Submission to the Trade Practices Act review

June 2002
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,


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

[Signature]

Professor Allan Fels AO
Chairman
2 July 2002

Secretary
Trade Practices Act Review
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

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Yours sincerely

[Signature]

Professor Allan Fels AO
Chairman
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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.
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, 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 as 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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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.
2 Criminal sanctions and increased pecuniary penalties

Summary

The Organisation for Economic Cooperation and Development (OECD) recently examined the problem of cartels in the international economy. It concluded that hard-core cartels (bid rigging, market sharing, output restriction and price fixing) are the worst form of anti-trust breaches because they are highly damaging both to consumers and the economy generally. The OECD estimated that the value of commerce affected by cartel conduct worldwide is many billions of dollars each year.

In 1998 Ministerial Council of the OECD unanimously recommended that member countries enact significant sanctions capable of deterring firms and individuals from participating in cartels. The Commission does not believe that the existing civil penalty regime in Australia is an appropriate means for dealing with hard-core cartels in all cases, nor is it an effective deterrent particularly considering the incentives to collude. This chapter argues for the introduction of criminal penalties and outlines the elements of a model for doing so.

Pecuniary penalties fail to deter the most flagrant and harmful collusive agreements, where competitors agree to fix-prices, rig bids, limit output or share markets.

Hard-core collusion is morally reprehensible. It is usually clandestine and should be recognised as fraud and criminalised accordingly. It does not matter that the perpetrators are pillars of society. The nature and effect of the conduct make it criminal. The current maximum penalty of $10 million for corporations and $500 000 for individuals indicates how seriously Parliament regards such conduct. It is anomalous that hard-core cartel conduct is not criminal, when these penalties are compared with penalties applying to other white collar conduct that is recognised as criminal such as market manipulation and insider trading.

Hard-core cartels can be highly profitable for those involved and are difficult to detect. This makes the incentives high for businesses to engage in such fraudulent and clandestine conduct. It also makes it imperative that significant deterrents exist to counteract these incentives.

The Federal Court has imposed penalties for breaches of s. 45 of the Act in a number of cases when cartel participants, or related companies, have previously been found to have contravened that section. In each case the conduct occurred after 1993 when the maximum pecuniary penalty for a corporation under the Act was raised to $10 million.

There is a long list of other cases that illustrate that multi-million dollar civil penalties are not, by themselves, adequate to deter cartel conduct. One example is the international vitamins cartel. This cartel began operating in Australia after 1993 and it continued to operate after the court imposed penalties exceeding $11 million in the express freight cartel involving TNT and Mayne Nickless in 1994 and $20 million in the pre-mixed concrete cartel involving Pioneer, CSR and Boral in 1995. The
distribution transformer matter is another example of a cartel that continued to operate after the Federal Court imposed these multi-million-dollar penalties. (See section 2.2.3.3 for other examples.)

The Commission considers that a criminal penalty regime (including imprisonment for individual respondents involved in the unlawful conduct) represents international best practice and is the most effective way to deter and prevent this cartel conduct. The Commission proposes a maximum custodial sentence for individuals of seven years. (See section 2.3 for discussion about the Commission’s reasons for supporting the introduction of criminal sanctions.)

The Commission proposes a number of legislative safeguards to ensure that criminal sanctions are not applied inappropriately. (See sections 2.4 and 2.5 for details of the proposed safeguards.)

- Sanctions would only apply to hard-core cartels.
- The law would only apply in relation to conduct carried out by, or in, large corporations.
- The Constitution requires that serious criminal offences be tried by a judge and jury.
- To obtain a conviction a unanimous jury verdict is necessary.
- The existing exemptions that protect agreements from civil liability would also operate for criminal convictions and an additional defence could be considered for application to bid rigging when the person requesting tenders was informed of the agreement in question. (See sections 2.6 and 2.7 for discussion about the proposed structure and elements of criminal cartel offences.)

The Commission proposes that the new criminal offences operate concurrently with the existing civil regime. (See section 2.9 for discussion of some practical issues, including how an investigation may be conducted when it is not clear whether a matter will be civil or criminal and the involvement of the Director of Public Prosecutions (DPP).)

The Commission believes that two amendments to existing civil penalty provisions are also important (see section 2.10).

First, the Commission proposes that the Act be amended so that the maximum penalty the court may impose on a corporation be the higher of $10 million or three times the value of any commercial gain from contravention. If it is difficult to estimate the gain, the court should have the option to substitute 10 per cent of the corporation's Australian turnover for the duration of the infringement for a maximum of three years. This measure, will ensure that a penalty can be set at a level that removes the possibility of a company profiting from engaging in illegal conduct is well recognised in overseas jurisdictions.
Second, the Commission proposes that the statutory limitation period for the commencement of proceedings be extended to 10 years. This extension would only operate for contraventions of s. 45.

2.1 Introduction

In Australia, s. 45(2) of the Act prohibits the making, or giving effect to, a contract, arrangement or understanding between firms that are, or should be, in competition with each other, if a provision of the contract has the purpose, effect, or likely effect of lessening competition or if the contract includes an ‘exclusionary provision’.

Cartel agreements, which are agreements that have the effect of price fixing, bid rigging, output restriction or market sharing, will fall for consideration under s. 45 of the Act. Each will usually be illegal per se. A price fixing agreement is deemed (pursuant to s. 45A) to substantially lessen competition and therefore breach s. 45.

An exclusionary provision is defined in s. 4D as one that has the purpose of preventing, restricting or limiting dealings with particular persons (whether absolutely or on particular conditions) by all or any of the parties to the arrangement, which parties are competitive with each other or are potential competitors. Bid rigging, output restriction, and market sharing agreements are usually exclusionary provisions and as such prohibited per se.

A corporation found to have engaged in cartel conduct in contravention of these sections of the Act is liable for a maximum pecuniary penalty of $10 million per contravention. Individuals are liable for penalties of $500 000 per contravention. The Commission considers this does not, particularly in the case of large companies, effectively deter cartel conduct, which is difficult to detect and potentially highly profitable. It also considers that, given the gravity of some contraventions of the Act, as is reflected in the $10 million maximum pecuniary penalty, it is somewhat surprising that the Act does not provide criminal sanctions at least for the worst breaches of the Act.

2.2 Justification for introducing criminal sanctions for hard-core cartel conduct

2.2.1 The impact of cartel conduct

The OECD, which is comprised of the 30 leading market economies that produce two-thirds of the world’s good and services, has labelled hard-core cartels the most ‘egregious violations of competition law’ and has called for stronger sanctions against cartel participants to improve deterrence. In 1998 the OECD Ministerial Council

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3 ibid., p. 2.
Concerning Effective Action Against Hard Core Cartels unanimously recommended that OECD members provide for ‘… effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in cartels’.

The 2002 OECD report highlighted some cartel cases prosecuted by member states between 1996 and 2000. The report concluded that the harm caused was often difficult to determine. However, the OECD estimated the total amount of commerce affected in 16 large cartel cases alone, exceeded US$55 billion. The report also showed that in some cases prices were as much as 50 per cent above the competitive price.

The United States Sentencing Guidelines estimate that the average gain from price fixing is 10 per cent of selling price. They suggest that losses exceed the gain because, ‘among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at higher prices’. The OECD suggests average gain may in fact be more like 15 to 20 per cent.

The OECD estimates the value of commerce affected by cartel conduct worldwide is many billions of dollars each year. Reports from a number of overseas jurisdictions about cartel investigations confirm that despite heavy penalties being applied in a number of countries to cartels that are detected, national and international cartels continue to flourish. The major reason for this is that cartels are potentially so highly profitable. The Commission is particularly concerned that Australia have penalties in place that will be effective deterring international corporations engaging in cartels in Australia.

On 10 April 2002 the Financial Times reported that an ‘extraordinary’ level of illegal price fixing and market sharing behaviour in the United Kingdom is leading to one cartel a month being uncovered by the Office of Fair Trading. One example reported in a separate article on the same day, involves an allegation of price fixing among six UK drug companies supplying penicillin-based antibiotics and the heart drug Warfarin. This conduct is estimated unofficially to have cost the National Health Service up to £400 million (A$1.08 billion). Australia is not immune to this conduct.

The impact cartels have had on the Australian economy is illustrated by the following examples:

- The participants in the express freight cartel, Mayne Nickless, TNT and Ansett were estimated to hold 90 per cent of a market which was estimated to be worth between $1 billion and $2 billion dollars per year. The agreement operated from the 1970s until the early 1990s.

- The Queensland fire protection cartel is estimated to have affected commerce worth more than a total of $500 million.

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4 United States Sentencing Guidelines §2R1.1 cmt. n. 3.

5 These cartels are discussed in more detail below.
Between 1989 to 1994 the participants in the Queensland pre-mixed concrete cartel accounted for the sale of $1.1 billion worth of concrete.

Market sharing and price fixing by the principal manufacturers and suppliers of electricity distribution and power transformers in Australia is estimated to have effected commerce worth more than $360 million in total.

In Australia in the six years to 2001 the Commission received 2426 cartel and price fixing complaints and conducted 400 investigations (see table 1). The Commission is currently investigating around 20–25 cases that would be classified as potentially relating to hard-core cartels if they were found to involve illegal conduct. The Commission does not suggest that the table indicates that there has been an increase in cartels. However, it does show that the number of complaints has risen. The number of proceedings each year has stayed relatively constant, from three to five.

Table 2.1. Cartel and price fixing investigations and complaints

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Total</th>
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<td>95–96</td>
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<td>00–01</td>
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<tr>
<td>01–02</td>
<td></td>
</tr>
<tr>
<td>Number of complaints</td>
<td>167</td>
</tr>
<tr>
<td>Cartels investigations</td>
<td>13</td>
</tr>
</tbody>
</table>

The trade practices penalty regime in Australia is weak compared with those in other developed countries. The level of deterrence has slipped relative to our trading partners. This has exposed Australians to increased risks from anti-competitive conduct generally and from serious hard-core collusion in particular. Introducing criminal sanctions for the most egregious breaches of competition law—hard-core cartel conduct—and increasing the level of pecuniary penalties will redress this imbalance.

2.2.2 Cartels are blatant frauds that warrant significant sanctions

An objective assessment of the nature and effects of hard-core collusion, and a comparison with other corporate crimes makes it clear that it is inappropriate for Australia’s enforcement regime to be based purely on civil remedies. Indeed, it is anomalous that criminal sanctions do not apply given the hefty civil penalties, $10 million for a corporation and $500 000 for individuals, that currently apply to each contravention. By way of example, insider trading and market manipulation, which are both criminal offences under the Corporations Act 2001 for which offenders may be gauled, carry the maximum fines of $220 000 and $22 000 respectively.

Hard-core collusion is morally reprehensible. It is a form of theft and little different from other white collar crimes (including insider trading and obtaining a benefit by deception) that already attract criminal sentences.
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. Cartels are calculated and malevolent attempts to transfer wealth to the cartel operators. They are blatant frauds on consumers. They have no pro-competitive benefits.

A cartel can maximise joint profits by acting in the same way a single-firm monopolist would, that is, by increasing prices and reducing output.

Cartels are also usually highly secretive and difficult to detect. This heightens their distortionary impact.

Competitors have a strong incentive to collude to acquire monopoly power and monopoly rents illegally. Significant sanctions are required to outweigh these incentives.

The potential gains from hard-core collusion are so great, and the chances of being caught are perceived to be so remote, that pecuniary penalties are insufficient deterrents.

In a recent judgment in the transformers matter, Justice Finkelstein stated:

> Generally the corporate agent is a top executive, who has an unblemished reputation, and in all other respects is a pillar of the community. These people often do not see antitrust violations as law breaking, and certainly not conduct that involves turpitude, … There are, however, important matters of which the sentencing judge should not lose sight. The first is the gravity of an antitrust contravention. It is not unusual for anti-trust violations to involve far greater sums than those that may be taken by the thieves and fraudsters, and the violations can have a far greater impact upon the welfare of society… Secondly, there is a great danger of allowing too great an emphasis to be placed on the “respectability” of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so.

While members of the community, including in the business community place emphasis on having strong law and order policies, it is difficult to argue that criminal sanctions should not apply to business in relation to behaviour as abhorrent as hard-core collusion.

### 2.2.3 Pecuniary penalties are insufficient deterrents

#### 2.2.3.1 The deterrent role of the Act

The aim of the Act is to promote competition and fair trading by discouraging and punishing commercial conduct that is anti-competitive as defined in the Act. The Commission takes several approaches to achieving compliance. For instance, the Commission informs businesses and consumers of their rights and obligations under the

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Act and monitors and reports on developments in specific sectors of the economy. However, the key to the Commission’s success has been, and will remain, a successful and high profile enforcement program.

The Commission takes court actions to stop anti-competitive conduct and to have penalties or other remedies imposed on businesses that breach trade practices law. The Commission may also seek to impose remedies on individuals directly involved in illegal conduct. The Commission publicises the outcomes of these matters. The publicity serves both to educate the community and deter anti-competitive conduct.

The general deterrent effect of enforcement is critical because of the impossibility of monitoring all businesses and the difficulty of successfully prosecuting violations. This is especially true for cartel conduct that is clandestine and when participants will often go to great lengths to cover up their conduct. ‘Competition law works best where it acts as a real deterrent against individuals and companies engaging in anti-competitive behaviour.’

Commercial enterprises aim to maximise profit by ensuring that the benefits of their conduct outweigh its costs. The Commission believes that given the potential for huge illicit gains arising from cartel conduct, a significant deterrent is required. Indeed, because corporate decision makers are considered rational, deterrence plays a more significant role in commercial and corporate crime than in other areas of criminal law.

General deterrence (the deterrence of others) is generally seen as the fundamental goal of anti-trust penalties. It is the keystone of the anti-trust division of the US Justice Department's sentencing guidelines. Australian case law supports the primacy of deterrence in the Act’s penalties but acknowledges that penalties may also be punitive.

Eleven years ago, in *TPC v. CSR Ltd*, Justice French found that retribution, rehabilitation and compensation had no part to play in economic regulation of the kind contemplated by Part IV. His Honour considered that the principal and probably the only object of civil pecuniary penalties for violation of Part IV is specific and general deterrence.

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7 In appropriate cases, the Commission may seek to resolve a matter administratively.


11 Kerns, op cit, p. 991. See also Orlansky op. cit., p. 1235.

This view was also expressed by the Full Court in *N W Frozen Foods v. ACCC*\(^\text{13}\), when the majority confirmed that the object of the civil penalty regime under the Act is deterrence. The court stated that ‘the penalties imposed by s. 76 are ... not criminal sanctions, and their purpose, established now by a long line of cases, is not punishment.’\(^\text{14}\) However, Justice Carr disagreed with this proposition and held that the earlier cases ‘have not ruled out or excluded punishment as one of the purposes of s. 76’.\(^\text{15}\)

Later decisions have reinforced Justice Carr’s comments.\(^\text{16}\) Justice Heerey in the *McPhee* case\(^\text{17}\) found that while deterrence remained a key objective when imposing penalties, the civil penalty regime also imported concepts of moral responsibility well known to the criminal law.\(^\text{18}\) Justice Goldberg in *ACCC v. Australian Safeway Stores Pty Ltd*\(^\text{19}\), while following the Full Court in *NW Frozen Foods* also had difficulty with the proposition that imposing a penalty for a contravention of Part IV should not be seen as a form of punishment.\(^\text{20}\)

### 2.2.3.2 The level of pecuniary penalties

The OECD report\(^\text{21}\) identified a trend towards stronger sanctions and increasing enforcement efforts in cartel conduct. For example, the OECD reports that in the

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\(^{13}\) (1996) 71 FCR 285.

\(^{14}\) Burchett and Kiefel JJ, at 296.

\(^{15}\) ibid., at 299.

\(^{16}\) Refer also to Nathan Butler, ‘Pecuniary Penalties: If Size Really Does Matter, What About Structure?’ *Competition And Consumer Law Journal*, 1999, vol. 7, pp. 80, 84. This article suggests that several factors in s. 76 of the Act are more relevant to punishment than deterrence. In particular the direction take into account prior convictions and that sanctions apply to attempted contraventions.

\(^{17}\) *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd (No 5)*, (1998) ATPR 41–628.

\(^{18}\) Heerey J said (at 40–891) that while deterrence remains a primary object of the imposition of penalties:

> … nevertheless s. 76 imports into the penalty fixing process concepts of moral responsibility long known to the criminal law. In other words, the sources of the substantive provisions of Pt IV are doubtless economic policy and theory, but the penalties for contraventions are to be applied in a moral universe.

\(^{19}\) (1997) ATPR 41–562 and 43–811.

\(^{20}\) In *ACCC v. Alice Car & Truck Rentals* (1997) ATPR at 41–582, Mansfield J (at 44–049) noted Goldberg J’s views, but followed the approach of the majority in *N W Frozen Foods*. In *ACCC v. George Weston Foods* (2000) ATPR at 41–763, Goldberg J repeated his observation that ‘a court in an appropriate case where there has been a flagrant and wilful contravention might take the view that a severe penalty was warranted having regard to the deliberateness and wilfulness of the contravention’, while again noting that he was bound by the Full Court’s decision in *N W Frozen Foods* not to have regard to punishment in determining the penalty to be imposed.

decade to 1997 fines of US$29 million were collected in the US and in the four years from 1997 to 2000 US$1.7 billion in fines was collected. The report notes that similar dramatic increases have been observed in Australia, Canada, the European Union, Germany and South Korea.22

At Annex A the OECD report includes a table listing cartel cases and the pecuniary penalties imposed. In the EU, the US and Germany sanctions of more than US$100 million have been imposed. While it is difficult to generalise, the table does show that Australia falls significantly behind these three jurisdictions in terms of the penalties imposed for cartel conduct.

Several OECD countries can fine natural persons for their involvement in cartel conduct. Only Australia, Canada, Germany and the US reported to the OECD that they had imposed monetary penalties on individuals.

2.2.3.3 The deterrent effect of pecuniary penalties

While introducing criminal penalties (or increasing maximum pecuniary penalties) will never prevent all anti-competitive breaches of the Act, the Commission believes that current penalties, on their own, are inadequate as effective deterrers.

In most cases, existing civil penalties are enough to deter contraventions of the Act. However, they fail to effectively deter the worst collusive arrangements.

The prosecution in the United States of Hoffmann-La Roche (HLR) for participating in the international vitamin cartel is an example of how ineffective pecuniary penalties are in overcoming strong incentives to engage in cartel conduct. Two years before HLR’s involvement in the vitamin cartel was exposed, the US Department of Justice (DoJ) was investigating an international cartel in the citric acid industry. HLR admitted involvement in the cartel, cooperated with the DoJ investigation and was eventually fined US$14 million.

At the time the DoJ was also investigating cartel activity in the vitamin industry. It interviewed two HLR executives who were responsible for both the citric acid and vitamin businesses. Both executives denied any knowledge of a vitamin cartel, even though HLR had been engaged in a worldwide vitamin cartel for almost a decade. Following the statements, the executives took steps to further conceal HLR's involvement.

Hoffman-La Roche was prosecuted and fined US$500 million. Both executives were sent to prison. The vitamin cartel was so profitable that even a US$14 million fine arising from the citric acid prosecution was not enough to deter their continuing participation in the vitamin cartel, it merely caused them to re-double their efforts to avoid detection.

In the last few years, the instances of cartel conduct affecting the Australian economy that have been investigated by the Commission has risen. There is little evidence to suggest that increased penalties after 1993 and the large penalties imposed in the mid-

22 ibid., para. 11.
1990s in the express freight and Queensland pre-mixed concrete cartels have sufficiently deterred collusive agreements. As well as domestic cartels, the number of international cartels being exposed by overseas regulators that potentially effect the Australian market has risen.

The following list of cases in which the court has imposed penalties for price fixing, market sharing and bid rigging illustrate how ineffective the existing penalty regime has been in deterring cartel conduct.

**Express freight cartel.** Three of Australia’s major express freight companies and their senior executives were ordered to pay penalties in excess of $11 million for their involvement in price fixing and market sharing arrangements. The conduct ran for approximately 20 years and occurred prior to the 1993 amendments that increased the maximum penalty from $250,000 to $10 million. Among other things, the participants agreed not to approach each other’s customers. On occasion, when a customer decided to change to a new freight carrier, there were instances of freight being lost or damaged deliberately in order to encourage that customer to return to their original carrier. This is surely criminal by any standards. In relation to this behaviour Justice Burchett’s view was that:

> an arrangement to maintain a cartel be deliberately providing poor service in order to compel customers to turn or to return to a supplier with whom they might be dissatisfied, must be particularly pernicious.

**Pre-mixed concrete cartel case.** The Pioneer, Boral, CSR cartel involved price fixing and market sharing in the pre-mixed concrete market in south-east Queensland from 1989 until 1994. The participants had more than 50 regular meetings and phone conversations that in addition to fixing prices, agreed on market shares and not to compete on specified major projects. The participants even engaged an accountant to monitor market shares and enforce compliance with the agreement.

Penalties of $6.6 million were imposed on each company. Penalties were also imposed on six executives, the maximum being $100,000. The conduct was particularly reprehensible because each of the companies or other companies within the groups had previously been found to have engaged in similar conduct. The behaviour did not cease after the introduction of the higher statutory penalties in 1993.

**Animal vitamin cartel case.** In this case three international pharmaceutical companies fixed the price for animal vitamins A and E, which are used primarily in animal feeds. The Australian arrangements started in 1994 and continued until 1998, even after penalties totalling $21 million in the Pioneer, CSR and Boral concrete price fixing and market share in cartel in 1995. The participants admitted collusion and cooperated with the Commission after exposure by the US authorities.

In a direct reference to their failure to deter collusion that would be difficult to detect and that had the potential to be highly profitable, Justice Lindgren in the animal vitamin cartel case stated:

\[ TPC v TNT Australia Pty Limited & Ors (1995) ATPR 41-375, 40,166. \]
In some important respects the collusive arrangements were even more serious than the cartel arrangements in [the pre-mixed concrete cartel]... The [$20 million] penalties imposed in the Pioneer case appear to have had no effect on the conduct of BAL, Roche Australia and AAN Australia or their offshore affiliates involved in the Overseas Arrangements. In these circumstances, deterrence of similar future conduct and its potential origins is of paramount importance and... the Court should leave no room for any impression of weakness in its resolve to impose a penalty sufficient to ensure such deterrence.

**Fire protection cartel.** This cartel ran in Queensland for about 10 years until 1997 and did not end until more than four years after Parliament increased pecuniary penalties. The Commission filed proceedings against 56 companies and individuals—almost the entire fire alarm and fire sprinkler installation industry in Brisbane. The participants referred to the regular meetings that agreed on prices to be tendered for projects as ‘the Coffee Club’.

What stopped the participants was not the sudden realisation that they faced massive penalties, but that the Commission had detected their cartel.

**Transformer cartels.** These cartels involved price fixing and bid rigging in the market for power and distribution transformers and involved the main manufacturers and suppliers in both markets. The collusion that has been admitted in the power transformer market ended in late 1995 and was orchestrated in a series of covert meetings and phone conversations. Similar collusive conduct existed in the distribution transformer market. This conduct did not cease until early 1999, apparently as a result of the failure of one participant to abide by the agreement.

**Queensland foam cartel.** Three companies, Joyce Corporation Ltd, Foamlite (Australia) Limited and Vita Pacific Australia Limited, were involved, over a period of about 10 years from the mid 1980s, in a price fixing and market sharing agreement in the industrial flexible polyurethane foam market. The agreement developed from a personal friendship between the managers of the three companies who met regularly for lunch. The court imposed penalties totalling approximately the $3.5 million in the case.

**Tasmanian frozen food cartel.** The Federal Court imposed penalties of approximately $1.5 million on four companies who together held 80–90 per cent of the Tasmania market for the supply of frozen food to catering businesses. The collusion began in 1991 and continued until the Commission commenced investigations in 1996. In his judgment in the case at first instance, Justice Heerey stated:

> It is a depressing thought that the introduction of the vastly increased (and well-publicised) penalties in January 1993 had no effect whatsoever on [the participants]. It was business as usual.

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24 One company, ABB Transmission and Distribution Limited has contested liability. The other companies Wilson Transformer Company, Schneider Electric, A. W. Tyree Transformers and Alstom Australia did not contest liability and penalties of $2.5 million, $7 million, $3.5 million and $7.1 million respectively were imposed by the court.

25 Fines were also imposed on the seven managers.

26 ATPR (1996) 41-515, 42-446.
The fact that many of the cartels, including the distribution transformers cartel and the animal vitamin cartel, continued as long as they did after the large penalties imposed in the express freight and pre-mixed concrete cartels is an indication that the pecuniary penalties are not deterring hard-core collusion. Another graphic illustration of the inefficacy of pecuniary penalties, on their own, to deter hard-core collusion comes from the number of times a corporation has engaged in collusion after it, or a related company, has been prosecuted for engaging in similar conduct. The McPhee, George Weston and Simsmetal cases are three classic examples.

**J McPhee & Son.** In 1998 the Full Federal Court\(^27\) imposed penalties of $2.6 million against J McPhee & Son (a subsidiary of TNT) for attempting to enter into a price fixing arrangement in the freight industry in 1994 and 1995. The contravention came soon after the maximum pecuniary penalties for breaches of the Act were increased and McPhee was attempting to rig the market at the very time its parent company was negotiating a penalty of many millions of dollars to propose with the Commission to the court for the same conduct. Penalties were imposed on three managers, the highest being $100 000. The managers clearly learned nothing from TNT’s penalty and thought collusion was worth the risk.

**George Weston.** In May 2000 George Weston was penalised $900 000 for attempted price fixing in relation to biscuit products in Tasmania. The corporation was trying to avoid a price war between retailers of its product. Justice Goldberg said that the conduct:

> ... was a deliberate and conscious attempt to eliminate competition in the relevant market, to disadvantage consumers and to induce two retailers to commit a per se contravention of the Act.

The court recognised that the penalty and the compliance program introduced after an earlier breach had failed to prevent the second offence. This offence was instigated by a senior level manager and occurred only days after George Weston had been penalised $1.25 million for several price fixing and resale price maintenance incidents in Victoria. Justice Goldberg concluded that:

> It is not unreasonable to infer that his attitude was: it is worth a punt to try and get the two retailers to increase their prices. He must have believed that trying to prevent the payment of the markdown claims outweighed the risk which flowed from the attempt to induce the contravention of the Act.

**Simsmetal Ltd.** In June 2000 the Federal Court fined Simsmetal Ltd $2 million for twice attempting to reach a market sharing agreement with a competitor in South Australia. Simsmetal, the largest scrap metal recycler in the southern hemisphere, tried to bully a small competitor into a market sharing arrangement to insulate itself from competition. On the second occasion, a Simsmetal executive was recorded threatening to ‘destroy’ the competitor’s business if the competitor approached any Simsmetal customers. This threat was made less than one year after the Federal Court had imposed a penalty upon Simsmetal and two of its employees for engaging in price fixing in Victoria.

\(^{27}\) (2000) ATPR 41-758.
2.3 The benefits of criminal sanctions

The likelihood that imposing heavy pecuniary penalties on participants in a cartel does not deter such conduct led to the recent development and introduction of the Enterprise Bill into the UK Parliament. The Bill proposes to create new criminal offences (with the option for imposing a fine instead of imprisonment). The bill passed the House of Commons on 19 June 2002 and is now before the House of Lords.

Although criminal sanctions and higher penalties in the US or the EU have not prevented corporations or individuals from engaging in hard-core cartel conduct28 there is a growing consensus that criminal sanctions are more effective deterrents and appropriate in the case of cartels. For instance:

- the UK Government concluded that introducing criminal sanctions would be a more effective deterrent for those involved in cartel conduct.29

- In the US, the Director of Criminal Enforcement of the Anti-trust Division of the Department of Justice has stated that:

  There is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials. Corporate fines alone are simply not sufficient to deter many would-be offenders. For example, in some cartels, such as the graphite electrode cartel, individuals personally pocketed millions of dollars as a direct result of their criminal activity. The corporate fine alone, no matter how punitive, is unlikely to deter such individuals.30

- In a paper delivered in June 2001 Justice Finkelstein said that criminal sanctions, with the possibility of imprisonment for managers, would have a significant effect in reducing anti-trust violations.31

- Sweden has proposed to criminalise cartel conduct.32

The need for criminal sanctions is subject to active debate in the EU. The Commission believes that it is inevitable that criminal sanctions will be introduced in Australia and believes that the current review offers an important opportunity to consider the issue.

Because anti-trust violators have the option to engage in unlawful activity or not, the knowledge that severe criminal sanctions will be imposed can have a major effect in deterring such conduct.33

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28 Kerns, op. cit., p. 994.
At the corporate level, vigorous enforcement of stringent penalties, including criminal sanctions is likely to spur corporate efforts to detect and prevent illegal activity.\textsuperscript{34}

Individual criminal sanctions also strengthen the deterrence of corporate crime because employees have an added incentive to resist any pressure to act illegally in pursuing higher profits or performance bonuses. If corporate managers are liable for the conduct of employees under their supervision, and are at risk of imprisonment, they have strong incentives to implement procedures that eliminate illegal behaviour and are discouraged from directing employees to engage in conduct that may breach the law.\textsuperscript{35}

Of our major trading partners with well-developed anti-trust legislation, criminal sanctions (that include the option of imprisonment and would apply to hard-core collusion) are available in the US, Canada, Japan, Korea, UK (bill only), and Germany.\textsuperscript{36} Maximum custodial sentences are five years in Germany, Canada and Japan and three years in the US.\textsuperscript{37} In the UK, the proposed maximum sentence is five years.

Maximum sentences, and equivalent fines\textsuperscript{38}, applying to offences under the Commonwealth Criminal Code that may apply to white collar crimes include:

\begin{itemize}
\item Kerns, op. cit., p. 993.
\item Orlansky, op. cit., p. 1244.
\item ibid., p. 1259.
\item Criminal sanctions also apply in Ireland, Norway, the Slovak Republic, Mexico and France. The law in each country bar Mexico and France provides for imprisonment of offenders.
\item The US Department of Justice's sentencing guidelines recommend a base sentence of 18 months in all criminal anti-trust cases. After the base sentence is established the guidelines outline factors that will either increase or decrease the recommendation in a specific case. Aggravating factors include the amount of commerce involved; the position of the individual in the corporation and the conspiracy; the existence and degree of predatory coercive conduct; and the duration of the defendant's participation. Mitigating factors include any guilty plea; cooperation; business, family or personal hardship; and factors indicating the conspiracy was small or local.
\item Section 4B of the Crime Act 1914, provides a formula that applies unless the contrary intention appears, to calculate a maximum fine from a given maximum gaol sentence. The table uses this formula and the value of the penalty units provided in s. 4AA, to calculate equivalent fines for the offences.
\end{itemize}
Section 131 Theft 10 years $66,000

Section 133 Obtaining property or money by deception 10 years $66,000

Obtaining financial advantage by deception 10 years $66,000

Section 135 Obtaining gain or causing loss dishonestly 5 years $33,000

Conspiracy to defraud 10 years $66,000

Corruption 10 years $66,000

As already noted, under the Corporations Act, the maximum penalty for insider trading\(^{39}\) and share market manipulation\(^{40}\) is five years. Fines of $220,000 and $22,000 also apply respectively.

Considering this range of penalties the Commission proposes a maximum custodial sentence of seven years for cartel conduct.

It may be suggested that such a maximum is longer than applies for anti-trust breaches in other jurisdictions. However, it is important that sanctions are proportionate and consistent. In this context sentences applying to other corporate frauds in Australia are comparable to the maximum sentence proposed.

Another reason for introducing criminal penalties is that it may not be practical to set pecuniary penalties high enough to deter cartel participation; they may affect the financial viability of offending corporations and punish innocent parties such as employees, shareholders or creditors. For instance in the electricity transformer market, AW Tyree Transformers Pty Limited was penalised for price fixing. Since then, the company has entered voluntary administration, reportedly in part because of the size of the penalty. It is also noted that penalties will often ultimately end up being passed on to the consumer in the form of higher prices.

Imposing sanctions on individuals, as opposed to companies, involved in a breach will not affect innocent parties. Appropriate sanctions could include pecuniary, custodial or alternative penalties, such as banning orders.

The Commission proposes that an effective leniency policy be put in place to complement the introduction of criminal sanctions. (See chapter 10, for the rationale for a leniency policy and details of the Commission’s new draft policy.) An effective leniency policy increases detection and makes prosecution easier. It also encourages cartel participants to cease their conduct and cooperate with the enforcement agency.

\(^{39}\) Corporations Act 2001, s. 1002G and s. 1013.

\(^{40}\) ibid., s. 997.
Applying sanctions to individual participants has the further benefit of encouraging individuals to ‘blow the whistle’.

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.

Other non-custodial sentences applying to individuals upon criminal conviction, such as disqualification from holding office (similar to banning orders under the Corporations Act) and fines (especially if the company cannot indemnify the individual) may also be effective deterrents. However, they must promote deterrence and instil confidence in the legal system.

2.4 Should criminal liability be limited to hard core cartel conduct?

2.4.1 Background
The Commission advocates criminalising only the worst anti-trust offences: hard-core cartel conduct.

2.4.2 What is a hard-core cartel?
The OECD definition of hard-core cartel conduct is:

... an anti-competitive agreement, anti-competitive concerted practice or anti-competitive 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.\(^{41}\)

2.4.3 Proposed definition of new criminal offences
Broadly the Commission proposes that, in addition the existing civil offences, new criminal offences be created to criminalise agreements (contracts, arrangements or understandings) between competitors that would directly or indirectly:

- fix a price of a product or service
- limit or prevent supply or production of a product or 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.

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There would of course need to be legislative safeguards to ensure that the new offences were not too wide. Equally, it is important not to narrow the definition of the offence to the point that it fails to catch serious collusion, especially having regard to the many safeguards (see section 2.6).

The Commission’s proposal is consistent with the formulation of offences proposed in the UK Enterprise Bill (see appendix 1).

2.4.4 Cartel conduct
This section examines the types of conduct identified in the OECD definition in more detail.

2.4.4.1 Price fixing
Price fixing involves ‘an agreement among rivals or potential rivals\textsuperscript{42} with the purpose or effect of raising prices or reducing output in order to (a) increase profit or (b) achieve some other result that may result from higher prices or profits’.

In Australia s. 45(2) of the Act prohibits contracts, arrangements or understandings between firms that are, or should be, in competition with each other, and that have the effect of lessening competition. An agreement is deemed to substantially lessen competition (under s. 45A) if it:

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\ldots\text{has the purpose, or has or is likely to have the effect ... of fixing, controlling or maintaining, [or providing therefore] the price for [or a discount, and so on] goods or services supplied or acquired ... by the parties to the contract ... or by bodies corporate that are related to any of them in competition with each other.}
\]

Because such agreements are deemed to substantially lessen competition they will breach s. 45(2)(a)(ii) and, to the extent it was given effect, breach s. 45(2)(b)(ii). The Commission’s proposal focuses on per se price fixing breaches.

In the US courts can inquire whether a restraint of trade is legitimate (in which case the courts have held the Sherman Act ought not to prohibit the conduct). This test is known as the ‘rule of reason’. However, price fixing is so pernicious that it raises a presumption against legitimacy—it is illegal per se.

2.4.4.2 Bid rigging
Bid rigging is an agreement between two or more persons when, in response to a call or request for bids or tenders, one or more of them agrees not to submit a bid or to submit a bid that has been arrived at by agreement between or among themselves.\textsuperscript{43}

\textsuperscript{42} However, the Commission’s starting point is to use s. 45A and s. 4D as a guide and to limit criminal sanctions to agreements between competitors.

While in the past collusive tendering has been a stand-alone offence in Australia, such agreements must now be considered under s. 45 of the Act. A collusive tendering agreement is likely to be a per se breach (as an exclusionary provision under s. 4D of subs. 45(2) of the Act) and it is not necessary to show that the agreement has the effect or likely effect of substantially lessening competition.

In the US bid rigging is a restraint of trade under s. 1 of the Sherman Act and is illegal per se. Under US sentencing provisions bid rigging is sometimes seen as more serious (and harmful) than ordinary price fixing because bid rigging is more easily enforced by cartel members.

2.4.4.3 Market-sharing (market division)

There are four forms of horizontal market division agreements. These are agreements to refrain from:

- producing one another’s products
- selling in one another’s territories
- soliciting or selling to one another’s customers
- expanding into a market in which another participant is an actual or potential rival.

Market division is seen as even more harmful than price fixing because it leaves no room for competition at all. By contrast, price fixing leaves firms free to compete on non-price elements such as quality or standard of service.

In Australia there is no specific market sharing offence. However, if two or more firms who are or should be competitive enter into a contract, arrangement or understanding that shares or divides a market by allocating customers, suppliers, territories or lines of

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44 Part X of the Restrictive Trade Practices Act 1971 dealt specifically with collusive tendering. The Trade Practices Act 1965 also included a specific provision prohibiting collusive tendering. Section 96 of the 1971 Act defined collusive tendering as:

(b) any other agreements that has the purpose or effect of preventing or restricting competition among all or any of the parties in respect of tendering for the supply or acquisition of goods or services ...

45 This is because it will be characterised as including a provision that has the purpose or effect, or likely effect, of preventing, restricting or limiting the supply of goods or services from particular persons (that is, those involved in the collusive tendering arrangement) in particular circumstances or on particular conditions, and if the parties to the agreement are, or could be, competitive with each other, the arrangement will be an exclusionary provision (pursuant to s. 4D).


47 ibid.,para. 2030.
commerce, that arrangement would usually amount to an exclusionary provision under s. 4D. It would thus be a per se breach of s. 45(2) of the Act.

Some forms of market sharing are not as harmful as others. In the US this has led to certain agreements between rivals being treated not as per se breaches but subject to the ‘rule of reason’. For instance, in some industries cooperation among rivals is necessary to make a product, such as rival teams combining to conduct a sporting competition. In Australia, market sharing, if it is caught by s. 45, can be authorised.

Market sharing may also be vertical. Market sharing between manufacturers and distributors or franchisors and franchisees may be in the best interests of consumers. It may increase rather than decrease output. In the US these arrangements are treated in accordance with the rule of reason. They are not characterised as unlawful per se. The Commission has indicated that it does not seek to criminalise vertical agreements. They are not currently covered by s. 4D of the Act.

**2.4.4.4 Output restrictions**

A price fixing agreement may be accompanied by an agreement to restrict output so that any reduction in sales as a result of higher unit prices is shared between the colluding firms. Output restrictions may also be agreed for their own sake.

Some output restrictions do arise in conjunction with a joint venture—for example limits on the number of teams in a sports competition or the number of games that are televised. These are currently lawful to the extent that such a joint venture would not substantially lessen competition.

**2.4.5 What conduct is criminalised in other jurisdictions?**

As noted above, participants in a cartel are liable for criminal possible sanctions and imprisonment in at least nine OECD countries.\(^{48}\)

**2.4.5.1 US law and experience**

Section 1 of the Sherman Act prohibits any agreement that restrains interstate trade. All conduct that breaches the section is subject to criminal sanctions.

In practice in the US, per se offences are treated as criminal. Criminal prosecutions are confined to situations when the conduct amounts to hard-core cartel conduct and when the accused has acted with ‘specific intent’ to restrain trade.

Criminal proceedings are unlikely if there is a genuine dispute about the existence of the agreement, or if circumstantial evidence is relied upon, there is an innocent reason for the agreement. Criminal proceedings are also unlikely if the amount of commerce affected is small.\(^{49}\)

\(^{48}\) OECD *Report on the nature and the impact of hard-core cartels*, op. cit., para. 27.

They are also unlikely if there:

- are novel issues of law or fact
- is clear evidence that the defendants were not aware of, or did not appreciate, the consequences of their action
- is confusion as to whether the conduct would be categorised as illegal per se.50

2.4.5.2 Canadian law and experience

The Canadian Competition Act makes bid rigging and price maintenance illegal per se.51 It also criminalises price fixing arrangements that ‘unduly’ lessen competition.52 The ‘unduly’ test requires a similar analysis to the US rule of reason.

Because the Crown must prove beyond reasonable doubt that competition has been lessened unduly53, it has been difficult to prosecute price fixers who have been able to raise ‘specious arguments’54 about the collateral benefits of the arrangement.55

2.4.5.3 Proposed UK law

The UK Enterprise Bill would have the effect of criminalising price fixing, market sharing, production limitation and bid rigging (see appendix 1). The Bill has passed the House of Commons.

2.5 Applying criminal sanctions to both individuals and corporations

2.5.1 Criminal sanctions should apply both to individuals and corporations

Section 45 currently prohibits a corporation from making a contract, arrangement or understanding that contains an exclusionary provision or has the purpose, or the effect or would be likely to have the effect, of substantially lessening competition.

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50 Refer Department of Justice, *Antitrust Division Manual*, section C5, p. III–16. These are administrative guidelines as to when the Department of Justice will seek criminal sanctions. They are not legally binding limits on the scope of the application of such sanctions.

51 Competition Act, ss. 47 and 49 and s. 61 respectively.

52 Competition Act, s. 45.

53 On 23 April 2002 the Canadian Standing Committee on Industry, Science and Technology released its report entitled a Plan to Modernise Canada’s Competition Regime. It recommended that the word ‘unduly’ be deleted from section 45, thereby lowering the threshold of competitive harm.


55 There is no civil prohibition against price-fixing.
Section 76(1)(a) sets out a pecuniary penalty for a person who has contravened the s. 45 prohibition. The primary penalty applies only to a body corporate—only a corporation can contravene s. 45.

However, under ss. 76(1)(c), (e) and (f) penalties may also be imposed upon persons who have:

- aided, abetted, counselled or procured the contravention, or
- directly or indirectly been knowingly concerned in, or party to, the contravention, or
- conspired with others to contravene the provision respectively.

In the UK it is proposed that criminal liability only be imposed on individuals. The Enterprise Bill provides that ‘an individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement [an agreement that would give rise to a cartel]’.

Criminal sanctions in the US apply to both corporations and individuals. The Commission acknowledges that the deterrent effect of criminal sanctions is reduced for corporations who cannot be imprisoned. However, the Commission proposes that criminal sanctions apply to corporations as well as individuals for two main reasons:

- the stigma attached to a criminal conviction, and consequently its deterrent effect, can be expected to be greater than for civil offences, even for a corporation, and there is likely to be more negative publicity associated with such a conviction, and
- there are likely to be efficiencies in the investigation phase and in prosecution because it will minimise difficult evidentiary issues that may arise in civil proceedings against a corporation if there are limits on the use of evidence obtained in the course of a criminal investigation of an individual (through which that corporation acts).

Consistent with existing civil sanctions (analogous to paragraphs 76(1)(c), (e) and (f)) one way to achieve this is to impose primary criminal liability for entering into or giving effect to a cartel agreement upon a corporation and for individuals who

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56 This was a relevant factor in the UK decision to apply criminal sanctions only to individuals. In addition, the significant difficulties associated with obtaining a criminal prosecution and issues of consistency with the EU persuaded the UK Government that it would be preferable to pursue corporations under a civil standard.

57 It would be possible in Australia for criminal liability to be imposed directly (and solely on individuals) or on both corporations (as primary offenders) and individuals (for aiding and abetting etc.).

58 Section 12.1 of the *Criminal Code Act 1995* provides for corporate criminal liability. If a physical element of an offence is committed by ‘an employee, agent or officer’ acting within the actual or apparent scope of his employment or authority the physical element is attributed to the corporation.
participate in the conduct to be liable as accessories. Criminal accessorial provisions also exist in s. 5 of the Commonwealth Crimes Act.

A second option would be to have two separate offences. One applying to corporations entering into, or giving effect to, a cartel agreement and a second offence applying to individuals whose actions, on behalf of a corporation, result in the corporation entering into, or giving effect to, a cartel agreement.

The Commission does not express a view on which option is preferable. However, the Commission does not support imposing criminal liability upon a person who is not personally involved in the contravention.

2.5.2 Applying criminal sanctions to large corporations

The Commission considers that the focus of criminal prosecutions should be on conduct by, or in, large corporations. 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.

By focusing on large corporations, criminal sanctions would not apply to small businesses, professionals in small business, trade unions and farmers.

This limitation could be achieved in two ways. First, it may be possible to limit liability by statute. Alternatively, the prosecutorial discretion could be exercised to focus on larger corporations. A statutory limit could be achieved by:

Option 1—creating an exemption for businesses below a prescribed size

Option 2—carving out an exemption for conduct with a distortionary impact below a statutory threshold

Option 3—exempting the participants in a cartel when those participants have a combined market share lower than a statutory threshold.

The Commission does not support Options 2 and 3. Both involve complicated assessments of market or quantum of damage as a threshold for criminality. These would make deterrence uncertain and complicate proceedings because matters would need to be proved beyond reasonable doubt as a precondition to liability.

The Commission believes that the most practical method would be to limit liability to large corporations below a prescribed size—Option 1. A similar mechanism is used in

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The fault elements, other than negligence, are also attributed to the corporation when the corporation ‘expressly, tacitly or impliedly authorised or permitted the commission of the offence’. This is analogous to s. 84(1) of the Act.
s. 45A of the *Corporations Act 2001* which defines a large proprietary company as one that for any financial year satisfies at least two of the following factors:

- the gross operating revenue for the financial year of the company and the entities it controls (if any) is $10 million or more
- the value of the consolidated gross assets in the financial year of the company and the entities it controls (if any) is $5 million or more
- company and the entities it controls (if any) have 50 or more employees at the end of the financial year.\(^59\)

This mechanism could be adapted by ascribing values to each variable appropriate to the trade practices context.

The 2001 *Business Review Weekly* survey of Australia's 1000 largest employers (by revenue) indicated that all had revenues over $149 million. The total asset value of these 1000 companies fluctuated widely with many not ascribed a value. The lowest asset value was around $45 million. The survey included a separate list of the 100 largest employers, all employing more than 4500 employees.

Using these figures as a rough guide, the Commission would propose to apply criminal sanctions to a corporation that alone, or in combination with its related entities, satisfied two or more of the following criteria in the financial year in which a contravention occurs:

- gross revenue in excess of $100 million
- gross asset value in excess of $30 million
- more than 1000 full-time equivalent employees.

This test would be worded to prevent a large corporation avoiding liability by trading through a number of smaller subsidiaries.

An alternative mechanism would be to create an offence of general application but allow the Commission/DPP to exercise the discretion to lay charges in accordance with published guidelines, which give priority to pursuing cartels involving large corporations. The Commission does not support this approach, even though it has been adopted in other jurisdictions including in the US and Canada.

The UK Enterprise Bill also proposes a criminal offence of general application without a *de minimus* threshold. All jurisdictions have (or propose) prosecutor's guidelines to be

\(^59\) The Corporations Law (s. 45A) includes specific provisions to ensure that a part-time employee is accounted as an appropriate fraction of a full-time equivalent. It also includes a provision to ensure that consolidated gross operating revenue and consolidated gross assets are calculated in accordance with accounting standards. Similar provisions would be appropriate for adoption.
applied case by case and taking into account matters such as the scale and the impact of the conduct.

Investigating authorities (such as the Australian Securities and Investment Commission or the Australian Customs Service) usually have policy guidelines to determine what matters should be given priority for prosecution as criminal matters. This may include monetary thresholds. The DPP will assess a matter that has been referred to determine whether a prima facie case exists. Even if a prima facie case can be established the DPP may determine that there are insufficient prospects of success or that prosecution is not in the public interest.

2.6 Structure of the amendments—elements of the offence

2.6.1 The requirements of the Criminal Code

The Commonwealth Criminal Code will apply to any new criminal offence provisions inserted into the Act. Therefore, a new offence applying to cartel conduct will need to be drafted consistent with the code and will need to specify the relevant physical elements (actus reus) and corresponding fault elements (mens rea).

The criminal consumer protection provisions of the Act were recently redrafted so that civil offences under Part V are now mirrored in Part VC consistent with the requirements of the Criminal Code. This provides the option of civil and criminal penalties for the same conduct.

In practical terms, the code almost certainly requires the drafting of new criminal offences provisions, which the Commission supports. The Commission would not support simply introducing the added option of criminal liability for a breach of the existing ss. 45, 4D and 45A.

Assuming that specific criminal offences are drafted there are various structural options.

Option 1—Part IV could be re-drafted (so it complied with the code) to be substantially the same as the existing Part and so that civil and criminal penalties applied concurrently to the same offences.

Option 2—Alternatively, new offence provisions could be drafted in accordance with the code to mirror current Part IV offences. This option is analogous to the concurrent consumer protection regimes in Parts V and VC. In terms of consumer protection, the intention was that Parts V and VC were to provide parallel civil and criminal regimes. Consequently, the offences in Part VC were drafted in accordance with the requirements of the Criminal Code, but maintaining the substantive interpretations of the existing provisions of Part V.

Option 3—Another alternative would be to create new criminal offences distinct from Part IV that are limited to specific forms of conduct serious enough to be criminalised. Part IV would continue to operate unchanged for civil matters.

The Commission supports Option 3 for several reasons.
- Options 1 and 2 are less well suited to a proposal that only hard-core cartel conduct be criminalised.

- Hard-core cartel conduct is only a subset of what is currently covered by s. 45 conduct. It is therefore sensible to carve out discrete conduct for criminal liability.

- If Option 3 is adopted, the existing provisions in Part IV would not need amending. This would avoid arguments about changes in the interpretation of the existing civil offence provisions.

2.6.2 Elements of criminal offences

This section outlines what should be the elements of a criminal offence for hard-core cartel conduct. It reviews what elements are required in other jurisdictions and whether it should be necessary to prove that the parties acted dishonestly or covertly.

2.6.2.1 Elements of criminal offences in other jurisdictions and regimes

2.6.2.1.1 United States

The US Supreme Court has held that criminal liability can be imposed only when defendants either intended a clearly illegal result such as fixing or raising prices, or acted with knowledge that illegal results, which actually occurred, were probable. When the conduct is clearly illegal (such as price fixing or bid rigging) criminal intent to restrain trade can be presumed. Any facts surrounding the conduct, such as its very secrecy or the willingness of defendants to lie about its occurrence, will support a presumption of criminal intent.60

2.6.2.1.2 Canada

In Canada, it is necessary to prove that:

- the accused intended to enter into the agreement

- the accused knew of its terms

- the likely effect of the agreement would be to ‘prevent or unduly lessen competition’

- the accused intended it to have this effect.

To prove the accused’s intention about the consequences of the agreement it is only necessary to show that a reasonable person familiar with the relevant business would

have presumed that the agreement would have had or been likely to have had the prohibited effect.  

In Canada most prosecutions (almost 60 per cent) have resulted in guilty pleas. Only three out of 22 contested prosecutions have resulted in a conviction. Almost two-thirds of these prosecutions are lost because of insufficient evidence of the ‘undue’ lessening of competition or of the parties’ intention that the agreement have that effect. 

The Commission does not suggest that a competition test form part of a criminal cartel offence.

2.6.2.1.3 United Kingdom

Under the proposed UK legislation it will be necessary to prove that parties ‘dishonestly’ agreed to make or implement an agreement and that the agreement, if it operated as intended, would achieve various prohibited outcomes such as fixing prices or limiting output.

2.6.2.2 Should dishonesty be a necessary element of the criminal offence?

Under the Criminal Code fraudulent conduct, particularly relating to property offences and obtaining an advantage by deception, is judged against a standard of dishonesty, as are some Corporations Act criminal offences.

Clause 130.3 of the Criminal Code (which is consistent with English common law) defines ‘dishonest’ as:

- dishonest according to the standards of ordinary people, and
- known by the defendant to be dishonest according to the standards of ordinary people.

Under clause 130.4 the determination of dishonesty is a matter for the trier of fact—in other words in the case of a jury trial, the jury.

The High Court in Peters v The Queen (1998) 192 CLR 493 gave some support to the proposition that when an offence involves conduct that is inherently objectionable (such as price fixing and bid rigging) a more objective standard of dishonesty is applied using the test of what ordinary people would consider to be honest.

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62 Chandler and Jackson, op. cit., p. 9. However, as noted above, (footnote 54) it has been recommended that the ‘unduly’ requirement be removed from Canadian law.

63 English case law (R v Ghosh (1982) 3 WLR 110) has taken the view that the proper approach to determining dishonesty is to:

- first decide whether the accused's conduct was dishonest according to the ordinary standards of reasonable and decent people; and secondly, if it is dishonest by this standard, the jury must then consider whether the accused realised that his or her conduct was by those standards, dishonest.
Dishonesty is an element of the proposed UK offence. However, the Commission does not support the inclusion of dishonesty as an element requiring proof.

Price fixing, bid rigging and market sharing are contrasted to theft. A person can acquire property with a number of different intentions, but it is dishonesty that makes it criminal. A business is highly unlikely to enter a cartel agreement bona fide; this is reflected in the fact that such agreements are illegal per se. Indeed authorisation exists to afford protection in those few cases when parties may have an honest reason for entering a cartel agreement.

On a practical level it is also unclear what the prosecution would need to prove to establish that an agreement was entered into dishonestly.

2.6.2.3 Is secretiveness necessary?

Covert arrangements are the most pernicious and the most likely to corrupt markets. Trebilcock suggests that it is the covert nature of an arrangement that justifies criminality.64

It would be very difficult for the prosecution to prove the negative; that the world did not know of the agreement. Although it may be possible to introduce a system where an agreement was deemed not to be secret if the Commission was notified of its existence, the Commission would not support such a mechanism.

The model proposed in Canada by Trebilcock involved immunity from criminal sanctions (at any time) if those involved file a notification before the agreement took effect or within 30 days of its execution. Trebilcock suggested that the competition agency should be able to review a notified arrangement and seek injunctive orders and civil penalties, but that while a valid notification was in place no civil remedies should be available.

Section 45 conduct cannot presently be notified.

In Australia, before the 1976 Swanston Committee recommendations were implemented, ‘clearance’ was available for such conduct. The committee recommended the clearance provisions be abolished for several reasons including that they ‘deprived the community of the sort of self-reliance which competition-oriented legislation might be expected to encourage ...’.65 The mechanism was also resource intensive for the Commission.

For the reasons it was abolished, the Commission would not support the re-introduction of a clearance system or the requirement to prove secretiveness. Whether or not conduct is clandestine would be an appropriate matter to form part of the discretion to pursue a criminal sanction. (Section 2.9.2. includes an indicative list of the matters that

64 Trebilcock, op. cit., p. 54.

the Commission proposes be taken into account in making the decision about clandestine conduct.)

2.6.3 Suggested elements requiring proof for a criminal conviction under the Act

Having regard to the Criminal Code, criminal offence provisions in other jurisdictions and the existing elements of the civil offences in ss. 45, 45A and 4D, the Commission suggests the following approach to the construction of the proposed criminal offences be considered. 66

2.6.3.1 Price fixing

A corporation commits an offence if:

(a) it enters into an agreement (contract, arrangement or understanding), or gives effect to a provision of an agreement (etc.), that is intended to, or has the effect of, or which, if it operated as it was intended, would have the effect of, price fixing (etc.) of goods or services

(b) the goods and services are supplied or acquired (or proposed to be so) by the parties to the agreement (etc.)

(c) the parties to the agreement (etc.), or bodies corporate related to them, are competitors in relation to the particular goods or services.

Under the Criminal Code, conduct in paragraph (a) would need proof (the mens rea or fault element) of either a subjective intention to fix prices or recklessness as to whether the agreement would be likely to fix prices. Paragraphs (b) and (c) are circumstances for which, the default fault element is recklessness.

2.6.3.2 Bid rigging, market sharing and output restrictions

A corporation commits an offence if:

(a) it enters into an agreement (etc.), or gives effect to a provision of an agreement (etc.), that is intended to share markets, rig bids or limit output of goods or services

(b) the parties to the agreement (etc.), or bodies corporate related to them, are competitors in relation to the particular goods or services.

Under the Criminal Code, conduct in paragraph (a) the fault element (mens rea) would be recklessness as to whether the agreement would have the prohibited effect. For paragraph (b) the default fault element is recklessness.

If it was not possible to prove subjective intention with direct evidence of the parties’ intention at the time it may still be possible to infer from the terms of the agreement that the parties must have intended an unlawful result.

66 The outline of the offence provisions will need to be developed further and is not intended as suggested drafting.
It would of course be necessary to define more specifically what amounts to bid rigging, price fixing, market sharing and output restriction. Section 45A would be the basis for the definition of price fixing. Clauses 179 and 180 of the UK Enterprise Bill also offer useful guidance (see appendix 1).

As an alternative to accessorial criminal liability for individuals it would be possible to create separate offences for individuals who, as employees or agents of a company, participate in making or giving effect to cartel agreements. The Commission does not suggest a preferred formulation at this stage of the inquiry. However, constitutional limitations, which require a sufficient connection between the individual concerned and a ‘foreign, trading or financial’ corporation, would prevent Australia adopting a definition as ‘simple’ as that proposed in the UK, absent a referral of powers from the states and territories.

2.7 Structure of the amendments—defences/exemptions and authorisations

2.7.1 What exemptions are appropriate?

To the extent that existing exemptions protect agreements and arrangements from civil liability, they should also give protection against criminal conviction.

The Act implicitly acknowledges that not all horizontal arrangements reduce welfare. It identifies many factors that either prevent an agreement being anti-competitive or overcome the presumption of anti-competitiveness in per se offences.67 For instance, professional partnerships while amounting to arrangements between competitors or potential competitors, will usually increase welfare68 and are completely exempted from Part IV by subs. 51(2). Price fixing between joint venture partners is exempted from per se liability under subs. 45A(2).

In the UK, it is intended that the offence of bid rigging not apply when the person requesting the bid is informed at or before the time the bid is made of the arrangement.69 No similar protection currently exists in Australia. However, the Commission believes that it may be worthwhile to consider affording a similar protection to that proposed in the UK in Australia in relation to criminal sanctions.

67 Section 45 does not prohibit agreements the only parties to which are related bodies corporate (ss. 45(8)). Nor does it apply to agreements that are authorised (ss. 45(6)) or agreements that deal with the acquisition of shares or assets (ss. 45(7)), nor, broadly speaking, does it prohibit provisions that would amount to exclusive dealing under s. 47, retail price maintenance under s. 48. In addition, s. 45 does not apply to any provision that breaches s. 48 or any provision that is a covenant to which s. 45B applies (ss. 45(5)).

68 Trebilcock, op. cit., p. 49.

69 Subclause 179(6).
The Commission proposes that the treatment of joint ventures mirror that currently applying under the existing civil regime. Joint venture agreements could be authorised and an exemption based on s. 45A would operate for price fixing.

The Commission’s proposals do not involve any change to the existing treatment of such agreements for the purposes of civil liability.

2.7.2 Application of authorisation provisions to conduct that may be categorised as criminal

Part VII of the Act allows the Commission to authorise corporations to enter and/or give effect to anti-competitive contracts, arrangements or understandings if the Commission is satisfied that the public benefits outweigh the anti-competitive detriment.

The policy behind this power is twofold. First, it acknowledges that circumstances arise in which conduct that may breach the Act has benefits that outweigh any anti-competitive detriment and that these should be able to be approved case-by-case for the overall benefit of the economy. Second, it acknowledges that an authorisation gives parties to the arrangement some legal certainty by protecting them from legal liability. This is particularly important when there are doubts about whether conduct will breach the Act or if the benefit of the arrangement and the anti-competitive detriment are finely balanced.

Of course, it is highly unlikely that the public benefit of an arrangement that would amount to hard-core cartel conduct would outweigh the anti-competitive detriment. It is thus unlikely that the Commission would ever be asked to authorise such conduct; particularly as cartels tend to be covert. However, there may be cases when it is doubtful that an arrangement amounts to price fixing, bid rigging, output restriction or market sharing. There may also be cases when an agreement to fix prices may actually reduce prices.

To provide some commercial certainty an authorisation under Part VII should offer protection from both civil and criminal sanctions. The possibility of authorisation will enable a corporation who believes a collusive agreement is justified to ensure that it is not exposed inappropriately to criminal penalties.

2.8 Leniency policy

A well-publicised and effective leniency policy would complement criminal sanctions. The importance of an effective leniency policy has been recognised in recent international studies on the remedies appropriate for cartel conduct.70 Leniency policies

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encourage participants in a cartel or criminal conspiracy to inform on other participants; it destabilises agreements.

To be effective the leniency policy should be transparent and certain. (See chapter 10 for discussion about the Commission’s soon-to-be-released draft leniency policy.)

The US leniency policy involves a full amnesty for the first person to confess, providing certain conditions are met including the person cooperates fully and is not a ring-leader. In the EU, where criminal sanctions do not apply, there are different levels of leniency for:

- spontaneous confessions (75 to 100 per cent fine reduction)
- confessions during the course of an investigation and before incriminating evidence is discovered (50 to 75 per cent fine reduction)
- partial cooperation (10 to 50 per cent fine reduction).

The Commission proposes that when criminal and civil penalties apply concurrently, the leniency policy clearly states what protection is offered for both forms of penalty. At this stage, the Commission envisages equal protection in civil and criminal matters.

The Commission is currently responsible for conducting proceedings in civil matters and can therefore guarantee that it will not initiate proceedings or will apply for a reduced pecuniary penalty. However, in criminal proceedings while the Commission may investigate conduct, it will be the DPP’s responsibility to have charges laid and conduct the proceedings. To ensure the level of certainty necessary for the leniency policy to be effective, the DPP would need to commit to the policy in a transparent way.

The DPP has adopted a strict set of criteria against which it assesses all cases before deciding whether to have charges laid. These criteria include the public interest. It would be necessary to ensure the DPP’s view of the public interest was consistent with that of the Commission and took into account the importance of maintaining an effective, certain and transparent leniency policy for breaches of competition law.

2.9 Practical issues in imposing criminal sanctions

Introducing concurrent civil and criminal penalty regimes would raise many practical issues. These are not new to Australian regulators and could be managed to avoid prejudice to the regulated community. Indeed, such a regime already exists in Parts V and VC of the Act. Many of the issues are canvassed in the recently released Australian Law Reform Commission (ALRC) decision paper, on civil and administrative penalties. The paper notes that there is some support for the law offering the option of criminal and civil proceedings for the same conduct, allowing regulators to tailor their
response to a particular contravention so that the penalty imposed is appropriate and proportionate.\textsuperscript{71}

In these circumstances, the Review Committee should not feel constrained in recommending the introduction of criminal sanctions pending publication of the ALRC’s final report.

2.9.1 Jurisdictional issues

Cartel conduct is serious enough to warrant trial on indictment in a superior court, which requires trial by jury under s. 80 of the Constitution. While the Commission would prefer to have competition law matters continue to be tried in the Federal Court, it accepts that it may be necessary to have jury trials in the relevant state court system.

Jury verdicts must be unanimous. Proving an offence beyond reasonable doubt to the satisfaction of a jury will add a degree of complexity to criminal proceedings that does not currently exist in civil proceedings under the Act.

However, the offences proposed by the Commission do not require proof beyond reasonable doubt of complex competition and market definition issues. In these circumstances, the Commission does not believe the additional complexity of prosecuting a criminal offence will weaken the important deterrent effect of criminal penalties.\textsuperscript{72} On the contrary, the Commission considers criminalising hard-core cartel conduct will increase the deterrent effect of the Act.

The Commission would expect that most matters would continue to be dealt with civilly. However, for the worst kind of conduct when there is evidence of deliberate and flagrant breaches, the Commission believes that criminal sanctions will be an important additional tool in the armoury of the Commission to promote compliance with the Act.

2.9.2 Investigation decision to pursue a matter as civil or criminal

The different evidentiary standards applying to civil and criminal matters will make it necessary to identify as early as possible in an investigation whether the matter will proceed as a criminal prosecution. In the few cases when the Commission believes criminal proceedings are justified the investigation will need to be conducted in a different way and to a higher standard. As an investigation proceeds it may become clear that criminal proceedings are not warranted and the investigation will need to be adjusted accordingly. This means the Commission must monitor developments in investigations closely and review how the matter should progress.

There may be legitimate concern about the cost and difficulty of collecting evidence from the very beginning of an investigation in a way that is appropriate for subsequent

\textsuperscript{71} Australian Law Reform Commission, Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation, April 2002, Discussion paper 65, paras. 6.13 and 8.11.

\textsuperscript{72} The introduction of criminal sanctions was rejected in New Zealand because it was considered that it may result in a ‘weakened deterrence effect’.
tender in criminal proceedings when there is no expectation that the matter may proceed to a criminal charge. Another concern is having to redo early work to bring evidence up to the criminal standard. These issues are not insurmountable. They are routinely dealt with in tax, customs and Corporations Act cases.

The Commission would develop and publish guidelines on what matters would be appropriately pursued as criminal. The sort of matters that may be included would include:

Are there circumstances surrounding the conduct that warrant criminal prosecution?

Is the conduct clearly illegal?

What was the scale of the conduct? Has it continued for a long time? Do the participants represent a significant part of the market?

What was the impact of the conduct? Has it had a significant economic impact assessed by reference to the volume of commerce affected or the extent of the price rise?

Did the participants go to great lengths to keep the conduct secret or to enforce participation?

Are there characteristics of the participants that warrant criminal prosecution?

Did the participants engage in the conduct in question genuinely, but erroneously, believing that they did so as part of a genuine joint venture?

If the participants are small players in a market, is the arrangement an attempt to obtain some countervailing market power in the face of large competitors with significant market power?

Is there clear evidence that the defendants were not aware of, or did not appreciate, the consequences of their action?

Is there evidence that the participants knew that their conduct was illegal but decided to proceed to engage in that conduct?

Other matters

Would the leniency policy militate against prosecution?

Is the public interest served by prosecution?

Is the matter so complex that a jury may have difficulty understanding it?
2.9.3  Double jeopardy and restrictions upon the use of evidence in criminal and civil proceedings

The ALRC discussion paper notes that laws that provide for both civil and criminal penalties must ensure that defendants are not subject to double jeopardy and that information obtained in the context of one proceeding is not inappropriately used in any subsequent proceedings.73

The Corporations Act deals explicitly with both these issues. It provides protections to make sure that civil proceedings are not pursued following a criminal conviction. However, criminal proceedings may be commenced after civil proceedings. This ensures that civil remedies, such as interlocutory injunctions, do not preclude later criminal penalties being imposed when appropriate. However, civil proceedings will be stayed if criminal proceedings are commenced.74

It is not proposed that a criminal conviction would prevent a private action for damages.

The Corporations Act also specifically prevents the use of evidence in a criminal proceeding if it has been previously used in civil proceedings and the conduct alleged to constitute the offence is substantially the same. However, the absolute privilege against self-incrimination does not apply—the regulator can use the evidence to follow a chain of inquiry but cannot use it directly.

Should the Review Committee recommend the introduction of criminal sanctions into the Act these important protections could be incorporated in a manner consistent with the final recommendation of the ALRC.

2.9.4  Early involvement with the DPP

The Commission would envisage negotiating a memorandum of understanding with the DPP to reflect a shared understanding of enforcement priorities and leniency issues in criminal cases. It would also have to deal with practical issues such as how and when the Commission would consult the DPP about a complaint and about developments in an investigation. This would maximise the opportunity of identifying those cases that may be appropriate for criminal prosecution—and just as importantly, those that may not. The Commission accepts that it will need to work closely with the DPP to ensure that the merits and evidentiary requirements of a matter are assessed early so that resources can be properly and efficiently deployed. The Commission consulted the DPP on the proposed framework for the application of criminal penalties to hard-core cartels. The DPP did not raise any in-principle objections to the Commission’s proposal that such conduct be made subject to criminal sanctions.

73 ALRC, op. cit., para. 8.21.

74 ALRC, op. cit., para. 8.35ff and Corporations Act 2001, ss. 1317N and 1317P.
2.9.5 Who would investigate and prosecute

The Commission proposes that it retain the power to investigate criminal matters and that the DPP would be the prosecuting authority. The Commission considers that it is important to use the expertise of the DPP as prosecutor. It also believes that it is appropriate for the Commission to continue to investigate matters because the Commission has the expertise to investigate competition-related matters. It would also facilitate investigation if it is unclear whether a matter is appropriate for criminal or civil proceedings. This arrangement is already in place under the Act with respect to Parts V and VC matters.

In the UK the Crown prosecutor (the equivalent of the Commonwealth DPP) is the Criminal Prosecution Service. The UK Enterprise Bill proposes that criminal cartel offences be prosecuted by a separate body, the Serious Fraud Office. The Serious Fraud Office will have an investigative function (with coercive powers) and an independent prosecutorial function in those cases it investigates.

2.9.6 Criminal liability and level of penalty

The Commission proposes that both individuals and corporations be liable for criminal conviction.

A corporation convicted of a criminal offence would be liable for a fine at the same maximum level that would apply if the contravention were civil. (See section 2.10.1 for discussion of the Commission’s proposal to vary the existing maximum penalty.)

Individuals involved in committing an offence would be liable on conviction for a custodial sentence. The Commission proposes a maximum sentence of seven years. Once convicted, individuals could also be disqualified from being appointed as company directors.

The Commission proposes that a fine could be imposed in lieu of a prison term. However, the formula specified in s. 4B of the Crimes Act 1914 would convert a prison term to an inappropriately small pecuniary penalty for cartel conduct and consideration needs to be given to this issue.

Whether an individual is sent to gaol or required to pay a criminal penalty would of course be a matter of judicial discretion.

2.10 Civil liability amendments

In addition to the introduction of criminal sanctions, the Commission believes that it is important that civil pecuniary penalties be amended if they are to be effective deterrents. (See section 2.10.1 for details of a proposal to amend the civil penalty provisions to reflect a measure of illicit gain.)

Given that hard-core collusion is highly secretive, the current six-year statutory limitation period in the Act is another concern for the Commission. By the time the Commission becomes aware of possible contraventions and has investigated them to the point when penalty proceedings can commence, it is common that at least some of
the conduct falls outside the six-year period. In cases like this courts cannot impose penalties for that conduct. (See section 2.10.2 for details of a proposal to increase the statutory limitation period for the commencement of civil penalty proceedings under s. 45 of the Act to 10 years.)

2.10.1 Increased pecuniary penalties

Existing maximum pecuniary penalties are inadequate, particularly for large corporations who may net substantial gains from their participation in cartels, to deter cartel conduct that is both difficult to detect and potentially highly profitable. The penalties are too low and are arbitrary because they bear no relation to the illicit gain or the harm caused.

The Commission proposes that the Act be amended so that the maximum penalty a court may impose upon a corporation can be as high as three times the value of any commercial gain from the contravention, or in certain circumstances 10 per cent of the corporation’s Australian turnover.

The Commission does not propose that the maximum penalty for individuals be increased. However, it is proposed that corporations be prohibited from paying an individual’s fine, and that the court be given power to make alternative orders such as banning orders—for some individuals, these may be a more effective deterrent than pecuniary penalties.

2.10.1.1 Deterrence and an appropriate level of penalties

An effective deterrent should minimise the prospect of illegal gain. As detection and punishment are not perfect, effective deterrence requires penalties to be greater than the expected benefit from the illegal activity.75 As Posner states:

Concealability drives the probability of being punished for a violation below 100 per cent, and …[t]he correct fine… is calculated by dividing the social cost … by the probability of detection.76

Bryant and Eckhart believe that as few as one in six or seven cartels are detected and prosecuted. This would imply a multiple of six.77 However a multiple of three is more common in other countries.

The recent OECD report on cartels78 analysed pecuniary penalties in several cartel cases in OECD countries. The fines expressed as a percentage of gain varied from 3 per cent to 189 per cent. Only in four cases were the fines more than 100 per cent of the estimated gain. The OECD report concludes that ‘… while there is a distinct, if uneven

75 OECD, Optimal sanctions in cartel cases, op. cit., para. 30.
trend towards more rigorous sanctions in cartel cases, available data indicate that larger sanctions are required to achieve effective deterrence.79 An Australian example involves $15 million in fines in the Queensland fire protection case. These fines were estimated to represent only 31 per cent of the total harm caused.80

2.10.1.2 Proposal to increase pecuniary penalties—individuals and corporations

In proposing that the maximum pecuniary penalties under the Act be increased the Commission is mindful that legislation regulating competition must balance a number of competing objectives. It must provide an effective deterrent to anti-competitive behaviour but it should not deter efficient commercial activity. The level of penalties and remedies should be clearly known to the market and set to make anti-competitive conduct profitless.81

2.10.1.2.1 Increased pecuniary penalties applying to corporations.

In 1993 the maximum penalty that can be imposed on a corporation under the Act was raised from $250,000 to $10 million. The maximum penalty for contravening the Sherman Act is also US$10 million. However, the largest penalty imposed on a corporation for multiple offences in Australia is $15 million. This compares to the largest penalty in the US of US$500 million. US courts are able to impose a penalty of twice the gain or twice the victims’ loss, even if that exceeds the maximum $10 million penalty.

A penalty should be flexible enough to take into account that the benefits accruing to a company with a large turnover may be very high. In a recent New Zealand report on the Optimal sanctions in cartel cases82 a maximum penalty of $5 million was seen as too small to be a real deterrent, being less than one day’s turnover for many firms. In Australia, a $10 million penalty is less than one-fifth of the daily turnover of our largest corporations.

In response to the New Zealand report the NZ Commerce Act 1996 was amended83 to improve enforcement and deterrence measures especially to counter hard-core cartel conduct. Among other things, the amendments increased the maximum penalty for corporations from $5 million to $10 million. As an alternative, they also introduced a pecuniary penalty of three times the value of any commercial gain from the contravention. If the commercial gain cannot readily be ascertained courts can use as a proxy 10 per cent of turnover of the corporation and all its related bodies corporate within New Zealand.


80 Calculating the gain realised by a cartel is difficult. Indeed, it is rarely done. Some jurisdictions use a percentage of turnover as a proxy for gain.

81 OECD, Optimal sanctions in cartel cases, op. cit., para. 26ff.

82 OECD, Optimal sanctions in cartel cases, op cit., para. 12.

83 By the Commerce Amendment Act 2001.
New Zealand legislators considered that merely increasing the maximum penalty for corporations from $5 million to $10 million would only substitute one arbitrary upper limit for another and bear no relation to the value of the illicit gain.\(^{84}\) As such it was not considered to be an effective deterrent.

Many maximum penalties and fines in other jurisdictions are also tailored according to illicit gains, for instance:

- **Switzerland**—penalties as much as three times the profit (or if the profit cannot be calculated, 10 per cent of the firm’s turnover)

- **US**—maximum fine $10 million or twice the pecuniary gain from the offence, or twice the gross loss to persons other than the defendant

- **EU**—fines up to 10 per cent of the firm's worldwide turnover in the preceding year

- **France**—pecuniary sanctions up to 5 per cent of the previous year's turnover (in France)

- **Germany**—a penalty up to three times the additional profit obtained as a result of the violation, as well as a maximum five years imprisonment

- **UK**—under existing law, fines up to 10 per cent of UK turnover for the duration of the infringement for a maximum of three years.

New Zealand also introduced exemplary damages for private actions, believing them to be more appropriate than ‘treble damages’ that apply in the US. New Zealand believes that treble damages may lead to an increase in litigation as plaintiffs commence strategic or speculative claims.

The Commission proposes that the Act be amended so that the maximum penalty for a contravention of the Act would be the greater of $10 million or three times the value of any commercial gain from the contravention. The Commission considers also that it would be appropriate for courts to have the power to substitute a percentage of turnover if it is difficult to quantify the commercial gain from the contravention.\(^{85}\) The Commission proposes 10 per cent of the firm’s Australian turnover for the duration of the infringement for a maximum of three years.

\(^{84}\) OECD, op. cit., para. 64.

\(^{85}\) The Commission considers that this formulation (consistent with that applying in the UK) would be effective to prevent manipulation of a corporation's accounts in the period between the detection of the contravention and the imposition of a penalty by a court.
2.10.1.2.2 Monetary penalties applying to individuals.

In Australia, the maximum pecuniary penalty for an individual for breaching the Act is $500 000. This compares with US$350 000 in the US, NZ$500 000 in New Zealand, more than €1.5 million in France and Germany and CAN$10 million in Canada.

Only four countries—Australia, US, Canada and Germany—have imposed fines on individuals. The largest in Australia was $150 000 compared with a fine of US$10 million in the US.

The 2001 amendments to the New Zealand Competition Act not only increased penalties applying to corporations but modified how penalties are imposed on individuals. The maximum penalty for individuals was not increased; however the legislation now86:

- prohibits firms indemnifying their agents and employees against any pecuniary penalties
- allows courts the discretion to disqualify individuals from being directors or managers
- encourages courts to impose pecuniary penalties on individual perpetrators.

The Commission does not suggest an increase in the maximum pecuniary penalty for individuals but would support the introduction of measures similar to those introduced in New Zealand.

2.10.2 Limitations periods

2.10.2.1 Current law

Pursuant to s. 77 of the Act only the Commission may institute proceedings for recovery of a pecuniary penalty on behalf of the Commonwealth. Proceedings must be commenced within six years of the alleged contravention.

This limitation is inappropriate in the context of hard-core collusion. By their nature, cartel agreements are clandestine. They are shrouded in secrecy and it may be difficult to prove illegal agreements. In the circumstances, it may be many years before illegal conduct is detected and it may take a long time to investigate a matter to a point when the Commission can to commence proceedings.

It is common for cartel conduct to continue for many years. Even if it is possible to commence proceedings for recent contraventions, there will often be conduct resulting from cartel agreements that occurred more than six years before the proceedings started. In these cases, the Commission may plead, but is unable to prosecute

86 The maximum penalty for individuals remains $500 000.
participants for the making of an agreement, or conduct that gives effect to an agreement, that occurred outside the limitation period.87.

The Commission has found itself in this situation on a number of occasions for collusive agreements. The express freight, transformer and Queensland fire protection cartels are just three examples. It is not such a problem for other breaches of Part IV including ss. 46, 47 and 48.

2.10.2.2 Proposed amendment

To address these problems the Commission proposes that:

- the statutory limitation period for contraventions of s. 45 of the Act be raised to 10 years, and

- an amendment be made to remove any doubt that when an action is commenced within the limitation period a court may take account of conduct before the limitation period as a factor in understanding the subsequent contraventions and determining an appropriate penalty for those contraventions.

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87 In contrast, in the US, if any conduct giving effect to an illegal collusive agreement takes place in the limitation period, the parties to the agreement may be prosecuted for all conduct related to that agreement, whether or not it occurred outside the limitation period.
3 Misuse of market power

Summary

The Commission believes that both competition and fair trading generally, and the interests of consumers, small business and many big businesses would be promoted by two significant amendments to improve the operation of s. 46:

- the introduction of an ‘effects test’ to supplement the existing ‘purpose’ test, and
- allowing faster action in certain cases under the Trade Practices Act, specifically by the introduction of cease and desist orders.

The objective of the Trade Practices Act (the Act) is to enhance the welfare of Australians, as outlined in chapter 1, by promoting competition and fair trading and provision for consumer protection. The prohibitions in Part IV and specifically s. 46 serve this objective. Each section in Part IV is aimed at conduct that either has the purpose or has the effect of damaging competition in markets—promotion of competitive markets enhances consumer welfare. (See appendix 2 for the reasons why competitive markets enhance the welfare of Australians.)

Section 46 is also expressly directed at fair trading, by protecting smaller businesses from anti-competitive conduct of firms that possess substantial market power. It prohibits firms with substantial market power from taking advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor
(b) preventing entry to markets
(c) deterring or preventing a person from engaging in competitive conduct.

The Commission believes that the provisions of s. 46 are generally appropriate and, in general, have been properly applied by courts in accordance with the underlying objectives of the law. 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 s. 46 constitutes a gap in Australia’s competition law.

The Commission supports the introduction of an effects test to supplement the existing purpose test. Arguments in favour of this amendment include:

- an effects test in s. 46 will more effectively protect the process of competition—promoting competition and fair trading in accordance with the object of the Act
s. 46 will be brought into line with the balance of Part IV, which is generally
directed towards conduct that has the purpose or effect of damaging competition

the amendment will overcome enforcement difficulties associated with proving
purpose in a range of circumstances.

The amendment will also bring s. 46 into line with similar prohibitions in overseas
jurisdictions, including Europe and the United States.

At the outset, 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. 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 of 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.

Opponents of an effects test amendment claim that it will result in legitimate
competitive conduct being prohibited. The Commission disagrees with this assessment.
The Commission’s view is that s. 46 contains significant safeguards to protect
legitimate competitive conduct. Particularly (for the reasons explained in this
submission) legitimate competitive conduct will not constitute a taking advantage of
market power as that expression is interpreted by the High Court.

To widen enforcement options available under the Act, the Commission also supports
the introduction of cease and desist orders. Section 46 contraventions often occur in
concentrated markets when a new competitor seeks to enter the market. A firm with
market power will act swiftly in an effort to stifle the new entrant before it gains a
foothold in the market. The Commission’s ability to act to protect the competitive
process is often hindered by:

- the need to gather evidence of anti-competitive purpose before intervening, and

- the normal timetable of investigation and court processes, which has resulted in
  many s. 46 actions taking up to six years to complete.
Cease and desist orders can be designed with safeguards to ensure that they are not abused or used incorrectly. (See section 3.6.1 for discussion about these issues.)
3.1 Overview of section 46

The misuse of market power provision is a key provision of Part IV of the Act. Section 46 is directed at preventing firms with substantial market power from engaging in illegitimate anti-competitive conduct. Situations in which it may arise include: predatory behaviour, anti-competitive refusals to supply, illegitimate leveraging of market power in one market to damage competition in another market and some vertical practices. The law plays a vital role in protecting the process of competition. This section gives a brief overview of the provision and the scope of its application.

3.1.1 The elements of section 46

Section 46(1) currently reads:

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 a 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

In line with current judicial interpretations, conduct will only breach section 46 if:

(i) a corporation has a substantial degree of power in a market

(ii) the corporation has taken advantage of its market power; and

(iii) the conduct has a proscribed purpose.

The following paragraphs provide a brief overview of these elements of s. 46 and are not intended to provide a definitive analysis of their operation.

3.1.1.1 Substantial degree of market power

Section 46 does not prohibit the possession of monopoly or substantial market power, or the accumulation of that power by competitive means such as superior efficiency or economic performance. However, it does prohibit a taking advantage of market power for a proscribed purpose. Accordingly, for the provision to apply a corporation must have a ‘substantial degree of power in a market’.

The reference to power in s. 46 is a reference to market power (s. 46(4)(a)). However, the Act does not define market power. The concept of market power is an economic concept and has been defined as follows:
A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions.\(^{88}\)

There tends to be an inverse relationship between the existence of market power and the level of competition in a market. In a competitive market, a firm would be constrained by competitive forces and would have no market power to influence price or output. Further, price may not merely mean the monetary price but also the ability of a firm to supply inferior goods or services and the ability to impose unfavourable terms and conditions.\(^{89}\)

There are varying degrees of market power. The characteristics that condition or constrain a corporation’s conduct and all relevant market factors will inform the court’s assessment of whether a corporation has the requisite degree of market power. Courts have also accepted that more than one corporation may have a substantial degree of power in a particular market.

### 3.1.1.2 Take advantage

The mere possession of a substantial degree of market power does not of itself result in a breach of s. 46. The prohibition is directed at the ‘taking advantage’ of the power that results from being in such a position. In *Queensland Wire Industries v BHP*\(^{90}\) the court states that the question is simply whether a firm with a substantial degree of market power has used that power for a proscribed purpose. The expression ‘take advantage’ does not mean anything materially different from ‘use’ and does not require conduct which is predatory or morally blameworthy.\(^{91}\) The appropriate test is whether a corporation would be likely to engage in the same conduct in a competitive market.

The Commission considers that the ‘take advantage’ limb operates as a critical filter to the application of s. 46—ensuring that only non-competitive conduct is caught by the section. The ‘take advantage’ limb is discussed in detail at section 3.2.3.

### 3.1.1.3 Proscribed purpose

The taking advantage of substantial market power is prohibited only if it is for the purpose of eliminating a competitor of the corporation, preventing the entry of a person into a market or preventing a person from engaging in competitive conduct.

The role of the purpose provisions was commented on by Mason CJ and Wilson J in *QWI*:

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\(^{90}\) (1989) 176 CLR 177 at 191 comments by Mason CJ and Wilson J.

\(^{91}\) *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253 hereafter referred to as ‘Melway’.
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 ... the purpose provisions in s. 46(1) are cast in such a way as to prohibit conduct designed to threaten that competition. 92

The Act contains several interpretation provisions that impact upon the ‘purpose’ limb of s. 46. Section 4F of the Act provides that where conduct is engaged in for more than one purpose, a proscribed purpose need not be the sole or dominant purpose. Subsection 46(7) permits a court to infer purpose from the conduct of the corporation or other relevant circumstances. Subsection 84(1) allows the state of mind of a director, servant or agent to be imputed to the corporation. However, as discussed in section 3.3.3, the Commission takes the view that the current requirement to establish a proscribed purpose is onerous and is becoming increasingly difficult.

3.1.2 Prohibited conduct

The text of s. 46 does not prohibit specific forms of conduct, however judicial decisions have confirmed that the provision covers a broad range of anti-competitive behaviour. Several examples of potentially anti-competitive conduct include:

- refusals to supply
- predatory pricing
- leveraging from one market into another
- price squeezing
- vertical restraints.

Anti-competitive refusals to supply are the most common type of conduct examined by Australian courts under s. 46. It is accepted that a corporation with a substantial degree of market power is not under a comprehensive obligation to supply all potential acquirers. However, under some circumstances a refusal to supply by a corporation with substantial market power can be anti-competitive and in breach of s. 46. 93

The term ‘predatory pricing’ in general terms refers to pricing at a low level by a corporation with market power directed at damaging smaller competitors, driving a competitor from the market, or deterring a potential competitor from entering a market. While the courts have not adopted overseas approaches to predatory pricing, such as the recoupment test, such conduct has been found to fall within the scope of s. 46. 94

92 Note 90 supra.

93 See for example QWI v BHP Note 90 supra and ACCC v Universal Music Australia Pty Ltd [2001] FCA 1800.

94 See for example Australian Competition and Consumer Commission v Boral Ltd (2001) ATPR 41-803. This decision is currently under appeal to the High Court.
The courts have recognised that market power in one market can be used to give rise to market power in another market.\textsuperscript{95} This concept is referred to as ‘leveraging’. It occurs most frequently through tying arrangements, where a corporation with substantial market power in one product uses that power to damage competition in the market for the tied product.

Vertical integration can give rise to an anti-competitive practice known as ‘price squeezing’.\textsuperscript{96} For example a supplier who has substantial power in a component market may charge excessive prices to both its downstream subsidiary and downstream competitors. The price squeeze may drive downstream competitors from the market, while the vertically integrated corporation merely offsets the subsidiary’s losses in the downstream market against the above normal profits accruing to the upstream supplier.

Vertical restraints involve the imposition of obligations that a buyer deal only with a particular seller or that a seller deals only with a particular buyer or group of buyers. Some forms of vertical restraint are prohibited under s. 47 of the Act where they have the purpose or effect of substantially lessening competition. However, vertical restraints may also have a non-competitive objective and consequence, potentially breaching s. 46. For example a supplier with substantial market power may foreclose distributors by obliging its dealers not to deal in the goods of competing suppliers. This has the effect of forcing rival suppliers either to vertically integrate into distribution, or to secure alternative independent distributors. A second example is that of foreclosure of customers. Customers or end users may accept an obligation to acquire all or a considerable part of their requirements from a supplier with substantial market power.\textsuperscript{97} This has the effect of preventing competing suppliers and new entrants from supplying those customers for the duration of the obligation. Such obligations can significantly damage competition in relevant markets.

Section 3.2.3.2 contains further analysis of some of the issues arising under s. 46 and distinguishing between competitive and non-competitive conduct.

\textsuperscript{95} In \textit{QWI v BHP}, Mason CJ and Wilson J held that BHP had infringed s.46 by extending its market power from the steel products market to the market for rural fencing products.

\textsuperscript{96} See for example \textit{Pont Data Australia Pty Ltd v ASX} (1990) ATPR 41-007.

\textsuperscript{97} See for example \textit{Hoffmann La-Roche v Commission} [1979] 3 CMLR 211 at 289.
3.2 Objectives and framework of s. 46

This section discusses the policy objectives of s. 46 and the legal framework of the section as it is currently drafted. (See appendix 5 for statistics on recent s. 46 cases brought by the Commission.)

3.2.1 Objectives

The Act is a broad statute that regulates many aspects of trade and commerce within Australia. The breadth of the Act is reflected in the objects statement in s. 2:

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.

The primary objective of Part IV of the Act is to promote competition and fair trading within Australian markets. It does this by prohibiting various types of conduct that are likely to damage competitive and fair market mechanisms. This objective has also been recognised judicially. For example, in Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation, Justice Deane said:

The general purpose and scope of the Part can be described by saying that it contains provisions which proscribe and regulate agreements and conduct and which are aimed at procuring and maintaining competition in trade and commerce.

This objective can also be expressed in the opposite way. The provisions of Part IV prohibit various types of conduct that are likely to maintain or enhance market power other than by competitive means.

In the context of s. 46, the prohibition is focused on unilateral conduct of firms that have substantial market power. The prohibition can be paraphrased as:

(a) the use of non-competitive commercial strategies by firms with substantial market power (see 3.2.3.1 for explanation of ‘non-competitive’), and

(b) to maintain or enhance their market power (thereby damaging other competitors and competition generally).

Perhaps more so than the other prohibitions in Part IV, s. 46 is also directed towards the promotion of fair trading. The precise boundaries of this policy objective are difficult to draw. There continues to be considerable debate about the scope of this policy objective. It has been considered on many occasions in the 100-year history of anti-trust law in the US and has often been discussed in the Australian context. It has been argued that the fair trading objective might include:

- the protection of small business from illegitimate competition by large competitors

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98 (1980) ATPR 40 –156.
the protection of ease of entry to business or markets

a concern about the accumulation of economic power by large corporations

the encouragement of fair trading in business.

Despite frequent policy discussion, the fair trading objective has not yet been given definition through judicial analysis. In *Queensland Wire Industries v BHP*, Chief Justice Mason and Justice Wilson stated:

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. 99

The Commission believes that a fair trading objective is promoted by both s. 46 and the other prohibitions of Part IV and that this is consistent with the competition objectives of Part IV. Smaller and more vulnerable firms are entitled to protection under Part IV from non-competitive conduct of rival firms that is aimed at or has the effect of harming smaller firms. Conduct engaged in by firms that possess substantial market power and that does not conform to the norms of competitive markets is inherently unfair.

It is argued in this submission that if the law does not even prohibit large firms with substantial market power from taking advantage of it with the effect of damaging competition—by virtue of such actions as an anti-competitive refusal to supply, anti-competitive predatory behaviour, anti-competitive leveraging of market power in one market to damage competition in another market—the law is not only deficient as a matter of economic policy, but deficient in relation to the above objectives.

3.2.2 Framework

The basic framework of each of the prohibitions in Part IV is similar. They each prohibit specified conduct that is regarded as detrimental to competitive markets. On the other hand, none of the prohibitions in Part IV prohibits or condemns holding substantial market power by itself. The mere fact that a firm holds substantial market power is not a cause for criticism or regulation under Part IV.

This principle is equally true of s. 46. Section 46 (and all of Part IV) recognises that market power can arise, be maintained and enhanced by competitive means—in other words, by the superior efficiency and economic performance of the firm. This is the economic goal pursued by competition policy. Firms that succeed through greater efficiency are entitled to enjoy the benefits of their success. This is the reward that encourages competition.

The Full Federal Court confirmed this by stating that s. 46 does not strike at monopolists or those in a monopolistic position. In particular, there is no contravention

99  *QWI v BHP* Note 90 *supra*
of s. 46 by charging a particular price (albeit a high or monopolistic price) provided it
does not take advantage of market power for a proscribed purpose\(^{100}\).

While s. 46 does not prohibit the possession of substantial market power, nor the
accumulation of market power by competitive means (the reward for efficiency), it
does prohibit the taking advantage of market power for the proscribed anti-competitive
purposes. These two elements of the prohibition require comment.

3.2.3 Taking advantage of market power
As noted above, s. 46 does not prohibit the accumulation of market power by
competitive means; it only prohibits the taking advantage of market power. What do
these words mean?

In discussing this limb of s. 46, the Commission is conscious of the need for care in
independently analysing one out of the three limbs of s. 46. The prohibition is a unified
section and it is possible to fall into error in deconstructing one part of a composite
section. In Melway\(^{101}\), the High Court observed that the ‘take advantage’ and ‘purpose’
aspects of the s. 46 prohibition are inter-related. The opposite is also true. The
provision of a statute usually includes several elements. Each of those elements must be
satisfied before the provision operates. Therefore it is desirable to consider the meaning
of the ‘take advantage’ limb. Again in Melway the High Court concluded that Melway
had not taken advantage of its market power despite a conclusion that it had a
proscribed anti-competitive purpose.

3.2.3.1 High Court interpretation
The High Court considered the meaning of s. 46 in Queensland Wire and Melway. Both
cases were concerned with conduct involving a refusal to supply. In the later Melway
decision, the High Court affirmed its earlier Queensland Wire decision. However, the
facts of each case were different and led to different outcomes.

In Queensland Wire, all the judges concluded that the words ‘take advantage’ did not
have a pejorative meaning. The words meant nothing more than ‘use’. Chief Justice
Mason and Justice Wilson said:

> The phrase ‘take advantage’ in section 46(1) does not require a hostile intent inquiry—nowhere
> is such a standard specified ... 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.\(^{102}\)

Justice Deane said:

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\(^{100}\) Australian Stock Exchange v Pont Data (No 2) (1991) ATPR 41–109 at 52, 666.

\(^{101}\) 178 ALR 253 at 260 per Gleeson CJ, Gummow, Hayne and Callinan JJ.

\(^{102}\) Note 90 supra.
Read in context, the words ‘take advantage of... power’ are simply inadequate to superimpose upon the economic notions and objectives which section 46(1) reflects some indefinite moral or public purpose qualification ...103

Justice Dawson agreed with the conclusions of Justice Deane stating ‘I am of the view that the words “take advantage of” do not have moral overtones in the context of s. 46.’104 Justice Toohey also concluded that ‘take advantage’ simply meant ‘use’.105

It is a relatively easy matter to state that ‘take advantage’ only means ‘use.’ However, using market power is necessarily an abstract concept. Market power is not embodied in physical form, and therefore the use of the market power cannot be observed physically. How then can the use of market power be identified?

This problem was recognised and answered by the High Court. As market power is an economic concept, the High Court employed economic tools to determine whether market power had been used. In determining whether BHP’s refusal to supply Y-bar to Queensland Wire involved a use of market power, the High Court asked whether BHP would have been likely to engage in the same conduct (refusing to supply) in a competitive market. The High Court concluded that BHP would not refuse supply because this would simply result in reduced sales to BHP and Queensland Wire sourcing the product elsewhere in a competitive market. Chief Justice Mason and Justice Wilson stated:

In effectively refusing to supply Y-bar to the appellant, BHP is taking advantage of its substantial market power. It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant. If BHP lacked that market power—in other words, if it were operating in a competitive market—it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.106

Justice Dawson’s reasoning was similar. His Honour said:

... there can be no real doubt that BHP took advantage of its market power in this case. It used that power in a manner made possible only by the absence of competitive conditions. Inferences in this regard can be drawn from the fact that BHP could not have refused to supply Y-bar to QWI if it had been subject to competition in the supply of that product. BHP supplies all its other steel products without restriction and its practice with regard to Y-bar was not in accordance with its normal behaviour. If there had been a competitor supplying Y-bar, BHP’s refusal to supply it to QWI would have eroded its position in the steel products market without protecting AWI’s position in the fencing materials market.107

Justice Toohey expressed the same conclusion in this manner:

103 167 CLR 177 at 194.

104 ibid at 202.

105 ibid at 213-14.

106 ibid at 192.

107 ibid at 203.
The only reason why BHP is able to withhold Y-bar (while at the same time supplying all the other products from its rolling mills) is that it has no other competitor in the steel product market who can supply Y-bar ... it is exercising the power which it has when it refuses to supply QWI with Y-bar at competitive prices.\textsuperscript{108}

Justice Deane reached the same conclusion although, perhaps, with slightly different reasoning. His Honour focused on the purpose that BHP was trying to achieve by refusing supply. That purpose was to prevent Queensland Wire from competing with BHP’s fencing materials subsidiary, AWI. His Honour said:

That purpose could only be, and has only been, achieved by such a refusal of supply by virtue of BHP’s substantial power in all sections of the Australian steel market as the dominant supplier of steel and steel products. In refusing supply in order to achieve that purpose, BHP has clearly taken advantage of that substantial power in that market.\textsuperscript{109}

Although Justice Deane’s approach to determining whether market power had been used differs from the other judges, the difference may not be material, taking into account the facts before the High Court. The next logical step from Justice Deane’s approach is that if BHP was constrained by competition it would not have refused to supply because the refusal would not have achieved its stated purpose. Accordingly, the next logical step of Justice Deane’s reasoning is the same as the reasoning of the other members of the High Court.

In \textit{Melway}, the High Court affirmed this approach to the interpretation of the words ‘take advantage’. The majority stated:

The focal point of debate was whether ... Melway’s refusal to supply the respondent was a taking advantage of that power for the proscribed purpose. Consistently with the approach of the court in Queensland Wire, much of the argument was directed to a consideration of how Melway would have been likely to behave, if it had lacked the power it had. Section 46 of the Act requires, not merely the coexistence of market power, conduct, and the proscribed purpose, but a connection such that the firm’s conduct in question can be said to be taking advantage of its power.\textsuperscript{110}

Later, the majority observed of the \textit{Queensland Wire} decision:

A majority of the court considered that the correct test whether BHP was taking advantage of its power was to ask how it would have been likely to have behaved in a competitive market. Exactly how competitive such a market might be, and the assumed structure of such a market, were open questions. The important thing was that, once it was concluded that in a competitive market BHP would have been constrained to supply QWI, and that BHP’s ability to refuse to supply resulted from the absence of such constraint, it followed that, in refusing to supply (for an anti-competitive purpose), BHP was taking advantage of its market power.\textsuperscript{111}

The Commission intervened in the \textit{Melway} case and proposed a slightly different formulation of the ‘take advantage’ test. The Commission submitted that a corporation

\begin{itemize}
  \item \textsuperscript{108} \textit{ibid} at 216.
  \item \textsuperscript{109} \textit{ibid} at 198.
  \item \textsuperscript{110} 178 ALR 253 at 264.
  \item \textsuperscript{111} \textit{ibid} at 265.
\end{itemize}
may take advantage of its market power if its conduct has been materially facilitated by that power. This formulation of the take advantage test is based on the language of the Explanatory Memorandum accompanying the 1986 amendments to s. 46:

The term take advantage in this context indicates that the corporation is able, by reason of its market power, to engage more readily or effectively in conduct directed to one or other of the objectives in paragraphs (a), (b) and (c). It is better able, by reason of its market power, to engage in that conduct. Its market power gives it leverage which it is able to exploit and this power is deployed so as to ‘take advantage of’ the relative weakness of other participants or potential participants in the market. Whether this is so in a particular case is a matter to be inferred from all the circumstances.\(^{112}\)

In obiter, the High Court accepted the Commission’s submission. The majority concluded:

Dawson J’s conclusion that BHP’s refusal to supply QWI with Y-bar was made possible only by the absence of competitive conditions does not exclude the possibility that, in a given case, 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 the 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.\(^ {113}\)

To that extent, it can be considered that the High Court believed there was no significant difference between whether a firm is likely to engage in specified conduct in a competitive market and whether the conduct has been ‘materially facilitated’ by the firm’s market power. The Commission’s formulation of the ‘take advantage’ test was specifically designed to address a potential concern about the meaning of ‘take advantage’. Various submissions have argued that conduct does not involve a use of market power if the corporation could engage in the same conduct in a competitive market. The Commission considers such a test is inconsistent with the High Court’s decisions of Queensland Wire and Melway. The appropriate test is whether the corporation would be likely to engage in the same conduct in a competitive market.

Therefore, the ‘take advantage’ limb focuses on the economic characteristics of the conduct. It requires the conduct in question to be measured against the norms of competitive market behaviour. These norms of competitive market behaviour are defined by economic theory. To what extent, then, is economic analysis a prerequisite to determining whether conduct involves a use of market power or, in other words is unlikely to occur in a competitive market?

The High Court decisions in both Queensland Wire and Melway indicate that a detailed economic analysis is not always needed. For example, in Queensland Wire the High Court concluded that BHP would have been unlikely to refuse supply of Y-bar to Queensland Wire in a competitive market. Two reasons were given. First, in all other comparable markets BHP did not refuse supply. Accordingly, its behaviour towards Queensland Wire was out of the ordinary. Second, if there had been another supplier of


\(^{113}\) 178 ALR 253 at 265.
Y-bar in the market, the High Court concluded that BHP would have supplied Queensland Wire. BHP would not have allowed the sales of Y-bar go to its competitor. In other words, if the market was competitive, the profit-maximising strategy for BHP would have been to supply Y-bar. In Melway, the High Court reached the opposite conclusion on the facts of the case. It decided that in a competitive market Melway would be likely to refuse supply to the wholesaler Robert Hicks Pty Ltd. Again, there were two reasons. First, in the Sydney market when Melway did not have substantial market power; it maintained a similar selective distribution system (which involved a refusal to supply other distributors). Second, Melway was unlikely to change its conduct even if there were alternative sources of street directories available to Robert Hicks. In other words, the High Court concluded that Melway’s selective distribution system was profit maximising regardless of its market power.

In Melway the High Court briefly referred to the economic methodology a court might use to determine whether a corporation had used its market:

An absence of a substantial degree of market power does not mean the presence of an economist’s theoretical model of perfect competition. It only requires a sufficient level of competition to deny a substantial degree of power to any competitor in the market. To ask how a firm would behave if it lacked a substantial degree of power in a market, for the purpose of making a judgment as to whether it is taking advantage of its market power, involves a process of economic analysis which, if it can be undertaken with sufficient cogency, is consistent with the purpose of section 46. But the cogency of the analysis may depend upon the assumptions that are thought to be required by section 46. ... In some cases a process of inference, based upon economic analysis, may be unnecessary. Direct observation may lead to the correct conclusion.114

The High Court recognised the economic characteristic of the ‘take advantage’ limb. However, the High Court also recognised that it may not always be necessary to undertake a detailed economic analysis to arrive at the correct conclusion.

Given the High Court’s interpretation of the ‘take advantage’ limb, it is possible to describe s. 46 as a prohibition against ‘non-competitive’ conduct. The expression ‘non-competitive’ conduct is used in contra-distinction to the expression ‘competitive’ conduct. The distinction is simply that competitive conduct is the types or norms of conduct that are expected and desired within competitive markets while non-competitive conduct is the opposite.

### 3.2.3.2 Identifying a ‘taking advantage’ of market power—distinguishing competitive and non-competitive conduct

This section makes the distinction between non-competitive and competitive conduct by referring to common issues that arise under s. 46. It is not a definitive exposition of the types of conduct that will be unlawful under s. 46. Rather, examples are used to illustrate the distinction between competitive and non-competitive conduct, in accordance with the High Court’s interpretation of the expression ‘taking advantage’ of market power.

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114 178 ALR 253 at 266.
(a) High prices

Is charging a high or ‘monopoly’ price a use of market power? In one sense, charging prices above the level that would be set in a competitive market involves a use of market power. By definition the price is not one that would be set by a competitive market. In another sense charging high prices or maximising profits is consistent with competitive market behaviour.

In *Pont Data*, the Full Federal Court concluded that s. 46 was not directed at conduct that was merely profit maximising through charging high prices. There are two possible explanations of this. Either the conduct does not involve a use of market power or the conduct does not involve one of the proscribed anti-competitive purposes (absent other circumstances such as price discrimination).

The Commission does not believe that s. 46 should be directed towards the mere charging of prices that are above a competitive level. While the conduct is undesirable from an economic welfare perspective it is not in itself damaging to competition, which s. 46 aims to protect. High prices are the market signal that attracts new entrants to markets, thereby increasing competition.

(b) Price discrimination or price squeeze

In contrast, there are different considerations if a high price is associated with price discrimination or a ‘price squeeze’. Price discrimination may occur when a firm with substantial market power is vertically integrated and discriminates in favour of its own downstream subsidiary. In a case like this the discrimination may involve a use of market power. To determine this it is necessary to consider whether a corporation without market power is likely to engage in the same price discrimination in a competitive market. Generally price discrimination is removed in a competitive market unless there is an alternative economic justification for the discrimination. Most commonly, the discrimination is justified by differences in the cost of supply.

*Queensland Wire* showed the anti-competitive potential of price discrimination. The price for Y-bar offered by BHP to Queensland Wire was set at a level that made it uneconomic for Queensland Wire to purchase and compete in a downstream market. The conduct can be considered either as a form of price discrimination or a constructive refusal to supply.

A price squeeze also occurs when a firm with substantial market power is vertically integrated. In a price squeeze the firm does not discriminate in price between its own downstream subsidiary and a downstream competitor. However, the price of supply offered to both downstream companies is a high or ‘monopoly’ price. The purpose or effect of the high price is to squeeze the downstream companies’ profit margin. It does not matter to the supplying firm that its downstream subsidiary may not make a profit or may even trade at a loss. The above-normal profits being made upstream would compensate for or subsidise the downstream losses.

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Note 100 *supra.*
On the other hand, the price squeeze may drive the competing downstream company out of business. Such price squeeze conduct involves a use of market power. In a competitive market, the downstream competitor would have alternative sources of supply. Accordingly the price squeeze would not be effective and to maximise profits the upstream firm would be likely to supply at a competitive price.

(c) Charging a low price

Low prices or prices at competitive levels are desired outcomes of competitive markets. However, firms with substantial market power may also price at a low level to drive a competitor from a market or deter a potential competitor from entering a market.

Although it has proved difficult for the courts to define the circumstances in which low prices manifest non-competitive conduct, it is possible to distinguish between non-competitive and competitive pricing conduct. Economic research has sought to identify characteristics that will practically and accurately distinguish between non-competitive and competitive pricing conduct. The courts continue to assess this research and attempt to convert it into practical rules that can be applied in the context of Australia’s competition law.

In the past 30 years, US courts have considered several tests to distinguish non-competitive and competitive conduct. These tests include various cost-based approaches as well as a recoupment test. In *Barry Wright Corporation v ITT Grinnell Corporation*, Judge Breyer said:

> ... courts have reasoned that it is sometimes possible to identify circumstances in which a price cut will make consumers worse off, not better off. ... Suppose, for example, a firm cuts prices to unsustainably low levels—prices below ‘incremental’ costs. Suppose it drives competitors out of business, and later on it raises prices to levels higher than it could have sustained had its competitors remained in the market. Without special circumstances, there is little to be said in economic or competitive terms for such a price cut.116

The economic reasoning for this conclusion is that corporations in competitive markets are very unlikely to price below avoidable (or incremental) cost and if they do, they will have little or no prospect of recouping foregone profits.

In Australia the Full Federal Court in the *Boral* decision rejected sole reliance on these tests. Instead the Court analysed the issues by applying directly the approach of the High Court in *Queensland Wire* and asking whether the firm would be likely to price at the same level in a competitive market. Justice Merkel said:

> [I]t is clear that to a significant extent, BBM (Boral) was able to behave independently of competition and of the competitive forces in the market. Each of the elements of BBM’s exclusionary conduct demonstrate that during the relevant period it persistently behaved in a manner that was significantly different from the behaviour that a competitive market would enforce on the firm facing otherwise similar cost and demand conditions.117

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Another method of distinguishing between competitive and non-competitive pricing conduct is to consider whether the corporation’s conduct is profit maximising in the medium term, assuming no competitor exits the market. In general terms, corporations within competitive markets must set their pricing strategies to maximise profits in the medium term, assuming competitive constraints continue to operate.

By applying this test it is possible to ask why the corporation in question set its prices at a particular level. Was it responding to discounts in the market from other competitors? Was it likely to lose sales to those other competitors if it did not respond? What volume of sales would it have lost? Taking account of all possible reactions in the market and the likely lost sales, was the price or range of prices chosen by the corporation consistent with a profit-maximising strategy? Or did the corporation deliberately forego profits? If so, why? Did it forego profits to drive a competitor from the market or to deter new entry? If it was to deter new entry, was its behaviour may be non-competitive

(d) Refusal to supply

The most common type of conduct examined by Australian courts under s. 46 is refusal to supply. Most of the cases post-date the High Court’s decision in *Queensland Wire*. However, very few cases have succeeded.

In a free market economy, firms often choose not to supply products to other firms. Indeed our free market economy is based on the premise that efficiency is enhanced by allowing firms to advance their self-interest by choosing whether or not to supply.

However, the reasons for a refusal to supply can be both competitive and non-competitive. Competitive reasons why firms choose not to supply include:

- the acquirer is unwilling to pay an adequate amount for the product
- the acquirer is at high risk of defaulting on payment
- the acquirer is an intermediate distributor of the products and the supplier believes that the acquirer will not add further value to the distribution process or increase sales of the product to be distributed.

There are also non-competitive reasons for a refusal to supply. The most common reason is vertically integrated corporations refusing to supply a product to a downstream competitor, with the aim of restricting or damaging the competitive position of the downstream competitor. This happened in *Queensland Wire*. The High Court observed that the refusal would not have occurred if there had been competing suppliers of Y-bar.

(e) Vertical restraints

Vertical restraints are relatively common in commercial dealings. Economists have recognised that vertical restraints may have pro-competitive objectives and consequences in certain market settings. However, in other market settings vertical restraints may be anti-competitive. Recognising this, most forms of vertical restraints
are only prohibited under s. 47 of the Act if they have the purpose or likely effect of substantially lessening competition.

Vertical restraints may also involve using market power for a proscribed anti-competitive purpose. When do vertical restraints involve a use of market power?

Economic analysis can provide an appropriate framework for distinguishing between competitive and non-competitive vertical restraints. It is helpful to consider whether the restraint is solely directed at improving the efficiency of the firms imposing and accepting the restraint. If it is, it is possible that the firm with substantial market power would engage in the same conduct in a competitive market, and the conduct may not involve a use of market power. Examples of efficiencies that can be created for the firms imposing and accepting the restraint include:

- a manufacturer may agree to supply its products to another person on condition that the person acquires all of its requirements from the manufacturer. This obligation may be efficiency enhancing for the manufacturer if it enables the manufacturer to invest in or maintain its manufacturing capacity where otherwise the manufacturer may not because of commercial uncertainty. The obligation may be efficiency enhancing for the acquirer because it can plan its supply chain with greater certainty, and

- a manufacturer may agree to supply its products to a wholesaler or retailer and promise that it will not supply the products to a competing wholesaler or retailer. The promise may be efficiency enhancing for the manufacturer and the wholesaler or retailer if it is directed to providing sufficient commercial incentive for the wholesaler or retailer to invest in the marketing and sales of the manufacturer's product, where otherwise the wholesaler or retailer may be deterred from investing in marketing and sales because of a free rider problem—the marketing and sales investment may be appropriated by a competing wholesaler and retailer.

In contrast, some vertical restraints may have a clear non-competitive objective and consequence. Several cases have come before the courts. For example, in *TPC v CSR Ltd*118, CSR refused to supply plasterboard to a Western Australian distributor because the distributor had sourced plasterboard from a competitor of CSR. It was apparent that the conduct of CSR in that case was not directed towards efficiency. Instead, the conduct had an exclusionary objective. In those circumstances, it could be concluded that CSR would have been unlikely to impose the same condition in a competitive market.

It should be noted that the test for legality of vertical restraints under ss. 46 and 47 differs. A restraint may be unlawful under s. 47 because it has the likely effect of substantially lessening competition, regardless of whether the conduct was directed to enhancing the efficiency of the firms imposing and accepting the restraint for the purposes of s. 46.

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3.2.3.3 Purpose or effect

As currently drafted, there is a significant difference between s. 46 and the remaining prohibitions in Part IV of the Act concerning the outcome of the proscribed conduct. Sections 45, 47, 48 and 50 prohibit conduct either:

- absolutely, because it is assumed that the conduct will have an anti-competitive effect, or
- if it can be established that the conduct has the likely effect of substantially lessening competition.

In addition, ss. 45 and 47 prohibit conduct if it has the purpose of substantially lessening competition.

Section 46 differs because it prohibits conduct only if it has one of the three proscribed purposes set out in paragraphs (a), (b) and (c) of subs. (1).

The reason for the distinction between s. 46 and the other Part IV prohibitions is not obvious. The policy objective of s. 46 is fundamentally the same as the other prohibitions in Part IV—that is, the prohibition of specified conduct that will damage competition. As well, Australia’s prohibition on misuse of market power is inconsistent with similar prohibitions in the United Kingdom, Europe and the United States. The Commission believes the distinction between s. 46 and the other Part IV provisions should be removed.

However, this does not suggest that the purpose test in s. 46 is inappropriate. As in ss. 45 and 47 a purpose test is an important element of s. 46 where it can be proved.

The current purpose test promotes the policy objectives of s. 46 and Part IV for three reasons.

- If a firm has substantial market power, takes advantage of that market power (acts in a non-competitive manner) and also has a purpose of damaging a competitor, it is likely that the purpose will be achieved. This is because the firm is in the best position to appreciate the consequences of its conduct. Accordingly, it should not be necessary to wait for the outcome of the firm’s conduct to become apparent.
- If a firm has substantial market power, takes advantage of that market power, and also has a purpose of damaging a competitor, the conduct should be unlawful whether or not the firm is actually able to achieve the purpose (for example, the purpose is misconceived). There is no justification for acting in a non-competitive manner—that is taking advantage of market power—with an anti-competitive purpose.
- Purpose establishes an appropriate standard for liability in those cases when non-competitive conduct is undertaken for a proscribed purpose, but anti-competitive effects will not be immediately apparent. Examples here include strategic but potentially anti-competitive conduct by incumbent firms with market power in

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deregulated markets, when purpose may be evident but the immediate effect on competition is difficult to establish.

It can also be observed that US law prohibits both monopolisation and an attempt to monopolise—that is, the purpose test is a similar concept to an ‘attempt’.

3.3 The case for an effects test

The Commission supports the inclusion of an effects test in s. 46 for five reasons:

- an effects test in s. 46 would better serve the object of the Act in protecting the process of competition and fair trading
- s. 46 would be brought into line with the balance of Part IV, which is generally directed towards conduct that has the purpose or effect of damaging competition
- the amendment 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 when network effects are present
- s. 46 would be brought into line with similar prohibitions in overseas jurisdictions including in the US and Europe.

Importantly, including an effects test would also ensure that various types of non-competitive conduct likely to damage competitors and competition would be prohibited, where it would otherwise be difficult to prove an anti-competitive purpose.

Accordingly, the Commission believes that to the extent that the effects of misuse of market power are excluded from s. 46, the section is based on the wrong principles and provides deficient protection to competition and fair trading.

These reasons are discussed in this section.

3.3.1 Policy objective of Part IV

The prohibitions in Part IV are underpinned by a common policy objective of protecting competition. This is achieved through prohibitions on various types of conduct that are likely to be detrimental to competition and fair trading. (See discussion in 3.2.) Surely if a firm takes advantage of its substantial market power to damage the competitive process, this is of concern to the health of the economy and is contrary to the underlying economic aims of the Act.

The current s. 46 is drafted in terms of anti-competitive ‘purpose’, and ignores the actual competitive effects of conduct. This omission is inconsistent with a policy objective of promoting competitive markets. The Commission believes that commercial strategies that are both non-competitive (that is, they are inconsistent with competitive
market behaviour) and lead to actual damage to competition should be prohibited, even though it may not be possible to demonstrate an anti-competitive purpose motivating the conduct.

It has been argued that prohibiting the use of market power in the absence of an anti-competitive purpose is unfair and a potentially damaging intrusion into competitive market behaviour (see section 3.4 for more discussion on this.) However, these claims sit oddly with the policy objective of Part IV—the protection of competitive markets. Competition can be damaged irrespective of the purpose motivating that conduct. Reference to intention or purpose seems unnecessary when conduct causes anti-competitive effects in a market. An analysis of effects on competition would enable courts to concentrate on the economic context of the conduct, particularly the specific market characteristics and competitive outcomes.

### 3.3.2 Consistency with the other prohibitions in Part IV

Section 46 is inconsistent with the other Part IV prohibitions because of its sole focus on purpose. Other provisions in Part IV are framed in terms of purpose or effect. This illustrates that the underlying concerns of Part IV are about economic effects and harm to the economy.

From a policy perspective, the Act is intended to encourage increased efficiency—that is, producing the goods and services most wanted by consumers at the lowest cost. It is unnecessary and undesirable for this efficiency motivation to be undermined by conduct having anti-competitive effects. This concern is particularly real in the context of firms with substantial market power.

The introduction of an effects test in s. 46 would bring it into line with most of the other Part IV prohibitions, particularly ss. 45 and 47 (s. 48 is a per se offence and s. 50 is based on an effects test alone).

Sections 45 and 47 prohibit a wide variety of trading agreements and conduct that are likely to have the effect of substantially lessening competition. The big business lobby had concerns about the application of these provisions upon their introduction in the 1970s. Any argument that these prohibitions are unfair or intrude too far into normal business conduct ceased long ago. It seems to be a quirk of legislative history that for so long s. 46 has been directed only at anti-competitive purposes and not at anti-competitive effects consistently with ss. 45 and 47.

### 3.3.3 Forensic difficulties in proving purpose under s. 46

The Commission’s experience has been that in the absence of ‘smoking gun’ documents, proving a relevant purpose under s. 46 to the satisfaction of a court is an onerous forensic process.

In *QWI v BHP*, a private action and the first s. 46 case considered by the High Court, the court found that BHP misused its substantial market power for the purpose of

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119 *QWI v BHP*, Note 88 supra.
preventing entry into a market. The case concerned a virtual monopolist and very specific conduct (refusal to supply). The High Court accepted the trial judge’s finding of a prohibited purpose from BHP’s internal documents and the failure of BHP to call witnesses to give evidence on that issue. In the time since QWI the Commission and its predecessor the Trade Practices Commission (TPC) have had limited success in actions under s. 46. In earlier s. 46 cases ‘purpose’ was not contested and so did not emerge as a significant issue. For example:

- in TPC v Carlton & United Breweries,120 Carlton United admitted contravention of s. 46 so that there was no need to prove ‘purpose’, and

- in TPC v CSR Ltd,121 again the necessary s. 46 purpose was admitted and there was no need to prove the issue to the satisfaction of the court.

Since those cases, despite an activist approach to litigation, the TPC and the Commission did not institute proceedings under s. 46 for approximately six years. On a number of occasions, the TPC and Commission did not take court action for breach of s. 46 because it was considered that they would not be able to prove the necessary purpose on the available evidence, although the conduct appeared to have anti-competitive effects.

In the last few years the Commission has instituted a number of cases under s. 46, although, as will be discussed further below, none have yet reached final conclusion because they are under appeal.

In more recent cases the Commission did take to court internal company documents have helped the Commission to prove the requisite purpose.

In ACCC v Boral Ltd,122 the Commission proved the necessary s. 46 purpose at first instance, relying heavily on internal Boral documents. That finding was not disturbed on appeal to the Full Federal Court. This matter is now the subject of an appeal to the High Court.

In ACCC v Rural Press,123 the Commission proved the necessary purpose and breach of s. 46 at the first instance. Again, the Commission relied heavily on Rural Press internal documents. This decision is now the subject of appeal to the Full Federal Court.

In ACCC v Universal Music,124 the Federal Court found that Warner and Universal did engage in misuse of market power and exclusive dealing conduct. This matter was of

120 (1990) ATPR 41–037.
particular relevance to the market share element of s. 46. The court found that a market share of 17 to 18 per cent, combined with other factors, can amount to a substantial degree of market power in a market for highly differentiated products like Top 40 CDs. Based on oral evidence and documents obtained through discovery and the s. 155 process, Justice Hill found that a proscribed purpose existed. Warner and Universal have lodged appeals against the substantive decision and the Commission has lodged an appeal on the penalty only.

In contrast, in ACCE v Australian Safeway Stores the Commission’s claims of breaches of s. 46 were dismissed by Justice Goldberg at first instance. His Honour found a proscribed purpose existed in two of the incidents alleged to be s. 46 breaches and did not exist in five incidents. The Commission has appealed the decision.

These recent matters are all currently subject to appeal. (See appendix 6 for a summary of the timing from the alleged conduct to litigation)

Over the years, the Commission has received complaints concerning a number of industries where there may be anti-competitive conduct by corporations with market power. These complaints have not been pursued for several reasons, often as the Commission has been unable to obtain adequate evidence of proscribed purpose. The relevant sectors include communications and entertainment, energy, financial services, transport and distribution.

The difficulty with establishing sufficient evidence of a proscribed purpose was summarised by Justice Northrop in the CUB case:

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.\(^{126}\)

The Commission notes that the Act contains two measures intended to lessen the evidentiary burden of establishing a proscribed purpose. First, by virtue of s. 4F, purpose is not limited to a sole or dominant purpose. Second in some cases purpose may be inferred from conduct that is inconsistent with a corporation’s normal business methods or without any good business justification. Subsection 46(7) was inserted into the provision in 1986 to clarify that purpose can be inferred from conduct or other circumstances and subsection 84(1) allows the state of mind of a director, servant or agent to be imputed to the corporation. However, the Commission considers a court is unlikely to draw an adverse inference against a respondent either when there is also credible evidence of an apparently legitimate purpose or when the facts could equally support an inference of an apparently legitimate purpose. Notwithstanding the combination of s. 4F and subs. 46(7), there are several further issues that make the forensic task of proving purpose more difficult for the Commission.

Firms with substantial market power appear to be very much aware of the consequences of ‘smoking gun’ documents being found in their internal records, such

\(^{125}\) (No 2) [2001] FCA 1861.

as those relied upon in the QWI, Boral and Rural Press proceedings. Some firms appear to take great care to avoid creating or storing potentially incriminating documents. For example, the Commission is aware that some corporations have issued specific instructions about creating or destroying internal documents that display a disregard for compliance with the Act.

Legal firms are also advising clients to pay careful attention to statements contained in corporate documents. A recent competition newsletter of a major law firm advised that rigorous attention should be given to the content of management reports and business plans to eliminate ‘purple prose’ which overstates corporate intentions and achievable objectives. It also advised that all corporate data and business records should be reviewed for accuracy to avoid mistaken objectives and plans, especially for reports going to senior management or to the board for review. Later in the same newsletter it states that organisations should avoid colourful language in documents, emails, etc. which might evidence purpose, as such unhelpful evidence and inferences as to prescribed purpose infected analysis in the lower courts during the Melways case.

The recent Tobacco case\textsuperscript{127} in the Supreme Court of Victoria demonstrates the lengths to which some corporations may go to destroy potentially incriminating documents. In that case (now subject to appeal), Justice Eames found that there had been a policy designed to ensure the destruction of material which would be harmful to the defence of litigation\textsuperscript{128} and stated:

\begin{quote}
In my opinion, the process of discovery in this case was subverted by the defendant and its solicitor Clayton Utz, with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful.\textsuperscript{129}
\end{quote}

The Commission also has experience in the trade practices context of document destruction to avoid the possible discovery of evidence. In \textit{ACCC v Tyco Australia}\textsuperscript{130} Justice Drummond commented on the destruction of numerous files:

\begin{quote}
When the Commission issued notices under s 155 of the Trade Practices Act in May 1997 to the first and second respondents, Mr Sproule’s response was to arrange for the destruction of a considerable body of relevant documentation, something which hindered the Commission’s investigation in a number of respects.
\end{quote}

The limitations in proving a proscribed purpose are broader than the destruction of primary evidence as to purpose. The Commission also has experience of corporations seeking to create documentation of apparently legitimate purposes. If a corporation actually creates and later adduces credible evidence of apparently legitimate purposes, then a court is unlikely to draw an adverse inference against a respondent.

\textsuperscript{127} McCabe v British American Tobacco [2002] VSC 73.

\textsuperscript{128} \textit{ibid} at 289.

\textsuperscript{129} \textit{ibid} at 384.

\textsuperscript{130} (2000) ATPR 41-740
Consequently, the forensic task for the Commission in proving s. 46 breaches is getting more difficult.

As discussed above, corporations and their legal advisers are getting wise about the risk of smoking gun documents. The Commission maintains that proper investigation and effective enforcement of the Act requires s. 155 to be interpreted in a way that includes access to documents that would normally attract legal professional privilege. In the Daniels case the Full Federal Court held that a claim of legal professional privilege is not a valid excuse for refusing to answer a notice served under s 155 of the Act.131 Justice Wilcox, with whom Justice Lindgren agreed, said:

Conduct that involves a contravention of the Trade Practices Act, often comprises many separate acts, some of which may be effected through lawyers. Without information about contacts between the person under investigation and that person’s lawyer, it may be impossible for ACCC to see the whole picture.132

The Daniels decision is currently under appeal in the High Court. If legal professional privilege is a valid answer to a s. 155 notice, the Commission will be even more restricted in properly investigating alleged breaches of s. 46 because relevant information and evidence as to purpose could be withheld.

The current requirement to establish a proscribed purpose is onerous and it is becoming more difficult. The Commission believes there should be an alternative method of establishing a contravention of s. 46 when unilateral non-competitive conduct results in harm to competition.

3.3.4 Flaws in applying the s. 46 purpose test to high technology and network markets

High-technology markets are characterised by rapid innovation, short product life spans and path-dependence because of technology choices. In these markets anti-competitive effects can easily arise out of activities that in other markets, might be viewed more benignly.

Some important characteristics also separate high-technology markets from other markets:

- High-technology markets often involve substantial investment in research and development and competition issues are entwined with intellectual property. For example, research and development joint ventures may create concerns especially if they involve marketing cooperation. Similarly, cooperation in setting technological standards is often socially desirable, although this may create competitive concerns because of the potential for inter-firm collusion and the ability for ‘insiders’ to a co-operative agreement to exclude ‘outsiders’.

131 Australian Competition and Consumer Commission v Daniels Corporation (2001) ATPR 41-808

132 ibid at 42,796
High-technology markets often involve network effects. In other words, there are spillovers between customers so that individual customers benefits by making similar system choices. For example one customer’s choice of a computer operating system, game console or video system influences other customers’ choices who want to share software. Small shifts in customer volume can ‘tilt’ markets to a specific system choice. The failure of the Beta video system compared to the VHS system is one example. Choices may also be subject to manipulation. For example in communications systems, differences between on-network and off-network charges may allow a large network to create artificial barriers to entry by new network providers.

Production in technology-based markets often involves high fixed costs and low marginal costs. The production of computer software is one example. This technology creates competitive issues as firms must recover their fixed costs by either pricing above marginal cost or using non-linear pricing schemes. These schemes may support robust competition but can be abused, for example by locking customers in to specific choices to the detriment of long-term competition.

These features of high-technology markets create incentives for unilateral anti-competitive activities, such as predatory pricing, exclusion or undesirable tying and bundling. These actions are not limited to high-technology markets and have been dealt with under ss. 46 and 47 of the Act. However, the growth of high-technology markets raises the likelihood of these types of anti-competitive behaviour and the difficulties of showing anti-competitive purpose for this behaviour under s. 46. As noted in a recent report to the UK Office of Fair Trading

What makes the analysis more difficult is that in the complex world of, say, computer software platforms and related software products where there are complex interfaces, network effects, and complex issues of product integration, the potential for undertaking anti-competitive actions, including predation, under the guise of legitimate business decisions may be significantly wider and more difficult to detect.133

The UK report recommends a ‘first principles’ approach to anti-competitive analysis in high-technology industries. This would focus directly on the anti-competitive effects of market conduct. The report also states this approach is not new but ‘it is particularly well suited to the analysis of alleged anti-competitive conduct in the new economy.’134

The current purpose test in s. 46 is not suited to a first principles approach. By focusing on the intent of a market participant rather than on the effect of their behaviour, the test allows scope for significant harm to high-technology markets.

Further, the fast pace of developments in high-technology markets means that a purpose test can allow significant harm to occur before action can be taken under the

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134 ibid at pp. 41-42.
Act. The necessity to adduce evidence of purpose slows the investigation and enforcement processes, even when anti-competitive effects are clear and unequivocal.

The potential benefits from introducing an effects test in s. 46 are especially relevant in high-technology and network markets. The anti-competitive effects of market activities can have substantial long-term consequences. For example, if an action ‘tilts’ the market to one technology choice rather than another then this may be irreversible in the market place. The result is a change in the direction of technological development in Australia. In such circumstances, it is important that firms are held accountable for engaging in non-competitive conduct that causes anti-competitive consequences that are detrimental to consumers and society.

3.3.5 Overseas comparisons

Legislation of overseas competition regimes generally adopts an effects based test in relation to monopolisation and misuse of market power. Section 46 of the Trade Practices Act is out of step with the important economic principles reflected in the laws of many overseas jurisdictions.

Appendix 3 compares equivalent laws in several overseas jurisdictions, including the US, Europe and Canada. Both US and European laws proscribing ‘monopolisation’ and ‘abuse of a dominant position’ are directed towards the likely competitive effect of the conduct and are not based on proving anti-competitive purposes. There is an ongoing debate in many countries about the balance to be struck in the law between protecting and deterring competition, but the purpose or effects issue has not been a central issue in most overseas jurisdictions. The general approach to competition law around the world is that it is concerned with outcomes rather than just the purposes of behaviour. Amending s. 46 to include an effects test would bring Australian law into line with European and US law and acknowledge the importance to the Australian economy of the underlying economic principles.

3.3.6 Case studies—the problems with purpose

The most important question is whether the inclusion of an effects test in s. 46 will make a difference. Is it possible to describe conduct that should be prohibited but is likely to escape liability under the current purpose test? The Commission believes it is possible to describe such conduct. This section illustrates the problems with the purpose test in five brief case studies.

Many instances of misuse of market power can be illustrated by two general situations:

- predatory behaviour—this is behaviour engaged in by a firm with substantial market power that harms a competitor at the same level of the supply chain. Its most usual form is predatory pricing but it can manifest in other forms including predator supply for example by overproduction, attempts to raise rivals’ costs and erecting barriers to entry, and

- discriminatory behaviour—this is behaviour engaged in by a firm with substantial market power in one market which harms a competitor in a different market—that
is, in upstream, downstream market or collateral markets. The harm occurs because the firm produces a product that is required (an input) in the second market. The firm discriminates in favour of its related company or division in the second market. The discrimination may take the form of differential trading terms or a refusal to deal.

The purpose element of s. 46 is difficult to prove in both these categories. This can be illustrated in the following case studies.

**Predatory pricing**

Predatory pricing is a well recognised form of misuse of market power. However, distinguishing competitive pricing responses from anti-competitive responses has proved difficult for competition regulators internationally. In Australia the difficulty is compounded by the purpose test in s. 46. This is because the purpose test gives scope for an incumbent firm, responding to new entry, to argue self-interest. In response to an allegation of predatory behaviour, the incumbent firm may say:

> My purpose was only to retain my market share, why should I be forced to relinquish my market share to the new entrant?

An argument based on self-interest presents difficulties under the purpose test. Under the current s. 46 it is necessary to prove a purpose of damaging a competitor or deterring new entry or competitive conduct. But is that established if the incumbent merely says, ‘I wanted to maintain my sales’?

The Commission believes that such an argument based on self-interest should not excuse predatory pricing, or at least not be the basis of determining predatory pricing cases. Such arguments may not be accepted by the courts as an evidentiary matter in any event. But it should not be necessary to overcome such a hurdle. The Commission believes that a more appropriate test of unlawful conduct in these circumstances is to consider:

- whether the firm had substantial market power
- whether the firm took advantage of its market power—as discussed earlier, this is answered by considering all the circumstances of the pricing decisions, and assessing whether the firm would be likely to price in this manner in a competitive market (assuming it would face long-term competitive constraint from the new entrant), and
- the competitive effect of the pricing conduct.

**Refusal to deal**

Refusals to deal probably lead to the greatest number of misuse of market power complaints. Usually this arises as a form of discriminatory behaviour. A firm with substantial market power favours its own related company or division by refusing to deal with another company that operates in a second market. In response to allegations of predatory conduct a firm may again argue self-interest:
My purpose is to dedicate my resources to my related company or division. I have no care for my competitors and why should I be forced to look after a competitor?

Again, this response can present difficulties for the purpose test in s. 46. If the firm is focused solely on its own self-interest, has it formed a purpose of damaging a competitor? This raises the problem of primary and secondary purposes or immediate and ultimate purposes, which to some extent has dogged Trade Practices Act jurisprudence.

Recently the problem was discussed in *South Sydney District Rugby League Football Club v News Limited.* The case concerned a clause agreed between the Australian Rugby League and News Ltd in connection with the merger of the rival rugby league competitions. The clause was to the effect that the number of teams in the competition would be reduced over a several years. The question was whether the purpose of the clause was to restrict the supply of services to and the acquisition of services from the excluded team or whether the purpose was to ensure the creation of a viable and sustainable rugby league competition.

The Full Federal Court was somewhat divided on the question. Justice Heerey decided that it was appropriate to look at the ultimate purpose, which was not restrictive. Justice Moore focused on the immediate purpose which was restrictive. Justice Merkel recognised both immediate and ultimate purposes, but decided that if the immediate purpose (or the means of achieving the ultimate purpose) was restrictive, this was enough to attract the prohibition in the Act.

There has been some success in prosecuting the most obvious forms of discriminatory conduct under s. 46. *Queensland Wire* is the best known example. But there are many other cases investigated by the Commission that have not led to prosecution because of ambiguity over purpose. For example, one form of discriminatory conduct is when a firm dominant in one market (1st market) supplies its products to a competing firm in a downstream market (2nd market) in which the dominant firm also competes. When the dominant firm learns that the competitor has decided to enter the 1st market, it decides to cease supplying its competitor or to vary the terms of supply so that they become less favourable. The usual explanation for this conduct from the dominant firm is that if the downstream competitor has decided to enter the 1st market, it no longer needs assistance from the dominant firm. Such companies argue that they should not be forced to assist their competitors as they should be able to look after their own interests. A distinction is purported to be drawn between actually damaging a competitor and simply refusing to assist it.

The Commission believes that such purpose-based arguments should not necessarily excuse this type of conduct, or at least not be the basis for determining whether it is prohibited. In any case, the courts may identify a proscribed purpose from the circumstances of the case. However, liability should not be based on the court’s willingness to see through these purpose arguments. Instead, the Commission believes the focus should be on:

assessing the market power of the incumbent firm and whether there are realistic substitutes available to the competing firm

considering whether the refusal to deal involved a use of market power—that is, asking whether the firm would have been likely to deal if there were other competitors who were willing and able to deal if the other firm did not, and

assessing the overall competitive effect of the refusal in the market context.

**Insisting on better terms than any rival**

The third illustration is the commercial practice of firms with substantial market power insisting on receiving better terms of supply than any of its rivals. This practice can raise rivals’ costs. However, a firm seeking these terms can argue self-interest:

> My sole focus is to lower my own costs of supply. If I am able to lower my own costs relative to my rivals, I will be a more effective competitor. I have no thought to damaging any competitor or deterring entry. Everyone must simply look after themselves.

Under the current purpose test, propositions like this are given considerable weight. Is there a purpose of damaging competitors? Does the purpose differ from a purpose of lowering your own costs? How is the difference identified in a given case? This kind of analysis also leads to the problems of immediate and ultimate purpose identified above.

The Commission submits that an effects test is a better filter of anti-competitive conduct in these circumstances. If the acquiring firm has substantial market power it is more appropriate to consider:

whether the demand for better terms than a rival involves a taking advantage of market power—is the behaviour consistent with likely behaviour in competitive markets when no one buyer has substantial market power, or is the behaviour made possible only by the absence of competitive constraint?, and

what is the competitive effect of the conduct likely to be?

**Discriminatory rebate/discount schemes**

Discriminatory rebate or discount schemes is another problem that emerges in markets where a firm with substantial market power is vertically integrated and faces competition in an upstream or downstream market. The firm may offer its products to the downstream market with rebates or discounts based on volume or other commercial factors. The effect of the rebate or discount scheme may be to discriminate in favour of the firm’s downstream subsidiary or division and against a downstream competitor in the overall price of supplying the products. As well the rebate/discount scheme may have no commercial or economic justification for being framed in a way which discriminates.

However, the firm may not have actively formed an anti-competitive purpose in establishing the scheme. The firm could say:
This is the rebate/discount scheme that I think is appropriate in the market. I haven’t considered whether it is harmful to other firms. I should be free to choose the scheme that I think best maximises my return as a supplying firm.

This creates a difficulty for the purpose test in s. 46 because the firm with market power may not have thought about the scheme’s effect on the downstream market. It may be lazy or careless but it has not formed an anti-competitive purpose.

Even without an anti-competitive purpose, the Commission believes rebate/discount schemes like these should be assessable under s. 46. Assuming the supplying firm has market power the conduct should be assessed by asking:

- is the rebate/discount scheme non-competitive in the sense that it would be unlikely to occur in a competitive market? This can be assessed by looking at the commercial and economic basis for the scheme. If there is no such basis, then a conclusion can be reached that such a scheme would not occur in a competitive market, and

- what is the competitive effect of the scheme?

If s. 46 operated with an effects test in this way, it would impose a competitive discipline over the trading conduct of firms with substantial market power. It would also ensure that such firms could not hide behind an excuse that they did not turn their mind to the consequences of their trading conduct.

**Discriminatory regulatory burdens**

Using regulatory burdens in a discriminatory way is similar to rebate/discount schemes. This problem usually occurs in utility industries (for example, electricity and gas), but can also arise in other industries.

Deregulation in many industries often leaves one supplier in charge of a natural monopoly segment of the industry. Although it is desirable that such a monopoly provider be vertically separated from all contestable industry segments this has not always happened. Also it is common that competition will be encouraged or facilitated in respect of the maintenance, augmentation or expansion of the natural monopoly segment, as a second best option. As well, the natural monopoly service provider has often been left with regulatory responsibilities, including responsibility for safety.

The Commission has received complaints about the imposition of regulatory burdens by original monopoly service providers. The regulatory burdens may have a discriminatory effect because they impose greater costs on a competing service provider, compared with the original monopoly provider. In response to questions about the operation of regulatory obligations, the provider might say:

> These obligations are necessary for safety reasons. I have not turned my mind to the competitive impact on other providers. That is not my responsibility. I am only charged with ensuring the industry is safe.

The Commission considers that while this may be true, it is not a satisfactory answer. Under the current purpose test in s. 46, there is no direct obligation on firms with
substantial market power to design regulatory impositions in the least anti-competitive manner. However, if s. 46 included an effects test it would be possible to assess:

- whether the regulatory imposition was commercially justifiable or was extraneous to the relevant regulatory objectives, and
- the competitive impact of the regulatory burden.

An effects test would impose a discipline over firms to justify the regulatory burden and not use these burdens to disguise lazy design or mischievous intent.

3.4 Responses to the case against an effects test

In the past, the inclusion of an effects test in s. 46 has been considered on many occasions and has been rejected. (See appendix 4 for a summary of inquiries and committees that considered this and why they rejected it.)

Previously, the Commission has not fully pursued the issue of an effects test because of higher priorities. It has often simply stated that it believed such a change should be made, but pursued it no more than that because of the difficulty of persuading Inquiries of the need for other changes (for example, the Cooney Committee on mergers and the Hilmer Committee on an access regime and on application of the Act to individuals). With at least one parliamentary committee, it was unenthusiastic about its report being the vehicle for promoting an effects test.

The main reason for past rejections of the amendment appears to be a concern that it would inhibit or stifle legitimate competitive conduct. The Commission understands that those currently opposing the addition of an effects test in s. 46 advance this view.

This is a very significant issue. The Commission fully supports the Act’s policy objective that it should not prohibit legitimate competition or ‘competition on the merits.’ On this fundamental policy issue, therefore, the Commission agrees with many who oppose an amendment to s. 46. But the Commission does not believe that adding an effects test to s. 46 will lead to prohibition of legitimate competitive conduct and that concerns about this stem from a misunderstanding of the jurisprudence of s. 46 as developed by the High Court and the Federal Court.

The argument against an amendment usually proceeds this way. In Queensland Wire, the High Court decided that the words ‘take advantage’ simply mean ‘use’. Therefore, any conduct engaged in by a firm with substantial market power that has the effect of damaging a competitor or competition generally would be prohibited by an amendment to s. 46. The assumption is that anything done by a firm with market power must, of necessity, involve a taking advantage of market power.

This argument is fundamentally flawed for two reasons.

First, it ignores most of what was said by the High Court in Queensland Wire and Melway (see section 3.2.3 for extracts from these cases). In deciding that the words ‘take advantage’ mean ‘use’, the High Court rejected that the words ‘take advantage’
implied an additional element of predatory or hostile intent. However, it is wrong to suggest that the High Court’s conclusion means that the words ‘take advantage’ are devoid of meaning or have little or no role to play in the operation of s. 46. On the High Court’s interpretation, these words are fundamental to the application of the section. The High Court interpreted the words ‘take advantage’ to mean non-competitive conduct—conduct that the firm would be unlikely to undertake in a competitive market, because in a competitive market the firm would be constrained to act in an way that improved efficiency and competition.

In Melway, the majority stated expressly:

Section 46 of the Act requires, not merely the coexistence of market power, conduct, and the proscribed purpose, but a connection such that the firm’s conduct in question can be said to be taking advantage of its power. \(^{136}\)

The High Court clearly rejected the view that all conduct engaged in by a firm with market power constituted a ‘taking advantage’ of that market power. Mere co-existence of market power and conduct is insufficient.

Second, if opponents of an effects-based amendment are right and the words ‘take advantage’ had no role to play in the application of s. 46, the current s. 46 would have an extremely precarious policy basis. One would have thought that the business community would be even more concerned about the current operation of the section. It would mean that a firm with substantial market power that engages in any conduct with the purpose of taking sales away from a competitor is at risk of liability under s. 46. This would happen even if the firm was more efficient than its competitors and was simply pricing its products at a profitable but competitive level consistent with its efficiency. The Commission has never argued that s. 46 operates or should apply in this way; but this is the logical extension of the argument advanced by opponents of the amendment.

The error of such a proposition is also apparent from the Second Reading Speech accompanying the Trade Practices Bill in 1974, where the Attorney-General said:

…A monopolist is not prevented from competing as well as he is able eg by taking advantage of his economies of scale, developing new products or otherwise making full use of such skills as he has … In doing these things he is not taking advantage of his market power.

In 1986, the Attorney-General reinforced this in the Second Reading Speech accompanying the Trade Practices Revision Act. He said:

Section 46 in its proposed form, which will be described as misuse of market power rather than monopolisation, is not aimed at size as such or at competitive behaviour as such of strong businesses.

Over the past 10 years in s. 46 cases, the section has been interpreted and applied in the manner described above, and the ‘take advantage’ element of the section has been decisive in the operation of the section.

\(^{136}\) 178 ALR 253 at 264.
In the two High Court cases to consider s. 46—Queensland Wire and Melway—the purpose element was found to exist. Therefore the cases turned solely on whether the conduct involved a ‘taking advantage’ of market power. Although both cases concerned a refusal to supply, different conclusions were reached on the basis of the different facts and the assumptions the court was able to make on whether the refusal was consistent with competitive market behaviour in the circumstances of the case.

In each of the following cases, the court concluded that the s. 46 claim could not be sustained, largely because there had been no ‘taking advantage’ of market power:

- Melway Publishing v Hicks (2000)
- Stirling Harbour Services v Bunbury Port Authority (2000)
- Helicruise Air Services v Rotoway Australia (1996)
- Petty v Penfold Wines (1993)
- General Newspapers v Telstra (1993)

This substantial list of cases demonstrates that this element of s. 46 is critical in the offence of misusing market power.

In summary, the Commission’s view is that s. 46 contains significant safeguards to protect legitimate competitive conduct and that the opposition to the amendment proposed is built on an entirely false premise. An effects test amendment to s. 46 will not lead to the prohibition or stifling of efficient and competitive conduct. The safeguards embedded in s. 46 will continue to act as efficient filters to preclude the section from reaching legitimate, lawful competitive conduct, should an effects test be included. Competitive conduct will not constitute a taking advantage of market power and will remain (correctly) immune from s. 46. Instead, the amendment will have the desirable result that inefficient and non-competitive conduct will be prohibited if it is either motivated by an anti-competitive purpose or has that effect.
3.5 How to formulate an effects test

The Commission’s preferred formulation is an effects test based on the current paragraphs (a), (b) and (c) of s. 46(1). The Commission believes that this formulation will best advance the policy objectives of s. 46.

The current s. 46 and the existing purpose test would be retained and incorporate an effects test in addition to, and in the same terms as, the existing purpose test. This could be drafted as:

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 a 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.

This formulation is preferred by the Commission because it is consistent with the current legal framework of s. 46, a framework that generally works well other than in respect of the omission of the key principle that the effects of behaviour should be considered.

Section 46 applies to conduct directed at harming individual competitors or potential competitors. In this, it differs from the other prohibitions in Part IV, which are directed more broadly towards the competitive environment. 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 a potential competitor, that conduct will be sufficiently detrimental to competition and fair trading (and the welfare of Australians) to justify prohibition. The standard or threshold of liability under s. 46 has been consciously set lower by the Parliament than the threshold in the other sections in Part IV. This choice is deliberate and recognises the damage that can be done to competition, fair trading and consumers by firms with substantial market power taking advantage of their market power—that is, acting in a non-competitive manner.

This assumption underlying the drafting of s. 46 has been recognised judicially by the High Court. In *Queensland Wire*, Chief Justice Mason and Justice Wilson stated:

The object of section 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.¹³⁷

The Commission believes that the threshold for liability for the purpose test is also appropriate for an effects test. If it is appropriate to prohibit certain forms of conduct engaged in with the purpose of achieving specific anti-competitive outcomes, how

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¹³⁷ Note 90 *supra.*
much more should the conduct be prohibited if the same outcomes are actually
achieved?

It may be argued that including an effects test in this form will act to prohibit ordinary
competitive conduct. After all, a normal consequence of competition and competitive
markets is that some firms will succeed and others will fail. If a firm with substantial
market power invests in a superior product or is able to set prices below its competitors
because of superior efficiency, will its conduct be subject to challenge under such an
effects test in s. 46?

The Commission believes amending s. 46 in this manner will not result in competitive
market behaviour being challenged or questioned. The ‘take advantage’ element
operates as a filter on the operation of s. 46 (see sections 3.2.3 and 3.4). It ensures that
only non-competitive conduct is subject to scrutiny under the section—conduct that is
inconsistent with the norms of competitive behaviour that are the result of competitive
markets. Competitive market behaviour will never be subject to scrutiny or challenge
under s. 46.

The Commission supports its proposed formulation of an effects test because it meets
the policy objectives of promoting competition and fair trading. It believes that s. 46
deals with a particular problem of unilateral conduct by firms with substantial market
power. Such firms have the potential to direct non-competitive conduct at individual
competitors and potential competitors. This conduct is both damaging to competition
(even though directed at individual firms) and unfair. Accordingly, the Commission
believes it is consistent with the objectives and framework of s. 46 to add an effects test
based on paragraphs (a), (b) and (c) of subs. (1).

3.6 Enforcement issues

The Commission is concerned that the Act’s object 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 would 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.

3.6.1 Cease and desist orders

To widen the available enforcement options under the Act, the Commission supports
the introduction of cease and desist orders applying to anti-competitive uses of market
power. The Commission proposes a model similar to that contained in the New
Zealand Commerce Act.

Cease and desist orders provide interim administrative orders restraining corporations
from engaging in specified anti-competitive conduct. A decision to issue an order
would be based on the Commission’s reasonable satisfaction of prima facie anti-
competitive use of market power, if urgent action was required in the public interest.
Judicially imposed penalties and injunctions would be available for breach of a cease
and desist order.
3.6.2 Issues supporting cease and desist orders

3.6.2.1 Speed

The ability to take fast enforcement action is becoming extremely important in the new economy and the global marketplace. Effective enforcement of competition laws requires powers to put an immediate temporary stop to anti-competitive conduct by corporations. Cease and desist orders provide a practical and effective tool to stop anti-competitive conduct quickly—avoiding irreversible damage to competition while matters are fully investigated and pursued through the judicial process.

Only the courts have the power to determine whether there has been a breach of s. 46. The demands of bringing a misuse of market power case are such that there is a considerable delay in enforcing a breach of s. 46. The Commission’s recent experience is that the time between alleged breaches occurring and final court orders being handed down can be up to eight years. (See appendix 6 for a summary of the timing issues in recent s. 46 investigations by the Commission). Apart from making it more difficult to fashion an appropriate remedy, such delays can extend the damage to markets caused by the conduct.138

Cease and desist orders would allow early intervention to maintain the market status quo until judicial enforcement proceedings can be brought for alleged breaches of s. 46. This power is likely to provide significant assistance to small businesses that are targeted by anti-competitive conduct. Early intervention to stop anti-competitive conduct would allow small business competitors with limited resources to avoid bankruptcy before a matter can be fully investigated and enforcement proceedings instituted.

For example, new entrants are especially vulnerable to misuses of market power, often having limited resources to withstand anti-competitive conduct while attempting to establish a foothold in the market. If anti-competitive conduct can be stopped quickly, market participants would have the opportunity to compete on their merits until the matter can be brought before the court. Further, the recipient of a cease and desist order would not be in a position to unjustly profit from the anti-competitive conduct during the period of investigation by the Commission. Where there is no early intervention, competitors can be eliminated from the market and the court may not be able to remedy such damage to competition.

3.6.2.2 Informal resolution

The issue of cease and desist orders may benefit all relevant parties by promoting a faster and less costly resolution of disputes than litigation. A possible outcome from the issue of a cease and desist order may be that the conduct is stopped quickly and any damage is avoided or satisfactorily remedied. It may then not be necessary to proceed to litigation. Such an outcome would benefit the public interest by obtaining a less costly resolution of alleged anti-competitive conduct. However, in cases where for

138 See for example Telecom Corporation of New Zealand Ltd v Clear Communications Ltd [1995] 1 NZLR 385.
example the conduct is serious, advertent, continuing or widespread the Commission may proceed to institute court actions.

The knowledge that a cease and desist order may be issued may also act as a deterrent to relevant anti-competitive conduct being engaged in, thereby improving standards of acceptable competitive conduct. However, cease and desist orders could not be used oppressively by the Commission to define standards of conduct because they would remain subject to review by the courts and companies would be entitled to defend the lawfulness of particular conduct in substantive proceedings.

If cease and desist orders were added to the range of regulatory tools available under the Act, the Commission could select the most appropriate options to deal with a specific issue.

3.6.3 Model for cease and desist orders

The cease and desist model supported by the Commission would operate in the following way:

i Where the Commission is satisfied that

(a) a corporation

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

(c) is engaging in conduct

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

(e) the conduct is anti-competitive

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

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

(h) the conduct is contrary to the public interest

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

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

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

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

Legislation should also confirm that the Commission retains s. 155 powers in the period after a cease and desist order is issued and before any contravention proceedings are instituted in the court.

3.6.4 Other considerations

3.6.4.1 Interlocutory injunctions

To prevent certain conduct from continuing or occurring the Commission can seek interlocutory injunctions by application to the Federal Court. It has been argued that because of the availability of urgent interlocutory injunctions, cease and desist powers are not warranted. However, the Commission’s view is that interlocutory injunctions do not provide a sufficient remedy to stop anti-competitive conduct quickly in the context of detailed s. 46 investigations that require the collection and preparation of complex evidence.

To grant interlocutory injunctions a court must be satisfied that the evidence shows that:

- there is a serious question or issue to be tried
- the balance of convenience is in favour of granting injunctive relief
- there are no discretionary reasons for refusing the grant of the relief sought.

Section 46 cases require substantial time and resources to investigate and prepare for litigation (see appendix 5). For example, issues of market power require preparation of detailed economic evidence. Section 46 actions also require evidence of subjective purpose, which is problematic regardless of the period of time or resources available (see 3.3.3). The time from commencement of the alleged conduct, through investigation

139 Subsection 80(2) empowers the court to grant an interim injunction pending determination of an application under s. 80(1). Equitable principles apply to the grant of injunctions under the Act.

140 The principles are well established, for discussion see Gibbs CJ in Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board of Queensland (1983) 57 ALJR 425.
and on to filing of court proceedings, is likely to be measured in years, not days or weeks.

The evidentiary requirements for the grant of an interlocutory injunction make it difficult to stop anti-competitive conduct at the investigation stage. To satisfy the ‘serious question to be tried’ test, the applicant needs to adduce a level of cogent evidence that is unlikely to be available in the necessary timeframes. The ‘balance of convenience’ test can also operate against the applicant because of the difficulties in establishing a strong case in a short time. Particularly, it is difficult for the Commission to quickly gather evidence of anti-competitive purpose in support of an application for an interim injunction.

The recent South Sydney Rugby League case highlighted the problems with interlocutory injunctions in the Part IV context. Having found a serious question to be tried, Justice Hely held that the balance of convenience was heavily against the grant of interlocutory relief, even after allowing for the public interest in observing the Act.\(^1\) However, in the following substantive proceedings the majority of the Full Federal Court found contraventions of ss. 45(2)(a)(i) and 45(2)(b)(i).\(^2\)

A further important limitation on the utility of interlocutory injunctions is that after it has commenced court proceedings, the Commission is not able to issue a notice under s. 155 of the Act where the answer to the notice is relevant to those proceedings.\(^3\) Consequently if the Commission seeks an interlocutory injunction upon learning of anti-competitive conduct, its subsequent ability to fully investigate the matter is limited and the prospects for success in substantive proceedings are hindered. Accordingly, the public interest would be better served by a cease and desist power under the Act to temporarily stop conduct damaging to competition and consumers, pending a full investigation of the matter.

### 3.6.4.2 Constitutional issues

The Commission is aware of suggestions that legislation creating cease and desist powers may be invalid under the Commonwealth Constitution. The validity issue arises from the separation of administrative and judicial powers under the Constitution. The contention appears to be that the issue of a cease and desist order may involve the exercise of judicial power contrary to Chapter III of the Constitution.

The Commission has carefully considered these issues and consulted with the Australian Government Solicitor’s Office of General Counsel. The proposed model outlined above has been designed as an interim administrative measure with such Constitutional considerations in mind. The Commission takes the view that a cease and desist power can be drafted in accordance with the High Court’s approach to Chapter III issues and that such legislation is likely to withstand Constitutional challenge.

\(^1\) South Sydney District Rugby League Football Club Ltd v News Ltd (1999) 169 ALR 120.

\(^2\) South Sydney District Rugby League Football Club Ltd v News Ltd [2001] FCA 862; (2001) 181 ALR 188.

\(^3\) See Brambles Holdings Pty Ltd v TPC (1980) ATPR 40-179.
3.6.4.3 Safeguards on the use of cease and desist orders

The cease and desist model proposed by the Commission adopts rigorous safeguards to ensure that such orders would operate appropriately, balancing the interests of recipient corporations against the object of protecting competition.

(i) Preliminary thresholds

A cease and desist order could only be issued where numerous preliminary thresholds are satisfied. The Commission would be required to be satisfied that a corporation has used its substantial market power to act anti-competitively, that the conduct is likely to cause loss or damage and that there is an urgent need to prevent the continuation of the conduct in the public interest.

(ii) Natural justice requirements

Prior to the issue of a cease and desist order, the relevant corporation would have the ability to make submissions to the Commission providing reasons why an order should not be made. The Commission would take those submissions and other relevant information into account in determining whether the requirements for the issue of an order have been satisfied.

(iii) Ability to issue orders rests solely with the Commission

The ability to issue a cease and desist order would rest only with the Commission. The Commission expects that matters where cease and desist orders would be warranted are likely to be infrequent. When considering how the Commission would approach the use of a cease and desist power, it is instructive to consider the Commission’s use of the power to issue Competition Notices under the telecommunications-specific competition provisions in Part XIB of the Act. This is because the Commission’s power to issue competition notices is arguably akin, although with some clear differences, to a cease and desist power.144

The Commission has conducted 17 major investigations under Part XIB since 1997—and has issued competition notices in relation to only three of these matters. This demonstrates the Commission’s careful and considered approach to utilising such a regulatory tool—balancing the potential exposure of the recipient to considerable liabilities against the potential permanent damage to competition (and ultimately consumers) if the conduct continues.

In relation to certain matters, the Commission formed the view that it did not have a ‘reason to suspect’ that a contravention of the competition rule145 had occurred. In some

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144 A competition notice does not require that the party the subject of the Competition Notice cease engaging in the conduct as it is described in the competition notice. Rather, it essentially acts to put the recipient of the competition notice ‘on notice’ that the Commission has a reason to believe that the relevant conduct is anti-competitive. Particular effects flow from the issuing of a competition notice, which it is not suggested would or should flow from a cease and desist power.

145 The Commission’s determination of whether it has a reason to suspect a breach of the competition rule is part of the preliminary phase of its consideration of whether there has been a contravention of the Act. If the Commission has reason to suspect that a carrier or carriage service provider has
instances, the Commission discontinued the investigation once it had formed the view that there had been no contravention of the competition rule. Other matters were resolved through further commercial negotiation without the need for continued involvement by the Commission. The three matters when competition notices were issued relate to Internet peering agreements, commercial churn, and ADSL. In each matter, the change in conduct brought about by the Commission’s action has been vital to ensuring competitive conditions in a number of telecommunications markets.

The Commission has a considerable incentive not to proceed with unmeritorious claims. The resources of the Commission are limited and it would bear the other party’s costs in the event that the Commission loses the court proceedings.

(iv) Limited duration

Cease and desist orders would operate for a strictly limited time period. Such orders are intended to maintain the status quo while the Commission gathers information and evidence to support instituting judicial proceedings in relation to the conduct. Accordingly, cease and desist orders would expire upon withdrawal, at the end of the specified period or upon the institution of court proceedings by the Commission.

(v) Oversight of the courts

Importantly, the courts would provide the ultimate check on the use of cease and desist orders. The proposed model provides for explicit judicial oversight of cease and desist orders. Notwithstanding that cease and desist orders would be subject to the original jurisdiction of the High Court, the proposed model confers on recipient corporations an additional statutory right of review as to the validity of an order. A cease and desist order that was issued without proper regard for procedural fairness may be impugned in judicial review.

Further, cease and desist orders would only be enforceable by the courts. Where a party fails to comply with an order, the Commission would be required to institute enforcement proceedings for a penalty and injunctions.

3.6.5 Overseas comparisons

Virtually all competition regimes include a provision for orders to cease or correct abusive conduct. In some overseas jurisdictions, the orders are issued by the enforcement agency. In others, the agency must apply to a court for orders.

3.6.5.1 European Union

Where the European Commission’s (EC) reaches a decision finding a violation of Art. 82, the EC can issue a cease and desist order requiring termination of the offending conduct as well as imposing a fine for the violation. The order may also call for positive actions, although the scope of a mandatory (rather than prohibitory) order could be limited.

Contravened, or is contravening, the competition rule, the Commission must act expeditiously in deciding whether to issue a competition notice in relation to that contravention: section 151AQ.
The European Court of Justice has said that an order of termination must be connected to the specific violation, and accompanying requirements of positive action must be to correct its particular effects, for example to provide something that was wrongfully withheld. The EC’s orders are self-executing. The EC need not apply to a court for a preliminary or permanent order. Violation of the EC’s order exposes a firm to sanctions.

The regulation that prescribes the EC’s powers does not provide for interim relief, but the European Court of Justice has found that such a power is implicit in it. Interim measures may be ordered if there is immediate danger of irreparable harm. They must be temporary and designed to maintain the status quo and no more. The EC must consider the interests of all sides and apply the general jurisprudential principle of proportionality. And it must act by formal decision—that is, the Commissioner of Competition cannot issue an interim order on its own authority, but it must be an action of the EC. Interim measures cannot be ordered ex parte and the party affected has the right to appeal the decision to the Court of First Instance.

### 3.6.5.2 United Kingdom

After finding a violation of the Chapter II prohibition, the Director General of Fair Trading has the power to issue mandatory orders to bring the infringement to an end—that is, to modify or cease conduct (Competition Act, s. 33(1)). The same power is provided to deal with the Chapter I prohibition against restrictive agreements under s. 32(1). The directions are not self-enforcing. If a firm did not comply, the Director General would have to go to court for an order, and only if the court order were disobeyed would there be consequences for contempt such as financial penalties or imprisonment.

Similarly, the Director General may give ‘interim measures directions’ if there is reasonable suspicion that the prohibitions have been infringed and he considers that it is necessary to act urgently to prevent serious, irreparable damage to particular persons or to protect the public interest (Competition Act, s. 35). These interim measures are enforced by a court in the same way as ordinary directions in final decisions.

### 3.6.5.3 Germany

In Germany, the Federal Cartel Office (FCO) generally has the power to issue orders prohibiting conduct that violates the Act against Restraints of Competition (GWB—s. 32). These orders are especially significant in Germany because restrictive agreements are not necessarily void ab initio and an order may be a necessary predicate for effective private action. If a party continues a wilful or negligent violation after being served with an order, the FCO can make a claim to recover the additional proceeds (s. 34—‘skimming off’). Wherever the FCO can issue a final order or decision it can also issue a preliminary injunction to regulate the situation temporarily until it reaches a final decision (s. 60). The FCO need not apply to a court for these orders but it may need to apply to the court for sanctions if the order is violated.

### 3.6.5.4 Italy

The Italian Competition Authority’s power to set a deadline by which offenders must bring their conduct into compliance with the law is interpreted to authorise both mandatory and prohibitory orders (s. 15 Competition and Fair Trading Act). Failure to
conform by the deadline results in fines. In serious cases fines can be imposed without first giving the parties a chance to reform. There is no specific provision in the competition statute about interim or preliminary relief—except about mergers when the Authority can order the ‘temporary suspension’ of the transaction until the Authority’s investigation is completed (s. 17).

3.6.5.5 France

In France the Conseil can generally order parties to cease anti-competitive practices by a set deadline and can impose specific conditions (Art. 13 of the Ordonnance of 1 December 1986). Also on the authority of the Conseil, the order is backed by a fine for non-compliance. As well, fines can be imposed without giving the parties a chance to correct their behaviour. The Conseil may issue interim measures at any time if the practice poses a serious and immediate threat to the general economy, to the sector concerned, to the interests of consumers or to the complainant (Art. 12). Interim measures must be limited to what is ‘indispensable’ to handling the emergency. They are not issued *ex parte*. The parties must be heard. As with final orders, interim orders can be enforced by fines imposed by the Conseil.

3.6.5.6 United States

In the US, the Federal Trade Commission (FTC) has the power to issue orders to cease and desist from violations of the Federal Trade Commission Act, at the conclusion of the administrative process after a finding of actual violation. These orders are not self-enforcing. If a respondent does not obey, the FTC must apply to a district court for an order imposing civil penalties or other equitable relief. The courts have permitted the FTC to issue orders that extend somewhat beyond the bare facts of the misconduct found, for example by prohibiting similar conduct in other markets. And some orders mandate affirmative actions as well, for example licensing intellectual property or disclosures to correct misleading advertising.

Courts are empowered to issue injunctions under the Sherman Act (s. 4) and the Clayton Act (s. 15). Generally, there are applicable rules of civil procedure providing for preliminary injunctive relief pending the completion of full judicial proceedings.

The FTC can also apply for a court order under s. 13(b) of the FTC Act to preserve the status quo pending the completion of the FTC’s administrative proceedings. The FTC Act authorises the FTC to act where it has ‘reason to believe’ that there is a violation or potential violation of one of the laws it enforces and that enjoining it pending the FTC’s own complaint and decision would be in the public interest.

The US district court may issue a temporary restraining order or preliminary injunction if it is persuaded that ‘weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest’. A court may issue a temporary restraining order *ex parte*. In practice, the most important consideration is the likelihood of success on the merits. These criteria do not include the usual equity jurisprudence requirement of irreparable damage from delay. The FTC must issue its own complaint within 20 days except in actions to enjoin false advertising, which are brought under subs. 13(a).
The court may also issue a permanent injunction, which amounts to a judicial ‘cease and desist’ order, enforceable by the court’s criminal contempt powers. By contrast the FTC’s own cease and desist orders are enforceable by civil penalties. Court orders under s. 13(b) are issued after notice to the parties. The applicant must show a risk of imminent irreparable injury. The order may only last for 10 days and may be renewed only once. The FTC has used the s. 13(b) procedure to enjoin mergers pending final decisions, to stop consumer frauds, and to obtain special relief such as disgorgement of improper profits, which the court can order in a permanent injunction under US equity rules.

The scope of permanent injunctions is set by the course of decisions and to some extent by the statutes’ terms, founded though on equity jurisprudence generally: to ‘prevent and restrain violations,’ issuing ‘such orders and decrees as are necessary or appropriate’ to accomplish the statutory purposes. Orders have included divestitures and requirements to buy from particular suppliers. The courts’ powers are the same, whether a case is brought by the Antitrust Division or by a private party (or state official).

3.6.5.7 Canada

The Canadian Commissioner of Competition has cease and desist powers under s. 104.1 of the Canadian Competition Act for abuse of dominance in the domestic aviation sector. A new s. 103.3 proposes temporary order powers for other industries.

Under s. 104.1, the Commissioner makes the ‘temporary order’ subject to review by the Canadian Competition Tribunal. Under the proposed s. 103.3, the Tribunal would make the order on ex parte application by the Commissioner.

A three-stage test is to be applied before a temporary order will be made:

Stage 1—the Commissioner has commenced an inquiry under the Competition Act

Stage 2—there is evidence on which to base a preliminary opinion that a firm is engaged in anti-competitive conduct

Stage 3—there is evidence of harm including injury to competition, the likely elimination of a competitor or a competitor suffers significant loss of market share or revenue that cannot be remedied by the Tribunal.

Temporary orders under s. 104.1 have effect for 20 days and can be extended up to a maximum of 80 days. Judicial review of the Commissioner’s order is very limited. The only avenue is an application to the Competition Tribunal.

3.6.5.8 Japan

In Japan an order to cease and desist issued by the Japan Fair Trade Commission (JFTC) is the basic sanction for ‘unreasonable restraints of trade.’ A financial ‘surcharge’ can be imposed in response to violations affecting price and criminal fines are also possible in theory. The sanctions for private monopolisation can be orders to stop exclusion or eliminate situations that restrain competition. Generally the orders are prohibitory rather than mandatory. In cases of ‘urgent necessity’ to maintain conditions during the enforcement and decision process and when it is difficult to restore
competitive conditions if relief must await the end of that process, the JFTC may ask a court to order the temporary cessation of the conduct that is alleged to have violated the Antimonopoly Act (s. 67).

3.6.5.9 New Zealand

Section 74A of the New Zealand Commerce Act empowers a Commissioner to make cease and desist orders by consent or following a hearing by a Commissioner, where there is a prima facie case that a person has engaged in anti-competitive conduct and it is necessary in the public interest to act urgently to prevent serious loss or damage. The New Zealand cease and desist orders apply broadly to restrictive trade practices and merger provisions. Where there is non-compliance with an order, the Commission can apply to the Court for the imposition of pecuniary penalties.

3.6.6 Divestiture

The Commission believes that an amendment introducing the remedy of divestiture for a contravention of s. 46 warrants consideration, although it is not actively pursuing such an amendment at this time. For a discussion of the remedy of divestiture, see the Commission’s February 2002 submission to the Senate Legal and Constitutional References Committee’s Inquiry into the Trade Practices Act 1974.
4 Collective bargaining and small business

Summary

In light of recent discussion about whether the authorisation process provides an effective mechanism to address small business collective bargaining issues under the Act, chapter 4 focuses on:

- how collective bargaining is dealt with in Australia through the authorisation process
- how small business collective bargaining issues are dealt with in some key overseas jurisdictions
- the Commission's assessment of the main policy options for improving the Trade Practices Act (the Act) and its administration to achieve a more efficient, fair, timely and accessible competition law framework, in light of concerns raised by small businesses regarding collective bargaining.

The Commission's preferred option is a notification process for collective bargaining modelled on the existing notification process for exclusive dealing. Access to this process should be restricted to small businesses dealing with large businesses with a substantial degree of market power.

While the authorisation process has been used for many years to facilitate collective bargaining in the public interest, a number of factors—including deregulation in key agricultural industries and the extension of the Act to apply to individuals and unincorporated associations—has led to an increased focus on the role of the authorisation process as a way of enabling collective bargaining under the Act.

Since 1 July 1995 the Commission has only denied two applications for authorisation of collective bargaining conduct. As well, there has been only one application for review by the Australian Competition Tribunal (the Tribunal) of a Commission determination on collective bargaining.

A survey of competition law regimes as they apply to small businesses in New Zealand, Canada, the United States, the European Union and the United Kingdom shows that with the exception of NZ, which has an authorisation process like Australia’s, they provide no mechanism for allowing small business collective bargaining on broad public benefit grounds.

The survey shows that compared to these overseas jurisdictions, Australia's competition law, incorporating an authorisation process, has more flexible mechanisms for dealing with small business collective bargaining and it is likely to be more responsive to the needs of small business.
Nevertheless, some small business groups have said that the authorisation process does not offer a timely and cost effective mechanism to obtain immunity from the Act to facilitate collective bargaining on public interest grounds.

There are several policy options for addressing small business concerns about the way in which collective bargaining is dealt with under the competition provisions of the Act. The main options considered in this chapter are:

- a range of administrative improvements
- amendments to the existing authorisation process
- new processes for granting immunity for collective bargaining, including a modified notification process
- a block exemption process
- a registration processes modelled on Part X of the Act as suggested by the Motor Trades Association of Australia (MTAA)
- a general legislative exemption for small business collective bargaining.

Following is a summary of the Commission’s assessment of these options.

- There is scope for the Commission to better use its resources to assist small business through the authorisation process.

- The Act could be amended to:

  - require the Commission to consider the public benefit of having an efficient small business sector when assessing applications for authorisation
  - give the Commission a discretion to waive the authorisation application fee where the fee imposes an unreasonable burden on the applicant

However, time limits imposed on the authorisation process are likely to operate to the detriment of small business. This is because large businesses and their industry associations often have the resources to better manage consultation processes with tight deadlines than small businesses and small business industry associations with limited resources.

- A modified notification process for small business collective bargaining has the potential to provide an appropriately streamlined mechanism for granting immunity from the competition law. At the same time, there should be adequate checks and eligibility criteria to ensure that access to the process is limited to small businesses collectively bargaining with large businesses with a substantial degree of market power. Under this process, the Commission would effectively revoke any notification of conduct that is not likely to operate in the public interest. A process of this type is the Commission’s preferred option for reform.
While there are potential administrative efficiencies associated with a block exemption power, adopting it would constitute a significant departure from Australia's competition law framework.

The Commission considers the MTAA’s proposal to provide immunity for small business collective bargaining based on the registration mechanism set out in Part X of the Act would be quite inappropriate, given the potentially significant effects of collective bargaining arrangements across a wide range of Australian industries. The lack of transparency, public consultation and an effective public interest test associated with a Part X style process would be of particular concern in relation to primary boycotts that have the potential to cause significant commercial damage to businesses.

The Commission would also be particularly concerned about any general legislated exemption for small businesses collective bargaining and would not support this option. Small businesses play a substantial role in the Australian economy, representing 95 per cent of all private sector businesses in 1998–99 and accounting for 30 per cent of the total sales of goods and services of all businesses in 1997–98.

A general exemption for small businesses to collectively bargain would exempt an extremely large section of the Australian economy from the operation of competition law. This would undermine the fairness, legitimacy and effectiveness of the competition provisions of the Act and could lead to significant increases in inefficiency across all sectors of the economy. An exemption would also reduce consumer welfare and undermine the efficiency and international competitiveness of the Australian economy to the detriment of all Australians.

An unfettered ability by primary producers to collectively bargain has the potential to unwind the deregulation process across a range of agricultural industries. It would give primary producers the power to set an industry wide price for their produce in a manner directly comparable to the price setting functions of the old statutory marketing authorities.

4.1 Collective bargaining and the authorisation process

When negotiating with big business, small businesses often feel that they have little or no bargaining power and that sometimes they are forced to accept unfavourable terms and conditions, including unfavourable prices. In some industries, small businesses see collective bargaining as an effective strategy to redress this imbalance in bargaining power and achieve more appropriate commercial outcomes in their dealings with big business.

Collective bargaining can raise concerns under the competition provisions of the Act. In particular, some collective bargaining arrangements involve agreements between competitors on price, primary boycotts or arrangements that substantially lessen, prevent or hinder competition.

Notwithstanding these competition law prohibitions, the Commission can grant immunity from legal action on public benefit grounds through the authorisation
process. Authorisation enables collective bargaining arrangements that would otherwise risk breaching the Act.

The Commission accepts that collective bargaining arrangements can often operate in the public interest and has granted authorisation for collective bargaining arrangements in the vast majority of cases in which authorisation was sought. Since 1 July 1995 authorisations have enabled collective bargaining by chicken growers, dairy farmers, sugar cane growers, lorry owner-drivers and small private hospitals.

Since 1 July 1995 the Commission has only denied two applications for authorisation of collective bargaining conduct. Both of these concerned collective bargaining in the health care industry, an area in which the Commission has had competition concerns.146

The Commission is currently considering nine applications for authorisation relating to collective bargaining conduct.

Since 1 July 1995 the Commission has imposed conditions in less than half the cases where it has granted authorisation for collective bargaining arrangements. For instance, in the Australian Dairy Farmers’ Federation (ADFF) application, the ADFF applied for an authorisation to enable the ADFF to negotiate on behalf of every dairy farmer in Australia. The Commission considered that the formation of a national collective bargaining group would lead to an industry-wide price fixing arrangement and the imposition of a set of identical supply contracts across the entire industry. This could have substantially distorted competition and allowed dairy farmers to extract a monopoly rent from processors and increase prices to consumers. However, the Commission was prepared to authorise collective bargaining arrangements subject to conditions that restricted the scope and operation of collective bargaining groups to ensure that collective bargaining operated on a more limited basis in the public interest.

Since 1 July 1995 the average amount of time for which authorisation has been granted by the Commission for collective bargaining is approximately four years.147

As well, since 1 July 1995 the Commission has not revoked any authorisations dealing with collective bargaining conduct and there has only been one application for review by the Tribunal of a determination by the Commission on collective bargaining. This was the recently lodged application by National Foods Ltd for a review of the Commission's decision to grant authorisation in the ADFF matter. In general terms, National Foods sought review, arguing that the Commission granted authorisation to the ADFF in terms that were too broad and uncertain. They claimed that groups of dairy farmers collectively bargaining with processors may be able to exercise too much market power.

146 In the case of the Commission's 1998 decision to grant authorisation to the Australian Medical Association (AMA) to collectively bargain with the South Australian Health Commission on behalf of doctors working in South Australian rural public hospitals, the Commission granted authorisation only for a period of 11 months (from 31 July 1998) to provide the parties with sufficient time to establish a negotiating process that was consistent with the Act.

147 Excludes the March 2000 Newspaper decision and the July 1998 AMA decision in which the applicants sought authorisation for unusually short lengths of time.
The Commission considers that the relative small number of applications for review by the Tribunal on collective bargaining arrangements reflects well on the rigour and integrity of the Commission's decision making and its administration of the authorisation process.

4.1.1 Small business concerns with the authorisation process

While the authorisation process has been used for many years to make collective bargaining in the public interest easier, several factors—including deregulation in a number of agricultural sectors and the extension of the Act to apply to individuals and unincorporated associations—have led to an increased focus on the role of the authorisation process as a way to enable collective bargaining under the Act.

As a result of legislative changes made in response to national competition policy reviews, deregulation in the agricultural sector has seen a number of statutory marketing authorities dismantled. This has left the price of primary produce to be set by the market. Previously, the price for primary produce was often set by statutory marketing authorities operating under legislation with an exemption from the Act. Following deregulation, producers of several commodities—most notably dairy producers—have seen collective bargaining as a key strategy for negotiating effectively with processors in a deregulated environment.

The extension of the Act to apply to individuals and unincorporated associations has also led to groups of health care professionals seeking authorisation to engage in collective bargaining.

Indeed, around 60 per cent of the authorisation applications lodged with the Commission for collective bargaining arrangements since 1 July 1995 have been in agricultural or health care industries, which have relatively recently had their pricing and supply decisions fully subject to competition law. In this context, some small business groups, particularly primary producer groups and health care professional associations, have criticised the authorisation process as not going far enough to make collective bargaining by small businesses easier.

4.2 Small business collective bargaining under overseas competition law regimes

Many overseas jurisdictions directly or indirectly ameliorate the application of competition law to the activities of small businesses. The main examples are:

- legislated exemptions that directly benefit small business, for example the UK’s Small Agreements and Conduct of Minor Significance Regulations and some US state government exemptions for collective bargaining agreements between medical professionals

- exemptions granted by the competition agency, for example the EC block exemption for horizontal agreements and the Commission’s power to grant authorisation
4.2.1 Applying competition law to small business in other countries

This section outlines the application of competition law to small businesses in NZ, Canada, the US, the EU and the UK. It is common for one jurisdiction’s competition law to incorporate a number of features (see section 4.2).

However, apart from the Australian and NZ authorisation processes, in most cases these approaches offer little or no comfort for price fixing as part of a collective bargaining strategy by small business. Under the NZ authorisation process, the focus of the Commerce Commission's public benefit analysis has increasingly been on gains in economic efficiency. Accordingly, broader, less tangible non-economic public benefits (which are less easily quantified) tend to be given less weight. Such an approach conceivably has the potential to affect the ability of small business applicants in rural and regional areas to establish a net public benefit.

Even in the UK and the EU where prohibitions on anti-competitive agreements can be declared inapplicable by the competition authority if an agreement meets certain cumulative criteria, there is little scope for agencies to consider benefits to the public other than those associated with efficiency. Under the EC and UK competition rules, a party will not qualify for an exemption unless they can establish that the agreement leads to improvements in the production or distribution of goods, or the promotion of technical or economic progress and consumers will gain ‘a fair share’ of the benefits of the efficiency gain. Where this is shown, exemptions are nevertheless unavailable when conduct could potentially eliminate competition for a substantial part of the products involved, whatever the size of efficiency gains.

The UK, the EU and the US each have a system of ‘safe harbours’ within which agreements are presumed by agencies not to raise competition concerns. However these safe harbours are generally not available for agreements which fix price and they offer little assistance to small business collective bargaining on price.

Compared with these overseas examples, Australia's competition law—incorporating an authorisation process—provides a more flexible mechanism for dealing with small business collective bargaining. It is likely also to be more responsive to the needs of small businesses than the mechanisms used in other jurisdictions.

4.2.2 Exemptions in other countries

4.2.2.1 New Zealand

New Zealand’s Commerce Act 1986 applies to both small and large businesses. Although the Act allows for the creation of statutory exceptions to the restrictive trade
practices provisions, generally NZ small businesses that wish to engage in collective bargaining activities (including agreements on price) must seek authorisation from the Commerce Commission on the grounds that the conduct will lead to a net public benefit.

Under the NZ authorisation process, the primary focus is on efficiency gains—the Commerce Commission assesses both benefits and detriments and the focus has increasingly been on economic efficiency. The Commerce Act specifically requires the Commerce Commission, when it determines the extent to which conduct will result in a public benefit, to have regard to any efficiencies that will result from the conduct. Other than an application currently before it involving proposed collective negotiations by pharmacists, the Commission understands that the Commerce Commission has not adjudicated in recent years on any applications relating to small business collective bargaining.

4.2.2.2 European Union

The EU competition rules do not contain an explicit small business exemption. However, the European Court of Justice found that agreements between competitors that do not have an appreciable effect on competition or on intra-community trade are not caught by the prohibition on agreements that have the object or effect of preventing, restricting or distorting competition.

The European Commission (EC) considers that conduct will not appreciably restrict competition if the aggregate market share of parties to an agreement is no greater than 10 per cent when the parties are actual or potential competitors, or 15 per cent when they are not. The market share threshold drops to 5 per cent when competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers. However, these ‘safe harbours’ do not apply to agreements which, among other things fix prices, limit output or sales or allocate markets or customers.

In contrast to the broad public benefit test used in the Australian authorisation process, the prohibition on agreements that may prevent, restrict or distort competition can be declared inapplicable only if an agreement or practice meets all these criteria:

- contributes to improving the production or distribution of goods or to promoting technical or economic progress
- allows consumers a fair share of the resulting benefit

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149 ibid. On 26 April 2002, the Commerce Commission issued a draft determination proposing to deny authorisation to these arrangements.

150 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), European Commission, 2001/C, at 368–07.
does not impose unnecessary restrictions on the parties involved

- does not afford those parties the possibility of eliminating competition in respect of a substantial part of the products in question.

As well as the power to provide parties with exemptions for individual agreements, the EC also has limited power to declare that the prohibition does not apply to certain limited categories of agreements. For example, for horizontal agreements the EC has issued block exemption regulations for research and development (R&D) and specialisation agreements. However these do not exempt the parties if their combined market share exceeds 25 per cent (for R&D) and 20 per cent (for specialisation agreements). They also do not apply to agreements that aim to fix price or limit output or sales.

4.2.2.3 United Kingdom

The UK’s *Competition Act 1998* applies to all businesses, whatever their size. Other than price fixing or market sharing, the Director-General of Fair Trading does not regard an agreement as having the requisite appreciable effect on competition if the parties’ combined market share does not exceed 25 per cent.151

In addition, regulations made under the Act provide limited immunity from financial penalties only for ‘small agreements’ entered into by parties with combined worldwide turnover of less than £20 million, and ‘conduct of minor significance’ (which may involve an abuse of a dominant position) by a party with combined worldwide turnover of less than £50 million. However, once again immunity under these regulations is not available for price fixing agreements. Nor does it protect businesses involved from any Office of Fair Trading investigations, or any other consequences that may arise from an infringement of the Competition Act.

Competing businesses that wish to collectively agree on price (or engage in conduct that is likely to appreciably prevent, restrict or distort competition) risk contravening the Competition Act unless they obtain an individual or block exemption. The grounds for such an exemption are the same as those applying under EC law.

4.2.2.4 United States

The Sherman Act outlaws ‘every contract, combination … or conspiracy, in restraint of trade’. The US Supreme Court found that a reasonable interpretation of this provision is that it only prohibits arrangements that injuriously restrain trade and it does not prohibit arrangements which, although restraining trade, do so in a way that promotes competition, for example through the efficient self regulation of trade.

Under US law, price fixing agreements can be declared per se unlawful without requiring a detailed assessment of actual market power. The US Federal Trade Commission (FTC) has expressed the view that stand-alone ‘joint negotiation of price terms by non-integrated competing’ small businesses would amount to an agreement

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151 See the UK Office of Fair Trading’s publication, *The Chapter 1 Prohibition*. 
not to compete on price, and would be per se unlawful. However, where the negotiations on price are reasonably related to ‘an efficiency-enhancing integration of economic activity’ and are reasonably necessary to achieve the pro-competitive benefits of the integration, an arrangement will fall for consideration under the rule of reason. The FTC considers also that ‘mere coordination of decisions on price, output, customers, territories, and the like’ is not considered integration and cost savings without integration are insufficient to avoid the per se prohibition. US courts have been prepared to condemn naked price agreements or boycotts by small business even where the participants may not have a particularly large market share. The courts do not recognise countervailing power as a defence.

The FTC and US Department of Justice issued Antitrust Guidelines for Collaborations Among Competitors, which provide a safe harbour for competitor collaborations as a matter of enforcement policy. Under the guidelines, neither agency will ordinarily challenge a collaboration where the market shares of the collaboration and its participants collectively account for no more than 20 per cent of each relevant market. These safe harbours do not apply for price fixing or other per se conduct, and so they are unlikely to provide a safe harbour for small business collective bargaining on price.

The US Small and Medium-Size Business Act 1958 allows exemptions for ‘certain narrowly-defined agreements between small "independently owned and operated" firms which are not dominant in their sphere of activity’. However, these exemptions, which have almost never been used, only appear to cover joint R&D agreements and those that in the President’s opinion contribute to national defence.

A small number of US states have passed (or introduced) laws enabling medical professionals to collectively negotiate and in some cases require health care providers to negotiate in good faith with medical professionals. For example, since September 1999 Texas legislation has allowed competing doctors to jointly negotiate with health benefit plans where the likely benefits outweigh the likely disadvantages of a reduction in competition. When fees are being negotiated, the Texas Attorney-General is required to determine whether the health plan has substantial market power.

During the Clinton administration, the Campbell Bill was introduced (but not passed) which would have granted doctors and other health professionals an anti-trust

\[^{152}\text{See, for example, the FTC’s Advisory Opinion provided to MedSouth Inc.}\]

\[^{153}\text{See the FTC and US Department of Justice’s Antitrust Guidelines for Collaborations Among Competitors (April 2000), p. 8.}\]

\[^{154}\text{Ibid.}\]

\[^{155}\text{For a discussion of this issue, see for example, FTC v Superior Court Trial Lawyers Association (1990) 493 US 411.}\]

exemption comparable to that available to labour unions. The Bill was strongly opposed by the FTC and the Department of Justice who argued that boycotts and price fixing by doctors would result in higher health care costs to consumers without any assurance of higher quality of service.

4.2.2.5 Canada

Canada’s competition laws apply to all sectors of the Canadian economy, except where specific exemptions exist (under the Competition Act or other legislation). The Competition Act contains no specific exemption for small businesses and accordingly many arrangements between small business, particularly on price, are considered under the prohibition against conspiracies. First, this prohibition involves a consideration of whether the parties to the agreement have market power (that is, the ability to unilaterally affect industry pricing) and second, whether their behaviour is likely to be injurious to competition. While price fixing is generally viewed as injurious to competition, arrangements between small businesses which together do not have power in the relevant market do not contravene the Act.

4.2.3 Collective bargaining in agriculture

The application of competition law to the activities of primary agricultural producers varies considerably. While the EC and the UK approaches are influenced by the competing objectives of the formation of the EU, the US retains traditional protections for agricultural cooperatives and marketing organisations (while devolving more limited anti-trust responsibility to a specialised agency). New Zealand, Australia and Canada have favoured more universal application of competition law. However, by allowing primary producers to seek authorisation for collective bargaining, Australia and NZ have the flexibility to permit anti-competitive conduct where it is in the public interest.

The application of competition law to collective bargaining in rural agricultural industries also varies among key overseas jurisdictions.

Although there is scope for statutory exemptions to be made under the NZ Commerce Act, the Commission understands that there are few NZ regulations exempting arrangements in particular industries. However, following the amalgamation of numerous dairy cooperatives to form one national dairy processor, the NZ Government passed specific legislation giving the Commerce Commission powers to regulate the national dairy processor’s operations.

The EC competition rules apply to production and trade in agricultural products. However, a regulation exempts from the rules agreements that form an integral part of a national public market authority or are necessary to meet common agricultural policy objectives (including productivity, efficiency and reasonable prices for consumers).

In particular, arrangements of farmers or farmers' associations in one state—for the production or sale of agricultural products or the use of joint facilities for storage,

treatment or processing—are exempt, if they do not fix prices, exclude competition or jeopardise common agricultural policy objectives. To ensure compliance with EC competition rules concerning agriculture, the UK Competition Act excludes certain agreements from the prohibition on anti-competitive agreements, to the extent that they relate to the production of or trade in an agricultural product.

Agriculture is one of a few US industries that are to various degrees exempted from general anti-trust laws. These exemptions are in a number of US statutes, including the Capper-Volstead Agricultural Producers’ Associations Act, which allows persons engaged in the production of agricultural products to act together for the purpose of ‘collectively processing, preparing for market, handling and marketing’ products. However, this exemption is not absolute and the Secretary for Agriculture is authorised to act against cooperatives that monopolise or restrain trade to such an extent that the price of an agricultural product is ‘unduly enhanced’.

Canadian competition law applies to rural industries, but not to arrangements and legitimate collective bargaining activities (including agreement on price) between ‘fishermen’ and persons engaged in buying or processing fish.

4.3 Policy options to address small business concerns about collective bargaining and the Act

There are a number of policy options for addressing small business concerns about the way in which collective bargaining is dealt with under the competition provisions of the Act. The main policy options include:

**Option 1—Administrative improvements**

The Commission’s administration of the existing authorisation process could be improved and streamlined to make small business collective bargaining easier (see section 4.4.1).

**Option 2—Amend the existing authorisation process**

Options include to:

- **2a:** amend the public benefit test to require the Commission to have specific regard to the public benefit of assistance to efficient small business for example guidance on costing and pricing or marketing initiatives which promote competitiveness (see section 4.4.2.1).

- **2b:** reduce authorisation fees for small businesses and give the Commission discretion to waive authorisation application fees when the fees impose an unreasonable burden on the applicant (see section 4.4.2.2), and

- **2c:** impose time limits on the Commission’s consideration of authorisation applications (see section 4.4.2.3).
Option 3—Establish a new process for granting immunity from the Act’s competition provisions for small business collective bargaining

Models that could be used for this process include to:

3a: establish a notification process comparable to the existing process for notifying exclusive dealing conduct (see section 4.4.3.1)

3b: set up a block exemption process similar to that used by the EC (see section 4.4.3.2), and

3c: create a registration process comparable to the process in Part X of the Act for exempting international liner cargo shipping agreements (see section 4.4.3.3)—the MTAA has raised this option

Option 4—Establish a general legislative exemption for small business collective bargaining (see section 4.4.5)

4.4 The Commission's assessment of the policy options

The Commission's assessment of policy options to address small business concerns about the effect of the Act’s competition provisions on their ability to collective bargain is made on the basis that any system for granting small businesses immunity from the competition law to facilitate collective bargaining should:

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

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

In assessing these policy options the Commission is mindful of the following principles that are at the heart of Australia's competition law regime:

- in a market economy, competition is generally the best means of maximising national economic welfare

- the competition provisions of the Act should prohibit market participants from engaging in anti-competitive conduct

- these prohibitions should apply equally to all market participants

- the Act should have sufficient flexibility to ensure it allows conduct that results in a net public benefit
exemptions for anti-competitive conduct should only be granted when the conduct results in a net public benefit

any process for granting exemptions for anti-competitive conduct on public benefit grounds should be transparent and offer procedural fairness and natural justice to those affected.

4.4.1 Option 1: Administrative improvements
The Commission's administration of the existing authorisation process could be improved and streamlined to make small business collective bargaining easier.

In recent years, the Commission has put a high priority on helping small businesses and primary producers to understand the Act so they can respond effectively if they become the target of misrepresentation, misuse of market power or unconscionable conduct by larger companies.

The Commission has small business and rural and regional units which have Regional Outreach Officers and Small Business Managers in each state and territory. They run seminars and meetings to distribute trade practices information and to advise small business and rural communities about the Act and the role of the Commission.

In addition, every six months, the Commission also holds the Competing Fairly Forum which is broadcast live by satellite to more than one hundred regional and rural locations, to discuss trade practices issues of particular relevance to small businesses in regional areas. The Commission also has a Regional Network involving more than three hundred organisations in regional communities.

The focus of the Commission’s small business and rural outreach services has been to raise general awareness of the Act. However, because of concerns raised recently by small business and rural organisations about the authorisation process, the Commission recognises that it could better use its small business and rural outreach networks to help small businesses through the authorisation process. This would lead to improved understanding of and access to the authorisation process by small business.

With this in mind, the Commission could:

- publish a small business guide to the authorisation process, which would give small business:
  - a clear explanation of how the authorisation process operates
  - easy-to-understand and practical guidance on how to apply for authorisation for collective bargaining, details of the type of information the Commission expects in supporting submissions and how to present public benefit arguments to the Commission (this could include a checklist and a template submission to help them present their case to the Commission)
  - information about how the Commission has assessed public benefit and competition issues in past authorisation decisions dealing with collective
bargaining arrangements to help small business better understand and anticipate the approach the Commission takes to collective bargaining authorisation applications

- run workshops for small business groups to help them manage trade practices issues, including advice on how to apply for authorisation

- establish a unit within the Commission’s Adjudication Branch that would specialise in guiding small businesses through the authorisation process and focus resources on streamlining the Commission's assessment of small business collective bargaining authorisation applications. The Commission would draw on its existing small business and regional outreach expertise to support the new unit. The unit’s role would be to:

  - develop expertise and understanding within the Commission of small business collective bargaining issues
  - ensure that when seeking authorisation from the Commission for collective bargaining arrangements, small businesses would deal with specialist staff who are aware of their concerns and are able to guide them effectively through the authorisation process
  - focus the Commission’s resources on small business collective bargaining authorisation applications so that the applications are dealt with efficiently and promptly.

4.4.1.1 Benefits of Option 1

Professional fees can constitute by far the greatest cost of lodging an authorisation application. Adopting Option 1 could significantly reduce the cost of the authorisation process for small businesses by reducing or eliminating the need to employ expensive professional advisers to assist them through the authorisation process.

Improving the Commission's administration of the existing authorisation process would increase its responsiveness to the needs of small business without undermining the integrity and broad legitimacy of either the existing authorisation process—which offers a uniquely flexible way to balance competition law with broad public interest concerns—or the general application of Australia's competition law regime to all market participants.

4.4.2 Option 2: Amend the existing authorisation process

4.4.2.1 Option 2a: Amend the public benefit test to require the Commission to have specific regard to the public benefit of an efficient small business sector

When determining what amounts to public benefit in assessing an authorisation application for mergers, the Act requires the Commission to regard as a public benefit:

- a significant increase in the real value of exports, and
- a significant substitution of domestic products for imported goods.
The Act also requires the Commission to take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Similarly, small businesses could be given statutory reassurance that the Commission will give adequate consideration to their interests by amending the authorisation test to require the Commission to have regard to the public benefit of assistance to efficient small business, for example, guidance on costing and pricing or marketing initiatives which promote competitiveness.

4.4.2.2 Option 2b: Reduce authorisation fees for small businesses and give the Commission discretion to waive authorisation application fees when the fees impose an unreasonable burden on the applicant

The fee for lodging a non-merger authorisation application with the Commission is $7500. This fee can be a significant financial burden on small businesses, however, the Commission currently has no power to reduce of waive the fee for small businesses. The Trade Practices Regulations could also be amended to reduce authorisation application fees for individuals and proprietary companies which would benefit small businesses. Such a discount currently operates for exclusive dealing notifications.

However, there is benefit in keeping application fees high enough to discourage frivolous authorisation applications, for example when it is highly unlikely that the arrangement will raise trade practices issues. The Commission considers that a discounted fee for individuals or proprietary companies of $500 to $1000 would be appropriate.

The Act could also be amended to enable the Commission to waive authorisation application fees when the fees impose an unreasonable burden on the applicant. This would ensure that the application fee did not prevent small businesses and small business associations with limited resources from applying for an authorisation to enable them to engage in conduct that benefits the public.

4.4.2.3 Option 2c: Impose time limits on the Commission's consideration of authorisation applications

The Act could be amended to impose time limits on the Commission's decision making processes. This may appear superficially to offer a relatively simple way to speed up the Commission's assessment of authorisation applications. However, the imposition of inflexible and arbitrary time limits may have adverse effects on both small business applicants and small business interested parties.

- Large businesses and their industry associations often have the resources to better manage consultation processes with tight deadlines than small businesses and small business industry associations with limited resources. Time limits may introduce a structural bias into the authorisation consultation process in favour of large businesses and their industry associations.

- By limiting the time for applicants to satisfy the Commission that their proposal will operate in the public interest—and, in particular, limiting the time available to applicants to amend their proposal in light of concerns raised by interested parties—time limits may compel the Commission to issue more determinations.
denying authorisation simply because the applicant has been unable to address
government and competition concerns before the Commission is required by a
statutory time limit to make its decision.

- Time limits are likely to hinder or prevent the authorisation process being used by
industry to develop workable, industry-based solutions to a range of industry
reform and self-regulation challenges. Time limits could restrict and even eliminate
the scope for negotiating with interested parties and for amending proposals in light
of those negotiations. This could mean that the Commission might have to deny
authorisation to proposals which, although they did not satisfy the public benefit
test in the form initially proposed, could be improved to meet the public benefit test
if there was enough time to make appropriate amendments. The operation of
statutory time limits may mean that applicants withdraw their application to avoid
an adverse decision by the Commission and then, once appropriate amendments
had been made to their proposal, re-applies for authorisation. A new fee would then
have to be paid and the entire authorisation process would have to be repeated,
resulting in considerable administrative inefficiency, delay and expense.

The Act currently provides a mechanism where the Minister may require the
Commission to make a determination on an authorisation application within four
months of a date set by the Minister (subs. 90(10)). If the Commission does not make a
determination within that time, the Commission is deemed to have granted the
authorisation applied for. The four months can be extended if the Commission seeks
additional information from the applicant relevant to the determination of the
application. The extension lasts for the amount of time taken by the applicant to
provide the additional information to the extent that they can.

Should a genuine concern arise that the Commission is unnecessarily delaying the
assessment of an authorisation application, this provision allows the Minister to address
that concern. In deciding whether to exercise the power to impose a time limit under
subs. 90(10), the Minister would be in a position to consider both the positive and
negative effects of the imposition of a time limit in the particular case. The
Commission considers that such a case-by-case imposition of a time limit offers the
most effective way to address this issue.

4.4.3  Option 3: Establish a new process for granting immunity from the
competition provisions of the Act for small business collective bargaining

4.4.3.1 Option 3a: Establish a notification process comparable to the existing process
for notifying exclusive dealing conduct

The Act could be amended to establish a process for the notification of collective
bargaining arrangements, modelled on the existing exclusive dealing notification
process set out in s. 93 of the Act. This is the Commission’s preferred option for
addressing small business concerns.

The main benefit for small businesses would be a streamlined mechanism for them to
gain automatic immunity, subject to appropriate checks, from the relevant competition
law prohibitions in the Act. At the same time, the notification process would also
ensure that the provision of immunity remains subject to a public benefit test through
the Commission’s power to revoke notifications if the conduct does not result in a net public benefit.

If a notification process was adopted to address small business collective bargaining, it would need to be modified in response to the significantly greater anti-competitive potential associated with collective bargaining compared with exclusive dealing arrangements that the current notification process was designed to address. Exclusive dealing involves vertical restraints of trade which are generally seen as having less anti-competitive potential than horizontal agreements between competitors that directly restrict competition between those competitors.

The broad features of a notification process modified so that it would be appropriate for small business collective bargaining arrangements are set out in Box 4.4.3.1 and discussed below.

<table>
<thead>
<tr>
<th>A workable notification process for small business collective bargaining</th>
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<tr>
<td>In the Commission’s view, a notification process for collective bargaining arrangements should incorporate the existing notification provisions, including the following features.</td>
</tr>
<tr>
<td>- So that the Commission can assess the potential public benefit and anti-competitive effect, the notification should contain certain information, including identifying who is giving the notification, details of the notified conduct and details of the class or classes of persons to which the conduct relates.</td>
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<tr>
<td>- The Commission maintains a public register of notifications.</td>
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<tr>
<td>- The Commission can revoke immunity under a notification if it is satisfied that the likely public benefit from the notified conduct will not outweigh the likely detriment to the public from the notified conduct.</td>
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<tr>
<td>- Before issuing a notice revoking immunity, the Commission must issue a draft notice and give interested parties the opportunity to call a conference to discuss the draft notice.</td>
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<tr>
<td>- If the Commission issues a notice revoking the immunity under a notification, interested persons dissatisfied with the Commission's decision may apply to the Tribunal to review the Commission's decision.</td>
</tr>
<tr>
<td>- Immunity under a notification comes into effect automatically following a specified time after the notification is lodged, unless the Commission has formally commenced the process of revoking the notification by issuing a draft notice.</td>
</tr>
<tr>
<td>- The Commission may use its powers to obtain information under s. 155 of the Act to obtain information relevant to making a decision to issue a notice or a draft notice revoking immunity.</td>
</tr>
<tr>
<td>- Section 87B enforceable undertakings can be provided in relation to a notification.</td>
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The Commission considers that some extra features should be incorporated into any new notification process for collective bargaining conduct to ensure that the process is workable and operates in the public interest.

- The notification should provide immunity for s. 45 conduct, including price fixing, but should not provide immunity from the prohibition on primary boycotts. Authorisation would still be available for such conduct.

- Immunity should not come into effect until 30 days (or 45 days in the case of complex matters) after the notification is lodged to ensure the Commission has sufficient time to assess the likely effect of the notified conduct.

- The Commission 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 Commission to make an informed decision about the notification.

- The Commission should be able to impose conditions on notifications.

- Immunity under a notification should operate for three years, after which parties will have to lodge a new notification if they wish the immunity to continue.

- The notification process should be subject to eligibility criteria to ensure that only small businesses collectively bargaining with large businesses with a substantial degree of market power are eligible to lodge a notification.

The notification process is a mechanism for automatic immunity from the relevant competition provisions of the Act unless and until that immunity is revoked by the Commission. Under any new notification process, sufficient checks should ensure that this mechanism cannot be used to gain immunity inappropriately (albeit temporarily) for highly anti-competitive conduct.

This is particularly important in the case of inappropriate collective bargaining arrangements which have the potential to cause significant commercial damage in a relatively short time, especially if used strategically during commercial negotiations.

4.4.3.1.1 Rationale for incorporating extra features

To ensure there are sufficient checks in the process for the notification of collective bargaining conduct, the Commission offers the following rationale for the suggested additional features.

Why not include primary boycotts in the notification process?

Primary boycotts can have particularly significant anti-competitive effects. Under collective bargaining, a right to impose a primary boycott on a party with whom the collective bargaining unit is negotiating can operate in a very similar way to a right to strike in the context of industrial relations (see also section 4.4.4.1). In the context of the commercial supply of goods or services, such a right could enable a collective bargaining unit to inflict significant commercial damage on those with whom they negotiate. If used strategically it could also give a collective bargaining unit a degree of
countervailing power that goes well beyond that necessary to address any imbalance in market power issues. Indeed, in some cases such a right could simply reverse any imbalance in bargaining power.

The Commission considers that primary boycotts can significantly increase the potential anti-competitive effect of collective bargaining arrangements and should not be included in any notification process.

Collective bargaining groups wishing to engage in primary boycotts should be required to seek immunity through the full authorisation process. This would give an opportunity to anyone who may be adversely affected by the arrangements to put their views to the Commission and to ensure that immunity is only obtained if there are demonstrable public benefits sufficient to outweigh the anti-competitive detriment associated with such conduct.

**Why have a delay of 30 days (and 45 days in complex matters) before immunity comes into force after the notification is lodged?**

The existing statutory arrangements for the notification of third line forcing conduct means that immunity does not come into effect until 14 days after the notification is lodged. In the case of collective bargaining arrangements, which are significantly more complex than exclusive dealing arrangements, a longer period would be needed to give the Commission enough time to conduct a preliminary assessment of the notification. As well, if the notified conduct is not likely to operate in the public interest, a longer period would enable the Commission to prevent the immunity under the notification from coming into effect by issuing a draft notice to start the process of revoking the notification. This would provide an effective check on the ability of parties to use the notification process to gain immunity inappropriately to engage in highly anti-competitive conduct, (albeit temporarily) while the Commission goes through the process of revoking the immunity.

Collective bargaining arrangements can be complicated arrangements and can affect wide and disparate sections of the public. The Commission must have enough time to consult interested parties and to make an initial assessment of the likely effect on competition and public benefit associated with notified collective bargaining conduct before immunity comes into operation.

The new arrangements would provide a check to ensure that conduct which has the potential to have significant anti-competitive effects—including significant commercial damage to competitors or other negotiating parties—is not implemented in the absence of a net public benefit simply because immunity is gained automatically and it takes time for the Commission to revoke a notification.

The Commission considers that 30 days (and 45 days in complex matters) would offer an appropriate balance between the need to minimise delays in the notification process and the need to ensure that immunity is not given to arrangements that will not operate in the public interest.

In addition, the Commission could be given the power 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 allow the Commission to make an informed decision on the notification.

**Why should the Commission have the power to impose conditions on a notification?**

In dealing with collective bargaining arrangements through the authorisation process the Commission has found that imposing conditions is a very efficient and flexible way to ensure that arrangements for which immunity is granted operate in the public interest. Some applicants seek authorisation for very broad collective bargaining arrangements with significant anti-competitive detriment. Imposing conditions on these arrangements can restrict the scope and operation of collective bargaining units so they do not operate against the public interest.

Without the power to impose conditions on a notification that does not pass the net public benefit test, the only way the Commission can respond is to revoke the notification, even if deficiencies in the notification could easily be addressed by imposing an appropriate condition.

In many cases, the power to impose conditions on a notification provides a more efficient, flexible and less costly mechanism for responding to public interest concerns than addressing them through the Commission’s power to revoke a notification.

**Why should such notifications operate for three years only?**

The existing notification provisions for exclusive dealing conduct mean immunity can operate indefinitely until a notification is revoked.

Over time and as market conditions change, the relative public benefit and anti-competitive effect of collective bargaining arrangements can change considerably. A notification process whereby the immunity afforded by the notification operated for three years only would have the effect of requiring notifying parties to regularly update their notification in light of changing market conditions and enable the Commission to review the notification in light of any changes. For instance, in some cases collective bargaining will only operate in the public interest for as long as the participating small businesses need to develop their negotiating and information collection skills.

**Why should the right to lodge a notification be subject to eligibility criteria?**

The policy objective of a collective bargaining notification process is to enable small businesses to collectively bargain to address an imbalance in bargaining power when dealing with large businesses with a substantial degree of market power. Assisting small business to engage in collective bargaining to counter-balance the bargaining power of big businesses can ensure that harsh or unfair contract terms are minimised and that both sides to an arrangement have equal input. A legislative solution to this problem should minimise the potential for any unintended consequences.

To ensure a targeted approach to legislative change, access to a notification process should only be available to small businesses that are collectively bargaining with large businesses with a substantial degree of market power.
Without eligibility criteria, a notification process could have unintended and undesirable consequences, some of which may operate directly against the policy objective of the notification process.

For example, in the absence of eligibility criteria restricting access to the notification process to small businesses, large businesses could try to use the process to collectively bargain with other business, including small businesses.

An unconstrained notification process could see large businesses attempting to circumvent the Act’s merger provisions by collectively bargaining on price and the terms of supply with their customers. At the same time, small businesses could try to use the notification process to collectively bargain with other businesses that do not have a substantial degree of market power, including other small businesses. Outcomes like these would not be consistent with the policy objectives of such a notification process.

While it is possible the Commission could deal with these concerns through its power to revoke a notification, this would impose a considerable administrative burden on the Commission. The consistent application of appropriate eligibility criteria is far more likely to lead to an efficient and timely mechanism than the revocation procedures.

The Commission recognises that it may be difficult to draft workable legislative provisions that effectively restrict the notification process to small businesses collectively bargaining with large businesses with a substantial degree of market power. Legislated criteria are likely also to be inflexible. For example, a statutory definition of small business according to maximum employee numbers, annual turnover or market share may lead to some small businesses being arbitrarily excluded from collective bargaining arrangements because they fall slightly outside the criteria. However, more general or ambiguous statutory criteria may lead to uncertainty, especially if the primary mechanism for dealing with any ambiguities in statutory criteria would be court interpretation. Litigation about whether a particular group of small businesses are eligible to lodge a notification is likely to be costly and time-consuming and could be used to delay or frustrate attempts by small businesses to lodge a notification.

To ensure that any eligibility criteria are sufficiently flexible to provide a workable means to limit access to the notification process, the Commission considers that notification should be available to parties that satisfy the Commission that the notified conduct concerns small businesses collectively bargaining with large businesses with a substantial degree of market power. This process could operate in the following manner:

- the Commission issuing guidelines, following consultation with interested parties, specifying eligibility criteria that restrict access to the notification process so far as practicable to small businesses collectively bargaining with large businesses with a substantial degree of market power

- notifying parties being required to demonstrate, when lodging their notification, that they meet these criteria
the Commission having the power to determine that a notification is not valid because it does not satisfy the eligibility criteria set out in the Commission's guidelines

the Commission being able to amend its guidelines and eligibility criteria following consultation with interested parties.

Parties who were ineligible to lodge a notification for collective bargaining because of the operation of such eligibility criteria would still be able to apply for authorisation. Any eligibility criteria would not operate to prevent parties from gaining immunity for collective bargaining conduct, but rather only to exclude some parties from a streamlined process.

4.4.3.2 Option 3b: Set up a block exemption process similar to that used by the EC

The Act could be amended to give the Commission the power to grant block exemptions to facilitate small business collective bargaining.

The Commission only has the power to grant immunity from prosecution under the authorisations process case-by-case, with the process triggered by an application for authorisation for specific conduct and the onus placed on the applicant to satisfy the Commission that immunity should be granted on public benefit grounds.\(^{158}\)

Giving the Commission the power to grant block exemptions on broad public benefit grounds to facilitate small business collective bargaining arrangements could reduce the cost to business of seeking immunity compared with the existing authorisation process. Costs to business would be reduced because:

- the Commission could grant immunity for similar types of arrangements in one process, without having to undertake multiple authorisation processes, and

- the immunity gained through a block exemption would not involve the costs of preparing and lodging an application for authorisation.

Because a block exemption would cover both current and future arrangements of a particular type, granting a block exemption for particular conduct would also promote regulatory certainty for business by giving them clear guidance on what conduct would fall within the exemption.

The power to issue a block exemption to certain types of arrangements would also reduce the resources used by the Commission in assessing authorisation applications on similar issues. As well, the power would allow the Commission to play a proactive role in granting immunity for particular types of conduct that operate in the public interest.

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\(^{158}\) The Commission currently has power to authorise contracts that are similar to a contract that is the subject of an authorisation application: s. 88(13). However, the effect of ss. 88(10) and (12) would seem to be that parties to the proposed arrangements must be identifiable to the Commission by the applicant, on the Commission’s request. In practice, this limits the utility of this provision to enable the Commission to extend an authorisation to cover a range of similar arrangements.
rather than being restricted to responding reactively to specific applications for immunity for specific conduct.

While a block exemption power could mean benefits for both business and the Commission, adopting a block exemption power would be a significant departure from Australia’s current competition law framework.

4.4.3.3 Option 3c: Create a registration process comparable to the process in Part X of the Act for exempting international liner cargo shipping agreements

In a document published by the MTAA in late 2001, the MTAA suggested the establishment of a legislative exemption or safe harbour for collective bargaining modelled on the process in Part X of the Act. The MTAA proposed that this process would only be available to:

- groups of small businesses with a collective market share of no more than 20 per cent in any relevant market, and
- all small businesses involved in an exclusive buying or selling relationship with the same big business buyer or seller.

The MTAA proposed that the provision would:

- only relate to small businesses when negotiating with large customers or suppliers
- be limited to collective negotiations or bargaining and not cover dealings with other customers and other suppliers
- provide protection from s. 45
- cover collective boycotts—the MTAA pointed out that the Commission would need to issue guidelines on what boycotts were permissible before the amendments became law.

The MTAA considers that protected collective negotiations could include:

- agreements on price, quality, to whom products will be sold, transport arrangements, standard growing agreements and appointing representatives to enter into negotiations
- agreements among sellers to withhold products from sale to particular buyers
- cooperative advertising arrangements and agreements on rates paid to advertising agencies and the media, and
- refusals to accept standard rates of remuneration offered in advance and irrespective of the nature and quality of the work performed.
Part X establishes an extremely complex statutory framework for certain limited
exemptions from the competition provisions of the Act. They only apply to agreements
on outwards and inwards liner cargo shipping services dealing with the transport of
cargo by sea. The unique features of Part X reflect Australia’s heavy reliance on foreign
shipping lines and the significance of these services for the national interest.

The Commission would have substantial concerns with any process for facilitating
small business collective bargaining modelled on Part X of the Act. In particular Part X
would not provide:

- an adequate process for public consultation for granting immunity, and
- a mechanism for an effective public interest test to be applied to registered
  agreements.

A process modelled on Part X would not reassure the community that immunity would
only be granted for collective bargaining conduct that operated in the public interest or,
if it did not operate in the public interest, that the Commission could revoke it. In
addition, a process modelled on Part X lacks the transparency and public consultation
processes currently set out in Part VII of the Act.

The Commission considers that, because of the potentially significant effects of
collective bargaining arrangements across a wide range of Australian industries, it
would be quite inappropriate to base a process for granting immunity for such conduct
on Part X of the Act.

However, the Commission considers that some aspects of the MTAA’s proposal could
be used productively in the development of appropriate eligibility criteria for a
notification process for collective bargaining arrangements.

4.4.4 Option 4: Establish a general legislative exemption for small business
collective bargaining

The Act could be amended to establish a general exemption from s. 45 of the Act for
small businesses collective bargaining. The Commission considers this has significant
disadvantages.

An exemption would undermine the fairness, legitimacy and effectiveness of the Act’s
competition provisions. The experience of the Swanson Committee, which in 1976
conducted the first inquiry into the Act, is instructive on this point. The Committee's
Report made the following comments in relation to exceptions and exemptions from
the Act:

We believe it to be extremely important that the Trade Practices Act should start from a
position of universal application to all business activity ... only in this way will the law be fair,
and be seen to be fair, and avoid giving a privileged position to those not bound to adhere to its
standards ...

The Committee was presented with numerous proposals to exclude from the operation of all or
some of the provisions of the Act, both particular organisations, and matters relating to
particular industries or affecting different functional levels within those industries ... We
refrain from listing the industries and organisations claiming exclusion. However, as already
indicated, we consider that in general the Act should apply across-the-board and be admissible of exceptions only where a case for public benefit can be made out, or where Parliament has specifically legislated to regulate an area.159

This view that the Act should have universal application across all market participants to ensure its fairness, legitimacy and effectiveness and that exemptions should only be granted where a public interest case can be made out has continued to be upheld by Committees of inquiry into the Act over the last twenty five years, most significantly in the Hilmer Committee of Inquiry report in 1993. The Hilmer Committee affirmed that:

There are compelling efficiency and equity arguments for ensuring that competitive conduct rules ... are applied uniformly and universally throughout the economy, with exemptions or special treatment accorded only on demonstrated public benefit grounds.160

A general legislative exemption for small businesses to collectively bargain would have the effect of exempting an extremely large section of the Australian economy from the operation of competition law.

Small businesses play a substantial role in the Australian economy. The Australian Bureau of Statistics estimates there were over one million small private sector businesses in Australia in 1998–99, representing 95 per cent of all private sector businesses and accounting for 48 per cent of all private sector employment.

In 1997–98, small non-farm businesses accounted for 30 per cent of the total sales of goods and services of all businesses, and 39 per cent of the operating profit before tax of all businesses. Total sales of goods and services by small businesses in the non-farm sector amounted to over $313 billion in 1997–98. Small businesses are particularly significant in some sections of the economy, representing for example, 55 per cent of the sale of goods and services of all businesses in the construction sector, 47 per cent of sales in the property and business services sector and 43 per cent of sales in the retail sector.

ABS figures also show that 86 per cent of agricultural businesses in 1997–98 were small businesses, accounting for 53 per cent of total turnover and 45 per cent of total wages, salaries and supplements. In 1997–98 the total turnover of small businesses in the agricultural sector in 1997–98 was over $14 billion.161

A general legislative exemption would also undermine the fairness, legitimacy and effectiveness of the competition provisions of the Act and could lead to significant increases in inefficiency across all sectors of the economy. This would reduce consumer welfare and reduce the efficiency and international competitiveness of the Australian economy to the detriment of all Australians.


160 Independent Committee of Inquiry (Hilmer Committee), National Competition Policy, Canberra: AGPS, 1993, p. 85.

Indeed, a general exemption to enable small business to enter into anti-competitive agreements, including price fixing and collective boycotts, could allow small businesses to establish monopolies or near monopolies in key sectors of the economy, particularly in those areas where all or almost all of the market participants are small businesses—for example, in some professions (such as doctors and surgeons), skilled trades (such as plumbers and electricians), drycleaners, newsagents, and so on.

Although a more narrowly defined exemption could reduce the economic damage, exemption of an entire industry sector would undermine the fairness and legitimacy of Australia’s competition law which is based on a principle of universal application throughout the economy because effective competition laws contribute to the productivity, efficiency and growth of the Australian economy.

An unfettered ability by producers to collectively bargain could also undermine current efforts to deregulate rural industries.

In the past, the price for primary produce was often set by statutory marketing authorities operating under legislation with an exemption from the Act. Statutory marketing authorities are typically grower controlled and coordinated organisations with a statutory power to compulsorily buy entire crops from growers and to determine crop varieties, qualities, grades and prices. Deregulation in line with national competition policy has seen many of these statutory marketing authorities dismantled leaving the price of primary produce to be set by the market through negotiations between individual primary producers and buyersprocessors. This deregulation process has been a key feature of Australia's agriculture policy in recent times.

A general exemption for producers to collectively bargain has the potential to unwind this reform process by allowing producers to set an industry wide price for their produce in a way directly comparable to the price setting functions of the old statutory marketing authorities.

In 1976 the Swanson Committee rejected the need for a general exemption from the competition law for primary producers. The committee’s report stated:

… the Committee accepts the need at this time for certain individual primary producers to be able to act collectively in arranging the sale of their products, including price negotiations. The main reason for this is, of course, the nature of the market in which such producers operate: there are a very large number of sellers which individually have very little or no bargaining power and who sell to comparatively few buyers who further process the product and/or arrange for marketing to the consumer ... **However, we do not think that this reasoning should lead to a sweeping exemption for primary industry** [emphasis added].

More recently in 1993 the Hilmer Committee affirmed the value of the current regime of competitive conduct rules, including an authorisation process, because it provided an appropriate mechanism for dealing with competition and public interest issues arising out of the progressive deregulation of the rural sector and the extension of competition law in these areas. In relation to the deregulation of mandatory agricultural marketing schemes, the Hilmer Committee stated:

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As mandatory schemes are deregulated it is likely that the number of voluntary arrangements will increase. Application of competitive conduct rules is particularly important in these circumstances to ensure that the anti-competitive habits which may have developed under a mandatory regime are not perpetuated through private arrangements. Application of such rules may also assist in deregulating these sectors, allowing anti-competitive arrangements that are in the public interest to continue, while phasing out those that are not.\footnote{Hilmer, op. cit., p. 142.}

Following implementation of national competition policy, the authorisation process has played an important role in providing farmers with a mechanism to address issues raised by the legislation review process. In this context the National Competition Council stated:

If a review recommends that compulsory agricultural arrangements be removed, farmers may still develop voluntary arrangements for collective marketing. There are no barriers to collective marketing on export markets. Australia’s Trade Practices Act does apply to domestic sales, however, primary producers can apply to the Australian Competition and Consumer Commission (ACCC) for approval of voluntary collective marketing arrangements. Examples of this are the collective negotiating arrangements which the Commission has approved for the poultry meat industries in several States.\footnote{National Competition Council, \textit{Securing the future of Australian Agriculture: overview}, community information paper, July 2000.}

For these reasons, the Commission would be particularly concerned about any general legislated exemption for small businesses and/or collective bargaining by rural producers and would not support this option.

\textbf{4.4.4.1 Differences between collective bargaining in relation to employment and small business collective bargaining}

It has been argued that in some contexts small business collective bargaining should benefit from a similar exemption from the Act as that enjoyed by employees who collectively bargain with their employer over the terms and conditions of their employment.

The competition provisions of the Act contain a general exemption for collective bargaining and collective agreements on employment conditions, including remuneration, hours of work and employee’s working conditions. While collective bargaining by employees on the terms and conditions of their employment is not subject to regulation under the Act, this is because employee/employer collective bargaining is subject to detailed regulation under special industrial and workplace relations legislation. Among other things, the legislation regulates the circumstances in which labour can engage in collective bargaining, including providing for a system for the arbitration of industrial disputes over employment terms and conditions.

The special legislative regime for industrial relations has developed over many years and reflects a wide range of social, political and historical factors. It takes account of not only the potential imbalance in bargaining power between large employers and individual employees but also the very significant economic consequences of collective bargaining by employees to individual businesses, industries and for the Australian
economy as a whole. This is particularly true of the substantial economic damage that can be caused by employee boycotts.

In this context, the trend in industrial relations legislation over recent years has been to decrease the scope of collective bargaining on employment conditions. For instance, there is a move from industry-wide negotiation of employment conditions to enterprise specific bargaining arrangements that incorporate opportunities for employees to negotiate individually.

Were small businesses granted a general exemption from the competition provisions of the Act comparable to that for collective bargaining by employees, the exemption would operate without any of the checks and balances governing collective bargaining by employees. In the absence of these checks and balances, the economic consequences of a general exemption could be severe.

The Commission considers that a comparison between small business collective bargaining and collective bargaining by employees in an industrial relations context is ill-founded and does not support the suggestion that small businesses should benefit from an exemption from the Act comparable to that currently available for collective bargaining by employees.
5 Mergers—efficiencies, globalisation and processes

5.1 Introduction

Mergers perform an important role in the efficient functioning of the economy. They allow firms to achieve efficiencies such as economies of scale and scope, synergies and risk spreading. Furthermore, they facilitate an active ‘market for corporate control’ in which under performing firms and managers are replaced by better ones.

Apart from the stock market, there are no objective standards of managerial efficiency. Only takeovers offer some assurance of competitive efficiency among corporate managers. The threat of takeover imposes a competitive discipline on managers to perform, otherwise their companies will be vulnerable to takeover.

Most mergers do not raise any competition issues. However, some mergers may have anti-competitive effects by altering the structure of markets and therefore the incentives for firms to behave in a competitive manner. This is the concern of ss. 50 and 50A of the Trade Practices Act (the Act).

The primary objective of s. 50 is to promote the economic policy which underpins the restrictive trade practices provisions by ensuring that parties cannot avoid restrictions on anti-competitive behaviour through merger.

It is sometimes questioned why s. 50 is a necessary element of the regulatory scheme as monopolisation is already caught within the scope of s. 46. Section 50 is designed to prevent the development of market structures conducive to anti-competitive behaviour that is caught under the conduct provisions of Part IV of the Act. The aim is to prevent the accumulation of market power resulting in higher prices and/or lower quality goods and services for consumers.

Nevertheless, the Act recognises that the impact of mergers on market performance will vary. Hence it has adopted an ‘effects’ test to meet the underlying economic policy objective of socially useful competition. Unlike other provisions of Part IV of the Act, the merger provisions focus on the structure of a market.

Section 50 generally prohibits mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services.

Mergers law is necessary to ensure that the Australian economy does not evolve into a highly anti-competitive structure with associated harm to business and consumers. Current mergers law recognises the link between conduct in a market and the structure of that market. The decisions firms make about research, production, marketing, pricing and selling are often largely responsive to the structural aspects of the market. While not determinative, higher levels of concentration, absent contestable markets, import competition or other such balance, can often lead to a loss of competitive market discipline.
The Commission recognises the broad benefits that may accrue to mergers, including: disciplining errant or ineffective management; allowing firms to achieve efficiencies otherwise unattainable on their own terms; providing access to capital, better management, additional markets, technical talent or other synergies.

However, they can also lead to an effect on competition such that there is increased scope for price rises, coordinated behaviour and a lessening of the dynamic elements driven by competition that so influence market development.

Mergers law plays a critical role in ensuring competitive conduct by preserving competitive industry structures. An active merger assessment process is necessary to ward off anti-competitive mergers in order to promote and enhance economic efficiency.

If we had no merger law the economy would be vulnerable to the emergence of highly anti-competitive market structures. We could see more monopolies, higher levels of concentration and fewer market participants, to the great detriment of all Australians.

We could see harm to business itself for its suppliers would be uncompetitive, inefficient and costly. In addition to the harm done to business, consumers would also be faced with higher prices and/or deteriorating quality and service. World-class competitiveness is dependent on the development of industries based on innovation and skill. A weakened mergers law is more likely to lead to less competition and higher prices, without developing the world class edge that flows from the response to competitive pressures.

The Commission believes that higher levels of market concentration would also inevitably lead to higher public demand for direct regulation of business in concentrated sectors of the economy.

5.2 Authorisation

The emphasis in Part IV of the Act is on the preservation and maintenance of the competitive markets. However, there may be circumstances when the costs associated with anti-competitive conduct do not exceed the public benefits which also accrue from the conduct.\(^{165}\) Thus, society is better off if the conduct is allowed to continue even though it is anti-competitive.\(^{166}\) This is the underlying rationale in the Act for the authorisation process.

In order to grant an authorisation application for a merger, the Commission has to be satisfied in all the circumstances that the acquisition would result in such a benefit to the public that the merger should be allowed to take place.


\(^{166}\) ibid.
Authorisation is a subsequent and separate step from the competition assessment for mergers contained in s. 50. It is a transparent process with a rigorous testing of claims through public consultation with rights of recourse to administrative review. There are good reasons for such a process—effectively, the Commission is granting a dispensation or immunity from a significant economic law that has universal application to business activities. The public interest demands that proper processes and safeguards should apply.

In the case of a merger authorisation application, the Commission is being asked to accede to a merger that may constitute a significant accumulation of market power, even to a monopoly situation in some cases. 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 and 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 or business customers), suppliers, competitors and others.

5.3 Efficiencies

5.3.1 Section 50

In the latest edition of its Merger guidelines, the Commission specifically recognises efficiencies as one of the factors it will consider in a merger investigation.

Section 50 is concerned with the level of competition in markets and not the competitiveness of individual firms. However, the extent to which any efficiency enhancing aspects of a merger may impact on the competitiveness of markets is relevant in the context of s. 50.

Where a merger enhances the efficiency of the merged firm, for example by achieving economies of scale or effectively combining research and development facilities, it may have the effect of creating a new or enhanced competitive constraint on the unilateral conduct of other firms in the market, or it may undermine the conditions conducive to coordinated conduct. Pecuniary benefits, such as lower input prices due to enhanced bargaining power, may also be relevant in a s. 50 context.

If efficiencies from a merger are likely to result in lower (or not significantly higher) prices, increased output and/or higher quality goods or services, the merger may not substantially lessen competition.

The Commission recognises that the precise quantification of efficiencies is extremely difficult. In its consideration of efficiencies, the Commission will require strong and credible evidence that efficiencies are likely to accrue and that the claimed benefits for competition are likely to follow.

In examining three merger proposals that would rationalise the Australian plastics industry in 1996–97, the Commission recognised that increasing globalisation was putting additional pressure on domestic businesses to seek cost efficiencies. In Dow Chemical/Huntsman Chemical, Kemcor/Hoechst Plastics and ICI Australia/Auseon the Commission decided not to oppose on the basis that import competition would
constrain the exercise of any market power, and that the mergers would result in increased efficiencies and generate higher levels of output.

### 5.3.2 Authorisation

The consideration of efficiencies are generally relevant in the context of an authorisation application.

Section 50 need not prove to be an absolute impediment to mergers that result in a substantial lessening of competition if it can be demonstrated that they generate other public benefits such as increased efficiencies and/or international competitiveness which outweighs the anti-competitive detriment.

The statutory test for merger authorisations directs the Commission to have regard for the public benefits to be achieved from:

- a significant increase in the real value of exports
- a significant substitution of domestic products for imported goods
- matters that relate to the international competitiveness of any Australian industry.

Indeed, Australia’s authorisation regime has received critical acclaim for its ability to incorporate efficiency considerations into the merger investigation process. According to Griffin and Sharp:

> Australia, …is currently more progressive in its incorporation of efficiency considerations to proposed mergers than the European Union and the United States.\(^{167}\)

In comparing the capacity of Australia’s competition law regime to incorporate efficiencies within the merger assessment process against that of the European Union and the United States, Griffin and Sharp concluded that:

> Australia now appears to be the most progressive of the three jurisdictions considered here in its application of economic tools and adaption to the globalisation of business.\(^{168}\)

Efficiency issues are further covered in chapter 8 of the submission.

### 5.4 International competitiveness

#### 5.4.1 Introduction

The extent of international competition is given full consideration in the Commission’s merger assessment process. Section 50(3)(a) requires that the Commission consider the

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\(^{168}\) ibid.
actual and potential level of import competition in a market. In a small open economy such as Australia the importance of giving special consideration to the role of actual and potential import competition in considering the likely effect of a merger on competition is widely acknowledged.

The Commission recognises that globalisation is changing the boundaries of many markets. Competition may come from sources other than domestically based firms. The Commission has not objected to any merger where comparable and competitive imports have held a sustained market share of 10 per cent or more for at least 3 years. In reality, even greater flexibility has been made available as it is not the historical share of imports that is significant, but their potential to constrain the price and output decisions of the merged firm. Consequently, the Commission has in some instances, not objected to a merger proposal, even where imports were less than 10 per cent but there was the strong potential for imports to constrain domestic market power.

Examples of mergers which the Commission has not opposed in concentrated markets on the basis of effective or potentially effective import competition are Ardmona/SPC (canned fruit), Manildra/George Weston (starch, starch sugars, flour and gluten), Email/Southcorp (white goods), and Amcor/APPM (paper wholesaling). In the Manildra/George Weston matter, the Commission concluded that the domestic prices of gluten would be constrained by actual and potential import competition as gluten was an internationally traded commodity. In the Ardmona/SPC case, the Commission decided that imports would impose an effective competitive constraint on the merged firm despite the fact that imports of canned fruit accounted for less than 10 per cent of the market at the time of the merger. In regard to Email/Southcorp, the Commission decided not to oppose this merger on the basis that existing and potential import competition within the major product markets was likely to ensure that the merger would not result in a substantial lessening of competition. With respect to the Amcor/APPM matter, the Commission concluded that strong import competition would constrain the merged firm despite Amcor becoming the only domestic manufacturer of paper.

The merger authorisation process also places a heavy emphasis on the international competitiveness of Australian industry. The Commission is under explicit direction in the Act to take into account all relevant matters that relate to the international competitiveness of Australian industry. The Act also directs the Commission to regard as a public benefit:

- a significant increase in the real value of exports
- significant import substitution.

5.4.2 Non-traded sector

The exposure of firms in the traded sector of the economy to the disciplines of international competition has reduced Commission concerns with mergers in that sector. The Commission’s focus has therefore increasingly shifted to mergers in the non-traded sector.
The competitiveness of the trade-exposed sector depends not only on the competitiveness of other trade-exposed firms, but also on the competitiveness of the non-traded sector that supplies the trade exposed sector with many of its essential inputs. The analysis of mergers in the non-traded sector, particularly in service and infrastructure industries, is critically important to ensure firms in the traded sector have competitive input markets so as to be better placed to compete more effectively both domestically and internationally.

5.4.3 Global mergers

Increasingly, the Commission must deal with acquisitions in a global context. This may involve consideration of global competition, or even global markets, and the role of mergers in enhancing efficiency and international competitiveness.

In addition, the mergers themselves may occur on a global scale, often involving multinational corporations. Where these mergers impact on a market in Australia they will generally be subject to the Act. Firms involved in these mergers will often have to deal with multiple competition agencies around the world. It should be borne in mind that many global mergers do not raise competition concerns within Australia.

It is also important to distinguish between firms that operate in global markets and those that operate in overseas markets. The fact that an Australian firm earns significant profits from its overseas operations does not in itself mean that the firm operates in global markets. For example, a ready mix concrete producer may have operations in numerous countries, but unless concrete is globally traded, the relevant market will have a much narrower geographic dimension. Some Australian firms with overseas operations appear to confuse global markets with global activities.

The Commission is increasingly involved in discourse and cooperation with its counterpart agencies around the world. The Commission regularly consults and liaises with the New Zealand Commerce Commission, the Department of Justice and the Federal Trade Commission of the United States, the United Kingdom Office of Fair Trading, the Canadian Competition Bureau, and the European Commission in regard to global mergers.

Recent examples of cooperation between the Commission and its counterparts in overseas jurisdictions have been in regard to the De Beers/Ashton Mining and the Metso/Svedala mergers.

In assessing De Beers proposed acquisition of Ashton Mining, the Commission liaised with the Canadian, United States and European competition authorities. Liaison with the European Commission was particularly extensive and useful, allowing the Commission to develop a better understanding of the global trade in diamonds.

Contact with overseas jurisdictions was also used extensively in assessing the global rock and mineral processing equipment merger between Metso and Svedala. In this case the European Commission obtained divestiture orders which greatly reduced the anti-competitive impact of the transaction worldwide and on Australian markets.

The Commission also liaised extensively with the European Union and United States competition authorities in respect of the global aluminium merger of Alcoa and
Reynolds. This case raised competition concerns with the Commission as well as the European Commission and the US Department of Justice. Alcoa offered undertakings to the US and European Union authorities to divest itself of its interest in the Worsley alumina refinery in Western Australia. These undertakings were sufficient to allay the concerns of the Commission. The Commission's recognition of undertakings given to other competition authorities as an effective remedy shows that cooperation between competition authorities can lead to effective outcomes.

5.4.4 Branch office economy

A common chorus of criticism by big business is that the current mergers law is responsible for turning Australia into a branch office economy.

According to Kirby:

> Dozens of Australian CEOs say [the Trade Practices Act] has stopped them attempting mergers or acquisitions. Firstly, because they believed the ACCC would never approve it. Secondly, even if the deal was approved, companies would have to divest so much that the value of the acquisition would be destroyed. And thirdly, they would be left hanging as the elongated approval process was played out—and other bidders perhaps emerged.

> The end result is that Australian companies are being bitten off one by one by larger global firms.169

According to the President of the Business Council of Australia (BCA) and former Managing Director of Pioneer International, Dr John Schubert:

> If you get to a certain size in Australia, your growth obviously has to occur outside Australia. And, as you are more and more successful, you will finish up with the majority of your business outside Australia. So, if you finish up, for example, like Pioneer did, … — seventy per cent of our activities and business and people are outside Australia.170

In discussing the performance of Australia firms overseas, Dr Schubert has commented:

> the more successful they are offshore, the more likely it is that they will then tend to have a need to move their activities and perhaps their head office, offshore. Now, the reality is, if they can be allowed to be bigger in Australia, then at the very least, that move offshore will be delayed, or the pressures for that move will be delayed. So that’s where it gets into the area of competition law.171

Schubert’s comments suggest that the BCA recognises that the decision to move offshore is linked to where the majority of a firm’s business is conducted rather than to the application of competition law. Further, the inference is that should Australian merger law be watered down to allow domestic firms to achieve dominance and

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169 Peter Kirby, *Is the Branch Office All We Can Aspire To?*, speech to the Securities Institute of Australia, 21 June 2001.


171 ibid.
exercise monopoly power at the expense of Australian consumers and businesses, at best the move offshore would only be delayed.

The Commission notes that foreign investment is the responsibility of the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975* and beyond the scope of this inquiry. However, in response to claims that the present mergers test is contributing to Australia becoming a branch office economy, the Commission would observe that the assets of a takeover target are always worth more to a potential monopolist than other possible bidders.

A recent survey on offshore investment by Australian firms conducted by the Productivity Commission concluded that:

> Australian mergers regulation did not rate as a major influence on respondents’ decisions to produce or relocate offshore.¹⁷²

In addition, the survey found that:

> Australian merger law was ranked lowest among commercial and government-related factors identified in the questionnaire as likely to influence decisions about headquarter relocation.¹⁷³

Of the 200 firms surveyed by the Productivity Commission as part of its study, only 12 per cent of respondents rated mergers law as being a factor of high importance in inhibiting their domestic growth.

Based on the available evidence, claims that the current mergers law regime is a significant contributing factor in turning Australia into a branch office economy may be somewhat exaggerated.

### 5.4.5 National champions debate

Big business in Australia has expressed the view that in a relatively small economy such as Australia, firms should be given more flexibility to merge to enable them to more successfully compete overseas. According to this line of argument, firms need to reach ‘critical mass’ in order to achieve economies of scale and scope of sufficient magnitude so that they can be competitive on international markets. In small markets such as Australia, proponents of this argument claim that at best, only one or two firms in any market can achieve this critical mass. They become ‘national champions’ with domestic dominance sufficient to challenge in global markets.

According to Kirby:

> To be strong offshore, you need a strong home base. You need to have a secure cash and profit flow to take the risks involved in international expansion. You need a home base which does

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¹⁷³ ibid.
not unduly distract management attention, and which will enable you to train and develop the
people you need to lead your overseas expansion.174

There is a possibility that national champion type arguments are being pushed to justify
the creation of domestic monopolies in Australia. At its simplistic level, the national
champions argument suggests that Australia should allow the development of domestic
monopolies who take advantage of their market power by charging high prices and use
the profits generated to subsidise overseas expansion. Such an approach should be of
concern to all interested in an efficient domestic Australian economy.

In response to such concerns, Kirby has argued that:

The criticism that local consolidation would cause local customers to pay extra, to subsidise
overseas expansion, need not be the case. Why can’t my subsequent behaviour be monitored.175

The Commission believes that the most effective form of behavioural monitoring is to
maintain competitive market structures in the first instance.

The Australian business community is far from unanimous in its support for the
creation of national champions. The results of a survey conducted by Australian
Business Limited found that 61 per cent of businesses surveyed said that more big
business mergers should not be allowed in order to create national champions.176

According to this survey, opposition to national champions stems from the perceived
reduction in domestic competition and the effect mergers might have on current
business activities.177

In addition, a number of academic studies have arrived at an entirely different
conclusion on the desirability of national champions as compared to big business.

In *The Competitive Advantage of Nations* in which a survey of the international
competitiveness of 10 nations was undertaken, Porter found a strong empirical link
between vigorous domestic rivalry and the creation and persistence of competitive
advantage in an industry. Porter observed that:

> We found … few “national champions,” or firms with virtually unrivalled domestic positions,
that were internationally competitive. Instead, most were uncompetitive though often heavily
subsidised and protected.178

174 Peter Kirby, *Is the Branch Office All We Can Aspire To?*, speech to the Securities Institute of

175 ibid.

176 Press release by Australian Business Limited, *Many businesses wary of mergers changes in Trade

177 ibid.

Porter and Sakakibara undertook a detailed examination of the international competitiveness of Japan.\(^{179}\) In this work, they examined three competing hypotheses about the effect of domestic competition on international market performance:

- Local collusion and limits on domestic competition enhance international competitiveness whereby the relation between the intensity of local rivalry and international competition is negative.

- The intensity of domestic competition will have little or no association with international competitiveness because the distinction between domestic and international competition has been rendered unimportant by the widespread internationalisation of markets.

- There is a strong association between domestic rivalry and international competitiveness whereby rivalry among domestically based firms offers greater benefits to competitive upgrading than either imports or foreign companies with minimal investment in the nation.

Porter and Sakakibara concluded that their examination provided robust evidence that domestic rivalry is positively associated with international trade performance. They further concluded that:

> protection of the home market, by limiting competitive pressure, works against export competitiveness. Competing at home, then, fosters success abroad.

> Contrary to some popular views, our results suggest that Japanese competitiveness is associated with home market competition, not collusion, cartels, or government intervention that stabilises it.\(^{180}\)

Based on his various studies of competitiveness, Porter has mounted a damning attack on the national champions argument:

> When local rivalry is muted, a nation pays a double price. Not only will companies face less pressure to be productive, but the business environment for all local companies in the industry, their suppliers, and firms in related industries will become less productive. This demonstrates the danger in arguments about the creation of “national champions” in an industry in the home market in order to gain the scale to compete internationally. Unless a firm is forced to compete at home, it will quickly lose its competitiveness abroad.\(^{181}\)

In conclusion, no empirical evidence exists to support the national champions thesis. As a result, arguments regarding the need to reform merger laws relying on national champions type arguments should be treated with extreme caution. A weak or


\(^{180}\) ibid.

compromised mergers policy in response to national champion type arguments could actually undermine Australia’s international competitiveness.

Beyond these conclusions, the Commission through its administration of the mergers law recognises that in certain instances authorisation may be appropriate when the public benefits can be substantiated in terms of improving Australia’s international competitiveness.

In 1992 the Act was amended which directed the Commission when considering merger authorisation applications, to consider as public benefits a significant increase in the real value of exports, and significant import substitution. As part of these amendments, the Commission was further directed to consider any other relevant matters that relate to the international competitiveness of any Australian industry in regard to a merger authorisation application. As noted earlier, the Commission has never opposed a merger where imports constrain the exercise of domestic market power.

5.4.6 Criticisms of Australia’s mergers law regime

There have been several claims that the mergers law contained in s. 50 of Act is out of date and in need of reform.

According to the BCA:

The nature of competition has changed since the Act was last reviewed. The BCA has raised the concern—as have many of its members—that the Act, and its application, do not sufficiently recognise that markets are increasingly global and that the Australian economy has opened up substantially in the past 20 years.

Any weaknesses in the competition regulatory regime have several potential adverse consequences for Australia, particularly if mergers are being prevented that would otherwise deliver net public benefits.182

The Trade Practices Act has been subject to a number of substantial reviews and inquiries since it was enacted in 1974. Some of the most prominent reviews and inquiries that have examined s. 50 include the following:

- Report to the Minister for Business and Consumer Affairs—Trade Practices Review Committee, August 1976 (Swanson Committee).
- Mergers, monopolies & acquisitions: adequacy of existing legislative controls—Report by the Senate Standing Committee on Legal and Constitutional Affairs, December 1991 (Cooney Committee).

Australian mergers law is fully consistent with that of most major economies. The current mergers test contained in s. 50 of the Trade Practices Act is in fact based on s. 7 of the Clayton Act of the United States.

The competition test for mergers of a substantial lessening of competition (SLC test) as applied in Australia will shortly have universal coverage throughout the English speaking world. If Australia were to move away from a substantial lessening of competition test then it would become the exception among the English speaking nations.

Australia currently joins the United States, Canada, Ireland and New Zealand in having an SLC test. A Bill is currently before the Parliament of the United Kingdom (the Enterprise Bill) that will shortly provide for an SLC test in that country as well.

Aside from the United Kingdom and Ireland, most other members of the European Union as well as the European Commission itself apply a dominance test to mergers. However, the European Commission has published a Green Paper to launch a debate on the respective merits of the dominance test as compared to an SLC test.

Claims and charges that Australia’s mergers law regime is outdated and antiquated in light of overseas experience are without foundation. Australia’s current approach to mergers law arguably represents international best practice.

In addition, any move away from the current SLC test would be a step in the wrong direction towards moves to standardise and harmonise Australia’s business laws with those of major overseas trading partners such as the United States, Canada, the United Kingdom and New Zealand.

**Canada**

Canada’s mergers law is set out in the *Competition Act 1985*. The basic mergers test is contained in s. 92 of the Competition Act and prohibits a merger or proposed merger that lessens, or is likely to prevent or lessen, competition substantially in a relevant market.

The degree of competitive lessening that will be treated as ‘substantial’ is met when the merged entity can sustain a materially greater price in a substantial part of a relevant market for two years.

Section 93 of the Competition Act specifies seven factors that may be considered in determining the competitive effects of a merger. They are

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger.

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail.
(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available.

(d) any barriers to entry into a market, including (i) tariff and non-tariff barriers to international trade, (ii) inter-provincial barriers to trade, and (iii) regulatory control over entry, and any effect of the merger or proposed merger on such barriers.

(e) the extent to which effective competition would remain in a market that is or would be affected by the merger or proposed merger.

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor.

(g) the nature and extent of change and innovations in a relevant market.

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

**New Zealand**

Section 47(1) of the Commerce Act 1986 provides that:

A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

One of the main reasons why New Zealand has fairly recently converted its mergers threshold test from dominance to substantially lessening of competition was because the dominance test did not allow for the scrutiny of mergers where market power can be obtained without a single firm gaining a high market share.

**United Kingdom**

The United Kingdom is in the process of changing its current mergers threshold test.

On 26 March 2002 the UK Government introduced the Enterprise Bill into the House of Commons. The Bill passed through the House of Commons on 17 June 2002 and was introduced into the House of Lords on 19 June 2002.

It is the intention of the UK Government under the Enterprise Bill to reform its current mergers law provision from a public interest test to a competition-based test based around the concept of a substantial lessening of competition. According to the UK Government:

We see SLC as a test that is fundamentally better adapted to merger control, primarily because it is directly grounded in economic analysis and the impact of a merger on competition in a way that the concept of dominance is not. It is also a more flexible test than dominance, making it particularly well suited to tackling oligopolistic markets.183

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United States

Mergers in the United States at the federal level can be examined under the Clayton Act, the Sherman Act and the Federal Trade Commission Act. In practice, mergers are generally reviewed under the Clayton Act. Under s. 7 of the Clayton Act, stock and asset acquisitions, including mergers and joint ventures may be held illegal where their effect may be substantially to lessen competition, or to tend to create a monopoly in any particular geographic and product market.

Ireland

In April 2002, Ireland enacted the Competition Act 2002 to consolidate and modernise the existing enactments relating to competition and mergers. Under this new legislation, the Irish Competition Authority has to approve or reject mergers based on a competition test. The test applied under s. 20(1)(c) of the Competition Act is whether the result of the merger or acquisition will be to substantially lessen competition in markets for goods or services in the state.

European Union

Mergers law across the 15 member nations of the European Union is governed by Council Regulation 4064/89. Article 2(3) of Council Regulation 4064/89 entitled ‘Appraisal of concentrations’, applies the following test:

A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

The European Union regulation applies either in the form of single dominance or collective dominance.

Although the wording of the test applied in the European Union and that applied in the English speaking world are phrased in quite different language, the practical application of the tests is remarkably similar. The European Union not only takes into account the market power that can be exercised by a single firm in the event of a merger. It also considers whether market power can be exercised by a group of firms able to coordinate their conduct from a position of oligopolistic dominance or collective dominance.

The European Commission has applied the dominance test as laid down in Article 2(3) of the merger regulation in cases where the result of the concentration would be the creation of a position of collective dominance. Both European courts have endorsed the concept of collective dominance with the European Court of Justice and the Court of First Instance supporting the European Commission’s approach.

In view of the increasingly international scope of mergers, the European Commission has recognised that the alignment of the wording of the test used by the main competition authorities worldwide might have some attractions. This is one of the reasons why the European Commission’s Green Paper on the Review of Council Regulation No 4064/89 explicitly calls for a public debate on the merits of the dominance test, and in particular on how its effectiveness compares with the substantial lessening of competition’ standard used in some other jurisdictions.
According to the European Commission Green Paper:

From a procedural viewpoint, the main reason proposed in favour of such a re-evaluation is that it could allow an alignment of the Merger Regulation’s appraisal criteria with those applied in other major jurisdictions such as the US, Canada and Australia, which rely on a concept of *substantial lessening of competition* (the SLC test). Such an alignment towards a global standard for merger assessment holds certain attractions. It would, for example, facilitate merging parties’ global assessment of possible competition issues arising from contemplated transactions, by obviating the current need to argue their case according to differently formulated tests. This would in turn provide competition agencies with a better basis on which to build effective cooperation in cases that are notified in several jurisdictions. Moreover, as a common test would tend to highlight the actual application of the test, rather than the test itself, it would provide for better benchmarking of the activities of competition authorities and courts, as well as facilitating the development of competition-orientated research and modelling.184

### 5.5 Informal notification

Although notification of mergers is not compulsory in Australia, the Commission encourages parties to approach it, on an informal basis, as soon as there is a real likelihood that a proposed acquisition may proceed, and certainly well before the completion of an acquisition.

Unlike many other countries Australia’s mergers law contains no formal requirement that parties to a proposed acquisition advise the Commission prior to entering into an agreement to effect an acquisition unless they decide to formally apply to the Commission for authorisation. Australia’s position stands in marked contrast to that of most other countries. Around 39 jurisdictions in the world have formal notification requirements for mergers, including the United States, the European Union and Japan. Australia is one of only a handful of countries around the world that does not have any formal notification requirements with respect to mergers.

The Commission relies upon a system of voluntary informal notification. The informal notification system has, on balance, resulted in administrative efficiencies and a comparatively light regulatory burden. Considering the size of the Australian economy and the level of merger activity, the system works well. The merger notification system of other countries has been criticised because of the compliance burden it imposes, especially given that most transactions raise no anti-competitive concerns.

While Australia’s system avoids the worst of the compliance burden features of overseas jurisdictions, it poses some uncertainty for the Commission and the business community in that it has no legislative mandated time periods for the notification and clearance of mergers. Neither are there the explicit information requirements that have developed through form and filing requirements in jurisdictions with merger notification.

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In December 1999 the Commission undertook extensive consultations with members of the legal profession with whom it deals on a regular basis. The Commission sought the views of the legal profession on possible changes to its timing and notification procedures.

The legal profession strongly endorsed the Commission’s informal clearance process with the Law Council of Australia commenting that:

The Trade Practices Committee of the Law Council believes that the existing informal notification system works very well. … informal clearance is an important service provided by the ACCC to the business community, and plays an important role in the efficient regulation of merger activity in the Australian economy. … The ACCC’s record for expedition in non-contentious mergers, is excellent, and in the Committee’s view, there is no basis for changing the present system.185

The Commission’s Merger guidelines set out information requirements for those seeking to lodge a submission and also outlines indicative time frames the Commission targets in assessing mergers. Most mergers do not raise significant competition concerns and are handled quickly, with the Commission promptly advising parties that it does not intend to take any action. Most transactions then proceed on the basis of that advice.

In less complex matters the Commission tries to complete its analysis within 10 to 15 calendar days. This is from receiving the formal submission to advising the parties.

More complex matters or those that appear to cross the Commission’s merger concentration thresholds require more extensive analysis. It takes about one month for market inquiries and consideration. Within this group are a small number of highly complex and major transactions that raise substantial issues, and these take from six to eight weeks. The Commission may need to request additional information on such matters, which may extend the time frame. Time frames may also be extended if parties put mergers on hold for commercial reasons or to amend proposals.

Confidential proposals are assessed as quickly as possible, within a target of 10 to 15 working days. However, for commercial reasons the parties themselves may delay public announcement. This means that the Commission cannot begin making any necessary market inquiries. If the parties’ requirements are such that the proposed acquisition remains confidential, the Commission is unlikely to be in a position to provide a final view about the transaction. The Commission takes the view that a proper assessment requires the views of market participants prior to finalising its response.

A confidential assessment does allow the parties and the Commission to discuss any issues that may be identifiable without market inquiries and provides parties with an opportunity to consider their response prior to the proposal becoming public and market inquiries being undertaken.

Once the Commission arrives at a decision, the parties are notified prior to any public statements being made or press release issued. In confidential matters the parties are informed of the Commission’s initial views and no public statements are made unless the parties themselves go public.

The Commission recognises that mergers can be time sensitive. Delay can have adverse consequences resulting in uncertainty for shareholders and employees and, in extreme cases, the competitive position of the commercial entities involved. The Commission is open to any constructive suggestions to help overcome procedural delays flowing from its processes or the way that parties and their advisers bring matters to the Commission for consideration within the context of the informal notification system.

Parties dissatisfied with the Commission’s current time frames for the informal clearance process may wish to consider the move to a formal notification system although the Commission is not advocating such a proposal.

5.6 Mergers committee

In order to streamline the decision-making process with respect to mergers, the Commission has established a Mergers Committee that meets weekly to consider most merger matters, reporting its decisions to the Commission. Major matters are referred to the full Commission for further consideration.

The Mergers Committee provides an avenue for a streamlined and fast track merger review process by the Commission. The Mergers Committee provides for a quick turnaround on merger proposals unlikely to raise issues under s. 50.

The Mergers Committee also ensures that in those cases that do raise issues under s. 50, the Commission is able to provide preliminary feedback to parties and quickly identify competition concerns.

5.7 Merger statistics

Merger statistics show that while the number of mergers examined has been steadily rising, the number actually opposed by the Commission is very small, averaging between 4 and 5 per cent. Of these, many have been resolved using court enforceable undertakings under s. 87B of the Act. This has resulted in only 2 per cent of mergers in effect being opposed by the Commission between 1999–2000 and 2001–02.

When the Commission has concerns regarding the competition implications of a merger proposal, it can accept a court enforceable undertaking in order to address those concerns. Section 87B undertakings are a flexible alternative to the Commission opposing an acquisition that is likely to substantially lessen competition. Between 1999–2000 and 2001–02 the acceptance by the Commission of undertakings allowed around 3 per cent of mergers to proceed whereby they would have been otherwise opposed.
The following table demonstrates that of the 1227 mergers investigated over the last six years by the Commission, only 69 have been opposed. However, following the acceptance of s. 87B undertakings 37 of these have been allowed to proceed.

Figure 4.1

<table>
<thead>
<tr>
<th>Mergers not opposed, opposed and resolved with the ACCC</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>2001–02</td>
</tr>
<tr>
<td>2000–01</td>
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<tr>
<td>1999–2000</td>
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<tr>
<td>1998–99</td>
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<td>1997–98</td>
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<td>1996–97</td>
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<td>1995–96</td>
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<tr>
<td>1994–95</td>
</tr>
<tr>
<td>1993–94</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Number of Matters</td>
</tr>
<tr>
<td>0  50  100  150  200  250  300</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Not Opposed  71  101  105  140  165  168  226  252  207</td>
</tr>
<tr>
<td>Opposed  5  7  9  5  5  7  4  3  8</td>
</tr>
<tr>
<td>Resolved  1  5  3  2  6  10  5  10  4</td>
</tr>
</tbody>
</table>

Note 1: Figures for 2001–02 are only up to 21 June 2002.

Between 1975 and 1992 the Commission examined 38 merger authorisation applications at an average rate of 2.1 applications a year. Of those, 22 were granted, 15 were denied and 1 was withdrawn.

Since 1993 the Commission has examined 12 merger authorisation applications at an average rate of 1.2 applications a year although it has not received a merger authorisation application since 1998–99. Of those 12 applications, 7 were granted, 4 were denied and 1 was withdrawn. Overall, the Commission has granted more than 50 per cent of the merger authorisation applications received.
Table 4.1. Authorisation of mergers, acquisitions and joint ventures assessed by the Commission since 1993

<table>
<thead>
<tr>
<th>ACQUIRER</th>
<th>TARGET</th>
<th>DECISION</th>
<th>DATE</th>
<th>AUTHOURISATION GRANTED SUBJECT TO CONDITIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>CSR Ltd Mackay Sugar Co-op Assoc Ltd</td>
<td>Newco</td>
<td>Denied</td>
<td>8/12/93</td>
<td></td>
</tr>
<tr>
<td>Foodland Associated Limited / Davids Limited</td>
<td>Independent Holdings Limited / Composite Buyers Ltd</td>
<td>Withdrawn</td>
<td>22/12/93</td>
<td></td>
</tr>
<tr>
<td>Comalco Pty Ltd</td>
<td>Gladstone Power Station</td>
<td>Granted</td>
<td>3/3/94</td>
<td>No</td>
</tr>
<tr>
<td>Qantas Airways Limited / British Airways Plc</td>
<td>Joint services agreement</td>
<td>Granted</td>
<td>12/5/95</td>
<td>Yes</td>
</tr>
<tr>
<td>Davids Ltd</td>
<td>Composite Buyers Ltd</td>
<td>Granted</td>
<td>29/5/95</td>
<td>Yes</td>
</tr>
<tr>
<td>Silver Top Taxi Service Ltd</td>
<td>North Suburban Taxis Ltd</td>
<td>Denied</td>
<td>16/10/95</td>
<td></td>
</tr>
<tr>
<td>Du Pont Aust Ltd</td>
<td>Ticor Chemical Co Pty Ltd and Howson Algraphy Australasia Pty Ltd</td>
<td>Granted</td>
<td>8/5/96</td>
<td>No</td>
</tr>
<tr>
<td>Davids Ltd</td>
<td>QIW</td>
<td>Granted</td>
<td>28/3/96</td>
<td>Yes</td>
</tr>
<tr>
<td>Wattyll Aust Pty Ltd</td>
<td>Taubmans Industries Ltd Courtaulds Aust Pty Ltd and Pinchin Johnson Aust Pty Ltd</td>
<td>Denied</td>
<td>17/5/96</td>
<td></td>
</tr>
<tr>
<td>Bristile Holdings Limited</td>
<td>Pioneer Building Products (WA) Pty Limited</td>
<td>Denied</td>
<td>3/11/97</td>
<td></td>
</tr>
<tr>
<td>Adelaide Brighton Limited</td>
<td>Cockburn Cement Limited</td>
<td>Granted</td>
<td>30/4/99</td>
<td>Yes</td>
</tr>
<tr>
<td>Adelaide Brighton Limited</td>
<td>Adelaide Brighton Cement Limited</td>
<td>Granted</td>
<td>30/4/99</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The Commission has a reasonably quick turnaround on merger investigation matters, as the following figures demonstrate.
Note: In addition to the matters summarised in figure 4.2, 15 matters (out of those the Commission did not oppose) did not require any detailed consideration given they did not raise any s. 50 issues and so were therefore able to be assessed without being referred to either the Commission or the Mergers Committee.

Figure 4.2

Duration of matters informally assessed in 1999–2000

<table>
<thead>
<tr>
<th>Duration</th>
<th>Number of matters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 weeks</td>
<td>65</td>
</tr>
<tr>
<td>2 - 3 weeks</td>
<td>34</td>
</tr>
<tr>
<td>4 - 6 weeks</td>
<td>35</td>
</tr>
<tr>
<td>7 - 9 weeks</td>
<td>30</td>
</tr>
<tr>
<td>More than 9 weeks</td>
<td>56</td>
</tr>
</tbody>
</table>

Figure 4.3

Duration of matters informally assessed in 2000–01

<table>
<thead>
<tr>
<th>Duration</th>
<th>Number of matters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 weeks</td>
<td>112</td>
</tr>
<tr>
<td>2 - 3 weeks</td>
<td>48</td>
</tr>
<tr>
<td>4 - 6 weeks</td>
<td>37</td>
</tr>
<tr>
<td>7 - 9 weeks</td>
<td>23</td>
</tr>
<tr>
<td>More than 9 weeks</td>
<td>45</td>
</tr>
</tbody>
</table>
Consistent with the time frames outline in the *Merger guidelines*, the Commission has maintained tight frames for assessing the major proportion of the merger matters it has considered in the past three financial years. In 2000–01, 60 per cent of matters were cleared in under four weeks and a further 14 per cent of matters were cleared within six weeks. In 1999–2000, 45 per cent of matters were cleared in under four weeks and 61 per cent were cleared within six weeks. In 1998–98, 58 per cent of matters were cleared in under four weeks and a further 23 per cent were cleared within six weeks.

There are a number of reasons why time frames can be extended out, and these sometimes relate to matters beyond the Commission’s immediate control. More complex matters require further analytical work relating to the application of the *Merger guidelines* and therefore take more time to assess. In these cases the Commission may request additional information and if the parties delay in providing such information in an expeditious manner the time frame will be further extended. The time frame can also be extended when parties put individual merger proposals on hold for commercial reasons or when they amend initial proposals. Offshore mergers and acquisitions which are assessed by the Commission also generally require an extended time frame to assess all of the relevant information.

For an informal clearance process the Commission’s time frame compares favourably with other OECD countries. It should also be noted that most overseas jurisdictions operate systems of compulsory notification for mergers, unlike the case in Australia. In jurisdictions which have formal notification of mergers, legislative time periods and information requests are quite common. In the United States, parties must wait a specified period, usually 30 days, before they may complete a transaction. If there is a request for additional information or documentary materials from the parties to a reported transaction this will extend out the waiting period for a further specified period, usually 30 days, after all parties have complied with the request. In the European Union, the European Commission must reach a preliminary decision within one month from the effective date of notification. If the European Commission decides that the concentration maybe incompatible with its mergers regulation, it will commence an in-depth second stage investigation which may last up to a maximum of four months.

The 2000 review of international competition regulators conducted by the Global Competition Review (GCR) found that:

> The ACCC’s speed of merger handling is well regarded and its leadership is given an unusually strong endorsement.\(^{186}\)

In the GCR’s 2001 review of international competition regulators, the Commission was also recognised for its fairly quick turnaround on merger investigations. According to the GCR:

> staff are described as “approachable and well prepared”, which allows for the process to be essentially “speedy and efficient.”\(^{187}\)

Since the current s. 50 was enacted back in 1992, only one company has been prosecuted for breaching s. 50. In that case in December 1996, the Federal Court awarded penalties and costs totalling $5 million against Pioneer International and a subsidiary company for acquiring the assets of a vigorous competitor in the south Queensland concrete masonry market that had the effect of substantially lessening competition.

5.8 Transparency and accountability for merger decisions

As a public organisation, the Commission is subject to an extremely high standard of transparency and accountability.

The Commission’s Merger guidelines outline the Commission’s administration and enforcement policy for dealing with mergers. The purpose of the guidelines is to show the Commission’s approach when considering mergers and acquisitions and the types of information which are relevant. They provide guidance for the business community, their advisers and the public generally.

As an organisation established by statute, the Commission is accountable through its Minister to the Parliament of Australia and through this channel ultimately to the community at large. Commission office bearers and staff routinely appear before Parliamentary Committees to answer questions on the operations and decisions of the organisation.

The decisions of the Commission receive wide coverage and scrutiny within the media. The Commission often issues press releases on its merger decisions. The Commission’s decisions and the reasons behind them are published on a public 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.

On important merger matters the Commission publishes a detailed statement of reasons behind its decisions, as in the case of Commonwealth Bank/Colonial, Australian Stock Exchange/Sydney Futures Exchange, Email/Southcorp and Westpac/Bank of Melbourne.

The Commission is not the final arbiter on whether or not breaches of the Trade Practices Act have occurred. If parties disagree with the decisions reached by the Commission, then they have the option of challenging the Commission in the Courts. This means the Commission is accountable to the Courts.

In the course of litigation, the Commission is obliged to behave as a model litigant as directed by the Commonwealth Attorney-General.

The Commission’s determinations in merger authorisations are subject to merits review by the Australian Competition Tribunal. This means the Commission is accountable to the Tribunal.

As is the case with all public agencies, the Commission is subject to additional levels of accountability. It must abide by the provisions of the Commonwealth Freedom of Information Act 1982, and its conduct and processes are subject to the scrutiny of the Commonwealth Ombudsman and Auditor-General.

5.9 Does the Commission have an anti-merger bias?

Within the context of the recent public debate over the mergers provision of the Act, many critics of Australia’s mergers law have implied that the Commission is predisposed towards opposing mergers. This view has been summarised by John Durie:

> The Australian business community is very good at attacking the ACCC’s perceived anti-merger bias but extraordinarily bad at actually using the measures allowed by the existing law to get their plans approved.188

The evidence clearly demonstrates that the Commission is not biased against mergers nor has the operation of s. 50 acted as a major impediment to the restructuring and rationalisation of Australian industry.

The Commission opposes relatively few mergers—4–5 per cent on average. Taking into account the acceptance by the Commission of s. 87B undertakings, the Commission’s effective rate of opposition to merger proposals falls to only 2 per cent over the past three years.

Even in the Commission’s priority area for mergers of the non-traded sector, the Commission in fact opposes very few mergers. Recent examples of mergers in the non-traded sector not opposed by the Commission include: Bunnings and BBC Hardware; Toll and Lang’s acquisition of National Rail/Freight Corp; the Grain Pool of WA and Cooperative Bulk Handling Authority; Suncorp/Metway and AMP/GIO; the acquisition of Wreckair Hire by Coates; Maynes’ purchase of Faulding and the Commonwealth Bank’s acquisition of Colonial.

A study of large enterprises in the Australian economy conducted by the Department of Foreign Affairs and Trade noted that:

> Weak profit performance and globalisation have been drivers of extensive industry rationalisation in recent years, with a tendency for companies to focus on core strengths. Considerable takeover activity has been prompted by such rationalisation.189

The Commission would note that it has not prevented such industry rationalisation from occurring.


The current mergers law process has also been criticised for preventing merger proposals with significant public benefits from coming forward in the first instance. In referring to the Act, Peter Kirby has commented that:

Dozens of Australian CEOs say it has stopped them attempting mergers or acquisitions. Firstly, because they believed the ACCC would never approve it.190

It is difficult for the Commission to respond to such claims when no such proposals are brought before it in the first instance. The Commission is therefore unable to comment on the veracity of such claims. However, the Commission does examine merger proposals on a confidential basis and provides a preliminary assessment if requested to do so by the parties concerned.

Given the very small number of merger proposals that are, in fact, actually opposed by the Commission, it is extremely difficult to envisage that the current mergers law is preventing a significant number of additional merger proposals from coming forward that would be rejected by the Commission.

5.10 Conclusions and recommendations

To protect consumers from the ill effects of monopoly, regulation is typically required. The best and most cost effective form of regulation is generally the preservation of competition before a monopoly situation has developed. The danger with any attempts to emasculate Australia’s current mergers law is that the consequent monopolisation of markets could end up generating sufficient community concern to warrant the imposition of far more onerous forms of price regulation than has previously been implemented in Australia.

The Commission believes that Australia’s current mergers law regime has served this country well during the 10 years that it has been in operation. It has played an important role in the maintenance of competitive market structures within the Australian economy and 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. Therefore, the Commission is not making any recommendations to change the current arrangements. However, the Commission is not averse to change and remains receptive to any constructive suggestions for improvements to its processes in the administration of s. 50.

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190 Peter Kirby, *Is the branch office economy all we can aspire to?*, speech to the Securities Institute of Australia, 21 June 2001.
6 Role of the Commission—processes and accountability

Summary

As part of the terms of reference, the Review Committee was asked to review the operation of the competition and authorisation provisions of the Trade Practices Act (the Act), specifically Parts IV (and associated penalty provisions) and Part VII to determine whether they, among other things:

a) provide adequate protection for the commercial affairs and reputation of individuals and corporations (including the processes followed by the Commission)

b) allow businesses to readily exercise their rights and obligations consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances.

The terms of reference also state that the Review Committee is not to reconsider the merits of past individual cases. Therefore, the Commission’s submission focuses on the processes of the law and the Commission, not specific cases.

The Commission considers 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, effectiveness, transparency and accountability in the administration of the law.

The legal framework and the Commission’s processes underpin its selection of enforcement matters, its accountability, use of information, and publicity.

As the law develops and requires clarification in its application to different circumstances and cases, it is not possible to design a legislative framework which provides complete certainty to businesses about their rights and obligations. Equally, it is not possible to protect information about commercial affairs and reputation in all circumstances.

If a business or individual has breached the law, it is inevitable that the reputations of those involved will suffer.

If by virtue of the Commission instituting proceedings under the Act, a business or individual has been alleged to have breached the law, then although the great majority of the public knows the difference between an allegation and a finding of unlawful behaviour by a court of law, there may still be in, in some minds, some damage to the reputation of the party against whom the allegations are made, although this will be totally or largely corrected if the proceedings are unsuccessful and the business or individual exonerated.
Nevertheless, the system of justice is a public one and the fact that proceedings have
been instituted is an inevitably known public fact in our system of law. The courts
have made it clear that it is not only acceptable but desirable that the Commission issue
media releases when it institutes proceedings, making clear the nature of its allegations,
and making it clear that they are allegations.

When the Commission is investigating a matter, its practice is not to take action to
make the fact that it is conducting such an investigation public, subject to some
exceptions when a public policy purpose is involved.

The fact that the Commission is investigating however, is sometimes made known by a
complainant, or by the firm itself or by other parties including Ministers who refer
matters to it. In a number of such cases, the Commission confirms it is investigating.
Although most members of the public recognise the difference between an
investigation, an allegation and a court finding, there may be some impact in the minds
of some on the reputation of the party being investigated. This is a factor taken into
account in the Commission’s own practice of not, save in exceptional circumstances,
announcing or otherwise making known of its own accord that it is conducting an
investigation.

The Commission’s activities are only likely to lead to investigations which could affect
the affairs and reputation of individuals and businesses in very limited circumstances.
The Commission only investigates cases when there is a very real public interest in
pursuing them.

In practice, few complaints brought to the Commission are taken further. Of
approximately 95 000 complaints received in 2000–01 proceedings were instituted in
only 33 cases.

The Commission is currently held accountable for its enforcement activities and other
conduct through a variety of mechanisms including courts, where at present it is
involved in around 80 cases, tribunals, the Parliament and the Commonwealth
Ombudsman. The Commission’s track record in these areas is strong. The Commission
endeavours to review its processes and address any process issues that are highlighted
by these mechanisms (see section 6.3).

In pursuing its investigative and enforcement role, the Commission receives
information in a number of ways and from a variety of sources.

The Commission’s enforcement strategy ensures that it will only seek information from
parties where it considers that there is a likely breach of the law, and the circumstances
warrant action by the regulator.

The Commission believes that in using information given to it, existing laws and
processes provide an appropriate balance between the competing interests of disclosure
of information for the purposes of transparency and accountability and, in certain
circumstances, protecting the commercial affairs and reputation of individuals and
corporations by limiting disclosure. (See sections 6.1 and 6.4).

There are good reasons for disclosing information, particularly in matters where
proceedings have been instituted or a s. 87B undertaking has been obtained (see
Section 6.4). This helps to promote compliance with the law and accountability and transparency of the Commission’s processes. At the same time, the Commission is subject to established legal principles on disclosure and confidentiality of information under the Privacy Act and the *Freedom of Information Act 1982* which ensure that an appropriate balance between confidentiality and disclosure is maintained.

As in many other jurisdictions, legislation and the courts in Australia allow the media to report on matters and investigations and for the Commission, as the competition regulator to comment on specific matters.

The Commission believes there is a public interest in disseminating information about cases involving breaches of Part IV of the Act and that publicity also plays an important role in achieving compliance with the Act (see section 6.5).

The media plays a critical role in ensuring transparency and accountability of the courts and the Commission. Media coverage results in a high level of scrutiny of the Commission’s own processes.

The Commission follows certain internal processes to ensure adequate protection of reputation when appropriate. It limits its media releases to factual and accurate accounts of cases instituted and the outcomes of decisions.

The Commission considers that the current legislative framework, and the processes of the Commission regarding public scrutiny via the media of Part IV matters adequately protects reputation and commercial affairs, while balancing the public interest in certainty, effectiveness, transparency and accountability by publicising certain issues.

### 6.1 Introduction

The Commission considers 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, effectiveness, transparency and accountability in the administration of the law.

The main functions of the Commission under Part IV of the Act are to ensure compliance by providing information to consumers and business about the operation of the legislation, investigating complaints and taking appropriate action (either by administrative settlement or through the courts) when necessary.

The legal framework and the Commission’s processes underpin its selection of enforcement matters, its accountability, use of information and publicity.

Chapter 6 examines the Commission’s processes in performing these functions.

### 6.2 The Commission’s role and decision-making process

The Commission was established in November 1995 by the merger of the former Trade Practices Commission and the Prices Surveillance Authority. It is an independent, national statutory authority answerable to the Commonwealth, States and Territories.
The Commission has offices in all capital cities and in Townsville and Tamworth.

6.2.1 The Commission’s role

The Commission has a significant role in the administration of competition and consumer protection policy in Australia.

The last 10 years have seen substantial change in competition law, both domestically and internationally. Codes regulating access to essential facilities have been formulated and approved. Penalties have increased and competition and consumer protection provisions are more vigorously enforced. Merger law has been strengthened and protection for small businesses is more robust because of strengthened unconscionable conduct provisions.

As a result of the 1976 Hilmer Inquiry, broader reforms in competition policy were introduced under the *Competition Policy Reform Act 1995*. This included extending the scope of the Act to cover unincorporated bodies and government business enterprises. In 1999 the new Part VB of the Act was introduced, which also gave the Commission transitional responsibilities under the New Tax System to ensure no price exploitation occurs and that consumers are not exposed to greater than necessary price rises.

The Commission’s role in ensuring compliance with the Act is a broad one. It covers nearly all sectors and industries and all forms of entities involved in trade or commerce, including government business enterprises and unincorporated entities as well as trading and foreign corporations.

The Act regulates the conduct of Australian businesses by prohibiting certain unacceptable conduct. The Commission is also responsible for monitoring compliance with, and if necessary enforcing, certain standards. Its role is wide ranging and covers:

- anti-competitive practices generally and in the telecommunications industry (Parts IV and XIB)
- unconscionable conduct (Part IVA)
- industry codes (Part IVB)
- consumer protection (Part V)
- product liability (Part VA)
- price exploitation under the New Tax System (Part VB) (which expired on 1 July 2002).

The Commission also has responsibilities and powers under other parts of the Act, notably authorisation and notification (Part VII) and access regimes (Parts IIIA and XIC).
It is the only national agency responsible for dealing with broad competition matters and enforcing the competition provisions in Part IV of the Act. It also administers associated state/territory competition policy application legislation (the Competition Code).

In fair trading and consumer protection its role complements the primary consumer protection role of state and territory consumer affairs agencies, which administer mirror legislation (fair trading acts) in their jurisdictions.

The Commission also has responsibilities under the *Prices Surveillance Act 1983*. This allows the Commission to monitor the prices of selected goods and services with the objective of promoting competitive pricing whenever possible and restraining price rises in markets where competition is less than effective. These goods and services must be ‘declared’ by the Federal Government. For instance, in 2000 the Government asked the Commission to monitor prices in the dairy industry. Price monitoring of state and territory businesses is permitted only with the agreement of the relevant state or territory government.

The Commission also has responsibilities under other legislation:

- *Broadcasting Services Act 1992*—approvals in respect of pay TV licences and the access regime for digital TV
- *Telecommunications Act 1997*—relating to the telecommunications-specific provisions in the Act
- *Trade Marks Act 1995*—for approvals of certification trade marks
- *Australian Postal Corporation Act 1989*—for arbitration on access to the postal network
- *Airports Act 1996*—has a detailed regulatory role on prices and access and quality of service
- *Gas Pipelines Access (Commonwealth) Act 1998*, and
- various responsibilities in to the health insurance sector.

### 6.2.2 Corporate governance of the Commission

The Commission has a Chairperson, a Deputy Chairperson (currently vacant), other full-time Commissioners and part-time Associate Commissioners. Commissioners are drawn from a wide range of backgrounds including lawyers, economists and commercial, small business and consumer backgrounds. Individual Commissioners are independent and do not report to the Chairperson.

Commissioners are appointed by the Governor-General if the Minister is satisfied that the person has the requisite knowledge or experience in industry, commerce, economics, law, public administration, consumer protection or small business matters...
and appointments must be supported by a majority of the states and territory governments.

The Minister may also appoint other people to be Associate Commissioners. In recent years, these have been drawn from a broad range of backgrounds including Queens Counsel, solicitors and industry specialists in areas such as information technology and pharmaceuticals.

Some of the Associate Commissioners are ex officio appointments from other federal, state and territory regulatory agencies including the ACT Independent Pricing and Regulatory Commission, the Australian Broadcasting Authority, the Queensland Competition Authority, the NSW Independent Pricing and Regulatory Tribunal, the Tasmanian Prices Oversight Commission, the Australian Communications Authority and the Victorian Regulator-General.

6.2.3 The Commission’s decision making processes

Section 16 of the Act provides that the Chairperson shall convene meetings of the Commission as they think necessary for the efficient performance of the Commission’s functions. The Commission meets each week to discuss matters and to make decisions on specific issues. Decisions are by majority vote. Key decisions made at Commission meetings include decisions to institute proceedings for alleged breaches of the Act.

To streamline decision making, the Commission also has internal committees comprising Commissioners on telecommunications, mergers, transport, enforcement, energy, and corporate governance. The committees provide a basis for developing ongoing expertise and consistency in decision making in key areas of the Commission’s work.

6.2.4 Relationship between the Commission and the courts

The main functions of the Commission in relation to Part IV are to:

- provide information to consumers and business about the operation of the legislation;

- ensure compliance by investigating complaints and taking appropriate action (either administrative or through the courts); and

- adjudicate on matters brought before it pursuant to the authorisation and notification provisions contained in Part VII.

While complaints may be resolved administratively if the Commission exercises its discretion not to proceed or if it accepts undertakings, enforcement ultimately takes place in the Australian court system. The Commission does not have power to decide whether or not someone has broken the law. Nor does the Commission have any power to impose monetary penalties or fines for breaches of the law. This is the responsibility of the courts.
6.2.5 The Commission’s compliance and enforcement strategy

The Commission’s priority statement identifies the ways it will seek to achieve compliance. This includes:

- informing consumers and the business community about their rights and responsibilities under the Act, and the benefits of compliance and enforcement of the law through:
  - liaising with and informing business and consumer associations about the law so that they can, in turn, inform their members and customers
  - issuing publications and media releases, speaking to the public, conducting public meetings and conferences and using the latest technology to reach businesses and consumers throughout Australia
  - publicising litigation and educational activities
- responding quickly to allegations of breaches of competition, fair trading and consumer legislation
- seeking appropriate remedies when there is a breach of the law
- working with other competition, fair trading and consumer protection agencies in Australia and overseas.

Frequently the most appropriate response to a particular market problem involves combining some of these into an integrated strategy. For example, completed litigation invariably triggers information and liaison activities, which maximise deterrence and educational effects.

In new areas of activity, the Commission seeks to develop a compliance strategy, incorporating educational materials and guidance to industry to facilitate voluntary compliance. (See Chapter 7.4 for more information about the Commission’s compliance, information, guidance and liaison roles). Later, the Commission’s enforcement tools may be exercised to deter non-compliance or clarify the application of the law if this proves necessary.

In applying the Act, the Commission focuses on areas where problems are major, detriment to public welfare is significant and meaningful results can be achieved.

6.2.6 The Commission’s investigation and enforcement role

A key Commission function involves securing compliance with the Act through enforcement and investigation.

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Despite its increasingly diverse role, including for instance in relation to the implementation the New Tax System, the Commission has not scaled down its enforcement efforts. The number of matters pursued and successes have increased, in the courts and quite commonly through other solutions.

The Commission’s enforcement role is broader than simply taking matters to court. Matters selected for enforcement action are often resolved by informal dispute resolution and mediation, court enforceable undertakings, uncontested court proceedings or contested court proceedings.

In exercising enforcement powers, the Commission is very conscious of the ‘public interest’ nature of enforcement of the Act and it seeks to carries out its role and uses resources in ways that best serve the public interest in compliance with the Act.

The Commission has a degree of discretion in case selection and the selection of appropriate tools to use which best serve the public interest in each case.

The Commission strongly believes that a discretionary approach is vital to providing flexibility and meeting the changing community needs, especially as economic conditions change. At the same time, it is important for the effective administration of justice that processes are as transparent as possible (while still having appropriate regard to the reputation of those under investigation) and that matters are not selected unfairly or arbitrarily for enforcement activities.

The Commission has a series of publicly available enforcement priorities and criteria for matter selection. The priorities are constantly under review and react to economic trends and strategically targeted areas that the Commission identifies as important, such as new areas of the law or emerging industries. A key element in identifying priorities is that they reflect the public interest.

In determining whether it is appropriate to take enforcement action, the Commission measures conduct against certain priorities, including:

- apparent blatant disregard of the law
- history of previous contraventions of the law, including overseas contraventions
- significant public detriment and/or a significant number of complaints
- potential for action to have a worthwhile educative or deterrent effect
- if the matter involve a significant new market issue
- whether the likely outcome justifies the use of resources.

In selecting matters, the Commission will have regard to whether the conduct falls within one or more of these enforcement priorities.
The Commission’s activities are likely to lead to investigations which could affect the affairs and reputation of individuals and businesses in very limited circumstances. The Commission only investigates those cases when there is a very real public interest in pursuing them.

In practice, a very small proportion of complaints brought to the Commission are pursued. Of approximately 95 000 complaints received in 2000–01, proceedings were instituted in only 33 cases. (See chapter 10 for more information about the Commission’s investigation processes and outcomes.)

6.3 Oversight of the Commission’s processes

The Commission has detailed processes and guidelines to ensure that its roles and responsibilities are carried out in a fair, impartial and transparent manner.

An important element of the Commission’s publication series is a number of technical and procedural guides which outline the Commission’s priorities, its procedures in conducting investigations and the statutory basis for exercising its powers under the Act. These include procedural guides such as, *Section 155 of the Trade Practices Act, Collection and Use of Information; Section 87B of the Trade Practices Act: The ACCC and its use of penalties; Access to Public Registers; The ACCC: role and functions; and Making Markets Work: directions and priorities*. (See chapter 10 for more information about these documents.)

External scrutiny also plays an important role in monitoring the Commission’s conduct and accountability. This includes scrutiny by the courts, tribunals, the Parliament and the Commonwealth Ombudsman. The Commission reviews and addresses any process issues that are highlighted by these mechanisms.

The Commission considers that these existing mechanisms are adequate and effective. They covers a broad range of issues including:

- court scrutiny. In general the Commission cannot affect anyone’s legal rights against their will, without successfully conducting litigation against them in the Federal Court. In relation to authorisation decisions, these may be appealed to the ACT.

- parliamentary scrutiny of the Commission’s conduct in enforcement activities (see section 6.3.1)

- appeals to the Commonwealth Ombudsman in relation to complaints from parties who believe they have been treated unfairly or unreasonably by the Commission (see section 6.3.2)

- Freedom of Information (FOI) requests (see section 6.3.3)

- review of authorisation and other arbitration decisions by the Australian Competition Tribunal (see section 6.3.4)
judicial or administrative review of the Commissions decisions by the Federal Court pursuant to the Administrative Decisions (Judicial Review) Act, (AD(JR)) Act, or the Administrative Appeals Tribunal (AAT) (see sections 6.3.4 and 6.3.5)

court actions in relation to alleged defamation or abuse of process (see section 6.3.6 and 6.3.7).

6.3.1 Parliamentary committees

As an independent statutory authority the Commission must submit an annual report to the Commonwealth Parliament. The Commission is also accountable for its enforcement activities through appearances before a number of Parliamentary Committees.

Each year, the House of Representatives Standing Committee on Financial Institutions and Public Administration (the Hawker Committee) examines the Commission's annual report. This is an important accountability mechanism to monitor the Commission’s role and functions. The Hawker Committee also oversees issues and developments in areas of the Commission's responsibility.

For example, the Hawker Committee made a number of recommendations arising from the 1996–97 annual report. The recommendations focussed on developing guidelines on the interaction between the private sector and the Commission on case preparation. As part of its response, the Commission developed new guidelines and distributed them to all its legal panel firms.

In 2000–01, the Commission appeared twice before the Hawker Committee and three times before the Senate Legislation Committee (Economics), which holds Senate Estimates hearings. Given the public interest nature of the Commission's enforcement activities, the Commission often answers questions about a variety of enforcement matters at the estimates hearings.

6.3.2 The Commonwealth Ombudsman

Complaints to the Commonwealth Ombudsman are also an important element in ensuring the Commission is accountable for its enforcement activities. The Ombudsman has the power to consider and investigate complaints from parties who believe they have been treated unfairly or unreasonably by the Commission. The Commonwealth Ombudsman has the ability to make formal recommendations to government if it believes that it is necessary in light of its investigation of a complaint against an agency.

Table 6.1 includes statistics on complaints about the Commission received and investigated by the Ombudsman over five years and the outcomes of those investigations.
Table 6.1. Complaints to the Commonwealth Ombudsman

| Financial year | Total complaints | Issues identified | Discretion exercised | with/withdrawn/lapsed | Investigated | Arguable agency defect | No apparent agency defect | No conclusion | Substantially in favour of client/complainant | Partially in favour of client/complainant | Not at all in favour of client/complainant |
|---------------|------------------|-------------------|----------------------|----------------------|--------------|------------------------|----------------------------|--------------|--------------------------------|--------------------------------|--------------------------------|--------------------------------|
| 2000−01       | 46               | 48                | 31                   | 4                    | 17           | 4                      | 9                          | 4            | —                                | —                                | —                                | —                                |
| 1999-2000     | 26               | 29                | 22                   | 0                    | 4            | 2                      | 1                          | 1            | —                                | —                                | —                                | —                                |
| 1998−99       | 17               | 18                | 11                   | 0                    | 7            | 1                      | 1                          | 1            | 1                                | 1                                | 2                                |                                  |
| 1997−98       | 14               | 14                | 9                    | 0                    | —            | —                      | —                          | —            | 0                                | 1                                | 6                                |                                  |
| 1996−97       | 24               | —                 | 17                   | 1                    | —            | —                      | —                          | —            | 3                                | 2                                | 0                                |                                  |

As at 5 June 2002, the Commission’s records indicate that nine complaints lodged with the Commonwealth Ombudsman in 2001−02 were referred to the Commission.

Table 6.1 shows a rise in complaints in 2000−01. This change reflects increases in general enforcement work and the Commission’s GST monitoring role. Despite this, the number of adverse findings was still very low.

6.3.3 Freedom of Information

The Commission has a FOI contact officers in its national office and in each regional office. FOI contact officers help applicants identify which documents they seek access to.

In 2000−01, the Commission received 21 formal FOI requests under the Freedom of Information Act. The requests were for access to a wide range of documents about investigations and complaints involving the Commission.

Information is provided whenever possible. However, the Commission seeks to protect information provided to it during investigations and inquiries and treats it as confidential. This is to protect sources and ensure the flow of information vital to the Commission’s work continues.
In 2000–01 no requests for internal review and no applications for review about the Commission’s handling of FOI requests were made to the AAT. Since 1996, the only request for review to the AAT involved one Telstra matter (see section 6.4.2.1).

Table 6.2 includes statistics on FOI applications over six years.

**Table 6.2. FOI requests to the Commission**

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Received</th>
<th>Granted in part</th>
<th>Granted in full</th>
<th>Refused</th>
<th>Not proceeded with</th>
<th>No relevant documents</th>
<th>Not finalised in financial year</th>
<th>Processing charges waived</th>
<th>Internal Review</th>
<th>Appeal AAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001–02(^{192})</td>
<td>30</td>
<td>11</td>
<td>1</td>
<td>2</td>
<td>5</td>
<td>1</td>
<td>10</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2000–01</td>
<td>21</td>
<td>9</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1999–2000</td>
<td>12</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>0</td>
<td>1(^{193})</td>
</tr>
<tr>
<td>1998–99</td>
<td>19</td>
<td>17</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>7</td>
<td>1(^{194})</td>
</tr>
<tr>
<td>1997–98</td>
<td>17</td>
<td>6</td>
<td>3</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>1996–97</td>
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<td>8</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**6.3.4 Tribunals**

The Australian Competition Tribunal is the tribunal to review Commission decisions in such areas as authorisations. The AAT also has role in reviewing decisions under Freedom of Information legislation.

Applications to the Australian Competition Tribunal relate to regulatory decisions such as authorisations and, more recently, about decisions concerning regulated industries

\(^{192}\) As at 5 June 2002.

\(^{193}\) *Telstra Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71 (7 February 2000): The Commission agreed to release the documents that were no longer considered sensitive by the parties who provided them and Telstra withdrew its request for access to several other documents. In relation to the eight documents that remained in dispute, the AAT upheld the Commission’s decision to refuse access.

\(^{194}\) Editorial error in Annual Report.
such as arbitration decisions in the telecommunications industry and decisions under the National Third Party Access Code for Natural Gas Pipelines.

6.3.5 AD(JR) challenges

In 2001–June 2002, there were 4 applications to the Federal Court for judicial review of a decision, conduct or delay by the Commission. Three of these matters were decided in favour of the Commission. One is awaiting decision.

6.3.6 Defamation

If the Commission published information that was harmful to a person it could be held liable under the law of defamation or for breach of confidence.

For example, in *Giraffe World Australia Pty Ltd v ACCC*,¹⁹⁵ the Commission obtained interlocutory injunctive orders against Giraffe World Australia, issued a media release concerning the orders obtained, and informed an officer of the New South Wales Department of Fair Trading that the orders had been obtained. The officer distributed a memorandum about the information within the department.

Giraffe World Australia instituted proceedings against the Commission alleging numerous causes of action, including defamation pleadings. The Federal Court found that the defamation allegations against the Commission were not made out. Giraffe World Australia’s application in the defamation proceedings was dismissed with costs.¹⁹⁶

6.3.7 Applications for stay of proceedings

Another way in which the Commission is held accountable for its enforcement actions before the courts is through allegations of abuse of process by the Commission and the power of the courts to permanently stay proceedings.

In *Walton*,¹⁹⁷ the majority of the High Court summarised the relevant principle at 298:

> The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.

In September 1998 the Minister for Customs and Consumer Affairs directed the Commission pursuant to s. 29(1) of the Act, among other things to:

> …initiate, as soon as practicable after 1July 1998, legal proceedings in an action or actions based upon alleged contraventions of the Trade Practices Act 1974 for the purpose, among

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¹⁹⁵ (1999) ATPR 41–669


others, of establishing legal precedent under new section 51AC of the Trade Practices Act on matters of specific relevance to small business.

In February 1999, the Commission instituted proceedings against Leelee Pty Ltd and another alleging breaches of s. 51AC of the Act. The Commission issued a media release quoting the Chairman as saying ‘… [a] successful outcome in this case will show how the new law protects small business and that landlords must treat their tenants fairly.’

In May 1999 the respondents applied for orders, amongst others, permanently staying the action. The respondents asserted that the maintenance of the proceedings was so unfair and unjustifiably oppressive as to amount to an abuse of the process of the court.

In Leelee the court accepted that the possible varieties of abuse of process are not closed. However, in refusing to make an order permanently staying the proceedings Justice Mansfield made the following comments:

… 52. It was appropriate not to contend that the applicant had an improper purpose in instituting and maintaining the proceedings. The applicant is expressly empowered to institute proceedings under the Act: s 80, including in appropriate circumstances the claim for compensation on behalf of the Choongs: s 87(1B). The express seeking of findings under s 83 does not indicate any improper purpose on its part: [references omitted]. The fact that the applicant regards the proceedings as a potential test case about the operation of s 51AC of the Act also does not involve any element of improper purpose on its part.

… 64. I refuse to make an order permanently staying the proceedings. The applicant in fulfilment of its functions and powers has properly invoked the jurisdiction of the Court. It is therefore entitled to the exercise of that jurisdiction by the Court. I do not think that the respondents have made out that it is so unfairly and unjustifiably oppressive that the proceedings should continue as to constitute an abuse of the process of the Court. I have considered the various matters put by the respondents individually. I have also taken the step of considering whether, collectively, they tilt the scales in the way the respondents contend. I do not think they have that effect. There are matters to go into the scales in favour of the maintenance of the proceedings, in particular the public interest in the Court resolving matters properly brought before it, the public interest in the conduct of these proceedings, and the fact that the respondents can be afforded procedural fairness in their conduct. As Kirby P (as he then was) said in Gardiner v Walton (1991) 25 NSWLR 190 at 204, the power to terminate proceedings before they have been decided on their merits is “clearly exceptional and reserved to cases having special characteristics”.

6.3.8 Contempt of court

Another accountability mechanism that constrains improper conduct by the Commission is the risk of facing action for contempt of court.

Relevant principles applying to contempt of court were cited by Brennan J in Victoria v The Australian Building Construction Employees’ and Builders Labourers’ Federation:

Three requirements were identified by Lord Diplock in Attorney-General v Times Newspapers Ltd. (61):

198 ACCC v Leelee Pty Ltd and Anor (2000) ATPR 41-742
The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.

6.3.9 External audit

During 2000–01 the Commission’s financial operations were audited by the Auditor-General. The audit of the financial statements was satisfactory and an unqualified audit report was issued.

The volume and complexity of the Commission’s workload is increasing. In 2001, the Commission and the Department of Finance and Administration conducted a joint review of the Commission199. It found that the Commission had faced a major increase in its regulatory activities because of the growing complexities of markets, technological changes such as electronic commerce, and rapidly increasing international challenges, including the impact of globalisation. The Review evaluated the Commission’s processes and reporting systems. Following the review, additional funding was allocated by the Government to specific areas including telecommunications, gas, small business and e-commerce.

6.4 Treatment of information received

The Commission receives information in a number of ways from a variety of sources. Most information received in relation to Part IV matters is obtained voluntarily or through the Commission’s powers to obtain information pursuant to s. 155 of the Act.

The Commission’s enforcement strategy ensures that it will only seek information from parties where it considers that there is a likely breach of the law, and the circumstances warrant action by the regulator.

The Commission and its staff are subject to general limitations on the use and disclosure of information collected in the performance of their duties. These ensure transparency and accountability in the way the Commission deals with information. In some circumstances the disclosure limitations also protect the commercial affairs and reputation of individuals and corporations.

The Commission believes that in using information given to it, existing laws and processes provide an appropriate balance. The balance is achieved by taking account of the competing interests of disclosure of information for the purposes of transparency

and accountability and, in appropriate circumstances, protecting the commercial affairs and reputation of individuals and corporations by limiting disclosure.

Often, there are good reasons for disclosing information, particularly when proceedings have been instituted or a s. 87B undertaking has been obtained. Disclosing information helps to promote compliance with the law and ensure accountability and transparency of the Commission’s processes. At the same time, the Commission is subject to established legal principles regarding disclosure and confidentiality of information under the Privacy Act and the Freedom of Information Act in relation to information it collects during investigations. In appropriate cases these principles protect the commercial affairs and reputation of individuals and corporations by limiting information disclosure.

The Commission is concerned to protect confidentiality of information it collects during investigations. Receiving information is crucial to the Commission effectively carrying out its enforcement and regulatory functions. The Commission recognises that it must maintain the confidence of voluntary information providers. Otherwise it could lose vital information sources.

Sometimes this causes criticism, especially by alleged offenders who claim the Commission places too much emphasis on bringing their affairs into the public arena. They claim the Commission protects the information provided by informants but leaves alleged offenders unable to rebut the information.

In fact, this is not the case. The Commission adheres to established legal principles that balance the interests of disclosure and confidentiality. Alleged offenders are given opportunities to review evidence within the trial process.

6.4.1 Information use

Commission staff cannot disclose or use information other than for the performance of their statutory duties.200

The Commission believes that if it has legitimately obtained information for one purpose and that material discloses information relevant to another of its statutory functions, it is under no general duty to disregard the information in the context of that other function.

Some examples when this might arise include:

- information about a Prices Surveillance Act matter which is relevant to a Commission enforcement function—for example consideration of a merger; and

- information under s. 155 about an enforcement investigation which is subsequently relevant to another Commission investigation.

200 See Public Service Regulation r. 7 s. 70 of the Crimes Act 1914; and the Privacy Act 1998.
6.4.2 Confidentiality

Information is provided to the Commission voluntarily or under its coercive powers. Some information providers do not put any restrictions on the use of the information they voluntarily provide. However, the circumstances and the nature of the information may dictate whether or not it is treated as confidential.

Some information providers will request that the information be kept confidential. Others may only provide information on condition that it is kept confidential.

When information is already publicly available the Commission does not attempt to protect that information.

6.4.2.1 Voluntary information

The law and proper administration require the Commission to take confidentiality issues into account. A general disclosure policy was first included in the Trade Practices Commission 1981–82 annual report (p. 7). The Commission adopted this policy and has restated it many times.

The TPC will not disclose what it receives in confidence from commercial sources unless ordered to do so …. The reason is that the TPC must keep faith with those who give information in confidence; that is the only way to maintain the flow of confidential information that is necessary for its work. The TPC is not seeking to protect itself in this, but rather those who trust the TPC with their confidential information.

The AAT has recently endorsed the rationale for the policy in Re Telstra Corporation Limited and Australian Competition and Consumer Commission. Recognising that the Commission needs to protect confidentiality, the AAT at paragraph 7 stated that:

The Commission largely depends upon the whole-hearted cooperation of suppliers of information in order to carry out its functions effectively. The degree of dependence placed on this information greatly assists in determining that its absence will present a real likelihood of prejudice.

At paragraph 44 the AAT continued:

The release of the document … could reasonably be expected to have a substantial adverse effect on the future way in which the Commission gathers its information in the telecommunications field and carries out its regulatory duties.

The Commission places a high priority on protecting the confidentiality of information provided to it and must continue to do so to encourage informants to come forward. Without voluntary information law enforcement can not be effective.

6.4.2.2 Information obtained under s. 155 powers

There are no specific provisions setting out requirements for the Commission’s use of information or documents obtained in response to a s 155 notice. However, ss. 155AA

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202 ibid.
and 155AB restrict disclosure by the Commission of information obtained under s. 155. The Commission cannot disclose the information to any person except in the performance of its official duties or functions or when required to by law.

The Commission considers that for information provided to it under s. 155 it is not under a general law obligation of confidence. However, it may have a broad implied duty to consult relevant parties before disclosing that information.

6.4.2.3 Information obtained under specific statutory powers

When information provided under a statutory power is confidential, the Commission must comply with specific statutory restrictions on disclosure. The rules of natural justice would normally dictate that the Commission consult the provider of that information before deciding to disclose it.

6.4.3 Specific obligations to disclose or protect information

To balance the need to protect confidentiality with the public interest in transparency, the Commission can be compelled in certain circumstances to produce material it has received either voluntarily or under a statutory power:

- in response to a request under the Freedom of Information Act 1982;
- as part of its duty to provide discovery or comply with a notice to produce in proceedings it initiated or in proceedings against it;
- in response to a subpoena regarding proceedings between third parties; and
- in response to a statutory discovery obligation.

Before releasing any documents or information, the Commission usually advises any party who has provided confidential material, whether voluntarily or otherwise, and where relevant, to produce the material in compliance with its legal obligations. The Commission does not consult with parties about releasing non-confidential information.

In some cases, it is assumed that information is confidential even though the information provider did not request confidentiality. If disclosure becomes an issue, the Commission clarifies whether the material is confidential.

The Freedom of Information Act includes examples of disclosure of confidential information of third parties and, when information is going to be disclosed, the Commission will consult and generally seek to respect, the wishes of third parties.

In court proceedings, whether in response to a discovery obligation or a notice to produce or a subpoena, there is no general protection against disclosure of relevant


confidential information. However, courts and tribunals tend to appreciate the need to protect the confidentiality of information. In consultation with the information providers, the Commission can seek to ensure that disclosure is subject to a court imposed confidentiality regime.

### 6.4.4 Privacy Act

When collecting and using information the Commission must have regard to the *Privacy Act 1988*. This Act sets out broad rules to protect personal information against unfair or overly intrusive collection by all federal government agencies.

The Commission adheres to the Federal Privacy Commissioner’s Information Privacy Principles Guidelines.

The Federal Privacy Commissioner has the power to investigate any acts or practices that may breach of the Privacy Act\(^ {205}\) and to conduct random audits of an organisation’s processes and procedures.\(^ {206}\)

### 6.5 The Commission and the media

One of the terms of reference of this review is for the Committee to consider whether the operation of the competition and authorisation provisions of the Act provides adequate protection for the commercial affairs and reputation of individuals and corporations.

This raises the issue of whether the publicity associated with specific Part IV matters is unduly damaging to the reputation and/or commercial affairs of offenders and alleged offenders.

As in many other jurisdictions, legislation and the courts in Australia allow the media to report on matters and investigations and for the regulator to comment on specific matters.

The Commission considers that the current legislative framework, and the processes within that framework regarding the public scrutiny via the media of Part IV matters adequately protects reputation and commercial affairs, while balancing the public interest in effectiveness, certainty, transparency and accountability by publicising trade practices issues.

It is not always possible to protect information about commercial affairs. When there is a breach of the law it is inevitable that the reputations of those involved will suffer.

If by virtue of the Commission instituting proceedings under the Act, a business or individual has been alleged to have breached the law, then although the great majority of the public knows the difference between an allegation and a finding of unlawful

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\(^{205}\) Section 27(1)(a) *Privacy Act 1988*.

\(^{206}\) Section 27(1)(h) *Privacy Act 1988*.
behaviour by a court of law, there may still be in, in some minds, some damage to the reputation of the party against whom the allegations are made, although this will be totally or largely corrected if the proceedings are unsuccessful.

Nevertheless, the system of justice is a public one and the fact that proceedings have been instituted is an inevitably known public fact in our system of law. The courts have made it clear that it is not only acceptable but desirable that the Commission issue media releases when it institutes proceedings, making clear the nature of its allegations, and making it clear that they are allegations.

As to the fact that the Commission is conducting an investigation into whether particular unlawful behaviour is occurring, it is the Commission’s practice not to take action to make the fact that it is conducting such an investigation public, subject to some exceptions where a public policy purpose is involved. Currently, the Commission is involved in some 200 serious investigations.

The fact that the Commission is investigating however, is sometimes made known by the complainant, or occasionally by the firm under investigation (especially sometimes by virtue of its legal challenge to the investigation’s validity) or infrequently by a party where co-operation with the investigation is sought. The complainant may be a customer, competitor, supplier, a Minister of the Government of other concerned party. In a number of such cases, the Commission confirms it is doing an investigation. Although most members of the public know the difference between an investigation, an allegation and a court finding of unlawful behaviour, there may be some impact in the minds of some on the reputation of the party being investigated. This consideration is a factor in the Commission’s own practice of not, save in exceptional circumstances, announcing or otherwise making known it is conducting an investigation.

The Commission believes there is a public interest in disseminating information about cases involving breaches of the Act and that publicity also plays an important role in achieving compliance with the Act. The media’s role is critical in ensuring transparency and accountability of the courts and the Commission. Media coverage results in a high level of scrutiny of the Commission’s own processes.

As the Commission’s responsibilities grow its activities attract greater community interest and media coverage. For example when the Commission took on the role of ensuring there was no price exploitation under the GST, the Chairperson and the Commission attracted a higher than usual level of media and public recognition.

As a matter of practice, the Commission follows certain internal processes to ensure adequate protection of reputation when appropriate. It limits its media releases to factual and accurate accounts of cases instituted and the outcomes of decisions. The Commission does not comment publicly on ongoing investigations, except in exceptional circumstances. This avoids raising public perceptions that a potential offender has breached the law, before the Commission has decided to institute proceedings.
6.5.1 Statutory obligation—s. 28

Concerns are sometimes raised about publicising the Commission’s enforcement and other roles. However, issuing media releases about enforcement activities under Part IV and other media-related issues falls within the Commission’s legislative functions under s 28 of the Act.

Section 28(1) provides that:

In addition to any other functions conferred on the Commission, the Commission has the following functions:

(a) to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to carrying out of the functions, or the exercise of the powers, of the Commission under this Act;

… (d) to make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;

(e) to make known for the guidance of consumers the rights and obligations of persons under provisions of law in force in Australia that are designed to protect the interests of consumers.

In addition, the price exploitation provisions of the Act relating to the introduction of the GST explicitly provided for the release of public notices (dubbed shame notices) to aid the prevention of price exploitation in relation to overcharging it considered was occurring under the GST. Section 75AX provided that:

(1) The Commission may give a corporation a notice in writing under this section if the Commission considers that doing so will aid the prevention of price exploitation..

(2) The notice must: ..

(c) specify the maximum price that, in the Commission’s opinion, may be charged for a supply to which the notice is expressed to relate.

(4) The Commission may publish the notice, or particulars of the notice, or particulars of any variation of the notice, in such manner as the Commission considers appropriate, including, for example, in a national newspaper.

6.5.2 Rationale for providing information to the media

The Commission provides information to the media because it helps to keep the public informed about an important law—Part IV of the Trade Practices Act—including information on its operation and the role of the Commission.

Journalists inform the public how justice is administered. Providing information to the media helps promote confidence in the law and its administration and ensures transparency and accountability of the Commission and the courts.

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207 For example, see R Corbett, ‘Corbett calls for ACCC Overseer’, *Australian Financial Review*, Friday, 7 June 2002 p. 3.
Substantial public interest in the enforcement activities of regulators such as the Commission reinforces the need for open court proceedings and issuing media releases.

Courts have long recognised that open court proceedings are an important element in ensuring the accountability of the judiciary in the administration of justice. Jeremy Bentham wrote:

Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.208

Equally, the publicity surrounding a matter plays an important role in ensuring that the Commission itself remains transparent in its processes, and accountable for its decisions. Just as the parties may experience adverse publicity from a trial, so does the Commission if it takes inappropriate or ill informed actions.

Communicating with the media also helps to promote compliance with the law. This is a fundamental objective of the Act.

Media communications is a critical element of the Commission’s compliance strategy. It is one of the most effective ways of educating the public, small and large businesses and consumers about their rights and obligations under the law and how the Commission applies the law.

The audience goes beyond those in the courtroom and it is important to alert potential offenders about the consequences of breaching the law. Media articles about the results of litigation and administrative settlements provide ‘real life’ examples of the uses and application of the law and highlight the fact that failure to comply with the law attracts significant penalties. Unfavourable publicity about those who breach the law also helps to persuade other firms to comply rather than face publicity themselves.

Publicity also helps build a general culture understanding and support for competition and the law and its administration. It promotes greater understanding of competition policies and promotes critical evaluation of competition policy and discussion of potential improvements to the law.

In reality, many of the companies (especially large companies) involved in investigations and proceedings by the Commission make public statements themselves. The Commission believes making information available to the media is an important contribution to ensuring fair and accurate reporting of matters.

### 6.5.3 The Commission’s media strategy

Contact with the media is one part of a wider Commission communication and public relations strategy. The media is not the only means the Commission uses to disseminate information. It engages in a wide range of activities to promote understanding of the law, including the production of publications, and giving speeches and presentations on various issues. (See chapter 10 for further details of the Commission’s compliance strategy).

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208 *(Selected Extracts from the Works of Jeremy Bentham*, 1843, p. 155.)
Distributing information is crucial if the Commission is to effectively fulfil its role in the Australian economy. The Commission cannot police all commercial transactions in Australia. It is only through raising awareness about trade practice laws and publicising the Commission's actions that it can hope to promote competition and fair trading. Deterrence and education are both critical.

The main media-related activities of the Commission involve the issue of media releases and the holding of media conferences.

Typically, the Commission will issue several hundred media releases a year. In 2000, the Commission issued 371 media releases and 335 in 2001. The number of media releases in 2000 was higher, reflecting the Commission’s role during the introduction of the GST. About once a week the Commission holds a media conference, which is usually attended by journalists from print and electronic media.

Most releases are reported in the general media and about half receive substantial attention. This reflects the significant level of public interest in the Commission’s dealings, many of which may involve well-known businesses or products.

6.5.4 Issuing media releases and making public comments

Usually one or more Commissioners and the Chairman are involved in approving and sometimes partly drafting media releases.

A dedicated Media Unit is responsible for identifying appropriate distribution channels and assisting staff in developing an appropriate communications approach for specific cases.

In all drafting media releases Commission staff apply several principles.

■ Media releases about institution of proceedings should state briefly what the Commission alleges, what redress the Commission seeks and, when available, the date of the directions hearing.

■ Information which is not in the Statement of Claim is not included.

■ Institution of proceedings media releases must be ‘moderately worded and accurate’. 209

■ Media releases must be prepared usually well in advance to ensure that moderately worded, accurate information is available as soon as proceedings are instituted.

■ Media releases about court results may be more expansive than institution of proceedings media releases. This is to ensure the facts and findings of the court are

209 To conform with court principles on the appropriateness of media releases set out in the case TPC v Cue Design Pty Ltd & Anor (1996) ATPR 41–475.
accurately reported and to communicate the implications of a decision as part of the Commission’s educative and compliance strategy role. Result media releases include a statement of the result, the impact of the decision for consumers, what the court found (including judges’ comments), what the Commission thinks of the result and what lessons there may be for business/consumers.

Media releases relevant to Part IV can cover institution of proceedings, results of proceedings, s. 87B undertakings and administrative undertakings.

In most circumstances, the Commission issues a media release when proceedings start. This is to ensure transparency and accountability in the Commission’s activities and that the public has access to clear and accurate information about the allegations. Whether or not releases generate publicity depends on the level of media and public interest.

The Commission usually issues media releases when a matter is concluded. This is to give the public and the media an accurate record of the outcome and the decision in law and to highlight the lessons that business and consumers can learn from the decision.

The Commission may also issue media releases in relation to court enforceable s. 87B undertakings. This is an important element of encouraging compliance, as it assists traders and legal practitioners in negotiating solutions in similar matters and raise public awareness about the parties’ obligations and how to complain to the Commission if the parties breach them.

Depending on the circumstances, the Commission may seek more publicity about a case or an issue, for example by holding a media conference.

A media release may be issued when companies announce a significant merger. These releases may indicate if the Commission is reviewing the matter, if there have already been discussions with the companies and in some cases, the kinds of issues the Commission will seek to investigate. In this regard, the Commission’s intention is to quickly inform the market of matters relevant to the merger. The Commission will typically issue a media release notifying the outcome of a merger investigation – whether it intends to oppose the merger or not.

When a proposed merger or acquisition could potentially raise competition concerns, the Commission insists the proposal is made public before reaching a decision. This is because the likely economic effect of the merger can only be evaluated properly by questioning customers, suppliers, competitors and others about its likely effect.

The Commission issues media releases announcing specific priorities and compliance objectives. For example, when the Commission records a build up of complaints about a specific practice, it may issue a media release. These are to warn traders about the potential trade practices implications of such conduct, to educate them about their rights and responsibilities and to promote future compliance.

The Commission also issues media releases and makes public comments in response to questions about consumer protection law and policy from the media, the Parliament, government departments and agencies, and so on.
Where public submissions are sought regarding an issue of relevance to competition and consumer protection law and policy, for example, to assist a review, Committee or inquiry, the Commission will usually release its submission with a press release. The Commission sees this as a useful mechanism to stimulate meaningful public debate on important issues of public interest.

6.5.5 Allegations of misbehaviour

Given the public interest in trade practices issues and for transparency and accountability reasons, the Commission believes it is appropriate to state whether it is investigating a matter and there should be no legal restrictions on its ability to do so.

However, the Commission does not issue a media release informing the public that it is investigating a particular matter unless there are exceptional circumstances and a public interest in doing so.

The Commission may comment on a matter where the investigation is already within the public domain. This may occur if a complainant, a person under investigation or a third party from whom the Commission has sought information has informed the media. Similarly, in some cases the media may find out about a matter when Parliament or some other industry association publicly refers it to the Commission.

In such cases, the Commission may consider it appropriate to comment, as the public has an interest in knowing whether a matter brought to its attention which is already in the public domain is considered of sufficient merit to warrant investigation by the Commission. Further, it is important that the Commission comment in order to address any inaccuracies or false speculation about its own views and the investigation. Sometimes a statement by the Commission emphasising that no conclusion about whether a breach occurring has occurred can reduce the potential for adverse publicity which can arise from inaccurate or speculative media statements.

In very limited circumstances, the Commission may make a limited statement regarding an investigation if it is considered necessary usually in order to induce witnesses to come forward. For example, in a recent matter the Commission successfully advertised for whistleblowers to come forward because anonymous evidence was incomplete.

This practice is extremely rare. The Commission is currently investigating approximately 200 serious investigations and few, if any, have or are likely to be referred to in a media release before proceedings commence.

6.5.6 Accusations of ‘trial by media’

Some businesses have criticised the Commission for conducting what is described as trial by media. These criticisms are based on fear that by publicising the institution of proceedings and cases, alleged offenders are exposed to trial by media—that is, being tried and punished through adverse publicity rather than the courts. To a degree, criticisms that the Commission engages in trial by media reflect a simple dislike by business of any publicity under the Act and an attempt to mis-label it as ‘trial by media’.
However, as outlined above, the Commission has a responsibility to publicise its activities and it is appropriate for the Commission to communicate its decisions to institute proceedings as well as the outcomes of proceedings and s. 87B undertakings. These practices are long-standing. The courts have considered the relationship between the Commission and the media, and specifically approved the Commission’s practice of issuing media releases informing that it has instituted proceedings in a number of cases.

For example, in *Eva v Southern Motors Box Hill Pty Ltd*, Smithers J considered this issue:

> It was pointed out that the Trade Practices Commission itself gave wide press publicity in February 1976 to the fact that the summonses in these proceedings had been issued … and stated in a press release particulars of the matters which the Commission would allege.

> It may well be that considerations of public policy justify wide publicity being given to the issuance of summonses but where what is involved are court proceedings in which the defendants are regarded as innocent until the contrary is proved, appropriate restraint in tone and content is required.\(^{210}\)

In the recent case of *TPC v Cue Design Pty Ltd*, it was held that:

> I would have thought that a moderately worded, accurate news release, such as that published by the Commission in this case, serves a very useful purpose… Without it, the media is left to its own inquiries and compile its own summaries. In doing that there is an increased risk that, by accident, inaccuracies might occur and greater harm could be done to a defendant.\(^{211}\)

Courts have also considered whether adverse publicity may mitigate against penalties imposed. They have confirmed that when media releases are moderately worded and accurate, such publicity is not inappropriate and there are no grounds for reduction in penalties.

In *ACCC v Nationwide News Pty Ltd and others\(^{212}\)*, Nationwide complained about a media release issued after the court had pronounced its findings, on the basis that it had diminished the importance of acquittal on 18 of the 24 charges laid. The court found that the information included by the Commission in its media release was an accurate summary of the effect of the judgment and was not unfair. On this basis, Nationwide’s argument for reducing the penalty failed.

In accordance with these principles, in its media releases and responding to media questions, the Commission ensures that public statements are accurate and moderate.

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\(^{211}\) (1996) ATPR 41,475 at 41,835. See also *ACCC v Nissan Motor Co (Australia) Pty Ltd & Anor* (1998) ATPR 41–660 as per Von Doussa J at 41,352:

> The ACCC has a statutory function under s 28 of the Act to make available to the public information in relation to matters that affect consumers. No criticism is made by Nissan of the fact that the ACCC issued a media release on 28 July 1998 concerning the hearing of the prosecution in the Federal Court and the pleas of guilty entered by Nissan. The criticism was directed to the content of this particular release.

\(^{212}\) (1996) 18 ATPR 519 at 42,507.
The Commission recognises that this helps to maintain its credibility with the media. The Commission believes that always responding quickly and accurately to media interest is a key element in an effective compliance strategy.

Generally speaking, when the Commission institutes proceedings the pleadings are lodged in the Federal Court Registry and are publicly available. No further media contact is sought. If a journalist seeks additional information they must refer to the court documents. The Commission’s practice is not to publicly provide, independent of court processes, detailed arguments that would support allegations to be made in court. The Commission’s case is presented on the day of the case. It is presented during the trial, and may then be reported publicly.
7 Overview of competition law in Australia

Summary

The terms of reference of the Review require the Committee to examine the impact of Part IV and VII on the competitiveness of Australian businesses, economic development and consumer interests.

This chapter will provide a detailed explanation of the existing legal framework and its underlying philosophy which demonstrates that while there are areas for improvement, as discussed in chapters 2–6, generally the underlying legislative framework promotes competitiveness, economic development and consumer welfare. Nevertheless, there continues to be a need to keep the Act under review as changes in Australia’s economy continue, particularly as many segments of industry are increasingly exposed to international forces.

The Australian competition laws are primarily contained in Part IV of the Act. The objective of Part IV is to promote competition and therefore enhance consumer welfare by prohibiting certain types of conduct that restrict competition.

A less competitive environment may enable some businesses to grow larger and stronger. They may argue that this helps them achieve efficiencies in their operations and compete internationally. However, allowing such conduct may ultimately restrict economic development and be detrimental to consumer welfare. Firms that are not subject to competitive threats tend to become less efficient in their practices and less innovative. In less efficient and competitive markets, consumers may suffer higher prices and lack of choice of products and services. Smaller businesses may be subjected to unfair trading practices by larger firms, restricting their ability to grow and compete.

The Act is a key element in promoting competition for the benefit of consumers. It is particularly important in a small economy such as Australia’s where markets tend to be more concentrated, and prone to the development of firms with a significant degree of market power.

Further, Australia, like all modern economies, is facing new economic challenges. Three major sources of change are driving the modern economy. First is the growing economic interdependence of nations, that is, globalisation. Second is new technology, especially information and communication technology. Third is the progressive liberalisation of international and national markets by lowering trade and investment barriers and the repeal of anti-competitive regulation. These three forces have major implications for the future of competition law. Globalisation, new technology and market liberalisation, whilst generally good for competition and consumer choice, also tend to give rise to major attempts by businesses to defeat its competitive effects. To prevent their efforts from succeeding requires a vigorous and effective competition law.

The existing competition law provides a comprehensive but balanced approach to prohibiting conduct that is likely to have a substantial anti-competitive purpose or effect. It is an economic law, based on economic principles which reflects the accepted
view of all modern economies that competition generally enhances consumer welfare and market efficiency. At the same time, even though the emphasis and purpose of the Act is on the achievement of competitive outcomes, through the authorisation process the legislation provides sufficient flexibility to take into account public benefits, including international competitiveness.

However, because authorisation provides immunity from prosecution in serious matters of public interest, it cannot be granted lightly. The process must be rigorous, fair, transparent and accountable.

The legislative framework for assessing public benefits, the authorisation process, provides an effective mechanism for deciding whether those benefits justify allowing potentially anti-competitive conduct to occur. It is a transparent process in that submissions and determinations are publicly accessible. It is a fair process in that it enables any party, and importantly consumers themselves to participate in, and comment on authorisation applications by providing submissions. Thus, the authorisation process ensures that the broadest range of views are represented in important debates of public interest. It is an accountable process in that Commission decisions are appealable to the ACT.

7.1 Development of trade practices laws in Australia

This section outlines the development of competition law in Australia.

7.1.1 Competition law pre-1974

Before the introduction of comprehensive legislation addressing restrictive trade practices, the Australian economy was characterised as being highly concentrated and restrictive practices were rife:

Restrictive practices have a long history in Australia and have come to be regarded by businessmen and consumers alike as normal business behaviour. Indeed, certainly until very recently, the average businessman would have been rather hurt to hear his trade agreements described as restrictive. 213

The small size of the Australian economy, and high levels of market concentration meant that restrictive trade practices were more prevalent in Australia than in countries such as the United States and the United Kingdom. A particular feature of the Australian economy at the time was the stability of restrictive practices due to high levels of concentration and the use of vertical restraints such as tying clauses and requirements contracts in association with price fixing arrangements. It has been said that:

Finally, mention should be made of what is distinctive in Australia (at least by comparison with Britain and the United States). First, there is not only an unusually high incidence of restrictive agreements, but these agreements also have an unusual stability clearly associated with the high degree of market concentration. Second, another consequence of high concentration, unilateral

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vertical practices such as tying clauses and requirements contracts are fairly common. And finally, “orderly marketing” in Australia is a term which comprehends restrictive practices of a more extreme kind such as level tendering, collusive bidding, collective boycotts and reciprocal trading.\textsuperscript{214}

Competition law was first introduced in Australia in 1906 but was not effective. In 1965 a second attempt was made to introduce a new competition law. The purpose of this Act was to preserve and encourage competition in Australian trade and commerce to the extent required by the public interest. Again, this law was ineffectual, because of factors such as constitutional uncertainty, lack of comprehensiveness of the provisions, and the secrecy given to restrictive arrangements.\textsuperscript{215}

### 7.1.2 Trade Practices Act of 1974

Modern Australian competition policy began with the enactment of the \textit{Trade Practices Act 1974}.

In developing the law, Australia was able to learn from the experiences of the United States and Europe, and to strike a sensible balance between their differing approaches. This balance recognised, in particular, the need for a strong law prohibiting anti-competitive behaviour, but at the same time acknowledged the need in some circumstances in a small economy for anti-competitive behaviour to be authorised on the grounds of public benefit.

The primary provisions concerning competition laws are found in Part IV and VII. The legislation states that certain types of restrictive practices unlawful, and the parties who engage in such conduct will be liable for prosecution in the courts. Remedies awarded by the court include injunctions, damages and pecuniary penalties. In certain circumstances, conduct may be exempt from the legislation’s ambit if the parties are granted authorisation of the conduct on public benefit grounds. In addition to the competition laws, the legislation introduced consumer protection laws in Part V to prevent misleading and deceptive conduct, and other unfair practices.

The Act also provided for the establishment of the former Trade Practices Commission, an independent statutory authority responsible for administering the Act and adjudicating on authorisation applications. The former Trade Practices Tribunal was established as an appeal body for authorisation determinations.

When the legislation took effect in 1974, a vast number of cartels and anti-competitive practices, both of a horizontal and vertical character, became unlawful overnight. Following this initial high level of activity, there was a period of consolidation during the remainder of the 1970s and the 1980s.

The 1990’s saw further development of competition laws, in line with, but in many respects ahead of developments in other countries.


First, the Act became more effective. Penalties were increased from a maximum of $250,000 to $10 million per offence for corporations. At the time, several cases attracted high penalties for cartel behaviour, including the Freight case\(^{216}\), where penalties over $11 million were imposed under the old scale, and the concrete case\(^{217}\) where penalties of $21 million were imposed under the new scale. The Parliament, the Federal Court and the Trade Practices Commission all supported higher penalties. This sent a strong signal to Australian businesses that the Act was to be taken far more seriously than in the past and led to widespread adoption of more effective compliance programs than had occurred in the 1980s.

Second, in the 1990s the Trade Practices Commission (and later the Australian Competition and Consumer Commission) began to enforce the consumer protection provisions of the Act more vigorously than in the past. It pursued a series of high profile cases concerning, for example, life insurance companies selling complex policies to Aboriginal people, the AMP case in which refunds of around $100 million were paid to consumers, and the Telstra wire repair plan case in which consumers received refunds of over $40 million.

The third important development was the strengthening of the merger law. The merger test was changed from one of dominance to a substantial lessening of competition to bring it in line with the North American practice. This change in the law was extremely important, because over time merger law has a large effect on how competitive the structure of an economy is. It plays an especially important role in deregulating areas where almost invariably businesses’ response to deregulation is to seek to merge and thereby minimise or offset the procompetitive effects of deregulation. The Federal Court decision to grant an interlocutory injunction when Coles Myers sought to acquire Foodlands via Rank Associated signalled substantial court recognition that the public interest in the promotion and protection of competition is the key element in merger law.

The fourth development occurred in 1992, when a committee of inquiry led by Hilmer put forward recommendations for the implementation of a national competition policy. Following the report of that Committee\(^{218}\) an access regime was introduced into the Trade Practices Act. The legislation was extended in 1995 to unincorporated businesses trading within states, and also to state public utilities. Reviews of laws that restrict competition became part of the national competition policy agenda. Issues of competitive neutrality were systematically pursued at federal, state and territory level. The monopoly structures of public utilities were reviewed and in some cases changed.

In 1995 the Commission took over the functions of the Trade Practices Commission and the Prices Surveillance Authority to achieve better coordination of competition and prices policy. The Commission also became much more closely linked with broad

\(^{216}\) *TPC v TNT Australia Pty Ltd* (1995) ATPR 41-375.

\(^{217}\) *ACCC v Pioneer Concrete Pty Ltd & Ors* (1996) ATPR 41-457.

issues of microeconomic reform, taking a regulatory role in areas such as communications, energy and transport.

The fifth development occurred in May 1997 when the House of Representatives Standing Committee on Industry Science and Technology released its findings on fair trading issues concerning small business (the Reid report). This report identified the imbalance in buying power between small and large business exposed small businesses to unfair dealing and exploitation, and recommended improved legal protection for small business. As a result of this, two new provisions were inserted into the Trade Practices Act—s. 51AC and s. 51AD—which came into effect from 1 July 1998. Section 51AC prohibits a stronger party from dealing with a disadvantaged party in a harsh or exploitative way. Section 51AD establishes the basis for mandatory codes of conduct to clarify and improve relations between businesses. These changes flagged a growth in activity in the protection of small business from unfair practices in areas including franchising, and shopping centre leases.

Finally, in June 1999 legislation was passed which fundamentally reformed the existing tax system, including the introduction of a broad-based consumption tax (GST) and the removal of a number of indirect taxes including Wholesale Sales Tax. Given the complexity of the changes, the government was concerned that some businesses could use consumers’ lack of understanding about the impact of the new tax regime to increase profit margins. Accordingly, the Commonwealth Government legislated to create a new offence of price exploitation, and gave the Commission a range of tools to help prevent and eliminate price exploitation during the transition to the New Tax System. Given the widespread impact of the changes to the taxation system, this has had an extraordinary impact on the profile of competition and consumer protection law and the Commission.

7.2 Rationale for an Australian competition law

This section outlines the key factor traditional factors and new economic forces which underpin the need for regulation of anti-competitive conduct.

Part IV is a critical element of economic policy. It regulates the ability of businesses to enter into:

- arrangements that restrict competition between competitors (horizontal arrangements)
- arrangements that restrict the ability of suppliers or customers to trade (vertical arrangements)
- misuse of market power
- mergers.

A less competitive environment may enable some businesses to grow larger and stronger. They may argue that this helps them achieve efficiencies in their operations
and compete internationally. However, allowing such conduct may ultimately restrict economic development and be detrimental to consumer welfare. Firms that are not subject to competitive threats tend to become less efficient in their practices and less innovative. In less efficient and competitive markets, consumers may suffer higher prices and lack of choice of products and services. Smaller businesses may be subjected to unfair trading practices by larger firms, restricting their ability to grow and compete.

The vigorous enforcement of competition laws is vital in a small economy such as Australia. The size of Australian industry means that there is a strong tendency towards the concentration of market power in a few hands through mergers and rationalisation, and a high potential for the exercise of market power.

Also, Australia, like all modern economies is facing a series of new challenges. There are three major sources of change driving the modern economy. First, there is the growing economic interdependence of nations, that is, globalisation. Second, there is new technology especially in the areas of information and communication technology. Third, there is progressive liberalisation of international and national markets through the lowering of trade and investment barriers and through the repeal of anti-competitive regulation.

All of these forces have major implications for the future of competition law. Globalisation, new technology and market liberalisation, whilst generally good for competition and consumer choice, also tend to give rise to major attempts by businesses to defeat its competitive effects, requiring a vigorous and effective competition law to prevent their efforts from succeeding.

At the same time, it is important that laws are sufficiently flexible to allow conduct which would be justifiable on public benefit grounds—for example, arrangements which assist in the transition from regulated to deregulated industries, or when small businesses whose conduct is not likely to have a substantial anti-competitive effect are not inadvertently caught by the legislation. This is provided by the authorisation process.

7.2.1 Size and geographic location

In terms of geographic size, Australia is almost the same size as the 48 mainland states of the US. However, it has a relatively small population of 19 million. In 2001 its GDP was approximately $445 billion, with a growth rate averaging about 3–4 per cent a year.

The size of Australian industry means that there is a tendency towards market structures characterised by a high degree of market concentration, where a few players are more likely to possess market power. Businesses must be able to achieve sufficient returns to invest capital to produce goods and services. To a greater or lesser extent depending on the industry, the costs of production falls as the level of production increases, providing greater incentive for businesses. In economic terms, this is known as economies of scale.

Smaller population and markets means that there is less room for a large number of more evenly matched firms in a market, and a tendency for industry rationalisation to obtain economies of scale. This may result in a situation where one or a few firms may
face little external competition from local or international sources, and accordingly, may enjoy a significant degree of market power. Equally, a small number of players may increase the opportunities for collusion and market sharing to increase prices and stifle potential competition.

There is therefore a real need for strong competition laws to protect consumers and small business from higher prices, lower output, and unfair trading terms which are commonly associated with economies where a few companies hold substantial market power.

However, there may be some beneficial elements in allowing firms to grow larger to achieve greater economies of scale. It may create a more efficient operation and more employment opportunities, and it may increase the ability of Australian businesses to take advantage of export opportunities. These kinds of arguments must be assessed very carefully as the consequences of allowing a monopoly to develop are very serious. This is one of the reasons for introducing a public benefit test within the Act in order to assess such issues in a fair and transparent manner.

7.2.2 Small business and rural and regional sector

Given the tendency towards concentrated markets in Australia, substantial weight is given to the development and protection of a competitive small business sector.

Small business is an important element of Australian industry. Although market power may be concentrated in a few hands in some areas, there are approximately one million small to medium sized businesses in Australia. Small business accounts for more than 70 per cent of growth in employment over the past 10 years, and contributes about 30 per cent to GDP. Small businesses are particularly significant in some sections of the economy, representing for example, 55 per cent of the sale of goods and services of all businesses in the construction sector, and 43 per cent of sales in the retail sector.

The government places a high priority on the development of small business in Australia through a variety of programs and assistance. In a recent statement, the Hon. Joe Hockey, MP said:

> The small business sector provides enormous potential to enhance Australia’s wealth, especially in rural and regional areas where communities depend on the sector for the strength of their economies. The government has an important role in assisting the sector move into the 21st century and beyond.

The government has provided specific funding to the Commission in order to enhance its role in informing small business about its rights and obligations under the Act. It has also signalled the high priority to be given to the protection of small business interests by strengthening the unconscionable conduct provisions of the Act, to protect small businesses from unfair practices by larger business.


220 ibid.
7.2.3. Globalisation

The increased interdependence between the nations of the world is generally beneficial for competition and consumers. More sources of supply become available. There are more diverse offerings, more competitors than in a closed market, consumers have a wider choice of goods and more suppliers to choose from.

One consequence of globalisation is that many more economic transactions are of an international character involving participants in different nations, supplying goods and services on a multinational basis and taking decisions that affect many countries simultaneously. Anti-competitive behaviour is not exempt from this trend. There are an increasing number of international transactions that raise serious competition issues. These include global mergers, global cartels, global misuse of market power and global consumer protection questions.

This increases the need for national competition laws to operate effectively and for greater levels of cooperation and harmonisation between competition laws and agencies in different countries.

Competition agencies are organised on a national basis. In the past there has been limited cooperation between them. There is starting, however, to be a significant upgrading of the international dimension to competition policy. Cooperation agreements and treaties between countries are all on the rise. At the bilateral level Australia and the US have recently concluded the most progressive treaty in the world concerning the sharing of confidential information. Australia stands to benefit from this before long as a result of US investigations into global cartels (information cannot be shared in relation to mergers). Cooperation in a working sense between the USA and the European Union has greatly increased in recent years. There is also a great amount of plurilateral and multilateral activity at the OECD, World Trade Organisation, APEC and in other regional groupings around the world.

International cooperation is not an easy matter. A key difficulty is that unlike some areas of international cooperation, intensive fact finding lies at the heart of the application of competition law. Business practice in one setting may be highly anti-competitive yet pro-competitive in another—for example, exclusive dealing. The evaluation of much anti-competitive behaviour depends on a full analysis of competition in markets in the countries concerned and this is hard to do from outside the country. There can also be conflicting national interests when an international approach to competition law is attempted. There are great sensitivities in exchanging information between countries, especially when that exchange may be perceived to harm the interests of corporations in those countries. Making decisions about multi-jurisdictional mergers or cartels is not a simple matter. Nevertheless there will be sharply increased attempts worldwide to accelerate the development of the international side of competition law in coming years.

An important outcome of the recent debate about the interaction of trade and competition policy has been the pressure for Asian, African and Latin American countries to develop competition laws. Indeed, few countries now do not have some form of competition policy, although developing countries’ policies are still evolving and in some cases lack coherence, comprehensiveness and effectiveness. In Asia most countries are actively developing competition laws and policies. This is partly because
of trade pressures but also because their policy makers recognise the need for competition policy and its benefits, alien though it may be to established and powerful economic interests in those countries.

Australia is playing an important role in helping to teach and train Asian regulators in the methods of applying competition law. Australian business stands to gain through better access for Australian exports to these countries since the adoption of competition law will help end some of the restrictive practices in those countries which hinder Australian exports and foreign investment at present.

7.2.4. New technology

A major source of change in the global economy is the rapid advance of new technology especially in the areas of communications and information technology. Again, this may bring new products and services, new suppliers and more competitors, and more choice for consumers.

However, new technology can also give rise to a new important set of competition issues, as recently illustrated in the Microsoft case.

While the new technology generally liberates competition, in some cases it creates new monopolies and new sources of market power. These new monopolies may also be able to leverage successfully off their power in one set of markets and tip it into related markets, again a feature of the Microsoft case. This may be assisted by the control by these monopolies of networks, the use of which is essential to operate in other sectors.

One view is that competition law should not apply in these sectors. Some economists, most notably those inspired by the Austrian school of Hayek and Schumpeter, believe that competition law should have no role in high technology areas. They argue that any market power will soon be displaced as each new form of technology is quickly superseded by further new forms of technology. Moreover they contend that regulators and courts will be quite unable to understand and foresee the effects of technology and their decisions are therefore likely to be mistaken.

However, the antitrust division of the US Department of Justice, and the US District Court (Judge Jackson), whose judgement was largely upheld by the US Appeals Court in the Microsoft case\textsuperscript{221}, have signalled the opposite. In that case, both the regulator and the courts took the view that some areas of new technology give rise to large accumulations of market power in a short time. They considered that the scope for large scale exploitation of consumers and for large scale anticompetitive conduct is very substantial and the damage can occur in a very short time. They advocate a need for fast, strong and effective application of competition law in these situations. They were also particularly concerned at the use of market power in one market to spill over into another market, resulting in weakening of competition in other related markets and the exploitation of consumers.

\textsuperscript{221} \textit{United States v Microsoft Corp.}, 253 F.3d 34 (D.C. Cir 2001).
Moreover, the Microsoft case also demonstrates that it is not so difficult to understand what is happening in many of these markets. The Microsoft case is a good example. Despite the technological complexity it became quite clear what was occurring. It was made even more clear by an examination of the internal documentation and the e-mails within Microsoft. Competitors of Microsoft, as well as some customers, were able to fully inform the Department of Justice about what was really happening.

The Microsoft case is not an isolated one. In recent years there has been a great deal of activity by US and European regulators in the high technology and communications industry with interventions in mergers being especially notable.222

This view is gaining increasing support from economists. For example, Professor Carl Shapiro stated:

Some commentators have suggested that enforcement officials should leave the high-tech sector alone, since it is fluid, experiencing a rapid technological change, and by and large displaying vigorous competition. Yet few can deny that pockets of monopoly power remain, usually associated with the control of some information bottleneck; local telephone companies, cable television operators, and Microsoft present themselves as examples… The leading goal of competition policy in the information economy should be to hasten the erosion of such monopoly power, and to prevent the use of monopoly power to destroy competition in adjacent markets.223

A key focus has been on network economics where the accumulation of market power in sector after sector seems to be very great. The field of network economics raises new and important challenges for competition policy in the financial sector, utilities and high technology areas and will be at the centre of much antitrust action for years ahead.224 Intellectual property issues often arise in these settings and are likely to become increasingly important in the development of competition policy.

7.2.5 Trade liberalisation

Liberalisation both of international trade and foreign investment and of the domestic economy in the form of deregulation is also central to the agenda of competition policy. Liberalisation also tends to benefit consumers. However, for liberalisation to work effectively, whether international or domestic, it needs to be complemented by an effective competition policy if its beneficial effects are not to be largely undone.


224 As was recently stated in a report for the Office of Fair Trading, UK, network effects are a key characteristic of the new economy, and raise a range of issues, particularly the tendency for markets to ‘tip’ to a single dominant vendor or technology when network systems are present: Charles River Associates, ‘Innovation and competition policy’, Report Prepared for the Office of Fair Trading, Part 1, March 2002 p. 22.
Whenever governments liberalise and seek to unchain the forces of competition, elements in the private sector are likely to seek to resist the unleashing of competitive forces. Their actions take various forms. First the number of international cartels detected in recent years has risen, which reflects better detection methods as well as an increase in business actions to counter the effects of lower trade and investment barriers. As trade barriers fall, businesses in different countries which have previously had national markets largely reserved to themselves find on the one hand that they face the prospect of competition from larger players overseas who had been denied entry into their markets previously and on the other hand have the opportunity of entering the very markets of those players which threatened them in their own markets. These circumstances often set the scene for attempts by businesses in different countries to enter into international conspiracies and cartels to share markets, to agree on prices and to avoid undue competition with one another.

A further reaction is that merger activity may be triggered for the same reason. Much global merger activity may be a logical commercial reaction to the integration of world markets made possible by trade liberalisation as well as new technology and falling transport costs. However some international mergers seem to be a calculated attempt to ward off the pro competitive effects of international liberalisation.

Misuse of market power may also have global effects. Again the Microsoft case is an example of this. The actions of Microsoft seem quite clearly to have had effects all round the world and not just in the United States. One of the most important items on the emerging agenda of international competition policy is to deal with anti competitive behaviour on a global scale.

Similarly, domestic local deregulation is occurring continuously on a large scale in numerous countries, including Australia. There is a high rate of merger activity in deregulating sectors such as the dairy industry, energy and telecommunications which indicates that deregulation, while generally promoting competition, also establishes forces within the private sector for anti-competitive behaviour. The behaviour may take the form of cartel activity, the potential misuse of market power or anti-competitive mergers. In the same way as globalisation drives many commercial mergers, so also deregulation with its broadening of markets often requires substantial restructuring of an industry and often brings about mergers which simply are a logical and efficient response to the market broadening. However, a subset of mergers in deregulating areas may have the effect of undoing the pro competitive effects of deregulation. These mergers and other forms of anti competitive activity that may emerge—anti competitive agreements and misuse of market power etc—would all come under the scrutiny of competition regulators and will be very high on their agenda of concerns.

7.2.6. Other forces

There are some other forces that are likely to affect competition policy in years ahead.

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Another force is that of convergence. There is a closer interaction between communications, information technology and media sectors along with links to other energy sectors. There is also a great deal of convergence occurring within the finance sector and in utilities, especially between gas and electricity, but more broadly between the energy sector and the telecommunications sector. One clear consequence of this is that industry specific regulation will have increasing difficulty in coping with a changing world and greater reliance is likely to be placed on general competition laws and policies.

Finally all around the world competition law and policy have become far more active in the last few years and are likely to remain so for some time ahead. A demand for a more vigorous and effective competition policy is growing everywhere and in nearly all directions.

Behind this lies a recognition that consumers, whether they be household consumers or simply business users of the goods and services of others, come first. There has never been greater recognition of the public interest in competition and this will mean continuing activism in every market economy, including Australia, by competition regulators.

7.3 Adoption of economic concepts within the Trade Practices Act

This section outlines the underlying economic principles which explain how the protection of competition enhances consumer welfare, and how these principles have been adopted into the legislative framework in order to assess restrictive conduct.

In the 2nd Reading Speech introducing the Trade Practices Act, it was clearly stated that ‘Legislation of this kind is concerned with economic considerations.’

The language of the Trade Practices Act reinforces the economic nature of the law, by using phrases such as ‘market’, ‘competition’ and ‘substantial effect on competition in a market’. For example, s. 50(3) provides that in determining whether a merger is likely to result in a substantial lessening of competition in a market, matters to be taken into account include height of barriers to entry, level of concentration, countervailing power, substitution possibilities, and dynamic characteristics—all factors associated with an economic evaluation of competition.

The High Court in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd* (‘QWI’)\(^226\) confirmed that the courts also considered economic concepts at the heart of the legislation. As Justice Deane stated:

\[\ldots\] the essential notions with which s. 46 is concerned and the objective which the section is designed to achieve are economic and not moral ones. The notions are those of markets, market power, competitors in a market and competition. The objective is the protection and advancement of a competitive environment and competitive conduct.

\(^226\) (1989) ATPR 40-925 at 50,011.
Similarly, in that case, Dawson J adopted economic principles in defining the term ‘market’ for the purposes of identifying the existence of market power:

The basic test involves the ascertainment of the cross-elasticities of both supply and demand, that is to say, the extent to which the supply of or demand for a product responds to a change in the price of another product. Cross-elasticities of supply and demand reveal the degree to which one product may be substituted for another, an important consideration in any definition of a market.227

However, the Trade Practices Act is not designed to implement all economic policy objectives, but is one of a range of economic policy tools used to pursue economic goals.

In an early analysis of the legislation, Brunt stated that the economic policy underlying the Act is ‘essentially to prohibit anti-competitive business practices unless they can be shown to give rise to some offsetting public benefit’.228

Section 2 of the Trade Practices Act states, ‘The object of this Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.’

It is clear therefore that the terminology adopted by the Act as the standard of liability by which conduct is to be assessed is that of the competitive effect of conduct tempered by considerations of public benefit.

7.3.1 Relationship between competition and consumer welfare

In the economic sense, welfare or public interest is closely associated to market efficiency or performance.

Efficiency is ideally a distributive or relational concept, which embraces the whole economy. Essentially, it is a state in which no rearrangement of outputs among products and no redistribution of inputs among firms could increase consumer satisfaction.229

Market efficiency is measured in terms of allocative, productive and dynamic efficiencies. Allocative efficiency occurs where resources are allocated to the production of goods and services of the highest value uses. Productive efficiency is achieved where firms produce the goods and services they offer at least cost. Dynamic efficiency is achieved where industries change to meet new consumer tastes and productive opportunities.230

227 ibid. at 50,014.


Thus, efficient markets are associated with consumer welfare in terms of increasing production and employment opportunities, and providing access to innovative new products over time at the lowest cost. Inefficient market performance or market failure is associated with higher prices, higher costs and a reduction in output.

The process of competition is a method that may be used to deliver market efficiency. When faced with vigorous competition, a firm’s behaviour is most likely to coincide with efficient outcomes. That is, firms faced with competition will strive to produce at least cost, allocate their resources to the most valued uses, and engage in product innovation.

However, as recognised in the Hilmer report, if protecting the competitive process does not promote economic efficiency or if other policy goals conflict with economic efficiency, exemptions from the general rules should be granted.\(^{231}\)

### 7.3.2 Concept of competition

The classical economic approach to competition theory was to equate perfect competition with efficient outcomes. This early concept of competition can be traced back to the theories of Adam Smith, which focused on the concept that competition would force prices down when they were above their natural level, because other producers would be attracted by the excess profits and would increase supply. It was considered that the maximum efficient allocation of resources occurs when there are a large number of buyers and sellers in a market, none of whom may individually influence price, each has equal access to resources and no barriers to entry or exit.

However, because economists recognised that conditions of perfect competition simply do not exist in reality, economic thinking progressed to the development of theories to explain the achievement of efficient outcomes in imperfect markets, commonly known as theories of “workable or effective competition”.

Workable competition means a situation where the presence of other participants, or potential new entrants, is sufficient to ensure that each participant is constrained to act efficiently. Any imbalance in access to resources, distribution outlets, finance etc. is not necessary treated as anti-competitive, as long as there is the opportunity for sufficient influences to exist in a market.\(^ {232}\)

In assessing conduct under the Act, the courts and the Trade Practices Tribunal have largely adopted this approach.

In *Outboard Marine Pty Ltd v Hecar Investments (No 6) Pty Ltd*\(^ {233}\) it was stated that:

\(^ {231}\) ibid.


\(^ {233}\) (1982) 44 ALR 667 at 679-80.
Where there is a market which is generally competitive, it plainly does not follow that conduct which affects the balance of competition by advantaging or disadvantaging a particular dealer or dealers or a particular product or product necessarily lessens competition in the market.

In the case of *Re Queensland Cooperative Milling Association Ltd, Defiance Holdings Ltd (Proposed mergers with Barnes Milling Ltd) (QCMA)* the ACT found that:

The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into a field, would keep this power in check by offering or threatening to offer effective inducements.234

### 7.3.3 Market power

The inverse of effective or workable competition is a situation of market power. Accordingly, the key focus of Part IV is to restrict behaviour which results in, or is likely to result in a situation of market power. The wording used within the legislation to describe this concept is whether the behaviour in question is likely to result in a ‘substantial lessening of competition in a market’.

The concept of market power has been defined as follows:

> A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions.235

Generally, market power will be exhibited through higher prices and restricted output—that is, to ‘charge more and give less’. However, Australian courts have also recognised that market power may manifest through other practices designed to restrict competition. As Justice Dawson stated in *QWI*:

> The term market power is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner…. But market power has aspects other than influence on market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal.236

### 7.3.4 Market definition

A key element of assessing market power or a substantial lessening of competition is to define the market in which to assess the conduct.

In *QWI*, Mason CJ and Wilson J said;

> ‘In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant’s market power. Defining the market and evaluating the degree of

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236 *QWI* at 50,015 per Dawson J.
power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated. 237

A market, in the economic sense, can be defined as follows:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them… Within the boundaries of a market there is substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is a 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. … Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance and cost and price incentives.

It is the possibilities of such substitution which set 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? 238

Section 4E of the Trade Practices Act defines the term market to include a market for those goods and services and other goods and services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services, indicating that it is the economic concept of a market which is to be applied in relation to the Trade Practices Act. 239

A market involves four dimensions: product, geographic, functional and time.

The Commission has set out in its Merger Guidelines the tests it applies in identifying the scope of the relevant market. The main test applied is the price elevation test outlined in QCMA above. The process of market definition can be viewed as 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 and non-transitory increase in price (SSNIP) above the level that would otherwise prevail.

Identifying the scope of substitution possibilities in terms of product, geographic, functional and time dimension is critical in assessing the competitive structure of a market. If the substitutes are defined narrowly, then firms within that market are more likely to be considered to have joint or individual market power, and their activities are more likely to attract scrutiny under the Act. If substitutes are defined broadly, then it is less likely that firms within that market will fall within the scope of the Act.

Accordingly, the process of defining a market requires a complex inquiry into a range of actual and potential substitutes.

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237 QWI, op cit., at 50,008.

238 QCMA, at 17,247.

239 This definition was inserted on the recommendation of the Swanson Committee in order to clarify this point: see Swanson Committee, Trade Practices Review Committee Report, (1976) at para. 4.22.
The nature of the market in question is also an important element in assessing whether particular firms within a market possess market power. Economic theory suggests that market power (and potentially less efficient market behaviour) is more likely to arise in relation to certain market structures.

The Trade Practices Tribunal in QCMA stated:

> Competition expresses itself as rivalrous market behaviour… In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

> Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:

1. the number and size distribution of independent sellers, especially the degree of market concentration;
2. the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
3. the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
4. the character of “vertical relationships” with customers and with suppliers and the extent of vertical integration; and
5. the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.240

In other words, it is not just the number of market participants which determines whether a particular firm or firms possesses market power, but whether they are likely to face potential competition from new entrants if they attempt to raise prices, and whether market power derives from product differentiation, vertical integration or other arrangements between firms.

7.3.5 The new industrial organisation or strategic approach

The above analysis suggests that although the restrictive trade practices provisions in the Act focus on market conduct, the approach taken in most cases is to examine market structure to assess the likely effect of particular conduct on competition, and hence, consumer welfare.

This is sometimes criticised as being old fashioned and irrelevant. In particular, it is argued that this approach focuses too heavily on an assumed link between market structure and efficiency which is not supported by empirical evidence. Modern economic theory, sometimes referred to as new industrial organisation theory, focuses on the relationship between strategic competition or firm conduct and acquiring and maintaining market power in imperfectly competitive markets, rather than a mechanical

240 QCMA, at 17,246.
assumption that market definition will in all cases identify the existence of market power.

New industrial organisation focuses competition analysis on identifying strategies which create and maintain market power on an industry-specific basis and in particular, on the ability of firms to engage in conduct to deter entry into a market. Such analysis also relies on game theory to explain a firm’s behaviour when faced with imperfect market conditions when the effects of particular conduct are codependent on the response of other firms.241

This modern shift away from a structuralist approach has found favour, particularly in new economy industries such as high technology and communications, which exhibit characteristics that do not always fit easily within a market definition analysis. For example, such markets are sometimes characterised by competition on the basis of product features rather than price—therefore, traditional SNNIP tests do not always identify the competitive forces within the market, and where market power is based on intellectual property rights rather than market shares.

Nevertheless, the economic tools for analysing market power outlined above 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.

As Salop has commented, the appropriate approach is one of first principles:

The first principles approach centres on an examination of the competitive effects of the conduct at issue. This is appropriate because competitive effect is the true core of antitrust. Although market power and market definition have a role in antitrust analysis, their proper roles are parts of and in reference to the primary evaluation of the alleged anti-competitive conduct and its likely market effects. They are not valued for their own sake but rather for the roles they play in evaluation of market effects.242

This approach was recently approved by Charles River Associates in assessing the role of competition policy in innovation:

We believe that the ‘first principles’ approach as described by Salop that focuses the analysis of anti-competitive conduct directly upon the alleged conduct itself and on the effects of that conduct is not only appropriate for the analysis of anti-competitive behaviour generally, but that it is particularly well suited to the analysis of alleged anti-competitive conduct in the new economy. It provides the framework and flexibility for appropriately considering competition issues in the new and old economies.243

Australian competition law is sufficiently flexible to embrace other economic approaches to identifying market power. Ultimately, the law is based on identification of anti-competitive purpose or effect, and uses appropriate economic approaches to assess conduct. As economists such as Rhonda Smith and Jill Walker have identified,

while the Australian legislation requires some analysis of market definition based on substitution possibilities to identify market power, it also allows a fuller consideration of the implications of particular conduct for the competitive process.  

7.3.6. A wider definition of competition—soft competition

Another theory of competition exists, which suggests that competition may also be defined to support a policy of rivalry between certain types of competitors. That is, competition policy may involve preserving particular kinds of competitors, especially small business competitors. This approach would place particular value on a certain kind of market structure, and restrict market conduct that threatens the existence of a large number of small independent firms. While protecting a particular small firm, or many small independent firms, is not necessarily associated with a higher level of efficiency, it is still closely associated with other economic and consumer welfare policies such as protection of small business enterprise, and fairness in dealings.

To a certain extent, such concepts are accommodated within the scope of the Act. In particular, such issues may be taken into consideration in assessing the public benefits associated with particular conduct. Also, some specific legislative provisions may offer some limited protections to smaller businesses, in particular, Part IVA prohibits unconscionable conduct by a larger firm towards a weaker trading partner.

7.4 Dual enforcement mechanism and rationale for the authorisation process

This section outlines the institutional features of the Act, in particular, the dual enforcement mechanism.

One of the unique features of the Australian law is the dual enforcement mechanism.

Essentially, the Act provides that some matters are to be determined by a court, and others via an administrative process by the Commission and the ACT (the authorisation and notification processes contained in Part VII).

The dual enforcement mechanism is critical to the effectiveness of the Act’s administration.

The enforcement mechanism established under the Act is primarily a court-based process. Proceedings may be brought to the Federal Court for breaches of Part IV. In all cases except mergers, actions may be brought by the Commission or third parties. In merger matters, proceedings may only be commenced by the Commission or the Attorney-General.


However, parties may choose to seek authorisation or notification to exempt conduct from the operation of the Act where they consider there are public benefits to justify the conduct.

The role of the Commission includes investigating possible breaches of Part IV and, where appropriate, bringing proceedings against offenders. The Commission is also responsible for granting or refusing authorisation and notification applications on public benefit grounds. Where authorisation is granted, or notification is not revoked, the conduct in question is protected from prosecution under the legislation for the time specified in the authorisation determination, or in the case of notification, until the notification is revoked. These decisions by the Commission may be appealed to the Australian Competition Tribunal.

The Trade Practices Act allows authorisation in respect to all forms of restrictive conduct, except use of market power.246

The test that the Commission must apply in deciding authorisation matters is primarily based on balancing the anti-competitive effects against the public benefit in allowing the conduct to proceed. The Act does not expressly define public benefits for the purposes of authorisation. However, it does specify that international trade effects should be taken into account in assessing authorisations relating to mergers.

The legislation also allows parties to notify the Commission of certain types of exclusive dealing. Where notification has been given, the conduct is deemed to be lawful unless and until the Commission declares that the conduct is likely to substantially lessen competition and that the conduct has not, or is not likely to result in a public benefit which outweighs the anti-competitive detriment of the conduct. The notification process differs from the authorisation process in that the Commission must show a substantial lessening of competition before weighing the public benefits and detriments of a case. In an authorisation process, there is no requirement to prove substantial lessening of competition.

7.4.1 Rationale

The authorisation process provides a fair and transparent mechanism for assessing important issues of consumer welfare.

A very sharp distinction is drawn between matters that are assessed under the authorisation process, and those considered under Part IV of the legislation.

Authorisation is often sought matters where there is serious anti-competitive detriment involved, particularly in mergers or joint venture matters. These proposals will have a long-term impact on consumers. In such cases, the issue at hand will more often than not involve a decision about whether two firms should be allowed to merge or create a joint venture to form a monopoly, or near monopoly situation. Examples include ACI which involved a merger between the two largest glass container manufacturers in

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246 Section 46. The authorisation provisions are found in ss. 87D–91C.
Australia—Wattyl/Taubmanns—a proposed merger between the second and third largest paint companies in Australia; and Adelaide Brighton, involving the reduction in the number of market participants in the WA cement industry from three to two.

Because authorisation provides immunity from prosecution in serious matters concerning public benefit, it is not granted lightly, and the determination process must be rigorous, fair, transparent and accountable.

The authorisation process provides such a mechanism. It is rigorous and fair because it ensures public access to submissions and an opportunity for all interested parties to present their arguments via submission or in the course of publicly held conferences through a non-adversarial process. Any party, and importantly consumers themselves can participate in and comment on authorisation applications. Thus, the authorisation process ensures that the broadest range of views are represented in important debates of public interest. It is a transparent process in that submissions and determinations are publicly accessible. The process ensures that decision-makers are highly accountable, as authorisation decisions may be appealed to the ACT. In addition, the authorisation process provides a suitable forum for adjudication as the Commission and the ACT have the experience and expertise to assess complex economic efficiency arguments.

The authorisation process also enables flexibility in approach to deal with important public benefit arguments which may arise, particularly in deregulating industries, rural and regional sectors, and small business.

It is important in an economy the size of Australia that firms have an opportunity to argue that the conduct in question should be allowed on public interest grounds. As Baxt and Brunt have commented:

… an economist would regard the presence of such a gateway as essential in view of the size of the Australian economy and the potential significance of economies of scale.

In 1993 the Hilmer Committee also found the authorisation and notification process to be appropriate because it:

has the benefit of independent adjudication and the flexibility to address concerns specific to individual industries or activities on a case-by-case basis.

This aspect of the authorisation process is particularly relevant in relation to deregulating industries where there may be specific circumstances which should be taken into account. Since many structural changes are aimed at assisting the

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251 Hilmer, op cit. p. 96.
international competitiveness of Australian industries, the authorisation process, by enabling industry to find workable solutions to effectively implement reforms, plays a key role in assisting these industries to become more competitive internationally.252

Further, the authorisation process is a necessary element of the competition law regime, because it enables small businesses and others involved in activities, which may inadvertently breach the legislation but are unlikely to lessen competition, to pursue those activities without risk of prosecution.

7.5 Role of the Commission

This section outlines the role and functions of the Commission.

The Commission performs both enforcement and adjudication functions in relation to the competition law, and has a primary role in enforcing consumer protection provisions of the Act. The Commission also has a regulatory role in specific industries including telecommunications, airports, gas, electricity and rail.

The integration of these functions into one body sometimes raises criticisms that its powers are too broad. However, the Commission believes that this is unlikely to have a negative effect and in fact is appropriate and beneficial in the Australian context.

First, the concept that the Commission holds too much power is erroneous. The Commission cannot affect the legal rights of any person or business without their consent, unless it successfully prosecutes cases in court. Also, authorisation decisions can be appealed.

Second, each of the Commission’s functions are complementary to its role to ensure compliance with the restrictive trade practices provisions of the Act and deliver a consistent approach to the administration of competition policy over a wide range of industries.

The Commission’s regulatory role, which is primarily to improve market conditions in deregulating industries in accordance with a specific legislative framework involving access, pricing and anti-competitive conduct rules, is based on the same underlying economic policy as its role in Part IV. In carrying out its regulatory and enforcement functions, it is required to analyse the same economic and legal concepts of competitiveness, efficiency and market definition. Placing these functions within one entity ensures consistency in approach in applying economic policy.

If the administration of industry-specific competition regulation was placed in various different bodies, answering to different oversight mechanisms, this could result in inconsistent and unfair results. It may also lead to confusion and increased compliance costs by businesses when some of their functions may be subject to the restrictive trade practices provisions, and others subject to a different regulatory regime. Finally, it

252 Case studies are detailed in chapter 7.3.
ensures that the regulator has sufficient distance from specific industries to maintain its independence and integrity.

This issue was considered carefully when the Commission was given some industry-specific competition regulation roles as a result of the Hilmer review. The Hilmer Committee noted:

The Committee started from the proposition that competition policy across all Australian industries should desirably be administered by a single body. In particular, the Committee considers that there are sufficient common features between access issues in the key network industries to administer them through a common body. As well as the administrative savings involved, there are undoubted advantages in ensuring regulators take an economy-wide perspective and have sufficient distance from particular industries to form objective views on often difficult issues.253

The enforcement of consumer protection laws is closely associated with competition issues and may be considered to be an adjunct to competition laws. It is equally important to the efficient operation of markets that consumers are well informed about the prices and characteristics of products and services in order to make their choices. This is achieved through enforcement of the consumer protection laws. Consumers are the end-users in the competitive process, therefore, as a matter of policy it is important that the regulator understands the consumer impact of competition determinations.

Accordingly, to ensure consistency in the administration of the overall economic policy, and that the regulator does not ignore an important element of the equation—that is, the consumer—it is appropriate that the Commission has responsibility for consumer protection as well as competition enforcement.

From a practical perspective, it is also important in a small economy to have the economic and legal resources in one body to reduce regulatory costs and duplication of resources.

7.6 Prohibited conduct under Part IV of the Act

This section outlines the prohibitions within Part IV of the Act and the rationale for those prohibitions in detail.

The main categories of conduct which fall within the scope of the Trade Practices Act are price fixing, bid rigging, market sharing and collective boycotts (horizontal arrangements between competitors), exclusive dealing and retail price maintenance (vertical arrangements between buyers and sellers), mergers and misuse of market power. There is also a special category of conduct targeted at preventing unconscionable conduct in commercial dealings between businesses where one has a superior position or bargaining power.

Nevertheless, in most cases, such conduct may be allowed to continue if it can be shown that the public benefits outweigh the detriment.

253 op cit. p. 327.
7.6.1 Exceptions
Statutory exemption from certain prohibitions is available under the Trade Practices Act, in particular for conduct:

- that is specifically authorised or approved by a Commonwealth or state Act, or a territory law
- arising from industrial agreements relation to conditions of employment
- arising from a provision of the sale of a business
- arising from compliance with Standards Australia standards
- arising from partnership agreements between individuals
- arising from export agreements (if full particulars are notified to the Commission)
- consumer boycotts
- certain arrangements relating to patents, copyrights, trade marks or designs.\(^\text{254}\)

7.6.2 Per se offences
As discussed above, the primary objective of Part IV is to restrict anti-competitive conduct that is likely to result in inefficient market performance.

An important feature of the legislation is that the drafting of the Act is deliberately ‘loose’, reflecting the concerns of the drafters that if it was written too proscriptively it may fail to capture the economic reality of a particular situation. This would result in legislation which maybe both too wide or too narrow in some cases. However, the drafters of the legislation also recognised that such an approach may contain drawbacks in terms of certainty for business, as well as the cost and effectiveness of enforcement of the law.

Those categories of conduct which are considered very likely to cause harm are often referred to as per se offences, and, unless it can be shown that overriding public benefits justify the conduct, they are treated as breaches of the Act without a full inquiry of the competitive effects of the conduct. This is because in fact there is little likelihood that the conduct would be found to be permissible.

In this way, the Act gives business more certainty, thus facilitating better overall compliance with the intent of the legislation at a lower cost to business. It also reduces the time and cost involved in an inquiry (for both business and the regulator) by

limiting the issue to a factual examination of whether the conduct occurred or was attempted, rather than a full inquiry into the competitive effects of the conduct.

### 7.6.3 Price fixing

Section 45A of the Act deems the following to be illegal: contracts, arrangements or understandings between competitors that have the purpose, effect or likely effect of fixing, controlling or maintaining prices (including discounts, allowances, rebates or credits) for goods or services in which two or more of the parties compete.

Price fixing arrangements are deemed to be likely to result in a substantial lessening of competition under the TPA because they limit a key aspect of competition between rivals—price competition.

The Australian legislation provides that arrangements that have the purpose or effect of fixing prices are prohibited without requiring an examination of these factors. This is the case whether the price set is considered reasonable or not, or whether the effect is to fix a price, or merely to control or maintain prices. Equally, the prohibition extends to discounts, allowances, rebates and credits related to goods and services.

The rationale for the prohibition, as stated by the US Supreme Court in *US v Socony-Vacuum Oil Co* is that:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered or stabilised prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defence to price-fixing conspiracies.

The issue was also considered by the Hilmer Committee, which strongly supported the legislative prohibition of agreements between competitors which fix, control or maintain price. The Committee considered that such arrangements should be prohibited without any inquiry into the competitive effect of the arrangement. It was considered that while cartels survived, they are likely to impose substantial costs on the community, and may survive for extended periods. It was also argued that such agreements are generally unambiguously detrimental to economic efficiency, because they encourage technical and organisational inefficiency, without the benefits of increased production efficiency which would be associated with single-firm monopolies. Finally, the Committee found that removing a price fixing agreement is unlikely to undermine the internal efficiency or organisational integrity of the cooperating firms.

The prohibition on price fixing extends to arrangements that have either the purpose or effect of fixing, maintaining or controlling price.

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255 310 US 150 (1940) at 221.

256 F Hilmer, op. cit., p. 33.
In the case of *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd*, in relation to whether a joint rates card produced by competing radio stations amounted to an arrangement to fix, maintain or control prices, the court held:

The word ‘fixing’ in s 45A takes color from its general context and from the words used with it – ‘controlling or maintaining’ – and not from every determination of a price, following discussion between competitors, will amount to a price ‘fixing’. There must, we believe, be an element of intention or likelihood to affect price competition before price ‘fixing’ can be established. This will often be a matter of inference, requiring no direct evidence for it to be established.257

The addition of the wording ‘or effect’ is designed to ensure that price fixers cannot circumvent the operation of the provision by entering into agreements that are not expressly related to price, but have the effect of fixing or controlling price.

Courts have upheld this interpretation of the provision, by holding that some arrangements which do not expressly cover price may still fall within the scope of the provision.

In the case of *ACCC v CC(NSW) Pty Ltd & Ors*258, it was held that in an arrangement between four construction contractors and the Australian Federation of Construction Contractors (AFCC), the successful tenderer for a particular job would pay each of the unsuccessful tenderers $750 000 and a special fee of $1 million to the AFCC amounted to an arrangement or understanding likely to have the effect of controlling the price of the tender. It was held that tender prices were controlled because the $2 250 000 ‘cost’ was such a substantive proportion that it is more likely than not that the whole or part of the cost would be taken into account as an additional amount in calculating each party’s tender price.

Nevertheless, the legislation provides for a small number of exceptions to the general prohibition on price fixing. These exceptions do not exclude such arrangements from the operation of the Act, but require them to be assessed in accordance with the substantial lessening of competition test.

The main exceptions are provisions relating to joint ventures and collective acquisitions.

The joint venture exception contained in s 45A(2) covers a provision for the purposes of a joint venture which relate to the joint supply (or supply in proportion to share) of goods or services jointly produced by all the parties. This was introduced pursuant to the recommendations of the Swanson Committee in recognition of the fact that these types of joint venture arrangements may be likely to result in efficiencies and therefore, justified a full inquiry into the competitive effectives of the transaction.

Another important exception to the per se offence against price fixing is collective acquisitions. The exemption recognises that joint buying may in some cases be aimed


at achieving economies of scale not otherwise available, particularly to small business. Examples include centralised ordering, combined warehousing and/or distribution. On this basis such activities are considered under a competition test rather than as a per se offence.

7.6.4 Exclusionary provisions

Section 45(2)(a)(i) of the Act prohibits a corporation from entering into a contract, arrangement or understanding if it contains an exclusionary provision.

An exclusionary provision is one which has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services from or to particular persons or classes of persons, or the supply or acquisition of goods or services from or to particular persons or classes of persons in particular circumstances or on particular conditions. It is also necessary that at least two of the parties involved are competitive with each other in relation to the goods or services that are the subject of the exclusionary clause.

The problems associated with collective boycotts was identified prior to the introduction of the Trade Practices Act. In applying the 1965 Act to such conduct, the Commissioner for Trade Practices stated:

The arguments in favour of controlling channels of distribution are generally arguments, such as the need for proper service, that might justify a supplier’s care in choosing his distributor… This is a very different thing from suppliers banding together to decide collectively the terms on which any of them will choose and supply distributors. If agreements between competitors are required to support distribution arrangements, a purpose or effect is to protect the parties from competitive pressures likely if they each had to take responsibility of their own decisions. This is particularly so in cases where the parties have agreement on prices and discounts within the distribution structure, because control of the structure can be a necessary reinforcement to control of the prices or discounts.259

In the 2nd reading speech of the Trade Practices Amendment Bill 1977, Mr Howard said:

it is considered that boycotting the commercial activities of particular persons is generally undesirable conduct, and that the Trade Practices Act should take a firm line on these matters.

Commentators Clarke and Corones provide the following rationale for the per se offence:

In particular, they are disliked because they can be used to take away the freedom of the firms and individuals to trade as they wish and because they can be used to threaten the very existence, commercially or professionally, of targets having little or no countervailing economic power. The potential for boycotts to generate and exploit power is seen as inherently objectionable, regardless of whether or not they are used to lessen competition. For this reason, they are seen as being properly the subject of a per se prohibition.260


Currently, s. 4D may be interpreted to cover a broad range of arrangements, and is subject to a number of High Court appeals, which may clarify the scope of operations.\(^{261}\)

These decisions may impact on important areas including the application of s 4D in relation to joint venture arrangements and the scope of s. 47(6) which provides an exemption from a per se treatment of conduct falling within the scope of the exclusive dealing provisions of the Act.\(^{262}\)

### 7.6.5 Third line forcing

Sections 47(6) and 47(7) of the Trade Practices Act prohibit a supplier dealing with a customer on the condition that the customer will acquire goods or services from a third party, or refusal to deal if the customer does not agree to this condition. The rationale for the prohibition is that it limits the ability of the acquirer to choose between suppliers of another product.

Such conduct is prohibited as a per se offence, but may be allowed if it is notified or authorised by the Commission on public benefit grounds.

In 1976 the Swanson Committee Report stated that third line forcing is considered in virtually all cases to have an anti-competitive effect.\(^{263}\)

The per se nature of the prohibition on third line forcing has been subject to some criticism. It may be argued that such ties or bundling of products is only likely to have a detrimental impact on competition when the effect of the tie is to foreclose competitor’s access to a market. Accordingly, there is an argument that the provision could be limited to situations where the offender has significant market power in the market for the tying product. Also, the bundling of products may have some efficiency benefits, and it may be asked why bundling of products produced by a single party or related parties is assessed under a competition test, but bundling of separately owned products is considered under a per se test.

These issues were considered briefly by the Hilmer Committee in 1993.\(^{264}\) While Hilmer recommended the per se prohibition be removed on third line forcing, this recommendation was not adopted.

Historically, third line forcing raised particular concerns in Australia as there was a history of such conduct being associated with secret commissions or ‘kick backs’. The cases in this area were underpinned by a consumer welfare consideration. For example,

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261 The cases of South Sydney District Rugby League Football Club v News Ltd [2000] FCA 862 and Australian Competition and Consumer Commission v Visy Paper (2001) ATPR 41-835 are currently on appeal to the High Court.

262 Exclusive dealing is defined in s. 47 of the Trade Practices Act.

263 Swanson Committee, Op cit at para. 4.103.

264 F Hilmer, Op Cit., p. 52.
the United Permanent Building Society Ltd case concerned the impact of building societies’ requirements that members insure property offered as security with an insurance company nominated by the society; TPC v British Building Society concerned a lending scheme which required borrowers to take out life insurance with a nominated insurance company.

Firms will not fall within the scope of the third line forcing rules unless goods or services have been supplied ‘on condition’ that the acquirer also acquire goods or services from a third party, or supply has been refused because the acquirer has not agreed to acquire goods or services from a third party. Accordingly, the per se prohibition on third line forcing will only apply when there is a condition that goods or services are acquired from another person. If the supplier acquires the ‘tied’ products and then charges the customer for both products, this does not fall within the prohibition on third line forcing.

Courts have also recognised that when a package of goods or services is supplied, such as beer delivered to a particular destination, or entertainment venue hire and ticketing services, this may also fall outside the scope of the prohibition on third line forcing.

Since 1995, third line forcing may be notified to the Commission pursuant to s. 93 of the Trade Practices Act. This means that when an applicant lodges a notification with the Commission, the notification immunises the conduct. Once notification is received, the onus is on the Commission to challenge the notification if it believes that the public detriment of the conduct outweighs the public benefits. Notification takes effect 14 days from the date of lodgement or on the date on which the Commission advises the applicant that it has decided not to give notice that the public detriment of the conduct outweighs the public benefits.

In this way the legislature has provided a mechanism for efficiency-enhancing bundling of non-related products to proceed, without placing the more onerous task of proving public benefit outweighs detriment, as required in the authorisation process on the parties.

7.6.6 Resale price maintenance

Another form of vertical restraint which is treated as a per se offence is resale price maintenance (s. 48). However, resale price maintenance may be authorised.

Sections 96 and 96A define resale price maintenance as conduct by a supplier who:

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265 (1976) 26 FLR 129.


267 Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd (1986) ATPR 40-751.

268 The Paul Dainty Corporation Pty Ltd & Anor v The National Tennis Centre Trust & Ors (1989) ATPR 40-951.
- attempts to induce a person not to sell the supplier’s products or services at a price less than a price specified by the supplier

- makes known to a person that they will be refused supply unless the person agrees not to sell the supplier’s products or services at a price less than a price specified by the supplier, or

- enters into an agreement for the supply of goods or services containing a provision that the purchaser will not sell below the supplier’s specified price.

The competitive harm associated with resale price maintenance is that it is often associated with an underlying price fixing arrangement. Dealers may collude on price, and then require a manufacturer to enforce it through resale price maintenance. Equally, resale price maintenance may be used to enforce a supplier-driven cartel.

As discussed above, such vertical restraints used to enforce horizontal cartel behaviour was a common feature of the Australian economy before the introduction of trade practices legislation, and accordingly, a strong policy stance has been taken in relation to resale price maintenance.

In 1993 the Hilmer Committee considered whether resale price maintenance should be retained as a per se offence. It took the view that although there may be some instances where resale price maintenance may be efficiency-enhancing, there was not convincing evidence that efficiency-enhancing resale price maintenance occurred with such frequency that it should be assessed under a competition test rather than as a per se offence. Nevertheless, the Committee did consider that because such conduct could raise complex efficiency arguments, it would be appropriate to consider it under the authorisation provisions.269

7.6.7 Contracts, arrangements and understandings that have the purpose or effect or likely effect of substantially lessening competition in a market (s. 45)

Section 45 of the TPA provides that contracts, arrangements and understandings that have the purpose, effect or likely effect of substantially lessening competition in a market are prohibited.

This covers the category of horizontal or vertical conduct that does not necessarily involve a direct reduction in competition between competitive rivals, or fall within specific provisions regarding vertical restrictions, but may nevertheless affect competition within a market. Examples of the types of conduct that may fall within the scope of this provision include information exchange agreements, arrangements involving non-price cooperation, professional and industry codes, and joint ventures.

The provision requires that the purpose or effect on competition must be substantial, and the framework for analysis is to assess competition within a market. The phrase

269 F Hilmer, op. cit., p. 57–58.
‘substantial’ has been interpreted by courts to mean something that is not insubstantial, insignificant or minimal.270

Some forms of non-price vertical restrictions which would constitute exclusive dealing under s. 47 are exempt from the operation of s. 45.271

Equally, arrangements involving the direct or indirect acquisition of shares or assets are exempt from the operation of s. 45. Those types of arrangements are assessed under the merger provisions contained in s. 50 of the Trade Practices Act.272

7.6.8 Non-price vertical restrictions

Section 47 prohibits certain types of vertical restrictions where the purpose, effect or likely effect is to substantially lessen competition. As outlined above, while third line forcing is contained in s. 47, it is treated as a per se offence, unlike other non-price vertical restrictions.

Vertical restrictions involve various types of restrictions on trade imposed between buyers and suppliers.

Common forms of non-price vertical restrictions include solus agreements (i.e. supply agreements subject to the acquirer agreeing not to acquire similar goods or services from another person), requirements contracts (requiring a person to acquire or supply a certain proportion of their requirements from the one buyer or supplier), tying (requiring buyers to acquire a bundle of goods or services), and customer and territorial restrictions (i.e. restrictions on re-supplying).

The regulation of restrictive terms of trade between buyers and sellers is generally based on economic efficiency arguments. Vertical restraints may raise competition issues because such restrictions may lead to a reduction in competition in either the buyer or seller side of the market. That is, if buyers are not able to source products from a range of suppliers because of restrictive terms of trade with a particular supplier, this may have a detrimental effect on competition in the supplier’s market and enable that one supplier to enjoy market power in that market. Essentially, the seller’s conduct forecloses the market from other sellers. Similar issues may arise when restrictions are placed on suppliers’ ability to deal with a range of competing acquirers.

Alternately, such exclusive supply arrangements may be used to facilitate collusion. Collusive arrangements work best when the participants are not able to deal in secret outside the cartel to undermine cartel prices for their own advantage. However, when the market is characterised by exclusive dealing arrangements, it is difficult for a firm to engage in such trading outside the cartel. Such concerns are particularly relevant in a small economy such as Australia, where the relatively concentrated nature of markets means that the threat of foreclosure and cartelisation is greater.

270 ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1) (1990) 27 FCR 460 at 478.

271 Section 45(6).

272 Section 45(7).
Some vertical restrictions may also affect other markets. For example, territorial restrictions imposed on a buyer by a supplier which restrict the ability of buyers to compete against each other would affect the buyer’s market.

The purpose of imposing vertical restrictions in the Australian context was discussed in the Swanson Report which concluded:

For trade practices legislation to concentrate solely upon horizontal restrictions of competition would be to ignore the structure inherent in many areas of the Australian economy. Where there are few market participants at primary distribution levels, the elimination of horizontal restraints may not, of itself, induce competitive behaviour. That will often only be achieved by competitive pressures stemming from levels further down the chain of distribution.273

Nevertheless, although the potential competitive dangers of vertical restrictions are recognised under the Trade Practices Act, it is implicitly acknowledged that many vertical arrangements may enhance efficiency. Therefore, for those vertical restrictions not included in a per se category of offence, the legislation does not prohibit vertical restrictions unless it can be shown that the arrangement has the purpose, effect or likely effect of substantially lessening competition in a market.

The legislation also recognises an underlying economic view that vertical restraints are less likely to raise competition issues and more likely to raise legitimate efficiency arguments than horizontal restraints between competitors in the administrative mechanisms which are used to assess vertical restraints.

Thus, the notification process is available for conduct falling within the scope of s. 47. Under the notification process, parties may lodge a notification, but it is up to the Commission to then determine whether a particular vertical arrangement warrants further inquiry, and the onus of showing that the conduct is against public interest rests with the Commission. Under the authorisation process, a full assessment of public interest would need to be made in each case, the onus lying on the parties to show that the public interest in the conduct outweighs the competitive detriment. Thus, notification provides a faster, less costly and less onerous alternative for parties, reflecting the lesser likelihood of damage arising from vertical restraints falling within s. 47.

7.6.9 Misuse of market power (s. 46) and unconscionable conduct

Section 46 prohibits a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor
- preventing the entry of a person into that or any other market, or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.

273 Swanson Committee, op. cit., at para. 4.90.
Section 46 is a necessary complement to prohibitions against cartel arrangements and vertical restrictions in that its objective is to ensure that the effects of such arrangements cannot be achieved individually by a person in a position of substantial market power. As one commentator has noted:

There is little point in proscribing the fixing of prices at anticompetitive levels or the limiting of production by agreement between competitors if the purpose of achieving like results by one in a monopoly position (and hence, often, their achievement) is not controlled.274

Accordingly, the underlying economic damage which s. 46 seeks to remedy is the same as that sought in prohibiting certain types of horizontal and vertical restraints on trade. That is, to prevent conduct which damages the competitive process. Section 46 also has a fair trading objective of protecting smaller business from anti-competitive conduct of firms that possess substantial market power.

As discussed in chapter 3, Section 46 matters are treated differently to other restrictive practices in that the analytical framework does not incorporate an effect test. The Commission has outlined its proposal for amendments to s. 46 in chapter 3 that better reflect the objectives of the competition law and fair trading by restricting anti-competitive conduct which harms consumer welfare.

The Trade Practices Act prohibits unconscionable conduct in both commercial dealings (ss. 51AA and 51AC) and in consumer transactions (s. 51AB). To some extent, this also provides weaker parties some redress against the practices of larger firms in the market.

Section 51AA provides that a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the general non-statutory or common law as it has evolved through decisions of the courts. This generally encompasses situations that have the following elements:

- one party to a transaction suffered from a special disability or disadvantage, in dealing with the other party, and
- the disability was sufficiently evident to the stronger party, and
- the stronger party took unfair or unconscionable advantage of its superior position or bargaining power to obtain a beneficial bargain.

Section 51AC specifically prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services. The provision provides a list of non-exclusive factors that may be taken into account in assessing whether the conduct is unconscionable. These include the relative bargaining strengths of the parties whether, as a result of the stronger party’s conduct, the other was required to meet conditions not reasonably necessary to protect the stronger party’s legitimate interests whether the

target business could understand any documentation used and the use of any undue influence, pressure or unfair tactics by the stronger party.\textsuperscript{275}

Section 51AC only applies to transactions less than or equal to $3 million. It does not apply in any case to transactions in which the business subject to the conduct (target business) is a listed public company.

The extent to which these provisions may assist businesses in addressing issues of unequal bargaining power are tested on a case by case basis by the courts.

7.7 Comparison of Australian framework with other jurisdictions

This section outlines the similar approach taken to competition law in other modern economies.

7.7.1 United States of America

The major federal statutes governing restrictive trade practices law in the US are the Sherman Act 1890, the Clayton Act 1914, and the Federal Trade Commission Act 1914.

There are two main sections of the Sherman Act. Section 1 prohibits contracts, combinations and conspiracies in restraint of trade or commerce. Section 2 prohibits monopolisation, attempts to monopolise, and combinations or conspiracies to monopolise. Penalties can be imprisonment and/or a fine.

The Clayton Act was passed in 1914 to define anti-competitive acts more clearly. It prohibits tying clauses and exclusive dealing and mergers that may have the effect of substantially lessening competition. In 1936 s. 2 of the Clayton Act was amended by the Robinson-Patman Act to make price discrimination illegal if it may substantially lessen competition or tends to create a monopoly, or injures, destroys or prevents competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. In 1976 the Hart-Scott-Rodino Act was passed, providing for the pre-notification of large proposed mergers.

The Federal Trade Commission Act, also passed in 1914, declared unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices affecting commerce to be unlawful. The Federal Trade Commission Act also created the Federal Trade Commission (FTC) to perform investigatory and adjudicative functions in relation to competition and consumer protection laws.

While the terminology used in the US legislation is more vague than the Trade Practices Act, it covers very similar forms of conduct as the Australian legislation and in its interpretation conforms to the same underlying economic principles. To a significant extent, the direction of the US laws has been shaped by its judiciary and many of these concepts were adopted into the Australian legislation in 1974.

\textsuperscript{275} For a full list of the factors, see section 51AC.
While it could be argued on the face of the Sherman Act, that any conduct which restrains trade may be prohibited, the US courts have interpreted that the words ‘restraint of trade’ only embrace acts or contracts or agreements or combinations which, either because of their inherent nature or effect or because of the evident purpose of the acts etc., unreasonably restrain trade. Accordingly, the analysis applied is that when a practice has no beneficial effects and only harmful effects, it is considered to be inherently injurious and therefore prohibited per se. Practices which do not fall within a per se category of conduct are analysed under a ‘rule of reason’ test to determine whether the effect will be injurious or not. In particular, the US courts have established a per se prohibition on cartelisation similar to the prohibition on price fixing and collective boycotts found in the Australian legislation.276

However, there are some distinct differences between the US and Australian restrictive trade practices laws. The US law treats price discrimination as illegal when it substantially lessens competition. Such a law does not sit comfortably within a framework based solely on protection of efficiency-enhancing competition. In many instances, price discrimination is an efficient pricing mechanism whereby a firm increases output by charging each consumer what they are prepared to pay for a product or service. Nevertheless, it may be considered as part of a broader competitive strategy to protect the interests of small business against larger competitors and prevent exploitation of trading partners.

The US law also differs in terms of the administration of its restrictive trade practices laws. It is a court-based system in which a court will weigh both competition and public benefit issues in a single hearing. This means that if a category of conduct is identified as a per se offence, the courts will not inquire further as to any potential public benefits which may mitigate the conduct. In Australia, as outlined above, the Trade Practices Act enables the Commission to consider whether authorisation for price fixing and other per se offences may be granted on the basis of public benefits.

As in Australia, statutory bodies have an important role in the enforcement of restrictive trade practices laws in the United States. Both the FTC and the Anti-trust Division of the Department of Justice play a primary role in enforcement and in handling pre-merger notifications under the Hart-Scott-Rodino Act of 1976. The FTC also has responsibilities in relation to the enforcement of consumer protection provisions of the Clayton Act, including unfair and deceptive practices.

7.7.2 Canada

The primary legislation governing restrictive trade practices in Canada is the federal Competition Act. It aims to promote competition in the marketplace by stopping anti-competitive practices. It applies to most businesses and contains criminal as well as civil provisions.

Criminal offences under the Competition Act include conspiracy to fix prices or price fixing and bid rigging. Civil offences include abuse of dominant position and exclusive

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276 The validity of the per se offence approach in the US was confirmed in United States v Socony-Vacuum Oil Co. et al., 310 US 150, 218 91940.
dealing which are likely to result in a substantial lessening of competition, refusal to deal which substantially affects a person’s business or results in an inability to carry on business because they cannot obtain adequate supplies of a product on usual trade terms, and mergers.

The Commissioner of Competition, who heads the Competition Bureau, is responsible for the administration and enforcement of the Competition Act, as well as other consumer protection laws. The Bureau has power to bring civil matters before the Competition Tribunal or other courts, depending on the issue. It has the ability to refer criminal matters to the Attorney General of Canada who then decides whether to prosecute before the courts.

The Canadian law differs somewhat from the Australian system in that it has an express ‘efficiency’ exception to mergers, and the Competition Tribunal may apply an efficiency test in relation to certain types of restrictive conduct. It does not have the broad public benefit override test that is applied in Australia through the authorisation process.

It also differs in that the Commissioner of Competition is a senior officer of a government department, Industry Canada, which is responsible for competition policy in Canada. Therefore, in Canada there is an overlap between competition enforcement and policy, whereas in Australia, there is clear separation between the role of the Commission, and the government’s role in setting policy.

7.7.3 European Community (EC)

The primary legislative provisions governing restrictive trade practices in the EC are articles 81 and 82 of the EC Treaty. Article 81 prohibits agreements and concerted practices which may affect trade between Member States of the EC and which may have the object or effect of preventing, restricting or distorting competition within the common market. Article 82 prohibits abuse by an undertaking of a dominant position within the common market. Mergers are regulated under the European Merger Control Regulation 1989.

The Commission of the European Communities (the ECC) has responsibility for the administration of restrictive trade practices laws. Article 81(3) enables the ECC to exempt conduct from Article 81(1) which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit as long as the restriction is indispensable to obtaining those goals, and does not eliminate competition in respect to a substantial part of the products in question. Effectively, this has lead to the development of a centralised authorisation system for all restrictive practices requiring exemption based on efficiency considerations.

In practice, the ECC has adopted an approach that is similar to other jurisdictions in interpreting what types of restraints of trade to prevent. Firstly, it applies an ‘appreciable effect on competition’ test, in order to remove minor cases from the scope of Article 81.277 Agreements between competitors that have the objective of restricting

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competition by means of price fixing, output limitation or sharing of markets or customers are considered the most harmful and therefore are almost always prohibited.²⁷⁸ The ECC has granted ‘block exemptions’ pursuant to Article 81(3) for certain types of conduct including certain types of research and development projects, certain types of vertical arrangements, technology transfer agreements, motor vehicle distribution and servicing agreements, and some franchising agreements.

The ECC investigates alleged breaches of Articles 81 and 82 and may impose fines of up to 10 per cent of the turnover of each undertaking taking part in an infringement.

7.7.4 New Zealand

The *Commerce Act 1986* is the primary legislation governing restrictive trade practices in New Zealand.

The Commerce Act was modelled on the Australian Trade Practices Act, but differs in some respects. The Commerce Act prohibits contracts, arrangements and understandings that contain provisions, which have the purpose or effect of substantially lessening competition in a market. Price fixing and retail price maintenance are treated as per se offences. Recently, the New Zealand government decided to amend the Commerce Act to replace the existing ‘dominance’ thresholds for mergers and misuse of market power to adopt a ‘substantial lessening of competition’ and ‘substantial degree of market power’ tests respectively.

Like the Australian model, the New Zealand legislation provides a dual enforcement mechanism. The Commerce Act provides that breaches of the legislation will be determined by the courts. The NZ Commerce Commission was established to perform a similar role to that of the Commission. It is empowered to authorise certain restrictive practices, and to investigate and take proceedings in relation to breaches of the Commerce Act, where appropriate. However, appeals from the decisions of the Commerce Commission are taken to the High Court, which for the purpose of such appeals, comprises a judge of the court and at least one lay member appointed because of their knowledge or experience in industry, commerce, economics, law or accountancy.

The Commerce Act specifically requires the Commerce Commission to have regard to any efficiencies in assessing conduct under the authorisation provisions. In practice, the Commerce Commission focuses on economic efficiency in assessing public benefit.

8 Overview of Australia’s merger laws

Summary

The opening part of this chapter provides a brief outline of Australia’s current mergers law regime.

The next section (8.1) focuses on the underlying rationale for mergers law and outlines its economic basis. In addition, it assesses claims that merger law is responsible for stifling innovation and finds little evidence in support of this argument.

The following section (8.2) covers efficiency issues dealing specifically with the so-called ‘efficiency defence’ in the case of anti-competitive mergers. It assesses many of the problems and difficulties that must be overcome in applying an efficiency defence framework.

Section four covers a range of merger issues. It provides an overview of the benefits of the current substantial lessening of competition test as well as outlining the authorisation process. It describes the Commission’s approach on market definition and canvasses some market definition issues and outlines the Commission’s current approach to ‘failing firms’.

8.1 Outline of Australia’s mergers law

8.1.1 Section 50 and 50A

Unlike other provisions of Part IV of the Act that focus on conduct, the merger provisions focus on the structure of a market. This focus recognises the accepted link between conduct in a market and the structure of a market.

Section 50 generally prohibits mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services.

Section 50(3) provides a non-exhaustive list of factors that must be taken into account in determining whether an acquisition would have the effect or likely have the effect of substantially lessening competition. Those factors are:

(a) the actual and potential level of import competition in the market

(b) the height of barriers to entry to the market

(c) the level of concentration in the market

(d) the degree of countervailing power in the market

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins
(f) the extent to which substitutes are available in the market or are likely to be available in the market

(g) the dynamic characteristics of the market, including growth, innovations and product differentiation

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor

(i) the nature and extent of vertical integration in the market.

Section 50A deals with certain acquisitions occurring outside Australia that would substantially lessen competition in a market within Australia.

If an acquisition is not covered by s. 50 and is covered by s. 50A, the Commission, the Minister or any other person can apply for a declaration by the Australian Competition Tribunal (Tribunal) that an acquisition producing a substantial lessening of competition has occurred and that it has no resulting public benefit which would justify it. Such an application must be made within 12 months of the acquisition.

If a declaration to this effect is made, the relevant business has up to six months (which may be extended to a maximum of 12 months) in which to cease carrying on business in the relevant market.

In its consideration of matters under s. 50A, the Tribunal is required to take account of the same criteria as apply to Commission determinations for merger authorisation.

Section 4G of the Act provides:

For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition.

Section 4E of the Act provides:

For the purposes of this Act, unless the contrary intention appears, ‘market’ means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.

### 8.1.2 Legal remedies for anti-competitive acquisitions

There are three main legal remedies that the Commission is able to pursue in the event of anti-competitive acquisitions.

**Injunctions**

Pursuant to s. 80 of the Act, the Commission is able to seek a permanent injunction to restrain an anti-competitive merger. In addition, the Commission can also seek an interim injunction from the Federal Court to stop the proposed acquisition going ahead, prior to a final hearing.
**Pecuniary penalties**

Where an acquisition occurs without notice to the Commission and it considers there to have been a breach of the Act, the Commission is able, in accordance with s. 76(1) of the Act, to pursue penalties against all those involved in the acquisition, including directors, lawyers, banks and other advisers, as well as the corporations themselves. The Commission can also consider seeking injunctions against the same persons to prevent similar unlawful conduct in the future, pursuant to s. 80(1).

**Divestiture**

The Commission can also apply to the Federal Court for an order pursuant to s. 81 of the Act that the acquirer dispose of the shares or assets in contravention of the Act or apply for a declaration that the acquisition is void (resulting in the vendor refunding the consideration for the acquisition).

**8.1.3 Merger authorisation**

Parties to mergers at risk of breaching the Act may apply to the Commission for authorisation. Authorisation is the process of granting immunity, on public benefit grounds, for mergers and acquisitions which would or might otherwise contravene ss. 50 or 50A of the Act.

Applications for authorisation are considered initially by the Commission. Its determinations can be reviewed by the Tribunal on application by an interested party. Authorisation may be granted conditionally and/or may be granted subject to statutory undertakings provided by the applicant.

The Commission has a period of 30 days to consider an authorisation application. This may be extended to 45 days for complex matters. In addition, it may also be extended by the Commission requests for information from the applicant or with the agreement of the applicant. If the Commission has not made a determination in the relevant period the authorisation is deemed to have been granted.

An application for authorisation is a public process in which any interested party may make a submission, and submissions are open for inspection on a public register, and there may be provision for a conference of interested parties. There is provision for maintaining the confidentiality of commercially sensitive information or otherwise where it appears desirable to the Commission to grant confidentiality.

Under s. 90(9) of the Act, the Commission will not grant authorisation:

unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

Section 90(9A) provides that in determining what amounts to a benefit to the public, the Commission must have regard to:

- a significant increase in the real value of exports
- significant import substitution
other relevant matters that relate to the international competitiveness of any Australian industry.

The onus is on the applicant to satisfy the test.

8.1.4 Merger undertakings

Section 87B of the Act allows the Commission to accept written undertakings in connection with matters where it has the power or function under the Act.

Undertakings pursuant to s. 87B are a flexible alternative to simply opposing an acquisition where the Commission believes that the acquisition is likely to substantially lessen competition.

When the Commission forms the view that a proposed acquisition is likely to substantially lessen competition in breach of s. 50, it will provide reasons for that view. If parties consider that undertakings could be offered to reduce or eliminate the stated concerns, they may choose to offer the Commission undertakings aimed at restructuring the proposal in such a way as to address the competition concerns.

In the case of merger undertakings, the Commission usually favours ‘structural’ undertakings. Structural undertakings often involve the divestiture of certain clearly identifiable assets of the acquired businesses to a new entrant or an existing smaller player in a particular market or markets. Such undertakings are considered to be more effective in maintaining competition and are more easily established, monitored and enforced, and are typically the Commission’s preferred remedy.

The use of s. 87B provide far greater certainty to merger parties in the event that the Commission raises concerns regarding a merger proposal than is the case under the authorisation process. The Commission’s authorisation determinations, unlike s. 87B undertakings, are subject to merits review before the Tribunal.

8.2 Rationale for mergers law

8.2.1 Introduction

Mergers law plays a critical role in ensuring competitive conduct by preserving competitive industry structures. An active merger assessment process is necessary to ward off anti-competitive mergers in order to promote and enhance economic efficiency. The aim is to prevent the accumulation of market power resulting in higher prices and/or lower quality goods and services for consumers.

Various social reasons have also been advanced for the application of mergers law.

It may be desirable to widely disperse the exercise of economic power within society as it leads to a wider distribution of opportunities. This facilitates the opportunity for everyone to carry on business and to prosper on one’s own individual merits as determined by a free market. From this perspective, the free market may be viewed as
emphasising competition as an aspect of human liberty that may be impinged upon by the exercise of market power.279

Mergers law also guards against the exercise of unchecked economic power. This is the fear of concentrated power in its social and political aspects, and a desire for the dispersal of power throughout society.280 The community may be extremely wary of the accumulation and aggregation of power that is left unchecked by market or political forces.

Concern has also been expressed that the concentration of economic power will eventually lead to a concentration of political power, which would be contrary to democratic objectives.

In simple economic terms the rationale for mergers law is to promote economic efficiency in all of its various forms: allocative, productive and dynamic efficiency.

8.2.2 Allocative efficiency

The theoretical case for competition laws has been traditionally founded upon the need to protect allocative efficiency.

The typical outcome of an anti-competitive merger is that prices rise and output is reduced. This results in an inefficient level of output because some of the consumers who would have purchased the product in a competitive market do not choose to do so at the higher price, hence the loss of what is called allocative efficiency.

This outcome produces a net social cost because the losses to consumers are larger than the increase in profits to the merged firm. This net social cost is known as a deadweight loss. The deadweight loss is the reduction in the consumer surplus and the producer surplus that results when the output of a product is restricted to less than the optimal efficient level.281

The elevation of prices also results in an income transfer from consumers to producers. It is questionable whether it is desirable for such an income transfer to occur, although economic theory provides no definitive answer to this problem.

8.2.3 Productive efficiency

Productive efficiency is an aspect of market performance that denotes the efficiency of a market in producing current products at the lowest cost in the long run, utilising


280 ibid, p. 25.

281 Consumer surplus is the difference between what the consumer would have been willing to pay for each unit of a good or service purchased and what the consumer actually had to pay for those same units. Producer surplus is the difference between what the producer would have been willing to accept when selling each unit of a good or service and the amount they receive for each of those same units.
existing technology. Productive efficiency means that given output, production takes place in practice using the most effective combination of inputs.

It has long been recognised within economic literature that competition plays an important role in deterring productive inefficiency. Smith observed in 1776 that ‘monopoly … is a great enemy to good management.’

Leibenstein postulated that the lack of incentives or competitive pressures may lead firms with market power to neglect productive efficiency and tolerate what he called X-inefficiency. X-inefficiency represents the gap between actual and minimum attainable supply costs. According to Leibenstein:

[With a given] set of human inputs purchased and … knowledge of production techniques available to the firm, a variety of outputs are possible. If individuals can choose, to some degree the APQT bundles (Activity, Pace, Quantity of work, Time spent) they like, they are unlikely to choose a set of bundles that will maximise the value of output.

Although X-inefficiency can affect both monopolists and competitors alike, it will impose a far greater impact on a monopolist because a monopolist will have no discipline imposed by competition. The existence of X-inefficiency means that the price of market power to society is not just limited to the loss of allocative efficiency but also productive efficiency.

8.2.4 Dynamic efficiency

Dynamic efficiency refers to the rate of technological innovation. Dynamic efficiency reflects the needs of industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

Firms innovate in order to improve their competitiveness. Innovation can help a firm lower its costs of production and/or produce better products giving it a competitive advantage over its rivals in the market place. Left to compete in terms of price alone, with given products and technology, there is little scope for an individual firm to enhance its profitability even temporarily. The ability of a firm to change the products that it sells or the technology it uses, increases the field over which it can compete.

It has been postulated that there may be a trade-off between allocative and productive efficiency on the one hand with dynamic efficiency on the other.

One of the popular versions of the Schumpeterian hypothesis is the argument that market power stimulates innovative activity for reasons such as:


Firms with greater market power are better able to finance innovation from their own financial resources.

Firms with greater market power can more easily appropriate the returns from innovation and hence have better incentives to innovate.285

The Schumpeterian hypothesis has received endorsement from the Business Council of Australia (BCA), commenting that:

Excessive competition in some sectors may be hampering innovation and risk taking.286

However, counterarguments to this form of the Schumpeterian hypothesis have also been advanced.287

- The absence of active competitive forces may allow certain behavioural disadvantages of monopoly to become manifest. Managers may exhibit a preference for leisure and become sleepy, and bureaucratic inertia and control loss may generate substantial x-inefficiency.

- Incumbent monopolists whose positions are based on previous innovations will enjoy a lower net return from introducing a new innovation which displaces part of the activities of the old ones than new entrants would. Consequently the incentives to innovate may decrease as the degree of market power increases.

Porter has observed that:

Innovation in the broad sense is driven by competition. While technological innovation is the result of a variety of factors, there is no doubt that healthy competition is an essential part. One need only review the dismal innovation record of countries lacking strong competition to be convinced of this fact.288

8.2.5 Empirical evidence on dynamic efficiency

There is a dearth of academic literature to support the Schumpeterian hypothesis and the proposition that market power and high levels of market concentration stimulates innovation.

Geroski concluded that ‘(t)here is, in short, almost no support in the data for popular Schumpeterian assertions about the role of actual monopoly in stimulating


progressiveness’ based on a study utilising UK firm data during the 1970s. Geroski drew the following policy conclusions:

Monopolies, whether publicly or privately created, do not seem to be particularly progressive in general, and it is hard to believe that restraining the hand of anti-trust authorities will improve this picture. Small firms and new entrants play a role in stimulating innovativeness which is clearly discernible in the data, and probably considerably understates their total effect on innovation. Competition - desirable on other grounds - certainly seems desirable in this area.

Symeonidis reviewed the empirical literature on the links between innovation, market structure and firm size and concluded that:

The present literature survey suggests that there seems to be little empirical support for the view that large firm size or high concentration are factors generally conducive to a higher level of innovative activity.

The most recent review of the empirical literature by Ahn on this subject concluded that:

The claim that market concentration is conducive to innovation does not appear to be supported by recent empirical findings. Motivated by the Schumpeter conjecture that large firms in concentrated markets have advantage in innovation, many empirical studies have investigated the relation between market concentration and innovation. On the whole, however, there is little empirical support for the view that large firm size or high concentration is strongly associated with a higher level of innovative activity.

Given the paucity of empirical evidence supporting the Schumpeterian hypothesis, claims advanced in favour of relaxing merger laws to promote innovation should be treated with extreme caution.

8.3 Efficiency issues

In 1968 Oliver Williamson postulated a trade-off model to assess the societal benefits and detriments of mergers. Under Williamson’s ‘naive trade-off model’, it is possible for the improved productive efficiency achieved through the creation of a merged firm to outweigh the detrimental consequences through the loss of allocative efficiency from

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290 ibid.


allowing the merger to proceed. However, Williamson recognised that most mergers produced neither significant price nor efficiency consequences, and that his model had limited application.

The Williamson trade-off model 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. In reference to the Act, Burn and Munchenburg have argued that:

in the actual application of the legislation, the regulator gives undue weight to consumer welfare, particularly as measured by prices. For example, this appears to be the approach taken by the ACCC in its public pronouncements, particularly where it seeks to put itself against major corporations on behalf of the general community.294

However, contrary to the impression that is often created, mergers do not always generate efficiencies. A recent study which reviewed the empirical evidence on efficiency gains in mergers provides good reason for a cautious approach. That study concluded that:

First, the empirical literature does provide some support for fear that horizontal mergers increase market power. Second, there seems to be no support for the general presumption that mergers create efficiency gains. Third, in particular cases, however, mergers do create efficiencies.295

There are various problems associated with the adoption of an efficiency defence in the event of an anti-competitive merger.

8.3.1 Choice of an efficiency standard

The first problem is choosing the exact efficiency standard against which to assess an anti-competitive merger. Williamson’s trade-off model would permit a merger that on balance increases total surplus despite prices rising above the competitive level. The simple Williamson model suggests that in many cases a relatively modest gain in economies of 5 per cent or less would be sufficient to offset a price increase of 10 or 20 per cent.296

One difficulty with the total surplus approach is that it ignores the income transfer from consumers to producers, notwithstanding that the total overall surplus has increased. Some argue that the monopoly overcharge—that is, the higher prices—represents a real harm to consumers, not just a transfer from one consumer to another in the form of shareholders.

294 Peter Burn and Steven Munchenburg, ’Taxation and Regulation in an Open Economy’, Aspire Australia, Business Council of Australia, 2002, pp. 135–149.


296 Organisation for Economic Co-operation and Development, ‘Efficiency Claims in Mergers and Other Horizontal Agreements: Background Note by the Secretariat’, Competition Policy and Efficiency Claims in Horizontal Agreements, OECD, Paris 1996.
This problem may be further exacerbated in the Australian economy because of high levels of foreign ownership. Foreign ownership means that the total surplus approach may constitute a transfer of income from Australian consumers to foreign shareholders, and therefore facilitate a redistribution of income from Australians to foreigners that is detrimental to overall national economic welfare.

An alternative approach to the total surplus standard is the consumer surplus standard. This standard requires that the efficiency gains must be so substantial as to ensure that the merger will not result in an income transfer from consumers to producers. In other words, the increase in efficiency generated as a result of the merger is so large as to cause the profit-maximising price to be no higher than the pre-merger price.

Another approach is that of total welfare, in which efficiency gains from the merger that would occur in markets other than the relevant market for competition analysis are included in the trade-off analysis. If the merger was to occur in an input market, then the overall impact of the merger would cascade throughout the entire economy with the direct effect transferred through to other inter-related markets.

### 8.3.2 International experience

#### United States

United States law has no explicit efficiency defence. The only criterion considered in mergers is the effect on competition. However, the US Department of Justice and the US Federal Trade Commission’s *Horizontal Merger Guidelines* do address the issue of efficiencies in merger inquiries. According to those guidelines:

> The Agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed *merger-specific efficiencies*.

*Cognizable efficiencies* are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.\(^{297}\)

#### European Union

Efficiency considerations with respect to mergers in the European Union are covered by the Merger Regulation.\(^{298}\) The test within the Merger Regulation is for the

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\(^{297}\) Revised Section 4 Horizontal Merger Guidelines Issued by the US Department of Justice and the Federal Trade Commission, April 8, 1997.

prohibition of a concentration that creates or strengthens a dominant position. There is no real legal possibility of justifying an efficiency defence under the Merger Regulation. Efficiencies are assumed for all mergers up to the limit of dominance—the ‘concentration privilege’. Any efficiency issues are considered in the overall assessment to determine whether dominance has been created or strengthened and not to justify or mitigate that dominance in order to clear a concentration that would be otherwise prohibited.

The European Commission has recently sought out views as to the proper role and scope of efficiency considerations in the field of merger control.299

Canada

Canada’s Competition Bureau is responsible for administering and enforcing the *Competition Act 1985*. Under s. 92 of the Competition Act, the basic mergers threshold test is whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market. To oppose a merger, the Competition Bureau’s Commissioner of Competition must formally apply to the Canadian Competition Tribunal (CCT) for a remedial order, or allow the merger to proceed. The CTT is an adjudicative body whose decisions can be appealed to the Canadian Federal Court of Appeal.

Under section 96 of the Competition Act:

(1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or
(b) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

One ongoing case highlights the difficulties associated with an explicit efficiency defence as has been applied in Canada.300 In December 1998 the Competition Bureau challenged the Superior Propane Inc acquisition of ICG Propane Inc. Hearings were held before the CCT in late 1999 and early 2000.


On 30 August 2000 the CCT found that the merger would prevent competition in Atlantic Canada and substantially lessen competition in many local markets across Canada, as well as for national Canadian customers. However, while acknowledging that the appropriate remedy would be the total divestiture of ICG Propane, a majority of CCT members concluded that the two companies had successfully raised the efficiency defence and, thus, should be allowed to merge. The CCT applied a total surplus standard to the case and concluded that the merger’s efficiency gains could only be compared with its negative impact on the economy’s use of resources. Under this standard, other effects of the merger, notably that consumers would pay higher prices to the merging parties, could not be considered.

The Competition Bureau appealed this decision and in April 2001 the Federal Court of Appeal ruled that the Tribunal had misrepresented the Competition Act’s efficiency defence provisions. The Federal Court of Appeal remitted the matter back to the CCT so that it could issue a new ruling in light of this judgment.

In April 2002 the majority of the CCT ruled that they were satisfied that the respondents’ efficiency defence met the requirements in section 96 of the Competition Act. The majority of the CCT concluded that it should not make the order for the divestiture on the grounds that the efficiencies claimed by the merging parties would be greater than and would offset the effects of any prevention or lessening of competition.

The Competition Bureau has announced that it will file a notice of appeal with the Federal Court of Appeal regarding the CCT’s second decision on the Superior Propane/ICG Propane merger.

8.3.3 Practical difficulties

Several practical difficulties are encountered in applying an efficiency trade-off model and quantifying the anti-competitive detriment compared to the productive efficiency benefits.

Applying an efficiency trade-off model requires a great deal of information about prices, quantities, costs and the price elasticities of demand. It would be impossible to apply an efficiency trade-off model without such information.

The efficiency trade-off model has an underlying assumption that the starting point is a competitive equilibrium position with no pre-existing market power. However, if you do not commence from a competitive equilibrium position, then price is already greater than in a competitive market. Pre-existing market power ensures that further mergers will amplify the size of the existing anti-competitive detriment and exacerbate the damage wrought on the community through the additional loss of allocative efficiency.

According to the OECD in 1996, there have been very few cases in which the efficiencies defence was given by a competition agency or court as the basis for a decision to approve a merger.\footnote{Organisation for Economic Co-operation and Development, ‘Efficiency Claims in Mergers and Other Horizontal Agreements: Background Note by the Secretariat’, \textit{Competition Policy and Efficiency Claims in Horizontal Agreements}, OECD, Paris, 1996.} One of the reasons attributed by the OECD for this has
been the lack of preparedness on the part of merging parties to articulate in detail the nature and size of the expected efficiencies, and to bear the burden of proving that achieving the efficiencies is probable and not reasonably attainable by less anti-competitive means.302

8.3.4 Qualitative issues

Using an efficiency trade-off model in merger assessment also raises several qualitative issues that are not easily overcome. Because an efficiency trade-off approach is a quantitative assessment it overlooks qualitative issues.

There is no consideration of factors such as standards of service or quality. Efficiency trade-off models make no allowance for the loss of productive efficiency as a result of increases in managerial slack and x-inefficiency.

Also, an efficiency trade-off model depicts market power as a snapshot of the market in equilibrium. It ignores the fact that competition is a dynamic and ongoing process, and that the concern in practice lies with the market’s future development and with market power enduring over time.

The model also looks exclusively at the demand for the immediate firms involved in the merger. Hence, no consideration is given to the possibility of increased dependence and greater parallel conduct by other firms in the market leading to further allocative inefficiencies and income transfers from consumers to producers.

8.4 Application of mergers law in Australia

8.4.1 Substantial lessening of competition test

Section 50 of the Act originally prohibited any merger or acquisition likely to result in a substantial lessening of competition in a market for goods and services in Australia. In July 1977 amendments were made to the mergers test whereby only mergers or acquisitions which would be likely to result in a corporation being able to dominate or control a substantial market for goods and services in Australia, state or territory were proscribed. The 1977 amendments were made on the basis of trying ‘to achieve economies of scale and to improve international competitiveness.’303

In 1992 the mergers test was changed back to the substantial lessening of competition test in form that we have today. According to the then Attorney-General:

After much consideration the Government has decided to amend section 50 to prohibit mergers or acquisitions which are likely to substantially lessen competition and which have not been authorised by the Commission. In an Act which seeks to preserve competition it is appropriate

302 Ibid.

that the merger test should focus on the effect on competition in a market rather than on the
dominance of a particular firm. The effect of the amendment will be to broaden the range of
transactions which can be examined under section 50. This can only be procompetitive.\textsuperscript{304}

The Commission strongly endorses the sentiments expressed by the then Attorney-
General. It is important to recognise that the change back to an SLC test brought s. 50
back into alignment with the other provisions contained in Part IV of the Act.

The primary advantage of the current mergers test is that it enables the Commission to
consider both the potential effects of unilateral market power and coordinated market
power.

When a merger enables a single firm to increase prices without coordinating with its
competitors in some way, it has created a unilateral effect.\textsuperscript{305} A firm might be able to
increase prices unilaterally if it has a large enough share of the market, if the merger
removes its closest competitor, and if the other firms in the market cannot provide
substantial competition.

Under the Commission’s current merger guidelines, if a merged firm will supply 40 per
cent or more of the market the Commission will give the merger further consideration
out of concern for the possible exercise of unilateral market power.

The fundamental problem with the previous dominance test was that a merger could
place a corporation in a position to engage in anti-competitive conduct without
dominating a market. The SLC 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.

The SLC test allows the Commission to deal explicitly with cases that raise issues
regarding coordinated market power.\textsuperscript{306} In a concentrated market with only a few firms,
there is a danger that the firms will find it easier to lessen competition by colluding.
This collusion could be in the form of an explicit agreement, or take a more subtle
form, which is known variously as tacit coordination, coordinated interaction or
conscious parallelism. Firms may prefer to cooperate tacitly rather than explicitly
because tacit agreements are more difficult to detect, and explicit agreements are
subject to prosecution whereas tacit agreements are not.

Firms coordinating their interactions need not reach complex terms concerning the
allocation of the market output across firms or the level of the market prices but may,
instead, follow simple terms such as a common price, fixed price differentials, stable
market shares, or customer or territorial restrictions. Terms of coordination need not

\textsuperscript{304} Hansard, House of Representatives, 3 November 1992, p. 2404.

\textsuperscript{305} Material used in the discussion of the effects of unilateral market power is drawn heavily from the
US Department of Justice and the US Federal Trade Commission’s 1992 \textit{Horizontal Merger
Guidelines}.

\textsuperscript{306} Material used in the discussion of the effects of coordinated market power is drawn heavily from the
US Department of Justice and the US Federal Trade Commission’s 1992 \textit{Horizontal Merger
Guidelines}.

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perfectly achieve the monopoly outcome in order to be harmful to consumers. Instead, the terms of coordination may be imperfect and incomplete—inasmuch as they omit some market participants, omit dimensions of competition, omit some customers, yield elevated prices short of monopoly levels, or lapse into episodic price wars—and still result in significant competitive harm.

If a merger will result in a post-merger combined market share of the four (or fewer) largest firms of 75 per cent or more and the merged firm will supply at least 15 per cent of the relevant market, the Commission will want to give further consideration to a merger proposal before being satisfied that it will not result in a substantial lessening of competition. This concentration threshold reflects concern regarding the potential exercise of coordinated market power.

The Commission does not oppose a merger simply on the basis that it may cross one of its concentration thresholds for the exercise of market power. Despite the small size of Australian product markets by world standards and the concentrated nature of many product markets in Australia, the concentration thresholds adopted by the Commission are quite liberal by world standards, particularly with respect to the exercise of coordinated market power. Countries that apply a far stricter concentration threshold in regard to the exercise of coordinated market power include Germany, Canada and arguably the United States.

Some critics have claimed that because economics provides no definitive single theoretical exposition in regard to oligopolies, the Commission’s consideration of coordinated market power is therefore fundamentally flawed.

However, Australia’s consideration of coordinated market power is fully consistent with the approach adopted in numerous overseas jurisdictions. The anti-competitive detriment created by increased market concentration and the heightened capacity of firms to engage in tacit collusion has been recognised by the courts in both the European Union and the United States.

In support of the current SLC test, Baxt opined that:

I am happy with the current test. It is consistent with other provisions in the TPA. There is little doubt that the substantial lessening of competition test provides significant flexibility to the ACCC. It has been a very successful platform in that body’s more aggressive implementation of competition law since that test was changed and the penalties for breach of the TPA (Part IV) were increased . . . 307

### 8.4.2 Authorisation process

Even where a merger proposal breaches the SLC test, it may be allowed to proceed if the merger parties can show public benefit through the authorisation process. Public benefit is not defined in the Act, except to the extent that it requires that significant increases in exports or import replacement be considered as public benefits and that the Commission take account of all relevant matters relating to international competitiveness. However, the former Trade Practices Tribunal (now the Australian

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Competition Tribunal) has suggested in *QCMA* that the term should be given its widest possible meaning:

…anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements… the achievement of the economic goals of efficiency and progress.308

The Tribunal also stated in *QCMA* that the relevant public benefit is a net or overall benefit after any detriment to the public resulting or likely to result from the proposed acquisition:

We accept that the statute calls upon us to adopt a balance-sheet approach: we must balance the likely benefits and detriment from the acquisition.309

In assessing the benefit to the public of the proposed acquisition it is appropriate to start with an assessment of the competitive impact of the proposed acquisition. In *QCMA* the Tribunal gave the following reasons:

1. A merger may positively enhance the competitive process and this give rise to a substantial benefit…

2. But the benefits claimed may not mention competition. … Nevertheless, our appraisal of all the listed claims must depend upon our appreciation of the competitive functioning of the industry, with and without the merger. …

3. A claimed benefit may in fact be judged to be a detriment when viewed in terms of its contribution to a socially useful competitive process. …

4. … the substantiality of benefits needs to be measured against likely anti-competitive effects (and other detriments).

5. Quite generally, the Tribunal’s role is seen as forming one of the means of achieving the policy objective of the Act, namely the preservation and promotion of useful competition.310

**Authorisation applications**

There have been a number of significant merger authorisation applications. Not all applications have been successful. Some of the most prominent cases are outlined below.

1) *Adelaide Brighton/Cockburn Cement*. This was a Commission determination on an authorisation application for a merger which, in its view, reduced competition in the markets for cement and lime in certain areas of Western Australia. However, public benefits, including rationalisation benefits as well as increased competitiveness in all other markets in Australia, partly arising from the international experience and financial strength of Rugby Cement of the United Kingdom (which would become

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308 *Re Queensland Co-operative Milling Association Ltd and Re Defiance Holdings Ltd* (1976) 1 ATPR 40-012 (QCMA) at 17,242.

309 ibid at 17,243.

310 ibid at 17,244-17,245.
involved in the ownership structure) was considered to justify the authorisation. This is an example of a merger which substantially lessened competition in one market (and, therefore, likely to contravene the Act) but which gave rise to preponderant public benefits, including increased competition, in various, collectively wider, markets, which could be authorised. Section 87B undertakings were offered and accepted by the Commission, which included certain conditions, to reduce the anti-competitive detriment of the merger.

2) **Davids/Composite Buyers Limited.** This was a merger in the grocery wholesaling sector of supermarket distribution, which resulted in ‘monopoly’ provision of such services to independent supermarkets. The anti-competitive effect was assessed as limited, because a wholesaler’s market power was heavily constrained by the large, integrated supermarket chains. On the other hand, substantial productive efficiencies, a significant proportion of which were likely to be passed on to consumers, were accepted as being of sufficient public benefit to justify the authorisation.

3) **DuPont/Ticor.** This was a merger in the sodium cyanide market. The product is used to extract gold from ore by leaching out impurities. The world market was highly concentrated with only three producers, two of which operated in Australia. Ninety per cent of domestic demand, which was growing, was satisfied by the domestic producers, with DuPont the major importer. Despite the anti-competitive risk from potential cooperative arrangements arising out of high domestic market concentration and the removal of DuPont as an independent importer, the Commission authorised the merger because increased domestic production, although unlikely to generate exports due to growing domestic demand, was likely to replace imports, the volume of which was likely to otherwise increase.

4) **Wattyl/Taubmans** This was an application for authorisation to enable the second largest manufacturer of architectural paints in Wattyl, to acquire the third largest manufacturer of architectural paints in Taubmans. The number of significant players in this market would have been reduced from three to two and the Commission believed that the detriment to competition would not have been insubstantial. The fact that the merger would give rise to increased Australian ownership was considered to be a public benefit, but not sufficient to warrant the potential anti-competitive detriment caused by the merger. In this case, the Commission believed that the reduction in the number of big producers from three to two would have made price increases more likely, to the detriment of consumers. The Commission opposed this authorisation application.

### 8.4.3 Market definition

The Act requires that the assessment of substantial lessening of competition be related to a market. Delineation of the relevant market also serves the purpose of focusing the analysis of competition effects.

Market definition is an integral part of competition analysis. It identifies the sellers and buyers who effectively constrain price and output decisions of the merged firm. It identifies the relevant arena of competition. An appropriate definition of the market is the critical underpinning for the evaluation of ‘substantial lessening of competition’,
the calculation of concentration ratios and the evaluation of import competition and barriers to entry.

A market involves four dimensions:

- product
- geographic
- functional
- time.

The merged firm is the starting point for delineating the relevant market. In this way the market which is identified is that which assists in the analysis of the likely competitive effects of the merger.311

The process of market definition can be viewed as 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 and non-transitory increase in price (SSNIP) above the level absent of the merger. More generally, the market can be defined as the smallest area over which a hypothetical monopolist (or monopsonist) could exercise a significant degree of market power. This would be possible only if all sources and potential sources of close substitutes for the merged firm’s products have been included in the definition of the market.

The process of establishing the market boundaries starts with the product, geographic and functional areas of supply covered by the merged firm. These are then extended in product, geographic and functional space to include all those sources, and potential sources, of close substitutes which would otherwise make it non profit-maximising for the hypothetical monopolist to impose a SSNIP or otherwise exercise a significant degree of market power. If consumers switched their demand to close substitutes and/or firms would switch their production to supply the customers of the merged firm, it would not be profit maximising for the hypothetical monopolist to impose a SSNIP and the relevant market would need to include these sources of substitute products.

To establish the relevant market for a proposed merger the Commission is concerned to establish the potential sources of competitive, that is close, substitutes for the product(s) of the merging parties. Following the practice of the Australian Competition Tribunal and the Australian courts, the Commission considers substitution possibilities on both the demand and supply side when identifying the competitive constraints which delineate the relevant market.

On the demand side the Commission examines which goods and services consumers consider to be close substitutes for the merged firm’s product and which geographic

sources of supply they consider to be substitutable. If, in the event of a significant price rise or equivalent exercise of market power by the merged firm, consumers switched to purchasing these alternatives to the extent of defeating such a price rise, these products and sources of supply would be included in the relevant market.

On the supply side the Commission considers which suppliers could, without significant investment, switch their production and/or distribution facilities to supply a substitute product to that supplied by the merged firm, or switch from supplying another geographic area to that supplied by the merged firm. If, in the event of a significant price rise, these suppliers switched their supply to the extent of defeating the price rise, these suppliers would be included in the relevant market.

Delineation of the relevant product market (or markets) requires the identification of the goods and/or services supplied by the merged firm and sources, or potential sources, of substitute products. Starting with the product (or products) supplied by the merged firm, each product market is gradually expanded to incorporate those firms which supply, or would supply, a close substitutable product in the event of a significant price rise, or equivalent exercise of market power, by the merged firm.

Delineation of the relevant geographic market (or markets) involves the identification of the area or areas over which the merged firm and its rivals currently supply, or could supply, the relevant product and to which consumers can practically turn. Starting with the geographic area (or areas) supplied by the merged firm, each geographic market is gradually expanded to incorporate sources of supply to which consumers would turn and firms which supply, or would supply, the relevant product into that area in the event of a significant price rise, or equivalent exercise of market power, by the merged firm.

Delineation of the relevant functional market requires identification of the vertical stages of production and/or distribution which comprise the relevant arena of competition. This involves consideration of both the efficiencies of vertical integration, commercial reality and substitution possibilities at adjacent vertical stages.

The time dimension of the market refers to the period over which substitution possibilities should be considered. The Commission will consider substitution possibilities over the longer term, but still in the foreseeable future, that will effectively constrain the exercise of significant market power by the merged firm. The Commission recognises that competition and substitution are dynamic processes.

The Commission has sometimes been criticised for the narrow approach that it takes to market definition. According to Global Competition Review rating of international competition regulators:

> Arguable difficulties relating to merger handling seem to stem from a tendency within the ACCC to apply over-narrow market definitions.\(^{312}\)

However, the Commission’s approach in regard to market definition is fully consistent with international practice. Amongst numerous other jurisdictions, the two largest jurisdictions in the world in the United States and the European Union both adopt the SSNIP test as applied by the Commission in Australia.

It is important to note that competition agencies define markets for a specific purpose. That purpose is to identify those firms who might constrain any market power created by the merger. This may not reflect the merger parties’ idea of competition. For example, a manufacturer of carbonated soft drinks may consider that all other beverages including milk, juice, tea, coffee and so on are competitors. Competition agencies would delineate the market according to the extent to which these other products could constrain a price increase by merging soft drinks companies. If a price increase in soft drink does not cause a significant switching to other beverages, the products are not part of the same market.

**Deregulating industries**

The Commission recognises that deregulation may have a significant impact on market boundaries. For example, the removal of restrictions on the geographic movement of products will result in market boundaries being determined by fundamental conditions of supply and demand rather than artificial regulatory restrictions. Similarly, changes in the licensing arrangements for financial institutions may result in greater supply side substitution and broader product markets.

Deregulation may also have a significant impact on barriers to import competition or new entry. Import quotas and tariffs restrict the supply elasticity of imports and the import parity price at which import competition constrains domestic prices. Government licensing often directly limits the number of potential participants in a market. Liberalisation or abolition of these requirements can ease or remove barriers to entry and any competition concerns relating to acquisitions in these markets.

Privatisation of government assets are generally subject to the Act. The Commission has scrutinised proposed acquisitions by private sector competitors, suppliers and customers that could potentially result in a substantial lessening of competition in a substantial market. Where assets have been disaggregated, the Commission has tried to ensure that the intent is not undermined through acquisition by horizontally or vertically related parties where this would have the effect of substantially lessening competition in a relevant market. Subsequent to the privatisation and disaggregation of assets, both horizontal and vertical, the Commission has also scrutinised proposed mergers and acquisitions to ensure that the pro-competitive effects of disaggregation have not been undone.

Where governments are planning to remove restrictions on the supply of particular products, the Commission seeks to scrutinise proposed acquisitions which might seek to pre-empt the competitive effects of such deregulation.

Whether or not the Commission defines the relevant market according to current substitution possibilities will depend on the timing and certainty of deregulation, the extent to which current price and output decisions are constrained by future substitution possibilities, and the extent of anti-competitive detriment that is likely to occur prior to deregulation.
The Commission has closely examined privatisations and mergers in deregulated infrastructure industries such as the energy sector (particularly gas and electricity), the transport sector (including airports, ports and rail), the communications sector (including broadcasting and telecommunications) and the financial services sector.

**Innovation**

The Commission’s approach to market definition fully adapts to take account of innovation. The Commission recognises that product innovation and new technologies can change relevant product and geographic market boundaries other time in some industries.

The Commission’s approach to market definition in the financial sector provides an appropriate example of how the Commission adapts in response to innovation over time. The market definitions that the Commission has used in regard to its consideration of bank mergers have undergone substantial change over time in recognition of the ongoing process of financial innovation.

In 1995 the Commission examined the proposal by Westpac to acquire Challenge Bank in Western Australia. At that time the Commission took the view that it was appropriate to consider banking as a cluster of banking services which banks delivered to customers as a bundle.

However, in 1997, when the Commission examined the Westpac/Bank of Melbourne merger, the Commission identified six product market categories for ‘retail banking’ and the associated geographic markets as follows:

- home loans (moving to a national market)
- personal loans (state-based market)
- deposit/term savings products (state-based market)
- small business banking products (probably more local than state, but state-based figure were used for analytical purposes due to a lack of reliable regional based figures)
- credit cards (state-based market)
- transaction accounts (state-based market).

When the Commission came to examine the Westpac/Bank of Melbourne merger in 1997 it found that a sufficient proportion of customers were by then prepared to unbundle key components of the cluster and to shop around for the best price on those components.

In 2000 when the Commission examined the Commonwealth Bank/Colonial merger, the market definitions adopted for retail banking had changed again. The Commission was mindful that the increased use of technology-driven service delivery channels and
changing consumer behaviour may have altered some of the product as well as geographic market definitions.

In its examination of the Commonwealth Bank/Colonial merger, the Commission identified the following retail banking product markets:

- home lending (national market)
- personal loans (moving to a national market)
- hybrid personal lending products (national market)
- credit card issuing (national market)
- credit card — merchant servicing (local to state-based market)
- deposit/term products (state-based market)
- transaction accounts; small and medium enterprise banking (local to state-based market)
- agribusiness banking (local to state-based market).

8.4.4 Failing firm

It is part of the competitive process that firms will fail, either because of internal problems or due to external changes in market demand and resultant excess capacity.

In most instances, the acquisition of a failing firm does not even raise competition concerns because there are sufficient competitive constraints on the merged firm remaining in the market. Where competition concerns do arise, Australia does not have an explicit ‘failing firm defence’. However, failure may be relevant to the evaluation of a merger under both s. 50 and the authorisation provisions.

Before the Commission would consider a ‘failing firm defence’ type argument, it would need to be convinced that the firm cannot be successfully reorganised and there is no other viable buyer whose acquisition of the firm would not raise competition concerns, and no likelihood of such a buyer emerging, such that the firm’s resources are likely to exit the market absent of the merger and so cease to represent an actual or potential constraint on the market.

The critical issue here is how the acquisition of a failing firm will affect competition.

If the target firm is considered to be failing, the Commission will consider the likely effect of the acquisition on competition compared to the effect of the target’s assets exiting the market. Under the latter circumstances, the distribution of the target’s customer base among the remaining market participants would be determined by market forces, whereas an acquisition would tend to deliver those customers to the acquiring firm.
If the acquirer is the only other participant in the market, the two scenarios give the same result and the acquisition is unlikely to have any effect on the level of competition. Only where the acquiring firm is able to obtain some strategic advantage from the acquisition, deterring further entry, might there be a substantial lessening of competition.

In oligopolistic markets the effect on competition is likely to be less straightforward. With a merger the market share of the acquiring firm will increase by more than if the failing firm exits the market and the failing firm’s share is picked up by all the remaining firms. However, whether this amounts to a substantial lessening of competition will require a full assessment of the two scenarios, taking into account all factors, including an assessment of possible strategic motives for the acquisition of the failing firm.

The Commission accepted a failing firm argument in regard to the Qantas acquisition of Impulse when it decided not to oppose this transaction in May 2001. On this occasion, the Commission independently evaluated the claim that Impulse was a failing firm and concluded that the withdrawal of support by certain investors had prevented Impulse from remaining viable.

The likely failure of Impulse and the lack of alternative buyers led the Commission to consider two alternatives on longer-term competitiveness in domestic aviation. These alternatives were to allow Impulse to go into receivership or allow Qantas to acquire the company.

Given the alternatives on this occasion, after extensive evaluation the Commission concluded that while the acquisition would lessen competition, the competition concerns could be better addressed by allowing the acquisition to proceed accompanied by undertakings designed to improve the competitive position of firms constrained in their ability to expand and any new potential new entrants. Under the other alternative of receivership for Impulse, a far less competitive outcome was likely to prevail.

Arguments regarding any claimed public benefits that may arise from the acquisition of a failing firm can be considered in the context of an application for authorisation. The claimed benefits may include retention of technical or productive assets, avoidance of social dislocation and unemployment or the achievement of resource savings through rationalisation and economics of scale.
9 Authorisation provisions and processes

Summary

This section provides an overview of the authorisation and notification processes set out in Part VII of the Act in relation to non-merger matters. Merger authorisation issues are discussed above in chapter 5.

Through the use of case studies, this section will highlight the importance and effectiveness of the authorisation process in providing a mechanism to ensure that Australia's competition law regime is flexible and responsive, particularly to the transitional needs of industries and communities affected by regulatory change and to the requirements of rural and regional areas. A number of the case studies discussed in this section will also demonstrate how the authorisation process can facilitate businesses arrangements that promote the international competitiveness of Australian industries.

This section will also set out the Commission's response to criticisms that the authorisation process is too time consuming and costly.

The Commission considers that the authorisation process effectively balances the need for a process that is flexible and responsive, broadly accessible, fair to all parties, efficient and timely, gives business certainty and has an appropriate framework for accountability.

Delays in the authorisation process are often outside the control of the Commission. Section 9.4 provides a number of examples of recent authorisations that were delayed for reasons beyond the Commission's control.

While public consultation is often time consuming, adequate consultation ensures that applicants and interested parties are afforded procedural fairness and the Commission is seen to only grant immunity from the competition provisions of the Act in a transparent and publicly justifiable manner.

In relation to the cost of the authorisation process, the Commission has no discretion to waive or vary the authorisation and notification fees prescribed in the Trade Practices Regulations. Using professional advisers such as legal advisers can add significantly to the cost to business of accessing the authorisation process. However, using high-cost professional advisers should not be seen as a necessary part of the cost to business of the authorisation process.

The Commission also considers that the role of the Tribunal enhances the legitimacy and integrity of the authorisation process.
9.1 Authorisation and notification provisions of the Act

The Act recognises that the public interest may not always be met by the operation of competitive markets. The authorisation and notification processes in Part VII of the Act address this by allowing the Commission to grant immunity on public benefit grounds for conduct that might otherwise breach the competition provisions of the Act. Authorisation is available for all the competition provisions of the Act, except misuse of market power. The Act allows authorisation to be granted for a specified period of time and to be granted subject to conditions.

The authorisation and notification processes give Australia's competition law the flexibility to ensure that the prohibitions on anti-competitive arrangements in the Act do not prevent the development of industry arrangements that operate in the public interest.

The authorisation process also plays an important role in ensuring that Australia's competition law framework is flexible and responsive, especially to the transitional needs of industries undergoing structural or regulatory change and to the requirements of rural and regional areas.

In recent years the authorisation process has played a key role in allowing deregulating industries to develop arrangements that assist them in dealing with the deregulation process. Deregulation is often aimed at assisting the international competitiveness of Australian industries. By facilitating deregulation, the authorisation process has played an important role in helping key industries to become more competitive internationally. Case studies that demonstrate this are contained in section 9.2.

The authorisation process has also played an increasingly important role in balancing the competing interests of small businesses dealing with large businesses by enabling small businesses to collectively bargain with large businesses. In the past few years the Commission has made several significant determinations on small business collective bargaining, including authorising collective bargaining in the rural sector, most recently by dairy farmers and chicken growers.

9.1.1 Public benefit

The Commission can only grant immunity under the authorisation process if it is satisfied that the conduct for which authorisation is sought satisfies the public benefit test set out in the Act. In general, the Commission must be satisfied that in all the circumstances the conduct for which authorisation is sought would be likely to result in a public benefit that outweighs the detriment to the public constituted by any lessening of competition that is likely to result from the conduct.\(^{313}\) The onus is on the applicant to satisfy the Commission that the public benefit test is satisfied.

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\(^{313}\) There is some variation in the tests set out in ss. 90(6) and 90(8). However, the Tribunal and the Commission consider that in practical application the tests are essentially the same: Re Media Council of Australia (No. 2)(1987) ATPR 40–774 at 48,418.
The assessment of public benefit is a key factor in any authorisation application. Public benefit is not defined by the Act. Public benefit is given a wide ambit by the Commission and the Tribunal. The Tribunal has stated that a public benefit is:

anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.314

Both economic and non-economic benefits (for example social public benefits) are included in the concept of public benefit. Over the years, the Commission and the Tribunal have recognised a range of public benefits of an economic nature. For example, the Commission and the Tribunal have recognised, among others, the following as public benefits:

- fostering business efficiency, especially when this results in improved international competitiveness
- improvements in the quality and safety of goods and services and expansion of consumer choice
- assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness
- growth in export markets
- industrial harmony
- supply of better information to consumers and business to permit informed choices in their dealings
- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs.

The Commission and the Tribunal have also accepted a range of non-economic benefits such as improvements to health and safety, environmental protection, avoiding conflicts of interest and adopting provisions that lead to equitable dealings between businesses. There is some overlap between social and economic public benefits. The main point is that the Commission's assessment of public benefit is not limited to economic benefit.

Examples of non-economic public benefits accepted by the Commission as the basis for granting authorisation include:

314 QCMA and Defiance Holdings (1976) ATPR 40–012 at 17.242.
- encouraging the provision of information on formula feeding from public health professionals that is accurate and balanced and does not undermine the decision of women to breastfeed (these public benefits were found to outweigh the detriment from restricting advertising and other promotional activities in relation to infant formula)\textsuperscript{315}

- promoting public safety by, for example ensuring the safe use of farm chemicals and national uniformity in the storage of farm chemicals,\textsuperscript{316} and by only allowing scuba gear to be hired to certified divers\textsuperscript{317}

- maintaining ethical standards, for example the Commission granted authorisation in relation to a ruling by the ACT Law Society that prevented solicitors, except in certain circumstances, acting for both vendor and purchaser in matters concerning the sale of land, due to a potential for conflicts of interest.

Section 9.2 contains a number of case studies of authorisations granted by the Commission for non-economic public benefit reasons.

### 9.1.2 The authorisation process: certainty, transparency and accountability

The authorisation process is very public, transparent and consultative. The Commission considers that the authorisation process effectively balances the need for a process that is flexible and responsive, broadly accessible, fair to all parties, efficient and timely, gives business certainty and has an appropriate framework for accountability.

The Act sets out the process that the Commission must undertake before it can grant authorisation. The main steps in the process are:

**Step 1**—an application for authorisation is lodged with the Commission

**Step 2**—the Commission seeks comment from interested parties and assesses the application

**Step 3**—the Commission publishes a draft determination on the application

**Step 4**—the applicant or any interested party can call a conference to discuss the Commission’s draft decision

**Step 5**—the Commission issues a final determination

To help prospective applicants through the process, they are encouraged to hold informal discussions with the Commission to get guidance on the authorisation process before lodging an application.

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\textsuperscript{315} Abbott Australasia Pty Limited and Nestle Australia Limited (1992) ATPR (Com) 50-123.

\textsuperscript{316} Agsafe Limited and Avecare Limited (1994) ATPR (Com) 50-150.

\textsuperscript{317} Federation of Australian Underwater Instructors (1983) ATPR (Com) 50-055.
After receiving an application for authorisation, the Commission invites interested parties to make submissions in response to the application.

The range of interested parties consulted by the Commission depends upon the nature of the conduct for which authorisation is sought and the types of persons likely to be affected. Typically, interested parties can include competitors, customers, suppliers and other persons affected by the conduct; relevant government bodies, including regulators; relevant industry associations, consumer groups and community associations; and industry experts. When appropriate, the Commission may also seek submissions from the community by advertising in newspapers and trade journals. As well as inviting submissions, the Commission conducts its own market inquiries and research.

Unless the Commission accepts a claim for confidentiality, submissions and other relevant documents are placed on the Commission's public register and become publicly available.

Applicants are given the opportunity to respond to issues raised throughout the public consultation process.

Before issuing its final decision on a matter the Commission issues a draft determination stating whether it proposes to grant authorisation and setting out the reasons for its proposed decision. Draft determinations are distributed to the applicant, all parties who made a submission and other interested parties and are placed on the public register.

The Commission then invites the applicant and interested parties to call a pre-decision conference. A pre-decision conference gives the applicant and interested parties an opportunity to discuss the Commission's draft decision and to put their views directly to a Commissioner. A record of any pre-decision conference is also placed on the public register.

Whether or not a conference is called, applicants and interested parties may provide further submissions to the Commission.

The Commission then issues a final determination which may:

- grant authorisation
- grant authorisation subject to conditions, or
- deny authorisation.

A copy of the Commission's final determination is sent to the applicant and all other interested parties. It is also placed on the public register and the Commission's website. Copies are also published commercially by legal reporting services.

The Commission's decisions in relation to authorisation matters are subject to a high degree of accountability. If the applicant or any interested party is dissatisfied with the Commission's final determination on an authorisation matter they can apply to the
Tribunal to review the Commission's decision on its merits. The Commission's decision making processes are also subject to review under the *Administrative Decisions (Judicial Review) Act 1977*.

The Commission recognises the need for businesses to have reasonable certainty about the requirements for authorisation. The Commission publishes a number of guides to the authorisation process (available on the Commission’s website), including:

- *Authorisations and notifications*—a brochure outlining the authorisation and notification processes, including an outline of the ‘five steps to authorisation’

- *Guide to authorisation and notification*—a general guide to the authorisation and notification processes, which is being updated to make it more comprehensive, practical and user-friendly guide

- *Guide to authorisation and notification for third line forcing conduct*—a detailed guide that addresses specific issues in authorisation and notification for third line forcing conduct.

The authorisation process has operated for more than 25 years. There is now a substantial body of published reasoning by both the Commission and the Tribunal on authorisation applications. This offers businesses a high degree of certainty about the requirements for authorisation under the Act.

### 9.1.3 Interim authorisation

The Act gives the Commission power to grant interim authorisation in relation to authorisation applications. Interim authorisation allows an applicant to engage in the conduct for which authorisation is sought while the Commission considers the merits of the authorisation application.

Because an interim authorisation allows an applicant to temporarily gain the benefit of authorisation before their application has been formally assessed, the Commission will usually grant interim authorisation only in exceptional circumstances.

Interim authorisation is unlikely to be granted when the market could not return substantially to its pre-interim authorisation state if the Commission later denied final authorisation. However, the power to grant interim authorisation helps to make the authorisation process flexible, especially for time critical matters.

### 9.1.4 Commission use of time limits and conditions

The Commission has found that time limits and conditions can be very useful in ensuring that the authorisation process is flexible enough to deal with structural change in the economy, especially when industries are undergoing rapid economic change or deregulation. Rapid change can create unavoidable uncertainties about whether proposed industry arrangements for which authorisation is sought will operate in the net public benefit.
Imposing conditions and time limits on an authorisation can address these uncertainties. They allow the Commission to grant authorisation in circumstances where, in the absence of such conditions and time limits, the Commission may feel unable to grant authorisation because of uncertainty that the proposed arrangement is likely to result in a net public benefit because of a rapidly changing economic or regulatory environment.

Granting an authorisation subject to conditions is also an important way of addressing competition concerns raised during the consultation process while still enabling the community to gain the benefit of the authorised conduct. In addition, since applications for authorisation are often expressed very broadly, imposing conditions on an authorisation can ensure that arrangements are refined to generate a net public benefit.

9.1.5 Variation and revocation of authorisations

The Act provides the flexibility to allow minor variations to an authorisation without the Commission having to conduct a full consultation process by issuing a draft determination and, if requested, holding a pre-decision conference.

The Commission may also revoke an authorisation if it is satisfied that:

- the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular
- a condition applying to the authorisation has not been complied with, or
- there has been a material change of circumstances since the authorisation was granted.

Before revoking an authorisation, the Commission must seek submissions from interested parties. Any interested party including the applicant can object to the revocation. If this happens, even if one of the above conditions is satisfied, the Commission may only revoke the authorisation if it is satisfied that it would, if the authorisation had not already been granted, be prevented from granting the authorisation because the net public benefit test has not been satisfied.

The power to revoke an authorisation because of a material change in circumstances gives the authorisation process the flexibility to address changing market and other circumstances.

9.1.6 Review by the Tribunal

If an applicant or any interested party is dissatisfied with the Commission's final determination on an authorisation matter, including a determination to revoke an authorisation, they can apply to the Tribunal to review the Commission's decision.

The Tribunal conducts a re-hearing of the matter and makes its decision completely independent from the Commission's determination. The Tribunal can consider new facts and arguments that were not considered by the Commission in its determination. This means that the case put to the Tribunal by the applicant and interested parties may be quite different from the case originally considered by the Commission.
9.2 Authorisation case studies

The following case studies highlight the importance and effectiveness of the authorisation process in ensuring that Australia's competition law regime is flexible and responsive, especially to the transitional needs of industries and communities affected by structural change and to the requirements of rural and regional areas. The studies also show how the authorisation process can contribute to business arrangements that promote the international competitiveness of Australian industries.

9.2.1 Authorisation case study 1—CSR

Assisting the Burdekin community, north Queensland and facilitating the international competitiveness of Australia's sugar industry

In July 2001 the Commission granted authorisation to allow sugar cane growers and CSR to collectively negotiate terms and conditions for supplying sugar cane to the CSR-owned Pioneer and Invicta mills in the Burdekin region.

The Commission was satisfied that the agreements would deliver economic public benefits to the Burdekin cane growing regions flowing from increased mill throughput and farm output and associated new investment and efficiency from improved infrastructure use.

The Commission acknowledged that the communities and many towns in the Burdekin sugar region are substantially maintained and/or affected by the raw sugar industry and its associated service areas.

Facilitating international competitiveness

The sugar industry is Australia’s second largest crop industry and Queensland’s largest rural commodity. Around 85 per cent of raw sugar is exported.

The effect of the Commission's decision to grant authorisation was to allow implementation of industry agreements to provide for a gradual extension of the cane crushing season, together expansion of mill crushing capacity. In its decision to grant authorisation the Commission recognised that the agreement was likely to result in export growth and an increase in the international competitiveness of the sector.

9.2.2 Authorisation case study 2—Agsafe

Facilitating the safe use of agricultural and veterinary chemicals

The Commission recently reauthorised an agricultural and veterinary (agvet) chemical industry self-regulation compliance program run by Agsafe Limited.

The Agsafe program has been operating successfully under Commission authorisation for more than 10 years. In that time the program has benefited users and the community by promoting the safe use of agvet chemicals and Australia-wide uniform standards for their safe storage.
The authorisation granted by the Commission applies to Agsafe's industry accreditation scheme requiring persons and premises involved in the transport, handling and storage of agvet chemicals to be accredited and to comply with a code of conduct. The authorisation also allows Agsafe to apply trading sanctions to premises that fail to meet accreditation standards.

Agsafe trains industry participants in the relevant safety and regulatory requirements. Agsafe also inspects premises where agvet chemicals are stored to ensure they comply with all relevant state and federal safety regulations. Where premises breach these regulations Agsafe is able to, as a last resort, impose trading sanctions. Trading sanctions prohibit other businesses purchasing from or supplying to the offending premises until safety concerns have been addressed.

The Agsafe program brings benefits to rural and regional Australia where agvet chemicals are mostly used. Through its accreditation and training scheme, the Agsafe program has increased knowledge and understanding of existing regulatory requirements for the safe transport, handling, and storage of agvet chemicals.

This decision is one of several the Commission has released in recent times that demonstrate how the authorisation process accommodates social issues—such as public safety and the specific needs of rural Australia—as well as economic considerations.

9.2.3 Authorisation case study 3—dairy authorisations

Helping dairy farmers adjust to negotiating in a deregulated market and facilitating the international competitiveness of Australia's dairy industry

On 1 July 2000 the dairy industry in Australia was fully deregulated and there are no longer any formal quantitative controls on the supply or price of milk in Australia.

*Premium Milk Supply Pty Ltd authorisation*

In December 2001 the Commission granted authorisation to allow Premium Milk Supply Pty Ltd to collectively bargain farm-gate prices and milk standards in negotiations with Pauls Limited in Queensland. Pauls specialises in producing branded milk and dairy products and is the largest milk processor in Queensland. The 580 Queensland dairy farmers that supplied milk to Pauls through six co-operatives were offered Premium membership.

The Commission accepted that this arrangement would lead to a net public benefit because efficiency gains from transaction costs savings and by smoothing the transition from a regulated to a deregulated market. The Commission granted authorisation until 1 July 2005.

*Australian Dairy Farmers' Federation authorisation*

On 12 March 2002 the Commission issued a final determination granting authorisation to the Australian Dairy Farmers' Federation (ADFF) to allow groups of dairy farmers to collectively negotiate pricing and supply arrangements with dairy processing
companies across Australia. The authorisation was subject to a number of conditions and was granted until 1 July 2005.\footnote{On 2 April 2002 National Foods Limited (NFL) applied to the Australian Competition Tribunal for review of the Commission’s determination. NFL is dissatisfied with the conditions that the Commission imposed on the formation of collective bargaining groups. Because of this application the Commission’s determination has not come into force and will not unless and until the Tribunal decides that the proposed conduct should be authorised.}

ADFF applied for authorisation in very broad terms and the Commission considered that the collective bargaining arrangements proposed by ADFF were likely to have a detrimental effect on competition with consumers likely to be charged higher prices for dairy products. To address these concerns the Commission imposed conditions to limit the scope of the collective bargaining groups that could be formed.

The Commission considered that the conditional authorisation of collective bargaining by dairy farmers would lead to several public benefits, including:

- increased competition in the supply of raw milk by allowing dairy farmers to take advantage of additional market opportunities for their milk
- reducing the likelihood of harsh or unfair contractual terms by improving the confidence of individual dairy farmers in dealing commercially with processors and increasing their individual bargaining power
- assisting with the transition to a deregulated market by giving farmers the opportunity to gain negotiating and information collection skills and increasing their ability to conduct efficient and effective negotiations when they ultimately assume independent responsibility for negotiations
- to the extent that the ability to collectively negotiate would stop farmers exiting the dairy industry, benefiting the rural communities that rely on dairying through continued employment and commercial activity.

Facilitating international competitiveness

Over 50 per cent of Australia’s annual milk production is exported, with some 50 000 people employed in the dairy industry. The competitiveness of Australia’s dairy industry is crucial to the economic wellbeing of many rural areas in Australia.

Dairy deregulation—such as ending the Domestic Market Support scheme—has been an important part of the Federal Government’s approach to assisting the Australian dairy industry to develop a long term competitive position in both international and domestic markets to ensure the long-term health of the dairy industry.

The authorisation process will play a key role in allowing dairy farmers to adapt to these regulatory changes.
9.2.4 Authorisation case study 4—Port Waratah coal loading services
Facilitating workable solutions to promote Australia's international competitiveness

In 1997 a large queue of coal ships developed at the coal loading facilities in Newcastle with queues of between 35 and 40 vessels common. The effect of this queue was to damage the reputation of the port in the eyes of overseas buyers with the potential to damage the international competitiveness of the Hunter Valley coal industry. Over 68 million tonnes of coal is exported each year through the Newcastle port. This represents over 90 per cent of total exports from the Hunter region.

To provide a short-term solution to the queuing problem, the Commission granted an authorisation for a capacity allocation system. The Commission recognised a clear public benefit in promoting the quantity and the value of coal exports out of Newcastle. The Commission accepted the need for a short-term exemption from the competition provisions of the Act to be granted, subject to conditions, to resolve the vessel queuing problem that was damaging the international competitiveness of Australia's coal industry.

9.2.5 Authorisation case study 5—Homeworkers code of practice
Facilitating occupational health and safety

On 11 July 2000 the Commission granted authorisation to the Homeworkers Code of Practice (the code).

The code—a voluntary self-regulatory scheme negotiated by industry participants in 1997—was designed to supplement the outworker provisions of the Clothing Trades Award 1982.

The aim of the code is to redress the non-award conditions of many people employed in the garment making industry as homeworkers—that is, people who sew in premises other than a registered factory. The garment industry increasingly uses homeworkers to do their sewing.

The code provides for the accreditation of parties along the garment manufacturing and retail chain. Competition issues include the potential use of commercial sanctions, which retailers and manufacturers may impose on contractors—who engage homeworkers—if they do not comply with the code.

The Commission was satisfied that the arrangements in the code would benefit the public because they helped to:

- lessen the risk of exploitation of a disadvantaged group
- improve compliance with statutory award requirements
- provide information to help homeworkers understand their employment conditions
ensure satisfactory employment options for women who chose to stay at home
improve the social environment of the families of homeworkers by providing standard working conditions.

While the code could restrict the use of contractors by suppliers, the Commission decided the code would not substantially affect their ability to compete. The Commission also considered that adequate safeguards existed to minimise the adverse effects on competition from trading sanctions under the code.

9.2.6 Authorisation case study 6 (current authorisation application)—Royal Australian College of General Practitioners (RACGP)

Giving certainty to GPs on fee arrangements—draft determination

On 31 August 2001 the Royal Australian College of General Practitioners (RACGP) lodged an application with the Commission seeking authorisation to allow general medical practitioners working in specified business arrangements to agree on fees charged to patients within a single general practice.

The Commission recently issued a draft determination proposing to grant authorisation to these arrangements. Under the draft decision, all GPs in partnerships will be able to agree on fees. In proposing to grant authorisation the Commission noted that partnerships are traditional business structures that should remain available to GPs.

The Commission also proposes to grant authorisation to GPs in associateships that meet criteria largely specified by the RACGP (associateships are groups of GPs who wish to remain independent businesses while co-locating to obtain certain advantages. Some may simply share rent and administrative costs, while others may be more closely integrated).

The Commission decided that authorising these GPs to agree on fees would help a team approach to patient care and improve the quality of care.

The proposed authorisation will apply to GPs in metropolitan and rural and remote areas across Australia.

The authorisation will give certainty to general practitioners working in specified business arrangements because they will be able to agree on fees charged to patients without risk of action under the Act.

9.3 Notification

Immunity from the exclusive dealing provisions of the Act can also be obtained by lodging a notification with the Commission. Immunity from the prohibition on exclusive dealing is obtained automatically from the time the notification is lodged with the Commission or, in the case of notifications of third line forcing conduct, 14 days after the notification is lodged.
The immunity afforded by a notification operates unless and until the Commission issues a notice revoking that immunity. In the case of third line forcing notifications, the Commission can revoke a notification if it is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public.

In all other cases, the Commission can revoke a notification if the Commission is satisfied that the notified conduct has the purpose or likely effect of substantially lessening competition and that any benefit to the public would not outweigh the likely detriment to the public.

These tests differ because third line forcing is a per se breach of the Act while all other forms of exclusive dealing specified in s. 47 of the Act only breach the Act if they have the purpose or likely effect of substantially lessening competition.

9.4 Commission's response to some criticisms of the authorisation process

Some groups argue that the authorisation process is too time consuming and costly and that review by the Tribunal leads to delays and uncertainties.

9.4.1 Criticism that the authorisation process takes too long

Authorisation has the effect of taking away from third parties the right to take legal action under the Act for breaches of the competition law. The Act imposes large penalties for anti-competitive conduct because such conduct can result in significant damage to businesses, consumers, the Australian economy and the community. This explains the importance of having a transparent, public process before the Commission grants an authorisation. It means the applicant’s public benefit claims are tested and those who may be adversely affected by the granting of an authorisation are given an opportunity to put their views to the Commission.

Public consultation is often time consuming, especially when the conduct for which authorisation is sought is complex, controversial or affects many individuals and businesses. However, adequate public consultation ensures that:

- applicants and interested parties are afforded procedural fairness, especially by allowing those who may be adversely affected by the conduct to put their case and allowing applicants to respond to any objections raised by them

- the validity of the applicant’s public benefit claims are rigorously tested so that the Commission can be satisfied the conduct is likely to benefit the public

- sufficient market inquiries are conducted so that the Commission fully understands the likely impact of the conduct on competition and the community more generally

- the community has confidence that the Commission only grants immunity from legal action under the competition provisions of the Act in a transparent way that is open to public scrutiny and is publicly justifiable.
As part of the consultation process, the Act requires the Commission to issue a written draft determination and, if requested, hold a pre-decision conference of interested parties, before issuing a final written determination setting out the Commission's decision and the reasons for that decision. These steps can add several weeks to the time it takes for the Commission to issue a decision. The delay can be longer if significant issues raised about the Commission's draft decision need to be taken into account before the Commission’s final decision. However, the Commission considers these processes are appropriate and they contribute to adequate and informed public consultation.

In a number of cases, the authorisation process is used to facilitate industry-based reforms. In cases like this the authorisation processes can facilitate community and industry consultation on the details of industry reform proposals. In this context, applicants often amend their proposals because of the issues raised during the Commission's public consultations. The consultation process can also be used by applicants to develop broad support for their reform proposals as operating in the public interest.

Public consultation and negotiation involving industry-wide reforms can be time consuming. For example, the authorisation process has recently been used to facilitate collective bargaining arrangements as part of the dairy industry's response to deregulation.

The Commission conducted a national consultation process on the dairy industry's collective bargaining proposals. These involved dairy farmers and farmers’ associations; dairy processing companies and co-operatives; supermarket and retailer representatives; and government departments. Because of concerns from stakeholders during the consultations, the Australian Dairy Farmers' Federation amended and refined its proposed collective bargaining arrangements. The consultation process ensured that the Commission could grant authorisation, subject to certain conditions, confident that the ADFF collective bargaining arrangements would operate in the public interest.319

In some cases of industry wide reforms with significant affects on industry participants, the process of consultation and negotiation can take more than a year to finalise. This is not because of any fault in the authorisation process but simply because implementing industry based reforms in a consultative, transparent and flexible manner necessarily and appropriately takes time. Attempts by the Commission to speed up this process by imposing artificial time constraints on the consultation process may result in the authorisation process hindering rather than facilitating the ability of industry to develop and implement workable solutions to a range of industry reform and self-regulation challenges.

319 The application for review of the Commission's decision to grant authorisation in the case of the ADFF’s authorisation application is narrowly framed and concerns only the drafting of some of the conditions on which the Commission granted authorisation. There is broad industry acceptance of the main terms of the Commission's decision and this reflects in part on the success of the authorisation process in facilitating the development of a workable approach to collective bargaining in the dairy industry.
Some authorisation decisions are delayed because of circumstances specific to particular applications. Following are some examples of recent matters where the Commission's decision has been delayed for reasons that are beyond the Commission's control.

9.4.1.1 Delay between lodging an authorisation application and applicants providing a supporting submission

As part of the authorisation process, the onus is on the applicant to satisfy the Commission that immunity should be granted on public benefit grounds. In the Commission's publicly available *Guide to Authorisations and Notifications*, the Commission requests that applicants provide a submission in support of their application. This is also clearly communicated by Commission staff to applicants. Failure to lodge a supporting submission with an application can cause substantial delays because the Commission cannot meaningfully commence the consultation process on an authorisation application until a supporting submission setting out the applicants' public benefit claims is lodged.

In October 2001 the Queensland Newsagents' Federation (QNF) lodged an application for authorisation of collective bargaining conduct. However, the QNF did not lodge its supporting submission until the end of April 2002—more than six months after the application was lodged.

Similarly, the the Royal Australasian College of Surgeons and the Royal Australian College of General Practitioners lodged their supporting submission four months after their authorisation applications were lodged.

9.4.1.2 Delay caused by applicants amending their proposed conduct while the authorisation is being considered

Changes to applications may lead to more consultation with interested parties and a reassessment by the Commission of the public benefit and likely effect on competition of the conduct. This can create delays.

In December 2001 Health Purchasing Victoria (HPV) lodged an application for authorisation with the Commission. On 9 April 2002 HVP amended its application following a direction by the Victorian Department of Human Services capping payments to nursing agencies. As a result, the Commission assessment of the application was delayed significantly.

After a series of delays, the Showmen's Guild of Australasia (SGA) lodged an application for authorisation in February 2000. In mid-April 2002, the SGA amended the application to include collective bargaining arrangements. As a result, the Commission assessment of the application could not start consultations on the collective bargaining arrangements until over two years after the original application was lodged.

9.4.1.3 Delay caused by applicants amending their proposal in response to the Commission’s draft determination

In December 2000, the Commission issued a draft determination proposing to grant an application for authorisation by several New South Wales metropolitan and rural private hospitals to collectively bargain with private health funds and the Department of Veterans’ Affairs. The applicants then took six months to provide the Commission
with the final details of their proposed arrangement in response to the Commission's draft decision. The Commission could not make a final determination until it received details of the proposed arrangements. This meant a delay of over six months.

9.4.1.4 Delay caused by a change in the applicant during the authorisation process

In January 2001, the Southern Sydney Waste Board and the Inner Sydney Waste Board lodged applications for authorisation of collective bargaining conduct. However, both applicants were subsequently abolished by the New South Wales Parliament. This meant several months’ delay while new applicants were found.

9.4.1.5 Delay caused by questions about the validity of an application which need to be resolved following its lodgement

In December 2001, the Drycleaning Institute of Australia (DIA) lodged an application on behalf of suppliers of dry-cleaning chemicals. However, this was done without the consent of the chemical suppliers. Consideration of the application by the Commission has been deferred while the DIA consults chemical suppliers about their legal status under the application. By June 2002, the DIA had still not resolved this matter with chemical suppliers and so the Commission has been unable to commence its assessment of the application.

9.4.1.6 Applicants may request that the Commission delay a decision

In September 2001, Adelaide Airport lodged an application for authorisation that involved the building of a new airport terminal. It later asked the Commission to defer issuing a draft determination for several months because of uncertainty caused by the collapse of Ansett Airlines.

In summary, each authorisation takes a different amount of time to assess. It depends on the complexity of the issues and the outcome of the public consultation process. Delays are often outside the control of the Commission.

9.4.1.7 Authorisation case study 7

**CECS authorisation: facilitating reform of Australia's ATM and EFTPOS payment system**

In September 1996 the Australian Payments Clearing Association (APCA) sought authorisation for its proposed regulations and procedures for the Consumer Electronic Clearing System (CECS). In May 1997 APCA lodged a further application for authorisation in relation to the rules.

CECS member financial institutions agree on standards and procedures for interchange arrangements between themselves as issuers or acquirers in the ATM and EFTPOS networks. The CECS applications for authorisations concerned the rules governing payment arrangements for debit card transactions generated within these networks.

In August 1997 the Commission issued a draft determination proposing to deny authorisation. The Commission found that the proposed rules were substantially incomplete with regard to the standards and procedures necessary to facilitate the effective clearing and settlement of debit card transactions.
After consulting with interested parties, the Commission considered that if the CECS rules were to result in a net public benefit, they would need to be further developed and amended. The Commission considered that certain procedures relating to participation in the EFTPOS network as an issuer should be made mandatory. It also considered that APCA should introduce mandatory interchange standards and procedures for participation in the EFTPOS network as an acquirer and in the ATM network as an issuer or an acquirer. The Commission also considered that APCA should take on responsibility for administering compliance with these mandatory standards and procedures.

In 1998 and 1999 APCA made several amendments to the CECS arrangements, which included introducing a range of standards, establishing a consultative forum and revising membership criteria. ACPA then asked the Commission to finalise its consideration of the applications for authorisation.

Following further consultation with interested parties, the Commission concluded that the amended CECS arrangements were likely to result in a net public benefit. It found that the setting of minimum standards would have a positive effect on access to ATM and EFTPOS networks for issuers, acquirers and merchant principals. The Commission also found that the proposal for APCA to certify that acquirers and merchant principals satisfy the minimum standards would improve the objectivity and transparency of the rules. The Commission considered that the minimum standards and procedures, along with the certification process, would be likely to benefit the public by improving the security and integrity of the ATM and EFTPOS networks.

The Commission granted authorisation on 16 August 2000.

Although the authorisation process took four years to complete, this does not reflect a failing of the authorisation process. Rather, it reflects the flexibility of the authorisation process in facilitating industry wide reforms over payment system arrangements of national significance.

9.4.2 Criticism that the authorisation process is too costly

The fees for lodging an authorisation application with the Commission are specified in the Trade Practices Regulations. For non-merge authorisation applications, the fee is $7500. A concessional fee of $1500 is payable for any additional application related to conduct in the same market or closely related market lodged within 14 days of the first application.

The Act does not provide the Commission with any discretion to waive or vary the fees prescribed in the regulations.

The use of professional advisers such as legal advisers can add significantly to the cost to business of accessing the authorisation process. It is not necessary for applicants to employ professional advisers to prepare authorisation applications and supporting submissions. The Commission publishes many guides to the authorisation process and Commission staff regularly help applicants to prepare their application and supporting submission and guide applicants through the authorisation process.
In the Commission's experience, a number of applicants have not utilised professional advisers to prepare their authorisation application and supporting submission and the Commission does not consider that this has had a detrimental effect on their ability to present their viewpoint to the Commission in an effective manner.

In the Commission's view, it is entirely a matter of free choice whether a business utilises the services of professional advisers to assist them through the authorisation process. It is also a matter of choice whether an applicant uses high cost professional advisers or lower cost advisers and the extent to which such advisers are utilised. The extensive use of high cost professional advisers should not be regarded as a necessary part of the cost to business of the authorisation process.

9.4.3 Criticisms about delays and uncertainties associated with possible review by the Australian Competition Tribunal

Reviews can be resource intensive and time consuming for the applicant and the Commission. However, the Commission considers that the existence of a right of review reinforces the legitimacy and integrity of the authorisation process and the Commission's decision-making role.
10 The Commission’s compliance role and processes

10 Summary

The Commission is an independent, national statutory body answerable to the Commonwealth, states and territories. Its responsibilities cover a broad range of areas including anti-competitive practices, unconscionable conduct, consumer protection, product liability, and price exploitation under the New Tax System, as well as regulatory roles in specific industries, and its adjudication functions under Part VII.

The workload of the Commission is increasing. Since the implementation of the GST, the number of complaints received by the Commission has increased significantly. The number of complaints relating to non-GST matters is also increasing from approximately 11 000 in 1998–9 to 52 352 between 1 July 2001 to 31 May 2002.320

The main functions of the Commission in relation to Part IV are to ensure compliance by providing information to consumers and business about the operation of the legislation, investigating complaints and taking appropriate action (either by administrative settlement or through the courts) where necessary.

Through outlining the Commission’s processes in carrying out these functions, this chapter will demonstrate that the Commission conducts itself in a transparent and ethical manner.

The Commission sees its roles as one of furthering public interest by encouraging compliance with the Act. The Commission’s compliance strategy seeks to educate both consumers and business of their rights and obligations under Part IV.

Where appropriate, the Commission will investigate complaints regarding non-compliance with Part IV, and seek an appropriate remedy, whether through court proceedings, informal administrative settlement, or court enforceable undertakings pursuant to s. 87B. Such action serves the public interest in punishing the wrongdoer, deterring the wrongdoer from repeating the conduct, and providing a general deterrent to other traders engaging in similar conduct. The Commission publishes a number of guides that outline its priorities and processes and it continues to review its priorities in line with changing economic conditions.

The appropriateness of the Commission’s conduct in selecting matters for litigation is demonstrated by its enforcement record. The success rate in contested matters is in excess of 90 per cent and the number of cases won is greater than the number settled.

320 During 2001 the Commission established a dedicated information centre which has resulted in improved reporting mechanisms. Accordingly, to some extent, the increasing number of complaints recorded in the 2001–02 reporting period may be attributed to this factor.
10.1 Compliance information guidance and liaison

The Commission has a continuing commitment to maintaining substantial information and guidance programs for the general community and, as needed, for specific target audiences. It also sees such programs as assisting the transparency of its processes.

This information covers areas including the operation of the Act and its application to particular industry sectors, the Commission’s own priorities, processes and procedures, and specific case examples. Such background material provides predictability, assisting the business community to conduct its affairs in a manner that complies with the Act. However, the Commission does not provide legal advice to business or consumers on specific issues.

Information is disseminated via a broad range of communications channels including Commission and joint Commission publications, Internet, conferences and speeches, media and one-on-one meetings with individuals, businesses and associations. As part of this process, the Commission places a high priority on maintaining links with external stakeholders through ongoing liaison and consultation. These links are an important element in the effective dissemination of educational materials, and obtaining feedback from stakeholders regarding the Commission’s procedures and identifying priorities.

To enhance the effectiveness of its activities in this area, the Commission is currently developing a broad communications strategy aimed at improving community understanding of the Commission’s roles and functions. In particular, emphasis is being placed on building a more comprehensive understanding with business and other external stakeholders.

In new priority areas, the Commission has allocated resources towards specific educational programs. These programs are outlined in more detail below

10.1.1 Publications and Internet site

The Commission produces a range of publications in print, electronic and audiovisual form. This includes technical reports, parliamentary reports and papers, guides to legislation, consumer leaflets and magazines, product safety brochures, small business booklets and videos.

Publications are designed to inform business and consumers regarding various aspects of the law, particularly new areas of the law or new applications of the law.

Publications are also issued to provide greater transparency of the Commission’s own activities by informing the community of specific actions taken by the Commission, and its priorities and processes. They also provide business and consumers with information about how they can expect the Commission to conduct itself in certain circumstances, for instance in relation to requests/orders to disclose information.

An important element of the Commission’s publication series has been to produce a number of technical and procedural guides which outline the Commission’s priorities, its procedures in conducting investigations and the statutory basis upon which it exercises its powers under the Trade Practices Act. These include procedural guides:
Section 155 of the Trade Practices Act, Collection and Use of Information; and Section 87B of the Trade Practices Act: The ACCC and its use of penalties; Access to Public Registers; The ACCC: role and functions; and Making Markets Work: directions and priorities.

The Commission has issued over 300 publications (see appendix 7 for a list of the publications).

In addition to a variety of booklets and brochures, the Commission distributes two regular publications, ACCC Journal and ACCC Update. The Journal is distributed to approximately 800 businesses, professional and consumer organisations. It is published bi-monthly and outlines all matters resolved either in the courts or between the Commission and companies or individuals concerned. ACCC Update’s circulation is close to 10,000 copies. It is largely an issues-based publication. It is available without charge and is distributed to industry and business organisations, consumer groups, educational institutions, businesses and individuals.

The Commission’s Internet website continues to grow rapidly and has become an important adjunct to the Commission’s extensive print publications program.

In addition to basic information about the work of the Commission, and how to contact it, the site includes:

- online versions of the Commission’s main publications
- online text of media releases and other public statements
- drafts and discussion papers on which the Commission seeks public comment
- links to related sites, especially those of agencies that are often more appropriate sources of information or help to people making inquiries of the Commission.

10.1.2 Speeches and conferences

Commissioners and Commission staff deliver speeches and presentations to a wide variety of forums to educate the community regarding the Act and the role of the Commission. In 2001 Commissioners delivered more than 54 speeches.

The Commission has hosted, or co-hosted a number of conferences focusing on particular topics in recent years.

Demand for the Commission and staff to give presentations and speeches is very high. In 2001 the Commission established a Communications Committee whose responsibilities include coordination of these activities to ensure that the Commission is reaching the audiences it needs to in the most efficient and effective manner.
10.1.3 Consultation with stakeholders
At both national and regional levels the Commission places a high priority on developing and maintaining contact with a wide variety of private sector organisations and Commonwealth, state and territory agencies.

These contacts are especially important to the Commission’s work, for fostering information flows, cooperative ventures and reducing duplication of effort.

The Commission also has extensive links with overseas competition agencies and participates in various international forums. These linkages are discussed more fully below.

10.1.4 Industry and consumer stakeholders
The Commission convenes a consultative consumer committee four times per year to act as a forum to exchange views and information on trade practices issues. It has expanded its liaison with the small business community by establishing a Small Business Advisory Group that comprises representatives from a wide range of business and professional areas. The group meets every six months to discuss trade practices issues affecting small business. The Commission has also established the Utility Regulators Forum which meets three times a year to discuss specific issues in regulated industries.

The Chairman, Commissioners and staff are accessible and have meetings with relevant industry, groups, businesses and industry leaders to discuss particular issues as the need arises.

These activities are critical to the activities of the Commission, not only in assisting to educate relevant groups regarding the operation of the Act and explaining the Commission’s role, but also in obtaining industry feedback on issues and the Commission’s processes and procedures generally.

10.1.5 Government departments and agencies
The Commission continues to expand its already extensive links, formal and otherwise, with Commonwealth, State and Territory agencies.

The Commission has formal Memorandums of Understanding with a wide range of agencies including Standards Australia, Australian Communications Authority, State Fair Trading Offices, ASIC, APRA, Reserve Bank of Australia, the NSW Health Care Complaints Commission and the Office of the Health Services Commissioner, Victoria.

It uses these links to develop a better understanding of common issues of concern, and at a practical level, to facilitate information sharing and the referral of complaints between agencies where appropriate.

10.1.6 New programs
As outlined above, the Commission gives a high priority to developing education and information programs in relation to new areas of commercial activity which may raise issues under the Act. This may include areas of activity which have only recently been
brought within the scope of the Act, for example, the professions, or new forms of commercial activity, for example, e-commerce.

The Commission has received additional funding to establish programs in the following areas.

10.1.6.1 Professions, health and medical sectors

Before the extension of the Act to cover more activities of the professions, health and medical sectors in the mid-1990s, the former Trade Practices Commission had already undertaken significant research focussing on competition in professional markets. In December 1990 a discussion paper, Regulation of professional markets in Australia: issues for review, was launched. In September 1992 the TPC issued a report focusing on architects, and another on the legal profession in 1994.

Following the announcement of the recommendations of the Hilmer Inquiry to extend the jurisdiction of the Act to this sector more fully, the Commission decided that it should first educate the professions about their new rights and responsibilities. This education has been extensive with seminars, special guides for particular sectors, numerous speeches and articles.

For example, the Commission wrote to each of the medical colleges with an offer of assistance. The aim was to assist those colleges with possible changes that may have been necessary to the Constitution, rules or by-laws of such college if they contained anti-competitive restrictions. In 1997 the Commission held a joint conference with the University of Western Australia and University of Notre Dame to discuss the implications of the national competition policy for the professions.

Since the 1996 reforms, Commissioners and Commission staff have given more than 50 presentations at various conferences, seminars and formal meetings of professional associations.

The Commission has also issued a number of specific publications to assist the health sector understand the application of the Act.321

Some additional funding from the Commission’s 2001–02 budget has been used for a dedicated team to work on the application of the Act to the professions. The objective of the Professions team is to determine the level of compliance achieved by various professionals since the Act was extended to cover all professions and to ensure that the Commission’s approach is consistent and coordinated.

This team has completed the Commission’s third report to the Senate on anti-competitive practices by health funds in regard to private health insurance.

10.1.6.2 E-commerce

The Commission received extra funding for work in the emerging areas of e-commerce and computer forensics. This has enabled the Commission to investigate the trade practices implications of B2B (business to business), B2C (business to consumer) transactions and online marketing.

The Commission has undertaken significant research into the potential competition and consumer issues surrounding e-commerce transactions, and the impact this may have on Australian consumers. In September 2001, the Commission released a discussion paper outlining potential competition issues associated with electronic marketplaces, *E-Commerce and competition issues under the Trade Practices Act: discussion paper*. It then held a conference in November to discuss issues raised in the Discussion Paper, drawing on the knowledge and experience of industry experts, economists and legal practitioners. The E-commerce Conference also brought together external stakeholders to identify trends and issues for consumers in dealing with online traders.

10.1.6.3 Small business

The Small Business Unit is now in its third year of operation.

The Small Business and Rural and Regional Services Program informs and educates small business and consumers across Australia about the Act, including rights and responsibilities under the legislation and also about the alternatives available to small business in dispute resolution.

It has established a Regional Network to provide services as part of the Network in rural and regional communities. The network continues to expand (to date, in excess of 300 agencies have committed). Members of this network are both a focal point for trade practices information, and a referral service to and from the Commission, advising the Commission of local trade practices concerns. Outreach staff continue regular field trips, seminar programs and radio interviews, backed with advertisements, articles and editorial comment in local, state and national press, to assist the Regional Network disseminate trade practices information.

The unit is responsible for establishing liaison with the Small Business Advisory Group which comprises representatives from a wide range of business and professional areas. The group meets every six months to discuss trade practices issues affecting small business. Regular liaison also occurs at a state or territory level on a bi-monthly to quarterly basis with a range of consultative groups. These include a broad spectrum of governmental, industry and local representation with a focus on small business issues.

The unit conducts regular mail-outs (six each year) of trade practices articles and information to interested subscribers, including all groups mentioned above. In addition to the regular mail-out, the Commission produces *ACCC Briefing* (around five per year). There are over 1200 subscribers at this time. Mail-out articles are regularly included in subscribers’ own internal briefings, magazines or otherwise distributed to a wider audience than is indicated by the individual recipients in the Commission’s database.

The unit co-produces a flier with the Australian Retailers Association (ARA) twice yearly—called *Retail Flash*. This publication comprises trade practices material
applicable to the retailing industry, based on advice from the ARA regarding current issues of relevance.

The Unit also is responsible for the Competing Fairly Forums which are broadcast via satellite to rural and regional towns throughout Australia on a twice yearly basis. These broadcasts provide people in regional communities with the opportunity to participate directly with the Commission’s Chairman and Commissioners, and other trade practices experts, to have their concerns directly heard.

10.1.7 International context

The Commission is an active contributor to numerous international fora on competition and consumer protection, and works very closely with its international counterpart agencies in relation to enforcement cooperation and in the provision of technical assistance and capacity building to economies in transition. This allows the Commission to keep up to date on developing trends in competition laws and practices of other regulators. It also promotes better understanding and closer cooperation between regulators.

10.1.7.1 Enforcement cooperation

With the continuing trend towards the globalisation of business, the Commission is increasingly faced with borderless and complex enforcement issues associated with matters including international cartels, mergers involving multinational corporations, and international consumer fraud and product safety issues as examples. Competition regulation authorities have a prime interest in cooperating to combat these problems and to seek solutions in this new environment.

The Commission receives every month an average of twenty complaints, inquiries or requests for assistance from its counterpart agencies or consumers located abroad. In the reverse, the Commission requests information or assistance from one of its international counterparts an average of ten times per month.

The international work of the Commission is facilitated through a number of initiatives, outlined below:

10.1.7.2 Formal cooperation arrangements

The Commission has formalised its relations with a number of its counterparts (among others the Canadian Competition Bureau, the Federal Trade Commission in the US and the Competition Commission in New Zealand) and there is a treaty between the Government of Australia and the Government of the United States of America on mutual antitrust enforcement assistance.

These agreements foster and facilitate information sharing and enforcement and regulatory cooperation, although a considerable amount of information sharing and cooperation still occurs with countries and agencies where the Commission does not have formal cooperation arrangements in place.
10.1.7.3 Involvement in international forums

Contributing to international discussions in seeking to develop a united approach to managing borderless enforcement issues is also of importance to the Commission. This is reflected in its participation in a range of international fora where competition and consumer protection issues are discussed, including:

- OECD—Competition Committee and Joint Working Group on Trade and Competition
- Relevant APEC working groups on competition, deregulation, consumer protection/e-commerce, telecommunications and energy
- the WTO Working Group on the Interaction between Trade and Competition Policy

10.1.7.4 Technical assistance to economies in transition

A number of developing countries’ Governments see the Australian model and experience as highly useful in developing their own country’s regime. As a consequence, the Commission has become an active provider of technical assistance in recent years, making available its resources and expertise in competition, consumer protection and utility regulation to countries with less developed regimes. These activities are usually via funding assistance from AusAID and focused primarily on the Asia-Pacific region.

10.2 The Commission’s investigation and enforcement priorities

The Commission’s role also involves securing compliance with the Act through enforcement and investigation.

Despite being given an increasingly diverse role, including for instance in relation to the implementation of the New Tax System, the Commission has not scaled down its enforcement efforts. In fact, the number of matters pursued and the number of successes have increased, both in the courts and more commonly by alternative avenues of resolution.

It should be noted at the outset that the Commission’s enforcement role is broader than simply matters taken to court. Matters which are selected for enforcement action may be resolved by way of informal dispute resolution and mediation, court enforceable undertakings, uncontested court proceedings or contested court proceedings.

10.2.1 Public interest nature of enforcement role of the Commission

In exercising its enforcement activities, the Commission is very conscious of the ‘public interest’ nature of enforcement of the Act and seeks to exercise its role and utilise its resources in a way that best serves the public interest in compliance with the Act.

The public interest nature of litigation under the Act has been recognised by the courts on various occasions.
In the application by the Commission to prevent *Rank Commercial Ltd and Coles Myer Ltd and others* from acquiring shares in the capital or assets of Foodland Associated Ltd, alleging a breach of s. 50 of the Act Justice Beaumont, in assessing the balance of convenience stated:

> It is to be borne in mind … that the shares in FAL are reasonably widely held, so that undesirable complications arising in a bid now proceeding could impact adversely upon a significant section of the public. Their interests, in my view, should be accorded substantial weight in judging where the balance of convenience presently lies.\(^{322}\)

In another example, in *ICI Australian Operations Pty Ltd v TPC*\(^{323}\) in concluding that the grant of an injunction in addition to penalties was appropriate, Justice Lockhart stated:

> Part IV and V of the Act involve matters of high public policy. Parts IV and V relate to practices and conduct that legislatures throughout the world in different forms, and to different degrees, have decided are contrary to the public interest… These are legislative enactments of matters vital to the presence of free competition and enterprise and a just society.\(^{324}\)

Similarly, in the same case, Justice French stated:

> The Trade Practices Act 1974 is concerned primarily with the protection of the public interest in the prevention of anti-competitive conduct in markets within Australia (Pt. IV) and the fair treatment of consumers (Pt. V).\(^{325}\)

### 10.2.2 Commission enforcement priorities

The Commission is also highly conscious of the degree of discretion it has in case selection, and the selection of appropriate tools to use to meet its compliance objectives.

The Commission strongly believes that a discretionary approach is necessary in order to provide flexibility and an ability to meet the changing needs of the community as economic conditions change. At the same time, it is important that its processes are as transparent as possible (whilst having appropriate regard to the reputation of those under investigation) and that matters are not selected for enforcement activities on an arbitrary or unfair basis.

Accordingly, the Commission has developed a series of publicly available enforcement priorities and criteria for matter selection. These enforcement priorities are constantly

\(^{322}\) *TPC v Rank Commercial Ltd & Others* (1994) ATPR 41–324 at 42, 287.

\(^{323}\) (1992) ATPR 41–185.

\(^{324}\) (1992) ATPR 41–185 at 40, 524.

under review and both react to trends in the economy and strategically targeted areas that the Commission identifies as important, such as new areas of the law or emerging industries. A key element in identifying priorities is that they reflect the public interest.

The priorities which the Commission measures conduct against to determine whether it is appropriate to take enforcement actions are:

- apparent blatant disregard of the law
- history of previous contraventions of the law, including overseas contraventions
- significant public detriment and/or a significant number of complaints
- potential for action to have a worthwhile educative or deterrent effect
- does the matter involve a significant new market issue
- would the likely outcome justify the use of resources.

In selecting matters, the Commission will have regard to whether the conduct falls within one or more of the enforcement priorities.

In addition, the Commission has specific priorities for anti-competitive conduct. Irrespective of the industry or market involved, the Commission is likely to be most concerned with the following forms of anti-competitive conduct:

- anti-competitive agreements, with particular emphasis on price-fixing and primary boycotts
- mergers which would, or would be likely to substantially lessen competition in a substantial market
- misuse of market power (especially conduct inhibiting structural reform or focusing on emerging markets/competition or stifling the development of innovation and small business)
- resale price maintenance imposed by major suppliers or induced by major customers
- exclusive dealing where it significantly affects consumers or business
- secondary boycott conduct with a major detrimental community impact.

International anti-competitive conduct, often in cooperation with agencies overseas is also a particular area of attention.
In relation to small business issues the Commission’s enforcement priorities are focused on establishing relevant legal precedent and matters involving relationships with marked disparity in bargaining power or market power (for example landlord and tenant or franchisor and franchisee relationships). These issues may be considered under s. 46 (misuse of market power), or in some cases Part IVA (unconscionable conduct). The Franchising Code under Part IVB is also relevant.

These priorities were published by the Commission in 1999 to enable business and consumers to clearly understand the Commission’s policy in investigating matters.326

10.2.3 Enforcement trends

The Commission receives many thousands of complaints and inquiries each year and this has increased, especially with the GST role. The Commission analyses these complaints for trends and emerging issues. This analysis assists the determination of its enforcement priorities.

As was identified in the recent Output Pricing Review conducted by the Commission and Department of Finance and Administration (Finance), the Commission’s workload is increasing, and in some areas increasing rapidly.

10.2.3.1 Complaints

As more people have become aware of the activities of the Commission, a greater number of complaints have been received. The figures in Figure 10.1 show that since the implementation of the GST, the number of complaints has increased significantly. The number of complaints relating to non-GST matters is also increasing from approximately 11,000 in 1998–99 to 52,352 between 1 July 2001 to 31 May 2002.327

326 ACCC, Making Markets Work, Directions and Priorities, ACCC, p. 7.

327 Note that during 2001, the Commission established a dedicated information centre which has resulted in improved reporting mechanisms. Accordingly, to some extent, the increasing number of complaints recorded in the 2001–02 reporting period may be attributed to this factor.
Figure 10.1

The figures in Figure 10.2 depict the highest concentration of complaints and inquiries by the industry they relate to.

Note 1: The above figures do not include complaints generated as a result of major investigations. These would add several thousand to the pursued category.

Note 2: In 1999/2000, a more sophisticated computer reporting system was introduced. In 2001, a dedicated information centre was established which further improved reporting mechanisms. Accordingly, to some extent, the sharp increase of complaints recorded may be also attributed to these factors.

The figures in Figure 10.2 depict the highest concentration of complaints and inquiries by the industry they relate to.
10.2.3.2 Cases instituted

However, although the number of complaints received is very high, a large number of complaints are filtered by application of the enforcement priorities, resulting in a small number of cases instituted in court. Accordingly, of the 95,000 complaints and inquiries received by the Commission in 2000–01, proceedings were instituted in only 33 matters.

Figure 10.3
While the number of cases instituted is very small proportionate to the number of complaints received and pursued, Figure 10.3 does indicate that from approximately 1992–93 onward, the Commission is pursuing a larger number of cases through the courts than was the case in the first 15 years of the Act’s operation.328

In its 20th Anniversary Bulletin, the current Chairman of the Commission noted:

> There has been a general stepping up of enforcement activity by the Commission. The amount of litigation which it has undertaken has risen quite sharply, under both Parts IV and V. This has helped with compliance. It has also produced some useful precedents.329

An increasing proportion of matters pursued are of a serious and complex nature resulting in court proceedings. This reflects improvements in the Commission’s selection processes, particularly in the establishment of an Information Centre which enables the Commission to take a more coordinated and consistent approach to screening the growing number of inquiries and complaints in accordance with the Commission’s enforcement priorities.

As identified by the former Chairman of the Commission, Professor Bob Baxt during his term of office, in the early 1990’s there were still many provisions of the Act which needed to be tested in court in order to clarify the application of the law. This was the reason for the Commission’s intervention in the leading case of *Queensland Wire*.330 This need persists today.

Consequently, the Commission has recently taken action and intervened in a number of complex s. 46 (misuse of market power) matters in order to clarify the law further and develop greater understanding and certainty regarding the law for business. Examples include the recent cases of *ACCC v Boral*331, *ACCC v Rural Press*332, *ACCC v Safeway Stores Pty Ltd*333, *ACCC v Universal Music*334 and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*335. These matters involve significant resources and complex legal and economic arguments, particularly in the areas of predatory pricing where the law is currently unsettled. The Commission considers that there is a very real public interest in pursuing such matters, because clarification of the law in areas such as predatory pricing may have a real impact on commercial activities, particularly for small business. The Commission is also pursuing other complex and resource intensive issues

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328 See also Karen Yeung, *The public enforcement of Australian competition law*, 2001, p. 28.


of public interest such as alleged misuse of market power in the airline industry, and
alleged petrol price fixing in the Ballarat region.

In the consumer protection area, the Commission is taking on more complex matters,
pursuing issues such as fine print advertising (for example, proceedings have been
instituted in relation to a number of retailers and insurance funds in relation to fine print
advertising).

The Commission is also increasingly focusing its resources towards matters that are of
particular industry concern. For example, the Commission is, where appropriate,
focusing its enforcement activities into areas such as the professions, small business
(unconscionable conduct matters) and e-commerce to foster compliance. It was these
areas that the Government signalled that it saw serious issues arising by providing
additional funding to the Commission for compliance programs in these sectors.

These new areas will often raise more complex issues, and therefore are more resource
intensive. For example, in the e-commerce area, the Commission has taken action in a
number of cases seemingly involving simple ‘pyramid selling’ schemes or
misrepresentations. However, in addition to the investigative issues encountered in
gathering and presenting electronic evidence, these cases often raise complex
jurisdictional issues (for example, the Skybiz matter in which the Commission is testing
the ability to take action in relation to principles located outside the jurisdiction).
Equally, in the growing area of unconscionable conduct, cases are very fact intensive
and as the law in this area is uncertain, require significant resources to litigate.

Also, rapid advances in communications technology, the forces of globalisation, and
trade liberalisation have placed additional responsibilities on competition regulators
such as the Commission to participate in international enforcement activities to deter
global cartel activities. For example, the Commission recently brought action against
three animal vitamin suppliers for alleged price fixing and market sharing in which the
Federal Court imposed $26 million in penalties. This case arose in from a confession by
those involved after the conduct was exposed in the US.

It is also relevant to note that as the Commission brings more of these matters forward,
it is increasingly subject to the scrutiny of the courts system, and particularly the higher
courts of appeal.

10.2.3.3 Section 87B undertakings

Figure 10.4 shows the number of s. 87B undertakings received in Part IV and V matters
as a proportion of matters pursued. This indicates that over the last six years the usage
of s. 87B undertakings has remained relatively stable (with the exception of the years
1999–2001 where s. 87B undertakings were used specifically in relation to price
exploitation matters arising from the GST) and is a very low proportion of matters
pursued.
10.2.3.4 Summary

These trends indicate that awareness and visibility of the Commission within the community is increasing rapidly, resulting in a significant increase in workload.

At the same time, the Commission itself is subject to an increasing level of scrutiny and accountability through the court system as the number of cases instituted increases. Further, as more complex cases are being taken to clarify the application of the law, these matters are more likely to be subject to appeal and a very high level of scrutiny by the courts.
Table 10.1. Commission investigation and enforcement decision-making processes

* Section 87B undertakings are sometimes considered in conjunction with court outcomes.
10.3 Investigations processes

The Commission’s investigation process is outlined at Table 10.1.

10.3.1 Finding out about potential breaches of the Act

In 2000–01 the Commission received roughly 95 000 complaints and inquiries by telephone, email, fax, letter or in person. The majority of these complaints are received by the Commission’s Information Centre or through the network of regional offices.

The Commission relies significantly on these complaints to find out about potential breaches of the Act. Complaints are made for any number of reasons by people including customers, suppliers, competitors of a business or informants. Issues may also be raised with the Commission by politicians, or referred by other government agencies or departments. By observing conduct in various sectors, the Commission may itself become aware of potential breaches. The longer an unlawful practice goes on and the more widespread the conduct, the more likely it is that it will be brought to the attention of the Commission.

10.3.2 Complaint handling processes

The Commission receives complaints from a number of sources including consumers, small and large business, industry groups and other agencies. The Commission has developed a number of mechanisms for complaints to be made including telephone, email and letter.

Most complaints sent by email or telephone are handled in the first instance by the Commission’s centralised Infocentre. The Infocentre receives queries regarding a wide range of matters ranging from consumer protection and product safety matters to queries regarding ongoing court proceedings and competition matters. While many matters can be dealt with by the Infocentre staff directly, matters relating to anti-competitive behaviour will be escalated from the Infocentre to the appropriate Regional or Central Office Branch for assessment. Consistent handling of complaints is facilitated by a printed Resource Manual that provides guidelines for the handling and escalation of complaints.

Written complaints sent by mail will generally be assessed by the receiving Regional Office. In some cases, if the matter is to be pursued, the Regional Office may refer the matter to another region if it appears more convenient for the matter to be dealt with in the other region.

Where a competition matter is escalated from the Infocentre, or received by a Regional Office by mail, staff will then assess it to determine whether the matter raises any threshold issues under Part IV of the Act. If the matter does not raise issues, the complainant will be notified.
All complaints are recorded in the Commission’s electronic database. To ensure consistency of approach and identify trends in complaints which may impact on the Commission’s priorities, the Infocentre generates a weekly report summarising major trends during the previous week and matters escalated. The complaints database is also reviewed periodically in relation to targeted areas such as telecommunications, small business, international matters and e-commerce to identify emerging trends and issues in dealing with new forms of conduct or new industries.

10.3.3 Investigating a complaint

If a complaint raises a potential breach of the Act it is immediately escalated to an investigator or flagged for follow up.

When an investigator receives a complaint, it is again considered in terms of a potential breach of the Act. At this stage an assessment is made as to whether or not the matter comes within the Commission’s enforcement priorities outlined above.

Where an investigator forms the view that the complaint raises a potential breach, in most cases a Director or Assistant Director will review the investigator’s assessment and direct further investigation. Usually, the business involved is contacted in writing and given the opportunity to give its views on the matter. The Commission believes it is important to inform the relevant business that a complaint has been made against it. Firstly, the business then has the opportunity to correct any unintentional breaches. Secondly, many businesses consider it important to know that a complaint has been made and appreciate the opportunity to respond to these complaints, clarifying any misunderstandings.

There will be some instances where a complaint is not referred to the business against which the complaint is made. If an allegation involves a collusive agreement between businesses and the Commission believes that important evidence may be destroyed if the businesses were made aware of the allegation, the Commission would attempt to investigate the matter indirectly or, if the requirements of s. 155 were satisfied, it may seek to use its coercive powers to obtain relevant information.

Commission staff may seek objective legal advice on particular issues that arise in the course of the investigation. Legal advice can be obtained from in-house counsel, commercial firms on the Commission’s legal panel or from counsel.

In many instances, the matter concludes here because it is evident that no breach has occurred, or there is insufficient evidence to support further investigation of the matter. Where a matter concludes at this stage, there is no major imposition on the business involved.

If the information supplied by the business still indicates a potential breach, it is likely that further inquiries will be made under the direction of a Director. Typically, this may include interviewing competitors and consumers, as well as the management and staff of the business concerned.
10.3.4 Enforcement Committee

Following these further investigations, if there is a view that the Act has been breached, the matter is referred to the Enforcement Committee. The Enforcement Committee meets weekly to oversee the Commission’s enforcement program.

The Enforcement Committee’s roles include:

- developing policies and strategic directions for the Commission’s enforcement function
- overseeing major enforcement matters requiring Commission consideration
- recommending use of s. 155 powers
- overseeing and where appropriate being involved in settlement negotiations, assisting regional directors in negotiations
- considering the outcomes of litigation for impact on the Commission and public education in respect of the Commission’s enforcement achievements
- considering any matters referred by the Commission
- ensuring consistency of approach in the Commission’s enforcement function, especially including matters where the community would expect a national agency to act consistently in every State
- overseeing the conduct of the Commission’s role in other litigation where the Commission is involved (for example as a defendant) or in matters in other tribunals in which the Commission is involved (for example the AAT).

Where a matter is referred to the Enforcement Committee, it considers a paper prepared by Commission staff outlining the allegations, all relevant information and any legal advice. The Enforcement Committee then directs staff as to what course the investigation should take.

Further consideration is given to what outcomes would be appropriate in the particular matter, informed by the enforcement priorities and objectives.

How the Commission achieves those outcomes varies significantly and is determined on a matter by matter basis.

Recommendations by the Enforcement Committee might include:

- not to pursue a matter further
• to investigate a matter further, including consideration of whether there is sufficient grounds to invoke powers under s. 155, compelling the provision of information

• seek to settle the matter administratively including by way of s. 87B undertakings, or

• direct the matter be referred to the Commission for a decision regarding whether or not the matter should be litigated.

10.3.5 The Commission

The Enforcement Committee has a supervisory role through the investigation and any litigation phase of a matter. Substantive issues are referred to the full Commission for decision.

The Commission considers a paper prepared by staff that outlines the allegations, all relevant information on a matter, recommendations from the Enforcement Committee and any further developments. The Commission makes all formal decisions as to whether to institute proceedings.

In recent years, the Commission has adopted ‘fast track’ strategies, particularly in relation to its GST compliance role, to stop offending conduct quickly and cost effectively and achieve satisfactory outcomes for consumers. These strategies are particularly appropriate for breaches of Part V.

A matter may be fast-tracked if there are allegations of a blatant breach of the Act which has significant consumer detriment. In these cases the Enforcement Committee may authorise a letter of demand to the business involved. This letter would detail the conduct; set out why it is allegedly a breach; detail the remedies that are required; and set out how those remedies are to be achieved. The letter of demand will also set a short time frame for response. This letter may also suggest that the business may wish to consider offering the Commission enforceable undertakings. Upon receipt of a reply from the business, if it was considered that the matter warranted litigation, that recommendation would be put to the Commission for a decision.

Remedies sought may include cessation of the conduct, corrective advertising, recompense to consumers or businesses for losses and the establishment of a trade practices compliance program.

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336 As fast-track matters are usually matters that appear to be sufficiently serious to warrant litigation, the Commission may seek consent orders rather than accept a s. 87B undertaking.
10.3.6 Evidence gathering techniques and use of s. 155 notices

Investigations by the Commission into possible breaches of the Act and other laws necessarily centre on the search for evidence of a breach, regardless of whether subsequent action involves litigation or some alternative strategy.

Generally, Commission investigators will seek statements from witnesses and in some circumstances obtain a formal record of interview. Witnesses are not compelled to answer questions in these situations.

The Commission generally prefers to obtain information through cooperation. Generally, the voluntary production of information is more efficient, less time consuming and more flexible than the alternative practice of obtaining information by using its coercive powers.

However, s 155 of the Act provides the Commission with mandatory information-gathering powers.

The Commission will consider using its coercive powers if:

- voluntary disclosure is not forthcoming
- voluntary disclosure is conditional and the conditions could constrain the use of that information
- if it is considered necessary that sanctions be available for non-compliance, or
- if it offers some advantage to the information provider.

The Commission has published a guideline on how s. 155 powers will be used. The Committee is referred to this publication. Important process issues involved in the Commission's use of s. 155 notices to are noted below.

10.3.6.1 Section 155 information gathering power

Section 155 confers administrative powers on the Commission to obtain information, documents and evidence when investigating possible contraventions and in connection with some of its adjudicative and telecommunications functions.

In short, s. 155(1) provides that where the Commission, Chairperson or Deputy Chairperson has reason to believe that a person has information, documents or evidence about a matter that constitutes or may constitute a contravention, a member of the Commission can issue a notice requiring the person to provide the information, documents or evidence.

A ‘member of the Commission’ refers to the Chairperson, Deputy Chairperson or a Commissioner.
Section 155(2) provides that where the Commission, Chairperson or Deputy Chairperson has reason to believe that a person has engaged in conduct that constitutes or may constitute a contravention of the Act or Part 20 of the Telecommunications Act or Part 6 of the Telstra Corporation Act, a member of the Commission can issue a notice authorising a Commission staff member to enter premises and inspect and copy documents in that person’s control to ascertain whether they have engaged in that conduct.

Specifically, a notice may require the recipient to:

- furnish information in writing within the time and in the manner specified (s. 155(1)(a))
- produce documents specified in the notice to the Commission, or to a person specified in the notice (s. 155(1)(b))
- appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce documents (s. 155(1)(c)).

The power is broadly similar to the investigatory powers of other Commonwealth law enforcement agencies, including the Australian Taxation Office and the Australian Securities and Investments Commission.

The power is only investigative, not judicial. In formulating a ‘reason to believe’ of the kind described in s. 155, the Commission is not making a determination as to the facts or applying the law to them in any way that is binding or authoritative.338 (See chapter 2 for discussion about limitations of the power to enter premises and inspect and copy documents. This chapter advocates criminal sanctions for cartel conduct).

10.3.6.2 The use of s. 155 to obtain information

The decision to issue a s. 155 notice is not taken lightly by the Commission. The Commission uses the power to properly investigate potential breaches of the Act and other relevant legislation.

Before issuing a notice, the Commission will consider:

- whether the information is otherwise available, including whether it would be provided voluntarily
- whether there is a risk that the information may be destroyed, not provided or provided only on terms unacceptable to the Commission

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338 Pioneer Concrete Pty Ltd v TPC & Anor (1982) 152 CLR 460 at 467.
whether it is appropriate to obtain the information in a formal manner, for example, under oath or by way of affirmation

whether the information is necessary and relevant to the Commission’s investigation

the time and cost implications of the s. 155 process for the Commission and the recipients of the notices.

The Commission will not use its powers under s. 155 to conduct a ‘fishing expedition’ for information. It does not issue a notice unless it has the requisite ‘reason to believe’ in relation to the matter.

10.3.6.3 Proper scope of a s. 155 notice

Section 155 has been recognised as a broad conferral of investigatory power on the Commission. To issue a notice the Commission, Chairperson or Deputy Chairperson must have a reason to believe that is objectively supportable by material facts and any other relevant information that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention of the Act.

The ‘reason to believe’ statement will go beyond a mere assertion that the relevant matter constitutes or may constitute a contravention. The notice will incorporate a sufficient description of the matter alleged to show the necessary relationship between the information sought and the matter in respect of which it is sought. The contravention to which the s. 155 notice relates is often described as the ‘matter’ which is the subject of the notice.

The matter is one that may constitute a contravention of the Act. This includes concepts of possibility and futurity. Therefore it is sufficient if:

- there is a possibility that the conduct in question would contravene, or

- the relevant conduct constitutes an existing contravention or could in future constitute a contravention.

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

339 See for example, SA Brewing Ltd v Bast (1989) ATPR 40–967 per Justices Fisher and French.

340 TNT Australia Pty Ltd v Fels (1992) ATPR 41–190.
The Commission does not have to show that there is a reason to believe that the information, documents or evidence will establish or tend to establish a contravention (or even that they establish a prima facie case), but merely that they relate to a matter that may constitute a contravention.341

The courts have upheld the use of s. 155 powers for a range of investigative purposes, including:

- providing the Commission with admissible evidence intended to be tendered in anticipated proceedings342
- obtaining evidence to be used in penalty proceedings on the question of quantum of any penalty343
- ascertaining whether there is a possible defence under s. 85(1) of the Act.344

10.3.6.4 Limits on the use of s. 155 powers

Section 155 expressly limits the Commission in the use of its s. 155 powers to obtain information the subject of a claim for privilege under the Prices Surveillance Act.

There are also a number of implied limitations on the use of the s. 155 power.

- The power to issue a notice must be used in good faith, not for a collateral purpose, but to perform Commission functions under the Act.345 The mere fact that a notice may pose a substantial burden does not invalidate it provided the Commission has weighed the burden with the benefit to be derived from obtaining that information and provided it is reasonable in the circumstances to seek the information requested.346

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341 WA Pines Pty Ltd v Bannerman (1980) 30 ALR 559 at 561.
343 id.
344 Riley Mackay Pty Ltd v Bannerman (1977) 31 FLR 129.
There is some debate as to the relationship between the Commission’s power and the court’s inherent power to govern the conduct of proceedings once proceedings have been instituted.347

While it is not possible to be definitive of those circumstances, the Commission takes the view that:

- it is unlikely to issue a notice addressed to a private individual respondent to the Commission proceedings
- it may be able to issue a notice addressed to a corporate respondent to the Commission proceedings, but as a general proposition it is unlikely to do so and will rather rely on court procedures, such as discovery, notices to produce and admit, interrogatories and subpoenas
- it may be able to issue a notice addressed to a non-party to the proceedings, and it may be appropriate to do so in some cases.

10.3.6.5 Compliance with the s. 155 notice

The notice will state the requirement of the addressee to provide information, produce documents or give oral evidence on specified day(s), at a specified place and a specified time. Reasonable time (usually 2 to 3 weeks) will be allowed to comply with a notice to provide information or documents or to attend an examination.

An addressee is obliged to comply with a notice. The obligations of the addressee are set out in ss. 155(5) and (6).

A person who contravenes ss. 155(5) or (6) is guilty of an offence. In the case of a person not being a body corporate the maximum penalty is a fine of $2 200 and in the case of a body corporate the maximum penalty is a fine not exceeding $11 000.

10.3.6.6 Privilege against self-incrimination

A person cannot choose not to comply with a valid notice on the basis that the material to be provided in response to the notice or the material to be inspected would expose the recipient to a penalty or might incriminate them.348

347 See, for example, Kotan Holdings Pty Ltd v Trade Practices Commission (1991) ATPR 41–134.
348 Pyneboard Pty Ltd v Trade Practices Commission (1983) 45 ALR 609. In any event, the High Court has also held that the privilege against self-incrimination is not available to corporations. EPA v Caltex Refining Co Pty Ltd (1993) 178 CLR 477.
However, with certain limited exceptions s. 155(7) renders evidence obtained via s. 155 inadmissible against the person providing the information in any criminal proceedings.

10.3.6.7 Legal professional privilege

Court decisions in other contexts indicate that the privilege is generally available unless a contrary statutory intention is shown by express words or necessary implication.349 Section 155 does not expressly provide for any exemption from compliance based on legal professional privilege.

The Commission takes the view that s. 155, on its proper construction, provides for no implied exemption from compliance on the basis of legal professional privilege, rather the section demonstrates an intention to exclude the privilege. The Commission’s view is based on the consideration that s. 155 confers a broad investigative power which would be undermined if the privilege were available.

In March 2001, the Full Federal Court in ACCC v The Daniels Corporation350 held that a claim of legal professional privilege was not a valid excuse for refusing to answer a notice served under s. 55 An appeal from this decision and two stated cases on the same point were heard by the High Court of Australia on 18 June 2002.

10.4 Processes for litigation

10.4.1 When is litigation action taken by the Commission?

Litigation action will only be taken where the Commission believes there is a likely breach and that it is appropriate for it, as a public agency, to pursue.

As outlined above, once the Commission has identified an alleged breach which falls within its enforcement priorities, it will then consider the appropriate response to take—ranging from informal settlement, alternative dispute resolution, court enforced undertakings, or litigation.

This decision will depend on the nature of the matter, the likelihood of obtaining an appropriate outcome via the means selected, and the public interest in pursuing a particular course of action.

This involves consideration of a complex range of issues, and different factors will be relevant in each case. Accordingly, there must be a certain degree of flexibility in the Commission’s approach to the selection of the appropriate enforcement tool in each case to ensure that the public interest is served. However, the Commission’s decisions are


guided by its published priorities and guidelines which outline the Commission’s philosophy towards when litigation is appropriate\textsuperscript{351}. The Commission’s general philosophy is that legal proceedings continue to be a significant focus because of the significant effects of court decisions, including:

- deterrence by way of penalty and resultant publicity
- punishment of unlawful conduct
- authoritative statement of the gravity of breaches of the law
- clarification of the requirements of the law and establishment of precedent\textsuperscript{352}.

In deciding on an appropriate course of action, the Commission will also be influenced by such factors as:

- the nature of the alleged breach in terms of:
  - its impact on third parties and the community
  - the type of practice
  - the product or service involved
  - the size of the business or businesses involved
- the history of complaints against the business or businesses and of complaints involving the practice, the product or the industry generally and any relevant previous court or similar proceedings
- the cost effectiveness for all parties of pursuing an administrative resolution instead of court action
- prospects for rapid resolution of the matter
- the apparent good faith of the corporation.

\textsuperscript{351} Paragraph 7.113 of ALRC discussion paper 65 suggests guidelines are useful in structuring discretion to ensure consistent and fair treatment of the regulated community. The Commission believes that it is published priorities and guidelines serve this purpose.

The list is not exhaustive and the Commission may take into account other considerations which reflect the particular circumstances of the alleged breach.\textsuperscript{353}

Notwithstanding that proceedings have been instituted, in most instances the Commission remains open to achieving an appropriate negotiated outcome.

\textbf{10.4.2 Litigation procedures}

There are a number of measures that promote fairness and accountability in the Commission’s use of litigation as an enforcement tool.

\textbf{10.4.2.1 Legal advice on any matter that goes to litigation}

Before starting court proceedings, the Commission is required by the Legal Services Directions\textsuperscript{354} to have independent legal advice from external barristers and/or solicitors, or from its General Counsel, that there are reasonable grounds for starting those proceedings.

\textbf{10.4.2.2 Attorney-General’s Legal Services Directions}

The Commission is required to comply with the Legal Services Directions issued by the Commonwealth Attorney-General, the Hon Daryl R Williams AM QC MP, under the \textit{Judiciary Act 1903}. The directions require the Commission, and its representatives, both counsel and panel firms of solicitors, to act as Model Litigants.

The model litigant policy contains general principles, including an obligation to avoid litigation, wherever possible. The policy was clarified by the Attorney-General in a speech he delivered in September 2000 to the Government Law Group entitled ‘Justice and Accountability: The Establishment of the Administrative Review Tribunal and the Model Litigant Obligation’.

The Attorney-General said:

\begin{quote}
Another area where difficulties sometimes arise is with the obligation to avoid litigation wherever possible. \\
This aspect of the model litigant obligation is designed to ensure that the Commonwealth considers alternatives to litigation, including settlement and alternative dispute resolution, and that in general it does not pursue litigation unless it has reasonable prospects of success. \\
…There are also many agencies whose functions include the institution of litigation in some circumstances, to recover debts for example.
\end{quote}


\textsuperscript{354} See clause 4.7, Legal Services Directions (issued by the Attorney-General pursuant to s. 55ZF of the \textit{Judiciary Act 1903}, with effect from 1 September 1999).
Indeed, there are some agencies such as regulatory agencies that need, in many cases, to institute litigation in order to discharge their statutory functions.

The prosecution of these proceedings will form a substantial part of the role of the agency. In these circumstances, the model litigant obligation to avoid litigation wherever possible means that a proper assessment must be made in each case of whether there are reasonable grounds for bringing the proceedings.

One of the Legal Services Directions prevents court proceedings from being commenced without external legal advice that there are reasonable grounds for starting the proceedings. There will generally be reasonable grounds for starting proceedings where there are reasonable prospects of success.

There may also be reasonable grounds for instituting or defending proceedings or for bringing an appeal where the prospects of success are not strong.

An agency will have reasonable grounds for pursuing litigation where the institution or continuation of the litigation is justified in the public interest, including where pursuit of the litigation is a legitimate means of clarifying the law on a particular topic.

The circumstances in which litigation should be pursued in the public interest where there is no clear prospect of success are limited.

Pursuit of litigation in those circumstances may give rise to questions of whether the other side should be funded, at least to some extent.

### 10.4.3 Use of panel firms

The Commission cannot represent itself in court litigation. It must retain solicitors and through them counsel. It is noted however that in merit review matters before the Australian Competition Tribunal or the Administrative Appeals Tribunal the Commission is not obliged to retain solicitors. It can, and has, represented itself. The Commission has a panel of legal firms to conduct litigation on its behalf.

The following firms are currently appointed to the Commission Legal Panel: Corrs Chambers Westgarth, Philips Fox, Deacons, Slater & Gordon, Norman Waterhouse and the Australian Government Solicitor. The firms each operate under a deed of standing offer for a period of three years which expires on 20 September 2004.

### 10.4.4 Representative actions

Pursuant to subs. 87(1A), the Commission can, in relation to a contravention of a provision Parts IV, IVA, IVB and V, commence proceedings for compensatory orders on behalf of persons who have suffered loss or damage as a result of conduct in contravention of the Act. The Commission can also take ‘grouped’ proceedings under Part IVA Federal Court of Australia Act in the Federal Court of Australia.

The Commission will consider taking such action in cases where it is a more efficient method of seeking compensation than leaving parties to take private action.
10.4.5 Intervention policy

In appropriate cases the Commission may seek leave of the court to intervene in private proceedings. New s. 87CA, provides that the Commission may, with the Federal Court’s leave and subject to any conditions imposed by the court, intervene in any proceeding instituted under the Act (subs. (1)). If the Commission intervenes it becomes a party to the proceeding and has all the rights, duties and liabilities of such a party (subs. (2)).

In the past, Australian courts have recognised that the public interest may be served by permitting the Commission to be heard in private proceedings, for example if the case involves an issue of general public importance—as in O’Keeffe Nominees Pty Limited v BP Australia Limited and Trade Practices Commission [Intervener]. Another important reason the Commission may seek to intervene is if the outcome would help to clarify the law.

These two issues are the basic guiding principle that will be considered by the Commission in deciding whether to intervene. The public interest may be served by intervention if there is a major detrimental effect on fair trading and competitive market forces and the Commission wishes to make submissions to preserve the competitive process and prevent future contraventions of the Act.

The Commission’s role to seek clarification of the law has been recognised consistently by the courts. The Commission believes it can provide a perspective that may help a court to see matters in a wider public interest context than could private parties, who may be unable or unwilling to do so.

It is also noted that if a conduct the subject of a case has international implications, the Commission’s linkages with international regulators may assist a court understand the nature and consequences of the particular conduct.

10.4.6 Leniency policy

In 1998 the Commission published a guideline dealing with cooperation and leniency in enforcement (‘the 1998 cooperation guideline’). The 1998 cooperation guideline was expressed in general terms and applied to all potential civil contraventions of the Act. The 1998 cooperation guideline essentially acknowledged what had been happening in

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practice, where leniency was given by the Commission and the Federal Court to those parties that disclosed illegal conduct or assisted the Commission in its investigation and any subsequent litigation. The nature and extent of leniency under the 1998 cooperation guideline was assessed on a case by case basis having regard to the factors it set out.

In July 2002 the Commission proposes to published a draft leniency policy for cartel conduct (‘the leniency policy’) and a draft cooperation in enforcement guideline designed to replace the 1998 cooperation guideline. The Commission proposes to seek public response to these papers prior to publishing final versions.

The draft leniency policy only applies to cartel conduct in particular circumstances and is intended to provide greater certainty and incentive for disclosure and cooperation. The draft cooperation in enforcement guideline will apply to disclosure and cooperation in civil matters that do not fall within the scope of the leniency policy.

The Commission is of the view that a leniency policy that provides clear and certain incentives to potential applicants is a valuable tool in fighting illegal cartel conduct. Where the extent of the leniency to be provided is certain, persons are more likely to take advantage of such the policy and disclose potentially illegal and harmful conduct.

In encouraging businesses to disclose cartel behaviour through an effective leniency policy, the Commission is better placed to stop the detrimental effects of the illegal conduct. Just as importantly, a leniency policy that provides incentives to businesses to disclose illegal behaviour is also a powerful disincentive to the formation of cartels, as there exists a greater risk of detection by the Commission and court proceedings.

It is important to note that a leniency policy does not offer a reward to ‘good corporate citizens’. It is a compliance tool designed to deliver benefits to all Australians by identifying, stopping and deterring harmful and illegal behaviour.

The essence of the draft leniency policy proposed to be published in July 2002 is that the Commission will agree not to institute proceedings or not to seek a pecuniary penalty against the first cartel participant to come forward with information disclosing the existence of a cartel operating within Australia. Any immunity granted by the Commission to a leniency applicant will be conditional upon their full and ongoing cooperation. Furthermore, the Commission will not grant leniency to any person that has coerced others to break the law or who was the clear leader in the cartel. The policy will apply in a similar way to corporations and individuals.

The draft policy will be circulated shortly for comment by interested parties.

10.4.7 Uncontested matters

In some cases, an alleged offender may decide to admit a contravention and negotiate a settlement with the Commission. In such cases, it may be appropriate to file a joint submission as to the penalties that should be imposed and other orders that should be made.
In such cases, it is acknowledged that it is for the court to make its own assessment of the penalties that should be applied pursuant to s. 76 of the Act, and the other orders that should be made.

The rationale for negotiating a settlement was noted in the case of *NorthWest Frozen Foods v Australian Competition and Consumer Commission* as per Justices Burchett and Kiefel:

There is an important public policy involved. When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention.  

The court also found that for the purposes of providing parties with some certainty as to the outcome, courts will not depart from an agreed penalty figure merely because it might be disposed to select some other figure where an agreed penalty figure is within the range of penalties that the court considers appropriate.

There has been some criticism that it is difficult for defendants to know what penalty a court may impose. The Commission does have regard to the need to update judicial pronouncements on penalty in its conduct of matters. However, it is noted that judicial notions of appropriate penalty levels are not uniform. For instance, in the Rural Press and Universal Music cases penalties were imposed at a low level. On the other hand, Justice Finkelstein recently commented in the *Transformers* case, paragraph 13 after reviewing the history of penalty awards, ‘I am left with the distinct impression that current penalties are on a low side.’

The use of negotiated penalties is sometimes criticised on the basis of concerns that parties may be improperly pressured into accepting a settlement rather than exercising their right to trial and there may be a lack of transparency and consistency of outcomes.

As discussed above, the Commission’s enforcement priorities and objectives which inform its decisions are strongly based in public interest considerations. The model litigant policy ensures that where there is not sufficient likelihood of success, proceedings will not be instituted so that there will be no occasion for a negotiated settlement. When joint submissions as to penalty are prepared, the Commission ensures that they contain adequate reason to justify the appropriateness of the amount negotiated.

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359 ALRC discussion paper 65, para. 7.163.
361 *ACCC v Universal Music Australia Pty Ltd* [2001] FCA 1800.
A further criticism of agreed penalties is that the Commission will require full admissions and that this prejudices defendants if they subsequently decide to contest liability or penalty\textsuperscript{363}. In many instances, penalty negotiations will involve considerations arising from the application of the leniency policy. It would make it impossible for the Commission to negotiate an appropriate penalty without a full understanding of the facts. The Commission is responsible not just for disposing of matters but doing so in a way that furthers the objects of the Act and the public interest.

Where a negotiated settlement includes submitting agreed undertakings for acceptance by the court, the terms of the undertakings must be appropriate for acceptance because a court’s power to accept undertakings is not unlimited.

In the recent case of \textit{Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd}\textsuperscript{364}, Weinberg J emphasised that courts do not merely ‘rubber stamp’ an agreed settlement but that as long as courts are provided with a submission for an appropriate range of penalties to be imposed such practices were unexceptional.

Another example of the scrutiny by the court of negotiated settlements submitted to the court is \textit{ACCC v Z-Tek Computer Pty Ltd}\textsuperscript{365}, where the court found that it could not grant an injunction pursuant to s. 80 of the Act in relation to consent orders for a compliance program that was broader in its scope than the relevant conduct.

### 10.5 Remedies

Where there is evidence to establish a serious breach of the law, the types of remedies the Commission may seek to pursue through legal proceedings include:

- court orders restraining the person engaging in specified conduct (injunctive relief)
- orders requiring the person to do specified things
- orders declaring that the person is in breach of the law
- orders recording findings of fact for use as prima facie evidence in subsequent litigation (for example for compensation by private parties)
- orders requiring the advertising, offering or payment of refunds and/or compensation

\textsuperscript{363} ALRC discussion paper 65, para. 7.164.

\textsuperscript{364} (2002) FCA 619.

\textsuperscript{365} (1997) ATPR 41–580.
orders requiring a person or body corporate to pay a pecuniary penalty for Part IV of $10 million for corporations and $500 000 for individuals—ancillary orders and other non-punitive orders are also available for breaches of Part IV

orders requiring a person to pay the Commission’s costs.

10.5.1 Commission litigation record
Table 10.2 shows the outcomes of Commission litigation under Part IV.

Table 10.2. Cases won and lost

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Won</th>
<th>Lost</th>
<th>Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001–02</td>
<td>5</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2000–01</td>
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<td>1</td>
</tr>
<tr>
<td>1999-2000</td>
<td>6</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>1998–99</td>
<td>4</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>1997–98</td>
<td>4</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>1996–97</td>
<td>5</td>
<td>1</td>
<td>7</td>
</tr>
</tbody>
</table>

Note: Statistics for 2001–02 up to 1 April 2002. The table does not include current matters (including matters subject to appeal, heard or part heard).

The table above indicates that the Commission does not commence proceedings unreasonably, nor does it settle an inappropriately large number of proceedings. The success rate in contested matters is in excess of 90 percent and the number of cases won is greater than the number settled. It is also noted that the number of cases settled has actually declined over recent years.

10.6 Administrative settlements

10.6.1 Section 87B undertakings
The key tool utilised by the Commission to achieve administrative settlements prior to the commencement of proceedings is the acceptance of an undertaking under s. 87B of the Act.

Frequently this approach affords quicker and less costly resolution than litigation, tangible benefits for affected parties, and the prospect of lasting improvement in market
conduct by the corporation involved. However, although the Commission may raise the possibility of section 87B undertakings, the Commission cannot demand an undertaking; they are voluntary.

The Commission will only seek to resolve a matter in this way if it believes that a breach has occurred or is likely to occur. Thus a s. 87B undertaking could be suggested or accepted during an investigation, but not at the outset.

A public register of such undertakings is available for inspection through Commission offices.

It is a matter for the Commission to determine whether it will pursue court action or accept an administrative settlement. This issue was considered by the Federal Court in *TPC v Cue Design*\(^{366}\). In that case, the option of a s. 87B Undertaking had been explored prior to instituting proceedings, and on that basis, Cue argued that the proceedings were unnecessary. Justice O’Loughlin held in favour of the Commission that the acceptance of a s. 87B undertaking was a matter for the Commission, not the court. A similar issue was considered by the Federal Court in the matter of *ACCC v Goldy Motors*\(^{367}\) where it was held that the Commission was entitled to have the court rule on and issue (irrespective of the s. 87B terms offered).

To assist businesses and their advisers in 1999 the Commission issued a Procedural Guideline which outlines its policy towards s. 87B undertakings.

In assessing a proposed s. 87B undertaking, typical elements which the Commission would have regard to include:

- a positive commitment to cease the particular conduct and not recommence it

- mechanisms for corrective action and compensation, including in some cases community service orders

- undertaking a program to improve overall compliance and

- a requirement that the s. 87B undertaking be a matter of public record and open to public scrutiny.


10.6.2 Criticisms of the Commission’s use of undertakings

In the past, criticisms have been raised that s. 87B undertakings are less transparent and subject to procedural fairness than court processes and enable the Commission to require alleged offenders to offer very broad undertakings in order to avoid litigation.

Section 87B undertakings can be used to overcome limitations on court powers to order remedies in appropriate circumstances. In *ACCC v Z-Tek Computer Pty Ltd*, Justice Merkel found that it was not within the power of the court under s. 80 to order a compliance program which went beyond the particular sections contravened, as this was not sufficiently closely connected to the conduct. However, he stated further:

> If the ACCC wants to impose a general trade practices compliance program as a term of settlement it may be open to it to do so by agreement… My decision relates to that which is ‘appropriate’ for a Court to order under s 80…. It is not intended that the decision govern, influence or limit a trade practices compliance program which might be the subject of agreement between the ACCC and a party to a proceeding…

As a consequence, s. 87B undertakings may be accepted as part of a settlement of proceedings in addition to consent orders.

In utilising its s. 87B powers, the Commission seeks to balance the competing public interest in obtaining a less costly and more flexible solution with the need for transparency.

The Commission considers that s. 87B undertakings are generally an effective and efficient means of achieving compliance with the Act. In 1997, the Commission requested Associate Commissioner Don Watt to evaluate this issue. The evaluation involved seeking views from clients and their advisers who had been subject to undertakings, as well as Commission members and staff.

The Watt report found that the use of s. 87B undertakings was an appropriate use of the Commission’s powers to fulfil its compliance goals and enforcement objectives. In particular, it noted that because s. 87B undertakings provided a quicker and more cost-effective mechanism for resolution than court proceedings, it falls within the Commission’s objective of efficient and effective use of its resources. Importantly, the Watt report also noted that the use of s.87B undertakings ensured that clients were not forced to incur costs which were inappropriate for the circumstances.

The Watt report concluded that:

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368 1997 ATPR 41–580 at 44, 035.

I think it is fair to say that the various communications I have had with members, staff and clients of the Commission have not thrown up any fundamental, or even awfully serious, problems in relation to the use of undertakings…

Obviously, in all the activities of the Commission, its goals and objectives must be borne constantly in mind. However, as mentioned earlier, these goals and objectives, particularly when leavened by the precept of effective and efficient use of resources, require at times the exercise of fine judgement. Nevertheless, even though there have been, and no doubt will continue to be, cases in which judgements may be quite properly questioned, I have seen or heard nothing which would lead me to the view that the Commission has a fundamental problem in this area.370

As to transparency, the Commission seeks to make s. 87B undertakings as transparent as possible. It has issued a procedural guideline outlining its policy, it maintains a public register of s. 87B undertakings, and issues media releases in relation to settlements.

As outlined above, the Commission considers whether to accept a s. 87B undertaking in light of a transparent set of enforcement objectives. Just because an alleged offender offers a broad settlement does not necessarily mean that the Commission will accept it in order to get a quick result. The factors the Commission considers include whether the conduct should attract penalties, whether the alleged offender’s record suggests that an administrative settlement will be sufficient to deter it from future conduct, and whether there needs to be a clarification of the law by the courts to better inform the community at large.

The responsible use of the Commission’s ability to accept s. 87B undertakings is reflected in the statistics for use of s. 87Bs in the past 6 years. Figure 10.5 shows that the number of s. 87B undertakings accepted is relatively constant, and is very small in proportion to the number of matters pursued.

370 Watt, p. 10.
Further, the courts provide an ultimate check on the scope and content of s. 87B undertakings in any particular matter. Ultimately, if a s. 87B undertaking were to go beyond the scope of its power, it would not be enforced by the courts. Also, the courts play a role in scrutinising the process by which undertakings are made. As stated in the case of *The Hospital Benefit Fund of WA Inc v ACCC*[^371], an undertaking that has been accepted in circumstances which fall short of the requirements of procedural fairness may be impugned in judicial review process.

There is also some criticism that s. 87B undertakings are private and the parties who may be affected are not consulted[^372]. The impact of the conduct on third parties, and the appropriateness of the terms of the undertaking, are matters taken into account by the Commission in determining whether to accept a s. 87B undertaking.

Finally, there has also been some criticism that the Commission publicises the acceptance of a s. 87B undertaking[^373]. The Commission's policy is clearly spelt out in its s. 87B undertakings guidelines. It is also noted that the Commission would only accept an undertaking where it believed a breach has occurred. If the Commission initiated proceedings it would publicise that fact and the Commission believes it is appropriate to publicise the acceptance of a s. 87B undertaking (where such an undertaking is offered in lieu of a litigated outcome).

[^373]: ALRC discussion paper 65, at para. 7.177.
10.6.3 Informal administrative settlement

As outlined above, in circumstances where a breach of the legislation is minor or easily fixed, matters may be settled without proceeding to litigation or s. 87B undertakings.

However, in cases where a corporation or business continues to engage in the unlawful conduct, the Commission may escalate the matter and seek other remedies including enforceable undertakings or court orders.
Appendix 1     Extract from UK Enterprise Bill

CARTEL OFFENCE

179   Cartel offence

(1) An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).

(2) The arrangements must be ones which, if operating as the parties to the agreement intend, would –

   (a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,

   (b) limit or prevent supply by A in the United Kingdom of a product or service,

   (c) limit or prevent production by A in the United Kingdom of a product,

   (d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,

   (e) divide between A and B customers for the supply in the United Kingdom of a product or service, or

   (f) be bid-rigging arrangements.

(3) Unless subsection (2)(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would –

   (a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) of a product or service,

   (b) limit or prevent supply by B in the United Kingdom of a product or service, or

   (c) limit or prevent production by B in the United Kingdom of a product.
(4) In subsections (2)(a) to (d) and (3), references to supply or production are to supply or production in the appropriate circumstances (for which see section 180).

(5) “Bid-rigging arrangements” are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom –

(a) A but not B may make a bid, or

(b) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.

(6) But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.

(7) “Undertaking” has the same meaning as in Part 1 of the 1998 Act.

**Cartel offence: supplementary**

(1) For section 179(2)(a), the appropriate circumstances are that A’s supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by B in the United Kingdom.

(2) For section 179(2)(b), the appropriate circumstances are that A’s supply of the product or service would be at a level in the supply chain –

(a) at which the product or service would at the same time be supplied by B in the United Kingdom, or

(b) at which supply by B in the United Kingdom of the product or service would be limited or prevented by the arrangements.

(3) For section 179(2)(c), the appropriate circumstances are that A’s product of the product would be at a level in the production chain –

(a) at which the product would at the same time be produced by B in the United Kingdom, or

(b) at which production by B in the United Kingdom of the product would be limited or prevented by the arrangements.

(4) For section 179(2)(d), the appropriate circumstances are that A’s supply of the product or service would be at the same level in the supply chain as B’s.

(5) For section 179(3)(a), the appropriate circumstances are that B’s supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by A in the United Kingdom.
(6) For section 179(3)(b), the appropriate circumstances are that B’s supply of the product or service would be at a level in the supply chain –

(a) at which the product or service would at the same time be supplied by A in the United Kingdom, or

(b) at which supply by A in the United Kingdom of the product or service would be limited or prevented by the arrangements.

(7) For section 179(3)(c), the appropriate circumstances are that B’s production of the product would be at a level in the production chain –

(a) at which the product would at the same time be produced by A in the United Kingdom, or

(b) at which production by A in the United Kingdom of the product would be limited or prevented by the arrangements.

181 Cartel offence: penalty and prosecution
(1) A person guilty of an offence under section 179 is liable –

(a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both;

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.
Appendix 2  Competition and market power

Economic goal of efficiency
One of the primary economic goals of Australian society is the satisfaction of the material needs and wants of its citizens—that is, the production of the goods and services needed and wanted by Australian citizens at a price they can afford.

This economic goal can also be explained by the concept of efficiency. This is a multi-faceted concept and includes at least:

- allocative efficiency—the allocation of resources within the community to produce the goods and services consumers value the most
- productive efficiency—producing the goods and services wanted by consumers at the lowest cost
- dynamic or innovation efficiency—producing new or alternative goods and services in response to innovation and development of new technology.

Society’s material needs and wants are best satisfied by increased efficiency.

The primary mechanism chosen by Australia to meet this economic goal is the free market. In a free market consumers are free to purchase the goods and services they prefer and suppliers are free to produce the goods and services they believe are most desired by consumers. Adopting a free market economy does not preclude government intervention to address various types of market failure. However, it is accepted that government intervention will be secondary to the operation of the free market.

The benefits of competition
Australian government policy holds that competition within free markets is most likely to enhance efficiency. Because of rivalries between firms motivated by the desire for profit, the goods and services wanted by consumers will be produced (allocative efficiency), new technologies will be discovered and commercialised (dynamic efficiency) and goods and services will be produced at the lowest cost (productive efficiency).

Competition is a rich concept. At its most simple it describes the state or degree of rivalry that exists between producers (and between consumers) within a free market. However, this single expression does not do justice to the concept. In a leading and early decision on the meaning of ‘competition’ in the context of the Trade Practices Act 1974, the Trade Practices Tribunal said:
Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society’s resources. Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard the signals at their peril, being fully aware that there are other firms, whether currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.

This does not mean that we view competition as a series of passive, mechanical responses to ‘impersonal market forces’. There is of course a creative role for firms in devising the new product, the new technology, the more effective service or improved cost efficiency. And there are opportunities and rewards as well as punishments. Competition is a dynamic process; but that process is generated by the market pressure from alternative sources of supply and the desire to keep ahead.\(^{374}\)

The detriments of market power

In terms of the primary economic goal of Australian society monopoly is the opposite to competition. By definition the monopolist is not constrained by other competitive firms to produce the goods or services most desired by consumers, or to innovate or produce at the lowest cost. The monopolist can also increase the price of its products above the level that would be charged in a competitive market. Although this may result in less product being sold (because fewer consumers can afford to pay for the product) the monopolist may still be better off. The profits earned at the higher price (even with a lower volume sold) may exceed the profits that would be earned at the lower price.

Monopoly has the potential to be detrimental to Australian society in many ways, including:

- First, the monopolist can price its product above the level that would be set in a competitive market. The consumers that can still afford the product will be paying more. From a pure economic perspective this may be seen as a mere transfer from consumers to the monopolist. However, from a broader social perspective it represents a redistribution of wealth that would not occur in a competitive market.

- Second, the increased price is likely to result in reduced demand for the product. This reduced demand is a social cost and is often described as the ‘dead weight’ loss of monopoly. Less of society’s resources are directed to efficiently producing products that are desired by its citizens.

\(^{374}\) Re Queensland Co-operative Milling Association Ltd; Re Defiance Holding Ltd (1976) 1 ATPR 40–012.
Third, monopolists may use resources to maintain or enhance their monopoly position. This expenditure is a loss to society’s resources because it is not being used in the production of goods and services desired by citizens. In turn, this can lead to more waste because firms seeking to enter a monopoly market and compete may be forced to use resources in overcoming impediments or barriers erected by the monopoly firm. Again, this expenditure is not directed to the satisfaction of society’s needs and wants. It is wasted on overcoming artificial barriers to market entry.

**Degree of competition**

Each market is characterised by varying degrees of competitiveness: the (theoretical) perfect competition to the (probably also theoretical) condition of absolute monopoly. In most Australian markets, the degree of competition lies somewhere between the extremes of perfect competition and absolute monopoly. A market is affected by a wide range of factors including:

- the number and distribution of suppliers and acquirers
- the existence of barriers to entry to the market
- the degree of product differentiation or homogeneity of the products sold
- the absence of horizontal collusive arrangements between suppliers or between acquirers
- the existence and nature of vertical arrangements or relationships between suppliers and acquirers.

Generally the economic goal of efficiency is satisfactorily served by a concept of workable or effective competition. This concept was embraced by the Trade Practices Tribunal in *Re QCMA*. The Tribunal quoted with approval the US Attorney-General’s National Committee to Study the Anti Trust Laws 1955 report, which stated:

> The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements.

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377 Note 58 *supra*. 
The expression ‘market power’ describes a market in which competition is less than ‘workable’ or ‘effective’. One or more firms in such market are said to hold market power or substantial market power. If a firm possesses market power it has the ability to some extent to increase its profits by giving less and charging more. In the leading High Court decision on the Trade Practices Act (specifically, s. 46) Chief Justice Mason and Justice Wilson stated:

Market power can be defined as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product.\(^{378}\)

Justice Dawson described market power in similar terms:

The term ‘market power’ is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner. But market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal. The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices. Thus, Kaysen and Turner define market power as follows:

‘A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions’. (Kaysen and Turner, *Anti Trust Policy* (1959) at p. 75)\(^{379}\)

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\(^{378}\) *QWI v BHP* (1989) 167 CLR 177 at 188.

\(^{379}\) Note 3 *supra*. 
Appendix 3  Comparative analysis of monopolisation/abuse of market power provisions in overseas jurisdictions

A system of rules about abusive behaviour usually includes a threshold for liability incorporating purpose or effect, to determine what conduct is to be controlled or forbidden. The choice between formulations based on intent or purpose and formulations based on causation or effect appears to follow jurisprudential tradition and history, though the distinctions may also represent drafting accidents as well. Generally in modern competition analysis one of the most important policy considerations are the effects on competitive process or on competitive conditions in an industry.

European Union

Article 82 of the EC Treaty prohibits abuse of dominant position in so far as it may affect trade between member states. The article is intended to regulate dominance and to prevent firms with significant market power from ‘abusing’ competitors and consumers. Any abuse of a dominant position is prohibited. The particulars listed in the Treaty (unfair prices or conditions, limiting output or technology, discrimination causing competitive disadvantage and extortionate contract terms) imply a concern about effects although they do not call for a separate showing in each case.

By contrast the provision of the Treaty about restrictive practices—Art. 81—refers specifically to ‘object or effect’ and either is sufficient to support a case. If the parties intend to restrict competition, they cannot avoid the prohibition by showing there is no effect. If they succeed they cannot avoid prohibition by showing they did not intend to do it.

In the Hoffman-La Roche case, the conventional formulation of ‘abuse’ is expressed as:

…an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as the result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. (Hoffman-La Roche Case 85/76 [1979] ECR 461; 3 CMLR 211.)

Purpose may be relevant but the ultimate issue is effect. The fact that there is an effect test is generally accepted.

Although the European Union has an effects test, it is applied in relation to abuse of a dominant position. However, in recent years, the European Union has interpreted dominance as including collective dominance—a standard similar to that of a substantial degree of market power.
United States

The terms ‘effect,’ ‘intent,’ or ‘purpose’ are not in the text of the analogous US law—s. 2 of the Sherman Act. This section declares it a crime to ‘monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce’ among the states or with foreign countries. Monopolization is 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.’ (United States v. Grinnell Corp. 384 US 563, 570–71 (1966).)

The courts have required an ‘element of deliberateness’ to the conduct involved. While intention is relevant to US jurisprudence, in practice effect is more important and the intention is inferred from it. The role of purpose and intent is to help predict probable effect.

For the offence of monopolisation, a firm must be in a position of monopoly and must also have intended to acquire or maintain that position by inappropriate means. The requisite intent is ‘general’ intent in the criminal law sense, rather than a subjective showing of ‘specific intent’ to violate the law. But intent is linked to effect, for a firm can be presumed to have intended the consequences of its actions.

If conduct is rational only because it will produce an adverse effect, then the court will infer the anti-competitive intention. The economic-effects line is becoming dominant in the courts. A subjective general intent to be a monopoly does not lead to a violation of the law, if the means used make sense as ordinary, strong competition.

The requirement of intent has survived from the Sherman Act’s origins as a criminal law. Conviction depends on mens rea. Most cases now are civil not criminal and the ‘wilfulness’ element is a device for classifying behaviours according to their likely effects, from which intent is inferred. If anti-competitive effects are absent, even though the defendant clearly intended to cause some harm, it is difficult to establish a violation.

The recent Microsoft case shows the role of intent or purpose in identifying conduct that amounts to monopolisation. In this case, Microsoft was a dominant supplier of computer operating systems. Microsoft perceived that Netscape Navigator might develop capabilities that would weaken the network externalities that gave Microsoft such dominance in the operating systems market. To counter this perceived threat, Microsoft took steps that the court found protected its market power by means other than competition on the merits in breach of s. 2. Proof of malevolent intent was relevant to rebutting the possible argument that the conduct was justified as normal competition on merits. It was not necessary to show that Microsoft’s conduct was effective in preventing the emergence of competition. It was enough that the conduct reasonably appeared capable of making a significant contribution to maintaining Microsoft’s monopoly power.

For the separate offence of ‘attempted’ monopolisation, the prosecutor must show specific intent (to violate the law), not merely general intent (to do the act that has the
forbidden effect). There must be a ‘dangerous probability’ that the attempt could have succeeded. Most claims of attempted monopoly fail because of this element.

The provisions of the Clayton Act are more explicit in prohibiting conduct (especially exclusive dealing, tying, mergers and discrimination) if its effect may be to substantially lessen competition or create a monopoly. For these parts of the law intent as such is hardly relevant. The Supreme Court has found that an act that was demonstrably motivated purely by malice would not violate the Clayton Act unless the appropriate measure of effect was demonstrated. (Brooke Group v. Brown & Williamson 509 US 209, 225 (1993).)

Canada

Section 79 of the Canadian Competition Act includes three elements to establish a contravention—substantial market power, anti-competitive acts and actual or likely effect of substantially lessening competition. Intent or purpose are not referred to in the general prohibition of abuse. But ‘purpose’ does appear in the description of several examples of anti-competitive acts listed in s. 78. Three of them (vertical squeeze, acquisition and freight equalisation) include the phrase ‘for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market’.

Since s. 76 was adopted in 1986, the Competition Tribunal has heard only six matters. In those matters the Tribunal has amalgamated ‘purpose’ with ‘effect.’ No proof of subjective intent is required. A firm will be deemed to intend the effects of its actions.

Japan

In Japan, ss. 3 and 2(5) of the Antimonopoly Act prohibit ‘private monopolisation’. Private monopolisation refers to overtly exclusionary or controlling conduct that causes substantial restraint of competition that is contrary to the public interest. The provisions are based on effect, not intention or purpose. The provisions have almost never been used. More often the JFTC has taken action against abusive tactics and exclusionary practices by treating them as unfair practices, probably because the standards of proof are less demanding. These practices are listed and defined in terms of effect—that is, they ‘tend to impede fair competition’ (s. 2(9)). The separate (and never used) provision about ‘monopolistic situations’ (s. 8–4) empowers the JFTC to break up monopolies without regard to whether they have engaged in monopolising practices. This section depends on market structure and to some extent on competitive effects, but not at all on intent or purpose.

New Zealand

Section 36 of the New Zealand Competition Act is modelled on the current section 46 of the Trade Practices Act. The prohibition on unilateral anti-competitive behaviour prevents a person from taking advantage of a substantial degree of market power for the purpose of restricting entry to any market, preventing or deterring competition or eliminating anyone from a market.
Appendix 4  History of Section 46

Original s. 46 in the Trade Practices Act 1974

The original s. 46 was referred to in the marginal note as ‘Monopolization.’ The Second Reading speech for the Trade Practices Act included a description of how section 46 was intended to operate:

Monopolisation is defined in clause 46…The clause covers various forms of conduct by a monopolist against his competitors or would-be competitors. A monopolist for this purpose is a person who substantially controls a market…Clause 46 as now drafted makes it clear that it does not prevent normal competition by enterprises that are big…the provision will prohibit an enterprise which is in a position to control a market from taking advantage of its market power to eliminate or injure its competitors.

The provision will not apply merely because a person who is in a position to control a market engages in conduct within one of the classes set out in the clause. It will be necessary for the application of the clause that, in engaging in such conduct, the person concerned is taking advantage of the power that he has by virtue of being in a position to control the market.380

Subsection 46(1) was originally enacted in the following terms:

A corporation that is in a position substantially to control a market for goods or services shall not take advantage of the power in relation to that market that it has by virtue of being in that position–

(a) to eliminate or substantially to damage a competitor in that market or in another market;

(b) to prevent the entry of a person into that market or into another market; or

(c) to deter or prevent a person from engaging in competitive behaviour in that market or in another market.

Swanson Committee (1976)

The Trade Practices Act Review Committee (the Swanson Committee) chaired by Mr T Swanson issued its Report to the Minister for Business and Consumer Affairs in August 1976. The terms of reference generally required the Swanson Committee to report to the Minister for Business and Consumer Affairs on the operation and effect of the Trade Practices Act.

Section 46 as enacted in 1974 did not adopt the terminology of ‘purpose’ or ‘effect.’ The prohibition was against a corporation that is in a position substantially to control a market taking advantage of its power ‘to’ damage a competitor or deter new entry or competitive

380 Australia, Hansard Senate, 30 July 1974, p 544.
conduct. According to the Swanson Committee, there was considerable uncertainty about the interpretation of ‘to.’ The Committee said ‘the word “to” could change its meaning according to whether one interpreted it as “in order to” or “with the result that”’.\textsuperscript{381} Another possibility is that it was intended to cover both possibilities.

The Swanson Committee recommended that s. 46 be amended to require an intent to monopolise:

> The Committee believes that the phrase ‘take advantage of’ when read with the word ‘to’ imports an element of intent. However, to place the matter beyond doubt, we recommend that the matter be clarified by replacing the above mentioned word ‘to’ by a reference to a purpose, or purposes which include a purpose.\textsuperscript{382}

The Committee dealt with the issue of effects in s. 46 by addressing the question ‘whether, if intention is required, it should also be necessary to demonstrate that the action of the corporation did, in fact, achieve one of the results set out in paragraphs (a), (b) and (c)’.\textsuperscript{383} In answer, the Committee stated:

> …the Committee considers that the rationale of the section would be largely negated if a contravention required proof that one of the matters in paragraphs (a), (b) or (c) had occurred. It is hardly appropriate to allow the conduct to be checked only after the damage has occurred… It should be possible to halt such conduct of a monopolist without proof that the conduct has already achieved the object.\textsuperscript{384}

**1977 amendments**

Following the Swanson Committee recommendations, the words ‘for the purpose of’ were introduced to s.46(1) by the *Trade Practices Amendment Act 1977*. According to the Explanatory Memorandum this amendment was designed to emphasise that it is not necessary that the proscribed purpose actually be achieved. Conduct may be ineffectual and fail to achieve one of the proscribed purposes but may still be unlawful. It is worth noting that the changes in 1977 were part of a wider set of changes seen as weakening the impact of the Act.

**Blunt Committee (1979)**

In December 1979, the Trade Practices Consultative Committee (the Blunt Committee) chaired by Gaire Blunt completed a report called *Small business and the Trade Practices Act*.

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\textsuperscript{382} *ibid* at p. 40.

\textsuperscript{383} *ibid* at p. 39.

\textsuperscript{384} *ibid* at p. 40.
The Committee acknowledged that purpose under s. 46 is difficult to prove in the context of economic legislation and stated:

… In view of our recommendation that the ambit of section 46 be extended so that it will more clearly prohibit predatory conduct by firms with a substantial degree of market power we perceive that there is a need to place some limit on the application of the section.

It is only purposive misuse of market power and not inadvertent conduct or efficiency inspired conduct that should be at risk. Accordingly, we recommend that the purpose element should remain because we consider it is fundamental to a provision dealing with misuse of market power.\(^{385}\)

The Blunt Committee recommended two amendments to s. 46:

- the ‘position substantially to control’ threshold should be altered to ‘substantial degree of power in a market’, and
- ‘take advantage of the power’ should be altered to ‘use that power.’

**Green Paper (1984)**


The Green Paper proposed two amendments to s. 46:

The test in sub-section 46(1) would be changed from one of ‘substantial control’ to one of ‘substantial degree of market power’ thereby lowering the threshold.

The words ‘or that has or is likely to have the effect’ would be added to sub-section 46(1) to give litigants an alternative method of establishing a contravention by proving the effect or likely effect of the corporation’s conduct rather than having to establish a predatory purpose.\(^{386}\)

**1986 amendments**

In 1986 s. 46 was substantially amended and the marginal note was changed from ‘monopolisation’ to ‘misuse of market power’. The most significant amendments provided:

- a lower threshold covering the application of the provision—a corporation to be subject to the provision when it holds a ‘substantial degree of power in a market’.

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\(^{386}\) Senator the Hon Gareth Evans QC (Attorney-General), Hon Barry Cohen, MP (Minister for Home Affairs and Environment) and Hon Ralph Willis, MP (Minister for Employment and Industrial Relations). *The Trade Practices Act. Proposals for Change*, 1984, p. 9.
compared with the previous higher threshold of being in a position ‘substantially to control a market’ (s. 46(1))

- a statutory ability to infer purpose—the question of whether a corporation has taken advantage of its market power for a specified purpose may be ascertained by inference from the conduct of the corporation, any other person or from any relevant circumstances (s. 46(7))

- a guide to the meaning of market power (s. 46(3)).

Griffiths Committee (1989)

In May 1989 the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) chaired by Alan Griffiths, MP issued a report called *Mergers, Takeovers and Monopolies: Profiting from Competition?*

The Griffiths Committee made the following observations about s. 46:

> [I]nsufficient evidence has been presented to support the need for a major redrafting of section 46. Indeed, the bulk of the evidence suggests that no change to the section is required, and that sufficient opportunity should be provided through the evolution of case law for the resolution of any potential difficulties in the section. Given that the High Court [in QWI] has now provided significant clarification of the existing wording of the section, the Committee is of the view that any major changes to the wording would at this time be a retrograde step which could lead to renewed uncertainty if new and untested provisions were substituted. In particular, the major proposals for reform suggested during the inquiry would not contribute to the achievement of any greater certainty in the law.387

The Committee recommended that the s. 46 be retained in its existing form.

Cooney Committee (1991)

In December 1991 the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) chaired by Senator Barney Cooney issued a report in December 1991 called *Mergers, Monopolies & Acquisitions. Adequacy of Existing Legislative Controls.*

The Cooney Committee made the following observations about s. 46:

> 5.62 The proof of purposive conduct under section 46 clearly poses considerable difficulties for the TPC and private litigants. These difficulties were addressed in 1986 with the addition of ss. 46(7) and 84(1) enabling purpose to be inferred from conduct and other relevant circumstances, and facilitating the proof of conduct where engaged in by a corporation. However, the Committee accepts that establishment of a purpose will continue to present difficulties of proof for litigants relying on section 46.

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...5.65 The Committee accepts that the process of effective competition involves engaging in
cconduct the potential effect of which is to produce the very ends proscribed in section 46, and
considers that prohibiting such conduct by reference to its effect may challenge the competitive
process itself.388

The Cooney Committee recommended a form of reversal of the onus of proof in s. 46:

5.67 The Committee recommends that section 46 be amended by adding a further subsection to
provide that, although the Trade Practices Commission has the overall onus of proving a breach
of that section, when it has brought forward evidence which makes it as likely as not that one has
occurred then one will be taken to have occurred unless the corporation in question shows
otherwise.389

Hilmer Committee (1993)
In August 1993 the Independent Committee of Inquiry (the Hilmer Committee) chaired
by Professor Frederick Hilmer presented to the Government its report called National
Competition Policy.

The Hilmer Committee considered several options for reform to s. 46 including an effects
test and stated:

The Committee sees a need to strike a balance between deterring undesirable unilateral conduct,
encouraging business certainty and minimising the regulatory interference in daily business
decisions. The Committee is not satisfied that any perceived difficulties with the current
operation of s 46 are sufficient to warrant an amendment that would create additional uncertainty
and thus potentially deter vigorous competitive activity. The Committee recommends that the
current misuse of market power provision should be included in the conduct rules of a national
competition policy.390

Reid Committee (1997)
In May 1997 the House of Representatives Standing Committee on Industry, Science and
Technology (the Reid Committee) chaired by Senator Bruce Reid issued a report called
Finding a Balance. Towards fair trading in Australia.

The Reid Committee considered two options for strengthening s. 46. These were to
replace the ‘purpose’ test with an ‘effect’ test and give the Commission a representative
action power in relation to the restrictive trade practices provisions. The Committee’s
report did not reach a conclusion on an ‘effects’ test, opting instead to recommend
representative action powers under Part IV:

________________________________________

388 The Senate Standing Committee on Legal and Constitutional Affairs, Mergers, Monopolies &

389 ibid at p. 97.

The Committee recommends that the Trade Practices Act 1974 be amended to give the Australian Competition and Consumer Commission the power to take representative actions under Part IV of the Trade Practices Act which deals with various forms of restrictive trade practices, including the misuse of market power.391

The Reid Committee also examined the role of the Commission in investigating and litigating small business complaints and made the following recommendation:

The Committee recommends that the Australian Competition and Consumer Commission make investigation of complaints, and enforcement of the law, in relation to the misuse of market power in the retail sector a top priority in light of the high degree of concentration in that sector and the disturbing evidence submitted to the Fair Trading Inquiry.392

**Baird Committee (1999)**

In August 1999 the Joint Select Committee on the Retailing Sector (the Baird Committee) chaired by the Hon Bruce Baird MP released its report called *Fair Market or Market Failure? A review of Australia’s retailing sector.*

The Baird Committee reiterated the Reid Committee’s recommendation on representative actions:

The Committee recommends that the Trade Practices Act 1974 be amended to give the Australian Competition and Consumer Commission the power to undertake representative actions and to seek damages on behalf of third parties under Part IV of the Act.

The Committee also gave consideration to a reversal of the onus of proof as to purpose in s. 46 and stated:

The Committee recommends that the Parliament reconstitute the Committee three years from the date of tabling this Report in order to review the progress of the recommendations... and to determine whether further legislative changes are required. Such changes may include:

(a) An amendment to section 46 of the Trade Practices Act 1974 to provide that:

Once it has been established that a corporation with a substantial degree of market power has used that market power, the onus of proof shifts to that corporation to prove it did not use that power for a prohibited purpose (as prescribed).

(b) An amendment to section 80 of the Trade Practices Act 1974 to include divestiture of assets as an additional remedy for contravention of Part IV, IVA, or IVB or V.393

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392 *ibid* at p. 135.

Hawker Committee (2001)

The House of Representatives Standing Committee on Financial Institutions and Public Administration (the Hawker Committee) chaired by David Hawker, MP undertakes a yearly review of the Commission’s annual report.

In 2001 the Hawker Committee commented on discussion of a possible effects test in s. 46:

Given … breakthroughs in the interpretation of section 46 and the repeated concerns expressed by various inquiries about the move to an effects test, the committee’s preference is to await the outcome of further cases on section 46 before considering any change to the law.394

Senate Legal and Constitutional References Committee (2002)

In August 2001 the Senate Legal and Constitutional References Committee received a reference on s. 46 and the remedy of divestiture. The terms of reference addressed whether there should be a reversal of the onus of proof as to purpose in s. 46 for actions brought by the Commission.

On 14 May 2002 the Committee tabled the Report of its Inquiry in the Senate. The Committee did not make recommendations on its findings. It proposed to refer the public submissions, the transcript of the public hearing and the report to the current Review of the Trade Practices Act and await its report and any recommendations.395


Appendix 5  Section 46 complaints, investigations and proceedings

Table 1. Complaints, investigations and proceedings instituted under s. 46 of the Trade Practices Act

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Complaints under s. 46</td>
<td>545</td>
<td>698</td>
<td>558</td>
<td>713</td>
<td>629</td>
<td>932</td>
<td>4075</td>
</tr>
<tr>
<td>S. 46 investigations</td>
<td>104</td>
<td>128</td>
<td>92</td>
<td>72</td>
<td>110</td>
<td>87</td>
<td>593</td>
</tr>
<tr>
<td>S. 46 cases instituted</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>9</td>
</tr>
</tbody>
</table>

Complaint statistics were extracted from the Commission’s MARS database (*financial year 2001–02 statistics to 20 June 2002).

Investigation statistics were extracted from the Commission’s PRISM database.

Litigation statistics provided by the Commission’s Legal Group, include all matters where s 46 was pleaded in proceedings instituted by the Commision. Note that the Sony, Universal and Warner cases are all counted as separate proceedings.

Table 2. Resolution of recent s. 46 actions taken by the Commission

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Won</th>
<th>Lost</th>
<th>Settled</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current matters</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1*</td>
</tr>
<tr>
<td>2001–02</td>
<td>2**</td>
<td>1**</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>2000–01</td>
<td>2**</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>1999–2000</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
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<tr>
<td>1998–99</td>
<td>0</td>
<td>0</td>
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<td>1997–98</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1996–97</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

11***
• *Current matters include:

    *Qantas Airways*—awaiting trial.

• **Matters subject to appeal.


    *Universal/Warner*—first instance judgment for the Commission in December 2001. Awaiting Full Federal Court appeal. Note that the *Universal* and *Warner* cases are counted as separate proceedings.

• ***Resolution statistics include two matters instituted prior to 1996–97.
### Appendix 6  Summary of timing issues in recent s. 46 investigations

<table>
<thead>
<tr>
<th></th>
<th>ACCC v Boral</th>
<th>ACCC v Safeway</th>
<th>ACCC v Rural Press</th>
<th>ACCC v Universal/Warner</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>When alleged conduct took place.</strong></td>
<td>Relevant conduct occurred from around February 1995</td>
<td>Between May 1994 and November 1995</td>
<td>Conduct occurred July 1997 to April 1998</td>
<td>July–October 1998 (approx)</td>
</tr>
<tr>
<td><strong>When conduct was brought to Commission’s attention.</strong></td>
<td>Complaint to Commission in October 1995 about conduct of Boral and Pioneer   • 8 months after conduct commenced</td>
<td>Commission became aware when the matter was raised in Victorian Parliament (based on a complaint from a constituent) in early December 1995  Investigation commenced immediately after media reports</td>
<td>Complaint made in early May 1998, 10 months after conduct commenced and shortly after it ceased</td>
<td>25 August 1998, contemporaneous to conduct</td>
</tr>
<tr>
<td><strong>Time to file proceedings (approx)</strong></td>
<td>Commission filed against Boral in February 1998   • 3 years from conduct starting   • 2½ years from complaint</td>
<td>Proceedings filed about December 1996   • 1¼ years from conduct starting   • 1 year from investigation</td>
<td>Proceedings filed on 14 July 1999   • 2 years from conduct starting   • 14 months from investigation</td>
<td>Proceedings filed 30 August 1999   • 1 year from becoming aware of conduct</td>
</tr>
<tr>
<td><strong>Progression of court proceedings (approx only)</strong></td>
<td>Trial commenced in July 1999 and concluded in September 1999, Judgment for Boral in September 1999   • trial approx 2 months   Filing to first instance judgment 1½ years   Full Federal Court heard appeal in February 2000   Appeal judgment for Commission against BBM delivered February 2001   • appeal decision handed down 3 years after instituting   • conduct to decision 5½ years   Special leave to appeal to High Court hearing December 2001</td>
<td>Interlocutory arguments were lengthy and mainly involved discovery issues   Trial commenced in February 1999 and concluded in October 1999   • trial 92 sitting days   • proceedings 3 years   Judgment for Safeway in December 2001   Commission filed notice of appeal in February 2002</td>
<td>Trial held in mid-December 1999 with final submissions in February 2000   Judgment for Commission on liability in March 2001   • Institution to decision 1¼ years   Penalty submissions heard on 9 July 2001 with penalty handed down 7 August 2001   • Institution to penalty 2 years   Appeal by Rural Press on liability/Commission on penalty heard by Full Federal Court in March 2002   • awaiting Full Federal Court decision</td>
<td>Settled against Sony in April 2001   • approximately 1¾ years   Proceedings continued against Universal, Warners   Trial held between 2 April 2001 and 4 May 2001 and resumed between 23–25 May 2001   Judgment for Commission in December 2001   • institution to decision 2¼ years   Penalty handed down in March 2002   • institution to penalty 2½ years   Appeal by Warner and Universal on liability/Commission on penalty to be heard by Full Court in November 2002</td>
</tr>
<tr>
<td><strong>ACCC v Boral</strong></td>
<td><strong>ACCC v Safeway</strong></td>
<td><strong>ACCC v Rural Press</strong></td>
<td><strong>ACCC v Universal/Warner</strong></td>
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<tr>
<td>• conduct to decision 5¼ years Special leave to appeal to High Court hearing December 2001 • High Court hearing 21–22 May • awaiting High Court judgment</td>
<td>December 1995–December 2001 6 years (i.e. to first instance decision) December 1995–July 2002 6½ years (awaiting Full Federal Court appeal)</td>
<td>May 1998–August 2001 3¼ years (i.e. to first instance penalty decision) May 1998–July 2002 4 years (i.e. to date, awaiting appeal)</td>
<td>Sony: Approx 2½ years Universal, Warners and others: July 98–March 02 3½ years (i.e. to first instance penalty decision) July 98–July 02 4 years (i.e. to date, awaiting appeal)</td>
<td></td>
</tr>
</tbody>
</table>

**Time between Commission becoming aware and resolution (approx)**

| **Time between conduct starting and resolution (approx)** |
|------------------|------------------|------------------|------------------|------------------|
| October 95–July 2002 6¼ years (i.e. awaiting appeal judgment) | May 1998–August 2001 3¼ years (i.e. to first instance penalty decision) | Sony: Approx 2½ years Universal, Warners and others: July 98–March 02 3½ years (i.e. to first instance penalty decision) |
| February 1995–February 2001 6 years (i.e. to Full Federal Court decision) Feb 1995–July 2002 7½ years (i.e. to date, awaiting High Court decision) | May 1998–July 2002 4 years (i.e. to date, awaiting appeal) | July 97–August 2001 4 years (i.e. to first instance penalty decision) July 97–July 2002 5 years (i.e. to date, awaiting appeal) |

| **Total time between conduct starting and resolution** |
|------------------|------------------|------------------|------------------|
| February 1995–February 2001 6 years (i.e. to Full Federal Court decision) Feb 1995–July 2002 7½ years (i.e. to date, awaiting High Court decision) | May 94–July 2002 8 years (i.e. to date, awaiting Full Federal Court appeal) | July 97–August 2001 4 years (i.e. to first instance penalty decision) July 97–July 2002 5 years (i.e. to date, awaiting appeal) |

Sony: Approx 2½ years Universal, Warners and others: August 98–March 02 3½ years (i.e. to first instance penalty decision) August 98–July 02 4 years (i.e. to date, awaiting appeal)