Australian
Competition &
Consumer
Commission

Submission to the **Trade Practices Act** review

June 2002

Australian Competition & Consumer Commission

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2 July 2002

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

Dear Sir Daryl,

Submission to the Committee of Inquiry for the Review of the Competition Provisions of the Trade Practices Act 1974 (the Review)

I attach for the consideration of the Committee of Inquiry the Australian Competition and Consumer Commission (the Commission) submission to the above review.

The Commission welcomes the current review of the competition provisions of the Trade Practices Act 1974 (the Act) and its administration as an opportunity to ensure that economic regulation in Australia remains appropriate, effective and efficient and in line with international best practice.

In order to assist the Committee in its review of the relevant provisions of the law and the administration of those laws, the Commission has prepared the attached submission.

I hope that the Committee finds these materials of use to it in its review. The Commission would also be happy to provide further details regarding any issues arising from its submission, or provide any other additional materials or submissions the Committee considers may be relevant to its deliberations.

The Commission expects that there will be issues not addressed in this submission that may be raised by others in their submissions. The Commission would appreciate the opportunity to consider these matters as they are raised, and may seek to make further submissions to the Committee to address particular matters.

I look forward to discussing the Commission's submission, and other issues arising from the Review with you as the review process continues.

Yours sincerely

Allan Fels

Professor Allan Fels AO
Chairman

Australian Competition & Consumer Commission

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1 OVERVIEW

The *Trade Practices Act 1974* has been in operation for almost 30 years. Over this period, there have been major changes in the structure of the Australian economy. Its objective has been to enhance the welfare of Australians through the promotion of competition and fair trading. It has been reviewed on numerous occasions.

There will be a need to keep the Act under review as changes in the world and the Australian economy continue, particularly as trade barriers are reduced and competition from international firms increases.

The Commission welcomes the current review of the competition provisions of the Act as an opportunity to ensure that economic regulation in Australia remains appropriate, effective and efficient and in line with best international practice.

Generally, the Commission believes that the existing law has a balanced approach. It generally prohibits conduct that has or is likely to have a substantial anti-competitive purpose or effect. The legislation is an economic law, based on economic principles that reflect the accepted view of all modern economies that competition generally enhances consumer welfare and market efficiency.

The concepts underlying the Act—such as competition, fair trading and markets—are generally sound, and suitable for application in a changing world.

Economic regulation is complex in practice and will often be criticised as intrusive. While this cannot be avoided altogether, the Commission supports efforts to ensure that intrusion is minimised, consistent with the public interest. Suggestions for improvement in the law and practice should be considered where these do not prejudice the ability of the Act to enhance the welfare of Australians through the promotion of competition and fair trading.

At the same time, even though the emphasis of the Act is on the achievement of competitive outcomes, the legislation, through the authorisation process, provides sufficient flexibility to take into account situations where there are public benefits, including international competitiveness resulting from anti-competitive behaviour. However, authorisation is a separate process. For conduct to be authorised an applicant must satisfy the Commission (or, on appeal, the Australian Competition Tribunal) that there is a sufficient benefit to the public. The process of authorisation is open and transparent and provides for participation by all those affected by authorisation decisions, including customers, consumers, suppliers and competitors, as well as applicants.

In assessing the effectiveness of the Act, the Commission believes that there are five key areas that arise directly from the Terms of Reference which it has addressed in chapters 2–6 of this submission. These are:

- introducing criminal sanctions for hard-core cartels

- introducing an effects test into s. 46 (misuse of market power), along with an enhanced ability for prompt action against misuse of market power (a cease and desist power is suggested)

- amending the authorisation process as it applies to collective bargaining by small businesses, particularly in the rural sector

- assessing the effectiveness of the merger provisions and processes for merger review, and

- reviewing whether the Act provides adequate protection for the commercial affairs and reputation of individuals and corporations.

To assist consideration of these areas the Commission has also provided details of the economic rationale and underpinnings of the Act, the mergers law and the authorisation process, as well as the Commission's role and processes in administering these laws. This material is in chapters 7–10.

The Commission expects that there will be issues not addressed in this submission that will be raised by others in their submissions. The Commission will consider these matters as they are raised and may seek to make further submissions to the Committee to address particular matters.

Criminal sanctions

The Commission proposes that the Act be amended to introduce criminal sanctions for the most serious contraventions of the competition provisions of Part IV: 'hard-core' cartels. The Commission proposes that it be a criminal offence for a large company to collude with a competitor to fix prices, rig bids, limit output or share markets. Individual executives and employees found to have been personally involved in a contravention would be liable to be imprisoned.

Collusion is extremely harmful both to business customers and consumers. The gains can be large and it is difficult to detect. The incentives for collusion are high in important areas of the modern economy.

Hard-core collusion is morally reprehensible, and abhorrent to the vast majority of business people as well as the public. It is a form of theft comparable to fraud and little different from classes of corporate crime that already attract criminal sentences. Civil remedies fail to deter the most flagrant and harmful collusive agreements, where competitors, usually in secret, agree to fix prices, rig bids, limit output or share markets.

An enforcement regime based purely on civil remedies is inappropriate having regard to the nature and effects of hard-core collusion. Indeed, it is anomalous that criminal

sanctions do not apply, given the civil penalties ($10 million for a corporation and $500 000 for individuals) that currently apply to each contravention.

Cartels are potentially so profitable and difficult to detect that pecuniary penalties are inadequate to deter those who would collude.

The fear of possible gaol sentences is a far more effective deterrent.

The Commission notes that as many economies reduce trade barriers and competition from foreign firms increases, the incidence of international cartels has risen. Recent resolutions by the OECD Council of Ministers condemning hard-core collusion by big business reflects a growing level of international concern about its impact.

The Australian law needs to remain in step with that applying in many of its major trading partners including the United States, Canada, Japan, Korea and Germany. The United Kingdom is in the process of adopting criminal sanctions and the subject is being debated in many other countries. The Commission believes that it is timely that Australia joins these countries and introduces criminal penalties for collusion.

Maximum pecuniary penalties per contravention were low before 1993, being $250 000 for a corporation and $50 000 for an individual. Since 1993 the maximum penalties per contravention have been more substantial—$10 million for a corporation and $500 000 for an individual. It is now clear that even these levels of penalty are not sufficient.

In late 1994 penalties exceeding $11 million were imposed on TNT, Ansett Freight Express and Mayne Nickless and a number of executives for conduct which occurred under the previous penalty regime (of $250 000 maximum).

In 1995, under the new penalty regime, Boral, CSR and Pioneer were each penalised $6.6 million for price fixing for ready mixed concrete in South Eastern Queensland. The behaviour in which they had engaged continued to occur after the rise in penalties in 1993.

There are numerous examples of collusion that continued after these cases:

- An international vitamin price-fixing cartel operated in Australia from 1994 until 1998. The Federal Court imposed penalties of $26 million. This collusion only ceased after it was exposed by US authorities.

- The Queensland fire protection cartel, which involved 56 companies and individuals, almost the entire fire alarm and sprinkler installation industry in Brisbane, operated for 10 years until 1997. It only ceased operating when it was detected by the Commission.

- Price fixing and bid rigging cartels operated in the power and distribution transformer markets from about 1993. In the case of the distribution transformers, the collusion continued until 1999. To date, penalties of $22 million have been imposed on companies and numerous executives.

- In 1994 the Federal Court imposed a penalty on Simsmetal, the largest scrap metal recycler in Australia, for engaging in price fixing in Victoria. Less than one year

later the South Australian arm of the company attempted to bully a small competitor into a market sharing arrangement.

- Perhaps the most vivid demonstration of the inadequacy of the pecuniary penalties on their own, is that of J McPhee and Son. In that case, the company attempted to enter a price fixing arrangement in the freight industry. The company was a subsidiary of TNT, which only months previously had been penalised $4.1 million for collusion in the same industry over many years.

A number of other cases are dealt with in the submission.

It is proposed that in Australia criminal sanctions apply only to larger corporations; in general, the larger the presence of a corporation in a market, the greater the scope for highly profitable collusion on a large scale.

It is proposed that small business, including in the rural and professional sectors, and unions not be liable for criminal sanctions.

Thus, the Commission is proposing that only large companies which satisfy two of the following criteria be liable for criminal penalties:

- **gross revenue in excess of $100 million**
- **gross asset value in excess of $30 million or**
- **more than 1000 employees**

Price fixing and usually bid rigging, output restrictions and market sharing are illegal per se under the existing civil provisions of the Act pursuant to s. 45 and ss. 45A and 4D. However, s. 45 also prohibits other less reprehensible conduct. As a consequence, the Commission proposes that new stand-alone criminal sanctions be introduced into the Act and that they apply only to hard-core cartels.

The Commission proposes that the introduction of criminal sanctions would not affect the continued availability of existing civil remedies. This is consistent with the law in other countries and would allow court imposed remedies to be tailored to the gravity of the contravention.

This would allow the Director of Public Prosecutions (DPP), the agency established to prosecute breaches of the Commonwealth criminal law, and the Commission the option to tailor the remedy sought from a court to the gravity of the offending conduct. The Commission would publish guidelines as to what matters it would consider in determining whether it should commence civil proceedings or refer a matter to the DPP.

The Commission considers that both corporations and individuals should be subject to criminal liability and that the maximum penalty for individuals should be seven years

imprisonment. Imprisonment would of course be at the discretion of the court (which may choose to impose a pecuniary penalty, or other appropriate remedy, in lieu of a gaol sentence) and would only apply to persons directly involved in collusion.

The Commission notes that significant safeguards would be in place to ensure conduct was not inappropriately criminalised.

- The sanction would apply only to defined acts of collusion; that is, price fixing, bid rigging, output restriction and market sharing. It would not apply to other parts of the Trade Practices Act.
- The sanction would only apply to large corporations and their employees and managers actually involved in the collusion.
- It would be necessary to prove the elements of the offence beyond reasonable doubt.
- The DPP would prosecute criminal cartel conduct.
- Accused persons would be entitled to a trial by jury.
- The jury verdict would need to be unanimous.
- The judge would have discretion as to whether or not a gaol sentence, as opposed to other sanctions, such as a fine, be imposed.
- Parties to an innocent agreement could have the agreement authorised.
- Agreements where all parties are related or that amount to exclusive dealing under s. 47 or retail price maintenance under s. 48 would be exempt.

The Commission also proposes that pecuniary penalties applying to corporations (for both criminal and civil conduct) should be amended. The existing $10 million maximum penalty is not seen as a truly effective deterrent. The gain a corporation obtains from the collusion may be many times more than $10 million, particularly when a participant is a large corporation with a significant market presence. Consequently, the Commission proposes the maximum pecuniary penalty be amended so that the maximum penalty can be up to three times the value of any commercial gain from the contravention, or, if no estimate of gain can be made, 10 per cent of the corporation's Australian turnover.

Details are set out in chapter 2 of this submission.

Misuse of market power and cease and desist powers

The Commission believes that the operation of s. 46, the misuse of market power provision, would be improved by incorporating an 'effects test' to supplement the existing purpose test. It is also suggested that there is a need for the Commission to be able to take action more quickly in certain instances and the Commission recommends the introduction of a cease and desist power based on the New Zealand model. These changes will promote both competition and fair trading generally and the interests of consumers and business, especially small business.

Section 46 of the Trade Practices Act prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of; eliminating or substantially damaging a competitor, preventing the entry of a person into any market or deterring or preventing a person from engaging in competitive conduct in any market.

The objective of s. 46 is to prevent firms with substantial market power from engaging in illegitimate anti-competitive conduct. Such behaviour is damaging to competition and consumers, and to small business, and is a form of unfair trading. Situations in which it may arise include: predatory behaviour, refusal to supply in an anti-competitive manner and the illegitimate leveraging of market power in one market to damage competition in another market.

Section 46 plays a very important role in supporting the process of competition and in upholding standards of fair trading in our economy. Without it large firms with a substantial degree of market power have the capacity to take advantage of their power and engage in unacceptable anti-competitive behaviour. This behaviour further entrenches their market power and damages competition. Parliament, in enacting s. 46, clearly intended to provide legislative protection for small businesses against unacceptable anti-competitive behaviour.

Section 46, which is broadly similar to laws in North America, and Europe, is intended to distinguish between illegitimate anti-competitive conduct and genuine pro-competitive conduct. Both North America and Europe have an effects test. The US law is concerned with the effect of monopolisation. The EU law concerns the effect of abusive behaviour by businesses that are dominant or enjoy collective dominance.

To the extent that s. 46 excludes an effects test, it appears to be based on a wrong principle. It is difficult to see why this section of the Act should be limited to conduct that has an anti-competitive purpose if the conduct is anti-competitive and damages competition. Overseas jurisdictions generally use an effects test and it is not a matter of controversy. If a firm with substantial market power seriously damages the process of competition with illegitimate behaviour of the kind aimed at by the Act, then under the present law, it is not unlawful, no matter how great and enduring the harm to competition, unless a proscribed purpose can be shown.

The Trade Practices Act is an economic statute implemented through the use of legal instruments. The concern of economic policy is with the effect of behaviour.

Competition law is concerned with protecting the process of competition in modern economies and preventing harm to the economy from anti-competitive conduct. Competition law around the world is generally concerned with economic outcomes rather than with just the purposes of behaviour.

There is an ongoing debate in all countries about the balance to be struck in the law between protecting and deterring competition but the debate is not concerned with whether or not there is an effects test.

In 1977 following big business lobbying, the Act was weakened. The Act was new, the times were different and the big business lobby held more sway, including in areas where rational economic policies were proposed. The dominance test was introduced for mergers and only reversed in 1993. A purpose test was also introduced into s. 46 at that time as a further concession. This amendment in 1977 limited the application of s. 46 and deprived small business of an economically acceptable and desirable protection from anti-competitive behaviour that provides and promotes business opportunities and enables small business to operate in a climate of fair trading.

The Commission believes it is now time to amend s. 46 to include an effects test in Australia. The inclusion of an effects test will more effectively protect the process of competition—promoting competition and fair trading in accordance with the objective of the Act. The other provisions of Part IV are generally concerned with the effect—and generally with the purpose also—of behaviour. This proposed amendment will achieve consistency by aligning s. 46 with the remainder of Part IV and in the Commission's view better serve the underlying economic goals of Part IV by directing the application of this section to conduct that has the purpose or effect of damaging competition. As noted above, the introduction of an effects test would also bring s. 46 into line with similar prohibitions in overseas jurisdictions including the US and Europe.

The Commission’s view is that s. 46 currently contains significant safeguards to protect legitimate competitive conduct. The safeguards embedded in s. 46 will continue to act as efficient filters to preclude the section from inhibiting legitimate, lawful competitive conduct. In particular, under s. 46 it is necessary to demonstrate that a corporation has a substantial degree of market power, that it has taken advantage of that market power, and that it has the purpose (or effect, if this proposal is accepted), in relation to proscribed forms of behaviour.

It should be noted that with a purpose or effects test, or both, s. 46:

- does not prohibit monopoly or market power—it only prohibits abuse of monopoly or market power.

- does not prohibit corporations from acquiring a position of monopoly or substantial market power by normal commercial means. The section does not prohibit firms, for example, from acquiring enhanced market power as a result of greater efficiency or innovation or better commercial strategies than their competitors or potential competitors. If this ‘damages’ competition, it is not prohibited. Section 46 only prohibits the use of illegitimate, anti-competitive tactics that go beyond normal commercial practice in competitive markets, to achieve these outcomes.

- does not prohibit corporations from taking actions which 'injure' competitors. The High Court and Federal Court have long recognised that this is the essence of the competitive process. Issues arise only where the means used to 'injure' competitors go well beyond the limits set out in a myriad of cases in Australia and overseas for many years.

The High Court of Australia has clearly expressed its view of s. 46. In the 1989 BHP/QWI case[1], Chief Justice Mason and Justice Wilson said:

> The 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 the inevitable consequence of the competition s. 46 is designed to foster. In fact, the purpose provisions in s. 46(1) are cast in such a way as to prohibit conduct designed to threaten that competition—for example, s. 46(1)(c) prohibits a firm with a substantial degree of market power from using that power to deter or prevent a rival from competing in a market. The question is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section, thereby undermining competition, and the addition of a hostile intent inquiry would be superfluous and confusing.

The High Court's view is clear: that the section is about protecting competition and the interests of consumers. This will not be changed by the introduction of an effects test, just as the presence of an effects test in North America and Europe does not change the essential character of the law. There will continue to be development, refinement, debate and case law in Australia and overseas about the economic, commercial and fair trading issues involved in laws about the misuse of market power. But the essential issues about the distinction between legitimate and illegitimate behaviour will not be affected by the introduction of an effects test.

Quicker action under s. 46

The Commission is concerned that the Act's objective of promoting and protecting competition and fair trading is not always being met because of the significant length of time between anti-competitive uses of market power and the final legal outcomes in these matters. The Act needs to operate more effectively with appropriate provision to address misuses of market power more expeditiously. The Commission's preferred approach to the problem is the introduction of cease and desist orders.

The Commission is concerned about the length of time it can take to obtain results under s. 46. Cases tend to take many years. Interim injunctions are difficult to obtain. If the aim of the law is to protect competition, verdicts that occur years after the behaviour may not achieve that goal.

The Commission sees a strong case for the introduction of cease and desist orders of the kind available in New Zealand and many overseas jurisdictions. Such orders would broaden the enforcement options available under the Act in those cases where there is evidence of anti-competitive conduct leading to real concerns that new entrants and

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[1] (1989) 176 CLR 177 at p. 191.

competitors will be forced from the market and damage to competition will not be able to be remedied. Cease and desist orders can be designed with safeguards to ensure they are used appropriately. Details are set out in chapter 3 of this submission.

Authorisation and collective bargaining

The Commission recognises the need to address the treatment of small business collective bargaining under the Act and related small business concerns with the authorisation process.

It proposes a notification process for small business collective bargaining modelled on the existing notification process for exclusive dealing.

The Commission's proposal is for a notification process that would be speedier, less expensive and simpler than the existing authorisation process. It would be restricted to small businesses dealing with large businesses that have a substantial degree of market power.

In some industries small businesses see collective bargaining as an important strategy when dealing with large businesses with market power to address the imbalance in bargaining position. An example would be small primary producers who might wish to collectively bargain with a small number of large processors.

Collective bargaining arrangements have the potential to breach the Act and so may require authorisation under Part VII of the Act. However, a number of small business groups, particularly some primary producer groups, have criticised the authorisation process for not going far enough to facilitate collective bargaining by small businesses.

The Commission has reviewed a range of policy options for addressing small businesses concerns in this area. The Commission's assessment of the main policy options is set out in detail in chapter 4 of this submission which also includes a survey of how small business collective bargaining is dealt with under the competition law regimes in key overseas jurisdictions.

On the basis of this assessment, the Commission has formed the view that such concerns are best dealt with through the adoption of a notification process for small business collective bargaining modelled on the existing notification process for exclusive dealing conduct.

Chapter 4 sets out a framework for a workable notification process for small business collective bargaining. This framework balances the need to minimise the regulatory burden on small businesses seeking immunity from the Act to collectively bargain with large businesses possessing a substantial degree of market power, with the need to ensure that immunity from the Act is only readily granted where such conduct is likely to operate in the public interest.

Chapter 4 also identifies some strategies the Commission can adopt to improve its administration of the existing authorisation process to make it more accessible to small businesses.

An overview of the authorisation provisions of the Act and their administration is contained in chapter 9 of this submission. The authorisation process gives Australia's competition law a high degree of flexibility by giving the Commission the power to grant immunity from the competition law on public benefit grounds. There are a number of authorisation case studies which highlight the way in which, through its administration of the authorisation provisions of the Act, the Commission has ensured that Australia's competition law is responsive to the transitional needs of industries undergoing, or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas. A number of these case studies also show how the authorisation process has been used to facilitate industry arrangements that promote the international competitiveness of key Australian industries.

The authorisation process is broadly accessible, allowing businesses to readily exercise their rights under the authorisation process both as applicants and as interested parties. The authorisation process is a very public, transparent process. With over 25 years of detailed published determinations by the Commission on authorisation applications, along with a range of publications explaining the authorisation process, there is a high degree of certainty about the requirements for authorisation under the Act. The Commission's decisions in relation to authorisation matters are also subject to a high degree of accountability, being subject to merits review by the Australian Competition Tribunal as well as review under the *Administrative Decisions (Judicial Review) Act 1977*.

Merger provisions and processes

The Commission considers that s. 50 of the Act and the Commission's own informal clearance process for merger assessments are working well and is not persuaded that any significant change is required to either.

Chapters 5 and 8 examine a range of issues relating to Australia's mergers law contained in s. 50 of the Act. Section 50 generally prohibits mergers or acquisitions that would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services. The application of s. 50 and how it relates to Australia's international competitiveness is specifically addressed in chapter 5. The Commission concludes that there is no compelling evidence to support claims that the current mergers law is stifling Australia's international competitiveness or that it is unsuitable in an era of globalisation. Indeed, a weak or compromised mergers policy could actually undermine Australia's international competitiveness.

An outline of the Commission's informal merger notification process is provided in chapter 5. This non-compulsory system has, on balance, resulted in administrative efficiencies, a comparatively light regulatory burden and a fast turnaround of proposals. The Commission believes that, given the law, the informal notification process works

well and notes it has previously received the strong endorsement of the legal profession.

Merger statistics show that while the number of mergers examined has been steadily rising, the number of mergers actually opposed by the Commission is small, averaging between 4 and 5 per cent. Of these, a large number have been resolved through the use of court enforceable undertakings utilising s. 87B of the Act. This has resulted in only 2 per cent of mergers being finally opposed by the Commission between 1999–2000 and 2001–02. The Commission has a reasonably quick turnaround on merger investigation matters and its time frames compare favourably with other OECD countries.

The mergers authorisation process is dealt with briefly in chapter 5 and then in further detail in chapter 8. Because there may be occasions when the public benefits exceed the detriments associated with an anti-competitive merger, the Act allows for the authorisation process.

Authorisation is a subsequent and separate step from the competition assessment contained in s. 50. It is transparent in that it is a rigorous testing of claims through a public process with rights of recourse to administrative review. In the case of a merger authorisation, the Commission is being asked to accede to a merger that has a significant detrimental effect on competition, even to the extent of monopoly. In such circumstances, the Commission believes that a rigorous public process that enables a thorough testing and examination of public benefit claims is entirely justified. It also believes that there should be the scope for participation in the process by parties likely to be affected by such a serious transaction including customers (whether household consumers or business customers), suppliers, competitors and others.

The Commission's current treatment of efficiency considerations is addressed in chapter 5. The attainment of efficiencies through a merger has been used to argue for a more lenient approach to mergers law in regard to potentially anti-competitive mergers that may also generate improvements in productive efficiency. The Commission specifically recognises efficiencies as one of the factors that it will consider in the context of a merger investigation. The extent to which any efficiency enhancing aspects of a merger may affect the competitiveness of markets is taken into account in the Commission's analysis. Further, even in those cases where a proposal leads to a substantial lessening of competition, firms can apply for authorisation when public benefits such as increased efficiencies are specifically taken into account. There are various problems associated with the explicit adoption of an efficiency defence (or a public benefit defence) in s. 50. This issue is canvassed in chapter 8.

Regarding the underlying mergers test, the fundamental problem with the previous dominance threshold employed in Australia from 1977 to 1993, was that a merger could lead to a substantial lessening of competition when it did not give rise to single firm dominance. The substantial lessening of competition test enables the Commission to focus on mergers and acquisitions that may reduce competition in a particular product market, irrespective of whether dominance has been attained by a single firm. Authorisation remains available for mergers that may result in a substantial lessening of competition. This issue is further addressed in chapter 8.

In summary, the Commission believes that Australia's current mergers law, including the 'significant lessening of competition' test operates effectively. It has played an important role in the maintenance of competitive market structures within the Australian economy, thus ensuring lower prices and higher quality goods and services for all Australians. The Commission is unaware of any compelling arguments supporting a major overhaul of the current arrangements and is therefore not making any recommendations for change. However, the Commission is not averse to change and remains receptive to any constructive suggestions for improvements to processes in the administration of s. 50.

Accountability, certainty and transparency of the Commission's processes and the protection of the reputation of individuals and corporations.

The Commission submits that the existing legal framework and the Commission's processes provide an appropriate balance between adequate protection of commercial affairs and reputation and maintaining certainty, transparency and accountability in the administration of the Act.

The Commission is required to enforce the conduct provisions of Part IV of the Act. This involves investigation of complaints, and in some cases litigation and court imposed remedies. Rights and obligations of businesses evolve over time as court decisions clarify the provisions of the legislation.

The Commission needs to be diligent and effective in enforcing competition law. Equally, it needs to do so properly and fairly. This means that its processes must be carried out in an efficient and comprehensible manner. Its processes must be transparent, providing accurate communications to the courts, the public and the Parliament. It must maintain public confidence. The community will only support the Commission's endeavours to apply competition and consumer law if the Commission is viewed as an effective, unbiased and impartial regulator. By enhancing public confidence, the Commission facilitates the effective operation of the Act, provides a catalyst for business to comply with the provisions of the Act and encourages business and consumers to exercise their rights under the Act.

Transparency enables the Commission's performance to be measured and improved. It is crucial to ensuring that the various accountability mechanisms that govern the Commission's activities are effective. It is also critical in maintaining certainty as to businesses and consumers rights and obligations under the Act. Unless the community is made aware of the Commission's activities and court proceedings there can be no wide understanding of rights and obligations under the Act.

Transparency is also fundamental to public confidence. It ensures that the community has the opportunity to assess the performance of the Commission and that the Commission obtains public feedback on its performance. Accordingly, the Commission

believes that, as far as possible, it is important that the Commission provide detailed accounts of all of its activities.

To assist the Committee, chapter 6 outlines the legal framework and key internal processes of the Commission in relation to selection of enforcement matters, accountability, information use and publicity and how these contribute to and promote certainty, transparency and accountability whilst providing an appropriate level of protection for reputation. Chapter 10 details the Commission's overall compliance strategy, enforcement activities, and investigation and litigation processes, and demonstrates the high level of professionalism and the ethical approach taken by the Commission in its activities.

The Commission is of the view that the existing legal framework and processes of the Commission provide an appropriate balance in this regard. The Commission conducts its activities in an open, fair and accountable manner.

The Commission's submission provides detail of how it is currently held accountable for its enforcement activities and other conduct through a variety of mechanisms including courts, tribunals, Parliament and the Commonwealth Ombudsman. The Commission is at present involved in some 80 matters before the Federal Court.

In relation to issues surrounding the Commission's use of publicity and in particular its role in the media, chapter 6 provides detail on the Commission's approach and processes. It demonstrates the appropriateness of the Commission's approach in publicising cases where it has instituted proceedings or a decision has been reached by the courts, while having appropriate regard for the reputation of businesses and individuals. The legislation and the courts allow media reporting of matters and investigations, and for the regulator to comment on particular matters. In this respect, the Australian law follows the same practice as other jurisdictions.

The Commission also accepts that there is a strong public interest in the dissemination of information regarding cases involving breaches of the Trade Practices Act. Publicity in itself plays an important role in achieving compliance with the Act through dissemination of information to businesses and the public. The media plays a critical role in ensuring transparency and accountability of the Commission and results in a high level of scrutiny of its processes.

Nevertheless, as a matter of practice, the Commission has developed its own processes to ensure adequate protection of reputation where appropriate. In particular, it limits its media releases to factual and accurate accounts of cases instituted and the outcomes of decisions. The Commission's practice is not to initiate comment on investigations, except in exceptional circumstances, prior to the Commission forming any view that it is appropriate to institute proceedings. On a small number of occasions the fact that the Commission is conducting an investigation may become known publicly as a result of a complainant, a Minister or an investigated party telling the public of the complaints or concerns that have been conveyed to the Commission. As the courts have stated, it is appropriate for the Commission to announce that it has instituted proceedings, and to report the outcome of proceedings. Further, it is subject to a range of external oversight mechanisms, as discussed above.