

COMMONWEALTH GOVERNMENT RESPONSE TO THE REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT 1974

Part 1: Overview

The importance of competition

The object of the *Trade Practices Act 1974* (the Act) is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. The competition laws are contained in Part IV of the Act and are comprehensive and far-reaching. Broadly speaking, Part IV prohibits collusive agreements, misuse of market power, exclusive dealing and mergers that substantially lessen competition in a market. Some provisions are subject to a competition test, while other provisions prohibit conduct on a per se basis, that is, regardless of their likely effect on competition. Part VII of the Act provides for the authorisation and/or notification of otherwise prohibited conduct when that conduct is justified in the public interest, notwithstanding a lessening of competition.

Whilst various specific provisions of the Act have been reviewed in recent years, there had not been a comprehensive review of the competition provisions since the Hilmer Committee in 1993. In light of significant structural and regulatory changes that have impacted upon the competitiveness of Australian businesses, economic development and consumer interests, it was considered timely to review the competition provisions of the Act.

The Committee reviewed the competition and authorisation provisions of the Act to establish whether they meet the needs of business, consumers and the economy in the current environment or whether improvements might be made to ensure that they are effective. The Committee also had regard to the way in which the competition provisions and related aspects of the Act have been administered.

Against this background, the Government's response to the Committee's recommendations is set out below.

Recommendation 1.1 The consideration of possible changes to Australia's regulatory framework should continue to have regard to international developments in the area of competition.

Recommendation 1.2 Australian Governments should ensure that the competition provisions of the Act are applied as broadly as possible across the economy and extend to the commercial activities of governments themselves.

Recommendation 1.3 Competition provisions should be uniformly applied and measures which are specific to a particular industry should be avoided.

Recommendation 1.4 The competition provisions should not be regarded as a means of implementing an industry policy or the preservation of particular corporations that are not able to withstand competitive forces.

Government response

The Government notes the Committee's conclusion that the competition provisions in Part IV of the Act have served Australia well and that the ACCC has been commendably

vigorous in discharging its responsibility to enforce those provisions.

The Government agrees with the values expressed in Recommendations 1.1 to 1.4. The Government supports the need to make sure that our competition provisions reflect international best practice and notes the international consultation and research undertaken by the Committee in completing this review. The Government supports a broad and uniform application of the competition provisions across the economy.

The Government accepts that the competition provisions are designed to protect the competitive process rather than a specific market structure or individual competitors and that competition laws should be distinguished from industry policy. Competition laws should not be seen as a means of achieving social outcomes unrelated to the encouragement of competition, or of preserving businesses that are not able to withstand competitive forces.

Recommendation 1.5 Businesses should seek to ensure that voluntary compliance programs are provided for their staff and the ACCC should review the assistance it is able to provide to business in this regard in consultation with interested parties through the reconstituted consultative committee recommended by the Committee.

Government response

The Government accepts the principle expressed in this recommendation. Compliance is enhanced by businesses ensuring staff understand the competition provisions.

Part 2: Mergers

Merger clearance under section 50

Section 50 of the Act prohibits mergers that would have the effect or be likely to have the effect of substantially lessening competition in a market. In the absence of a formal statutory arrangement, a system has evolved under which the ACCC provides informal clearances for proposed mergers which it considers would not be in breach of section 50.

The Committee did not consider that any amendment to the current section 50 mergers test was necessary, but did recommend changes to the ACCC's merger processes.

While the Committee found that there is generally widespread support for the informal clearance system, which is praised for its relative speed and efficiency, it also found significant weaknesses with the system. These weaknesses are evident in the absence of an effective mechanism for review and the absence of reasons for the ACCC's decisions.

Recommendation 2.1 The ACCC should provide adequate reasons for its decisions (taking care to protect any confidentiality) in the informal clearance process when requested to do so by the parties and in cases where it rejected a merger or accepted undertakings.

Government response

The Government supports the provision of reasons by the ACCC for its informal clearance decisions when requested by the applicants and in cases where it has rejected a merger or accepted undertakings. This will improve the process by promoting a better understanding of the ACCC's decisions and reducing uncertainty.

Recommendation 2.2 A voluntary formal clearance process should be introduced, parallel to the existing informal clearance process, in relation to merger applications requiring consideration under section 50. This formal clearance process should have the following features:

- 2.2.1 on application by the parties, the ACCC might grant a binding clearance upon the basis that a proposed merger would not contravene section 50. The applicant would have immunity from proceedings by any party while complying with any conditions specified by the ACCC as a condition of the approval of the merger. The ACCC would be required to monitor compliance with these conditions;**
- 2.2.2 the information required for such an application, which could be set out in revisions to the ACCC's Merger Guidelines, should not be onerous but should be sufficient for the ACCC to make a reasoned assessment;**
- 2.2.3 the Act should require the ACCC to make a decision within 40 days which would allow the ACCC to consult with third parties. If a decision is not provided within 40 days, the clearance of the merger should be deemed to be refused. The 40 day limit should be capable of extension only at the request of the applicant; and**
- 2.2.4 only the applicants should be granted a right of review on the merits by the Tribunal. The application for review should be made within 14 days of the ACCC's decision. The hearing before the Tribunal should be on the material before the ACCC and not a hearing de novo. Decisions of the Tribunal should be made within 30 days. The Tribunal should be able to grant or reject a clearance or grant a clearance subject to conditions.**

Government response

The Government agrees that the creation of a formal, but not compulsory, clearance process, operating in parallel with the existing informal system, will retain the advantages of the current system but will overcome some of its disadvantages.

An optional formal system will provide parties with an alternative process for progressing their merger. Parties will be able to use the informal system and request reasons and/or use the optional formal system. Under the formal system parties would be presented with reasons for the ACCC's decision and be given the opportunity to have the Tribunal review an unfavourable decision. The decisions of the Tribunal will also provide guidance to the ACCC in its approach to clearance upon questions such as the definition of the relevant market or the lessening of competition likely to result from the merger. Under this system, the ACCC will have 40 days to make a decision. This will increase the level of certainty for business.

Merger authorisation process

Mergers that would otherwise contravene section 50 may be authorised where the public benefit arising from the merger is such that the proposal ought to proceed.

Currently the ACCC is responsible for assessing merger authorisations. The Committee found that this process has been less than satisfactory, largely as a result of the time taken by the ACCC to reach a decision and the risk of third party intervention by way of review by the Tribunal. These factors have rendered the authorisation process

commercially unrealistic for many merger proposals. The Committee noted that only five authorisations of mergers have been sought from the ACCC since 1995.

Recommendation 2.3 Applications for the authorisation of mergers should be made directly to the Tribunal. This process should have the following features:

2.3.1. applications should be considered within a statutory time limit of three months;

2.3.2. there should be no review on the merits of the Tribunal's decision; and

2.3.3. the Tribunal should have the power to remit an application for consideration by the ACCC if it were of the view that the application required a decision solely on competition issues under section 50 rather than a decision concerning public benefit and the ACCC had yet to formally examine the matter.

Government response

The Government agrees that direct applications to the Tribunal will greatly reduce the time required to consider merger authorisations. It will also meet the perception of some parties that the ACCC is not able to look afresh at authorisation applications based upon public benefit where it has previously considered a matter under section 50. If third party interests are considered as part of the Tribunal's assessment, rather than through an appeal process, great savings in time and certainty of outcome will be achieved.

Part 3: Market conduct

Misuse of market power

Section 46 of the Act prohibits the misuse of market power, which requires the demonstration of an anti-competitive purpose. The addition of an effects test was proposed in a number of submissions because of the perceived difficulty of proving purpose.

The Committee recommended against the amendment of section 46 to introduce an effects test. The Committee was of the view that the introduction of an effects test would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive behaviour. Overseas experience, so far as it is of assistance, did not indicate that the introduction of an effects test would be appropriate.

In March 2003, the Committee reaffirmed its recommendations in light of the High Court decision in *Boral v ACCC*, maintaining that no amendment should be made to section 46, although the position could be reviewed after a number of other cases are determined, such as *Safeway*, *Rural Press* and *Universal Music*. The Committee noted and endorsed observations by the High Court in the *Boral* case that the purpose of section 46 is to promote competition and that successful competition is bound to cause damage to some competitors.

Recommendation 3.1 No amendment should be made to section 46.

Recommendation 3.2 The ACCC should give consideration to issuing guidelines on

its approach to Part IVA.

Recommendation 3.3 The ACCC should consult with industry and issue guidelines on the application of Part IV to intellectual property.

Government response

The Government acknowledges the extensive consideration given to possible amendments to section 46, including the introduction of an effects test, by this and previous reviews, and supports the recommendation that no amendment should be made to section 46.

The Government supports the development of guidelines by the ACCC.

Price discrimination

Price discrimination occurs when like goods or services are provided to different people at different prices and the differences in price are unrelated to the costs of providing the goods or services. Price discrimination can be pro-competitive or anti-competitive. To be anti-competitive, the corporation engaging in price discrimination must have market power. For these reasons, the Committee concluded that it was appropriate to consider the effect of price discrimination on competition on a case by case basis in accordance with section 46. The Committee also concluded that the principle of ‘like terms for like customers’ did not offer a suitable basis for regulation of the grocery industry.

Recommendation 4.1 No change should be made to the Act in relation to price discrimination.

Government response

The Government accepts the Committee’s reasoning and hence this recommendation.

Cease and desist orders

Cease and desist orders have been described by proponents as emergency administrative cessation of conduct orders that would be issued by the ACCC if it considered that a breach, or threatened breach of the Act has occurred. The Committee found no evidence that the existing process of obtaining an interim injunction, to cease conduct that may potentially be in breach or threatened breach of certain parts of the Act, was cumbersome or overly difficult. Moreover, the Committee was of the view that it was not clear that the proposed cease and desist powers would be any speedier or more efficient than the existing process of obtaining an interim injunction.

Recommendation 5.1 The Act should not be amended to introduce a power to make cease and desist orders or to extend the powers of the ACCC under section 155 of the Act so that they apply after the commencement of judicial proceedings.

Government response

The Government accepts the view of the Committee that the case for cease and desist orders has not been made and that the existing provision of obtaining an interim injunction has not been demonstrated to be deficient.

Authorisation

Non-merger market conduct that would otherwise contravene the competition provisions may be granted immunity through authorisation. Authorisation enables efficient or welfare enhancing arrangements, such as joint ventures or collective bargaining processes, to be protected even though they may reduce competition.

Depending on the provision that would otherwise be contravened, conduct may be authorised by the ACCC either because the public benefit arising from the conduct outweighs the detriment caused by the lessening of competition or because the public benefit arising from the conduct is such that the proposal ought to proceed. An exception is misuse of market power, which cannot be authorised. Any person with sufficient interest, including third parties, may seek review of the ACCC's authorisation determinations before the Tribunal.

The Committee agreed that the considerable time and expense associated with non-merger authorisation applications were of concern. A large part of the expense was said to be associated with the costs of preparing an authorisation application, which may be addressed through a better understanding of the process.

Recommendation 6.1 The Act should be amended to include a time limit of six months for the consideration of non-merger applications for authorisation by the ACCC, and consideration should be given to imposing a time limit on any review by the Tribunal.

Recommendation 6.2 The ACCC should be given a discretion to waive, in whole or in part, the fee for filing a non-merger application for authorisation where it would impose an unduly onerous burden on an applicant.

Recommendation 6.3 The ACCC should develop an informal system of consultation with non-merger applicants for authorisation designed to provide those persons with guidance about the authorisation process and the requirements of the Act.

Government response

The Government considers the non-merger authorisation provisions to be an important feature of the Australian system of competition regulation. These provisions allow a flexible response to evolving market situations, including industries undergoing structural change.

The Government will amend the Act to include a time limit of six months for the consideration of non-merger applications for authorisation by the ACCC. The ACCC will be provided with a discretion to waive, in whole or in part, the fee for filing a non-merger application for authorisation. The Government supports the development by the ACCC of an informal system of consultation with non-merger applicants for authorisation.

These changes will improve the accessibility and effectiveness of the authorisation process by reducing the time and cost involved in obtaining authorisation.

Collective bargaining

Any contract, arrangement or understanding (agreement) that has the purpose, effect or likely effect of substantially lessening competition will breach the Act. Collective bargaining agreements are therefore constrained by the Act because they will often, for example, involve agreements between competitors on the price of goods or services. Such agreements are deemed to substantially lessen competition. However, the Committee found that collective bargaining by small businesses negotiating with big business may also benefit the community. Such arrangements may provide competing small businesses with sufficient bargaining power to balance that of the big businesses

with which they have to deal.

Recommendation 7.1 A notification process should be introduced, along the lines of the process provided for by section 93 of the Act, for collective bargaining by small businesses (including co-operatives that meet the definition of small business) dealing with large business.

Recommendation 7.2 A transaction value approach should be adopted to provide a definition of small business. Initially the amount of transactions should be set at \$3 million but be variable by the Minister by regulation.

Recommendation 7.3 A period of 14 days should be required to elapse before a notification takes effect.

Recommendation 7.4 Provision should be made for third parties to make a collective bargaining notification on behalf of a group of small businesses.

Government response

The Government accepts these recommendations and will develop a notification process for collective bargaining by small businesses dealing with large business. While small business will retain access to the authorisation provisions, the proposed notification process is to be based on the Committee's recommendations and will be speedier and simpler for small business than existing processes. To ensure that costs are kept to a minimum for small businesses, the notification fee is to be set at an appropriately low level. Immunity is to extend for three years from the date of notification, and third party representative actions will be allowed. It will aim to provide an appropriate balance of power where small businesses are competing or dealing with businesses that have substantial market power.

Per se prohibitions

Certain types of agreements between competitors are prohibited per se, that is, they are deemed to be illegal regardless of their likely effect on competition. These agreements include those that contain exclusionary provisions, fix prices or involve third line forcing. Where net public benefits arise from such agreements they may be authorised.

Exclusionary provisions

An exclusionary provision has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons either altogether or in particular circumstances or on particular conditions.

Recommendation 8.1 The Act should be amended so that it is a defence in proceedings based upon the prohibition of an exclusionary provision to prove that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition.

Recommendation 8.2 The Act should also be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates, to a competitor or competitors, actual or potential, of one or more of the parties to the exclusionary provision.

Government response

The Government agrees with these recommendations. Although much of the behaviour covered by the present prohibition may damage competition, there is a risk that the prohibition may also be capturing some behaviour that is not detrimental to competition.

To ensure the prohibition only ever stops harmful behaviour, the Government will establish a competition defence, as outlined in Recommendation 8.1. In addition, the prohibition will be confined to those agreements that target competitors, actual or potential, of the parties to the agreement.

Third line forcing

Third line forcing occurs when goods or services are sold, or sold at a discount, but only if the purchaser also buys other goods or services from a third person. The petrol discounts offered by some supermarkets are an example of third line forcing conduct.

Recommendation 8.3 The prohibition of third line forcing should cease to be a per se prohibition and be made subject to a substantial lessening of competition test.

Recommendation 8.4 Related companies should be treated as a single entity for the purposes of section 47.

Recommendation 8.5 Section 93(2) should be repealed.

Government response

The Government accepts that the prohibition on third line forcing should no longer be prohibited per se because third line forcing can be beneficial and pro-competitive. The Government notes that very few of the hundreds of notifications received annually by the ACCC are opposed. This amendment will generate benefits for business by reducing the need for notifications, generating savings in terms of cost and time. The technical amendments outlined in Recommendations 8.4 and 8.5 will improve the operation of the third line forcing provisions.

Joint ventures

Goods and services can be supplied more efficiently by businesses cooperating in joint ventures that provide scale and scope not achievable by any single business. The businesses involved will usually need to agree on the price to be charged for the venture's output. Consequently, the Act recognises the need to exempt joint ventures from the per se prohibition of agreements that fix prices.

The existing joint venture exemption was introduced primarily to benefit ventures in the mining and manufacturing sectors. However, this exemption was found by the Committee to be too narrow for many newer forms of joint venture, such as those found in e-commerce. The Committee was of the view that many joint ventures may be pro-competitive, particularly when they are employed as a means of developing new products or services, or producing existing products or services more efficiently. Although the Committee was also conscious of the potential for anti-competitive effects, it felt that on balance the existing provisions of the Act to be too narrow.

Recommendation 9.1 The Act should be amended by substituting for the current exemption to section 45A(1) provided by section 45A(2), a provision that section 45A(1) does not apply to a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition.

Recommendation 9.2 The ACCC should develop and issue guidelines outlining its approach to joint ventures.

Government response

To ensure that legitimate joint ventures are not impeded by the Act, the Government proposes a competition defence similar to that set out in Recommendation 9.1. The Government supports the issuing of guidelines by the ACCC.

Dual listed companies

A dual-listed company (DLC) operates in a similar manner to an entity established via a merger and involves two corporations, one listed on a domestic stock exchange and the other listed on a foreign stock exchange, contracting to operate their businesses as a unified enterprise. Unlike the corporate groups established by merger, DLCs are not considered a single economic entity for the purpose of the competition provisions.

Recommendation 9.3 The Act should be amended to allow intra-party transactions in a DLC to be treated on the same basis as related party transactions within a group of companies. Consistently with this, the aggregate size of the DLC should be recognised for the purposes of assessing the entity's market power.

Government response

The Government will amend the Act as proposed to ensure consistency between DLCs and corporate groups.

Part 4: Penalties

Criminal penalties

'Hard core' or serious cartel behaviour, such as price fixing, can cripple competition and harm the economy. The competition provisions already prohibit such behaviour. The Act enables the Federal Court to impose significant civil penalties for any breach, including pecuniary penalties of up to \$10 million for corporations and \$500,000 for individuals.

Such penalties aside, many submissions supported the introduction of criminal penalties, including imprisonment, for serious cartel behaviour, primarily because criminal sanctions were said to be better able to deter corporations and individuals from engaging in such behaviour.

Other submissions to the Committee questioned the need for criminal sanctions and highlighted the problems that would have to be addressed if criminal sanctions were to be introduced. These problems include developing an appropriately defined criminal offence and combining any such offence with a workable leniency or amnesty policy (to encourage cartel participants to reveal the existence of cartel behaviour). Problems also relate to the concurrent operation of civil and criminal sanctions, and the development of a workable method of combining a clear and certain leniency policy with a criminal regime.

Recommendation 10.1 The Committee is of the view that solutions must be found to the problems identified by it before criminal sanctions are introduced for serious cartel behaviour. The problems are, importantly, the development (preferably by a joint body representing the Director of Public Prosecutions (DPP), the Attorney-General's Department, the ACCC and the Treasury) of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear

and certain leniency policy with a criminal regime. Subject to this proviso, the Committee recommends the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.

Government response

The Government accepts, in principle, that criminal penalties may be more effective than civil penalties in deterring people from engaging in serious cartel behaviour.

The Government will further consider the introduction of criminal penalties for serious cartel behaviour. Appropriate solutions must be found to the problems identified by the Committee. In addition, to enhance the welfare of Australians, any new criminal penalty must be applied broadly and must not impose significant additional uncertainty and complexity for business. Any new offence must also work well in the context of the Australian legal system, because it will only deter if the risk of conviction and substantial penalty are real.

Civil penalties

The Act enables the Federal Court to impose significant civil penalties for any breach of the competition provisions, including pecuniary penalties of up to \$10 million for corporations and \$500,000 for individuals. In addition, the Federal Court may make other orders including the cessation of unlawful conduct and the payment of compensation or damages. Civil community service orders, probation orders and publicity orders may also be made.

The Committee concluded that comparable jurisdictions enable Courts to deter illegal behaviour by imposing maximum penalties upon corporations that are either a multiple of the gain or a proportion of the corporation's turnover. The Committee also supported recent New Zealand amendments providing an option for Courts to exclude individuals from being involved in the management of a corporation and prohibiting corporations from indemnifying their officers, employees or agents from the payment of a pecuniary penalty.

Recommendation 10.2 The Act should be amended so that:

- 10.2.1 the maximum pecuniary penalty for corporations be raised to be the greater of \$10 million or three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any);**
- 10.2.2 the Court be given the option to exclude an individual implicated in a contravention from being a director of a corporation or being involved in its management; and**
- 10.2.3 corporations be prohibited from indemnifying, directly or indirectly, officers, employees or agents against the imposition of a pecuniary penalty upon an officer, employee or agent.**

Government response

No corporation should benefit from anti-competitive behaviour. The Government will raise the maximum pecuniary penalty applicable to corporations. Also as proposed, the Government will introduce an option for Courts to exclude implicated individuals from being a director of a corporation or being involved in its management, and will address avoidance issues by prohibiting corporations from indemnifying officers, employees or agents.

Part 5: Administration

Accountability of the ACCC

The Committee's terms of reference required it to examine the administration as well as the policy of the competition provisions. More submissions dealt with the ACCC's administration of the Act than with the Act itself.

Recommendation 11.1 Consideration should be given to the establishment of a single Joint Parliamentary Committee to oversee the ACCC's administration of the Act.

Government response

The Government accepts this recommendation. The Government notes the Committee's view that the ACCC has been commendably vigorous in discharging its responsibilities under the Act.

The Government encourages the Parliament to establish a Joint Parliamentary Committee to provide further oversight of the administration of the Act by the ACCC. The Joint Committee would be well placed to develop a special understanding of the responsibilities of the ACCC and of the concerns of the parties with whom it deals.

Recommendation 11.2 The Act should be amended to establish a consultative committee to advise the ACCC on the administration of the Act. The consultative committee should be constituted so that it is convened by an independent chairperson appointed by the Treasurer. The chairperson should appoint the members of the committee in consultation with the ACCC. The committee should report to Parliament by way of a dedicated section of the ACCC's annual report.

Recommendation 11.3 An associate commissioner should be appointed to the ACCC to receive and respond to individual complaints about the administration of the Act and to report each year in the ACCC's annual report.

Government response

The Government accepts the principle of putting in place effective consultative and complaints handling arrangements. The Government has commissioned a report by Mr John Uhrig, AC on the corporate governance of Commonwealth statutory authorities and office holders, which is expected to report shortly. After considering that report, the Government will announce a more specific response on these recommendations.

Recommendation 11.4 Consideration should be given to the manner in which the remuneration of commissioners is determined to ensure that the Government is able to attract as commissioners candidates of sufficient calibre.

Recommendation 11.5 The ACCC should consider the temporary placement of ACCC staff with other parties to develop staff resources.

Government response

The Government believes that remuneration should be set by the Remuneration Tribunal. The Government notes the Remuneration Tribunal's review of the entitlements of office holders in 2002 (determination 23/2002). This determination has greatly increased the flexibility of remuneration packages which may be offered to full-time office holders (including ACCC Commissioners). Full-time office holders may now convert non-salary benefits into an additional salary payment and may also receive remuneration in lieu of performance pay. Accordingly, the need for the review of ACCC remuneration has been addressed.

The Government accepts Recommendation 11.5 and encourages the ACCC to build upon its existing arrangements for exchanges with other regulatory authorities. The Government also encourages the ACCC to develop staff exchanges with key groups with which it interacts.

Recommendation 11.6 The ACCC should review its service charter, in conjunction with the proposed consultative committee, in the light of the outcome of this review and the relevant recommendations of the Wilkinson Review.

Government response

The Government agrees that the ACCC should review its service charter. Subject to the Government's specific response to recommendation 11.2, there is no objection to the proposed consultative committee contributing to such a review in order that the concerns of interested parties may be taken into account.

Use of the media

The Committee noted that the ACCC has been successful in raising the community's awareness of the importance of competitive markets and in encouraging compliance with the Act. It also noted that many of the submissions it received expressed concern regarding the manner in which the ACCC releases information and makes comments to the media.

Recommendation 12.1 A media code of conduct should be developed through the proposed restructured consultative committee.

Recommendation 12.2 The media code should be based on the following principles:

- 12.2.1 the public interest is served by the ACCC disseminating information about the aims of the Act and the ACCC's activities in encouraging and enforcing compliance with it. This extends to information about proceedings instituted by it, but an objective and balanced approach is necessary to ensure fairness to individual parties;**
- 12.2.2 the code should cover all formal and informal comment by ACCC representatives;**
- 12.2.3 whilst it may be necessary for the ACCC to confirm or deny the existence of an investigation in exceptional circumstances, the ACCC should decline to comment on investigations;**
- 12.2.4 with the object of preserving procedural fairness, commentary on the commencement of court proceedings by the ACCC should only be by way**

of a formal media release confined to stating the facts; and

12.2.5 reporting the outcome of court proceedings should be accurate, balanced and consistent with the sole objective of ensuring public understanding of the court's decision.

Government response

The Government accepts this recommendation. The Report notes the Committee's observation that the ACCC should exercise care in publicising particular matters to ensure that there is no unfairness to the parties involved. The development of a code of conduct governing the ACCC's use of the media will assist the ACCC's relationship with business and consumers. Subject to the Government's specific response to recommendation 11.2, the proposed consultative committee could appropriately contribute to the development of this code of conduct. The principles outlined in Recommendation 12.2 provide a useful foundation for developing this code of conduct.

ACCC investigation powers

Section 155 of the Act provides the ACCC with the power to obtain information, documents and evidence in the course of investigating possible contraventions of the Act and for use in proceedings under the Act. The Committee identified concerns that the ACCC's investigative powers lack adequate safeguards, particularly in relation to section 155(2), which provides the ACCC with the power to enter premises and inspect documents without the need for a warrant.

Recommendation 13.1 The ACCC should continue to give careful consideration to the financial implications of requests for information that are made to businesses consistent with the ACCC's guidelines on this matter.

Government response

The Government accepts this recommendation. While the ACCC needs broad investigative powers for the purpose of detecting and prosecuting contraventions, it should, nevertheless, be concerned about the effect of information requests upon recipients.

Recommendation 13.2 The function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice should be delegable to senior staff of the ACCC.

Government response

The Government supports the flexibility provided by this recommendation because ACCC Commissioners need not be directly involved in the detail of particular investigations.

Recommendation 13.3 Section 155(2) of the Act, which provides for the ACCC to enter premises and inspect documents, should be amended to:

13.3.1 require the ACCC to seek a warrant from a Federal Court Judge or Magistrate for the exercise of these powers; and

13.3.2 provide the ACCC with the power to search for and seize information.

Government response

The ACCC has extensive powers under section 155(2) to enter premises and inspect documents but these do not require that a warrant be sought. Regulatory power must be

matched with appropriate accountability.

The Act will be amended to require the ACCC to seek a warrant, although these should be capable of issue by a State or Territory judicial officer. Providing the ACCC with the power to search and seize information will provide greater clarification and certainty, as the elements of these powers are generally well known.

Recommendation 13.4 Section 155 should also be amended to:

13.4.1. extend the availability of the ACCC's investigative powers to circumstances where the ACCC is considering the revocation of an authorisation under sections 91B and 91C; and

13.4.2 repeal the redundant section 155(4).

Government response

The Government agrees with this recommendation. These technical amendments will improve the general application of the ACCC's investigative powers.

Recommendation 13.5 It should be made explicit in the Act that section 155 does not require the production of documents to which legal professional privilege attaches.

Government response

The Government agrees with this recommendation. Preserving legal privilege is in the public interest because it facilitates the obtaining of legal advice and promotes the observance of the law. This recommendation is consistent with the finding of the High Court in *ACCC v. Daniels Corporation International*.