Supplementary Submission by Telstra Corporation Limited to the Dawson Committee Review of the Trade Practices Act

October 2002

1 Introduction

The first part of this submission sets out some additional comments relating to the Australian Competition and Consumer Commission's ("Commission")'s investigation guidelines and the Commission's compliance with those guidelines. This information draws on Telstra's experiences with investigations under Part XIB of the Trade Practices Act 1974 (Cth) ("Act"). Telstra has kept its examples brief, given confidentiality concerns, but could provide further information to the Committee if necessary.

The second part of this supplementary submission briefly sets out Telstra's comments on two specific proposals presented by the Commission in its submission to the Dawson Committee. These proposals relate to:

(a) the incorporation of an effects test into section 46; and

(b) the introduction of a power for the Commission to issue cease and desist orders.

2 Commission investigation guidelines

Telstra submits that the Commission's investigation guidelines should be expressed at a greater level of detail, in stricter terms, and that the Commission should be formally required to comply with those guidelines. Such an approach would assist in increasing the accountability and transparency of the Commission's activities, consistent with Telstra's initial submission.

The inclusion of statutory guidelines to govern the Commission's investigation and decision making procedures would provide greater certainty to parties that are subject to an investigation by the Commission as to how the investigative process will be conducted and the way in which those parties can be expected to be treated by the Commission for the duration of the investigation. As highlighted in its initial submission, Telstra believes in the value of creating a Board of Review or appointing an Inspector General to oversee the administration of the Act by the Commission. Independent oversight would be particularly valuable in ensuring adherence by the Commission to its investigation guidelines.

Telstra has drawn on its experience with Commission investigations under Part XIB of the Act to provide examples of why the Commission should be bound to comply with its guidelines. That is, because without clear obligations to do so, there is no guarantee that the Commission will exercise its powers appropriately. Part XIB is particularly relevant in the context of the Dawson Review given that the competition notices contemplated by Part XIB are broadly similar to the "cease and desist" powers currently sought by the Commission. Telstra assumes that its experience with the Commission is indicative of the experience of other firms which have been subject to Commission investigations.

2.1 Nature of Commission investigation guidelines

Telstra has a number of concerns regarding the level of detail of the Commission's investigation guidelines and the manner in which the guidelines have been expressed. The guidelines appear to provide greater guidance to complainants than to firms under investigation (with firms under investigation referred to by the Commission as "subjects"). Any statements by the Commission in the guidelines are heavily qualified and thus provide little accountability.

Relevantly, in the Part XIB context for example, the Commission is expressly required to formulate written guidelines under section 151AP of the Act to guide its decision whether or not to issue a competition notice. The Commission must then "have regard to" those guidelines when deciding whether or not to issue a competition notice as well as having regard to such other matters as the Commission considers relevant.

The Commission's section 151AP guidelines are currently set out in:

- Telecommunications - competition notice guideline, August 1999, 9 pages.

While this paper is useful, it is notable for its brevity. However, the paper does footnote three other Commission publications to which the Commission directs persons interested in the methodology and procedures the Commission will apply in analysing various forms of anti-competitive conduct (p3).

The three relevant Commission publications are:

- Anti-competitive conduct in telecommunications markets - an information paper, August 1999.

- Misuse of market power: Section 46 of the Trade Practices Act - A Background \Paper, February 1990.

- Don't let your suppliers tell you what to charge: resale price maintenance, November 1990.

Of these, the first paper sets out the procedures to be followed for Part XIB investigations. Chapter 4 of the paper describes the process of Part XIB competition notice investigations and sets indicative time frames. The Commission relevantly imposes the following "obligations" on itself in the guidelines relating to its competition notice investigations:

- that it will "*aim to determine whether it has a reason to suspect that there is a contravention of the Act, and whether it should proceed with a complaint, within 30 days of the initial complaint*" (p17);

- "*generally, the complainant and other interested parties will be informed of the Commission's decision as to whether it has a reason to suspect there is a contravention of the Act*" (p18);

- that "*the Commission's aim is to investigate and reach a decision on whether it has a reason to believe within three months of deciding it has a reason to suspect there is a contravention of the competition rule*", although the Commission notes that this may not be achievable if the "*matter is particularly complex or there are other reasons for delay*" (p18);

- that "*if the investigation stage is likely to extend beyond three months the Commission will inform the complainant and interested third parties, and provide regular updates on the progress of the investigation*" (p18);

- that "*the Commission will determine, case by case, at which point during the overall process it will inform the subject of an investigation that the Commission is investigating an allegation of a contravention of the competition rule, and the possibility that a competition notice may be issued*" (p20). Presumably, this general statement must be read to be subject to the Commission's earlier statement that the investigative phase includes

"*notification of the investigation to the subject of the investigation and other interested parties*" (p14);

- that "*the Commission will endeavour to decide to issue a Part A competition notice within 30 days of having formed a reason to believe there is a contravention of the competition rule*" (p20).

Telstra has a number of concerns regarding the weighting of these obligations to favour the interests of complainants rather than subjects.

Telstra believes, for example, that the Commission should be required to promptly inform subjects of investigations about those investigations and immediately notify them of complaints against them which the Commission decides are worthy of investigation.

If subjects are not promptly informed of investigations, then subjects cannot take early action to remedy their conduct, which has public interest ramifications, as well as implications for the subject. Further, issues of procedural fairness and natural justice require that the Commission, before making a decision to issue a competition notice, give "proper, genuine and realistic consideration"[1] to the merits of the case and make a reasonable and unbiased decision in good faith and based on the facts available. If subjects are not provided with an early opportunity to provide information to the Commission in response to complaints, the Commission is likely to form an initial view on the conduct under investigation based simply on the facts as portrayed by the complainant. The result will be that subjects are denied procedural fairness.

2.2 Compliance by the Commission with its guidelines

Even where the guidelines are expressed at a reasonable level of detail, Telstra has a number of concerns regarding the Commission's compliance with its guidelines. As can be seen from the guidelines extracted above, no guarantee or commitment is provided by the Commission as to the action it will take, and the period within which action will be taken. In this sense, the guidelines do not confer true "obligations", and the concept of "compliance" with the guidelines is misleading, as they are expressed in such a manner that they give the Commission very considerable discretion and impose little in the way of obligation on the Commission.

In particular, Telstra's concerns relate to the following procedural fairness and timing issues:

- the extent to which the Commission has not provided sufficient details of complaints it receives, in a timely manner, to ensure procedural fairness to subjects under investigation;

- the Commission's apparent failure to comply with its own indicative time frame for completing the investigative phase (namely three months); and

- the Commission's apparent failure to comply with the statutory requirement that the Commission "act promptly" in deciding whether to issue a Competition Notice.

Telstra has set out four examples below. In considering these examples, Telstra asks the Committee to bear in mind that Telstra, as the subject of these investigations, is subject to the most severe penalties possible under the Act. As a result, it could be expected that the Commission would be quite stringent in following its own guidelines and may even have a higher obligation to deliver natural justice to the party being investigated than would ordinarily be the case.

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1 Australian Competition and Consumer Commission *Anti-competitive conduct in telecommunications markets - An information paper*, August 1999, p 19-20

Data termination investigation (2001)

- In the data termination investigation, the Commission apparently formed a view that it had a "reason to suspect" a contravention of the competition rule by Telstra on 16 May 2001, but did not inform Telstra of the investigation until six months later in November 2001. The Commission did not terminate its investigation until March 2002, around 10 months after it commenced the investigation. Again, this is inconsistent with the intent of the guidelines.

- Over this six month period from May to November 2001, Telstra was not informed of the Commission's investigation or that the Commission had formed a "reason to suspect" a contravention of the competition rule. Telstra was not asked to provide a response to complaints received and was not made aware of such complaints.

Switchports investigation (2000)

- In the switchports investigation, the Commission issued a press release announcing that Telstra was taking certain actions without waiting for Telstra's response outlining the actions it was proposing to take. The Commission had previously given Telstra a deadline of 5pm on that day to provide a submission to the Commission, but the Commission issued its press release at 3pm without prior warning to Telstra that it was intending to do so.

- Further detail relating to the switchports investigation is set out in Telstra's initial submission to the Dawson Committee at pages 41 and 42.

Commercial churn investigation (1999)

- Between August 1998 and April 1999 the Commission issued a series of six competition notices in respect of Telstra's commercial churn service. Telstra maintained that it had not breached the competition rule. However, Telstra felt obliged to reduce its prices further below its costs as a result of the regulatory pressure brought to bear by the Commission under its Part XIB powers. The last four of the six commercial churn notices became the subject of extensive Federal Court litigation.

- The Commission alleged that various terms and conditions under which Telstra offered to churn a customer's services or account from Telstra to a service provider which was reselling Telstra's telephony services, were an abuse of Telstra's market power and had the effect or likely effect of substantially lessening competition. In particular, the Commission alleged that the costs to Telstra of processing transfer rejections were 'substantially less' than those charged to service providers, and that some items of costs were 'inappropriate' to include in the rejection fee.

- Telstra challenged the Commission's reasoning and denied that it had taken advantage of any alleged substantial market power in the market for fixed local telephony, and denied that the conduct alleged, whether separately or collectively, had the effect, or likely effect of substantially lessening competition.

- Given an absence of information provided by the Commission regarding its allegations, Telstra lodged a Freedom of Information application to obtain access to internal Commission documents and documents provided by third parties on which the decision to issue the competition notices was first based. It took more than 17 months from the date of its application for Telstra to obtain documents to which it was at all times entitled.

- Litigation concluded in February 2000 when the Commission discontinued the proceedings in light of the extensive evidence filed by Telstra. While Telstra considers that it was never in breach of the Act, in order to settle the matter and avoid the remote possibility of an adverse result, Telstra agreed to further reduce fees for its churn services and to set up a fund, to be administered by the Commission, to assist service providers to develop their ability to move onto Telstra's Wholesale Billing Platform.

- For the majority of the two year period between the first raising of competition concerns and settlement, Telstra was forced to continue its business under the threat of substantial penalties and was subject to continuing adverse publicity by the Commission. During this period, potential penalties accrued at the rate of $1 million per day per competition notice.

- The Commission could have - even before it issued the first competition notice - put an immediate stop to conduct believed to constitute a contravention of the competition rule by seeking an interim injunction directly from the Court. Instead, the proceedings ran for over 12 months without reaching a substantive hearing and involved Telstra being subject to significant adverse publicity and the possibility of substantial fines (increasing daily), and with Telstra and the Commission incurring substantial costs and diverting significant resources from other activities.

Internet peering investigation (1998)

- In May 1998, the Commission issued a competition notice to Telstra alleging that Telstra was in breach of the competition rule in Part XIB by charging its Internet access provider ("IAP") competitors for certain services, while at the same time not paying for similar services received from those IAPs. In June 1998, this notice was replaced with a revised notice when Telstra pointed out that the original notice had significant deficiencies and sought judicial review of the first notice. The second competition notice was finally withdrawn after Telstra finalised 'peering' arrangements with the three IAPs in question.

- Telstra at no stage considered that its conduct was in breach of the Act, but the significant pressure applied by the Commission in effect forced Telstra to enter into negotiations with the other IAPs. These negotiations culminated in peering arrangements even though those parties did not have a comparable network or a comparable volume of traffic at the time sufficient to qualify it as a 'peer' of Telstra. Telstra is not aware of any other country in the world in which the regulator has intervened in such commercial arrangements in this manner.

- Telstra refers to the following three articles setting out further criticisms of the Commission's conduct in the Internet peering context:

  - H. Ergas, "Internet Peering: A Case Study of the ACCC's Use of its Powers under Part XIB of the Trade Practices Act 1974" (2000) 8 *Trade Practices Law Journal*.

  - M. Landrigan and T. Warren, "Administrative Costs and Error Costs in Market Conduct Regulation: Two Case Studies" (2000) 7(3) *Competition and Consumer Law Journ*al 224.

  - B.W. Buffier "Shoot First, Ask Questions Later: The Rapid Response Powers of the ACCC to Regulate Anticompetitive Conduct in Telecommunications Markets" (2002) 10(1) *Trade Practices Law Journal* 5.

2.3 Measures to improve the accountability of the Commission in the application of its investigative guidelines

Statutory guidelines

With no legal obligation on the Commission to follow its guidelines, and the high level of discretion given to the Commission in relation to whether it complies with the 'obligations' contained in its guidelines, the credibility of Commission decision-making is undermined and significant uncertainty is created.

For this reason, Telstra proposes that the current non-binding obligations are reviewed by an independent body for their appropriateness. For example, it might be considered whether the guidelines:

- attribute the correct weight to the interests of the subject of the investigation, the complainant(s) and other interested parties;
- adequately protects a party the subject of an investigation from adverse publicity by the Commission, prior to a full and complete investigation being undertaken;
- set reasonable time frames for the Commission to undertake its investigation, make decisions and inform all parties involved;

Once the guidelines have been assessed, and modified where appropriate, Telstra recommends that they be given the status of statutory guidelines, which the Commission is bound to comply with. Telstra agrees that the guidelines should be phrased in terms flexible enough to accommodate the different requirements of each investigation, as it recognises that the level of time and resources required to complete a thorough investigation will vary on a case-by-case basis. However, there should be a clear idea provided by the guidelines as to what all parties can expect from the Commission while it undertakes the investigation, and parties should be given a statutory right to see that these expectations will be met.

Inspector-General

Telstra recommended the appointment of an Inspector-General in its initial submission. It is an approach that is not without precedent where governmental agencies have very considerable aggregate powers, as in the case of the Commission. For example, ASIO is subject to oversight by an Inspector-General with the aim of increasing the accountability of Australia's intelligence and security agencies.

Appointing an independent Inspector-General would provide aggrieved parties with an additional avenue of complaint regarding perceived unfair conduct by the Commission in the administration of the Act, including, in this context, its adherence to its investigation guidelines. As noted in Telstra's initial submission, such a mechanism would impose greater discipline upon the Commission to do what it says it will do.

Appointing an Inspector-General would not affect in any way the right of an aggrieved party to complain to the Commonwealth Ombudsman regarding the Commission's conduct. Although, as discussed in Telstra's initial submission, the Ombudsman does not provide any significant accountability for the Commission in relation to the Commission's actions.[2]

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2 See page 57 of Telstra's initial submission

Telstra recommends that if an Inspector-General is appointed, he or she should be required to investigate complaints and prepare a report that could be publicly tabled in Parliament, or make directions to the Commission.[3]

Independent governing board

In its initial submission, Telstra proposed that the Act be amended to create an independent governing board for the Commission which is directly accountable to Parliament.[4] Again, this proposal is not without Australian precedent with the Reserve Bank of Australia (RBA) having two Boards thus increasing its accountability.

Telstra maintains that an independent governing board, given the role of preparing reports and conducting inquiries into the actions of the Commission, as requested by Parliament, would be particularly beneficial in monitoring the investigations undertaken by the Commission, and ensuring that the Commission adheres to its investigation guidelines.

2.4 Conclusions and recommendations

Telstra's experience has been that competition notice investigation timeframes are frequently inconsistent with the timeframes set out in the Commission's guidelines. The guidelines appear to be more focussed on the complainant receiving details of the progress of the investigation than in providing natural justice to the subject of the investigation; and giving that party a reasonable opportunity to understand the nature of the complaints made and a reasonable opportunity to address those complaints. Telstra is often informed of investigations a considerable period of time after the Commission has commenced them. When Telstra is informed of investigations it is typically by way of a letter from the Commission demanding additional information as a matter of urgency, often with little or no prior warning. The Commission often does not provide sufficient information from which Telstra can make an informed response to the Commission's concerns.

Furthermore, to the extent that the Commission does "act promptly", as required by the Act, it is often at Telstra's expense. For example, the Commission frequently imposes unreasonable time frames for Telstra to respond to lengthy information requests notwithstanding that the conduct under investigation has been before the Commission for a considerable period of time previously and there would appear to be no legitimate reason why Telstra could not have been informed of the complaint at a much earlier stage.

Telstra recommends that:

- the existing investigation guidelines receive formal independent review to determine their appropriateness;
- the Commission be formally required to comply with these guidelines as statutory guidelines;
- an Inspector-General be appointed to oversee the administration of the Act by the Commission and to a provide an avenue of complaint to aggrieved parties;
- an independent governing board, directly accountable to Parliament, be established to monitor the administration of the Act by the Commission.

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3 This recommendation was made by Telstra at p 45 of its initial submission

4 See page 67 of Telstra's initial submission .

3 The proposed effects test for section 46

Telstra is strongly opposed to an effects test, as detailed in its initial submission. However, Telstra is equally alarmed by the Commission's proposed drafting for an effects test in section 46 and thus has a few comments in relation to that drafting. The Commission's proposed drafting is 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:
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> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (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."

Telstra believes the drafting proposed by the Commission is totally unsatisfactory. Such drafting highlights the dangers Telstra identified in its previous submission and by other persons making submissions, such as the Productivity Commission.

In particular:

- This drafting is inconsistent with the formulation of the effects test in Part XIB of the Act or elsewhere in Part IV of the Act so would not provide the benefit of greater consistency as previously claimed by the Commission.

- There is no link between this proposed drafting and the objective of the Act, namely to promote competition. Rather, the drafting emphasises the protection of competitors by seeking to prevent conduct that has the effect of damaging competitors.

- As Telstra noted in its initial submission, the High Court has interpreted section 46 as primarily concerned with protecting the process of competition, not individual competitors. However, it would presumably be difficult for the court to sustain such an interpretation in the face of such an amendment.

- Under the Commission's formulation, a corporation with a substantial degree of market power could be in breach of the proposed section 46 simply by "taking advantage' of its market power with the effect of, for instance, damaging a competitor, even if there was no impact on competition.

- Similarly, the Commission's model for section 46 provides no room for analysing the actual competitive consequences of the suspected conduct. A corporation could conceivably breach section 46, in its proposed form, even if the conduct in fact if served to *promote* competition but inadvertently harmed one competitor.

These appear to be compelling reasons why the Commission's proposed drafting has little merit.

4 Cease and Desist Orders

Telstra sets out a few comments below in response to the Commission's proposed model for cease and desist orders.

- The Commission makes much of the difficulties it faces in meeting the 'serious question to be tried' test and the 'balance of convenience' test for interim injunctions. However, Telstra queries why competition would be further protected/promoted if the Commission was permitted to issue cease and desist orders without first obtaining evidence strong enough to convince a court of the need for the order sought. The safeguards associated with interim injunctions were developed for a clear reason. Furthermore, section 60(6) of the Act exempts the Commission from the normal requirement to give an undertaking as to damages when seeking an interim injunction.

- While the Commission indicates that a corporation potentially subject to a cease and desist order would be given an opportunity to make submissions before the order were issued, the corporation's practical ability to do so would depend on the information available to it at the time. Accordingly, the Commission would need to be required to specify detailed particulars of the alleged contravention, as is usual in court proceedings.

- In the Productivity Commission's consideration of the analogous competition notice regime in Part XIB of the Act, the Productivity Commission expressed the following concerns about insufficient transparency in relation to competition notices. These concerns apply equally to cease and desist orders:[5]

  > *"The ACCC has indicated the importance of its administrative decisions being made in accordance with procedural fairness and natural justice. However, there is only limited transparency of Part XIB action. Although a competition notice had to be publicly notified, a Part A notice does not need to include detailed particulars of the alleged contravention of the competition rule. Further, there appears to be no requirements for the ACCC to publish its reasons for a decision to issue or not to issue a notice, either to the firm that is the subject of a notice, or more generally. There are no requirements for public transparency in a number of other areas including the receipt of a complaint, the commencement of investigations or their conclusion. The ACCC does not even need to inform a firm that it is the subject of complaint nor that it may be seeking information from others. There are no requirements for public inquiry or draft reports, or, indeed, for any report at all."*

- Under the Commission's proposal, a corporation subject to a cease and desist order cannot appeal against the order on its merit. It can only seek judicial review under administrative law principles. However, administrative law provides a very limited basis for challenging a notice. A corporation issued with a cease and desist order cannot thus seek to have the decision to issue reviewed on the basis that the decision is wrong on its merits. Such limited rights are particularly problematic when seen in the context of the added risks associated with introducing any effects test into section 46, given the difficulties in differentiating between legitimate beneficial conduct and illegitimate anti-competitive conduct.

- Similarly, a corporation might never get an opportunity to challenge the substantive merits of the Commission's claim that it is engaged in anticompetitive conduct that is likely to be a

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5 Productivity Commission *Telecommunications Competition Regulation: Final Report* (Productivity Commission, Canberra, 2001), p 161.

breach of section 46. A corporation issued with a cease and desist order, which genuinely believed that it was not in fact engaging in any misuse of market power, but rather behaving competitively, would thus have limited options. The corporation might well decide to cease engaging in the conduct the subject of the order, even though its conduct was legitimate.

5 Cease and Desist Orders - international comparisons

The Commission argues that cease and desist orders are provided for in the majority of competition regimes overseas. Telstra notes, though, that there are important differences between many of these overseas models and the model proposed by the Commission.

5.1 New Zealand

The Commission suggests that its model for cease and desist orders is similar to that recently introduced in New Zealand.[6] However, Telstra notes that there are a number of safeguards in the New Zealand model which are not mirrored in the Commission's proposed model. By way of example:

- *Separation of functions:* There is a separation of functions between the staff responsible for the investigation of the conduct and bringing an application for a cease and desist order, and the staff who hear and determine the application. Furthermore, two New Zealand Commissioners were appointed for the sole purpose of hearing and determining applications for cease and desist orders. These Commissioners may not sit with other members of the Commerce Commission.

- *Clearly established process must be followed:* Under the New Zealand scheme, there are a number of additional procedural steps, including:

  - An investigation must have been conducted into the alleged contraventions and a report submitted to the Commission recommending that a cease and desist order be sought.[7]

  - If the Commission agrees with the recommendation to seek a cease and desist order, it will make an application for the order, and must serve the person against whom the order is sought with a notice in writing detailing the alleged contravention, the orders proposed and the reasons for the proposed order.[8]

  - The person against whom the order is sought can access the relevant information held by the Commission, can make a written submissions and can either consent to the terms of the proposed order or can elect to have the matter determined by a Commissioner following a hearing.[9]

  - If a cease and desist order is made, the person against whom it was made may exercise the right of appeal to the High Court of New Zealand from a determination of a Commissioner at the hearing.

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6 *Commerce Amendment Act 2001*, section 15, entered into force 26 May 2001 as an amendment to New Zealand's *Commerce Act 1986, sections 74A to 74D.*

7 *Commerce Act 1986,* section 74B(a).

8 *Commerce Act 1986,* section 74B(b) and (c).

9 *Commerce Act 1986,* section 74C.

- *Right of appeal rather than review:* New Zealand cease and desist orders can be appealed on their merit to the New Zealand High Court.[10] When determining such an appeal, the High Court is entitled to exercise any of the powers that could have been exercised by the Commerce Commission.[11] It can, therefore, re-examine the merits of the Commerce Commission's decision *de novo*, and form of its own view of whether the conduct should in fact have been the subject of a cease and desist order.

5.2 United States

While the US Federal Trade Commission has the power to issue orders to cease and desist from unfair competition practices, the US model provides significant protection to recipients of cease and desist orders.

- *Order not enforceable till upheld by a court:* An order of the Federal Trade Commission does not become final until the period in which the recipient of the order is entitled to appeal comes to an end.[12] This means that the order does not generally become final until 60 days after it was served on the recipient. The recipient is not subject to a penalty until it violates an order of the Federal Trade Commission which has become final.[13]

  If the recipient does file a petition to have the order reviewed, an appropriate court of appeals has the power to stay the order. The recipient is required to file an application for stay with the Federal Trade Commission initially, and if the Federal Trade Commission denies this application, then a court reviewing the order has the power to issue a stay of the order.[14]

  The effect of this regime is that, provided the recipient of an order applies to have that order reviewed, the order has no effect until it has been upheld by a court. This is clearly very different to the Commission's model, under which an order cannot be stayed, so that the recipient would be exposing itself to penalties if it continued to engage in the conduct the subject of the order while seeking to have the order reviewed on administrative law grounds.

- *Public policy considerations:* Another significant feature of the US model is that the Federal Trade Commission is required to take account of public policy considerations before issuing a cease and desist order, as follows:[15]

  > *"The Commission shall have no authority…to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantive injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established policies as evidence to be considered with all other evidence."*

5.3 Canada

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10 *Commerce Act 1986*, sections 91 and 92.
11 *Commerce Act 1986*, section 93.
12 USC 15, Chapter 2, section 45(g).
13 Ibid, section 45(l).
14 Ibid, section 45(g).
15 Ibid , section 45(n).

In Canada there is no general power for the Canadian Commissioner of Competition to issue a cease and desist order. Rather, there is a "temporary order" power in relation to the aviation industry in section 104.1 of the Canadian *Competition Act 1985*. This order does not extend to other industries generally.

The introduction of cease and desist powers has been debated in Canada. In April 2000 the Canadian Competition Bureau asked the Public Policy Forum ("PPF") to lead a national consultation on amendments to the *Competition Act* and the *Competition Tribunal Act* including review of a Bill (Bill C-472) proposing cease and desist powers.

Bill C-472 proposed that the Commissioner of Competition be given the power to issue a temporary order either prohibiting a person from undertaking an activity that could, in the opinion of the Commissioner, constitute an anti-competitive act or else requiring the person to take the steps that the Commissioner considers necessary to prevent injury to competition or harm to another person.

Submissions made to the PPF covered many of the issues currently being canvassed in Australia both for the power (need for swift enforcement to prevent irreparable harm to competition and unjust profits being made by perpetrator) and against it (already interim order procedures, lack of accountability; unconstitutionality).

In its Final Report the PPF concluded:[16]

> *"The general conclusion of participants was that there already exist viable alternatives to the Commissioner of Competition being provided with the power to issue a cease and desist order, and that these would achieve the same policy objectives as those under the current proposal….Above all, it was generally agreed that the power to issue such [temporary] orders should either remain within the court system or be vested in the Competition Tribunal, exercisable by the judicial authority."*

Therefore, Canada is not a jurisdiction which supports the introduction of a general cease and desist power.

16 Public Policy Forum "Amendments to the Competition Act and Competition Tribunal Act: A Report on Consultations" Final Report Submitted to the Commissioner on Competition, Ottawa, 20 December 2000, p 27.