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# Summary of the *Trade Practices Act 1974*

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— and additional responsibilities of the  
Australian Competition and Consumer  
Commission under other legislation

September 2001



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### **Important notice**

This publication is a plain language description of the provisions of the *Trade Practices Act 1974* and other legislation under which the Australian Competition and Consumer Commission has powers and responsibilities. It is not intended to be used instead of the legislation itself, which readers should consult for any use other than to gain a general understanding.

Other publications dealing with specific aspects of the Trade Practices Act are available from ACCC offices and website.

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# Legislation and institutions



# The legislation

## Trade Practices Act

This publication incorporates the 26 July 2001 amendments to the Trade Practices Act. The amendments are in orange print.

The objective of the Trade Practices Act, as set out in the legislation, is to enhance the welfare of Australians through the promotion of competition and fair trading and providing for consumer protection. This summary of the Act deals mainly with the following major parts.

Part IIIA — third party access to nationally significant essential facilities.

Part IV — anti-competitive practices.

Part IVA — unconscionable conduct.

Part IVB — industry codes.

Part V

- Division 1 — unfair practices.
- Division 1A — product safety and information.
- Division 1AA — country of origin claims.
- Division 2 — conditions and warranties.
- Division 2A — actions against manufacturers/importers.

Part VA — product liability.

Part VB — price exploitation in relation to the New Tax System.

Part VC — offences.

Part VII — authorisation and notification.

Part X — international liner cargo shipping.

Part XIB — a telecommunications-specific regime dealing with anti-competitive conduct.

Part XIC — a telecommunications-specific regime for regulated access to carriage services.

The Trade Practices Act itself applies generally to the business and commercial activities of:

- most corporations;
- sole traders or partnerships whose activities:
  - cross State boundaries; or
  - take place within a Territory; or
  - are conducted by telephone or post, or use radio or television (Parts IVA and V only); and to the
- commercial activities of the Commonwealth.

However, the reach of Part IV extends to virtually all businesses, including unincorporated businesses and government trading activities, as a result of State/Territory application laws.

Each State and Territory has legislation which substantially mirrors the fair trading provisions of the Commonwealth legislation. As a result unincorporated traders which do not operate across State boundaries and which are, for constitutional reasons, not covered by the Act must nevertheless meet fair trading requirements.

## Legal actions and court jurisdiction

### Private actions

The Federal Court hears private actions relating to anti-competitive practices (Part IV).

Both the Federal Court and State and Territory Supreme Courts hear private actions dealing with:

- unfair trading practices (Parts IVA and V, Division 1);
- safety and information standards, bans and recalls (Part V, Division 1A);
- actions against manufacturers/importers — (Part V, Division 2A);
- industry codes — (Part IVB); and
- product liability (Part VA).

Remedies available in private actions are:

- damages;
- injunctions (but not for mergers);
- divestiture (mergers only); and
- other orders.

In State and Territory lower courts these remedies are available subject to any limitations on the remedies a court may grant under State or Territory law.

Cases concerning implied conditions and warranties in contracts (Part V, Divisions 2 and 2A) are heard by the State or Territory courts which has the jurisdiction to deal with disputes under the relevant contract. The Federal Court may deal with these matters only if they are closely linked to other matters in which the Federal Court has jurisdiction, for example, unfair trading practices.

## Transfer of cases between courts

**Sections 86A** and **86B** of the Act, and the *Jurisdiction of Courts (Cross Vesting Act) 1987* (and mirror laws in each State and Territory), allow ready transfer of private actions (other than anti-competitive practices cases) between the Federal Court, State and Territory Supreme Courts and the Family Court. A party to an action may apply to have a case transferred to the court which is the most convenient and least costly forum and that court may exercise

whatever jurisdiction is required to deal with the matter. This avoids unproductive and costly disputes about which court has jurisdiction and also disposes of competing proceedings in the same matter in different courts.

The Federal Court retains principal jurisdiction to deal with anti-competitive practices matters but these are occasionally raised in proceedings in a State or Territory Supreme Court. In any such case a party may apply for transfer of these issues to the Federal Court. If the Commonwealth Attorney-General considers it appropriate in a particular case, transfer must take place to the Federal Court. In **ss. 45D, 45DA, 45DB, 45E or 45EA** cases, proceedings can be taken only in the Federal Court.

### **Private representative proceedings**

Where several individuals have each suffered injury, loss or damage as a result of similar conduct in breach of the Act, amendments in 1992 to the Federal Court of Australia Act permit a person to take a representative or class action in the court on behalf of a group of seven or more such persons. Each identifiable member of the whole group must be notified of the proceeding and may choose to opt out of the action. Those who do not opt out will receive such share of any compensation granted as the court may award to them but will not be able to bring their own individual actions.

This procedure has the advantage of efficiently resolving a large number of individual claims in one action and granting compensation to individuals who may not have been able to bring their own action. A defendant may also benefit by having to face only one action rather than several.

### **Actions brought by the ACCC**

The ACCC can bring civil proceedings in the Federal Court in restrictive trade practices matters seeking:

- monetary penalties;
- injunctions (including for mergers);
- divestiture of acquired assets (mergers only); and
- various other orders.

The ACCC may seek fines and orders (such as injunctions or orders for remedial advertising) through criminal prosecutions in the Federal Court for breaches of the unfair trading practices provisions other than misleading or deceptive conduct (**s. 52**) and unconscionable conduct provisions (**ss. 51AA, 51AB and 51AC**), for which only civil actions may be taken.

The ACCC may prosecute in the Federal Court for breaches of the criminal provisions relating to safety and information standards and bans and may seek injunctions and other orders.

The ACCC may also bring representative actions (**s. 87(1B)**) for breaches of the provisions of Parts **IV (except for breaches of ss. 45D and 45E)**, IVA, IVB, V and VA of the Act, seeking compensation for persons identified as having suffered, or likely to suffer, loss or damage as a result of the breach and who would otherwise have had to bring action of their own.

The ACCC may not bring actions, representative or otherwise, for consumers in contract disputes involving implied conditions and warranties (Part V, Divisions 2 and 2A).

## **Time limits**

In 2001 the Trade Practices Act was amended to alter the time limits for bringing an action for a contravention. Part VI of the Trade Practices Act contains some of the enforcement and remedy provisions.

Until 25 July 2001 s. 82(2) states that the time limit for bringing an action for damages for contravention of Parts IV, IVB, V or s. 51AC is **three** years after the cause of action has accrued. A three-year time limit also governs applications for other orders under s. 87(1A) for a contravention of Parts IVB or V. Section 87(1AC) states that the time limit for other orders is only **two** years for a contravention of Part IVA.

From 26 July 2001 the time limit for bringing an action for damages for a contravention of Parts IV, IVA, IVB and V is increased to **six** years after the cause of action has accrued (**s. 82(2)**). Section 87(1AC) states that a six-year time limit also governs the applications for other orders under s. 87(1A) for a contravention of Parts IVA, IVB or V. The six-year limitation period applies to all

causes of action accruing on or after 26 July 2001 and to existing causes of action that were still in time on that date.

For actions for contraventions of Part V, Division 2A and Part VA the time limit is still three years (**s. 74J and s. 75AO**).

Until 15 December 2001 a time limit of three years applies to fines for a contravention of Part V other than ss. 52, 65Q, 65R or 65F(9). From 15 December 2001 a new Part VC will contain the **criminal** sanctions for contravention of the consumer protection provisions. Part V will be retained, containing the **civil** consumer protection provisions. A time limit of three years will apply to fines for breaches of Part VC.

From 15 December 2001 applications for other orders under s. 87(1A) will also be available for contraventions of Part VC. These applications will be subject to the six year time limit.

As injunctions are discretionary remedies, there is no statutory time limit for making an application under s. 80 in respect of a contravention of Parts IV, IVA, IVB or V, s. 75AU or s. 75AYA. **From 15 December 2001 applications for an injunction under s. 80 will also be available for contraventions of Part VC.**

# The institutions

## Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission is a statutory authority responsible for ensuring compliance with parts IV, IVA, IVB, V, VA, VB and VC of the Trade Practices Act, State and Territory application legislation and the provisions of the Conduct Code and for administering the Prices Surveillance Act.

The ACCC is the only nationally operating agency dealing generally with competition matters and the only agency with responsibility for enforcement of the Trade Practices Act and the State/Territory application legislation.

In fair trading and consumer protection its role complements that of the State and Territory consumer affairs agencies, which administer the mirror legislation of their jurisdictions, and the Consumer Affairs Division of the Treasury.

The ACCC also has responsibilities under other Acts (see Other responsibilities, p. 81).

The ACCC comprises a Chairperson, a Deputy Chairperson, and a number of full-time Commissioners and part-time Associate Commissioners.

Appointments to the ACCC involve participation by Commonwealth, State and Territory Governments.

The ACCC's objectives are to:

- improve competition and efficiency in markets;
- foster adherence to fair trading practices in well-informed markets;
- promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective;

- inform the community at large about the Trade Practices Act and the Prices Surveillance Act and their specific implications for business and consumers; and
- use resources efficiently and effectively.

## **Trade practices work**

Under the Trade Practices Act the ACCC's work largely flows from:

- marketplace information, including complaints and inquiries about possible breaches of the Act;
- examination of merger proposals;
- applications for authorisation (including merger proposals), notifications;
- determinations and consideration of undertakings under Part IIIA; and
- inquiries made on the ACCC's own initiative.

On enforcement, when it has discretion on whether or not to act, the ACCC gives priority to matters where:

- there appears to be blatant disregard for the law;
- the matter particularly affects disadvantaged consumers;
- there appears to be substantial damage to competition;
- there is significant public detriment;
- successful enforcement, by litigation or other means, would have a significant deterrent or educational effect; or
- an important new issue is involved, e.g. one arising from economic or technological change.

## Prices surveillance work

The Prices Surveillance Act (s. 17(1)) gives the ACCC three pricing functions:

- to vet the proposed price rises of any business organisation 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 prices, costs and profits of an industry or business and to report the results to the Minister.

## National Competition Council

The National Competition Council consists of a president and up to four other councillors.

Its function is to make recommendations to Government on access declarations under Part IIIA of the Trade Practices Act and prices oversight of State/Territory Government businesses.

## Australian Competition Tribunal

The Australian Competition Tribunal deals with applications for review of decisions made by the ACCC on authorisations and notifications. It may also make declarations relating to offshore mergers.

The tribunal consists of a president, who must be a Federal Court judge, and members who are appointed because of their knowledge of, or experience in industry, commerce, economics, law or public administration.

The tribunal also hears appeals from decisions of the Minister or NCC in access matters.

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# The Trade Practices Act 1974

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Part IIIA

Part IV

Part IVA

Part IVB

Part V

Part VA

Part VB

**Part VC**

Part VII

Part X

Part XIB

Part XIC

## Part IIIA — the access regime

Part IIIA of the Trade Practices Act establishes a legislative regime to facilitate third party access to the services of certain essential facilities of national significance such as electricity grids or natural gas pipelines. Its object is to encourage competition in related markets.

Access to essential services involves either an application to the National Competition Council to have the service 'declared', or the giving of undertakings to the ACCC.

The Council may recommend declaration of a service if it is satisfied that:

- access to the service would promote competition;
- that 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.

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.)

Ministers' decisions are subject to appeal to the Australian Competition Tribunal.

The owner or operator of a facility can offer an undertaking to the ACCC about the terms and conditions on which it will provide third party access. If the ACCC accepts such an undertaking the services provided by the facility cannot be declared by the NCC.

Once a service is declared, parties are free to negotiate terms and conditions of access — including by arbitration. (Agreements reached by private arbitration can be enforced if, subject to a public interest test, they are registered with the ACCC.)

If it is not possible to reach agreement, the parties can notify the ACCC of a dispute and the ACCC can make a determination setting the terms and conditions of access. Such determinations can be appealed to the Australian Competition Tribunal.

# Part IV — anti-competitive practices

## Prohibitions

Broadly speaking, Part IV of the Act prohibits the following anti-competitive trade practices:

- anti-competitive agreements and exclusionary provisions, including primary or secondary boycotts (s. 45);
- misuse of market power (s. 46);
- exclusive dealing (s. 47);
- resale price maintenance (ss. 48, 96–100); and
- mergers which would have the effect or likely effect of substantially lessening competition in a substantial market (ss. 50, 50A).

In some situations the prohibition is subject to a competition test. Most conduct can be exempted from legal proceedings by the processes of authorisation or notification (see p. 66).

## Anti-competitive agreements — ss. 45–45EA

Sections 45 to 45EA deal with a variety of proscribed agreements.

- Agreements which involve, for example, market sharing or which restrict the supply of goods are prohibited **if they have the purpose or effect of substantially lessening competition** in a market in which the businesses operate.
- **Agreements that contain an exclusionary provision.** Sometimes referred to as a 'primary boycott', these are agreements between persons in competition with each other

which exclude or limit dealings with a particular supplier or customer or a particular class of suppliers or customers (s. 45(2)). 'Exclusionary provision' is defined in s. 4D.

- **Agreements that fix prices (s. 45A).** This includes agreements which purport to 'recommend' prices but which in reality fix prices by agreement. Some joint ventures and collective buying groups are excluded from this prohibition.
- **Secondary boycotts (ss. 45D–EA).** The Act prohibits action by one person in concert with a second person (where 'a person' can be an individual, corporation or trade union) which hinders or prevents a third person from:
  - supplying goods or services to a business;
  - acquiring goods or services from a business;
  - engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

Where the first and second person engage in the conduct in concert with one another and are members of the same organisation of employees, then that organisation is taken to have engaged in the secondary boycott conduct as well (s. 45DC).

Section 45DD allows employees to engage in secondary boycott action of which the dominant purpose substantially relates to their pay or employment conditions.

Section 45E generally prohibits a person from making an agreement with a union for the purpose of preventing or hindering trade between that person and a target person, where the person is accustomed to or under an obligation to supply goods or services to the third person. The giving of effect to such an agreement is proscribed by s. 45EA.

Consumer boycotts are not caught by the secondary boycott provisions.

## Misuse of market power — s. 46

A business that has a substantial degree of power in a market is prohibited from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor;
- preventing the entry of a person into any market; or
- deterring or preventing a person from engaging in competitive conduct in any market (**s. 46(1)**).

**Subsection 46(1A)** makes it clear that references in **s. 46** to a competitor or person include references not only to a particular competitor or person but both to competitors or persons generally and to a particular class of competitors or persons.

Whether or not a business is regarded as having a substantial degree of market power depends on the circumstances in each case. The court will take into account the extent to which the activities of the business in its market are constrained by the conduct of its competitors or potential competitors, or by the behaviour of those to whom it supplies or those who supply it (**s. 46(3)**).

Although there may be no direct evidence that the business used its market power for any proscribed purposes, the court may infer the necessary purpose from its conduct, the conduct of other persons or businesses, or from other relevant circumstances (**s. 46(7)**). The purpose of a director, employee or agent of a corporation is deemed to be the purpose of the corporation (**s. 84**).

While s. 46 prohibits the misuse of substantial market power it does not prohibit the mere acquisition or possession of such power. The ACCC does not have the power to authorise conduct which contravenes or is likely to contravene s. 46.

### Trans-Tasman competition laws

The introduction on 1 July 1990 of **s. 46A** of the Trade Practices Act extended the misuse of market power provisions of the Act to markets in New Zealand and Australia.

Complementary legislation was enacted in New Zealand — **s. 36A** of the Commerce Act.

As a result provisions against misuse of market power extend to companies involved in trans-Tasman trade, whether based in Australia or New Zealand and irrespective of where the conduct takes place. The Federal Court may sit in New Zealand and the equivalent New Zealand court may sit in Australia to deal with any action under these provisions.

## Exclusive dealing — s. 47

Section 47 prohibits anti-competitive exclusive dealing which has the purpose or effect of substantially lessening competition in a relevant market. Broadly speaking, exclusive dealing involves one person which trades with another imposing restrictions on the other's freedom to choose with whom, or in what, it deals.

It is prohibited to supply goods or services **on condition** that the purchaser:

- will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier (**s. 47(2)(d)**); or
- will not resupply, or will resupply only to a limited extent, goods to particular persons or a particular class of persons or in a particular place or places (**s. 47(2)(f)**).

A **supplier** may not refuse to supply goods or services because the intending **purchaser** will not comply with these conditions (**s. 47(3)**). It is likewise prohibited for a purchaser to impose such conditions on a supplier of goods or services (**s. 47(4)**).

One form of exclusive dealing prohibited by the Act is 'third line forcing', which involves the supply of goods or services on condition that the purchaser acquire goods or services from a particular third party or a refusal to supply because the purchaser will not agree to that condition (**s. 47(6) and (7)**).

Exclusive dealing arrangements (including third line forcing) may be protected from challenge through the notification process. (The notification process for third line forcing differs from that for other

exclusive dealing conduct.) Protection for exclusive dealing is also available through authorisation (see section on Authorisations and notifications p. 66).

## Resale price maintenance — ss. 48, 96–100

Suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale. This type of conduct, known as resale price maintenance, involves a supplier:

- agreeing with a reseller that the latter will not advertise or sell below a specified price (**s. 96(3)(c)**);
- setting a minimum price at which resellers should advertise, display or offer their goods for sale or for the resupply of services (**s. 96(3)(a)**);
- inducing resellers not to discount, for example by giving special deals to resellers who agree not to (**s. 96(3)(b)**);
- taking or threatening to take action against a reseller to force the reseller to sell the goods or resupply services at or above the minimum specified price, for example by refusing to continue supplying them (**s. 96(3)(d), (e)**); or
- indicating a price that is taken by the reseller as a price below which the reseller should not resell (**s. 96(3)(f)**).

A supplier may recommend a resale price for goods or resupply price for services, provided that the document setting out the suggested price makes it clear that it is a **recommended** price only and that the supplier takes no action to influence the reseller not to sell or resupply below that price (**s. 97**). Suppliers may specify a **maximum** price for resellers without infringing the resale price maintenance prohibition.

**Section 98(2)** permits a supplier to withhold supplies of goods to a person who, within the preceding 12 months, sold goods or resupplied services obtained from the supplier at less than their cost in order to promote business or to attract persons likely to purchase other goods or services. (Selling particular goods or resupplying

services below acquisition cost for these purposes is known as 'loss leader selling'.)

The exemption relating to loss leader selling does not apply to a genuine seasonal clearance sale of goods or services which were not acquired for the purpose of being sold at that particular sale, nor does it apply where the sale took place with the consent of the supplier (s. 98(3)).

## Mergers or acquisitions — ss. 50, 50A

**Section 50** generally prohibits mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services.

**Section 50(1)** prohibits a **corporation** from directly or indirectly acquiring shares in the capital of a body corporate or assets of a person if the acquisition would have the effect or likely effect of substantially lessening competition in such a market.

**Section 50(2)** prohibits a **person** from directly or indirectly acquiring shares in the capital of a corporation or assets of a corporation if the acquisition would have the effect or likely effect of substantially lessening competition in such a market.

The following (non-exhaustive) list of factors must be taken into account in the evaluation of the effect or likely effect of particular acquisitions (s. 50(3)):

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market.

Parties to mergers at risk of breaching the Act may apply to the ACCC for authorisation (see section on Authorisation p. 66).

## Acquisitions that occur outside Australia

**Section 50A** deals with certain acquisitions occurring outside Australia that would substantially lessen competition in a market within Australia.

**Section 50A(1)** applies where, among other things, an acquisition occurring outside Australia results in the acquiring person obtaining a controlling interest in a corporation or corporations in Australia.

If an acquisition is not covered by s. 50 and is covered by s. 50A, the ACCC, the Minister or any other person can apply for a declaration by the Australian Competition Tribunal that an acquisition producing a substantial lessening of competition has occurred and that it has no resulting public benefit which would justify it. Such an application must be made within 12 months of the acquisition (**s. 50A(3)**).

If a declaration to this effect is made, the relevant business has up to six months (which may be extended to a maximum of 12 months) in which to cease carrying on business in the relevant market (**s. 50A(6)**).

In its consideration of matters under s. 50A, the tribunal is required to take account of the same criteria as apply to ACCC determinations for authorisation under s. 50.

## Statutory exemptions — s. 51

Statutory exemption from certain prohibitions is available under the Trade Practices Act, within participating jurisdictions, for:

- conduct that is specifically authorised or approved by a Commonwealth or State Act, or a Territory law, or any regulation under any such Act, which expressly refers to the Trade Practices Act. Statutory exemptions are limited for a period of two years from the date of the regulations coming into operation or two years from the date of the action. The ACCC is required under s. 171 of the Act to report annually to Parliament on the use and effect of these exceptions;
- mergers and acquisitions under ss. 50 and 50AA (if made by Commonwealth Act); or
- conduct that arises from:
  - industrial agreements relating to conditions of employment, etc;
  - a provision of a contract for the sale of a business or shares in a corporation solely for the protection of the purchaser in respect of the goodwill of the business;
  - compliance with Standards Association of Australia (Standards Australia) standards;
  - partnership agreements between individuals;
  - export agreements (if full particulars are notified to the ACCC within 14 days of being made);
  - consumer boycotts; and
  - certain arrangements relating to patents, copyrights, trade marks or designs.

### Exemptions under s. 172(2)

Section 172(2) provides for exemption of:

- conduct of a kind exempted from the application of the Act by

regulation, for example some primary product marketing agreements (s. 172);

- where regulations under the Act so prescribe, a contract or proposed contract between the Government of Australia and the government of another country; and
- similarly prescribed conduct in the course of a business carried on by the Commonwealth or a prescribed Commonwealth authority.

## Penalties and remedies for Part IV breaches

Various penalties and remedies are available in the Federal Court for breach of the provisions of Part IV of the Act.

These are:

- monetary penalties of up to \$10 million for companies (with the exception of ss. 45D, 45DB, 45E and 45EA, for which penalties of up to \$750 000 apply (s. 76));
- monetary penalties of up to \$500 000 for individuals (with the exception of ss. 45DA, 45DB, 45E and 45EA for which no monetary penalties apply) (s. 76));
- injunctions (s. 80);
- damages (s. 82);
- divestiture of shares or assets illegally acquired or a declaration that a share transaction is void in the case of a prohibited merger (s. 81);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
  - specific performance;
  - rescission and variation of contracts;

- damages;
- provision of repairs and spare parts (**s. 87**);
- probation orders, community service orders and corrective advertising orders (**s. 86C**);\*
- adverse publicity orders (**s. 86D**);\* and
- if a defendant is unable to pay both a fine and compensation to victims the court must give preference to compensation (**s. 79B**).\*

The ACCC now has the power to take class actions for breaches of Part IV (**s. 87(1B)**)\* (excluding actions for breaches of s. 45D and s. 45E).

\*For contraventions occurring on or after 26 July 2001.

The ACCC has the power to seek monetary penalties, injunctions or divestiture.

Individuals and corporations may, through a private action, seek:

- injunctions (except in the case of a merger prohibited by **s. 50**);
- damages or one of the ancillary orders available under **s. 87**; and
- divestiture in relation to a merger (**s. 81(1)**).

The Federal Court has the power to enforce undertakings concerning conduct given by a person to the ACCC (**s. 87B**).

A defence based on Part IV may be raised in a Supreme Court proceeding, for example, to a term of a contract.

Any person or the Minister may seek a declaration from the court about the operation of the Act and in relation to conduct or proposed conduct. The ACCC and the Minister are entitled to intervene in any such proceedings.

**Section 83** provides that if in a proceeding it is proved that a person has contravened a provision of Part IV, IVA or V of the Act, a finding of fact made by a court may be used as prima facie evidence in subsequent related proceedings by a person for compensation.

# Part IVA — unconscionable conduct

The Trade Practices Act prohibits unconscionable conduct in both **commercial dealings (s. 51AA and s. 51AC)** and in **consumer transactions (s. 51AB)**.

## Commercial transactions

### Section 51AA

Section 51AA provides that a corporation must not, **in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law** of the Australian States and Territories — that is, the general non-statutory or common law as it has evolved through decisions of the courts. ‘Unconscionability’ is accordingly not defined in the Act.

Section 51AA **does not apply** to situations covered by s. 51AB or 51AC.

The term **unconscionable conduct** has come to refer to circumstances which have the following elements:

- one party to a transaction suffered from a **special disability or disadvantage**, in dealing with the other party; and
- the disability was sufficiently evident to the stronger party; and
- the stronger party took unfair or unconscionable advantage of its superior position or bargaining power to obtain a beneficial bargain.

### Section 51AC

Section 51AC **specifically** prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.

The provision does not apply to conduct before 1 July 1998, to transactions greater than \$3 million, or to transactions in which the business subject to the conduct (target business) is a listed public company.

Although the Act does not define 'unconscionable conduct', s. 51AC does include a non-exhaustive list of factors which may be taken into account by the court. Expressed briefly, these are:

- the relative bargaining strengths of the parties;
- whether, as a result of the stronger party's conduct, the other was required to meet conditions not reasonably necessary to protect the stronger party's legitimate interests;
- whether the target business could understand any documentation used;
- the use of any undue influence, pressure or unfair tactics by the stronger party;
- how much the target business would have had to pay/charge, and under what circumstances, to buy/sell identical or equivalent goods or services from/to **another** supplier;
- the terms and circumstances in which the weaker party could have engaged in a similar transaction with another party;
- the extent to which the stronger party's conduct was consistent with its conduct in similar transactions with other businesses;
- the requirements of any applicable industry code (or of any other code if the target business acted in the reasonable belief that the stronger party would comply with it);
- the extent to which the stronger party unreasonably failed to disclose:
  - any **intended** conduct that might affect the interests of the target business; or
  - any risks to the target business arising from that conduct which the stronger party should have foreseen would not be apparent to the target business;

- the extent to which the stronger business was willing to negotiate with the target business the terms of any supply contract; and
- the extent to which each party acted in good faith.

## Consumer transactions — s. 51AB

Section 51AB prohibits unconscionable conduct by corporations when they supply goods or services that are ordinarily acquired by consumers for their personal, domestic or household use but not for resupply or use in trade or commerce.

In such a transaction the stronger party may not take advantage of its position by behaving in an unfair or unreasonable manner.

Although the Act does not define ‘unconscionable conduct’, s. 51AB does include a non-exhaustive list of factors which may be taken into account by the court. These are:

- relative bargaining strengths of the parties;
- whether the consumer understood any documentation used;
- the use of undue influence or pressure, or unfair tactics;
- the imposition of conditions not reasonably necessary to protect the supplier’s legitimate interests; and
- how much the consumer would have had to pay, and under what circumstances, to buy equivalent goods or services from **another** supplier.

## Remedies

Individuals and the ACCC can bring civil actions in the Federal Court for unconscionable conduct seeking monetary compensation, rescission or variation of a contract, refund, or specific performance of a contract. Damages under **s. 82** are available as a remedy for unconscionable conduct only for breaches of **s. 51AC**, but other equivalent orders can be made by the court under **s. 87(2)(d)**. Actions under Part IVA can also be brought in State or Territory

Courts of competent jurisdiction, and the extent of remedies available depends on the particular court's jurisdiction.

In 2001 the Trade Practices Act was amended to include these possible penalties for a contravention of Part IVA:

- if a defendant is unable to pay both a fine and compensation to victims the court must give preference to compensation **(s. 79B)**;<sup>\*</sup> and
- probation orders, community service orders and corrective advertising orders **(s. 86C)**.<sup>\*</sup>

<sup>\*</sup>For contraventions occurring on or after 26 July 2001.

# Part IVB — industry codes

**Section 51AD** prohibits contraventions by corporations of **applicable** industry codes of practice.

For the purposes of this section, an applicable code is one which is mandatory for the industry in question or a voluntary industry code that binds the corporation.

Such codes must be declared, either as mandatory or voluntary, by regulations under **s. 51AE**.

For voluntary codes the regulations may specify the method by which a corporation agrees to be bound and the method by which it ceases to be bound.

Franchising is specifically defined as an industry for the purposes of Part IVB. Similarly, franchisors and franchisees are declared to be participants in the franchising industry, even if they are also participants in another industry.

## Penalties and remedies

The Act provides a range of penalties and remedies if an applicable industry code is contravened.

These are:

- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken (**s. 80**);
- damages (**s. 82**);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
  - specific performance;
  - rescission and variation of contracts;
  - damages;

- provision of repairs and spare parts (**s. 87**); and
- probation orders, community service orders and corrective advertising orders (**s. 86C**).\*

\*For contraventions occurring on or after 26 July 2001.

## Part V — fair trading

Part V of the Act contains a range of provisions aimed at protecting consumers and corporations that qualify as consumers (see p. 47 for definition of consumer).

The ACCC has responsibility for unfair practices (Division 1).

The ACCC has responsibility for product safety and information standards and banning orders (Division 1A). Product safety policy and product recalls are the responsibility of the Consumer Affairs Division of the Treasury.

The Australian Securities and Investments Commission has primary responsibility for consumer protection in the financial services area.

Protection is also afforded through:

- conditions and warranties in consumer transactions (Division 2); and
- actions against manufacturers and importers (Division 2A).

### Unfair practices — ss. 52–65A

#### General prohibitions — s. 52

##### Misleading or deceptive conduct

Section 52 is a very broad provision. It prohibits conduct by business which is misleading or deceptive, or which is likely to mislead or deceive. Whether or not conduct is held to be misleading or deceptive will depend on the particular circumstances of each case.

Generally, sellers are required to tell the truth or refrain from giving an untruthful impression. Failure to disclose material information may in some circumstances be a breach of the Act. The duty to disclose can arise even where there is no particular relationship between the parties — such as trustee and beneficiary or principal and agent.

Only civil proceedings can be brought for breach of s. 52.

## Specific prohibitions — ss. 51A, 53–65A

### Misleading representations about the future supply and use of goods and services

Section 51A deems as misleading the making of representations about the happening of any future event without reasonable grounds. A business is deemed not to have had reasonable grounds for making a prediction unless it can produce evidence to the contrary.

### False or misleading representations

**Section 53** specifically prohibits false claims about:

- the standard, quality, value, grade, composition, style, model or history of goods or services (**s. 53(a), s. 53(aa)**);
- whether goods are new (**s. 53(b)**);
- the agreement of a particular person to acquire the goods or services (**s. 53(bb)**);
- the sponsorship, approval, performance characteristics, accessories, uses or benefits of goods or services (**s. 53(c)**);
- the sponsorship, approval or affiliation of a corporation (**s. 53(d)**);
- the price of goods or services, for example that it is less than a competitor's price (**s. 53(e)**);
- the availability of repair facilities or spare parts (**s. 53(ea)**);
- the place of origin of goods (**s. 53(eb)**);
- a buyer's need for goods or services (**s. 53(f)**); and
- the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (**s. 53(g)**).

### False representations in relation to land

**Section 53A** prohibits a business from making false or misleading representations or using misleading or offensive conduct in relation to the sale of land, for example about sponsorship or price.

## Misleading conduct in relation to employment

**Section 53B** prohibits a business from engaging in conduct likely to mislead people seeking employment about the availability, nature, terms or conditions, or any other matter relating to the employment.

## Not specifying the full cash price

**Section 53C** requires corporations to specify the full cash price when it advertises **part** of the price of goods or services, for example the deposit or the terms of repayment.

## Falsely offering prizes

**Section 54** prohibits corporations from offering gifts, prizes or other free items in connection with the supply of goods or services if it does not intend to provide them as offered.

## Misleading the public as to the nature or characteristics of goods and services

**Section 55** prohibits a person from engaging in conduct which is liable to mislead the public as to the nature, manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

**Section 55A** prohibits a corporation from engaging in conduct which is liable to mislead the public about the nature, the characteristics, the suitability for their purpose or the quantity of any services.

## Bait advertising

**Under s. 56** goods or services must not be advertised at a specified (not necessarily a 'special') price if the seller is or should reasonably have been aware that it would not be able to supply reasonable quantities at that price for a reasonable period. What is 'reasonable' will depend on the particular circumstances, including the market in which the goods are sold and the nature of the advertisement.

## **Referral selling**

**Section 57** prohibits the sales technique of inducing consumers to buy goods or services by offering them a rebate, commission or some other benefit in return for suggesting potential customers, or assisting in any way in selling the goods to other consumers if the inducement is contingent on an event occurring after the sale is made.

## **Accepting payment without intending to supply**

**Section 58** prohibits a corporation from accepting payment for goods or services where it does not intend to supply them or intends to supply goods or services materially different from those paid for.

It may also be a breach if there are reasonable grounds, of which the corporation was (or should be) aware when accepting payment, that it would not be able to supply.

## **Making false or misleading statements about work-at-home schemes**

**Section 59** prohibits false or misleading representations about the profits and practicability of home-operated businesses, for example an activity that requires performance of work at or from home or a scheme that requires investment of money and associated work by the investor.

## **Harassment or coercion**

**Section 60** prohibits the use of physical force, undue harassment or coercion by a corporation (or its servants or agents) in relation to the supply of goods or services to a consumer, or payment by a consumer for goods or services.

## **Pyramid selling**

**Section 61** prohibits the promotion of, or participation in, pyramid selling schemes in which a person makes a payment to a corporation with the prospect of receiving payments for the introduction of other participants to the scheme.

## **Sending unsolicited debit or credit cards**

**Section 63A** makes it unlawful to send unsolicited debit or credit cards, or cards which can be used for both purposes, to any person.

## **Unsolicited goods or services**

**Section 64** prohibits a corporation from demanding payment for unsolicited goods or services unless it has a reasonable basis for believing it has a right to payment. The prohibition includes demanding payment for:

- unsolicited advertising; and
- unsolicited directory entries.

**Section 65** provides that a person receiving unsolicited goods will not be liable for any loss or damage that occurs to the goods other than wilful or unlawful damage he or she causes.

If the recipient gives written notice that the goods were unsolicited and specifies where they are held, the supplier has one month to collect them. After that the goods become the property of the recipient. If no such notice is given, the supplier has three months from receipt of the unsolicited goods in which to recover the goods from the recipient before losing right of ownership (**s. 65(3), (4), (5)**).

## **State of mind**

In proceedings against a corporation, the state of mind of its directors, servants and agents can be attributed to the corporation. A person's 'state of mind' includes knowledge, intention, opinion, belief or purpose. For the person's state of mind to be so attributed, the conduct in question must be within the scope of their actual or apparent authority (**s. 84**).

## **News reporting**

A publisher of a newspaper or the owner of a radio or television station will not be liable for misleading or deceptive conduct, or misleading representations in the course of news reporting or otherwise providing information (**s. 65A**).

The exemption does not apply to representations in an advertisement or which relate to the supply or promotion of goods or services by the media outlet.

## Penalties and remedies

The Act provides a range of penalties and remedies for breaches of the unfair practices provisions of Part V.

These are:

- up to and including 14 December 2001, monetary penalties of up to \$220 000 for individuals and \$1.1 million for companies for breaches of Part V;
- on or after 15 December 2001, monetary penalties of up to \$220 000 for individuals and \$1.1 million for companies, for breaches of those provisions replicated in Part VC;\*
- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken (**s. 80**);
- damages (**s. 82**);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
  - specific performance;
  - rescission and variation of contracts;
  - damages;
  - provision of repairs and spare parts (**s. 87**); and
  - probation orders, community service orders and corrective advertising orders (**s. 86C**).\*

\* For contraventions occurring on or after 26 July 2001.

The particular courts which may deal with private actions are referred to in the section Legal actions and court jurisdiction on p. 4.

The ACCC, the Minister or any other person can ask the court for an injunction (**s. 80(1)**).

**Section 83** provides that if in a proceeding it is proved that a person has contravened a provision of Part IV, IVA, IVB, V or VC of the Act, a finding of fact made by a court may be used as prima facie evidence in subsequent related proceedings by a person for compensation.

## Part V, Division 1A — product safety and product information

**Sections 65B–65T** in Division 1A of Part V are designed to ensure that:

- certain goods meet particular standards; and
- dangerous goods are not sold or can be quickly withdrawn from sale.

The ACCC is responsible for enforcing of ss. 65C and 65D, which relate to goods not complying with standards or bans, and for conducting conferences to review proposed and emergency bans or proposed compulsory recalls of consumer products (**ss. 65J, 65K, 65M and 65N**).

The Consumer Affairs Division of the Treasury is responsible for the other sections, which relate to recalls and warning notices.

### Compulsory consumer product standards

Compulsory consumer product standards for a particular good may be made by regulation or declared by the Minister for Financial Services and Regulation by a notice in the Commonwealth Gazette (**ss. 65C, 65D and 65E**). Corporations are prohibited from supplying goods:

- that do not conform with a compulsory consumer product safety standard;

- for which there is in force a notice declaring the goods to be unsafe; or
- which are subject to a notice imposing a permanent ban (s. 65C(1)).

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 (s. 65C(2)).
- 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 (s. 65D).

A corporation may not export goods that do not comply with a compulsory product safety standard without the Minister's approval (s. 65C(3)).

## Unsafe goods and bans

Goods that may cause injury to any person can be declared unsafe by the Minister, by notice in the Commonwealth Gazette (s. 65C(5)).

The supply of goods which have been declared unsafe is banned for 18 months following the declaration. The banning order may then be renewed for a further 18 months, be allowed to expire unless revoked before the end of the period (s. 65C(6)), or made permanent (s. 65C(7)).

Before goods are declared unsafe or a permanent ban is brought into effect, suppliers of the goods — manufacturers, retailers, and others — may request a conference with the Commission concerning the order (s. 65J).

After the conference the Commission will make recommendations to the Minister which will be taken into account when the final form of the order is being decided (s. 65K). The whole process must be completed promptly.

## Warning notices

The Minister can issue public warning notices stating that the safety aspects of particular goods are under investigation and/or warning of possible risks involved in using them (**s. 65B(1)**).

Once any announced investigation is completed, and provided banning and/or compulsory recall action has not been taken, the Minister is required to publish a further notice advising of the outcome of the investigation. Any proposed further action in respect of the goods may also be announced (**s. 65B(2)**).

## Voluntary product recalls

A supplier who voluntarily decides to recall unsafe goods (i.e. not as a response to a compulsory product recall order), is required to notify the Minister of the details, in writing, within two days of taking the action (**s. 65R**).

## Compulsory product recalls

The Minister also has the power to order suppliers to recall consumer goods that have safety-related defects (**s. 65F**).

The power applies to consumer goods which:

- do not comply with a compulsory product safety standard prescribed under the Act;
- are banned goods; or
- are goods which may cause injury to any person; and
- where the supplier has not taken satisfactory action to prevent them causing injury, for example by recalling the goods.

In these circumstances the Minister can issue an order requiring the supplier to:

- take action to recall the goods within the period specified in the notice; and/or

- disclose to the public the nature and circumstances of the defect and procedures for the disposal of the goods; and/or
- inform the public that the goods will be repaired or replaced or the price refunded, as the supplier thinks appropriate (**s. 65J**).

## Emergency orders

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 implementing one of the following without a conference (**s. 65L**):

- a banning order; or
- an order for product recall, disclosure of defect and disposal, repair, replacement or refund of price.

When an emergency banning order is made, a conference may be held after it comes into effect (**s. 65M**).

No subsequent conferences are available if the emergency order is for product recall, repair or replacement.

## Conferences on bans and recalls

Before a compulsory recall order comes into effect (except for emergency recalls) all suppliers of the goods have the opportunity to 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.

As soon as practicable after the conference the ACCC is required to recommend to the Minister whether the notice should be made final, whether any modifications should be made to the proposed order, or whether the notice should be withdrawn.

A record of proceedings at the conference, including documents and particulars of the recommendations, are placed on the ACCC's public register (**s. 65K**). There is some provision for confidentiality to be granted if a company's secret formula or process is involved.

## Penalties and remedies

The principle ones are:

- monetary penalties of up to \$220 000 for individuals and \$1.1 million for companies, for breaches of those provisions replicated in Part VC;\*
- injunctions (s. 80);
- damages (s. 82); and
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
  - specific performance;
  - rescission and variation of contracts;
  - damages;
  - provision of repairs and spare parts (s. 87); and
  - probation orders, community service orders and corrective advertising orders (s. 86C).\*

\* For contraventions occurring on or after 26 July 2001.

The ACCC can seek penalties or injunctions if a supplier is found to have supplied goods that:

- do not comply with a compulsory standard; or
- are the subject of a banning order.

Any person who has suffered loss or damage as a result of a failure to comply with a standard or banning order or with a compulsory recall order can seek, by way of a private action, damages, injunctions or other court orders.

Depending on the amount of damages involved, individuals can seek remedies through a lower court, e.g. State, Territory, or small claims tribunal, as a result of the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987*.

# Part V, Division 1AA — country of origin claims

## Country of origin claims

Division 1AA sets out in some detail tests which must be met to ensure that claims about the country of origin of goods do not breach ss. 52 or 53(eb) of the Act.

The tests are for three types of country of origin representation:

- general country of origin claims;
- 'Produce of'/'Product of' claims; and
- the use of a prescribed logo.

## General country of origin claims — s. 65AB

This provision covers such broadly expressed claims as 'Made in Australia', 'Australian made', 'Manufactured in Australia', 'Processed in Australia' and 'Assembled in Australia' (and similar expressions referring to other countries).

Goods must pass two tests to qualify for the general country of origin defence. They must be **substantially transformed** in the country that is the subject of the representation and **50 per cent or more of the cost of production or manufacture** of the goods must be incurred in relation to processes that occurred in that country.

## Substantial transformation

Substantial transformation in a country is defined under s. **65AE** as goods undergoing:

... a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.

## Cost of production/manufacture

The method of calculating the cost of production or manufacture of goods is set out in subdivision B (**ss. 65AG to 65AM**) of Division 1AA. The subdivision considers three broad categories of eligible costs:

- expenditure on materials incurred by the producer/manufacturer in the production or manufacture of the goods;
- expenditure on labour incurred by the producer/manufacturer, that relates to the production or manufacture of the goods and can reasonably be allocated to the production or manufacture of the goods; and
- expenditure on overheads incurred by the producer/manufacturer, that relates to the production or manufacture of the goods and can reasonably be allocated to the production or manufacture of the goods.

Regulations may prescribe (for all three categories) particular costs that are not allowable and may prescribe the manner of working out costs in each category. (No such regulations had been made at time of publication.)

## Exceptions

There are two exceptions to the general country of origin test. One is use of the term 'product of' and similar constructions, see below. The other is a provision for Parliament to make regulations for prescribed logo representations, see p. 46.

## The 'Produce of'/'Product of' test — s. 65AC

Section 65AC sets out a higher threshold for representations employing the terms 'Produce of', 'Product of' and variations on the word 'produce'.

It requires that each significant ingredient or component of the goods in question must come from the country of the representation **and** all, or virtually all, of the production or manufacturing processes associated with the goods must occur within that country.

The question of 'significant ingredient' or 'significant component' is not necessarily related to the percentage that the ingredient or component makes up of the goods in question.

## The use of a prescribed logo — s. 65AD

Section 65AD provides for the use of a logo, or logos, to indicate the country of origin of goods.

Subsection 65AD(2) gives Parliament the power to make regulations that prescribe a percentage of manufacturing or production costs in the range 51 per cent to 100 per cent to qualify for the use of a prescribed logo.

If a corporation makes a representation as to the country of origin of goods by means of a prescribed logo, the goods must pass both the substantial transformation test and meet the prescribed percentage of production or manufacturing costs that apply for that logo.

No regulations had been made prescribing a logo for use under s. 65AD at the time of publication.

# Part V, Divisions 2, 2A — conditions and warranties in consumer transactions

## Rights against sellers

### Definition of a consumer

Division 2 protects consumers when they acquire goods or services. It implies various conditions and warranties into the transaction whether this is a contract for sale, exchange, lease, hire or hire purchase of goods or the supply of services.

A consumer, who can be either an individual or a business, is someone who acquires:

- goods or services of a type normally bought for personal or household use, whatever they cost; or
- any other type of goods or services costing \$40 000 or less; or
- a commercial road vehicle or trailer of any cost that is used mainly to transport goods on public roads

provided that the goods are not acquired solely for reselling or for using up or transforming commercially to produce, repair or treat other goods (**s. 4B**).

The statutory warranties do not cover:

- insurance contracts;
- transport or storage of commercial goods; or
- professional services provided by architects or engineers (**s. 74**).

## The conditions

The Act implies the following conditions into contracts.

- The supplier must be able to give the consumer clear title to the goods, including any bought at auction (**s. 69**).
- The goods must be of **merchantable quality**. This means that they must meet a basic level of quality and performance that would be reasonable to expect of the particular goods, having regard to their price and the manner in which they are described (**ss. 71(1), 66(2)**).
- The goods must be **fit for their purpose**. This means they must be suitable for any particular purpose the consumer made known to the supplier when negotiating or arranging to purchase the goods, or a purpose which is obvious from the circumstances in which the sale took place (**s. 71(2)**).
- Goods that are supplied by **description or sample** must correspond with the description or sample (**ss. 70, 72**).

## The warranties

The Act implies the following warranties in contracts.

- The consumer is entitled to enjoy quiet possession of the goods (**s. 69**).
- The consumer is entitled to own the goods outright (**s. 69**).
- Services must be carried out with due care and skill (**s. 74(1)**).
- Services (except those provided professionally by architects and engineers) and any materials associated with them must be fit for the purpose for which they are supplied. That is, they should achieve the result that the consumer made known to the supplier, unless the consumer did not rely, or it was unreasonable to rely, on the supplier's skill and judgment (**s. 74(2)**).

## Excluding conditions and warranties

A seller may not exclude, restrict or modify the statutory conditions and warranties. Any term of a contract which attempts to do so will be void (s. 68).

A corporation risks prosecution if it states or implies that its liability is limited in any way. Any attempt to do so, e.g. by stating or implying that no refunds will be given under any circumstances, is in breach of s. 53(g), which prohibits the making of false or misleading representations about a consumer's rights.

## Limited liability

If goods or services are not of a type normally bought for domestic, household or personal use, a supplier may sometimes be able to limit its liability to:

- replacement of the goods or the supply of equivalent goods;
- repair of the goods;
- payment of the cost of replacing the goods or of acquiring equivalent goods;
- payment of the cost of having the goods repaired; or in the case of services:
  - re-performance of the services; or
  - payment of the cost of having the services supplied again.

## Liability of credit providers

A credit provider who regularly arranges finance for a supplier's customers, i.e. is 'linked' to the supplier, may be liable jointly with the supplier to compensate a consumer in the event of misrepresentation, breach of contract, failure of consideration or breach of a condition or warranty by the supplier (s. 73(1)).

A consumer who buys goods that breach any of the statutory conditions and warranties, using a credit provider who is independent of the seller, may claim only against the supplier (s. 73(2)).

## Remedies

The ACCC cannot bring an action for breach of any of the statutory conditions or warranties.

A consumer may bring a private action for damages in any court or tribunal of competent jurisdiction against a supplier who, for example supplies goods that are not of merchantable quality, or are not fit for their purpose.

Damages can include:

- the cost of repair of goods (including any necessary freight costs);  
or
- performing the services again.

In some circumstances the court may award compensation for any consequential loss or damage, for example if a defect in an appliance causes damage to a consumer's home.

For breach of a condition (not a warranty) a consumer has the right to return the goods to the seller and obtain a refund of the purchase price.

To obtain a refund, a consumer should:

- return the goods within a reasonable time;
- not dispose of, lose, or destroy the goods;
- not allow the goods to become unmerchantable through failing to take reasonable care to preserve them; and
- not damage the goods by using them in an abnormal way (s. 75A).

## Rights against manufacturers or importers

Division 2A provides rights against manufacturers or against importers if the manufacturer has no place of business in Australia. These are similar to the rights provided in Division 2 against sellers.

The rights apply only to goods that are ordinarily acquired for personal, domestic or household use (s. 74A(2)).

### Liability

A consumer — or a person who has acquired or derived title to the goods from a consumer (e.g. as a gift or buying second hand) — may bring an action for damages against a manufacturer or importer if:

- the goods are not reasonably fit for a purpose which was made known before the supply of the goods or for a purpose for which the goods are commonly supplied (s. 74B);
- the goods do not correspond to the description on which the purchase was based (s. 74C);
- the goods are not of merchantable quality (s. 74D); or
- the goods supplied by reference to a sample do not correspond with the sample (s. 74E).

A manufacturer will not be liable to pay damages if the goods do not comply with the condition or warranty because of some fault that occurred after the goods left its control.

A manufacturer or importer supplying goods direct or through sellers will be liable to pay damages to a consumer (or a person who has acquired or derived title from a consumer) if:

- it fails to ensure that there is a reasonable supply of parts and repair facilities (unless the consumer is told when goods are bought that repair facilities or parts would not be available, or that there is a time limit on their availability) (s. 74F);

- the goods do not comply with its own express warranty or conditions — these include written warranties, other claims made about the goods in promotional and technical material or by the manufacturer’s staff or agents, and promises about the provision of services or availability of supplies (**s. 74G**).

A manufacturer may be liable to indemnify a seller who has had to compensate a consumer for a breach of one of the conditions or warranties in Division 2 (**s. 74H**). This liability applies to:

- goods ordinarily acquired for personal, domestic or household use; and
- other goods costing \$40 000 or less.

### **Limited liability**

A manufacturer’s liability for goods which are not of a personal, domestic or household nature is limited to:

- the cost of replacing the goods;
- having the goods repaired; or
- obtaining equivalent goods (**s. 74L**).

### **Excluding conditions and warranties**

A manufacturer may not exclude, restrict or modify a consumer’s rights or remedies under Division 2A (**s. 74K**) except in the limited circumstances covered by **s. 74L**. Any term of a contract, such as a manufacturer’s guarantee, which attempts to do this will be void.

A corporation may not, without risk of prosecution, imply or state that its liability is limited. Any attempt to do so is in breach of **s. 53(g)**, which prohibits making false or misleading representations about a consumer’s rights.

### **Remedies**

Consumers may bring an action for damages against manufacturers and importers for breach of any of **ss. 74B–74G**.

Damages can be:

- the cost of repair of goods (including any necessary freight costs);  
or
- performing the services again.

In some circumstances the court may award compensation for any consequential loss or damage, for example if a defect in an appliance causes damage to a consumer's home.

### **Time limits**

Actions under Division 2A must be brought within **three** years of the date the consumer became aware of the fault or damage occurring, and in any event, within **10** years of the date on which the goods were first supplied (**s. 74J**).

# Part VA — liability of manufacturers and importers for defective goods

Part VA of the Act came into force on 9 July 1992. It does not alter any of the rights and obligations arising under the law which existed before its enactment. However, it does give individuals additional rights and imposes new obligations on manufacturers.

A person who is injured, or whose property is damaged, by a defective product will have a right to compensation against the manufacturer of the product.

Goods are defective if their safety is not what persons are entitled to expect in all the relevant circumstances (**s. 75AC**).

## Rights and obligations

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 caused a loss.

The provisions of Part VA cannot be restricted, excluded or modified by contract (**s. 75AP**).

The manufacturer is primarily liable for damages caused by defective goods. However, the term 'manufacturer' has an extended meaning including (**s. 75AB**):

- the corporation that actually made the goods;
- a corporation that holds itself out to be the manufacturer;
- a corporation that sells 'home brand' goods manufactured for it under licence;
- a corporation that permits someone to promote the goods as the corporation's;

- a corporation that imports the goods; or
- a corporation that produced or manufactured raw material or component parts.

Where the manufacturer is unknown to the claimant, a retailer or other supplier of the goods may be considered by Part VA to be the manufacturer. In such circumstances the potential claimant is required to send a written request to the supplier(s) of the allegedly defective goods requesting the manufacturer's identity or the name of the person who provided the goods to that supplier (**s. 75AJ**).

'Supplier' could mean the retailer, wholesaler or any other intermediate supplier known to the claimant. A written notice may be served on any or all of these.

After 30 days, if the potential claimant cannot identify the manufacturer, action may be taken against any supplier who did not respond to the request as though it were the manufacturer.

The rights and obligations previously conferred by the Act remain undisturbed. This means that manufacturers and importers may become liable for damages caused by goods in one of two ways:

- where the goods are not of merchantable quality, through the operation of Part V, Division 2A; and
- where the safety of the goods is not what persons are entitled to expect and the manufacturer cannot be identified, through the operation of Part VA.

## Business and employment relationships

Part VA is not intended to create rights of a commercial nature. A loss arising out of a business relationship between the injured person and the potential claimant is specifically excluded from its operation (**s. 75AE**).

Similarly, loss caused by work-related injuries is excluded, as existing workers' compensation systems provide for this. Losses regulated by international agreement are also excluded (**s. 75AI**).

## Manufacturers' defences

Manufacturers may not be liable for defects which occurred later in the distribution chain or as a result of unforeseeable misuse by the injured party or other users. If, however, an injury resulted from a defect such as unsafe product packaging or packaging with inadequate warnings they could be found liable.

A manufacturer will not be liable to compensate a claimant for defective goods if it can prove one of the following defences:

- the defect did not exist when the product left its control;
- the only reason the product was defective was because it complied with a mandatory standard;
- detection of the defect would not have been possible when the manufacturer supplied the product given the state of scientific or technical knowledge at the time (known as 'development risks' or 'state of the art' defence); or
- in the case of a manufacturer of component parts, the defect was the fault (e.g. careless assembly, use of an unsuitable component, or incorrect or inadequate instructions) of the ultimate manufacturer, not the component manufacturer (**s. 75AK**).

## Mandatory standard

Where a manufacturer successfully argues a defence of compliance with an Australian mandatory standard, the Commonwealth and not the manufacturer is liable to compensate the claimant. The manufacturer must, however, as soon as possible after raising the defence serve notice on the Commonwealth (**s. 75AL**).

## Liability of manufacturers

Manufacturers of defective goods are liable both individually and collectively to a claimant for the same loss. A claimant may sue the party which will best be able to pay compensation and is not required to take separate action against each party that is liable to make compensation (**s. 75AM**).

## Contributory acts or omissions to reduce compensation

In cases where loss is due to both a defect in a product and a culpable act or omission of a person who uses the product, the manufacturer's liability will be reduced by the court by an amount which it thinks represents the person's contribution to the loss (s. 75AM).

## Time limits

A claimant must bring a liability action under Part VA within **three** years of the time of becoming aware of (or ought to have become aware of), the loss, the defect and the identity of the manufacturer of the defective goods (s. 75AO(1)).

Actions to recover damages must be begun within 10 years of the time the allegedly defective product (i.e. the one that caused the loss, not merely one of that type) was first supplied by the manufacturer (s. 75AO(2)). This is known as the 'repose period', and it begins to run from the time when the alleged defective good was first supplied by the manufacturer.

## Representative actions

The ACCC may take legal proceedings against a manufacturer for defective goods on behalf of one or more persons who have suffered loss, providing those persons give written consent for the ACCC to act on their behalf (s. 75AQ).

## Other remedies

Part VA does not limit, exclude or otherwise affect a claimant's pre-existing rights under Commonwealth, State or Territory law for claiming remedies for losses. In other words, it does not prohibit a person from taking action under tort, contracts or statutory law for losses resulting from defective goods (s. 75AR).

# Part VB — price exploitation in relation to the New Tax System

Part VB has been inserted into the Trade Practices Act to prevent the exploitation of consumers or excessive profit taking resulting from the implementation of the New Tax System. Primarily, this is achieved through the prohibition of price exploitation (s. 75AU), and the ACCC will be granted a broad range of powers to enable it to efficiently enforce this prohibition.

## Price exploitation (s. 75AU)

Section 75AU prohibits price exploitation. A corporation contravenes this provision if:

- it makes a regulated supply (s. 75AU(2)(a)); and
- the price of that supply is unreasonably high having regard to the New Tax System changes alone (s. 75AU(2)(b)); and
- the price for the supply is unreasonably high even if the following other matters are also taken into account:
  - (i) the supplier's costs;
  - (ii) supply and demand conditions;
  - (iii) any other relevant matter (s. 75AU(2)(c)).

A regulated supply covers the vast majority of goods or services supplied by businesses operating in Australia. The definition of a regulated supply was amended by legislation in December 1999 to cover goods or services supplied before the introduction of the GST on 1 July 2000. Therefore, it is clear that price rises in anticipation of a GST liability may constitute price exploitation.

## Notice

### **Where the ACCC considers that a corporation has contravened s. 75AU (s. 75AW)**

If the ACCC considers that a corporation has made a supply in contravention of s. 75AU, it may give the corporation notice in writing.

If notice is given it must identify:

- the corporation that made the supply;
- the kind of supply made; and
- the circumstances in which the supply was made (s. 75AW(2)(b)).

The notice must also state that it is the ACCC's opinion that the price for the supply was unreasonably high having regard to the New Tax System changes alone and that the unreasonably high price was not attributable to the other matters referred to in paragraph 75AU(2)(c).

The notice must specifically say that it is notice under s. 75AW.

The notice is taken to be prima facie evidence that the price was unreasonably high and that the unreasonably high price was not attributable to matters referred to in paragraph 75AU(2)(c) in any proceedings relating to s. 75AU under ss. 76 or 80.

### **Where the ACCC believes notice will help prevent price exploitation (s. 75AX)**

Notice may also be given to a corporation if the ACCC considers that doing so will help prevent price exploitation.

The notice must specify which supply, the circumstances of the supply, and the period during which the notice relates. The notice must also specify what the ACCC believes the maximum price should be for the supply.

Such notice must specifically express that it is notice under s. 75AX.

The ACCC may, either as a result of an application by the corporation or of its own initiative, vary or revoke notices given under s. 75AW or s. 75AX. The ACCC must give notice in writing to the corporation of this change.

## Guidelines

The ACCC must have regard to guidelines (which it is required to formulate) when making decisions under ss. 75AW or 75AX. The court may have regard to these guidelines when making decisions under s. 76 relating to s. 75AU, or under s. 80 for an injunction relating to s. 75AU. The guidelines are available from ACCC offices and from its website.

## Monitoring prices

The ACCC may monitor prices to assess the general effect of the New Tax System changes on prices charged by corporations for supplies during the New Tax System transition period (**s. 75AY(1)(a)**).

The ACCC may also monitor prices for the purpose of considering whether s. 75AU has been, is being, or may in the future be, contravened (**s. 75AY(1)(b)**).

A member of the ACCC may serve notice on a person in writing, requiring that the person:

- give the ACCC specified information; or
- produce specified documents

if that information or those documents relate to prices or the setting of prices, and the member considers it will or may be useful to the ACCC (**s. 75AY(2)**). Such a request may be for information or documents relating to prices:

- before or after any or all of the New Tax System changes have taken effect;
- before or after the start of the New Tax System transition period; and
- in a situation, or during a period, specified in the notice.

A person who fails to provide this information, or who provides information that is intentionally or recklessly misleading may be liable for a penalty of 20 penalty units. (Under s. 4AA of the *Crimes Act 1914* one penalty point equals \$100.)

## Penalties and remedies

Various remedies are available for a breach of Part VB. These are:

- monetary penalties of up to \$10 million for companies (**s. 76**);
- monetary penalties of up to \$500 000 for individuals (**s. 76**);
- injunctions (**s. 80**);
- a court order requiring a person to provide a regulated supply at a price less than the price specified in the order (**s. 80B(a)**); and
- a court order requiring that person, or a person involved in a contravention, to refund money to a person specified in the order (**s. 80B(b)**).

Only the ACCC may seek these remedies.

## Part VC — offences

On 26 July Part VC was inserted into the Trade Practices Act, to come into operation on **15 December 2001**. The civil and criminal consequences of contraventions of the consumer protection provisions will be divided between Part V and the new Part VC respectively.

Part V retains the core contraventions that give rise to civil actions and Part VC establishes a separate criminal consumer protection regime within the Trade Practices Act. This is except for the sections in Part V, Division 1A which specifically create an offence.

The new Part VC maintains the current statutory and judicial interpretations that apply to the consumer protection provisions in Part V. Part VC redrafts the criminal unfair practices and product safety provisions which are:

- s. 53 false or misleading representations;
- s. 53A false representations and other misleading or offensive conduct in relation to land;
- s. 53B misleading conduct in relation to employment;
- s. 53C cash price to be stated in certain circumstances;
- s. 54 offering gifts and prizes;
- s. 55 misleading conduct to which Industrial Property Convention applies;
- s. 56 bait advertising;
- s. 57 referral selling;
- s. 58 accepting payment without intending or being able to supply as ordered;
- s. 59 misleading statements about certain business activities;
- s. 60 harassment and coercion;

- s. 61 pyramid selling;
- s. 63A unsolicited credit and debit cards;
- s. 64 assertion of right to payment for unsolicited goods or services, or for making an entry in directory;
- s. 65A application of the division provisions to prescribed information providers;
- s. 65C product safety standards and unsafe goods;
- s. 65D product information standards; and
- s. 65G compliance with product recall order.

These are redrafted in sections 75AZA–75AZU to explain what mental threshold will apply when deciding if an offence has occurred. These thresholds may be intention, knowledge, recklessness or negligence, depending on what the section specifies. The part also clearly identifies any defences applicable to those offences, and each section prescribes a maximum penalty that will be incurred if it is contravened.

## Defences and exemptions

A defendant can be excused liability in a criminal prosecution (for fines) for contravention of Part VC only if it can be shown:

- the contravention was due to a reasonable mistake; or
- the defendant relied on information supplied by another person (but not an employee or an agent of the business); or
- the reason for the alleged contravention was:
  - (i) the action or failure of another person (but not a director, employee or agent of the defendant);
  - (ii) an accident; or
  - (iii) some other matter beyond the defendant's control; **and**
- the defendant took reasonable care and precautions to avoid the contravention (s. 85).

## State of mind

In proceedings against a corporation, the state of mind of its directors, servants and agents can be attributed to the corporation. A person's 'state of mind' includes knowledge, intention, opinion, belief or purpose. For the person's state of mind to be so attributed, the conduct in question must be within the scope of their actual or apparent authority (**s. 84**).

## Penalties and remedies

For contraventions of Part VC:

- adverse publicity orders (**s. 86D**);
- monetary penalties of up to \$1.1 million for companies and up to \$220 000 for individuals (**finances are specified in each section**);
- probation orders, community service orders and corrective advertising orders (**s. 86C**);
- if a defendant is unable to pay both a fine and compensation to victims the court must give preference to making an order for compensation (**s. 79B**);
- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken (**s. 80**);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
  - specific performance;
  - rescission and variation of contracts;
  - damages; and
  - provision of repairs and spare parts (**s. 87**).

## Misrepresenting the effect of the GST

Section 75AYA prohibits conduct, in connection with the supply of goods or services, that falsely represents, or misleads or deceives a person about, the effect of the New Tax System changes. The penalty for contravening this section can be up to \$10 million for a body corporate and up to \$500 000 for a person other than a body corporate.

It is a defence to this section if the person can show that they made a reasonable mistake or the contravention was due to reasonable reliance on information provided by another person. It is also a defence if the contravention has occurred due to circumstances beyond the person's control and the person had taken reasonable precautions against such a contravention.

### Penalties and remedies

For contraventions of s. 75AU or s. 75AYA:

- adverse publicity orders (**s. 86D**);\*
- if a defendant is unable to pay both a fine and compensation to victims the court must give preference to compensation (**s. 79B**);\* and
- probation orders, community service orders and corrective advertising orders (**s. 86C**).\*

\*For contraventions occurring on or after 26 July 2001.

# Part VII — authorisation and notification

Under the authorisation and notification provisions the ACCC has power to grant immunity from legal proceedings for some arrangements or conduct that might otherwise breach the anti-competitive practices provisions of the Act.

It is necessary to make formal application to the Commission. Application for authorisation can only be made by a party to the arrangement or a party engaging in the conduct in question.

## Authorisation — ss. 88–91

Authorisation is available for:

- anti-competitive agreements;
- primary boycotts;
- price agreements;
- secondary boycotts;
- anti-competitive exclusive dealing arrangements;
- exclusive dealing involving third line forcing;
- resale price maintenance; and
- mergers leading to a substantial lessening of competition in a market;

but **not** for:

- misuse of market power.

The ACCC's statutory 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 ACCC that the agreement results in a benefit to the public that outweighs any anti-competitive effect.
- For primary and secondary boycotts, third line forcing, resale price maintenance and mergers, the applicant must satisfy the ACCC that the conduct results in a **benefit to the public such that it should be allowed to occur**.

Except for mergers, the ACCC must publish a draft determination and provide the opportunity for a conference of interested parties, before making a final decision whether to grant authorisation.

The immunity conferred by authorisation operates only from the time the ACCC grants final authorisation.

The ACCC is required to keep a public register of all documents relating to an authorisation decision. The only exception is commercially sensitive material for which confidentiality may be granted (s. 89).

Applicants granted authorisation may apply for minor variations (s. 91A), revocation (s. 91B), or substitution of authorisations (s. 91C).

The ACCC can also initiate revocation and substitution of authorisations.

Review of an authorisation determination by the ACCC may be sought by applying to the Australian Competition Tribunal (s. 101).

The tribunal is required to determine appeals from the ACCC in merger authorisation cases within 60 days (s. 102(1A)). However, this time limit does not apply if the matter is especially complex or other special circumstances arise (s. 102(1B)).

(For details of the authorisation procedure, see the ACCC's *Guide to authorisations and notifications*.)

## Merger authorisations — ss. 50, 50A

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

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

Authorisation is deemed to be granted if the ACCC does not make a decision within whichever time frame applies. In deciding whether to grant the authorisation the ACCC will consider all potential public benefits from the proposed merger. It is specifically required by the Act to regard as a public benefit:

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

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

## **Notification — ss. 93–93A**

Exclusive dealing conduct (except for third line forcing) gains immediate and automatic immunity from legal proceedings under the Act when notification of it is given to the ACCC. Immunity for third line forcing comes into force at the end of the prescribed period from the time the ACCC receives the notice.

For third line forcing notifications lodged after 30 June 1996 the prescribed period is 14 days.

That immunity remains unless revoked by the ACCC. It cannot be revoked unless the ACCC finds that:

- the conduct (other than for third line forcing) substantially lessens competition within the meaning of s. 47 of the Act; and
- any public benefit flowing from the conduct is outweighed by the lessening of competition.

In the case of third line forcing, immunity cannot be revoked unless the ACCC finds that the public benefit from the conduct does not outweigh the public detriment from the conduct.

It should be noted that for third line forcing notifications, the immunity will not commence at the end of the prescribed period if the ACCC issues a draft revocation notice during the prescribed period. In such a case immunity will only commence when the ACCC decides **not** to issue a final revocation notice. If immunity has commenced at the expiry of the prescribed time it is open to the ACCC to review the conduct and issue a draft revocation notice at a later time as with other notifications.

If the ACCC wants to revoke a notice it must first issue a draft notice saying so and give the party an opportunity to respond to it. Once the ACCC issues a final notice of revocation the conduct will no longer be protected after 31 days or from such later date as the ACCC may specify.

## Notification procedures

Before revoking a notification the ACCC must give interested parties the opportunity to call a conference. Application for a review of a decision on notification is made to the tribunal (**s. 101A**).

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

## Fees

Under trade practices regulations fees are payable on lodgment of applications for authorisation and notifications. At time of publication the fees were as follows.

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

- additional related notifications — \$500
- Third line forcing notifications by a proprietary company or individual — \$100
- Third line forcing notifications in any other case — \$1000
  - additional related notifications — \$200

## Part X — international liner cargo shipping

Broadly, Part X of the Act deals with limited exemptions from the provisions of Part IV for international liner cargo shipping conferences. (A conference is an unincorporated association of two or more ocean carriers carrying on two or more businesses each of which includes the provision of liner cargo shipping services.)

The exemptions apply to conference agreements registered with the Registrar of Liner Shipping in the Department of Workplace Relations and Small Business.

They apply only to certain specified practices which might otherwise breach:

- **s. 45** — anti-competitive agreements; or
- **s. 47** — anti-competitive exclusive dealing (other than third line forcing).

There are no exemptions from **s. 45D** (secondary boycotts), **s. 46** (misuse of market power), or **s. 50** (mergers and acquisitions).

The ACCC may examine complaints from parties adversely affected by shipping conference agreements and by the conduct of conference lines and non-conference lines having substantial market power.

The Minister may reduce or remove the exemptions given to conferences under the Act or accept undertakings from shipping lines. Breaches of such undertakings can be investigated by the ACCC.

The Minister may request the Australian Competition Tribunal to inquire and report on the question of whether a non-conference ocean carrier has a substantial degree of market power in the provision of outward liner cargo shipping services.

Non-conference ocean carriers found by the tribunal to have a substantial degree of market power on a trade route are required to negotiate with certain designated shipper bodies.

## Changes to Part X

On 26 July 2001 Part X was amended to **extend to Australian importers** the protection given to Australian exporters.

The protection for importers requires parties to inwards conference agreements to:

- register their agreements;
- negotiate with the designated inwards peak shipper body about the minimum levels of service to be provided under the agreement (**s. 10.29**);
- negotiate with the relevant designated body for importers on charges for land-based services in Australia (such as terminal handling charges), and on some other matters where the contract for shipping the cargo is made in Australia; and
- provide shippers with any requested information that is reasonably necessary for such negotiations.

The main changes for conferences are:

- the Part X exemptions (in ss. 45 and 47 of the Trade Practices Act) are limited to liner shipping activities covering ocean transport and loading and discharge operations at cargo terminals, including inland terminals used for assembling export cargo by or on behalf of ocean carriers for delivery to a port, or delivering cargo to importers (**s. 10.14**);
- a national interest test is included in assessing conduct by parties to an outwards liner shipping agreement that might unreasonably hinder Australian flag shipping (**s. 10.45(2)**);
- undertakings given by shipping lines can now be enforced by a court (**s. 10.49A**);
- increased powers to the Minister and the ACCC to deal with an agreement or conduct likely to result in an unreasonable increase in freight rates and charges and/or an unreasonable decrease in services (**s. 10.45(3)**); and
- conferences cannot unreasonably restrict the entry of new parties (**s. 10.45(4)**).

# Parts XIB and XIC — Telecommunications

Legislation in March 1997 provided a role for the ACCC in, amongst other things, regulating access within, and enforcing competitive safeguards in, the Australian telecommunications industry. The legislation included telecommunications specific amendments to the Trade Practices Act, provision for transitional arrangements from the previous regulatory regime existing under the *Telecommunications Act 1991*, a revised *Telecommunications Act 1997* and amendments to the *Radiocommunications Act 1992*. (See Other responsibilities, p. 81 for an outline of ACCC responsibilities under the Telecommunications and Radiocommunications Acts.)

The broad policy intention of the legislation was to establish, from 1 July 1997, open market access to both telecommunications infrastructure and service provision. (Technical regulation and licensing are within the jurisdiction of the Australian Communications Authority (ACA).)

Amendments to the Trade Practices Act introduced two new parts, one dealing with anti-competitive conduct in the telecommunications industry (Part XIB), and the other setting out the rules and procedures for guaranteeing access to network services, for the purposes of interconnectivity and interoperability between carriers and service providers (Part XIC). These apply **in addition** to the parts of the Act which regulate restrictive trade practices and unfair practices in general.

## Part XIB — anti-competitive conduct

Part XIB is a telecommunications specific regime which aims primarily to prevent carriers and carriage service providers with a substantial degree of market power in a telecommunications market from engaging in anti-competitive conduct.

Carriers and carriage service providers are prohibited from engaging in anti-competitive conduct as defined in the part. This is known as the 'competition rule'. Anti-competitive conduct is defined in two ways in Part XIB.

- First, a carrier or carriage service provider with substantial market power (in a telecommunications market) engages in anti-competitive conduct if it takes advantage of that power with the effect or likely effect of substantially lessening competition in that or any other telecommunications market.
- Second, a carrier or carriage service provider is taken to engage in anti-competitive conduct if it engages in conduct relating to a telecommunications market which contravenes most of the general restrictive trade practices provisions in Part IV of the Act.

On identifying conduct in breach of the competition rule the ACCC is empowered to seek an injunction and also issue a competition notice which states that the carrier or service provider has contravened or is contravening the rule. The competition notice is prima facie evidence of the matters in the notice and if the carrier or carriage service provider continues the conduct the ACCC can seek Federal Court orders for various remedies and pecuniary penalty. Once a notice has been issued, private parties may seek injunctions or other orders for breaches of the competition rule.

## **Guidelines**

The ACCC must have regard to guidelines (which it is required to produce) when exercising its discretion whether or not to issue a competition notice.

## **Exemption orders**

Carriers and service providers can apply to the ACCC for exemption from the anti-competitive conduct provisions in Part XIB. (Such exemption orders do not apply to breaches of the general restrictive trade practices provision in Part IV).

## **Tariff filing directions**

In some circumstances carriers or carriage service providers are required to provide information to the ACCC about charges they make for telecommunications goods and services.

## Record keeping rules

The ACCC can also make rules specifying the manner in which specified carriers or service providers must keep and retain certain records.

## Penalties

The Federal Court may impose on corporations the following maximum penalties for contraventions:

- of the competition rule, \$10 million for each contravention and \$1 million for each day it continued;
- of a tariff filing direction, \$10 million for each contravention;
- of a record-keeping rule, \$250 000 for each contravention.

For individuals the maximum penalties are \$50 000 for each contravention of a record-keeping rule and \$500 000 for each of any other contraventions.

## Part XIC — access

Part XIC establishes an industry-specific regime for regulated access to carriage services, and reflects policy interests in promoting any-to-any connectivity and reliance on commercial resolution of access issues as far as possible.

Access to telecommunications services under Part XIC is achieved through the declaration of eligible services by the ACCC, either in consultation with an appointed industry self regulatory body made up of carriers and carriage service providers, or by the ACCC through declaring access services itself after a public inquiry. (The industry body is known as the Telecommunications Access Forum.)

Carriers and carriage service providers can give undertakings on access and/or register agreements, thereby enabling the ACCC to exercise arbitration powers in respect of access disputes. (Other publications dealing in detail with Parts XIB and XIC are available from ACCC offices and website.)

# Miscellaneous important provisions

## Enforcement of undertakings — s. 87B

Section 87B of the Trade Practices Act provides for enforcement in the court of written undertakings accepted by the ACCC in the exercise of its powers (other than in relation to Part X).

Where the ACCC believes that a term of such an undertaking has been breached it may apply to the court for:

- an order directing compliance; and/or
- an order to pay the Commonwealth up to the amount of any financial benefit that can be reasonably attributed, directly or indirectly, to the breach; and/or
- any order the court considers appropriate to compensate a third party for loss or damage resulting from the breach; and/or
- any other order the court considers appropriate.

## Intervention by Commission — s. 87CA\*

With the leave of the court the ACCC may intervene in any proceedings instituted under the Act. The ACCC then becomes a party in the action and therefore has all the rights, duties and liabilities of a party.

## ACCC annual report — s. 171(3)\*

The ACCC is now required to provide greater details in its annual report about the enforcement activities that it has undertaken.

\*Sections 87CA and 171(3) inserted into the Trade Practices Act by amendments commencing 26 July 2001.

## Powers to obtain information — s. 155 and s. 75AY

### Section 155

**Section 155** confers powers on the ACCC to obtain information, documents and evidence when investigating possible contraventions of the Act and in some of its adjudication work. The section also applies to ACCC investigations under Part X of the Act.

**Section 155(1)** provides that where the ACCC, the Chairperson or Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence about a matter that constitutes, or may constitute a contravention of the Act, or is relevant to a decision under **s. 93(3)**, a member of the ACCC may issue a notice requiring the person:

- to furnish information in writing within a specified time and in a specified manner (**s. 155(1)(a)**);
- to produce documents specified in the notice to the ACCC or to a person specified in the notice (**s. 155(1)(b)**); and
- to appear before the ACCC at a time and place specified in the notice to give evidence, either orally or in writing, and produce documents (**s. 155(1)(c)**).

**Section 155(2)** empowers a member of the ACCC to authorise in writing a staff member to enter premises and to inspect any documents in the possession of, or under the control of, a person the ACCC, the Chairperson or Deputy Chairperson has reason to believe has engaged, or is engaging, in conduct which constitutes or may constitute a breach of the Act and to make copies of or take extracts from those documents.

**Section 155(3)** provides that **s. 155(1)(c)** evidence may be taken on oath or affirmation.

**Section 155(5)** imposes a legal obligation on a person to comply with a notice and **s. 155(6A)** makes non-compliance an offence punishable by a fine or imprisonment.

**Section 155(6)** provides that a person in charge of premises which an authorised officer enters under **s. 155(2)** must provide all reasonable facilities and assistance for the effective exercise of those powers.

**Section 155(7)** provides expressly that a person is not excused from furnishing information or producing or permitting the inspection of a document on the grounds that the information or document may tend to incriminate them.

**Section 159** provides that a person appearing before the ACCC to give evidence or produce documents is not excused from answering a question or producing a document on the grounds that the answer to the question or the document may tend to incriminate them.

## **Section 75AY**

**Section 75AY** confers powers on the ACCC to obtain information or documents relating to prices, or the setting of prices, that may be useful in the monitoring of prices. The ACCC may monitor prices under this section to assess the general effect of the New Tax System changes on prices during the New Tax System transition period, or to assist its consideration of whether s. 75AU has been, is being, or may in the future be, contravened.

**Section 75AY(2)** provides that where a member of the ACCC wishes to gain information or documents for the purposes of monitoring prices for any of the reasons above, that member may issue a notice requiring a person:

- to give the ACCC specified information in writing signed by the person or, if the person is a body corporate, a competent officer of the body corporate; or
- to produce to the ACCC specified documents.

**Section 75AY(3)** provides that the information or documents that may be required under s. 75AY(2) may relate to prices, or the setting of prices:

- before or after all or any of the New Tax System changes have taken effect;

- before or after the start of the New Tax System transitional period; or
- in a situation, or in a period, specified in the notice.

**Section 75AY(4)** provides that, if a person fails to comply with a request for information under s. 75AY(2), or intentionally or recklessly provides information that is false or misleading, that person may face a penalty of 20 penalty units. (Under s. 4AA of the *Crimes Act 1914* one penalty point equals \$110.)

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## Other responsibilities

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## Prices Surveillance Act 1983

The *Prices Surveillance Act 1983* enables the ACCC, where the Government declares products or services, to examine prices with the objectives of promoting competitive pricing wherever possible and restraining price rises in markets where competition is less than effective.

The Act relates to goods or services that are supplied in Australia for a price. Supply is defined broadly but explicitly covers situations where goods are sold, leased or exchanged, and where services are provided, granted or conferred.

The law does not deal with contracts of service, i.e. employment contracts where a task is performed in exchange for a wage or salary (**s. 3**).

The Act can be applied to the business activities of Commonwealth, State and Territory authorities, trading, financial and foreign corporations, and people or firms supplying goods or services within the ACT or across State or Territory boundaries (**ss. 4 and 5**).

In certain circumstances the Act will permit price oversight of State and Territory Government businesses.

Price surveillance will be possible where the State and Territory concerned has agreed or where the National Competition Council has, on the request of an Australian Government, recommended declaration of the authority and the Commonwealth Minister has consulted the appropriate Minister of the State or Territory concerned. The council can not recommend declaration if the government business is already subject to effective prices oversight.

Price monitoring of State and Territory businesses will be permitted only with the agreement of the State or Territory concerned.

## Broadcasting Services Act 1992

Section 96A(1) of the *Broadcasting Services Act 1992* requires the Australian Broadcasting Authority (ABA), in conjunction with the ACCC, to monitor the cross-media ownership of the holders of

subscription television broadcasting licences allocated under s. 96 in the context of the objectives of the Broadcasting Services Act.

Subsection 97(1) of the Broadcasting Services Act provides that, before a subscription television broadcasting licence is allocated, the Australian Broadcasting Authority must request the ACCC to provide a report. Subsection 97(2) says:

- (2) The report is to advise whether, in the opinion of the ACCC, the allocation of the licence to the applicant:
  - a) would constitute a contravention of section 50 of the *Trade Practices Act 1974* if the allocation of the licence were the acquisition by the applicant of an asset of a body corporate; and
  - b) would not be authorised under section 88 of that Act if the applicant had applied for such an authorisation.

## Telecommunications Act 1997

The *Telecommunications Act 1997* delegates a number of specific functions and powers to the ACCC in addition to those of the other bodies involved in regulating the industry — the Australian Communications Authority (ACA) and the Telecommunications Industry Ombudsman (TIO).

The ACCC's main functions under the Telecommunications Act relate to telecommunications competition matters coming within that legislation. Various provisions of the Telecommunications Act give the ACCC a role wider than it has under the Trade Practices Act.

Briefly, the ACCC's functions and powers under the Telecommunications Act are as follows.

### International rules of conduct

Part 20 of the Telecommunications Act provides a mechanism by which the Government can deal with what is termed 'unacceptable conduct' engaged in by international operators, through empowering the Minister to make rules of conduct administered by the ACCC, directed at regulating carriers and carriage service providers in their dealings with international telecommunications operators.

## **Directions to the ACA on number portability and the numbering plan**

In administering the Numbering Plan under Part 22 of the Telecommunications Act, the ACA cannot include rules about number portability unless directed to do so by the ACCC. Any rules the ACA puts in the plan regarding number portability must be consistent with any directions by the ACCC.

## **ACCC directions in regard to electronic addressing**

Division 3 of Part 22 of the Telecommunications Act provides for the regulation of electronic addressing by empowering the ACA to determine that a specified person or association is the declared manager of electronic addressing in relation to a specified kind of listed carriage service.

The ACA must not make such a determination unless either directed to do so by the ACCC or it is of the opinion that the person or association is not managing electronic addressing in accordance with generally accepted principles and standards.

## **ACCC directions on technical standards**

Part 21 of the Telecommunications Act establishes a scheme whereby the ACA may make a technical standard relating to the interconnection of facilities, but must not do so unless directed to by the ACCC. The ACCC must not give such direction unless it is necessary to promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services; or to reduce or eliminate the likelihood of hindrance to the provision of access to declared services.

## **ACCC consultation on facility installation permits**

Before making a decision to issue, or to refuse to issue, a permit authorising a carrier to carry out the installation of one or more facilities (a 'facility installation permit' under Schedule 3 of the Telecommunications Act) the ACA must consult the ACCC.

## **ACCC advice on industry codes of conduct and standards**

Part 6 of the Telecommunications Act provides for industry self-regulation of a wide range of telecommunications activities by means of industry developed codes of conduct which may be registered by the ACA. Before the ACA registers an industry code it must be satisfied that the ACCC has been consulted about the development of the code, and it must not declare or vary an industry standard before it has consulted with the ACCC.

## **ACCC consultation on service provider rules**

Part 4 of the Telecommunications Act, which sets out definitions of carriage service providers and content service providers, establishes a regime enabling the ACA to make written determinations, in addition to specific rules found in Schedule 2 of that Act, setting out rules that apply to service providers in relation to the supply of either or both of specified carriage or content services. However, before making a service provider determination in relation to carriage or content services, the ACA must consult the ACCC.

## **ACCC consultation on pre-selection**

Under Part 17 of the Telecommunications Act the ACA may require certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers. Pre-selection must include over-ride dial codes for selecting alternative carriage service providers on a call-by-call basis. Before making a determination requiring a carrier or carriage service provider to provide pre-selection the ACA must consult the ACCC.

## **ACCC arbitration responsibilities under the Telecommunications Act**

Under various provisions in the Telecommunications Act the Commission may become involved in the arbitration of disputes in relation to the following matters:

- (a) the provision of carrier access to:
  - supplementary facilities, telecommunications transmission towers, transmission tower sites, eligible underground facilities;
  - certain information relating to the operation of telecommunications networks (i.e. network information, information databases, network planning information, quality of service information);
  - certain operator services to end-users of standard telephone services; and
  - directory assistance services to end-users of standard telephone services.
- (b) the provision of number portability in compliance with the numbering plan administered by the ACA;
- (c) the provision of pre-selection in favour of specified carriage service providers;
- (d) the provision of access to facilities for the purpose of emergency call services;
- (e) the supply of a specified carriage service for the use of the Department of Defence or the Defence force.

## Australian Postal Corporation Act 1989

The *Australian Postal Corporation Act 1989* at subsection 32B(1) provides for the provision of regulations which allow the ACCC to inquire into any dispute as to the amount of postal rate reduction given by Australia Post to bulk mailers interconnecting or attempting to interconnect to the Australian Postal System. The ACCC, after the dispute hearing process, is required to make a recommendation to the Minister for Communications and the Arts.

## Certification Trade Marks

Under the *Trade Marks Act 1995*, the ACCC has responsibilities in relation to the approval of Certification Trade Marks. The ACCC's role involves assessing and approving rules for the use of Certification Trade Marks, including:

- considering the competence of an applicant for a Certification Trade Mark (or any approved certifier) to certify that goods or services bearing the Certification Trade Mark comply with the rules governing the use of the trade mark. The rules set out the qualities and standards to be met by goods or services bearing the trade mark; and
- examining the rules to ensure they are not in themselves anti-competitive or misleading or deceptive. (It is a matter for the Registrar to determine if any use of a trade mark is misleading or deceptive.)

## ACCC regulatory responsibilities under the national gas code

Under the National Third Party Access Code For Natural Gas Pipeline Systems the ACCC has important functions in the regulation of some 15 major gas transmission pipelines and two distribution networks.

All States/Territories other than Western Australia have nominated the ACCC as transmission regulator.

Within 90 days of the code coming into force in a particular jurisdiction, the service providers of each covered pipeline in that jurisdiction are obliged to offer access arrangements to the regulator for their respective systems. The regulator has six months to consider the proposed access arrangements, during which time it must seek submissions, issue a draft determination, consult with interested parties on the draft, then issue a final determination.

In considering whether to approve a proposed access arrangement, the regulator must assess it against the minimum requirements set out in the code. These include that the proposed access arrangement must contain policy statements covering the following:

- the services being offered;
- the reference tariff(s) for those services and associated terms and conditions;
- capacity management and trading;
- extensions/expansions;
- queuing; and
- a review date.

The regulator has a significant ongoing monitoring and enforcement role. Areas requiring monitoring include:

- compliance with the ring fencing arrangements and assessments as to whether they are appropriate given any changes in market circumstance;
- potential breaches of the hindering access prohibition;
- whether target rates of return have been achieved;
- whether proposed costs are incurred;
- whether proposed demand projections are accurate; and
- the effectiveness of incentive mechanisms.

Related party contracts entered into by service providers are unenforceable unless they have been approved by the regulator. This involves a process of public consultation, including a draft determination, consideration of submissions and a final determination.

The regulator also has a significant ongoing role in dispute resolution. Dispute resolution is limited to disputes over access to spare or developable capacity, where negotiations have broken down. The regulator determines whether there is a dispute or not. The regulator can arbitrate and make determinations about access to capacity. The code sets out detailed principles the arbitrator is to take into account in making any arbitration determination and also restrictions upon determinations.

## Financial services markets

The *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998*, which commenced 1 July 1998, implemented a new consumer protection regime for the financial services sector.

Under this legislation the Australian Securities and Investments Commission (ASIC), was given primary responsibility for consumer protection and market integrity in this sector.

ASIC has responsibility for consumer protection matters involving:

- facilities for taking money on deposit — made available in the course of conducting a banking business;
- securities;
- futures contracts;
- contracts of insurance;
- retirement savings accounts; and
- superannuation interests.

The ACCC retains responsibility for consumer protection matters involving foreign exchange contracts and credit — and for enforcement of the competition provisions of the Trade Practices Act in the whole of the financial services sector.

The ACCC and ASIC signed a cooperation agreement in July 1998.

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