Appendix 3 The legislation

The Trade Practices Act

Access regime

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. Its object is 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.

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; and
- access would not be against the public interest.

Having made an assessment according to the criteria, the Council must recommend to the Minister either that the service be declared or that it not be declared.

The Council's recommendation is considered by the designated Minister who decides whether or not to declare the service. (Where a facility is owned or operated by a State or Territory Government which 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 cannot agree to 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 Commission to have the contract registered. In deciding whether to register a contract the Commission must apply a public interest test. Once registered the contract may be enforced as if it were a Commission 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 Commission of a dispute and the Commission 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 make an assessment of 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 which has been recognised by the Commonwealth 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 Commission specifying the terms and conditions on which access will be made available to third parties. The Commission has a discretion to accept or reject an undertaking proposal. However, the Commission cannot accept an access undertaking if the service concerned is a declared service. If the Commission 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 Commission thinks that a provider of an access undertaking has breached that undertaking, the Commission may apply to the Federal Court to enforce the undertaking as accepted by the Commission.

Further information regarding access may be obtained by purchasing the Commission publication entitled *Access Regime*.

Anti-competitive practices

The Commission or the Minister can bring a civil action in the Federal Court seeking the imposition of pecuniary penalties — up to $10 million for a corporation and up to $500 000 for an individual, or can seek injunctions, ancillary orders, or, in relation to a merger, divestiture. The Minister will cease to be able to initiate civil action after the second commencement date.

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.

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, some can be authorised by the Commission.

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

- most **price agreements**; and
- agreements containing **exclusionary provisions**, commonly known as **primary boycotts**, i.e. collective refusals to deal with another party.

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

Secondary boycotts — 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 — a corporation with a substantial degree of market power is prohibited from taking advantage of this power for the purpose of eliminating or damaging an actual or potential competitor, preventing the entry of a person into any market, or deterring or preventing a person from engaging in competitive conduct in any market.

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.

Exclusive dealing — 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, e.g. by imposing territorial or customer restrictions on the buyer. Similarly, buyers cannot impose restrictions on the freedom of suppliers to sell as they wish. **Exclusive dealing is prohibited only if it has the purpose or effect of substantially lessening competition**. The Competition Policy Reform Act prohibitions

extend to the resupply of services as well as goods. Supplying goods or services on condition that the buyer will acquire other goods or services from another supplier, even a related company, is prohibited outright regardless of its effect on competition (**third line forcing**). However, this conduct can be notified to the Commission, 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, e.g. by threatening to cut off supplies or actually cutting them off. Two exemptions from this prohibition are **genuinely** recommended prices and loss leader selling. However, resale price maintenance on both goods and services is authorisable provided it delivers a benefit to the public such that it should be allowed to occur.

Mergers — are prohibited where they would have the effect, or likely effect, of substantially lessening competition in a market. However, such mergers can be authorised on public benefit grounds. (See 'Authorisation' below.)

Consumer protection

The consumer protection provisions of the Act contained in Part V — ss 51A to 75A — deal with:

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

There is also Part IVA relating to unconscionable conduct.

Their aim 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.

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 of the Act seeking damages, injunctions, or ancillary orders.

The Commission can bring a criminal prosecution in the Federal Court for breach of these provisions seeking monetary penalties of up to $200 000 for corporations and up to $40 000 for individuals. Civil, not criminal, proceedings can be taken for s. 52 (misleading conduct) in Division 1, Part V.

The Commission, the Minister, or any other person can ask the court for an injunction but only the Commission or the Minister can apply for a court order requiring corrective advertising (not applicable to a breach of unconscionable conduct).

Only individuals or corporations 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.

Section 51AB of Part IVA prohibits unconscionable conduct in consumer transactions.

Actions concerned with product liability can be brought by individuals, or as representative actions by the Commission on one or more person's behalf. A claimant does not have to prove negligence but does have to prove 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.

Actions must be taken within ten years of supply of the goods.

Product safety and product information

The Commission is responsible for enforcing ss 65C and 65D of Division 1A of Part V of the Act, 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.

The Federal Bureau of Consumer Affairs is 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 Minister for Consumer Affairs by a notice in the Commonwealth Gazette. There are two types of compulsory consumer product standard.

- Safety standards require goods to comply with particular performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging rules e.g. to display warning labels on the flammability of children's nightwear.
- Information standards require prescribed information to be given to consumers when they purchase specified goods e.g. labelling garments or household fabrics to indicate the most suitable method of cleaning.

The Minister has the power to:

- by a notice in the Commonwealth Gazette, declare as unsafe those goods that may cause injury to a person — the supply of goods declared unsafe is banned for 18 months following the declaration. Bans may then be renewed, allowed to expire, or made permanent;
- issue public warning notices about possibly unsafe goods; and
- 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 Commission to discuss the order. The request must be made within 10 days, or longer if the Commission 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 prior conference, for a ban or a product recall, disclosure of defect and disposal, repair, replacement or refund of price.

The same remedies apply for breaches of the safety provisions as for unfair business practices:

- monetary penalties of up to $200 000 for companies and $40 000 for individuals;
- injunctions;
- damages; and
- corrective advertising.

Ancillary orders are also 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 involved, individuals can also seek remedies through a lower court e.g. State, Territory or small claims tribunal.

Authorisation and notification

Authorisation and notification are processes whereby the Commission has the power to grant immunity from court action for certain practices that would otherwise be in breach of the Act.

Authorisation

The immunity given by authorisation operates only from the time it is granted in the form of a final authorisation by the Commission.

The Commission's only function in considering an application for authorisation is to apply one of two tests, depending on the conduct in question.

For agreements that may substantially lessen competition, the applicant must satisfy the Commission that the agreement results in a benefit to the public that outweighs any anti-competitive effect.

For primary and secondary boycotts, resale price maintenance, third line forcing, and

mergers, the applicant must satisfy the Commission that the conduct results in a **benefit to the public such that it should be allowed to occur**.

The Commission must look at the effect on competition in the market overall, not at the effect on individual competitors.

Once the application has been considered the Commission issues a draft determination and provides an opportunity for interested parties to request a conference. After the conference (if any) the Commission reconsiders the application and issues a final determination.

Authorisation **cannot** be granted for misuse of market power (s. 46).

Mergers: Authorisation applications for mergers are covered by additional specific legislative requirements.

The Commission must make a decision on such applications within 30 days of receiving them (plus any time taken by the applicant to provide additional information sought by the Commission).

The Act provides for the Commission to extend the period to 45 days in complex matters.

Authorisation is deemed to be granted if the Commission does not make a decision within whichever time frame applies.

In making its assessment the Commission will consider **all** potential public benefits from the proposed merger.

It is specifically required by the Act to regard as public benefits:

- a significant increase in the real value of exports; or
- significant import substitution.

It must also take into account all other relevant matters that relate to the international competitiveness of Australian industry.

Notification

Notification is available only for exclusive dealing, including third line forcing.

For notification of exclusive dealing conduct, immunity operates from the date of lodgment with the Commission and remains unless revoked by the Commission. The protection cannot be revoked unless the Commission is satisfied that the conduct substantially lessens competition in the relevant market **and** there is insufficient public benefit flowing from the conduct to outweigh the lessening of competition.

In the case of third line forcing, protection is not accorded from the time of notification but comes into force at the end of a prescribed period from the time the Commission receives the notice, unless the Commission forms the view within the specified period that the likely benefit to the public from the conduct will **not** outweigh the likely detriment to the public. If immunity has commenced it is open at any time for the Commission to review the conduct and issue a draft revocation notice as with other notifications. Once a final revocation notice has been issued the conduct will no longer be protected after 31 days or from such later date as the Commission may specify.

Before a notification can be revoked an opportunity must be given for a conference with interested parties. An application for a review of a decision to revoke can be made to the Australian Competition Tribunal.

For both authorisation and notification procedures the Commission is required to keep a public register of all related documents. Copies of this information are available for inspection at Commission offices in each capital city. However, commercially sensitive material for which confidentiality has been granted by the Commission will not be available for public inspection.

Fees

- Application for merger authorisations (s. 88(9)) — $15 000
- Authorisation applications other than under s. 88(9) — $7500
- Additional related authorisation applications — $1500
- Notifications — $2500 (other than for third line forcing)
- Additional related notifications — $500
- Third line forcing notifications — $1000
- Additional third line forcing notifications — $200

Private actions

Individuals or corporations can bring private actions for contravention of restrictive trade practices provisions (Part IV), the unconscionable conduct provisions (Part IVA), or the consumer protection provisions (Parts V & VA) of the Trade Practices Act.

Remedies include:

- damages (s. 82);
- injunction (except for mergers prohibited by s. 50) (s. 80);
- ancillary orders in favour of persons who suffer loss or damage, including return of property, return of money, specific performance, rescission or variation of contracts, and provision of repairs or spare parts (s. 87). (There is a wider scope for such orders arising from breaches of Parts IVA & V than for Part IV breaches); and
- divestiture of shares in relation to an unlawful merger (s. 81).

Jurisdiction to hear private actions arising from breaches of Part V has been extended by recent Commonwealth legislation and will be extended further if proposed complementary State legislation is passed.

The purpose of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* is to provide a more convenient and less expensive method of dealing with civil matters by permitting the Federal Court or a State or Territory Supreme Court either to deal with all related proceedings or to transfer them to another appropriate court.

The Cross-Vesting Act provides that, where a matter covering unconscionable conduct (Part IVA), unfair practices (ss 51A–65), all product safety and product information (ss 65B–65U), or product liability (Part VA) has been raised in the Federal Court or in a State or Territory Supreme Court, a party may apply to have the matter transferred to a State court that has appropriate jurisdiction for the remedies sought.

The additional jurisdiction does not apply to Part IV matters. The Cross-Vesting Act will not confer jurisdiction on inferior State courts until State complementary legislation has been passed.

The *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* invests State and Territory Supreme Courts and inferior courts with concurrent jurisdiction in private action proceedings under the unfair trading practices and product safety and product information divisions of Part V of the Trade Practices Act within the limits of their various jurisdictions — for example as to subject matter and amount in issue. The grant of jurisdiction to inferior courts is further limited to remedies of a kind they could grant under relevant State or Territory law.

Generally, cross-vesting of jurisdiction and the investing of new jurisdiction in State courts in trade practices matters is in addition to jurisdiction already enjoyed by those courts either as a matter of general law or by other statutes. Appeals from State and Territory courts are heard in their relevant appeal courts.

A defence based on Part IV of the Trade Practices Act can be raised in Supreme Court proceedings (Carlton and United Breweries v Castlemaine Tooheys Ltd, 1986 ATPR 40712) and presumably the same would apply to defences based on Parts IVA or V.

With State legislation mirroring Part V of the Trade Practices Act now operating in all States and Territories, this legislation will minimise jurisdictional issues which might otherwise arise.

Guidance, research and information

The Commission is required by s. 28 of the Trade Practices Act to disseminate information and undertake research projects. The main purpose of this requirement is to make the business community more aware of their obligations and rights under the Act and make consumers aware of the relevance of the Act to them.

The Commission therefore produces a range of publications, makes Commission staff available to speak to consumer and industry groups, and arranges seminars and workshops on matters of topical interest.

The Prices Surveillance Act

The Prices Surveillance Act enables the Commission to examine the prices of selected goods and services in the Australian economy.

The three pricing functions assigned to the Commission are:

- to vet the proposed price rises of any business organisations placed under prices surveillance;
- to hold inquiries into pricing practices and related matters, and to report the findings to the responsible Commonwealth Minister; and
- to monitor the prices, costs and profits of an industry or business and to report the results to the Minister.

Prices surveillance

The Minister determines which organisations, goods or services should be subjected to prices surveillance. These are formally 'declared'. In cases where an organisation is specified, the Minister must nominate how long the declaration must remain in effect.

A declared organisation can not raise the price of a declared product beyond its peak price of the previous 12 months unless it fulfils the requirements of the Act. It is liable to a $10 000 penalty if it does not comply.

The declared organisation has to notify the Commission of a proposed price rise and the terms and conditions of supply. The prohibition on supply ceases if:

- the Commission advises it does not object to the proposed increase; or
- the declared organisation agrees to implement a lower price specified by the Commission; or
- the prescribed period — initially 21 days — expires.

The Commission has the option of recommending an inquiry — and an extension of the prohibition on a price rise — to the Minister in cases where the outcome of the prices surveillance procedure is perceived to be unsatisfactory.

The Commission maintains a public register of surveillance matters showing price notifications, the Commission's deliberations, the outcome and the reasons for the outcome.

Inquiries

The Minister determines the subject of a Commission inquiry. The Commission has to give widespread and reasonable notice of the inquiry and serve individual notices on any organisations specially identified in the Minister's directions.

During the period of the inquiry, an organisation that has been served with the notice can not raise its price beyond its peak price of the previous 12 months unless it fulfils the requirements of the Act. It is liable to a $10 000 penalty if it does. However, the Commission can authorise interim price increases.

A report of the Commission's findings and recommendations is submitted to the Minister and a copy is sent to any notified organisation on the same day. Any notified organisation has to advise the Commission of its proposed prices within 14 days of receiving a copy of the report. It could be fined $1000 if it fails to do so. The Commission has to make public those prices within another 14 days.

Monitoring

The Commission can monitor the prices, costs and profits of an industry or business. The Minister determines which industries or businesses are monitored and how often the Commission should report. The report is submitted to the Minister and copies are sent to the monitored organisations on the same day. Inquiry and monitoring reports are to be made available to the public as soon as possible after they have been submitted to the Minister.