Second, I sought the views of two groups:

- members and staff of the Commission; and
- clients, and their advisers, who had been subject to undertakings.

A representative sample of the latter group were asked in a letter from the Chairman to respond to specific questions. These questions were designed to elicit the clients' insight into those issues and give them the opportunity to comment on various operational matters. A gratifying number of clients responded.

Frequency of use of undertakings

During preliminary discussions with Commission members and staff I did not detect any question of possible *under* use of undertakings. Therefore the questions directed to the clients related to possible over use. The other way of looking at the point is that to ask clients who have given undertakings whether they would have preferred to have been taken to court is unlikely to produce a useful answer. Nevertheless I will obliquely touch on the under use question in the next few sections.

The primary function of the Commission is to achieve compliance with the Trade Practices Act. The Commission's goals and objectives are really ways and means by which that primary function may be advanced.

The mechanics of that function commence with the Commission becoming aware, from one or more of a variety of sources, of conduct which may constitute non-compliance with the Act. At the next stage, normally after a preliminary assessment of the initial evidence and of the prospect of additional evidence, the Commission may choose to pursue one of a number of courses of action (always reserving the flexibility to 'change horses' as the matter develops). It seems to me that the principal options are:

- do nothing — usually in a *de minimus* case;
- communicate to the party concerned a 'reminder' of the appropriate provisions of the Act, but not requiring any specific response;
- a stronger communication which requires a response, at times in the form of an acknowledgment that the client will not behave in a particular manner (an administrative undertaking);
- canvass the possibility of an undertaking; and
- commence court proceedings.

This choice of courses should be largely guided by the Commission's goals and objectives, and it is perhaps worthwhile expanding on those briefly.

Compliance with the Act

The first objective — compliance with the Act — means compliance by everyone, not just by the person whose conduct is in issue. When viewed in this light, a particular course of action by the Commission that is private between it and the client may not be appropriate. Circumstances may dictate that a more public course of action be taken to better ensure future compliance by other members of the public — perhaps an undertaking. Other circumstances may dictate a course of action which not only publicises the matter, but takes the next step of clothing it with the authority of the Court so as to further ensure compliance by others — perhaps a court order prohibiting specified conduct. Finally, further circumstances may dictate that the additional step of public and judicially determined punishment is warranted to influence compliance by others.

Having made, and possibly overemphasised, the point that this compliance objective includes compliance by the whole community, it seems to me that in choosing the course to take the Commission should, at least initially, concentrate on the issue of compliance by the party whose conduct is in issue. That does not mean to say that broader compliance should not feature in the decision, particularly in factual circumstances in which publicity and possibly judicial association, with or without penalty, create a particularly effective opportunity to 'get the message' to the wider community. However, sight should not be lost of the fact that the Commission may well have available to it other very effective ways of

achieving the same objective, in which case a judgment (still controlled by the Commission's goals and objectives, but tempered by the possible unfair effect on the particular client) has to be made.

Improvement in market conduct/a community educated about the Act

These objectives raise very similar issues to the compliance objective. Processes which are private between the Commission and the client will not advance these objectives at all, other than the future conduct of the client concerned.

Efficient and effective use of Commission resources

On a strict view the preceding objectives would tend to point to court action in every case where the evidence was adequate. The 'effective use' consideration provides a practically necessary and eminently sensible qualification to this strict approach, but in doing so takes us out of the area of reasonably firm guidelines and into a much more shadowy area of judgment and compromise.

It is of course the fact that the choice of an appropriate course of action can be influenced by factors such as:

- the timeliness in which a particular problem can be publicly exposed, addressed and redressed; and

- the different remedies the various courses may offer, particularly in relation to future conduct.

However, I think that on closer analysis these are not additional factors, but merely subsets of the Commission's goals and objectives.

Moving now from these general concepts to the more particular issue of frequency of use of undertakings, most of what follows will relate to the question of over, rather than under use. All I would say specifically about under use is that there must always be circumstances in which a statutory undertaking will be more appropriate than an administrative undertaking, such as where:

- the view taken of the individual client is that his/her continued compliance with the Act is more likely to be achieved by a course of action which has more clout than an administrative undertaking;

- because of matters such as the facts of the individual case and/or the state of the industry in question, the case represents a unique opportunity to get the message across to the wider community (and therefore influence compliance by them) — an opportunity which cannot be as effectively or efficiently achieved by the use of other resources available to the Commission.

As to possible over use of undertakings, this arises at both ends of the spectrum, namely:

- when legal proceedings would have been more appropriate (the soft option issue); and

- when a less formal administrative undertaking would have been more appropriate (the overkill issue).

(In each case and throughout this paper I have used 'appropriate' in terms of the achievement of the Commission's goals and objectives.)

Dealing first with the soft option issue, I must say I had real doubts as to the utility of canvassing views on it from former clients. It seemed to me almost inevitable that they would all say that their future conduct etc. would have been precisely the same if they had been under a court order rather than an undertaking enforceable by a court. Generally speaking I would accept that. I doubt whether too many clients would draw a very fine distinction between the two processes; and if that is correct, may it not follow that legal proceedings (other than where an important legal principle requires clarification, and assuming of course that the client is prepared to give an acceptable undertaking) would only be appropriate where the additional element of **punishment** arises (because of the defendant's record, *mala fides*, etc.).

Turning now to the overkill issue, it seems to me to be nigh on unarguable to say that an administrative undertaking will **ever** be **more**

effective than a statutory undertaking in achieving the Commission's goals and objectives. At best, the effectiveness of both forms of undertaking will, in a number (I suspect a large number) of cases, be the same. That has certainly been the response of the clients surveyed. However, in the balance of the cases, it is difficult to believe that the potentially recalcitrant client will not feel more moved toward appropriate behaviour by a statutory undertaking than by an administrative undertaking; and we should not lose sight of the fact that, on one view, enforcement policy should be primarily directed towards the potential recalcitrants rather than the large majority of clients who will comply with any commitment given to the Commission, irrespective of the form that commitment may take.

If that analysis is correct, then apart from the question of cost, it could be argued that the Commission should never accept an administrative undertaking.

Moving now to the cost question, what follows is based on the proposition that has been put to me, particularly by Commission staff, that in many cases the more formal nature of an undertaking involves both the client and the Commission in expenditure both of time and third party expenses greater than would be the case with an administrative undertaking. Interestingly, only a relatively small percentage of the clients surveyed specifically complained about the cost involved in the actual structuring of the undertaking. However, even if the increased cost proposition is accepted, unless one takes the rather cynical view that such additional expenditure seldom produces a form of words which is more comprehensive, precise and focused (and therefore more likely to achieve the Commission's objectives), there is some added value which may arise from that additional cost.

This question of cost becomes a legitimate consideration for at least two reasons.

- The Commission's fourth goal is the efficient and effective marshalling and use of Commission resources.
- It is not part of the Commission's goals or objectives to force clients to incur costs (as to time and/or out of pocket) which are 'inappropriate'.

In the end, I suspect that the overkill issue will simply be a question of balance between, on the one hand, the additional costs and, on the other hand, the added value of a better undertaking (of particular value in the case of a potential recalcitrant) and the additional pressure an undertaking places on potential recalcitrants (the statutory undertaking benefits).

Ultimately that balance can only be struck by the Commission, but one possible approach would be to explore a fairly simple (and perhaps over simplistic) test for gauging recalcitrance probability. For example, a client (large or small) engaged in conduct at the lower end of the scale, with no previous record, no proof of *mala fides* and with a positive and constructive approach to communications from the Commission is less likely to re-offend than a client who cannot satisfy some or all of those criteria. On this basis the use of an administrative undertaking in the case of the former type of client may be the more appropriate because the statutory undertaking benefits are of less relevance.

Another related issue raised by Commission staff in the cost area involved the apparently very common situation where undertakings are given by small businesses to whom the additional costs are much more significant than they would be to a larger client. My initial reaction to this was that as a matter of policy it may be difficult to justify, in relation to two instances of the same conduct, different levels of undertaking depending upon the **size** of the client. Interestingly, a number of the larger clients surveyed complained that smaller competitors engaging in similar practices have not been targeted by the Commission. I can see that the **content** of the undertakings could differ. For example a compliance program may be appropriate for a large client with numbers of people involved but not for a sole trader. However, if the concept of statutory undertaking benefits is valid, it applies equally to big and small clients. Accordingly, the 'potential recalcitrance index' may be a better basis for distinction, rather than size. Having

said that, I suppose it would be possible to include size as a factor in the index, but in so doing you would move beyond the issue of recalcitrance and into the area of relative potential harm to the public. They are two distinct matters which in my view are best not mixed.

Content of undertakings

Before going to the substance of this issue there are two matters of general application.

- I do not consider any form of undertaking (statutory or administrative) should include a provision which the Commission is not prepared to monitor. There is a real danger that the whole process could fall into disrepute (and thereby lose its effectiveness) if it became known that certain matters were not followed up by the Commission.

- I am not at all sure that any distinction in content (in the sense of topics covered rather than the degree of formality of the words used) can be drawn between the two forms of undertaking.

The major substantive issue here is the appropriate extent or scope of an undertaking. Again the touchstone is the Commission's goals and objectives, and the question in each case is to what extent does a particular undertaking serve to achieve those goals or further those objectives. However, having said that, I am not sure that, in practice, that touchstone is going to be all that helpful because it is not possible to say that any of the undertakings I have seen are not directed towards those goals and objectives.

As a matter of principle, however, it seems to me that there are three possible approaches.

The first is to concentrate on the particular conduct under investigation and to say that the Commission's goals and objectives are to ensure that the particular client does not repeat the particular conduct.

The second is to view the particular conduct under investigation as potentially indicative of:

- more widespread conduct of the same kind by other participants in the market; and

- a more general ignorance or disregard of the Trade Practices Act as a whole by the particular client under investigation,

and that therefore the Commission's goals and objectives require the undertaking to go beyond the specific issue.

The third is to take the opportunity afforded by the investigation to seek to ensure not only that the client (and other industry participants) become fully aware of their general and specific obligations under the Act, but also to influence an industry structure, for example in such a way as to lessen the likelihood of participants being in a position to make the wrong move.

As I said, all of those approaches are directed towards the same general outcome — namely compliance with the Act. Therefore none of them is right or wrong.

The initial emphasis should be on ensuring that in the future the client in question complies with the specific part of the Act which is in issue.

Put another way, I think that the most efficient and effective use of the Commission's finite resources requires a primary focus on the specific problem in hand. The greater the content of an undertaking, the greater the cost of formulating, negotiating and monitoring that undertaking.

Having said that, however, I readily concede that there will be circumstances where the facts or market setting of a particular case are such that the most serious aspect of the compliance part of the Commission's goals and objectives is the potential of breaches of the Act which go beyond the specific breach under investigation. I find it difficult, however, to conceive of any useful guidelines which might assist in identifying those exceptional cases.

The recalcitrance index may also be helpful in determining the content of an undertaking so that a person with a high level of potential for future breaches of the Act would be subjected

to much more detailed restrictions and obligations than a person with a low potential recalcitrance level. This suggestion is, in a way, linked with a concept raised by two of the clients. Their proposition was that a significant amount of the time (and therefore cost) involved in putting undertakings in place was a result of the provisions being too detailed. The argument is that because the undertaking is enforceable by the court, clients are reluctant to submit to highly detailed obligations lest an inadvertent slip led to an adverse court order.

The solution which is suggested does not cut down in any significant way on the matters which the client is required to address. It simply splits those requirements into two categories:

- a formal s. 87B commitment, probably in fairly general terms and couched in terms of outcome rather than process; and
- a less formal, and non court enforceable, outline of the process whereby the outcome would be achieved.

Assuming that the experience of the Commission staff supports the basic premise that the devil (in the cost sense) is in the detail, the proposal may have some merit. However, a particular client's position on the recalcitrance index would be a relevant consideration. Quite apart from the question of cost, such an approach would also go part of the way to responding to the proposition put by a number of clients that undertakings at times tended to be heavy handed.

One specific aspect of the content of undertakings which I have canvassed with various people is the inclusion in the undertaking document of admissions by the client of:

- actual breach of the law; or
- a detailed statement of conduct.

There are certainly a number of clients who consider that an undue amount of time (and cost) is spent on negotiating this 'guilt' issue.

I gather that the only hard and fast rule is that the Commission will not permit the inclusion of a denial of wrongdoing by the client, but I must say that if that was the only stumbling block to the achievement of an otherwise satisfactory undertaking I could be convinced that the Commission's goals and objectives may be better achieved by accepting it.

Miscellaneous

Two of the questions posed related to procedural aspects of undertakings.

The first was:

> Do you feel that you had sufficient information concerning the implications of a s. 87B undertaking (such things as court enforceability, potential publicity, etc.) prior to making a decision as to whether or not to offer such an undertaking, and what were the prime sources of such information?

The only aspect of the response to this question which is worth mentioning is that clearly a number of clients were taken aback at the nature and extent of the publicity which followed the undertaking. However, no one suggested that they had not been made aware that the result would be public and I suspect that the response is little more than a very natural disappointment that a transgression has been revealed to a wider audience.

The second operational question was:

> Do you feel that the option of a s. 87B undertaking was raised with you in an appropriate manner?

My initial draft of that question, which was modified at the suggestion of staff, was a little more specific:

> Do you feel that you were subjected to any inappropriate pressure prior to making a decision as to whether or not to offer the undertaking?

Despite the softening of the question, quite a number of respondents were critical of the attitude of Commission staff with whom the undertakings were negotiated. However, the criticisms were general in nature and not specifically related to the undertaking process, and accordingly do not need further development in the context of this report.

Two of the clients did mention the use of undertakings to bring about a restructured market in which the tendency or opportunity for a breach of the Act is lessened. Neither client suggested that there was anything inherently wrong with such an approach, which appears to me to be entirely consistent with the Commission's goal of improved market conduct. However, both clients drew attention to the potential dangers of 'tampering' with a market, and I am aware from discussions with Commission members and staff that these dangers are fully appreciated.

Conclusion

I think it is fair to say that the various communications I have had with members, staff and clients of the Commission have not thrown up any fundamental, or even awfully serious, problems in relation to the use of undertakings.

Clearly there are some clients who have less than warm feelings in relation to their experience in this area, but I am comfortable that in the vast majority of cases that is not the result of anything which can be specifically related to the s. 87B process.

Obviously, as in all activities of the Commission, its goals and objectives must be borne constantly in mind. However, as mentioned earlier, these goals and objectives, particularly when leavened by the precept of effective and efficient use of resources, require at times the exercise of fine judgment. Nevertheless, even though there have been, and no doubt will continue to be, cases in which judgments may be quite properly questioned, I have seen or heard nothing which would lead me to the view that the Commission has a fundamental problem in this area.

More disappointingly, however, apart from a few ideas developed earlier in this report, I have not been able to suggest a process by which this judgmental exercise could be significantly improved, and just hope that some of the matters I have canvassed do not tend to obfuscate the process.