order (i.e. the ACCC must be *reasonably satisfied* that there is a *prima facie* anti-competitive use of market power) and the drafting of s 155, it could prove to be difficult to challenge the substance of a cease and desist order. In any event, it is questionable whether a corporation would choose to challenge a cease and desist order in Court in light of the adverse publicity that would be likely to arise. The ACCC's claim that judicial review provides a safeguard should therefore be treated with caution.

Comparisons with the use of s 155 also suggest that such powers, once given, tend to be used with increasing frequency, as is seen in the 600% increase in the issuing of s 155(1)(a) and (b) notices in the past four years. The ACCC's assurances that cease and desist orders would not be used frequently need to be seen in this light.

Cease and desist orders may compromise the policy objective of the TPA and section 46

As discussed above, the underlying policy objective of s 46 is to promote the processes of competition rather than protecting individual competitors. While the ACCC claims that cease and desist orders would assist in overcoming enforcement difficulties, there is also an argument that cease and desist orders would undermine the policy objectives of s 46. Rather than promoting the processes of competition, the issue of a cease and desist order on a "thin" evidentiary basis which, at best, must only reasonably satisfy the ACCC that there is a *prima facie* contravention of s 46, is likely to interfere in the processes of competition. This is particularly the case where the effects test, in the form proposed by the ACCC, establishes a low threshold of liability which could potentially catch legitimate, competitive behaviour having a proscribed effect.

Temporary curbs on lawful conduct may have enduring effects. If a business was required to undertake positive acts in consequence of conduct wrongly perceived as anti-competitive, the practical ramifications may be hard to reverse or to remedy.

In addition, it is arguable that any issue concerning time affects corporations as much as the ACCC. That is, while cease and desist orders may reduce the time it takes the ACCC to reach the point when it may enforce s 46, such orders would be likely to delay the introduction of

---

[217] Productivity Commission, Submission to the Review Committee (July 2002, p 37).

[218] *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559 at 561.

market initiatives by corporations which they might genuinely believe to be legitimate and pro-competitive. This could be costly to both the Australian economy and Australian consumers.

Cease and desist orders may not be constitutional

Finally, the power to order cease and desist orders is likely to be unconstitutional. Under Chapter III of the Constitution, the judicial power of the Commonwealth can only be exercised by a Court established pursuant to s 71 and constituted in accordance with s 72. The ACCC is not such a body and the issue of an order to cease or desist a particular course of conduct would seem to constitute an exercise of judicial power, particularly where failure to comply with such an order will be visited by sanctions.

4. Conclusion

In summary, not only is the ACCC's case for an effects test in s 46 unpersuasive, but there is also a real risk that an effects test in the form proposed by the ACCC may:

- establish a low threshold for liability such that corporations will be subject to a high degree of uncertainty when conducting their commercial affairs;

- inhibit competitive behaviour to the detriment of the Australian economy and Australian consumers; and

- undermine an overriding objective of the review, namely to consider whether the Act provides for the recognition of globalisation factors and the ability of Australian companies to compete globally.

By prohibiting conduct on the part of corporations with substantial market power which has the effect or the potential effect of resulting in one of the three proscribed outcomes, s 46 will establish a low threshold of liability. Arguably any conduct on the part of a corporation having substantial market power is likely to have the effect or potential effect of, for example, deterring or preventing another from engaging in competitive conduct'', notwithstanding the "taking advantage" component of the test. This will lead to corporations facing a high level of uncertainty when engaging in competitive conduct. Given the level of penalties that may be imposed on a corporation which is found to contravene s 46, it is objectionable that a corporation will not be in a position to assess meaningfully whether its proposed course of conduct is likely to be lawful.

In addition, faced with this inherent uncertainty of the effects test in the form proposed by the ACCC, corporations having a substantial degree of market power are likely to choose not to engage in a particular course of conduct if there is a risk that such conduct would fall within the scope of s 46. As a consequence, corporations may be deterred from engaging in innocent commercial strategies if there is a possibility that those strategies inadvertently give rise a proscribed effect. Rather than promoting the processes of competition, s 46 would be likely to intervene in the operation of ordinary market dynamics and to "chill" the processes of competition.

This "chilling" of competition is likely to be compounded even further by the ACCC's proposal to introduce the power to issue cease and desist orders in respect of alleged contraventions of s 46. As the ACCC would only have to be reasonably satisfied of a *prima*

facie anti-competitive use of market power, coupled with the low threshold for liability under the proposed effects test, it is likely that the ACCC could issue cease and desist orders with relative ease. Given that legitimate, competitive conduct which inadvertently has a proscribed effect could be the subject of a cease and desist order, there is a strong argument that such a power would interfere in the competitive processes and, furthermore, that such a power is unnecessary in light of the availability of injunctive relief.

Moreover, the corporations which are likely to have a "significant degree of market power" are those corporations which are likely to compete in international markets. Those corporations are already likely to be constrained by other international players, many of whom are likely to be conglomerates having access to shareholder funds significantly larger than those of their Australian competitors. Importantly, the ACCC has appeared to accept these arguments in the context of a number of merger proposals involving internationally traded commodities.

In such circumstances and against the background of the terms of reference of the Review Committee (which specifically include a consideration of the ability of Australian companies to compete globally), the Business Council questions whether the ACCC's recommendations can be justified in practice or, indeed, on principle.