PART I: COMPETITIVE CONDUCT RULES

2. Overview of Competitive Conduct Rules

Every modern market economy provides a set of rules intended to ensure the competitive process is not undermined by the anti-competitive behaviour of firms. Typically, these rules prohibit agreements or arrangements that increase the market power of firms and prohibit firms which possess substantial market power in their own right from using that power in an anti-competitive way. In Australia, these rules are contained in Part IV of the Commonwealth *Trade Practices Act 1974* (TPA).

This Part considers the content, scope of application and enforcement of competitive conduct rules proposed for general application to business transactions throughout the economy. There are a number of markets where there is a case for these rules to be supplemented to ensure effective competition, and the additional measures proposed for these markets are discussed in Part II.

This Chapter presents a brief overview of the key issues raised in developing a regime of competitive conduct rules intended to be of general application.

Section A considers the possible objectives of the regime and concludes that the appropriate role for these rules is the protection of the competitive process, rather than conferring benefits upon particular sectors of society.

Section B outlines the types of market conduct addressed by competitive conduct rules, including agreements between parties and unilateral conduct.

Section C reviews the main types of rules which may be used to address anti-competitive conduct, including outright prohibition, prohibition based on competitive effect or purpose, and prohibition dependent on an assessment of the public interest. The section also discusses proposals for simplification of the existing competitive conduct rules.

Section D considers the range of mechanisms under which it is currently possible to obtain exemption from conduct rules.

Section E discusses the regime for enforcing conduct rules.

A. THE OBJECTIVES OF COMPETITIVE CONDUCT RULES

In broad terms, competitive conduct rules could have two possible objectives. First, they could be designed to protect the competitive process *per se*. In such a regime, the effective functioning of the competitive process, and hence economic efficiency and the welfare of the community as a whole, is the primary objective. Consumers and competitors benefit from such rules to the extent that their interests coincide with the interests of the community as a whole.

Secondly, such rules might be cast so as to confer special benefits on a particular sector of the community, whether that be consumers or a particular class of competitors, such as small businesses. Under a regime of this kind, the benefits to the community as a whole are subordinated to the interests of a particular category of beneficiaries.

The Committee unhesitatingly embraces the objective of protecting the competitive process as that most appropriate for the competitive conduct rules of a national competition policy. The rules themselves should not be aimed at favouring particular sectors of society. If such objectives are to be achieved it should be through accommodations to the rules according to the principles and exemption mechanisms discussed in Chapters Five and Six. To the extent that protecting the competitive process does not promote economic efficiency in a particular market, or where other policy goals conflict with economic efficiency and require some trade-off to be made, exemptions from the general rules should also be granted through those exemption mechanisms, such as authorisation.

B. TYPES OF MARKET CONDUCT ADDRESSED

While there are probably no limits to the kinds of behaviour a firm might conceive as a means of subverting the competitive process, conduct involving agreements between firms can be distinguished from other forms of conduct.

Agreements between firms at the same level of the business chain, such as between suppliers or between consumers, are referred to as "horizontal agreements". These agreements may relate to price or to other matters, and it is useful to distinguish these two categories for the impact of the former on competition is usually quite clear. Agreements between firms at different levels of the business chain, such as between suppliers and customers, are referred to as "vertical agreements". Again, the distinction between agreements on price and agreements on other matters will usually be important. The rules addressing horizontal and vertical agreements are discussed in Chapter Three, where it is argued that the rules contained in the TPA are generally appropriate but warrant some fine-tuning.

Other forms of conduct are of concern from a competition perspective. These include instances where a single firm misuses its market power, certain mergers and acquisitions, and in some circumstances price discrimination. Conduct of these kinds will generally involve agreements between firms but, as in the case of refusals to deal or hostile takeovers of listed companies, need not always do so. The rules for addressing these kinds of conduct are discussed in Chapter Four, which argues that the current rule against price discrimination should be repealed but that the other rules in this category are appropriate for inclusion in a national competition policy.

In reviewing the current rules the Committee has been mindful that unnecessary tinkering could create uncertainty for business and delay extending the application of the rules, which is seen as the more pressing policy objective. Accordingly, the Committee has adopted a deliberate policy of limiting proposed changes to those areas where the current rules were found to be clearly deficient from the standpoint of a national competition policy.

C. TYPES OF COMPETITIVE CONDUCT RULES

Because of the wide range of competitive and efficiency consequences of different forms of business conduct, different types of rules are appropriate for different types of conduct.

Per Se Prohibition

The anti-competitive impact of some kinds of conduct may be so unambiguous that they should be prohibited outright without having to demonstrate their impact in each particular case. Where this conduct can be defined with sufficient certainty, prohibition of it *per se* will often be warranted. *Per se* prohibitions remove the need to prove effects on competition, and thus provide savings in enforcement costs, and greater certainty for firms seeking to comply with the law. This is the approach taken, for example, to price-fixing agreements by the TPA.

Competition Test

Other forms of behaviour, such as certain cooperative arrangements between firms, are more ambiguous in their impact on competition. In these circumstances a *per se* prohibition would be inappropriate, for it might prevent behaviour that is potentially socially useful. Accordingly, conduct of this kind will generally only be prohibited if it is shown to have a particularly adverse impact on competition. This is the approach taken by the majority of competitive conduct rules of the TPA, where the proscribed impact on competition is a "substantial lessening of competition in a market".

When assessing the effect on competition of particular conduct, it is necessary to define the markets which may be affected by it. A "market" is an area of close competition or rivalry in which one product or source of supply may be substituted for another in response to changing prices. Markets have product, geographic, temporal and functional dimensions. Appraisals of market limits have important implications for levels of competition or market power, for narrowly defined markets are more likely to support findings of adverse effects on competition.[1]

Some submissions received by the Inquiry expressed dissatisfaction with judicial interpretations of markets in some cases.[2] While

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1 "Market" is defined in s.4E to mean a market in Australia, and to include goods or services which are substitutes for products in the market. In assessing competition in a market, regard should be had to import competition (s.4 definition of "competition"), either actual or potential (*Queensland Wire Industries* (1989) 83 ALR 577 at 588). This approach has recently been reinforced in relation to the mergers provision (see new s.50(3)).

2 Australian Institute of Petroleum Ltd (Sub 22); Unilever (Sub 28); Coopers & Lybrand (Sub 42); Mr R Copp (Sub 107); NSW Govt (Sub 117).

acknowledging the difficulties in this area, the Committee is not convinced that they are so great as to warrant a fundamental departure from the existing methodology. The principles of market definition set out in landmark decisions such as *QCMA*[3] and *Queensland Wire*[4] accord with sound economic principles, and some dissatisfaction with particular decisions is inevitable in an adversarial context, particularly when the key concepts are not subject to exact proofs.[5] Opportunities to improve the court's access to and use of economic material are considered in Chapter Seven.

Authorisation and Notification

Where conduct breaches the competition rules, under either a *per se* prohibition or a competition test, there may nevertheless be offsetting public benefits which indicate that the conduct should be permitted. For example, there may be cases in which conduct which adversely affects competition nevertheless promotes economic efficiency and community welfare.

An authorisation or notification scheme provides a mechanism for consistent and cost-effective resolution of these conflicts on a case-by-case basis. The existing authorisation scheme permits an independent body, the Trade Practices Commission (TPC), to "authorise" certain conduct where the public benefit of the reviewed conduct exceeds the anti-competitive detriment. Notification is a similar procedure, which confers automatic immunity from the competitive conduct rules upon notification of particular conduct to the TPC, with that immunity continuing until such time as the Commission revokes the notification on public benefit grounds. Appeals from the TPC's authorisation and notification decisions can be made to the Trade Practices Tribunal (TPT).

Administrative authorisation is the most direct mechanism for resolving possible conflicts between protecting the competitive process and achieving other policy goals, and is examined in Chapter Five. It provides a flexible and transparent means of dealing with possible new issues posed by extending market conduct rules to a

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3 (1976) 25 ALR 169.

4 *Queensland Wire Industries* (1989) 83 ALR 577.

5 For a discussion of the principles of market definition see Norman N, "Markets and Competition: A Note on Economic Concepts Imported from Economic Analysis" *Australian Trade Practices Reporter* ¶2-500.

wider range of market participants. Nevertheless, some forms of conduct may be so inherently anti-competitive and contrary to economic efficiency that administrative authorisation should not be permitted. In such circumstances, accommodation of conflicting policy goals should be achieved through alternative policy instruments such as specific legislation.

Simplifying Principles

The TPC has proposed that the competitive conduct rules could be more simply expressed by a single provision that "all conduct which substantially lessens competition is prohibited unless authorised."[6] While seeing some merit in the idea behind this proposal, the Committee has come to the view that such a sweeping simplification would not be appropriate.[7] The competitive consequences of different types of conduct warrant different types of rules, and it is not always appropriate to permit authorisation. The proposal would also present significant problems in the area of unilateral conduct.[8]

International experience with "simple" statements of competition rules, such as in the United States (US) and the European Community (EC), suggests that a considerable body of case law or regulations inevitably develops to interpret the simple propositions and their application to specific types of conduct, so that legal complexities are not eliminated.

Despite proposing some minor modifications to the existing rules, the Committee has concluded that the operation of the existing rules has been largely satisfactory, with the principal concern relating to their scope of application. In these circumstances, the Committee sees benefit in preserving existing approaches where possible to avoid any unnecessary uncertainty for those to whom the rules do and will apply.

Cooperation between the Commonwealth and the States in extending the application of competitive conduct rules to currently exempt areas presents opportunities to simplify the drafting of the

6 TPC (Sub 69).

7 See also Trade Practices Committee of the LCA (Sub 65).

8 See discussion in Chapter Four relating to proposals for an "effects test" under a misuse of market power provision.

legislation.[9] For example, currently complex drafting to tie the operation of each rule to the Commonwealth's heads of legislative power could be removed if there were a referral of powers from the States. Apart from simplification in this respect the Committee does not propose any drafting changes other than those necessary to give effect to its recommendations.

D. EXEMPTIONS FROM COMPETITIVE CONDUCT RULES

There are a range of exemptions from the current TPA of both a general and a specific nature.

Administrative authorisation and notification procedures provide one general source of exemption. Other general exemptions arise through constitutional constraints on Commonwealth power; the legal doctrine of "shield of the Crown"; exemption by regulation made under the Act or by specific authorisation by other Commonwealth, State or Territory laws or regulations. The TPA also includes a number of specific exemptions, including certain standards, intellectual property matters and overseas shipping. Chapter Five reviews these exemptions and concludes that a national competition policy should rely on a narrower range of more rigorous and transparent exemption processes. Chapter Six considers the application of the Committee's recommendations to a range of individual sectors and activities and reviews the specific exemptions set out in the Act itself.

The Committee's work uncovered two major misconceptions about the TPA, which ultimately proved pivotal to its recommendations.

The first is the extent to which particular entities or activities are exempt from the Act. While the Committee found that many of the current exemptions from the Act are not justified on considered policy grounds, there are no general exemptions favouring government businesses, the professions or agricultural marketing authorities, and many of these groups are already subject to the Act to some degree or in some circumstances.

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9 See Trade Practices Committee of the LCA (Sub 65); Centre for Plain Legal Language (Sub 138).

The second misconception relates to the impact of applying the Act to currently excluded sectors. Application of the TPA would have only limited impact on many sectors that are partially excluded from its reach. Important as it is in protecting competition, the Act only prohibits certain kinds of voluntary conduct that may restrict competition, and will generally have little or no impact on matters such as market structure or restrictions imposed by laws or other government policies. Some of the complexities in this area are illustrated by the discussion in Box 1.[10]

While the Act's prohibitions of anti-competitive conduct are an important part of competition policy, their inability to address the full range of conduct and market structures of concern from a national competition policy perspective prompted the Committee to propose the additional policy elements discussed in Part II of the Report.

E. ENFORCEMENT REGIME

The Committee proposes that, leaving aside questions of what bodies should perform what functions the enforcement regime for competitive conduct rules should be substantially based upon the existing enforcement regime under the TPA. Chapter Seven explores various elements of an enforcement regime: remedies; public versus private enforcement; and the processes by which judicial determinations are made. Some opportunities to improve courts' capacity to deal with economic issues are discussed.

10 See Executive Overview

3. Anti-Competitive Agreements

Agreements which restrict firms from competing are among the central concerns of competition law.[1]

"Horizontal" agreements are those between competing firms. They will be of concern where competitors agree to refrain from particular forms of competitive conduct, such as agreeing not to charge below a specified price. The *Trade Practices Act 1974* (TPA) distinguishes between different forms of horizontal agreements. They are here discussed as price fixing agreements, boycotts and other horizontal agreements. In general the Committee is satisfied that the existing provisions operate effectively, but proposes some minor amendments in relation to price fixing agreements.

"Vertical" agreements are those between firms at different levels of the chain of production such as, for example, wholesalers and retailers. Vertical agreements are of concern where a firm at one level (eg, a retailer) agrees to restrictions on competitive conduct imposed by a firm operating at another level (eg, a wholesaler). The TPA distinguishes between non-price vertical agreements and resale price maintenance. Again, the Committee is generally satisfied with the operation of these provisions, but proposes some minor amendments in relation to certain non-price vertical agreements and resale price maintenance.

A. PRICE AGREEMENTS BETWEEN COMPETITORS (ss.45A & 45C)

Pricing decisions lie at the heart of the competitive process, and the Committee strongly supports the Act's *per se* prohibition of agreements between competitors which fix, control or maintain prices.

At present, administrative authorisation is available for price fixing agreements for services but not for goods. Because of the central

[1] The term "agreement" is used here to describe informal arrangements and understandings as well as legally binding agreements: see the discussion of the expression "contract, arrangement or understanding" in Pengilley W, "Anti-Competitive Agreements" *Australian Trade Practices Reporter* ¶3-280.

importance of price competition, and to remove any ambiguity over the undesirability of price-fixing, the Committee proposes that the treatment of goods and services be brought into line by removing the potential for authorisation for price-fixing agreements for services.

While the Committee supports the current provision for certain recommended price agreements to be authorised, such agreements should no longer be specifically excluded from the *per se* prohibition.

Background

Seeking the profits of a single-firm monopoly, competitors may agree to refrain from competing against each other, and instead collude to raise prices and thus restrict output. Such cartels must please most members to maintain their allegiance, and typically perform even less efficiently than single-firm monopolies because they fail to minimise the costs of production. With less external pressures on firms, technical and organisational inefficiency can also emerge. Situations in which cartels are likely to be effective are fairly rare, but they are more likely to succeed in industries with relatively few competitors and significant barriers to entry. Most cartels break down because of organisational difficulties in obtaining and maintaining agreement, cheating by cartel members or because high profits attract new entry. Nevertheless, while cartels survive they are likely to impose substantial costs upon the community, and some may survive for extended periods.

Unlike other horizontal agreements, price agreements are generally unambiguously detrimental to economic efficiency. Further, removing price agreements is unlikely to undermine the internal efficiency or organisational integrity of the cooperating firms, so that there is generally no case against prohibiting price agreements. There are thus sound reasons for prohibiting price fixing agreements *per se*, without any inquiry into the competitive effects of such agreements.

Current Approach

Agreements[2] and covenants[3] between competitors which have the purpose or effect of fixing, maintaining or controlling prices are *per se*

2 Sections 45, 45A(1).

3 Sections 45B, 45C(1), 45C(2).

illegal under the Act. Joint venture pricing,[4] price recommendation agreements between 50 or more persons[5] and buying groups' pricing[6] are exceptions to the *per se* prohibition, but will be prohibited if they substantially lessen competition. Authorisation is not available for price fixing in relation to goods but is available in relation to services and the three forms of price agreements excepted from the *per se* prohibition.[7]

Overseas Approaches

International experience indicates strong support for a *per se* prohibition of price fixing agreements. In the countries where *per se* prohibitions are not a general part of competition law, a strong line is nevertheless taken against such agreements.

In the United States, all agreements to fix prices are illegal *per se*,[8] unless ancillary to the achievement of another pro-competitive purpose in which case they are subject to a 'rule of reason' which balances the opposing competitive detriments and benefits.[9]

In New Zealand, price fixing agreements are illegal *per se*,[10] but can be authorised. The per se prohibition does not apply in respect of inputs to joint ventures,[11] price recommendations by groups of 50 or more[12] or joint buying promotional arrangements.[13]

In the United Kingdom, although not legally subject to absolute prohibition,[14] no price fixing agreements have been permitted by the Restrictive Practices Court since 1966, and earlier decisions have been criticised. Price recommendations by trade associations are treated in the same way as explicit agreements as to price.[15]

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4 Sections 4J, 45A(2).

5 Section 45A(3).

6 Section 45A(4).

7 Sections 88(1), 88(2), 88(5). Authorisation is generally unlikely to be granted in relation to price fixing of services: Heydon J D, *Trade Practices Law* [4.900]-[4.920].

8 Section 1 Sherman Act (US), *US* v *Socony-Vacuum Oil Co* 310 US 150 (1940).

9 Eg *Board of Trade of City of Chicago* v *US* 246 US 231 (1918).

10 Sections 27, 30, 34 Commerce Act (NZ).

11 Section 31 Commerce Act (NZ).

12 Section 32 Commerce Act (NZ).

13 Section 33 Commerce Act (NZ).

14 Sections 6(1)(a), 11(2)(a) Restrictive Trade Practices Act (UK).

15 Sections 8(2),8(3),16(3), 16(4) Restrictive Trade Practices Act (UK).

In the EC, price fixing agreements are prohibited to the extent that they affect trade between Member States.[16] The prohibition extends to recommended price agreements.[17] There are no *per se* rules in EC competition law. Exemptions may be granted by the Commission where certain conditions are demonstrated, although few exemptions have been granted in relation to price fixing agreements.[18]

In Canada, agreements which unreasonably enhance prices, which prevent, lessen or otherwise restrain or injure competition unduly are prohibited.[19] Bid rigging is prohibited *per se*.[20] Agreements between banks on, amongst other things, interest rates or loan terms, are prohibited *per se*.[21] There is no provision for authorisation.

Submissions

Submissions to the Inquiry indicate no major concerns with the current provisions. There were suggestions that authorisation be available for all price agreements;[22] that a clearance or notification procedure be introduced in respect of the three excepted classes of price agreements;[23] that recommended pricing should be available to groups of less than 50 parties;[24] and that the operation of the joint venture exception be clarified.[25]

Consideration

Per Se Prohibition vs Competition Test

The current *per se* prohibition of price fixing is warranted on the basis that the occurrence of efficiency-enhancing price fixing agreements is rare, that the benefits of identifying and permitting efficiency-enhancing price fixing agreements in a court setting are outweighed

16 Article 85(1), *Treaty of Rome* (EC).

17 *Cementhandelaren* v *Commission* (Case 8/72) [1972] ECR 977, [1973] CMLR 7.

18 Article 85(3) *Treaty of Rome* (EC). Van Bael I & Bellis J-F, *Competition Law of the EEC* (1987) at 231.

19 Section 45 Competition Act (Canada).

20 Section 47 Competition Act (Canada).

21 Section 49 Competition Act (Canada).

22 TPC (Sub 69); NFF (Sub 90); Assn of Consulting Engineers Aust (Sub 127).

23 Small Business Coalition (Sub 12).

24 IC (Sub 6); NFF (Sub 90); BCA (Sub 93).

25 BHP (Sub 133).

by the enforcement and judicial costs of a competition test and the benefit from the certainty induced by such clear rules.

Per se prohibition or a competition test are not the only possible approaches to price fixing. Following a recent review of the Commerce Act, the New Zealand Government has decided to replace the provision deeming price fixing agreements to substantially lessen competition with a rebuttable presumption: agreements to fix, maintain or control prices would be presumed to substantially lessen competition unless the defendant could show otherwise.[26] The argument against such a test is that it may involve a wasteful analysis of evidence which is ultimately unlikely to rebut the presumption, thus increasing enforcement costs. It also signals to firms that putting resources and effort into price fixing may be rewarding behaviour.

Authorisation

The *per se* prohibition against price fixing is qualified by the availability of authorisation for price fixing agreements involving services (as well as the three exemptions from the *per se* prohibition: joint venture pricing; recommended pricing for groups of 50 or more; buying groups' pricing). There seems to be no reason in principle for the distinction between goods and services: price fixing in relation to services is no less capable of diminishing economic efficiency than price fixing in relation to goods.

Options for dealing with this inconsistency are:

(i) removing authorisation in relation to services;
(ii) permitting authorisation in relation to goods; or
(iii) maintaining the status quo.

The Committee strongly favours the first option. Removing authorisation in relation to services would provide a clear and simple message that price fixing is not acceptable business behaviour. Although some authorisations have been granted for price-related agreements concerning services, most of these have involved agreements which did not require compliance with the relevant price. The most significant line of authorisations has been in road transport, involving agreements between owner-drivers to collectively negotiate

26 The Hon Philip Burdon, New Zealand Minister of Commerce, "Review of the Commerce Act", Press Statement 16 February 1993.

rates of remuneration with freight owners, and in this area the Trade Practices Commission (TPC) now seems less likely to grant authorisation.[27]

Permitting authorisation in relation to goods is the course urged in some submissions. It could be argued that firms wishing to demonstrate the public benefits of their price fixing agreements should at least have the opportunity to do so. Against this, it would be wasteful of resources to provide such opportunities where the ultimate result should almost always be a refusal of authorisation. Further, the availability of authorisation would undermine the normative effect of the legislative prohibition, encouraging firms to think that price fixing may be acceptable in some circumstances.

The status quo is inconsistent in the treatment of goods and services, is not supported in principle, sends conflicting messages to businesses about the acceptability of price fixing and unnecessarily increases the complexity of the law.

Price Recommendations

Recommended pricing by groups of 50 or more competitors is currently exempt from the provision of the Act that deems pricing agreements to substantially lessen competition[28] and can be authorised. The Committee proposes removal of the exemption but continuing the availability of authorisation.

- *Per Se Prohibition vs Competition Test*

Price "recommendations" may be a cloak for underlying price fixing agreements, and may in reality have the effect of "fixing" price. With a large group, maintaining adherence to underlying agreements will be difficult, so that an agreed price is more likely to be a "genuine" recommendation. Nevertheless, even genuine recommendations may have the effect of encouraging greater price uniformity, that is, controlling or maintaining price. If a price recommendation does have the effect of "fixing, controlling or maintaining" price there seems little reason to treat it differently from other price fixing agreements. If the price recommendation does not have this effect, the *per se* prohibition does not apply in any event.

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27 See *Re Lamont* (1990) ATPR ¶41-035.

28 See s.45A(3).

Removing the exemption from the *per se* prohibition will not render illegal price recommendations which do not have the purpose, the effect or the likely effect of fixing, controlling or maintaining price. Nor will it prohibit many information sharing arrangements, such as information on the most recent trades, or recommended pricing in a vertical relationship, such as where a manufacturer recommends a price to retailers. It will, however, underline the message that price competition is central to effective competition and will prohibit agreements, however described and comprising however many firms, which have an adverse effect on price competition.

- *Authorisation*

The most common arguments in favour of permitting price recommendations to be authorised are that in some cases the task of setting prices can be complex (eg, small grocery retailers with a wide range of products), and in some cases the market price can be unclear (eg, primary produce may be subject to fluctuating world prices). The argument that setting prices is too complex for some businesses seems weak: at the very simplest, retailers can unilaterally adopt a cost plus mark-up pricing policy. The argument that market prices for commodities are unclear may have had greater strength in bygone days, but seems weak today in light of developments in information and communications technology.

In the case of genuine price recommendations, however, it may not be immediately apparent whether the agreement has the effect of fixing, controlling or maintaining price. In such cases, business certainty might be enhanced by the availability of authorisation. But to permit authorisation for a 'recommended' price agreement between a small number of parties might allow firms to use the cloak of price "recommendations" to seek authorisation for price fixing agreements. As already observed, for a large number of parties it seems likely that an agreement would be a genuine price recommendation, and it is only in such circumstances that authorisation should be permissible. While 50 is perhaps an arbitrary number, it represents a fair assessment of the minimum number of parties required to ensure that a recommended price is no more than that.[29] Thus the Committee

[29] It is not possible to simply add otherwise uninvolved parties to an agreement, to achieve the desired 50 persons. Section 45A(3) relates to the parties to an agreement, being an agreement which falls within s.45A(1) (the deeming provision). Section 45A(1) deals with price agreements

supports retention of the current provision which permits authorisation for recommended price agreements between 50 or more competitors.

Joint Ventures

Joint venture pricing is exempt from the provision of the Act that deems pricing agreements to substantially lessen competition.[30] Joint venture pricing remains subject to the competition test, but authorisation is available where net public benefit can be demonstrated. The Committee considers that the operation of the joint venture pricing exemption should be clarified, but otherwise proposes no change to the provision.

Joint ventures are an emerging legal concept, and may take the form of a separate company formed for the purpose of a common enterprise, a partnership or an unincorporated joint venture which is not a partnership.[31] In trade practices cases, joint ventures have generally involved the development and marketing of natural resources,[32] but this is not the only recognised area of joint ventures.[33] Joint ventures are frequently used where there is difficulty in a single firm raising the necessary capital, or bearing all the risk, associated with a particular business venture. In the absence of joint venture agreements some projects simply would not occur.

The joint sale of joint venture products could constitute a price agreement between competitors, technically falling within the terms of s.45A(1), but it is simply a natural extension of the joint venture process and should thus not be prohibited *per se*. Nevertheless, scrutiny under the substantial lessening of competition test is appropriate for such agreements, given the anti-competitive potential of all price agreements between competitors. The potential benefits of

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between competitors. Thus, parties to a recommended price agreement would need to be competitors, competing within a particular market.

30 See s.45A(2).

31 See s.4J; *Brian Pty Ltd* v *United Dominion Corporation Ltd* (1985) 60 ALR 741; and Chetwin M C, "Joint Ventures — A Branch of Partnership Law?" (1990) 16 *Uni of Queensland Law Journal* 256.

32 See, eg, the TPC's authorisation decisions in *West Australian Petroleum & West Australian Natural Gas Pty Ltd* (1979); *Woodside Petroleum Development Pty Ltd — North West Shelf Venture* (1977); *Santos Ltd* (1988) ATPR (Com) ¶50-074; *Bridge Oil Limited* (1988) ATPR (Com) ¶50-073; *Delhi Petroleum Pty Ltd and Santos Ltd* (1988) ATPR (Com) ¶50-076.

33 See, eg, the TPC's authorisation decisions in *Bankcard Scheme: Interbank Agreement* (1980); *Electric Lamp Manufacturers (Australia) Pty Ltd* (1982) ATPR (Com) ¶50-033.

joint venture arrangements suggest that authorisation should be available where net public benefit can be demonstrated.

There have been suggestions that the joint venture pricing exemption does not operate in respect of a price agreement relating to the joint venture's product where not all of the joint venture parties are parties to the price agreement.[34] It would be a simple matter of legislative drafting to resolve this uncertainty, and the Committee considers that the existing provision should be redrafted to make clear that not all the joint venture parties need to be parties to a pricing agreement to qualify for the exemption.

Joint Buying Groups

As with joint ventures, joint buying groups are exempt from the provision which deems price agreements between competitors to substantially lessen competition.[35] Joint buying groups remain subject to the substantial lessening of competition test, and authorisation is available where net public benefit can be demonstrated.

Joint buying arrangements can permit small businesses to take advantage of economies of scale or scope in purchasing and advertising, while continuing to compete at the retail level. The exemption from the deeming provision relates to the purchasing and advertising activities of such groups and is warranted, given the potential benefits of such arrangements.

Conclusion

The Committee is satisfied that the provision which deems price fixing agreements to substantially lessen competition is warranted, and should be incorporated into the competitive conduct rules of a national competition policy.

The Committee supports retention of the exemptions from the deeming provision of joint venture and joint buying groups but not that for recommended pricing agreements. The operation of the joint venture exemption should be clarified.

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34 BHP (Sub 133).

35 See s.45A(4).

Subject to appropriate transitional arrangements,[36] the Committee supports the removal of administrative authorisation for price agreements for goods and services, with the only exceptions being the existing ones for joint ventures, joint buying groups and recommended pricing agreements with 50 or more parties. The Committee does not support extending the recommended pricing exception to groups of less than 50 parties.

B. BOYCOTTS (ss.4D, 45D & 45E)

Boycotts are agreements between competitors aimed at restricting the ability of a target firm to either buy or sell in a market. A number of countries have adopted stringent approaches to boycotts. The operation of the secondary boycott provisions is currently the subject of a Senate Inquiry. On the basis of submissions received by this Inquiry, the Committee has not been persuaded of the need to amend the current provisions dealing with boycotts.

Background

A primary boycott occurs when a group of people agree not to deal with (either sell to or buy from) a target person, or class of persons.

A secondary boycott occurs when a group of people who may not themselves deal with the target person persuade an otherwise uninvolved party (such as a supplier) not to deal with the target person. A secondary boycott could occur because a group of competitors wished to discipline or eliminate a competitor. In the Australian context, the most common secondary boycotts involve industrial action by unions and union members with no direct complaint against the target employer.

Current Approach

Primary boycotts are prohibited *per se*,[37] but can be authorised.[38]

Secondary boycotts which have the purpose and effect of causing substantial loss or damage to the business of a target corporation, or

36 See Chapter 15.

37 See s.4D and s.45. Note also s.45D(1A).

38 Section 88(1).

substantial lessening competition in a market in which the target operates, are prohibited by s.45D(1).[39] Section 45D(1A) prohibits two or more people from engaging together in conduct with the purpose and effect of preventing or substantially hindering a target from engaging in inter-State or overseas trade.

An exemption from both these provisions applies if the the dominant purpose of the relevant conduct is substantially related to remuneration, conditions of employment, hours of work, working conditions, or termination of employment.[40] While it is possible for the employees of one employer to pursue similar claims to those made by other employees against another employer, a boycott pursued for purposes related to the remuneration, employment conditions, etc of another group of employees would not generally satisfy the requirements for exemption.[41]

Where a union attempts to persuade a person not to deal with a target, the person is also prohibited from agreeing to the union demands unless the target is a party to the agreement, consents in writing to it, or the TPC authorises it.[42]

The Australian Industrial Relations Commission has jurisdiction under Part VI, Division 7 of the Industrial Relations Act to conciliate in ss.45D and 45E disputes where there is an application in the Federal Court for an injunction to restrain a boycott. No other provisions of the Industrial Relations Act deal with such behaviour.

Authorisation is available for conduct which contravenes the secondary boycott provisions.[43]

Overseas Approaches

International experience indicates support for prohibiting boycotts through competition or industrial relations policy.

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39 Additional requirements apply if the target is not a corporation.

40 Section 45D(3).

41 *Concrete Constructions Pty Ltd* v *Plumbers and Gas Fitters Employees' Union of Australia* (1987) 115 FCR 31 at 57-58; ATPR ¶40-766 at 48-309. See also *Meat & Allied Trades Federation of Australia (Qld Div) Union of Employers* v *Australian Meat Industry Union of Employees (Qld Branch)* (1989) ATPR ¶40-986 at 50,750 and 50,755; *Ascot Cartage Contractors Pty Ltd* v *Transport Workers' Union of Australia* (1978) 32 FLR 148 at 154; ATPR ¶40-766 at 48,309.

42 Section 45E.

43 Sections 88(7), 88(8).

In the US, boycotts are prohibited *per se*.[44] While the anti-trust laws operate subject to a labour exception, secondary boycotts in an industrial context would usually be caught under specific industrial legislation.[45]

In New Zealand, primary boycotts are prohibited *per se* and are authorisable. There is no specific legislative provision equivalent to ss.45D and 45E, but secondary boycotts fall under the general prohibition against agreements which substantially lessen competition. Industrial secondary boycotts may be challenged under industrial legislation.[46]

In the UK, boycotts may, depending on the form of the relevant agreement, be registrable under the *Restrictive Trade Practices Act 1976*, although not where the boycott relates to certain matters of employment. Common law economic torts may have application to boycotts in an industrial context.[47]

Canada's *Competition Act 1986* does not deal specifically with boycotts, although some boycotts may breach the general prohibition against conspiracies, agreements and arrangements that lessen competition unduly.

Submissions

The current provisions dealing with primary boycotts received little attention. One submission suggested that they should be subject to the substantial lessening of competition test, rather than *per se* prohibition.[48]

Recognising that the secondary boycott provisions were not a major focus for this Inquiry, the arguments for reform were not fully canvassed in submissions to this Committee. Nevertheless, some proposals were advanced, including support for the current regime,[49] a proposal that boycott laws should only prohibit arrangements where

44 *Klors Inc* v *Broadway Hale Stores Inc* (1959) 359 US 207.

45 National Labour Relations Act (US).

46 See ss.63 and 64 of the Employment Contracts Act (NZ).

47 Section 224 Trade Union and Labour Relations (Consolidation) Act (UK).

48 NSW Govt (Sub 117).

49 Trade Practices Committee, LCA (Sub 65); Small Business Coalition (Sub 100).

a group of competitors restrict or limit dealings with other potential or actual competitors,[50] and a proposal that unions should be exempt from ss.45D and 45E.[51]

Consideration

Prohibitions on primary and secondary boycotts were inserted in 1977, following recommendations of the Swanson Committee.

Section 45D had its origins in a recommendation of the Swanson Committee that "the law provide an effective avenue of recourse for the trader directly affected, by allowing him access to an independent deliberative body."[52] The Committee pointed to the examples of boycotts by bread delivery drivers against retail outlets which were selling cut-price bread and boycotts by petrol tanker drivers against service stations advertising cut-price petrol. The Swanson Committee made no recommendation as to whether secondary boycotts should be dealt with in trade practices or industrial relations legislation.[53]

Section 45E arose out of a dispute in 1980 when a union placed a black ban on an oil company from supplying petrol to a company. The oil company, to keep its depots open, agreed to the union's demands that the target firm not be supplied. The Government felt that companies should not succumb to such pressure, and enacted s.45E in response.[54]

The major field of operation for ss.45D and 45E has been in industrial disputes, but there have also been a number of purely commercial disputes involving the secondary boycott provisions.[55] The operation of these provisions is currently the subject of an inquiry by the Senate Standing Committee on Employment, Education and Training, which is to report by the end of September 1993.

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50 Dr W Pengilley (Sub 11).

51 ACTU (Sub 113). Note that unions are not directly affected by s 45E, but that they could conceivably be prosecuted for aiding and abetting a contravention of s 45E.

52 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, (1976), recommendation 10.19 at 86.

53 Ibid, para 10.20, at 86.

54 See Debate, 15 May 1980, Hansard, H of R, p.2827 et seq.

55 Eg *White Industries* v *JD Trammell and Ors* (1983) ATPR ¶40-429; *Jewel Food Stores* v *Hall and Ors* (1991) ATPR ¶41-098; *Traztand Pty Ltd* v *Bousafield & Ors* (1984) 6 ATPR ¶40-484 and ¶40-497; *Hamburg-Suedamerckanisse* v *J Fenick and Ors* (1984) (unreported); and *Refrigerated Express Lines (A'Asia) Pty Ltd* v *Australian Meat & Livestock Corporation & Ors* (1980-81) 3 ATPR ¶40-137 and ¶40-156.

Per Se Prohibition vs Competition Test

Both primary and secondary boycotts are subject to *per se* prohibition. Secondary boycotts have an alternative competition test, which is frequently irrelevant given the existence of the other most commonly applied test of damage to the business of the target corporation. The Committee was not presented with compelling evidence that would suggest an alternative approach to primary or secondary boycotts.

Authorisation

Primary and secondary boycotts are authorisable. No evidence was presented to the Committee of practical problems which have arisen as a result of this facility.

Conclusion

The Committee did not receive any compelling evidence supporting reform of the primary or secondary boycott provisions, which appear broadly consistent with overseas practice. In these circumstances, the Committee does not propose any amendment to the current provisions.

The secondary boycott provisions have been controversial in Australia, largely because of their industrial relations role. The provisions are currently the subject of a separate review by the Senate Standing Committee on Employment, Education and Training, and may be reconsidered in the context of reforms to the industrial relations system.

C. OTHER HORIZONTAL AGREEMENTS (ss.45, 45B)

The Committee has found the current treatment of other agreements between competitors to be soundly based in policy. In these circumstances no changes are recommended to these provisions.

Background

In a cartel's pursuit of monopoly profits, price agreements and output restrictions are two sides of the same coin, and the observations made above in relation to price agreements can also apply to agreements

between competitors to restrict output. Some agreements between firms which do not compete can also adversely affect competition.

But there are many reasons why different firms, including competing firms, might enter into agreements that contain restrictions but are not intended to have and do not have any substantially adverse impact on competition. For example, agreements on procedures for resolving consumer complaints might have no discernible affect on competition. Equally, however, agreements on matters other than price can facilitate tacit price collusion, as well as providing constraints on product differentiation and technological improvement. Even restrictions that limit important elements of competition, such as advertising, might be argued to have offsetting public benefits in some circumstances.

Trade or industry associations can provide a useful forum for exchange of information which may enhance technical efficiency. For example, monitoring and reporting on cost information between firms may facilitate moves towards international best practice and encourage "yardstick competition" between firms. Information exchanges may also serve to lessen competition, however, particularly where the information relates to prices. Market sharing by territorial restrictions or allocation of customers and products can create local monopolies.

Current Approach

Agreements and covenants which have the purpose or likely effect of substantially lessening competition are prohibited by sections 45 and 45B respectively.[56] Such agreements or covenants can be authorised.[57]

Overseas Approaches

International experience strongly supports a competition analysis of non-price horizontal agreements, rather than a *per se* prohibition.[58] Of the countries examined, the only divergence from this approach is in the US, where some types of agreements seeking indirectly to limit

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56 Vertical agreements and mergers are excluded from the operation of these provisions: ss.45(5),(6) and (7).

57 Section 88(1).

58 Section 1 Sherman Act (US); ss.27, 28 Commerce Act (NZ); Article 85 *Treaty of Rome* (EC); s.45 Competition Act (Canada).

price competition, such as agreements to restrict output, or to divide markets territorially, are subject to *per se* prohibition. As such agreements may fall within the *per se* prohibition of price-fixing under the Australian Act, the US approach is only a limited divergence.

Submissions

Submissions generally supported the current approach to these agreements.[59] One submission[60] suggested that efficiency should act as the general test in cases of horizontal agreements, while another[61] argued that s.45 currently prohibits economically efficient conduct which would not be authorised but gave no examples of its concerns. A technical amendment to s.45(6) was also proposed.[62]

Consideration

Per Se Prohibition vs Competition Test

A *per se* prohibition of all agreements between competitors would catch much economically efficient conduct. A case-by-case analysis of the impact on competition of horizontal agreements, other than price-fixing and boycotts, is clearly appropriate.

Authorisation

The Committee was not presented with evidence that economically efficient conduct would not be authorised. The current authorisation scheme operates effectively to ensure that conduct which lessens competition but nevertheless enhances economic efficiency can be permitted, and the Committee's proposed amendments to the scheme, discussed in Chapter Five, should reinforce the primary role of efficiency considerations.

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59 Eg, National Institute of Accountants (Sub 88); Small Business Coalition (Sub 100).

60 Metal Trades Industry Association of Australia (Sub 59).

61 NSW Govt (Sub 117).

62 It was argued that s.45(6) does not recognise that s.6 of the Act might prevent intrastate conduct by an unincorporated entity from infringing s.47 whilst not preventing conduct being covered by s.4D. It was therefore proposed that s.45(6) should also specify "conduct that would, but for the operation of s.6(2), infringe s.47": Mr P Argy (Sub 60). This point has been referred to the Treasury for consideration.

Conclusion

The Committee considers that no need has been demonstrated for amendments affecting the rules contained in ss.45 and 45B, and believes that these rules should be incorporated into a national competition policy.

D. NON-PRICE VERTICAL AGREEMENTS (S.47)

There is a wide range of vertical agreements under which firms at one stage in the production process impose restrictions, other than price restrictions, on the conduct of firms at another stage. Economic analysis provides no simple rules for the treatment of vertical restraints, including such tying arrangements as "third-line forcing". As a consequence a test which enquires into the effects of individual agreements on competition is required. The Committee thus proposes that the provisions relating to third-line forcing should be made consistent with the other provisions dealing with vertical agreements, by replacing the *per se* prohibition with a competition test, and permitting notification.

Background

Vertical restraints are restrictions a firm at one stage in the production process imposes upon the conduct of firms at another stage. For example, a manufacturer may impose various restrictions on retailers of its products.[63]

Vertical restraints may reduce or eliminate intra-brand competition, that is, competition among dealers in the product of a particular manufacturer. And if all manufacturers in an industry adopt similar practices, inter-brand price competition (among sellers of different brands) may also be affected.

In a "tying arrangement", the sales of two or more products are tied: the seller will only sell unrelated products as a bundled package, or offers one product only on the condition that the buyer also purchases one or more other products. In "full-line forcing", a seller requires a buyer to purchase an entire line of products in order to acquire any

63 For a discussion of the economics of vertical restraints see Scherer F M & Ross D, *Industrial Market Structure and Economic Performance* (1990) Chapter 15.

(eg, a car manufacturer might require dealers to carry all of its models). "Third-line forcing" involves a requirement that a third party's product be bought in conjunction with the seller's product. Tying arrangements may enable firms to extend market power from one market with low elasticity of demand into an unrelated market; may permit price discrimination which would otherwise be impossible; may be used to raise entry barriers;[64] or may facilitate avoidance of price regulations on one good. There is a broad spectrum of tying arrangements, with many having a positive implication for economic welfare. For example, a supplier may be able to achieve production or distribution efficiencies or technical superiority by tying together two or more particular products.

Territorial restrictions or restrictions as to the types of customers which may be served can be used to restrict competition. For example, a manufacturer might grant exclusive territories to its retailers, resulting in increased profits for those retailers at the expense of consumers. In some circumstances, however, the grant of an exclusive territory might be warranted to encourage retailers to provide an appropriate level of services, such as where there are free-rider issues.[65] A case-by-case approach is necessary to determine the effects on competition and efficiency of territorial or customer restrictions.

Exclusive dealing entails a requirement by one firm that another firm it supplies, or from whom it purchases, not deal with its competitors.[66] The potential anti-competitive element in exclusive dealing is market foreclosure, removing distribution outlets or supply sources from use by potential competitors. Exclusive dealing may also enhance efficiency where, for example, a manufacturer finds it less costly to deal with a relatively small number of dedicated distributors, or where distributors will not promote a new product unless they have the security of knowing that the product of their promotional efforts will not be reaped by others.

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64 Eg, a computer manufacturer requires that it provide all maintenance, thus forestalling the entry of rival service organisations.

65 A free-rider problem can arise where, for example, one retailer provides considerable advice to customers, while another provides no such service and can thus sell at a lower price. Customers can obtain the advice from one retailer and then buy from the lower priced retailer. For a discussion of free-rider problems in vertical relationships see Hanks F & Williams P L, "The Treatment of Vertical Restraints Under the Australian Trade Practices Act", (1987) *ABLR* 147.

66 Note that the Act calls all vertical restraints "exclusive dealing".

Current Approach

Section 47 prohibits third-line forcing *per se*[67] and other forms of tying, territorial restrictions and exclusive dealing if they substantially lessen competition.[68] Authorisation is available for conduct which would otherwise contravene s.47.[69] Notification, which provides immediate and automatic immunity from legal proceedings, is available for all conduct covered by s.47 except third-line forcing.

Overseas Approaches

International experience supports a competition analysis of vertical arrangements, as opposed to a *per se* prohibition.

New Zealand, the EC and Canada prohibit vertical agreements only where an adverse effect on competition can be proved.[70] New Zealand and the EC have mechanisms for obtaining exemptions from these prohibitions.[71]

The UK permits a balancing of costs and benefits of vertical agreements,[72] either by the Restrictive Practices Court or by administrative investigation.[73]

In the US, certain forms of tying arrangements, including third-line forcing, are illegal *per se* but otherwise non-price vertical restraints are judged according to their competitive effect on the market, which at least requires a weighing of effects on intra-brand and inter-brand competition.[74] None of the countries examined singled out third-line forcing in the manner adopted by Australia.

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67 Sections 47(6), 47(7), 47(8)(c), 47(9)(d).

68 Section 47.

69 Section 88(8).

70 Sections 27, 28 Commerce Act (NZ); Article 85(1) Treaty of Rome (EC); s.77 Competition Act (Canada).

71 In New Zealand authorisation is available, under s.58 Commerce Act. In the EC exemptions, including "block exemptions" for classes of agreements, are available under Article 85(3) *Treaty of Rome* (EC).

72 Sections 10, 19, 21 Restrictive Trade Practices Act (UK).

73 Anti-competitive practices: ss 2-10 Competition Act (UK); monopoly references and general references: Pts I, IV and s.78 Fair Trading Act (UK).

74 Sections 1, 3 Sherman Act (US).

Submissions

Very few submissions raised difficulties with the operation of the current provisions relating to vertical agreements. The main issue was whether third-line forcing should be made subject to the substantial lessening of competition test, rather than *per se* prohibition. Some submissions supported this proposal,[75] while one submission supported retaining *per se* prohibition for third-line forcing.[76] One submission suggested that provisions dealing with the re-supply of goods should be extended to the re-supply of services.[77]

Consideration

Per Se Prohibition vs Competition Test

As noted in the background discussion, the effects on competition and economic efficiency of vertical agreements need to be examined on a case-by-case basis.[78] The US has *per se* prohibitions against tying arrangements, but these rules have come under increasing scrutiny and criticism.[79] The Australian rules applying to vertical agreements generally adopt a competition test, and thus accord with economic principles.

The basis for a distinction between third-line forcing and other forms of tying is not clear. *Per se* prohibitions are appropriate where conduct has such strongly anti-competitive effects that it is almost always likely to lessen competition. Third-line forcing does not fall into this category. For example, the practice of building societies requiring borrowers to take out property or life insurance with a nominated insurer provides insurers with large captive markets and less incentives to compete.[80] However, where borrowers are permitted to choose from a list of insurers who are prepared to enter into concession agreements with the lenders, and who are operating with

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75 IC (Sub 6); Trade Practices Committee, LCA (Sub 65); NSW Govt (Sub 117).

76 TPC (Sub 69).

77 Mr P Argy (Sub 60).

78 See Tirole J, *The Theory of Industrial Organization* (1988) at 186; Waterson M, "Vertical Integration and Vertical Restraints" (Summer 1993) 9 *Oxford Review of Economic Policy* 41.

79 "Chicago School" theorists have stressed the situations in which vertical restraints can enhance economic efficiency. The most extreme of these positions is that of Bork, who maintains that "every vertical restraint should be completely lawful" *The Antitrust Paradox* (1978) at 288.

80 See United Permanent Building Society Ltd and Others (TPC determination, 30 June 1976). The TPC found a tendency for tied insurance rates to exceed market rates.

the authority of the Insurance Commissioner, competition is unlikely to be substantially lessened.[81]

In some cases third-line forcing will be less restrictive than full-line forcing conduct. It is anomalous that a supplier tying in favour of a wholly owned subsidiary, or related company, is subject to a *per se* prohibition, but a supplier tying in favour of one of its divisions is subject only to a competition test. The *per se* prohibition may catch some arrangements whereby a group arranges discounts for its members from specified suppliers. Further, there is an artificiality about distinguishing between the forcing of a third party's products and the sale of a package of goods or services.[82]

The variety of problems and anomalies arising from the divergent treatment of third-line forcing and other forms of tying suggests that a more consistent approach would be appropriate. Accordingly, third-line forcing should only be prohibited if it substantially lessens competition.

Authorisation/Notification

Authorisation is currently available for all forms of vertical restraints, including third-line forcing. Notification is available for vertical restraints other than third-line forcing. Notification effectively places the onus on the TPC to establish that particular vertical agreements are against the public interest. As there appears to be no significant policy rationale for distinguishing between third-line forcing and other vertical agreements, notification should be extended to third-line forcing.

Goods vs Services

Some of the provisions of the current s.47 are directed at restrictions imposed upon one party concerning the re-supply of goods.[83] To come within these provisions, the goods which are initially sold to retailers would need to be the very goods which are re-supplied. The personal nature of many services means that they cannot be resold, and issues of re-supply do not arise. There are other cases in which in

81 See Association of Co-operative Building Societies of New South Wales Ltd and Others; (TPC determination, 8 June 1977).

82 See, eg, *Castlemaine Tooheys Ltd* v *Williams & Hodgson Transport Pty Ltd* (1986) 162 CLR 395.

83 See ss.47(2)(e),(f); 47(3)(e),(f); 47(8)(a)(ii); and 47(9)(b).

a loose sense re-supply of services seems to occur, but it may often be the case that the bundle of legal rights which is transferred from wholesalers to retailers is different from the bundle of legal rights which is transferred from retailers to consumers. In such cases, it may not be the same service which is passed on, and there may be no "re-supply" to be addressed. Bearing in mind the wide definition of services in s.4, there may be other cases in which the re-supply of services is possible. For example, the rights to intellectual property might be capable of being re-supplied.

Whether in a legal sense the same service is passed on, it is possible to impose vertical conditions on the re-supply of services. There is no reason in principle why such conduct should not be treated in the same manner as vertical conditions on the re-supply of goods.

Conclusion

The Committee does not believe that third-line forcing is so significantly anti-competitive as to warrant treatment which differs from other forms of tying and recommends that third-line forcing be subject to a competition test and notification.

The Committee considers that the provisions dealing with vertical restrictions on the re-supply of goods should be extended to cover the situation where one person supplying services to a second person imposes conditions on the re-supply of those services, or on the supply of services provided in connection with those services.

Otherwise, the Committee considers that the TPA's treatment of non-price vertical restraints should be incorporated into the competitive conduct rules of a national competition policy.

E. RESALE PRICE MAINTENANCE (s.48, Part VIII)

Resale price maintenance (RPM) is the practice whereby a supplier requires retailers to sell at or above a minimum price. RPM has historically been associated with collusive retailing practices, and the raising of consumer prices. Modern economic thinking, however, recognises that in some circumstances RPM could enhance economic efficiency. For example, a producer who guarantees minimum retail prices may in some situations be promoting economic efficiency by

encouraging the distributors to increase the level of their pre- or post-sales services in relation to the product.

The Committee proposes that the current *per se* prohibition be maintained, and extended to cover practices solely involving services, but that authorisation be made available.

Background

While it is not generally in a profit-maximising manufacturer's interest to raise dealers' margins above the competitive level, there are a number of possible reasons for the imposition of minimum resale prices.

Dealers' market power may permit a colluding group to fix the resale price and require the manufacturer to enforce it on their behalf. Alternatively, a group of competing manufacturers may use RPM to facilitate collusive or tacit price-fixing arrangements. Such occurrences of RPM are generally recognised as efficiency-reducing.

Other situations in which firms have an incentive to engage in RPM may give rise to efficiency-enhancing behaviour. An efficiency-enhancing role for RPM occurs where it enables producers to improve sales by enhancing customer services or product quality. Where there are problems with "free-riding" on provision of services, RPM can encourage all retailers to provide desirable services which may increase the desirability of manufacturers' products. Manufacturers might adopt RPM to attract dealers or to maintain their loyalty, particularly where dealers are easily able to change allegiance. RPM can be used to enhance a reputation for product quality, at least during the initial period of the product's life cycle. Manufacturers with reputations for high quality and value may adopt RPM to prevent loss leader sales because such sales detract from the product's reputation and lessen incentives for other retailers to carry the product.

Current Approach

Specification of minimum resale prices is prohibited *per se* in relation to goods, or services sold in connection with goods, but not in relation to services alone.[84] The prohibition does not apply where RPM is used

84 Sections 48, 96-100, 4C(b), 4C(c).

in response to loss leader selling.[85] Authorisation is not available for RPM.

Overseas Approaches

International treatment of RPM generally supports *per se* prohibition. New Zealand and Canada, have each recently reviewed their legislation, and prohibit RPM *per se*,[86] although New Zealand now permits authorisation. In the UK, resale price agreements which come within the proscribed forms are illegal although exemption mechanisms are available in relation to resale price restrictions imposed by a firm acting unilaterally.[87]

In the EC, while RPM is subject to a general competition test,[88] the practical approach has been fairly stringent. RPM has been considered illegal in cases where groups of suppliers agree to impose resale prices on their purchasers and in cases where a single supplier agrees with its resellers that they will not resupply a product below a certain price.

In the US, resale price maintenance agreements in a vertical relationship, as between a manufacturer and a retailer, are illegal *per se.* [89]

Submissions

Several submissions argued that the current prohibition on RPM should be relaxed, either by subjecting it to a competition test[90] or by permitting authorisation[91] or notification.[92] Other submissions suggested that the prohibition be extended to services.[93]

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85 Section 98(2).

86 Sections 37 - 42 Commerce Act (NZ); s.61 Competition Act (Canada).

87 See ss.1 and 9 Resale Prices Act (UK). Classes of goods can be exempted by the Restrictive Practices Court where public interest criteria are satisfied. These exemptions are not available in relation to collective agreements to enforce the maintenance of resale prices.

88 Article 85 *Treaty of Rome* (EC).

89 Section 1 Sherman Act (US), *Dr Miles Medical Co* v *John D Parl & Sons Co* 220 US 373 (1911); *Monsanto Co* v *Spray-Rite Service Corp*, 465 US 752. It is not illegal, however, for a manufacturer acting unilaterally to announce in advance its resale prices and refuse to do business with non-complying customers: *United States* v *Colgate & Co* 250 US 300 (1919).

90 IC (Sub 6); Pacific Dunlop (Sub 112).

91 IC (Sub 6); Trade Practices Committee of the LCA (Sub 65); TPC (Sub 69); Pacific Dunlop (Sub 112).

92 Mr P Argy (Sub 60).

93 DOTAC (Sub 58); Mr P Argy (Sub 60); TPC (Sub 69).

Consideration

Per Se Prohibition vs Competition Test

Economic theory indicates that there are circumstances in which RPM could enhance economic efficiency. For example, it may be that consumers will buy more of a certain good if there are associated pre-sales services, such as explanation of certain technical matters. Retailers who do not offer those services may operate at lower cost, and thus offer lower prices. Customers may be able to obtain the services from the high cost retailer and buy the goods from the low price retailer. In such situations competition among retailers could result in less than optimal provision of pre-sale services, and thus less than optimal total sales of the manufacturer's product. To increase sales, the manufacturer may wish to encourage all retailers to provide increased services. This might be achieved by RPM because if retailers are unable to compete on price they will be forced to compete in other ways, such as the level of services provided.

There are disputes about the frequency of efficiency-enhancing RPM, both as a matter of theory[94] and as a matter of empirical observation,[95] and it is not clear what sorts of practices would emerge with a modified legislative approach to RPM. Historically RPM in Australia was frequently linked with horizontal agreements to fix prices, either by suppliers or retailers, and this link helped to foster a strong policy stance against RPM. It is clear that such practices should be prohibited.

The uncertainty surrounding the effects of RPM presents a choice between *per se* prohibition and a competition test. The current provision has helped to eliminate many inefficient trade practices, has simplified the task of enforcing the prohibition against such undesirable activities and does not prevent recommended retail prices. The Committee has not been presented with convincing evidence that efficiency-enhancing RPM occurs with such frequency that the *per se* prohibition should be relaxed.

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94 Scherer FM & Ross D, *Industrial Market Structure & Economic Performance* (1990) at 550 - 558.

95 Wang Y & Davison M, "Resale Price Maintenance: Is the Per Se Prohibition Justified?", (1992) 14 *Adel LR* 35; Hanks F & Williams P L, "The Treatment of Vertical Restraints Under the Australian Trade Practices Act", (1987) *ABLR* 147.

Authorisation/Notification

The economic theory associated with RPM does, however, present a convincing argument that RPM can, in certain circumstances, enhance economic efficiency. These arguments are highly technical, and could appropriately be examined in an authorisation context. Permitting applicants to argue their case before an expert authorising body would permit a better assessment of the practical extent of efficiency enhancing RPM. The empirical evidence of the frequency of such instances of efficiency enhancing RPM is not considered sufficient to warrant the introduction of a notification system, however.

Goods vs Services

The RPM provisions as currently drafted refer to resale of goods, but not to resale of services. As with other vertical restrictions noted in relation to s.47, it is possible for manufacturers to impose vertical pricing restraints where services are sold, even if in a legal sense it is not precisely the same service which is resold. There is no reason in principle why services should be treated differently from goods.

Conclusion

The Committee considers that a *per se* prohibition of RPM should be included in the competitive conduct rules of a national competition law, and that authorisation should be available to permit firms to argue their case if they believe that their proposed RPM would enhance economic efficiency or provide other net public benefits.

The Committee further considers that the provisions dealing with RPM should cover the situation where one person selling services to a second person requires the second person to re-sell those services at or above a specified price; or where one person selling goods or services to a second person requires the second person to sell other services, provided in connection with the resale of the original goods or services, at or above a specified price.

F. RECOMMENDATIONS

The Committee recommends that:

3.1 The provisions of the Trade Practices Act ("the Act") dealing with non-price horizontal agreements (ie, ss.4D, 45, 45B, 45D and 45E) provide the basis of provisions dealing with such agreements as part of the competitive conduct rules of a national competition policy.

3.2 Sections 45A and 45C of the Act provide the basis for the competitive conduct rules governing price-fixing agreements between competitors under a national competition policy, subject to the following amendments:

- subject to appropriate transitional arrangements, authorisation not be permitted for price fixing agreements covering services;
- recommended price agreements with 50 or more members be removed as an exemption from the deeming provision of s.45A; and
- the operation of the joint venture exemption from the deeming provision of s.45A be clarified.

3.3 Section 47 of the Act provide the basis for the competitive conduct rules governing non-price vertical agreements under a national competition policy, subject to the following amendments:

- third-line forcing be made subject to a substantial lessening of competition test and be capable of notification; and
- provisions dealing with vertical restrictions on the re-supply of goods be extended to transactions involving services.

3.4 Section 48 and Part VIII of the Act provide the basis for the competitive conduct rules governing resale price maintenance under a national competition policy, subject to the following amendments:

- authorisation be available; and
- the provision be extended to the resale of services.

4. Misuse of Market Power, Mergers & Other Rules

As well as agreements by which firms accept restrictions on their competitive conduct, competition law is concerned with unilateral conduct which adversely affects the level of competition in markets, and with mergers and acquisitions.

Unilateral conduct includes misuse of market power and price discrimination. Misuse of market power embraces a wide range of forms of conduct, and the Committee has come to the conclusion that the existing provision dealing with such conduct should be maintained.

Price discrimination involves the charging of different prices to different customers. The Committee considers that the existing provision, which prohibits price discrimination in certain circumstances is not warranted and should not form part of the competitive conduct rules of a national competition policy.

Mergers and acquisitions are a means whereby the conduct of individual firms affects the structure of the market. The provisions dealing with mergers and acquisitions have recently been amended and the Committee considers that any further review of these provisions should await further experience with the new provisions.

A. MISUSE OF MARKET POWER (SS.46 & 46A)

> *The difficulty in determining what conduct constitutes taking advantage of market power and what conduct does not, stems inevitably from the need to distinguish between monopolistic practices, which are prohibited, and vigorous competition, which is not. Both here and in the United States the search continues for a satisfactory basis upon which to make the distinction. For the most part, all that emerges are synonyms which are not particularly helpful. Words such as "normal methods of industrial development", "honestly industrial", "anti-competitive", "predatory" or "exclusionary conduct" merely beg the question.*[1]

1 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Ltd & Anor* (1989) ATPR ¶50,010, per Dawson J.

The role of a provision dealing with misuse of market power is to distinguish between vigorous competitive activity, which is desirable, and economically inefficient, monopolistic practices, which are undesirable. The difficult task facing legislatures attempting to address misuse of market power is to develop a process which will make the appropriate distinctions while providing businesses with the necessary certainty as to the limits of legal conduct. In one specific area, that of refusals to permit access to facilities of national significance, the Committee sees a case for special processes (discussed in Chapter 11), but in the general case the Committee favours maintaining the form of the current rule so as to avoid dampening desirable competitive vigour and to avoid further uncertainty in an extremely difficult area.

Background

It is the essence of competition that firms should attempt to outperform competitors in a manner which, if successful, could have adverse consequences for those competitors. For example, the introduction of a new and better product might put competitors at a disadvantage or in extreme cases even put them out of business, but is not the sort of conduct which should be prohibited.

Firms with market power may be able to engage in conduct which exceeds the limits of vigorous competition, and thereby entrench their market positions to the detriment of the competitive process. For example, in the *Queensland Wire Industries* case, the High Court found that BHP used its market power to deter or prevent Queensland Wire from engaging in competitive activity in the rural fencing products market, by refusing to supply Queensland Wire with Y-bar, an input for the manufacture of star pickets.

A central difficulty for competition policy, in Australia and elsewhere, lies in distinguishing between vigorous competitive activity by firms with market power, and conduct by such firms which in some way oversteps the mark and prevents the competitive process from continuing to operate effectively. The challenges are to define conduct which is "excessive" in a policy sense, and to develop a mechanism which can identify practical instances of such "excessive" conduct. In addressing these challenges, the need to deter egregious behaviour must be balanced against the need to encourage competitive activity.

There are considerable difficulties in identifying precise categories of conduct which are to be viewed as "excessive." "Predatory pricing" provides an example of these difficulties. Where a firm has greater financial staying power than actual or potential rivals, and there are high barriers to market entry, it may be feasible to temporarily sell below cost, driving competitors out of the market. The firm can then recoup its losses through unconstrained monopoly pricing which may continue for an extended period or even indefinitely. Such predatory pricing is a risky strategy, given that the losses from cutting prices are certain but the gains are dependent upon the uncertain ability to successfully drive competitors out and keep them out of the market.

Predatory pricing provides consumers with lower prices in the short run, but may lead to higher prices in the long term. Predatory pricing is difficult to distinguish from strong competitive behaviour. Industrial organisation theory has not provided a clear definition of what is meant by selling "below cost". There is significant dispute as to whether measures such as marginal cost, average variable cost or average total cost are appropriate or practical, and to what extent long run or short run costs should be emphasised. It seems that no test invariably allows one to predict which particular conduct, when applied to realistic market situations, will lead to higher social welfare in the long run.[2]

Another area of difficulty is that of refusals to deal. The refusal by a firm with market power to deal with others can exclude or eliminate them from markets, or at least raise their costs. Firms with market power may have a number of incentives to refuse to deal with others, particularly where they control essential facilities. Possible reasons for refusing to deal could include restriction of output linked to monopoly pricing;[3] elimination of competitors in downstream markets who undermine the ability to price discriminate in the downstream markets;[4] or avoidance of price regulation.[5] On the other hand, there

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2 Ordover JA & Saloner G, "Predation, Monopolisation & Antitrust" in Schmalensee R & Willig R, *Handbook of Industrial Organization Vol I*, (1990) at 590.

3 However, restriction of customers might permit some degree of countervailing power. An alternative strategy would be simply to deal with all comers, but only at the monopoly price.

4 Eg, a monopolist would like to extract maximum prices from each of its customers, by charging high prices to customers who place a high value on the product and low prices to other customers. The ability to do so is constrained by the existence of competitors who offer lower prices to the high value customers. In response the monopolist may refuse to provide its competitors in the downstream market with an input, driving the competitors out of the market or raising their costs to the point where there is only competition for the high value customers.

may be circumstances where refusals to deal can be justified on efficiency grounds, such as where vertical integration is the most efficient means of operation.

Associated with both refusals to deal and predatory pricing are "price squeezes" by vertically integrated firms who supply competitors. By temporarily raising the price at which it sells to competitors, and lowering the price at which it sells to final customers, such a firm could eliminate its competitors, leaving it free to monopoly price. It may be, however, that the lower price to customers is the result of greater efficiency in the downstream market.

Firms with market power may be able to engage more readily in other restrictive practices, such as exclusive dealing.[6] Exclusive dealing arrangements can raise the barriers to entry because potential competitors must establish their own distribution networks rather than benefiting from the existing one. Other forms of vertical restraints may also be induced by firms with market power. As with vertical restraints generally, there may or may not be a lessening of efficiency as a consequence of such conduct.

Firms with substantial market power may be able to charge monopolistic prices. Such pricing policies are not usually the subject of generally applicable market conduct rules, although they may raise competition policy concerns in some situations. Possible means of addressing these concerns are discussed in Chapter 12.

Current Approach

The current Australian approach to identifying "excessive" conduct focuses on the purpose of that conduct. Section 46 of the *Trade Practices Act 1974* (TPA) prohibits taking advantage of a substantial degree of power in a market for the purpose of:

(a) eliminating or substantially damaging a competitor;
(b) preventing the entry of a person into a market; or

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5 Eg, where a vertically integrated monopolist is regulated in its monopoly market, but not in its downstream market, it may deny competitors access to the downstream market so that it reaps monopoly profits in the unregulated market. See also, the discussion of the "essential facilities problem in Chapter 11.

6 See discussion of Vertical Agreements in Chapter Three.

(c) deterring or preventing a person from engaging in competitive conduct in a market.[7]

Purpose may be ascertained by inference from the conduct of the firm with market power or of any other person, or from any other relevant circumstances.[8] Misuse of market power cannot be authorised, but where particular conduct, such as exclusive dealing, is authorised or notified it will not be taken to contravene s.46.[9]

Overseas Approaches

A consideration of international experience indicates that there is no universally accepted method of dealing with misuse of market power, although many nations have adopted a purpose-based approach.

The history of the United States (US) prohibition of "monopolisation"[10] is illustrative of the difficulties in this area. The offence has traditionally required the possession of monopoly power and the intention to acquire or maintain that power, but over the past century different courts have been more or less willing to infer the necessary purpose from objective circumstances. At times interpretation of the law has come close to prohibiting the possession of monopoly power *per se*.[11] In more recent years there has been a greater tendency to focus upon the effects of particular conduct,[12] although the purpose element remains a basis of liability. Jurisprudential development has been influenced by political intervention in the enforcement processes. While the prohibition may have discouraged particularly rapacious conduct it may also have deterred desirable competitive activity, and does not appear to be a suitable model for providing business certainty.

New Zealand has adopted a purpose-based approach which is very similar to the Australian approach. The use of a dominant position in

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7 See also s.46A which provides essentially the same prohibition in relation to trans-Tasman markets. Note also that following a recommendation of the Cooney Committee, ss.46 and 46A were amended in 1992 to provide that references to 'a competitor' or 'a person' include references to competitors or persons generally or particular classes of competitors or persons (ss.46(1A, 46A(2A)). This amendment merely confirmed existing interpretation of s.46.

8 Section 46(7).

9 Section 46(6).

10 Section 2 Sherman Act (US)

11 Eg, *United States* v *Aluminium Co (America)* (1945) 148 F 2d 416.

12 Eg, *MCI Communications Corp* v *American Telephone & Telegraph Co* (1983) 708 F 2d 1081.

a market for the purpose of restricting entry, preventing or deterring competitive conduct or eliminating a person from a market is prohibited.[13] Authorisation is not available.

The Canadian approach provides a non-exhaustive list of proscribed conduct, but retains a purposive element in all the listed examples (see Box 4.1). Anti-competitive acts, which include the listed forms of conduct, may be prohibited if they substantially lessen competition.[14] Predatory pricing is the subject of a special prohibition addressed at selling at different prices in different areas of Canada with the effect or purpose of substantially lessening competition, or "selling products at prices unreasonably low".[15]

The European Community's (EC) prohibition against the abuse of a dominant position[16] has very wide scope, which it seems has not yet been fully explored. Under this prohibition a number of different types of anti-competitive conduct have been identified by the Commission and the Court, including mergers, price discrimination, tying arrangements and refusal to supply. To distinguish abusive behaviour from legitimate behaviour the Court and Commission have developed a concept of "objective justification". A non-exhaustive list of proscribed conduct is provided.[17]

The United Kingdom (UK) has not defined the circumstances which might constitute a misuse of market power. Conduct may be investigated administratively,[18] and these investigations can lead to orders being made by the Secretary of State for Trade and Industry, prohibiting the conduct. There is some dissatisfaction with this approach, with the Government having recently canvassed various options for an improved approach, including introducing a

13 Section 36 Commerce Act (NZ).

14 Section 79 Competition Act (Canada).

15 Competition Act s.50(b),(c).

16 Article 86, *Treaty of Rome* (EC).

17 The list includes matters such as unfair prices; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions placing other firms at a competitive disadvantage; and imposing contractual conditions which by their nature or according to commercial usage have no connection with the subject of the contract.

18 Anti-competitive practices: s.2-10 Competition Act (UK); monopoly situations or general reference: Pts I, IV, s.78 Fair Trading Act (UK).

prohibition against abuse of market power such as the EC's prohibition.[19]

Box 4.1: Abuse of a Dominant Position in Canadian Law

Section 79 of Canada's *Competition Act* provides that where a person substantially or completely controls a "class or species" of business, and has engaged in or is engaging in a practice of "anti-competitive acts" and the practice has the effect of preventing or lessening competition substantially in a market, the Competition Tribunal may make an order prohibiting the practice.

Section 78 defines "anti-competitive act" to include any of the following:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalisation on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

19 See UK Department of Trade & Industry, *Abuse of Market Power: A Consultative Document on Possible Legislative Options* (Nov 1992).

Submissions

Although several submissions supported Australia's current approach to this issue,[20] there were several proposals for new approaches.

One submission proposed an administrative regime which would investigate the economic efficiency of particular conduct, as opposed to a legal prohibition.[21] Other submissions supported retention of the prohibition approach, but suggested possible amendments.

A proposal to extend the prohibition to *effects* on competition, as well as purpose, was supported by some submissions,[22] but was specifically opposed by others.[23]

Several submissions supported the purpose-based prohibition but proposed some variation. Proposals included: minor amendments to the existing proscribed purposes to clarify that the provision protects competition rather than individual firms;[24] the introduction of a rebuttable presumption of intent in defined circumstances;[25] the addition of a requirement that the proscribed conduct be conduct which a firm in a competitive market would not have engaged in without economic loss to itself;[26] and provision for authorisation of misuse of market power.[27]

Some submissions saw difficulties in principle in the application of the current provision in cases of refusal to deal, proposing special regimes to deal with such problems.[28] Others saw practical difficulties in the provision of pricing remedies in misuse of market power cases.[29]

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20 Eg, IC (Sub 6); Treasury (Sub 76); National Institute of Accountants (Sub 88); BCA (Sub 93); BHP (Sub 133).

21 PSA (Sub 97).

22 Prof R Baxt (Sub 18); TPC (Sub 69); Mr C Sweeney (Sub 119).

23 IC (Sub 6); Trade Practices Committee of the LCA (Sub 65); Treasury (Sub 76); BHP (Sub 113).

24 Prof R Baxt (Sub 18); PSA (Sub 97); NSW Govt (Sub 117); Mr C Sweeney (Sub 119).

25 IC (Sub 6).

26 Mr C Sweeney (Sub 119).

27 Trade Practices Committee of the LCA (Sub 65).

28 DOTAC (Sub 58); Dr S Corones (Sub 86).

29 IC (Sub 6); Dr W Pengilley (Sub 11); Mr M Corrigan (Sub 72); Dr S Corones (Sub 86); PSA (Sub 97); NSW Govt (Sub 117).

Consideration

The central conundrum in addressing the problem of misuse of market power is that the problem is not well defined nor apparently amenable to clear definition. There is considerable debate about what sorts of conduct should be prohibited. Even if particular types of conduct can be named it does not seem possible to define them, or the circumstances in which they should be treated as objectionable, with any great precision. For example, it may be possible to say that "predatory pricing" is undesirable, but it does not seem possible to give a clear definition of what will amount to predatory pricing in all circumstances.

Faced with this problem, but recognising that there are clearly some cases which do go beyond the limits of vigorous competitive conduct and extend into the realm of conduct by which firms damage the competitive process, the challenge is to provide a system which can distinguish between desirable and undesirable activity while providing an acceptable level of business certainty. In this respect it is important to stress that uncertainty over the bounds of legally acceptable behaviour may deter efficient and socially useful competitive behaviour.

In addressing this challenge, the Committee starts from the position that there is already in place a regime which provides a basis for making the appropriate distinctions, that the regime is broadly consistent with approaches in comparable overseas jurisdictions, and that it has been sufficiently interpreted by the High Court to provide a reasonable degree of business certainty as to the limits of acceptable conduct. Moreover, none of the submissions presented to the Inquiry gave practical examples of any particular behaviour that was not proscribed by the current law and yet was clearly unacceptable. The Committee thus considers that proposals for alternative mechanisms for dealing with misuse of market power should offer a demonstrable improvement over the current regime to justify introducing further uncertainty in this difficult area.

Prohibition Approach vs Administrative Approach

Perhaps the boldest proposal for dealing with misuse of market power was that administrative investigation should replace legal prohibition.

The approach of prohibiting misuse of market power has been adopted by, inter alia, Australia, New Zealand, the US, the EC and Canada. An administrative approach has been adopted in the UK, whereby misuse of market power is investigated and undertakings are sought to restrain future conduct contrary to the public interest. The disadvantages of the UK scheme have been seen as relatively weak deterrence flowing from the absence of a prohibition; the absence of third party rights, leaving affected parties without remedies such as damages or injunctions; and reliance on potentially slow government inquiries.[30] A body with wide investigatory powers also has the potential to be highly intrusive. Australian courts have a strong reputation for consistency and fairness, and the notion of judicial precedent enhances business certainty. Overall, the Committee was not satisfied that any deficiencies in the current law warranted so bold a departure in approach.

Purpose Test vs Effects Test

The TPC proposed that unilateral conduct should be prohibited if it has the effect of substantially lessening competition.[31] Such a test would not, in the Committee's view, constitute an improvement on the current test. It does not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct.

As the High Court has observed, the very essence of the competitive process is conduct which is aimed at injuring competitors. A firm that succeeds in aggressive competitive conduct may drive other firms from the market and achieve a position of pre-eminence for an extended period. It does not necessarily follow, however, that the competitive process will be damaged by the conduct or that the potential for competition will be diminished, even if the immediate manifestations of the successful competitive conduct may suggest it. Firms should be encouraged to compete aggressively by taking advantage of new and superior products, greater efficiency and innovation. There is a serious risk of deterring such conduct by too broad a prohibition of unilateral conduct. The Committee takes the view that an effects test is too broad in this regard. The courts might develop a gloss upon an effects test to ensure that it did not prohibit

30 See UK Department of Trade & Industry, *Abuse of Market Power : A Consultative Document on Possible Legislative Options* (Nov 1992).

31 TPC (Sub 69). Also note Mr C Sweeney (Sub 119).

economically efficient conduct, but it is not clear that the final result would differ from the existing interpretation of s.46, or that any such difference would constitute an improvement.

Section 46 has been interpreted by the High Court in a manner which accords with the policy intention of distinguishing between a misuse of market power and aggressive competitive behaviour. In an oft-cited passage, Mason CJ and Wilson J noted that:

> 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 section 46 is designed to foster.[32]

The courts have indicated that they are alert to the distinctions which the legislature has attempted to make. There is a growing body of case law dealing with misuse of market power, and over time the limits of the existing provision will be explored. The current provision has the advantages over an effects test of an appropriate interpretation and a greater level of certainty for businesses.

Modifications of Current Purpose-Based Approach

One submission suggested that there may be specific circumstances in which the burden of proof should be reversed by a rebuttable presumption of proscribed purpose. The difficulty is determining what those circumstances might be. For example, the Industry Commission suggested that where price discrimination which substantially lessens competition has been demonstrated, the presumption could operate.[33] Given the difficulties associated with proving that price discrimination substantially lessens competition, this might not greatly advance an applicant's cause.[34] To simply reverse the onus of proof when price discrimination is proven would threaten much efficient behaviour.

It was suggested that, although the High Court's interpretation of s.46 as protecting the competitive process, rather than competitors, was

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32 *Queensland Wire Industries Pty Ltd* v *Broken Hill Proprietary Company Ltd & Anor* (1989) ATPR ¶50,010.

33 IC (Sub 6). The IC's proposal was based on the assumption that s.49 would be repealed.

34 See the discussion of price discrimination below.

appropriate, it would be desirable to amend the words of s.46 to confirm that interpretation. The Committee was not convinced that such an amendment would enhance the operation of s.46, and could serve to increase, rather than decrease, uncertainty in this area.

Another proposal was to introduce an additional criterion of liability, that the conduct in question be conduct which a firm in a competitive market would not have engaged in without economic loss to itself.[35] The Committee was not persuaded that this proposal would add much to the existing interpretation of the phrase "take advantage of" market power,[36] but it could increase uncertainty over the operation of the provision.

Finally, there have been suggestions that s.46 might be amended to include a non-exhaustive list of proscribed purposes, which would include more closely defined practices such as predatory pricing. This is the approach adopted in Canada and outlined in Box 4.1. Such an approach could suggest a greater degree of precision concerning proscribed practices than is warranted. To take predatory pricing, for example, there is considerable controversy over the appropriate level of price below which pricing should be regarded as "predatory". Greater precision in the language of the prohibition might intimate a non-existent nexus between particular conduct and purpose. Explicit specification of particular purposes could lead to the exclusion of conduct which should be caught, either because litigants are less likely to bring actions or because courts are more reluctant to find a contravention where the relevant conduct does not occur in the proscribed list. As with other proposals for change in this area, the proposal would undermine existing certainty, without putting forward a regime which would be any more certain in its operation.

Authorisation

It has been suggested that there should be the capacity to authorise conduct which would contravene s.46, particularly if there were to be an "effects" test. However, the potential for authorisation would not resolve the difficulties with that test. The outcome would be to require consultation with the competition authority for a wide range

35 Mr C Sweeney (Sub 119).

36 The High Court in *Queensland Wire* indicated that taking advantage of market power required the use of that power in a manner made possible only by the absence of competitive conditions.

of normal business activities, such as the decision to introduce a new and better product or to embark on an aggressive marketing campaign. Such regulatory intrusion into daily business activities goes well beyond the purpose of a prohibition on misuse of market power.

More generally, the Committee was not persuaded of the need for or desirability of authorisation in misuse of market power situations. Conduct which contravenes other provisions can be authorised, and while such an authorisation remains in place, will not be taken to contravene s.46.[37]

Refusals to Deal

There have been a number of cases under s.46 involving refusals to deal. Although there have been criticisms of courts' ability to provide remedies in such situations, the Committee is not convinced that alternative proposals for a generally applicable duty to deal are capable of being sufficiently specific in their application to ensure they would not themselves lead to inefficient results. Nor has the Committee been satisfied that these alternatives would avoid the difficulties inherent in this area, or lead to "better" outcomes.

In the US, an "essential facilities" doctrine has developed in the interpretation of the Sherman Act. Under this doctrine, a person who controls an "essential facility" is obliged to provide access to the facility to competitors.[38] To illustrate the limits of the US law, courts have found football and basketball stadiums to be essential facilities,[39] and a small photographic company has argued (albeit unsuccessfully) that it should have access to the products of Kodak's research to enable it to compete with Kodak.[40] The limits of the US doctrine are not yet clear, and it has been observed that "the doctrine has not developed with clarity, coherence or consistency, let alone with strong economic foundations".[41] The Committee is not satisfied that the

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37 See s.46(6).

38 The most concise definition of the doctrine is given in *MCI Communications* v *American Telephone & Telegraph Co* (1983) 708 F 2d 1081; cert denied 464 US 891; but this definition has never been adopted by the Supreme Court.

39 *Hecht* v *Pro-Football, Inc*, 570 F 2d 982 (DC Cir 1977), cert denied 436 US 956 (1978); *Fishman* v *Estate of Wirtz*, 807 F 2d 520 (7th Cir 1986).

40 *Berkey Photo* v *Eastman Kodak Co* 603 F 2d 263 (2d Cir 1979), cert denied 444 US 1090 (1980).

41 See Vautier K M, *The "Essential Facilities" Doctrine* (1990) at 65. See also Areeda P, "Essential Facilities: An Epithet in Need of Limiting Principles" (1990) 58 *Antitrust Law Journal* 841.

doctrine has sufficiently developed to provide a suitable model for Australian law.

Nevertheless, the national importance of some industries may require that a positive duty to deal be created, albeit in carefully circumscribed circumstances. The Committee's proposals in this area are detailed in Chapter 11.

Pricing Issues

A number of submissions noted that there were difficulties with pricing remedies under s.46, particularly in relation to refusals to deal. These issues are considered in Chapter Seven.

Conclusion

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.

B. PRICE DISCRIMINATION (s.49)

The prohibition against price discrimination prevents the sale of like goods to different persons at different prices, where such discrimination substantially lessens competition. The provision is contrary to the objective of economic efficiency and has not been of assistance to small businesses. The Committee does not believe that it is the role of the competitive conduct rules to protect any particular sector of society, and does not believe that the competition rules should be used to achieve objectives contrary to economic efficiency.

Background

Price discrimination is the sale or purchase of different units of a good or service at price differentials not directly corresponding to

differences in supply cost.[42] In general, sellers can only profitably engage in systematic price discrimination where they have some degree of market power, are able to segregate their customers into distinct groups, and the opportunities for resale from low priced customers to high priced customers ("arbitrage") are limited.

Price discrimination can enhance competition by encouraging price experimentation[43] or by helping to undermine an oligopolistic pricing discipline.[44] Certain forms of systematic price discrimination, such as Ramsey pricing,[45] can enhance economic efficiency in some circumstances.

On the other hand, price discrimination can be anti-competitive where it enables a firm to entrench its position of market power by creating strong buyer-seller ties and thus raising barriers to the entry of new competitors. Extreme forms of price discrimination can amount to predatory pricing.[46]

Current Approach

Price discrimination is prohibited by s.49 where a firm discriminates between purchasers of like grade and quality in relation to the prices charged for the goods, or discounts or other matters in relation to the supply of the goods; and the discrimination is of such magnitude or of such a recurring or systematic character that it is likely to substantially lessen competition.

There are two defences to s.49. The first is where the discrimination makes only reasonable allowance for differences in the cost of manufacture, sale or delivery resulting from the different places to

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42 Scherer F M & Ross D, *Industrial Market Structure & Economic Performance* (1990) at 489.

43 A firm might not wish to jeopardise its profits, or provoke adverse competitor or rival reactions by cutting price across its whole market, but might be willing to experiment with the effects of a price cut if it can lower price in respect of a small test area.

44 Where it becomes known that one of the oligopolists has been granting secret discounts to a few aggressive buyers, other firms may try to match or undercut the discounts, price concessions spread and the prices to all buyers are eventually reduced.

45 In general, an economically efficient outcome will be achieved if a firm sets price equal to marginal cost. Where a firm faces increasing returns to scale over a large range (usually associated with substantial fixed costs) to do so would ensure that the firm makes a loss. Ramsey pricing provides a formula whereby firms remain profitable, but price relatively efficiently. It relies on being able to discriminate between different classes of customers each of which has different demand characteristics.

46 Predatory pricing was discussed in relation to misuse of market power.

which, methods by which or quantities in which the goods are supplied to the purchasers. The second is where the discrimination occurs in good faith, to meet a price or benefit offered by a competitor.

Instances of anti-competitive price discrimination might also contravene s.45 (agreements which substantially lessen competition) or s.46 (misuse of market power).

Industry-specific provisions dealing with price discrimination exist in relation to outwards liner cargo shipping,[47] petroleum retail franchising[48] and telecommunications.[49]

Overseas Approaches

New Zealand has no provision equivalent to s 49. Charging different prices to different customers will only be illegal if it contravenes the general prohibition against agreements which substantially lessen competition, or amounts to a misuse of market power.

In the UK, price discrimination could be investigated administratively,[50] but there is no prohibition against unilateral price discrimination.

In the EC, Article 85(1)(d) prohibits agreements which "apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".

In Canada, price discrimination between competitors who purchase similar volumes of a product is prohibited.[51] The supplier must know that the purchasers are in competition and make a practice of discrimination for this to be an offence.

In the US, price discrimination is prohibited by the *Robinson-Patman Act* 1914. The US law differs from the Australian law in that conduct may be prohibited where adverse effects on particular competitors are

47 Section 10.05.

48 Section 20 *Petroleum Retail Franchising Act 1980* (Cth).

49 Part 9 Division 4 *Telecommunications Act 1991* (Cth).

50 Under the *Fair Trading Act 1973* (UK) or the *Competition Act 1980* (UK).

51 Section 50 Competition Act (Canada).

proven. There has been considerable criticism of this law over a number years.[52]

Submissions

Several submissions called for the repeal of section 49, suggesting that anti-competitive price discrimination can be dealt with under other provisions, particularly s.46.[53] The Small Business Coalition suggested that the provision be amended to prohibit price discrimination that disadvantages individuals without the requirement to show damage to competition in a market.[54]

There were opposing views on the extension of the provision to services. Some engaged in service industries argued that the provision should not be extended to them.[55] Others suggested that if the provision were to be retained there was no logical basis for treating goods and services differently in this respect.[56]

Consideration

There are considerable practical difficulties with s.49. It is not clear what degree of similarity is required for goods to be regarded as being "of like grade and quality"; it is not clear what might constitute a "reasonable" allowance for differences in cost; and it is not clear whether, when meeting a competitor's price, the goods must bear the same degree of similarity to the competitor's goods as is required by the phrase "of like grade and quality". The cost defence does not necessarily correspond with those factors which firms would monitor or consider significant.

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52 Professor George Stigler has been quoted as saying: "if all economists in favour of [the US price discrimination law] were put into a Volkswagen, you'd still have room for a portly chauffeur": (1984) 53 *The Antitrust Law Journal* at 845.

53 Dr W Pengilley (Sub 11); Trade Practices Committee of the LCA (Sub 65); Treasury (Sub 76); BCA (Sub 93); PSA (Sub 97); TPC (Sub 69); NSW Govt (Sub 117); BHP (Sub 133).

54 Small Business Coalition (Sub 100).

55 National Institute of Accountants (Sub 88).

56 DOTAC (Sub 58); TPC (Sub 69); Australian Federation of Travel Agents Limited (Sub 96); Small Business Coalition (Sub 100).

More importantly, there are concerns that the prohibition on price discrimination may discourage pro-competitive conduct. As Corones[57] has observed:

> If prices must be equal, suppliers will be prevented from granting discounts to purchasers with large requirements such as grocery chains in the absence of a cost justification. The public generally will be denied the lower retail price the purchaser with large requirements would have been able to offer its customers, and prices may tend to go up to the level of the corner store rather than down to the level of the chain store.

In 1976 the Swanson Committee gave similar reasoning for recommending the repeal of s.49. It observed:[58]

> In the Australian context the conduct of a large buyer who is endeavouring to secure price cutting in its favour, whether it be discriminatory or not, may be more pro-competitive than anti-competitive. Indeed such price cuts as a large buyer is able to obtain can trigger off competition from rival suppliers or can trigger off competition in a market, where other forces are unlikely to produce active competition.
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> ... [T]he prohibition on price discrimination has, in our view, operated substantially to limit price flexibility. The Committee believes that in the Australian context, s.49 has produced such price inflexibility that the detriment to the economy as a whole outweighs assistance which small business may have derived from it. It is price flexibility which is at the heart of competitive behaviour.

As indicated by the Swanson Committee, there may be perceptions that s.49 offers particular protection to small businesses. In the US, the Robinson-Patman Act was initially enacted, at least in part, in response to concerns that the discounts for large volumes which chain stores obtained from manufacturers were threatening the existence of local corner stores and independent operators. In a 1977 review of the Robinson-Patman Act, the US Department of Justice condemned the Act as having failed to achieve any of its aims, and as having actually harmed competition by imposing rigid pricing in oligopolistic

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57 Corones S G, *Competition Law and Policy in Australia* (1990) at 291, summarising the reasoning in *O'Brien Glass v Cool & Sons* (1983) ATPR 40-376.

58 Trade Practices Act Review Committee (Swanson Committee), *Report to the Minister for Business and Consumer Affairs* (1976) at 45-46.

markets, where firms have used the law to prevent competitors from engaging in price-cutting.[59]

The Australian provision is more limited than the US provision. Section 49 only applies where there is an adverse effect on competition in a market, while the US law applies where there is a probable adverse effect on particular competitors; and there are other aspects of burden of proof and level of required probability which provide s.49 with a more limited operation than its US counterpart. Where the US provisions have been ineffective it seems likely that the more limited operation of s.49 would similarly offer little comfort to small businesses. Indeed, in 1979 the Blunt Committee recommended repeal of s.49, notwithstanding that it was required by its terms of reference to explore avenues for the improvement of the market position of small business.[60]

It has been suggested that if s.49 were not repealed it might require amendment to permit Ramsey pricing or the price discrimination relied on by some government businesses to deliver community service obligations. Although it seems unlikely that Ramsey pricing or the delivery of community service obligations would cause a substantial lessening of competition in a market, repeal of the section would have the added advantage of overcoming any remaining concerns of this nature. This may be particularly important given the imperative to ensure the competitive conduct rules of a national competition policy receive full application, particularly to currently excluded government businesses.

Conclusion

The Committee considers that price discrimination generally enhances economic efficiency, except in cases which may be dealt with by s.45 (anti-competitive agreements) or s.46 (misuse of market power). To the extent that s.49 has had any effect it seems to have been to diminish price competition. The Committee does not consider that competition policy should be distorted to provide special protection to any interest group, including small business, particularly where this is potentially to the detriment of the welfare of the community as a

59 Cited in Trade Practices Consultative Committee (Blunt Committee) *Small Business and the Trade Practices Act* (1979) at Vol I, 96-97.

60 Trade Practices Consultative Committee (Blunt Committee), *Small Business and the Trade Practices Act* (1979).

whole. Sectoral assistance policy of this sort is generally most efficiently implemented by more open and direct assistance, including budgetary and taxation measures of various kinds. In any event, it seems clear that small businesses have not achieved any significant benefit from the presence of s.49.

Concerns about the implications of the current provision for some currently excluded sections — particularly government businesses — make the case for repeal overwhelming. The Committee recommends that a provision such as s.49 should form no part of a national competition policy, and that the existing provision should be repealed.

C. MERGERS AND ACQUISITIONS (SS.50 & 50A)

The role of a merger provision is to distinguish between welfare enhancing and welfare reducing mergers and acquisitions. The current provisions dealing with mergers are the result of considerable public consultation and the Committee proposes that they form the basis of the merger provisions of a national competition policy.

Background

Mergers between firms can be an effective way of developing competitive advantage, optimising the benefits of complementary strengths and taking advantage of economies of scale and scope. Mergers can also operate as an important discipline upon poorly performing management. Merger activity can thus improve efficiency to the benefit of consumers and the community generally.

At the same time, mergers, by definition, result in a reduction in the number of participants in an industry, at least in the short term. In some cases, and particularly where there are significant barriers to market entry, mergers can lead to increased industry concentration and possibly increased market power which may be against the community interest. For this reason, most modern western economies include in their competition law a mechanism for distinguishing between welfare enhancing and welfare diminishing mergers.

Current Approach

Section 50 of the TPA was amended in late 1992 to prohibit mergers or acquisitions which have, or are likely to have, the effect of

substantially lessening competition unless authorised. Interpretation of the merger test has been buttressed by the inclusion of a set of non-exhaustive factors.[61] Between 1977 and the 1992 amendments, the relevant test was "market dominance".

The test for authorisation is currently administered by the TPC and requires the showing of a net public benefit. A significant increase in the real value of exports, or a significant substitution of domestic products for imported goods, is to be regarded as a public benefit and consideration must also be given to any other relevant matter relating to the international competitiveness of any Australian industry.[62]

The Government has announced plans to introduce a pre-merger notification scheme.

Overseas Approaches

Of the countries examined, international treatment of mergers was evenly divided between a "substantial lessening of competition" test and a "dominance" test.

In the US, mergers which substantially lessen competition are prohibited.[63]

In New Zealand, mergers which result in or strengthen a dominant position are prohibited, unless authorised.[64]

In the UK, mergers are dealt with administratively and may be prohibited where found to be contrary to the public interest, having regard to matters such as competition, consumer interests, efficiency, regional employment and export growth.[65]

In the EC, the Merger Control Regulation provides that mergers with a Community dimension (assessed by reference to turnover of the merging firms) are assessed by the Commission to determine whether they are compatible with the common market. A merger which creates or strengthens a dominant position as a result of which

61 Section 50(3).
62 Section 90(9A).
63 Section 7 Clayton Act (US).
64 Sections 47, 50, 66-69, 88(9).Commerce Act (NZ).
65 Sections 57-77, 84 Fair Trading Act (UK).

effective competition would be significantly impeded in the common market, or in a substantial part of it, will be declared incompatible with the common market.

In Canada, mergers may be prohibited if they are likely to prevent or lessen competition substantially, but will not be prohibited if they are likely to bring about efficiency gains which outweigh any lessening of competition.[66]

Pre-merger notification exists in various forms in the US, the EC and Canada.[67] New Zealand abandoned its pre-merger notification requirements in 1990.

Submissions

A number of submissions indicated opposition to the new "substantial lessening of competition" test,[68] while others indicated support.[69]

Consideration

The evidence concerning the benefits or detriments of mergers is equivocal.[70] Studies which have examined share market values have indicated that target firms' shareholders benefit, while bidding firms' shareholders are likely to at least break even. Studies which have examined returns on investment have found returns to be negative, on average, in the two years after merger, and declines in profitability have been observed following mergers. A study in 1990 by the Bureau of Industry Economics found only modest benefits from the studied mergers, and that the benefits were much less than had been expected prior to the merger. These studies have obviously not included analysis of mergers which have not proceeded because they contravened competition laws. It could be expected that the competitive detriments of mergers would be greater in cases which create or enhance market power, or have significant adverse effects upon the level of competition, although these detriments might be offset by increased returns to shareholders.

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66 Sections 91-100 Competition Act (Canada).

67 Hart Scott Rodino Antitrust Improvements Act (US); Article 4 Merger Control Regulation (EC); Part IX Competition Act (Canada).

68 Prof R Baxt (Sub 18); Caltex Aust (Sub 27); Carlton & United Breweries (Sub 34); MTIA (Sub 59); Pioneer International (Sub 81); BCA (Sub 93).

69 IC (Sub 6); TPC (Sub 69).

70 See EPAC (Sub 126) for a survey of recent studies.

Debate concerning the appropriate test for mergers has focused on the alternatives of "dominance" or "substantial lessening of competition". Relevant factors include the regulatory and compliance costs of different tests, the need to encourage industry efficiency and scale economies, the desirability of consistency in tests between the mergers provisions and other provisions in the Act, the need for business certainty and the benefits or detriments flowing from mergers which are not caught by one or the other of the tests.

The issue of the appropriate merger test has been canvassed extensively in recent years, and was the subject of detailed inquiry by the Griffiths Committee in 1989 and the Cooney Committee in 1991. The amendments flowing from the Cooney Committee recommendations only commenced in late 1992, and have yet to be subject to judicial consideration. Against this background, the Committee is satisfied that any review of the merger provisions should await more practical experience with the operation of the amended provisions.

Details of the Government's proposed pre-merger notification scheme have not been released. The benefit of such a scheme is that it will ensure that the competition authority is always given sufficient notice of mergers to examine them and take appropriate action before their consummation. The potential detriment of such a scheme is that it may impose substantial burdens upon businesses, through information requirements and through delays to mergers while notifications are considered. The Committee would be concerned if the benefit of the scheme were outweighed by the burdens imposed upon businesses. An essential criterion in the evaluation of the scheme will be whether it is administratively simple and imposes minimal reporting obligations on businesses.

Conclusion

The Committee considers that a form of merger regulation is an important part of a national competition policy. It is also satisfied that any more detailed review of the merger provision of the TPA could best be undertaken with the benefit of more practical experience with the amended provisions.

D. RECOMMENDATIONS

The Committee recommends that

4.1 The provisions in the Trade Practices Act relating to misuse of market power and mergers provide the bases for provisions on these matters in a national competition policy; and

4.2 A specific prohibition on price discrimination not be included in a national competition policy, and s.49 of the Act be repealed.

5. Scope of Application: Principles & Issues

There are compelling efficiency and equity arguments for ensuring that competitive conduct rules of the kind proposed in this Part are applied uniformly and universally throughout the economy, with exemptions or special treatment accorded only on demonstrated public interest grounds. Despite this, the conduct rules of the *Trade Practices Act 1974* (TPA) are subject to a number of significant gaps and limitations, some of which are not so justified.

The operation of these limiting exceptions is complex, with some sectors of the economy potentially subject to more than one possible exception. This Chapter examines each of the current exemption mechanisms and concludes that only four of the existing seven mechanisms should be retained, and that the remaining three be limited in important respects. The following Chapter reviews the impact of the current exceptions and the Committee's findings on particular sectors of the economy.

Section A of this Chapter explores the rationale for universal application of competitive conduct rules and the bases for permitting exceptions in some circumstances, and presents an overview of the extent of current exceptions.

Section B examines the current exception mechanisms on a case-by-case basis, considering their conformity with principles already agreed by Heads of Australian Government, overseas approaches and submissions, and presents the Committee's conclusions on each.

Section C presents the Committee's recommendations.

A. UNIVERSAL APPLICATION & POSSIBLE LIMITS

This Section outlines the rationales for universal and uniform national application of market conduct rules; considers possible rationales for limiting the application of those rules in some cases; and provides a brief overview of the exceptions to the current Act.

1. Rationales for Universal & Uniform Application

The two main rationales for the universal and uniform application of competitive conduct rules of the kind proposed in this Part are efficiency and equity.

First, the competitive conduct rules are aimed at protecting the competitive process and thereby avoiding misallocation of resources and inefficiency which adversely affects community welfare. Exemption of particular businesses, sectors of business or kinds of conduct has the potential to induce inefficiency and disadvantage consumers.

Second, exemption from market conduct rules can be inequitable as between businesses. As the Swanson Committee observed:[1]

> We believe it to be extremely important that the Trade Practices Act should start from a position of universal application to all business activity, whether public sector or private sector, corporate or otherwise. Only in this way will the law be fair, be seen to be fair, and avoid giving a privileged position to those not bound to adhere to its standards.

The efficiency rationale has never been more important. Australia is under increasing pressure to improve its international competitiveness so as to maintain and improve living standards. In this environment, pleas for special treatment warrant the closest scrutiny. This is particularly so in respect of many of the current exemptions from the TPA — including some government-provided services such as electricity and port services and private professional services — which are largely sheltered from international competition, yet provide key inputs to businesses that must contend with domestic and international competition.

Several of the sectors currently excluded from the TPA are being exposed to competition to various degrees to improve their efficiency. Individual enterprises are being given increasing autonomy over pricing, marketing and other business decisions. In this environment, it is important to ensure that anti-competitive habits acquired while under a regulated regime are not perpetuated after deregulation through anti-competitive practices by individual firms. For example,

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1 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) at 84.

the expected benefits of introducing competition to electricity generation, and of deregulating agricultural production, would be lost if producers remained free to collude to fix prices, use their market power to limit consumer choice, or to engage in other anti-competitive activity.

The equity rationale is also attracting increasing attention, particularly in relation to the continuing exemption of some government businesses, which are becoming increasingly commercial and now often compete directly with firms that must comply with competitive conduct rules. Submissions received by this Inquiry indicate that this has become a major concern across the community.[2]

These considerations have already been recognised by the Heads of Australian Governments, who agreed in 1992 that a national competition policy should, as far as possible, apply universal and uniformly applied rules of market conduct to all market participants.

The Committee thus approaches its task with a strong presumption favouring universal and uniform coverage of the market conduct rules proposed in this Part. Moreover, consistent with the principles agreed to by the Heads of Governments,[3] it will be seeking to ensure:

- that any exceptions from such universal coverage are only permitted on public interest grounds;

- that claims of public interest are assessed by an appropriate transparent assessment process, with provision for review; and

- that reforms in this area are consistent with the development of an open, integrated domestic market for goods and services and, in recognition of the increasingly national operation of markets, reduce complexity and eliminate administrative duplication.

2. Possible Grounds For Providing Exemptions or Special Treatment

In view of the efficiency and equity objectives considered above, it is clear that any exemptions from the application of competitive conduct

2 Some wider issues associated with "competitive neutrality" in these settings are discussed in Chapter 13.

3 The principles are set out in the Terms of Reference (Annex A) and later in this Chapter.

rules should only be justified on the showing of a clear public interest. In broad terms, possible "public interest" grounds can be seen as falling within two main categories.

First, some markets or economic activities may have special features which suggest that competitive market conduct will not maximise economic efficiency. Possible examples of such "market failure" relevant to market conduct rules include cases where there are unusual information problems in the market and, in limited circumstances, where the existence of monopoly power on one side of a commercial transaction warrants permitting the formation of countervailing market power.

"Market failure" cases are usually capable of expert adjudication to determine whether the alleged market failure exists, and what degree of departure from competitive conduct norms is required to respond to the identified failure. Thus, not all restrictions on the competitive conduct of professionals may be justified because of information difficulties, and the circumstances in which rural producers should be permitted to increase their market power to countervail the power of their customers on market failure grounds are quite rare.[4]

Second, there are some situations where competitive market conduct may achieve economic efficiency, but at the cost of other valued social objectives. For example, providing special benefits to particular sectors of society, on equity or other grounds, might lessen economic efficiency, but nevertheless accord with community values. The values which determine these alternative social objectives are not immutable, and vary over time.

Determination of instances where economic efficiency should give way to alternative social objectives may involve more difficult judgments. However, consistent with the principles agreed between Heads of Government, all claims to special treatment on such grounds should be assessed in an open and transparent manner, with the costs and benefits of particular anti-competitive behaviour subject to public scrutiny.

In both categories, it is also important to recognise that there will usually be a host of policy instruments by which governments can

4 Eg, see IC (Sub 6); TPC (Sub 69) at 113-115; and ABARE (Sub 95).

pursue their particular economic or social objectives. Permitting particular market participants to engage in anti-competitive activity is usually only one option, and will not always be the most efficient. For example, if a government chose to favour a particular sector or activity for strategic, social or political reasons, it will generally be more efficient to provide direct budgetary assistance. While subsidies of this kind may impact on competition between subsidised and non-subsidised sectors or activities, the efficiency losses will often be less than those associated with permitting anti-competitive behaviour. Moreover, the transparency of the assistance will ensure that the desirability of that special treatment is subject to regular scrutiny.

3. Overview of Current Exceptions

Some of the current limitations on the application of the TPA are only loosely related to the evaluation of public interest arguments of the kind discussed above. Constitutional limitations and the shield of the Crown doctrine, in particular, provide blanket exemptions for important parts of the economy without any conscious evaluation of the costs and benefits involved. The other exceptions do involve a more conscious attempt to deal with the trade-offs involved, although the mechanisms vary in their transparency, flexibility and in the extent to which they reflect a national perspective.

The seven kinds of exemption mechanisms under the current Act can be considered within two main categories — those which are, and those which are not, based on an assessment of the circumstances in which exemption is granted.

(a) Exemptions Based on an Assessment of Particular Circumstances

These exemptions operate by specifically exempting or authorising conduct that might otherwise offend the TPA. There are five main processes, with the main differences being the identity of the decision-maker and the transparency of the assessment process.

- *Specific Authorisation by an Independent Body*

  Under the TPA, some conduct that would otherwise contravene the Act can be subject to authorisation by the Trade Practices Commission (TPC) on the showing of a net public benefit. Some types of agreements can receive exemption from the Act by simple

notification to the Commission, but this exemption can be revoked when such agreements lack sufficient public benefit. Exemptions of these kinds have been granted to a wide range of market participants, including the professions and agricultural marketing arrangements.[5]

- *Exemption by Specific Provision in the Act Itself*

  The TPA provides special treatment to aspects of arrangements governing employment conditions,[6] standards,[7] restrictive covenants,[8] export contracts,[9] consumer boycotts,[10] licensing or assignment of intellectual property rights[11] and arrangements governing international liner cargo shipping.[12]

- *Exemption by Regulation Made under the Act*

  The TPA makes provision for regulation-based exemptions in relation to primary product marketing arrangements; prescribed conduct of the Commonwealth or its agencies; and certain arrangements made pursuant to international arrangements.[13] These provisions have not been used in recent years, however, and all previous exemptions under this regulation-making power have expired.

- *Specific Exemption by Other Commonwealth Act or Regulation*

  The TPA provides that other Commonwealth Acts (other than an Act relating to patents, trademarks, designs or copyright), or regulations made under those Acts, can specifically approve or authorise conduct that would otherwise offend the Act.[14]

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5 See examples noted in Chapter Six.
6 See s.51(2)(a).
7 See s.51(2)(c).
8 See s.51(2)(b),(d) & (e).
9 See s.51(2)(g).
10 See s.51(2A).
11 See s.51(3).
12 See Part X of the Act.
13 See s.172(2).
14 See s.51(1)(a).

- *Specific Exemption by State or Territory Act or Regulation*

  The TPA provides that State and Territory statutes and regulations can specifically authorise or approve conduct that would otherwise offend the Act, although the Commonwealth can over-ride such exemptions by regulation.[15]

In considering the last two categories, it is important to emphasise that not all Commonwealth, State or Territory legislation that has anti-competitive effects is relevant to the operation of these provisions. Competitive conduct rules of the kind contained in the TPA are directed to voluntary conduct of market participants, acting either individually or collectively, and do not affect anti-competitive arrangements that are imposed by legislation. Thus, for example, legislation may provide for statutory monopolies, impose licensing regimes, vest the ownership of a commodity in a marketing body, regulate prices or restrict other competitive conduct without involving conduct of the kind prohibited by the Act. Some of the subtleties that can arise in this area are outlined in Box 2.[16] Although regulations of this kind are a critical part of competition policy, they are unaffected by the prohibitions contained in the Act and are discussed separately in Chapter Nine.

(b) Exemptions that arise without evaluation of particular circumstances

This category comprises two main limiting principles that operate independently of any assessment of particular costs or benefits.

- *Constitutional Limitations*

  The Commonwealth's legislative power in the competition law area is not unlimited. As the TPA is currently drafted,[17] it applies to trading and financial corporations and to persons engaging in interstate or overseas trade or commerce, operating in a

15 See s.51(1)(b) and (d).

16 See Executive Overview.

17 As discussed in Chapter 15, it seems likely that some of these limitations could be overcome by greater reliance by the Commonwealth on its existing heads of constitutional authority.

Territory or supplying the Commonwealth.[18] There are also constitutional limitations on the Commonwealth's capacity to regulate state banking and state insurance.[19] The effect of constitutional limitations can be seen in relation to three main areas: some government owned businesses; some professions; and other unincorporated businesses.

- *Shield of the Crown*

  Under the legal doctrine of "shield of the Crown", the Crown and its instrumentalities are not bound by a statute without express words or necessary implication. Express words have been provided in the TPA in relation to the Crown in right of the Commonwealth, so that Commonwealth instrumentalities are bound by the Act to the extent they engage in a business.[20] The TPA has been interpreted as not being intended to bind the Crown in right of the States[21] and the Territories.[22] Whether or not a particular entity is entitled to the shield of the Crown is frequently a matter of considerable uncertainty, requiring a close examination of the legislation establishing the entity and the activities undertaken pursuant to it.

The operation of all these various limitations or exception mechanisms can be very complex and uncertain, particularly where more than one is applicable to a single sector or economic activity. For example, a single State government-owned business may be able to rely on the shield of the Crown doctrine, the constitutional limitation (if it is not a trading or financial corporation or engaged in interstate or overseas trade) and State legislation specifically approving particular conduct. The relevant activity may also be capable of authorisation by the TPC, although the other grounds for exclusion will generally obviate the need for such a transparent evaluation of the costs and benefits associated with anti-competitive behaviour. Box 5.1 provides an overview of the applicability of these various exceptions.

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18 The TPA is drafted to apply to corporations, and the extended operation, relying on various constitutional heads of power, is provided by s.6 of the Act.

19 See Constitution s.51(xiii) & (xiv) and *Bourke* v *State Bank of NSW* (1990) 64 ALJR 406.

20 See s.2A of the Act.

21 *Bradken Consolidated Ltd* v *BHP*(1979) 145 CLR 107.

22 *Burgundy Royale Investments Pty Ltd* v *Westpac Banking Corporation* (1988) 18 FCR 212.

Box 5.1: Exceptions by Primary Area of Significance

SECTOR/ ACTIVITY	Possible Auth. by TPC	Specific Exempt in TPA Itself	Exempt by Reg Made Under TPA	Exempt by Other Cth Laws	Exempt by State /Terr. Law	Constit-utional Factors	Shield of Crown Doctrine
Cth Govt businesses	X		X				
State Govt businesses	X				X	X	X
Territory Govt businesses	X				X		X
Professions	X				X	X	
Unincorp. Businesses	X					X	
Agricultural Marketing	X		X	X	X	X	X
Overseas Shipping	X	X					
Intellectual Property	X	X					
Labour	X	X		X	X	X	
Standards	X	X					
Restrictive Covenants	X	X					
Export Contracts	X	X					
Consumer Boycotts	X	X					
International Agreements etc	X		X	X			

The impact of the current exceptions and of the Committee's conclusions on particular sectors or activities is considered in the following Chapter, while this Chapter concentrates on general exemption mechanisms.

B. EVALUATION OF CURRENT EXEMPTION MECHANISMS

As part of the lead up to the current inquiry the Prime Minister, Premiers and Chief Ministers agreed to a set of principles to which a national competition policy should give effect. These principles comprise an important part of the inquiry's terms of reference and are set out in Box 5.2:

Box 5.2 : The Agreed Principles

(a) no participant in the market should be able to engage in anti-competitive conduct against the public interest;

(b) as far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership;

(c) conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed;

(d) any changes to the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms:

  (i) to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition; and

  (ii) in recognition of the increasingly national operation of markets, to reduce complexity and eliminate administrative duplication.

This Section reviews each of the current exemption mechanisms against the agreed principles, submissions and other considerations relevant to the implementation of a national competition policy and concludes that a number of amendments are required.

1. Authorisation by an Independent Body

Conduct which would otherwise contravene the TPA may be exempted from the its prohibitions through approval by the TPC.

The TPC can authorise many types of conduct that would otherwise contravene the Act, if it is satisfied that there is a net "public benefit".[23] The conduct is prohibited until the Commission grants an authorisation. At present, authorisation can be granted for most horizontal and vertical agreements but not for unilateral conduct such as a misuse of market power. In Chapter Three the Committee recommended that the scope for authorisation be extended to resale price maintenance, but be removed from price fixing agreements for services after an appropriate transitional period.

In addition to authorisation, a limited class of vertical agreements[24] may be given exemption under the notification procedure. Persons wishing to make such an agreement can notify the TPC, and the agreement will gain automatic immunity from the time of notification.[25] The immunity can be revoked by the Commission on "public benefit" grounds. The types of conduct for which notification is available, such as the appointment of a sole distributor in a country town, may be differentiated from other forms of conduct prohibited under the Act, on the basis that while these vertical agreements have an adverse effect on competition, the adverse effect is often offset by economic efficiency or other public benefits. Notification avoids the potential delays associated with the authorisation process for this limited class of anti-competitive conduct. In Chapter Three the Committee recommended that notification be extended to third-line forcing.

"Public benefit" is not defined in the Act[26] and has been interpreted to comprise both economic efficiency and a range of other considerations. In *Re ACI Operations Pty Ltd* the TPC listed examples including economic development; fostering business efficiency; supply of better information to consumers and businesses to permit informed choices in their dealings; growth in export markets; expansion of employment in efficient industries; and steps to protect the environment.[27] However, the achievement of economic goals of efficiency and progress will commonly be paramount.[28]

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23 See s.90.

24 See Chapter Three for a discussion of vertical agreements.

25 See s.93.

26 Although note s.90(9A) in relation to merger authorisations.

27 (1991) ATPR (Com) 50-108.

28 See *Re Rural Traders Co-Operative (WA) Ltd* (1979) 37 FLR 244 at 262.

The current authorisation and notification processes permit the Commission to consider submissions from any interested person, and the Commission presents applicants and other persons with the opportunity to discuss a draft determination at a conference before a final decision is made.[29] An appeal is available to the Trade Practices Tribunal.[30]

Conformity With Agreed Principles

This exemption mechanism has the benefit of independent adjudication and the flexibility to address concerns specific to individual industries or activities on a case-by-case basis. As authorisations can be limited as to time, conditional or granted on the basis of specific enforceable undertakings, it is possible to ensure that the costs and benefits of anti-competitive conduct are reviewed in light of changing circumstances without the need for legislative amendments. Similarly, notifications can be revoked in the public interest.

The authorisation and notification processes are consistent with the agreed principles. Specifically:

- the public benefit test ensures exceptions are limited to public interest considerations (principle a);
- that public interest is assessed by a transparent assessment process to demonstrate the nature and incidence of the public costs and benefits claimed (principle c);
- the assessment process includes provision for review (principle c);
- as it is administered through a national process, it is consistent with the goals of developing an open, integrated domestic market for goods and services, reducing complexity and eliminating administrative duplication (principle d).

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29 See ss.90, 90A, 93 and 93A of the Act. In light of the tight time constraints in merger authorisation cases, there is no requirement to provide a draft determination in such cases.

30 See Part IX of the Act.

Overseas Experience

New Zealand has an authorisation process along the lines of the Australian scheme.[31]

Submissions

Submissions which addressed the authorisation and notification processes uniformly supported their retention.

Some submissions argued that efficiency should be the sole objective for the Act,[32] which has implications for the scope of the "public benefit" test.

One submission argued that the Commission's practice of limiting authorisations as to time was onerous on business and involved the Commission becoming a de facto regulator for particular industries.[33] Other submissions were also critical of the time and resources involved for business in the TPC's review of previous authorisations.[34]

Consideration

The current authorisation and notification procedures are an important feature of the current Act, conform to each of the agreed principles and appear to enjoy general support in the community.[35]

Although the Committee had some sympathy with those submissions urging that public benefit considerations should be limited to matters of economic efficiency, it did not feel that parties should be denied the opportunity to demonstrate other dimensions of community welfare. Nevertheless, the Act should be amended to confirm that primary emphasis should be placed on economic efficiency considerations.

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31 See Part V of the *Commerce Act 1986*.

32 Eg, IC (Sub 6); MTIA (Sub 59); DITAC (Sub 101).

33 Dr W Pengilley (Sub 11).

34 Eg, REIA (Sub 68).

35 Eg, Australian Dairy Farmer's Fedn (Sub 10); Trade Practices Committee of the Law Council of Australia (Sub 65); REIA (Sub 68); TPC (Sub 69); Treasury (Sub 76); National Inst of Accountants (Sub 88); NFF (Sub 90); BCA (Sub 93); DITAC (Sub 101); Qld Govt (Sub 104).

The Committee does not support time-limited authorisations being used as a means of imposing unjustified regulation or other compliance costs on business. At the same time, it accepts that this more flexible approach may be necessary to manage transition to less restrictive trading arrangements or to keep the anti-competitive consequences of authorised conduct under review in appropriate circumstances, particularly where the alternative to a time-limit might be failure to allow authorisation at all.[36] Whether any particular time-limit or subsequent review is justified on public interest grounds is properly a matter for the Commission, however, and the Trade Practices Tribunal provides a review mechanism if a particular time-limit is considered unjustified.

The TPC suggested that the Committee consider the need for greater flexibility in revoking or re-examining past authorisations.[37] The Committee considers that the current criteria relating to a change in material circumstances in an industry are adequate, particularly when the resource costs for both business and the TPC in conducting reviews of past authorisations is taken into account. The Committee does not propose any changes in this area.

The Government has recently announced the introduction of user-fees for authorisation and notification proceedings.[38] While the Committee supports the general principle of user-pays, it is concerned that the new regime does not appear to include provision for fees to be waived in exceptional circumstances, such as where an applicant could reasonably claim financial hardship and the public benefits of the conduct far outweighed any anti-competitive detriment. The Committee recommends that this matter be considered further by the Government.

Conclusions

The Committee recommends that a national competition policy should include authorisation and notification processes along the lines of those under the TPA. As noted above, however, the

36 The TPC (Sub 69) notes that time-limited authorisations have been particularly useful in industries undergoing rapid economic change or deregulation (such as the rural and aviation sectors).

37 TPC (Sub 69).

38 R.28 *Trade Practices Regulations*. The fees are: notifications $2,500; merger authorisations $15,000; other authorisations $7,500.

Committee recommends that the legislation be amended to confirm that, in determining questions of "public benefit", primary emphasis should be placed on economic efficiency considerations. The application of the new "user pays" regime also warrants further consideration.

As discussed in Chapter 14, the Committee recommends that the authorisation process under the competitive conduct rules of a national competition policy be administered by a new body — the Australian Competition Commission.

2. Specific Exemption In the Act itself

A number of matters are subject to specific exemption or special treatment in the TPA itself, including aspects of arrangements governing employment conditions,[39] standards,[40] restrictive covenants,[41] export contracts,[42] consumer boycotts,[43] licensing or assignment of intellectual property rights[44] and arrangements governing international liner cargo shipping.[45]

Conformity With Agreed Principles

Legislated exceptions of this kind conform to the agreed principles. Specifically:

- any exceptions are limited to public interest considerations, as determined by the elected (and accountable) Parliament (principle a);

- the means of assessing that public interest — the legislative process — is transparent and allows the nature and incidence of the public costs and benefits involved to be demonstrated (principle c);

39 See s.51(2)(a).
40 See s.51(2)(c).
41 See s.51(2)(b),(d) & (e).
42 See s.51(2)(g).
43 See s.51(2A).
44 See s.51(3).
45 See Part X of the Act.

- the assessment process includes some provision for review, including through the role of the Senate and any subsequent inquiries (principle c); and

- the national reach and focus of the Commonwealth legislative process is consistent with the development of an open, integrated domestic market for goods and services, the increasingly national operation of markets, the reduction of complexity, and the elimination of administrative duplication (principle d).

Submissions & Overseas Experience

Most systems appear to have the capacity for specific legislated exemptions in the competition statute itself. The detail of specific exceptions, and relevant submissions, are considered in Chapter Six.

Consideration

There may be some cases where governments believe that the grounds for providing special treatment to a particular sector or activity are sufficiently clear-cut, or politically sensitive, that they would rather stipulate that special treatment in the Act itself, rather than require each individual case to be subject to adjudication through the authorisation process. This approach has the advantage of maximising certainty for business, although it does so at the expense of the flexibility of an assessment on a case-by-case basis.

Legislatively based exceptions may also not be as amenable to regular review according to changing circumstances — for example, many of the exceptions contained in the current Act have not been subject to review since the Swanson Committee reported in 1976.[46]

Conclusions

The Committee supports the principle of legislated exemptions but considers that they should be subject to regular review to ensure they remain justified on public interest grounds. The Committee's conclusions on the contemporary justification of each of the existing legislated exemptions are set out in Chapter Six.

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46 See Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, (1976), especially Chapter Ten.

3. Exemption by Regulations Made Under the Act

The current Act makes provision for regulation-based exemptions in relation to primary product marketing arrangements; prescribed conduct of the Commonwealth or its agencies; and certain arrangements made pursuant to international arrangements.[47] Significantly, no new exemptions under this provision have been made for some time, and all previous exemptions have expired.

Conformity With Agreed Principles

Regulation-based exceptions conform to the agreed principles to a reasonable degree. Specifically:

- exceptions are limited to public interest considerations, as determined by the Parliament in the first instance (in prescribing the scope for such exemptions) and thereafter by the Executive, subject to supervision by the Parliament (principle a);

- the evaluation of the costs and benefits of particular exceptions are evaluated within the Executive branch of government, and will often be less transparent than either legislation or authorisation (principle c);

- the assessment process includes some provision for review, including through administrative law and the supervisory role of the Parliament (principle c); and

- the national focus of the Commonwealth Executive is consistent with the goal of developing an open, integrated domestic market for goods and services, the increasingly national operation of markets, reducing complexity, and eliminating administrative duplication (principle d).

Overseas Experience

The US, Canada and New Zealand do not have a special provision permitting exceptions by subordinate legislation made under the competition statute, although New Zealand permits exceptions made under other statutes.[48]

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47 See s.172(2).

48 See s.43 of the *Commerce Act 1986*.

Submissions

Some submissions proposed that regulated exemptions be given an expanded role in a national competition policy.[49] Other submissions proposed that the current provision be wider in terms of subject matter but limited to the transitional period in a market.[50]

Consideration

Exemptions under regulations can be seen as a compromise between the flexibility of case-by-case determinations under the authorisation process and the certainty and direct political accountability provided by legislated exceptions. Subject to any conditions on the scope for possible regulations in the legislation itself, the decision on whether or not to allow an exception ultimately depends on policy judgments by governments. The regulation-making process is not necessarily as open and transparent as either the legislative or authorisation processes, although there is scrutiny by the legislature and decisions may be reviewed through administrative law processes or by direct appeal to the political process.

The Committee noted that no regulations had been made under this provision for some time, and that all previous regulations have expired. As discussed in the following Chapter, the Committee's review of the current areas for exemption by regulation suggest no compelling case for retaining the provisions. In these circumstances, the Committee was inclined to recommend the repeal of the provision, leaving all such matters to be left to legislation or the authorisation process.

However, it is conceivable that some matters may arise — such as those relating to inter-governmental agreements currently covered by the existing provision[51] — which the Government considers are not appropriate for the authorisation process but for which the passage of relevant legislation may be delayed. To deal with situations such as this, the Committee considered it might be appropriate to replace the current regulation-making power with one that is unlimited as to

49 TPC (Sub 69); NFF (Sub 90); DITAC (Sub 101).

50 Eg. Treasury (Sub 76).

51 See s.172(2)(b) and discussion in Chapter Six.

subject matter but which is strictly limited in duration to (say) two years.

Conclusion

The Committee proposes that the current regulation-making power be replaced by one that is unlimited as to subject matter but strictly limited as to duration. The duration in question should be that time sufficient to permit the Parliament to consider appropriate legislation, or no more than two years. Regulations under this power should not be extended without a public inquiry.

The proposed Australian Competition Commission should be required to monitor such regulations and publish a list as part of its annual report.

4. Exemption by other Commonwealth Statute or Regulation

The TPA provides that any other Commonwealth Act (other than an Act relating to patents, trademarks, designs or copyright) or regulations made under such an Act, may specifically approve or authorise conduct that would otherwise offend the TPA.[52] The provision appears to have been used only once, in relation to the special competition policy provisions established for the telecommunications sector.[53]

As noted above, legislation of the kind relevant to this provision must be distinguished from other legislation which, although involving anti-competitive consequences, does so without involving conduct in breach of the Act. Thus, for example, legislation could create a legislative monopoly[54] or regulate prices[55] without requiring a business to engage in conduct prohibited by the Act. The current provision relates to business conduct that is voluntary and deliberate, as opposed to mandated, but which is specifically approved by another Commonwealth Act or regulation.

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52 See s.51(1)(a) of the TPA. The requirement for specificity is interpreted strictly: see *In re Ku-ring-ai Building Society (No.12) Ltd & Anor* (1978) ATPR 40-094.

53 See *Telecommunications Act 1991*, Pt.8 & Pt.11.

54 Eg, s.29 of the *Australian Postal Corporation Act 1989* (Cth).

55 Eg, s.140 of the *Telecommunications Act 1991* sets out pricing principles to govern charging for access agreements relating to the interconnection network.

Conformity With Agreed Principles

The relevant strengths and weaknesses of this mechanism are akin to those of legislative exceptions in the Act itself and regulations made under the Act. Specifically:

- any exceptions are limited to public interest considerations, as determined by the elected Parliament and/or Executive (principle a);

- the transparency of the evaluation process, and the scope for review, depends on whether legislation or regulation is involved. While the legislative process is more transparent, regulations are often subject to more regular review (principle c).

- the national reach and focus of the Commonwealth Parliament and Executive is consistent with the development of an open, integrated domestic market for goods and services, the increasingly national operation of markets, the reduction of complexity, and the elimination of administrative duplication (principle d).

Overseas Experience

New Zealand exempts conduct which is specifically authorised or approved by any Act or Order in Council.[56]

The United States relies on judicial mechanisms for resolution of conflicts of laws where the antitrust laws come into conflict with other federal laws. Antitrust law defers to other laws where "conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress."[57]

Canada also relies on judicial doctrine to resolve conflicts of laws.[58]

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56 See s.43(1) Commerce Act.

57 *Rica* v *Chicago Mercantile Exch.* 409 US 289, 300 (1973).

58 *Jabour* v *Law Society of British Columbia* (1982) 2 SCR 397.

Submissions

Some submissions proposed that the current provision be repealed, and that primary emphasis be placed on authorisation by an independent body.[59] Others proposed that the provision be retained but that new and existing exemptions be subject to a more formal review process to aid transparency.[60]

Consideration

The current provision provides a useful means for Parliaments to clarify that conduct required as part of some other regulatory regime is immune from the TPA.

The Commonwealth Parliament cannot, under the principle of sovereignty of Parliament, bind itself. In the absence of the current provision, difficult legal issues would arise as to whether subsequent Commonwealth laws were inconsistent with the Act, and which law should prevail. The current provision provides a mechanism to guide statutory interpretation, indicating the circumstances in which subsequent laws will prevail over the Act. In doing so, it avoids uncertainty. In fact, the Commonwealth has only once enacted legislation which specifically authorises conduct which might otherwise contravene the Act.[61]

The rationale of providing guidance in statutory interpretation does not apply, however, in the case of subsequent regulations, which in the absence of the current provision would not over-ride the Act. There are also a number of difficulties associated with placing exemptions in statutes or regulations distinct from the Act.

First, an approach of this kind fragments the coherence of the competition policy regime to some degree, requiring a range of legislation to be consulted. While this may be acceptable where statutes are involved, it may be difficult to uncover the extent of regulations contained under different Acts.

Second, even where statutes are involved, there is no requirement for the provision that purports to authorise conduct to state that it is

59 Eg, Prof R Baxt (Sub 18); TPC (Sub 69); DPIE (Sub 50); BCA (Sub 93).

60 Eg, Trade Practices Committee of the LCA (Sub 65); Mr M Corrigan (Sub 72).

61 See s.236 Telecommunications Act.

doing so for the purposes of exempting particular conduct from the general conduct rules. This has two consequences. First, the legislature may not be fully apprised of the consequences of its action when passing legislation containing a provision of this kind, which in turn weakens the transparency of the process. Second, the extent of exceptions from the general conduct rules may be difficult to uncover and, even when a possible provision is uncovered, its relationship vis-a-vis the TPA may be unclear. This may in turn add unnecessary uncertainty and complication.

Finally, the dispersed and relatively non-transparent nature of such exemptions may inhibit regular scrutiny of the continued justification for the exemption.

Conclusions

Given the constitutional reality that it is not possible to prevent the Commonwealth from passing laws which exempt particular conduct from the Act, the Committee considers that the current provision plays a useful role in directing statutory interpretation, at least in respect of subsequent Commonwealth statutes. However, the Committee recommends that the current provision should be amended to improve the transparency of any exemptions in this area. In particular, it is recommended that any new exemptions should be required to be in statutes, rather than regulations, and to expressly state that the authorisation or approval is for the purposes of the relevant provision(s) of the competition statute.

As discussed below, the Committee considers that similar provisions deferring to State and Territory statutes and regulations should be repealed in their entirety. Although this conclusion is justified by the very different nature and operation of the exceptions in the two cases, the Committee is aware that this may give rise to concerns over a lack of symmetry in a federal system.

Leaving aside the question of whether symmetry should be a goal in its own right, the Committee considers that concerns in this area may be ameliorated if the Commonwealth Government agreed to consult State and Territory Governments before exercising this power in a way that had a significant impact on the their interests. Furthermore, the Commonwealth should consider proposals from State or Territory Governments that the power be exercised to exempt

particular conduct, where such proposals would not have adverse national consequences and are in the public interest. To assist in resolving disputes on such matters, it may be appropriate to seek the advice of the proposed National Competition Council.

In addition, the Australian Competition Commission should be required to monitor such exemptions and publish a list as part of its annual report. The competition authority might also make recommendations to the government proposing the repeal of such exemptions where it considers that the continuing exemption from conduct rules is no longer justified in the public interest.

Existing exemptions that do not meet the new requirements should be deemed to have lapsed within three years.

5. Exemption by State/Territory Statute or Regulation.

The TPA currently provides that State or Territory statutes or regulations may specifically authorise or approve conduct that would otherwise offend the Act.[62] The Commonwealth has the power to over-ride particular State-based exemptions by regulation, and has used this power once.[63] The provision rests on considerations of comity in a Federal system[64] rather than any constitutional limitations on the Commonwealth.

As with Commonwealth legislation mentioned above, it is important to distinguish State and Territory legislation relevant to this provision from other legislation which, although anti-competitive in consequence, achieves its result in a way that does not involve conduct in breach of the Act. States may create statutory monopolies,[65] regulate prices or establish other anti-competitive

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62 See s.51(1)(b), (c) and (d). While the "specificity" requirement has been interpreted strictly (*In re Ku-ring-ai Building Society (No.12) Ltd & Anor* (1978) ATPR 40-094.), it has been held that the provision "should be construed generously in favour of the State" (*Paul Dainty Corporation Pty Ltd* v *National Tennis Centre Trust* (1990) ATPR 41-029 at 51,465).

63 See s.51(1)(b), and note s 51(1)(d) in relation to the ACT. The Commonwealth power to over-ride State exemptions was exercised in respect of third-line forcing of insurance by building societies approved under the *Cooperation Act 1923* (NSW): see *Trade Practices (Removal of Exception) Regulations*.

64 See *Paul Dainty Corporation Pty Ltd* v *National Tennis Centre Trust* (1990) ATPR 41-029 at 51,465. Not dissimilar approaches have developed by the courts in Canada (see *A-G Canada* v *Law Society of British Columbia* [1982] 2 SCR 307 and the US (see *Parker* v *Brown* 317 US 341 (1943) and *California Retail Liquor Dealers Assn* v *Midcal Aluminium* 445 US 97 (1980)).

65 Eg, s.36 *Electricity Act 1976-89* (Qld).

arrangements without necessarily involving conduct that would offend the Act. Some of the distinctions in this area are illustrated in Box 2.[66]

The extent of State- and Territory-based derogations from the Act is difficult to identify with certainty[67] and in many cases it can be questioned whether the conduct approved of would otherwise involve a contravention of the Act.[68] However, purported derogations of this kind appear to be prevalent in relation to legislation authorising anti-competitive conduct by professional associations,[69] agricultural marketing bodies[70] and some State or Territory-owned businesses.[71] As with the similar provision relating to Commonwealth statutes and regulations, there are currently no limits on the possible beneficiaries or rationales for States or Territories to rely on such provisions.[72]

Conformity With Agreed Principles

This provision reflects some of the advantages and disadvantages of the provision for special treatment in Commonwealth Acts or regulations. There are additional disadvantages, however. Specifically:

- as the question of public interest is being determined by a regional rather than a national body, there is the question of whether the interest of a single State or Territory will always coincide with

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66 See Executive Overview.

67 In 1979 the Trade Practices Consultative Committee noted in relation to the agricultural sector that "It has not been possible to make a general assessment of the extent of exceptions because even an exhaustive analysis of the laws in force at both the Commonwealth and State level would not finally determine clearly whether conduct of a type prohibited by the Act is exempted" : *Report to the Minister for Business & Consumer Affairs on the Operation of the Trade Practices Act in relation to Primary Production in Australia* (1979) at 14.

68 For example, the *Victorian Arts Centre (Amendment) Act 1988* (Vic) was passed to specifically authorise the making of certain agreements that were found not to violate the Act even without such protection. See *Paul Dainty* v *National Tennis Centre* (1990) ATPR 41-029.

69 Eg, the *Legal Profession Practice Act 1958* (Vic) enables members of the Law Institute of Victoria to reach agreement about restrictions on behaviour and, through the Law Institute Council, have such rules approved by the Chief Justice. It has been suggested that a rule restricting fee advertising has implications under the Act: see Law Reform Commission of Victoria, *Competition Law : The Introduction of Restrictive Trade Practices Legislation in Victoria* (1991) at 63.

70 Eg, *Marketing of Primary Production Act 1983* (NSW), s.164.

71 Eg, *Victorian Arts Centre (Amendment) Act 1988* (Vic). See also s.86 of the *State Owned Enterprises Act 1992* (Vic)

72 Eg, the *Industries Development Act 1941* (SA) provides a general regulation making power to exempt activity that is not confined to any particular class of market participants or conduct.

the national interest. Although the Commonwealth is empowered to over-ride State-based exemptions, it may be difficult to uncover offending exemptions when they are embodied in diverse statutes and regulations in each of the States and Territories;

- while the legislative and regulatory processes involved in assessing the public interests involved in a particular exception are similar to like processes at the Commonwealth level in terms of transparency and capacity for review, the sub-national focus of these processes reduces the scrutiny of particular proposals, particularly where regulations rather than statutes are involved;

- State- or Territory-based exemptions have the effect of fragmenting the coverage of competitive conduct rules according to sub-national borders, and are thus not consistent with the goals of developing an open, integrated domestic market for goods and services; the increasingly national operation of markets; reducing complexity; or eliminating administrative duplication (principle d); and

- State- or Territory-based exemptions in disparate State and Territory statutes and regulations fragment the body of competition law and thus contribute to complexity. While there are some problems of fragmentation with Commonwealth statutes and regulations, in the case of the States and Territories this problem potentially is magnified ninefold (principle d).

Overseas Experience

The US courts developed a "state action" doctrine in the 1940s which allows States to approve conduct that would otherwise offend Federal competition law if the restraint is "one clearly articulated and actively expressed as state policy" and the State "actively supervises" the conduct in question.[73] The doctrine has been subject to considerable criticism[74] and there have been suggestions that it is likely to be reconsidered by the Supreme Court in the near future.[75]

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73 See *Parker* v *Brown* 317 US 341 (1943) and *California Retail Liquor Dealers Assn* v *Midcal Aluminium* 445 US 97 (1980).

74 Eg, Areeda PE & Hovenkamp H, *Antitrust Law* (1990 supp) at 126-129.

75 See Baker D I, "High Court Sheds Light on State Action", *National Law Journal* (1 Feb 1993) at 21.

Significantly, the US does not have a process akin to authorisation by an independent body.

The Canadian courts have developed a "regulated industries" exemption which deals with potential conflicts between Provincial regulation and Federal competition law,[76] although the breadth and rationale of the doctrine remain uncertain.[77] Canada does not have a process akin to authorisation by an independent body.

In the European Community, there is no provision for Member States to authorise conduct that offends the competition law provisions of the Treaty of Rome.[78]

Submissions

Repeal of the provision was advocated by the TPC and a number of other submitters,[79] with most emphasising the benefits of consulting with States and Territories and carefully reviewing existing exemptions prior to repeal. One submission argued that the provision should be narrowed[80] while others supported retention providing steps were taken to improve the transparency of exemptions.[81]

Consideration

From the perspective of a national competition policy, the current provision has two main defects. First, there are the impacts of diverse State and Territory exemptions on the transparency and cohesion of national law. Second, there are the potential commercial impacts of such exemptions on the efficient operation of an integrated national market.

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76 See *Jabour* v *Law Society of British Columbia* (1982) 2 SCR 397.

77 See Kaiser GE & Nielsen-Jones I, "Recent Developments in Canadian Law : Competition Law", *Ottawa Law Review* (1986) 18, 401-517.

78 EC law overrides law of the Member States to the extent of any inconsistency: *Costa* v *ENEL* (1964) ECR 585.

79 TPC (Sub 69); Prof R Baxt (Sub 18); VLRC (Sub 2); Law Institute of Victoria (Sub 13); Treasury (Sub 76).

80 Unilever Australia Ltd (Sub 28).

81 Trade Practices Committee of the Law Council of Aust (Sub 65); Mr M Corrigan (Sub 72).

- *Transparency & Cohesion Concerns*

The transparency and cohesion concerns noted above inhibit the effective operation of a national policy, fragment its coverage and obscure the appraisal of the costs and benefits of particular exemptions suggested to be in the public interest.

One response to these concerns would be to qualify State- and Territory-based exemptions in the same way as it is proposed to qualify Commonwealth exemptions. That is, the provision could be amended to require new exemptions to be in statutes, rather than regulations, and to expressly state that the authorisation or approval is for the purposes of the relevant provision of the competition statute. In addition, the national competition authority could be required to monitor such exemptions, publish a list as part of its annual report, and undertake periodic reviews to determine whether the provision was justified and consistent with relevant national interests. Existing exemptions that did not meet the new requirements within three years could be deemed to have lapsed.

- *Impacts on National Markets*

State-based exemptions also distort the operation of the national market. Apart from condoning inefficiencies that flow on to the national economy, State-based exemptions have the potential to impact directly on competition between industries or businesses located in different States.

The Committee considered two possible responses to this concern.

First, the scope of operation of the provision could be substantially narrowed. For example, it seems difficult to justify a State being able to exempt a merger from the Act, given that all mergers prohibited by the Act must involve a substantial lessening of competition in a substantial market in Australia, and would thus likely have national, not just local, implications. Similarly, it can be argued that conduct of the kind prohibited by the misuse of market power provision of the Act should not be capable of authorisation under State or Territory law. According to this approach, the scope for authorisation by State or Territory law would be limited to horizontal or vertical agreements of the kind discussed in Chapter Three, perhaps with an added

requirement that the conduct does not have a significant spill-over effect to businesses or consumers in other jurisdictions.

A second approach would be to repeal the provision in its entirety, leaving businesses who sought immunity from national competition rules to apply for authorisation through the Commission in the usual way, or to achieve the intended policy objective by legislating for that result directly, rather than approving the voluntary conduct of particular businesses.

Although there were suggestions that repeal of the provision would of itself see a large range of anti-competitive regulations being over-ridden, particularly in agricultural marketing and professional regulation, this is not borne out by a close analysis of the State and Territory laws in question. The overwhelming majority of laws examined by the Committee in areas such as these were found to achieve their anti-competitive effect in a way that did not involve conduct that would otherwise have been in breach of the Act, making the current provision irrelevant to their future operation.

For example, a law requiring the owner of an electricity transmission grid only to purchase electricity from particular generators might have the same effect in the marketplace as an exclusive dealing agreement or a misuse of market power. But in these circumstances a refusal to deal with other generators would not fall within the TPA's prohibitions, because the refusal would not occur pursuant to a contract, arrangement or understanding, and the purpose of the refusal would be compliance with legislative requirements rather than any proscribed purpose. The repeal of the provision which permits States to specifically authorise or approve conduct would not affect such arrangements.

Conclusions

The Committee favours repeal of the provision in its entirety. This might be accomplished by preventing any new exemptions of this kind and deeming any existing exemptions to have lapsed within three years, thus providing time to consider transitional or alternative authorisation arrangements.

If, contrary to the Committee's recommendation, a provision of this kind is to be retained, the Committee proposes that it be modified to

increase the transparency of exemptions by requiring that any exemption be specified in legislation, rather than regulation, and that the legislation expressly state that the authorisation or approval is for the purposes of the relevant provision of the competition statute. In addition, the Committee considers that State- or Territory-based exemptions should, at a minimum, be expressly limited to horizontal and vertical agreements of the kind currently proscribed by ss.45 and 47 of the TPA.

As noted above, the Committee has responded to possible concerns over asymmetry between the Commonwealth on the one hand and the States and Territories on the other by suggesting that the Commonwealth consult with the States and Territories on certain aspects related to the exercise of the its power.

6. Limitations through Constitutional Factors

The Commonwealth's legislative power in the competition law area is not unlimited. As currently drafted, the TPA draws primarily upon the constitutional power to regulate corporations, although it also applies to unincorporated businesses to the extent that they engage in interstate or overseas trade or commerce, operate in a Territory or in so far as they supply the Commonwealth.[82] Although the Commonwealth could make greater use of its constitutional powers to extend the coverage of the Act, it seems that some areas of economic activity would remain beyond the scope of Commonwealth law. For example, there are express constitutional limitations on the Commonwealth's powers over State banking and State insurance.[83]

The effect of limitations derived from constitutional considerations can be seen in relation to three main areas: some government-owned businesses; some professions; and other unincorporated businesses.

Conformity With Agreed Principles

Limitations of this kind offend each of the agreed principles. Specifically:

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82 The Act is based primarily on the Commonwealth's power in relation to "financial and trading corporations", but s.6 of the Act extends the Act through use of other Commonwealth powers. For a fuller discussion of this issue see Heydon J D, *Trade Practices Law* (1993) 1052-1054; and Tonking AI & Alcock RJ, *Australian Trade Practices Reporter* (1993), ¶480.

83 See Constitution s.51(xiii) & (xiv) and *Bourke v State Bank of NSW* (1990) 64 ALJR 406.

- it is difficult to identify any obvious "public interest" rationale for permitting such blanket exclusion from market conduct rules, particularly when the factors relevant to the exception are arbitrary and unrelated to any criterion of contemporary relevance (principle a);

- to the extent that there might be a public interest rationale for exemption in some cases, the blanket exclusion means that it is not subject to assessment by a transparent process to demonstrate the nature and incidence of the public costs and benefits claimed; necessarily, there is no process for review (principle c);

- as the limitation operates to discriminate between corporate and non-corporate forms of business, it specifically offends the principle that the form of ownership of a business should not be relevant to the application of market conduct rules (principle b);

- the limitation leads to differences in the application of conduct rules between the States and Territories, and between intrastate and interstate transactions, and is thus not consistent with the development of an open, integrated domestic market for goods and services (principle d); and

- uncertainties over the precise boundaries of Commonwealth constitutional power lead to uncertainty over the scope of the exception and thus conflict with the need to reduce complexity in increasingly national markets (principle d).

Overseas Experience

No other jurisdiction appears to discriminate between businesses depending on the legal form of ownership.

The reach of US antitrust laws does depend on some impact on interstate commerce. However, this requirement has been interpreted so broadly that it has been said that:

> In the field of economic regulation, at any rate, the notion that the States must be left with an area of exclusive power has been fully abandoned. While theoretically an effect on commerce might be regarded as too remote or not "substantial" enough to bring its control within power, it is difficult to imagine examples where such a finding would be made and there are no recent cases that have so found.[84]

While the application of Canadian competition law was also originally limited by constitutional requirements, the current law operates without such fine distinctions. As it was said in one case:

> A scheme aimed at the regulation of competition is in my view an example of the genre of legislation that could not practically or constitutionally be enacted by a provincial government. ... Canada is, for economic purposes, a single huge marketplace. If competition is to be regulated at all it must be regulated federally.[85]

Submissions

The overwhelming majority of submissions received by the Inquiry — including those from consumer, business and industry groups and individual businesses, small and large[86] — argued for the current gaps in coverage of market conduct rules to be filled. No submission supported the continuation of the current exclusions based on constitutional limitations.

Consideration

As discussed in the following Chapter, the current exclusion does not correspond closely with any particular group, sector or public interest rationale. Some professionals, farmers, small business people and government businesses benefit from the immunity while others do

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84 Zines L, *The High Court and the Constitution* (3 ed, 1992) at 51. An equally liberal approach is taken to the construction of "interstate commerce" in the antitrust laws themselves. In *Burke* v *Ford*, 389 US 320 (1967) the Supreme Court held that interstate commerce was adequately affected by an alleged intrastate territorial division among local wholesalers. The Court recognised that a territorial allocation of liquor sales within Oklahoma would tend to raise the price of liquor and would therefore tend to reduce the local demand for that product and thereby tend also to reduce the demand for liquor coming into the state. In *McLain* v *Real Estate Bd.*, 444 US 232 (1980) the Supreme Court was satisfied that price fixing among Louisiana housing brokers would tend to increase house prices and thereby reduce the demand for interstate financing and title insurance.

85 *A-G of Canada* v *Canadian National Transportation Ltd* et al (1984) 3 DLR (4th) 16, 79.

86 These submissions are considered in the following Chapter in relation to the particular sectors benefiting from the current exclusion.

not. The primary determinants are the legal form of the business and the inter-state character of transactions.

The notion that a business should be entitled to engage in anti-competitive conduct with impunity because of factors such as these is impossible to defend on considered public policy grounds. If some businesses currently excluded from the TPA claim some particular public interest rationale for continued exclusion, those claims can and should be tested in the same way as the claims of any other business.

Conclusion

There should be no room for limiting principles such as this in a national competition policy. The current gap should be filled as a matter of priority. Options for achieving this, and appropriate transitional arrangements, considered in Chapter 15.

7. Shield of the Crown Doctrine

According to ancient doctrine, the Crown and its instrumentalities will not be found to be bound by a statute except by express words or necessary implication.[87] As a result of recommendations by the Swanson Committee, the TPA was amended in 1977 to clarify that the Act was intended to apply to the Crown in right of the Commonwealth and its instrumentalities to the extent it engages in a business.[88]

Although the Swanson Committee also recommended action in relation to the Crown in right of the States, no such action has been taken. In 1979 the High Court found that the TPA was not intended to bind the Crown in right of the States[89] and this exemption has been held to also extend to the Territories.[90] The scope of application of the doctrine is uncertain, however, for whether or not a particular entity is entitled to claim the protection of the doctrine requires a close examination of the legislation establishing the entity and the activities undertaken pursuant to it.[91]

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87 For a review of the origins and significance of the doctrine see: Senate Standing Committee on Constitutional Legal Affairs, *The Doctrine of the Shield of the Crown*(1992).

88 See s.2A of the Act and discussion in Chapter Six.

89 *Bradken Consolidated Ltd* v *BHP*(1979) 145 CLR 107.

90 *Burgundy Royale Investments Pty Ltd* v *Westpac Banking Corporation* (1988) 18 FCR 212.

91 For examples of the application of the doctrine see discussion in Chapter Six.

An important aspect of the doctrine is that it not only exempts the agency entitled to the immunity, but also other persons engaged in doing business with the agency.[92]

While the High Court has recently expressed a more flexible approach to the application of the doctrine,[93] it has also indicated that it did not intend to overturn the settled construction of statutes passed before its decision.[94] Accordingly, an amendment to the competition statute seems necessary to address this matter. Significantly, there is no constitutional impediment to the Commonwealth doing this unilaterally.

Conformity With Agreed Principles

In its current operation, the application of the doctrine offends each of the principles already agreed between Heads of Australian Governments. Specifically:

- it is difficult to identify any obvious "public interest" rationale for permitting such a blanket exception from conduct rules, particularly in light of the increasingly commercial orientation of many government-owned businesses (principle a);

- to the extent that there might be a public interest rationale for exemption in some cases, it is not assessed by a transparent process to demonstrate the nature and incidence of the public costs and benefits claimed; necessarily, there is no process for review (principle c);

- as the doctrine is applicable only to government-owned businesses, it offends the principle that ownership of a business should not be relevant to the application of competitive conduct rules (principle b);

- it is difficult to see how the continued operation of the principle, which will differ in its practical effect between similar businesses in different States, is consistent with the development of an open,

92 See *Bradken Consolidated Ltd* v BHP(1979) 145 CLR 107.

93 See *Bropho* v *State of Western Australia* (1990) 171 CLR 1.

94 Ibid at 22.

integrated domestic market for goods and services (principle d); and

- uncertainties over the scope and application of the doctrine, which can be considerable, conflict with the need to reduce complexity in increasingly national markets (principle d).

Overseas Experience

International competition laws do not generally provide exemptions for government businesses.

The Crown is bound by competition law in New Zealand, in so far as it engages in trade,[95] and in Canada in respect of commercial activities.[96] US law limits the liability of local governments to treble damages remedies[97] but otherwise offers no special treatment for public agencies.

The competition law of the EC binds government businesses of the Member States. Although there is a qualification that application of the law should not obstruct the performance of particular tasks assigned to undertakings "entrusted with the operation of services of general economic interest", the overarching principle is that "the development of trade must not be affected to such an extent as would be contrary to the interests of the Community".[98]

Submissions

The extension of competitive conduct rules to all government-owned businesses, Commonwealth, State or Territory was supported by the overwhelming majority of submissions that dealt with this issue.[99]

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95 See s.5 of the Commerce Act .

96 See s.2(1) of the *Competition Act 1986* .

97 See *Local Government Antitrust Act 1983*.

98 See Article 90 of the Treaty of Rome. Although the qualification extends to "undertakings having the character of a revenue-producing monopoly", EC law, unlike the general rules proposed for an Australian national policy, extends to the charging of monopoly prices (see Article 86).

99 Eg, Victorian Law Reform Commission (Sub 2); Industry Commission (Sub 6); Dr R Albon (Sub 8); Dr W Pengilley (Sub 11); Law Institute of Victoria (Sub 13); Mr AI Tonking (Sub 16); Prof R Baxt (Sub 18); Esso Aust (Sub 21); Aust Institute of Petroleum (Sub 22); AGL (Sub 24); Caltex Aust (Sub 27); Unilever Aust (Sub 28); Shell (Sub 30); Carlton & United Breweries (Sub 34); Spark & Cannon (Sub 36); Aust Mining Industry Council (Sub 39); Aust Information Industry Association (Sub 40); DPIE (Sub 50); MTIA (Sub 59); Trade Practices Committee of the Law

The TPC argued that the application of conduct rules to the commercial activities of Commonwealth Departments should be clarified.[100]

Consideration

As discussed in more detail in Chapter Six, the blanket exclusion for government-owned businesses is difficult to justify in light of the increasingly commercial operation of those businesses and their significance as suppliers of key inputs to other industries. The practical uncertainty surrounding the question of whether a particular entity qualifies for protection under Shield of the Crown, and hence whether firms dealing with the entity can enjoy the benefits of that protection, also presents a strong case for the removal of this source of exemption.

It would seem especially important to remove the exemption where government businesses compete with private businesses. Because firms dealing with an emanation of the Crown can share in the immunity granted to the Crown, there is scope for collusive activity between competitors. For example if the Crown in right of a State were engaged in electricity generation in competition with private firms, a collusive agreement between the generators might be immune from the competitive conduct rules. Concerns of competitive neutrality, discussed in Chapter 13, also suggest that Crown businesses should be subject to the same rights and obligations as their competitors.

The Crown in right of the Commonwealth and its authorities are covered by the TPA "in so far as ... [it] ... carries on a business", and "business" is defined to include a business not carried on for profit.[101] Despite this provision, there are questions concerning the extent to which the TPA applies to intra-governmental activities of a commercial nature, including the case where one branch of the Commonwealth supplies another branch, in competition with private suppliers. Although such transactions may have what is commonly

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Council of Australia (Sub 65); TPC (Sub 69); National Bulk Commodities Group (Sub 71); Mr M Corrigan (Sub 72); Australian Chamber of Manufactures (Sub 73); Pioneer International (Sub 81); AMP Society (Sub 82); ABARE (Sub 95); PSA (Sub 97); Small Business Coalition (Sub 100); DITARD (Sub 101); Australian Consumers' Association (Sub 131); BHP (Sub 133).

100 TPC (Sub 69).

101 See s.2A and s.4.

understood to be a commercial nature, because the Crown is one indivisible entity, intra-governmental transactions can be argued not to amount to "business" activities, which would require at least two parties. Thus, for example, the supply of leased vehicles by the Commonwealth Department of Administrative Services to the Department of Defence may be argued not to be a business transaction, even though the Department of Administrative Services may be competing with private firms for the right to supply the Department of Defence.

The Committee considers that such transactions should be subject to the competitive conduct rules, and supports the principle, reflected in Canadian law, that the Crown should cease to enjoy immunities to the extent it is competing with private firms. In this regard, the notion of competition should include potential competition, so that the legislation would cover situations where new firms could establish competing businesses but for the anti-competitive conduct of incumbent government businesses.

Conclusions

The Committee considers that the shield of the Crown doctrine should have no place in the competitive conduct rules of a national competition policy. The provision by which the Crown in right of the Commonwealth is bound to comply with the competitive conduct rules should be extended to cover intra-governmental commercial transactions which occur in actual or potential competition with private firms. The Crown in right of the States and Territories should be bound in the same manner as the Crown in right of the Commonwealth.

C. RECOMMENDATIONS

The Committee recommends that:

5.1 An authorisation process of the kind currently administered by the TPC constitute the primary means of permitting exceptions to the competitive conduct rules of a national competition policy. However:

(a) the authorisation provisions should be amended to confirm that economic efficiency is the primary consideration in assessing public benefits; and

(b) permitting the waiver of recently introduced fees in appropriate circumstances should be considered.

5.2 Specific exemptions in the competition statute may be appropriate in certain circumstances; recommendations on individual exceptions in the current Act are contained in Chapter Six.

5.3 Provision for exceptions by regulation made under the Act be replaced by a regulation power unlimited as to subject matter, but strictly limited as to time. The Committee proposes two years as an appropriate period. The competition authority — the Australian Competition Commission — should be required to monitor such exemptions and publish a list as part of its annual report.

5.4 Provision for the specific approval or authorisation of particular conduct by other Commonwealth laws be subject to the requirements that the approval or authorisation:
(a) be in statutes, rather than regulations; and
(b) expressly state that the approval or authorisation is for the purposes of the relevant provision(s) of the competition statute.
In addition, the competition authority should be required to monitor such exemptions, publish a list as part of its annual report, and undertake periodic reviews to determine whether such exemptions continue to be justified in the public interest.

5.5 Provision for the specific approval or authorisation of particular conduct by State and Territory laws be repealed.

5.6 Current limitations in the application of competitive conduct rules arising from constitutional factors be removed.

5.7 Current limitations in the application of competitive conduct rules arising from the shield of the Crown doctrine be removed from the Crown in right of the Commonwealth, the States and Territories in so far as the Crown in question carries on a

business or engages in commercial activity in competition (actual or potential) with other businesses.

6. Scope of Application - Review by Sectors & Activity

Chapter Five argued that an authorisation process administered by an independent body — the proposed Australian Competition Commission — should be the primary means of exempting conduct from the competitive conduct rules of a national competition policy. In addition, however, some residual role was proposed for specific exemptions in the competition statute itself; for certain conduct that was specifically authorised by other Commonwealth statutes; and for temporary exemptions through regulations made under the competition statute.

The Committee's recommendations are to remove current exemptions or limitations on the *Trade Practices Act 1974* (TPA) arising from constitutional limitations; the shield of the Crown doctrine in so far as the Crown engages in business or engages in commercial activity in competition with private firms; specific authorisation by Commonwealth regulations made under other statutes, or by State and Territory statutes or regulations; and removal of the current provision of the TPA permitting certain categories of exemptions to be made by regulation.

As a corollary to that discussion, **Section A** of this Chapter reviews the impact of the current exclusions and the Committee's proposals on the twelve main sectors and activities currently subject to special treatment under the TPA. **Section B** presents the Committee's recommendations in relation to the current specific exemptions in the TPA.

A. SECTORS & ACTIVITIES SUBJECT TO SPECIAL TREATMENT

The main sectors and areas of activity currently subject to special treatment under the TPA are:

1. Government-owned businesses
2. Professions
3. Other unincorporated businesses

4. Agricultural marketing
5. Overseas shipping
6. Intellectual property
7. Labour
8. Approved standards
9. Export contracts
10. Restrictive covenants
11. Consumer boycotts
12. Conduct or arrangements pursuant to international agreements.

Each of these areas relies on one or more of the exemption mechanisms discussed in Chapter Five. The result of the Committee's recommendations would be to limit the special treatment accorded a number of these areas, particularly the first four. Each area is discussed in turn.

1. Government-Owned Businesses

The current exceptions for Government-owned businesses differ substantially between the Commonwealth and the States and Territories, and each category is considered separately below.

(a) The Commonwealth and Its Authorities

- *Current Exceptions*

Commonwealth-owned businesses are largely subject to the same competitive conduct rules as private businesses.[1] Since 1977 the Commonwealth and its authorities have been denied the protection of the shield of the Crown doctrine in so far as they carry on a business.[2] While this covers a wide range of commercial activity, it may not cover the supply of goods or services from one Commonwealth Department to another, even if in competition with other firms.[3]

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1 A Commonwealth business, AOTC, was recently found liable for a breach of the misuse of market power provision of the TPA: see *General Newspapers Pty Ltd & Ors v Australian & Overseas Telecommunications Corporation* (1993) ATPR ¶41-215.

2 "Business" is defined in the Act to include business not carried on for profit (s.4).

3 This argument rests on the notion that the Crown is indivisible. Thus, two Departments of the Crown — including businesses conducted as trust accounts under a Department — would be treated as part of a single entity, or a single corporation for the purposes of s.2A(2)(a).

There are no constitutional limitations on the application of the TPA to Commonwealth businesses.[4] There is provision to exclude particular conduct of the Commonwealth or its authorities by regulation,[5] although this has been used only once and the exemption has expired.[6]

The power to specifically authorise or approve conduct by other Commonwealth statute or regulation[7] has been used in relation to the special competition policy arrangements in the telecommunications sector, where it is not limited to the Commonwealth-owned business.[8]

- *Submissions*

The TPC argued that the application of conduct rules to the commercial activities of Commonwealth Departments should be clarified.[9] Several submissions expressed concern over aspects of the business conduct of Commonwealth Departments.[10]

- *Consideration*

The general inclusion of Commonwealth business activity within the Act's coverage is consistent with the increasingly commercial orientation of much governmental activity.

The concerns expressed in submissions over the possible advantages Commonwealth-owned businesses enjoy when competing with private firms extend beyond the application of competitive conduct rules, and are explored more fully in Chapter 13. However, uncertainty over the application of conduct rules to situations where one Commonwealth department is supplying goods or services to another arm of the Commonwealth in competition with private firms

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4 See s.2A(2), which deems the Commonwealth and its instrumentalities to be corporations for the purposes of the Act in so far as they engage in business.

5 See s.172(2)(c).

6 The exception was made in 1988 for Commonwealth businesses in the telecommunications sector: see Trade Practices (Telecommunications Exemptions) Regulations.

7 See s.51(1)(a) of the Act.

8 See ss.236 & 237 of the *Telecommunications Act 1991* (Cth), which cover certain acts by both the Commonwealth owned business (AOTC) and private firms.

9 TPC (Sub 69).

10 Eg, Spark & Cannon Pty Ltd (Sub 36); Australian Legal Reporting Group (Sub 66); Assn of Consulting Engineers Aust (Sub 127); Screen Production Assn of Aust (Sub 123).

warrants attention. This issue is likely to be of increasing significance as such markets are opened up to competition, a situation probably not envisaged when the TPA was extended to Commonwealth businesses in 1977.

- *Recommendations and Impact*

The Committee recommends that the general conduct rules of a national competition policy confirm that the rules apply to commercial transactions between Commonwealth agencies when those transactions are undertaken in (actual or potential) competition with private firms. This may require some Commonwealth entities to review their current business practices, but is not expected to involve any significant transitional arrangements.

The Committee also recommends that the provision in the TPA permitting certain activity of Commonwealth government businesses to be exempted by regulation be repealed.[11] As this provision has not been used for a number of years its repeal should not present any transitional difficulties.

(b) State- and Territory- Owned Businesses

- *Current Exceptions*

State- and Territory- owned businesses may be exempt from the TPA in three possible ways.

Some State- and Territory-owned businesses may benefit from the shield of the Crown doctrine.[12] The exact extent of this immunity is uncertain, and requires the legislation establishing the entity and the activities engaged in pursuant to that legislation to be analysed. Bodies found to benefit from the immunity include the Queensland Commissioner of Railways,[13] the Government Insurance Office of New South Wales,[14] the Northern Territory Loans Management

11 See Chapter Five.

12 For the States see *Bradken Consolidated Ltd* v *BHP*(1979) 145 CLR 107. For the Territories see *Burgundy Royale Investments Pty Ltd* v *Westpac Banking Corporation* (1988) 18 FCR 212.

13 See *Bradken Consolidated Ltd* v *BHP*(1979) 145 CLR 107, where the Queensland Commissioner of Railways was alleged to have offended ss.45 and 47 of the Act.

14 See *State Government Insurance Corporation* v *Government Insurance Office of NSW* (1991) ATPR ¶41-110.

Council[15] and the Metropolitan Water, Sewerage and Drainage Board.[16] However, other bodies have been found not to come within the doctrine, for example, Royal Prince Alfred Hospital.[17]

As the TPA is currently framed, State-owned businesses may also be able to avoid the TPA if they are not trading or financial corporations[18] and are not engaged in interstate or overseas trade or commerce. State banking has also been found to benefit from immunity under the Constitution,[19] and the same reasoning probably applies to State insurance.[20] Territory-owned businesses are not excluded from the TPA on constitutional grounds.[21]

States and Territories may also specifically approve or authorise particular conduct of their businesses (as well as conduct of any other business) by statute or regulation,[22] although the Commonwealth may over-ride such exemptions by regulation. As discussed in Chapter Five, the extent to which State or Territory statutes or regulations rely on this facility, as opposed to legislating to achieve particular anti-competitive outcomes in a way that does not involve conduct prohibited by the TPA, is often difficult to uncover. Moreover, some conduct that is expressly approved of in this way may not have involved a contravention even without such approval.[23]

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15 *Burgundy Royale Investments Pty Ltd* v *Westpac Banking Corporation* (1988) 18 FCR 212.

16 See *F Sharkey & Co Pty Ltd* v *Fisher & Ors* [1980] 33 ALR 173.

17 *E* v *Australian Red Cross Society* (1991) ATPR ¶41-085.

18 The following State bodies have been held to be trading corporations within the meaning of the Act: the Government Insurance Office of NSW (*State Government Insurance Corporation* v *Government Insurance Office of NSW* (1991) ATPR ¶41-110); Royal Prince Alfred Hospital (*E* v *Australian Red Cross Society* (1991) ATPR ¶41-085) and the State Superannuation Board (*State Superannuation Board* v *TPC* (1982) 60 FLR 165). The position of the Queensland Commissioner of Railways was not finally decided by the High Court in *Bradken* (ibid). The Tasmanian Hydro-Electric Commission has also been found to be trading corporations for the purposes of Commonwealth constitutional authority : see *Cth* v *Tasmania* (1983) 158 CLR 1.

19 See *Bourke* v *State Bank of NSW* (1990) 64 ALJR 406 and Constitution, s.51(xiii).

20 See Constitution, s.51(xiv) and McLachlan J, "The Application of the *Trade Practices Act 1974* (Cth) to State Government Instrumentalities" (1990) 64 *ALJ* 710-714 at 714.

21 The Commonwealth's authority over the Territories is established by s.122 of the Constitution, and is reflected in the extended reach of the Act provided for in s.6 of the Act.

22 See s.51(1)(b)&(c) of the Act. Examples of the application of this provision to State-owned business include s.86 of the *State Owned Enterprises Act 1992* (Vic) and the *Victorian Arts Centre (Amendment) Act 1988* (Vic).

23 Eg, arrangements specifically approved by the *Victorian Arts Centre (Amendment) Act 1988* (Vic) were found not to have involved a contravention of the Act even without such approval in *Paul Dainty* v *National Tennis Centre Trust* (1990) ATPR ¶41-029.

- *Submissions*

The current exemptions of State and Territory-owned businesses from market conduct rules were raised as a matter of concern by the large majority of submissions received by the Inquiry. Application of competitive conduct rules to government businesses was supported by consumer, business and industry groups, individual businesses and a host of other submitters.[24]

The New South Wales Government supported application of competitive conduct rules to government-owned businesses when they operated in competitive markets.[25] The Australian Capital Territory and South Australian Governments expressed concern over the potential impact of conduct rules on revenue objectives and community service obligations.[26] The Queensland Government argued that legislative extension of the conduct rules to cover State owned enterprises was unnecessary, at least in Queensland, because it already expressly provided for the application of the Act on a case by case basis.[27] Application of conduct rules was not opposed by some government businesses[28] or their representatives[29] but was resisted by others.[30] Some submissions, including those from groups representing government-owned businesses, emphasised the need to remove uncertainties over the application of the TPA.[31]

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24 Eg, Victorian Law Reform Commission (Sub 2); Dr R Albon (Sub 8); Dr W Pengilley (Sub 11); Mr A I Tonking (Sub 16); Prof R Baxt (Sub 18); Esso Aust (Sub 21); Aust Institute of Petroleum (Sub 22); AGL (Sub 24); Caltex Aust (Sub 27); Unilever Aust (Sub 28); Shell Co of Aust Ltd (Sub 30); Carlton & United Breweries (Sub 34); Spark & Cannon Pty Ltd (Sub 36); Aust Mining Industry Council (Sub 39); Aust Information Industry Assn (Sub 40); Aust Earthmovers & Road Contractors Federation (Sub 49); DPIE (Sub 50); MTIA (Sub 59); Mr P Argy (Sub 60); Trade Practices Committee of the LCA (Sub 65); TPC (Sub 69); National Bulk Commodities Group (Sub 71); Mr M Corrigan (Sub 72); Aust Chamber of Manufactures (Sub 73); Aust Road Transport Federation (Sub 74); Treasury (Sub 76); Pioneer International Ltd (Sub 81); AMP Society (Sub 82); NFF (Sub 90); BCA (Sub 93); Small Business Coalition (Sub 100); Aust Consumers' Assn (Sub 131).

25 NSW Govt (Sub 117).

26 SA Govt (Sub 98); ACT Govt (Sub 109).

27 Qld Govt (Sub 104).

28 Eg, Gas and Fuel Corporation of Victoria (Sub 7).

29 Eg, ESAA (Sub 89).

30 Eg, Fremantle Port Authority (Sub 55).

31 Eg, ESAA (Sub 89); ACT Govt (Sub 109).

- *Consideration*

Government-owned businesses constitute 10% of Australia's GDP.[32] Rail, electricity, gas and water utilities alone account for nearly 5% of GDP.[33] By any measure, they are a significant part of the economy.

As the reach of the present exceptions rests in large part on doctrines or principles of imprecise scope, it is difficult to judge what proportion of State- or Territory-owned businesses are already subject to the TPA. Certainly, as government businesses become more commercial in their operation they are less likely to be able to rely on the shield of the Crown, and corporatisation and related initiatives will see more of these businesses falling within the TPA as trading or financial corporations.

Historically, government-owned businesses have lagged behind their private sector counterparts in terms of efficiency. In the case of rail, electricity, water and gas utilities, for example, the Industry Commission has identified opportunities for increasing GDP by over 2%, or $8 billion per annum.[34]

Inefficiencies of this kind can be attributed in part to regulatory arrangements or government policy decisions that shelter these businesses from competition. Application of the conduct rules will not serve to over-ride these arrangements: nothing in the competitive conduct rules will over-ride regulatory restrictions on competition or oblige governments to permit competition where there is currently none.[35] Nevertheless, application of the rules would prevent the protected enterprises from expanding the boundaries of their mandated monopolies or restrictive regimes through private anti-competitive arrangements or the misuse of their market power. Such conduct is not unknown in the government-business sector.[36]

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32 See Clare R & Johnston K, *Profitability & Productivity of Government Business Enterprises*, (1992).

33 See Industry Commission: *Rail Transport (1991); Energy Generation and Distribution (1991); Water Resources and Waste Water Disposal (1992).*

34 *Ibid.*

35 The removal of regulatory restrictions on competition is discussed further in Chapter Nine.

36 The current exemptions and immunities generally mean that particular allegations of anti-competitive conduct by government-owned businesses are never proven in a court. However, such allegations have included anti-competitive agreements and exclusive dealing by the Queensland Commissioner of Railways (eg, *Bradken Consolidated Ltd* v *BHP*(1979) 145 CLR 107) and price-fixing agreements between a City Council and a competitor in the crematorium business (see NSW

As regulatory restrictions on competition are dismantled or relaxed, the application of competitive conduct rules becomes increasingly important. The non-competitive habits developed through decades of operation in a tightly regulated environment run the risk of being perpetuated through private arrangements. For example, many of the benefits of introducing competition into the electricity sector would be lost if ostensibly competing generators were able to engage in price-fixing or other collusive behaviour, or if a government-owned transmission grid were able to engage in anti-competitive conduct to limit competition in downstream markets.

More generally, government-owned businesses are increasingly competing directly with private firms in a range of activities. It is important on both efficiency and equity grounds that businesses competing in the same market face the same rules governing competitive conduct. This holds true whether the government business in question is a trading or financial corporation or is in some other form.

As the Swanson Committee observed: "The same standards of commercial conduct are clearly as appropriate for officers of the government as for persons in a less protected position".[37]

Similar sentiments were reflected by the High Court when it observed that:

> the historical considerations which give rise to a presumption that the legislature would not have intended that a statute bind the crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is common place for governmental, commercial, industrial and developmental instrumentalities and their servants and agents ... to compete and have commercial dealings on the same basis as private enterprise.[38]

Regulatory Review Unit, *Application of the Commonwealth Trade Practices Act to New South Wales State Government Instrumentalities* (1988) at 2).

37 Trade Practices Act Review Committee (Swanson Committee), *Report to the Minister Business and Consumer Affairs* (AGPS, Canberra, 1976) at 87.

38 *Bropho* v *State of Western Australia* (1990) 171 CLR 1 at 19.

The NSW Regulation Review Unit cited a number of expected benefits from applying the TPA to State government instrumentalities, including:

- fostering a greater respect for Government by the business community by forcing the State Government instrumentalities, in engaging in trade or commerce, to do so in accordance with the same rules and regulations that apply to private companies; and

- imposing a greater discipline upon each State Government instrumentality in making commercial decisions and, in particular, ensuring that those decisions do not substantially lessen competition or, if they do so, that the result is justifiable.[39]

As noted in Chapter Five, the most important bases for exempting State- or Territory-owned business from the conduct rules — the shield of the Crown doctrine and constitutional limitations — do not reflect any conscious judgment as to special claims or circumstance of those businesses. They specifically offend each of the principles already agreed by Heads of Government.

Removal of exemptions in this area would be consistent with the principles agreed between the Australian governments and the approaches adopted in other federal jurisdictions, including the United States[40] and Canada,[41] as well as in the European Community.[42]

- *Recommendations and Impact*

In Chapter Five the Committee recommended that the shield of the Crown exception be removed from State and Territory businesses in so far as they engage in business, including intra-governmental commercial transactions, in competition (actual or potential) with

39 NSW Regulation Review Unit, *Application of the Commonwealth Trade Practices Act to New South Wales State Government Instrumentalities* (1988) at 12-13.

40 The only exemption the US appears to extend to sub-national levels of government is a limitation on the liability of local governments for treble damages: see *Local Government Antitrust Act 1984* (PL 98-544).

41 Section 2.1 of Canada's Competition Act applies the Act to Federal and Provincial Crown Corporations in respect of commercial activities engaged in in competition, whether actual or potential, with other persons.

42 Article 92 of the Treaty of Rome applies the Treaty's competition policy provisions to public undertakings of the Member States with minor qualifications not relevant to the application of the conduct rules like those proposed by the Committee.

private businesses; that limitations based on constitutional considerations that protect unincorporated government businesses be removed; and that the provision permitting State and Territory Governments to specifically authorise or approve particular conduct be repealed.

Some governments expressed concern that application of competitive conduct rules would affect their businesses' capacities to raise revenue. However, nothing in the proposed general conduct rules affects the creation of statutory monopolies, the charging of excessive prices or other pricing arrangements determined by regulatory (as opposed to collusive or other anti-competitive) processes. To this extent, the profitability of such businesses would be unaffected.

It is possible that some government businesses might seek to increase their profits by entering into price-fixing arrangements with their competitors or seeking to increase their market power by engaging in anti-competitive behaviour such as exclusive dealing with a supplier or customer. This behaviour would be prohibited by the proposed conduct rules, as would similar activity by any other business. However, it is doubtful if any additional revenue obtained by such behaviour would be significant in a budgetary sense, and permitting such behaviour to continue seems difficult to justify.

Some governments expressed concern at the potential impact of applying conduct rules on their businesses' capacity to deliver community service obligations (CSOs) or achieve other governmental objectives.[43] However, nothing in the proposed general conduct rules affects the capacity of governments or their businesses to pursue non-commercial objectives providing they do so without acting anti-competitively. For example, the proposed conduct rules do not require a government business to place orders with the most efficient supplier or to charge all customers a uniform price. Nor do the rules affect budgetary assistance provided to particular groups or to arrangements that are required by State or Territory law.

The impact of applying the rules to State and Territory government businesses would be to require them to observe the same standards of competitive conduct as any other business. For example, they could not collude with competitors or engage in anti-competitive exclusive

43 SA Govt (Sub 98); ACT Govt (Sub 109).

dealing unless that conduct were demonstrated to be in the public interest before an independent Commission. Nor would they be permitted to misuse their market power for a proscribed purpose.

The Committee does not envisage that these changes would require substantial transitional arrangements, and considers that a two year period of adjustment would be ample. Transitional arrangements are discussed in more detail in Chapter 15.

2. Professions

Current Exception

Contrary to some suggestions, there is currently no exemption from the Act for the professions *per se;* indeed, "work of a professional nature" is specifically included in the definition of services.[44]

However, as some professionals practice in partnerships or in other non-corporate forms they are excluded from the Act on constitutional grounds unless they are engaged in trade or commerce across State or national borders or within a Territory. Historically, professions were not regarded as being part of trade and commerce,[45] although this argument seems less likely to be accepted today.[46]

In some States and Territories, certain conduct by some professions is exempted by being specifically approved or authorised by legislation.[47] However, this practice varies widely between States and Territories and between professions.

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44 See s.4, TPA.

45 For example, see *R* v *Small Claims Tribunal; Ex Parte Gibson* (1973) Qd.R 490 at 491 and see McGrath T G, "Apocalypse Now : Lawyers and the Trade Practices Commission", *Queensland Law Society Journal*, (Feb 1992) 35-47 at 37.

46 A number of cases have held that certain professional services were offered in trade and commerce for the purposes of Part V of the Act (eg, *Bond* v *Thiess* (1987) 14 FCR 215; *Argy* v *Blunt* (1990) ATPR ¶40-015; and *Wan* v *McDonald* (1992) ATPR ¶46-088). In *Helco* v *O'Haire* (1991) 28 FCR 230 the Federal Court held that no professional activity should be excluded *a priori* from the likelihood of being conduct in trade or commerce. The distinction has been rejected by the United States Supreme Court in *Goldfarb* v *Virginia State Bar* 421 US 773 (1975).

47 Eg, the *Legal Profession Practice Act 1958* (Vic) enables members of the Law Institute of Victoria to reach agreement about restrictions on behaviour and, through the Law Institute Council, have such rules approved by the Chief Justice.

Submissions

The overwhelming majority of submissions dealing with the professions supported removal of existing exemptions. Proponents of this view included the consumer, business and industry groups, individual businesses, and a host of other submitters.[48]

State and Territory governments either supported application of competitive conduct rules[49] or did not express opposition to this result.[50]

Some professional associations supported application of competitive conduct rules.[51] The Australian Council of Professions did not oppose application of the Act but argued that such application should not constrain professional associations from continuing to set and enforce entry requirements and practice standards, other than relating to fees.[52] The Australian Medical Association argued that were the Act to be applied to the medical profession there was a need for consultation over transitional arrangements.[53] The Victorian Bar Council argued that, as it did not engage in anti-competitive conduct, application of the Act was unnecessary.[54]

Consideration

There is no legal or universally agreed definition of the professions,[55] and statistics covering the field are generally poor. However, data

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48 Eg, Law Reform Commission of Victoria (Sub 2); Dr W Pengilley (Sub 11); Prof R Baxt (Sub 18); Caltex Aust (Sub 27); Unilever Aust Ltd (Sub 28); Shell Aust Ltd (Sub 30); Carlton & United Breweries (Sub 34); AMIC (Sub 39); Aust Earthmovers and Road Contractors Federation (Sub 49); DEET (Sub 57); MTIA (Sub 59); Mr P Argy (Sub 60); Trade Practices Committee of the LCA (Sub 65); TPC (Sub 69); Aust Chamber of Manufactures (Sub 73); Treasury (Sub 76); Pioneer Ltd (Sub 81); DHHCS (in relation to the health professions) (Sub 84); BCA (Sub 93); Small Business Coalition (Sub 100); Aust Consumers' Association (Sub 131).

49 NT Govt (Sub 91); ACT Govt (Sub 109).

50 The NSW Govt agreed with the principle of universal coverage (Sub 117); SA Govt noted the need to have regard to the role of professional bodies in meeting public interests (Sub 98); and the Qld Govt noted the impact of mutual recognition and increased incentives for incorporation on professions, and suggested that the removal of exemptions for architects and engineers might be considered by the review (Sub 104).

51 Eg, the Law Institute of Victoria (Sub 13); National Institute of Accountants (Sub 88).

52 Australian Council of Professions (Sub 12).

53 Aust Medical Assn (Sub 20).

54 Victorian Bar Council (Sub 33).

55 See TPC, *Regulation of Professional Markets In Australia : Issues For Review* (Discussion Paper, 1990). Note that the membership of the Australian Council of Professions comprises

for 1987-88 suggests that five occupational groups alone — lawyers, accountants, engineers, architects and real estate agents — accounted for nearly 2% of GDP.[56] The professions clearly comprise an important sector of the economy, and their services are a significant cost to many businesses which compete internationally.[57]

Whatever significance is attributed to the professions generally, it is important to emphasise that their partial exclusion from the Act is primarily due to a constitutional limitation which is unrelated to the status of professions. The scope of the exception depends largely on the legal form of the business, which varies widely across professions. Thus, for example, at the end of 1988 some 50% of engineering firms and 22% of accounting firms were incorporated, compared with less than 2% of legal practices.[58] Similarly, the constitutional limitation effectively discriminates between professions operating in States and in Territories, and between those firms that operate within a single State and those which operate nationally, as is increasingly the case with lawyers, accountants and engineering businesses. The overall result is patchy and difficult to justify on public policy grounds. As discussed in Chapter Five, limitations of this kind offend each of the principles already agreed by Heads of Government.

Restrictive practices in the legal profession have also been a matter of increasing concern to the community, as evidenced by the level of recent scrutiny at State, Territory and Federal levels.[59] Many of these issues could be addressed in a uniform national way by removing any gaps or uncertainty in the application of competitive conduct rules.

The recent agreement between governments on the mutual recognition of occupational regulation should overcome much of the fragmentation of professional regulation across States and

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architects, engineers, dentists, veterinarians, chemists, lawyers, accountants, surveyors, pharmacists, actuaries, quantity surveyors and physiotherapists.

56 Based on ABS turnover figures, cited in Trade Practices Commission, *Regulation of Professional Markets in Australia: Issues for Review* (1990).

57 For example, businesses are the largest consumers of legal services, accounting for 70% of barristers' services and 61% of solicitors' services in 1987-88: see TPC, *Legal Profession: Issues Paper*, (1992) at 11.

58 See TPC, *Regulation of Professional Markets in Australia : Issues For Review* (1990) at 39.

59 See, eg, Victorian Law Reform Commission, *Restrictions on Legal Practice* (1992); Senate Standing Committee on Constitutional & Legal Affairs, *Cost of Justice Inquiry* (Various reports, 1992-93); NSW Attorney-General's Department, *The Structure and Regulation of the Legal Profession* (Issues Paper - Nov. 1992); TPC, *Legal Profession* (Issues Paper- July 1992) and *The Legal Profession, Conveyancing & the Trade Practices Commission* (Draft report - Nov 1992).

Territories. Application of uniform competitive conduct rules would be consistent with this approach, and need not offend the goal of professional self-regulation.

Removing the special treatment enjoyed by some professions would also be consistent with the approach in several overseas jurisdictions, including the US,[60] New Zealand[61] and the EC.[62]

Recommendations and Impact

The Committee has recommended that the competitive conduct rules be extended to include all non-incorporated businesses and that the provision permitting State and Territory laws to specifically authorise or approve conduct be repealed.[63]

The impact of the Committee's recommendations on the professions would depend on the nature of the restrictions on competition in question.

Where anti-competitive restrictions on professional practice are imposed by Commonwealth, State or Territory law — such as through a licensing regime of some kind — compliance with that law would not involve conduct in breach of the proposed market conduct rules. Arrangements of this kind, including statutory monopolies for some professions, would not be affected.

Where restrictions on professional practice are imposed through the rules of professional associations, rather than law, rules that had the purpose or effect of substantially lessening competition would be prohibited unless authorised by the Commission on the showing of a net public benefit.[64] Arrangements involving architects,[65] doctors and solicitors[66] and pharmacists,[67] have already been authorised by the TPC.

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60 See *Goldfarb* v. *Virginia State Bar* 421 US 773 (1975).

61 Commerce Act (NZ). Note that a special provision for professional fee scales was removed from the Act in 1986: see Van Roy Y, *Guidebook To New Zealand Competition Laws* (1991).

62 Articles 85 & 86 of the *Treaty of Rome* (EC) apply to "undertakings", which is interpreted widely to include any commercial activity.

63 See Chapter Five.

64 See s.45 of the TPA and the discussion of horizontal agreements in Chapter Three.

65 Royal Australian Institute of Architects, Code of Conduct (Auth App No.A58)(1984).

66 Law Society (ACT) & Australian Medical Association (ACT), Agreement on Charges (Auth App No.A90406)(1985).

67 Pharmacy Guild of Australia (Qld) 'Pharma Care' Group (Auth App No.A2563)(1983).

A third category of restrictions is those that are imposed by the rules of professional associations, and the making of those rules or arrangements has been specifically approved or authorised by Commonwealth, State or Territory law. The Committee proposes that legislative exemption at the sub-national level be no longer possible. Professional rules that offend the conduct rules would have to modified, authorised by the Commission or exempted by the Commonwealth Parliament.

Application of the competitive conduct rules would not undermine the self-regulation of the professions. In conformity with relevant State or Territory law, professional bodies can continue to determine and enforce ethical and other standards for their respective professions. However, self-regulation could not be used to restrict competition in a way that was not justified in the public interest.

The Committee's examination of transitional issues is contained in Chapter 15. That Chapter recommends that legislation removing constitutional exemptions be passed as soon as possible, but not come into force until two years later. Exemptions currently provided by specific State or Territory statutes or regulations would be deemed to lapse three years after the new competition legislation is passed.

3. Other Unincorporated Businesses

Current Exception

There is no specific exception in the Act for unincorporated businesses. However, the constitutional limitations on the reach of the Act have this effect unless the business in question is engaged in interstate or overseas trade or commerce, operates in a Territory, or supplies the Commonwealth.

Submissions

No submissions supported this exemption. A number of submissions, including that of the Small Business Coalition,[68] specifically

68 Small Business Coalition (Sub 100).

mentioned unincorporated businesses when arguing for extended application of the Act.[69]

Consideration

As noted in Chapter Five, exemption on constitutional grounds offends each of the principles already agreed by Heads of Governments. In the case of unincorporated businesses, this limitation is particularly arbitrary, and permits businesses to evade regulation through the expedient of non-incorporation. The operation of the limitation may distort competition between corporate and non-corporate businesses, and between unincorporated firms situated in States and Territories.

It is sometimes assumed that unincorporated businesses are "small businesses", and worthy of special consideration on this basis. This is not necessarily the case, as partnerships may comprise up to 400 members[70] and a proprietary company can have as few as two members.[71] Rather, the choice of legal form as between companies, partnerships, sole proprietorships or the like will be influenced by a range of considerations including tax treatment and the desire to limit liability and financing requirements. In any event, this Committee, like previous Committees in 1976 and 1979,[72] considers that there is no reason for creating a general exemption for small business, however defined.

Application of competitive conduct rules to businesses irrespective of their legal form would be consistent with comparable overseas countries.

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69 Eg, Dr W Pengilley (Sub 11); Unilever Aust Ltd (Sub 28); Aust Earthmovers & Road Contractors Federation (Sub 49); Mr P Argy (Sub 60); NT Govt (Sub 91); ACT Govt (Sub 109); Aust Consumers' Assn (Sub 131).

70 See Application Order No 1 of 1990 under the Corporations Law (Cth), specifying that partnerships for lawyers and accountants can be of up to 400 members before being required to incorporate.

71 See s.114 of the Corporations Law (Cth).

72 See Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) at 88-91 and Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (1979) at 36.

Recommendations and Impact

The Committee has recommended that the competitive conduct rules be extended to include all unincorporated businesses.[73] Although no substantial transitional difficulties are anticipated, any concerns could be met by appropriate transitional arrangements. In Chapter 15 it is proposed that unincorporated businesses be afforded a two year transitional period to modify their conduct or seek authorisation.

4. Agricultural Marketing

Current Exception

There is provision in the TPA for regulations to be made exempting conduct engaged in by specified primary commodity marketing organisations.[74] While this provision was used quite extensively until recently,[75] all such regulations have now expired.

Some agricultural producers may not operate in corporate form or engage in interstate or overseas trade or commerce, and may escape the reach of the Act on this basis.[76] It is possible that some statutory marketing authorities may be excluded from the TPA under the shield of the Crown doctrine.

Some agricultural marketing arrangements that involve voluntary conduct that would otherwise offend the Act may be specifically authorised or approved by Commonwealth, State or Territory legislation.[77] These arrangements must be contrasted with those where conduct is required by law, however, which would not involve contraventions of the TPA.

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73 See Chapter Five.

74 See s.172(2)(a).

75 Regulations had been made covering products including mushrooms, oysters, citrus, dried fruit, bananas, apples, cherries, raw cotton, vegetables, macadamia nuts. See Trade Practices (Primary Products Exemptions) Regulations.

76 A 1979 review of the application of the TPA to primary production noted that a "significant number" of primary producers were excluded from the Act on this basis: Trade Practices Consultative Committee, *Report to the Minister for Business & Consumer Affairs on the Operation of the Trade Practices Act in Relation to Primary Production in Australia* (1979) at 16.

77 Eg, *Marketing of Primary Production Act 1983* (NSW) s.164.

Submissions

Although a number of submissions raised concerns about competition in the agricultural marketing sector, many of these did not distinguish between mandated arrangements — which are not affected by application of general conduct rules — and voluntary arrangements — where fuller application of conduct rules might have more significant results.

The National Farmers' Federation agreed on the need for reform to agricultural marketing arrangements, particularly at the State level, and supported application of the TPA.[78] Producer groups generally supported existing arrangements for milk[79] while there was difference of opinion on the detail of appropriate arrangements for sugar.[80]

Industry groups[81] and Federal agencies[82] supported universal application of the TPA and emphasised the benefits of reform of statutory marketing arrangements.

The Northern Territory Government supported application of the TPA to statutory marketing arrangements.[83] The New South Wales Government argued that, in line with the broad principle that nationally uniform rules of market conduct should apply equally to all sectors, the establishment of statutory marketing authorities be preceded by a public benefit assessment through an authorisation process.

Consideration

Agricultural marketing in Australia has long been dominated by statutory schemes of various forms, with rationales including price support to growers, price stabilisation, and the provision of countervailing market power to producers. Schemes vary between products and jurisdictions, but can include anti-competitive practices

78 NFF (Sub 90).
79 Eg, Aust Dairy Farmers' Federation (Sub 10); United Dairyfarmers of Vic (Sub 52); Aust Dairy Industry Council (Sub 53);
80 Eg, Canegrowers (Sub 67); Qld Sugar Corp (Sub 51); Mackay Sugar Co-op Assn Ltd (Sub 70).
81 Eg, Food Industry Council of Aust (Sub 79); MTIA (Sub 59); BCA (Sub 93).
82 Eg, DPIE (Sub 50); ABARE (Sub 95); DITARD (Sub 101); Treasury (Sub 76).
83 NT Govt (Sub 91).

ranging from production controls and compulsory acquisition of product to price fixing and monopoly marketing arrangements.

Arrangements of this kind are often grossly inefficient, and effectively tax users and consumers. According to the Industry Commission, such arrangements effectively taxed users and consumers by $550 million in 1988-89.[84] Benefits to these groups from reform of the milk, sugar and egg industries alone are estimated to total some $346 million per annum.[85]

The chief executive of one of Australia's major food processors has remarked that only about 20% of Australia's growers were as competitive as their off-shore counterparts, with the remainder falling behind in large part due to the operation of statutory marketing arrangements.[86] As he observed:

> SMAs seek price and income stability for all growers and in pursuing such objectives increase the price to allow less efficient operators to continue production. The cost to Australia, unfortunately, is the loss of world competitiveness, higher domestic prices and less consumer choice.

As well as the impact on consumer prices, price and quality effects of these arrangements flow on to Australia's food processing industry, and can impede the development of internationally-competitive value-added industries in Australia.[87] In recent years, there has been an increasing appreciation of the costs of such arrangements to the economy, and Australian governments have undertaken important reforms.[88]

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84 IC, *Statutory Marketing Arrangements for Primary Products* (1991).

85 *Ibid.*

86 Brass P, "Driving with a Destination : The Need for a National Vision", *Business Council Bulletin*, (May 1993) at 78.

87 See Minister for Industry, Technology & Commerce and Minister for Primary Industries & Energy, *Australian Agri-Food Industries*, (Joint Statement, July 1992)

88 For example, NSW has deregulated its egg industry and reformed its agricultural marketing arrangements more generally; Queensland has undertaken reforms in the dairy, bread, meat, and peanut industries; Victoria has commenced reform in the dairy and egg industries; Western Australia has undertaken a range of agricultural reforms, as have South Australia and Tasmania. The Commonwealth has undertaken a range of reforms, including in wheat and wool.

The effect of the current exemptions from competitive conduct rules depends on whether the marketing scheme operates by government mandate or through voluntary arrangements between growers.

Where the scheme operates by government mandate — such as where a law provides for compulsory acquisition, vests monopoly marketing powers in a single body, or stipulates the prices at which goods are to be sold — application of competitive conduct rules will not of itself upset these arrangements, for they achieve their anti-competitive effect without requiring conduct of the kind prohibited by the conduct rules. Nevertheless, application of conduct rules to marketing authorities will prevent them from engaging in anti-competitive conduct not required by their legislation, such as by misusing their often considerable market power.

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.

Exemptions that rest on constitutional limitations or shield of the Crown offend each of the principles agreed between governments. Exemptions that rely on private behaviour being specifically authorised or approved by State or Territory law fragment the operation of national markets. As exemptions in this area often exist under regulations, rather than statutes, and are scattered across scores of legislation in most jurisdictions, there is typically little scrutiny over the continuing public interest rationale for continuing preferential treatment.

Benefits of reform include lower prices for consumers and improved prospects for developing internationally-competitive domestic food processing industries.

Recommendations and Impact

The Committee recommends repeal of the special provision permitting agricultural marketing arrangements to be authorised by regulation made under the TPA. As this provision has not been used in recent years, no special transitional considerations are required.

The Committee also recommends removal of the constitutional limitation and shield of the Crown exemptions. The Committee does not anticipate any special transitional issues for the agricultural sector from these reforms. It proposes removal of these exemptions forthwith, but not commencing the relevant parts of the legislation for a period of two years, during which time existing arrangements can be modified or authorised by the Commission.

The Committee also recommends repeal of the provision permitting conduct to be specifically approved or authorised by State or Territory law or regulation. In line with laws relating to other sectors, the Committee proposes that three years be permitted before current exemptions under State and Territory laws are deemed to lapse. This should provide ample opportunity to review existing statutory arrangements in this area.

As with other sectors of the economy, conduct in the agricultural sector can be authorised by the Commission on the showing of a net public benefit, and authorisations have been made for arrangements dealing with products including oysters,[89] macadamia nuts,[90] apples and pears,[91] milk[92] and wine grapes.[93] The arrangement authorised for wine grapes is explicitly structured in both form and duration to allow transition from a regulated to a deregulated market. The Committee envisages that authorisations would continue to be granted by the proposed Australian Competition Commission as appropriate.

In this regard it should be noted that the TPA generally does not permit authorisation of price-fixing agreements. The Committee proposes a further tightening of the rules in this area, including by

89 See *Re Tasmanian Oyster Research Council Ltd* (1991) ATPR ¶50-106.

90 *Re Macadamia Processing Co and Suncoast Gold Pty Ltd* (1991) ATPR ¶50-109.

91 *Re Ardmona Fruit Products Co-op Ltd* (1987) ATPR (Com) ¶50-065.

92 *Re Southern Farmers Co-operative Ltd* (1986) ATPR (Com) ¶50-102.

93 See TPC (Sub 69).

removing the current exemption from the *per se* prohibition for recommended price agreements involving 50 or more persons. These arrangements will continue to be able to be authorised, however.[94] As a special measure to facilitate transition to the new regime, the Committee also recommends in Chapter 15 that price fixing arrangements of currently exempt firms be capable of authorisation by the Commission, on the demonstration of net public benefits, with any such authorisations lapsing no more than four years after the passage of the new competition law.

Given the export orientation of much of Australia's agricultural sector, it should also be noted that the Committee proposes to retain the special exception in the TPA for certain export contracts.[95]

Finally, the Committee notes that, notwithstanding some encouraging progress, there appears to be a substantial agenda of important potential reforms in relation to the many regulatory restrictions operating in the agricultural marketing area. As application of competitive conduct rules is not itself sufficient to achieve reform in this area, the Committee proposes in Chapter Nine a new mechanism aimed at removing regulatory restrictions on competition that cannot be justified in the public interest.

5. Overseas Shipping

Current Exception

Outward cargo (liner) shipping services operated by cartels (known as conferences) are regulated in Part X of the Act. Liner shipping services operate over specific routes and on regular schedules.

Practices of outwards conference operators that are currently exempt from the general conduct rules are the fixing of freight rates; the pooling or apportionment of business; the imposition of cargo restrictions; decisions on conference membership; loyalty agreements with shippers; and practices essential to the conference service and of overall benefit to exporters.[96] Shipping lines are exempt only if they lodge their conference agreements on a public register and negotiate freight rates and service arrangements whenever requested by a

94 See Chapter Three.

95 See s.51(2)(g), discussed below.

96 See Division 5 of Part X.

designated peak shipper body (currently the Australian Peak Shippers' Association).[97] However, the contents of registered agreements may be made confidential at the request of conference members if certain conditions are met, including no disadvantage to Australian exporters.[98]

Practices of inwards conference operators are provided with automatic immunity from aspects of the general conduct rules without the obligations imposed on outbound operators subject to Australian law. This difference reflects the difficulties in regulating inwards operations differently from the approach taken by originating countries.

Submissions

A number of submissions recommended that Part X be repealed, allowing anti-competitive conduct alleged to be in the public benefit to be subject to administrative authorisation.[99] The Department of Industry, Technology and Commerce also expressed concern that shipping costs be established in competitive markets.[100] No submissions supported retention of the current exemption.

Consideration

Ocean freight rates are the largest single cost component in transporting imports and exports and rates are influenced by the restrictive agreements operated by shipping conferences. On average, conferences transport 55% by volume and 60% by value of outbound and inbound liner cargo, with this share declining markedly over the last two years.[101] The conference shipping sector, largely exempt from competition law, carries in excess of $25 billion in freight annually.

The stated objective of Part X has been to ensure Australian exporters and importers have access to internationally competitive liner cargo services of satisfactory frequency, reliability and port coverage. The former Managing Director of ANL, Australia's only conference

97 See ss.10.03 & 10.41.

98 See ss.10.34 to 10.37 of the TPA.

99 AMIC (Sub 39); TPC (Sub 69); NFF (Sub 90); NT Govt (Sub 91); PSA (Sub 97).

100 DITARD (Sub 101).

101 ABS, *Foreign Trade: Australian International Cargo* (Cat No 5440.0).

operator, recently noted that there was "an increasingly blurred distinction in shippers' minds between conference and non-conference" operators.[102] If this is the case, it seems increasingly difficult to justify giving some operators special immunity from competition law.

The Committee's attention was drawn to a number of undesirable aspects of the current arrangements, including:

- the industry-wide centralised approach promoted by Part X has encouraged average (pan Australian) freight rates and industry-wide solutions rather than competitive resolution of freight rate issues (including inter-port competition) and greater regional specialisation. Moreover, the pooling and averaging of revenues and costs within conferences have reduced normal market incentives for increased efficiency;

- conferences effectively set benchmark port service and other ancillary charges which are then uniformly charged throughout the industry;

- many of the industry's commercial problems result from the cartel structure which has encouraged the provision of excess capacity[103] and inhibited desirable rationalisation of shipping services. Liner shipping is not a unique industry and other industries with similar characteristics do not receive similar immunity from competition law;

- price fixing is inherently anti-competitive with negligible, if any, offsetting public benefits and should no more be permitted in liner shipping than in other sectors. Ship operators would still be able to trade slots, and higher quality services would be available, for a premium, in a competitive market. Anti-competitive practices which enhance the quality of services would be authorisable under the general competition rules in any event, where there are net benefits; and

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102 Bicknell J, Speech to Australian Peak Shippers' Association Seminar (May 1992) at 15.

103 PSA, *Inquiry into Land Based Charges in Australian Ports by Ocean Carriers and Conferences*, (1992) at 35.

- the provision of assistance to ANL, which is publicly owned and a high cost operator, through the granting of special status for conferences is inefficient and impairs the international competitiveness of our traded goods sector. It is unlikely that ANL's participation in conferences significantly enhances its value, and there is little evidence that "protection" of ANL is yielding benefits for the Commonwealth budget or national economy.

The Committee considers that there is substantial evidence that the current Part X arrangements are a source of inefficiency and have contributed to the difficulty exporters and importers have experienced in realising the benefits that should be flowing from the gains in waterfront efficiency. On this basis, the case for special treatment of the anti-competitive behaviour in this sector should be viewed with scepticism.

The Committee notes that this scepticism is evident internationally in increasing scrutiny of the special arrangements covering international shipping conferences,[104] and any case for continuing special treatment of this industry is diminishing rapidly as greater efficiency is required of the domestic and international economy, and conferences lose market share to non-conference operators.

No compelling arguments for the retention of Part X were made to the Committee, and both the material presented to the Committee and the importance of this sector to the Australian economy suggest that the onus must rest with proponents of a continuing exemption to demonstrate that this would yield net public benefits. Overseas cargo shipping was first exempted from Australian competition law in the 1930s, primarily to protect services to a wide range of ports. This reasoning is clearly not relevant to Australia's contemporary circumstances, and pan-Australian freight rates and lack of transparency are inhibiting the development of inter-port competition.

Part X was to have been reviewed in 1994, but this review has been brought forward following the recent Prices Surveillance Authority Report.[105] The Commonwealth Government has established a

104 Eg, *Report of the US Advisory Commission on Conferences in Ocean Shipping* (1992).

105 PSA, *supra*, n 102.

separate review of Part X, which is to be completed by November 1993.

Recommendations

In view of the decision to establish a separate review of Part X, this Committee refrains from making comprehensive recommendations on this issue. However, submissions received by the Committee suggest that claims for continuing the current exemption will need to be assessed critically to ensure any restraints on competition are in the public interest. Moreover, consistent with the Committee's views on exemption from the conduct rules, any decision to continue special treatment should be reviewed regularly to ensure that the alleged benefits of anti-competitive activity exceed the costs of such behaviour, and that liner shipping policy objectives are being pursued in a way that is least injurious to competition.

It is not clear that the ability to fix prices is essential for conferences to provide the public benefits which are claimed to justify their existence. Indeed, there are understood to be conferences operating in other parts of the world which do not involve price fixing. Accordingly, any proposal to continue price fixing arrangements should be viewed with great care.

Removal of the special exemption for liner shipping conferences would raise the question of the scope for authorising price-related arrangements under the general rules, and the means for implementing any associated obligations on conference members considered appropriate. Although the Committee has recommended that, after an appropriate transitional period, price fixing for services no longer be authorisable, it may be that conference arrangements could still qualify for authorisation under the exemption for joint ventures.[106] Such authorisations could be conditional, or subject to undertakings imposing obligations on conference participants to limit their anti-competitive conduct.

If authorisation were not available under the joint venture exemption and some additional transitional period for conferences was considered desirable, this could be accommodated by an appropriate amendment to s.45A of the TPA limited to conferences.

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106 See s.45A(2)(a), discussed in Chapter Three.

6. Intellectual Property

Current Exception

The Act provides a specific and limited exemption for conditions contained in licences or assignments of intellectual property rights.[107] The scope of the exception varies somewhat between forms of intellectual property. The most important requirement for each is that the condition being imposed or enforced in such a licence must "relate to" the subject matter of the intellectual property (ie, invention, design). Moreover, the exemption does not extend to prohibitions on the misuse of market power or resale price maintenance.

Submissions

Retention of the existing provision was supported by the Australian Industrial Property Organisation, the Australian Information Industry Association and the Institute of Patent Attorneys of Australia.[108] The Commonwealth Department of Primary Industries and Energy supported the existing treatment of plant variety rights in the Act.[109]

One submission[110] argued that the interface between intellectual property licensing and competition policy required reconsideration. Although citing no practical problems with the current regime, it was suggested that the current exemption should be replaced by a new provision that is more certain in ambit and provides that any exercise of an intellectual property right that extends it in time, in scope or in strength would be subject to the TPA, but not otherwise.

The TPC proposed that this exemption be repealed, with intellectual property licensing matters addressed in the authorisation process.[111]

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107 Section 51(3) sets out the exemptions from the Act provided for patents, trademarks, designs, copyright and circuit layouts. Note also s.51(1)(a) and the *Plant Varieties Act 1987*.

108 Aust Information Industry Assn (Sub 40); Inst of Patent Attorneys of Aust (Sub 43); AIPO (Sub 77).

109 DPIE (Sub 50).

110 Mr S Stern (Sub 64).

111 TPC (Sub 69).

Consideration

The limited exemption is intended to allow the owner of certain intellectual property rights to assign or license those rights in ways that enhance the owner's control of the exercise of those rights. But for a provision of this kind, some licensing or assignment restrictions might be prohibited by the TPA unless authorised.

The true scope and hence significance of the provision remains uncertain because the important "relates to" requirement has not been subject to any definitive judicial interpretation. However, it has been suggested that exclusive grants, territorial, price and quota restrictions and minimum royalty/quantity requirements sufficiently relate to the product licensed to fall within the exception. Full or third-line forcing and many "non-competition" clauses, on the other hand, arguably relate to matters collateral to the product itself and would thus fall outside the exception.[112]

The difficulties of determining the proper balance between the exercise of intellectual property rights and the promotion of competition poses particular difficulties in this area. On the one hand, licensing of intellectual property rights benefits the competitive process by encouraging rapid commercial application of innovations, helping competitors to capture their rewards, and increases the incentive to innovate. At the same time, licensing agreements can be used to cartelise an industry or to increase the market power of a single licensor.

Although no submissions pointed to practical problems with the current provisions, the Committee has concerns about a number of aspects of the regime. The Committee was not presented with any persuasive arguments as to why intellectual property rights should receive protection beyond that available under the authorisation process. In this regard it notes that in 1984 the Stonier Committee recommended that particular arrangements in relation to patent licences and assignments be vetted on a case-by-case basis under the authorisation process.[113]

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112 See TPC, *Application of the Trade Practices Act to Intellectual Property* (1991).

113 See Industrial Property Advisory Committee, *Patents, Innovation & Competition in Australia* (1984).

Even assuming that some special exemption is warranted, it is not apparent that the current exemption meets the relevant policy goal, particularly given the uncertainty over its scope. The current provisions also treat differently the various forms of intellectual property right. While each intellectual property regime no doubt reflects a different balance of relevant policy interests, it is not clear that different treatment as to the application of the competitive conduct rules is warranted.

Recommendations and Impact

The Committee saw force in arguments to reform the current arrangements, including the possible removal of the current exemption and allowing all such matters to be scrutinised through the authorisation process.

Nevertheless, it was not in a position to make expert recommendations on the matter and recommends that the current exemption be examined by relevant officials, in consultation with interested groups. The examination should assess whether the policy reflected by the exemption is appropriate and, if so, whether it is expressed with sufficient precision and consistency regarding the range of intellectual property rights affected or potentially affected.

7. Labour

Current Exception

The TPA currently excludes from consideration any act done, or any provision of, a contract, arrangement or understanding, to the extent that it relates to the remuneration, conditions of employment, hours of work or working conditions of employment. The exception is available to employers and employees, and does not extend to the secondary boycott or resale price maintenance provisions.[114]

Submissions

The Business Council of Australia[115] proposed that the provision be repealed and reliance placed instead on the authorisation provisions

114 Section 51(2)(a). Note that while this exception does not apply in relation to secondary boycotts, s.45D(3) provides for similar considerations to operate as a defence.

115 BCA (Sub 93).

of the TPA. The Small Business Coalition suggested that the provision be reviewed to ensure consistency with relevant industrial legislation.[116] Two other submissions raised the general issue of coverage of trade unions.[117]

The current exemption was supported by the Australian Council of Trade Unions and State Public Services Federation.[118]

Consideration

But for a provision of this kind, collective agreements between employees (or employers) on employment related matters could be found to be agreements that substantially lessen competition in the labour market, and thus prohibited by the TPA unless authorised by the Commission. Where the agreement extended to remuneration, the agreement could constitute a price-fixing agreement that is prohibited *per se* by the Act and, if the Committee's recommendations were adopted, could not be authorised.

As well as agreements of this kind, the exception extends to any "act done" in relation to employment conditions and the like. It has been held that the relationship between the act and the employment conditions etc, must be direct and immediate.[119]

The special treatment of labour relations is a common feature of competition law in most comparable countries, and exemptions of this kind appear to exist in the US,[120] Canada,[121] the United Kingdom[122] and New Zealand.[123] As has been said in relation to a comparable New Zealand provision:

116 Small Business Coalition (Sub 100).

117 Mr W J Rourke, AO (Sub 4); Prof R Baxt (Sub 18).

118 State Public Services Federation (Sub 108); ACTU (Sub 113).

119 See *Ausfield Pty Ltd v Leyland Motor Corp of Australia Ltd* (1977) ATPR ¶40-025 at 17,350.

120 See s.6 of the Clayton Act (US) and *Connell Constructions Co v Plumbers & Steamfitters Local 100*, 421 US 616, 635 (1975).

121 See s.4 of the Competition Act (Canada).

122 See s.9(6) of the Restrictive Trade Practices Act (UK).

123 See s.44(1)(f) of the Commerce Act (NZ).

> Although labour relations is part of economic policy, it is based on collective action and regulation rather than individual action and competition. The social issues arising under labour law differ markedly from those relating to the conduct of firms in other markets.[124]

While recent developments in Australian industrial relations may place a greater emphasis on individual action and responsibility, collective agreements between groups of employees appear likely to remain important. Except for such a provision many labour agreements could infringe the competitive conduct rules. Such an outcome might infringe Australia's obligations under relevant International Labour Organisation Conventions which allow employees' freedom to organise and form trade unions.[125]

Recommendation

The Committee proposes no change to the current provision.

8. Approved Standards

Current Exception

The TPA specifically exempts any provision of a contract, arrangement or understanding obliging a person to comply with, or apply, standards of dimension, design, quality or performance prepared by or approved by the Standards Association of Australia or by any prescribed association or body.[126] To date the only prescribed body is the Australian Gas Association.[127]

Submissions

The Standards Association of Australia supported the current exemption, and the Australian Gas Association proposed that it continue to be an approved body for the purposes of the provision.[128]

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124 Van Roy Y, *Guidebook To New Zealand Competition Laws* (1991) at 28.

125 The International Covenant on Civil and Political Rights provides that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his (sic) interests". The International Covenant on Economic, Social and Cultural Rights provides that parties to the Covenant will ensure "the right of everyone to form trade union and join the trade union of his (sic) choice" and "the right of trade unions to function freely".

126 Section 51(2)(c).

127 See reg.8 of the Trade Practices Regulations.

128 Australian Gas Assn (Sub 17); Standards Assn of Aust (Sub 106).

Some submissions expressed concerns about services providing for the certification of compliance with standards[129] and about standards imposed by regulations,[130] although neither are affected by the current exemption.

Consideration

But for a provision of this kind, arrangements requiring compliance with some standards might possibly constitute a breach of s.45 of the TPA unless authorised. Even if a breach of the TPA were unlikely, it has been argued that an exemption encourages the use of standards by providing a useful assurance that litigation will not result from the imposition of such requirements.[131]

Comparable provisions exist in the UK[132] and New Zealand.[133]

Standardising products and systems may substantially enhance efficiency, increase competition by making products more readily substitutable, facilitate development of service industries for standardised goods and assist consumers and businesses in evaluating products.[134] Standards are becoming increasingly important to business operations for these reasons.

However, there is a risk that standards may be used as a barrier to market entry, particularly where they are mandatory and supported by regulation. Examples could include a standard that advantaged one product or producer over a rival on other than objectively reasonable, public interest grounds, or mandated particular technologies or systems rather than performance outcomes.

The Committee noted that this provision is broadly drafted, which is appropriate given the benefits of encouraging the use of appropriate standards. However, should any evidence come to light that

129 Aust Electrical & Electronic Manufacturers' Assn (Sub 118).

130 DITARD (Sub 101).

131 Eg, Van Roy Y, *Guidebook to New Zealand Competition Laws* (1991) at 27.

132 See ss.9(5) of the Restrictive Trade Practices Act (UK), which exempts arrangements requiring compliance with standards approved by either the British Standards Institution or the Secretary of State for Trade and Industry.

133 See s.44(1)(e) of the Commerce Act (NZ), which exempts standards approved by the Standards Association of New Zealand or any other prescribed body.

134 Heydon J D, *Trade Practices Law* (1993) at 2296.

standards and the protection afforded by this provision are being used to stifle innovation and competition, the provision should be reviewed. No such evidence was brought to the Committee's attention during the Inquiry.

Standards and certification arrangements established by government regulation raise more difficult issues but are not addressed by application of competitive conduct rules. Means of addressing these issues are discussed in Chapter Nine.

Recommendation

The Committee supports retention of the current exemption.

9. Export Contracts

Current Exception

The TPA specifically exempts provisions of contracts (not conduct) that relate exclusively to the export of goods from Australia or to the supply of services outside Australia, provided full particulars are registered with the TPC before 14 days from the making of the contract.[135] The provision does not extend to contracts, arrangements or understandings for the export of goods by sea, which are governed by Part X of the Act.[136]

There were no submissions commenting on this exception.

Consideration

A provision of this kind allows certain export contracts to be made which, if they related to domestic commerce, would offend competitive conduct rules. However, provisions of this kind may still be subject to scrutiny under the competition laws of other countries.

It has been said that this exemption rests on the belief that Australian businesses operating on world markets will be more competitive if permitted to behave in anti-competitive ways which would be

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135 Section 51(2)(g).

136 See *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat and Livestock Corporation & Ors* (1980) ATPR 40-156 and the discussion in Tonking A I & Alcock R J (eds) *Australian Trade Practices Reporter* at 8,631.

prohibited in Australia.[137] For example, a group of exporters may need to combine their efforts to take advantage of economies of scale in exporting, or to improve their bargaining power when dealing in world markets.

The Committee notes this provision relates exclusively to exports so that any impact on competition in Australia is likely to be at most indirect, that exempt agreements must be registered with the competition authority, and that a provision of this kind is far from unique to Australia. For example, similar exemptions exist in New Zealand,[138] Canada[139] the UK,[140] and the US.[141]

Recommendation

In the absence of persuasive argument for removing or modifying the provision, the Committee supports continuation of the current exemption.

10. Restrictive Covenants

Current Exceptions

Restrictive covenants are provisions included in agreements that restrict the liberty of one party from engaging in a rival business. They can be inserted in employment contacts, partnership agreements or on the sale of goodwill in a business. Historically, the enforceability of such conditions has been governed by the restraint of trade doctrine of the common law, where the reasonableness of the restraint is the primary consideration.

The TPA specifically excludes three kinds of restrictive covenant from the Act so that their validity will continue to be determined according to the common law doctrine.[142] These are:

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137 Heydon J D, *Trade Practices Law* (1993) at 1667.

138 See s.44(1)(h) of the Commerce Act (NZ).

139 See s.45(5) of the Competition Act (Canada).

140 See *Anti-Competitive Practices (Exclusion) Order 1980* (UK). Also note s 10(1)(f) and 19(1)(f) Restrictive Trade Practices Act (UK).

141 See the Webb-Pomerone Act, 15 USC ss. 61-65.(1982).

142 Section 4M provides that the TPA does not affect the operation of, inter alia, the law relating to the restraint of trade in so far as that law is capable of operating concurrently with the Act.

- provisions of a contract under which a person (not being a body corporate) agrees to accept restrictions as to the work he or she may engage in during or after the termination of the contract (Section 51(2)(b));

- provisions of a contract, arrangement or understanding between partners (none of whom being a body corporate) concerning restrictions on competition between the partners during or after the termination of the partnership (Section 51(2)(d)); and

- provisions of a contract solely for the protection of the purchaser of the goodwill of a business. These will usually involve restrictions on the vendor's ability to compete with his former business. (Section 51(2)(e)).

There were no submissions commenting on this exception.

Consideration

Contractual provisions of the kinds referred to in these exceptions are unlikely to substantially lessen competition in a market as distinct from lessening competition between individual competitors or potential competitors. In any event, the courts will strike down restrictions under the common law doctrine to the extent that they are unreasonably wide.[143]

The aim of these exceptions is to avoid further regulation of such contractual provisions by the TPA, and thus avoid introduction of a conflicting basis on which to regulate them.[144] There are obvious benefits in having this area of law subject to the degree of certainty and consistency provided by judicial precedents on such matters.

Similar provisions exist in New Zealand,[145] and a provision akin to s.51(2)(e) exists in the UK.[146]

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143 In NSW the common law on this subject is modified by the Restraints of Trade Act (NSW).

144 Tonking AI & Alcock RJ (eds), *Australian Trade Practices Reporter* at 8,611.

145 See ss.44(1)(a),(c) and (d) of the Commerce Act (NZ).

146 See *Restrictive Trade Practices (Sale and Purchase & Share Subscription Agreements)(Goods) Order 1989* SI 1989/1082 and *Restrictive Trade Practices (Services) (Amendment) Order 1989* SI 1989/1082.

Recommendation

In the absence of submissions arguing the contrary, the Committee supports retention of these provisions in their current form.

11. Consumer Boycotts

Current Exception

The Act specifically exempts consumer boycotts against the suppliers of goods or services, providing they are carried out otherwise than in the course of trade and commerce.[147] The exemption dates from 1977 and does not extend to the resale price maintenance provisions of the TPA.

There were no submissions commenting on this exception.

Consideration

But for this provision, consumers who combined to exert pressure on a supplier could be liable under competitive conduct rules. It has been observed that, in contrast to some places overseas, consumer lobbying groups have not been particularly active in Australia.[148] A similar provision exists in New Zealand.[149]

Recommendations

While the Committee questioned whether this exemption was a significant one in practice, in the absence of submissions on the underlying policy rationales it was prepared to support retention of the current provision.

12. Conduct or Arrangements Pursuant to International Agreements

Current Exception

The TPA allows regulations to be made that exclude from the Act contracts or conduct made or engaged in, in pursuance of or for the purposes of a specified agreement, arrangement or understanding

147 Section 51(2A).

148 Tonking AI & Alcock RJ, *Australian Trade Practices Reporter*, (1990) at 14-315.

149 See s.44(1)(h) of the Commerce Act (NZ).

between the Government of Australia and the Government of another country.[150]

There were no submissions commenting on this exception.

Consideration

No regulations have ever been made under this provision. The rationale for a special provision of this kind remains obscure.

Recommendations and Impact

The Committee proposes repeal of this and other narrowly focussed regulated exemptions under the TPA, preferring instead a more general regulation power that is limited in duration.[151] If the Commonwealth sought to have such conduct or arrangements exempted from the Act it could seek authorisation from the Commission, pass legislation specifically authorising or approving that conduct or rely on a more general but temporary regulatory authorisation of the kind proposed by the Committee.

B. RECOMMENDATIONS

In addition to the recommendations made in Chapter Five in relation to particular exemption principles and mechanisms, the Committee makes the following recommendations in respect of matters currently subject to specific statutory exemption under the Trade Practices Act:

The Committee recommends that:

6.1 The following statutory exemptions contained in the Act be continued under the competitive conduct rules of a national competition policy:
- (a) a provision dealing with labour along the lines of s.51(2)(a) of the Act;
- (b) a provision dealing with standards along the lines of s.51(2)(c) of the Act;
- (c) a provision dealing with export contracts along the lines of s.51(2)(g) of the Act;

150 Section 172(2)(b).

151 See Chapter Five.

(d) provisions dealing with restrictive covenants along the lines of s.51(2)(b), (d) & (e) of the Act; and
(e) a provision dealing with consumer boycotts along the lines of s.51A of the Act.

6.2 The provision exempting certain intellectual property matters be reviewed by relevant officials, in consultation with industry and other interested persons, to determine whether the current exemption is warranted; and if so, whether the current legislative formula meets the intended policy objective, and whether current inconsistencies between various intellectual property rights are justified.

7. Enforcement

Compliance with the competitive conduct rules is encouraged by the provision of an effective enforcement regime. The determination of issues under prohibition-based rules is inherently a matter for judicial decision-making. This Chapter examines three key questions concerning the design of such a regime:

- What remedies should be available to redress contraventions of the rules?
- Who should be able to bring an action to enforce the rules?; and
- What processes should be available to assist courts in making decisions?

A. REMEDIES

The basic objectives of a system of remedies are to deter people from contravening the law and to compensate injured parties. The current competitive conduct rules of the *Trade Practices Act 1974* (TPA) can, in appropriate circumstances, attract pecuniary penalties, injunctions, divestiture, damages, declarations and other compensatory orders. The adequacy of remedies under the Act is currently being considered by the Australian Law Reform Commission (ALRC), although the primary focus of that Inquiry is the consumer protection provisions of the Act.

Review of Current and Potential Remedies

In respect of the competitive conduct rules, the Committee is generally satisfied that the current remedies provide an appropriate level of deterrence and compensation, and is not convinced of the need for additional remedies.

1. Penalties (s.76)

Penalties provide the most direct form of deterrence for contraventions of the competitive conduct rules. To the extent that

the system provides appropriate deterrence, there will be fewer occasions when parties are injured and may require compensation.

To provide a suitable deterrent, penalties should be set at levels which reflect the significant profits that might be gained from anti-competitive conduct in contravention of the TPA, the costs to society of that conduct and the probability of detection. The economic objective of deterrence should be balanced against the legal system's concern with justice. Thus it will also be appropriate to examine matters such as the deliberateness of the contravention, whether the firm has shown a disposition to cooperate with the enforcement authorities, and the level of involvement of senior management. In assessing penalty levels, the courts take into account these various factors.[1]

Until recently the maximum level of penalties under the TPA was set at $250,000, which was clearly inadequate to achieve the deterrence objective. As one judge said:

> one can only suspect that the penalties have not been taken very seriously. Their deterrent effect has been insufficient, it appears, to counter-balance the profit apparently derived.[2]

In late 1992, the level of penalties was substantially increased to a maximum of $10 million.[3] Bearing in mind the principles courts apply in assessing penalties in particular cases, it can be expected that the maximum penalties will be applied only in extreme cases. The recent amendments have re-established penalties as a credible deterrent. The Committee considers that the current level of penalties, applied in accordance with current judicial principles, would be appropriate in a national competition policy.

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1 See eg, *TPC* v *Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR ¶40-091 at 17,896; *TPC* v *CSR Ltd* (1991) ATPR ¶41-076 at 52,152.

2 *TPC* v *Sony (Aust) Pty Limited & Ors* (1990) ATPR ¶41-053 at 51,691, Pincus J.

3 See s.76. Maximum penalties for contraventions of the competition provisions, other than the secondary boycott provisions, are $10 million in the case of a body corporate and $250,000 in the case of a natural person. For secondary boycotts the maximum penalty is $250,000 for a body corporate; penalties are not applied against natural persons.

2. Injunctions (s.80)

Under the TPA, courts may order injunctions to restrain firms from engaging in current or future conduct, or to compel them to engage in a particular form of conduct. The exercise of this power in cases involving the setting of prices has been the subject of some criticism, which is discussed below. Otherwise, the power is largely uncontroversial, and the Committee accepts it as a necessary and desirable mechanism for enforcing competitive conduct rules.

3. Divestiture (s.81)

An order for divestiture requires a firm to sell particular assets or particular parts of its business. The Committee considers that divestiture is appropriate in merger cases, but is not persuaded that the many disadvantages of providing a general divestiture power are outweighed by the possible advantages.

Under the current regime, divestiture is only available as a remedy in cases of mergers or acquisitions to undo the transaction. Some submissions to the Inquiry argued that divestiture should be available as a remedy in cases involving the misuse of market power, arguing that dismembering the firm removes the source of the problem.[4] The proposal was opposed by a number of other submissions.[5]

Arguments in favour of divestiture as a more generally available remedy are that it provides a structural remedy to a structural problem, rather than attempting to merely redress particular conduct; that it provides a strong deterrent to firms; and that it provides a strong negotiation tool in the hands of regulators seeking non-judicial dispute resolution.

Against this, a general divestiture remedy would give rise to a number of difficulties. It will often be arbitrary since it will not be clear what parts of a firm should be divested (contrast the case of mergers, where it is clearly the acquired assets or shares which should be divested). To break up a firm may eliminate economies of

4 Mr R Copp (Sub 107); Mr CA Sweeney (Sub 119).

5 IC (Sub 6); Treasury (Sub 7); Trade Practices Committee of the LCA (Sub 65); BCA (Sub 93); Qld Govt (Sub 104); BHP Ltd (Sub 133).

scale and/or scope or generally decrease economic efficiency. Divestiture could involve reshaping an entire industry with consequent disruption to all who deal with it. It would involve the courts in a process with inevitable political implications, something more appropriate for decision by governments than by the courts.

The severity of the remedy is such that firms facing divestiture proceedings could be expected to strenuously oppose the proceedings using every legal means to impede the enforcement agency and try to obtain a political settlement or abandonment of proceedings. In a long case the market situation can undergo fundamental changes and the original reason for bringing the case may become irrelevant.[6] The process of divestiture could also be expensive to administer.

There have been no cases in Australia of persistent misuse of market power and there is no demonstrated need for such a remedy. With increased penalties it is difficult to argue that divestiture is needed as a deterrent. The argument that divestiture provides a negotiation tool for regulators is simply a reiteration of the deterrent effect of divestiture.

The Griffiths and Cooney Committees both considered allowing divestiture as a remedy in cases of persistent misuse of market power, but recommended against such a proposal. A significant factor influencing these recommendations was that, in contrast to most other remedies, structurally separating a corporation will not have a predictable result. Indeed, as noted by the Cooney Committee, as a result of divestiture "the resulting parts of the corporation may be made less productive, less efficient, perhaps unprofitable, perhaps even non-viable."[7]

To some degree, pressures to restructure government monopolies have influenced debate on whether a more general divestiture power should be included in the Act. As discussed in Chapter Ten,

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6 Eg, the *IBM case* in the US ran for 14 years before being abandoned by the US Department of Justice. While the legal battle proceeded there were fundamental changes in the structure of the market, including the development of two new generations of computers.

7 Senate Standing Committee on Legal and Constitutional Affairs, *Mergers Monopolies and Acquisitions - Adequacy of Existing Legislative Controls* (1991) at 98.

the Committee does not favour court-ordered divestiture as a mechanism for restructuring public enterprises.

4. Damages (s.82)

Under the TPA, a person who suffers loss or damage as a result of a contravention may recover the amount of the loss or damage from any person involved in the contravention. The Committee considers that the existing provision for damages is a suitable model for a national competition law.

The prospect of orders for damages may provide an element of deterrence, but the essential role of damages is to provide monetary compensation to parties injured by contraventions of the competitive conduct rules. Damages also provide an incentive for private enforcement of the rules, easing the burden on public enforcement agencies.

In the United States, successful plaintiffs can receive awards for treble damages, that is, a sum of money which is three times the damage actually suffered. Although this approach enhances the deterrent value of damages and provides a greater incentive for private enforcement, the Committee notes that it also results in windfall gains to successful plaintiffs and may lead to speculative or vexatious litigation. The Committee considers that the advantages of a multiple damages scheme are outweighed by the disadvantages.

5. Declaration (s.163A)

There are occasions on which parties to a dispute wish simply to have a court clarify the nature of existing legal rights and obligations, without seeking to have the court provide a substantive remedy. The Committee considers that a power to grant declarations should be included in the enforcement regime of a national competition policy.

The TPA permits parties to seek a declaration in relation to the operation of the competition rules, or the validity of any proposed or actual conduct. Before the court will exercise its discretion to grant a declaration it must be satisfied that the question before it is

real and not theoretical; that the person raising the question has a real interest; and that there is someone whose interests are opposed to the declaration sought. The existing provision is uncontroversial, and would provide a suitable model for incorporation into nationally applicable laws.

6. Other Court Orders (s.87)

The TPA permits the court to make a wide range of orders to compensate damaged parties or reduce loss or damage which has occurred or may occur. A non-exhaustive list of orders is provided in section 87, which includes voiding contracts, varying contracts, and requiring the supply of specified services.

The Committee considers that the wide range of orders which the court can make under s.87 provides a powerful and flexible tool for achieving justice between the parties, and that such a power should be included in a system of national competitive conduct rules.

7. Remedies Involving Prices

Misuse of market power situations, particularly refusal to deal cases, may involve courts in ordering one party to deal with another at a particular price, or at a price calculated using a particular formula. Some submissions have observed that courts are reluctant to be involved in setting prices and lack expertise in such matters, and have suggested that pricing remedies should be settled by a specialist economic body, such as the PSA.[8] Such proposals include the possibility of having courts refer such matters to a specialist body for advice, with the final determination of remedies remaining for the courts. Underlying these criticisms of the current regime is a belief that a specialist economic body could provide pricing remedies which are in some way "better" than those currently provided by the courts.

Pricing remedies under the current Act may take the form of mandatory injunctions or other orders.[9] Generally, however, Australian courts are "slow to impose upon the parties a regime

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8 Trade Practices Committee of the LCA (Sub 65); Dr S Corones (Sub 86); PSA(Sub 97); Matilda Fuel Supplies (Sub 120).

9 See ss.80 & 87.

which could not represent a bargain they would have struck between them."[10] Thus courts have proven more willing to order that dealing occur at a particular price in cases where there has been a previous course of dealings.[11] In principle, courts could also order firms to deal on a non-discriminatory basis, or fix prices by reference to the market price for a comparable product.

What is more difficult is the issue of setting prices where there is no reference price. An important policy decision in such cases is whether firms with market power should be permitted to set high, monopolistic prices or whether they should be compelled to deal at low "as if competition" prices. Low prices would reduce economic profits and hence reduce the signals attracting the entry of new firms into the market. Such remedies might thus extend the duration of market power problems. Since charging high prices is not of itself a contravention of the competitive conduct rules there is an argument that where firms with market power are compelled to deal with others it should be on the basis of a high price. But to enshrine such a principle in the procedures for dealing with misuse of market power would undermine the bargaining power of persons seeking to deal with firms with market power.

Quite apart from the technical difficulties associated with price setting, there is no clear *policy* basis for the setting of prices where there is no reference price.[12] In such circumstances improving the technical expertise of courts, or referring pricing matters to specialist bodies, would not improve upon the existing regime, and for this reason the Committee does not propose to make any special provision for pricing remedies.

As barriers to imports are removed and the economy becomes more competitive, the likelihood of refusals to deal occurring diminishes. The courts may be prepared to grapple with the difficult policy judgments involved in setting prices in circumstances where there is no clear reference price. The possibility remains, however, that

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10 *ASX Operations Pty Ltd* v *Pont Data Aust Pty Ltd* (1991) ATPR ¶41-109.

11 *Maclean* v *Shell Chemical (Aust) Pty Ltd* (1984) ATPR ¶40-462; *O'Keefe Nominees Pty Ltd* v *BP Australia Ltd* (1990) ATPR ¶41-057; *ASX Operations Pty Ltd* v *Pont Data Australia* (1991) ATPR ¶41-109.

12 See Chapter 11 for a discussion of some of the competing policy considerations involved in the setting of prices.

some cases of refusals of supply in breach of s.46 may arise in which the court may not be prepared to specify a price so as to frame an appropriate order for supply. Where parties find the remedies available through the existing regime to be unsatisfactory they may in appropriate circumstances find relief through declaration for prices oversight purposes,[13] or through the system of special market access rules proposed in Chapter 11. The Committee has not been prepared to provide more prescriptive remedies in this area considering the circumstances in which they could be used might be relatively rare, but that their mere existence might have considerable adverse effects on incentives for investment.

8. Other Remedies

The Committee also considered the possible merits of other remedies, such as administratively-applied cease and desist orders.[14] Cease and desist orders effectively reverse the onus of proof, which could be particularly harsh where complex economic matters are involved, as is often the case in competition cases. In instances where there is an urgent need to prevent particular conduct, the competition authority may seek interim injunctions to preserve the status quo pending a full hearing. Overall, the Committee is not satisfied of the need for such additional remedies.

Conclusion

The Committee is satisfied that the current range of remedies available under the Act is suitable for inclusion in the competitive conduct rules of a national competition policy.

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13 See Chapter 12 for a discussion of the prices oversight mechanism proposed for a national competition policy.

14 A cease and desist order would be issued by the competition authority when it had reason to believe that a contravention of the Act had occurred. The recipient of the order would then be obliged to refrain from engaging in the conduct specified in the notice, unless it could be shown that the conduct did not contravene the Act. See, eg, s.5 Federal Trade Commission Act (US).

B. PRIVATE vs PUBLIC ENFORCEMENT

The current enforcement arrangements permit both private and public enforcement activities and, in the Committee's view, provide a suitable model for a national competition law.

Consideration

The arguments for private enforcement are simple. It provides a direct mechanism for injured parties to obtain compensation, and lessens the public burden of ensuring compliance with the competitive conduct rules.

There are a number of rationales for a system in which a public enforcement agency is charged with the responsibility of bringing actions in the courts against firms it considers have contravened the competitive conduct rules. The desirability of pecuniary penalties as a deterrence mechanism suggests a need for public enforcement. Private litigants would generally not have an incentive to request that pecuniary penalties be imposed and are not appropriate persons to assess the public interest in arguing for a particular level of penalty. In many restrictive practices cases the social costs of contraventions may be significant in total but be dispersed among many individuals. In such cases the costs of litigation militate against private actions,[15] again suggesting a role for public enforcement. A specialist enforcement agency may have greater resources for, and expertise in, investigating suspected conduct than private litigants, and may be entrusted with information gathering powers which it would be inappropriate to entrust to private litigants.[16] The mere existence of such an agency may enhance the deterrent value of the competitive conduct rules.

The current approach provides for both public and private enforcement of the provisions of the Act in most cases. Private

15 Class action rules, recently introduced in the Federal Court, may, however, encourage private actions in such cases.

16 Eg, the recipients of a notice from the TPC under s.155 of the Act are required to provide the requested information, notwithstanding that it may establish a contravention of the Act.

parties may not institute proceedings to obtain pecuniary penalties[17] or to obtain an injunction to prevent a merger.[18]

One submission has suggested that a private right of injunctive relief should be available in merger cases.[19] The right to obtain a private injunction to prevent a merger which contravenes the merger test was removed in 1977, on the basis that opponents of a merger could use the injunction process for purposes unrelated to competition, particularly in cases involving listed companies attempting to resist hostile takeovers. The Griffiths Committee recommended that the right be re-introduced but that takeover targets and associated persons should be excluded from the right. The Cooney Committee disagreed, concerned that it would not be possible to adequately protect against abuse by takeover targets and associated persons.

One argument in favour of a private right is that a public enforcement agency may not have full information, and that private litigants may be better placed to bring an action. But if such litigants wished to bring an action they could inform the enforcement agency.

Conclusion

The Committee has not been presented with evidence of practical difficulties caused by the absence of a private injunctive relief in merger cases, and on this basis has no difficulties with maintaining the current balance between public and private enforcement in merger cases.

C. COURTS' USE OF ECONOMIC MATERIAL

The competitive conduct rules require a number of judgments to be made about various economic facts, such as market definition, levels of market power, and the extent to which particular conduct lessens competition. Submissions to the Inquiry suggest a degree of dissatisfaction with the current court procedures for the utilisation

17 Section 77.

18 Section 80(1A).

19 Mr P Argy (Sub 60).

of economic material in the process of making such judgments.[20] In part, expressions of dissatisfaction with existing procedures may be the product of dissatisfaction with decisions in particular cases. In this respect, there will always be scope for disagreement, given the adversarial nature of a prohibition-based system.

Possible Reforms

The submissions raised a number of constructive proposals to improve current processes, many of which were not confined in their impact to competition matters but had implications for the justice system more generally. The Committee was not satisfied that any perceived difficulties peculiar to competition law and law enforcement were of sufficient magnitude to warrant major departures from current practices and procedures. Some of the proposals may warrant follow-up in the context of ongoing refinements of the justice system. The Committee outlines the six main proposals below.

1. Delegated Role for Trade Practices Tribunal

A number of submissions proposed an enhanced role for the Trade Practices Tribunal (TPT).[21] The Tribunal is not a court, is not bound by the rules of evidence, and has mixed membership of a presiding judge and appropriately qualified lay members. It is well regarded for its expertise and competence in handling complex economic issues.

The Griffiths' Committee recommended that consideration be given to enabling the Federal Court to refer economic issues to the Tribunal, more fully utilising the Tribunal's expertise and overcoming some of the perceived deficiencies of the court system. There are a number of potential difficulties with this proposal. Referring matters to the Tribunal may have the effect of increasing the time and cost of proceedings. There are constitutional difficulties with performance of judicial functions by non-judicial

20 Eg, IC (Sub 6); Prof R Baxt (Sub 18); Mr P Argy (Sub 60); TPC (Sub 69); Treasury (Sub 76); National Institute of Accountants (Sub 88); Small Business Coalition (Sub 100); Mr CA Sweeney (Sub 119); Mr R Copp (Sub 107). For a discussion of many of the issues raised by these submissions see Yeung K, "The Court Room Economist in Australian Anti-Trust Litigation: An Under Utilised Resource?" (1992) 20 *Australian Business Law Review* 461.

21 IC (Sub 6); Mr P Argy (Sub 60); Mr R Copp (Sub 107); Mr C A Sweeney (Sub 119).

bodies, and there are sound reasons for upholding this constitutional distinction: in matters with potential penalties of up to $10 million, or remedies as extreme as divestiture, it is appropriate that the assessment and balancing of evidence and the making of final decisions should lie with a judicial body.

2. Specialist Division of the Federal Court

One proposal for improving the expertise of judges involved in trade practices cases is to establish a special division of the Federal Court.[22] In addition to the existing Industrial and General Divisions, there might be a Competition or an Economic Division. Permitting judges to specialise in this particular area might have the advantage of enhancing expertise, but judges might become too specialised and, particularly with a Competition Division, may not have a sustainable case load.

Despite the difficulties associated with this proposal there may be merit in exploring this and other options for increasing the specialisation of judges involved in competition matters.

3. Assessors

Some submissions proposed the use of assessors, particularly referring to New Zealand experience.[23] Assessors, qualified by particular knowledge, skill or experience, sit with the bench during judicial proceedings to assist in the understanding of evidence. Assessors act as a source of information on matters concerning their special knowledge or skill. Judges need not indicate the nature or extent of reliance on assessors.

In New Zealand, the Administrative Division of the High Court is required to have at least one member qualified by knowledge or experience in industry, commerce, economics, law or accountancy when hearing appeals from decisions of the Commerce Commission.[24] The model appears to be successful. The NZ Court of Appeal has commented:

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22 Treasury (Sub 76).

23 Mr P Argy (Sub 60); TPC (Sub 69).

24 Section 77(9) Commerce Act (NZ).

> In providing for the appointment of lay members in appropriate cases the legislation recognises that in this complex area the knowledge and experience in a particular field or fields of a member of the court is likely to contribute to the just resolution of proceedings. It is not surprising that in the present case where, as it transpired, the parties placed great emphasis on the evidence of economists and on the impact of competition and the inhibition of competition in this industry it was considered desirable to appoint to the court a lay member with special expertise in commerce and economics ... In these circumstances we consider that the High Court, constituted as it was, was in a particularly good position to compare and assess the competing views and that its conclusions as to the acceptability and weight-worthiness of the expert opinion are entitled to great weight.[25]

Assessors in New Zealand participate in the decision-making process. This would present constitutional difficulties in Australia, where the Constitution provides that only judges may exercise judicial power. One method of addressing this problem might be to appoint as judges persons qualified by reason of their economic or business expertise. A less problematic method for the introduction of assessors would be to restrict them to a purely advisory role. One difficulty with this option is that parties are denied the opportunity to test assessors' advice to the court, although the judges might overcome this difficulty by adopting a practice of disclosing to the parties the nature of the issues raised and views expressed by the assessor, to give the parties a fair opportunity of dealing with them.

4. Court Experts

Greater utilisation of court experts was another proposal for assisting judges in their handling of economic issues.[26]

The *Federal Court Rules* permit the Court on the application of any party, to appoint an expert to inquire into and report on questions which arise in the proceedings.[27] The Court may:

(a) appoint an expert as court expert to inquire into and report upon the question;

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25 *TruTone Ltd* v *Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 at 357.

26 Mr R Copp (Sub 107).

27 Order 34, Federal Court Rules.

(b) authorise the court expert to inquire into and report upon any facts relevant to his inquiry and report on the question;
(c) direct the court expert to make a further or supplemental report or inquiry and report; and
(d) give such instructions as the court thinks fit relating to any inquiry or report of the court expert.

This option has rarely been used in practice. It may increase the costs of litigation, judges may have concerns that the choice of a court expert may be perceived as compromising the judges' impartiality, and litigants may be unlikely to seek the appointment of a neutral expert because they do not have control over this aspect of the litigation.

There seems to be little scope for improvements in the use of court experts — the existing legislation has provided opportunities for the use of court experts, but parties cannot be forced to take advantage of those opportunities.

5. Expert Witnesses

One submission suggested that existing procedures did not provide adequate latitude for parties to call their own expert witnesses.[28]

There seems little doubt that expert witnesses can enhance the court's understanding of economic issues. While making an evaluation of evidence presented to the court is inherently a matter for judges there are other areas in which expert economic evidence can be useful.

Some reforms may be desirable in the area of admissibility of expert evidence.[29] In particular, the desirability of the "basis rule" (the inadmissibility of opinion evidence based on material not already admitted) and the "ultimate issue rule" (the inadmissibility of evidence as to the ultimate issues in a case) could usefully be

28 IC (Sub 6).

29 See Yeung K, "The Court Room Economist in Australian Anti-Trust Litigation: An Under Utilised Resource?" (1992) 20 *Australian Business Law Review* 461; Blunt G, Shafron P & Kenneally B, *From Arnotts to QIW : A Study of Expert and Survey Evidence in Trade Practices Case* (paper presented at the Trade Practices Workshop, presented by the Business Law Section of the LCA, Canberra, July 1993).

examined. The basis rule can pose problems in competition cases where, for example, an expert economist discusses the principles by which market boundaries are established before the facts to which those principles relate are established. The ultimate issue rule can pose difficulties where, for example, it prevents expert economists from providing their opinions on the boundaries of a particular market, or whether conduct will substantially lessen competition.

Under these rules experts may be called to explain the economic theory underlying the process of market definition, but may not express an opinion on what the actual market is:

> Economists are able to assist the court in relation to economic principles. But once the relevant principles are expounded, their application to the facts of the case is a matter for the court. The proper definition of a market is entirely a matter of fact, the determination of which ought not to be made more protracted and expensive by the adduction of unnecessary expert evidence.[30]

In the US, expert opinion evidence is not objectionable on the ground that it embraces an ultimate issue, and there is no direct equivalent of the basis rule.[31]

The Federal Court Rules permit the relaxation of the rules of evidence in certain circumstances, but these may not be sufficiently broad to cover all cases in which expert evidence could usefully be admitted.

The ALRC considered the question of expert evidence in its reports on evidence.[32] Most of the recommendations of the final report were given effect in the Evidence Bill 1991, which was introduced into the Commonwealth Parliament but lapsed with the calling of the 1993 Federal election. If enacted the Bill would have resolved many of the current difficulties with expert opinion evidence, by modifying the "basis rule" and abolishing the "ultimate issue" rule.[33]

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30 *TPC* v *Australia Meat Holdings* (1988) ¶ATPR 40-876, per Wilcox J.

31 There is no requirement that the evidence which forms the basis of an expert's opinion be admissible in evidence, and the evidence need not be disclosed prior to the hearing.

32 ALRC, *Evidence (Interim)* (1985); *Evidence* (1987).

33 See clauses 66, 85 and 86.

The Bill codified the opinion rule, confirming that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.[34] However it also provided that the opinion rule would not apply to expert opinion wholly or substantially based on specialised knowledge gained through training, study or experience.[35] The basis rule would have been modified by allowing courts to admit evidence, including expert evidence, provisionally, where the relevance of the evidence is dependent on some other finding (in the case of expert opinion evidence, that the factual basis is as the expert asserts).[36]

The proposed amendments would have overcome many of the practical difficulties currently faced in competition cases. The Committee supports the Bill's treatment of these issues.

6. Evidence

One submission suggested that court procedures for dealing with survey evidence were inadequate.[37]

Survey evidence may assist in defining market boundaries and in determining the state of competition within the market. By avoiding the need to prepare considerable numbers of affidavits or to call witnesses, accurate and reliable surveys have the potential for significant time savings, in both the preparation for, and conduct of, court proceedings.

Historically there have been difficulties in admitting survey evidence because it has been seen as conflicting with the rule against hearsay[38] evidence, but this objection appears now to have been overcome. In the *Arnotts'* case[39] the trial judge was prepared to exercise his discretion to dispense with compliance with the rules of

34 See clause 82.

35 See clause 85.

36 See clause 66.

37 IC (Sub 6).

38 Hearsay evidence is evidence given by one person of what another person has been heard to say, as opposed to the direct evidence of that other person.

39 *Arnotts Ltd* v *TPC* (1990) 97 ALR 555.

evidence "where such compliance might occasion or involve unnecessary or unreasonable expense or delay".[40]

On appeal, the Full Court did not think it was "very profitable" to spend time in determining whether a particular survey was hearsay, reasoning that market survey techniques had now been refined to the point where they were capable of providing answers which were highly likely to be accurate (subject to a small sampling error) provided they were undertaken by experienced, professional people. In the event that a survey is hearsay, the Court felt use of the discretion was appropriate. Of course, such evidence would still only be one element in the overall picture, its importance varying from case to case.

The Full Federal Court adopted the following criteria for the adoption of survey evidence and noted that a survey which did not comply with the criteria, if admitted, should be given little weight:

> The offerer has the burden of establishing that a preferred poll was conducted in accordance with accepted principles of survey research, ie that the proper universe was examined, that a representative sample was drawn from that universe, and that the mode of questioning the interviewees was correct. He should be required to show that: the persons conducting the survey were recognised experts; the data gathered was accurately reported; the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys; the sample design and the interviews were conducted independently of the attorneys; and the interviewers, trained in this field, had no knowledge of the litigation or the purposes for which the survey was to be used. Normally this showing will be made through the testimony of the persons responsible for the various parts of the survey.[41]

Although these criteria appear to be reasonable, there may be merit in a more detailed appraisal of them. The suggestion has been made that the Federal Court should develop a practice note which would usually apply in relation to survey evidence.[42] Representatives of the Federal Court and the Law Council of Australia have conducted

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40 Order 33, rule 3 *Federal Court Rules*.

41 *Arnotts Ltd* v *TPC* (1990) 97 ALR 555, at 602-609.

42 *Interlego AG* v *Croner Trading Pty Limited* (1991) ATPR ¶41-125, per Sheppard J.

discussions with a view to preparing such a practice note. The Committee fully supports this initiative.

Apart from survey evidence, proof in accordance with the rules of evidence of all the facts necessary to define "markets" and to assess the competitive effects of conduct in those markets will frequently be cumbersome, time consuming and expensive. In this regard, the rules of evidence can at times appear to be unnecessarily obstructive, and options for avoiding the more restrictive effects of the rules have attracted some attention. That relaxation of the rules need not detract from the efficacy of the decision-making processes is illustrated by the TPT, which is not bound by the rules of evidence,[43] and the New Zealand High Court, which may receive in evidence any information which would assist it to deal effectively with the case, except in pecuniary penalty and criminal proceedings.[44]

The Federal Court Rules permit the court to dispense with the rules of evidence in certain circumstances, but it will usually hesitate to do so unless the parties agree or it is clear that none of the parties will be prejudiced. This is understandable as findings in trade practices cases may result in severe penalties and other sanctions.

It may, nevertheless, be desirable to give the court a clearer mandate to waive the rules of evidence. Proposals made by the ALRC and reflected in the Evidence Bill 1991 would provide a wide power to waive the rules of evidence in civil matters not genuinely in dispute or if unnecessary expense or delay would be caused.[45] An alternative approach might be to adopt the TPT or New Zealand High Court models and waive the rules of evidence in cases other than those involving pecuniary penalties.

Conclusion

The Committee considers that of the main proposals for refinement of court processes, three are especially worthy of further consideration: arrangements for increasing the specialisation of judges involved in competition matters; the use of assessors; and

43 Section 103(1)(c), *TPA*.

44 Section 79, Commerce Act (NZ).

45 See clauses 177 and 188.

relaxation of the rules of evidence. The Committee suggests that an appropriate consultative process be established to consider these proposals. One possible mechanism might be a working group of officials and members of the legal profession, with consultation, where appropriate, with members of the Federal Court. Examination of these proposals should not, however, warrant delay in the implementation of the Committee's other recommendations.

D. RECOMMENDATIONS

The Committee recommends that:

7.1 The remedies for the competitive conduct rules of a national competition policy be based on those currently available under the Trade Practices Act.

7.2 The arrangements for private and public enforcement of the competitive conduct rules of a national competition policy be based on those currently available under the Act.

7.3 The processes for assisting courts to make judgments on economic questions under the competitive conduct rules of a national competition policy be based on those currently available under the Act. However, without delaying the implementation of other recommendations, an appropriate consultative process could be established to consider proposals for refinement of current court procedures, including:

(a) arrangements for increasing the specialisation of judges involved in competition matters;
(b) the use of assessors; and
(c) relaxation of the rules of evidence.