Training Workshop on Competition Policy and Law Administration for staff and members of the Trade Practices Investigation Commission

Addis Ababa

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Understanding Competition Laws of Select Countries: Australia

Day Four

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Note on the coverage of this paper

This paper is not a comprehensive account of the entire *Trade Practices Act 1974* (TPA). The author has confined this paper to those areas of the TPA that he thought would be most relevant to this training workshop. The principal source for the content of this paper are various publications of the Australian Competition and Consumer Commission, most of which are available without cost from the ACCC's web site www.accc.gov.au The TPA can be found at: http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/index.html#longtitle

Useful sites for Australian Commonwealth legislation are: http://www.austlii.edu.au/ and http://www.comlaw.gov.au/

This paper reflects the personal views of the author and not necessarily those of his employer, the Australian Competition and Consumer Commission (ACCC).

Introduction to the Trade Practices Act

The *Trade Practices Act 1974* (TPA) is the principal competition law in Australia and the principal consumer protection law of general application at the federal level. The stated aim of the TPA is to enhance the welfare of Australians by promoting competition and fair trading and providing for consumer protection. I note that similar objectives are referred to in the preamble to *Proclamation No. 329/2003 Trade Practices Proclamation* (TP Proclamation) of the Federal Democratic Republic of Ethiopia.

The TPA deals with almost all aspects of the marketplace: the relationships between suppliers, wholesalers, retailers, competitors and customers. It covers unfair market practices (including both anti-competitive practices and unfair trade practices), industry codes, mergers and acquisitions of companies, product safety, product labelling, price monitoring, and the regulation of industries such as telecommunications, gas, electricity and airports.

I note that the TP Proclamation also has a wide coverage which includes some but not all of the areas covered by the TPA plus some additional areas not addressed by the TPA. Areas covered by both laws include anti-competitive practices and unfair trade practices and product labelling. While many of the prohibitions on anticompetitive conduct and unfair trade practices are common to each law there are some differences in coverage, form and detail.

Areas covered by the TP Proclamation but not addressed by the TPA included the power to regulate prices of basic goods and services, the distribution of basic goods and receipting of goods and services. Areas covered by the TPA but not addressed by the TP Proclamation include industry codes, mergers and acquisitions of companies, product safety, price monitoring, and the regulation of specific industries.

As a general proposition the TPA applies to almost all commercial activity in Australia. It applies to Federal Government whenever it is carrying on a business activity. It does not apply when the Government conduct is not in the course of business, for example the implementation of government policy. I note that this application is somewhat wider than that of the TP Proclamation.

The Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) is the Federal government agency established to administer and enforce the TPA. This includes investigating potential contraventions of the TPA, advocating the TPA, educating business and consumers and other roles set out in the TPA including adjudication.

The ACCC does not act on behalf of particular interests. It does not provide professional or commercial advice, mediation or conciliation services.

In most respects the ACCC appears to have similar responsibilities to the Investigation Commission. However, unlike the Investigation Commission the ACCC does not have the power to determine contraventions of the TPA nor to impose sanctions. Under the TPA the power to determine contraventions of the TPA or to impose sanctions the responsibility of the Federal Court of Australia.

Summary of the principal elements of the Trade Practices Act

The areas for the TPA that are described below are:

- Anti competitive conduct
- Anti competitive mergers
- Industry codes of conduct (Part IVB)
- 'Consumer protection' provisions including prohibitions on unfair trade practices
- Access regimes
- Authorisation

Anti competitive conduct

The restrictive trade practices provisions contained in Part IV of the Act—ss. 45 to 50A—prohibit the following types of anti-competitive conduct. However, as will be explained below, some types of anti-competitive conduct can be authorised or cleared by the ACCC.

Price fixing and primary boycotts

Horizontal agreements affecting competition—these are prohibited if they have the purpose or effect of substantially lessening competition. Prohibited outright are:

- most price agreements
- agreements containing exclusionary provisions, commonly known as primary boycotts, that is, collective refusals to deal with another party.

Price fixing agreements between competitors may be authorised if significant benefit to the public can be established.

I note that the types of agreements proscribed by Article 6 of the TP Proclamation address similar conduct but do not appear to restrict the prohibitions to agreements between persons at the same functional level (i.e. actual or potential competitors).

Secondary boycotts

These are prohibited if their purpose is to cause substantial loss or damage to a business, or a substantial lessening of competition in a market. They generally involve action by two persons, in concert, engaging in conduct that hinders or prevents a third person from supplying to, or acquiring goods or services from, a fourth person.

Misuse of market power

Section 46 of the TPA (Misuse of market power) addresses the type of conduct covered by the 'Abuse of Dominance' provisions (Article 11) of the TP Proclamation. Under the TPA merely having a "substantial degree of market power" is not prohibited. However, a corporation with a *substantial degree of market power* is prohibited from *taking advantage* of this power to eliminate or damage an actual or potential competitor, prevent the entry of a person into any market, or deter or prevent a person from engaging in competitive conduct in any market. In many jurisdictions (including Ethiopia) the type of conduct sought to be restrained by the 'misuse of market power' provisions is referred to as 'abuse of dominant position'.

The TPA provides less specific guidance as to what might constitute 'misuse of market power' (or 'abuse of dominant position') than the TP Proclamation. The TP Proclamation also includes some conduct that is not normally of concern in Australia such as 'hoarding, diverting or withholding goods from normal trade channels'.

Interestingly the TPA provisions against misuse of market power also extend to companies involved in trans-Tasman trade, whether based in Australia or New Zealand. Australian legal proceedings can be heard in New Zealand and vice versa. This extension of application reflects a high level of integration between to two economies.

Recent amendments to s. 46

Section 46 has been amended to provide that a corporation must not take advantage of a substantial degree of market power, either in the market in which the power is held, or any other market, for a proscribed purpose. The matters a court may have regard to in determining the degree of market power that a corporation has in a market, or may take into consideration when determining whether a corporation has misused its market power, have been expanded.

Section 46 now provides that a body corporate may have a substantial degree of market power even though it does not substantially control the market or does not have absolute freedom from constraint by the conduct of its competitors, suppliers or customers. Also, more than one corporation may have a substantial degree of power in a market.

Anti-competitive below-cost pricing by corporations with substantial market share is the subject of several recent amendments. A corporation with a substantial share of the market must not supply or offer to supply goods or services for a sustained period at a price below the relevant cost of the supply to the corporation for a specified anti-competitive purpose. Also, a court may have regard to the supply of goods or services by a corporation for a sustained period at a price below the relevant cost of the supply to the corporation, and the reasons for that conduct, when determining whether a corporation has breached s. 46(1). In considering whether a corporation has a substantial market share, the court may have regard to the number and size of competitors in the market.

Anticompetitive vertical arrangements

s. 47 of the TPA addresses anticompetitive vertical arrangements between persons at different functional levels, for example between producers and wholesalers or between wholesalers and retailers. It is unlawful for a supplier to attempt directly or indirectly to interfere with the freedom of buyers to buy from other suppliers or to sell to whom they choose, for example by imposing territorial or customer restrictions on the buyer *where that conduct will substantially lessen competition*.

Similarly, buyers cannot impose restrictions on the freedom of suppliers to sell as they wish.

Note that under the TPA the prohibitions on anticompetitive vertical conduct, with one exception noted below, are not *per se* contraventions. In contrast the types of agreements proscribed by Article 6 of the TP Proclamation appear on first reading of the provided English language text to capture some vertical agreements as per se contraventions, for example Article 6 (2)(c)&(d).

Supplying goods or services on condition that the buyer will acquire other goods or services from another unrelated supplier is prohibited outright regardless of its effect on competition (third line forcing). However, this conduct can be notified to the ACCC, and may be authorised on public benefit grounds.

Resale price maintenance

A supplier must not directly or indirectly fix a price below which resellers may not sell or advertise their products or services, for example, by threatening to cut off supplies or actually cutting them off. Two exemptions from this prohibition are genuinely recommended prices and loss leader selling. Setting a maximum resale price is not prohibited.

However, resale price maintenance on both goods and services may be authorised provided it delivers a benefit to the public such that it should be allowed to occur.

Refusing to supply consumers

In general, businesses may decide for themselves with whom they wish to deal. The TPA does not give anyone an absolute right to be supplied, whatever the circumstances. There is no automatic right to be supplied and there is no obligation on a business to justify its decision to refuse supply.

Enforcement and sanctions

The ACCC can bring a civil action in the Federal Court seeking the imposition of pecuniary penalties for anti-competitive conduct. For a corporation the penalties are whichever is the highest of:

- AU$10 million
- three times the value of the benefit
- 10 per cent of annual turnover.

For an individual the maximum penalty is AU$500 000.

(AU$1 is approximately the same as US$1)

The ACCC can also seek injunctions or ancillary orders.

The ACCC may take representative action and seek other orders including compensation for third parties when there has been a contravention of Part IV (other than the secondary boycott provisions ss. 45D to 45DE).

Individuals and corporations can, through private action, seek various remedies from the Federal Court for breaches of the restrictive trade practices provisions of Part IV of the Act. The remedies include injunction (except for mergers), damages, ancillary orders, or, in relation to a merger, divestiture.

Interestingly sanctions for contraventions of the TPA do not include suspension or cancellation of business licence. In Australia general business registration is covered by the *ASIC Act* and State/Territory legislation and most specific business licensing (eg trades and professions, food or pharmaceutical production, dangerous goods etc) are regulated by State/Territory legislation.

Anti competitive Mergers

Australian *competition policy* recognises that mergers perform an important role in the efficient functioning of the economy. They allow firms to achieve efficiencies such as economies of scale, synergies and risk spreading. They also provide a mechanism by which under-performing firms and managers are replaced by better performing ones.

However, in some cases mergers may also have anti-competitive effects by altering the structure of markets and therefore the incentives for firms to behave in a competitive manner. Section 50 of the TPA addresses the issue of anticompetitive mergers. I note that there is no similar Article in the TP Proclamation. Consequently I have included an expanded explanation of the anticompetitive merger provisions.

Section 50 of the TPA

Mergers are only prohibited if they would have the effect, or likely effect, of substantially lessening competition in a market. However, such mergers can be cleared by the ACCC or authorised by the Australian Competition Tribunal in certain circumstances.

Section 50 provides that:

(1) a corporation must not directly or indirectly:

(a) acquire shares in the capital of a body corporate or

(b) acquire any assets of a person.

If the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

(2) a person must not directly or indirectly:

(a) acquire shares in the capital of a corporation or

(b) acquire any assets of a corporation.

- If the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Section 50 applies to the following types of acquisitions:

- acquisitions of shares or assets within Australia including (but not limited to) shares in Australian companies, domestic businesses, local intellectual property such as trademarks and local plant and equipment
- acquisitions of shares or assets wherever situated if the acquirer is incorporated in Australia, carries on business in Australia, is an Australian citizen or is an ordinary resident in Australia.

Types of merger reviews

With the introduction of the formal clearance process in 2007, merger parties now have three main avenues available to have a proposed acquisition or merger considered and assessed under the TPA — these are listed below.

In addition to the three options listed below, as there is no legislative requirement that parties notify the ACCC of a proposed acquisition, merger parties also have the option of proceeding with a merger without seeking any regulatory consideration. However, pursuing this option may put merger parties at risk of the ACCC or other interested parties taking legal action under s. 50 on the basis that the merger would have the effect or likely effect of substantially lessening competition in one or more substantial markets.

Merger parties are encouraged to approach the ACCC on a confidential and informal basis as soon as there is a real likelihood that a proposed acquisition may proceed, to discuss possible competition issues and options for having the matter considered. It is imperative that parties choose from the outset whether to pursue either an informal or a formal merger clearance, not both.

Application to the ACCC for informal merger clearance under section 50

Consideration of merger proposals on an informal basis provides the merger parties with the ACCC's informal view on whether a particular proposal is likely to breach s. 50 and, by implication, whether the ACCC would challenge the merger in the Federal Court of Australia. An informal view by the ACCC not to oppose a merger or acquisition does not provide merger parties with protection from legal action by the ACCC or other parties under s. 50. There is no review mechanism available to the merger parties or third parties to appeal an informal merger clearance decision by the ACCC.

If the ACCC considers that an acquisition contravenes s. 50 of the Act and the parties do not agree to modify or abandon the acquisition, the ACCC can apply to the Federal Court for an injunction, divestiture or penalties.

For further details, see the ACCC's *Merger review process guidelines July 2006*.

Application to the ACCC for formal clearance of a proposed merger

Section 95AC of the Act provides that:

> The ACCC may grant a clearance to a person:
>
> (a) to acquire shares in the capital of a body corporate or
>
> (b) to acquire assets of another person.

If the ACCC grants a clearance, section 50 does not prevent the person from acquiring the shares or assets in accordance with the clearance.

The ACCC can grant clearance to a proposed acquisition only if it is satisfied that the acquisition would not have the effect or likely effect of substantially lessening competition in a market or markets. The onus is on the applicant to satisfy the ACCC that the acquisition will not have such an effect.

Where clearance is granted for an acquisition, protection is conferred on the person to whom clearance was granted from the operation of s. 50. This protection means that neither the ACCC nor any other party may initiate legal action on the basis of an alleged contravention of s. 50 for an acquisition which has been granted clearance, so long as the acquisition takes place in accordance with the clearance. The ACCC may not grant clearance to acquisitions that have already taken place.

It is important to note that applications for merger clearance can only be made for acquisitions covered by s. 50. Any ancillary arrangements or non-merger aspects of a transaction cannot be granted clearance under the formal merger clearance provisions of the Act.

The ACCC may grant clearance subject to certain conditions where those conditions are designed to reduce or eliminate competition concerns.

Should clearance be rejected by the ACCC, s. 50 will apply to the acquisition. Contravention of s. 50 permits the Federal Court to make a range of orders under Part IV of the Act, including injunctions (s. 80), penalties (s. 76) and divestiture orders (s. 81 of the Act).

ACCC determinations in respect of clearance applications may be reviewed by the Tribunal only upon application by the applicant. Applications for review must be lodged with the Tribunal within 14 days of the ACCC making its determination. ACCC determinations may also be appealed to the Federal Court on administrative law grounds.

For further details, see chapter 5 of the ACCC's *Formal merger review process guidelines 2007*.

Application to the Australian Competition Tribunal for merger authorisation

Authorisation is the process of granting protection, on public benefit grounds, for mergers and acquisitions which would or might otherwise contravene s. 50. Authorisation may only be granted for acquisitions that have not already taken place. Applications for s. 50 authorisation of merger proposals must be made to the Australian Competition Tribunal.

Section 95AT of the Act provides that:

> The Tribunal may grant an authorisation to a person:
>
> (a) to acquire shares in the capital of a body corporate or
>
> (b) to acquire assets of another person.
>
> If the Tribunal so grants an authorisation then section 50 does not prevent the person from acquiring the shares or assets in accordance with the authorisation.

The Tribunal must not grant an authorisation for a proposed acquisition of shares or assets unless it is satisfied in all the circumstances that the proposed acquisition would result or is likely to result in such a benefit to the public that the acquisition should be allowed to occur (s. 95AZH).

Once authorisation is granted for an acquisition, neither the ACCC nor any other party may take action under s. 50 in respect of the acquisition. The protection is conferred once authorisation is granted and only for the period authorisation is granted.

Merits review is not available for decisions by the Tribunal on merger authorisations.

For further details, see chapter 6 of the ACCC's *Formal merger review process guidelines 2007.*

Industry codes of conduct (Part IVB)

Part IVB prohibits contraventions by corporations of applicable industry codes of practice. A prescribed mandatory industry code of conduct is binding on all industry participants.

The ACCC is responsible for promoting compliance with prescribed industry codes of conduct by providing education and information and, where necessary, taking enforcement action.

There are currently three prescribed mandatory industry codes of conduct under the Act. These are Franchising Code, the Oil Code and the Horticulture Code.

Franchising Code

The Franchising Code of Conduct is a mandatory industry code of conduct that has the force of law under the TPA.

The Department of Innovation, Industry, Science and Research assists the Australian Government to develop the law on franchising matters.

The code aims to regulate the conduct of participants in franchising towards each other and to ensure that they are sufficiently informed about a franchise before entering into it. The code also provides a cost-effective dispute resolution scheme for franchisees and franchisors to resolve any disputes.

Oilcode

The Oilcode came into effect on 1 March 2007 as a prescribed industry code of conduct under the TPA. The Oilcode forms part of the Australian Government's Downstream Petroleum Reform Package.

The purpose of the Oilcode in general terms is to regulate the conduct of suppliers, distributors, and retailers in the downstream petroleum retail industry.

The Oilcode aims to:

- improve transparency in wholesale pricing and provide better access to declared petroleum products, as defined in the Oilcode, at a published terminal gate price (TGP)
- assist industry participants to make more informed decisions when entering, renewing or transferring a fuel re-selling agreement by requiring the disclosure of specific information
- improve the operating environment for all industry participants by providing access to a cost-effective and timely dispute resolution scheme as an alternative to litigation.

Horticulture Code

The Horticulture Code came into effect on 14 May 2007 as a prescribed mandatory industry code of conduct under the TPA.

The Department of Agriculture, Fisheries and Forestry assists the Australian Government to develop the law on horticulture industry matters. In September 2007 the relevant minister announced the appointment of a committee of growers, wholesalers and market operators to advise the Australian Government on the operation of the Horticulture Code.

The Horticulture Code regulates trade in horticulture produce between growers and wholesale traders (traders) to encourage greater clarity and commercial transparency in transactions between these parties. The Horticulture Code also provides an alternative to litigation by setting out an effective and inexpensive way of resolving disputes that may arise between growers and traders.

Consumer protection provisions

The civil consumer protection provisions are contained in Part V of the Act and the criminal unfair trade practices provisions in Part VC. Part VC replicates in substance certain divisions of Part V and gives effect to the drafting requirements of the Commonwealth Criminal Code.

The parts deal with:

- unfair practices—Part V, Division 1 and Part VC, Division 2
- product safety and information—Part V, Division 1A and Part VC, Division 3
- conditions and warranties—Part V, Division 2
- actions against manufacturers/importers—Part V, Division 2A
- product liability—Part VA.

There is also a consumer protection provision—that of unconscionable conduct—in Part IVA.

The aim of the provisions is to strengthen the position of consumers relative to sellers, distributors and manufacturers by ensuring that businesses compete fairly on price and quality, and by implying into consumer contracts non-excludable conditions and warranties as to quality, fitness and title.

I note that the product labelling requirements under the TP Proclamation are much more extensive than this under the TPA. In part this is explainable by the coverage of (largely uniform) Australian State and Territory laws in this area. However, the TPA does provide extensive regulation of 'country of origin' disclosure.

Unfair practices

This area of the TPA is described in a separate workshop paper *Unfair Trade Practices.*

Under the heading of 'Unfair Competition' the TP Proclamation addresses some of the conduct covered by the 'unfair practices' in the TPA. However it also includes some specific prohibitions not included in the TPA. A significant difference the TPA

and the TP Proclamation is the latter's emphasis on prohibiting conduct that specifically:

- '…causes confusion [as distinct from being mislead] with respect to another enterprise …'; and
- '… damages the goodwill or reputing of another enterprise …'.

Statutory conditions and warranties

The TPA implies certain conditions and warranties into consumer contracts. Because these become part of the contract enforcement is matter between the parties to the contract and the ACCC does not have an enforcement role.

Statutory conditions (goods)

The TPA implies the following statutory conditions into consumer contracts:

- The goods must be of merchantable quality. That is, they must meet a basic level of quality and performance, taking into account their price and description. They also should be free from defects that were not obvious to the consumer at the time of purchase.
- The goods must be fit for their purpose. That is, they should do what they are supposed to do and be suitable for any purpose that a consumer might have made known to the supplier.
- The goods must match the description the consumer was given or the sample the consumer chose from. For example, any carpet laid must be the same quality and colour as the sample the consumer chose from.
- The consumer must receive clear title to the goods, including goods bought at auction. In other words, the consumer can expect to own the goods outright and any restriction on ownership should be explained to the consumer beforehand.

Statutory warranties (services)

The TPA implies the following statutory warranties into consumer contracts:

- Services must be carried out with due care and skill.
- Any materials supplied in connection with the services must be reasonably fit for the purpose for which they were supplied.
- A consumer is entitled to enjoy quiet possession of the goods and to own the goods outright. No money should be owing on the goods the consumer has acquired (unless this is disclosed to the consumer), and no one who tries to claim title to the goods through the supplier should disturb the consumer's quiet possession of the goods.

Enforcement and sanctions

Individuals and corporations can bring private actions in any court of competent jurisdiction for contravention of the consumer protection provisions of Division 1, Part V seeking damages, injunctions, or ancillary orders. Only the ACCC can apply for a court order requiring corrective advertising.

Under Part VC the ACCC can take action under the criminal consumer protection provisions (which attract monetary penalties) in the Federal Court. The penalties are described in penalty units.

Only an individual or a corporation can bring private actions for breaches of a seller's conditions and warranties, arising under Division 2, and against manufacturers or importers under Division 2A of Part V.

Actions concerned with product liability can be brought by individuals, or as representative actions by the ACCC on one or more person's behalf. A claimant must demonstrate that on the balance of probabilities the product supplied by the manufacturer or importer was defective and that the defect was the cause of a loss or injury.

As noted above sanctions for contraventions of the TPA do not include suspension or cancellation of business licence.

Unconscionable conduct (Part IVA)

The concept of unconscionable conduct generally involves a stronger party exploiting an evident special disability or disadvantage suffered by another party.

Part IVA prohibits unconscionable conduct in:

- the common law sense of unconscionable conduct (s. 51AA)
- consumer transactions (s. 51AB)
- small business dealings (s. 51AC), after 1 July 1998.

Recent amendments: Unconscionable conduct in business transactions

The matters a court may have regard to in determining whether a breach of unconscionable conduct provisions ss.51AC(1) or 51AC(2) has occurred now expressly include whether a party has a contractual right to unilaterally vary a term or condition of a contract between a supplier and a business consumer, or between an acquirer and a small business supplier.

Section 51AC will now apply to transactions of up to $10 million, an increase from $3 million previously.

Product safety and product information

The ACCC is responsible for enforcing the civil provisions in Division 1A of Part V of the Act, and the criminal provisions in Division 3 of Part VC which relate to the non-compliance of goods with standards or bans, and for conducting conferences to review proposed and emergency bans or proposed compulsory recalls of consumer products.

Since the beginning of 2005 the Product Safety Policy section of the ACCC has been responsible for product safety policy and product recalls.

Compulsory consumer product standards for a particular good may be made by regulation or declared by the responsible Minister. There are two types of compulsory consumer product standards: Safety standards and Information standards.

Safety standards require goods to comply with particular performance, composition, contents, methods of manufacture or processing, design, construction, finish or

packaging rules, for example, to display warning labels on the flammability of children's nightwear.

Information standards require prescribed information to be given to consumers when they buy specified goods, for example, labelling garments or household fabrics to indicate the most suitable method of cleaning.

The minister has the power to:

- by a notice, declare as unsafe those goods that may cause injury to a person—the supply of goods declared unsafe is banned for 18 months after the declaration. Bans may then be renewed, allowed to expire, or made permanent
- issue public warning notices about possibly unsafe goods
- order suppliers to recall goods that have safety related defects.

Before goods are declared unsafe, or a permanent ban or compulsory recall order is brought into effect, suppliers of the goods may request a conference with the ACCC to discuss the order. The request must be made within 10 days, or longer if the ACCC permits, and the conference must be held within 14 days.

A supplier may also voluntarily decide to recall unsafe goods. The minister must be notified of the details, in writing, within two days of the voluntary recall.

If it appears to the minister that certain goods create an imminent risk of death, serious illness or severe injury, an emergency order can immediately be made, without a conference, for a ban or a product recall, disclosure of defect and disposal, repair, replacement or refund of price.

The remedies available for breaches of the product safety provisions include:

- injunctions
- damages
- punitive and non-punitive orders
- monetary penalties.

Ancillary orders may also be available for persons who have suffered loss or damage because of the conduct.

Individuals who have suffered loss or damage as a result of a failure to comply with a standard, banning order or compulsory recall order can seek, by way of a private action, damages, injunction or other court order. Depending on the amount of damages, individuals can also seek remedies through a lower court, for example, state, territory or small claims tribunal.

Product liability

Under Part VA, a person who is injured, or whose property is damaged, by a defective product has a right to compensation from the manufacturer of the product. Individuals can bring actions. The ACCC can also bring representative actions on behalf of one or more persons.

Access regimes

Part IIIA of the Act establishes a national legislative regime to facilitate third party access to the services of certain facilities of national significance such as electricity grids or natural gas pipelines. It aims to encourage competition in upstream or downstream markets.

Under this regime a party may apply to the National Competition Council asking it to recommend that a service be declared (that is, if there is a dispute over access to the service the ACCC can make a determination setting the access terms and conditions).

The council cannot recommend declaration of a service unless it is satisfied that:

- access to the service would promote competition in another market
- it would be uneconomical for anyone to develop another facility to provide the service
- the facility is of national significance
- access would not cause undue risk to health or safety
- access is not already the subject of an effective regime
- access would not be against the public interest.

Having made an assessment according to the criteria, the council's recommendation to either declare or not declare the service is considered by the designated minister. (If a facility is owned or operated by a state or territory government that is a party to the Competition Principles Agreement, the designated minister is the responsible state/territory minister. Otherwise the designated minister will be the responsible Commonwealth minister.)

The minister's decision is subject to appeal to the Australian Competition Tribunal.

Once a service is declared, parties are free to negotiate terms and conditions of access. If the parties disagree on the terms and conditions for access they may decide to refer the dispute to private arbitration. If the parties reach agreement through arbitration or negotiation they may apply to the ACCC to have the contract registered. In deciding whether to register a contract the ACCC must consider the public interest and the interests of all persons who have rights to use the service(s) to which the contract relates. Once registered the contract may be enforced as if it were an ACCC arbitration determination under Part IIIA.

If the provider of the service and the party seeking access cannot agree on any aspect of access to a declared service, either the provider or the party seeking access can notify the ACCC of a dispute and it can make a determination setting the terms and conditions of access. Such determinations may be reviewed by the Australian Competition Tribunal upon application by a party to the determination. A party to the determination may seek to enforce the determination through the Federal Court.

Part IIIA not only provides a national regime to facilitate third party access, but allows state and territory governments to seek exemption from declaration for services covered by conforming regimes. Under Part IIIA, state or territory governments may apply to have their access regimes recommended as 'effective' by the National Competition Council. Recommendations on the effectiveness of state or territory access regimes are made to the relevant Commonwealth minister on the basis of an

assessment of the regime according to the relevant principles set out in the Competition Principles Agreement. Having received a recommendation the Commonwealth minister must also assess the effectiveness of the access regime by applying the relevant principles set out in the Competition Principles Agreement. Once a decision is made by the Commonwealth minister it must be published. An access regime that has been recognised by the minister as effective, and continues to be recognised as such, cannot be declared under Part IIIA.

As an alternative to the declaration process, Part IIIA allows a service provider to give an access undertaking to the ACCC specifying the terms and conditions on which access will be made available to third parties. The ACCC has discretion to accept or reject an undertaking proposal. However, the ACCC cannot accept an access undertaking if the service concerned is a declared service. If the ACCC accepts such an undertaking the services provided by the facility cannot be recommended for declaration by the National Competition Council or declared by the designated minister.

If the ACCC thinks that a provider of an access undertaking has breached that undertaking, the ACCC may apply to the Federal Court to enforce the undertaking as accepted by the ACCC.

Authorisation

The ACCC may, if the relevant public benefit test is met, authorise conduct that might constitute:

- an exclusionary provision (primary boycott)
- an anti-competitive agreement (including a price agreement)
- a secondary boycott
- exclusive dealing
- resale price maintenance
- an acquisition that occurs outside of Australia.

I note that the TPA provides significantly more specification and direction in respect of the authorisation process than does the TP Proclamation, particularly in respect of public consultation.

The authorisation process

The authorisation process begins once a valid application and supporting submission are lodged and the appropriate fee paid.

The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

Before issuing its final decision the ACCC must issue a draft determination stating whether or not it proposes to grant authorisation, and setting out the reasons for its proposed decision.

The applicant for authorisation and interested parties are invited to respond to the draft determination, either by providing written submissions within a specified timeframe, or by calling a pre-decision conference. A pre-decision conference gives

the applicant or interested parties an opportunity to discuss the draft decision and to put their views directly to an ACCC commissioner.

The ACCC then issues a final determination which may grant authorisation, grant authorisation subject to conditions, or deny authorisation.

Six month time limit

A six-month time limit will apply to the ACCC's consideration of applications for non-merger authorisation lodged after 1 January 2007.

The six-month time limit only applies to new applications for authorisation. It does not apply to applications for revocation, revocation and substitution, or minor variation.

A six-month time limit on the ACCC's consideration of authorisation applications imposes a discipline on all those involved in the authorisation process.

The six-month period begins when a valid application for authorisation is lodged with the ACCC.

Once the six-month time period has begun, the ACCC will accept only minor amendments to an application.

Consultation with interested parties will take place according to strict deadlines for the submission of information.

The six-month period can be extended by up to a further six months if:

- the ACCC has issued a draft determination, and
- the applicant agrees to the extension.

For further information, please consult *Authorisation – new processes from 2007***.**

Streamlined authorisation process for collective bargaining applications

In January 2006 the ACCC introduced a streamlined authorisation process for small businesses proposing collective bargaining arrangements.

Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions with a supplier or a customer. Collective bargaining arrangements will ordinarily raise concerns under the competition provisions of the Trade Practices Act as they involve agreements between competitors, often in relation to pricing.

Under the streamlined authorisation process the ACCC will undertake to respond to requests for interim authorisation and issue a draft determination within 28 days of receiving an application and will finalise its consideration within 3 months.

Other areas of interest

Other areas of the TPA/TP Proclamation comparison that may be of interest to Workshop participants include:

public registers

The ACCC is required to create and maintain public registers under the TPA. It also maintains several voluntary public registers because it considers that information should be available to the public.

Through these registers the Commission remains transparent and accountable in its decision making. There are 27 statutory and voluntary public registers. The information they contain can vary from a few sentences giving a decision only, through to a comprehensive file of many pages.

All registers are available on the ACCC's website www.accc.gov.au. Note, however, that some have no content yet.

Powers of investigation (s155 of TPA, search warrants) (for comparison see Article 15 of the TP Proclamation)

Investigations by the ACCC into breaches of the Act and other laws necessarily centre on the search for evidence of a breach, regardless of whether subsequent action involves litigation or some alternative enforcement strategy.

Generally, ACCC investigators will seek voluntary statements from witnesses and, in some circumstances, obtain a formal record of interview. Witnesses are not compelled to answer questions in these situations.

While the ACCC generally prefers to obtain its information through cooperation, there are circumstances where it is more appropriate to obtain such information through the use of its mandatory information-gathering powers, primarily s. 155 of the TPA.

Section 155 confers wide powers on the ACCC to obtain information, documents and evidence when investigating possible contraventions of the TPA (enforcement) and in connection with some of its adjudicative and telecommunications functions (regulatory).

In short, s. 155(1) provides that where the ACCC, its chairperson or deputy chairperson has *reason to believe* that a person has information, documents or evidence about a matter that constitutes, or may constitute, a contravention of the Act (or about some specific adjudicative and telecommunications matters), a member of the ACCC can issue a notice requiring the person to provide the information, documents or evidence.

Specifically, a notice may require the recipient to:

- furnish information in writing within the time and in the manner specified;
- produce documents to the ACCC, or to a person specified in the notice; and/or
- appear before a member of the ACCC or a specified senior ACCC staff member at a time and place specified in the notice to give evidence, either orally or in writing, and produce documents.

The power is broadly similar to the investigatory powers of other Australian law enforcement agencies.

It is important to note that the power is only investigative, not judicial. In formulating a 'reason to believe' of the kind described in s. 155, the ACCC is not making a determination as to the facts or applying the law to them in any way that is binding or authoritative.

Powers of the Minister in respect of investigations and sanctions

The ACCC acts independently of the relevant Minister in deciding:

- what matters it will or won't investigation
- how it will concluded an investigation (for example by administrative settlement or court action)

in respect of suspected contraventions of the provisions relating to anticompetitive practices and unfair trade practices and sanctions imposed by the Federal Court.

TPA cases determined by the Federal Court are not subject to review or approval by the relevant Minister.

The Minister does however have various responsibilities in respect of other parts of the TPA.

Antidumping

Article 10 (2) (h)) appears to address the issue of 'dumping' (although it is not consistent with the usual definition of dumping) and is not limited to companies in a position of dominance. Antidumping regulation is not specifically addressed by the TPA (but is by other legislation), although selling below cost may constitute evidence in support of a case alleging misuse of market power (s. 46 of the TPA)